BEFORE THE HEARING EXAMINER
FOR CITY OF REDMOND

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| In the Matter of the Appeal of<br><br>**Dr. John Brunsman**<br><br>Of the August 22, 2017<br>Relocation Claim Determination<br>Related to property at<br>16145 NE Cleveland Street, Redmond | NO.<br><br>CITY OF REDMOND'S OPPOSITION TO APPELLANT'S MOTION TO CHANGE FORUM FOR APPEAL |

The Hearing Examiner should deny Dr. Brunsman's request to decline jurisdiction over this case. The request is premised on a conclusory assertion, offered without any citation to legal authority, that there can be no changes to the applicable legal process once an action is filed. The law is not as Dr. Brunsman proposes. As will be explained below, procedural rule changes almost always apply with immediate effect to existing actions. Hence, the parties to protracted civil litigation rely on the most recent versions of the civil rules and the evidence rules, rather than consulting the versions that were in effect when the cases were filed. An exception to this rule arises only when applying the new procedure would cause manifest injustice, such as when new deadlines render a previously timely claim untimely. Dr. Brunsman does not even attempt to argue that there is any injustice in having this matter heard by the Hearing Examiner. His motion should therefore be denied.



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(1) The Hearing Examiner has jurisdiction over this appeal.

As Dr. Brunsman acknowledges, the Redmond City Council delegated responsibility for relocation appeals to the Hearing Examiner by Ordinance No. 2894, passed on October 17, 2017. The regulations give the "displacing agency," here the City of Redmond ("City"), authority to review appeals. WAC 468-100-010. Dr. Brunsman has not challenged the City's authority to delegate that responsibility to the Hearing Examiner. Nor has he disputed that Ordinance No. 2894 did so effectively. He argues only that this delegation cannot apply to his appeal, because he filed it before the new ordinance went into effect and was "vested in whatever legal process was in place at that time for his appeal." Mot. at 2:7. Dr. Brunsman's basic assumption is wrong.

Both Washington and federal law favor applying new procedural rules to existing actions. *See Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); *Godfrey v. State*, 84 Wn.2d 959, 530 P.2d 630 (1975). The U.S. Supreme Court, for example, holds that the usual retroactivity analysis does not even apply to procedural rules:

> Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

*Landgraf*, 511 U.S. at 275 (citing *McBurney v. Carson*, 99 U.S. 567, 569, 25 L.Ed. 378 (1879). The Washington Supreme Court adopted this view in *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

An exception arises where retroactive application would "result in manifest injustice." *TwoRivers v. Lewis*, 174 F.3d 987, 994 (9th Cir. 1999) (citing *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 539 (9th Cir.1994)). This analysis focuses on whether the new rule "altered the legal consequences of the events giving rise to the claimant's suit." *Id.* at 994–95; *accord. Pillatos*, 159 Wn.2d at 471. Thus, when a plaintiff's claim would have been timely, but for a new statute



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that eliminated the tolling provision that preserved his claim, the Ninth Circuit declined to give the new statute retroactive effect. *See id.* Conversely, here, Dr. Brunsman fails to offer any explanation as to how having this matter heard by the Hearing Examiner would result in a manifest injustice or alter the legal consequences of the events giving rise to this appeal.

Washington courts reject the notion that, by filing a suit, a party gains a *per se* vested right in an existing legal process. Retroactive application is given to "statutes which relate to practice, procedure or remedies and do not affect a contractual or vested right." *Godfrey*, 84 Wn.2d at 961 (citing *Nelson v. Department of L & I*, 9 Wn.2d 621, 115 P.2d 1014 (1941)). "A vested right, entitled to protection from legislation, must be something more than a Mere expectation based upon an anticipated continuance of the existing law; *it must have become a title,* legal or equitable, *to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*" *Id.* at 963.

Merely changing the responsible decisionmaker does not transgress a party's vested rights. *See, e.g., Pillatos*, 159 Wn.2d at 471–72. In *Pillatos*, after the State had filed charges against the defendants, the Legislature amended the Sentencing Reform Act to give juries responsibility to find facts that might justify an exceptional sentence. Before that amendment, trial judges decided sentencing facts in a bench hearing. *See Blakely v. Washington*, 542 U.S. 296, 300–01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Because the defendants had notice that an exceptional sentence was possible when they committed their crimes, and the amendment was merely procedural and created "no new legal consequences," the amendment was properly applied to their trials. *Pillatos*, 159 Wn.2d at 471.

*Pillatos* controls this motion. Under Dr. Brunsman's theory, the *Pillatos* defendants would have been vested in the procedure that existed when the charges against them were filed, with trial judges deciding sentencing facts in a bench hearing. But the Supreme Court rejected that notion. Just as the Legislature could give juries fact-finding responsibility for the



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defendants' sentencing after the charges were filed in *Pillatos*, the City was free to give the Hearing Examiner responsibility for Dr. Brunsman's hearing after his appeal was filed.

Dr. Brunsman's arguments about the new ordinance's effective date do not alter this analysis. A statute's effective date might be relevant to whether the legislature intended retroactive application. *See Godfrey*, 84 Wn.2d at 966–67. But the courts inquire into that intent only when the statute falls outside the sphere of "practice, procedure and remedy." *Id.* at 965–66 (noting that non-procedural statutes may apply retroactively if the legislature has indicated some intent for retroactive application, and analyzing effective date in that context). Here, that analysis is inapposite because the new ordinance is squarely within the sphere of "practice, procedure and remedy," as discussed above. Ordinance No. 2894 therefore properly delegated responsibility for this appeal to the Hearing Examiner.

(2) Dr. Brunsman offers no valid basis for the Hearing Examiner to direct the City to submit this matter to an administrative law judge.

Dr. Brunsman's second request for relief is an order "directing the City to submit this matter to a state Administrative Law Judge." Mot. at 1:21. It is not necessary for the Hearing Examiner to consider the merits of that request because, as explained above, the matter is properly before the Hearing Examiner. In the interest of addressing all the issues raised, however, the City offers two observations about this request.

First, Dr. Brunsman fails to explain how this tribunal, if it determines it lacks jurisdiction, would have authority to issue orders to the City as to how this matter should be adjudicated. Any such order would be void. *See Long v. Harrold*, 76 Wn. App. 317, 319, 884 P.2d 934 (1994) (a judgment is void if entered without jurisdiction over the parties or the subject matter) (quoting *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 843 (1987)).

Second, Dr. Brunsman's authority for the requested order, WAC 10-08-050, fails to support his assertion that the matter must be referred to an administrative law judge, even if the Hearing Examiner had authority to enter such an order. The cited regulation applies when an



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agency "conducts a hearing which is not presided over by officials of the agency who are to render the final decision." WAC 10-08-050. Again, the City has authority to review this appeal under WAC 468-100-010. If the delegation to the Hearing Examiner were somehow ineffective—which it was not—then responsibility for presiding over the hearing would simply revert to the City's officials. WAC 10-08-050 does not apply.

The Hearing Examiner should therefore deny Dr. Brunsman's motion.

DATED this 28th day of November, 2017.

OGDEN MURPHY WALLACE, P.L.L.C.

By _____
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**DECLARATION OF SERVICE**

**I hereby declare that I sent a copy of the document on which this declaration appears via fax/mail/messenger/email/e-service to** TODD WYATT

**I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.**

**Executed at Seattle, WA on** 11/28/17

**Signed by:** Carole Hussey



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