

2013 HEARING EXAMINER ANNUAL REPORT

JANUARY 1, 2013 - DECEMBER 31, 2013



SNOHOMISH COUNTY

**Gordon Sivley
Hearing Examiner
December 31, 2013**

PREFACE

The Snohomish County Hearing Examiner is required by county ordinance to report in writing to, and to meet with, the Snohomish County Council and the Planning Commission at least annually for the purpose of reviewing the administration of the county's land use policy and regulatory ordinances. Such report shall include a summary of the Examiner's decisions since the last report. (Snohomish County Code (SCC) Section 2.02.200)

This Annual Report covers the period from January 1, 2013 through December 31, 2013. Statistical compilations are based on cases brought to hearing during the year and decided on or before the report date unless specifically noted otherwise.

MISSION OF THE HEARING EXAMINER'S OFFICE

The mission of the Hearing Examiner's office is to provide a quasi-judicial hearing system which ensures procedural due process and the appearance of fairness in regulatory hearings, to provide an efficient and effective hearing process for quasi-judicial matters, and to comply with state laws regarding quasi-judicial land use hearings. (SCC 2.02.010)

OFFICE OF THE HEARING EXAMINER

Gordon Sivley, Hearing Examiner

Mary Kurke, Administrative Services Assistant

Kris Davis, Clerk of the Hearing Examiner

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INTRODUCTION

This report covers hearing activity for the Office of the Snohomish County Hearing Examiner from January 1, 2013 to December 31, 2013. The Office of the Hearing Examiner consisted of Hearing Examiner Gordon Sivley, who was appointed by the County Council to serve as Hearing Examiner beginning January 1, 2013, Mary Kurke, Administrative Services Assistant, and Kris Davis, Clerk to the Hearing Examiner. In cases where the Examiner is unavailable to hear a case due to a conflict or absence, the Examiner contracts with several *pro tem* hearing examiners who are appointed by the Council to act in such capacity.

This Annual Report was prepared with the assistance of Kris Davis and Mary Kurke from the Hearing Examiner's staff, and Rob Simmonds, Principal GIS Analyst of the Department of Information Services. Their support and terrific work is greatly appreciated.

THE YEAR IN REVIEW

2013 represented a year of modest economic recovery across the State. As a result, land use activity remained relatively low throughout the County although the pace of project approval matters showed a significant increase over 2012. The Hearing Examiner held 37 total hearings during the year. Twenty eight of those hearings were related to land use permits and permit-related appeals. This represents an increase over last year's land use volume by 8 cases or 40%. The largest change over last year was the decrease in code enforcement and animal control appeals, which were less than half of last year's filings.

During 2013, the Hearing Examiner continued to hold hearings and issue decisions within the required timelines established by the County Code. There is no backlog of cases awaiting hearings or decisions. In most cases, hearings are scheduled as soon as the required notice timelines allow, unless the parties ask for a delay in the hearing date to allow for additional discovery, briefing or settlement negotiations. An adequate number of hearing days are being made available in any given month and there is additional capacity in the system to handle more, if case volumes increase in the near term.

THE YEAR AT A GLANCE – 2013

TOTAL NUMBER OF HEARINGS	37 Total
Land Use Permit and Appeal Hearings	28
Code Enforcement Appeals: Ch. 30.85 SCC	4
Auditor Appeals: Title 9.0 SCC	5
Hearing days used	27
TOTAL NUMBER OF DECISIONS ISSUED¹	45 Total
Land Use Permit (Type 2) and Appeal (Type 1) Decisions:	29
Code Enforcement Appeal Decisions:	9
Auditor Appeal Decisions:	7
APPEALS OF HEARING EXAMINER DECISIONS	Outcome on Appeal:
<u>TO COUNCIL:</u>	1 Total
12 104580 LU Clearview Gospel Assembly	Affirmed with modification adding additional conditions requested by the applicant
<u>TO SUPERIOR COURT:</u>	0 Total

¹Several cases were dismissed, withdrawn or settled prior to the issuance of a final decision.
2013 Annual Report

I. QUASI-JUDICIAL HEARING ACTIVITY

A. Land Use Permits and Appeals

Land use permitting activity before the Hearing Examiner consists of quasi-judicial hearings to consider permits or approvals for all permits that fall under “Type 2 permits and decisions” identified in SCC 30.72.020. These include: conditional use permits (CUPs) and major revisions to existing CUPs, official site plans for commercial developments in certain zones, flood hazard area variances, preliminary subdivision approvals and revisions (including rural cluster subdivisions (RCSs)), planned residential developments (PRDs), short subdivisions that include a public road dedication, boundary line adjustments, urban center developments and where requested by the Department of Planning and Development Services (PDS), shoreline substantial developments, shoreline conditional uses and shoreline variances.

The Hearing Examiner also has jurisdiction over appeals of decisions issued by the PDS Director identified as “Type 1 permits and decisions” under SCC 30.71.020. (SCC 30.71.070) The most common types of Type 1 hearings heard by the Examiner are appeals of threshold determinations made pursuant to the State Environmental Policy Act (SEPA). These decisions determine whether a project has a significant adverse environmental impact, whether identified impacts can be mitigated and whether an Environmental Impact Statement (EIS) should be issued. These appeals are typically coupled with Type 2 land use permit matters that are pending before the Examiner, and the two cases are heard together.

In terms of the 2013 caseload, the Hearing Examiner held 28 hearings on land use permits and appeals and issued 29 final decisions.² The overall caseload is beginning to show an increase, reflecting the modest economic recovery and resulting increase in land use activity.

LAND USE DECISIONS ISSUED BY PERMIT TYPE	2011	2012	2013
Type 2 - Subdivisions (Plats)	5	4	9
Rural Cluster Subdivisions	7	2	1
Rezones	6	1	8
Conditional Use Permits	8	4	6
Variances	1	0	0
Planned Residential Developments	0	0	0
Urban Center Development	N/A	2	0
Type 1 - Short Subdivisions & Short Subdivision Appeals / Admin Appeals	0	2	2
SEPA Appeals	2	0	1
Solid Waste Enforcement	2	2	2
Code Interpretation Appeal	2	1	0
TOTALS	33	20	29

² In one case, a revised decision was issued following a petition for reconsideration.

2013 APPROVED LAND USE APPLICATIONS³

File Number	Project Name	Address	Case Type	Acres	Lots
11 103756	Cascade Biosolids	12224 92nd Street, SE, Snohomish, WA	CU	1382	
12-104580	Clearview Gospel Assembly	6726 180 th Street SE, Snohomish, WA	CU	3.12	
07 111617	Sonora	19929 Damson Road, Lynnwood, WA	SD/R	4.93	29
12-104437	Glennwick Grove	52nd Ave West and 164th St SW	SD	18.74	45
12-108346	Grimm Project Rezone	1011 Center Road, Everett, WA	R	0.44	
12-107186	Lewis Project Rezone	3625 220th Street SE, Bothell, WA	R	1.89	
11-106296	Warm Woods RCSD	19626 Marine Drive, Stanwood, WA	RCS	22.6	7
12-104969	126 th Short Plat	1327 126th Street SE, Everett, WA	SP	1.16	6
12-108409	Speedway Mixed Use	12909 Mukilteo Speedway, Lynnwood WA	R	9.75	
12-110894	Camilla Lane	17203 Sunset Road, Bothell, WA	SD	4.26	29
12-105092	Cedar Crest Short Plat	24210 23rd Avenue West, Bothell, WA	SP	1.66	8
13-100807	Sierra Hills	22504 45th Ave SE, Bothell, WA	SD/R	4.77	30
12-110942	Filbert Road Veteran's Housing	1911 196th Street SW, Lynnwood, WA	CU	0.78	
13-100646	Filbert Glen	20029 Filbert Drive, Bothell, WA	SD/R	3.15	16
12-101964	Bambini Montessori Day Care	14727 42 nd Avenue West, Lynnwood, WA	CU	0.27	
12-104232	Mayfield Estates	13911 Seattle Hill Road, Snohomish, WA	SD/R	11.16	44
12-109347	Eastmont Heights	27th Ave SE and 92nd St SE, Everett, WA	SD/R	2.35	11
08-105784	Carter Estates	York Road and Jewell Road, Bothell, WA	SD/R	3.37	24
13-102871	Phillips Rezone	7622 – 222 nd Street SW, Edmonds, WA	R	0.42	
13-106261	Bing Road Rezone	725 Bing Road, Lynnwood, WA	R	1.11	
13-107470	Russell Way Rezone	3105 Russell Way, Lynnwood, WA	R	3.72	
13-102333	Yorkshire II	17412 Sunset Road, Bothell, WA	SD/R	1.98	12
13-108944	Gillis Rezone	1220 – 178 th Street SW, Lynnwood, WA	R	0.73	
12-105297	Verizon Tulalip	7929 16 th Avenue NE, Tulalip, WA	CU	9.77	

Legend

SD = Subdivision

R = Rezone

SP = Short Plat

UCD = Urban Center Development

RCS = Rural Cluster Subdivision

CU = Conditional Use

PRD = Planned Residential Development

³ This list does not reflect applications that were denied or remanded to PDS for further work.

II. ENFORCEMENT ACTIVITIES

A. Land Use Code Enforcement Appeals

The Hearing Examiner has jurisdiction to hear appeals of certain code enforcement cases under Chapter 30.85 SCC. These include Notice of Violation appeals and Contested Citation appeals. In addition, the Examiner may still hear older cases brought prior to November 1, 2008 for the imposition of monetary penalties.

New filings of code enforcement cases by PDS were lower than the prior year. The current number of land use enforcement cases heard by the Hearing Examiner is sharply down over prior years, mainly resulting from changes made to the County's regulations and procedures in 2008. As expected, Contested Citations continue to comprise the fewest number of enforcement appeals brought before the Hearing Examiner.

LAND USE ENFORCEMENT MATTERS

New Case Filings	2009	2010	2011	2012	2013
Notice of Violation Appeals	15	24	10	17	11
Contested Citation Appeals	7	6	1	3	2
Monetary Penalty Cases	17	4	0	0	1
Total New Filings	39	34	11	20	14
Number of Hearings	32	32	13	22	6
Number of Decisions Issued	34	19	12	6	6

B. Auditor's Office Enforcement Activity

The Hearing Examiner receives several different types of appeals from the Licensing Division of the Auditor's Office, including animal control matters, licensing decisions and adult entertainment matters. The 2013 caseload included only animal control matters filed pursuant to Title 9 SCC. Most animal control cases involve dogs without licenses, dog bites or attacks, and kennel violations, where the owner files an appeal challenging a Notice of Violation, Notice of Declaration of Potentially Dangerous Dog, Notice of Declaration of a Dangerous Dog, or a kennel license suspension. Many of these cases are resolved prior to the public hearing.

AUDITOR ENFORCEMENT MATTERS

Auditor Appeal New Filings	2009	2010	2011	2012	2013
Animal Control Appeals	18	11	5	22	11
Adult Entertainment License Appeals	0	0	4	4	0
Total New Filings	18	11	9	22	11
Number of Hearings	5	6	9	16	5
Number of Decisions	8	2	6	6	7

C. Solid Waste Enforcement Activity

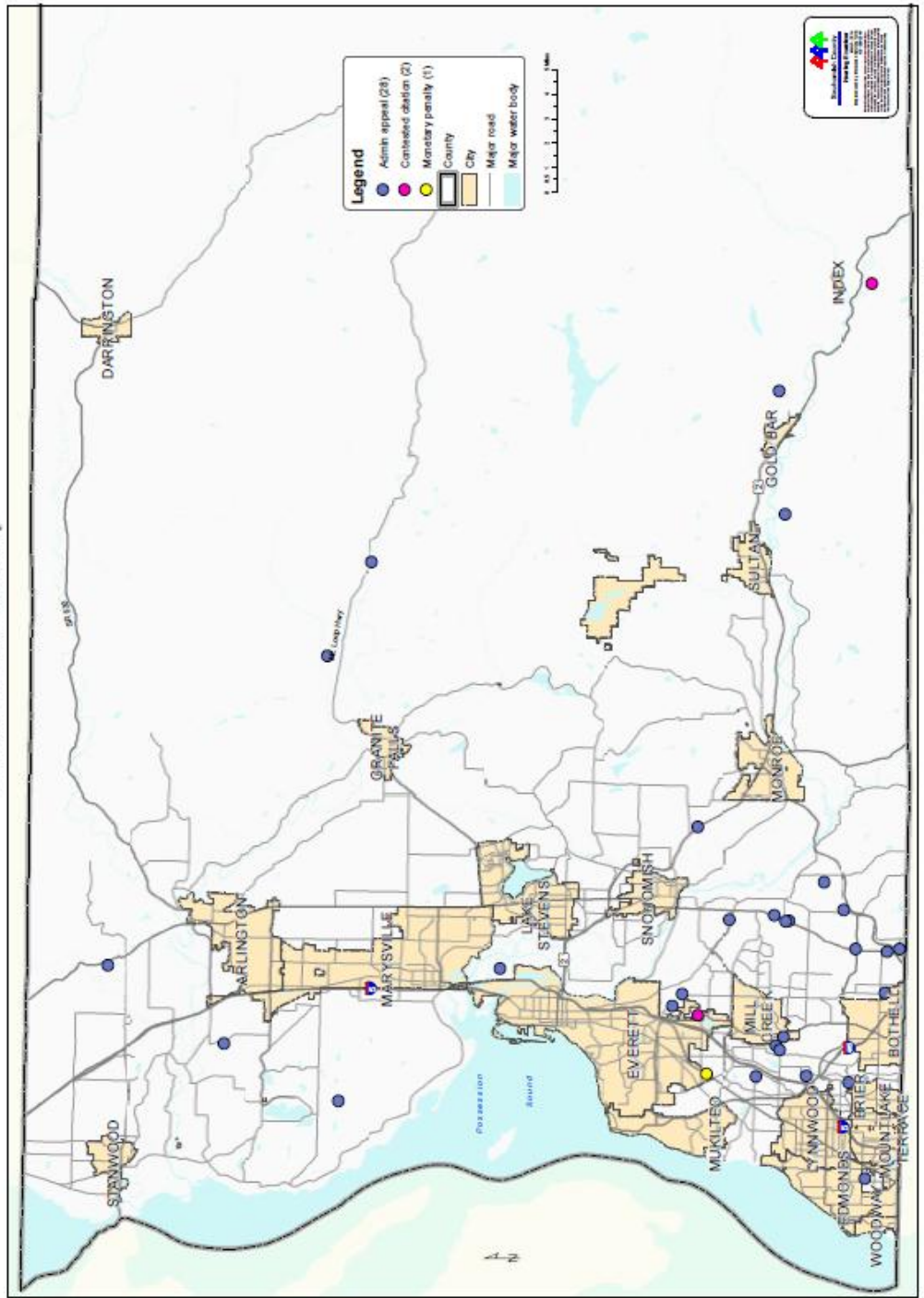
The Hearing Examiner hears appeals in cases involving enforcement of the county's solid waste code. In 2013, these were comprised of appeals from companies who were accused of violating the county's solid waste flow control regulations found in Chapter 7.35 SCC. These

appeals were filed late in the year. Two cases were settled and were closed and one remains to be resolved in 2014.

SOLID WASTE ENFORCEMENT MATTERS

Solid Waste Appeal New Filings	2009	2010	2011	2012	2013
Notice of Violation Appeals	0	0	2	1	3
Total New Filings	0	0	2	1	3
Number of Hearings	0	0	2	1	0
Number of Decisions	0	0	2	2	2

2013 Code Enforcement & Appeal Cases Snohomish County



III. QUASI-JUDICIAL HEARINGS

In considering the volume of quasi-judicial hearings heard over the past decade by the Office of the Hearing Examiner, the data shows that land use cases are the largest driver of hearings, with code enforcement having the next highest impact in terms of hearing volume. In peak years, the Office had employed two full-time examiners and often used examiners on a contract basis to meet the demand for hearings. In 2009, the Office consisted of only one full-time examiner, and three on-call *pro tem* examiners. In 2010, the Office was further reduced to one full-time examiner and one on-call *pro tem* examiner. Permanent staffing remained the same in 2013, but additional *pro tem* examiners have been added. These staffing fluctuations have been directly related to the volume of hearings before the Hearing Examiner.

In the past few years, as demand dropped, largely driven by the downturn in the economy and housing sector, land use permit activity slowed significantly. The case load stabilized in 2012, being roughly the same as the prior year. However, 2013 saw an upturn in development activity, particularly with regard to subdivisions.

QUASI-JUDICIAL HEARING VOLUME (2002-2012)

2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	10-Year Totals	Hearing Type
128	157	196	221	198	105	35	39	30	16	26	1151	Land Use Permits
8	11	93	20	28	8	3	2	7	4	2	190	Land Use Appeals
50	85	65	83	146	128	32	32	13	22	4	660	Code Enforcement
7	22	11	10	11	19	18	4	9	16	5	132	Auditor-All Appeals
0	0	0	0	0	0	0	0	2	1	0	3	Solid Waste Appeals
193	275	365	334	383	260	88	77	61	59	37	2134	TOTALS

IV. COMMENTS ON LAND USE REGULATION AND THE QUASI-JUDICIAL PROCESS

The Council has invited the Hearing Examiner to inform it of any issues that arise in the regular administration of the County's development regulations or quasi-judicial hearing process. To that end, the Examiner submits the following list of issues for discussion and consideration:

A. LAND USE REGULATION

1. Tree Retention (Ch. 30.25 SCC)

Tree retention and replacement requirements were added to Chapter 30.25 SCC by Section 20 of Ordinance 08-101. This ordinance also revised the stated purpose of Chapter 30.25. The County Council made a number of findings to explain why the new requirements were adopted. The pertinent findings stated in the ordinance are set forth below:

[T]he general removal of trees should be appropriately controlled and, where possible, existing trees should be preserved on-site.

Amendments to SCC 30.25.010 are necessary to incorporate tree retention and replacement objectives into the purpose statement. The addition of tree retention and tree replacement requirements as a part of land development activity enables the county to advance multiple objectives for neighborhood livability and environmental quality articulated in various chapters of the GMACP. Specifically, these provisions are intended to produce the following benefits to the natural environment and to the citizens of Snohomish County: enhanced residential property values; improved soil stabilization; improved water quality; reduced stormwater runoff; improved air quality; enhanced wildlife habitat; and better preservation of the forested character of our region and county.

The Code incorporates the following new tree retention requirements:

30.25.016 General tree retention and replacement requirements.

(1) No person, corporation, or other entity engaged in residential land development or construction within unincorporated urban growth areas shall remove a significant tree without first obtaining county approval, except as provided in SCC 30.25.016(2). County approval shall be integrated into the permit review process for any activity requiring a county permit on a site where any significant trees are present.

It appears to the Examiner that the tree retention and replacement requirements adopted by Ordinance 08-101 were the result of a change in County policy to significantly limit the removal of trees in the course of subdivision development as compared to what had been permitted in the past. The numerous legislative findings made by the County Council in the adoption of Ordinance 08-101 attest to the importance the County Council appeared to place on the need to adopt tree retention and replacement requirements to change how urban area development in the County will occur in the future.

The Examiner has observed that in practice, unfortunately, the exceptions to the general requirement for tree retention have eaten up the rule and, more often than not, most existing significant trees are removed and replaced rather than being retained. Projects do not tend to be designed to work around existing trees in an effort to retain them as much as possible. It appears far too easy for a project proponent to obtain a letter from an arborist that existing trees are “hazardous” and should be removed. SCC 30.25.016(2)(a).

The Examiner has also observed that the current tree retention code makes no special provision for existing sites that are heavily forested with significant trees. Strictly observing the requirement to retain all existing significant trees could effectively preclude development of such sites.

The Examiner recommends that the county’s tree retention policy and the code that is intended to implement it be re-examined to determine if they are consistent and effective or if either the policy or code should be modified.

2. Safe Walkways (SCC 30.41A.100)

State law (Chapter 58.17 RCW) and the County Code expressly impose a requirement that before a subdivision can be approved, it must make appropriate provisions for children who walk to and from school. SCC 30.41A.100(1) states,

30.41A.100 Decision criteria - general.

(1) The hearing examiner and the department shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. The hearing examiner shall approve a preliminary subdivision only if appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, sites for schools and school grounds, fire protection and other public facilities. The hearing examiner shall consider all other relevant facts, including the physical characteristics of the site and sidewalks and other planning features that assure safe walking conditions for students who walk to and from school to determine whether the public interest will be served by the subdivision and dedication.

The Engineering Design and Development Standards (EDDS) developed by the Department of Public Works (DPW) establish walkway standards that specify how sidewalks and other walkways are to be designed. Generally, PDS and DPW staff conclude that if the EDDS are met, then the statutory and code requirements for student walkways are satisfied. However, this may not always be the case.

The problems with assuring safe walking conditions for children become most pronounced when addressing the off-site portions of walking routes between a development and a school. This is because of legal limitations on how much the county can require of a developer in making off-site improvements – particularly when a deficiency in walkway facilities pre-existed and was not caused by a current development proposal. This issue becomes particularly troublesome with in-fill development proposals where new urban standard development is built side by side with pre-existing suburban or rural development which was built without sidewalks that meet current standards. In these situations, sidewalks are interspersed with relatively narrow paved road shoulders with no physical separation between vehicle traffic and students walking to school, save for a painted line. Can the Examiner conclude that such circumstances “assure safe walking conditions” for the students?

One solution to this dilemma is to focus county road improvements to rebuild the “missing links” in the sidewalk systems of urbanizing neighborhoods. The Examiner notes that in his 2014 budget proposal, the County Executive indicated that he is starting a program, “that focuses on improving pedestrian safety near elementary schools.” The Executive notes that, “[n]early 40 percent of schools in Snohomish County have limited or no safe sidewalks. Too many of our grade-school children are risking their safety simply walking to school each day.” The Examiner wishes to echo these concerns and encourages pursuit of the program described by the County Executive.

B. QUASI-JUDICIAL HEARING PROCESS

1. Update of the Hearing Examiner’s Enabling Ordinance (Chapter 2.02 SCC)

Prior Annual Reports noted that Chapter 2.02 SCC, the Hearing Examiner’s enabling ordinance, was out of date and needed revision. The passage of Ordinance 13-043, which was primarily designed to consolidate the administration of the Office of the Hearing Examiner, the Board of Equalization and the Boundary Review Board, also presented the opportunity to address some of these needed revisions. In addition, it

incorporated code revisions to provide better coordination between the Code and the recently revised Rules of Procedure. The Examiner worked with the Prosecuting Attorney's Office and Council Staff in preparing the legislation that was passed as Ordinance 13-043. Items that were addressed include:

- The Code has now been revised to state that the procedures specified in Ch. 2.02 SCC apply to supplement the procedures specified in Title 30 SCC (the UDC) for quasi-judicial matters brought under that Title. This corrected a provision in Title 2.02 which indicated that none of the procedures in Title 2.02 applied to matters brought under Title 30 SCC, even though some provisions of Title 30 SCC expressly referenced the procedures of Title 2.02.
- A change that had been sought by previous Hearing Examiners was included to provide the Examiner 15 working days to issue decisions following the conclusion of public hearings or petitions for reconsideration. Now, with weekends and holidays excluded from the 15 day decision period, the Examiner is provided a more consistent time frame in which to prepare decisions. This is particularly helpful when multiple land use decisions are due at the same time (having been heard on the same day). It should be noted that with the current hearing load, all decisions have been issued within the prescribe time period, most in significantly less than the full 15 days.
- Numerous minor revisions were made in both Chapter 2.02 SCC and Title 30, to include consistent terminology and timing provisions and to include provisions to prevent the unauthorized practice of law in appeals before the Hearing Examiner (for consistency with the previously revised Rules of Procedure).

2. The New Hearing Examiner Rules of Procedure

New Rules of Procedure were finalized in December 2012. These rules became effective in January 2013. All proceedings during 2013 were conducted under the new rules and no significant problems arose during the transition.

3. Update on the Historical Records Preservation Project

The first phase of this project was completed in 2011, with the completion of our work to scan all prior published decisions back to 1978. The second phase of this project proposed an upgrade to the Hearing Examiner's webpage to provide a search engine for published Hearing Examiner's decisions. After work in cooperation with the Clerk of the County Council, the Office has completed development of a searchable database of prior decisions, utilizing the services of Code Publishing Company, which provides the county's code updating service. This service will soon be accessible from the County's website.

V. CREATION OF OFFICE OF HEARINGS ADMINISTRATION

As mentioned above, the Council passed Ordinance 13-043 which, beginning in 2014, consolidates the Office of the Hearing Examiner, the Board of Equalization and the Boundary Review Board in to the new Office of Hearings Administration (OHA). The OHA is managed by the Administrator who is appointed by the County Council. The Administrator also serves as the county Hearing Examiner.

The latter half of 2013 saw a good deal of effort by the Hearing Examiner and the staff of both the Office of the Hearing Examiner and the Clerks of the Board of Equalization and Boundary Review Board to prepare for the implementation of the new OHA. A consolidated budget proposal was prepared, cross-training of staff was begun and a restructuring and reclassification of staff was pursued. As 2014 begins, more remains to attain full implementation of the consolidated office and the retirement of the current Administrator/Hearing Examiner at the end of January leaves completion of that effort to the new Administrator who will be appointed by the County Council.