

**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
	ORIGINATING DEPARTMENT: Hearing Examiner

PURPOSE/SCOPE:

The purpose of administrative code 2-6 is to establish procedures for the conduct of public hearings before the Hearing Examiner. This administrative code supplements Lee County's Land Development Code (LDC). If there is a conflict between the administrative code and the Land Development Code, the provisions of the LDC will prevail.

POLICY/PROCEDURE:

SECTION 1. FILING AND SCHEDULING OF CASES

1.1 Filing Appeals and Documentary Evidence Relating to Appeals from Administrative Actions

- A. Appeals from administrative actions must be filed on a Notice of Appeal form and the filing fees paid to the Department of Community Development (DCD) no later than the 30 days after the administrative action being appealed. Administrative appeals will be heard in accordance with the provisions of LDC section 34-145. A Notice of Appeal is not deemed filed until all fees have been paid.
- B. Within five working days after the Hearing Examiner's office receives the Notice of Appeal, the Hearing Examiner will provide the County Manager and the County Attorney, or their designees, with copies of the appeal and schedule the matter for a public hearing as set forth in Section 1.3. below.

- C. The Notice of Appeal must state with particularity the error made by the administrative official, the relief sought, and the legal basis for the same. An appeal may be dismissed for failure to specifically state the errors made by the administrative official. Objections regarding the appellant's failure to satisfy these requirements must be made no later than 15 days before the hearing or the objection is deemed waived.
- D. All subsequent appellate filings must be made to the Hearing Examiner's office.
- E. The appellant will have ten days from issuance of the Order of Dismissal to amend the Notice of Appeal. If an amended Notice of Appeal is not received within ten days, or the amended Notice of Appeal fails to specifically state the error or basis of the appeal, the Hearing Examiner may enter an order dismissing the appeal with prejudice.
- F. Appeals must be limited to the issues raised by the Appellant in the Notice of Appeal. Additional issues may not be raised outside of the initial 30 days unless the appellant files a formal request with the Hearing Examiner to amend the Notice of Appeal. A request to amend the Notice of Appeal must be filed no later than 15 days before the hearing. The Hearing Examiner does not have jurisdiction to determine matters not raised in the initial Notice of Appeal or amended Notice of Appeal.

1.2 Filing Applications for Rezoning, Variances and Special Exceptions

- A. All applications must be submitted to DCD on forms provided by that Department.
- B. Fees must be paid at the time of application submittal in accordance with the external fees and charges manual.
- C. The department will produce a written staff report summarizing the County Staff's position regarding the application, providing a substantive analysis of the request, and, when applicable, complying with requirements of Section 2.2(B)(5)(f), below. The staff report for zoning cases must be delivered to the applicant, the Hearing Examiner, and made available to the public at least 14 days prior to the public hearing. The staff report for variance and special exception cases must be delivered to the applicant, the Hearing Examiner and made available to the public at least 7 days prior to the public hearing. A hearing may not take place until the staff report has been provided in accordance with these guidelines. Upon receipt of the Staff report, the Hearing Examiner's office will notify each party the name of the Hearing Examiner that will preside over the case.

- D. After an application is deemed sufficient and before transmittal of the Staff Report to the Hearing Examiner, the Applicant may provide a report summarizing the Applicant's position regarding the application, providing a substantive analysis of the request, and attaching copies of documents, studies, plans, or other materials (hereinafter "materials") for the Hearing Examiner to consider. The report and materials will be included with the transmittal of the Staff Report to the Hearing Examiner. The Applicant will submit three (3) complete copies of any such materials to the staff at least twenty (20) days prior to the scheduled hearing date. Staff will include one copy of materials submitted by the Applicant to the Hearing Examiner simultaneously with transmittal of the Staff Report and will transmit one copy of such materials to the County Attorney's office. The third copy will be retained in Staff's official zoning file. Only materials submitted with the original Application or in response to sufficiency questions asked by staff may be submitted; no new materials that were not previously reviewed by staff may be submitted. If such materials are not submitted a minimum of 20 days prior to the scheduled hearing date, the Applicant waives its right to have any such materials transmitted to the Hearing Examiner prior to the hearing.

1.3 Scheduling Cases

The Hearing Examiner will schedule hearings for appeals of administrative actions. The date may be no sooner than 15 or more than 30 business days after copies of the appeal have been distributed in accordance with Section 1.1.B. above, unless a later date is agreed upon by the Parties.

1.4 Notice

Notice of hearings will be provided in accordance with AC 2-8.

SECTION 2. CONDUCT OF HEARINGS

2.1 Recording

The Hearing Examiner will provide for stenographic recording of all hearings by a court reporter. The recording will be preserved as a public record but will not be routinely transcribed. Any person may request and obtain a transcript of the record from the court reporter at their own expense.

2.2 Order of Proceedings

- A. Hearings will be conducted in an informal but courteous and professional manner. To the extent reasonably possible and at the Hearing Examiner's discretion, the order of proceedings will be as follows:

- (1) Hearing Examiner announcement of the matter to be heard, explanation of the rights and responsibilities of all interested persons as well as an explanation of future proceedings that may occur in relation to the matter to be heard.
- (2) Presentation of Request or Appeal by applicant, appellant, or representative.
- (3) Cross examination of Applicant or Appellant's witnesses by staff, the County Attorney, or Hearing Examiner with redirect examination by Applicant or Appellant. Re-Cross examination or re-re-direct examination may be limited or disallowed by the Hearing Examiner.
- (4) Presentation of the County Staff's position on the Request by County staff. Or, presentation of the County's position regarding an appeal by County Attorney.
- (5) Cross examination of County staff's witnesses by Applicant (Appellant) or Hearing Examiner with redirect examination by County staff or County Attorney. Re-Cross examination or re-re-direct examination may be limited or disallowed by the Hearing Examiner.
- (6) Cross examination of witnesses by non-parties is not permitted by right, but may be allowed at the Hearing Examiner's discretion.
- (7) Presentation by public participants or their representatives. Cross examination of public participants by Applicant (Appellant), County Staff, County Attorney, or Hearing Examiner.
- (8) Presentation of Rebuttal testimony.
 - a. Presentation of Rebuttal testimony will be in accordance with the following:
 1. Rebuttal testimony by the Applicant,
 2. Rebuttal testimony by Staff or County Attorney, which is limited to responding to the testimony raised during the rebuttal testimony presented by the Applicant,
 3. final surrebuttal, which is directly related to the testimony raised during the rebuttal testimony presented by County Staff or County Attorney.
 - b. Rebuttal evidence or rebuttal witnesses must be confined solely to the subject matter of the evidence being rebutted. New evidence on other subjects may not be brought as rebuttal.
 - c. Rebuttal testimony may not be used by an Applicant to provide new information or make changes to the information reviewed by County staff in preparing its recommendation.

(9) Closing statements by County Staff or County Attorney.

(10) Closing statements by the Applicant or Appellant.

B. Taking Testimony. Testimony will be taken in accordance with the following:

(1) Statements of counsel or authorized representatives will be considered argument and not testimony unless identified to the Hearing Examiner as based upon actual knowledge of the matters, which are the subject of the statements and are testified to under oath.

(2) The Hearing Examiner has the authority to refuse to hear testimony that is irrelevant, repetitive, defamatory, or spurious.

(3) All witnesses and public participants will be sworn and submit to reasonable cross-examination.

(4) Letters or other written statements from members of the public may be made a part of the record of the case but they will not constitute competent substantial evidence on which a decision can be based. The presence and ability to cross examine the author of the document is not required for admissibility.

(5) *Rules of Procedure.*

(a) *Due Process.* Proceedings conducted under § 34-145 (a) through (d) are quasi-judicial proceedings and must provide basic due process. For purposes of these proceedings, “basic 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. The term “parties” to any proceeding are the applicant and the County (or their representatives). The term “parties” does not include public participants or their representatives.

(b) *Evidence.* The Florida and Federal Rules of Evidence do not apply to proceedings under § 34-145(a) through (d). The following rules do apply:

1. *Admissibility.* The admissibility of evidence is as follows:

- a. All relevant evidence is admissible and is not limited to only competent and substantial evidence. *Relevant evidence* is defined as evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The “determination of the action” in zoning matters includes, but is not limited to, the project’s consistency with the Lee Plan and Land Development Code, the compatibility of the project and proposed uses on surrounding uses, the Hearing Examiner’s required findings and considerations, deviations and variances requested by the applicant, and the imposition of conditions.
- b. In proceedings under § 34-145(b) through (d), testimony and evidence regarding the proposed uses and potential impact of those uses are admissible.
- c. Lay opinion is admissible if the opinions and inferences do not require a special knowledge, skill, experience, or training. Lay opinion testimony can establish substantial competent evidence, so long as it is fact-based. Lay persons' opinions unsubstantiated by competent facts are not competent and substantial evidence.
- d. Objection to testimony based upon inadequacy of facts goes to the weight of the evidence and not to its admissibility.
- e. Relevant, fact-based testimony by expert or lay witnesses in a zoning matter is admissible and may constitute substantial competent evidence. Mere generalized statements of opposition must be disregarded. Relevant fact-based testimony may not be disregarded.
- f. An expert witness may give an opinion based on the expert’s own knowledge of the facts, stating those facts and then the expert’s opinion, or an expert may give an opinion based upon a hypothetical question as to facts already in evidence or evidence to be subsequently admitted. Where personal observation is lacking, however, an expert witness cannot be permitted to give an expert opinion until facts upon which the expert’s opinion is to be based have been properly hypothesized before the expert.

- g. The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the hearing.
- h. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence in order to establish the basis of the opinion.
- i. While hearsay evidence is generally admissible in proceedings under § 34-145(a) through (d), hearsay alone does not constitute competent, substantial evidence.

2. *Application of Rules.* The Hearing Examiner is responsible for ensuring these rules are applied equally and consistently to all evidence and testimony presented by the parties and public participants.

(c) *Weight of Evidence.* The Hearing Examiner must review the testimony and determine the appropriate weight to give evidence presented in the case. In accordance with subsection 2.2B(5)(b) above, the use of Rules of Evidence to determine the probative value of evidence is not appropriate.

(d) *Burden of Proof.* In proceedings under § 34-145(a), the appellant has the burden of proof to show that the County administrative official charged with the administration and enforcement of the provisions of the code erred in issuing or denying an order, requirement, decision, interpretation, determination or action.

In proceedings under § 34-145(b) through (d), the applicant has the burden of proof to show by competent and substantial evidence that the proposed request conforms to the LDC and the Lee Plan.

- 1. Competent and substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion.
- 2. The standard of proof that the applicant or appellant must meet in the proceedings under § 34-145(a) through (d) is by a preponderance of the evidence.

(e) *Final decisions and recommendations.* The Hearing Examiner's final decisions and recommendations must be based on competent and substantial evidence.

(f) *Expert Witness.*

1. A witness may be qualified by the Hearing Examiner as an expert through specialized knowledge, training, experience, or education, which is not limited to academic, scientific, or technical knowledge.
2. Objections to the level of an expert's expertise goes to credibility and weight; it does not affect admissibility of an expert's testimony.
3. A party intending to present expert testimony during a zoning hearing (not including variances, special exceptions and conventional rezoning cases) must provide the other party, not less than 48 hours before the date of the hearing during which the expert is expected to provide direct testimony, with the following:
 - a. Expert's name, business address and current resume;
 - b. A detailed description of the expert's qualifications (or copy of current resume) and the area of expertise that the witness will be qualified to testify as an expert;
 - c. A copy of the report that serves as the basis of the expert's opinion, if not already submitted as part of the application or staff report. The report must include:
 - i. A brief description of research conducted by the expert to reach his/her opinion;
 - ii. The nature of the opinion sought and the issues to which the opinion relates;
 - iii. A description of the factual assumptions and data on which the opinion is based; and
 - iv. The opinion and the basis for the opinion.
 - d. A complete copy of documents, studies, reports, charts or tables (along with the data used to create the charts or tables) relied upon by the expert in formulating the expert's opinion and which the party intends to use as evidence during the hearing. Charts, tables, graphs, maps, power point

presentations, or other demonstrative aids that are intended to be used during the hearing to reproduce, summarize, or demonstrate the data or facts relied upon by the expert do not need to be provided in advance, so long as the underlying data or information that is being reproduced, summarized, or demonstrated was provided. Citations to relevant provisions of the LDC, Lee County Administrative Code, Florida Statute, U.S. Code, Florida Administrative Code, or Lee Plan are sufficient to meet this requirement.

4. The documentation required above may not be submitted to the Hearing Examiner before the hearing unless submitted as part of the Applicants report permitted in accordance 1.2(D) above.
5. All documentation may be exchanged between the parties electronically.
6. Unless agreed upon by the parties, the Hearing Examiner may not admit or consider reports, studies, charts, tables, documents, or datum derived therefrom, if it was not provided in accordance with this provision. Notwithstanding, the Hearing Examiner may consider such information if offered as rebuttal to direct testimony.
7. At any time, the requirements in (f)(3) above, may be waived by either party at the request of the other party.

C. Taking Judicial Notice

The Hearing Examiner may take judicial notice of matters that are generally recognized by Florida courts.

D. Forty-Eight Hour Notice

Staff, Applicants, or the Applicant's representative, must provide a written notice of outstanding issues in zoning and land use cases at least 48 hours before the start of the scheduled hearing. Simple statements that one party disagrees with the other party is insufficient. The 48-hour notice must provide sufficient detail regarding the outstanding issues to enable the parties to prepare with appropriate witnesses and evidence. A copy of the notice must be sent to all parties, including the Assistant County Attorney assigned to the case, and the Hearing Examiner. The opposing party may, but is not required, file a response. Evidence or testimony

regarding outstanding issues that were not properly identified in the 48-hour notice may be excluded at the public hearing or may result in a continuance of the hearing charged to the party that failed to provide the required notice.

E. Requests for an order or relief.

A request for an order or other relief from the Hearing Examiner may be made by motion unless another form is required. The Hearing Examiner may request a response to a request by the opposing party.

2.3 Continuances and Deferrals

- A. If, in the opinion of the Hearing Examiner, the testimony, documentary evidence, or information presented at a hearing justifies allowing additional research or review in order to properly decide the case, then the Hearing Examiner, in the Hearing Examiner's sole discretion, may continue the case to a specific time and date to allow for such research or review. The Hearing Examiner may request Staff or the Applicant to submit additional written testimony, documentary evidence, or information by the time and date specified in the continuance order. The Hearing Examiner's decision to grant or deny such a continuance is not subject to review.
- B. Other deferrals or continuances may be granted in accordance with the provisions of the Lee County Land Development Code.
- C. If notices have been mailed or published, a request for continuance must be made on the Record at the originally scheduled hearing date.
- D. Once the hearing has begun, notice of continuances will be mailed only to the parties and public participants of record. No additional notices will be mailed or published for the general public or adjacent property owners.

2.4 *Disqualification or Recusal of a Hearing Examiner.*

- A. *Motion by Hearing Examiner.* At any time during the pendency of a zoning case or action before a Hearing Examiner, the Hearing Examiner may, of his or her own motion, disqualify himself or herself where, to the Hearing Examiner's own knowledge, any of the grounds for a suggestion of disqualification, as provided under Chapter 38, Florida Statutes exist. The failure of a Hearing Examiner to so disqualify himself or herself under subsection 2.4A, is not assignable as error or subject to review.
- B. *Motion by Party.* Any party to an action before the Hearing Examiner may move to disqualify the Hearing Examiner assigned to the case. A motion

for disqualification must satisfy the requirements under Rule 2.330 of the Florida Rules of Judicial Administration.

- C. *Basis of Motion.* A motion for disqualification must be based on a well-grounded fear on the part of the movant that he or she 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 that would be deemed unfavourable to the movant. 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 could not receive a fair and impartial hearing. 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. A motion for disqualification of a Hearing Examiner is also subject to the following:
1. A motion filed before the movant becomes aware of the Hearing Examiner formally assigned to the case is legally insufficient and must be denied.
 2. A motion filed after the period required under Rule 2.330 is legally insufficient and must be denied.
 3. A motion made during a hearing must be ruled on immediately or set for hearing at a future date. If the hearing on the motion is set for a future date, the current hearing must be continued to a date certain, no sooner than 30 days from the date of the hearing on the motion to provide an opportunity for the hearing on the motion to occur and the time for filing an appeal to run.
 4. A motion based solely on hypothetical or contingent facts is legally insufficient and must be denied.
 5. A motion based solely on a movant's subjective fear of bias is legally insufficient and must be denied.
 6. A motion based solely on very general and speculative assertions about a Hearing Examiner's attitudes is legally insufficient and must be denied.
 7. A motion based solely on prior adverse rulings or findings of a Hearing Examiner is legally insufficient and must be denied.
 8. A motion based solely on prior decisions of a Hearing Examiner to recuse himself or herself in another case, is legally insufficient and must be denied.
 9. The filing of a motion with an allegation of bias does not create a per se rule requiring recusal.
 10. A hearing on the motion is not required.

- E. *Appeal.* An appeal of the order on the motion for disqualification must be made to the circuit court within 30 days of the date the order was issued. An order denying a motion to disqualify a Hearing Examiner is reviewed by a petition for writ of prohibition.

SECTION 3. DECISIONS & RECOMMENDATIONS

3.1 Site Visits

Prior to rendering a decision or recommendation, the Hearing Examiner will make a site visit unless the site is not accessible.

3.2 Final Decisions and Zoning Recommendations

- A. The Hearing Examiner's decision/recommendation must contain the following:
 - (1) Identification of the subject matter or property involved and the action requested by the applicant or appellant.
 - (2) Summary of the evidence and testimony in the matter, including the recommendations of the County staff.
 - (3) Findings of fact and conclusions of law based on the evidence and testimony in the matter, including citations to relevant Code 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 specify any administrative action to be taken by virtue of a decision granting an appeal.
 - (5) The decision whether to grant, grant with conditions (specifying any such conditions), or deny the application.
- B. The Hearing Examiner will deliver all decisions and recommendations, including copies of the summaries of evidence and testimony (or transcript if available), by electronic mail or regular mail to the Parties and the County Commissioners' offices. The Hearing Examiner will deliver a notice of all decisions and recommendations to public participants by electronic mail, or by regular mail, in the event an email address is not available. The notice to public participants must provide case identification, the Hearing Examiner's recommendation or decision, and provide the location that the recipient may find the complete recommendation and summary of evidence and testimony. For the purpose of this administrative code, public

participants include any person who attends a hearing examiner proceeding or the authorized representative of a public participant.

- C. The Hearing Examiner's Office will prepare a summary of the evidence and testimony or provide a transcript of the proceedings.
- D. Once the recommendation in a zoning case has been delivered, DCD staff will schedule the matter for hearing by the Board of County Commissioners in accordance with LDC Chapter 34.