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A Better Way to Decide Land-Use Issues

Enabling the use of hearing examiners is unquestionably a step in the right direction.

By **Dwight Merriam** | May 30, 2019



Contentious board meetings can go on for hours, and sometimes days.

If you have ever suffered through a contested local planning and zoning commission or inland wetlands and watercourses agency hearing, you know something about torture. I get paid to represent clients at those hearings and in over 40 years I have had hearings run to 3 a.m., one in which a local citizen threatened to kill the moderator and the hearing had to be shut down, and in another a pitched battle over a proposed golf course community requiring zoning and wetlands approval that ran 27 (not a

typo) nights with the stakeholders collectively spending millions of dollars on lawyers, consultants and court stenographers.

With the wisdom that has only come to me in hindsight, I now know why California, Oregon, Washington, Idaho, Arizona, New Mexico, Utah, Illinois, Ohio, Maryland, Florida and maybe others have professional hearing officers, often called hearing examiners. As someone who is privileged to represent all the varied interests in land-use matters—applicants, neighbors, advocacy groups, boards and commissions—I believe all of them would be well-served if we adopted the hearing examiner approach to land-use decision-making. Connecticut law currently only allows hearing officers for the limited purpose of hearing challenges to fines for zoning violations (see Sections 8-12a(b) and 7-152c).

Recently the [Snoqualmie \[Washington\] City Council](https://www.ci.snoqualmie.wa.us/526/City-Council) (<https://www.ci.snoqualmie.wa.us/526/City-Council>) has been debating whether to use a hearing examiner for subdivision applications. Currently, the council decides them and there is no appeal. The proposal is to have the hearing examiner hold the hearing, take the evidence, and render a decision that could be appealed to the council. A senior planner on staff, advocating for using the hearing examiner, offered:

One of the main reasons to support using a hearing examiner is the hearing examiner is not a political animal. Hearing examiners are there to implement what the municipal code says, in their best judgment. The council is generally a political body. Members legislate, so they are subject to all those political pressures.

The members of land-use boards and commissions in Connecticut are dedicated, hardworking and driven to do their best. But most do not have the level of legal and substantive background a qualified hearing examiner does. They are necessarily, and appropriately, “political” in the sense that they are trying to not only apply the plans and regulations, but at the same time to find some balance. That push and pull between what the law of their regulations requires and what they may perceive as best for the community sometime yields suboptimum results. At the least, the process is overly long, often acrimonious, inefficient and sometimes downright uncivil.

A hearing examiner can bring order to chaos, manage the process of taking in the evidence, apply the rule of law in making decisions and make decisions based solely on the law as applied to the facts. Then, depending on the type of decision—a variance might be different than a subdivision—anyone with standing could appeal, either to a local administrative body or to the courts. In some states, purely legislative decisions, those that involve the making of policy such as a zoning text and map amendment, the hearing examiner would offer a proposed decision, and the zoning commission, based solely on that record and recommended decision, would make the final decision. There are many variations across the states and at the local level.

Today's planning and zoning commissions and local inland wetlands and watercourses agencies could become, for the most part, appellate bodies, hearing arguments for and against the hearing examiner's decision and upholding, modifying or reversing it, perhaps by supermajority. No new evidence would be taken. The record would be prepared for them, with a neat and clean distillation of the relevant facts and the applicable law. Zoning commissions would have more time to improve their regulations. Planning commissions could plan, instead of being bogged down in reviewing subdivision applications and special exception requests.

Gov. Ned Lamont wants our government—both state and local—to work better. We all do. Enabling the use of hearing examiners (note that I don't suggest mandating them) is unquestionably a step in the right direction. Towns that come to use hearing examiners will attract more and higher quality development, neighbors will be better protected, the burden in time and cost on towns will be less and appeals to court will decrease.

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