

King County

JANUARY-JUNE 2012

BI-ANNUAL REPORT OF THE KING COUNTY HEARING EXAMINER

The report provides information concerning compliance with the objectives of Ordinance 11502 and the other duties of the Hearing Examiner stated in Chapter 20.24 of the King County Code

David Spohr, Interim Deputy Hearing Examiner
August 31, 2012

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20.24.320 Semi-annual report

The chief examiner shall prepare a semi-annual report to the King County council detailing the length of time required for hearings in the previous six months, categorized both on average and by type of proceeding. The report shall provide commentary on examiner operations and identify any need for clarification of county policy or development regulations. The semi-annual report shall be presented to the council by March 1st and September 1st of each year.

20.24.010 Chapter purpose

The purpose of this chapter is to provide a system of considering and applying regulatory devices which will best satisfy the following basic needs:

- A. The need to separate the application of regulatory controls to the land from planning;
- B. The need to better protect and promote the interests of the public and private elements of the community;
- C. The need to expand the principles of fairness and due process in public hearings.

20.24.060 Deputy examiner duties.

The deputy shall assist the examiner in the performance of the duties conferred upon the examiner by ordinance and shall, in the event of the absence or the inability of the examiner to act, have all the duties and powers of the examiner. The deputy may also serve in other capacities as an employee of the council.

BI-ANNUAL REPORT OFFICE OF THE KING COUNTY HEARING EXAMINER

JANUARY - JUNE 2012

DAVID SPOHR
INTERIM DEPUTY HEARING EXAMINER

OVERVIEW

The King County Hearing Examiner is appointed by the [Metropolitan King County Council](#) to provide a public hearing process for land use and other critical issues that is fair, efficient, and accessible to all citizens. The Interim Deputy Hearing Examiner was appointed on June 4, 2012, and assumed the chief examiner's duties on June 15.

We hear certain types of land use applications and appeals of county administrative orders and decisions, issue formal decisions and make recommendations to the Council. We start this report with an overview of the specific Examiner jurisdictions, explaining the three broad categories and numerous subcategories of authorities provided by code. We then apply these groupings to the January-June 2012 period as we break down Examiner workload and compliance with the various, code-imposed deadlines.

We strive here to create a rich and reliable data environment, improve our reporting techniques (*e.g.*, categorizing and summarizing information, offering statistical analysis, and employing charts and graphs to clearly illustrate trends and simplify examination), organize and present the information in a manner transparent to (and accessible by) a broad range of stakeholders, and provide a statistical baseline to allow performance and work-load comparisons in future semi-annual reports.

We are committed to courtesy, promptness, and helpfulness in assisting the public to make full and effective use of our services. In this spirit, we describe our current office initiatives, including technological upgrades to date and efforts to move toward more real-time access, e-filing, and videoconferencing.

Our office strives to make our decisions and recommendations well written, clearly reasoned, and appropriately based on laws, rules, and policies. In furtherance of that, we conclude by analyzing and providing suggested code amendments related to one area, code enforcement penalty appeals, where our experience in conducting such appeals has convinced us that a code revision is necessary.

EXAMINER JURISDICTION

King County Code 20.24 confers authority to the Examiner over matters for which the Examiner makes: (a) recommendations to the Council for final determination; (b) a final determination, appealable to the Council; or (c) the final decision for King County, with such decisions appealable to the courts. Distinct matter types within these three main categories are numerous (over 80), but the majority of the Examiner’s caseload consists of 8 to 12 common types. A non-exhaustive list, categorized by decision-making process, follows.

RECOMMENDATIONS TO THE COUNCIL (20.24.070)

Applications for public benefit rating system, assessed valuation on open space land, and current use assessment on timber lands (20.36.010)

Road vacation applications and appeals of denials (14.40.015)

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

Zone reclassifications	Plat Vacations
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DECISIONS BY THE EXAMINER, APPEALABLE TO THE COUNCIL (20.24.072)

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

Preliminary plat	Plat alterations
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FINAL DECISION BY THE EXAMINER (20.24.080)

Development permit fees (27.24.085):

Permit billing fees	Fee estimates
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Code compliance enforcement (Title 23):

Land Use	Public Health
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Threshold SEPA Determinations (20.44.120)

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

Conditional use permit	Short plat, short plat revision, short plat alteration
Preliminary determinations under KCC 20.20.030(B)	Temporary use permit under KCC 21A.32
Reasonable use exceptions under KCC 21A.24.070(B)	Zoning variance
Shoreline substantial development permit	

20.36.010 Purpose and intent

It is in the best interest of the county to maintain, preserve, conserve and otherwise continue in existence adequate open space lands for the production of food, fiber and forest crops, and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the county and its citizens.

14.40.015 Procedure

A. The zoning and subdivision examiner shall hold public hearings on vacations which have been recommended for approval by the department of transportation, and provide a recommendation to the King County council, as prescribed by RCW 36.87.060.

20.20.020 Classifications of land use decision processes

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

NEW CASES

We received a total of 71 new cases in this reporting period. As detailed in Table 1, open space and timber lands applications (for which the Examiner makes recommendations to the Council) account for the majority of the new matters. This trend is not likely to recur in the second half of the year, as the heaviest period of open space and timber lands application filing occurs in the late fall and early winter months, followed by transmittal to this office in the spring.

Table 1	Number of cases
RECOMMENDATIONS TO THE COUNCIL	
Zone reclassification	1
Open space and Timber lands applications	44
Total	45
DECISIONS APPEALABLE TO THE COUNCIL	
Preliminary plat applications	2
FINAL DECISIONS	
Enforcement appeals	22
Type 2 land use appeals	2
Total	24
Combined total	71

Figure 1 illustrates the 71 new cases broken down by the categories called out in KCC 20.24.070, 20.24.072, and 20.24.080.

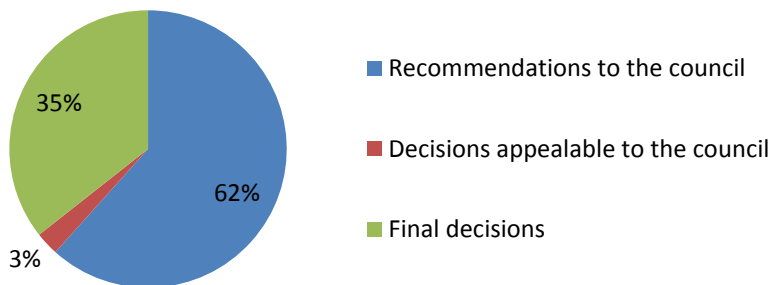


Figure 1 - New cases, by category

20.24.085 Appeals of permit fee estimates and billings by department of development and environmental services - duties.

A. As provided in K.C.C. chapter 27.50, on appeals of permit fee estimates and billings by the department of development and environmental services, the examiner shall receive and examine the available information, conduct public hearings and issue final decisions, including findings and conclusions, based on the issues and evidence.

20.44.120 Appeals.

A. The administrative appeal of a threshold determination or of the adequacy of a final EIS is a procedural SEPA appeal that is conducted by the hearing examiner under KCC 20.24.080 and is subject to the following:

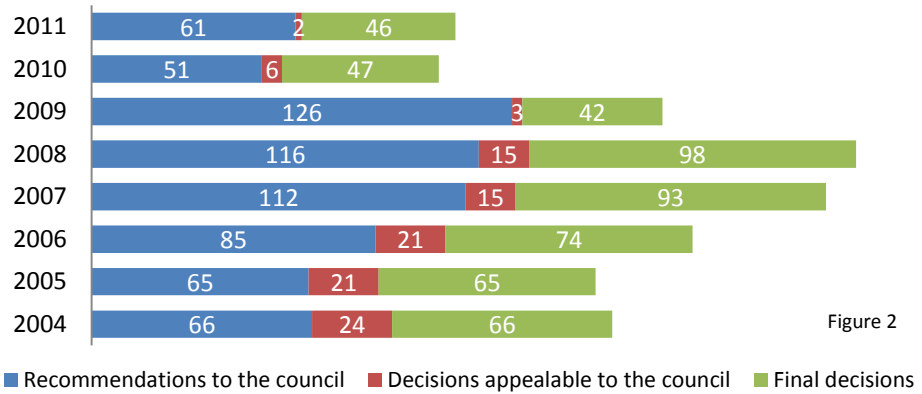
1. A procedural SEPA appeal to the hearing examiner is authorized only for an action classified as a Type 2, 3 or 4 land use decision in KCC 20.20.020 or as provided for by public rule adopted under KCC 20.44.075...

23.01.010 Code Compliance

A. The purpose of this title is to identify processes and methods to encourage compliance with county laws and regulations that King County has adopted...to promote and protect the general public health, safety and environment of county residents...

B. It is the intention of the county to pursue code compliance actively and vigorously in order to protect the health, safety and welfare of the general public. This county intention is to be pursued in a way that is consistent with adherence to, and respectful of, fundamental constitutional principles.

For comparison, Figure 2 details new case data from the previous eight years:



CASES CARRIED OVER FROM PREVIOUS YEARS

In addition to new matters received during the reporting period, the Examiner’s caseload includes 91 cases carried over from previous years. Of those, as of January 1, 2012, 80 were “continued on-call” (an inactive status granted to allow voluntary resolution of appeals or at an applicant’s request for a variety of reasons, requiring intermittent reports to the Examiner). The bulk of the “on-call” matters were land use enforcement appeals. The remaining 11 matters consisted of 3 cases awaiting court decisions and 8 requiring Examiner decisions following hearing records that closed in 2011. Table 2 provides detail on cases carried over, listed by year and category.

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
RECOMMENDATIONS TO THE COUNCIL			1						2	
DECISIONS APPEALABLE TO THE COUNCIL						1				1
FINAL DECISIONS	1	1	1	3	10	5	13	17	19	16
Total = 91										

In all, as illustrated in Figure 3, 95 percent of cases carried over are administrative appeals that, in lieu of voluntary resolution by the parties, require a final Examiner decision.

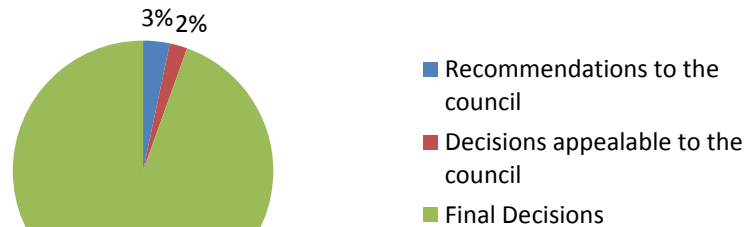


Figure 3 – Cases carried over from previous years, by category

20.24.130 Public hearing

When it is found that an application meets the filing requirements of the responsible county department or an appeal meets the filing rules, it shall be accepted and a date assigned for public hearing. If for any reason testimony on any matter set for public hearing, or being heard, cannot be completed on the date set for such hearing, the matter shall be continued to the soonest available date. A matter should be heard, to the extent practicable, on consecutive days until it is concluded. For purposes of proceedings identified in KCC 20.24.070 and 20.24.072, the public hearing by the examiner shall constitute the hearing by the council.

20.24.145 Pre-hearing conference

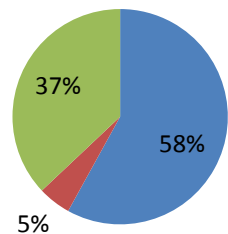
A pre-hearing conference may be called by the examiner pursuant to this chapter upon the request of a party, or on the examiner’s own motion. A pre-hearing conference shall be held in every appeal brought pursuant to this chapter if timely requested by any party.

PROCEEDINGS

For many years, anecdotal evidence indicated that time spent in hearings corresponded with case complexity and a commensurate increase in the amount of time needed to prepare reports. To more clearly illustrate the relationship between hearing length, matter complexity, and time spent writing reports, we introduce a new metric: time spent in hearings.

To evaluate this correlation, consider that while applications for open space and timber lands accounted for 47 of the 81 hearing conducted during the reporting period, they represented just over 3 percent of the total Examiner hearing time. Alternatively, 20 enforcement appeal hearings accounted for over 40 percent. (As Table 6 later illustrates, this correlation continues for report issuance: the Examiner issued decisions on open space and timber lands averaged 29 days after close versus 46 days for enforcement appeals.)

Number of Hearings



- Recommendations to the council
- Decisions appealable to the council
- Final decisions

Time Spent in Hearings

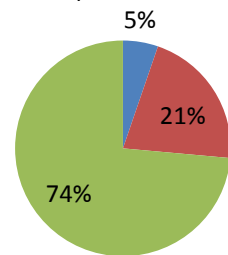


Figure 4 – Comparison of number of hearings to time spent in hearings

Table 3

	Number of hearings	Time spent in hearings
RECOMMENDATIONS TO THE COUNCIL		
Open space and Timber lands applications	46	04:00
Zone reclassification	1	00:45
Category totals	47	04:45
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary plat applications	4	19:05
FINAL DECISIONS		
Enforcement appeals	20	53:10
Type 2 land use appeals	8	12:30
Type 2 land use applications	2	00:40
Category totals	30	66:20
Combined totals	81	90:10

20.24.098 Time limits

In all matters where the examiner holds a hearing on applications under KCC 20.24.070, the hearing shall be completed and the examiner's written report and recommendations issued within twenty-one days from the date the hearing opens, excluding any time required by the applicant or the department to obtain and provide additional information requested by the hearing examiner and necessary for final action on the application consistent with applicable laws and regulations.

In every appeal heard by the examiner pursuant to KCC 20.24.080, the appeal process, including a written decision, shall be completed within ninety days from the date the examiner's office is notified of the filing of a notice of appeal pursuant to KCC 20.24.090.

When reasonably required to enable the attendance of all necessary parties at the hearing, or the production of evidence, or to otherwise assure that due process is afforded and the objectives of this chapter are met, these time periods may be extended by the examiner at the examiner's discretion for an additional thirty days. With the consent of all parties, the time periods may be extended indefinitely. In all such cases, the reason for such deferral shall be stated in the examiner's recommendation or decision. Failure to complete the hearing process within the stated time shall not terminate the jurisdiction of the examiner.

Finally, during the reporting period the Examiner spent close to 15 hours conducting a total of 19 conferences (*e.g.*, pre-hearing, telephone, motion) on administrative appeal matters (cases categorized as final decisions by the Examiner).

REPORTS ISSUED

From January 1 through June 30, 2012, the Examiner issued 84 reports. Figure 5 illustrates a category-level summary of the recommendations and decisions issued during the reporting period:

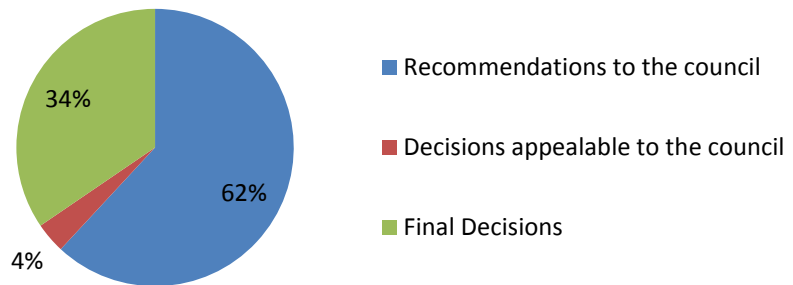


Figure 5 - Reports issued, by category

COMPLIANCE WITH CODE-MANDATED DEADLINES

Statutory requirements imposing processing-time deadlines articulate the expectation of swift and efficient Examiner processing of case matters. The three code-established deadlines covered below represent the principal processing-time requirements. We summarize performance related to each deadline. We also introduce a number of new data sets to aid in illustrating trends, especially compliance with deadlines and the frequency of Examiner deadline waivers.

DEADLINES ONE AND TWO

KCC 20.24.098 establishes two separate case processing deadlines, described separately below. For each category, parties may waive the deadline indefinitely (parties to 2 applications and 16 appeals waived deadlines, and those matters are excluded from the calculations below). Alternatively, the Examiner may unilaterally extend the applicable deadline for up to 30 days for certain, specified reasons.

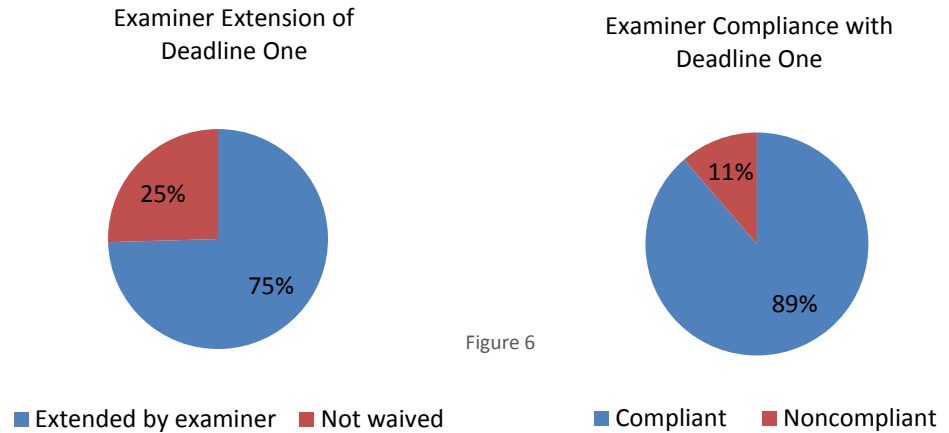
DEADLINE ONE—21 DAYS FROM APPLICATION HEARING OPEN TO REPORT

The first deadline relates to matters requiring an Examiner *recommendation* to the Council. For these, the deadline for issuing Examiner reports is 21 days after the *opening* of a hearing. (Computation of time does not include days required to allow for submission of supplementary materials the Examiner requests.)

Table 4 lists by type the number of cases on which we issued a recommendation during the reporting period, as well as time spent (an average of days).

Table 4 – Deadline One	Number of cases	Hearing open to report (average days)
RECOMMENDATIONS TO THE COUNCIL		
Zone reclassification	1	53
Open space and Timber lands applications	53	31
Totals	54	31

Figure 6 summarizes both the frequency of use of Examiner discretion to extend Deadline One and the Examiner’s compliance with Deadline One:



DEADLINE TWO—90 DAYS FROM APPEAL TRANSMITTAL TO REPORT

The second deadline relates to all matters on which the Examiner acts as the *final decision-maker*. For these, the deadline for issuing Examiner decisions is 90 days from the date of *appeal transmittal*.

Table 5 lists by type the number of cases for which the Examiner issued a decision during the reporting period, as well as time spent (an average of days).

Table 5 – Deadline Two	Number of cases	Appeal transmittal to report (average days)
FINAL DECISIONS		
Enforcement appeals	11	67
Type 2 land use appeals	3	100
Totals	14	75

20.24.210 Written recommendation or decision

A. Within ten days of the conclusion of a hearing or rehearing, the examiner shall render a written recommendation or decision and shall transmit a copy thereof to all persons of record. The examiner's decision shall identify the applicant and/or the owner by name and address.

....

Figure 7 summarizes both the frequency of use of Examiner discretion to extend Deadline Two and the Examiner's compliance with Deadline Two:

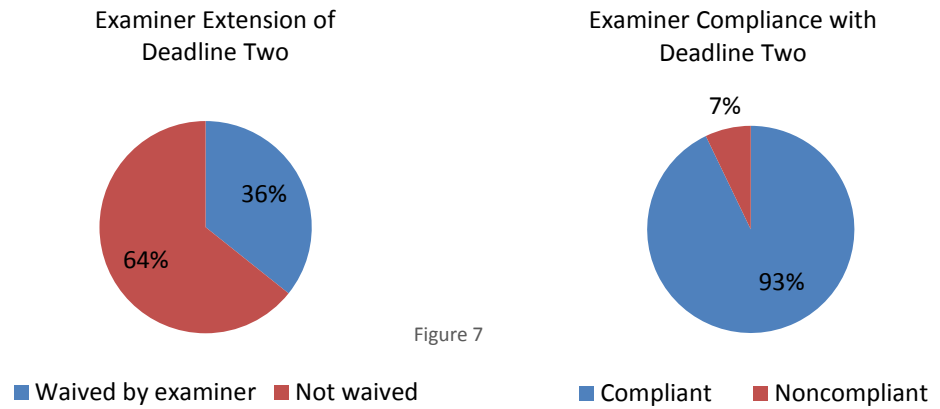


Figure 7

COMPLIANCE WITH DEADLINES ONE AND TWO—COMPARISON

Figure 8 illustrates the average number of days, pursuant to deadlines one and two above (21 days from hearing open or 90 days from appeal transmittal) to complete hearings and issue reports:

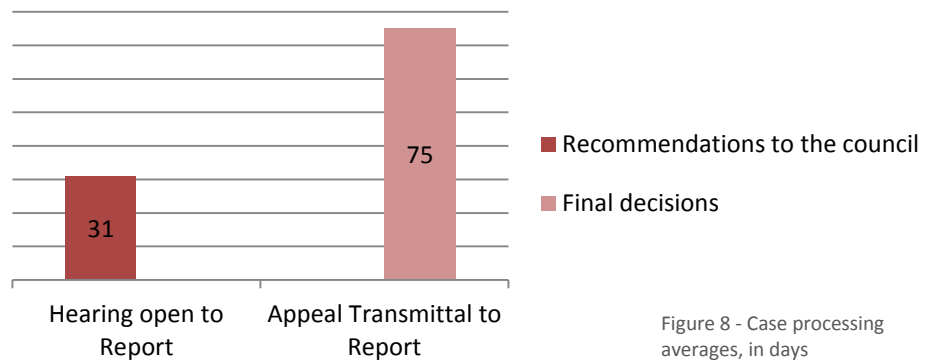


Figure 8 - Case processing averages, in days

DEADLINE THREE

Finally, for both Deadline One and Deadline Two cases, KCC 20.24.210(A) requires reports issued no later than 10 days following the *conclusion of a hearing*. Table 6 provides detailed data, organized by category, on the number of cases for which the Examiner issued a decision or recommendation during the reporting period, as well as the average time from hearing close to report issuance.

Table 6	Number of cases	Hearing close to report (average days)
RECOMMENDATIONS TO THE COUNCIL		
Zone reclassification	1	54
Open space and Timber lands applications	55	29
Total	56	30
DECISIONS APPEALABLE TO THE COUNCIL		
Type 3 preliminary plat applications	3	15
Total	3	15
FINAL DECISIONS		
Enforcement appeals	21	46
Development permit fee appeals	3	53
SEPA appeals	1	7
Type 2 land use appeals	5	52
Type 2 land use applications	1	45
Total	31	46
Combined totals	90	38

Figure 9 provides category-level summary data on the average time (in days) that elapsed from hearing close to report issuance:

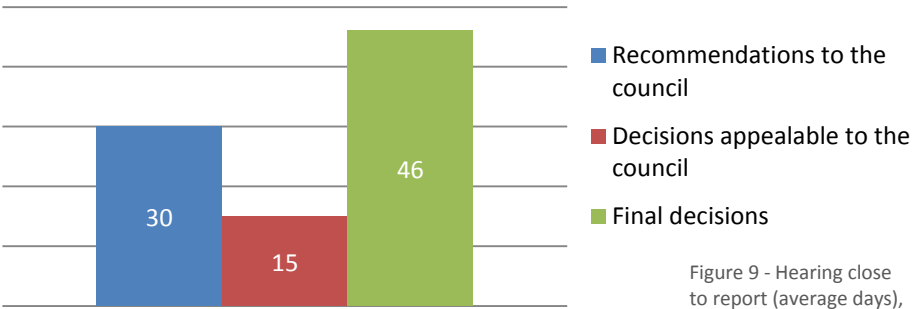


Figure 9 - Hearing close to report (average days),

Figure 10 illustrates the Examiner’s compliance with the 10-day, report issuance deadlines established in KCC 20.24.210(A):

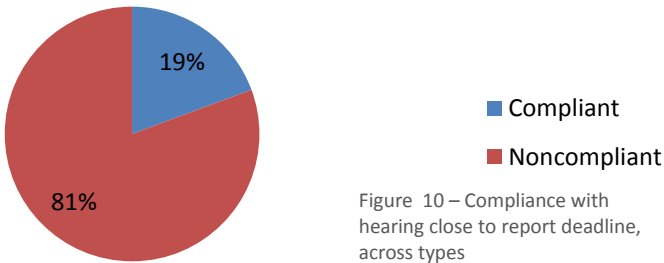


Figure 10 – Compliance with hearing close to report deadline, across types

20.24.170 Rules and conduct of hearings

A.1. The examiner shall adopt rules, including any amendments to the rules, for the conduct of hearings and for any mediation process consistent with this chapter.

2. The hearing examiner may propose amendments to the rules by filing a draft of the amendments and a draft of a motion approving the amendments in the office of the clerk of the council, for distribution to all councilmembers for review. At the same time as the filing of the draft, the hearing examiner shall also distribute for comment a copy of the proposed amendments to any county department that has appeared before the examiner in the year before the filing of proposed amendments and to any other parties who have requested to be notified of proposed amendments to the rules. Comments to the proposed amendments may be filed with the clerk of the council for distribution to all councilmembers for sixty days after the proposed amendments are distributed for comment. The amendments shall take effect when they have been approved by the council by motion.

3. The hearing examiner shall publish the rules and any amendments to the rules and make them available to the public in printed and electronic forms and shall post the rules and any amendments to the Internet.

RULES OF PROCEDURE AND MEDIATION

The Examiner Rules of Procedure guide our hearing conduct and the Rules of Mediation our dispute resolution efforts. The current versions were published 17 years ago. The time is ripe for an in-depth analysis of both sets of rules, which must be accomplished before proposing any substantial changes pursuant to the process established in KCC 20.24.170(A)(2). For example, technological advances during the last 17 years have been significant, and the repeated references to service by facsimile, at the exclusion of email, brand the materials as antiquated and hamper efficient practice. We intend to begin the review and revision process during the current (July through December) period.

TECHNOLOGY

Over the last five years, the office implemented numerous small- and large-scale upgrades to its software programs and hardware tools. The most recent large-scale upgrade, a new case management program, went “live” in June 2011. That project is mostly complete, although we still need to rework document templates for compatibility and functionality, create report templates that streamline the transfer of data from our case management system (such as downloading, organizing, and calculating data for use in semi-annual reports), and migrate a backlog of inactive (but still open) cases from our old system. To ensure the largest return on the office’s significant investment in this system, ongoing training is critical to ensure that staff possess a thorough understanding of system features and functionalities.

PROVIDING REAL-TIME ACCESS AND E-FILING

We are committed to continuously seeking out ways to align our business practices with our and the Council’s mission to provide excellent service to both external and internal customers. With our new system in place, and in keeping with our and the Council’s long-range plans, staff are beginning to work with our case management software vendor to establish a “client portal” webpage to allow participants to review case materials and data in real time.

Ideally, the “client portal” will also serve our need to establish a bona fide “e-filing” system. Establishing an e-filing system requires a commitment to a process that spends time thoughtfully considering the needs of case participants, results in a thorough delineation of rules and procedures, and ensures an efficient system of document transmission and receipt. An ill-conceived program could easily result in the inefficient use of administrative staff resources or an unsatisfactory level of service to the public. We are proceeding forward judiciously.

20.24.330 Voluntary mediation

As to any application or appeal pursuant to KCC 20.24 which is or could become the subject of a public hearing, the responsible county department, the council or the hearing examiner, may at their own discretion or at the request of the applicant or any person with standing to the application or appeal, at any state of the proceedings on the application or appeal, initiate a mediation process to resolve disputes as to such application or appeal. The mediation process shall be voluntarily agreed to by all participants to the hearing process, and conducted by an independent impartial mediator who shall not be a county employee or any person who will have any role in making any recommendation or decision on the application or appeal. The mediation shall be conducted in accordance with rules of mediation prepared by the hearing examiner.

In addition, prior to implementing any e-filing system, the Examiner Rules of Procedure regarding acceptable modes of service must be updated to allow electronic document submittal.

VIDEOCONFERENCING

If we make no changes to the way we schedule and travel to proceedings, when the Department of Development and Environmental Services (DDES) relocates to Snoqualmie (estimated for mid-October 2012), office travel costs (both in terms of mileage and FTE lost in transit) will increase.

While it is not typically necessary for parties to meet the Examiner in-person for a pre-hearing conference, land use enforcement officers often use the in-person conferences as an opportunity to connect with case participants, usually to discuss compromise solutions. One option to keep unnecessary Examiner travel losses down, while meeting the needs of members of the public who require computer access and department employees who want to preserve in-person pre-hearing meetings, is to establish procedures and procure the necessary equipment to allow the Examiner to conduct proceedings by videoconference from our offices, while the parties convene at DDES.

We likely will propose installation and long-term storage of a stand-alone terminal, scanner, and video camera in a locked cabinet in a conference room at DDES.

CODE CHANGE RECOMMENDATIONS

KCC 20.24.320 requires our semi-annual reports to identify needed code clarifications. In [Appendix A](#) of this report we analyze the portions of KCC Chapter 23.32 that allow citizens to appeal penalties assessed through the code enforcement process. We describe how, as currently written, the current procedure may not solve the due process problem it was explicitly designed to cure, creates a pleadings quandary, and could be more efficiently sequenced with DDES's internal penalty waiver process to offer a protective, yet streamlined, appeal process. We offer sample code language in [Appendix B](#).

Submitted August 31, 2012



David Spohr, Interim Deputy Hearing Examiner

Post v. City of Tacoma, 167 Wn.2d 300, 312, 315, 217 P.3d 1179 (2009), struck down, as a due process violation, a code enforcement system which failed to afford citizens an opportunity to appeal certain penalties. In response, the Metropolitan King County Council amended Title 23 to create that appeal opportunity. KCC 23.32.100-.120 (hereinafter, the “2011 Amendments”).¹

Having now had several opportunities to apply the 2011 Amendments in deciding such appeals, we offer commentary. We describe three ways in which the current code may not solve the due process problem the 2011 Amendments were explicitly designed to cure, point to a pleading requirement that would benefit from adjustment, and describe how penalty appeals could better mesh with the code’s pre-existing penalty waiver provisions. We provide narrative suggestions for amendatory language here, with sample code language in Appendix B.

Our first concern is that a civil penalty invoice appeal runs “fourteen days from the date of the invoice.” KCC 23.32.100(B). Unfortunately, invoices are not necessarily served promptly after the invoice is dated. In one case, for example, DDES mailed the invoice only *after* the appeal period had ended, then moved to dismiss the appeal as untimely. Bringing penalty appeals in line with other appeals under Title 23, that is, fourteen days from *service* (see, e.g., KCC 23.32.100(B)), seems a simple, curative solution.

Our second concern involves evidence a party may submit at a hearing. KCC 23.32.110 places the burden on an appellant to prove error (which reverses the typical burden of proof our Rules of Procedure apply in a penalty case), but then closes the record to her evidence in furtherance of meeting that burden. This may deprive her of the real opportunity to appeal potential errors regarding government penalties that *Post* indicates is necessary in the code enforcement penalty context. 167 Wn.2d at 313. We recommend removing or at least modifying the “closed record” language.²

Our third concern, and the final one related to due process, relates to the scope of a penalty appeal. Currently an appellant may “only challenge whether civil penalties were assessed for any time period after achieving compliance,” and the “hearing examiner’s determination is limited to finding whether civil penalties were assessed for any time period after achieving compliance and to establishing the proper penalty dates if the appeal is granted.” KCC 23.32.120.

That language captures part, but not all, of *Post*’s thrust. *Post* described a party not provided the opportunity to contend that his repair efforts had brought his property into compliance prior to Tacoma issuing a penalty as an example of how Tacoma’s system violated due process. 167 Wn.2d at 314. But *Post* clarified that this was only a “notable illustration” of why an appeal process was required.

¹The full text of KCC 23.32.100-.120 appears in Appendix B.

²The “closed record” language appears to come from the permit fee estimate appeal provisions of KCC 27.50.030, enacted a few years before the 2011 Amendments. But the process due a citizen where the government comes after her for a fine appears greater than that due an applicant approaching the government for a permit. *Post* did not address permit fees, only the “fundamental due process right to an opportunity to be heard” necessary in the code enforcement context. 167 Wn.2d at 313.

³We have employed the language “erroneous or excessive under the circumstances” in Appendix B because examiner jurisdiction presumably should not extend to fielding complaints about the propriety of, for example, the penalty assessment schedule duly enacted by the Council and set forth in KCC 23.32.010. Limiting appeals to “under the circumstances” would seem geared to restricting discussion to how DDES has applied the penalty schedule in a particular case, not the propriety of the schedule itself.

There are other ways, beyond achieving compliance before a penalty was assessed, that a monetary penalty can be “erroneous or excessive.” *Cf. id.* at 313. We suggest adding *Post*’s “erroneous or excessive” language to what an appellant may challenge and an examiner may decide.³

We are cognizant of a very legitimate rationale behind limiting appeals to only whether the property owner had achieved compliance by a certain date: it avoids the specter of an appellant trying to “back door” a challenge to an earlier determination that she either had an opportunity to challenge and did not, or did challenge but lost. *Post* explicitly notes that one who fails to timely exercise a clearly available appeal right is not entitled to later litigate an issue, *id.* at 314, and *res judicata* precludes a party from re-litigating an issue she lost on. We already (beyond the penalty arena) bar parties from raising challenges that should have been raised during an earlier appeal period, or were raised and rejected. We have attempted, in Appendix B, to make that limitation explicit without restricting appeal rights in a manner that may run afoul of *Post*.

A fourth issue involves what a statement of appeal must contain. Most of KCC 23.32.100(B)’s requirements are straightforward, but requiring an appellant to describe “the violations for which civil penalties were assessed” is problematic. DDES undoubtedly knows what specifically, of the variety of ways a party could fail to meet DDES’s (or an examiner’s or court’s) requirements, DDES believes triggered the penalty. Requiring a party to restate back to DDES precisely how DDES thinks the party was remiss seems a strange exercise.

More seriously, a respondent does not necessarily know precisely what DDES thinks she did that she should not have done, or she failed to do that she should have done. In one recent case there were four separate deadlines the responsible party had to meet to avoid penalties, yet the penalty invoice provided no detail on which particular milestone(s) DDES believed the appellant failed to meet beyond, “Civil Penalty VIO-1” and “Civil Penalty VIO-2.” Given that DDES possesses this knowledge, there can be no unfair surprise to DDES from failing to require this in an appeal statement. We suggest removing (or at least amending) the requirement.

The fifth and final issue involves sequencing appeals with DDES’s own penalty waiver provisions and both providing incentives for responsible parties to comply and conserving the appeals process for truly “final” DDES penalty decisions.

The current timing functionally eliminates one effective tool prudent code enforcement officers have to encourage compliance. Officers will often request billing for something less than the entire sixty days DDES’s typical bills before beginning the abatement process. Seeing an actual bill (as opposed to simply warnings) often lights a fire under responsible parties to redouble their

compliance efforts, especially given the specter of soon-to-follow additional penalties. But knowing that each bill presents an appeal opportunity, officers seem (for completely rational reasons) to have abandoned this measured step in favor of simply billing for the entire sixty days and thus only having to contend with a single penalty appeal per case. Once the entire sixty days are billed, the absence of imminent additional penalties removes an incentive for speedy compliance.

Moreover, the penalty appeal provisions do not intersect optimally with DDES's internal penalty waiver provisions. KCC 23.32.050 provides a variety of rationales for DDES's director (with the concurrence of the finance department) to waive penalties in whole or in part.⁴ However, the code is now structured so that the penalty invoice must be appealed quickly to the Examiner before seeking a DDES waiver. Presumably, if the Examiner denies the appeal, the party could then return to DDES and request a waiver under KCC 23.32.050, a sub-optimal sequencing of events.

An alternative approach would be to borrow from KCC 27.50's sequence for appealing permit fee estimates. There, an applicant cannot appeal a fee estimate to the Examiner until after she exhausts DDES's internal process. KCC 27.50.010(B).⁵ That seems wise. Applying that structure to Title 23, DDES could review challenged penalties in-house through the pre-existing penalty waiver process, conserving Examiner time (and DDES time preparing for and participating in the appeal process) for that subset of penalty disputes where a party has availed herself of DDES's internal process and yet remains troubled. And where DDES issues penalties incrementally (for example, in two week blocks versus the entire sixty days) or other steps may follow (such as re-inspection fees or the permit process), DDES could be allowed to postpone its waiver decision and thus Examiner involvement. Finally, an appellant would not be appealing a devoid-of-explanation invoice, but DDES's final letter explaining its decision. We have cribbed language from Chapter 27.50 in our suggested amendments to Chapter 23.32.

In sum, the 2011 Amendments were a necessary and worthwhile effort to address concerns our high court laid out in *Post*. Having now had experience applying the Amendments in several cases, we believe the pertinent code sections could benefit from further attention. Our suggestions on what such a revised process would look like are attached as Appendix B.

⁴The full text of KCC 23.32.050 appears in Appendix B.

⁵**27.50.100 Necessary conditions.**

A permit applicant may appeal to the hearing examiner permit fee estimates, including estimate revisions, issued by the department under the project management program only if:

...

B. The applicant had first filed a fee estimate dispute with the director, who denied all or a portion of the applicant's request. (Ord. 16026 § 10, 2008).

23.02.080 Service - citation, notice of noncompliance, notice and order - stop work order.

A. Service of a citation, notice of compliance, ~~or~~ notice and order, or penalty waiver decision shall be made on a person responsible for code compliance by one or more of the following methods:

1. Personal service of a citation, notice of noncompliance, ~~or~~ notice and order, or penalty waiver decision may be made on the person identified by the department as being responsible for code compliance, or by leaving a copy of the citation, ~~or~~ notice and order, or penalty waiver decision at that person's house of usual abode with a person of suitable age and discretion who resides there.

2. Service directed to the landowner and/or occupant of the property may be made by posting the citation, notice of noncompliance, ~~or~~ notice and order, or penalty waiver decision in a conspicuous place on the property where the violation occurred and concurrently mailing notice as provided for below, if a mailing address is available.

3. Service by mail may be made for a citation, notice of noncompliance, ~~or~~ notice and order, or penalty waiver decision by mailing two copies, postage prepaid, one by ordinary first class mail and the other by certified mail, to the person responsible for code compliance at his or her last known address, at the address of the violation, or at the address of the place of business of the person responsible for code compliance. The taxpayer's address as shown on the tax records of the county shall be deemed to be the proper address for the purpose of mailing such notice to the landowner of the property where the violation occurred. Service by mail shall be presumed effective upon the third business day following the day upon which the citation, notice of noncompliance, ~~or~~ notice and order, or penalty waiver decision was placed in the mail.

B. For notice and orders only, when the address of the person responsible for code compliance cannot reasonably be determined, service may be made by publication once in a local newspaper with general circulation.

C. Service of a stop work order on a person responsible for code compliance may be made by posting the stop work order in a conspicuous place on the property where the violation occurred or by serving the stop work order in any other manner permitted by this section.

D. The failure of the director to make or attempt service on any person named in the citation, notice of noncompliance, notice and order, ~~or~~ stop work, or penalty waiver decision order shall not invalidate any proceedings as to any other person duly served. (Ord. 15969 § 6, 2007; Ord. 13263 § 9, 1998).

¹The 2011 Amendments exclusively employed the term “penalties,” not “fines,” and Title 23 overwhelmingly relies on “penalties” instead of “fines.” Unless there is some additional concept captured by “fines” not captured by “penalties,” “fines” appears redundant.

²While 2007 code amendments generally added “notice of noncompliance [with a voluntary compliance agreement]” where notices and orders, citations, and stop work orders were listed (see KCC 23.02.080, directly above), KCC 23.32.050 appears, inadvertently, not to have been so updated.

23.32.050 Waivers.

A. The invoice for civil penalties imposed under this title shall include a statement advising the person responsible for code compliance that there is a right to request a waiver from the director of some or all of the penalties.

~~B. A. Civil fines and civil~~¹ penalties, in whole or in part, may be waived or reimbursed to the payer by the director, with the concurrence of the director of the department of finance, under the following circumstances:

1. The citation, notice and order, notice of non-compliance,² or stop work order was issued in error;
2. The civil ~~fines or civil~~ penalties were assessed in error; or
3. Notice failed to reach the property owner due to unusual circumstances.

~~C. B. Civil fines and civil~~ penalties, in whole or in part, may be waived by the director, with the concurrence of the director of the department of finance or its ~~it's~~ successor agency, under the following circumstances:

1. The code violations have been cured under a voluntary compliance agreement;
2. The code violations which formed the basis for the civil penalties have been cured, and the director finds that compelling reasons justify waiver of all or part of the outstanding civil penalties; or
3. Other information warranting waiver has been presented to the director since the citation, notice and order, notice of noncompliance, ~~or~~ stop work order, or penalty invoice was issued.

D. In cases where additional penalties may be assessed, or where compliance or other factors may provide a later ground for waiver, the director may postpone consideration of the waiver request. New penalties may be assessed as warranted, but no interest should accrue on (nor collection pursued for) penalties subject to a pending waiver request or timely-filed appeal.

E. When the director reaches a final determination on a waiver request, the department shall provide a written decision to the person filing the waiver request, either in person or by United States mail. The written decision shall inform the person of the right to appeal the waiver decision and shall provide notice of the appeal deadlines and requirements established in this chapter.

~~F. G.~~ The director shall document the circumstances under which a decision was made to waive penalties and such a statement shall become part of

the public record unless privileged. (Ord. 14309 § 7, 2002; Ord. 13263 § 41, 1998).

23.32.100 Civil penalty - invoice - appeal - notice.

A. A person who filed a penalty waiver request under KCC 23.32.050 may appeal the director's decision denying all or a portion of the requested waiver. The invoice for civil penalties imposed under this title shall include a statement advising the person responsible for code compliance that there is a right to appeal any civil penalties assessed for any time period after achieving compliance with a notice and order, stop work order or voluntary compliance agreement.

B. The person billed in an invoice for civil penalties who believes that civil penalties were assessed for a time period after achieving compliance may file an appeal with the department. In order to be effective, a written notice and statement of appeal must be received by the department within fourteen days from service of the director's penalty waiver decision ~~the date of the invoice~~. The statement of appeal must include:

1. The identity of the person filing the appeal;
2. The address of the property where the violations were determined to exist;
- ~~3. A description of the violations for which civil penalties were assessed;~~
and—
3. A description of the actions taken to achieve compliance (and, if applicable, the date of compliance); and
4. Any other reasons why the person believes the penalties are erroneous or excessive under the circumstances. (Ord. 17191 § 55, 2011).

23.32.110 Civil penalty - appeal - hearing - decision. ~~The hearing examiner shall conduct a closed record hearing on the appeal of the assessment of civil penalties.~~ The burden is on the appellant to demonstrate by a preponderance of the evidence that civil penalties were assessed after achieving compliance or that the penalties are otherwise erroneous or excessive under the circumstances. If the hearing examiner grants the appeal, the examiner shall modify the assessment of civil penalties accordingly. If the hearing examiner denies the appeal, the assessed civil penalties shall be reinstated in full. The hearing examiner's decision is final. (Ord. 17191 § 56, 2011).

23.32.120 Civil penalty - appeal - scope governing law --tolling and application.

A. In an appeal of the assessment of civil penalties, the appellant may not challenge findings, requirements, or other items that could have been challenged during the appeal period for a citation, notice and order, notice of non-compliance, stop work order, or earlier penalty. ~~only challenge whether civil penalties were assessed for any time period after achieving compliance. The hearing examiner's determination is limited to finding whether civil penalties were assessed for any time period after achieving compliance and to establishing the proper penalty dates if the appeal is granted.~~

B. The appeal of the assessment of civil penalties to the hearing examiner shall be governed by K.C.C. chapters 20.24 and 23.36, except that where specific provisions in this chapter conflict with K.C.C. chapters 20.24 or 23.36, the provisions of this chapter shall govern.

C. Upon the timely receipt of a statement of appeal, the assessment of civil penalties shall be tolled pending the hearing examiner's decision. Should the hearing examiner deny or dismiss the appeal, the civil penalties shall be applied retroactively from the date that compliance was required in the notice and order, stop work order, voluntary compliance agreement or the compliance dates set in a ~~the hearing examiner's decision on an appeal of a notice and order.~~ (Ord. 17191 § 57, 2011).