King County

ANNUAL REPORT OF THE KING COUNTY HEARING EXAMINER

JANUARY – DECEMBER 2019

The report provides information concerning compliance with the objectives and duties of the Hearing Examiner stated in Chapter 20.22 of the King County Code

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March 11, 2020

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OFFICE OF THE KING COUNTY HEARING EXAMINER
JANUARY—DECEMBER 2019

OVERVIEW

20.22.020 Chapter purpose

The office of hearing examiner is created and shall act on behalf of the council in considering and applying adopted county policies and regulations as provided in this chapter. The hearing examiner shall separate the application of regulatory controls from the legislative planning process, protect and promote the public and private interests of the community and expand the principles of fairness and due process in public hearings.

20.22.310 Annual report

The office of the hearing examiner shall prepare an annual report to the council detailing the length of time required for hearings in the previous year, categorized both on average and by type of proceeding. The report shall provide commentary on office operations and identify any need for clarification of county policy or development regulations. The office shall file the report by March 1 of each year.

Note: All our previous annual (and before that, semi-annual) reports were delivered early or on time. COVID-19 threw a little wrench into those gears.

The King County Hearing Examiner is appointed by the Metropolitan King County Council to provide a fair, efficient, and citizen-accessible public hearing process. We hear applications and appeals involving many county administrative determinations. For some case types, we issue the county's final decision on the matter. For other types, we hold the public hearing on behalf of the council and issue a decision or recommendation, with the council serving as the final arbiter.

We start this annual report by explaining and reviewing specific examiner jurisdictions. We then apply these groupings to 2019, analyzing examiner workload and compliance with various deadlines, and comparing 2019 to previous years. We describe an interesting case involving racially disparate incarceration rates and employment stigmas, discuss judicial appeals, and review office initiatives. We close with an update on several proposed code amendments we have previously reported on.

Case wise, 2019 brought the largest influx of new cases in our eight years as examiner—over a third more than we received in 2018. Not surprisingly, our case processing times were up a little. However, we continued making efficiency improvements to stay on track, deadline-wise, while offering first-rate service.

As to activities outside of direct case work, in 2019 we finished lengthy work on draft overhauls to the examiner code (KCC chapter 20.22) and to the animal code (KCC Title 11); legislation has yet to be introduced, but we expect that to occur this year. We also reprise some targeted suggestions on possible code clarifications from past examiner reports.

In sum, we appreciate the trust the council puts in us, and we remain committed to courtesy, promptness, and helpfulness in assisting the public to make full and effective use of our services. We continue striving to timely issue well-written, clearly reasoned, and legally appropriate decisions and recommendations.

20.20.020 Classifications of land use decision processes
A. Land use permit decisions are classified into four types, based on who makes the decision, whether public notice is required, whether a public hearing is required before a decision is made and whether administrative appeals are provided.

There are two main avenues by which matters reach the examiner. Sometimes, the examiner acts in an appellate capacity, hearing an appeal by a party not satisfied with an agency determination. Other times, the examiner has "original jurisdiction," holding a public hearing on a matter regardless of whether anyone objects to the agency's recommended course of action. Depending on the type of case, at the end of a hearing the examiner may issue the county's final decision, a decision that is final unless appealed to council, or a recommendation to council. As to subject matter, the examiner has jurisdiction over eighty distinct matters, in arenas ranging from arenas ranging from lobbyist disclosure (KCC Ch. 1.07) to transit rider suspension appeals (KCC Ch. 28.96) to open housing (KCC Ch. 12.20). But the examiner's caseload mainly consists of several common types. A list of more common case types, categorized by decision-making process, follows.

EXAMINER RECOMMENDATIONS TO THE COUNCIL (KCC 20.22.060)

20.22.030.C For the purposes of proceedings identified in K.C.C. 20.22.050 and 20.24.060, the public hearing by the examiner shall constitute the hearing required by the King County Charter by the council.

Public benefit rating system—current use assessment (KCC 20.36.010)

Road vacation applications and appeals of denials (KCC 14.40.015)

Type 4 land use decisions (KCC 20.20.020.A.4):

- Zone reclassifications
- Plat vacations

EXAMINER DECISIONS, APPEALABLE TO THE COUNCIL (KCC 20.22.050)

Type 3 land use decisions (KCC 20.20.020.A.3):

- Preliminary plat
- Plat alterations

EXAMINER FINAL DECISIONS (KCC 20.22.040)

Code compliance enforcement:

- Animal care and control (KCC ch. 11.04)
- For-hire transportation (KCC ch. 6.64)
- Land use (KCC Title 23)
- Public Health (Health Code ch. 1.08)

Threshold SEPA Determinations (KCC 20.44.120)

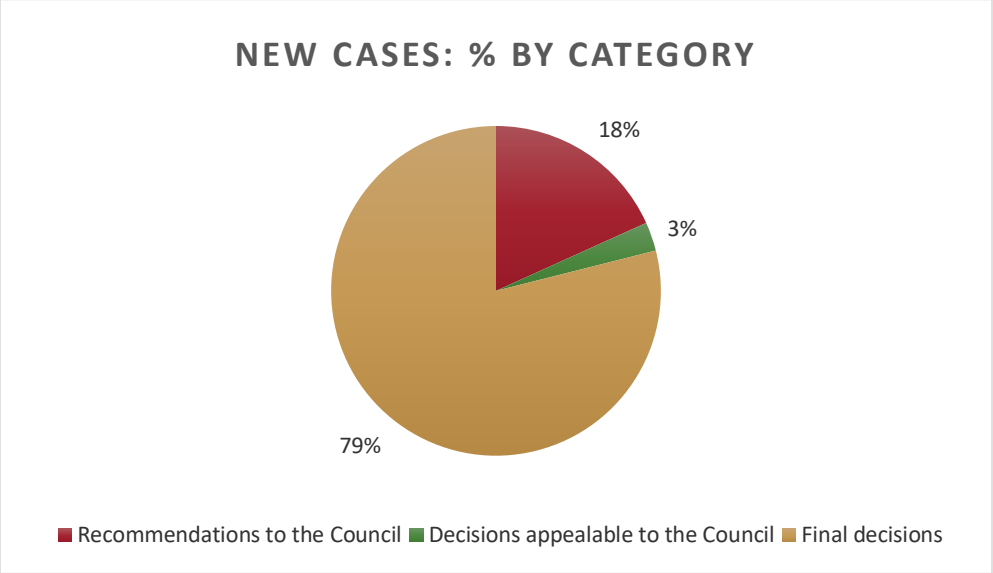
Type 2 land use decisions (KCC 20.20.020.A.2):

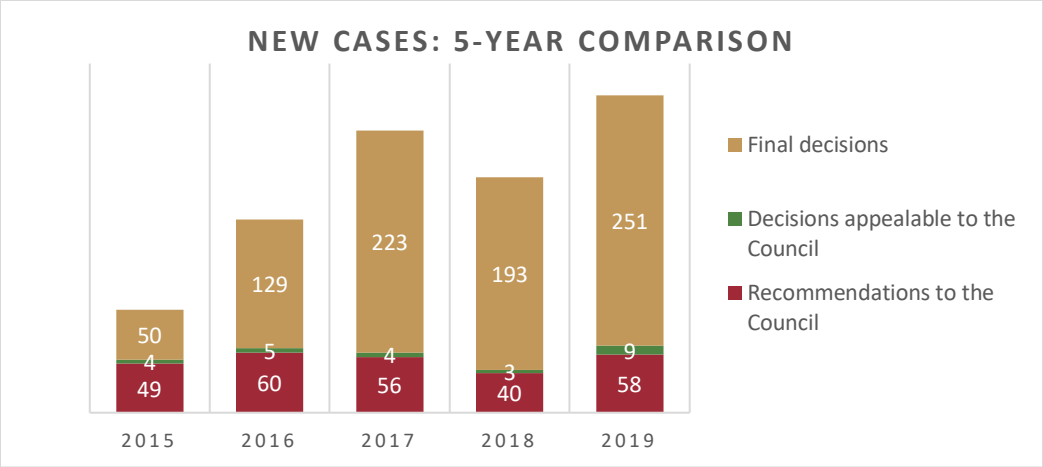
- Conditional use permits
- Shoreline substantial development permits
- Procedural SEPA appeals
- Temporary use permits

NEW CASES

Our 318 new cases represented our highest volume in our eight years as examiner, a 35-percent increase from the 236 cases we received in 2018. More generally, our new case filings, broken down into class, were:

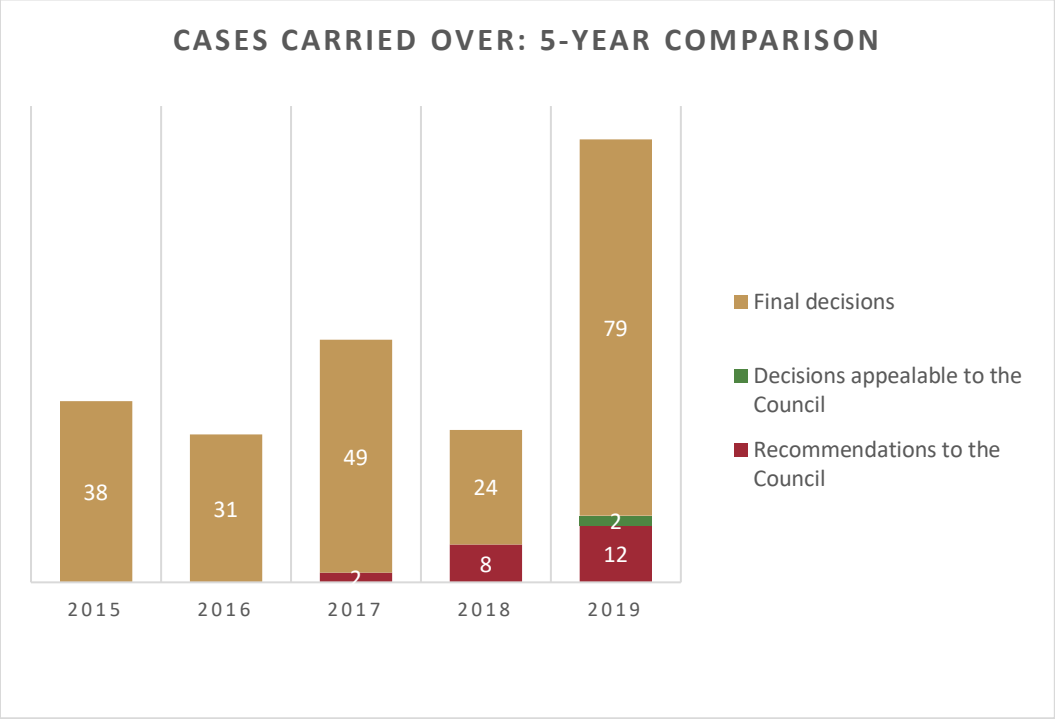
NEW CASES JANUARY—DECEMBER 2019	Number of Cases
RECOMMENDATIONS TO THE COUNCIL	
Current use assessment	56
Type 4 land use	1
DECISIONS APPEALABLE TO THE COUNCIL	
Preliminary plat	9
FINAL DECISIONS	
Animal Services enforcement	162
For-hire license enforcement	36
Land use enforcement	48
SEPA	4
Utilities Technical Review Committee	1
TOTAL	**318**





Cases Carried over from Previous Years

At the end of each year, we carry a certain number of cases into the next year. A small few are matters on appeal; our case is stayed while a court decides. Some are stayed at the joint request of the parties, typically while the parties attempt to reach an amicable resolution. And some are actively moving through the hearing process, typically cases we received towards the end of a calendar year.



For the 93 cases that were carried over from prior years in 2019, the chart below depicts the year those cases reached us.

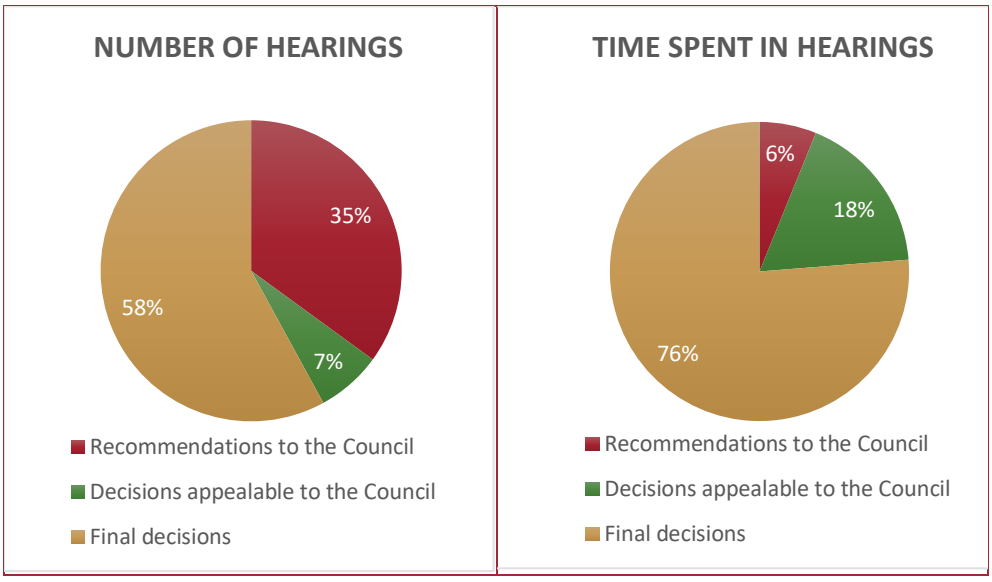
YEAR CASE OPENED	2009	2011	2012	2015	2016	2017	2018
RECOMMENDATIONS TO THE COUNCIL							12
DECISIONS APPEALABLE TO THE COUNCIL						1	1
FINAL DECISIONS	1	2	1	14	1	7	55
							TOTAL = 93

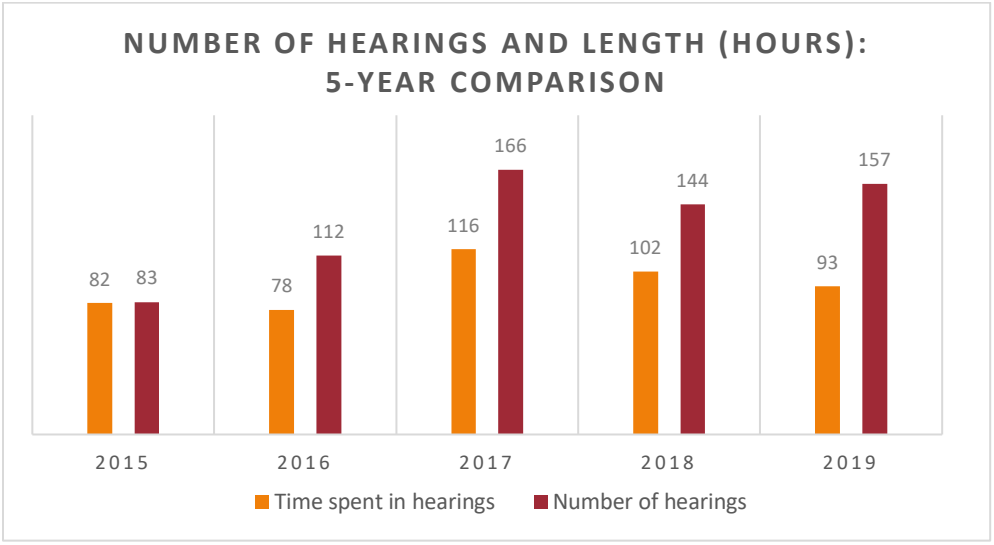
PROCEEDINGS

We held 157 hearings in 2019, a nine-percent increase from the 144 we held in 2019.

We attempt to extend a high level of service to all our participants. After all, even matters raising no novel legal issues or creating little impact beyond the parties are still crucially important to those parties. But not all types of cases require the same level of examiner involvement. For example, our one interim use hearing took longer than our entire current use assessment docket.

NUMBER OF HEARINGS January—December 2019	Number of hearings	Average Minutes
RECOMMENDATIONS TO THE COUNCIL		
Current use assessment	49	5
Road Vacations	6	19
Type 4 land use	2	36
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary plat	10	66
Interim Use	1	320
FINAL DECISIONS		
Animal Services enforcement	46	39
For-hire license enforcement	19	31
Land use enforcement	20	79
SEPA	4	56
TOTAL	157	35





In addition to actual hearings (where we swear in witnesses and take testimony, accept exhibits, and entertain argument), we also hold conferences. These usually take one of two forms.

20.22.120.A Prehearing conference. On the examiner's own initiative, or at the request of a party, the examiner may set a prehearing conference.

For some cases we schedule—either on our own motion or at a party's request—a *prehearing* conference. At these conferences, we determine whether to proceed directly to hearing (or whether the parties jointly want to pursue an alternative track), clarify the issues, consider discovery needs, and schedule hearing dates and pre-hearing deadlines.

When the parties decide to put off an adversarial hearing (typically while they attempt an amicable resolution), we "continue" their case. We then schedule periodic *status* conference calls (typically at 90-day intervals). These conferences help ensure we stay on top of things, keep parties' feet to the fire, and more

20.22.030.G. The examiner shall use case management techniques to the extent reasonable including:

1. Limiting testimony and argument to relevant issues and to matters identified in the prehearing order;

2. Prehearing identification and submission of exhibits, if applicable;

3. Stipulated testimony or facts;

4. Prehearing dispositive motions, if applicable;

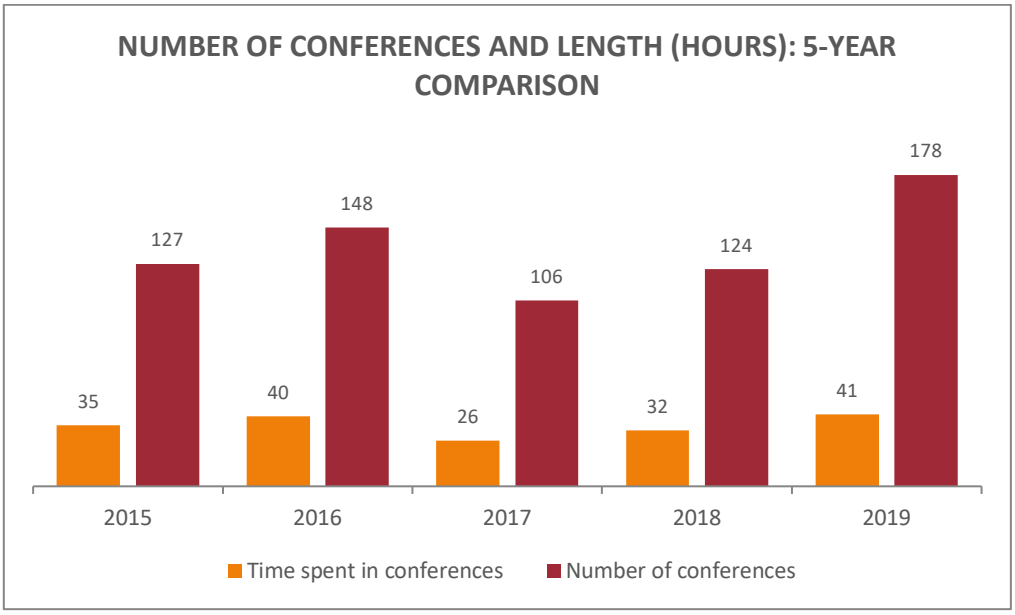
5. Prehearing conferences;

6. Voluntary mediation; and

7. Other methods to promote efficiency and to avoid delay.

speedily wrap matters up. These cases usually resolve by consensus. Less frequently, the parties reach a loggerhead and we end the continuance, scheduling an adversarial hearing and adjudicating the case with a written decision on the merits.

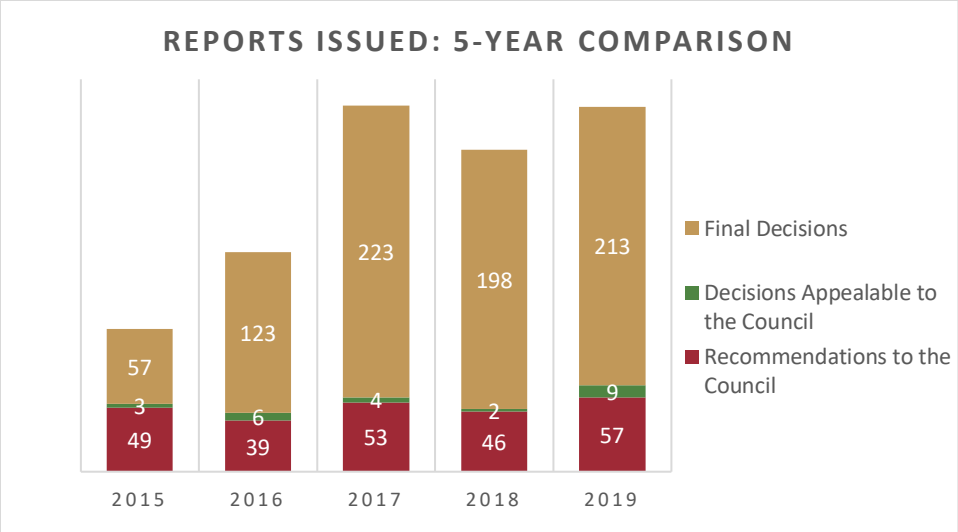
Not surprisingly, given our modern high of new case filings, he held 44% more conferences last year than in 2018.



Reports Issued

At the conclusion of a case, we issue a final report closing out our involvement. (As described on page 2, depending on the type of case, at the end of our process we either issue the county's final decision, a decision that is final unless appealed to council, or a recommendation to council.)

These closings are sometimes summary dismissals (such as when the parties settle a dispute). More often, our final reports are based on taking evidence and argument at a hearing and then deciding the case on the merits through written, typically detailed, findings and conclusions. We issued 279 reports in 2019, up 13% from the 246 we issued in 2018.



Going beyond the numbers, we typically describe an interesting case. This year we describe an appeal highlighting one equity and social justice aspect of our for-hire driver (Lyft, Uber, taxi) docket, a topic we return to at the end of this report.

In *Owens*,[1] Records and Licensing Services (RALS) denied a 2019 license application solely due to Mr. Owens' four-year old conviction for solicitation to commit possession of cocaine. The relevant code provision allowed discretionary ("may deny") rejection where the applicant had, in the previous five years, been convicted for a crime "reasonably related to the applicant's honesty and integrity, including, but not limited to, fraud, larceny, burglary or extortion." RALS explained that it considered the applicant's crime reasonably related to his honesty and integrity.

We started our analysis by observing that, "[p]utting aside a philosophical discussion of the relationship between drug use and straightforwardness or corruptibility, the [codes limits] the orbit of 'honesty and integrity.'" Applying our Court's guidance that general terms (here, "honesty and integrity") appearing in a statute in connection with specific terms (here, "fraud, larceny, burglary or extortion") are given meaning and effect only to the extent that those general terms suggest items "similar" to those specific terms, we concluded that "[u]nless Mr. Owens obtained (or was trying to obtain) the cocaine by shaking down a dealer or stealing someone's stash, his crime was not in the same ballpark as fraud, larceny, burglary, or extortion. The drafters did not intend for attempted drug possession to be treated as an honesty- or integrity-related crime."

[1]Our full *Owens* order is available at https://www.kingcounty.gov/independent/hearing-examiner/case-digest/appeals/for-hire-enforcement/2019.aspx

We then opined that in analyzing discretionary denials, two factors loomed large.

First, citing Michelle Alexander's scholarship in *THE NEW JIM CROW*, we explained that, "Although studies show that different racial groups use and sell illegal drugs at remarkably similar rates, African-Americans are incarcerated for drug crimes at a grossly disproportionate rate. Across the country, black men like Mr. Owens are imprisoned on drug charges at a rate 13 times higher than white men." Analyzing whether the national disparity might be less bleak in our area, we turned to an influential study, co-authored by Justice Steven Gonzalez, that found that Seattle had one of the highest rates of racial disparity in drug arrests in the United States, with African-Americans more than 21 times more likely to be arrested for selling serious drugs than whites, despite whites making up the majority of Seattle's sellers and users of serious drugs.

Second, we looked to the ongoing disparate impact of that disparate criminal conviction rate. We again cited Ms. Alexander's analysis that "[n]ot only are African-Americans far more likely to be labeled criminals, they are also more strongly affected by the stigma of a criminal record. Black men convicted of felonies are the least likely to receive job offers of any demographic group." We found that distinction important in light of the RCW setting the state's policy to "encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship, and the opportunity to… engage in a meaningful and profitable…occupation…is an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship."

APPELLATE ACTIVITY

An examiner's decision (or, in cases where an examiner determination reaches the council, the council's decision) almost always wraps up the matter. However, in a tiny fraction of cases a disputant seeks judicial review. We received three new appeals in 2019, and there were developments in two previously reported appeals. We start with the new cases, before updating the old ones.

Clement involved two dogs previously designated "vicious" and ordered contained after they mauled a neighbor's goats to death. After the containment order was repeatedly violated, Animal Services ordered the two dogs removed from the county. Ms. Clement appealed. We upheld the removal order in November, writing that, "We have overturned more removals than we have sustained. Yet today's case presents the clearest-cut case for removal we have seen in our dozens of removal appeals." In December, Ms. Clement appealed our decision to superior court. The appeal hearing is set for June 2020.

Danieli arises out of alleged overly-aggressive enforcement activity regarding a vicious cat. The plaintiff named many defendants, including King County, Bellevue, Animal Services, Bellevue, and various individuals, including the county examiner and county executive in their personal capacities. The court dismissed the examiner and executive as defendants; the case will go forward against the agency defendants. The examiner's office remains in the caption, but the PAO notified the court and the parties that, as the lower tribunal adjudicating this matter, we do not anticipate any substantive participation in court proceedings.

Noor involved Records and Licensing Services' decision to deny Mr. Noor's application to renew his for-hire driver's license. Mr. Noor's state driver's license had been suspended many times in recent years, and dispatch records revealed that Mr. Noor had provided numerous dispatched trips to customers while his state driver's license was suspended. A *pro tem* examiner upheld the denial of his renewal application. Mr. Noor appealed that decision to superior court. In May 2019, the court affirmed the examiner's decision. Mr. Noor did not appeal further.

Klineburger involves an attempt to develop property adjacent to the Snoqualmie River and in a FEMA-mapped floodway. Construction is generally not permitted in such a location. The Washington State Department of Ecology determined that the project did not satisfy any applicable exception. The Klineburgers proceeded with development anyway, and the county initiated a code enforcement case (*Klineburger I*). Klineburger appealed to the *pro tem* examiner, who denied his appeal. The Klineburgers then filed a LUPA appeal. In 2013, the superior court issued a decision in the Klineburgers' favor, concluding that although the examiner did not have the authority to override Ecology's determination, the court did. The county appealed, and Ecology intervened. The court of appeals reversed the superior court and reinstated the county's decision. The Klineburgers then applied to Ecology, unsuccessfully, to get the floodway map changed (*Klineburger II*). The Klineburgers litigated that matter through the court of appeals, losing at each step of the way.

Meanwhile, Permitting moved forward with a new code enforcement case based on new violations (*Klineburger III*). After a *pro tem* examiner denied their appeal, the Klineburgers filed another LUPA appeal, which the superior court dismissed. The Klineburgers again appealed to the court of appeals.

While *Klineburger III* was pending, Permitting assessed civil penalties against the Klineburgers on the original case, after the appeal processes had run their course and the violation remained unremedied. The Klineburgers requested a waiver of these civil penalties, which Permitting denied. The Klineburgers then filed an administrative appeal of Permitting's denial; a *pro tem* examiner upheld

Permitting's assessment of civil penalties (*Klineburger IV*). The Klineburgers filed a LUPA appeal of this decision in 2019.

In *Klineburger III*, the appellate court partially upheld the superior court's dismissal of the 2018 LUPA appeal and remanded back to superior court, because the superior court's dismissal did not reach the merits of the Klineburgers' allegations that the *pro tem* examiner erred. The Klineburgers filed a motion to consolidate the remanded case (*Klineburger III*) with their 2019 LUPA case appealing the *pro tem* examiner's decision on civil penalties (*Klineburger IV*).

In December 2019, superior court denied the motion to consolidate and dismissed the Klineburgers' two LUPA appeals (*Klineburger III* and *IV*) with prejudice. The Klineburgers have appealed those decisions to the court of appeals. Separately, the Klineburgers have hired an expert to work with the county to apply to FEMA to remove the Klineburger property from the federal map designating it within the floodway.

McMilian is another long-running code enforcement dispute, involving abutting sites in a single-family residence zone historically used as a wrecking yard. In the latest round, in 2018 Permitting issued a preliminary decision on McMilian's application. McMilian appealed the pre-application decision to the examiner, bringing in additional information. A *pro tem* examiner granted in part and denied in part McMilian's appeal in January 2019. In February 2019, McMilian appealed this decision to superior court under LUPA. The PAO argued the appeal in superior court in October 2019. The court took the matter under advisement and has yet to issue a decision.

Compliance with Code-Mandated Deadlines

Statutory requirements impose deadlines for swift and efficient examiner processing of certain case matters. The code-established deadlines discussed below represent our three principal time requirements. Each year we set 95% as our compliance goal.

There is one category of cases—road vacations—that we intentionally leave out from our deadline analysis for this reporting cycle.

As described in previous reports to council, petitioners seeking to vacate and acquire county rights-of-way historically paid compensation based on the appraised (or assessed) value of that property. In 2016, state and then county law changed to allow a downward "adjustment" from this appraised/assessed value to reflect advantages—increased tax revenue, limiting liability risk, eliminating maintenance costs, etc.—of transferring the property to private hands.

However, Roads Services decided that its default would be not to "adjust," but to outright eliminate, compensation. Despite our repeated urging, Road Services was unable and unwilling to present a model for how to calculate these adjustments, arguing for a flat zero compensation in every petition to reach us.

Not willing to abdicate our fiduciary duty and lacking any way to quantify even an order-of-magnitude sense of those adjustments, we stayed the petitions and turned to the county's Office of Performance, Strategy and Budget (PSB) for help crafting a sound financial approach. Eventually, it required a council budget proviso (which we greatly appreciate) to unstick the situation.

PSB answered the call, completing a thorough report at the end of January 2019 that, per the Executive's transmittal letter, "furthers the King County Strategic Plan goal of exercising sound financial management by understanding administrative costs and valuation of rights-of-way in road vacation petitions." This enabled us to continue processing our road vacation petitions. We resumed our public hearings in each of the stayed cases and issued recommendations that council acted on at various points in 2019.

The problem, from a case reporting standpoint, is that the above back-and-forth meant that for numerous road vacation petitions we were *well over a year* beyond our processing deadlines, skewing the overall data. We have thus excluded road vacations from the below discussion. Our 2020 road vacations are currently proceeding at a normal pace (or, as normal as any of our cases are progressing in the wake of COVID-19.)

Deadline One—45 Days from Appeal Transmittal to First Proceeding

For appeals, the examiner must hold a prehearing conference or hearing within 45 days of receiving the appeal packet, unless the examiner (on examiner motion or on the motion of one of the parties) extends the deadline for up to 30 days or, if the parties jointly request, longer. We were compliant in 98% of our cases, exceeding our 95% compliance goal.

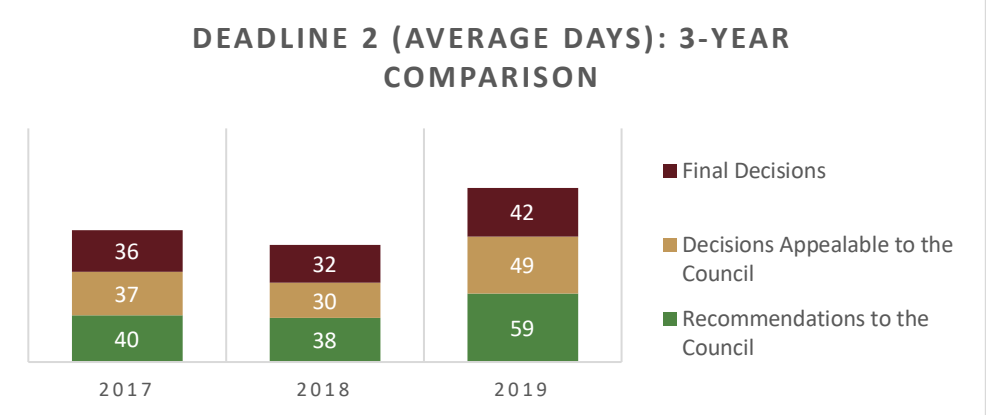
Deadline—1 Averages and Compliance 45 days from appeal transmittal to first proceeding	Average days	Percent Compliant
Final Decisions		
Animal Services enforcement	36	99%
For-hire license enforcement	39	94%
Land use enforcement	29	100%
SEPA	37	100%
Utilities Technical Review Committee	29	100%
TOTAL	29	98%

Deadline Two—90 Days from Application Referral/Appeal Transmittal to Report

The code sets deadlines for how quickly the examiner should complete review, including issuing a final determination. For appeals, the deadline is 90 days from our receiving the appeal packet. For applications, the deadline is 90 days from our receiving the council's referral. As with deadline one, the examiner (on examiner motion or on the motion of one of the parties) can extend deadline two for up to 30 days or, if the parties jointly request, longer. We were compliant in 97% of our cases, exceeding our 95% compliance goal.

Deadline—2 Averages and Compliance 90 days from application referral/ appeal transmittal to report	Average days	Percent Compliant
Recommendations to the Council		
Current use assessment	40	100%
Type 4 land use	78	100%
Decisions Appealable to the Council		
Preliminary plats	30	100%
Interim use	Waived	100%
Final Decisions		
Animal Services enforcement	38	96%
For-hire license enforcement	40	100%
Land use enforcement	57	93%
SEPA	Waived	100%
Utilities Technical Review Committee	82	100%
TOTAL	42	97%

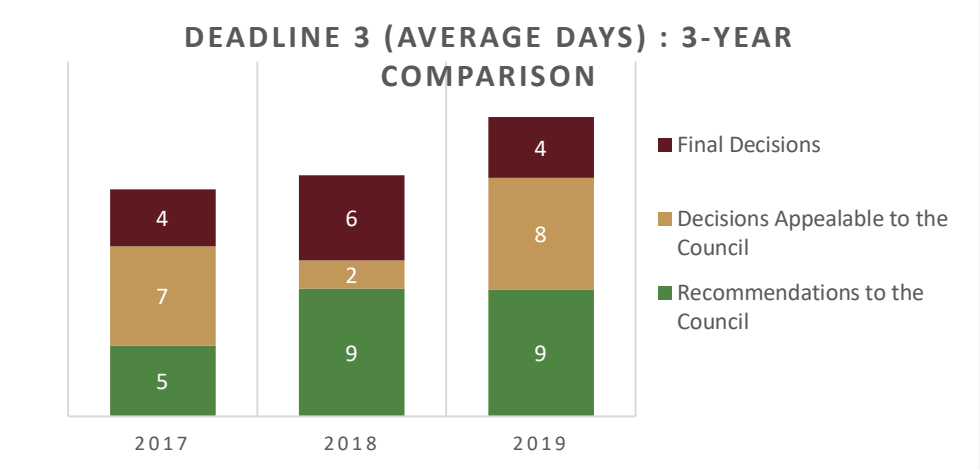
In mid-2016, the legal standard for how we calculate deadlines changed. Thus, we have only two apples-to-apples years (2017 and 2018) to compare with 2019. Not surprisingly, our influx of cases increased our processing times a bit.



Deadline Three—10 Business Days from Hearing Close to Report

The last deadline relates to all types of hearings, requiring the examiner to issue findings and conclusions no later than ten business days after completing a hearing. At 91%, we fell just shy—for the first time for any of our three deadlines in any of our eight years as examiner—of the 95% compliance goal we set coming into each year.

Deadline—3 Averages and Compliance 10 business days from hearing close to report	Average days	Percent compliant
Recommendations to the Council		
Current use assessment	9	88%
Type 4 land use	9	50%
Decisions Appealable to the Council		
Preliminary plat	6	75%
Final Decisions		
Animal Services enforcement	5	90%
For-hire license enforcement	3	100%
Land use enforcement	4	95%
SEPA	Waived	100%
Utilities Technical Review Committee	9	100%
TOTAL	4	91%



Office Initiatives

Examiner Code (KCC 20.22)

As part of our continuous improvement goal, we finished work in 2019 on a draft that would bring the examiner code (KCC chapter 20.22) into conformance with the council's 2018 style drafting guide. We found a council sponsor, from whom

we understand that the legislation will likely need to wait until at least after the Comprehensive Plan amendments wrap up.

Animal Code (KCC Title 11)

We spent considerable time in 2019 finishing a comprehensive overhaul of the animal code (KCC Title 11). Although initially slated to be introduced in December 2019, the latest word was that the legislation would be introduced at the end of March. (With COVID-19-related adjustments, all bets are now off.) We put three items on council's radar screen, for whenever the proposed ordinance arrives.

First, state law—and the laws of most other Washington municipalities—contain two tiers for troubling animal behavior. "Potentially dangerous" covers behavior like menacing a person, even if no bite is inflicted. A "dangerous" designation requires more than just a bite, something like killing a domestic animal or inflicting severe, disfiguring injury on a person. Conversely, county code currently has only a single category—"vicious"—a category more stringent than "potentially dangerous" but less stringent than "dangerous." The proposal would replace the county's one size, thumbs up/thumbs down category with more a more nuanced, tier system.

Second, the code contains several scenarios when removal of an animal is mandatory ("shall remove"). As removal is the harshest arrow in the civil enforcement quiver, the current draft moves some triggers out of the mandatory removal category and into the discretionary ("may remove") category.

Third, the existing code (KCC 11.04.190) equates any animal nuisance (even a first-time, minor incident) with a crime. The proposal clarifies that a crime requires something more—some serious (human) behavior, a previous incident, some type of *mens rea* (state of mind), etc.

Regulatory Change Recommendations

The code requires our annual reports to identify any needed regulatory clarification. KCC 20.22.310. In the previous section, we discussed recent work on proposed changes to the examiner code (KCC chapter 20.22) and to the animal code (KCC Title 11). At the request of a councilmember who asked us to keep track of unresolved examiner recommendations from previous reports, we consolidate below the regulatory topics introduced in our past reports that have yet to be tackled.[2] The first four relate to land use; we have been advised that an omnibus bill will likely not be introduced before this December. The last and most important relates to for-hire driver appeals; since we started raising the issue in 2016, we have received indefinite assurances that the Seattle and county

[2] We do not mean "not tackled in the manner we suggested," only that the topic we described has not, as far as we know, come up for council discussion.

executive branches are working on a solution, but never a clear indication of when exactly the problem will be fixed.

REGULATORY INTERPRETATIONS

KCC chapter 2.100 describes the process for requesting a formal code interpretation decision from the director (typically of the Department of Local Services). If that request occurs during review of a pending application, the director's decision is appealable as part of the appeal process for the underlying project. Similarly, if the request relates to a pending code enforcement action, the decision is appealable as part of the appeal process for the code enforcement action. KCC 2.100.050.B.

However, outside of the above scenario, the director's decision is not appealable. KCC 2.100.050.A. Sometimes a person responding to a code enforcement letter proactively tries to address the situation before it devolves to the agency needing to issue a notice and order, appealable to us. In that procedural posture, if the person disagrees with the director's decision, the interpretation is not appealable. KCC 2.100.050.B. As we read the current code, the person's only avenue to elevate the matter would be to say, "Well, Code Enforcement, I hate to go there, but I guess slap me with a notice and order, and then we can take our disagreement to the examiner." That seems suboptimal, for three reasons.

First, county notices-and-orders are recorded against (and can cloud) title, and they can carry potential monetary penalties. Although not as severe as the potential Clean Water Act penalties the Supreme Court dealt with in *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), the unanimous Court was troubled that people had to subject themselves to enforcement penalties to obtain an appealable ruling on a regulation's applicability. We do not see why people having a legitimate difference of opinion on what a regulation covers—and who are willing to tackle the issue proactively without forcing the agency to pursue them—should basically have to invite a formal enforcement order just to get the issue in front of the examiner.

Second, this force-a-formal-agency-decision is not how the code treats permit applicants. During the permit process, if the applicant receives a preliminary determination that something is not allowed, the applicant can appeal that determination to the examiner. KCC 20.20.030.D. The applicant does not have to continue through the permit process or demand a final permit decision, simply to get a regulatory dispute in front of the examiner.

Third, Code Enforcement's resources are stretched. It seems an unnecessary administrative step to have Code Enforcement proceed through the time-consuming notice and order machinations, if the issue involves a regulatory

interpretation. This is especially true because for many code interpretations a section other than Code Enforcement is driving the bus. We might be able to offer some clarity that wraps up a dispute quicker.

SMALL ANIMALS

Sometimes we tackle fundamental issues. Other times the issue is…chickens. On properties in the unincorporated area under 20,000 square feet (a little less than half an acre), KCC 21A.30.020 allows three small animals (per dwelling unit) kept outside. The owner of a 10,000-square-foot lot in unincorporated Skyway was thus limited to three chickens, while an owner of a similar-sized property in the surrounding cities would have been allowed eight (Seattle), ten (Tukwila), or eight (Renton) chickens. This seems odd, given that unincorporated areas are usually less (or at least not more) restrictive than cities when it comes to animal husbandry. If council had recently acted, we would have accepted its measured judgment without comment. But there has been no change in the basic framework—three chickens on lots less than half an acre—since 1993, before any of our current councilmembers were councilmembers. Thus, we recommend that council consider this issue whenever it updates KCC Title 21A.

We note that some jurisdictions restrict roosters, and several of our regional animal noise enforcement appeals have involved rooster-related noise. Roosters have been reported to emit 130 dB, more than the 90 dB reported for dogs.[3] If accurate, given the relationship of decibels to loudness, a rooster is not 44% louder than a dog (as one might think from comparing 130 to 90) but 1600% louder than a dog.[4]

That is also notable because roosters are renowned for their break-of-dawn crowing. As we have analyzed in numerous animal noise decisions, early morning/late night noise is more likely to be unreasonably disturbing than daytime noise, especially when it comes to how long (duration-wise) a noise must occur to qualify. (At night, duration is somewhat irrelevant, because if the noise repeatedly wakes someone up from sleep, even quickly quieting the animal after each episode is a bit like locking the barn door after the horse is gone—the damage for that night has already been done.) That is not to recommend any zoning-related curbs, just to offer one data point from our jurisprudence.

INCONSISTENT GRADING DEFINITIONS

The zoning code, which houses the critical areas chapter (KCC chapter 21A.24), employs a definition of "grading" as "any excavation, filling, removing the duff

[3] http://www.fresheggsdaily.com/2017/01/so-just-how-loud-is-roosters-crow.html.

[4] The general rule of thumb for loudness is that increasing the power by 10 dB makes a sound twice as loud. https://www.gcaudio.com/tips-tricks/the-relationship-of-voltage-loudness-power-and-decibels/. So, 100 dB is twice as loud as 90 dB, 110 dB is four times as loud as 90 dB, 120 dB is eight times as loud as 90 dB, and 130 dB is sixteen times as loud as 90 dB.

layer or any combination thereof." KCC 21A.06.565. Conversely, the grading code defines "grading" as any "excavating, filling or land-disturbing activity, or combination thereof." KCC 16.82.020.O.

Comparing those two definitions, the excavating, filling, and combination elements are constant. The difference is the third item, the zoning code's "removing the duff layer" versus the grading code's "land disturbing activity." The grading code elsewhere defines "land disturbing activity" expansively as "an activity that results in a change in the existing soil cover, both vegetative and nonvegetative, or to the existing soil topography." KCC 16.82.020.Q. Thus, the grading code's definition of "grading" is broader than the zoning code's definition—all "removing the duff layer" is "land disturbing activity," but not all "land disturbing activity" entails "removing the duff layer."

We take no position on the policy choice of the appropriate "grading" trigger. However, as the critical areas chapter (KCC chapter 21A.24) looks within the zoning code for its definitions, and given the normally heightened restrictions that apply to critical areas (as opposed to non-critical areas), it seems unintentional that the rules would be more restrictive in general than they would be when applied specifically to critical areas.

CLEARING AND GRADING THRESHOLDS

Our code's default is that no one may do *any* clearing or grading without a permit. KCC 16.82.050.B. The code then carves out exemptions, most of which set some fixed date baseline or allow property owners some clearing and/or grading without a permit. For example, the following may be performed without a permit:

- up to 2,000 square feet of new impervious surface added since 2005 (KCC 16.82.051.C.2);
- up to 2,000 square feet of new plus replaced impervious surface added since 2008 (KCC 16.82.051.C.2); and
- *annually* clear up to 7,000 square feet of invasive vegetation (KCC 16.82.051.C.7);

Moreover, total clearing limits on a property (meaning the total that can be cleared even *with* a permit), excludes areas legally cleared before 2005 (KCC 18.82.150.A.2.a). And the Surface Water Design Manual sets the "existing site conditions" (against which new projects are evaluated for drainage) as "those that existed prior to May 1979 (when King County first required flow control facilities)."

The annual allowance makes intuitive sense, and pegging other limits to the date, say, of when the Critical Areas Ordinance became effective, creates a relatively fixed, understandable baseline.

In contrast, the applicable permit-exemption for:

- excavating or placing fill is whether it "cumulatively over time" involves over hundred cubic yards (KCC 16.82.051.C.1);
- general clearing is "[c]umulative clearing" of less than 7,000 square feet (KCC 16.82.051.C.3); and
- clearing of invasive vegetation within certain critical areas is "cumulative clearing" of less than 7,000 square feet (KCC 16.82.051.C.8).

Those three are harsh. Looking at the 7,000-square foot clearing exemption, most sites with a pre-existing home will typically have over 7,000 square feet of "cleared" space. Thus, beyond something like maintaining a pre-existing lawn, any clearing triggers a permit. As DPER's Bulletin on the topic phrases it, once a "site already exceeds 7,000-square-feet of cleared area, any additional clearing requires a permit." And the definition of clearing is quite broad: "the cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means" (KCC 16.82.020.D). Weed whacking even a small new area, for example, would trigger the need for a permit. We do not believe this was council's intent.

Those three are murky. In contrast to a relatively clear baseline like "since 2005" or "within a 12-month period," what does "cumulative" really mean? Does it mean since the dawn of time? Does it include pre-Columbian, Native American burial mounds or active land management practices (like frequent, low-intensity, prescribed burns)? Does it peg to the first European settler taking an axe to wood or adding dirt to a trail to keep wagon wheels from getting stuck? Does it compile all the Himalayan blackberries ever cleared on a given site since Luther Burbank unleashed his botanical pox here in 1894? What if a forested area was cleared decades ago, but has since regrown with native vegetation—does this subtract from the cumulatively cleared total? We do not know the answers, and that ambiguity might open the county up to a "void for vagueness" legal challenge.

Those three seem inconsistent with other code provisions. The impetus behind setting limits on how much clearing and excavating/filling can be done on a site without a permit presumably stems from the same policy considerations as something like setting limits on how much new (or replaced) impervious surface can be added on a site without a permit: controlling unchecked drainage and surface water runoff. And it seems axiomatic that paving over a surface creates more of a drainage/water runoff impact than, say, replacing native vegetation

with landscaping while keeping that surface pervious. Yet regardless of how much impervious surface was on the property as of 2005, adding impervious surface has a post-2005 allowance that can be exercised without requiring a permit, while there is zero tolerance for clearing any new area on a site that has a pre-existing, 7,000 square feet of cumulative clearing. That seems incongruous.

Those three have led to understandable public confusion and anger. In several code enforcement appeals we have had to break it to appellants that cumulative really does mean cumulative, and they will need to apply for a permit for even relatively minor work, even work not touching any critical areas or critical areas buffers, because the pre-existing condition of the property already put them in the any-new-clearing-needs-a-permit box. The negative public reaction has been understandable.

The code needs improvement. When we decide cases, we interpret the codes "as they are written, and not as we would like them to be written." *Brown v. State*, 155 Wn.2d 254, 268, 119 P.3d 341 (2005). So, we have reluctantly upheld notices and orders involving "cumulative" clearing or grading.[5] But that does not mean we find the current set up wise. Annual reports are our code-directed opportunity to identify for council needed clarifications. We thus recommend that council consider amending KCC 16.82.051.C.1, .3 and .8 to replace "cumulative" with something more definitive and easier for the public to swallow.

FOR-HIRE DRIVER APPEALS

Pursuant to a 1995 cooperative agreement (Agreement) between then-Executive Locke and then-Mayor Rice, Seattle performs licensing functions related to for-hire vehicles, while the county performs licensing functions related to for-hire drivers. Thus, the county's Records and Licensing Section (RALS) reviews and decides for-hire applications for a dual county/city driver's license. RALS then issues a single letter approving or denying both licenses. Government at its cooperative, streamlined best.

However, those benefits evaporate once RALS issues a license denial, because the Agreement provides that the city and county each handle their own appeals. Thus, RALS's single denial document must be appealed twice—to us to decide the county portion of the letter and to Seattle to decide the city portion of the letter. This is problematic on at least three levels.

From the perspective of a licensee, it means having to file two separate appeals (Seattle's due at the 10-day mark, ours due at the 24-day mark) regarding the same underlying facts and typically the same controlling legal standard. Once properly filed, the licensee must attempt to navigate two administrative ladders,

including dealing with two sets of rules of procedure. And the licensee must take time out of multiple workdays (foregoing income) to attend parallel hearings. This scheme would be problematic for any licensee, but as a large percentage of applicants have limited English proficiency, no attorney, and require an interpreter at hearing—if they can even figure out how to sufficiently appeal and to get to a hearing—the scheme raises significant equity and social justice concerns.

From an administrative perspective, these parallel appeal processes increase staff time and cost, as RALS must prepare for and participate in parallel administrative hearings. Two hearing offices have to process appeals, taking the time to arrange for a proceeding (at least a hearing, and sometimes also a prehearing conference), prepare for the session, take testimony, documentary evidence, and argument, and then consider and rule on the same set of underlying events and often apply a legal standard identical to the other jurisdiction's.

And from a jurisprudential perspective, the current system creates the specter of inconsistent results. To be sure, there are some substantive differences between the county/city standards.[5] But where the controlling legal standard is the same, absent some materially different evidence produced in one of the hearings, a split result (i.e., one officer affirms a denial while the other officer overturns a denial) creates an inconsistency that does not enhance anyone's confidence in the fairness of the process.[6] And the appearance of fairness doctrine is a hallmark of the examiner system. Absent a different substantive legal standard, an applicant fit to drive in one place should be fit to drive in the other, and an applicant not fit to drive in one place should not be driving in either.

We have been writing about the need for a unified unitary appeal process since 2016. And while we have received indefinite assurances over the years that the executive branches of the county and city are working on a fix, it is now 2020. At a certain point, justice delayed becomes justice denied. A unified appeal process would put little strain on us—on those rare occasions where the substantive standard is materially different, a little extra analysis in deciding a combined appeal would be all in a day's work. And it would promote equity and social justice, improve administrative efficiency, and eliminate inconsistent hearing outcomes.

[5]For example, a conviction for driving under the influence of alcohol triggers mandatory license denial ("shall deny") for five years in the county and three years Seattle, which Seattle follows with a two-year discretionary denial period. So, for an applicant with a four-year old DUI conviction, we would affirm a denial of the county portion of the license outright but then would need to engage in an additional analysis of whether (balancing various factor) to sustain a denial of the Seattle portion of the license (the operative code language being "may deny"). In that scenario a split decision might be justified. We have yet to encounter that scenario, and that is not the inconsistency we discuss.

[6] For an example of a split result, see *Ahmed*, available at: https://www.kingcounty.gov/independent/hearing-examiner/case-digest/appeals/for-hire-enforcement/2018.aspx .

Last year was a busy year, but an invigorating one. We trust the above analysis was helpful, we welcome any questions or suggestion, and we look forward to a successful remainder of 2020.

Submitted March 11, 2020,

David Spohr, Hearing Examiner