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
2020

David Spohr, Hearing Examiner
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March 1, 2021

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ANNUAL REPORT
OFFICE OF THE KING COUNTY HEARING EXAMINER
JANUARY—DECEMBER 2020

20.22.020 Chapter purpose

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

20.22.310 Annual report

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

OVERVIEW

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

We start this annual report by explaining and reviewing specific examiner jurisdictions. We then apply these groupings to 2020, analyzing examiner workload and compliance with various deadlines, and comparing 2020 to previous years. We describe our most interesting case of 2020, discuss judicial appeals, and review office initiatives. We close with an update on several proposed code amendments we have previously reported on.

Needless to say, 2020 was a hard year in every sense. We were shorthanded until September. Transitioning from almost exclusively in-person hearings to exclusively remote hearings was a complex process. Having to recruit, interview, hire, and train a new employee without any in-person interaction presented its own challenges. And while our new case filings dipped from 2019 (2019 being the highest number of new cases our office had received in any single year this millennium), we actually held more hearings in 2020 than we did even in 2019, meaning we also had more decisions to write than in any past year. We certainly worked more late nights and weekends than we ever have in County service.

Not surprisingly, our case processing times were up a little. However, we continued making efficiency improvements to stay on track, deadline-wise, while offering first-rate service. Once we were back up to full staff, we updated our various hearings guide and got them translated into additional languages. And some of the lessons learned from Covid—like the many advantages of remote hearings and how to best conduct them—will help even after this plague passes.

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 decisions and recommendations.

There are two main avenues by which matters reach the examiner. Sometimes, the examiner acts in an appellate capacity, hearing an appeal by a party not satisfied with an agency determination. Other times, the examiner has "original jurisdiction," holding a public hearing on a matter regardless of whether anyone objects to the agency's recommended course of action. Depending on the type of case, at the end of a 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 ranging from the newly-formed human and civil rights commission, to transit rider suspensions, to speed limit changes. However, the examiner's caseload mainly consists of several common types. A list of more common case types, categorized by decision-making process, follows.

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

EXAMINER RECOMMENDATIONS TO THE COUNCIL (KCC 20.22.060)

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. 6.64)
- 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):

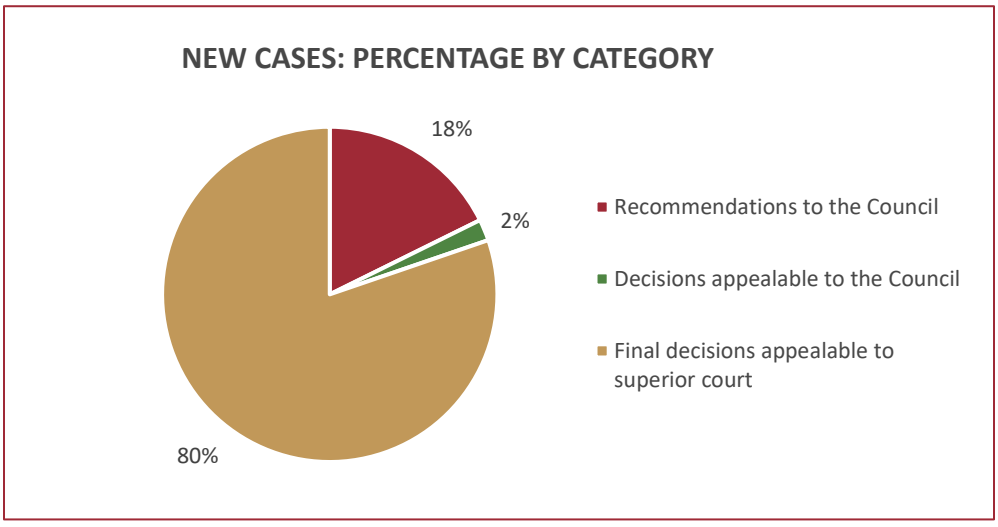
- Conditional use permits
- Shoreline substantial development permits
- Pre-application determinations
- Temporary use permits

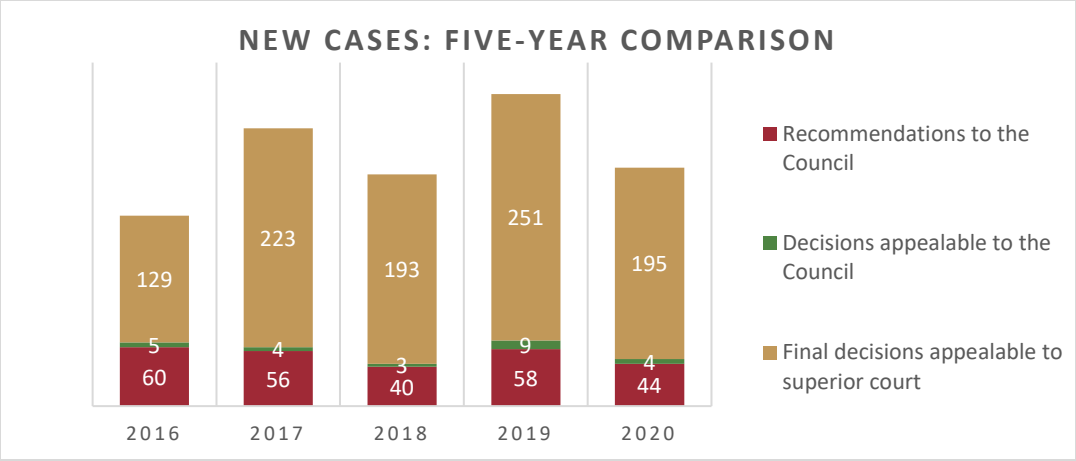
NEW CASES

We received 243 new cases in 2020, fewer than in 2019. The dip is not surprising, both because of Covid and because 2019 brought the highest number of new filings we had received in any year this millennium. The largest change came in the for-hire driver realm (a field devastated by Covid); we received *zero* driver appeals in 2020, down from 36 driver appeals in 2019.

Our 2020 new case filings broke down as follows:

NEW CASES JANUARY—DECEMBER 2020	Number of Cases
RECOMMENDATIONS TO THE COUNCIL	
Current Use Application	35
Road Vacation Petition	8
Special Use Permit Application	1
DECISIONS APPEALABLE TO THE COUNCIL	
Preliminary Plat Application	3
Plat Alteration Application	1
FINAL DECISIONS	
Animal Services Appeal	160
Code Enforcement Appeal	31
Water Quality Appeal	1
Metro Rider Suspension Appeal	1
Conditional Use Permit Appeal	1
Solid Waste Appeal	1
TOTAL	**243**



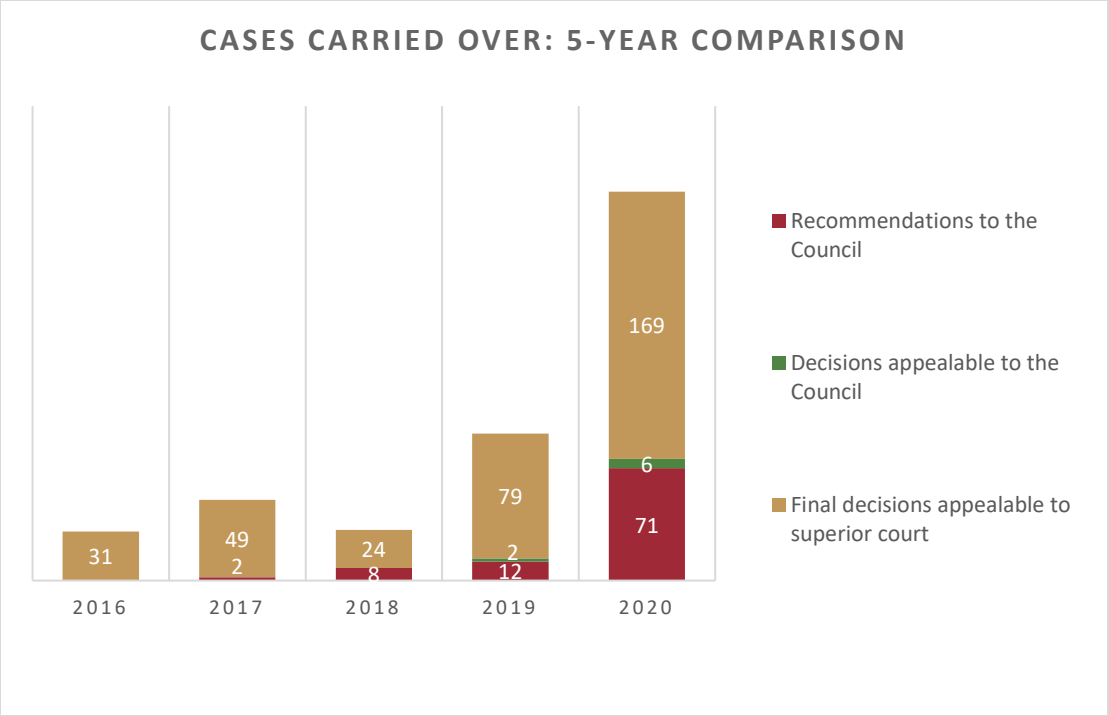


Cases Carried over from Previous Years

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

We carried over far more cases into 2020 then we have ever before. Some of that is a result of the large influx of new 2019 cases—we held more hearings in 2020 than we did in 2019 or in any previous year in the modern era; many cases we heard in 2020 arrived at our office in 2019. However, some of that was on our end.

Typically, at the end of each calendar year, we close out all the cases then-eligible for closing. However, one of our two staffers stepped away in December 2019, and we were not able to perform our normal year-end closing routine. Thus, we carried a whopping 246 cases into 2020, some of which were eligible for closing at the end of 2019. This situation will not repeat itself; to give a sneak peek, we carried 115 cases into 2021, having closed out (in December 2020) all those cases then-eligible for closing.



For the 246 cases carried over from prior years, the chart below depicts the year those cases reached us.

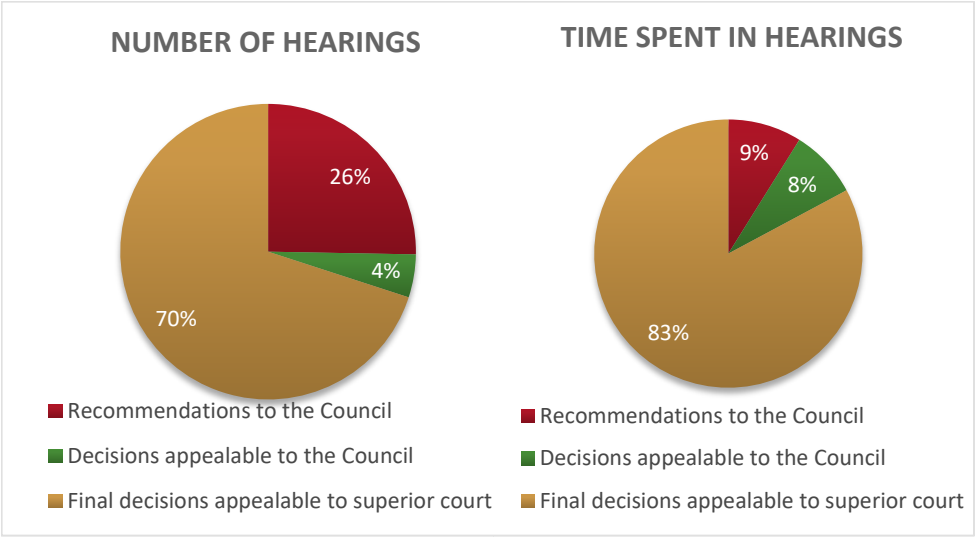
YEAR CASE OPENED	2008	2009	2011	2012	2013	2015	2016	2017	2018	2019
RECOMMENDATIONS TO THE COUNCIL									10	61
DECISIONS APPEALABLE TO THE COUNCIL					1			1		5
FINAL DECISIONS	1	1	1	3	1	5	1	5	13	138
										TOTAL = 246

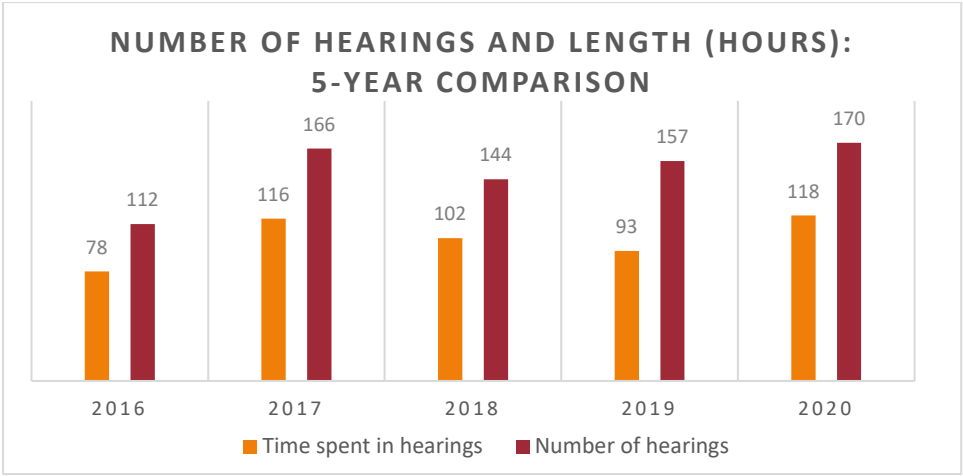
PROCEEDINGS

We held 170 hearings in 2020, our highest hearing total in the modern era. We also spent more cumulative time in hearings than in previous year.

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

NUMBER OF HEARINGS January—December 2020	Number of hearings	Average Minutes
RECOMMENDATIONS TO THE COUNCIL		
Current Use Application	36	7
Road Vacation Application	7	39
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary Plat Application	7	84
Special Use Permit Application	1	92
FINAL DECISIONS		
Animal Services Appeal	102	45
SEPA Appeal	1	120
Code Enforcement Appeal	16	71
TOTAL	170	42





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

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

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

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

3. Stipulated testimony or facts;

4. Prehearing dispositive motions, if applicable;

5. Prehearing conferences;

6. Voluntary mediation; and

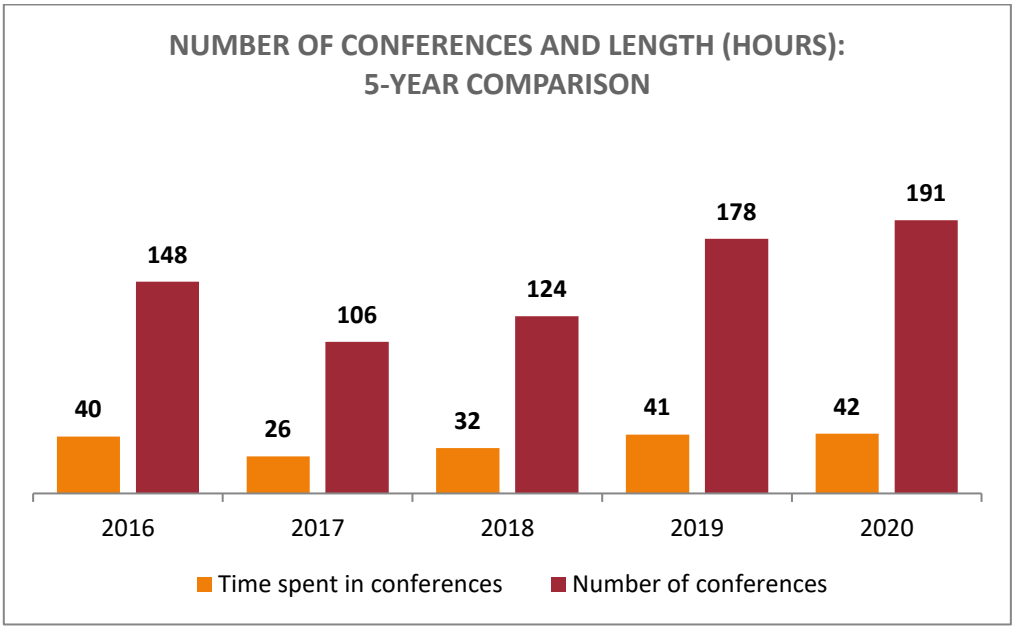
7. Other methods to promote efficiency and to avoid delay.

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.

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

When the parties decide to put off an adversarial hearing (typically while they attempt an amicable resolution), we "continue" their case. We then schedule periodic *status* conference calls (typically at 90-day intervals). These conferences help ensure we stay on top of things, keep parties' feet to the fire, and more speedily wrap matters up. These cases usually resolve by consensus. Less frequently, the parties reach a loggerhead and we end the continuance, scheduling an adversarial hearing and adjudicating the case with a written decision on the merits.

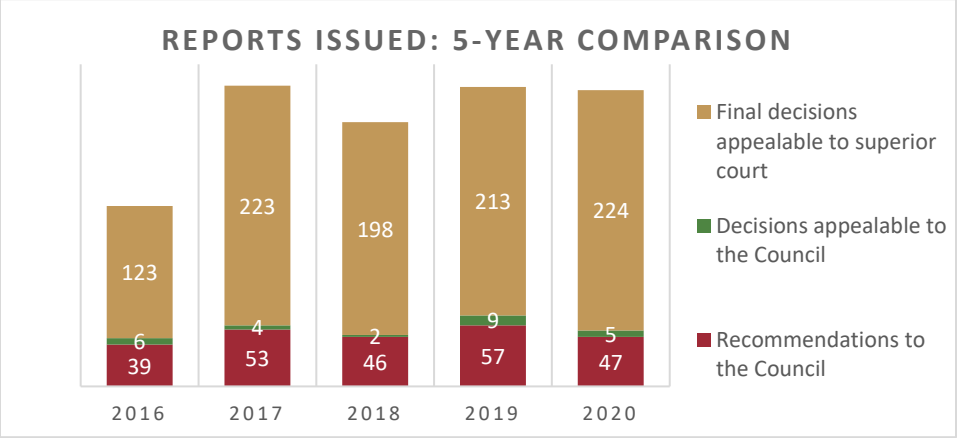
In 2020, we held more conferences than we ever before.



Reports Issued

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

These closings are sometimes summary dismissals (such as when the parties settle a dispute). And sometimes they are detailed findings and conclusions based on taking evidence and argument at a hearing and then deciding the case on the merits. We issued 276 reports in 2020.



Going beyond the numbers, we typically describe an interesting case in each annual report.

Our most typical Animal Services-related hearing involves three witnesses—the complainant, an Animal Services representative, and the appellant—and our post-hearing written decision tends to be shorter than for many other case types. In contrast, we entertained one animal appeal in 2020 that involved 11 witnesses, complex factual and legal issues, and what would become a 19-page decision.[1]

There was no dispute that, on the fateful day, the appellant's dog inflicted a gruesome bite to the complainant's leg. However, pretty much everything leading up to that bite was in sharp dispute. The complainant testified that the incident started as she walked her dog, on a short, retractable leash, along a river trail; appellant's unleashed dog then charged up from the water's edge, over the embankment, and attacked her dog, biting her dog multiple times before biting her leg. Conversely, the appellant testified that the complainant was *biking* with the dog on a *50-foot*, non-retractable leash, when the *complainant's* dog charged down the embankment and attacked appellant's dog, provoking the melee.

To get at the truth, we not only took testimony from the complainant and appellant (the only two eyewitnesses to events leading up to the bite) and two Animal Services officers, but also from the police officer and five emergency medical technicians (EMTs) who responded to the 911 call that day, and from a previous victim of appellant's dog.

[1] Our full *Schrock* order is available at https://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/animal%20enforcement/2020/2020%20Dec/V20010745V20010773Schrock.ashx?la=en.

Obtaining the EMT testimony was challenging; in addition to having to carefully frame the subpoenas and questions to avoid protected medical information, we accommodated each EMT calling in sometime during that EMT's shift (i.e. in-between taking emergency calls). That meant working with appellant and Animal Services to come up with a uniform list of questions in advance, and then taking and recording five different EMT calls over a ten-day period, including on a Saturday.

Once we received the parties' closing arguments, we started writing our decision. We began our factual analysis by evaluating the complainant's and appellant's testimonies, explaining why, standing alone, the appellant's version raised several yellow flags and was less plausible than the complainant's. We then scrutinized the consistency of their testimonies with their earlier written statements, finding significant discrepancies between the appellant's testimony and her earlier statements but no material discrepancies for the complainant. And we dissected their testimony in light of other witnesses' testimonies and with the remaining documentary evidence, citing Arthur Conan Doyle in the process.

Next, we took the version of events we found most persuasive (the complainant's) and performed a lengthy legal analysis. As if the case needed another layer of complexity, appellant's dog was a service dog. While appellant presented insufficient evidence that she suffered from an impairment that substantially limited a major life activity—the Americans with Disabilities Act (ADA) trigger—we nonetheless reviewed Animal Services' order through an ADA lens. We applied Justice Department guidance, federal statutes, and federal code, concluding that appellant's dog posed a direct threat, and that there was no reasonable expectation that again relying on appellant to leash and muzzle her dog (which she had promised to do after an earlier attack) would eliminate or acceptably minimize the risk. Despite two large thumbs on the scale against Animal Services—the scrutiny we apply to every order that an animal be removed from King County and our assumption that an additional ADA hurdle applied—we denied the appeal.

Appellate Activity

An examiner's decision (or, in cases where an examiner determination reaches the council, the council's decision) almost always wraps up the matter. However, in a tiny fraction of cases a disputant seeks judicial review. We received two new appeals in 2020, and there 2020 developments in three previously reported appeals. We start with the new cases, before updating the old ones.

Larsen was a code enforcement matter involving grading, construction, inoperable vehicles, debris, and placement of a mobile home without permits. After Mr. Larsen missed three examiner proceedings, we dismissed his case. Mr. Larsen appealed. The Prosecuting Attorney's Office was able to settle the matter by having Mr. Larsen direct his energies toward curing his code violations. He then withdrew his appeal.

Roth involved an Animal Services order for Mr. Roth to remove his dog from King County. Although the order listed the appeal deadline, and our hearing guide states in bold, purple, and underline that, "Whatever you do, make sure [Animal Services] receives your appeal by the deadline!" Mr. Roth filed his appeal two weeks past the deadline. Lacking jurisdiction to entertain his appeal, we dismissed. Mr. Roth appealed to superior court. The appeal has yet to be briefed.

Clement involved two dogs previously designated "vicious" and ordered contained after they mauled a neighbor's goats to death. After the containment requirements were repeatedly violated, Animal Services ordered the two dogs removed from the county. Ms. Clement appealed. In 2019, we upheld the removal, writing that, "We have overturned more removals than we have sustained. Yet today's case presents the clearest-cut case for removal we have seen in our dozens of removal appeals." Ms. Clement appealed our decision to superior court. The court dismissed her appeal in May 2020.

The ongoing ***Danieli*** litigation involves animal enforcement. In November, a superior court determined that we lacked jurisdiction over animal-related appeals arising out of Bellevue. In December, Bellevue updated its code to clarify we are the proper appellate tribunal going forward. Ms. Danieli's litigation against King County (including our office and the county executive's office), Bellevue, Animal Services, and two Animal Services employees, is ongoing.

Klineburger involves attempts to develop property adjacent to the Snoqualmie River and in a FEMA-mapped floodway. Against the Washington State Department of Ecology's determination that the project did not satisfy any applicable floodway exception, the Klineburgers proceeded with development anyway. The county initiated enforcement, and then later initiated enforcement on additional work in the floodway. We previously reported on the Klineburgers' unsuccessful appeals of various examiner decisions upholding various enforcement actions. In 2020, the parties briefed the Klineburgers' appeals from two 2019 superior court dismissals, but the court of appeals has yet to decide the matters.

Statutory requirements impose deadlines for swift and efficient examiner processing of certain case matters. The code-established deadlines discussed below represent our three principal time requirements. Each year we set 95% as our compliance goal for each of the three deadlines. We were 98%, 94%, and 95% 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. We were compliant in 98% of our cases, exceeding our 95% compliance goal.

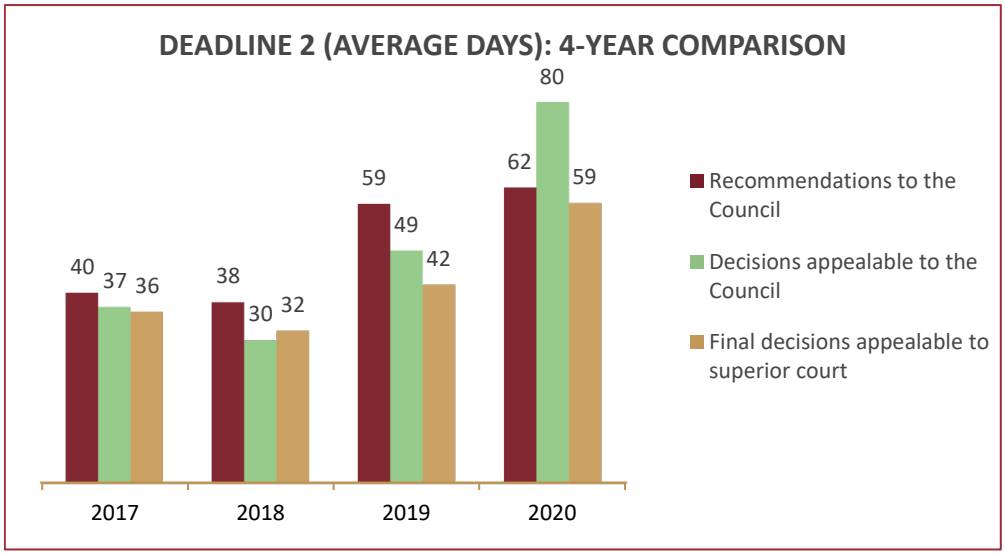
DEADLINE—1 AVERAGES AND COMPLIANCE 45 DAYS FROM APPEAL TRANSMITTAL TO FIRST PROCEEDING	Average days	Percent Compliant
FINAL DECISIONS		
Animal Services Appeal	33	100%
Conditional Use Permit Appeal	36	100%
Water Quality Appeal	24	100%
Solid Waste Appeal	19	100%
Code Enforcement Appeal	26	97%
Metro Rider Suspension Appeal	17	100%
Land Use Permit Appeal	Waived	100%
TOTAL	29	98%

DEADLINE TWO—90 DAYS FROM APPLICATION REFERRAL/APPEAL TRANSMITTAL TO REPORT

The code sets deadlines for how quickly the examiner should complete review, including issuing a final determination. For appeals, the deadline is 90 days from our receiving the appeal packet. For applications, the deadline is 90 days from our receiving the council's referral. As with deadline one, the examiner (on examiner motion or on the motion of one of the parties) can extend deadline two for up to 30 days or, if the parties jointly request, longer. We were compliant in 94% of our cases, just missing our 95% compliance goal.

DEADLINE—2 AVERAGES AND COMPLIANCE 90 DAYS FROM APPLICATION REFERRAL/ APPEAL TRANSMITTAL TO REPORT	Average days	Percent Compliant
RECOMMENDATIONS TO THE COUNCIL		
Current Use Application	46	100%
Road Vacation Petition	102	71%
Special Use Permit Application	38	100%
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary Plat Application	80	80%
FINAL DECISIONS		
Animal Services Appeal	59	94%
Conditional Use Permit Appeal	Waived	100%
For-hire Driver Appeal	28	100%
SEPA Appeal	49	100%
Solid Waste Appeal	21	100%
Water Quality Appeal	70	100%
Code Enforcement Appeal	62	92%
Metro Rider Suspension Appeal	28	100%
TOTAL	59	94%

Not surprisingly perhaps—given Covid, work-from-home, and being shorthanded through the first eight months of 2020—our processing times were about two weeks slower than in 2019. (Note, in mid-2016, the legal standard for calculating deadlines changed, so we do not quite have a full five years of apples-to-apples comparisons.)

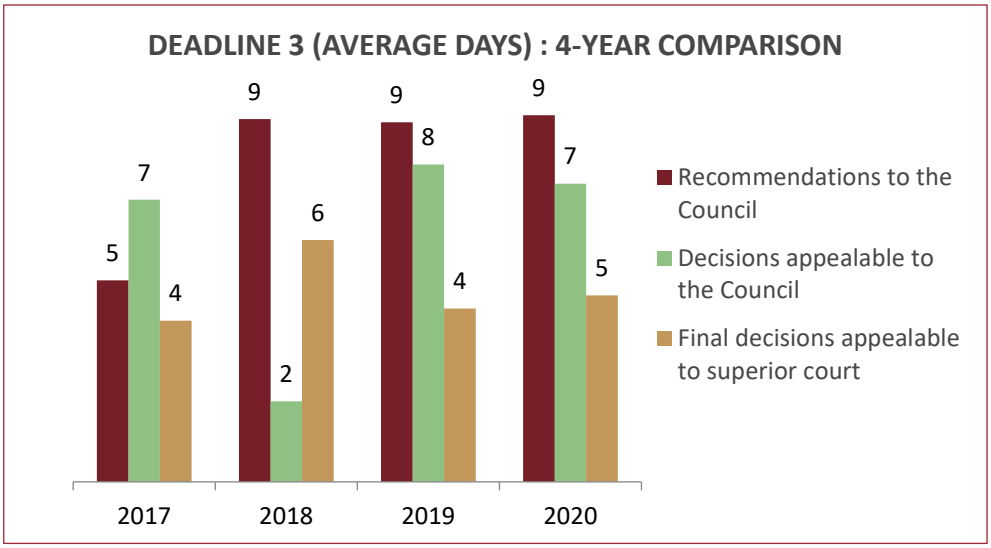


Deadline Three—10 Business Days from Hearing Close to Report

The last deadline relates to all types of hearings, requiring the examiner to issue findings and conclusions no later than ten business days after completing a hearing. We met the 95% compliance goal we set coming into each year.

Deadline—3 Averages and Compliance 10 business days from hearing close to report	Average days	Percent compliant
Recommendations to the Council		
Current use assessment	9	100%
Road Vacation Application	10	100%
Special Use Permit Application	10	100%
Decisions Appealable to the Council		
Preliminary plat	7	100%
Final Decisions		
Animal Services Appeal	5	93%
Conditional Use Permit Appeal	Waived	100%
Water Quality Appeal	1	100%
For-hire Driver Appeal	4	100%
Solid Waste Appeal	2	100%
SEPA Appeal	7	100%
Code Enforcement Appeal	4	97%
Metro Rider Suspension Appeal	6	100%
TOTAL	5	95%

Our average decision-writing times stayed fairly constant with 2019. (As noted above, in mid-2016, the legal standard for calculating deadlines changed, so we do not quite have a full five years of apples-to-apples comparisons.)



MORE EFFICIENT TELEPHONIC CONFERENCES

Historically, we conducted conferences by having each party, as well as any interested person from the public, call our main office line. The secretary would put the caller on hold and (when all participants were in place), merge the calls with the examiner, begin the recording, stay on the call, and later download the recording and do related administrative tasks. We made two changes that streamlined the process, enabling us to significantly reduce staff hours and allocate them elsewhere. We converted our telephone conferences to Skype conferences. This meant that everyone dialed in or clicked and joined online automatically, without needing a secretary to facilitate. And then, instead of having a secretary start the recording, stay on the line, download the recording, and complete other post-conference administrative tasks, the examiner shouldered those responsibilities. That added a few minutes (but only a few minutes) of examiner time to each conference, while allowing a secretary to skip the conference entirely and to allocate a much larger block of time to more pressing matters.

REMOTE HEARINGS

Covid and the necessity of working from home forced us to re-think how we conduct hearings. We researched what other hearing examiners were planning. We reached out to other jurisdictions and attended a make-shift examiner conference to learn about and share options on remote hearings. We began conducting our smaller hearings (such as many code enforcement and animal services appeals) as Skype telephone conferences. This made accessing the hearing easier for the public, as they only had to call in (without having to worry about video technology), leveling the playing field. For more complicated hearings (such as plats and noise hearings), where Zoom enables participants to walk through pictures, maps, videos, and other exhibits in real time, we developed protocols which have worked well. Remote hearings have a bright future, post-pandemic.

HEARING GUIDE TRANSLATIONS

After we got back to full-staffing levels in the fall, we set to work revising our hearing guides, guides the agency sends out to would-be appellants and to other interested persons and which we post on our website. We then sent these to multiple vendors to have them translated into at least the top three most common languages, depending on the type of case. For our General guide and our Code Enforcement guide, that meant Spanish, Russian, and Vietnamese. For

for-Hire Drivers, it meant Amharic, Oromo, Punjabi, Somali, Tigrinya, and Spanish. And for Animal Services, it was Spanish, Chinese, and Vietnamese.

Regulatory Change Recommendations

The code requires our annual reports to identify any needed regulatory clarification. KCC 20.22.310. With disruption from, and the response to, Covid consuming much of the oxygen in the room, we did not undertake any new regulatory items in 2020. At the request of a councilmember who asked us to keep track of unresolved examiner recommendations from previous reports, we consolidate below the regulatory topics introduced in our past reports that have yet to be tackled.[2] The first relates to the examiner code, the second to for-hire driver appeals, the third to the animal code, and the last four to land use.

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

Examiner Code (KCC 20.22)

We finished work in 2019 on a draft that would bring the examiner code (KCC chapter 20.22) into conformance with the council's 2018 style drafting guide. We found a council sponsor, but then Covid hit. We are hopeful we can get an amended code in place this year, which would then allow us to update our examiner rules. Updates would be especially advantageous in light of our Covid-inspired shift to electronic filings and virtual hearings.

For-Hire Driver Appeals

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

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

From the perspective of a licensee, it means having to file two separate appeals (Seattle's due at the 10-day mark, ours due at the 24-day mark) regarding the same underlying facts and typically the same controlling legal standard. Once properly filed, the licensee must attempt to navigate two administrative ladders, including dealing with two sets of rules of procedure. And the licensee must take time out of multiple workdays (foregoing income) to attend parallel hearings.

This scheme would be problematic for any licensee, but as a large percentage of applicants have limited English proficiency, no attorney, and require an interpreter at hearing—if they can even figure out how to sufficiently appeal and to get to 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/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.[3] 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 with in the Seattle 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. We understand there are bigger fish to fry than appeals. And, with Covid devasting the industry, we received zero for-hire driver appeals in 2020 (as opposed to 36 in 2019), meaning the siloed appeal process has created no recent harms. But we continue to push for commonsense changes to streamline the for-hire driver process, so we have an equitable, efficient, and fair hearing process when the cases return.

[3] For an example of a split result, see *Ahmed*, available at: https://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/for-hire%20enforcement/2018/65547_Ahmed.ashx?la=en .

ANIMAL CODE (KCC TITLE 11)

We spent considerable time in 2019 finishing a comprehensive overhaul of the animal code (KCC Title 11). Then Covid hit, putting the kibosh on most everything. Hope springs eternal for 2021. We keep three items on council's radar screen, for whenever a proposed ordinance arrives.

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

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

REGULATORY INTERPRETATIONS

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

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

First, county notices-and-orders are recorded against (and can cloud) title, and they can carry potential monetary penalties. Although not as severe as the potential Clean Water Act penalties the Supreme Court dealt with in *Sackett v.*

Environmental Protection Agency, 566 U.S. 120 (2012), the unanimous Court was troubled that people had to subject themselves to enforcement penalties to obtain an appealable ruling on a regulation's applicability. And having the notice and order on title can complicate an 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 issue involves 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 some clarity that wraps up a dispute quicker.

SMALL ANIMALS

Sometimes we tackle fundamental issues. Other times the issue is…chickens. On properties in the unincorporated area under 20,000 square feet (a little less than half an acre), KCC 21A.30.020 allows three small animals (per dwelling unit) kept outside. The owner of a 10,000-square-foot lot in unincorporated Skyway was thus limited to three chickens, while an owner of a similar-sized property in the surrounding cities would have been allowed eight (Seattle), ten (Tukwila), or eight (Renton) chickens. This 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% louder than a dog.

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

INCONSISTENT GRADING DEFINITIONS

The zoning code, which houses the critical areas chapter (KCC chapter 21A.24), employs a definition of "grading" as "any excavation, filling, removing the duff layer or any combination thereof." KCC 21A.06.565. Conversely, the grading code defines "grading" as any "excavating, filling or land-disturbing activity, or combination thereof." KCC 16.82.020.O.

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

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

CLEARING AND GRADING THRESHOLDS

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

grading without a permit. For example, the following may be performed without a permit:

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

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

The annual allowance makes intuitive sense, and pegging other limits to the date, say, of 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 hundred cubic yards (KCC 16.82.051.C.1);
- general clearing is "[c]umulative clearing" of less than 7,000 square feet (KCC 16.82.051.C.3); and
- clearing of invasive vegetation within certain critical areas is "cumulative clearing" of less than 7,000 square feet (KCC 16.82.051.C.8).

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

Those three are murky. In contrast to a relatively clear baseline like "since 2005" or "within a 12-month period," what does "cumulative" really mean? Does it mean since the dawn of time? Does it include pre-Columbian, Native American 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? Does it compile all the Himalayan blackberries ever cleared on a given site since Luther Burbank unleashed his botanical pox here in 1894? What if a forested area was cleared decades ago, but has since regrown with native vegetation—does this subtract from the cumulatively cleared total? We do not know the answers, and that ambiguity might open the county up to a "void for vagueness" legal challenge.

Those three seem inconsistent with other code provisions. The impetus behind setting limits on how much clearing and excavating/filling can be done on a site without a permit presumably stems from the same policy considerations as something like setting limits on how much new (or replaced) impervious surface can be added on a site without a permit: controlling unchecked drainage and surface water runoff. And it seems axiomatic that paving over a surface creates more of a drainage/water runoff impact than, say, replacing native vegetation with landscaping while keeping that surface pervious. Yet regardless of how much impervious surface was on the property as of 2005, adding impervious surface has a post-2005 allowance that can be exercised without requiring a permit, while there is zero tolerance for clearing any new area on a site that has a pre-existing, 7,000 square feet of cumulative clearing. That seems incongruous.

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

The code needs improvement. When we decide cases, we interpret the codes "as they are written, and not as we would like them to be written." *Brown v. State*, 155 Wn.2d 254, 268, 119 P.3d 341 (2005). So, we have reluctantly upheld notices and orders involving "cumulative" clearing or grading. 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 swallow.

Last year will not be remembered as a banner year, but we made the best of a bad situation. We trust the above analysis was helpful, we welcome any questions or suggestion, and we look forward to a healthier remainder of 2021.

Submitted March 1, 2021,

David Spohr, Hearing Examiner