

CITY OF MARYSVILLE AGENDA BILL

EXECUTIVE SUMMARY FOR ACTION

CITY COUNCIL MEETING DATE: 3/3/14

AGENDA ITEM: Professional Services Agreement between City of Marysville and Kevin McDonald	
PREPARED BY: Gloria Hirashima, Chief Administrative Officer	DIRECTOR APPROVAL:
DEPARTMENT: Executive	
ATTACHMENTS: Proposed Agreement for Hearing Examiner Services	
BUDGET CODE:	AMOUNT:

SUMMARY:

The proposed agreement establishes a professional services agreement between the City and Kevin McDonald for hearing examiner services. Kevin McDonald has served as the City's Deputy Hearing Examiner since 2006, working for McConnell/Burke through 2013 and has provided hearing services to the City through that period. Due to the retirement of Ron McConnell in 2013, the contract for services will now be directly with Mr. McDonald.

RECOMMENDED ACTION:
Staff recommends that City Council approve the professional services agreement for hearing examiner services.

HEARING EXAMINER AGREEMENT BETWEEN KEVIN MCDONALD AND CITY OF MARYSVILLE

THIS AGREEMENT is entered into on the date last below written between the CITY OF MARYSVILLE, WASHINGTON (“City”) and Kevin McDonald, (“the Hearing Examiner”).

WHEREAS, the City desires to retain the services of a Hearing Examiner; and

WHEREAS, the City has passed Ordinance 2852 creating the Office of the Hearing Examiner under the Marysville Municipal Code, Chapter 22G.060, to establish a quasi-judicial hearing system which will ensure procedural due process and appearance of fairness in regulatory hearings; to provide greater separation of the administration of land use regulations from the formulation of land use policy; and to provide an efficient and effective process utilizing a qualified professional hearing examiner for hearing and determining such matters as may be committed to the hearing examiner’s jurisdiction; and

WHEREAS, the Hearing Examiner has represented to the City that the Hearing Examiner is in compliance with the professional registration statutes of the State of Washington, and has signified a willingness to furnish Hearing Examiner services to the City; Now, therefore,

WHEREAS the City is therefore prepared to engage the services of the Hearing Examiner to provide the necessary Hearing Examiner Services; and

IN CONSIDERATION of the terms and conditions set forth below, or attached and incorporated and made a part hereof, the parties agree as follows:

1. Services by Hearing Examiner. The City hereby retains the Hearing Examiner to perform the professional services described in the scope of work which is attached hereto as Exhibit A, and incorporated herein by reference. The Hearing Examiner shall furnish all services, labor and related equipment necessary to conduct and complete the work, except as specifically noted otherwise in this Agreement.

2. Compensation.

2.1 In consideration of the Hearing Examiner performing the services under the Scope of Work, the City agrees to pay the Hearing Examiner \$140.00 per hour for all work performed. Such payment shall be full compensation for work performed or services rendered and for all labor, materials, supplies, equipment, and incidentals necessary to complete the services.

2.2 The Hearing Examiner shall maintain time and expense records and provide them to the City, along with invoices for services rendered, in a timely manner and in a format acceptable to the City for work performed to the date of the invoice.

2.3 Invoices shall be submitted no more frequently than once per month. All

invoices shall be paid by the City within 30 days of receipt of a proper invoice, unless the City gives notice that the invoice is in dispute.

2.4 The Hearing Examiner shall keep time, expense, billing, and other business records pertaining to this Agreement available for inspection by City representatives during the Hearing Examiner's normal business hours for three (3) years after final payment. Copies shall be made available upon the City's request. The copies will be provided without cost if required to substantiate any billing of the Hearing Examiner, but the Hearing Examiner may charge the City for copies requested for any other purpose.

2.5 If the Hearing Examiner proposes to alter the hourly rate, notice shall be given to the City not less than ninety days prior to the effective date of the new hourly rate.

3. Discrimination and Compliance with Laws.

3.1 The Hearing Examiner agrees not to discriminate against any employee or applicant for employment or any other person in performance of this Agreement because of race, creed, color, national origin, marital status, sex, age, disability, or other circumstances prohibited by federal, state, or local law or ordinance, except for a bone fide occupational qualification.

3.2 The Hearing Examiner shall comply with all federal, state, and local laws and ordinances applicable to the work to be done under this Agreement.

3.3 Violation of this Paragraph 3 shall be a material breach of this Agreement and grounds for cancellation, termination or suspension of this Agreement by the City, in whole or in part, and may result in ineligibility for further work for the City.

4. Term and Termination of Agreement.

4.1 This Agreement shall commence on the date of signature and remain in effect until terminated as herein provided.

4.2 This Agreement may be terminated by the City, without cause, upon ninety (90) days written notice. This Agreement may be terminated by the Hearing Examiner, without cause, upon ninety (90) days written notice. In the event of termination, all finished or unfinished documents, reports, or other material or work of the Hearing Examiner, pursuant to this Agreement, shall be submitted to the City, and the Hearing Examiner shall be entitled to just and equitable compensation for any satisfactory work completed prior to the date of termination.

5. Notices. All notices affecting the terms of this Agreement shall be in writing and shall be given in person, by US mail, or by courier services with confirmation of receipt, to the addresses set forth below:

Hearing Examiner:

Kevin McDonald
617 B Federal Avenue East
Seattle, WA 98102
206-941-9984
kdm617b@msn.com

City:

Gloria Hirashima
Chief Administrative Officer/Community Development Director
1049 State Avenue
Marysville, WA 98270

6. Ownership of Work Products. The City shall keep the official record in each Hearing Examiner matter and all primary copies of exhibits. The Hearing Examiner shall possess only secondary, working copies of all data, materials, reports, memoranda and any other documents or recordings developed under this Agreement. Upon notice of termination, consistent with Section 4 above, the Hearing Examiner shall complete any outstanding, unfinished matter within 90 days and consistent with state law. All completed decisions shall become the property of the City. The City agrees that if it uses products prepared by the Hearing Examiner for purposes other than those intended in this Agreement, it does so at its sole risk and it agrees to hold the Hearing Examiner harmless from such use. Upon termination of this Agreement, the Hearing Examiner shall return any working copies in her possession, as requested by the City, but shall be entitled to retain attorney work product.

7. General Administration and Management. For matters involving land use decisions or appeals, the City of Marysville Community Development Director, or their designee, shall be responsible for coordinating the work of the Hearing Examiner, shall provide any necessary information for and direction of the Hearing Examiner's services in order to ensure that such services meet the requirements of this Agreement, and shall be responsible for reviewing, monitoring, and approving the quality of such work. For matters involving administrative appeals, the City Clerk shall be responsible for coordinating the work of the Hearing Examiner. The parties understand that the Hearing Examiner will work independently and without direct supervision and that the only direction provided by the City will be administrative in nature.

8. Disputes. Any dispute concerning questions of fact in connection with the work not disposed of by agreement between the Hearing Examiner and the City shall be referred for resolution to a mutually acceptable mediator. The parties shall each be responsible for one-half of the mediator's fees and costs.

9. Legal Representation. Except in cases where the City elects to appeal or challenge an action or decision of the Hearing Examiner, the City will actively represent the Hearing Examiner and defend any and all legal challenges to or appeals of any action taken and/or decision rendered by the Hearing Examiner when acting within the scope of the quasi-judicial duties called for by this Agreement, to the same extent as it would for any other City quasi-judicial decision-maker. The costs of such legal representation shall not be charged to the Hearing Examiner as long as the action taken, and/or the decision rendered, are within the scope of the quasi-judicial duties called for in this Agreement.

The City reserves the right to settle any such appeal or legal challenge to any such action or decision in any manner deemed appropriate by the City, with or without consulting with or obtaining the consent of the Hearing Examiner. In the event that any action taken, and/or decision rendered, is determined to be outside the scope of the Hearing Examiner's quasi-judicial duties, the City shall have no obligation to represent or defend the Hearing Examiner or any action taken, and/or decision rendered, and the Hearing Examiner's indemnity obligations set forth in this Agreement shall apply.

10. Indemnity. The Hearing Examiner agrees to hold harmless, indemnify and defend the City, its officers, agents, and employees, from and against any and all claims, losses, or liability, for injuries, sickness or death of persons, including employees of the Hearing Examiner, or damage to property, arising out of any willful misconduct or negligent act, error, or omission of the Hearing Examiner, its officers, agents, or employees, in connection with the services required by this Agreement, provided, however, that:

10.1 The Hearing Examiner's obligations to indemnify, defend, and hold harmless shall not extend to injuries, sickness, death, or damage caused by, or resulting from the sole willful misconduct or sole negligence of the City, its officers, agents or employees; and

10.2 The Hearing Examiner's obligations to indemnify, defend, and hold harmless for injuries, sickness, death or damage caused by or resulting from the concurrent negligence or willful misconduct of the Hearing Examiner and the City, or of the Hearing Examiner and a third party, other than an officer, agent, or employee of the Hearing Examiner, shall apply only to the extent of the negligence or willful misconduct of the Hearing Examiner.

10.3 The City agrees to hold harmless, indemnify and defend the Hearing Examiner from and against any and all claims, losses, or liability, for injuries, sickness or death of persons, including employees of the City, or damage to property, arising out of any willful misconduct or negligent act, error, or omission of the City, its officers, agents or employees in connection with the services required by this Agreement, provided, however, that the City's obligation to indemnify, defend and hold harmless shall not extend to injuries, sickness, death or damage caused by or resulting from the sole willful misconduct or sole negligence of the Hearing Examiner.

11. City Business License. The Hearing Examiner has obtained, or agrees to obtain, a business license from the City prior to commencing to perform any services under this Agreement. The Hearing Examiner will maintain the business license in good standing throughout the term of this Agreement.

12. Subletting or Assigning Agreement. Neither the City nor the Hearing Examiner shall assign or subcontract any rights, duties or interests accruing from this Agreement without the express prior written consent of the other.

13. Simultaneous Agreements. Both the City and the Hearing Examiner acknowledge that the City may enter into a simultaneous agreement with another provider who would furnish Hearing Examiner Pro Tem services.

14. Further Support. The City makes no commitment and assumes no obligations for the support of the Hearing Examiner's activities except as set forth in this Agreement.

15. Independent Contractor. The Hearing Examiner is, and shall be at all times during the term of this Agreement, an independent contractor. The City shall not be liable for, nor obligated to pay to the Hearing Examiner, or any employee of the Hearing Examiner, sick leave, vacation pay, overtime or any other benefit applicable to employees of the City, nor to pay or deduct any social security, income tax or other tax from the payments made to the Hearing Examiner which may arise as an incident of the Hearing Examiner performing services for the City. The City shall not be obligated to pay industrial insurance for the services rendered by the Hearing Examiner.

16. Compliance and Governing Law. The Hearing Examiner shall, at all times, comply with all applicable federal, state, and local laws, rules, ordinances, and regulations. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

17. Non-Waiver. Payment for any part of the work or services by the City shall not constitute a waiver by the City of any remedies of any type it may have against the Hearing Examiner for any breach of the Agreement by the Hearing Examiner, or for failure of the Hearing Examiner to perform work required of it under the Agreement with the City. Waiver of any right or entitlement under this Agreement by the City shall not constitute waiver of any other right or entitlement.

18. Litigation. In the event either party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the parties agree that such actions shall be initiated in the Superior Court of the State of Washington, in and for Snohomish County. The parties agree that all questions shall be resolved by application of Washington law and that parties to such actions shall have the right to appeal from such decisions of the Superior Court in accordance with the law of the State of Washington. The Hearing Examiner hereby consents to the personal jurisdiction of the Superior Court of the State of Washington, in and for Snohomish County. The prevailing party in any such litigation shall be entitled to recover its costs, including reasonable attorney's fees, in addition to any other award.

19. Taxes. The Hearing Examiner will be solely responsible for the payment of any and all applicable taxes related to the services provided under this Agreement and if such taxes are required to be passed through to the City by law, the same shall be duly itemized on any billings submitted to the City by the Hearing Examiner.

20. Entire Agreement. This Agreement, together with attachments or addenda, represents the entire and integrated Agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral. This Agreement may be amended, modified or added to only by written instrument properly signed by both parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement on the ____ day of _____, 2014.

CITY OF MARYSVILLE

HEARING EXAMINER

Jon Nehring, Mayor
Date signed: _____

Print name: _____
Date signed: _____

Approved as to form:

By: _____
Grant K. Weed, City Attorney

EXHIBIT A

SCOPE OF WORK

1. Scope of Work. The Hearing Examiner shall perform all services and provide all goods as identified below.
2. City Direction. All duties shall be performed pursuant to the direction of the Chief Administrative Officer, the Planning Director or other designee.
3. Hearing Examiner Responsibilities.
 - a. The Hearing Examiner shall provide services and fulfill duties set forth in the following:
 - i. Marysville Municipal Code, chapter 22G.060, Hearing Examiner; and
 - ii. Such other matters as may be designated by Council; and
 - iii. Provide Rules of Procedure for the Office of the Hearing Examiner for Council's review and approval.
 - b. Additional services and duties described by new ordinances, regulations, or procedures may be added by written agreement of the parties.
 - c. The Hearing Examiner will work independently and without direct supervision. They will remain fully knowledgeable regarding the City of Marysville zoning codes and all other City codes, ordinances, resolutions, regulations or policies affecting the areas of concern related to the Hearing Examiner's duties. The City will provide all municipal codes, ordinances, resolutions, regulations, policies and guidelines and revisions thereof, necessary for the Hearing Examiner to maintain the required level of knowledge and understanding.
4. Schedule of Hearings. Hearings shall be scheduled at mutually agreeable dates and times.
5. Performance Standard. All duties shall be performed to the City's satisfaction, including, but not limited to, conducting orderly and impartial hearings, creating a professional and courteous environment for applicants, citizens and staff; and timely preparing findings of fact and conclusion of law which are clear and based on sound reasoning and all applicable law. When deemed appropriate by the Hearing Examiner, she will make site visits to familiarize herself with the site of the proposed land use and surrounding areas.
6. Administrative Support. The City of Marysville will provide administrative support services to the Hearing Examiner. These include:
 - a. Coordinate and assign hearing schedule with Hearing Examiner and City Departments;
 - b. Advertise hearings according to legal requirements;

- c. Attend all hearings to setup meeting room, record and create a record of the hearings;
- d. Maintain the official City file for each case;
- e. Perform administrative duties for the Hearing Examiner as required;
- f. Coordinate distribution of Hearing Examiner's decisions to City departments and all Parties of Record;
- g. Screen correspondence, email, and telephone calls to the Hearing Examiner in an effort to assure that prohibited *ex parte* contacts are not made;
- h. Process and approve all Hearing Examiner invoices;
- i. Oversee any contract changes on an annual basis; and
- j. Keep the Hearing Examiner apprised of all ordinance amendments or enactments relating to the provisions governing land use and Hearing Examiner services by sending copies of ordinances as soon as possible after adoption.

7. Access to City Legal Staff and Documents. The Hearing Examiner shall be entitled to consult with the City's legal staff and to have access to such City legal documents and supporting materials as may be necessary to fulfill the functions of the Hearing Examiner's office, provided that such consultation and access can be permitted within the bounds of professional ethics and standards applicable to the Hearing Examiner and the City legal staff, and without jeopardizing the integrity of any pending proceedings before the Hearing Examiner. In the event of conflict perceived by either City legal staff, or the Hearing Examiner, the City shall provide access to alternate legal counsel as may be required by the Hearing Examiner to perform his duties under this Agreement.

8. Advice to the City. The Hearing Examiner will meet with City staff and City Council as needed and scheduled by the City, to advise the City regarding clarity and adequacy of City codes, regulations, and procedures, and other legal issues bearing on land use, and other matters relating to the Hearing Examiner's duties and responsibilities. If additional meetings are required from time-to-time, the Hearing Examiner and the City will mutually agree on time, place, and participants to be included in such discussions. The Hearing Examiner will coordinate her assessment and her advice to the City at least annually to identify issues and confer on possible actions the City might take to improve its codes, regulations, and /or processes. Hearing Examiner time spent on such advisory duties will be compensated at the same professional rate agreed above.