

ADMINISTRATIVE CODE BOARD OF COUNTY COMMISSIONERS	
CATEGORY: Committees/Boards/Commissions/Examiners	CODE NUMBER: AC-2-6
TITLE: Administrative Procedure for Scheduling and Conducting Matters Coming Before the Lee County Hearing Examiner	ADOPTED: 12/14/88
	AMENDED: 8/5/92, 6/8/94, 8/31/94, 3/20/96, 6/3/97, 3/20/01, 6/21/11, 6/12/2012, 11/17/15
	ORIGINATING DEPARTMENT: Hearing Examiner

PURPOSE/SCOPE:

This administrative code establishes procedures for public hearings conducted before the Hearing Examiner. It supplements Lee County’s Land Development Code (LDC). If there is a conflict between this code and the LDC, the LDC will prevail.

Terms used in this code have the meanings specified in the LDC. References to the Hearing Examiner, County Manager, County Attorney, and department directors include their designees. References to County Staff may include the County Attorney, as a representative of the Board, unless the context indicates otherwise.

POLICY/PROCEDURE:

SECTION 1. FILING AND SCHEDULING CASES

1.1 Filing Appeals from Administrative Actions¹

- A. Parties appealing administrative actions must file a Notice of Appeal no later than 30 calendar days after the administrative official renders the action appealed.
 - (1) The Notice of Appeal must be filed with the Department on a Notice of Appeal form.
 - (2) A Notice of Appeal is not filed until payment of the filing fees.
- B. The Notice of Appeal must state with particularity the error made by the administrative official, the relief sought, and the legal basis for the requested relief. The failure to state the error made by the administrative official may result in dismissal of the appeal.
- C. The Department will submit the Notice of Appeal to the Hearing Examiner’s office within 15 working days after filing. The Department may include a position statement on whether the Appeal is within the Hearing Examiner’s authority and sufficiently states the claimed error.
- D. Within 10 working days after receiving the Notice of Appeal, the Hearing Examiner will either:

¹ Under LDC 34-145(a).

- (1) Issue an Order of Dismissal, dismissing the Appeal as outside the Hearing Examiner's authority or for failure to state the error made by the administrative official; or
 - (2) Issue an Order Accepting the Appeal and authorizing the Department to schedule the matter for public hearing in accordance with subsection 1.3.
- E. All subsequent appellate filings must be made to the Hearing Examiner's office.
 - F. The Appellant will have 10 days from issuance of the Order of Dismissal to amend the Notice of Appeal. If the Hearing Examiner does not receive an amended Notice of Appeal within 10 days or the amended Notice of Appeal fails to specifically state the error basis of the Appeal, the Hearing Examiner may dismiss the Appeal with prejudice.
 - G. Appeals are limited to the issues raised in the Notice of Appeal.
 - (1) The Appellant may amend the Notice of Appeal to raise additional issues, if filed with the Hearing Examiner at least 15 days before the hearing, but the amendment may result in the continuance of the hearing.
 - (2) The Hearing Examiner does not have jurisdiction to consider issues not raised in the initial or amended Notice of Appeal.
- 1.2 Applications for Rezoning, Variances, and Special Exceptions
- Applications for rezoning, variances, and special exceptions must be filed in accordance with the LDC or applicable Administrative Codes.
- 1.3 Scheduling Cases
- A. Cases will be scheduled in accordance with the LDC. Cases may be deferred or continued in accordance with paragraph 2.2.F.
 - B. Upon receipt of the Staff Report, the Hearing Examiner's office will advise the Parties of the Hearing Examiner assigned to the case.
- 1.4 Notice
- The Department will provide notice of hearings in the manner specified in the LDC and the Administrative Codes, except notice to adjacent property owners is not required for Appeals from Administrative Actions.

SECTION 2. CONDUCT OF HEARINGS

2.1 Recording

- A. The Hearing Examiner will record all hearings.
- B. The Hearing Examiner may arrange for a court reporter to attend a hearing and, if transcribed, the transcript is public record.
- C. Any person may arrange for a court reporter to attend the hearing at their own expense.

2.2 Pre-Hearing/Hearing Materials and Actions

- A. The Department will provide the Hearing Examiner with a written Staff Report in accordance with the LDC.
- B. Issues and Information Notices
 - (1) The Applicant may provide the Hearing Examiner, County Staff, and County Attorney with a written notice of outstanding issues at least 48 hours before the hearing.
 - (2) The Hearing Examiner may issue notice to the Parties requesting information to be presented at the hearing.
 - (a) The Hearing Examiner will provide the notice by electronic mail.
 - (b) The notice is a courtesy, intended to aid the Parties in preparation for the hearing.
 - (c) The notice, or lack thereof, does not limit the Hearing Examiner's right to request additional testimony or evidence on any issue relevant to the case.
- C. Motions.
 - (1) A Party may request an Order or other relief from the Hearing Examiner by motion, in accordance with the following:
 - (a) Motions made prior to a hearing.
 - 1. Motions must be in writing.
 - 2. The Party making the motion must provide the original motion and supporting documents to the Hearing Examiner, and copies to the other Party.
 - 3. The Hearing Examiner may give the opposing Party up to 10 working days to respond, unless that Party requests additional time. The Hearing Examiner may continue the hearing to permit sufficient time to respond to the motion.
 - 4. Parties may submit a memorandum of law in support of, or in response to, a motion. The Hearing Examiner may also request a memorandum of law on the motion. Memoranda must include a complete copy of cited cases.
 - 5. The Hearing Examiner will generally rule on written motions within three working days after the end of the response time.
 - (b) At the discretion of the Hearing Examiner, the Hearing Examiner will rule on motions made during a hearing:
 - 1. Immediately;
 - 2. After a pause in the hearing;
 - 3. On a continued hearing date; or
 - 4. After a separate hearing on the motion.
 - (c) If the Hearing Examiner sets a separate hearing on a motion:
 - 1. The Hearing Examiner must continue the current hearing to a date certain; and

2. Only legal argument pertaining to the motion will be heard at the hearing.
 - (d) The Hearing Examiner will not consider motions to strike testimony from the record.
- D. Disqualification of a Hearing Examiner.
- (1) By the Hearing Examiner. Hearing Examiners may disqualify themselves where there exists, to the Hearing Examiner's knowledge, any of the grounds for a suggestion of disqualification under Chapter 38, Florida Statutes. The failure of the Hearing Examiners to disqualify themselves is not assignable as error or subject to review.
 - (2) Motion by Party.
 - (a) The County or the Applicant may move to disqualify the Hearing Examiner assigned to the case. Only Parties may file motions for disqualification.
 - (b) A motion for disqualification must satisfy the requirements under Rule 2.330 of the Florida Rules of Judicial Administration.
 - (c) Basis of Motion.
 1. A motion for disqualification must be based on a well-grounded fear on the part of the movant that they will not receive a fair hearing. The well-grounded fear must be born out of actual facts that would create an objectively reasonable basis to fear prejudice or bias in the current case (as opposed to hypothetical facts). A well grounded fear cannot be based solely upon the fact a Hearing Examiner has heard a similar request and issued a recommendation/decision that would be deemed unfavorable to the movant.
 2. It is the burden of the Party seeking disqualification to show that Party has a well-grounded fear of not receiving a fair hearing.
 - (d) Legal Sufficiency of Motion
 1. In determining the legal sufficiency of a Motion, the Hearing Examiner must determine if the facts alleged, which must be taken as true, would prompt a reasonably prudent person to fear that he or she could not receive a fair and impartial hearing.
 2. A Motion for disqualification is legally insufficient and must be denied if the motion is:
 - a. Filed before the movant becomes aware of the Hearing Examiner formally assigned to the case;
 - b. Filed after the period required under Rule 2.330;
 - c. Based solely on hypothetical or contingent facts;
 - d. Based solely on a movant's subjective fear of bias;
 - e. Based solely on general and speculative assertions about a Hearing Examiner's attitudes;
 - f. Based solely on prior adverse rulings or findings of a Hearing Examiner; or

g. Based solely on the Hearing Examiner's prior disqualification decision in another case.

(e) A hearing on the motion is not required.

E. Objections.

- (1) During a hearing, the County or the Applicant may raise objections to testimony or evidence the Party contends:
 - (a) Violates a procedural provision of the LDC or Administrative Code;
 - (b) Is irrelevant to the decision to be made; or
 - (c) Is an opinion beyond the speaker's qualifications.
- (2) The objecting Party must state there is an objection and provide a short (one or two sentence) summation of the objection. The Hearing Examiner may ask for additional information on the objection prior to ruling.
- (3) Once the Hearing Examiner has ruled on the objection, it is not necessary to renew the objection. Ongoing objections will be noted for the record.

F. Deferrals and Continuances

(1) Deferrals.

- (a) A Party may request to defer a scheduled public hearing to a later time or date if requested before delivery of the public hearing notice to the newspaper.
- (b) Department-initiated deferral. If the Department defers a scheduled public hearing, the Department must notify the Applicant in writing of the reason for deferral and specify the information necessary to complete County Staff review.
- (c) Fee. There will be no fee for deferrals. However, the Applicant must obtain corrected notice posters from the Department and post the signs on-site, if required by the LDC or Administrative Codes.
- (d) The Director may defer a case without action by the Hearing Examiner.

(2) Continuances.

- (a) If the notice of the public hearing was delivered to the newspaper for publication, the scheduled public hearing may be postponed only through a continuance.
- (b) Hearing Examiner-initiated continuance. The Hearing Examiner may continue a case to a specific time and date to allow the submittal of additional testimony or documentary evidence necessary to decide the case, to consider a motion, or for other good cause. The Hearing Examiner's decision to continue the case is not subject to review.
- (c) Party-initiated continuance.
 1. The Parties are entitled to one continuance each as a matter of right. The Hearing Examiner may grant additional continuances upon a showing of good cause.

2. The Party must request the continuance on the record before the Hearing Examiner on the originally scheduled or previously continued hearing date.
 3. If the Hearing Examiner approves the continuance, the hearing will be continued to a date certain.
 4. The Party requesting the continuance must bear the cost of notification of the new hearing date if the LDC or Administrative Codes require notification.
 5. If the Hearing Examiner denies the request for continuance, the hearing will proceed.
 6. The Hearing Examiner's decision to grant or deny the continuance is not subject to review.
- (d) The Hearing Examiner will send notices of continuance to the Parties and participants. There will be no further notice to the general public or adjacent property owners.
- G. If a Party intends to submit new/modified application materials or Staff Report in the hearing, the documents must be provided to the other Party a minimum of 48 hours before the hearing. Unless waived by the other Party, failure to meet this deadline may result in a continuance of the hearing.

2.3 Hearing Proceedings

- A. The Hearing Examiner will conduct hearings in an informal but courteous and professional manner. The Hearing Examiner is responsible for ensuring equal and consistent application of these rules.
- B. Presentation Order. To the extent reasonably possible and at the Hearing Examiner's discretion, the order of proceedings will be as follows:
 - (1) Hearing Examiner's announcement of the case, explanation of the procedure, and an explanation of future proceedings that may occur.
 - (2) Presentation of Applicant/Appellant arguments, testimony, and evidence.
 - (3) Cross-examination of Applicant/Appellant's witnesses by County Staff and the Hearing Examiner, with redirect examination by Applicant/Appellant. The Hearing Examiner may limit or disallow re-cross examination or re-re-direct examination.
 - (4) Presentation of County Staff arguments, testimony, and evidence.
 - (5) Cross-examination of County Staff's witnesses by Applicant/Appellant or the Hearing Examiner, with redirect examination by County Staff. The Hearing Examiner may limit or disallow re-cross or re-re-direct examination.
 - (6) Presentation of participant argument, testimony, and evidence. Participants may direct questions relevant to the application/appeal to the Hearing Examiner. Participants may not engage in direct or cross examination of witnesses.
 - (7) Cross examination of participants by Applicant/Appellant, County Staff, and the Hearing Examiner.
 - (8) Responses to questions posed by participants during public comment. In the alternative, these responses may be addressed as part of rebuttal.

If a question can be answered quickly and it is not disruptive to do so, the Hearing Examiner may invite the Parties to answer a question posed by a participant when asked.

- (9) Rebuttal testimony by the Applicant/Appellant.
- (10) Rebuttal testimony by County Staff.
- (11) Final surrebuttal by Applicant/Appellant.
- (12) Closing statements by the Parties.

C. Testimony.

- (1) Witnesses will be placed under oath and submit to reasonable cross-examination by the Parties.
- (2) The Hearing Examiner will give all persons desiring to participate in the hearing an opportunity to speak. However, the Hearing Examiner has the authority to refuse to hear testimony that is irrelevant or repetitive.
- (3) Counsel statements are argument and not testimony unless identified as based on actual knowledge of the matters that are the subject of the statements and testified to under oath.

D. Rules of Procedure.

- (1) Due Process. The proceedings are quasi-judicial proceedings and will provide due process. For purposes of these proceedings, "due process" requires that the Parties have notice of the hearing and an opportunity to be heard. Furthermore, Parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the County acts.
- (2) Burden of Proof.
 - (a) In appeal proceedings, the Appellant has the burden of proof to show the County administrative official erred in issuing or denying an order, requirement, decision, interpretation, determination, or action.
 - (b) In other proceedings, the Applicant has the burden of proving, through the submission of competent and substantial evidence, the proposed request conforms to the applicable review criteria.
 - (c) If County Staff recommends denial of an application, Staff must provide competent substantial evidence to show:
 - 1. The application does not conform to the review criteria; or
 - 2. For zoning cases, that maintaining the existing zoning designation is not arbitrary, discriminatory, or unreasonable and accomplishes a legitimate public purpose.
- (3) Standard of Proof. The applicable standard of proof is the greater weight (preponderance) of competent and substantial evidence.
- (4) Evidence. The Florida and Federal Rules of Evidence do not apply to the proceedings. The following rules do apply:
 - (a) Admissibility.

1. All relevant evidence is admissible and is not limited to competent and substantial evidence.
 2. Lay opinion is admissible if the opinions and inferences do not require a special knowledge, skill, experience, or training.
 3. Relevant, fact-based testimony by expert or lay witnesses is admissible and may constitute substantial competent evidence.
 4. While hearsay evidence is generally admissible, hearsay alone does not constitute substantial competent evidence.
 5. Letters and other documents not prepared by a witness are admissible, but are hearsay and cannot be the sole basis for a decision or recommendation. The presence and ability to cross-examine the author of the document is not required for admissibility.
- (b) Taking Judicial Notice. The Hearing Examiner may take judicial notice of previous Board decisions, previous Hearing Examiner decisions or recommendations, and matters generally recognized by Florida courts.
- (5) Expert Witness.
- (a) The purpose of expert testimony is to aid the Hearing Examiner and the Board in understanding issues and evidence in areas that are not common knowledge.
 - (b) Acceptance as an Expert
 1. The Hearing Examiner may recognize a witness as an expert if the witness has specialized knowledge, training, experience, or education on the subject matter of their testimony.
 2. The acceptance of a witness as an expert goes to the witness' competence to testify on the subject and does not equate to greater credibility or weight.
 - (c) Basis of Expert Opinions
 1. Expert opinions must have a basis in facts identified in the record.
 2. An expert witness may give an opinion based on the expert's own knowledge of the facts, after stating those facts and then the expert's opinion, or an expert may give an opinion based on facts already in evidence.
 - (d) If the Applicant does not provide experts' opinion or materials required by the Director in accordance with LDC Section 34-376(b), the Department may object and request a break in the hearing or continuance to a later date to review the opinion materials or provide additional expert testimony. The Department's failure to object constitutes waiver.
- (6) Cross-Examination
- (a) The purpose of cross-examination is to test the accuracy, completeness, and truthfulness of the evidence provided. It may not be used to badger or intimidate a witness or as an opportunity to debate, disagree, or argue with the witness.

(b) Participants may not cross-examine witnesses. Questions from participants will be addressed in accordance with subparagraph 2.3.B.(6).

(7) Rebuttal

(a) Rebuttal evidence and witnesses must be confined to the subject matter of the evidence rebutted. New evidence on other subjects may not be presented as rebuttal.

(b) Final surrebuttal must directly relate to testimony raised during the rebuttal testimony presented by County Staff.

E. Accepting Additional Evidence

(1) Written Submissions. The Hearing Examiner may leave the record open until a specified date to receive amended documents specifically requested at the hearing.

(2) Additional evidence beyond that allowed by paragraph (1) may only be accepted in a public hearing, in accordance with the following:

(a) Additional Hearing Date.

If the Hearing Examiner or a Party determines a relevant issue is unresolved or additional evidence is necessary to fully review the case, the evidence may be provided at an additional hearing as follows:

1. The Hearing Examiners may schedule an additional hearing date by providing a Notice of Intent to Schedule an Additional Hearing Date. The Notice must include the issues to be discussed or evidence to be provided at the additional hearing and propose potential hearing dates.
2. A Party may request an additional hearing date by filing a Motion for an Additional Hearing Date, describing the issue or evidence that justifies the additional hearing and proposes potential hearing dates.
 - a. A Motion for an Additional Hearing Date must be filed with the Hearing Examiner by the later of the established Written Submission date addressed in paragraph (1), if any, or 15 working days after the close of the regularly scheduled hearing.
 - b. The other Party has 5 working days to respond to the Motion for an Additional Hearing Date.
 - c. The Hearing Examiner will rule on the Motion within 7 working days after the other Party's response.
3. If the Motion is granted or if the additional hearing date is initiated by the Hearing Examiner, the Hearing Examiner will provide notice of the scheduled additional hearing date, at least ten days before the hearing.
 - a. The notice will be provided to the Parties and record participants.
 - b. If there were no participants, the Parties may waive the ten day notice requirement.

- (b) Notice of Intent to Deny. The Hearing Examiner may issue a Notice of Intent to Deny for failure to provide adequate evidence, as contemplated in LDC Section 34-145(e), in accordance with the following:
1. The Notice must:
 - a. State the issues that require additional evidence; and
 - b. Request the Applicant to respond within 10 working days whether they will provide the requested evidence.
 2. If the Applicant does not agree to provide the evidence, the Hearing Examiner will issue a recommendation/decision denying the application.
 3. If the Applicant agrees to provide the requested evidence:
 - a. The Applicant must submit the evidence to the Department within 30 working days of the Notice.
 - b. The Department will send a copy of the requested evidence to the Hearing Examiner and record participants with the new hearing date.
 - c. The Department will review the additional evidence and prepare a supplementary Staff Report addressing only the issues pertaining to the new evidence. The Department will send the supplementary Staff Report to the Hearing Examiner, Parties, and record participants a minimum of five working days before the hearing.
 4. The hearing will be limited to the new evidence issues.

2.4 Hearing Record

- A. Official Records Custodian. The Department is custodian of the hearing recordings and exhibits.
- B. Record on Remand. If an application or appeal is remanded to the Hearing Examiner, the record of the previous hearing is a part of the remand hearing record.

SECTION 3. DECISIONS & RECOMMENDATIONS

- 3.1. Site Visits. The Hearing Examiner will make a site visit prior to rendering a decision or recommendation unless the site is not accessible.
- 3.2. Recommendations and decisions will generally be prepared by the Hearing Examiner in the order the case was heard, unless:
 - A. The record was held open for written submissions;
 - B. The testimony summary/transcript is not available to the Hearing Examiner;
 - C. It is more efficient to take the case out of order, at the Hearing Examiner's discretion; or
 - D. At the direction of the Board of County Commissioners.
- 3.3 Final Decisions and Zoning Recommendations
 - A. Weight of Evidence.

- (1) The Hearing Examiner must review the record and determine the weight to give the evidence presented in the case. Rules of Evidence are not applicable to the probative value of evidence. See 2.3.D.(4).
 - (2) The Hearing Examiner's final decisions and recommendations must be based on competent and substantial evidence.
 - (3) Uncontroverted competent substantial evidence should not be arbitrarily rejected, but the Board or the Hearing Examiner, as the final decision-makers, will determine the credibility of a witness and the weight to give evidence.
- B. The Hearing Examiner's decision/recommendation must include the following:
- (1) Identification of the subject matter or property involved and the action requested by the Applicant or Appellant.
 - (2) A brief summary of the relevant evidence and testimony, including the recommendations of the County Staff.
 - (3) Findings of fact and conclusions of law based on the evidence and testimony, including citations to relevant LDC and Lee Plan provisions to support the basis for the recommendation.
 - (4) In cases involving an appeal of administrative action, whether to grant or deny the appeal and, if the appeal is granted, the administrative action to be taken.
 - (5) The decision or recommendation to grant, grant with conditions (specifying the conditions), or deny the application.
- C. The Hearing Examiner will distribute decisions and recommendations to the Board, the Parties, participants, and members of the public that requested copies by electronic mail, or by regular mail if an email address is not available.
- D. Upon distribution of the zoning recommendation, the Department will schedule the Board hearing in accordance with the LDC.

SECTION 4. Remands

4.1 Applications or Appeals Remanded by the Board to the Hearing Examiner.

The following procedures apply to applications or appeals remanded to the Hearing Examiner by the Board:

A. Remand Information

- (1) Applicant/Appellant Requested Remands.
 - a. The Applicant/Appellant must provide to the Department the information/changes to the application/appeal responsive to the issue(s) prompting the remand within 131 calendar days following the remand vote.
 - b. Within 10 working days of receipt of the information/changes, the Department will schedule the public hearing before the Hearing Examiner and provide electronic or mailed notice to the Parties and the record participants.

- (2) Department Requested Remands.
 - a. The Department must provide to the Applicant the information or recommended changes to the application/appeal responsive to the issue(s) on remand within 60 calendar days following the remand vote.
 - b. The Applicant/Appellant may provide a response to the Department's information/recommended changes. The response must be filed with the Department within 131 calendar days following the remand vote.
 - c. No later than 142 calendar days following the remand vote, the Department will schedule a public hearing before the Hearing Examiner. The Department will provide notice of the hearing to all Parties and participants.
- (3) Board directed remands will be handled as if requested by the Department.
- B. Remanded hearings must occur within six months of the date the remand order was rendered.
 - (1) If the six month deadline is not met because of action or inaction of the Applicant/Appellant, the application/appeal will be considered withdrawn.
 - (2) The timeframe will be met if the hearing is opened and testimony is received within the six months, even if the record is left open.
- C. The Department will review the new information and prepare a revised Staff Report addressing the remanded issue(s). The Department will provide the new information and revised Staff Report to the Hearing Examiner a minimum of two weeks before the scheduled public hearing.
- D. Remanded hearings will be conducted in the same manner as the original hearing, but the scope of the hearing will be limited to the issue(s) that prompted the remand.
- E. The Hearing Examiner will prepare a recommendation/decision consistent with Section 3.