



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, 2018

JANUARY – DECEMBER
2017

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ANNUAL REPORT OFFICE OF THE KING COUNTY HEARING EXAMINER

JANUARY—DECEMBER 2017

DAVID SPOHR
KING COUNTY HEARING EXAMINER

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 citizen-accessible public hearing process. We hear applications and appeals of many county administrative determinations, issue formal decisions, and make recommendations to council.

The council recently streamlined our semiannual reporting structure to a single annual report. Unless specifically noted, this report covers all of 2017, not just the latter half. We begin by explaining and reviewing specific examiner jurisdictions. We then apply these groupings to 2017, analyzing examiner workload and compliance with various deadlines, and comparing 2017 to previous years. We describe one of our more interesting cases, discuss the two judicial appeals, review office initiatives, and close with our recommended code clarification, which this year involves clearing and grading permit thresholds.

Compared to 2016, our new case filings increased by 45 percent, our number of hearings and cumulative hours spent in hearings each rose 48 percent, and our reports issued jumped 67 percent. Obviously, we have needed to continually make efficiency improvements to keep meeting our deadlines while offering first-rate service. We (and I very much mean the collective “we” of Vonetta Mangaoang, Elizabeth Dop, and our *pro tem* examiner, Alison Moss) have done so, maintaining strict compliance with each examiner processing deadline.

As to 2017 initiatives, perhaps our most important was completely revamping what had been a single public guide to the hearing process, not only overhauling and dramatically improving the original hearing guide, but then creating three new case type-specific guides. We also held our first-ever, offsite retreat, a full of day at strategic planning, data optimization, subject matter-specific training, and team time management. And finally, we worked with transit stakeholders to figure out the desired process for handling transit rider suspension appeals; we drafted and circulated what is now an ordinance in front of council.

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. In addition, we continue striving to timely issue well-written, clearly-reasoned, and legally-appropriate decisions and recommendations.

There are two main avenues by which matters reach the examiner. Sometimes, the examiner acts in an appellate capacity, hearing an appeal by a party not satisfied with an agency determination. Other times, the examiner has “original jurisdiction,” holding a public hearing on a matter regardless of whether anyone objects to the agency’s recommended course of action. Depending on the type of case, at the end of a 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 lobbyist disclosure (K.C.C. Ch. 1.07) 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)

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)

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)

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

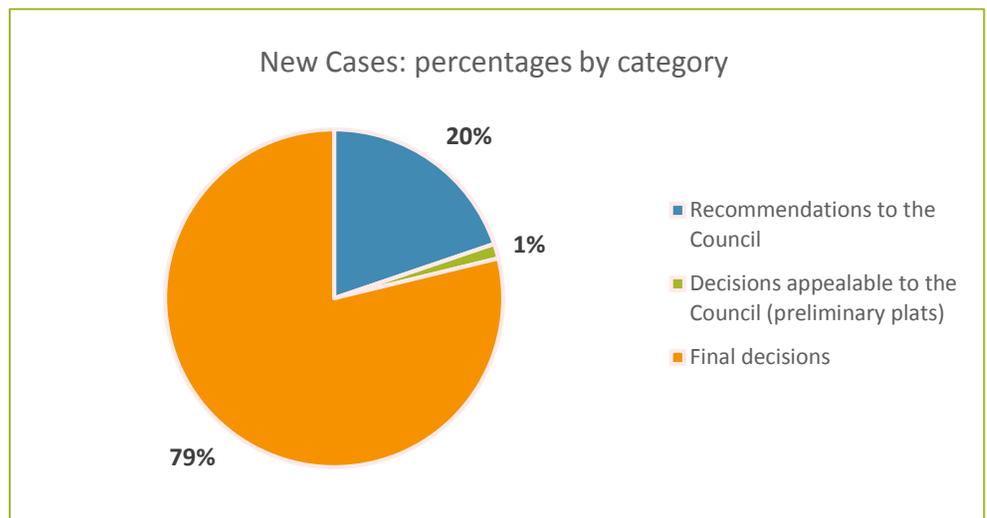
20.20.020 Classifications of land use decision processes

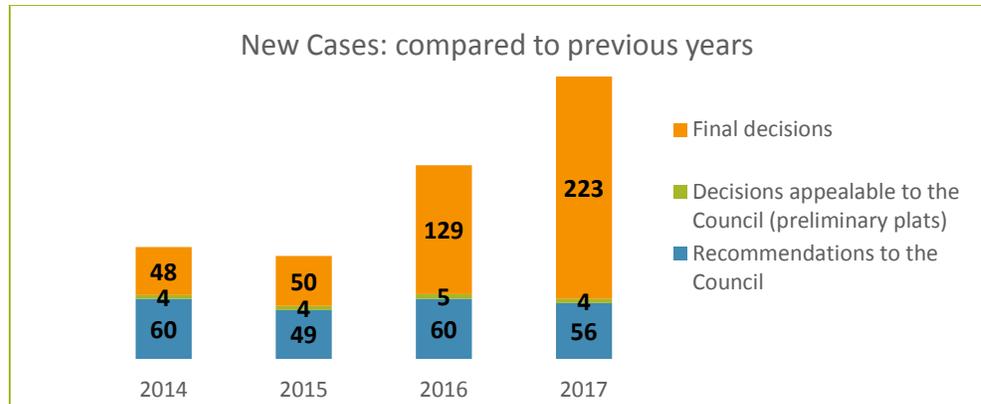
A. Land use permit decisions are classified into four types, based on who makes the decision, whether public notice is required, whether a public hearing is required before a decision is made and whether administrative appeals are provided.

NEW CASES

In 2017, we received 283 new cases, a 45-percent increase from the 194 cases we received in 2016. More generally, our new case filings, broken down into class, were:

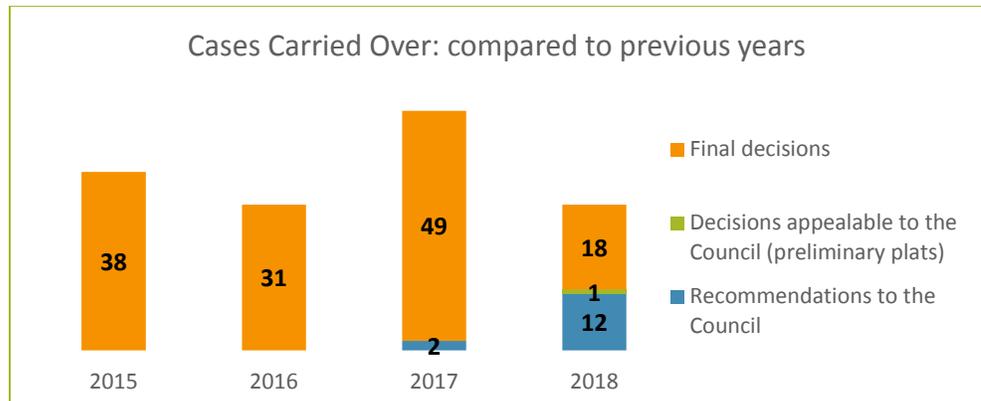
NEW CASES JANUARY—DECEMBER 2017		Number of Cases
RECOMMENDATIONS TO THE COUNCIL		
Open space		51
Rezone		1
Road vacation		4
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary plat		4
FINAL DECISIONS		
Animal Services enforcement		147
For-hire license enforcement		25
Land use enforcement		47
SEPA		1
Type 2 land use		3
TOTAL		283





CASES CARRIED OVER FROM PREVIOUS YEARS

At the end of each year, we carry a certain number of cases into the next year. A few are matters on appeal; our case is stayed while a court decides. Some are cases continued at the joint request of the parties, 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.



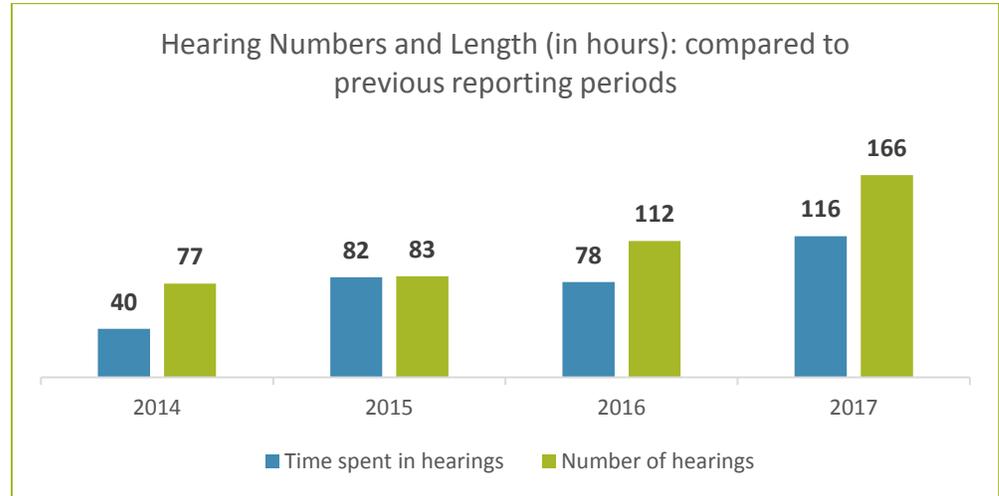
As the chart illustrates, we carried a higher-than normal number of cases into 2017, likely a consequence of our then new-to-us animal control and for-hire driver cases. We stabilized, and returned to our baseline carry-over rate, despite our increased caseload.

CASES CARRIED OVER	2008	2009	2011	2015	2016	2017
RECOMMENDATIONS TO THE COUNCIL						
Active processing						12
DECISIONS APPEALABLE TO THE COUNCIL						
Appealed to the Council					1	
FINAL DECISIONS						
Active processing					1	
Continued on-call	1	1	1	3	1	10
TOTAL=31						

PROCEEDINGS

We held 166 hearings in 2017, a 48 percent increase from the 112 we held in 2016.

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.



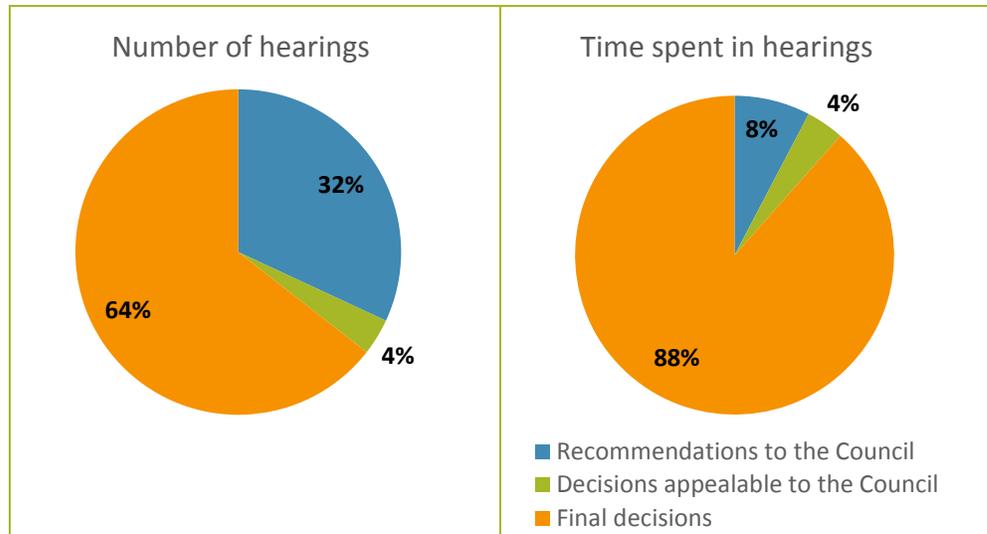
We attempt to extend a high level of service to all our participants. After all, even matters raising no novel legal issues or creating little impact beyond the parties are still crucially important to those parties. But not all types of cases require the same level of examiner involvement. For example,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

NUMBER OF HEARINGS January—December 2017	Number of hearings	Cumulative length of time
RECOMMENDATIONS TO THE COUNCIL		
Open space	48	7:31
Road vacation	5	1:15
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary plat	6	4:28
FINAL DECISIONS		
Animal Services enforcement	54	43:06
For-hire license enforcement	16	11:29
Land use enforcement	34	34:56
Type 2 land use	3	13:17
TOTAL	166	116:02

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

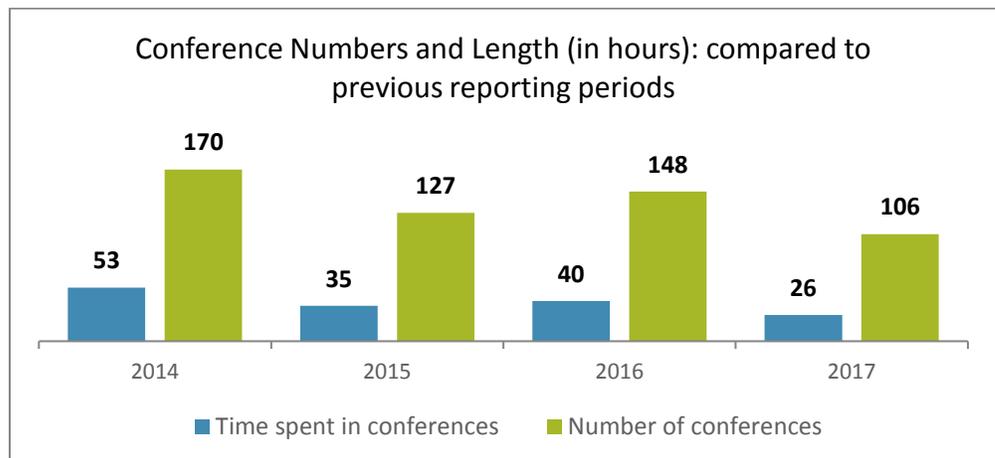
1. Limiting testimony and argument to relevant issues and to matters identified in the prehearing order;
2. Prehearing identification and submission of exhibits, if applicable;
3. Stipulated testimony or facts;
4. Prehearing dispositive motions, if applicable;
5. Prehearing conferences;
6. Voluntary 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.



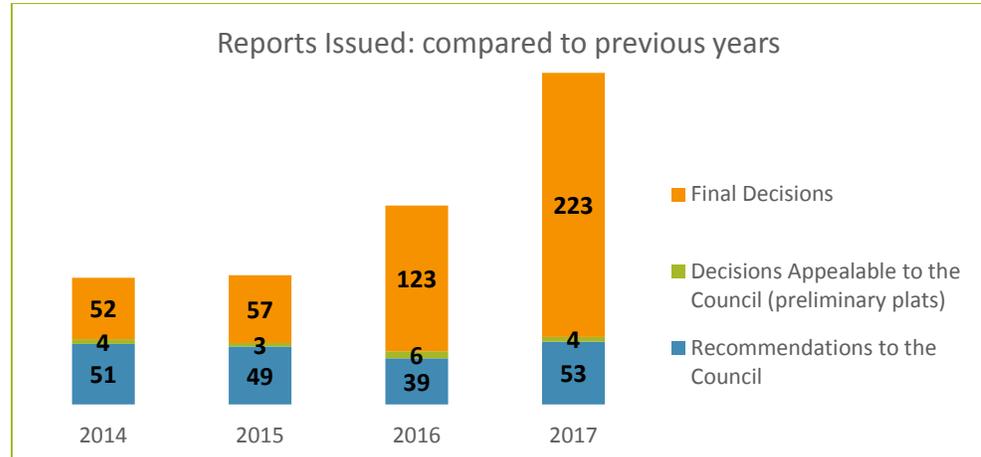
After being appointed examiner in 2013, we made a significant policy shift in 2014 to hold periodic status conference calls (typically at 90-day intervals) in every case “continued on-call.” These conferences ensure we stay on top of cases, keep parties’ feet to the fire, and more speedily resolve cases—either through the parties’ amicable resolution or (where the parties appear at loggerheads) by ending the continuance, going to an adversarial hearing, and writing a decision.

After needing to actively manage and resolve many “stale” cases in 2014, our conferences have remained relatively steady. The injection of animal enforcement and for-hire driving cases since 2016 have not translated into significantly more conferences because those do not typically (a) require *prehearing* conferences (unlike something like a complex land-use use appeal) or (b) get continued at the parties’ request (unlike something like a code enforcement case stayed while the appellant works through the permit process), which would necessitate periodic *status* conferences.



REPORTS ISSUED

At the conclusion of a case, we issue a final report closing out the matter. These closings are sometimes summary dismissals (such as when the parties settle a dispute). More often our final determinations are based on taking in evidence and argument at a hearing and deciding the case on the merits, explaining in detail our findings and conclusions. We issued 280 reports in 2017, a 67 percent increase from our 168 in 2016.



Going beyond the numbers, we now highlight an interesting case, selecting one from our for-hire driver’s license docket. Appeals involving license denials based on driving records typically involve judgment—how bad a driving record is too bad to allow someone to get behind the for-hire wheel?—but they are at least conceptually straightforward, comparing driving record to driving risk. Denials based on *non*-driving-related behavior requires an extra step: how should one translate, for example, a four-year-old domestic violence conviction into a risk to future for-hire passengers?

Fain involved the intersection of the state’s enacted policy to encourage and contribute to rehabilitating felons (including the opportunity to engage in a meaningful and profitable occupation) with the county’s commitment to protecting consumers (especially vulnerable rider populations) and to public safety. Mr. Fain was convicted in 2009 for dealing crack cocaine. In 2017, the county denied his for-hire driver’s license application, and Mr. Fain appealed.

We started off our decision¹ by explaining why, unlike some past cases, Mr. Fain’s felony did not “directly” relate to the specific occupation (the state standard). Even absent a direct relationship, we agreed that there were many scenarios where a criminal record—or even a single conviction—could be so heinous and create so much risk (especially to vulnerable populations) that we would have little hesitation ruling, “No. Never. Never ever.” In analyzing

¹Available at https://www.lsingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/for-hire%20enforcement/2018/FAIN-388_Fain.ashx?la=en

Mr. Fain’s situation—no crimes since 2008, successfully holding multiple jobs (including as an Uber driver) with no issues, and Mr. Fain not sugarcoating or excusing his criminal past—we drew on sources as disparate as *Freakonomics*, Oliver Wendell Holmes, Jr., and state statute. We concluded by granting his appeal, reasoning that Mr. Fain:

was a crack cocaine dealer. But he has not been one for over eight years. And his having been one once does not need to define his future. Nor does his almost eight-year old conviction for those crimes justify [the County] denying his for-hire driver’s license today.

APPELLATE ACTIVITY

Although not formally a reporting requirement, at the informal request of council we have been regularly including information involving appeals of examiner decisions. Our August 2017 semiannual report covered first half of 2017. This report covers the second half, including our one new appeal.

Vogl & Hannah is a code enforcement matter where the contested issues at hearing were whether structures and a substandard dwelling had been placed—and a gravel driveway had been constructed—without permits and within a stream buffer. In July, our *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. Appellants filed a LUPA appeal in Superior Court in August, but neglected to serve the county. The county has filed a motion to dismiss, which at this date is pending.

McMilian is a long-running code enforcement dispute we have reported on previously, involving abutting sites used as a wrecking yard. In 2009, the then-examiner decided the *northerly* parcel. The Court of Appeals mostly affirmed, but on one issue remanded. In 2012, the then-examiner issued a decision on remand, which McMilian unsuccessfully appealed, as the Court of Appeals decided in 2014. The dispute then turned to the *southerly* parcel. In 2016, the examiner (this time a *pro tem* examiner) denied in part and granted in part McMilian’s appeal. McMilian again appealed. The Superior Court also denied in part and granted in part McMilian’s appeal, and remanded it. The *pro tem* examiner issued an order on remand, which McMilian again appealed. The Superior Court stayed the new appeal, consolidated the new appeal with the most recent prior appeal, clarified its order, and remanded to the Department of Permitting and Environmental Review (DPER) for a pre-application conference at county expense.

COMPLIANCE WITH CODE-MANDATED DEADLINES

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.

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. In short, despite our 45-percent increase in new case filings, 48-percent rise in number of hearings and cumulative hours spent in hearings, and 67-percent jump in reports issued, we were 100 percent compliant with two of the deadlines and 98.6 percent compliant with the other, meaning we exceeded the 95 percent compliance goal we set for each deadline for each year.

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
FINAL DECISIONS			
	Animal Services enforcement	33	100%
	For-hire license enforcement	38	100%
	Land use enforcement	27	100%
	SEPA	29	100%
	Type 2 land use	31	100%
	TOTAL	31	100%

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 223 appeals, we used our extension twice in 2017.

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 did not employ this extension at all in 2017.

DEADLINE—2 AVERAGES AND COMPLIANCE		
90 DAYS FROM APPLICATION REFERRAL/ APPEAL TRANSMITTAL TO REPORT	Average days	Percent Compliant
RECOMMENDATIONS TO THE COUNCIL		
Open space	40	100%
Rezone	35	100%
Road vacation	55	100%
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary plats	37	100%
FINAL DECISIONS		
Animal Services enforcement	33	100%
For-hire license enforcement	40	100%
Land use enforcement	46	100%
SEPA	46	100%
Type 2 land use	49	100%
TOTAL	40	100%

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, and we met or exceeded this in each category in 2017, averaging 98.6 percent overall compliance.

DEADLINE—3 AVERAGES AND COMPLIANCE		
10 BUSINESS DAYS FROM HEARING CLOSE TO REPORT	Average days	Percent compliant
RECOMMENDATIONS TO THE COUNCIL		
Open space	7	98%
Rezone	4	100%
Road vacation	5	100%
DECISIONS APPEALABLE TO THE COUNCIL		
Preliminary plat	7	100%
FINAL DECISIONS		
Animal Services enforcement	3	98.7%
For-hire license enforcement	4	100%
Land use enforcement	4	97.5%
SEPA	5	100%
Type 2 land use	3	100%
TOTAL	4	98.6%

As noted in the introduction, council recently streamlined our reporting structure from semiannual to annual. Our August 2017 semiannual report discussed office initiatives for the first half of 2017; this section covers office initiatives from the second half of 2017.

HEARING GUIDES

The code directs us to issue a citizen’s guide that describes our process. In 2016, we went beyond this. Recognizing that such a guide—forged with land use in mind—would not be sufficient to help participants in our new animal enforcement cases, we crafted and issued an animal enforcement-specific guide.

In 2017, we completely overhauled our general guide (which, at 16 pages, read more like a technical reference manual than DIY instructions for laypeople), created code enforcement and for-hire driver-specific guides, and improved our animal enforcement guide. To make all our guides more useful tools for laypersons (not just lawyers), we applied the *Federal Plain Language Guidelines’* directions, such as: identify and write for our audience; develop questions our audience will have; organize the guide to answer those questions chronologically; employ many useful, short, question headings; address a person versus a group; avoid legal and technical jargon; use lists and examples; and provide sufficient white space to prevent the appearance of dense and cluttered text. Because many of our appellants have limited English proficiency, we sought and received helpful feedback from Ericka Cox, the Executive’s Office of Equity and Social Justice’s Inclusion Manager.

Although technically beyond this reporting period, we took another step in the last few weeks, requesting and obtaining valuable design input from the council’s excellent communications shop. Attached is the latest version of one of our guides.² These will be translated into the most common native languages of appellants, which differ significantly by case type.

The guides, in addition to being available on our website, are sent by departments along with its notices and orders. We think this is helpful. For example, our animal enforcement guide explains in detail how to file a *timely* appeal (how the appeal date is calculated, what is meant by a decision being “issued,” email versus snail mail, etc.). Since these began circulating, we have received significantly fewer untimely appeals we have had to dismiss.

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.

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

ANNUAL RETREAT

With the dramatic increase in caseload we began experiencing in 2016, we lost time in the workday to do long-term planning, conduct in-house trainings, and have in-depth exploratory conversations. As a remedy, we held our first-ever, full-day retreat at an offsite location. We each made presentations on timely topics, including:

Strategic planning. Ms. Mangaoang explained the components of a strategic plan, and we worked at developing vision and mission statements.

Data optimization. Ms. Dop summarized key concepts and solutions to improve our use of charts and graphs. We have applied her suggestions in this report.

Canine behavior. Relying on a variety of reference materials, Mr. Spohr discussed situations and emotions that give rise to certain types of dog behavior (animal enforcement being new-to-us casework). We practiced interpreting (from photographs) dog body language to determine its underlying emotions and possible behavioral responses.

Team time management. Ms. Mangaoang reviewed a number of tools to help us make the most of our time at work, avoid the reactivity trap, and prevent burnout resulting from exclusively focusing on short-term, task-oriented efforts. As a result of this training, we try to have weekly meetings to coordinate our short-term tasks and goals. We also now place a higher value on long-term, non-case specific projects.

TRANSIT RIDER SUSPENSIONS

In response to council motion 14441, King County Metro Transit (Metro) brought together representatives from across the county, dubbed the Transit Safety and Equity Work Group. Part of the work tackled appeals of transit rider suspensions. The Work Group requested—and we agreed—to be the impartial hearing officer for those who wish to contest the facts underlying the suspension or the lawfulness of that suspension. Council accepted the Work Group’s plan under motion 14675.

We explained to the stakeholders (Metro, rider advocates, the PAO, the public defenders, and the council sponsors) our normal system and role and probed to figure out what kind of process each wanted, such as which party bears the burden of proof, processing timelines, whether an appeal stays a suspension, scope of the examiner’s role, interplay between the examiner case and any pending criminal action, etc.

KCC 20.22.310 Annual report

The office of the hearing examiner shall prepare an annual report to the council... The report shall...identify any need for clarification of county policy or development regulations

³<http://your.kingcounty.gov/dnrp/library/water-and-land/stormwater/surface-water-design-manual/SWDM%202016%20complete%20document%20FINAL%20first%20errata%206%2015%202016.pdf> at 1-3.

With those questions answered, we drafted and circulated an ordinance that splits the process—with Transit continuing to handle, in-house, requests for mitigation (essentially seeking a rider contract allowing transit use during the suspension period), while the examiner would review challenges to the merits and legal basis for a suspension.

The Executive transmitted the ordinance last month, and we understand that ordinance 2018-0113 was referred to the Transportation, Economy and Environment Committee.

REGULATORY CHANGE RECOMMENDATIONS

The code requires our annual reports to identify any needed regulatory clarification. In addition to the transit rider suspension ordinance discussed above, the other need we see today relates to the clearing and grading thresholds above which a permit is required.

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

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

Moreover, total clearing limits on a property (meaning the total the can be cleared even *with* a permit), excludes areas legally cleared before 2005 (KCC 18.82.150.A.2.a). And the current 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).”³

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

In contrast, the applicable permit-exemption for:

- excavating or placing fill is whether it “cumulatively over time” involves over hundred cubic yards (KCC 16.82.051.C.1);

- general clearing is “[c]umulative clearing” of less than 7,000 square feet (KCC 16.82.051.C.3); and
- clearing of invasive vegetation within certain critical areas is “cumulative clearing” of less than 7,000 square feet (KCC 16.82.051.C.8).

Those three are harsh. Looking at the 7,000-square foot clearing exemption, the majority of sites with a pre-existing home will typically have had over 7,000 square feet of “cleared” space. Thus beyond something like maintaining a pre-existing lawn, any clearing triggers a permit. As DPER’s Bulletin on the topic phrases it, once a “site already exceeds 7,000-square-feet of cleared area, any additional clearing requires a permit.” And the definition of clearing is quite broad: “the cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means” (KCC 16.82.020.D). Weed-whacking even a small new area, for example, would trigger the need for a permit.

Those three are also 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 burial mounds or active land management practices (like frequent, low-intensity, prescribed burns)? Does it peg to the first European settler 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 in 1894?⁴ 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 at some point 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, say, setting limits on how much new (or replaced) impervious surface can be added on a site without a permit: controlling unchecked drainage and surface water runoff. And it seems axiomatic that paving over a surface creates more of a drainage/water runoff impact than, say, replacing native vegetation with landscaping while keeping that surface pervious. Yet regardless of how much impervious surface was on the property as of 2005, adding impervious surface has a post-2005 allowance that can be exercised without requiring a permit, while there is zero tolerance for clearing any new area on a site that has a pre-existing, 7,000 square feet of cumulative clearing.

⁴See

<http://kuow.org/post/strange-twisted-story-behind-seattles-blackberries>

⁵See, e.g.,

https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2017/2017%20November/ENFR170163_Turgeon.ashx?la=en

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, and solely 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 upheld DPER’s notices and orders involving “cumulative” clearing or grading.⁵ But that does not mean we find the current set up wise. And today is our code-directed chance to identify for council needed clarifications. We thus recommend that council consider amending KCC 16.82.051.C.1, .3 and .8 to replace “cumulative” with something more definitive and easier for the public to swallow.

CONCLUSION

Last year was, like 2016, a big leap in case volume. Yet we have weathered the transition, and now have an efficient system in place to continue a smooth-running process, while maintaining our high standards. We are open to questions and feedback between now and our next annual report, which we will present by March 1, 2019.

Submitted March 1, 2018,



David Spohr, Hearing Examiner