King County

ANNUAL REPORT OF THE KING COUNTY HEARING EXAMINER

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.

JANUARY – DECEMBER 2022

David Spohr, Hearing Examiner
Jessica Oscoy, Office Manager
March 1, 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 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 2022, analyzing examiner workload and compliance with various deadlines, and comparing 2022 to previous years. We describe our most interesting cases of 2022, discuss judicial appeals, and review office initiatives. We close with one new code recommendation, as well as provide an update on several proposed code amendments we previously reported on.[2]

Case-wise, in 2022 our total number of hearings actually stayed relatively constant from 2021. But the breakdown of new cases shifted. For *non*-Animal Services cases, our workload went up, with significantly more preliminary plats, land use fee and penalty waivers, and several adult-beverage cases. Yet our Animal Services cases—typically less time-consuming than land use cases, with a relatively higher pre-hearing settlement rate, but our highest single case type—dropped, meaning our overall new caseload number declined. 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 2022 we were 100%, 99%, and 98% compliant, respectively.

Beyond cases, we worked on several initiatives and code updates. Among these were producing videos overviewing (and helping the public navigate) the examiner process; [3] creating a publicly available hearing calendar; and updating past recommendations on potential code changes, along with raising a new issue (cell towers).

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 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.

[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 development regulations. The office shall file the report by March 1 of each year.

[3] https://vimeo.com/732603180 and https://vimeo.com/738428671.

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, 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 like changes to speed limits, water pollution abatement, and transit rider suspensions. However, the examiner's caseload mainly consists of several common types. A list of those common case types, categorized by decision-making process, follows.

EXAMINER RECOMMENDATIONS TO THE COUNCIL (KCC 20.22.060)[4]

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, 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. 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

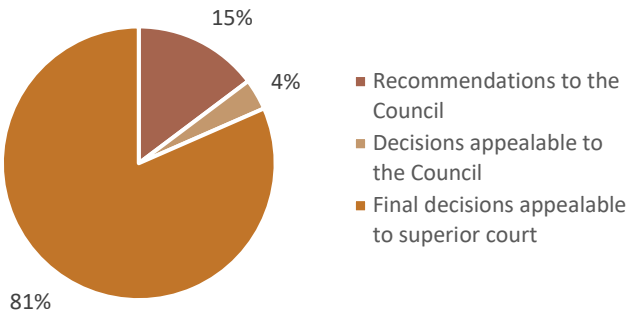
[4] **KCC 20.22.030.C**. For the purposes of proceedings identified in K.C.C. 20.22.050 and 20.22.060, the public hearing by the examiner shall constitute the hearing required by the King County Charter by the council.

NEW CASES

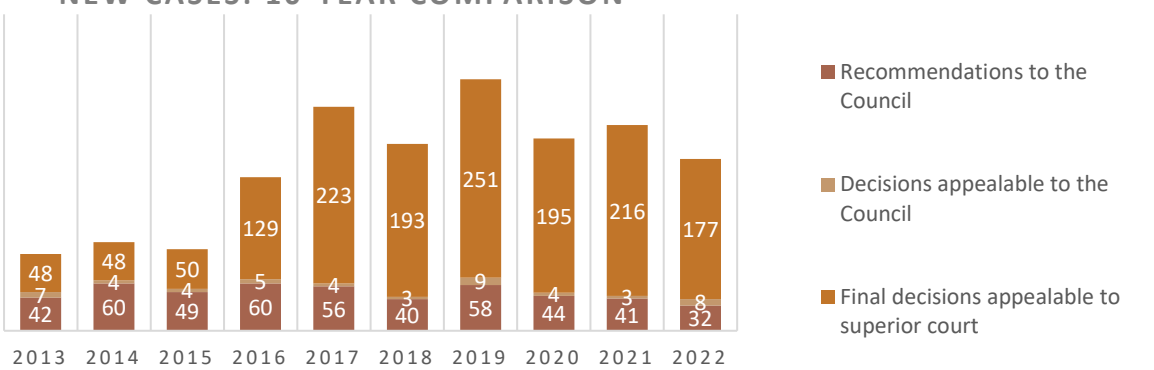
For non-Animal Services cases, our workload went up, with significantly more preliminary plats, fee and penalty waivers, and several adult-beverage cases. However, our Animal Services cases (typically less time-consuming than land use cases, but our highest number of cases) dropped, which meant our overall new caseload number dropped. Our total number of hearings stayed relatively constant, likely because Animal Services appeals have a higher settlement rate than other types of cases.

NEW CASES JANUARY—DECEMBER 2022	Number of Cases
RECOMMENDATIONS TO THE COUNCIL	
Current Use Application	30
Road Vacation Petition	2
DECISIONS APPEALABLE TO THE COUNCIL	
Preliminary Plat Application	8
FINAL DECISIONS	
Animal Services Appeal	140
Code Enforcement Appeal	16
Code Enforcement Fee Waiver	5
Business License Appeal (winery)	5
Permitting Fee Waiver	4
SEPA Appeal	2
Short Plat Appeal	2
Conditional Use Permit Appeal	1
For Hire Appeal	1
Temporary Use Permit Appeal	1
Critical Areas Exception Appeal	1
Total	217

NEW CASES: % BY CATEGORY

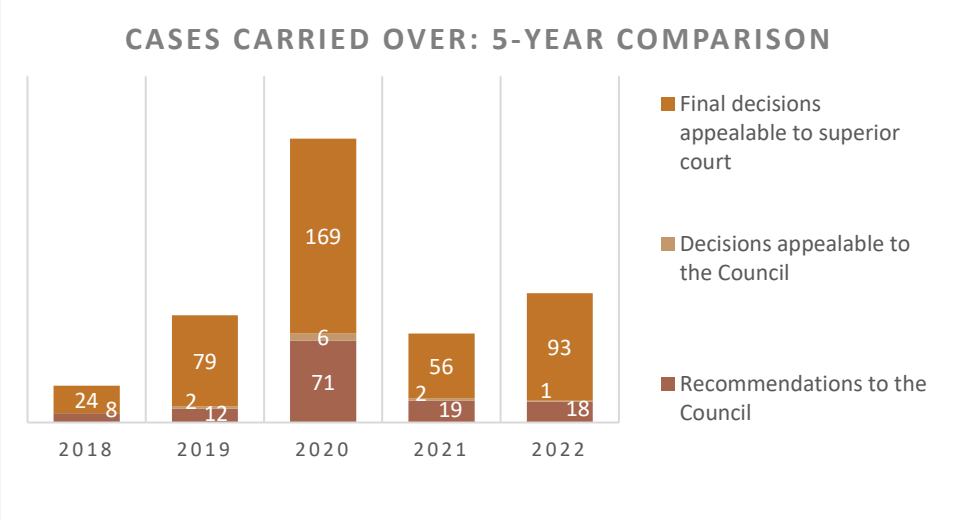


NEW CASES: 10-YEAR COMPARISON



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 close of a calendar year.



For the 112 cases carried into 2022, the chart below depicts the year each case reached us; 83 came to us in 2021, with the remainder held over from earlier years.

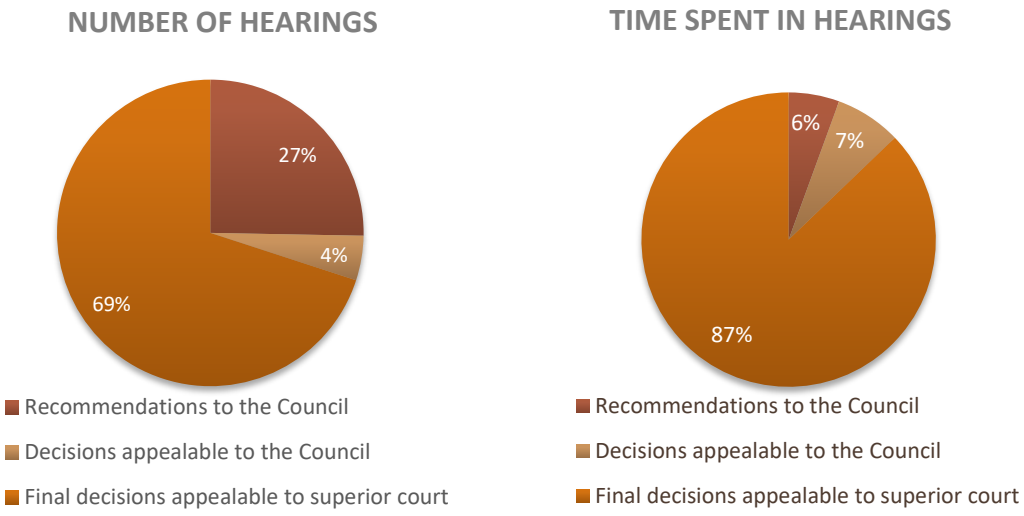
Year Case Opened	**2009**	**2015**	**2017**	**2018**	**2019**	**2020**	**2021**
Recommendations to the Council							18
Decisions appealable to the Council							1
Final decisions appealable to superior court	1	1	2	5	10	10	64

Proceedings

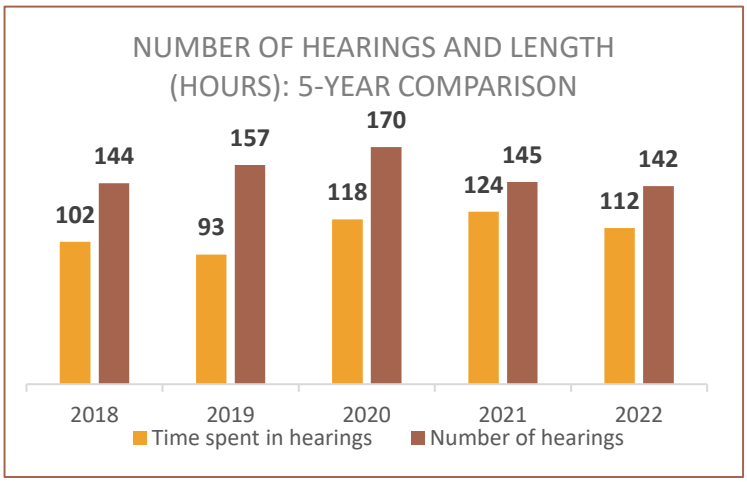
As noted above, even though our total number of new case filings declined in 2022 from 2021, the *number* of hearings we held remained relatively constant. Our 2022 total *time* spent in hearings was down from 2021, but 2021 had set an all-time (at least for this millennium) high, so a drop-off was expected.

Number of Hearings January—December 2022	Number of Hearings	Average Minutes
Recommendations to the Council		
Current Use Application	38	10
Decisions Appealable to the Council		
Preliminary Plat Application	6	81
Final Decisions		
Animal Services Appeal	79	53
Code Enforcement Appeal	11	102
Code Enforcement Fee Waiver Appeal	6	39
Temporary Use Permit Appeal	1	251
For Hire Appeal	1	29
Total	142	

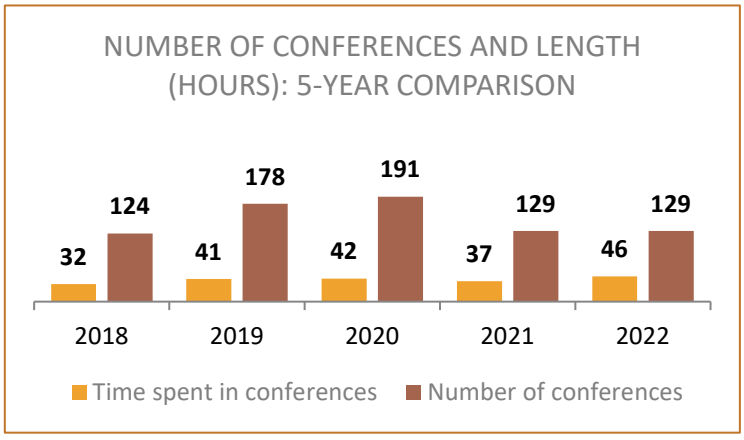
We extend a high level of service to all our participants. After all, even matters raising no novel legal issues or creating little impact beyond the parties themselves are still crucially important to those parties. But not all case types require the same level of examiner involvement, as the average-time-per-hearing chart below illustrates.



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—prehearing conferences and status conferences.



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 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 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.

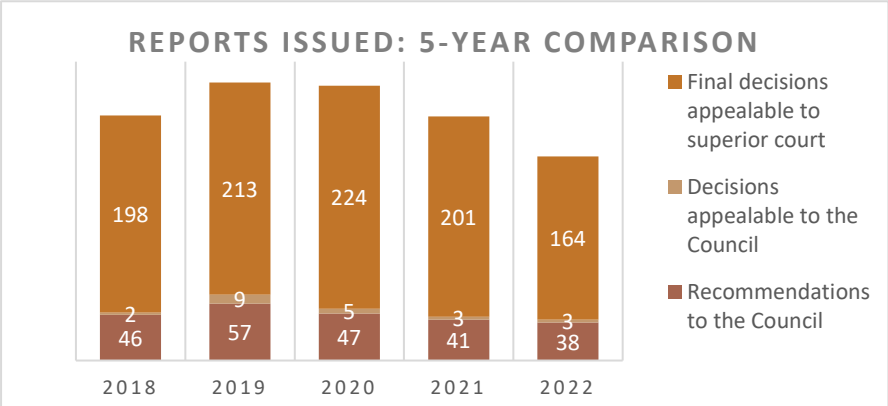
We held the same *number* of conferences in 2022 as in 2021, though our total *time* spent in conferences increased about a quarter.

[5] **KCC 20.22.120.A**. On the examiner's own initiative, or at the request of a party, the examiner may set a prehearing conference.

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, 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). Sometimes they are detailed findings of fact and conclusions of law based on taking sworn testimony, documentary evidence, and argument at a hearing and then deciding the case on the merits.[6] (As noted above, we held about the same number of hearings in 2021 and 2022.) And sometimes they are in-between, such as a dismissal explaining why we have no jurisdiction to reach the merits. We issued 205 reports in 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—one involving for-hire driver license denials based on *pending* criminal charges, and the other involving the geographic extent of cell tower co-location requirements. And we also discuss new developments in two previously reported judicial appeals of past examiner decisions.

For-Hire Driver License Suspensions

Licensing Services denied a dual Seattle/King County for-hire license for a driver with pending charges—but no conviction—for assault with sexual motivation and, even more seriously, first-degree rape of a child and first-degree child molestation. The driver appealed the County portion of the denial to us and the city portion of the denial to Seattle.

That left us in a quandary. We described the events laid out in the charging documents that led to the court's probable-cause finding as "stomach-churning." Yet there is a presumption of innocence until proven guilty, and that driver had an unblemished driving record, had never even had a complaint filed against him with Licensing Services, and would see his current livelihood eliminated if we upheld the denial.

We observed that allowing criminal charges to support a license denial could easily lead to abuse, if Licensing Services routinely denied, suspended, or revoked licenses on that basis. And yet in only one other case in our approximately 100 for-hire driver license appeals had Licensing Services attempted to stop someone from driving based on *pending* charges, rather than waiting for the criminal process(es) to play out. Given the gravity of the criminal charges, and the obvious connection between those alleged acts and

[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].

passenger safety, we understood why this case was the sequel. Yet it created a troubling predicament with no satisfying solution.

In the end, we upheld the license denial, but explained why we were far less confident than in the usual scenario where have a complete record (like actual criminal convictions/confirmed moving violations) or where we can fully probe events at hearing and make our own complete findings (examiners are in no position to decide whether or not crimes actually occurred).

We also wanted to avoid a possible split Seattle/County decisions and the poor reflection those make on the fairness of the quasi-judicial hearing process (see page 13-14's discussion, below). We observed that if the appellant was fit to drive in Seattle, he should be fit to drive in the County, and if he was not fit to drive in Seattle, he should not be fit to drive in the County either. We explicitly linked our decision to the outcome of the Seattle hearing examiner's process, writing that we would reverse our denial if the Seattle hearing examiner eventually granted the parallel appeal. A Seattle examiner later denied the appeal.[7]

Cell tower Co-Location Requirements

Comprehensive Plan policies discourage single-use cell tower proliferation and encourage co-location (i.e., siting new telecommunication facilities on existing structures) by requiring co-location "unless an applicant can demonstrate to the satisfaction of the county that collocation on an existing tower is not feasible and not consistent with service quality and access." CPP F-349. And KCC 21A.26.010 "[s]trongly encourage[s] the joint use of new and existing tower sites." KCC 21A.27.080 implements these purposes by requiring the applicant to provide a map showing structures located 0.25 miles of the proposed structure and by baring new transmission support structure within 0.25 miles, unless the applicant shows that co-location to an existing structure would be physically or technologically unfeasible.

AT&T received Local Services approval for a new tower. The owner of an existing cell tower 0.67 miles away from AT&T's proposed tower timely appealed, asserting that the County had not shown that co-locating AT&T's facility on the existing tower was physically or technologically unfeasible. We dismissed the appeal on summary grounds, finding the code's 0.25-mile language clear. We explained that, as the code is currently written, Local Services would have had no discretion to deny AT&T's application even if it determined that appellant's tower 0.69 miles away was both physically and technologically feasible. Thus, there was no basis on which we could grant appellant's challenge.

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, then Godspeed re-writing the code.[8]

[7] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/for-hire%20enforcement/2022/12258_Khan.ashx?la=en.
[8] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/conditional%20use/2022/CDUP200002_ATT_Sammamish_Beaver_Lake.ashx?la=en.

We formally put this matter on the Council's radar screen on pages 11-12, below.

Appellate Activity

An examiner's decision (or, in scenarios 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. No new examiner decisions were appealed in 2022, but there were new developments in two previously-reported appeals.

In ***de Maar***, two dogs bit a canvasser, one biting his testicles and slicing his scrotum, the other then joining in and biting his arm. Animal Services declared both dogs vicious. The de Maars appealed, denying that either dog had bitten the canvasser and alleging that the canvasser was a trespasser who slit his own scrotum and bloodied his own arm as part of some burglary ring or personal injury claim. After hearing the testimony, reviewing the exhibits, and receiving post-hearing briefing on the trespass issue, in December 2020 we rejected the de Maars' conspiracy theory, undertook five pages of legal analysis before finding the trespass defense factually and legally unpersuasive, and ultimately upheld the viciousness determination for the crotch-chomper while overturning it for the arm biter. The de Maars appealed to superior court in 2021. In 2022, the de Maars dismissed their appeal after the crotch-chomper passed away.

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. Earlier litigation resulted in Mr. McMilian being required to submit a development application. Mr. McMilian appealed a 2018 Local Services' preliminary decision on his application. In 2019, a *pro tem* examiner granted in part and denied in part his appeal. Mr. McMilian appealed that decision to superior court. In 2020, the court concluded that the 2019 process was a continuation of the previous code enforcement matter and assigned the County the burden of proof. On remand, Local Services sought to dismiss its enforcement stay; the *pro tem* examiner stayed the case to allow to Local Services to seek clarification from superior court. In November, the court denied Local Services' motion. The *pro tem* examiner has held two conferences in the last three months. The parties are currently preparing evidence, and then submitting briefing, for the *pro tem* examiner to review and rule on.

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. Each year we set 95% as our compliance goal for each of the three deadlines. In 2022 we were 100%, 99%, and 98% 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, 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.[9] We were compliant in 100% 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		
Permitting Fee Waiver Appeal	45	100%
Temporary Use Permit Appeal	34	100%
Animal Services Appeal	32	100%
Code Enforcement Fee Waiver Appeal	32	100%
Conditional Use Permit Appeal	29	100%
Code Enforcement Appeal	27	100%
Critical Areas Alteration Exception Appeal	18	100%
SEPA Appeal	17	100%
Business License Appeal (Winery)	16	100%
For-Hire Appeal	15	100%
Short Plat Appeal	Waived	100%
Total	31	100%

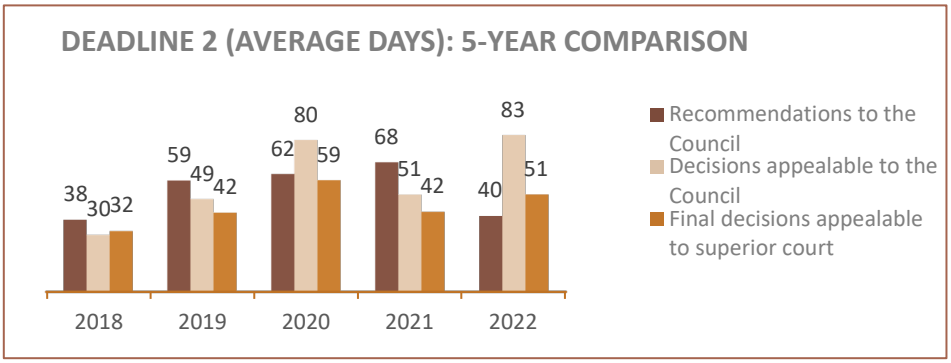
Deadline Two—90 Days from Application Referral/Appeal Transmittal to report

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.[10] For applications, the deadline is 90 days from receiving the council's referral.[11] 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

Deadline—2 Averages and Compliance 90 days from application referral/ appeal transmittal to report	Average days	Percent Compliant
Recommendations to the Council		
Current Use Application	40	97%
Decisions Appealable to the Council		
Preliminary Plat Application	83	67%
Final Decisions		
Conditional Use Permit Appeal	86	100%
SEPA Appeal	84	100%
Critical Areas Alteration Exception Appeal	78	100%
For-Hire Appeal	68	100%
Code Enforcement Fee Waiver Appeal	58	100%
Code Enforcement Appeal	52	100%
Animal Services Appeal	49	100%
Permitting Fee Waiver Appeal	41	100%
Short Plat Appeal	34	100%
Total	58	99%

[9] **KCC 20.22.100.B.1**. The examiner shall hold a prehearing conference or a hearing within forty-five days…of the date the office of the hearing examiner receives [the appeal packet].
[10] **KCC 20.22.100.B.1**. The examiner… shall complete the appeal process, including issuing a determination, within ninety days of the date the office of the hearing examiner receives [the appeal packet].
[11] **KCC 20.22.100.C**. For applications…, the examiner shall complete the application review, including holding a public hearing and transmitting the report required by K.C.C. 20.22.220, within ninety days from the date the council refers the application to the office of the hearing examiner.

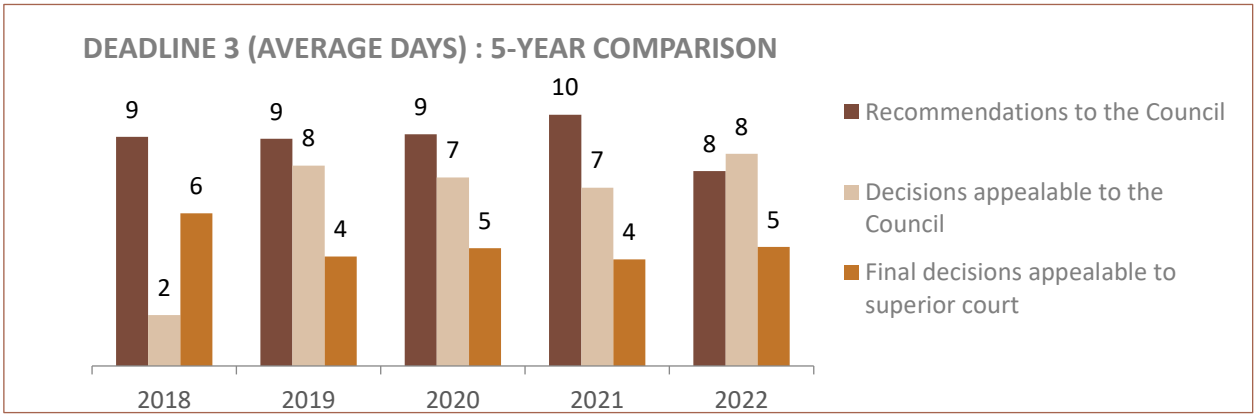
parties jointly request, longer.[12] We were compliant in 99% of our cases, exceeding our 95% compliance goal.



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.[13] (Unlike the first two deadlines, the examiner cannot simply extend the ten-day deadline.) At 98%, we exceeded 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 Application	8	100%
Decisions Appealable to the Council		
Preliminary Plat Application	8	100%
Final Decisions		
Conditional Use Permit Appeal	10	100%
Temporary Use Permit Appeal	10	100%
Critical Areas Alteration Exception Appeal	9	100%
SEPA Appeal	8	100%
For-Hire Appeal	7	100%
Code Enforcement Fee Waiver Appeal	6	100%
Permitting Fee Waiver Appeal	5	100%
Animal Services Appeal	5	96%
Code Enforcement Appeal	4	100%
Short Plat Appeal	1	100%
Total	5	98%



[12] **KCC 20.22.100.F**. The examiner may extend the deadlines in this section for up to thirty days. Extensions of over thirty days are permissible with the consent of all parties. When an extension is made, the examiner shall state in writing the reason for the extension.

[13] **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 render a written determination and shall transmit a copy of that determination.

WHO WE ARE AND HOW TO FILE AN APPEAL: VIDEOS

We have written (and frequently revised) guides to help laypeople navigate the examiner system.[14] Written in plain English, we have adapted these for specific case types (like land use, animal enforcement, and for-hire drivers), and have them available in multiple languages. However, one recommendation stemming from our previous work with the Council's Equity and Social Justice (ESJ) team was that we produce visuals to help those for whom navigating the written word is challenging. In 2022 we worked with the talented folks at King County TV to produce two short videos, one providing an overview of the examiner process[15] and one specifically geared to assisting people to appeal an adverse agency action.[16]

CREATING A PUBLICLY AVAILABLE ONLINE CALENDAR

We worked with the Council's excellent communications team to add our proceeding calendar (hearings and conferences) to our website. This allows the public to view our hearing schedule, allows parties attempting to schedule (or reschedule) a proceeding easier visibility, and facilitates public access.

WRITING COURSEWORK

To improve our writing skills, we jointly participated in a four-week, online, "Secrets of Powerful Writing" course taught by a local college professor. We developed outlining and organizational strategies, clarified useful grammar rules, and improved our editing skills. Key walk away points were to write for an eighth-grade reading audience, write freely first and only edit later, and better utilize the King County Editorial Style Guide.

REGULATORY CHANGE RECOMMENDATIONS

The code requires our annual reports to identify any needed regulatory clarification.[17] We add a new one this year (related to cell towers) while removing one that became law in 2022 (the public benefit rating system, codified in ordinances 19556 and 19484). We discuss two previous recommendations, one currently before Council (the animal code) and one likely to be introduced later this spring (the examiner code). And we close by re-listing regulatory topics introduced in our past annual reports that have not been tackled, including several which we hope are addressed in the next land use omnibus bill.

CELL TOWER CO-LOCATION

As discussed on page 7, 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) against *narrow* code language that only applies this policy when an existing site is within 0.25 miles of that proposed new tower—regardless of

[14] https://kingcounty.gov/independent/hearing-examiner/guide.aspx.
[15] https://vimeo.com/732603180.
[16] https://vimeo.com/738428671.
[17] **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 development regulations.

whether any existing sites over 0.25 miles might be physically and technically feasible 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.

We summarily dismissed the appeal because the existing structure was more than 0.25 miles away from the proposed new tower. Thus, we never had an opportunity to wade into the merits of what was physically or technologically feasible or to gain any technical insight. But it seems a topic worth exploring in the next land use omnibus bill.

Animal Code (KCC Title 11)

In late 2022, sweeping amendments to the animal code were finally introduced. Ordinance 2022-0348 is currently in the Government and Accountability and Oversight Committee. We highlight three proposed changes.

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 ordinance would replace the county's one size, thumbs up/thumbs down category with more a more nuanced, tiered 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 ordinance 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 draft proposal clarifies that a crime requires something more—some serious (human) behavior, a previous incident, intent, etc.

Examiner Code (KCC Chapter 20.22)

We continued the back-and-forth with council staff on re-writing codes related to the examiner process, both to improve overall clarity and to address a few discrete substantive issues. We understand that an ordinance will be introduced this spring. We are hopeful we can get an amended code in place this year, which would then allow us to update our examiner rules. Rules updates would be especially advantageous in light of our Covid-inspired shift to electronic filings and virtual hearings.

For-Hire Driver Appeals

The for-hire driver appeal we discussed on page 6 again underscores a significant problem with the current appellate setup.

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 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 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 both hearings—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 and city standards. 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 license denial while the other officer overturns it) creates an inconsistency that does not enhance anyone's confidence in the fairness of the process. 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 on the topic since 2016. While no one we have communicated within the city or the county executive branches disputes the advantages of a unified unitary appeal process, making it happen has—for years—taken a back seat to larger and more comprehensive changes to for-hire driver regulations the county, city, and even state (in a pending bill) are considering. We continue to push for commonsense

changes to streamline the for-hire driver process, so we have an equitable, efficient, and fair hearing process.

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, 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 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, I'll appeal, 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 notice and 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 permit applicants. 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 many 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.

We hope that this can be addressed in the next land use omnibus bill.

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) be 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 seemed 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 accept 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 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 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.

We hope that this can be addressed in the next land use omnibus bill.

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 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.

We hope that this can be addressed in the next land use omnibus bill.

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 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 (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 the Critical Areas Ordinance, 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 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 Local Services' 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 active land management practices (like frequent, low-intensity, prescribed burns)? Does it peg to the first European taking an axe to wood or adding dirt to a trail to keep wagon wheels from getting stuck? 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 drainage/water runoff impact than, say, replacing native vegetation with landscaping while keeping that surface pervious. Yet, 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. However, 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 understand and accept.

We hope that these can be addressed in the next land use omnibus bill.

CONCLUSION

In sum, 2022 was a rewarding year, with several interesting matters already on our docket in 2023. We trust the above analysis was helpful, and we welcome any questions or suggestions.

Submitted March 1, 2023,

David Spohr, King County Hearing Examiner