

**CITY OF BLAINE STAFF REPORT &
REQUEST FOR CITY COUNCIL ACTION
HEARING DATE: October 8, 2007**

SUBJECT: Amendments to the Blaine Municipal Code to transfer development permit review from the planning commission to the hearing examiner and related amendments.

PROPONENT: City of Blaine

PREPARED BY: Terry Galvin, Community Development Director

AGENDA LOCATION: Public Hearings

ATTACHMENTS

- Attachment A:** Ordinance #07-2663 -Code Amendments to Adjust Hearing Examiner/Planning commission Responsibilities
- Attachment B:** Planning Commission Recommendation
- Attachment C:** Land Use Decision Making Authority
- Attachment D:** Land Use Decision Types
- Attachment E:** Washington State Cities and Towns Using A Hearing Examiner
- Attachment F:** Article – Use of Hearing Examiners by Cities and Counties in WA
- Attachment G:** Written Public Testimony to PC addressing Ordinance 07-2663

SUMMARY OF THE PROPOSAL:

In 2002, the city council approved an ordinance creating a hearing examiner (HE) system to handle appeals for the City. The ordinance created chapter 2.58, BMC establishing a hearing examiner position, with limited responsibilities, and due process. Five years later, staff is proposing additional changes to the code that increase the responsibilities of the hearing examiner.

The proposal is to amend the Blaine Municipal Code to transfer development permit review from the planning commission to the hearing examiner and to eliminate the City Council from the appeal process. These amendments are contained in Ordinance #07-2663 and attached to this staff report as Attachment A. Staff contends that the amendments will allow the planning commission to focus on hearings and meetings necessary to make recommendations to the city council on land use code and comprehensive plan amendments.

The request requires amendments to several chapters of the Blaine Municipal Code:

- Proposed Amendments To Chapter 2.56 - planning commission
- Proposed Amendments To Chapter 2.58 - Hearing Examiner
- Proposed Amendments To Chapter 8.14 - Unfit, Improperly Maintained Or Substandard Structures Or Premises.

- Proposed Amendments To Chapter 15.08 - International Fire Code
- Proposed Amendments To Chapter 15.32 - Airfield Area Regulations
- Proposed Amendments To Chapter 17.02 - General Provisions
- Proposed Amendments To Chapter 17.06 Project Review and Approval Procedures

Description of Proposed Amendments

The proposal can be broken into four categories of code amendment as follows:

Request #1

1. Eliminate appeals of a hearing examiner decision to city council. The result will be that all hearing examiner decisions can only be appealed to the Whatcom County Superior Court.

Request #2

Expand the hearing examiner responsibilities as follows:

1. To hear and decide all Type II applications for site-specific land use permits with the exception of Major Development projects. The hearing examiner to make a recommendation to the City Council for Major Development final decisions.
2. To hear and decide on enforcement action relating to land use actions.

Request #3

Eliminate PC review of Type II permit applications. This will allow the PC to concentrate on the creation of a visionary comprehensive plan; to review UGA boundaries and establish concise annexation criteria, and finally, to development a state of the art land use code.

Request #4

(Staff note: these have changed slightly from staff original “requests” as a result of PC, public and legal input.)

To monitor and evaluate the hearing examiners performance to insure that appropriate and reasoned decisions are made in an open public hearing process. This will include the following actions:

1. The hearing examiner should annually submit a written report addressing the previous years review process. Additionally, the HE will provide feedback and recommendations to the CC and PC relating to improvement to the Blaine Municipal Code (BMC).
2. The city council should conduct an annual performance review of the hearing examiner to insure that appropriate, reasoned and consistent decisions are made in an open public hearing process.
3. The city should establish a contract that provides for one year extensions commencing in February of each year. The extensions of such contract should be predicated on a positive annual evaluation.
4. At the end of a two year period or upon completions of a comprehensive plan and Title 17 update, the city council should convene a town meeting to assess the advisability of returning development permit review to the planning commission. (Staff note – this request has been added as a result of public and PC input)

SUMMARY OF PLANNING COMMISSION HEARING AND RECOMMENDATION

The planning commission held a public hearing on the proposal on August 9. They held worksessions on August 29 and September 12. On September 13, after reviewing the proposal and considering public testimony, planning commission members concluded that they do not support staff’s proposal. Their signed recommendation of denial is contained in **Attachment B:**

Planning Commission Recommendation. The planning commission opposition focused on three staff proposals summarized in Request #1, #2 and #3.

Request #1. To eliminate appeals to the city council. The result would be that all Type II decisions could only be appealed to the Whatcom County Superior Court.

PC position: Members of this community should have the opportunity to appeal a land use decision directly to its duly elected leaders before it is taken to a court of law.

Request #2. To expand the hearing examiner responsibilities to hear and decide on all Type II applications for site-specific land use permits with the exception of Major Development projects. Under this proposal, the hearing examiner will make recommendations to the city council on Major Development final decisions.

Request #3. Eliminate PC review of Type II permit applications. This will allow the PC to concentrate on the creation of a visionary comprehensive plan; to review UGA boundaries and establish concise annexation criteria, and finally, to development a state of the art land use code.

PC position: The Planning commission believes that citizen review of development projects is critically important to the community and should be made by a body of those people who live in the community and have a commitment to the health and welfare of the city. This position was voiced by many individuals in the community who testified at the hearing in opposition to the proposal.

BACKGROUND & RATIONALE

Planning Commission/ Hearing Examiners existing role and responsibilities:

Current planning commission role - The current role of the planning commission is twofold:

- Legislative. To advise the city council on land use & community development policy and to guide the development of the City through their work on the comprehensive plan and the land use code.
- Quasi-judicial. To conduct public hearings on proposed development to insure public involvement, to conduct compliance review and either make final decisions or a recommendation to the city council based their findings.

Current Hearing Examiner Role - The current role of the hearing examiner is limited to hearing appeals of administrative decisions. In 4 ½ years that the city has contracted hearing examiner services, there have been only two appeals hearings.

Issue: In recent years development permit review has occupied most of the planning commission and staff's time leaving an inadequate amount of time to focus on comprehensive plan amendments and code updates.

Rationale for transfer of development permit review to hearing examiner:

The primary motivation for this change is to allow the planning commission to concentrate on the comprehensive plan and land use code update. The use of a hearing examiner can relieve the load of the planning commission and city council and allow more time for them to concentrate on legislative matters.

Another reason for the proposed change is the concern that with the passage of the Growth Management Act in 1990 and a multitude of related state legislation, the regulatory scene has become very complex with increasing potential for litigation and liability. There is evidence that supports the conclusion that the use of an attorney with land use expertise in his/her role as the city's hearing examiner will result in more legally defensible, timely, and consistent land use decisions. This change should reverse the trend toward more appeals and reduce the city's legal exposure and liability.

Related issues and the city's response:

The proposed regulatory amendments are one part of an **efficiency initiative** that has been ongoing for the last year. This initiative came to fruition after four joint CC/PC worksessions that resulted in direction from the city council in a number of areas. While the focus of this report is to provide the rationale for increased hearing examiner responsibilities, it is worth pointing out that these amendments are an integral part of a larger **efficiency initiative** that the city has embarked upon to achieve a higher standard of development review and, ultimately, a higher standard of development for the City of Blaine.

Issues/Problems:

1. Development review process is taking a long time to get to a decision;
2. Much needed updates to the comprehensive plan and corresponding land use regulations are not getting done;
3. There has been increasing disagreement over the direction and character of future growth in Blaine;
4. Appeals of planning commission decisions to the city council and superior court are taking place at a greater frequency and high cost.

Possible reasons for problem:

1. Substantial increase in size, number and capacity of development proposals;
2. Development proposals are becoming more controversial with substantial increases in public opposition;
3. Increasing litigious environment;
4. Lack of common vision of Blaine's past, present and future growth and character;
5. Communication between CC/PC is infrequent;
6. Project proposals are increasing in number and complexity. Consequently, staff and the planning commission are required to allocate increasing amounts of their time to permit review with less time available for legislative action;
7. In recent years, community development staff (CDS) staff has been both cramped and stretched and lack the time, space & resources to develop better processes for development permits and better support the planning commission.

City response - efficiency initiative:

In response to these issues, staff coordinated four (4) joint CC/PC meetings to discuss the issues and identify solutions. Additionally, staff invited developers to one meeting and land use consultants to another meeting with senior staff to advise the city of any problems and solutions

in the city's permit review process. These meetings resulted in direction from the city council and city manager to begin a four (4) part **efficiency initiative** that addresses the following issues:

Staffing work load.

Direction: Increase CDS staffing sufficient to manage and staff a permit system without unnecessary delay.

Action to date:

Action item #1: With a position upgrade authorized by the city manager, the CDS director has hired one full time seasoned and competent development permit manager to replace the previous current planner. The new development permit manager is focusing on increased permit review efficiency and speed.

Action item #2: With authorization the CDS director promoted Alex Wenger from a GIS/planning technician to a Planner I, and increased his hours from ½ time to full time.

Work space constraints.

Direction: Find additional space for the Community Development Services Department.

Action to date: The city manager has negotiated a 3 year lease for a larger office facility for the CDS department immediately adjacent to City Hall. CDS will move into the new space before the end of this year.

Administrative changes.

Direction: Increase communication and coordination between Community Development Services and the Public Works Departments.

Action:

A number of changes have been initiated to respond to this issue. They are listed below.

Action item #1: The Director has created a “**Development Review Team**”, which consists of 6 members from Public Works, Community Development Services, and the building official. The team meets each week, discusses the specifics of each proposal and coordinates the review requirements. Additionally twice a week, the Development Team will be available together in the Community Development Office to meet with applicants who wish to consult with city staff about pending applications.

Action item #2: The Development Review Team is now setting up **scheduled submittals of development project applications**. With both Public Works and CDS staff present and an opportunity to jointly go over the submittal with the applicant, delays associated with the submittal of incomplete applications and related confusion will be minimized.

Action item #3: The Development Review Team has revised the permit review process that uses the **Site Plan** as the center piece in the review process. This tool will efficiently pull together the variety of permits and approvals required for most projects, increase coordination, and dramatically reduce confusion.

Action item #4: **Technical Review Committee (TRC) expansion**, which already includes Utility, Police, PW, CDS and Fire department representatives, has recently been augmented by the inclusion of the CDS Office Specialist to provide additional detailed meeting notes to

the proponent. Furthermore a representative from the Semiahmoo Resort Association, Architectural Standards Committee has been invited to address development in West Blaine.

Direction: Increase Communication between CC and PC.

Action: PC chair now attends all CC meetings and reports directly to CC rather than through staff.

Action: CC has agreed to provide more feedback to PC and hearing examiner and:

1. Redirect when a recommendation or decision is wrong.
2. Meet to sort out issues.
3. Participate in joint hearings where appropriate when updating code or comprehensive plan.

Direction: Revise PC/HE responsibilities – reassign Development Review to hearing examiner.

Action: This will require hiring one or two attorneys under contract to perform these tasks. Staff is preparing for hearing examiner interviews and working on administrative adjustments to support the change. (See regulatory changes below for additional information).

Comprehensive planning & associated code changes

Direction: PC/HE responsibilities – amend the code to reassign development review to the hearing examiner and direct the planning commission to focus their efforts on the comprehensive plan update and related regulatory updates.

Action: Staff has prepared regulatory amendments to enable the transfer of development permit review responsibilities to the hearing examiner.

Direction: Focus on a common vision for the City of Blaine, past, present and future.

Action: Staff has requested and received permission from the city council to facilitate the creation of a Visioning task force comprised of local citizens whose job will be to work with staff to create a workable vision for the future of Blaine and related policy direction.

Direction: Sponsor and participate in educational community forums to clarify planning issues.

Action: Staff preparing the first of several educational forums that addresses community vision and its role in small community decisions.

SUMMARY OF ATTACHMENTS:

Attachment A: Ordinance #07-2663 -Code Amendments to Adjust Hearing Examiner/Planning Commission Responsibilities

This Ordinance is the legal instrument through which the Council can take action. The ordinance includes all proposed amendments. Changes to the existing code are marked with ~~cross-outs~~ and underlines where text is being proposed to be deleted or added.

Staff has provided a brief statement of rationale and explanation immediately after each code amendment.

Attachment B: Planning Commission Recommendation

The planning commission has recommended denial of the proposed amendments. Their complete recommendation is contained in Attachment B.

Attachment C: Land Use Decision Making Authority

This flow chart helps clarify what the decision making authority is relative to each decision type. It also illustrates when and to whom an appeal is directed.

Attachment D: Land Use Decision Types

This chart shows the relationship between each building and development permit and the type of decision required to receive permit approval.

Attachment E: Washington State Cities and Towns Using a Hearing Examiner

This is a self explanatory list. Staff have called and talked to numerous staff and some elected officials about the relative success of their Hearing Examiner system. The response was surprisingly positive with unanimous support.

Attachment F: Article – Use of Hearing Examiners by Cities and Counties in WA

Provides a clear and concise summary of the legal basis for a hearing examiner system and other related issues.

Attachment G: Written Public Testimony to PC addressing Ordinance 07-2663

This last attachment is a compilation of all written testimony submitted to the Planning Commission. It is part of the public record and must be forwarded to the City Council for their review. It is important to note that the vast majority of both written and oral testimony was submitted in opposition of the proposal. The next section of this report attempts to address some of the questions raised by community members.

QUESTIONS AND ISSUES THAT HAVE EMERGED FROM THE COMMUNITY DISCUSSION

Question: What is the legal basis for the municipal use of a hearing examiner?

Municipal Research and Services Center of Washington (MRSC), a state Information Center available to local municipalities, writes:

Cities and counties in Washington State have statutory authorization to establish a hearing examiner system. Under a hearing examiner system, a city or county hires or contracts with a hearing examiner to conduct quasi-judicial hearings, usually in place of local bodies such as the planning commission, the board of adjustment, the board of county commissioners, or the city council. The basic purpose of having a hearing examiner conduct these hearings is to have a professionally-trained individual, typically an attorney, make objective quasi-judicial decisions that are supported by an adequate record and that are free from political influences. Using a hearing examiner system allows local legislative and advisory bodies that might otherwise conduct these hearings to better concentrate on policy-making. It can also potentially reduce local government liability exposure through what should be more consistent and legally-sustainable quasi-judicial decisions.

A board of county commissioners or a city council has considerable discretion in establishing how the hearing examiner system will operate. The position of hearing examiner (appointment, qualifications, termination, etc.), the type of issues the hearing examiner is authorized to consider and decide, and the effect of the hearing examiner's decisions are among the matters that should be addressed by the local legislative body and

set out in the enabling ordinance. Although counties and cities use hearing examiners primarily for hearing and deciding land use permit applications and/or administrative appeals of land use decisions, hearing examiners may also be used to conduct hearings and make recommendations or decisions on other local matters.

RCW 35A.63.170 is the primary enabling legislation, allowing a city to authorize a hearing examiner to make decisions on the following:

- Site specific zoning amendments
- Any application for development
- Land use violations
- Variances
- Appeals

Other enabling legislation has been passed by the state legislature that addresses the use of a hearing examiner:

- [RCW 35.63.130](#) - Authorizes use of a hearing examiner system in first and second class cities and towns for certain zoning matters
- [RCW 35A.63.110](#) - Authorizes hearing examiner system as replacement for board of adjustment
- [RCW 36.70.970](#) - Authorizes use of a hearing examiner system in counties for certain zoning matters
- [RCW 58.17.330](#) - Authorizes use of a hearing examiner system in cities and counties for hearing and issuing recommendations or decisions on preliminary plat
- [RCW 36.70B.020\(3\)](#) - Defines open record hearings on project permit applications – hearing examiner may conduct
- [RCW 36.87.060\(2\)](#) - Authorizes hearing examiner to conduct hearing on proposed county road vacation
- LID/RID Hearings
- [RCW 35.43.140](#) - Authorizes use of a hearing examiner to conduct hearing on proposed LID formation
- [RCW 35.44.070](#) - Authorizes use of a hearing examiner to conduct LID assessment roll hearing
- [RCW 36.88.062](#) - Authorizes use of a hearing examiner to conduct hearing on proposed RID formation
- [RCW 36.88.095](#) - Authorizes use of a hearing examiner to conduct RID assessment roll
- [RCW 36.94.260](#) - Authorizes use of a hearing examiner to conduct hearings on assessments for LID within the area of a sewerage and/or water general plan
- [RCW 46.55.240](#) - Authorizes use of a hearing examiner to conduct hearings on abatement and removal of junk vehicles from private property
- [RCW 43.21C.075](#) - Authorizes use of a hearing examiner to conduct hearings on SEPA appeals
- [WAC 458-14-136](#) - Authorizes county boards of equalization to employ hearing examiner(s)

Question: Are other municipalities using the hearing examiner system and what are the costs of doing so?

Attachment E provides a list of municipalities that are currently using the hearing examiner system. Additionally, the following table provides a sample of cities and counties, their population, and related hearing examiner information.

Jurisdiction	Population	Responsibilities	Cost
Whatcom County	190,000	Type II & appeals	\$80,000/yr(Contract)
Island County	77,000	Admin appeals, SMP, CUP, zoning compliance & appeals, SEPA threshold appeals, and appeals of enforcement.	\$4,725/month(Contract)
Walla Walla	32,000	CUP, VAR, recommends to C.C. on preliminary plats, etc	\$150/hr, \$50/hr legal assistant(Contract)
Mount Vernon	29,000	Type II permits, Admin Appeals	\$100/hr(Contract)
Oak Harbor	22,000	Admin Appeals, Type II & Type III	\$18,000/yr (Contract)
Ferndale	10,000	Admin Appeals, Type II, Recommends to Council on Prelim Plats, Final Plats, PUD	\$200 filing fee + hourly rate paid by proponent (Contract)
Port Townsend	9,000	Admin Appeals, Type II, LID decisions and as directed by city council.	\$135/hr (Contract)

Question: Will it cost more to use a hearing examiner system?

Yes. The city will be transferring permit review responsibility from seven (7) volunteer planning commissioners to one (1) paid hearing examiner. The table above provides some insight into the fees that are charged for hearing examiner contract services. It is also important to point out that the use of a hearing examiner does not reduce staff's work load. That has not been the experience in other municipalities.

Many cities require the applicant to pay related hearing examiner fees in addition to normal permit processing fees. While the increase is significant, staff has found that most developers are willing to pay for them because of the increased speed in permit review and the perceived increase in predictability.

Issue: Community participation and accountability

Many in the community have voiced concern that a hearing examiner may not be as responsive to the community in his/her deliberations over a land use proposal; that the hearing examiner may not weigh and consider public comment as much as the planning commission currently does.

Another community concern is that a hearing examiner with the power to force testimony, require oaths and allows cross examination will make the public hearing process so intimidating that public participation will be significantly reduced.

In response to these concerns, staff has proposed the elimination of related provisions under section 2.58.080 Rules and regulations.

The hearing examiner shall ~~have the power to~~ prescribe rules and regulations for the conduct of hearings before him, subject to approval by the city council, ~~and also to issue summons for and compel the appearance of witnesses, to administer oaths and preserve order. The opportunity of cross-examination of witnesses shall be afforded all interested parties or their counsel in accordance with the rules of the hearing examiner.~~

Issue: Representative decision making

Staff has also heard some express the position that important land use decisions should be made by elected officials who believe in the city's future and not a hired professional with no particular interest in the city.

Issue: Potential disconnections between policy and development realities

Finally, it has been pointed out that without site specific development permit review, the planning commission and city council will lose their link with what is actually happening on the ground and ultimately get lost in their work on comprehensive plans and regulations. In other words, project review keeps PC plugged into the Community.

Additional discussion of the pros and cons can be found in **Attachment F**.

STAFF FINDINGS

1. The passage of the Growth Management Act in 1990 and successive state regulations have resulted in increasingly complex and sophisticated regulations with increasing potential for liability.
2. In recent years development permit review has occupied most of the planning commission and staff's time leaving an inadequate amount of time to focus on comprehensive plan amendments and code updates.
3. The City Council has directed staff to investigate and make recommendations related to the use of a land use expert with legal expertise to assist the City Council in the capacity of hearing examiner in the review and determination of land use decisions.
4. The proposed regulatory amendments are one part of an efficiency initiative that has been ongoing for the last year.
5. The use of a Hearing Examiner will result in more informed, timely and consistent land use decisions thus reducing the City's potential liability.
6. The use of a Hearing Examiner can reduce the quasi-judicial decision making load on the Planning Commission and City Council, allowing more time to concentrate on legislative matters.

RECOMMENDATION

- Staff recommends approval of the proposed amendments.
- The Planning Commission recommends denial of the proposed amendments.

FISCAL ANALYSIS

If these amendments are adopted, a hearing examiner system will require an increase in fees for Type II land use decisions. These additional fees will be paid by the applicant. If the city carefully tracks Type II permit processing fees to insure that, at the end of the year, they correspond to the cost of the hearing examiner contract; on balance the city should not experience any additional costs in this course of permit review.

An important financial consideration in this proposal is that with the additional hearing examiner fees, the City will be implementing concentrated work programs for both current and long range planning tasks. The increased volume of activity will result in increased costs to the City.

REVIEWED BY: City Manager _____ Finance Dir. _____ City Clerk _____

COUNCIL ACTION:

Approved Denied Tabled/Deferred Assigned to: _____

COUNCIL ACTION: _____

Attachment A

ORDINANCE NO. 07-2663

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLAINE, WASHINGTON, UPDATING THE BLAINE MUNICIPAL CODE, TITLES 2, 8,15, AND 17, TO AMEND THE APPEALS PROCEDURE AND TO EXPAND THE RESPONSIBILITIES OF THE HEARING EXAMINER TO INCLUDE DEVELOPMENT PERMIT REVIEW.

WHEREAS, Chapter of the Blaine Municipal Code currently requires the City to refer Type II development permit decisions to the planning commission; and,

WHEREAS, with the passage of the Growth Management Act in 1990 and successive state regulations with increasing complexity and sophistication, the potential for errors in interpretation and liability have increased; and,

WHEREAS, 36.70.970 RCW provides for local jurisdictions to use the Hearing Examiner system for the review of development permits; and,

WHEREAS, the City Council has directed staff to investigate and make recommendations related to the use of a Hearing Examiner to assist the City Council in the review and determination of land use decisions; and,

WHEREAS, a determination of nonsignificance and all legal notice requirements have been met; and,

WHEREAS, on August 9, 2007 the Planning Commission held a public hearing and heard all testimony relating to the proposal; and,

WHEREAS subsequent to the public hearing the Planning Commission conducted two worksession to discuss the issue and, on September 13, voted to recommend denial of the proposal to the City Council; and,

WHEREAS, in response to the Planning Commission recommendation , on October 8, 2007 the City Council held their own public hearing to hear public testimony on the proposal and to further consider the issue; and, subsequently, voted to approve the proposal,

NOW, THEREFORE, IT IS HEREBY ORDAINED BY THE CITY COUNCIL OF THE CITY OF BLAINE as follows:

SECTION 1: The Following Findings of Fact are hereby adopted:

1. The passage of the Growth Management Act in 1990 and successive state regulations have

resulted in increasingly complex and sophisticated regulations with increasing potential for liability.

2. In recent years development permit review has occupied most of the planning commission and staff's time leaving an inadequate amount of time to focus on comprehensive plan amendments and code updates.
3. The City Council has directed staff to investigate and make recommendations related to the use of a land use expert with legal expertise to assist the City Council in the capacity of Hearing Examiner in the review and determination of land use decisions.
4. The proposed regulatory amendments are one part of an **efficiency initiative** that has been ongoing for the last year.
5. The use of a Hearing Examiner will result in more informed, timely and consistent land use decisions thus reducing the City's potential liability.
6. The use of a Hearing Examiner can reduce the quasi-judicial decision making load on the Planning Commission and City Council, allowing more time to concentrate on Legislative matters.

SECTION 2: The city council shall monitor and oversee the development permit review process and hearing examiner rulings on an annual basis in the following manner:

1. The city council shall require the hearing examiner to annually submit a written report addressing the previous years review process. Additionally the hearing examiner shall submit written feedback and recommendations that address improvements that can be made to the Blaine Municipal Code (BMC).
2. The city council with the assistance of the planning commission shall annually conduct a performance review and evaluation of the hearing examiner. This evaluation should take place in January of each year.
3. The city shall establish a contract that provides for one year extensions commencing in February of each year. The extensions of such contract shall be predicated on the annual evaluation.
4. At the end of a two year period or upon completions of a comprehensive plan and Title 17 update, the city council shall convene a town meeting to assess the advisability of returning development permit review to the planning commission.

SECTION 2: Chapter 2.56 Planning Commission is hereby amended as follows:

Chapter 2.56 Planning Commission

2.56.010 Established – Membership.

A. There is created a city planning commission consisting of seven members who shall be selected by the city council pursuant to Chapter 2.08 BMC, as adopted and amended.

B. At the next regular meeting of the planning commission following the effective date of the ordinance codified in this section, the commissioners presently in office shall determine by lot whose terms shall expire in four years, three years, two years, and one year, respectively. Thereafter, the term of office for each appointive member shall be set by BMC 2.56.020. The members of the commission shall determine which member shall serve as chairperson.

2.56.020 Terms.

The term of office of the seven members appointed by the city council shall be six years.

2.56.030 Residency.

Any member appointed to the planning commission shall reside within the city limits for the term of his office.

2.56.040 Vacancies – Nonpartisanship – Compensation – Removal.

Vacancies occurring other~~wise~~ than through the expiration of terms shall be filled by ~~the mayor with the approval of the council, for inefficiency, neglect of duty or malfeasance in office.~~ The members shall be selected without respect to political affiliations and they shall serve without compensation. Any planning commission member may be removed from office, with just cause at any time by an affirmative vote of not less than two-thirds of city council members.

2.56.050 Duties.

The planning commission, as required by this chapter, shall conduct an open record hearing and make recommendations to the city council on proposed amendments to the City of Blaine Comprehensive Plan and Title 17, Land Use & Development, BMC.

~~A. Hold public hearings and make recommendations to the city council on conditional use permit applications;~~

~~B. Review all planned unit developments and mobile home park proposals, and make recommendations to the council;~~

~~C. Review all proposed amendments to this chapter and make recommendations to the council;~~

~~D. Review and decide on shoreline substantial development permit applications and proposed amendments to the shoreline program, as required in the Shoreline Management Master Program.~~

2.56.060 Research and fact-finding.

The planning commission may act as the research and fact-finding agency of the municipality. To that end it may make such surveys, analyses, researches and reports as are generally authorized or requested by the council.

2.56.070 Secretary.

~~The planning commission may designate one of its members to act as secretary without salary or, if requested by the commission, the city manager shall designate a member of the paid staff of the city to serve as such secretary/transcriber.~~ community development director shall serve as the secretary of the planning commission.

2.56.080 Quorum – Valid action.

A majority of the membership of the planning commission, not less than four appointed members, shall constitute a quorum for the transaction of business. Any action taken by a majority of those present when a meeting of the planning commission is held shall be deemed and taken as the action of the commission.

2.56.090 Expenditures – Employees.

The expenditures of the commission shall be within the amounts appropriated for the commission by the city council. Within such limits the commission may employ such employees and expert consultants as are deemed necessary for its work.

SECTION 3: Chapter 2.58 Hearing Examiner is hereby amended as follows:**Chapter 2.58 - HEARING EXAMINER****2.58.010 Established.**

~~Effective February 2002, the position of city of Blaine hearing examiner is created~~The City of Blaine shall have a hearing examiner system as provided for by RCW 36.70A. The authority of the hearing examiner is set forth in Sections 2.58 and 17.06, and elsewhere in the Blaine Municipal Code. The position shall be appointed as provided for under RCW 36.70.970 by the city council for a ~~two~~ one-year term and may be removed at will by the city council.

2.58.020 Blanket amendment.

All Blaine Municipal Code designations of “board of adjustment” or “board of appeals” or any variations therein shall be amended to read “hearing examiner.”

2.58.030 Purpose.

The purpose for creating a hearing examiner function is:

~~A. To provide an efficient and effective system for deciding appeals from administrative decisions;~~

~~B. To help insure procedural due process and appearance of fairness by holding such hearings before a neutral party, competent in the fields of land use and procedural requirements; and to produce reasoned, fair and defensible land use decisions.~~

2.58.040 Salary.

The hearing examiner shall be compensated on an hourly basis as established by resolution with an allocated budget set annually as part of the budget process.

2.58.050 Qualifications.

The hearing examiner and his or her pro tempore shall be appointed solely with regard to their qualifications for the duties of their office, and shall have such training or experience as will qualify them to conduct administration of quasi-judicial hearings on the application of regulatory enactments and to discharge other functions conferred upon them, and shall hold no other appointed or elected public office or position in the city government, except as provided in this chapter.

2.58.060 Appointment and removal.

The hearing examiner and one or more pro tem shall be appointed by a majority vote of the city council for a ~~two~~ one-year period. The hearing examiner may be removed from office at any time by an affirmative vote of not less than two-thirds of city council members.

2.58.070 Duties and powers.

The hearing examiner shall make a final decision upon the following matters:

- A. Appeals from any final written orders, requirements, permits, decisions or determinations made by an administrative official in the administration of BMC Titles 8, 12, 13, 15, 16 and 17;
- B. Appeals from SEPA determinations of significance, determinations of nonsignificance, and mitigated determinations of nonsignificance;
- C. Appeals of administrative decisions made by the director in the administration of the design guidelines and sign review regulations;
- D. Appeals of violations and enforcement citations;

C.E. Type II decisions including but not limited to:

1. Revocation proceedings involving all project proposals requiring an open record hearing;
 2. Applications for zoning conditional use permits;
 3. Applications for shoreline management substantial development permits;
 4. Applications for shoreline management program conditional use permits;
 5. Applications for long subdivision approval;
 6. Project permits that require a variance request;
 7. Applications for short plat approval when a short plat variance is being requested;
 8. Applications for general binding site plan approval;
 9. Applications for zoning or shoreline variances which accompany any of the applications listed in subsection (D)(1) of this section; and,
2. The hearing examiner shall conduct an open record hearing and prepare a record thereof, and make recommendations to the city council (Type II-CC decisions) for approval or disapproval of applications made for the project permits listed below:
- A. Major development permits;
 - B. Planned unit development permits; and
 - C. A consolidated application that includes permits for which the hearing examiner would otherwise make a final decision as provided in subsection (D)(1) of this section, when a Type II-CC decision is required by the City Council. The hearing examiner shall, instead, make a recommendation to the city council for their final decision.

2.58.080 Rules and regulations.

The hearing examiner shall ~~have the power to~~ prescribe rules and regulations for the conduct of hearings before him/~~her~~, subject to approval by the city council, ~~and also to issue summons for and compel the appearance of witnesses, to administer oaths and preserve order. The opportunity of cross-examination of witnesses shall be afforded all interested parties or their counsel in accordance with the rules of the hearing examiner.~~

2.58.090 Department reports.

The hearing examiner may request reports from appropriate staff.

2.58.100 Changes in legislation.

The hearing examiner may recommend changes in legislation to the community development department or city council.

2.58.110 Limited jurisdiction.

The hearing examiner shall have no jurisdiction or authority over any ~~project that requires a~~ legislative action~~s~~, such as but not limited to regulatory amendments, regulatory map amendments, a comprehensive plan change, or a shoreline management program amendment. The approval or denial of such projects shall be solely within the discretion of the city council. The hearing examiner shall have the authority to make a final decision or a recommendation to the City Council on project approvals as set forth in 2.58.070 of this chapter.

2.58.120 Final decision conditions.

The hearing examiner's final decision on all permits or appeals shall either grant or deny the permit or appeal. The hearing examiner may grant the permit or appeal subject to conditions, modifications or restrictions that the hearing examiner finds necessary to make the proposed project

compatible with its environment, and to carry out the objectives and goals of the comprehensive plan, the land use code, and other applicable official policies and objectives of the city. Performance bonds or other security, acceptable to the city, may be required to ensure compliance with the conditions, modifications and restrictions.

2.58.130 Final decision or recommendation – Findings and conclusions.

Each final decision or recommendation of the hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision or a recommendation to the City Council.

2.58.140 Time limitation on decision.

Each final decision of the hearing examiner shall be rendered within 10 business days following the conclusion of all testimony and hearings.

2.58.150 Review limited.

No final decision of the hearing examiner shall be subject to administrative or quasi-judicial review, except as provided herein.

2.58.160 Appeal of hearing examiner decision.

The decision of the hearing examiner shall be final unless appealed to the ~~city council within 21 days of the issuance of the written decision.~~ Whatcom County Superior Court pursuant to Section 17.06.190, BMC.

SECTION 4: Chapter 8.14 is hereby amended as follows:

Chapter 8.14 - UNFIT, IMPROPERLY MAINTAINED OR SUBSTANDARD STRUCTURES OR PREMISES.

8.14.070 Hearings before the inspector.

C. If, after the required hearing, the inspector determines that a structure or premises is unfit for use, improperly maintained, or substandard, he/she shall state in writing his/her findings of fact in support of such determination, and shall issue and cause to be served upon the owner and any other interested persons appearing in person at the hearing a copy of such findings and order in the manner provided in BMC 8.14.060. The inspector shall also post the order in a conspicuous place on said property:

1. Requiring the owner and/or parties in interest, within the time specified in the order, to vacate, close, demolish, remove, repair, alter and/or improve such structure or premises to render it fit for use, properly maintained or in compliance with standards; or
2. Requiring the owner or party in interest to abate the nuisance and setting out generally those steps necessary to render the structure or premises fit for use and properly maintained; or
3. Stating that an annual inspection fee has been assessed against a structure until such time as it is reoccupied or demolished.

In addition, such order shall state that the owner has the right to appeal to the hearing examiner within 10 days pursuant to BMC 17.06.180, Appeals, and unless the owner does appeal or comply with the order, the city shall have the power, without further notice or proceedings, to do any act

required of the owner in the order of the inspector, and to charge any expenses incurred thereby to the owner and assess them against the property.

D. If no appeal is filed, a copy of such order shall be filed with the Whatcom County auditor and shall be a final order.

8.14.080 ~~Hearings before the hearing examiner~~ Appeals.

A. The purpose of the ~~hearing examiner in this appeals~~ process, as it relates to this title, is to review the proceedings and orders of the inspector and to affirm, modify or vacate such orders.

B. Appeals of decision by the inspector shall be heard by the hearing examiner pursuant to BMC 17.06.180, Appeals. ~~Within 10 days from the date of service and posting of an order of the inspector, an owner may file an appeal with the hearing examiner by filing a written notice of appeal with the inspector and the hearing examiner specifying his/her reasons for claiming that the findings or order of the inspector are erroneous. Notice of the time and place of the hearing shall be served as provided at BMC 8.14.060. The matter of the appeal will be scheduled for a hearing before the hearing examiner so as to allow 10 days' notice of the hearing to the appellant and all interested parties and to permit the final decision thereon to be made within 60 days after the filing of the appeal. The filing of the notice of appeal shall stay the order of the inspector, except necessary temporary emergency measures, such as securing of a structure, to minimize any imminent danger to the public health or safety.~~

C. ~~At hearing of the appeal, the hearing examiner shall consider the file of the proceedings before the inspector and such other evidence as it may allow to be presented. After the hearing, the hearing examiner may affirm, modify or vacate the order of the inspector, or may continue the matter for further deliberation or presentation of additional evidence. Normally the hearing examiner will not accept new evidence or evidence not made available to the inspector in the absence of good cause. The hearing examiner's review is on the record rather than de novo. A record of the proceedings shall be made and kept for one year or until the matter is final, whichever is longer. The hearing examiner shall cause his/her findings of fact and order to be made in writing; provided, the hearing examiner may adopt the findings and order of the inspector, or so much thereof as supports its decision. Such findings and order shall be served and posted in the same manner as an order of the inspector. In addition, such notice shall state that the owner has the right to file an appeal with the superior court of Whatcom County for a review of the proceedings on the record before the hearing examiner within 30 days after posting and service of the order to determine whether the action of the hearing examiner has been arbitrary, capricious or contrary to law.~~

D. ~~Any action taken by the hearing examiner shall be final no later than 60 days after the filing of the notice of appeal, unless continued with consent of the owner. In the event that the hearing examiner fails to reach a decision or continues the hearing beyond 60 days from the filing of the appeal without consent of the owner, the inspector's findings and order shall become the findings and order of the hearing examiner, and shall be final and subject to petition to the superior court.~~

SECTION 5: Chapter 2.58 is hereby created and contains the following language:

Chapter 15.08 – INTERNATIONAL FIRE CODE

15.08.110 Appeals.

Appeals of any fire code official decision, order or determination relative to the application and interpretation of this chapter shall be made pursuant to Section 17.06.080, BMC.

~~Whenever the fire code official disapproves an application or refuses to grant a permit applied for, or when it is claimed that the provisions of the code do not apply or that the true intent and meaning of the code have been misconstrued or wrongly interpreted, the applicant may the decision of the fire code official to the Blaine board of appeals within 10 days from the date the decision is appealed.~~

SECTION 5: Chapter 15.32 is hereby amended as follows:

Chapter 15.32 – AIRFIELD AREA REGULATIONS

15.32.080 Variances and appeals.

~~Applications Requests~~ for variances and appeals shall be processed pursuant to Sections 17.06.170 and 17.06.180 BMC, respectively. ~~by the hearing examiner as provided at Chapter 17.62 BMC.~~

SECTION 6: Title 17 is hereby amended as follows:

Chapter 17.02 – GENERAL PROVISIONS

17.02.050 Administrative responsibilities.

C. Hearing Examiner (HE).

1. The hearing examiner shall conduct an open or a closed record hearings and prepare a record thereof, and make ~~a~~ final decision on all land use decisions pursuant to Chapter 2.58, BMC, upon the following matters except as provided in subsection E of this Section:

~~a. Appeals from any orders, requirements, permits, decisions or determinations made by the director in the administration of BMC Titles 16 and 17 except as provided in subsection (D)(1)(i) of this section;~~

~~b. Appeals from SEPA determinations of significance, determinations of nonsignificance, and mitigated determinations of nonsignificance; and~~

~~c. Revocation proceedings involving all project proposals requiring an open record hearing.~~

D. Planning Commission (PC).

~~1. The planning commission shall conduct open record hearings and prepare a record thereof, and make a final decision upon the following matters except as provided in subsection (D)(2) of this section:~~

~~a. Applications for zoning conditional use permits;~~

~~b. Applications for shoreline management substantial development permits;~~

~~c. Applications for shoreline management program conditional use permits;~~

~~d. Applications for long subdivision approval;~~

~~e. Project permits that require a variance request;~~

~~f. Applications for short plat approval when a short plat variance is being requested;~~

~~g. Applications for general binding site plan approval;~~

~~h. Applications for zoning or shoreline variances which accompany any of the applications listed in subsection (D)(1) of this section; and~~

~~i. Appeals of administrative decisions made by the director in the administration of the design guidelines and sign review regulations.~~

~~2. The planning commission shall conduct an open record hearing and prepare a record thereof, and make recommendations to the city council for approval or disapproval of applications made for the project permits listed below:~~

~~a. Major development permits;~~
~~b. Planned unit development permits; and~~
~~c. An application for any of the project permits for which the planning commission would normally make a final decision as provided in subsection (D)(1) of this section, when associated with a major development permit or a planned unit development. The decision on these permit applications shall instead be in the form of a recommendation to be forwarded to the city council for final approval.~~

1. The planning commission shall conduct an open record hearing and prepare a record thereof, and make recommendations to the city council ~~review and make recommendations to the city council~~ on proposed amendments to the City Comprehensive Plan, and Comprehensive Plan maps, including site specific rezones, and the City's land use and development code ~~and on proposed new regulations thereunder. Planned Unit Developments and Major Development permits are project approvals and not amendments to an existing code, plan or policy.~~ ~~a. As such, they are not reviewed by the Planning Commission for recommendations to the City Council.~~

E. City Council (CC).

1. The city council shall make a final decision on the following applications for project permits:

a. All project proposals that determined to be Major dDevelopment permits;
 b. Planned unit developments(PUD);
 c. Other land use permits when submitted concurrently with those in a. or b. Associated land use permits.

2. The city council, through its chairperson, shall review and sign final plats.

~~3. The city council shall hear appeals of hearing examiner and planning commission decisions as provided in BMC 17.06.180.~~

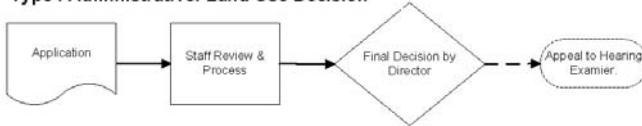
Chapter 17.06 - PROJECT REVIEW AND APPROVAL PROCEDURES

17.06.040 Land use final decisions and land use decision types.

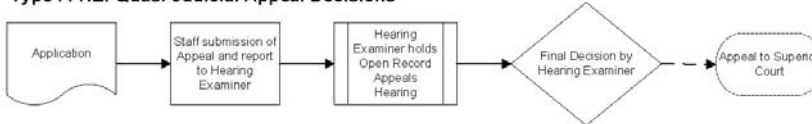
Replace existing flowchart with the following:

Land Use Decision Making Authority

Type I-Administrative: Land Use Decision



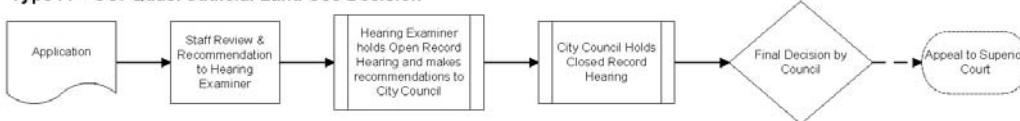
Type I I-HE: Quasi-Judicial Appeal Decisions



Type II I - HE: Quasi-Judicial Land Use Decision



Type II – CC: Quasi-Judicial Land Use Decision



17.06.170 Variances.

A. The ~~planning commission~~hearing examiner shall have the power and duty to authorize a variance from the terms of the area and dimensional regulations of this title when the request is consistent with the public interest and where, due to special conditions, literal enforcement of the provisions of this code would result in unnecessary hardship.

B. A variance from the terms of this title shall be granted by the ~~planning commission~~hearing examiner when a written application for a variance is submitted demonstrating all of the following:

[NO CHANGE TO THE CRITERIA]

C. No nonconforming use of neighboring lands, structures or buildings in the same district, and no permitted use of lands, structures or buildings in other districts, shall be considered grounds for the issuance of a variance.

D. The following steps are required for consideration of a variance:

1. Notice of public hearing shall be given consistent with the timelines established in this chapter;

2. The ~~planning commission~~hearing examiner shall hold an open record hearing addressing the variance request in conjunction with related permit applications or project proposals;

3. The ~~planning commission~~hearing examiner shall make findings that all of the requirements of subsections (B)(1) through (4) of this section are met;

4. The ~~planning commission~~hearing examiner shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building or structure; and

5. The ~~planning commission~~hearing examiner shall further make a finding that the granting of the variance will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

~~E. Variances Related to the Airport.~~

~~1. When a variance is requested from height regulations in the airfield zone of influence, the director shall provide a notice of application and a notice of open record hearing to the airport commission and the Federal Aviation Administration. Any response from these parties shall be submitted to the planning commission and considered in a staff report.~~

~~2. A variance from the airfield height restrictions may be conditioned to require the owner of the structure or obstacle in question to install, operate and maintain, at the owner's expense, such markings and lights as may be necessary.~~

~~3. A variance related to the airport will be granted only upon satisfaction of the conditions listed in this section as well as a finding that granting of the variance will not create a hazard to air navigation.~~

~~FE.~~ In granting any variance, the ~~planning commission~~hearing examiner shall set the expiration date at 12 months from issuance. If establishment or construction of the variance conditions has not commenced within this 12-month period, the applicant may reapply for a new variance permit. The ~~planning commission~~hearing examiner may extend the expiration date by one six-month period upon written request and evidence that the applicant intends to activate the permit within that time limit.

~~GE.~~ Under no circumstances shall the ~~planning commission~~hearing examiner grant a variance to allow a use not permitted under the terms of this chapter in the district involved, or any use expressly or by implication prohibited by the terms of this division in the district. Variances shall be limited to the area and dimension requirements of this division.

17.06.180 Appeals.

A. Type I-ADM Final Decisions. Type I final decisions, when provided in writing, shall be final and conclusive unless a statement of appeal is filed by the applicant, a department of the city, or any aggrieved person in the manner set forth below:

1. A statement of appeal shall be in writing and include a brief statement of the matter being appealed and the basis for the appeal;

2. The statement shall be submitted to the director, filed with the appropriate city hearing body and shall be accompanied by a fee pursuant to the city's unified fee schedule within 14 days of the issuance of the formal written decision. ~~The appropriate hearing body shall be determined by the director based on the matter under appeal;~~

3. The applicant may choose to submit a more comprehensive statement setting forth in detail alleged errors and/or the basis for appeal. This statement must be submitted by the appealing person within 30 days following the issuance of the final decision;

4. The appeal of a Type I decision shall be an open record appeal.

B. Type II Final Decisions – ~~Hearing Examiner or Planning Commission~~ Type II final decisions ~~made by the hearing examiner or planning commission~~ shall be final and conclusive unless a timely judicial appeal is filed with the superior court of Whatcom County pursuant to BMC 17.06.190, within 14 days following the mailing of such decision a written statement of appeal is filed with the city council by the applicant, a department of the city, or party of record, who is also an aggrieved person. The statement shall set forth any alleged errors and/or the basis for appeal and shall be accompanied by a fee pursuant to the unified fee schedule; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant. The appeal of a Type II decision shall be a closed record appeal.

~~C. Type II Final Decisions—City Council. Type II final decisions made by the city council shall be final and conclusive unless a timely judicial appeal is filed with the superior court of Whatcom County pursuant to BMC 17.06.190.~~

~~DC.~~ The timely filing of an administrative appeal shall stay the effective date of the decision until such time as the appeal is heard and decided or is withdrawn. The burden of proof regarding modification or reversal shall rest with the appellant.

~~ED.~~ Within ~~seven~~ fourteen days following the timely filing of an appeal, notice thereof and of the date, time, and place for the open record appeal hearing or closed record appeal action, as appropriate, shall be mailed to the applicant, the appellant, and to all other parties of record. Such notice shall provide a general description of the appeal and of the property location, and shall additionally indicate whether written and/or oral testimony will be accepted or whether the appeal is a closed record appeal.

~~FE.~~ A final decision on the appeal shall be rendered no later than 90 days after the timely filing of an appeal.

~~GE.~~ Type II-HE and Type II-PC final decisions on shoreline substantial development permits, conditional use permits and variances are appealable pursuant to Chapter 90.58 RCW and Chapter 17.92 BMC and not as provided in this chapter.

17.06.190 Appeals to the Whatcom County superior court.

A. Appeals from the final decision of the city council on a land use decision shall be made to the Whatcom County superior court ~~within 10 days of the date the decision or action became final by filing both a petition for review in the Whatcom County superior court and serving the petition on all necessary parties~~ in conformity with the requirements of the State Land Use Petition Act, Chapter 36.70C RCW.

B. Notice of the appeal and any other pleadings required to be filed with the court shall be served to the city clerk, the director, and city attorney within the applicable time period. This requirement is jurisdictional.

C. The cost of transcribing and preparing all records ordered, certified by the court or desired by the appellant for such appeal shall be borne by the appellant. The appellant shall post with the city clerk prior to the preparation of any records an advance fee deposit in the amount specified by the city clerk. Any overage will be promptly returned to the appellant.

D. No land use decision shall be deemed a final decision by the city and subject to judicial appeal until all available administrative appeals of the decision allowed by city code have been completed. Failure of a person to timely file an administrative appeal, if such is available, of a land use decision shall preclude further administrative or judicial review of the decision.

Section 3. Severability. If any section, sentence, clause or phrase of this ordinance shall be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 4. Effective date. This ordinance shall be in full force and effect upon the date of the Mayor's signature.

**PASSED BY THE CITY COUNCIL OF THE CITY OF BLAINE, WASHINGTON on the
____ day of _____, 2007.**

CITY OF BLAINE, WASHINGTON

**Mike Myers
Mayor**

ATTEST/AUTHENTICATE:

APPROVED AS TO FORM:

**Sheri Sanchez
City Clerk**

**Jon Sitkin
City Attorney**

**CITY OF BLAINE
PLANNING COMMISSION RECOMMENDATION
TO CITY COUNCIL**

SUBJECT: Amendments to the Blaine Municipal Code to transfer development permit review from the planning commission to the hearing examiner change the appeals process and other related amendments.

ATTACHMENTS:

Attachment 1: Oral & Written Public Testimony (addressing proposal)

REQUEST:

The primary proposal by staff is to amend the Blaine Municipal Code to transfer development permit review from the planning commission to the hearing examiner. Staff proposes this to be accomplished through a number of related amendments to the code as indicated below:

Staff's request includes amendments to several chapters of the Blaine Municipal Code:

- Proposed Amendments to Chapter 2.56 - Planning Commission
- Proposed Amendments to Chapter 2.58 - Hearing Examiner
- Proposed Amendments to Chapter 8.14 - Unfit, Improperly Maintained or Substandard Structures or Premises.
- Proposed Amendments to Chapter 15.08 - International Fire Code
- Proposed Amendments to Chapter 15.32 - Airfield Area Regulations
- Proposed Amendments to Chapter 17.02 - General Provisions
- Proposed Amendments to Chapter 17.06 Project Review and Approval Procedures

Summary. The proposal can be broken into 4 categories of code amendment as follows:

Request #1

1. To eliminate appeals to the city council. The result will be that all Type II decisions can only be appealed to the Whatcom County Superior Court.

Request #2

Expand the hearing examiner responsibilities as follows:

1. To hear and decide all Type II applications for site-specific land use permits with the exception of Major Development projects. The hearing examiner to make a recommendation to the City Council for Major Development final decisions. .
2. To hear and decide on enforcement action relating to land use actions.

Request #3

To reduce the planning commission responsibilities through the transfer of their review of Type II development permit applications to the hearing examiner.

Request #4

To monitor and evaluate the hearing examiners performance to insure that appropriate and reasoned decisions are made in an open public hearing process. This should be accomplished as follows:

1. To reduce the length of the HE contract to one year with annual extensions.
2. To conduct review of the Hearing examiner's performance.
3. To require the hearing examiner to annually provide written feedback and recommendations that addresses the Blaine Municipal Code (BMC).

PLANNING COMMISSION RECOMMENDATION:

After reviewing the proposal and considering public testimony, Planning Commission members have concluded that we do not support staff's proposal. While there are four requests associated with this proposal, the Planning Commission is fundamentally opposed to the proposals summarized in Request #1 and #2 and provides some of the rationale for its opposition.

Request #1. To eliminate appeals to the city council. The result would be that all Type II decisions could only be appealed to the Whatcom County Superior Court.

PC comment: The Planning Commission believes that members of this community should have the opportunity to appeal a land use decision directly to its duly elected leaders before it is taken to a court of law. In addition to the immediate impacts to the adjacent neighborhood, land use projects can have a major impact on the long term character and quality of life in a small community such as Blaine. This community should have a local forum through which citizens can appeal important decisions before the appeal gets shipped to the cold, hard, costly, and often foreign world of lawyers and judges who reside in the superior court.

Request #2. (1) To expand the hearing examiner responsibilities to hear and decide on all Type II applications for site-specific land use permits with the exception of Major Development projects. Under this proposal, the hearing examiner will make recommendations to the city council on Major Development final decisions.

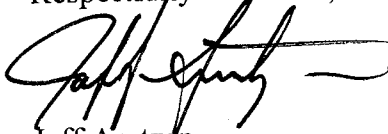
PC comment: The Planning Commission believes that citizen review of development projects is critically important to the community and should be made by a body of those people who live in the community and have a commitment to the health and welfare of the city. This position was voiced by many individuals in the community who testified at the hearing in opposition to the proposal. Both written and oral testimony is attached to this report (Attachment 1) to substantiate this assertion.

Many in the community have voiced concern that a hearing examiner may not be as responsive to the community in his/her deliberations; that the hearing examiner may not weigh and consider public comment to the extent that the planning commission currently does. Another concern was that a hearing examiner with his/her legal standing and background may exercise this leverage to force testimony, require oaths and allow cross examination. This condition, if allowed to develop, can render public hearings so intimidating that members of this community will simply stop participating.

The Planning Commission shares these concerns and believes that this relatively small town will be better served, in a more truly representative and democratic manner, through a commission of its peers than through the use of a hired professional who is unfamiliar with this community.

For these and many more reasons that have been voiced in the public hearing, we urge the city council to deny this proposal and allow members of the Planning Commission to return to the important work ahead of them.

Respectfully submitted,

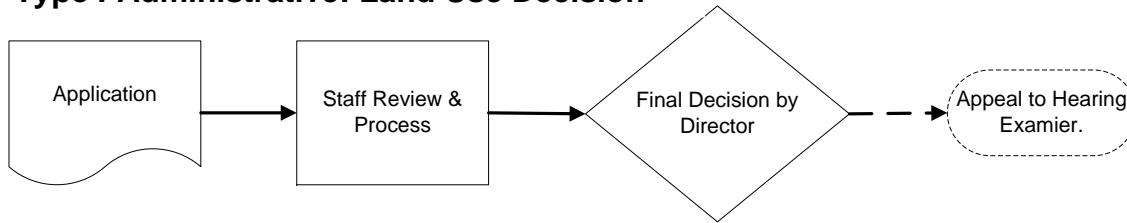
 09-20-07

Jeff Arntzen
Planning Commission Chair

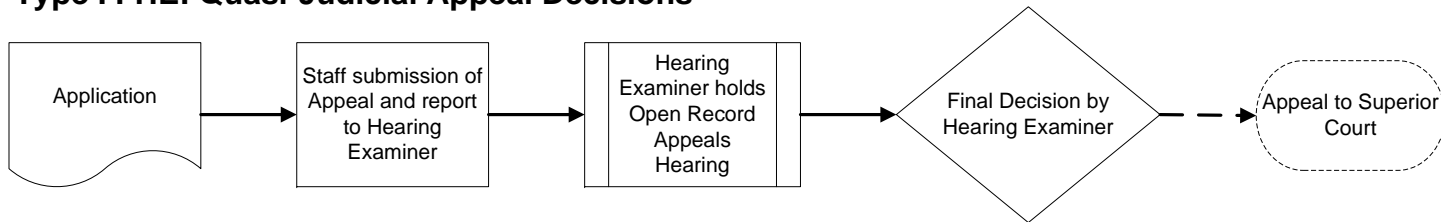
Attachment: C

Land Use Decision Making Authority

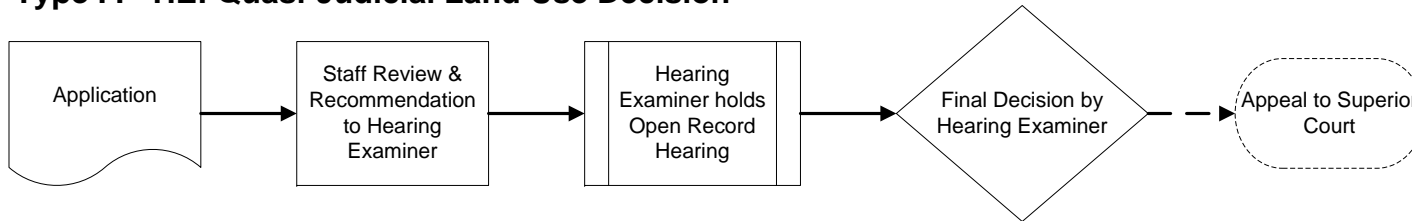
Type I-Administrative: Land Use Decision



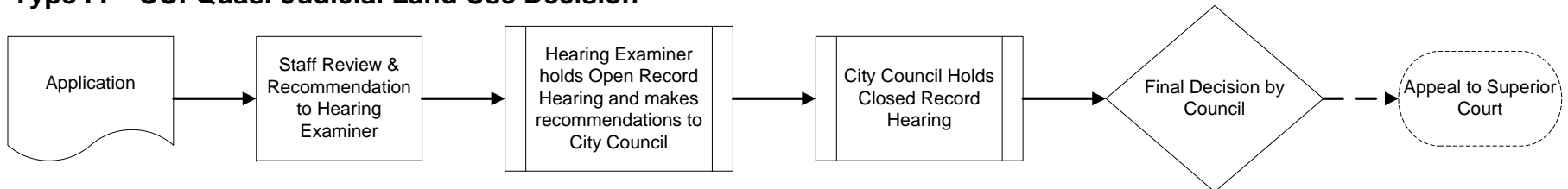
Type I I-HE: Quasi-Judicial Appeal Decisions



Type II - HE: Quasi-Judicial Land Use Decision



Type II – CC: Quasi-Judicial Land Use Decision



Attachment E

Washington State Cities and Towns Using A Hearing Examiner

Airway Heights
Algona
Auburn
Bainbridge Island
Battle Ground
Bellevue
Bellingham
Benton City
Bonney Lake
Bothell
Bremerton
Burien
Cashmere
Castle Rock
Cheney
Deer Park
Des Moines
Duvall
Edgewood
Edmonds
Ellensburg
Elma
Everett
Federal Way
Gig Harbor
Hunts Point
Issaquah

Kent
Kirkland
La Center
La Conner
Lacey
Lake Forest Park
Lake Stevens
Lakewood
Lynnwood
Marysville
McCleary
Medical Lake
Mercer Island
Milton
Mill Creek
Monroe
Montesano
Mount Vernon
Mukilteo
Newcastle
Oak Harbor
Ocean Shores
Olympia
Othello
Port Townsend
Pullman (SEPA appeals
only)

Puyallup
Redmond
Renton
SeaTac
Seattle
Shelton
Shoreline
Snohomish
Snoqualmie
Spokane
Sultan
Sumner
Tacoma
Toppenish
Tukwila
Tumwater
University Place
Vancouver
Walla Walla
Warden
Washougal
Westport
Wilbur
Woodinville
Woodland
Yakima
Yelm

Attachment F

Use of Hearing Examiners by Cities and Counties in Washington

What is a Hearing Examiner and Hearing Examiner System?

Local governments in Washington State have the option of hiring or contracting with a hearing examiner to conduct required quasi-judicial hearings, usually in place of local bodies such as the planning commission, the board of adjustment, the board of county commissioners, or the city council. A hearing examiner is an appointive officer who acts in a manner similar to a judge and typically is an attorney. The basic purpose of having a hearing examiner conduct these hearings is to have a professionally-trained individual make objective quasi-judicial decisions that are supported by an adequate record and that are free from political influences. Using a hearing examiner system allows local legislative and advisory bodies that might otherwise conduct these hearings to better concentrate on policy-making, and it can reduce local government liability exposure.

A board of county commissioners or a city council has considerable discretion in drafting an ordinance creating a local hearing examiner system. The position of hearing examiner, the type of issues the hearing examiner is authorized to consider and decide, the effect of the hearing examiner's decision, and whether an appeal of any final decision is provided should all be determined by the local legislative body and set out in the enabling ordinance. A hearing examiner's decision, as defined by the local legislative body, can have the effect of either a recommendation to or a decision appealable to the ultimate decision-maker (typically the board of county commissioners or the city council), or it can be a final decision (appealable to superior court).

Counties and cities use hearing examiners, often in place of planning commissions, primarily for hearing and deciding land development project applications and/or administrative appeals of land use decisions. Hearing examiners are particularly useful where the rights of individual property owners and the concerns of citizens require formal hearing procedures and preparation of an official record. State land use planning and growth management laws provide cities and counties with specific

authority to establish a hearing examiner system to conduct hearings and make recommendations or decide a variety of land use issues. Hearing examiners may also conduct hearings and make recommendations or decisions on other local matters.

This focus paper describes the use of a hearing examiner, the pros and cons of such systems, and options available to Washington counties and cities. References are provided for further information available from the MRSC library and through our Web site.

Establishing a Hearing Examiner System

The office or position of hearing examiner must be established by ordinance. That ordinance should identify what matters the examiner is empowered to hear and what will be the effect of the examiner's decision on those matters. A common approach in such an ordinance is to establish the framework for the hearing examiner system, while leaving it to the examiner to adopt specific, detailed rules for the conduct of hearings. Hearing examiner ordinances typically address: the appointment and term of the hearing examiner; qualifications of the examiner; conflicts of interest and freedom from improper influence; powers and duties, including matters heard; hearing requirements; effect of decisions; reconsideration of decisions, if allowed; and appeals. MRSC has many examples of hearing examiner ordinances and has a compilation of articles and ordinances relating to the hearing examiner system in this state. See <http://www.mrsc.org/library/compil/cphearex.htm>.

Use of the Hearing Examiner System for Land Use, Environmental, and Related Decisions

Most commonly, hearing examiners are used to hear and decide land use project permit applications where a hearing is required, such as in the case of applications for subdivisions, shoreline permits, conditional use permits, rezones, and variances. The recent trend in state law, particularly in conjunction with regulatory reform, has been to allow local governments to give more authority to the hearing examiner to make final decisions on quasi-judicial project permit applications. For example, RCW 58.17.330, as amended by 1995 regulatory reform legislation, provides that the local legislative body can specify that the legal effect of a hearing examiner's decision on a preliminary plat approval is that of "a final decision of the legislative body."

The hearing examiner's role in the project permit process can include:

- open record hearings on project permit applications;

- appeals of administrative SEPA determinations, which in most cases are combined with the open record hearing on the application;
- closed record appeals of administrative decisions made by the local planning staff, including appeals of SEPA determinations where an administrative appeal is provided;
- land use code interpretations to satisfy the statutory requirement that cities and counties planning under the Growth Management Act adopt procedures for such “administrative interpretations” (RCW 36.70B.110(11));
- land use code enforcement proceedings.

Other Issues Assigned to Hearing Examiners

The local legislative body may, by ordinance, authorize a hearing examiner to hear other types of contested matters, in addition to land use permit applications and code enforcement. Examples of other types of decisions and/or administrative appeals that could be handled by a local hearing examiner include:

- discrimination complaints under local personnel policies;
- employment decisions and personnel grievances;
- ethics complaints by citizens or employees;
- local improvement districts – formation hearing and/or assessment roll determinations;
- public nuisance complaints;
- civil infractions;
- property forfeiture hearings under the Uniform Controlled Substances Act (RCW 69.50.505(e));
- tax and licensing decisions and appeals;
- whistleblower retaliation claims.

Pros and Cons of Using Hearing Examiners

Pros

- More professional and timely decisions insuring fairness and consistency.

A professional hearing examiner prepares for and conducts hearings in a manner insuring procedural fairness. Hearings are less emotional and more expeditious. Hearing examiners develop a high level of expertise and specialization, saving time in making decisions and improving their quality and consistency.

- Time-saving for legislative body, freeing legislators to focus on legislative policy and other priority issues.

Conducting public hearings and making quasi-judicial decisions is time-consuming. Local legislators can free themselves from many of their hearing duties by delegating them to a hearing examiner. The local legislative body can still choose to make final decisions or to hear appeals of the examiner's decisions, and those appeals will be facilitated by a thorough and organized record. The use of hearing examiners is especially time-saving for routine decisions and for complex land use decisions requiring formal hearings, citizen participation, and subject matter expertise.

- Separation of policy-making or advisory functions from quasi-judicial functions.

Use of hearing examiners for quasi-judicial hearings separates legislative and administrative functions from quasi-judicial functions. This can improve decision-making by clarifying roles and avoiding conflicts. For jurisdictions with planning commissions, use of a hearing examiner system allows the planning commission to function as an advisory body. The legislative body can focus on policy-making while the planning department concentrates on administration. For counties with three-member boards of commissioners, use of a hearing examiner to conduct quasi-judicial proceedings can greatly assist commissioners who already responsible for a number of legislative and administrative functions.

- Improved compliance with legal requirements, including due process, appearance of fairness, and record preparation.

Hearing examiners have special expertise in managing legal procedural requirements and avoiding appearance of fairness and conflict of interest

issues. The hearing examiner assures procedural fairness, especially in cases where one side is represented by an attorney while the other side is not. Participants are often more satisfied with the proceedings, regardless of the outcome. A properly conducted hearing also results in a complete and well organized written record.

- Reduced liability relating to land use decisions and/or procedural challenges to decisions.

Using a hearing examiner system has been shown to reduce land use liability exposure. Improved hearing procedures, better records, and more consistent and documented decisions are typical of professional hearing examiners. At least one local government insurance authority has officially endorsed the use of hearing examiners for land use decisions based on a survey providing evidence of a lower risk profile for jurisdictions using a hearing examiner system for land use proceedings.

- Improved land development review integration under chapter 36.70B RCW (ESSB 1724).

A number of jurisdictions have adopted hearing examiner systems since the 1995 regulatory reform legislation mandating integration and consolidation of environmental and land use regulatory review for development projects. Use of a specialized land use hearing examiner is an effective method of consolidating and coordinating multiple review processes. For jurisdictions with a mandatory board of adjustment, adoption of a hearing examiner system eliminates the requirement for a board of adjustment.

- Opportunity for feedback to improve plans and regulations from professional hearing officer familiar with comprehensive plans and development regulations.

A professional hearing examiner has familiarity with the local comprehensive plan and development regulations and possibly those of other jurisdictions. Areas where plans, regulations, and policies are weak or inconsistent can be identified and referred to the planning staff, planning commission, or legislative body, providing feedback for continuous improvement.

- Removal of quasi-judicial decision-making from the political arena.

It may be difficult for elected local government officials to entirely eliminate political considerations from their quasi-judicial decision-making. Professional hearing examiners should be immune from political pressures.

Cons

- Cost to county or city for hiring a hearing examiner and staff.

There are costs in hiring hearing examiners and, if necessary, support staff. Counties and cities should consider whether savings in council and commission time, improvements in decision-making, and reduced liability justify the costs. Alternatives such as use of personal service contracts for hearing examiners can reduce costs.

- Increased cost to the parties due to more formal decision-making procedures.

Hearing examiners can increase the formality of the hearing process, although many of the procedural requirements and formalities are already required under state law. This formality can provide the advantage of increased appearance of fairness and impartiality in decision-making.

- Lack of accountability to voters for appointed hearing examiner making decisions or hearing administrative appeals.

Some people maintain that important decisions should be made by elected officials who are accountable to the voters. However, these concerns can be addressed by making the hearing examiner's decision a recommendation to the council or commissioners or by providing for an administrative appeal to the legislative body.

Options for Efficient and Effective Use of Hearing Examiners for Smaller Counties and Cities

Smaller local governments may be reluctant to establish a hearing examiner system because of cost considerations and concerns about whether there will be enough occasions to justify using a hearing examiner. Here are some ideas about addressing these concerns:

- Contract for hearing examiner services. Counties and cities may establish a contractual relationship with a hearing examiner in which the examiner is compensated, on an hourly or other basis, only as needed.
- Share use of a hearing examiner with other jurisdictions. Some local governments in the state have entered into interlocal agreements to contractually share the services of a hearing examiner.
- Increase the number of matters heard by hearing examiner. Doing this could reduce costs relating to use of staff that would otherwise be occupied with those matters.
- Fund the hearing examiner system from permit review fees. Local governments can add and/or increase permit fees and appeal fees to help cover the cost of maintaining a hearing examiner system.

Qualifications of Hearing Examiners

There are no state statutes that establish the minimum qualifications of hearing examiners. As noted above, hearing examiners are often attorneys; however, a law degree is not required. A background in the area in which the examiner will perform would obviously be helpful. Since hearing examiners operate mostly in the land use arena, some local governments use examiners with a planning, rather than legal, background. Keep in mind that the land use decision-making process requires a thorough knowledge of legal procedures, and relevant statutes, local ordinances, and case law. In the ordinance establishing the office of hearing examiner, it is a good idea to identify the minimum qualifications that the legislative body deems necessary for a hearing examiner.

Support, Resources, and Training for Hearing Examiners

- Washington Association of Professional Hearing Examiners; Jim Driscoll, President; 101 Yesler, Suite 607; Seattle, WA 98104; (206) 628-0039. This organization provides periodic training conferences and maintains a list of hearing examiners in the state.

MRSC Library Resources

The following MRSC Library resources provide more detailed information concerning use of hearing examiners and the land use hearing examiner system, including sample ordinances and rules of procedure:

- “Hearing Examiner System in Washington State: A Compilation of Articles and Ordinances,” MRSC, July 1997.
- “A Citizen Guide to the Office of Hearing Examiner,” City of Seattle, revised 1994.
- “The Hearing Examiner in Washington State: A Reference Manual for Local Government,” Washington State Planning and Community Affairs Agency (no longer in existence), June 1980.
- A Short Course on Local Planning, Planning Association of Washington and the Washington Department of Community, Trade and Economic Development, Version 3.2, March 1997.
- “You Be the Judge: A Handbook for the Land Use Decision Maker,” by Jim Driscoll and Ted Hunter, prepared for the Association of Washington Cities (1993).
- Other MRSC Library resources, including sample ordinances establishing the office of hearing examiner, hearing examiner rules of practice and procedure, hearing examiner job descriptions, hearing examiner contracts, and citizens’ guides to the hearing examiner process.

Attachment G

**Written Public Testimony
Submitted to the
Planning Commission
Addressing
Ordinance #07-2663**

**(staff note: This was previously Submitted
on September 24th, 2007)**

June 14, 2007

Blaine Planning Commission

I requested an opportunity to raise concern about three items that I understand to fall in the "jurisdiction", for lack of a better term, of the Planning Commission.

1. I believe it is imperative that "rules" be put in place that state how the front for a project and the height of buildings will be determined. Buildings heights along Peace Portal should be determined from Peace Portal as the front.

2. Chapter 17.48.030 Permitted Uses (This is a specific section of the Planned Unit Development Chapter 17.48) "Any uses permitted outright or as a conditional use in the zone where the planned unit development is located shall be permitted in a PUD, subject to the criteria established in this chapter; **provided, that duplexes or multifamily dwellings may be permitted as a planned unit in any residential zone.**-----" The last phrase should be eliminated. It negates any protection provided by zoning in the single family zones.

3. I am concerned that the proposed amendments to Chapter 2.58-Hearing Examiner will effectively eliminate public participation at Public Hearings conducted by the Hearing Examiner. 2.58.080 Rules and regulations pg. 3 +4 Attachment A (presented at City Council June 11, 2007)
"The hearing examiner shall have the power to prescribe rules and regulations for the conduct of hearings before him, subject to the approval by the city council, and also to issue summons for and compel the appearance of witnesses, to administer oaths and preserve order. The opportunity of cross-examination of witnesses shall be afforded all interested parties or their counsel in accordance with the rules of the hearing examiner." (Ord. 2507& 2,2002) There was a request from one of the Council members to basically makes the rules no more stringent than for any court. I don't think that will "increase" participation at Public Hearings. My feeling is that if you are going to "participate" have an attorney on retainer. For most developers this is just a cost of doing business.

As I understand the process now there will be a Public Meeting, a Public Hearing before the Planning Commission and a Public Hearing before the City Council. Somehow the public must be made aware of the contents and potential impact positive and/or negative that the exclusive use of a Hearing Examiner will have. Perhaps documents under consideration can be widely distributed and thoroughly discussed at the fore mentioned meetings. I hope so. The proposal appears to be counter to the GMA Compliance Amendments recently passed where it emphasized a Public Participation Program.

Dennis Olason
860 Georgia St.

LEADING ECONOMIC INDICATORS
Or
THE NUMBERS BEHIND THE BUILDING BOOM

1. Twenty years ago 23% of Americans owned their own home, today that number is approaching 70%.
2. Consumer spending currently represents 70% of the US economy; 70% of corporate costs are labor; therefore productivity gains imply a reduced role for labor and labor's spending.
3. For only the month of January 2006, the US Balance of Trade Deficit was \$68.5 billion dollars bringing the total to over \$800 billion annually.
4. Today, 33% of American households have 40% of their Disposable Income dedicated to Principle Tax and Interest (PTI) payments while 28% is still considered financially prudent by bankers.
5. The "Savings Rate" of American households is now a negative number (-0.5%) meaning that the majority of households spend more than they earn on an annualized basis, while the Savings Rate averaged 7.6% each year since 1929. Household's cash outlays for goods, services and non-financial assets (e.g. houses, SUVs) were approximately \$662 billion more than their cash inflows in 2005 – a record in dollar terms and a record 7.3% of disposable income. Households are now running a larger cash deficit than the federal, state and municipal government deficits combined.
6. Last year 28% of all home buyers and 45% of first-time buyers had no down payment involved in their home purchase.
7. 36% of all homes purchased in the US involved "interest only" loans.
8. The use of "negative amortization" loans through which the indebtedness grows each month is increasing rapidly in states like California.
9. 25% of all homes purchased in the US were for "speculative purposes" or bought by those interested in the short-term "exchange value" of the property as opposed to its "long-term use," while 4 of 10 Americans now own more than one home.
10. Bellingham, Washington, ranked the 16th most "overheated" real estate market in the US, based on the prevailing gap between the average home price and local incomes (Whatcom County's median household income according to the 2000 Census was \$32,530 while the national median income declined 3.6% from 2000 to 2004) and based on the difference between comparable rental rates as they relate to purchasing a similar home in that market.
11. Bellingham's homes appreciated by 23% last year, 80% over the last five years, or from an average price of \$182,012 in 2000 to \$327,825 in 2005.
12. The National Association of Realtors tracks "First-Time Homebuyer Affordability." In 2003, the average starter home price nationally was \$144,500 yet as of the last quarter of 2005 a "starter home" was \$181,100 representing a 25% increase, the lowest affordability rating in twenty years. The national median price for an existing home has risen from \$170,000 in 2003 to over \$210,000 currently with a commensurate increase in qualifying income; monthly payments similarly have risen to \$1,048 from \$793 in just the last three years.

"A speculative bubble: An unsustainable increase in prices brought on by investors' buying behavior rather than by genuine, fundamental information about value."

13. In 2005, to qualify for a “starter home” required an income of approximately \$50,000 whereas in 2002 the figure was \$37,000 although this gap is widening rapidly due to the increasing interest rates (note Whatcom County’s \$32K median income by comparison).
14. The average “baby-boomer” (77 million Americans born between 1946 and 1964) has \$50,000 in liquid assets and \$110,000 in total assets after the value of such inflated real estate is included (national median family net worth increased 1.5% from 2000 to 2004) a level at which retirement becomes demographically financially challenging considering that Medicare, Medicaid and Social Security are all projected to become technically insolvent.
15. In 2005, \$200 billion dollars was withdrawn by US homeowners in the form of “second mortgages” against the inflated value of their homes; the correlated amount of Consumer Spending represented 2% of the 3.5% annual US Gross Domestic Product (GDP). Freddie Mac reported that cash-out refinancing rose by 70% in 2005 and forecasts a drop of more than 50% or by \$125 billion dollars for 2006 (or from \$243 to \$116 billion dollars).
16. The price of crude oil has increased 300% from \$20 to over \$70 per barrel while natural gas has increased over 600% from \$2.25 to \$15 per million cubic feet, with a correlated affect on Consumer Spending.
17. In 2005, General Motors, Ford and VW each laid-off over 25% of their work force, over 80,000 people, due to the impacts of “globalization;” GM and Ford are both in the “top-four” of US corporate bond issuers which means they are concentrated in nearly all state employee retirement and mutual funds across the country; both GM and Ford are in the top-5 of the Fortune 500 based on their revenues of \$192 and \$177 billion dollars respectively, therefore, a bankruptcy would be historically unprecedented, two would be economically calamitous.
18. GM currently has over \$20 billion dollars in “un-funded pension liabilities” on its balance sheet, well in excess of 80% of its total stock market capitalization.
19. The national Pension Benefit Guarantee Corporation (PBGC) has over \$22 billion dollars in similar pension deficits and its Executive Director just resigned.
20. December of 2005 saw the highest number of personal bankruptcies in US history, including the Great Depression; last year saw a record for real estate foreclosures, at 2 MM up 500,000 over the previous year.
21. At \$287MM in agricultural revenues Whatcom County, Washington, ranks in the top percentile of US counties for total agricultural production, yet the agricultural land conversion rate to urbanization is one of the most rapid in the nation.
22. The Bush Administration recently requested another \$72.48 billion dollars for the war in Iraq bringing the war’s total for the last three years to over \$400 billion; Defense Spending has increased from 3% of GDP to 4.5% this year (by comparison the Regan Era represented 6% while Clinton’s reduction to 3% created significant Federal Budget surpluses).
23. The annual Federal Budget deficit now stands at \$423 billion dollars while the national debt is \$9 trillion and predicted to reach \$11 trillion by 2008.
24. The government’s share of Research and Development (R&D) spending fell last year from 60% to 30% of total R&D funding.

“A speculative bubble: An unsustainable increase in prices brought on by investors’ buying behavior rather than by genuine, fundamental information about value.”

25. The Standard and Poor's 500 stock index's corporate profits are forecasted to be 6% during 2006.
26. The Federal Funds Rate currently stands at 4.75% (03/31/06) after having experienced 20 increases of $\frac{1}{4}$ percent from a 50-year record low of 1%; the average Adjustable Rate Mortgage (ARM) presently represents over 7% annually, while \$2.5 trillion dollars of ARM's (21% of outstanding household debt) are scheduled for a "reset" upwards during 2006 which will displace \$3 billion dollars each month of consumer spending, an event that will reduce GDP by $\frac{1}{2}$ to 1% on an annualized basis.
27. During the current Administration's term the National Debt has grown from 5.7 to 8.965 trillion dollars or by 57.2% in six years.
28. In 1994, there were 14,000 Registered Lobbyists in Washington D.C. representing "special interests," in 2004 there were 37,000 lobbyists paid an average of \$64,864 annually (for a total of \$2.4 billion dollars) and only 535 Congressmen (a ratio of 69:1).
29. New home sales fell in February by 10.5% nationally, the largest drop in ten years; there are presently 548,000 residential units "in inventory" which represents a 6.5 month backlog, however, the sales drop in the West was 29.4% or the largest such monthly decline in over 25 years.
30. Former Goldman Sachs investment banker, John Talbott, estimates that Americans could be facing a 50% decline in housing price; he estimates that the top 40 US cities will experience an average 47.2% drop. He postulates that the current housing boom has added \$30 trillion dollars to housing prices worldwide, an unsustainable 75% increase.
31. The population "in-migration" of Whatcom County has declined every year since 1995; the population growth rate for each of the last five years averaged 1.7% although the rate of new home construction was 3.0% (almost twice as fast), this growth rate has caused the average number of people per house to decrease from 2.34% to 1.58% (note: less than two per residence) over the same period and the "vacancy rate" for totally unoccupied units to increase from 3.4% to 7.5%.
32. Whatcom County's "unemployment rate" in February rose from 4.5% to 5% while Washington State's unemployment rate rose from 5.3% to 5.6%.
33. During February there were approximately 100,700 people employed in Whatcom County, down from 102,500 in January, while due to the "boom" 1,100 additional construction jobs were estimated to be included in February's total compared to only one year ago bringing the total for housing sector jobs to over 28%.
34. The Dow Jones Industrial Average stood at around 3,600 in early 1994, by 1999 it had passed 11,000 more than tripling in five years, a total increase in stock market prices of over 200%, today it stands at 11,225 (05/04/06) however, over the same period, basic economic indicators did not come close to tripling; US personal income and GDP rose less than 30% and almost half of this increase was due to inflation; corporate profits rose less than 60% and that from a temporary recession-depressed base. VIEWED IN THE LIGHT OF THESE FIGURES THE STOCK AND HOUSING PRICE INCREASES APPEAR UNWARRANTED AND CERTAINLY BY HISTORICAL STANDARDS UNLIKELY TO PERSIST.

"A speculative bubble: An unsustainable increase in prices brought on by investors' buying behavior rather than by genuine, fundamental information about value."

THE NEW ROAD TO SERFDOM

An illustrated guide to the coming real estate collapse

By Michael Hudson

Information graphics by Nigel Holmes

Even men who were engaged in organizing debt-serf cultivation and debt-serf industrialism in the American cotton districts, in the old rubber plantations, and in the factories of India, China, and South Italy, appeared as generous supporters of and subscribers to the sacred cause of individual liberty.

—H. G. Wells, *The Shape of Things to Come*

Never before have so many Americans gone so deeply into debt so willingly. Housing prices have swollen to the point that we've taken to calling a mortgage—by far the largest debt most of us will ever incur—an “investment.” Sure, the thinking goes, \$100,000 borrowed today will cost more than \$200,000 to pay back over the next thirty years, but land, which they are not making any more of, will appreciate even faster. In the odd logic of the real estate bubble, debt has come to equal wealth.

And not only wealth but *freedom*—an even stranger paradox. After all, debt throughout most of history has been little more than a slight variation on slavery. Debtors were medieval peons or Indians bonded to Spanish plantations or the sharecropping children of slaves in the postbellum South. Few Americans today would volunteer for such an arrangement, and therefore would-be lords and barons have been forced to develop more sophisticated enticements.

The solution they found is brilliant, and although it is complex, it can be reduced to a single word—*rent*. Not the rent that apartment dwellers

*Michael Hudson is Distinguished Professor of Economics at the University of Missouri–Kansas City and the author of many books, including *Super Imperialism: The Origin and Fundamentals of U.S. World Dominance*.*

*Nigel Holmes was the graphics director of Time magazine for sixteen years and is the author of *Wordless Diagrams*.*

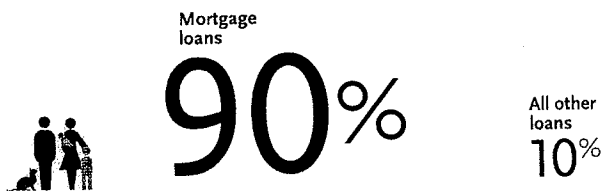
pay the landlord but economic rent, which is the profit one earns simply by owning something. Economic rent can take the form of licensing fees for the radio spectrum, interest on a savings account, dividends from a stock, or the capital gain from selling a home or vacant lot. The distinguishing characteristic of economic rent is that earning it requires no effort whatsoever. Indeed, the regular rent tenants pay landlords becomes economic rent only after subtracting whatever amount the landlord actually spent to keep the place standing.

Most members of the rentier class are very rich. One might like to join that class. And so our paradox (seemingly) is resolved. With the real estate boom, the great mass of Americans can take on colossal debt today and realize colossal capital gains—and the concomitant rentier life of leisure—tomorrow. If you have the wherewithal to fill out a mortgage application, then you need never work again. What could be more inviting—or, for that matter, more egalitarian?

That's the pitch, anyway. The reality is that, although home ownership may be a wise choice for many people, this particular real estate bubble has been carefully engineered to lure home buyers into circumstances detrimental to their own best interests. The bait is easy money. The trap is a modern equivalent to peonage, a lifetime spent working to pay off debt on an asset of rapidly dwindling value.

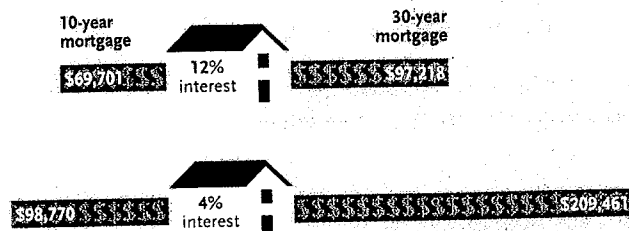
Most everyone involved in the real estate bubble thus far has made at least a few dollars. But that is about to change. The bubble will burst, and when it does, the people who thought they would be living the easy life of a landlord will soon find that what they really signed up for was the hard servitude of debt serfdom.

MORTGAGES ACCOUNT FOR MOST
OF THE NET GROWTH IN
DEBT SINCE 2000



1 The new road to serfdom begins with a loan. Since 2003, mortgages have made up more than half of the total bank loans in America—more than \$300 billion in 2005 alone. Without that growing demand, banks would have seen almost no net loan growth in recent years.

A \$1,000 MONTHLY PAYMENT CAN CARRY DIFFERENT LEVELS OF DEBT



2 Why is the demand for mortgage debt so high? There are several reasons, but all of them have to do with the fact that banks encourage people to think of mortgage debt in terms of how much they can afford to pay in a given month—how far they can stretch their paychecks—rather than in terms of the total amount of the loan. A given monthly payment can carry radically different amounts of debt, depending on the rate of interest and how long those payments last. The purchasing power of a \$1,000 monthly payment, for instance, nearly triples as the debt lingers and the interest rate declines.

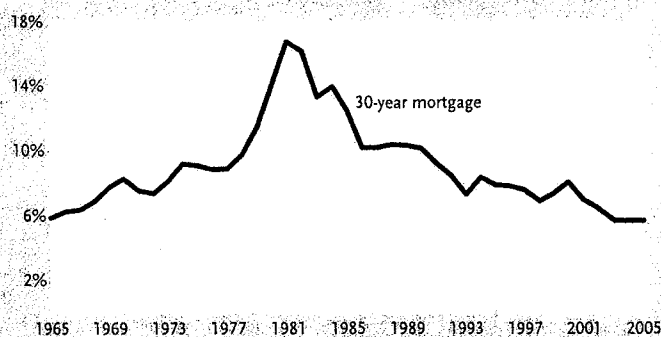
3 As it happens, banks are increasingly unhurried about repayment. Nearly half the people buying their first homes last year were allowed to do so with no money down, and many of them took out so-called interest-only loans, for which payment of the actual debt—amortization—was delayed by several years. A few even took on “negative amortization” loans, which dispense entirely with payments on the principal and require only partial payment of the interest itself. (The extra interest owed is simply added to the total debt, which can grow indefinitely.) The Federal Reserve, meanwhile, has been pushing interest rates down for more than two decades.

4 The IRS has helped create demand for debt as well by allowing tax breaks—the well-known home-mortgage deduction, for instance—that can transform a loan into an attractive tax shelter. Indeed, commercial real estate investors hide most of their economic rent in “depreciation” write-offs for their buildings, even as those buildings gain market value. The pretense is that buildings wear out or become obsolete just like any other industrial investment. The reality is that buildings can be depreciated again and again, even as the property’s market value increases.

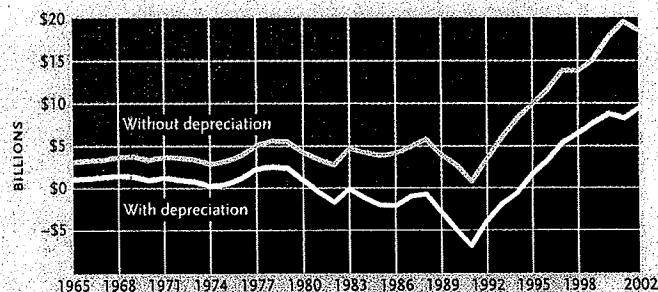
5 Local and state governments have done their share too, by shifting the tax burden from property to labor and consumption, in the form of income and sales taxes. Since 1929, the proportion of tax burden has almost completely reversed itself.

6 In recent years, though, the biggest incentive to home ownership has not been owning a home per se, or even avoiding taxes, but rather the eternal hope of getting ahead. If the price of a \$200,000 house shoots up 15 percent in a given year, the owner will realize a \$30,000 capital gain. Many such owners are spending tomorrow’s capital gain today by taking out home-equity loans. For families whose real wages are stagnant or falling, borrowing against higher property prices seems almost like taking money from a bank account that has earned dividends. In a study last year, Alan Greenspan and James Kennedy found that new home-equity loans added \$200 billion to the U.S. economy in 2004 alone.

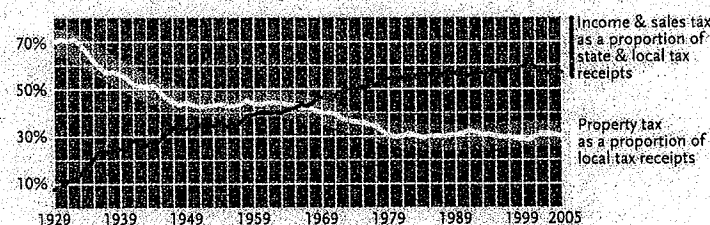
INTEREST RATES HAVE BEEN FALLING SINCE 1981



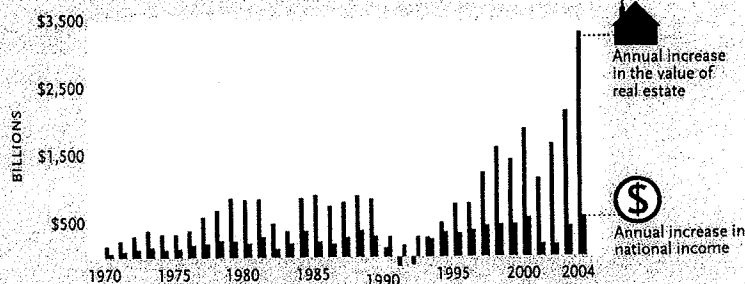
CORPORATIONS HIDE THEIR REAL ESTATE PROFITS BEHIND DEPRECIATION



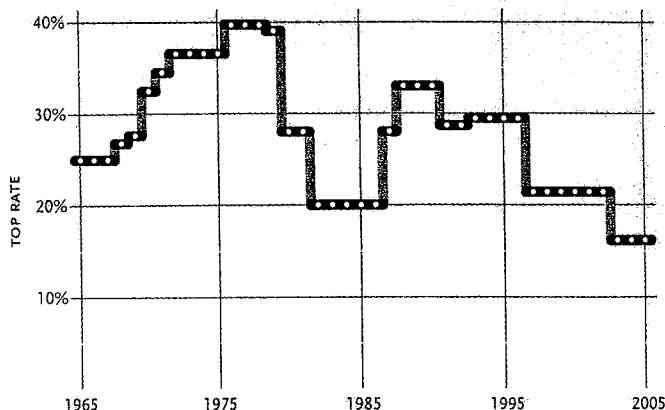
THE TAX BURDEN HAS SHIFTED FROM PROPERTY TO LABOR AND CONSUMPTION



REAL ESTATE PRICES HAVE FAR OUTPACED NATIONAL INCOME

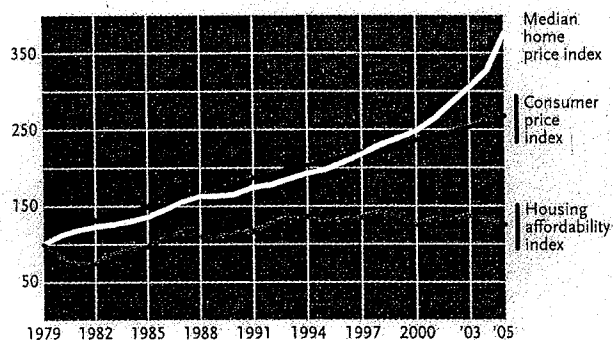


CAPITAL GAINS ARE TAXED AT A LOWER RATE THAN EVER



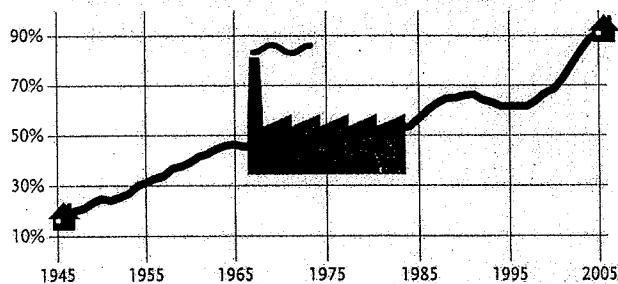
7 It is also worth noting that capital gains—economic rent “earned” without any actual labor or industrial investment—are increasingly untaxed.

HOUSING PRICES HAVE FAR OUTPACED CONSUMER PRICES, EVEN AS MONTHLY PAYMENTS REMAIN AFFORDABLE



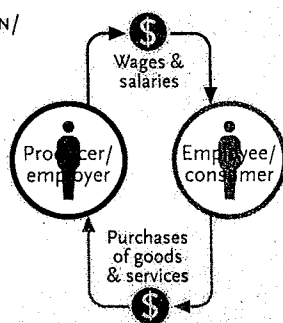
8 All of these factors have combined to lure record numbers of buyers into the real estate market, and home prices are climbing accordingly. The median price of a home has more than doubled in the last decade, from \$109,000 in 1995 to a peak of more than \$206,000 in 2005. That growth far outpaces the consumer price index, and yet housing affordability—the measure of those month-to-month housing costs—has remained about the same.

MORTGAGE DEBT IS RISING AS A PROPORTION OF GDP



9 That sounds like good news. But those rising prices also mean that more people owe more money to banks than at any other time in history. And that's not just in terms of dollars—\$11.8 trillion in outstanding mortgages—but also as a proportion of the national economy. This debt is now on track to surpass the size of America's entire gross domestic product by the end of the decade.

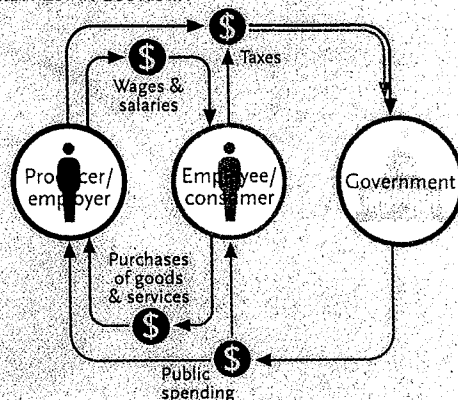
THE PRODUCTION/CONSUMPTION ECONOMY



10 Even that huge debt might not seem so bad, what with those huge capital gains beckoning from out there in the future. But the boom, alas, cannot last forever. And when the growth ceases, the market will collapse. Understanding why, though, requires a quick detour into economic theory. We often think of “the economy” as no more than a closed loop between producers and consumers. Employers hire workers, the workers create goods and services, the employers pay them, and the workers use that money to buy the goods and services they created.

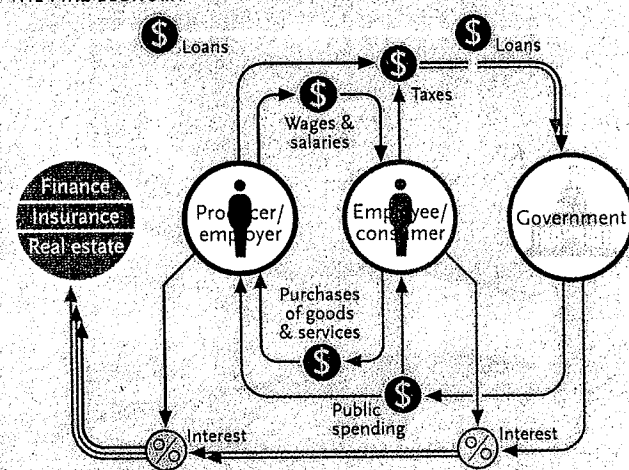
11 As we have seen, though, the government also plays a significant role in the economy. Tax hikes drain cash from the circular flow of payments between producers and consumers, slowing down overheated economies. Deficit spending pumps more income into that flow, helping pull stalled economies out of recession. This is the classical policy model associated with John Maynard Keynes.

THE KEYNESIAN ECONOMY



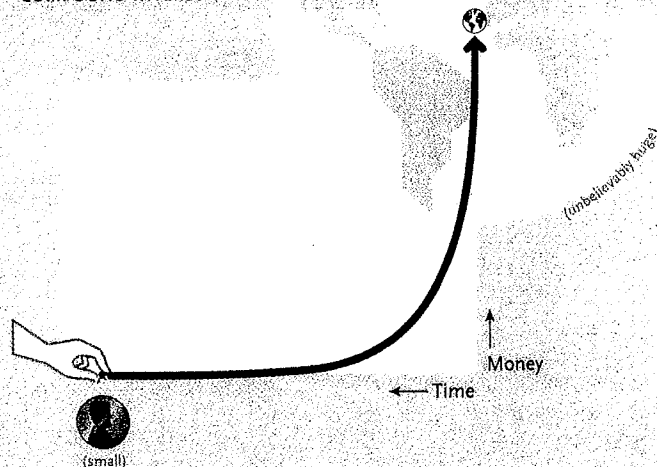
12 A third actor also influences the nation's fortune. Economists call it the FIRE sector, short for finance, insurance, and real estate. These industries are so symbiotic that the Commerce Department reports their earnings as a composite. (Banks require mortgage holders to insure their properties even as the banks reach out to absorb insurance companies. Meanwhile, real estate companies are organizing themselves as stock companies in the form of real estate investment trusts, or REITs—which in turn are underwritten by investment bankers.) The main product of these industries is credit. The FIRE sector pumps credit into the economy even as it withdraws interest and other charges.

THE FIRE ECONOMY

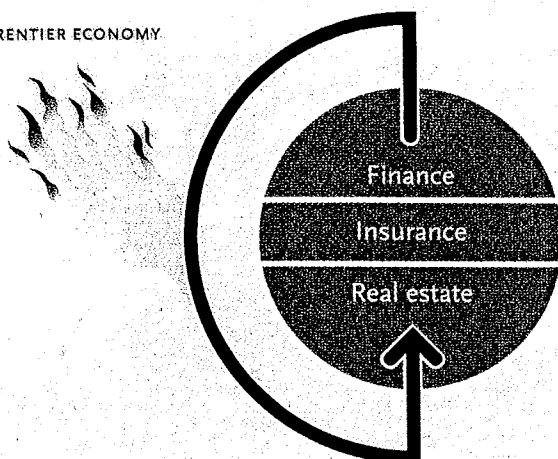


13 The FIRE sector has two significant advantages over the production/consumption and government sectors. The first is that interest wealth grows exponentially. That means that as interest compounds over time, the debt doubles and then doubles again. The eighteenth-century philosopher Richard Price identified this miracle of compound interest and observed, somewhat ruefully, that had he been able to go back to the day Jesus was born and save a single penny—at 5 percent interest, compounded annually—he would have earned himself a solid gold sphere 150 million times bigger than Earth.

THE MIRACLE OF COMPOUND INTEREST

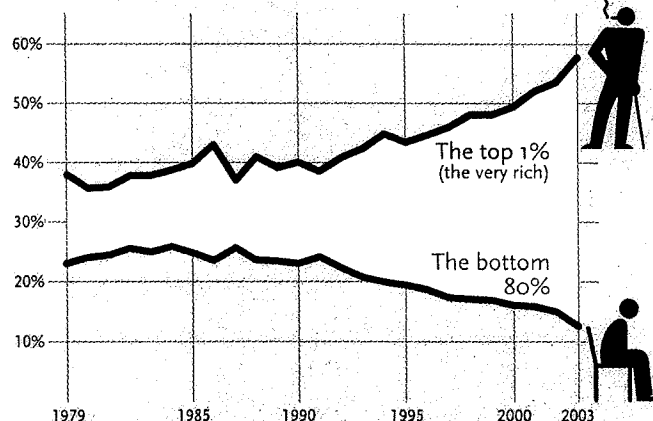


THE RENTIER ECONOMY



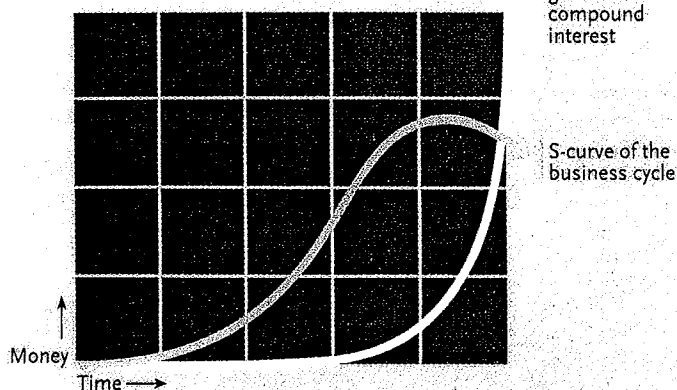
14 The FIRE sector's other advantage is that interest payments can quickly be recycled into more debt. The more interest paid, the more banks lend. And those new loans in turn can further drive up demand for real estate—thereby allowing homeowners to take out even more loans in anticipation of future capital gains. Some call this perpetual-motion machine a “post-industrial economy,” but it might more accurately be called a rentier economy. The dream is that the FIRE sector will expand to embrace the fortune of every American—that we need not work or produce anything, or, for that matter, invest in new technology or infrastructure for the nation. We certainly need not pay taxes. We need only participate in the boom itself. The miracle of compound interest will allow every one of us to be a rentier, feasting on interest, dividends, and capital gains.

RICH PEOPLE ARE GETTING A BIGGER SHARE OF OVERALL ECONOMIC RENT



15 In reality, alas, we can't all be rentiers. Just as, in Voltaire's phrase, the rich require an abundant supply of the poor, so too does the rentier class require an abundant supply of debtors. There is no other way. In fact, the vast majority of Americans have seen their share of the rental pie decrease over the last two decades, even as the real estate pie as a whole has expanded. Everyone got a little richer, but rich people got much, much richer.

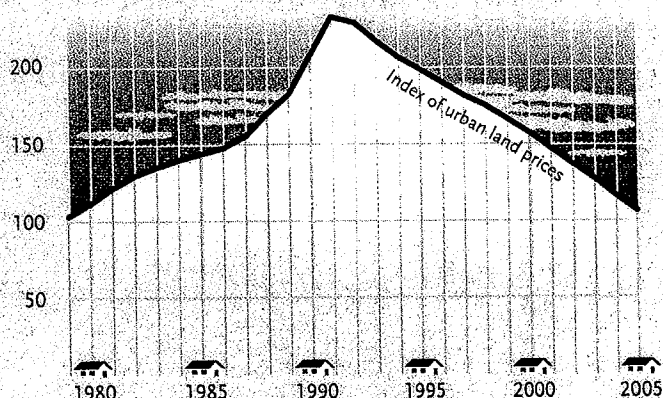
THE MIRACLE OF COMPOUND INTEREST WILL INEVITABLY CONFRONT THE S-CURVE OF REALITY



16 We will be hard-pressed to maintain even this semi-blissful state. Like any living organism, real economies don't grow exponentially, or even in a straight line. They taper off into an S-curve, the victim of their own successes. When business is good, the demand for labor, raw materials, and credit increases, which leads to large jumps in wages, prices, and interest rates, which in turn act to depress the economy. That is where the miracle of compound interest founders. Although many people did save money at interest two thousand years ago, nobody has yet obtained even a single Earth-volume of gold. The reason is that when a business cycle turns down, debtors cannot pay, and so their debts are wiped out in a wave of bankruptcy along with all the savings invested in these bad loans.

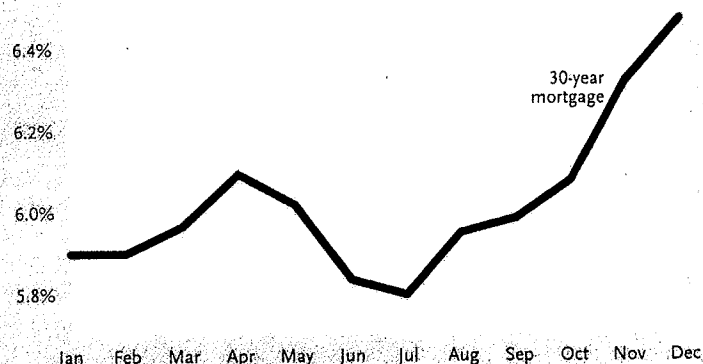
17 Japan learned this lesson in the Nineties. As the price of land went up, banks lent more money than people could afford to pay interest on. Eventually, no one could afford to buy any more land, demand fell off, and prices dropped accordingly. But the debt remained in place. People owed billions of yen on homes worth half that—homes they could not sell. Many commercial owners simply went into foreclosure, leaving the banks not only with “non-performing loans” that were in fact dead losses but also with houses no one wanted—or could afford—to buy. And that lack of incoming interest also meant that banks had no more reserves to lend, which furthered the downward spiral. Britain’s similarly debt-burdened economy inspired a dry witticism: “Sorry you lost your job. I hope you made a killing on your house.”

IN JAPAN, REAL ESTATE PRICES FELL AS QUICKLY AS THEY ROSE



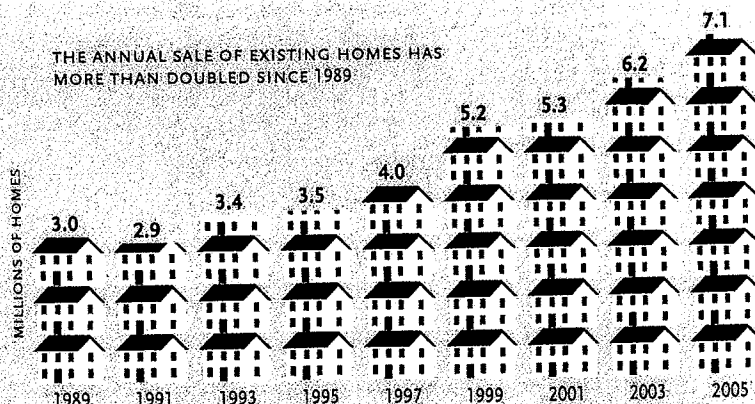
18 We have already reached our own peak. As of last fall, even Alan Greenspan had detected “signs of froth” in the housing market. Home prices had “risen to unsustainable levels” in some places, he said, and would have exceeded the reach of many Americans long ago if not for “the dramatic increase in the prevalence of interest-only loans” and “other, more exotic forms of adjustable-rate mortgages” that “enable marginally qualified, highly leveraged borrowers to purchase homes at inflated prices.” If the trend continues, homeowners and banks alike “could be exposed to significant losses.” Interest rates, meanwhile, have begun to creep up.

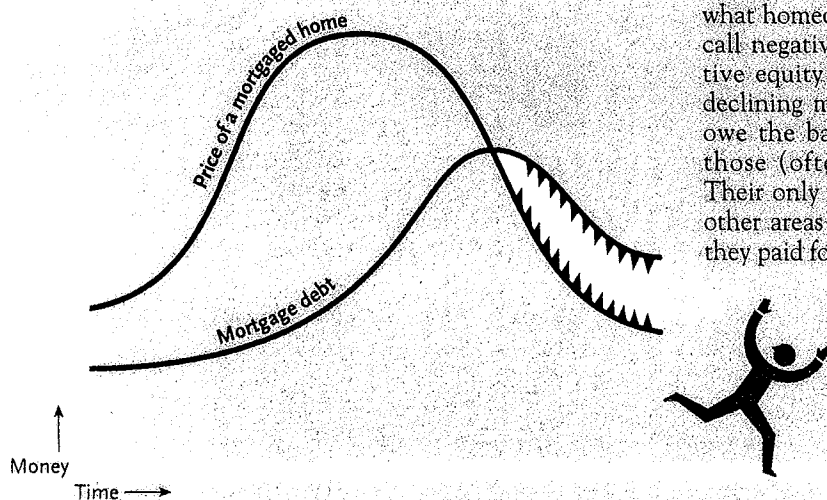
INTEREST RATES ARE ON THE RISE



19 So: America holds record mortgage debt in a declining housing market. Even that at first might seem okay—we can just weather the storm in our nice new houses. And in fact things will be okay for homeowners who bought long ago and have seen the price of their homes double and then double again. But for more recent homebuyers, who bought at the top and who now face decades of payments on houses that soon will be worth less than they paid for them, serious trouble is brewing. And they are not an insignificant bunch.

THE ANNUAL SALE OF EXISTING HOMES HAS MORE THAN DOUBLED SINCE 1989





20 The problem for recent homebuyers is not just that prices are falling; it's that prices are falling even as the buyers' total mortgage remains the same or even increases. Eventually the price of the house will fall *below* what homeowners owe, a state that economists call negative equity. Homeowners with negative equity are trapped. They can't sell—the declining market price won't cover what they owe the bank—but they still have to make those (often growing) monthly payments. Their only “choice” is to cut back spending in other areas or lose the house—and everything they paid for it—in foreclosure.

Free markets are based on choice. But more and more homeowners are discovering that what they got for their money is fewer and fewer choices. A real estate boom that began with the promise of “economic freedom” almost certainly will end with a growing number of workers locked in to a lifetime of debt service that absorbs every spare penny. Indeed, a study by The Conference Board found that the proportion of households with any discretionary income whatsoever had already declined between 1997 and 2002, from 53 percent to 52 percent. Rising interest rates, rising fuel costs, and declining wages will only tighten the squeeze on debtors.

But homeowners are not the only ones who will pay. The overall economy likely will shrink as well. That \$200 billion that flowed into the “real” economy in 2004 is already spent, with no future capital gains in the works to fuel more such easy money. Rising debt-service payments will further divert income from new consumer spending. Taken together, these factors will further shrink the “real” economy, drive down those already declining real wages, and push our debt-ridden economy into Japan-style stagnation or worse.

Then only the debt itself will remain, a bitter monument to our love of easy freedom.



Chart Sources

1 Federal Reserve; 2 Lendingtree.com mortgage calculator; 3 Freddie Mac; 4,5 Bureau of Economic Analysis; 6 Federal Reserve and Bureau of Economic Analysis; 7 U.S. Treasury Department; 8 Moody's Economy.com and Bureau of Labor Statistics; 9 Federal Reserve and Bureau of Economic Analysis; 15 Center on Budget and Policy Priorities; 17 Japan Real Estate Institute; 18 Federal Housing Finance Board; 19 National Association of Realtors.