

AC 2-6 Amendments - redlined

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, <u>10/ /15</u>
	ORIGINATING DEPARTMENT: Hearing Examiner

PURPOSE/SCOPE:

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

1.1 Filing ~~Appeals and Documentary Evidence Relating to~~ 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 Appeals from administrative actions must be filed with the Department 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.~~

(2) A Notice of Appeal is not deemed filed until payment of the filing all fees have been paid.

~~CB.~~ 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 same. An appeal may be dismissed for The failure to specifically state the errors made by the administrative official may result in dismissal of the appeal. 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.

¹ Under LDC 34-145(a).

- 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.
- ~~B~~D. Within ~~five~~10 working days after the Hearing Examiner's office receivesing the Notice of Appeal, the Hearing Examiner will either:
- (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 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 accordance with Ssubsection 1.3. below.
- ~~D~~E. All subsequent appellate filings must be made to the Hearing Examiner's office.
- ~~E~~F. The Appellant will have ~~ten~~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 is not received within ten10 days, or the amended Notice of Appeal fails to specifically state the error or basis of the ~~a~~Appeal, the Hearing Examiner may ~~enter an order dismissing the a~~enter an order dismissing the ~~a~~Appeal with prejudice.
- ~~F~~G. Appeals ~~must be~~are limited to the issues raised ~~by the Appellant~~ in the Notice of Appeal.
- (1) The Appellant may amend the Notice of Appeal to raise aAdditional issues, if filed 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 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 determine matters consider issues not raised in the initial or amended 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. Applications for rezoning, variances, and special exceptions must be filed in accordance with the LDC or applicable Administrative Codes.
- ~~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. {Last sentence relocated to Section 1.3.B.}~~

- ~~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

- A. 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. 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. {Substantive portions relocated from existing Section 1.2.C}

1.4 Notice

The Department will provide nNotice of hearings will be provided in accordance with AC 2-8 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 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.
- 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 request and obtain a transcript of the record from the court reporter 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. {Substantive portions relocated from existing Section 2.2.E}

- (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. {Substantive portions relocated from existing Section 2.4}

(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. {Substantive portions relocated from existing Section 2.3.A}

(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. {Substantive portions relocated from existing Section 2.3.C}
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. {Substantive portions relocated from existing Section 2.3.D}

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 h~~Hearings will be conducted~~ in an informal but courteous and professional manner. The Hearing Examiner is responsible for ensuring equal and consistent application of these rules. {Substantive portion relocated from existing Section 2.2.B.(5)(b)2}

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 matter to be heard~~, explanation of the procedure, and 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 Applicant/Appellant arguments, testimony, and evidence.~~
- (3) Cross-examination of Applicant/~~or Appellant's witnesses by County Staff, the County Attorney, or and the~~ Hearing Examiner, with redirect examination by Applicant/ ~~or Appellant.~~ The Hearing Examiner may limit or disallow ~~Re-Cre-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 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 ~~or County Attorney.~~

~~Re-Cross examination~~The Hearing Examiner may limit or disallow re-cross 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 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 public participants by Applicant/-(Appellant), County Staff, County Attorney, or 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.

(89) Presentation of Rebuttal Testimony. (a) Presentation of Rebuttal testimony will be in accordance with the following: 1. Rebuttal testimony by the Applicant/Appellant;

2.(10)Rebuttal testimony by County Staff, or County Attorney, which is limited to responding to the testimony raised during the rebuttal testimony presented by the Applicant;

3.(11)Final surrebuttal by Applicant/Appellant. {Substantive portions relocated to Section 2.3.D.(7)(b)}

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. {Substantive portions relocated to Section 2.3.D.(7)(a)}

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.

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

(10) Closing statements by the Applicant or Appellant the Parties.

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

(31) All wWitnesses and public participants will be sworn 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, tThe Hearing Examiner has the authority to refuse to hear testimony that is irrelevant, or repetitive, defamatory, or spurious.

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

~~(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. {Last sentence relocated to Section 2.3.D.(4)(a)5.}~~

~~(5)D.~~ Rules of Procedure.

~~(a1) Due Process. The pProceedings conducted under § 34-145 (a) through (d) are quasi-judicial proceedings and must will provide basic due process. For purposes of these proceedings, "basic due process" requires that the Pparties have notice of the hearing and an opportunity to be heard. Furthermore, Pparties 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.~~

~~(2) Burden of Proof. {Substantive portions relocated from existing Section 2.2.B(5)(d)}~~

~~(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. {Substantive portions relocated from existing Section 2.2.B.(5)(d)2}~~

~~(b4) Evidence. The Florida and Federal Rules of Evidence do not apply to the proceedings under § 34-145(a) through (d). The following rules do apply:~~

~~4.(a) Admissibility. The admissibility of evidence is as follows:~~

- ~~a1. 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.~~
 - e2. 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.~~
 - e3. 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. {Substantive portions relocated to Section 2.3.D.(5)(c)2.} 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.~~
 - i4. While hearsay evidence is generally admissible in proceedings under § 34-145(a) through (d), 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. {Substantive portions relocated from existing Section 2.2.B.(4)}
- (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. {Substantive portions relocated from existing Section 2.2.C}
- ~~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.~~ {Substantive portions relocated to Section 2.3.A}

~~(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.~~ {Substantive portions relocated to Section 3.3.A.}

~~(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.~~ {Substantive portions relocated to Section 2.3.D.(2)}

~~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.~~ {Substantive portions relocated to Section 2.3.D.(3)}

~~(e) Final decisions and recommendations. The Hearing Examiner's final decisions and recommendations must be based on competent and substantial evidence.~~ {Substantive portion relocated to Section 3.3.A.2}

~~(f5) Expert Witness.~~

~~1-(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. A witness may be qualified by tThe Hearing Examiner may recognize a witness as an expert if the witness has through specialized knowledge, training, experience, or education, which is not limited to academic, scientific, or technical knowledge on the subject matter of their testimony.~~

~~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. 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. {Substantive portions relocated from existing Section 2.2.B.(5)(b)1.f}

- ~~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 Statutes, 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 Applicant's 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.~~
- (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.

~~C. Taking Judicial Notice. The Hearing Examiner may take judicial notice of matters that are generally recognized by Florida courts. {Substantive portions relocated to Section 2.3 D.(4)(b)}~~

~~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 to, 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.~~

(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. {Substantive portions relocated from existing Section 2.2.A.(8)(b)}

(b) Final surrebuttal must directly relate to testimony raised during the rebuttal testimony presented by County Staff. {Substantive portions relocated from existing Section 2.2.A.(8)(a)3}

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.

~~E. Requests for an order or relief. {Substantive portions relocated to Section 2.2.C.}~~

- ~~(1) A request for an order or other relief from the Hearing Examiner may be made by Motion unless another form is required. Motions will be permitted in accordance with the following:
 - ~~(a) Motions made prior to a hearing, must be made in writing. Copies of the Motion, and companion documents (cases, etc.) must provided to all participating parties, including County Staff and Assistant County Attorney assigned to the case.~~
 - ~~(b) The Hearing Examiner may give the opposing party up to 10 days to respond, unless additional time is requested. The hearing may be continued to permit opposing party sufficient time to respond to the Motion.~~
 - ~~(c) If a Motion is made at the hearing, the Hearing Examiner may continue the hearing and afford the opposing party sufficient time to respond to the Motion.~~
 - ~~(d) Parties may submit memorandum of law in support of their Motion or response to a Motion. If necessary, the Hearing Examiner may request that one or both parties provide memorandum of law on the subject matter of a Motion.~~
 - ~~(e) If requested, the Hearing Examiner will provide an opposing party additional time to provide a response to a Motion or memorandum of law presented in support of a Motion.~~
 - ~~(f) A complete copy of all cases cited within the memorandum must be provided to the Hearing Examiner at the time the memorandum is submitted to the Hearing Examiner.~~~~
- ~~(2) Motions may be set for hearing at the discretion of the Hearing Examiner, and only legal argument will be heard at those hearings.~~

~~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. {Substantive portions relocated to Section 2.2.F.(2)(b)}~~
- ~~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. {Substantive portions relocated to Section 2.2.F.(2)(c)}~~
- ~~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. {Substantive portions relocated to Section 2.2.F.(2)(d)}~~
- ~~2.4 Disqualification or Recusal of a Hearing Examiner. {Substantive portions relocated to Section 2.2.D.}~~
- ~~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 2.4A1 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 wellgrounded 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.~~

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. Prior to rendering a decision or recommendation, ~~†~~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. {Substantive portions relocated from existing Section 2.2.B.(5)(c)}
 - (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 ~~contain~~ include the following:
 - (1) Identification of the subject matter or property involved and the action requested by the Applicant or Appellant.

- (2) A brief sSummary of the relevant 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 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, specify any if the appeal is granted, the administrative action to be taken by virtue of a decision granting an appeal.
 - (5) The decision or recommendation whether to grant, grant with conditions (specifying ~~any such~~ the conditions), or deny the application.
- ~~BC.~~ The Hearing Examiner will ~~deliver~~ distribute 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 Board, the Parties, and the County Commissioners' offices. The Hearing Examiner will deliver a notice of all decisions and recommendations to public participants, and members of the public that requested copies by electronic mail, or by regular mail, in the event if 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~~ Upon distribution of the zoning recommendation, the Department DCD Staff will schedule the matter for hearing by the Board of County Commissioners hearing in accordance with the LDC Chapter 34.

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.