KING COUNTY HEARING EXAMINER ANNUAL REPORT

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.

David Spohr, Hearing Examiner
Jessica Oscoy, Office Manager
March 15, 2024

King County

JANUARY – DECEMBER
2023

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OFFICE OF THE KING COUNTY HEARING EXAMINER

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OVERVIEW

The King County Hearing Examiner is appointed by the Metropolitan King County Council to provide a fair, efficient, and inclusive public hearing process.[1] 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 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 2023, analyzing examiner workload and compliance with various deadlines, and comparing 2023 to previous years. We describe two interesting cases from 2023, discuss judicial appeals, and review office initiatives. We close with discussions on recommended code updates.[2]

Case-wise, as compared to 2022, in 2023 we received 15% more cases, held 14% more hearings, and spent 72% more time in hearings (our longest time spent in hearings in at least a decade). Most of the new case uptick came from animal enforcement, for-hire licensing, and current use tax cases. In terms of how efficiently we processed cases, each year we set 95% as our compliance goal for each of the three deadlines the code sets. In 2023 we were 100%, 97%, and 92% compliant, respectively.

Beyond cases, we worked on several initiatives. Among these were staff spearheading the council's highly successful employee giving campaign, the undersigned participating in a culture change cohort, and substantial work on legislation. (Pages 12-18 discuss six land use items either in, or potentially addressable in, pending ordinance 2023–0440—right-of-way vacations and trails, inconsistent "grading" definitions, "cumulative" clearing and grading, regulatory interpretation appeals, zoning for small animals, and cell tower co-location radius—along with an update on three previous recommendations that became law in 2023.)

In sum, we appreciate the trust the council puts in us, and we remain committed to courtesy, promptness, and inclusivity in assisting the public to make full and effective use of our services. We continue striving to have an open, user-friendly, and accessible hearing process, and to timely issue well-written, clearly-reasoned, and legally-appropriate determinations.

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[1] **KCC 20.22.020.A**. The office of hearing examiner is created and shall act on behalf of the council in considering and applying adopted county policies and regulations. The 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, due process, openness, and equity in public hearings.

[2] **KCC 20.22.310**. 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 regulations. The office shall electronically file the report by March 1 of each year with the clerk of the council, who shall retain the original and provide an electronic copy to all councilmembers.

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 case type, at the end of a proceeding the examiner may issue the county's final decision or a recommendation to council (who then make the county's final decision). As to subject matter, the examiner has jurisdiction over eighty distinct matters, in arenas as varied as electric vehicle recharging station penalties, discrimination and equal employment, and open housing. However, the examiner's caseload mainly consists of several common types. A list of those common case types, categorized by the decision-making process, follows.

One significant categorical change occurred in 2023. Historically, one challenging an examiner decision on a plat (a subdivision) had to appeal first to council, with council making the county's final decision which a party could then appeal to superior court. In July 2023, the code was amended so that an examiner decision on a plat—like every other examiner decision—is appealable directly to superior court. (Note, because the change occurred mid-year, it makes classifying 2023 subdivision cases wonky. While the immediately-below list reflects the current law, to keep the reporting apples-to-apples, we treat all 2023 subdivision discussions elsewhere in this report as if they were all received and heard under the previous system.)

EXAMINER RECOMMENDATIONS TO THE COUNCIL (KCC 20.22.060)[3]

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 reclassification
- Special use permit

EXAMINER DECISIONS (KCC 20.22.040)

Code compliance enforcement:

- Animal care and control (KCC ch. 11.04)
- For-hire transportation (KCC ch. 11.04)
- Land-related compliance (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
- Pre-application determinations
- Shoreline substantial development permits
- Temporary use permits

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

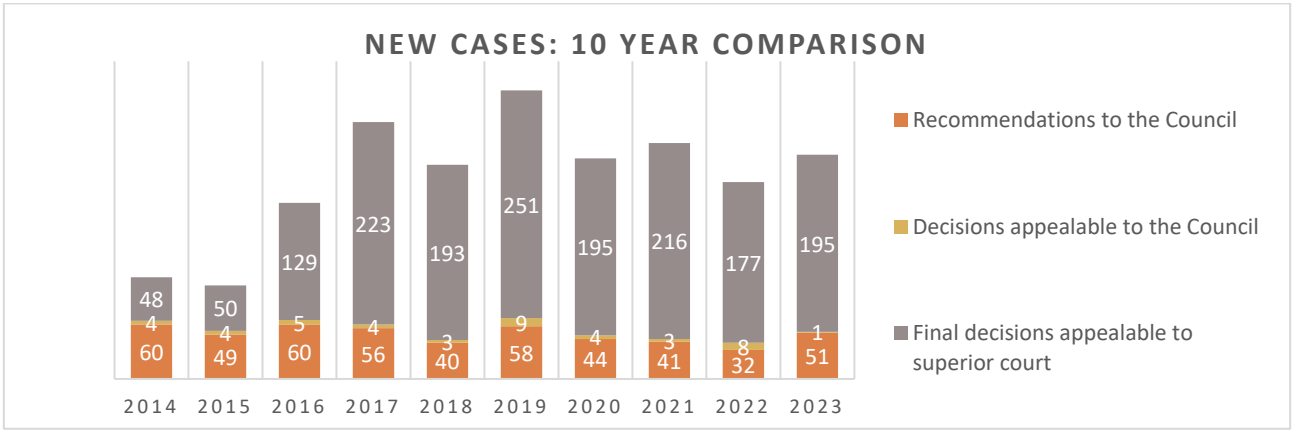
- Preliminary plats
- Plat alterations

[3] **KCC 20.22.030.C**. For the purposes of proceedings identified in K.C.C. 20.22.060, the public hearing by the examiner shall constitute the hearing required by the King County Charter by the council.

NEW CASES

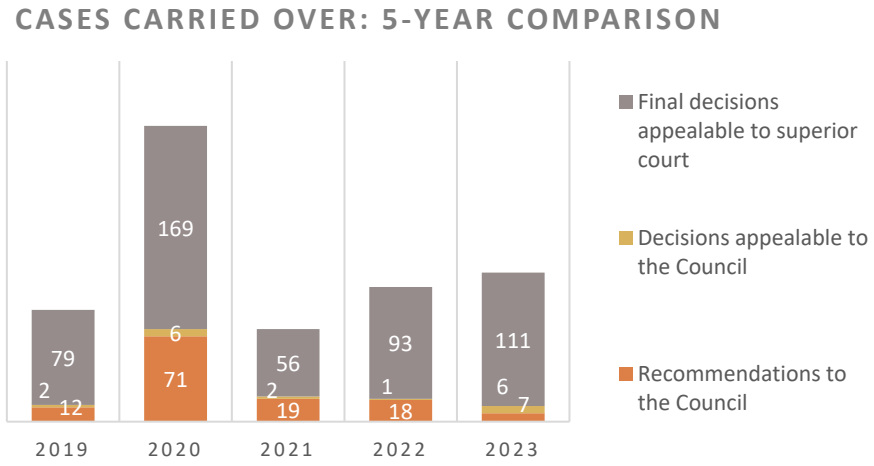
We received 30 more cases in 2023 than in 2022, a 14% increase. There were fewer new preliminary plats (as described later, 2023 was an especially heavy plat year, but mostly involving matters arriving in 2022) and fee and penalty waivers. Conversely, our animal enforcement, for-hire driver, and current use tax cases increased.

NEW CASES JANUARY—DECEMBER 2023	Number of Cases
RECOMMENDATIONS TO THE COUNCIL	
Current Use Application	44
Road Vacation Petition	6
Rezone Application	1
DECISIONS APPEALABLE TO THE COUNCIL	
Preliminary Plat Application	1
FINAL DECISIONS	
Animal Services Appeal	150
Code Enforcement Appeal	17
For-Hire Appeal	8
Critical Areas Exception Appeal	4
Water and Sewer Appeal	3
Code Enforcement Fee Waiver Appeal	3
Waste Management Appeal	3
Personnel Board Appeal	3
Stop Work Order Appeal	2
Conditional Use Permit Appeal	1
Preliminary Determination Appeal	1
Total	*247*



Cases Carried over from Previous Years

At the end of each year, we carry some cases into the next year. A small few are matters on appeal (we stay our case while a court considers). Some we stay at the joint request of the parties (typically while the parties try to find an amicable resolution). And some are actively moving through the hearing process (typically cases we receive towards the end of a calendar year).[4]



For the 124 cases we carried from 2022 into 2023, the chart below depicts the year each case reached us; 93 came to us in 2022, with the remainder held over from earlier years. Note, several of those are adult beverage-related cases where the validity of the county's 2016 adult beverage ordinance (and thus what substantive standard applies) has been in eight years of flux; our supreme court is set to hear the case in May.

YEAR CASE OPENED	2009	2015	2017	2018	2019	2020	2021	2022
Recommendations to the Council							1	6
Decisions appealable to the Council								6
Final decisions appealable to superior court	1	1	2	6	7	3	10	81

[4] Note, the anomalous number carried over from 2019 into 2020 was partly a caseload issue (2019 saw the highest number of new examiner cases filed in the 2000s) and party because our then-office manager departed near the end of the calendar year, the time in the cycle we normally close out cases.

PROCEEDINGS

Hearings: We held 21 more hearings (where we swear in witnesses and take testimony, accept exhibits, and entertain argument) in 2023 than in 2022, a 14% increase. And our time spent in hearings increased by 72%.

We 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 themselves are still crucially important to those parties. But not all case types require the same level of examiner involvement, as the average-time-per-hearing chart below illustrates.

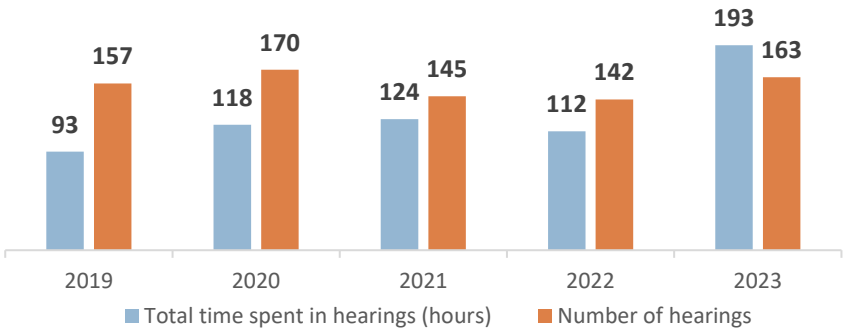
Conferences: In addition to actual hearings, we also hold prehearing conferences and status conferences, described below.

For some cases we schedule—either on our own motion or at a party's request—a *prehearing* conference.[5] At these conferences, we determine whether to proceed directly to hearing or whether to pursue an alternative track; if we are headed to hearing we then clarify the issues, consider discovery needs, and schedule hearing dates and pre-hearing deadlines.

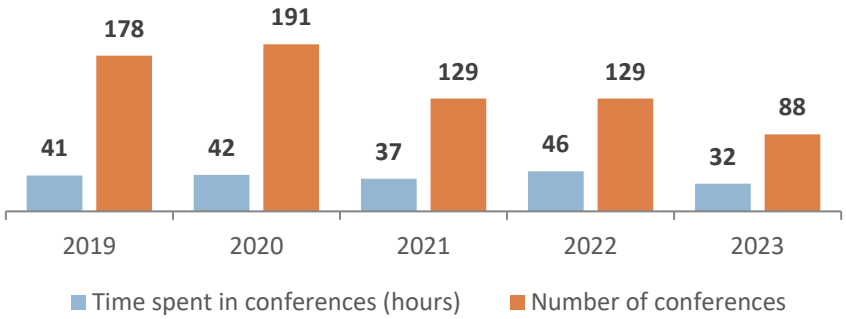
When the parties decide to put off an adversarial hearing (typically while they attempt an amicable resolution), we "continue" their case. We then schedule periodic

HEARINGS JANUARY—DECEMBER 2023	Number of Hearings	Average Minutes
RECOMMENDATIONS TO THE COUNCIL		
Current Use Application	32	7
Road Vacation Application	6	43
Rezone Application	1	324
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary Plat Application	8	229
FINAL DECISIONS		
Animal Services Appeal	92	73
Code Enforcement Appeal	9	129
For-Hire Appeal	5	25
Penalty Waiver Appeal	4	88
Stop Work Order Appeal	1	172
Fee Waiver Appeal	3	58
Alteration Exception Appeal	2	105
Total	163	71

NUMBER OF HEARINGS AND LENGTH (HOURS): 5-YEAR COMPARISON



NUMBER OF CONFERENCES AND LENGTH (HOURS): 5-YEAR COMPARISON



[5] **KCC 20.22.120**. On the examiner's own initiative, or at the request of a party, the examiner may set a prehearing conference. At least seven days before the prehearing conference, the examiner shall transmit notice of the date of, and how to participate in, the prehearing conference.

status conference calls (typically at 90-day intervals). These conferences can ensure we stay on top of things, keep parties' feet to the fire, and more 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 determination of the merits.

By design, we held fewer conferences in 2023 than in previous years. For Code Enforcement cases where the appellant requests time to proceed through the permit process to come into compliance, and for Animal Services cases stayed due to possible criminal charges, we shifted our practice of how we receive status updates. We found over time that, in many such instances, the parties only had a minimal update (like, "The prosecutor is still weighing whether to bring criminal charges" or, "We submitted a pre-application meeting request on [date] and that meeting is scheduled for [date]"), the conference only lasted a few minutes, and there was little value we could add.

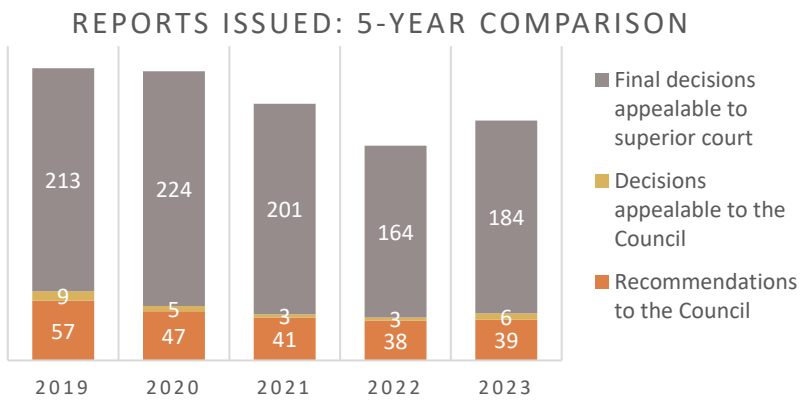
In 2023, we shifted to a greater reliance on requiring periodic email updates. It has proven more time-efficient for our office and the parties. There is no longer a need to expend effort: finding a conference time that works for everyone, staff and the examiner drafting and distributing a written notice, and parties and the examiner preparing for and attending a conference, only to repeat these steps every 90 days. We have freed up staff and examiner time for work with higher returns. The email updates we receive from the parties are *usually* sufficiently detailed and the parties are on the same page about next steps.

Usually, but not always. If the parties are nonresponsive, progress is inordinately slow, or there is a stalemate or confusion (such as how someone navigates the permit process), we promptly hold a conference to focus the parties, clarify and provide guidance, and determine future steps. In such scenarios, a conversation is beneficial and well worth the effort. Thus, we still hold plenty of status conferences. We have simply become more discerning on which scenarios could truly benefit from a conversation (versus an email update), instead of continuing with periodic status conferences as our default. It has created a more productive environment.

System Tests: To accommodate persons not knowledgeable or comfortable using Zoom for remote hearings, we include in our hearing notice the option to schedule a system test with would-be hearing participants to go over Zoom features, test audio and video capabilities, and answer any procedural questions. We held seven system tests in 2023.

Reports Issued

At the conclusion of a case, we issue a final report wrapping up the matter. (As described on page 2, depending on the case type, at the end of our process we either issue the county's final decision or make a recommendation to council.)



Sometimes we issue a summary dismissal (such as when the parties settle a dispute). Sometimes, based on taking sworn testimony, documentary evidence, and argument at a hearing, we craft detailed findings of fact and conclusions of law analyzing and deciding the merits.[6] And sometimes we write something in-between, such as a dismissal explaining why we have no jurisdiction to tackle the merits. We issued 229 reports in 2023, an 11 percent increase from 2022.

SPOTLIGHT CASES

Going beyond the numbers, we typically describe an interesting case or two in each annual report, especially where there is a policy implication for the council to consider. We report on two this round. And we also discuss new developments in previously reported judicial appeals of past examiner decisions.

ROAD VACATIONS AND PUBLIC TRAILS

If this subsection sounds déjà vu, kudos to you for regularly reading our annual reports! We previously highlighted a case involving a "road vacation" petition—the procedure where owners of land abutting public rights-of-way seek to expand their acreage by acquiring the right-of-way area. We noted that the code requirement that Roads Services study, "Whether it is advisable to preserve all or a portion of the right of way for the county transportation system of the future" was broader than "road system" and that trails are a part of the County's transportation system but not of its road system. Over Roads Services' objection we found that, due to public trail potential, vacation was not in the public interest, and we recommended against vacation.[7] Council adopted our recommendation and denied that petition.

In 2023, Road Services again recommended vacation in a scenario where the case against was even stronger. While in the 2021 case the public was not currently using that stretch of right-of-way (neighbors, trail interests, and Parks personnel only testified about its *potential* trail use), the 2023 case involved a public right-of-way the public was *already* using as a trail. And while the negative trail impacts in the 2021 case would only have been an incidental outcome of vacation (the genesis for the petition was a dispute involving two abutting owners), in the 2023 case the petitioners were explicitly *targeting*, and trying to bar, the public from walking the public right-of-way. Over Roads Services' objection we found that, due to public trail use, vacation was not in the public interest. We recommended against vacation, a recommendation Council adopted.[8]

As described on page 12, we recommend that Council clarify the language in the pending 2023-0440 ordinance to create a more productive hearing process the next time trail use arises in a road vacation petition.

[6] **KCC 20.22.030.A**. The examiner shall receive and examine available information, conduct open record hearings, and prepare records and reports, including findings and conclusions, and, based on the issues and evidence [issue a determination or take other action].

[7] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2727_GHR_LLC_Michael_Ritter.ashx?la=en.

[8] https://cdn.kingcounty.gov/-/media/king-county/independent/governance-and-leadership/government-oversight/hearing-examiner/documents/decisions-recommendations/applications/road-vacation/2023/v-2736_yi_lee_.pdf?rev=4d0a165ad078489fac9012311ba97798&hash=D5B3C6441FC613F2DC4289EC2B233C4D.

Rezone Requirements

We entertained a legally, factually, and policy-y[9] complex application seeking to upzone parcels from one home per ten acres (RA-10) to one home per five acres (RA-5). The case had it all:

- Code language requiring a rezone classification be consistent with the comp plan, versus well-established case law that a comp plan is only a general blueprint and a planning guide, not a "precise scheme" or land use decision-making tool, a plan tribunals usually require only general (not strict) conformity with. We observed that such jurisprudence could have significant implications for an open-ended reference to consistency with the comp plan, currently 623 pages anyone could cherry pick from, but not where a comp plan policy told us *precisely* what three policies to apply to our scenario.
- Legislative history on when and how the rural forest focus area was placed on the applicant's properties (contrary to applicant's assertion, decades before their purchase and adopted by ordinance after an open public process), and the intersection between those focus areas and the county-wide public benefit rating system (which reduce property taxes for forested properties).
- A policy, later codified, that RA-10 zoning is appropriate for lands within one-quarter mile of a forest production district. That led to two explorations tracks of analysis. Legally, we rejected the assertion that because the abutting forest was slated for recreation and habitat v. commercial timber harvesting, it was not "actual" or "true" forest production district; we noted that while other parts of the code and comp plan used terms such "approved site" and "managed for," the drafters chose "district"—a long-term zoning designation, not a description of current or even planned uses. And factually, the testimony and exhibits showed that most of the property was well within a quarter mile of the nearest actual commercial forestry operation.
- That was enough to definitively bar the rezone, but we addressed and agreed with applicant on a different policy (R-308). First, and contrary to agency's assertion that the subject parcels were "environmentally constrained," we found that (having reviewed hundreds of rural properties), the subject properties' environmental restraints were garden-variety for the rural areas. And we rejected the executive branch's request to interpret the policies' actual inquiry into "predominant *lot size*" in the surrounding area (most lots in the subject parcels' vicinity were well under 10 acres) as somehow equivalent to "predominant *zoning* designation" (most lots in the subject parcels' vicinity were zoned RA-10).

We closed by noting that if the executive branch believed the *consequences* of R-308(d), as currently written—with the touchstone being "predominant *lot size*"—were as profoundly negative as asserted, it should petition the council to amend the language to something better for the next comp plan. The latest comp plan draft we reviewed addresses that policy.

Appellate Activity

An examiner's determination (or, in scenarios where an examiner determination reaches the council, the council's determination) almost always wraps up the matter. However, in a tiny fraction of cases a disputant seeks judicial review. We review 2023's appellate activity below.

[9] "Policy-y" is obviously not a word, but it makes for a more parallel sentence construction here, and Shakespeare is credited with creating or introducing over 1700 words into the English language. Only 1699 left for us to match the Bard. Our next entry to the lexicon: people say "toast" to describe feeling burned out, losing, or done with it all; why not say "bread" as its antonym when feeling fresh, positive, and ready to take on the world. Only 1698 to go.

After sustaining a third viciousness designation for ***Sullivan***'s dog, we upheld an order removing the dog from King County, though we reduced the monetary penalty and gave Sullivan additional time to rehome the dog. Sullivan appealed. The superior court denied his petition, a decision Sullivan challenged. Sullivan recently filed his opening brief with the court of appeals.

Nguyen repeatedly proved unable or unwilling to keep his dog from trespassing on the neighbor's property and harassing their goats—there were associated violations for *six* separate incidents in a five-month period. The code standard at the time allowed for removal after *three* violations in a 12-month period. A *pro tem* examiner sustained Animal Services' order removing the dog from King County. Nguyen sought a writ, but the superior court dismissed his petition.

Between 2022 and 2023 we issued decisions in six different appeals filed by ***Schmidt***. The main event involved the correctness of Local Services' decision not to renew Schmidt's dwelling permit. In our June 2023 decision we pointed to the then-rural ombuds abandonment of neutrality and minimization of Schmidt's egregious behavior. We described Schmidt's flagrant disregard for examiner rules, harassment of Local Services staff (including graphic language, misogynist insults, and consistently racist slurs), and repeatedly going outside the approved permit plans and violating the hours of operation. And we expressed shock that Local Services had abandoned its merits defense of why it elected not to renew Schmidt's permit and instead tried (at hearing) to re-pitch its nonrenewal decision as a *non*-decision based on code language management claimed was "self-executing." That was a code interpretation Local Services had never cited in our almost 20 years as a third-party neutral, that its own Building Official had never seen used, that management was unable to cite even a single example of it being employed in a similar scenario, that was still not (as of our hearing) adopted Local Service policy for any *other* present or future applicants, and that was undermined by its own express, written, and somewhat persuasive, balance-of-factors analysis management had earlier presented as its actual rationale for its nonrenewal decision. Local Services having "completely torpedoed" its own case, we overturned its non-renewal of Schmidt's permit.

Schmidt filed a motion for clarification and Local Services filed the motion for reconsideration. We clarified our decision and denied Local Services' motion. Schmidt's Pierce County court challenge sought damages from Local Services for allegedly arbitrary and capricious, equal protection-denying, and due process-violating actions. And Local Services challenged our decision in the King County courts. The parties settled both matters relatively quickly.

A *pro tem* examiner reviewed and approved (subject to detailed conditions) four separate ***Fall City preliminary plat*** (subdivision) applications in this rural unincorporated town. A non-profit community organization appealed each *pro tem* decision to council. There were two main bones of contention: whether it was lawful for the projects to rely on a Large Onsite Septic System (LOSS) (meaning a single septic system for an entire each subdivision versus an individual septic system on each lot of a subdivision) and whether the design of the projects was consistent with adopted rural character requirements. The organization and the developer reached resolved the LOSS issue and one of the four plat appeals, leaving Council to decide the rural-character issue for the remaining three plats. Council affirmed the *pro tem*'s decision. The community organization has appealed the matter to superior court.

Finally, ***McMilian*** is a long-running code enforcement dispute involving abutting sites historically used as a wrecking yard but located in a single-family residential zone. In November 2022, the superior court denied

Local Services' motion for clarification. In December 2022, a *pro tem* examiner denied Local Services' request that the *pro tem* dismiss the matter without the examiner reaching the merits. As to the merits (which involved comparing historical v. more current building square footages), McMilian submitted square footage calculations but (as the *pro tem* phrased it), "Regrettably, [Local Services] chose not to engage the exercise to which it had agreed" and declined to submit its own calculations or even to analyze McMilian's. Unsurprisingly, in May 2023 the *pro tem* found in McMilian's favor. Local Services elected not to appeal the *pro tem*'s determination. Barring some future twist, the examiner's role is at an end.

Compliance with Code-Mandated Deadlines

Statutory requirements impose deadlines for swift and efficient examiner case processing. The code-established deadlines discussed below represent our three principal time requirements. We annually set 95% as our compliance goal for each of the three deadlines. In 2023 we were 100%, 97%, and 92% compliant, respectively.

Deadline One—45 Days from Appeal Transmittal to First Proceeding

For appeals, the examiner must hold a conference or hearing within 45 days of receiving the appeal packet from the agency, 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, for longer.[10] In non-waiver cases, we held a proceeding within 32 days and were compliant in 100% of our cases, exceeding our 95% compliance goal.

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 receiving the appeal packet.[11] For applications, the deadline is 90 days from receiving council's referral.[12] As with deadline one, the examiner (on examiner motion or on the motion of one of the parties) can extend this deadline for up to 30 days or, if the parties jointly request or the examiner details the rationale, longer.[13] For non-waiver appeals, we issued our decisions an average of 50 days of receiving the appeal and were 100% compliant.[14] For all applications, we issued our recommendations an average of 53 days after receiving the referral and were 87% compliant. Combined (and because we received so many more appeals than applications) we were compliant in 97% of our cases, exceeding our 95% compliance goal.

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[10] **KCC 20.22.100.B.1**. The examiner shall hold a prehearing conference or a hearing within forty-five days… of receiving [the appeal packet].

[11] **KCC 20.22.100.B.1**. The examiner shall… complete the appeal process, including issuing a determination, within ninety days of receiving [the appeal packet].

[12] **KCC 20.22.100.C**. For applications…, the examiner shall complete the application review, including holding a public hearing and transmitting a determination, within ninety days from the date the council refers the application to the office of the hearing examiner.

[13] **KCC 20.22.100.F**. The examiner, upon notice to the parties, may extend the deadlines in this section for up to thirty days. The examiner may extend the deadlines in this section for over thirty days, either with the consent of all parties or where the examiner details why good cause supports such an extension or stay.

[14] Unlike *applications*, where we occasionally push back a hearing a tad (say, scheduling a pre-hearing conference to clarify matters before proceeding to the public hearing, thus bumping back final resolution by a few weeks), for some *appeal*s, such as where we keep a code enforcement case while the appellant works through a complex permitting process(s) to resolve the alleged violation, or our adult beverage cases stayed while the validity of the underlying ordinance winds its way through the court system, such scenarios can take *years* to finally resolve. Averaging those into our "days between appeal receipt and final examiner decision" calculations would render the "average" result essentially meaningless, because a tiny number of cases would swamp the overwhelming majority of cases.

Deadline Three—10 business days from hearing close to report

The last deadline covers both appeals and applications; it requires the examiner to issue findings and conclusions no later than ten business days after completing a hearing.[15] For appeals, we issued a decision an average of six days after the record closed; we were compliant in 91% of our appeals. For applications, we issued a recommendation an average of nine days after the record closed; we were compliant for 98% of our applications (the one outlier being the complex rezone case described on page 8). Combined, we were compliant in 92% of our cases, falling short of our 95% compliance goal.

Office Initiatives

Employee Giving Program (EGP)

Our legislative secretary, Lauren Olson, again volunteered to lead the council's Employee Giving Program (EGP) for 2023 (as she had for 2022). Jessica Oscoy, our office manager, also reprised her work as an ambassador. Lauren led a group of eight ambassadors in hosting events and spreading awareness about EGP. They held a Halloween event raising money for the Ukrainian Community Center and a holiday gift fundraiser benefitting the Newborn Nurse at a Pediatric Care Center. Lauren and Jessica spoke at all-staff meetings to answer questions and promote events. Lauren gained project management, leadership, and organizational skills as the lead ambassador. Additionally, Jessica Oscoy organized a volunteer day for ten of our branch employees at Kubota Gardens. With their efforts, the council received the award for highest volunteer percentage for departments under 250 employees! We appreciate Jessica and Lauren's hard work orchestrating EGP in 2023.

Culture Change

While Lauren and Jessica were spearheading the council's charitable efforts, I was fortunate enough to join in the council's "culture change" work, a staff-driven effort to make the legislative branch a more supportive, equitable, and enjoyable place to work. As part of a facilitated cohort that spent many weeks learning and sharing, I gained numerous valuable insights, one of which I will share here.

The most common frustration expressed was that we in managerial positions make it very hard for our reports to preserve blocks of time where they can efficiently drill down and focus on the work we ourselves have assigned them, because we constantly interrupt them. While there are rare occasions where I truly need someone to interrupt their focus and address my issue immediately (like, "The hearing is starting in five minutes and I need…."), I now start out 90% of my communications by texting a simple, "Hey, give me a ring the next time you're at a good stopping point." The person does not need to break focus and later put the pieces back together and regain their momentum. It has meant minor discomfort when I must wait a little for staff to get back to me, but it has made for a happier, more efficient, and more equitable office.

Regulatory Work

Unquestionably 2023 was a busy year for potential code change work. In addition to those involving regulatory recommendations discussed in the following section, we also spent time analyzing proposals for

[15] **KCC 20.22.220.A.1**. Except [for site-specific land use map amendments], within ten business days of concluding a hearing or rehearing, the examiner shall make and transmit a written determination.

us to hear appeals or applications involving requirements for certain businesses to accept cash payments, and to assume responsibilities for the Personnel Board (a topic we will discuss in next year's annual report). And in response to July's ordinance 19648, which amended the examiner code (KCC chapter 20.22), we invested (and are continuing to invest) significant effort to amend our examiner rules, both to synch with the new code and to make other improvements.

Regulatory Change Recommendations

The code requires our annual reports to identify any needed regulatory clarifications.[16] In addition to the rezone comp plan recommendation explained on page 8 and already addressed in the latest comp plan draft, we discuss six land use items either in, or potentially addressable in, pending ordinance 2023–0440: right-of-way vacations and trails, inconsistent "grading" definitions, "cumulative" clearing and grading, regulatory interpretation appeals, zoning for small animals, and cell tower co-location radius. We then update three previous recommendations that became law in 2023, two with a successful conclusion (the examiner code and the animal code) and one (for-hire driver appeals) with a bittersweet ending.

Road Vacations (Addressable in Ordinance 2023-0440)

As described on page 7, in 2021, relying in part on code language requiring Road Services to study, "Whether it is advisable to preserve all or a portion of the right of way for the county transportation system of the future"—language broader than "road system," in that trails are a part of the County's transportation system but not of its road system—over Roads' objection we found that, due to public trail potential, vacation there was not in the public interest. We recommended against vacation, a recommendation Council adopted.

As part of a package of other code amendments in what became Ordinance 19648, the Executive proposed in early 2023 to change "county transportation system of the future" to "county road system of the future." The Council rejected that change, with the Council sponsor explaining her trail-related reasoning against the change. The amendment was adopted unanimously, signaling the Council's continuing commitment to trails.

In 2023, Road Services again recommended vacation in a scenario where the case against vacation was even stronger. While the 2021 case only involved a right-of-way with public trail *potential*, the 2023 case involved a public right-of-way the public was *already* using as a trail. And while the negative trail impacts in the 2021 case would only have been an incidental outcome of vacation, in the 2023 case the petitioners were explicitly targeting, and trying to bar, the public from walking the public right-of-way. Over Roads Services' objection we found that, due to active public trail use, vacation there was not in the public interest. We again recommended against vacation, and Council again adopted our recommendation.

In the current ordinance 2023-0440, which is expected to be adopted by the end of 2024, the Executive has once again proposed changing "county transportation system of the future" to "county road system of the future." If the Council has amended its position on trail importance, it can adopt the proposal, and we will adjust our approach for future applications. But if the trail commitment remains, we suggest council consider not only keeping "transportation system," but strengthening K.C.C. 14.40.0104.B.4's language to

[16] **KCC 20.22.310**. The office of the hearing examiner shall prepare an annual report to the council [that shall] identify any need for clarification of county policy or regulations.

something like, “Whether it is advisable to preserve all or a portion of the right of way for the county transportation system of the future, including use as a public trail.”

With that type of clear direction, perhaps for the next road vacation petition involving actual or potential trail use, the issues can be identified early enough in Local Services’ review process for all the stakeholders to work through an *alternative* trail alignment to propose *before* the case reaches us and we hold the public hearing. For example, we have previously recommended, and council has adopted, vacation where the petitioner offered an *alternative* right-of-way elsewhere on their property to make up for the to-be vacated portion. Crystal clear language might save future petitioners, neighbors, Local Services, the examiner, and council from going through a lengthy process that winds up essentially sending everyone back to the drawing board to re-think the trail issue.

Inconsistent Grading Definitions (Addressable in Ordinance 2023-0440)

The zoning code, which houses the critical areas chapter (KCC chapter 21A.24), currently employs a definition of “grading” as “any excavation, filling, removing the duff layer or any combination thereof.” KCC 21A.06.565. Conversely, the grading code currently 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.

The proposal we have seen would amend KCC 16.82.051 to, “Where definitions in K.C.C. 16.82.020 differ from the definitions in K.C.C. chapter 21A.06, the definitions in K.C.C. 16.82.020 shall control.” That would technically answer how we treat grading with a critical area or buffer, but it would be cleaner to also amend KCC 21A.06.565—either striking it as superfluous or having it mirror KCC 16.82.020.O—so that we no longer have two competing “grading” definitions on the books to potentially create confusion.

Clearing And Grading Thresholds (Addressable in Ordinance 2023-0440)

Our code’s default is that no one may do any clearing or grading without a permit. KCC 16.82.050.B. “Grading” is broad (including any change to the existing soil cover, both vegetative and nonvegetative) and “clearing” even broader (including not just chopping down actual trees but cutting or removing *any* vegetation or other organic material). The code does carve out exemptions, most of which set some fixed date baseline or allow property owners some additional 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 from certain areas (KCC 16.82.051.C.8);

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 16.82.150.A.2.a). The annual allowance makes intuitive sense, and pegging other limits to the date, say, of the modern clearing and grading code and the Critical Areas Ordinance (both January 1, 2005), creates a relatively fixed, objective baseline.

In contrast, the applicable permit-exemption for:

- excavating or placing fill is whether it "cumulatively over time" involves over 100 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 other critical areas is "cumulative clearing of less than 7,000 square feet annually" (KCC 16.82.051.C.7).

have no baseline. In past reports we have noted that, without a relatively clear baseline like "since January 1, 2005," those three exemptions:

- are harsh (most sites with a pre-existing home will typically already have over 7,000 square feet of "cleared" space, meaning something like weed whacking even a tiny new area could qualify as a violation without a permit);
- are murky (does "cumulative" mean all the clearing since the dawn of time? what does "*cumulative* clearing of less than 7,000 square feet *annually*" even mean?);
- seem inconsistent with other code provisions (why allow the permit-fee, post-2005 addition of 2,000 square feet on impervious yet have zero tolerance for *any* new clearing?); and
- have led to understandable public confusion and anger (appellants upset at having to apply for a permit for even relatively minor clearing work because the pre-existing condition of the property they purchased already put them in the any-new-clearing-needs-a-permit box).

The latest version of KCC 16.82.051 we reviewed addresses one of the KCC 16.82.051.C's three "cumulatives," namely .3's, "Cumulative clearing of less than seven thousand square feet on a single site since January 1, 2005...." We suggest keeping consistency and amending .1 to something like, "Excavation less than five feet in vertical depth, or fill less than three feet in vertical depth that, ((~~cumulatively over time, does~~)) since January 1, 2005, has not involved more than one hundred cubic yards on a single site," while amending .7 along the lines of "((~~Cumulative~~))Annual clearing of less than seven thousand square feet ((~~annually~~))...."

Regulatory Interpretations (Addressable in Ordinance 2023-0440)

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 certain pending applications that will ultimately reach the examiner, the director's decision is appealable as part of the appeal process for the underlying project. Similarly, if the request relates to a code enforcement action

where the department is issuing an enforcement action, the decision is appealable as part of the appeal process for the code enforcement action. KCC 2.100.050.B.

However, beyond the above scenarios, a director's decision is not appealable to the examiner. 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 an enforcement action, 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, stop work order, citation, etc.*], I'll appeal it, 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 there was troubled that people had to subject themselves to enforcement penalties to obtain an appealable ruling on a regulation's applicability. And having a formal enforcement order on title can complicate the owner's ability to refinance the property to obtain the funds to make the very corrections the county is demanding. 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 applicants for certain (but not all) permit cases.[17] During the permit process, if the applicant receives a negative preliminary determination that a proposal is precluded, 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 certain regulatory disputes 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 dispute boils down to a regulatory interpretation. This is especially true because for most code interpretations a department section *other* than Code Enforcement is essentially driving the bus. We might be able to offer clarity that wraps up a dispute quicker.

Small Animals (Potentially Addressable in Pending Ordinance 2023-0440)

We raise three issues related to KCC 21A.30.020.

[17] KCC 2.100.050.B could benefit from clarity on if or how permit applicants can get a regulatory interpretation challenge to an examiner. The "if the development project is subject to an *administrative appeal,* any appeal of the code interpretation shall be consolidated with and is subject to the same appeal process as the underlying development project*"* explicitly covers Type 2 land use types (for which the agency issues a decision and the examiner entertains an appeal). But the agency does *not* issue an appealable decision for Type 3 and 4 land use types, only a *recommendation* to the examiner, who then holds an *application* hearing. Presumably the drafters meant to include Type 3 and 4 permits, so something like, "if the development project subject to ((~~an administrative appeal~~)) hearing examiner review, ((~~any appeal of~~)) challenges to the code interpretation ((~~shall be~~)) are consolidated with and ((~~is~~)) are subject to the same ((~~appeal~~)) process as the underlying development project" might make that clearer.

The first is just some beneficial clean-up. For example, KCC 21A.30.020 is somewhat inconsistent with the new KCC chapter 11.04, especially when it comes to pets (cats and dogs) and hobby kennels and catteries. It has some other ambiguities and less-than-ideal wording that could use some wordsmithing.

Second and substantively, 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) be kept outside. We reviewed an appeal where an 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). That seemed odd, given that unincorporated areas are usually less (or at least not more) restrictive than cities when it comes to animal husbandry.

And third, and keeping with the chicken theme, we note that some jurisdictions restrict roosters, and several of our animal noise enforcement appeals have involved rooster-related noise. Roosters have been reported to emit up to 130 dB, more than the 90 dB reported for dogs. 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%.

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 (from any source) 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 a data point from our jurisprudence.

Cell Tower Co-Location (Potentially Addressable in Pending Ordinance 2023-0440)

As discussed in last year's report, in 2022 we entertained a cell tower-related appeal that juxtaposed *broad* policy language about discouraging single-use cell tower proliferation and strongly encouraging co-location (i.e., siting new telecommunication facilities on existing structures) with *narrow* code language (KCC 21A.27.080.A) that only requires review of existing sites within 0.25 miles of that proposed new tower—regardless of whether existing sites over 0.25 miles might be physically and technically feasible for co-location and consistent with service quality and access.

We closed our decision by explaining that:

> The 0.25-mile radius limitation may be good or bad policy. If the Council or Local Services believes that the co-location and anti-proliferation policies of the Comprehensive Plan would be better served by casting a wider net, requiring applicants to scope out a broader swath of territory, allowing Local Services to analyze a more robust area, and authorizing Local Services to deny an application based on existing cell towers across a greater expanse [than only a 0.25-mile radius], then Godspeed re-writing the code.

The latest version of 2023-0440 includes some proposed, cosmetic changes elsewhere in KCC 21A.27, but not to section .080. As noted earlier, because we summarily dismissed last year's appeal (as the existing structure was more than 0.25 miles away from the proposed new structure), we never had an opportunity

to wade into the merits of what was physically or technologically feasible or to obtain any technical insight. It might or might not be addressable in 2023-0440.

Animal Code (Addressed in Ordinance 19638)

Sweeping amendments to the animal code passed last year. There was some confusion immediately post-passage in those contract cities that had not previously adopted KCC Title 11 as their standard. For example, we dismissed (without prejudice) many notices and orders citing the "potentially dangerous" or "dangerous" designation, when as of the date of the alleged violation that city still had the old "vicious" designation, requiring Animal Services to re-issue a notice and order and re-start the appeal window. As of this writing, only Shoreline and Woodinville still have not brought their codes into compliance. And while no code is perfect, we appreciate that council provided us with a substantially sounder code to apply.

Examiner Code (Addressed in Ordinance 19648)

A new and improved version of the examiner code also passed last year. In response, we have already drafted amendments to our examiner rules which we will send out for comment this spring and then send to council to adopt by motion. Rules updates would be especially advantageous given our Covid-inspired shift to electronic filings and virtual hearings.

For-Hire Driver Appeals (Partially Addressed in Ordinances 19699 and 19700)

In every annual report since 2016, we decried the regime that forced for-hire drivers with (or applying for) a dual county/Seattle license, and receiving a *single* county letter suspending, revoking, or denying their dual license, to appeal twice—to us to decide the county portion of the letter and to Seattle to decide the city portion of the same 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 in 10 days, ours a more generous 24) regarding the same underlying facts and typically the same controlling legal standard, then attempting to navigate two administrative ladders and two sets of rules of procedure. And with a large percentage of (would be) drivers having limited English proficiency, no attorney, and requiring an interpreter at hearing—if the driver can even figure out how to timely appeal to get two hearings—the scheme raises significant equity and social justice concerns.

From an administrative perspective, these parallel appeal processes increase staff time and cost, as Licensing must prepare for and participate in parallel administrative hearings. And two hearing offices must process appeals, 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 an identical legal standard.

And from a jurisprudential perspective, the current system creates the specter of inconsistent results—two tribunals applying an oft-identical legal standard and reaching different results, eroding public confidence in the fairness of the system.

Over the years we repeatedly asked Licensing to peel off and address the discrete, uncontroversial, and commonsense changes to streamline the for-hire driver appeal process, instead of forcing an equitable, efficient, and unitary appeal process to continue taking a back seat to the far more complex, comprehensive, and controversial for-hire regulations the county and Seattle were working on for years.

But that did not happen. Those comprehensive changes took so long to complete that the state eventually stepped in and preempted any local changes related to transportation network companies (TNCs), essentially ossifying that duplicative appeal process. So, while 2023 saw ordinance 19700 create a simplified system for appeals of for-hire license actions for taxi and non-TNC for-hire drivers ("heard by the hearing examiner of the jurisdiction issuing the license action"), council was barred from making a similar change for TNC drivers when it passed ordinance 19699. Until the state provides drivers, local agencies, and their examiners with some relief, Uber and Lyft drivers will need to continue navigating two hearing processes.

CONCLUSION

In sum, 2023 was a rewarding year. We trust the above analysis was helpful, and we welcome any questions or suggestions.

Submitted March 15, 2024

David Spohr, King County Hearing Examiner