

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.

David Spohr, Hearing Examiner
Jessica Oscoy, Office Manager
March 1, 2022

JANUARY – DECEMBER
2021

TABLE OF CONTENTS

Overview	1
Examiner Jurisdiction	2
Case Workload	2
New Cases	2
Cases Carried over from Previous Years	4
Proceedings	5
Reports Issued	7
Appellate Activity	10
Compliance with Code-Mandated Deadlines	12
Deadline One—45 Days from Appeal Transmittal to Proceeding	12
Deadlines Two—90 Days from Application Referral/Appeal Transmittal to Report	12
Deadline Three—10 Business Days from Hearing Close to Report ..	13
Office Initiatives	14
Remote Hearings	14
Equity and Social Justice Consulting	15
Regulatory Change Recommendations	16
Examiner Code	16
For-Hire Driver Appeals	16
Public Benefit Rating System	16
Animal Code	18
Regulatory Interpretations	18
Small Animals	19
Inconsistent Grading Definitions	20
Clearing and Grading Thresholds	21
Conclusion	23

ANNUAL REPORT
OFFICE OF THE KING COUNTY HEARING EXAMINER
JANUARY—DECEMBER 2021

OVERVIEW

20.22.020 Chapter purpose

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

20.22.310 Annual report

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

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 2021, analyzing examiner workload and compliance with various deadlines, and comparing 2021 to previous years. We describe our most interesting cases of 2021 (road vacations!), discuss judicial appeals, and review office initiatives. We close with an update on several proposed code amendments we have previously reported on.

Compared to 2020, 2021 was a relatively normal year (to the extent anything can be “normal” during Covid). We were fully-staffed the entire year, already experienced at conducting remote hearings, and well-positioned to seamlessly handle a 7% increase in new case filings and an all-time high (at least for this millennium) of total hours spent in hearings. While in 2020 we had dipped just under our 95% compliance goal for one of three case processing deadlines, in 2021 we returned to 100%, 98%, and 97% compliance respectively. And we reduced our case processing times. If the tenor of our last annual report was “beleaguered,” the tenor of this one is “optimistic.”

In terms of office initiatives, we continued to improve our remote hearings process, and we asked for and received an equity audit to help us identify blind spots to better serve King County’s diverse communities. We also completed and transmitted a draft rewrite of the examiner code for introduction and worked on amendments to the public benefit rating system code.

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

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

EXAMINER JURISDICTION

There are two main avenues by which matters reach the examiner. Sometimes the examiner acts in an appellate capacity, hearing an appeal by a party not satisfied with an agency determination. Other times the examiner has “original jurisdiction,” holding a public hearing on a matter regardless of whether anyone objects to the agency’s recommended course of action. Depending on the case type, at the end of a proceeding the examiner may issue the county’s final decision, a decision that is final unless appealed to council, or a recommendation to council. As to subject matter, the examiner has jurisdiction over eighty distinct matters, in arenas like electric vehicle recharging station penalties, discrimination and equal employment, and open housing. However, the examiner’s caseload mainly consists of several common types. A list of those common case types, categorized by decision-making process, follows.

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)

Land-related compliance (KCC Title 23)

For-hire transportation (KCC ch. 11.04)

Public Health (Health Code ch. 1.08)

Threshold SEPA Determinations (KCC 20.44.120)

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

Conditional use permits

Pre-application determinations

Shoreline substantial development permits

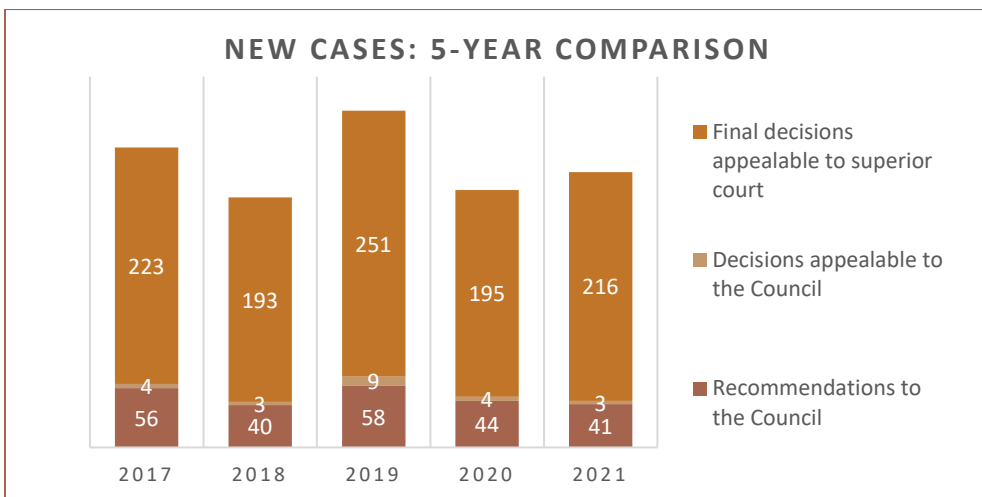
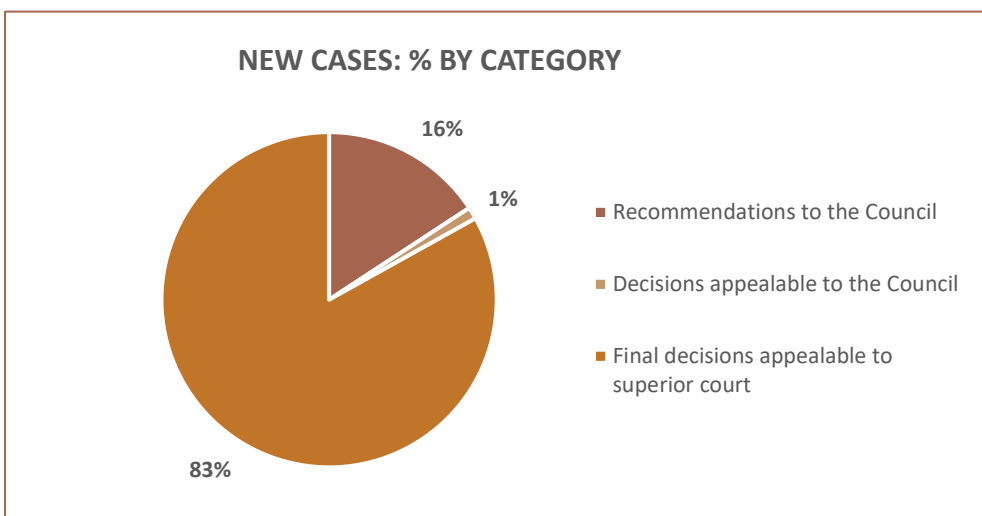
Temporary use permits

CASE WORKLOAD

NEW CASES

We received 260 new cases, 7% more than the 243 we received in 2020. Our 2021 new case filings are organized as follows:

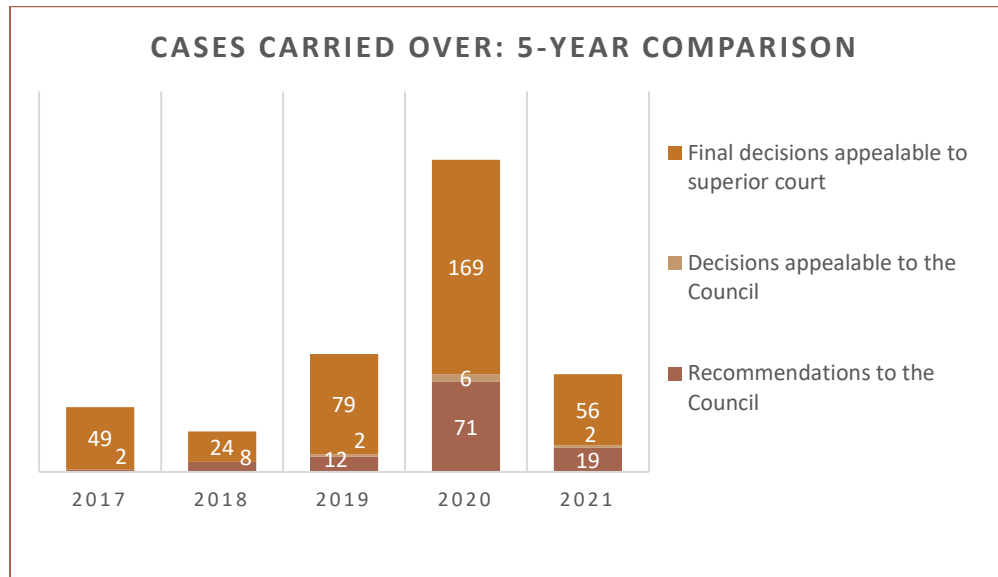
NEW CASES JANUARY—DECEMBER 2021		Number of Cases
RECOMMENDATIONS TO THE COUNCIL		
Current Use Application		35
Road Vacation Petition		6
Special Use Permit Application		1
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary Plat Application		3
FINAL DECISIONS		
Animal Services Appeal		197
Code Enforcement Appeal		17
Short Plat Appeal		1
Preliminary Plat SEPA Appeal		1
Total		260



CASES CARRIED OVER FROM PREVIOUS YEARS

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

As explained in last year’s annual report, we carried over far more cases into 2020 than we have ever before—some as a result of the historically large influx of new cases in 2019, and some because one of our two staffers stepped away in December 2019 and we were not able to perform our normal year-end closing routine. We returned to normalcy in 2021, having closed out (in December 2020) all those cases then-eligible for closing, and carrying into 2021 only the 77 cases that remained truly active.



For the 77 cases carried over from 2020 into 2021, the chart below depicts the year each case reached us. Only four pre-2020 cases remained on our docket.

YEAR CASE OPENED	2009	2011	2015	2020
RECOMMENDATIONS TO THE COUNCIL				19
DECISIONS APPEALABLE TO THE COUNCIL				2
FINAL DECISIONS	1	1	2	56
	Total = 77			

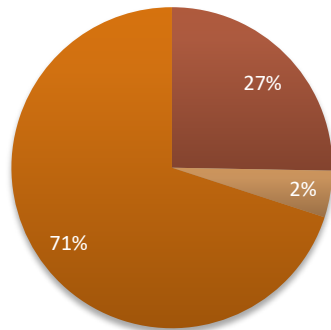
PROCEEDINGS

Even though our total *number* of hearings dropped from the record number we handled in 2020, our 2021 total *time* spent in hearings actually set an all-time (at least for this millennium) high.

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

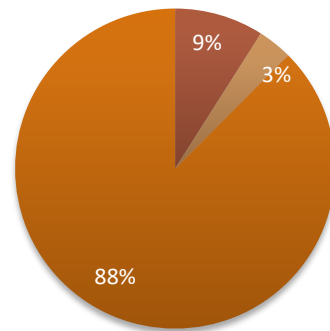
NUMBER OF HEARINGS January—December 2021	Number of hearings	Average Minutes
RECOMMENDATIONS TO THE COUNCIL		
Current Use Application	32	9
Road Vacation Petition	7	55
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary Plat Application	2	112
Plat Alteration Application	1	36
FINAL DECISIONS		
Animal Services Appeal	88	55
Preliminary Plat SEPA Appeal	1	120
Code Enforcement Appeal	14	108
Total	145	

NUMBER OF HEARINGS



- Recommendations to the Council
- Decisions appealable to the Council
- Final decisions appealable to superior court

TIME SPENT IN HEARINGS

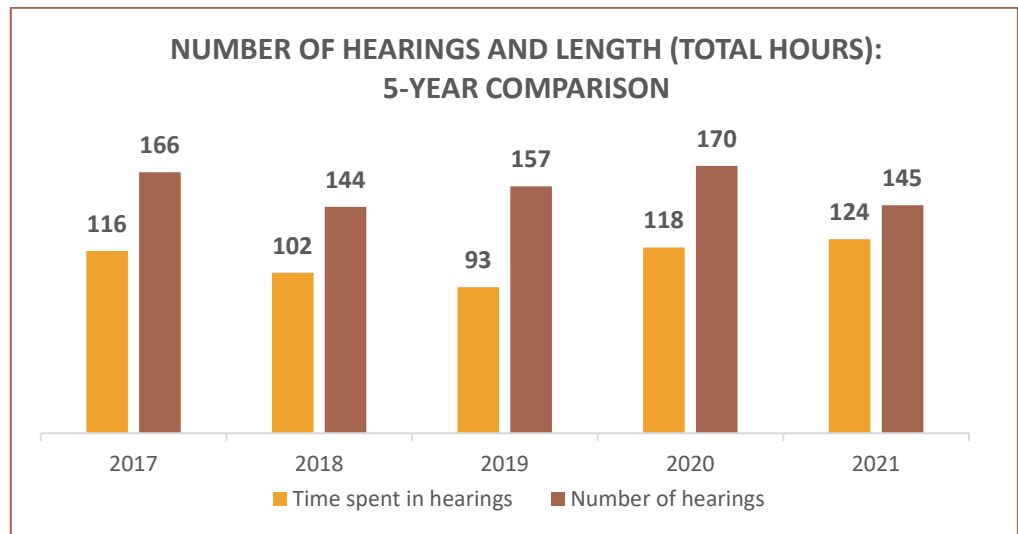


- Recommendations to the Council
- Decisions appealable to the Council
- Final decisions appealable to superior court

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.

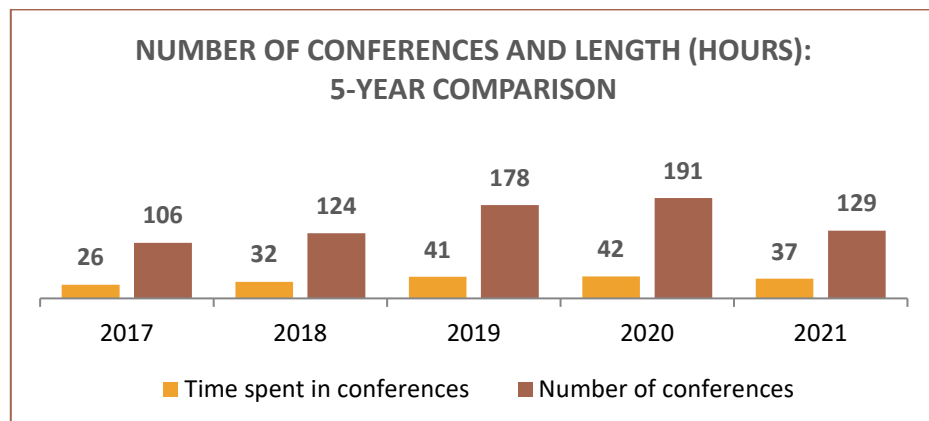


In addition to actual hearings (where we swear in witnesses and take testimony, accept exhibits, and entertain argument), we also hold conferences. These usually take one of two forms—prehearing conferences and status conferences.

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 to pursue an alternative track; if we are headed to hearing we clarify the issues, consider discovery needs, and schedule hearing dates and pre-hearing deadlines.

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

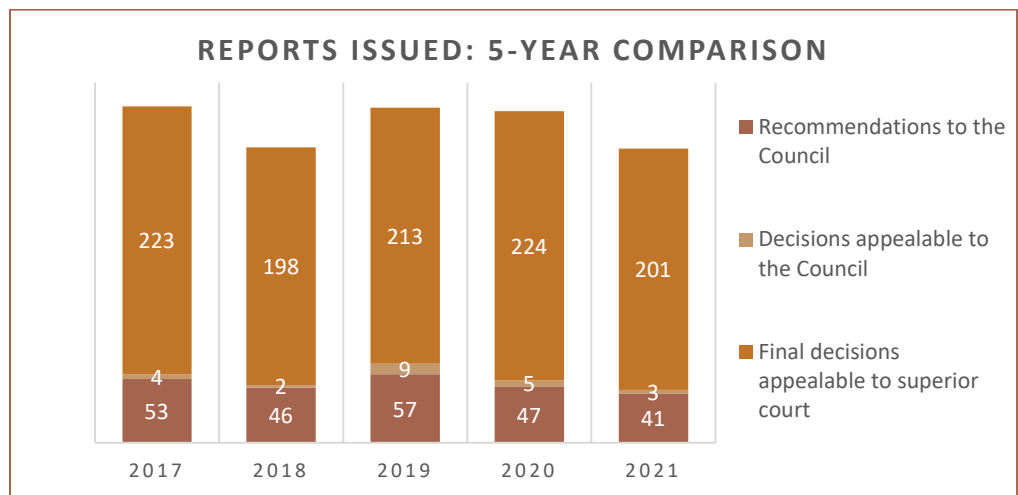
In 2021, we returned to a more normal conference rate, after two outlier years.



REPORTS ISSUED

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

These closings are sometimes summary dismissals (such as when the parties settle a dispute). Sometimes they are detailed findings of fact and conclusions of law based on taking sworn testimony, documentary evidence, and argument at a hearing and then deciding the case on the merits. And sometimes they are in-between, such as a dismissal explaining why we have no jurisdiction to reach the merits. We issued 245 reports in 2021.



SPOTLIGHT CASES

ROAD VACATIONS

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

Despite the name, “road vacations” have nothing to do with holiday travel. In fact, typically they have nothing to do with actual roads. Instead, they reach us when owners of parcels of land abutting public rights-of-way seek to expand their acreage by acquiring the public right-of-way area. Typically, that right-of-way was dedicated to the public when the land was originally subdivided decades (sometimes, over a century) ago, in anticipation that it would be developed as a road. But then it just sits there decade after decade as lines on a map, with no actual access route ever built and no remaining prospect of it ever being built. Such rights-of-way are typically useless to the public; in fact, maybe less than useless, because if, say, someone illegally dumped junk onto that public property, the County would need to pay to clean it up.

Not surprisingly, when such owners petition the County to acquire the right-of-way, the process is usually straightforward. The County checks with various stakeholders (including neighbors) to ensure there are no utility or drainage facilities or easements that need to be protected and no potential for the right-of-way to be developed into an actual access route. The public benefits from adding the property to the tax rolls and from avoiding any maintenance and maintenance responsibilities.

Typically, after holding a short public hearing, where often only the property owner and a County representative appear, we recommend vacation, predicated on the property owner compensating the County for the bump to their private property values from enlarging their holdings by adding the right-of-way area, after subtracting off the public benefit from added property taxes and eliminated potential County management and maintenance costs. Our recommendations to council are relatively short and straightforward, and the council passes them on their consent agenda. Not exactly newsworthy.

However, 2021 saw not one but two road vacations vastly more complex than any we had encountered in our decade on the job. We describe them in turn.

WATER BODIES AND EXCHANGES

The first petition involved an unopened Vashon Island right-of-way abutting Puget Sound. In the process of re-financing, the current property owner discovered that his 1934 home had been constructed several feet into the public right-of-way, scuttling not only re-financing but insurability.

The law is clear that a county may not simply vacate a public right-of-way abutting a water body. However, the owner proposed not an outright vacation but an *exchange*, moving the swath of public right-of-way currently blocked off by the 1934 house from one edge of his property to the other, meaning the same square footage of proposed right-of-way would still extend from the public road down to the Sound, with only the precise location of part of that route changing.

Whether such an exchange is ever legally allowed involves the interplay between two state codes, one allowing counties to exchange real property for privately owned real property of equal or greater value, and the other prohibiting counties from vacating rights-of-way abutting water bodies. In the face of little legislative history or legal precedent, we first had to determine whether exchanges meeting the purposes of both statutes were outright barred. After a half-dozen pages of legal analysis, we determined (contrary to the County's position) that there was no blanket prohibition to such exchanges, and that the seemingly conflicting state statutes could best be reconciled by allowing exchanges preserving public access to waterfront and meeting the other code criteria.

Our full *Steffen/Lemons* Report is available at <https://kingcounty.gov/~mediaindependent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2713-Steffen-Lemons.ashx?la=en>

However, we were only getting started. Then we had to decide whether *this* proposed exchange met all the code criteria and was in the public interest. After another lengthy analysis, we determined that the proposed exchange/vacation did not advance the public interest, but that exchanging the currently public right-of-way area for a *larger* currently private corridor could. Even that was not definitive, because to ensure the public interest was protected, more work was required, such as a formal property survey, a determination of the width necessary in the exchange area to make feasible future pedestrian access, confirmation regarding the legal status of the tidelands, the extent of the house’s encroachment, and clear title to the exchange area.

All that meant that the ordinance we ultimately submitted to council had to articulate *eight* items to complete prior to vacation, instead of the usual property-owners-pay- $\$X$ -compensation-by- Y -deadline. All in all, a fascinating ride.

PUBLIC TRAILS

Fast on the heels of the waterfront petition came a seemingly innocuous petition involving the southerly half of an unopened right-of-way near Redmond. The corridor had never been opened as a road, and no one asserted that it had any value as a possible public road. However, neighbors, trail interests, and Parks personnel testified (and provided documentary evidence supporting) that the right-of-way was in the pathway of the “missing link” to a longstanding regional trails project, providing a backup location to a preferred location under the power lines running past the opposite side of the petitioners’ properties. After entertaining extensive public testimony at a lengthy hearing, we kept the case open for briefing on several legal issues.

We then embarked on what would have been (if not for the waterfront petition discussed above) our most thorough road vacation analysis to date. We started with a threshold analysis of how the requirement that owners of the majority of the frontage must join in the petition applies, where only a half-width of the right-of-way is on the table; we found that so long as owners of the majority of the frontage along the half of the right-of-way being vacated join the petition, the petition is valid.

Then we engaged in the meat of the analysis. The County’s position was that because the right-of-way here was useless to the county “road system” (it being undisputed that that no public road would ever be built there), that should end our analysis and vacation should proceed. We did not accept that. Because vacations have to benefit the public, the code requires the County to consider preserving the right-of-way for the county “transportation system of the future,” a term which encompasses nonmotorized transportation. And the code section

Our full *GHR LLC/Michael Ritter* Report is available at https://kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2727_GHR_LLC_Michael_Ritter.ashx?la=en.

the County thought prevented a trail from being constructed unless it abutted a vehicular road was not actually a prohibition at all.

We then weighed the public benefits for and against vacation, finding that the benefits to preserving the subject right-of-way as a potential location for the needed “missing link” trail outweighed the benefits of vacation. We recommended against vacation, but only after providing several additional pages of analysis on how and when a *future* petition to vacate the subject right-of-way petition of the subject right-of-way might be successful.

APPELLATE ACTIVITY

An examiner’s decision (or, in scenarios where an examiner determination reaches the council, the council’s decision) almost always wraps up the matter. However, in a tiny fraction of cases a disputant seeks judicial review. We received two new appeals in 2021, and there have been developments in four previously-reported appeals. We start with the new cases, before updating the old ones.

In *de Maar*, two dogs bit a canvasser, one biting his testicles and slicing his scrotum, the other joining in and biting his arm. Animal Services declared both dogs vicious. The de Maars appealed, denying that either dog had bitten the canvasser and alleging that the canvasser was a trespasser who slit his own scrotum and bloodied his own arm as part of some burglary ring or personal injury claim. After hearing the testimony, reviewing the exhibits, and receiving post-hearing briefing on the trespass issue, we rejected the de Maars’ conspiracy theory, undertook five pages of legal analysis before finding the trespass defense factually and legally unpersuasive, and ultimately upheld the viciousness determination for the crotch-chomper while overturning it for the arm biter. The de Maars appealed to superior court in early 2021 but took no further action to move their appeal forward. We understand the County is preparing a motion to dismiss the appeal.

In *Triplet*, Animal Services had issued over 30 violations over a six-month period for Ms. Triplet’s pit bulls terrorizing the neighborhood, including killing a neighbor’s cat. After Ms. Triplet failed to comply with an order to remove two of her dogs from King County, the County seized those dogs pursuant to a search warrant. Ms. Triplet appealed to us, seeking the dogs back. We denied her challenge, and subsequently denied her motion for reconsideration. Ms. Triplet petitioned superior court, who dismissed her petition.

Roth involved an Animal Services order for Mr. Roth to remove one of his dogs from King County. Although the order emphasized the appeal deadline, our hearing guide states in bold, purple, and underline that, “**Whatever you do, make sure [Animal Services] receives your appeal by the deadline!**” and Mr.

Roth had almost had an earlier appeal of a previous Animal Services order dismissed as untimely, Mr. Roth nonetheless filed his appeal two weeks past the deadline. Lacking jurisdiction to entertain his appeal, we dismissed it. Mr. Roth appealed to superior court but subsequently withdrew his appeal.

McMilian is a long-running code enforcement dispute involving abutting sites historically used as a wrecking yard but located in a single-family residential zone. Earlier litigation resulted in Mr. McMilian being required to submit a development application. In 2018 DLS-Permitting issued a preliminary decision on his application. Mr. McMilian appealed the pre-application decision to the examiner. In 2019, a *pro tem* examiner granted in part and denied in part his appeal. Mr. McMilian appealed that decision to superior court. The court eventually concluded that the 2019 process was a continuation of the previous code enforcement matter and assigned the County the burden of proof regarding the extent of the legal nonconforming use. On remand, DLS-Permitting sought to dismiss the matter, but the *pro tem* examiner was unclear regarding DLS-Permitting's authority to dismiss; she stayed the case to give DLS-Permitting the opportunity to seek clarification from the superior court. The PAO is filing a motion with superior court, seeking clarification.

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. DLS-Permitting initiated enforcement and then later initiated a second enforcement based on additional Klineburger work in the floodway. The enforcement included assessing civil penalties. The Klineburgers appealed to the examiner. We previously reported on the Klineburgers' unsuccessful judicial appeals of various examiner decisions upholding various enforcement actions. The appealed cases were ultimately upheld by the Court of Appeals, and the Washington State Supreme Court denied the Klineburgers petitions for discretionary review.

Finally, **Danieli** stemmed from animal enforcement. In November 2020, a superior court determined that we lacked jurisdiction over animal-related appeals arising out of Bellevue; in December 2020, Bellevue updated its code to clarify that we are the proper appellate tribunal going forward. However, Ms. Danieli's litigation was broader, with multiple claims against King County (including our office and the county executive's office), Bellevue, Animal Services, and two Animal Services employees. While some of the litigation continues, in January 2022, the superior court dismissed our office from the case.

COMPLIANCE WITH CODE-MANDATED DEADLINES

Statutory requirements impose deadlines for swift and efficient examiner case processing. The code-established deadlines discussed below represent our three principal time requirements. Each year we set 95% as our compliance goal for each of the three deadlines. In 2021 we were 100%, 98%, and 97% 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 100% of our cases, exceeding our 95% compliance goal.

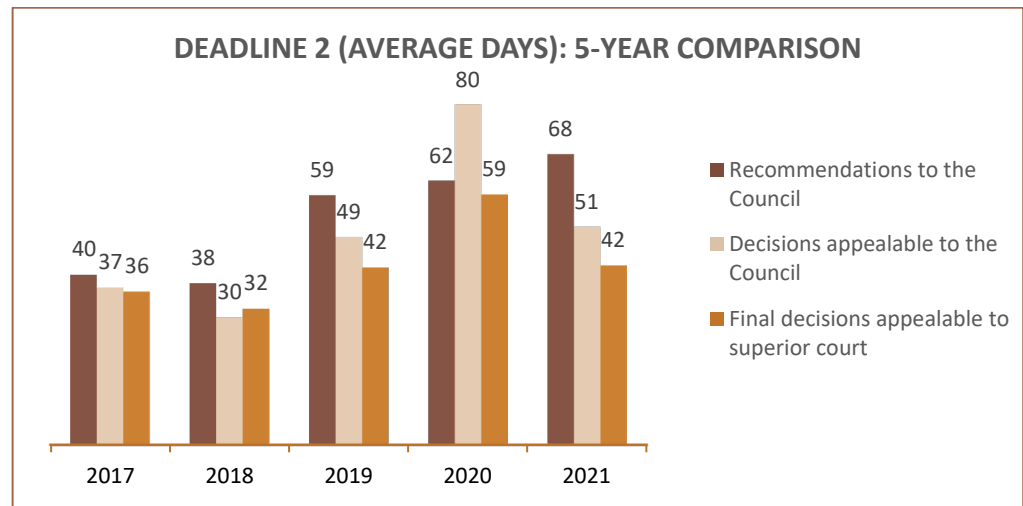
DEADLINE—1 AVERAGES AND COMPLIANCE 45 DAYS FROM APPEAL TRANSMITTAL TO FIRST PROCEEDING	Average days	Percent Compliant
FINAL DECISIONS		
Animal Services Appeal	32	100%
Code Enforcement Appeal	28	100%
Preliminary Plat SEPA Appeal	15	100%
Short Plat Appeal	33	100%
Total	32	100%

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

The code sets deadlines for how quickly the examiner should complete review, including issuing a final determination. For appeals, the deadline is 90 days from receiving the appeal packet. For applications, the deadline is 90 days from 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 98% of our cases, exceeding our 95% compliance goal. (Our one significantly below-average subcategory, road vacations, reflects the two uber-complex road vacation petitions detailed above.)

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	45	97%
Road Vacation Petition	92	57%
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary Plat Application	72	100%
Plat Alteration Application	31	100%
FINAL DECISIONS		
Animal Services Appeal	42	100%
Code Enforcement Appeal	56	100%
Preliminary Plat SEPA Appeal	59	100%
Total	48	98%

Not surprisingly perhaps—given Covid, work-from-home, and being shorthanded through the first eight months of 2020—our processing times were uncharacteristically slow in 2020. But in 2021, and despite receiving a modern-day record of new case filings, we rebounded, speeding up our processing times from 2020.

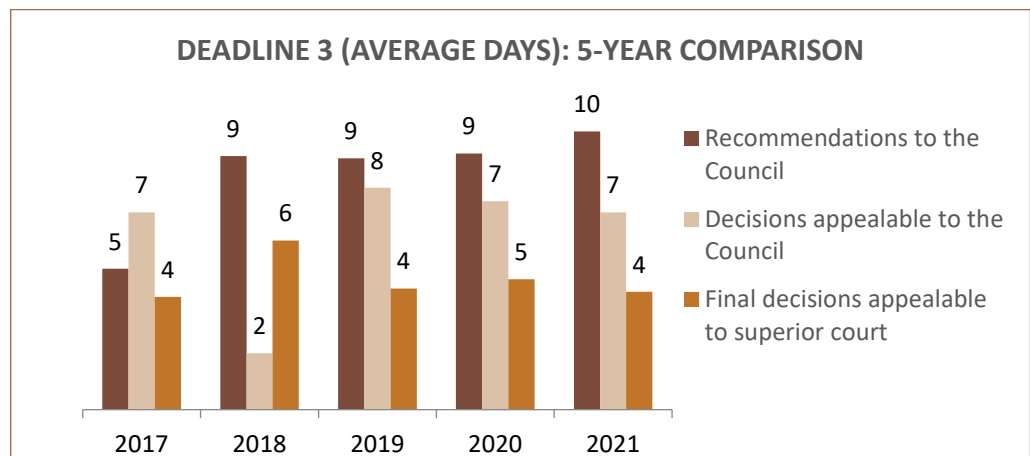


DEADLINE THREE—10 BUSINESS DAYS FROM HEARING CLOSE TO REPORT

The last deadline covers both appeals and applications; it requires the examiner to issue findings and conclusions no later than ten business days after completing a hearing. (Unlike the first two deadlines, the examiner may not extend the ten-day deadline.) At 97% this year, we exceeded the 95% compliance goal we set coming into each year. (Our one significantly below-average subcategory, road vacations, reflects the two uber-complex road vacation petitions detailed above.)

DEADLINE—3 AVERAGES AND COMPLIANCE 10 BUSINESS DAYS FROM HEARING CLOSE TO REPORT		Average days	Percent compliant
RECOMMENDATIONS TO THE COUNCIL			
Current Use Assessment		8	100%
Road Vacation Petition		12	71%
DECISIONS APPEALABLE TO THE COUNCIL			
Preliminary Plat		10	100%
Plat Alteration Application		4	100%
FINAL DECISIONS			
Animal Services Appeal		4	98%
Code Enforcement Appeal		5	92%
Preliminary Plat SEPA Appeal		10	100%
Total		5	97%

Our average decision-writing times stayed fairly constant in 2021, taking (as compared to 2020) an average of one day longer in one category, staying even in the second category, and being one day quicker in the last category.



OFFICE INITIATIVES

REMOTE HEARINGS

In 2021, we implemented several improvements to our remote hearing process:

Skype to Zoom: Based on a County-wide initiative, around July 2021 we transitioned from Skype to Teams. Since we had been hosting our status conferences via Skype but our full hearings via Zoom, we converted our conferences not to Zoom, consolidating under one platform.

System Tests: To accommodate persons not knowledgeable or comfortable using Zoom for remote hearings, we held system tests every Monday with would-be

hearing participants to go over Zoom features, test audio and video capabilities, and answer any procedural questions. We had some participation early in the year, which helped with hearings' accessibility and efficiency. By later in the year, as the public became more comfortable using video technology during the lengthy pandemic, system test participation plummeted and we transitioned to hosting system tests only on a case-by-case basis.

Recording Software: Prior to the pandemic, we recorded hearings using audio recorder and mics supported by somewhat costly software. Now, with the ability to record remote hearings via Zoom, the original recording software became extraneous. So, we paired that down, using only log notes and creating noticeable cost and efficiency savings.

EQUITY AND SOCIAL JUSTICE CONSULTING

In an effort to uncover our Equity and Social Justice (ESJ) blind spots and ensure that our policies, documents, practices, and procedures align with our commitment to serving King County's diverse communities, in 2021 we sought guidance from council's ESJ team. The ESJ team worked with us and towards the end of the year delivered an eleven-page report containing some key findings and recommendations, broken down into:

- Internal Practices
 - develop an ESJ mission, vision, and values to support strategic goals and outcomes;
 - establish new staff onboarding, orientation, mentoring, and training; and
 - implement a standardized performance review process, career professional development plan, succession planning, and exit interviews.
- Programmatic Practices:
 - develop an orientation for new appellants on how to prepare for a hearing, including notification and timelines; and
 - annual review language access needs to remain current;
- Community Engagement Practices:
 - Continue check-in meetings with the King County agencies who frequently appear before us to better understand ESJ needs and support our customers;
- General Practices:
 - continue participating on council's ESJ Team and keep training;
 - incorporate ESJ updates into our regular meetings, including wellness checkups; and
 - be more intentional and purpose driven around ESJ.

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.

REGULATORY CHANGE RECOMMENDATIONS

The code requires our annual reports to identify any needed regulatory clarification. KCC 20.22.310. In 2021 (and early 2022) we worked on amendments to the examiner code and reviewed a draft of legislation related to the public benefit rating system, described below. And, at the request of a councilmember who asked us to keep track of unresolved examiner recommendations from previous reports, we annually re-list regulatory topics introduced in our past reports that have yet to be tackled.

EXAMINER CODE (KCC 20.22)

We got back to work on the draft that would conform the examiner code (KCC chapter 20.22) to the council’s style drafting guide and address a few discrete substantive issues. Having revised our draft and received agency feedback in late 2021, we recently sent a draft ordinance to a council sponsor for introduction. We are hopeful we can get an amended code in place this year, which would then allow us to update our examiner rules. Rules updates would be especially advantageous in light of our Covid-inspired shift to electronic filings and virtual hearings.

PUBLIC BENEFIT RATING SYSTEM

One case type we regularly hear involves applications for landowners to receive favorable tax treatment for preserving or managing lands according to some publicly-beneficial purpose such as forestry, agriculture, or preserving or enhancing more critical areas buffers than the regulations require. The agency sought our input on its code update, and our suggestions were largely incorporated into the 2021-0451 legislation currently in front of the council.

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 same letter. This is problematic on at least three levels.

From the perspective of a licensee, it means having to file two separate appeals (Seattle's due at the 10-day mark, ours due at the 24-day mark) regarding the same underlying facts and typically the same controlling legal standard. Once properly filed, the licensee must attempt to navigate two administrative ladders, including dealing with two sets of rules of procedure. And the licensee must take time out of multiple workdays (foregoing income) to attend parallel hearings. This scheme would be problematic for any licensee, but as a large percentage of applicants have limited English proficiency, no attorney, and require an interpreter at hearing—if they can even figure out how to sufficiently appeal and to get to both hearings—the scheme raises significant equity and social justice concerns.

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

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

We have been writing on the topic since 2016. While no one we have communicated within the city or the county executive branches disputes the advantages of a unified unitary appeal process, making it happen has—for years—taken a back seat to larger and more comprehensive changes to for-hire driver regulations the county, city, and even state (in a pending bill) are considering. We continue to push for commonsense changes to streamline the for-hire driver process, so we have an equitable, efficient, and fair hearing process. Fingers crossed that 2022 is the year that finally happens.

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 for two years. We understand from Executive Services that it intends to transmit an ordinance in the second quarter of 2022. 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 scenarios, the director's decision is not appealable to the examiner. KCC 2.100.050.A. Sometimes a person responding to a code enforcement letter proactively tries to address the situation before it devolves to the agency needing to issue a notice and order, appealable to us. In that procedural posture, if the person disagrees with the director's decision, the interpretation is not appealable. KCC 2.100.050.B. As we read the current code, the person's only avenue to elevate the matter would be to say, “Well, Code

Enforcement, I hate to go there, but I guess slap me with a notice and order, I'll appeal, and then we can take our disagreement to the examiner." That seems suboptimal, for three reasons.

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

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

Third, Code Enforcement's resources are stretched. It seems an unnecessary administrative step to have Code Enforcement proceed through the time-consuming notice and order machinations if the dispute boils down to a regulatory interpretation. This is especially true because for many code interpretations, a department section other than Code Enforcement is essentially driving the bus. We might be able to offer clarity that wraps up a dispute quicker.

SMALL ANIMALS

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

any of our current councilmembers were councilmembers. Thus, we recommend that council consider this issue whenever it updates KCC Title 21A.

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

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

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 additional clearing and/or grading without a permit. For example, the following may be performed without a permit:

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

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

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

In contrast, the applicable permit-exemption for:

- excavating or placing fill is whether it “cumulatively over time” involves over 100 cubic yards (KCC 16.82.051.C.1);
- general clearing is “[c]umulative clearing” of less than 7,000 square feet (KCC 16.82.051.C.3); and
- clearing of invasive vegetation within certain critical areas is “cumulative clearing” of less than 7,000 square feet (KCC 16.82.051.C.8).

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

Those three are murky. In contrast to a relatively clear baseline like “since 2005” or “within a 12-month period,” what does “cumulative” really mean? Does it mean since the dawn of time? Does it include pre-Columbian, Native American active land management practices (like frequent, low-intensity, prescribed burns)? Does it peg to the first European taking an axe to wood or adding dirt to a trail to keep wagon wheels from getting stuck? 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 drainage/water runoff impact than, say, replacing native vegetation with landscaping while keeping that surface pervious. Yet, adding impervious surface has a post-2005 allowance that can be exercised without requiring a permit, while there is zero tolerance for clearing any new area on a site that has a pre-existing, 7,000 square feet of cumulative clearing. That seems incongruous.

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

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

CONCLUSION

In sum, 2021 was a welcome respite, after a taxing-on-all-fronts 2020. We enter 2022 more rested and ready to tackle new challenges. We trust the above analysis was helpful, and we welcome any questions or suggestions.

Submitted March 1, 2022,



David Spohr, King County Hearing Examiner