



**King County**

**Metropolitan King County Council**

David Spohr, Hearing Examiner

King County Courthouse

516 Third Avenue Room 1200

Seattle, Washington 98104

(206) 477-0860

[hearingexaminer@kingcounty.gov](mailto:hearingexaminer@kingcounty.gov)

[www.kingcounty.gov/independent/hearing-examiner](http://www.kingcounty.gov/independent/hearing-examiner)

**MEMORANDUM**

DATE: March 1, 2019  
TO: Metropolitan King County Councilmembers  
FROM: David Spohr, Hearing Examiner   
RE: Hearing Examiner Annual Report

I am pleased to submit to council our annual report covering 2018. The report:

- explains examiner operations, broken down into proceeding types and subtypes;
- employs those groupings to analyze, from a variety of statistical angles, examiner workload and compliance with various code-imposed deadlines; and
- describes some interesting cases, analyzes judicial activity, explains office initiatives, and closes with a “heads up” and on possible code changes.

Compared to 2017—our biggest year, in our seven as examiner, for new case filings, number of hearings and cumulative hours spent in hearings, and reports issued—2018 was a leveling. The decrease was relatively minor, and we still received more cases, held more hearings, and issued more decisions than we had in the years leading up to 2017.

Beyond direct case work, we worked on draft code changes to KCC chapter 20.22 (the examiner code), specifically in light of a code ambiguity highlighted by a previous appeal and more generally inspired by the council’s recent style drafting guide for ordinances. We also devoted considerable time on changes to the animal code (KCC Title 11). We expect both to reach council in the coming months.

We appreciate the trust the council puts in us, and we remain committed to courtesy, promptness, and helpfulness in assisting the public to make full and effective use of our services. We continue striving to timely issue well-written, clearly-reasoned, and legally-appropriate decisions and recommendations.

**Rod Dembowski** District 1  
**Jeanne Kohl-Welles** District 4  
**Pete von Reichbauer** District 7

**Larry Gossett** District 2  
**Dave Upthegrove** District 5  
**Joe McDermott** District 8

**Kathy Lambert** District 3  
**Claudia Balducci** District 6  
**Reagan Dunn** District 9



**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  
March 1, 2019

JANUARY – DECEMBER  
2018

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# ANNUAL REPORT OFFICE OF THE KING COUNTY HEARING EXAMINER

JANUARY—DECEMBER 2018

DAVID SPOHR  
KING COUNTY HEARING EXAMINER

## OVERVIEW

The King County Hearing Examiner is appointed by the [Metropolitan King County Council](#) to provide a fair, efficient, and citizen-accessible public hearing process. We hear applications and appeals involving many county administrative determinations. For some types of cases, 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 2018, analyzing examiner workload and compliance with various deadlines, and comparing 2018 to previous years. We describe one interesting group of cases, discuss judicial appeals, and review office initiatives. We close with a “heads up” on two code amendments we are working on, and place a third regulatory item (development regulation interpretation) on council’s radar.

Compared to 2017—our biggest year in our seven as examiner for new case filings, number of hearings and cumulative hours spent in hearings, and reports issued—2018 was a leveling. The decrease was relatively minor, and we still received more cases, held more hearings, and issued more decisions than in the years leading up to 2017. We continue making efficiency improvements to keep meeting our deadlines, while offering first-rate service.

As to activities outside of direct case work, we worked on draft code changes to KCC chapter 20.22 (the examiner code), specifically in light of a code ambiguity highlighted by a previous case and more generally inspired by the council’s recent style drafting guide for ordinances. We also devoted considerable time on changes to the animal code (KCC Title 11). We expect both to reach council in the coming months.

We appreciate the trust the council puts in us, and we remain committed to courtesy, promptness, and helpfulness in assisting the public to make full and effective use of our services. We continue striving to timely issue well-written, clearly-reasoned, and legally-appropriate decisions and recommendations.

### 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.

**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.

*EXAMINER JURISDICTION*

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There are two main avenues by which matters reach the examiner. Sometimes, the examiner acts in an appellate capacity, hearing an appeal by a party not satisfied with an agency determination. Other times, the examiner has “original jurisdiction,” holding a public hearing on a matter regardless of whether anyone objects to the agency’s recommended course of action. Depending on the type of case, at the end of a hearing the examiner may issue the county’s final decision, a decision that is final unless appealed to council, or a recommendation to council. As to subject matter, the examiner has jurisdiction over eighty distinct matters, in arenas ranging from transit rider suspension appeals (K.C.C. Ch. 28.96) to career service review (K.C.C. Ch. 12.16) to open housing (K.C.C. Ch. 12.20). But the examiner’s caseload mainly consists of several common types. A non-exhaustive list, categorized by decision-making process, follows.

**EXAMINER RECOMMENDATIONS TO THE COUNCIL (K.C.C. 20.22.060)**

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Applications for public benefit rating system-assessed valuation on open space land (K.C.C. 20.36.010)

Road vacation applications and appeals of denials (K.C.C. 14.40.015)

Type 4 land use decisions (K.C.C. 20.20.020.A.4):

Zone reclassifications

Plat vacations

**EXAMINER DECISIONS, APPEALABLE TO THE COUNCIL (K.C.C. 20.22.050)**

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Type 3 land use decisions (K.C.C. 20.20.020.A.3):

Preliminary plat

Plat alterations

**EXAMINER FINAL DECISIONS (K.C.C. 20.22.040)**

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Code compliance enforcement:

Animal care and control (K.C.C. Ch. 11.04)

Land use (K.C.C. Ch. Title 23)

For-hire transportation (K.C.C. Ch. 6.64)

Public Health (Board of Health Code Ch. 1.08)

Threshold SEPA Determinations (K.C.C. 20.44.120)

Type 2 land use decisions (K.C.C. 20.20.020.A.2):

Conditional use permits

Short plats, short plat revisions/alterations

Reasonable use exceptions

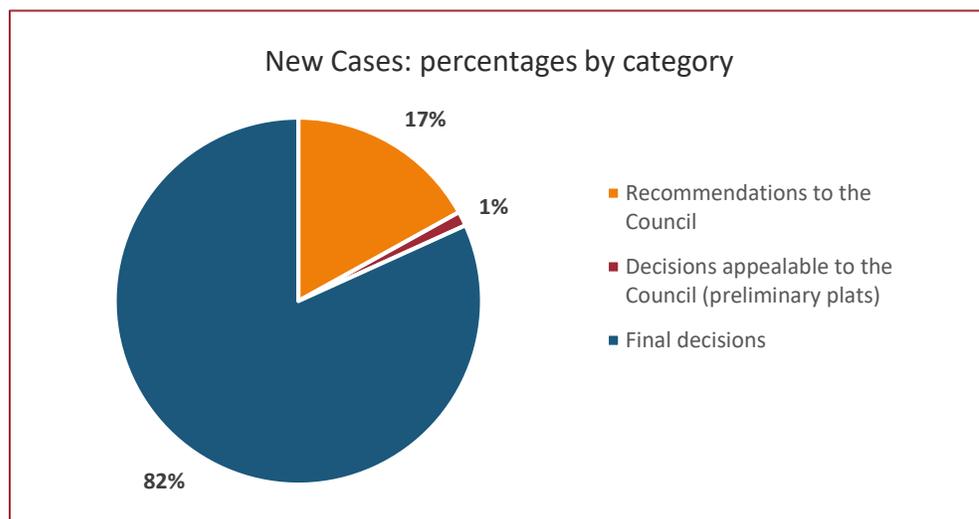
Temporary use permits

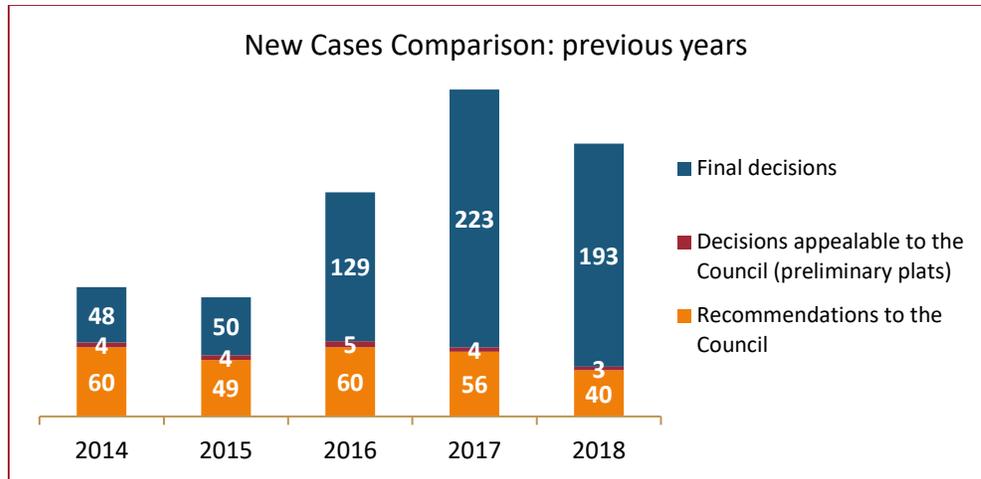
Shoreline substantial development permits Zoning variances

NEW CASES

After a large spike of new cases in 2017, things leveled off a little in 2018. Our 236 new cases represented a 17-percent decrease from the 283 cases we received in 2017. However, our 2018 filings were still significantly higher than we received in the years leading up to 2017. More generally, our new case filings, broken down into class, were:

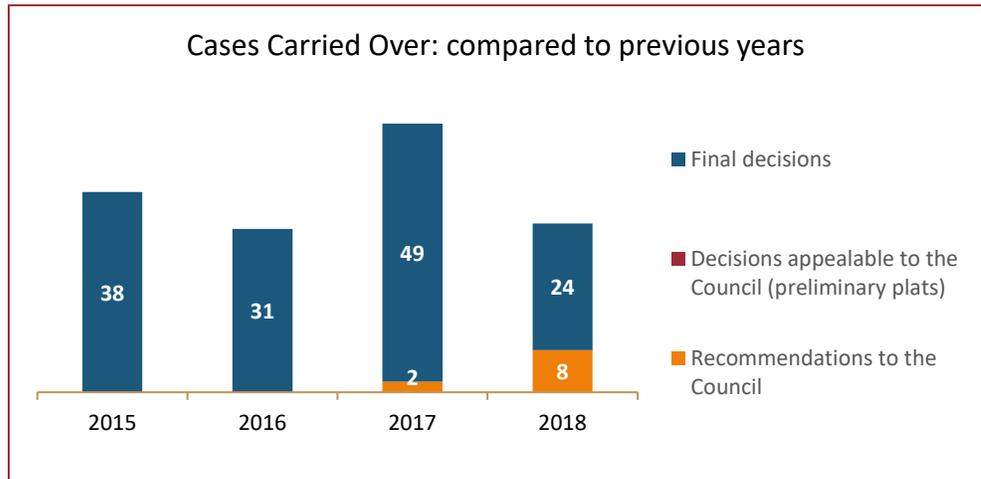
NEW CASES JANUARY—DECEMBER 2018		Number of Cases
<b>RECOMMENDATIONS TO THE COUNCIL</b>		
Landmarks Commission		1
Open space		30
Road vacation		8
Urban planned development		1
<b>DECISIONS APPEALABLE TO THE COUNCIL</b>		
Interim use permit		1
Preliminary plat		2
<b>FINAL DECISIONS</b>		
Animal Services enforcement		112
For-hire license enforcement		24
Land use enforcement		50
SEPA		2
Type 2 land use		5
<b>TOTAL</b>		<b>236</b>





### CASES CARRIED OVER FROM PREVIOUS YEARS

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



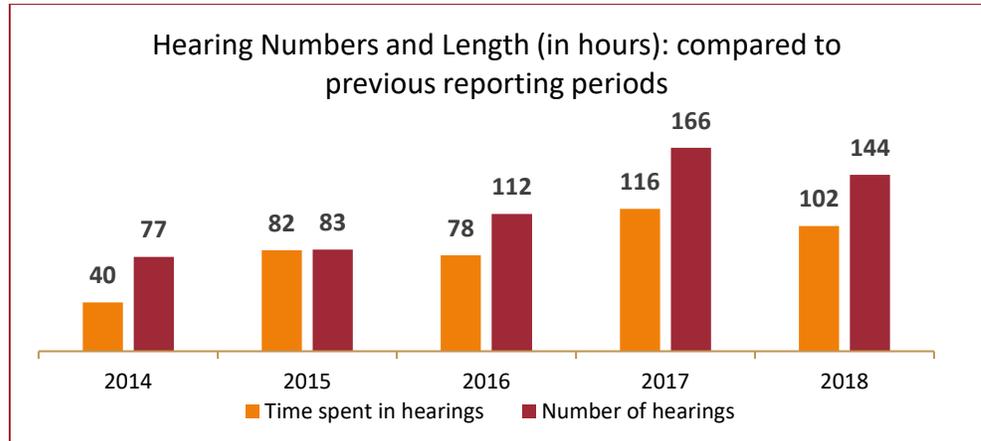
After a blip in 2017, we stabilized and returned to our baseline carry-over rate.

CASES CARRIED OVER	2008	2009	2011	2015	2017	2018
<b>RECOMMENDATIONS TO THE COUNCIL</b>						
Active processing						5
Continued on-call						3
<b>FINAL DECISIONS</b>						
Active processing						7
Continued on-call	1	1	1	2	4	8
<b>TOTAL=32</b>						

PROCEEDINGS

We held 144 hearings in 2018, a 13-percent decrease from the 166 we held in 2017. Those 144 hearings were still significantly more than we held in the years leading up to 2017.

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



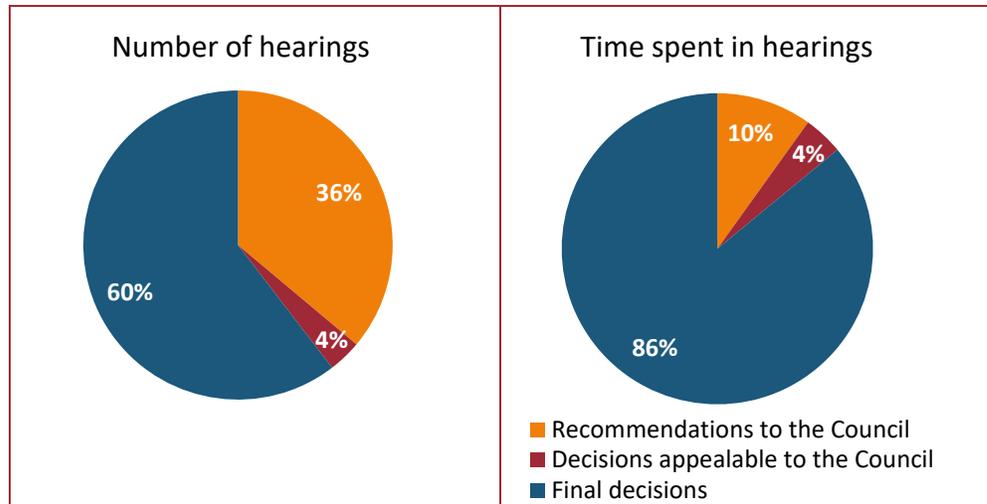
We attempt to extend a high level of service to all our participants. After all, even matters raising no novel legal issues or creating little impact beyond the parties are still crucially important to those parties. But not all types of cases require the same level of examiner involvement. For example, the average land use appeal hearing took almost thirty times longer than the average open space taxation hearing.

NUMBER OF HEARINGS January—December 2018	Number of hearings	Cumulative length of time
<b>RECOMMENDATIONS TO THE COUNCIL</b>		
Landmarks Commission	1	0:44
Open space	43	3:37
Road vacation	7	4:23
Urban planned development	1	1:20
<b>DECISIONS APPEALABLE TO THE COUNCIL</b>		
Interim use permit	1	0:41
Preliminary plat	4	3:30
<b>FINAL DECISIONS</b>		
Animal Services enforcement	29	24:58
For-hire license enforcement	18	10:57
Land use enforcement	30	30:35
SEPA	4	6:21
Type 2 land use	6	14:33
<b>TOTAL</b>	<b>144</b>	<b>101:39</b>

**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.

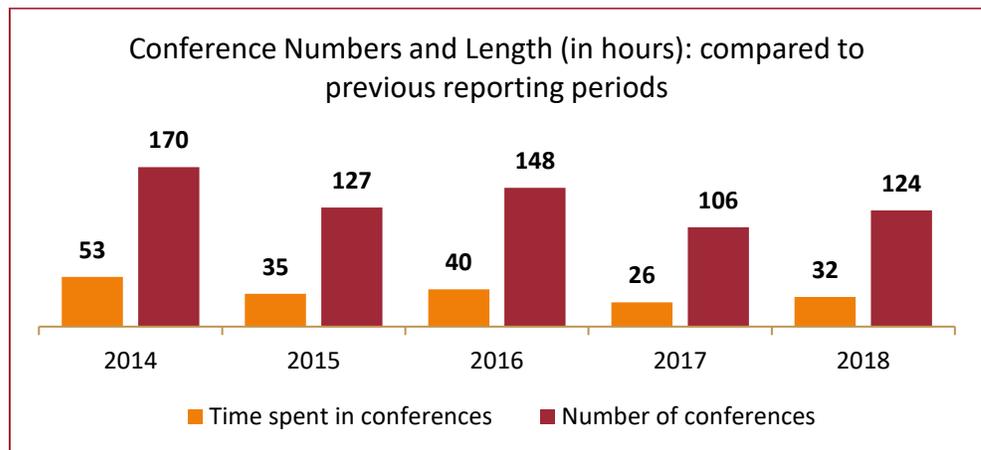
**20.22.120.A Prehearing conference** On the examiner's own initiative, or at the request of a party, the examiner may set a prehearing conference.



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

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

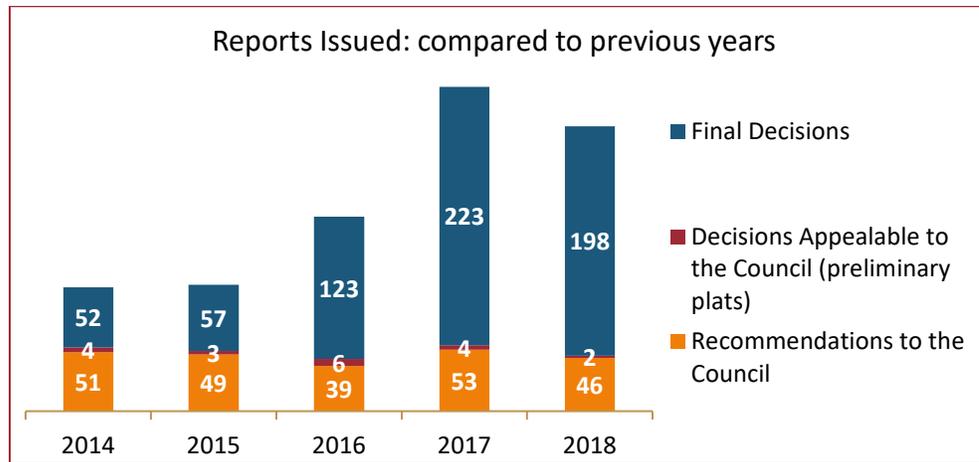
When the parties decide to put off an adversarial hearing (typically while they attempt an amicable resolution), we “continue” their case. We then schedule periodic *status* conference calls (typically at 90-day intervals). These conferences help ensure we stay on top of things, keep parties’ feet to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



## REPORTS ISSUED

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

These closings are sometimes summary dismissals (such as when the parties settle a dispute). More often our final reports are based on taking evidence and argument at a hearing and then deciding the case on the merits through written, typically very detailed, findings and conclusions. We issued 246 reports in 2018, down 12-percent from the unusual high of 280 we issued in 2017, but still significantly more than in previous reporting periods.



Going beyond the numbers, we typically highlight an interesting case or two. This year we describe a suite of cases—road vacations.

Historically, petitioners seeking to vacate and acquire county rights-of-way have paid compensation based on the appraised (or assessed) value of that property. In 2016, state and then county law changed to allow a downward “adjustment” from this appraised/assessed value to reflect advantages—increased tax revenue, limiting liability risk, eliminating maintenance costs, etc.—of transferring the property to private hands. Roads was not able to present a model for how to calculate these adjustments, instead arguing that we should outright eliminate the compensation requirement.

Without any way to quantify even an order-of-magnitude sense of those adjustments, we stayed the petitions and turned to the County’s Office of Performance, Strategy and Budget (PSB) for help crafting a sound approach. Eventually, it required a council budget proviso (which we greatly appreciate) to unstick the situation. Within the last month, we received a model from PSB. Within the last week we conducted prehearing conferences for three of the

<sup>1</sup>Available at [https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/for-hire%20enforcement/2018/FA-IN-388\\_Fain.ashx?la=en](https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/for-hire%20enforcement/2018/FA-IN-388_Fain.ashx?la=en)

stayed petitions, and have scheduled hearings in those for the end of April. We expect to have recommendations on this first batch of road vacations to council by early-to mid-May.

#### APPELLATE ACTIVITY

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The examiner’s decision (or in cases where an examiner determination reaches the council, the council’s decision) almost always wraps up the matter. However, in a tiny fraction of the cases, a disputant seeks judicial review. We only received one appeal on a new case in 2018. However, there have been developments on five earlier-appealed cases (appeals we have previously reported to council on). We start with the five old cases, before describing the one new case.

***Echo Lake Estates*** is a plat development located in the rural area adjacent to the City of Snoqualmie, a site the city has long sought to annex to allow urban, commercial development. The property owner pursued development of a rural subdivision on this site, proposing permit-exempt wells as the water source. In October 2016, we approved the plat, within a week of our high court issuing its *Hirst* decision. *Hirst* required heightened local review of water availability in the permit-exempt well context. The city and the public hospital district moved for reconsideration of our decision, based partially on *Hirst* but also raising other issues they could have raised at our hearing, had they participated. We concluded the movants were too late to raise their non-*Hirst* claims. We reevaluated our decision under *Hirst* and determined that the county had not violated *Hirst*. Still, we issued an amended October 2017 decision that tackled *Hirst*’s requirements as they related to later phases of development. The city and hospital district appealed to the King County Council. The council affirmed our decision in January 2018.

Three days after council action, the legislature adopted a bill that effectively overruled *Hirst*. Nevertheless, the city filed a LUPA appeal challenging the county’s action. The superior court granted the county’s motion to dismiss, based on mootness and lack of standing. The court did recommend that the county change our code to clarify that “party” status is required to appeal an examiner decision (something we address on pages 12–13 of this report). In June 2018, the city appealed again. The city and the developer reached a settlement, to which the county was not a party. A result of the settlement was that the city withdrew its appeal.

***McMilian*** is a long-running code enforcement dispute we previously reported on. It involves abutting sites in a single-family residence-zone historically used as a wrecking yard. In the latest round, in 2018, the agency now known as the Department of Local Services issued a preliminary decision on McMilian’s

application. McMilian appealed the pre-application decision to us, bringing in additional information. A *pro tem* examiner granted in part and denied in part McMilian’s appeal in January 2019. In February 2019, McMilian appealed this decision to superior court under LUPA.

**Klineburger** is another long-running code enforcement dispute. This round involved the unpermitted placement of a cargo container, unpermitted grading (installation of a gravel driveway), and unpermitted clearing within a federally-designated FEMA floodway and county-designated critical areas. In March 2018, a *pro tem* examiner upheld the violations and directed Klineburger to obtain permits to bring the property into compliance. Klineburger filed a LUPA petition with superior court the following month. The court dismissed his appeal with prejudice. Klineburger then appealed to the court of appeals. The issue has been briefed, but oral argument has not been set.

**Remlinger** dealt with the intersection between critical areas, shoreline jurisdiction, salmon, and agriculture. It turned on terminology—whether certain activities qualified as “clearing” and whether features on the property qualified as a “stream,” “aquatic area,” “channel,” and/or “ditch.” Remlinger cleared (without permits) a large area of the buffer to a critical area the county deemed critical because, during flood conditions, floodwaters conveyed salmon from the river into the area. We denied Remlinger’s motion for a directed verdict. However, we wrote that although our code does not exempt that scenario from regulation, a court could “certainly weigh in on whether some other principle makes, as a matter of law, the factual scenario (established thus far) exempt from our code’s reach.” On appeal, the superior court did reverse. The county sought court of appeals review, but the county and Remlinger later negotiated a resolution. We issued an order in February 2018 wrapping up the case.

**Vogl and Hannah** is a code enforcement matter involving whether structures, a substandard dwelling, and a gravel driveway had been constructed without permits and within a stream buffer. A *pro tem* examiner determined that the driveway and some of the structures were within the stream buffer. She required appellants to remove (or at least remove from the stream buffer) some of the unpermitted work and to obtain permits for the remainder. Vogl and Hannah filed a LUPA appeal in superior court, but failed to serve the county. The appeal was dismissed with prejudice in April 2018. Following dismissal, appellants have cured all but the violation involving the driveway and restoration of the graveled area.

**Jassal** was the one new matter appealed in 2018. It involved a dual Seattle/County for-hire driver’s license application. The County denied the application after Mr. Jassal was convicted of reckless endangerment—domestic

**20.22.100.B.1** For appeals initiated by delivering the appeal statement to the responsible department or division...The examiner shall hold a prehearing conference or a hearing within forty-five days, and shall complete the appeal process, including issuing a determination, within ninety days of the date the office of the hearing examiner receives those materials.

**20.22.100.C** For applications for which the responsible department or division issues a recommendation and an examiner holds a public hearing and issues a decision or recommendation, the examiner shall complete the application review, including holding a public hearing and transmitting the report required by K.C.C. 20.22.220, within ninety days from the date the council refers the application to the office of the hearing examiner. Any time required by the applicant or the responsible department or division to obtain and provide additional information requested by the examiner and necessary for the determination on the application and consistent with applicable laws, regulations and adopted policies is excluded from the ninety-day calculation.

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

violence and fourth-degree assault after driving his car into a car occupied by his wife. We upheld the denial as to the county portion of the dual license. (Under the current system, Seattle has to hold its own hearing on its portion of the license denial letter.) Mr. Jassal petitioned for judicial review of our decision, arguing that he did not have an interpreter present at our hearing. It appears Mr. Jassal confused our hearing (where we provided a Punjabi interpreter) with his parallel Seattle hearing (where Mr. Jassal apparently was not provided an interpreter). In any event, the court dismissed Mr. Jassal’s petition regarding our matter. This case highlights our continuing recommendation regarding the advantages of a single, consolidated appeal process in the scenario where the County denies a dual Seattle/County license.

***COMPLIANCE WITH CODE-MANDATED DEADLINES***

Statutory requirements impose deadlines for swift and efficient examiner processing of certain case matters. The code-established deadlines discussed below represent our three principal time requirements. For each deadline, we met or exceeded our 95 percent compliance goal.

**DEADLINE ONE—45 DAYS FROM APPEAL TRANSMITTAL TO FIRST PROCEEDING**

For appeals, the examiner must hold a prehearing conference or hearing within 45 days of receiving the appeal packet. We were compliant in all of our cases.

DEADLINE—1 AVERAGES AND COMPLIANCE 45 DAYS FROM APPEAL TRANSMITTAL TO FIRST PROCEEDING	Average days	Percent Compliant
<b>FINAL DECISIONS</b>		
Animal Services enforcement	28	100%
For-hire license enforcement	34	100%
Land use enforcement	28	100%
SEPA	7	100%
Type 2 land use	28	100%
<b>TOTAL</b>	<b>29</b>	<b>100%</b>

Note: in mid-2016 the legal standard for how we calculate deadlines changed. Thus, we have only one apples-to-apples year (2017) to compare with 2018. On average in 2018 we held a proceeding two days quicker than in 2017, when we averaged 31 days.

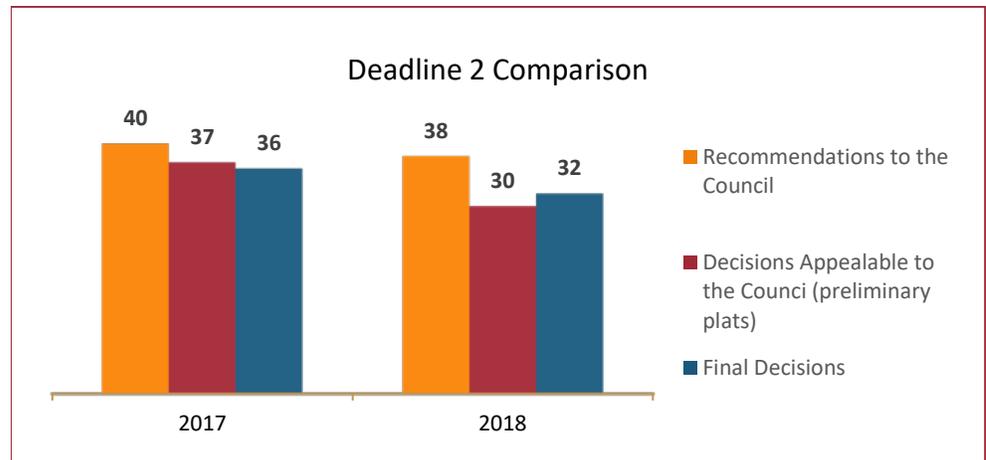
Where the parties jointly request an extension (such as when an appellant is working to obtain permits to resolve a code-enforcement case) the examiner may grant a lengthy extension to Deadline One. In addition, the examiner may (on examiner motion, or on the contested motion of one of the parties) extend this deadline by up to 30 days. We strive to keep examiner-initiated or non-consensual extensions to a minimum (less than five percent of our cases). Of our 96 appeals, we used the extension three times in 2018.

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

The code sets deadlines for how quickly the examiner should complete review, including issuing a final determination. For appeals, the deadline is 90 days from our receiving the appeal packet. For applications, the deadline is 90 days from our receiving the council’s referral. We were compliant in all of our cases.

As with Deadline One, an examiner may (on examiner motion or on the motion of one of the parties) extend Deadline Two for up to 30 days. Here too, we strive to keep examiner-initiated extensions to under five percent. We waived this deadline on two cases in 2018.

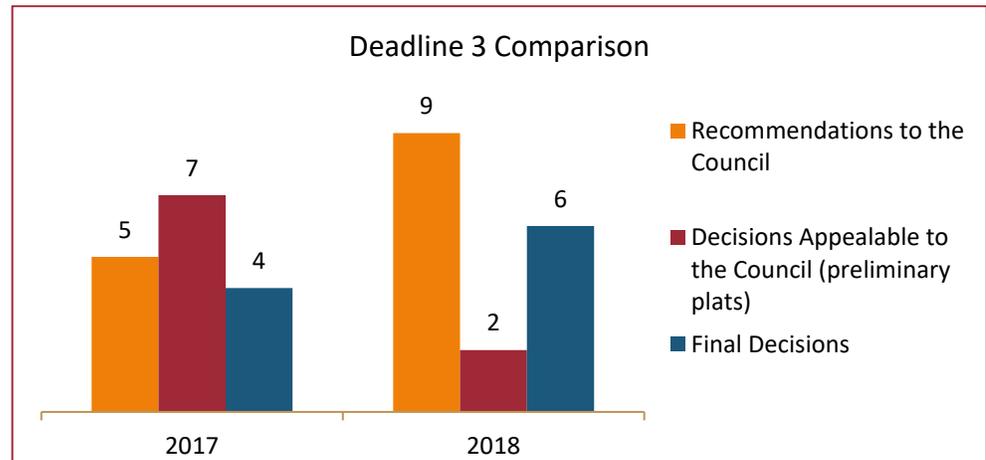
DEADLINE—2 AVERAGES AND COMPLIANCE 90 DAYS FROM APPLICATION REFERRAL/ APPEAL TRANSMITTAL TO REPORT	Average days	Percent Compliant
<b>RECOMMENDATIONS TO THE COUNCIL</b>		
Landmarks Commission	59	100%
Open space	35	100%
Road vacation	70	100%
Urban planned development	81	100%
<b>DECISIONS APPEALABLE TO THE COUNCIL</b>		
Preliminary plats	30	100%
<b>FINAL DECISIONS</b>		
Animal Services enforcement	28	100%
For-hire license enforcement	40	100%
Land use enforcement	35	100%
SEPA	59	100%
Type 2 land use	61	100%
<b>TOTAL</b>	<b>34</b>	<b>100%</b>



**DEADLINE THREE—10 BUSINESS DAYS FROM HEARING CLOSE TO REPORT**

The last deadline relates to all types of hearings, requiring the examiner to issue findings and conclusions no later than ten business days after completing a hearing. We set 95 percent compliance as our goal coming into each year, a rate we met in 2018.

DEADLINE—3 AVERAGES AND COMPLIANCE		
10 BUSINESS DAYS FROM HEARING CLOSE TO REPORT	Average days	Percent compliant
<b>RECOMMENDATIONS TO THE COUNCIL</b>		
Landmarks Commission	10	100%
Open space	6	100%
Road vacation	8	100%
Urban planned development	10	100%
<b>DECISIONS APPEALABLE TO THE COUNCIL</b>		
Preliminary plat	2	100%
<b>FINAL DECISIONS</b>		
Animal Services enforcement	3	96%
For-hire license enforcement	5	100%
Land use enforcement	6	88%
SEPA	7	50%
Type 2 land use	8	75%
<b>TOTAL</b>	<b>4</b>	<b>95%</b>



**OFFICE INITIATIVES**

**EXAMINER CODE (KCC 20.22)**

As described on page 8, *Echo Lake* highlighted a shortcoming in the current code. Two entities that failed to participate in our hearing process later filed a motion for reconsideration and then an appeal. If they had limited their challenge to the

### KCC 20.22.300 Citizen's

**Guide** The office of the hearing examiner shall issue a citizen's guide that describes the examiner process, including making an appeal or participating in a hearing.

*Hirst* issue our supreme court decided after our hearing, that could have fit within a recognized judicial exception (such as “futility”) to the exhaust-administrative-remedies requirement. However, appellants raised other legal and factual issues where there had not been any intervening change in law and that should have been raised during our initial hearing process. The superior court eventually dismissed the appeal, at the same time recommending the county change the code to clarify that “party” status is required to appeal an examiner decision.

We crafted some proposed legislation to amend the few relevant sections of KCC chapter 20.22 necessary to avoid the same ambiguity in a future case and to comply with our high court's admonishment to “encourage parties to fully participate in the administrative process.” *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997). However, rather than just forward a draft addressing those few sections, we are taking this as an opportunity to review the entire KCC chapter 20.22 and do some wordsmithing, in light of the council's 2018 style drafting guide. In the near future we expect to forward a draft ordinance cleaning up more of KCC chapter 20.22.

### ANIMAL CODE (KCC TITLE 11)

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We spent considerable time on a comprehensive review of the animal code (KCC Title 11). Today we put three items on the Council's radar screen, before it reviews a draft proposal in the coming months:

First, state law (and the law of most other Washington municipalities) contains two tiers for troubling animal behavior. “Potentially dangerous” covers behavior like chasing a person in a menacing fashion, even if no bite is actually inflicted. A “dangerous” designation requires more, like (without provocation) killing a domestic animal or inflicting severe, disfiguring injury on a person. Conversely, county code currently only has only one category—“vicious”—a category more stringent than “potentially dangerous” but less than “dangerous.” The current draft would replace the county's one-size-fits-all category with those two tiers.

Second, the code contains several scenarios when removal of the animal is mandatory (“shall remove”). As removal is the harshest arrow in the civil enforcement quiver, it seems that some of these should be in the discretionary (“may remove”) category.

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

<sup>2</sup>Also available at <https://www.kingcounty.gov/independent/hearing-examiner/guide/for-hire-guide.aspx>

## *REGULATORY CHANGE RECOMMENDATIONS*

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The code requires our annual reports to identify any needed regulatory clarification. As discussed in the previous section, we are working on proposed changes to the examiner code (KCC chapter 20.22) and the animal code (KCC Title 11). We expect those to reach Council in the coming months. We raise one additional point today.

KCC chapter 2.100 describes the process by which a person can request the director (typically of the Department of Local Services) for a formal code interpretation decision. 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 code enforcement action, the decision is appeal as part of the appeal process for the code enforcement action. KCC 2.100.050.B.

However, outside of the above scenario, the director's decision is not appealable. KCC 2.100.050.A. This creates what may be an unintended gap. Sometimes a person receiving a complaint proactively tries to address the situation before it devolves to the point where the agency has to issue a formal action—such as a notice and order—appealable to us. In that procedural context, if the person disagrees with the director's decision, that interpretation is not appealable. KCC 2.100.050.B. As we read the current code, the person's avenue for appeal would be to say, "Well, Code Enforcement, I hate to go there, but I guess issue me a notice and order, and then we can take our disagreement to the examiner." That seems suboptimal, for three reasons.

First, the potential code enforcement penalties we deal with are not nearly as severe as the Clean Water Act penalties the Supreme Court dealt with in *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012). However, county notices-and-orders are recorded against (and can cloud) title, and they can carry monetary penalties. In *Sackett*, the unanimous Court was troubled that people had to subject themselves to enforcement penalties in order to get an appealable ruling on the applicability of a regulation. In our context, we do not see why someone having a legitimate difference of opinion on what a regulation covers—and who is willing to tackle the issue proactively without forcing the agency to file a formal action—should basically have to invite a formal enforcement order just to get the issue in front of the examiner.

Second, this is force-a-formal-agency-decision is not, for example, how the code treats permit applicants. During the permit process, if the applicant receives a preliminary determination that something is not allowed, the applicant can appeal that preliminary decision to the examiner. KCC 20.20.030.D. The applicant

<sup>5</sup>See, e.g., [https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2017/2017%20November/ENFR170163\\_Turgeon.ashx?la=en](https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2017/2017%20November/ENFR170163_Turgeon.ashx?la=en)

does not have to continue through the permit process or demand a final permit decision, just to get the underlying dispute in front of the examiner.

Third, Code Enforcement’s resources are stretched. It seems an unnecessary administrative step to have Code Enforcement proceed through the time-consuming notice and order machinations if the issue is a regulatory interpretation. This is especially true because on many code interpretations Code Enforcement is not even driving the bus. We might be able to offer some clarity that allows a dispute to wrap up easier.

We do not offer today any magic language on how to accomplish this. We only put it on council’s radar screen for when it considers the next development regulation omnibus.

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### *CONCLUSION*

Last year was another busy and rewarding year. We look forward to continual improvement in 2019. We are always open to questions and feedback. We will present our next annual report by March 1, 2020.

Submitted March 1, 2019,



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David Spohr, Hearing Examiner