

◆ HEARING EXAMINERS ◆

The Dilemma Facing Rural Communities in Skagit County and Beyond

— PART ONE —

by *DIANE FREETHY*

~ SKAGIT CITIZENS ALLIANCE FOR RURAL PRESERVATION ~

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Trust in government is at an all-time low, yet elected officials continue to make decisions that tend to infuriate their constituents.

Some members of the Washington State Legislature simply refuse to recognize the urgency for cutting government waste. Rather, they promote objectives that require needless spending of taxpayer dollars and provide little benefit to the public-at-large. House Bill 2201 is a prime example.

HB2201 is titled "Addressing the use and governance of hearing examiners." The bill's sponsors claim that only six counties will be affected — Clark, King, Kitsap, Pierce, Snohomish and Thurston — but none are specifically identified in the bill. Strange as it may seem, all other counties will be permitted to opt-out of the newly proposed legislation. The opt-out clause is somewhat similar to those offered by credit card companies which "share" customer information with other businesses. In other words, it appears that rural cities and counties required to plan under GMA must declare their intent to accept or reject the new provisions, including the mandatory use of hearing examiners.

Notably, an Association of Washington Cities representative expressed concern over the bill during a House Local Government Committee hearing in January at which he stated: "This isn't the most necessary thing to do."

Public comments have been more to the point. Some citizens believe that hearing examiners cost too much while others are troubled that elected officials may have to give up control over decision-making, which is why they were elected in the first place.

HB2201 apparently has the support of several outliers including planning associations, land use attorneys, the insurance industry, and corporations or individuals seeking to avoid traditional legal procedures governing land use management.

### **Growth Management & Hearing Examiners**

Skagit County and the cities within its boundaries are required by the State to plan according to provisions of the Growth Management Act (GMA). However, the GMA allows local governments considerable discretion when adopting local land use regulations that not only control growth, but encourage environmental protection and economic stability while promoting the health and safety of its citizens. Skagit County and the City of Mount Vernon employ hearing examiners for the purpose of conducting administrative and quasi-judicial hearings related to land use decisions and appeals of same. Since examiners' contracts and compensation vary according to an employer's needs and ability to pay, many professional hearing examiners serve more than one jurisdiction.

Rarely does the average citizen have the opportunity or desire to participate in land use hearings, so the public's familiarity with the State's hearing examiner system is negligible. Nevertheless, organizations such as Skagitians to Preserve Farmland, Friends of Skagit County, Evergreen Islands and Skagit Citizens Alliance for Rural Preservation represent hundreds of local residents who support the concept of growth management but are cognizant of flaws in the hearing examiner system which tend to invite inconsistency and excuse partiality.

The State's Appearance of Fairness Doctrine requires all government decision-makers (including hearing examiners) to be both "fair in appearance and in fact." Moreover, hearing examiners are required to recuse themselves should their professional pursuits or personal interests denote a possible conflict of interest that could result in an unfair decision against the proponents or appellants of any land use permit application. At least one Skagit County examiner has demonstrated a lack of discipline in this area.

In a controversial Skagit County land use case, the hearing was repeatedly rescheduled to facilitate the examiner's contractual obligations to other jurisdictions. The proponents and appellants accrued extraordinary legal costs as a result, and when the County's expenses began spiraling, the parties decided to settle the matter through private negotiations.

Shutting down the democratic process is never a good remedy if, for example, the ultimate decision could potentially infringe on individual property rights or create a public health or safety hazard. The last chapter of this story has yet to be written.

## Local Debate Continues

As the pros and cons of the hearing examiner system continue to be debated by the Anacortes City Council, the Municipal Research and Services Center of Washington warns: "There are no state statutes that establish the minimum qualifications of hearing examiners." MRSC also points out that "a thorough knowledge of legal procedures, relevant statutes, local ordinances and case law" is beneficial but "a law degree is not required."

Most hearing examiner applicants are either retired attorneys or unemployed planners that come with baggage of one sort or another. Finding a willing individual, with or without a degree — who comprehends land use law and subscribes to the accepted rules of fairness and impartiality — presents a monumental challenge for rural communities.

Meanwhile, so many more important issues require the attention of local decision makers at this time. Hearing examiners probably don't rate very high on the to-do list.

For more information on hearing examiner systems, please read Parts 2 and 3 of this article to be sent in the next FOSC newsletters or go to [www.friendsofskogitcounty.org](http://www.friendsofskogitcounty.org) and Click on Hearing Examiner Articles.

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In a democratic society citizens have a right to question their elected officials about decisions that cause changes within their communities. The hearing examiner system has evolved over several decades in Washington State but, since the adoption of the Growth Management Act, local decision makers are making fewer decisions and relying more on hearing examiners to adjudicate land use issues.

When the Skagit County planning department recommended denial of a permit which would have allowed expansion of a rural commercial site, the hearing examiner concurred. Upon appeal, however, the examiner reversed his decision and, in 2010, the Board of County Commissioners granted the applicant a four-year extension to remedy a number of discrepancies pointed out by the County's planning staff. Meanwhile, ownership of the project site has changed and building plans ratified by the examiner remain in limbo. Neighbors, on the other hand, fear their wells are in jeopardy because the State Department of Ecology recently announced closure of the sub-basin that supplies groundwater for wells in the immediate area. The failure of local decision makers to recognize the absurdity of this proposal in the beginning suggests a serious breakdown in the hearing examiner system. The cost of legal mistakes is unfathomable. Nobody wins in this situation — least of all the taxpayers.

When faced with an unacceptable outcome following a quasi-judicial hearing, the only available recourse for appealing the decision is to petition the State Superior Court. Such appeals are subject to the provisions of the Land Use Protection Act, commonly referred to as the LUPA laws. The unfortunate truth about this gamble is a judge's narrow scope of reference as outlined in Chapter 36.70C of the Revised Code of Washington. A judge will usually defer to the final decision of a local legislative body, providing the city or county plans under the Growth Management Act and follows the guidelines of its duly adopted Comprehensive Plan. The chances of overturning a questionable Superior Court decision are slim at best and, regardless of the judge's ruling, local taxpayers once again bear the cost of defending the system.

## Recent Legislative Action

In 2011 the State Senate Committee on Government Operations heard the first reading of Senate Bill 5013. In summary, the intent of this proposed legislation is to "direct local legislative bodies to divest themselves of responsibility for administrative, quasi-judicial, and appellate decision making, and assign those responsibilities to hearing examiners or professional staff."

With all due respect to that bill's lone sponsor — the late Senator Scott White — one might ask why citizens should want to separate their elected representatives from their official duties. (Incidentally, there is no provision in this bill to separate them from their paychecks.) No action was taken on this bill during the last legislative session; however, it was reintroduced early this year in its original form.

While SB5013 is not directly linked to House Bill 2201, which also deals with hearing examiner issues, both bills seek to relieve elected officials of their decision-making obligations. In Olympia on January 10, 2012, when the House Local Government Committee heard HB2201 for the first time, a committee staff member made reference to a “fiscal note” but admitted he hadn’t reviewed it. Nobody asked for details. The fiscal note in question contains proposed changes in law which the public is entitled to review; namely, specific information about costs that could be passed along to local jurisdictions.

On January 25th the Committee passed an amended version of the bill. The lead sponsor, Representative Joe Fitzgibbon, described it as creating a "more predictable environment for developers." The party-line vote was 5-to-4 in favor. HB2201 currently awaits review by the House Rules Committee.

Creating a more predictable environment for one person or group at another’s expense violates the basic principles of democracy. Suggesting, for example, that the cost to appeal a hearing examiner decision should be borne solely by the appellant effectively shifts the advantage to the applicant and/or the governing body itself.

Skagit County absorbs a major portion of hearing-related expenses because asking developers to pay for anything requires considerable time and effort on the part of staff. Records reveal one instance where a developer refused to pay his permit application fees — plus an additional \$52,530 in delinquent property taxes — until the County agreed to grant his building permits. The County was forced to begin foreclosure procedures on his property to in order to collect the debt. Meanwhile, as the County continues to lay off planning staff to meet budget demands, the developer has accumulated another \$16,000 in delinquent property taxes.

### **Citizen Participation vs Private Manipulation**

Public meetings provide excellent opportunities for reviewing land use issues. Generally speaking, planning commissioners have a good sense of the goals and objectives spelled out in their respective Comprehensive Plans. Furthermore, they share a common interest in promoting sound growth management practices and, for the most part, are familiar with the original intent of current regulations. Appointed by publicly elected officials, they conduct formal deliberations — often at the request of a planning department — and provide recommendations for further action by legislative bodies.

Sinister schemes are often hatched in the boardrooms of large corporations and sometimes promoted by nonprofit organizations which represent their interests. Many have ample resources for coercing lawmakers into passing regulations that support their agendas. One notable offender in that regard is the insurance industry which has managed to infiltrate every level of government from Congress to local school boards.

Planning commissions have no doubt been manipulated by special interests from time to time and may have unwittingly influenced hearing examiner decisions as well. However, a robust and committed group of citizens provides one of the best methods of discouraging dishonesty and corruption.

For more information on hearing examiner systems, please read Parts 1 and 3 of this article.

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Is the hearing examiner system a by-product of corporate control over the people’s business? One very important element of democracy encoded in state statute should dispel any doubt that the right to self-governance is protected in Washington State; to wit:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. [RCW 42.56.030]

The hearing examiner system has been characterized by some in the private sector as nothing more than a tool to help minimize legal costs, but a closer look at its origins suggests it is meant to discourage public involvement in local affairs pertaining to the land use appeal process.

Washington Cities Insurance Authority (WCIA) has promoted the use of hearing examiners for decades. This agency is not widely known, but a few alert Anacortes residents certainly are aware of its existence. WCIA representatives have demonstrated strong support for the mayor of Anacortes who is determined to hire a hearing examiner and thereby critically limit the City Council's decision-making duties. Objections from a wide range of interests, however, have so far stalled a vote on the issue.

### **Pressuring Local Governments**

In 2003, WCIA attorney Mike Walters told the Edmonds City Council: "The goal, from a risk management perspective, is to clearly segregate the two decision-making roles so that the city council is not involved in both. Because it is important that quasi-judicial decisions be qualified and neutral and that no mistakes are made, I would recommend that the hearing examiner be the final decision maker."

Walters suggests that a hearing examiner — an individual who may or may not have a law degree — is less likely to make mistakes than a civil attorney. Coming from a risk management specialist, this statement is counterintuitive, if not totally outrageous.

While there is no law against it, city and county governments rarely relegate their authority over land use decisions to a single surrogate if he or she is incapable of comprehending the law. On the other hand, by embracing the hearing examiner system as recommended by WCIA, and eliminating the functions of a planning council or commission, a city or county at the very least invites mischievous behavior. Whether that behavior emanates from within the halls of government or is the result of individual or corporate manipulation, the consequences always come at considerable cost.

### **Risk Management — An Insurance Industry Hedge**

Insurance industry executives will gamble on just about anything that has a potential for increasing profit or averting loss. To hedge their bets they have masterfully created a sub-industry known as "risk management."

FORBES MAGAZINE recently predicted global giant Aon Corporation's annual revenue "will roll in at \$11.28 billion." Aon is heavily invested in the risk management business, along with other industry leaders Marsh & McLennan, Arthur J. Gallagher and the Willis Group. Incidentally, Aon announced in January 2012 that it is moving its headquarters from Chicago to London. According to WBEZ in Chicago, the move "is at least partially motivated by taxes."

With the insurance industry at their backs, risk management firms servicing both the private and public sectors during the last thirty years have increased their presence in western States. Risk management specialists have been taught to believe they have the power to control their own destiny by restricting the people's right to self-government. They feel no remorse about imposing their will on those who represent the masses and devote extreme energy and effort to undermine the fundamentals of community.

Just as hearing examiners are not required to make fair land use decisions, effective risk management does not require the advice of an insurance salesman. Most governments are capable of implementing risk management strategies and policies that suit their specific needs. On the other hand, organizations such as WCIA offer a one-size-fits-all approach to matters of land use. In other words, if it's good enough for Seattle or San Francisco, it's good enough for Anacortes.

### **Recognizing Corruption**

American enterprise is generally prohibited from creating monopolies, but in 1945 Congress chose to exempt the insurance industry from certain anti-trust laws and other provisions of the McCarran-Ferguson Act. While States have some regulatory authority, the industry's apparent influence over legislative process in Olympia is creating a backlog of bills targeted at land use regulations. Meanwhile, the Cato Institute — with the support of Koch Industries — continues to block the repeal of the McCarran-Ferguson exemption and is striving now to eliminate existing controls over insurance activity at the State level.

Three essential elements allow corruption to manifest itself: opportunity, motivation and minimal risk of detection. Recognizing the signs of potential corruption in the public sector is key to preventing costly mistakes. An employee who falsifies legal documents, for example, or one who inappropriately releases confidential information during permit application reviews, deserves rigorous scrutiny. But oversight shouldn't stop at planning department doors.

Deception, fraud and conflicts of interest occur everywhere. Controlling corruption not only requires constant vigilance at every level of government, citizens must be willing to speak up when they witness any type of behavior that threatens the safety and well being of their community . . . after all, it's theirs to lose. ■