

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **MICHAEL ELLIOTT,**

4 **Appellant,**

5 **v.**

6 **CITY OF TACOMA**, a Washington  
7 municipal corporation, through its  
8 Planning and Development Services  
Department,

9 **Respondent,**

10 **and**

11 **JOHN GIBSON,**

12 **Applicant-Respondent.**

**FILE NO.: HEX 2023-017**  
**(LU22-0144)**

**FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW,**  
**AND DECISION**

13  
14 **THIS MATTER** came before JEFF H. CAPELL, the Hearing Examiner for the City  
15 of Tacoma, Washington, for hearing on October 12, 2023.<sup>1</sup> Appellant Michael Elliott,  
16 appeared *pro se*. Respondent City of Tacoma (“City”) was represented by Deputy City  
17 Attorney Steve Victor. Applicant/Respondent John Gibson (“Gibson” or the “Applicant”)  
18 appeared *pro se*.

19 During the hearing, witnesses were placed under oath and testified. Exhibits were  
20 submitted and admitted, and arguments were presented and considered.

21 Witnesses testifying at the hearing were as follows (in order of appearance):

**FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW,**  
**AND DECISION**

- Cindy Turco,<sup>2</sup>
- Barry Beckner,
- Steve Clements,
- William Popp,
- Shirley Schultz,
- Trish Reiter,
- Milkah Kaguima,
- Michael Elliott.

Elliott also submitted a declaration from Katy Bloom. Of the above witnesses, only Shirley Schultz testified strictly on behalf of the City. All others were Appellant witnesses.

Based upon the evidence in the record, the Hearing Examiner makes the following:

**FINDINGS OF FACT**

1. Appellant Michael Elliott (hereinafter “Elliott” or “Appellant”) has appealed the approval of a seven-lot Preliminary Short Plat dividing a 131,588 square-foot area of real property into seven lots for development into multifamily residences under City land use permit LU22-0144 (the “Short Plat”).<sup>3</sup> The subject property is located near the corner of North Shirley Street and North 33rd Street and has a primary street address at present of 5517 North 33rd Street (the “Subject Property”). The Subject Property currently consists of four parcels identified by Pierce County Tax Parcel Nos. 0221264036, 0221264017, 0221264041, and 0221264060. *Elliott Testimony, Schultz Testimony; Ex. C-1, Ex. A-3.*

2. The City first approved the Short Plat in a written decision from the Director

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<sup>1</sup> The parties elected/agreed to hold the hearing in this matter solely in remote format via Zoom. As a result, the hearing was conducted over Zoom at no cost to any participant with video, internet, and telephonic access.

<sup>2</sup> Individuals who participated in or who were referenced during the hearing may be referred to by last name only hereafter. No disrespect is intended.

<sup>3</sup> Multi-family development under the City’s R4-L zoning designation was previously approved under LU21-0046. All references to approval of the Short Plat herein only reference preliminary approval. Final approval of the Short Plat will come later as set forth in Tacoma Municipal Code (“TMC”) 13.04.090.H.~M.

1 (the “Director”) of Planning and Development Services (“PDS”) dated April 4, 2023, which  
2 the City submitted as Attachment A to Exhibit C-1 (separately the “Original Decision” also  
3 found at *Exhibit A-3*). The Director affirmed the Original Decision in his written Order  
4 Denying Request for Reconsideration and Affirming Decision dated June 14, 2023 (*Exhibit*  
5 *C-1*, separately the “Reconsideration” and collectively with the Original Decision, referred  
6 to as the “Director’s Decision”). *Id.*

7 3. The Subject Property was rezoned from R-3 Two-Family Dwelling District to  
8 R4-L Low-Density Multiple Family Dwelling District in 2021 by the City Council in  
9 Ordinance No. 28781 (the “Rezone”). Development conditions were imposed on the Subject  
10 Property as part of approving the Rezone. The majority of these conditions were  
11 memorialized and recorded against the Subject Property in a Concomitant Zoning  
12 Agreement dated April 28, 2022 and recorded under Pierce County Auditor’s File No.  
13 202204280355 (the “CZA”). Other conditions addressing affordable housing were  
14 memorialized and recorded against the Subject Property in that certain Affordable Housing  
15 Incentives Program Covenant Agreement dated July 2, 2021 and recorded under Pierce  
16 County Auditor’s File No. 202204280354. *Elliott Testimony, Schultz Testimony; Ex. C-1,*  
17 *Ex. A-3.*

18 4. As approved in the Director’s Decision, the Short Plat reconfigures the Subject  
19 Property from the existing four parcels into seven more-or-less rectangular lots. These lots  
20 vary in size from 7,835 square feet to 40,014 square feet. Lots 1 and 2 are larger and are  
21 positioned on the west side of the Subject Property. The remaining lots 3 through 7 are

1 smaller and are located along the eastern boundary of the Subject Property. Vehicular access  
2 to all lots will be from North 33rd Street via a private access easement within the proposed  
3 parking areas. *Ex. A-3, Ex. C-1.*

4 5. The Subject Property is presently undeveloped. It is currently covered with  
5 trees and grassy vegetation. The surrounding area is made up primarily of a mix of  
6 residential uses, with both multifamily and single family uses present. Immediately abutting  
7 the Subject Property to the East is a row of nine single-family residences where most of  
8 Appellant's witnesses (save Popp and Turco) live. *Beckner Testimony, Clements Testimony,*  
9 *Reiter Testimony, Kaguima Testimony, Elliott Testimony; Ex. A-5, Ex. C-1.*

10 6. Schools that would serve residents of the Short Plat include Point Defiance  
11 Elementary, Truman Middle School, and Silas High School. Parks closest to the Subject  
12 Property are Vassault Park (0.4 mile walk) to the west, Kandle Park to the south (0.5 miles)  
13 and Jane Clark Park (0.8 miles) to the northeast. The Short Plat proposes a playground and  
14 dog park area within its boundaries in Lot 2. New sidewalk will be constructed along the  
15 face of the Short Plat on North 33rd Street. *Ex. A-5, Ex. C-1.*

16 7. At the application review stage, the Short Plat was circulated through City staff  
17 with expertise in the various areas that must be considered before approval can be granted.<sup>4</sup>  
18 These included, without being an exhaustive list, City stormwater staff, traffic engineering,  
19 land use, emergency services, and utilities. The Short Plat gets circulated to outside agencies  
20 with interest for comment as well. *Schultz Testimony; Ex. A-3, Ex. C-1.*

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<sup>4</sup> See *TMC 13.04.090.*

1           8. Schultz testified that the City’s review determined that the Short Plat appears to  
2 comply, or be able to comply by the time of final approval, with all applicable City codes  
3 and regulations. *Schultz Testimony*.

4           9. As part of the Rezone, an environmental review of the proposed development  
5 of the Subject Property was conducted under the State Environmental Policy Act, or SEPA  
6 (the “SEPA Review”),<sup>5</sup> which resulted in a Mitigated Determination of Nonsignificance  
7 dated July 1, 2021 (the “MDNS”). As part of the SEPA Review/Rezone process, a traffic  
8 impact analysis was performed and impacts to traffic from the development of the Subject  
9 Property were determined to not be significant if mitigated. No appeals were filed of either  
10 the SEPA Review/MDNS or the Rezone decision. Over the Respondents’ objection, the  
11 Examiner did allow some testimony at the hearing on traffic, under the general guise of  
12 public safety. *Schultz Testimony; Ex. A-3, Ex. C-1. See also TMC 13.04.090.F.1.*

13           10. Elliott and many of his witnesses registered their objection to the Rezone at the  
14 time it was considered. Elliott and his witnesses again registered their objection to the  
15 Subject Property being developed as proposed with a mix of multifamily dwelling units.  
16 Elliott and his witnesses (save for Popp and Turco) all live adjacent to, or across the street  
17 from the Subject Property. Witnesses’ objections to the development of the Subject Property  
18 as proposed included assertions that the added housing units will result in more noise, more  
19 crime, more traffic, less safety, and lower property values. There were also complaints  
20 expressed (a) that present pedestrian and street facilities are deficient, (b) that schools have  
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<sup>5</sup> SEPA is found at Revised Code of Washington (“RCW”) 43.21C, with accompanying regulations at Washington Administrative Code (“WAC”) 197-11.

1 no additional capacity, and (c) that the West-end Neighborhood “has done more than its  
2 share” to shoulder new housing development. Aside from traffic-related safety issues, these  
3 objections were registered as assertions without support beyond the assumption that more  
4 people in the neighborhood will produce the claimed results. Opponents to the Short Plat  
5 have also argued both (a) that the proposed development is out of keeping with the character  
6 of the neighborhood at present, and (b) that there are already enough multifamily  
7 developments in the neighborhood. Nearly all Appellant witnesses expressed their opinion  
8 that approving the Short Plat would not serve public interest. *Turco Testimony, Beckner*  
9 *Testimony, Clements Testimony, Reiter Testimony, Kaguima Testimony, Elliott Testimony;*  
10 *Ex. A-5. See also TMC 13.04.090.F.2.*

11 11. The most specific complaints expressed at the hearing regarded traffic. Popp  
12 was qualified as an expert witness traffic engineer at the hearing and he testified regarding a  
13 dangerous situation with left turns from North 33rd Street onto North Pearl Street one block  
14 to the west of the Subject Property. He testified that removing part of a raised island at that  
15 location would allow for more left-turn “storage” making left turns at that location less  
16 dangerous. He also illustrated improvements that would result in a safer crossing situation  
17 for pedestrians at/near this same location on North Pearl Street. He testified that these  
18 crossing and left turn conditions are presently dangerous. He did not present evidence of  
19 how the Short Plat will make them worse other than the general presumption that  
20 development of the Short Plat will lead to more vehicular and pedestrian traffic in the area.  
21 *Popp Testimony; Ex. A-16.*



1           4. The preponderance of the evidence standard is at the low end of the spectrum for  
2 burden-of-proof evidentiary standards in the U.S. legal system and it is not particularly  
3 difficult to meet.<sup>7</sup> That said, the Examiner must base his decisions on proven evidence and not  
4 on mere speculation, or unsupported assertions or opinions.

5           5. The law requires that decisions from adjudicative tribunals rest upon evidence.<sup>8</sup>  
6 Evidence is used to establish facts. “Proof of the fact to be established may be by direct or  
7 circumstantial evidence.”<sup>9</sup> Argument, however, is not evidence.<sup>10</sup> Unsupported assertions or  
8 opinions are not enough to establish a *prima facie* case.

9           6. Under Washington Administrative Code (WAC) 197-11-800, the Short Plat is  
10 categorically exempt from the Threshold Determination and Environmental Impact Statement  
11 requirements of SEPA. The proposed development of the Subject property was already  
12 reviewed in the MDNS.

13           7. TMC 13.04.090 governs short plat/short subdivision procedures. Subsections F.1  
14 and .2 of that section specifically sets forth the criteria for approving a preliminary short  
15 subdivision application as follows:

16                   F. Approval. The Director or designee shall review the proposed  
17 preliminary short subdivision application. The preliminary short plat  
18 shall not be approved unless it is found that:

19 \_\_\_\_\_  
20 <sup>7</sup> *In re Custody of C.C.M.*, 149 Wn. App. 184, 202-203, 202 P.3d 971, 980 (2009). Another somewhat recent  
21 case referred to it thusly: “The lowest legal standard of proof [in the U.S. legal system] requires the proponent to  
prove its case by a preponderance of the evidence.” *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d  
1241, 1246-1247 (2006).

<sup>8</sup> *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356-357, 493 P.2d 1018, 1022-1023 (1972).

<sup>9</sup> *Lamphiear*, 6 Wn. App. at 356, citing *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953); see also *GLEPCO, LLC v. Reinstra*, 175 Wn. App. 545, 563, 307 P.3d 744, 752-753 (2013).

<sup>10</sup> *Jones v. Hogan*, 56 Wn.2d 23, 31-32, 351 P.2d 153, 159 (1960); *Hollins v. Zbaraschuk*, 200 Wn. App. 578, 594, 402 P.3d 907, 915 (2017); *State v. Frost*, 160 Wn.2d 765, 782, 161 P.3d 361, 370 (2007).



1 1. Appropriate provisions are made for the public health, safety,  
2 and general welfare; and for open spaces; stormwater management,  
3 streets or roads; alleys; bike routes; other public ways; transit  
4 stops; potable water supplies; sanitary wastes; parks and recreation;  
5 playgrounds; schools and school grounds; and all other relevant  
6 facilities, including sidewalks and other planning features that  
7 assure safe walking conditions for students who walk to and from  
8 school and for transit patrons who walk to bus stops or commuter  
9 rail stations.

10 2. The public use and interest will be served by the platting and  
11 dedication of such subdivision and dedication as set forth by the  
12 Comprehensive Plan and other adopted City ordinances, manuals,  
13 design specifications, plans, goals, policies, and guidelines.

14 8. Compliance with TMC 13.04.090.F.1; “Appropriate Provisions are made  
15 for...”:

16 Because the Appellant bears the burden of proof in this appeal, there is an unspoken  
17 presumption that the Director’s Decision is correct unless the Appellant can show by a  
18 preponderance of the evidence that the approval of the Short Plat was in error. The Director’s  
19 Decision is light on the details of the City’s review and analysis of the TMC 13.04.090 short  
20 plat approval criteria (collectively the “Approval Criteria”). That notwithstanding, the  
21 Examiner is not required to give face value to unsupported assertions or opinions in opposition  
to the Short Plat. Evidence must win out.

The City determined that the Approval Criteria have been, or will be generally met,  
either through the intended provision of new facilities as the Subject Property is developed, or  
through existing facilities being sufficient to satisfy the requirements of TMC 13.04.090.F.1.<sup>11</sup>

The Approval Criteria are examined in turn now as follows:

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<sup>11</sup> It is not unusual for some of the TMC 13.04.090.F criteria to be met by existing facilities.

1           **(a) Public health, safety, and general welfare.** The record leading to the  
2 Director’s Decision and the Applicant and the City’s evidence at hearing  
3 indicate that the Short Plat can be developed safely and in compliance with all  
4 applicable laws and regulations. The Short Plat itself presents no discernible  
5 safety issues. If the Plat complies with all City recommended conditions (*Ex. C-1/Ex. A-3, Conditions Section*), the Short Plat can be safely developed in  
6 compliance with the TMC and all applicable safety regulations. The City’s  
7 SEPA Review addressed additional public health, safety and general welfare  
8 issues and determined that the Short Plat and its later intended development  
9 will not impact these areas in any significant adverse way.

10           In addition, the development of the Subject Property, after its subdivision, adds  
11 housing to a short supply and expensive market in Tacoma, where more  
12 affordable housing is in great need. This adds to the overall general welfare of  
13 our community helping to meet this criterion. As such, the Examiner concludes  
14 that these particular criteria are met.

15           On the topic of safety and traffic specifically, the Appellant did show by a  
16 preponderance that there is an existing traffic safety issue at the intersection of  
17 North 33rd Street and North Pearl Street approximately one block west of the  
18 Subject Property. The City may decide to address that issue at some point.  
19 Because the Appellant did not show by a preponderance that the Short Plat  
20 exacerbates that issue to a level that the Short Plat approval was erroneous,  
21 approval of the Short Plat stands. Because neither the Rezone nor the MDNS  
were appealed, this proceeding cannot become a collateral attack on these final  
decisions including their determinations on traffic issues.

**(b) Open space.** This criterion was not challenged by the Appellant.  
Nonetheless, open space will be required in the individual lots in the Short Plat,  
the CZA has open space requirements, and parks and open spaces are within a  
reasonable distance from the Subject Property to consider this criterion met.

**(c) Stormwater management.** The adequacy of stormwater facilities was  
not challenged in this appeal. The final short plat and the development of  
the Subject Property will have to comply with the City’s Stormwater  
Management Manual (SWMM) and all other applicable stormwater laws  
and regulations. Given that, the Short Plat fall under *Topping v. Pierce Cty.  
Bd. of Comm’rs*, 29 Wn. App. 781, 630 P.2d 1385 (1981), where the court  
held that “Matters which are specified by regulation or ordinance need not  
be considered [at the preliminary plat stage] unless conditions or infirmities  
appear or exist which would preclude any possibility of approval of the  
plat.” There is no indication that the Short Plat will have absolutely no path  
to stormwater compliance through appropriate provision of facilities.

1           **(d) Streets or roads; alleys; or other public ways; bicycle circulation, other**  
2           **public ways.** The Short Plat provides adequate access to the public right-of-  
3           way system and there is sufficient access to the proposed homes, and  
4           circulation with the Short Plat. As already mentioned, this proceeding cannot  
5           become a collateral attack on previously finalized decisions that were not  
6           appealed. One specific traffic issue was proved to exist a block away from the  
7           Short Plat. Requiring that the Applicant address it in order to maintain approval  
8           of the Short Plat was not supported by the evidence at hearing beyond the  
9           general presumption that the problem will worsen if more people live in the  
10          area. That presumption might provide some nexus with the Short Plat, but there  
11          was no evidence presented regarding the cost to address the North 33rd Street  
12          and North Pearl Street issue, nor was any evidence of proportionality  
13          presented.<sup>12</sup> City land use decisions must comply with the constitutional nexus  
14          and proportionality standards set forth in *Nollan* and *Dolan*.

15          **(e) Transit stops.** There was no evidence presented of existing transit stops  
16          being inadequate to serve the Short Plat. As such, this criterion stands.

17          **(f) Potable water supplies; sanitary wastes.** This criterion was not  
18          challenged by the Appellant. Nonetheless, all utilities necessary to serve the  
19          Short Plat are present in areas adjacent to the Short Plat presently and can  
20          (and will need to) be extended through the Short Plat to serve the homes  
21          developed. This criterion is met through availability and will be further met  
22          as the Short Plat is developed.

23          **(g) Parks and recreation, playgrounds.** This criterion was not challenged at  
24          the hearing. Nonetheless, park, recreation and playground facilities are  
25          available within a reasonable distance from the Subject Property. In addition,  
26          the Short Plat proposes the provision of a playground and dog park area for  
27          recreational use by residents of the Short Plat. This criterion is met. *FoF 6*.<sup>13</sup>

28          **(h) Schools and schoolgrounds.** Existing public educational facilities are  
29          available and presumed adequate to serve the development proposed by the  
30          Short Plat. There was an assertion in the record that the schools that serve the  
31          Subject Property have no capacity, but no foundation was offered for that  
32          assertion nor was any other supporting evidence offered. *See FoF 6*.

33          **(i) Sidewalks; other safe walking features.** New sidewalk will be provided  
34          along the face of the Short Plat along North 33rd Street. This is the only part of  
35          the Short Plat that abuts City right-of-way. Additional pedestrian facilities, as  
36          testified to by Popp, could certainly benefit the greater neighborhood, but

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<sup>12</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

<sup>13</sup> *FoF* is an abbreviation for Finding of Fact.

1 requiring them as part of this appeal is unsupported. This criterion appears to be  
2 met by the Plat as proposed and conditioned. *FoF 6, FoF 11.*

3 9. Compliance with TMC 13.04.090.F.2; Public Use and Interest Served,  
4 Consistency with the Comp Plan and other Adopted City Ordinances, Manuals, Design  
5 Specifications, Plans, Goals, Policies, and Guidelines:

6 The proposed Short Plat and the intended residential development of the Subject  
7 Property are consistent with the existing R4-L Low-Density Multiple Family Dwelling District  
8 designation on the Subject Property. The Short Plat and proposed development are consistent  
9 with the public use and interest, as that is embodied in the goals and policies of the Comp Plan  
10 and the City's development regulations.

11 At the hearing, most Appellant witnesses addressed TMC 13.04.090.F.2 and stated  
12 their opinion that the Short Plat does not serve the public interest. None made any reference to  
13 the public interest beyond their opposition to the development of the Subject Property and the  
14 perceived detrimental effects such development will work on their neighborhood. Beyond  
15 these opinions, there was no evidence to show by a preponderance that the Short Plat will be  
16 contrary to the public interest. A good example of this is the witnesses' (and the Appellant's)  
17 claim that the Short Plat will lead to a devaluation of their real property. All such claims were  
18 unsupported assertions. There was no evidence (such as appraisals or projections from a real  
19 property expert) to support these assertions.

20 Although these witnesses are members of the public and their concerns are legitimate  
21 to them, they are not the whole of the public interest. The popularity of a land use decision is  
not a factor in how it should be decided on appeal.<sup>14</sup>

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<sup>14</sup> *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 305, 936 P.2d 432, 441 (1997); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990).

1 As mentioned above, if ultimately granted final approval, the Short Plat will add to the  
2 current supply of housing in the City, a supply which is overtaxed at present resulting in  
3 significantly high market prices and rents. The required conditions of development in the  
4 Director's Decision (many of which will no doubt be included in the final approval process for  
5 the Short Plat), together with on-going monitoring by PDS and other City staff will combine to  
6 ensure that the Short Plat meets the part of this requirement dealing with City Ordinances,  
7 manuals, design specifications, and plans. Therefore, the Examiner concludes that the  
8 requirements of TMC 13.04.090.F.2 are, or will be met in the further unfolding of the final  
9 approval process, and in the Applicant's compliance with conditions of development.

10 10. Any finding herein which may be more properly deemed or considered a  
11 conclusion is hereby adopted as such.

12 Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing  
13 Examiner enters the following:

14 **DECISION**

15 Because the APPELLANT failed to meet his burden of proof to show that approval  
16 of the Short Plat was granted in error, this APPEAL is DENIED. The approval of the Short  
17 Plat in the Director's Decision is UPHELD together with all conditions imposed therein.

18 **DATED** this 19th day of October, 2023.

19   
20 \_\_\_\_\_  
21 **JEFF H. CAPELL, Hearing Examiner**

1 **NOTICE**

2 **RECONSIDERATION/APPEAL OF EXAMINER'S DECISION**

3 **RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:**

4 Any aggrieved person or entity having standing under the ordinance governing the matter,  
5 or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner  
6 requesting reconsideration of a decision or recommendation entered by the Examiner. A  
7 motion for reconsideration must be in writing and must set forth the alleged errors of  
8 procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14  
9 calendar days of the issuance of the Examiner's decision/recommendation, not counting the  
10 day of issuance of the decision/recommendation. If the last day for filing the motion for  
11 reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next  
12 working day. The requirements set forth herein regarding the time limits for filing of  
13 motions for reconsideration and contents of such motions are jurisdictional. Accordingly,  
14 motions for reconsideration that are not timely filed with the Office of the Hearing  
15 Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall  
16 be within the sole discretion of the Examiner to determine whether an opportunity shall be  
17 given to other parties for response to a motion for reconsideration. The Examiner, after a  
18 review of the matter, shall take such further action as he/she deems appropriate, which may  
19 include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code*  
20 *1.23.140*)

21 **NOTICE**

**APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:**

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing  
Examiner's decision may be appealable to the Superior Court for the State of Washington.  
Any court action to set aside, enjoin, review, or otherwise challenge the decision of the  
Hearing Examiner will likely need to be commenced within 21 days of the entering of the  
decision by the Examiner, unless otherwise provided by statute.