



APPEAL APPLICATION FORM

To file an appeal of a Type I, II, or III decision or a SEPA determination, please complete the attached form and pay the applicable fee by 5:00 p.m. on the last day of the appeal period.

Form submission and payment must be by **PERSONAL DELIVERY** at City Hall 2nd Floor Customer Service Center c/o Office of the City Clerk-Hearing Examiner, 15670 NE 85th Street. Contact the Office of the Hearing Examiner with process questions at 425-556-2191.

Standing to Appeal:

- **Appeal to the Hearing Examiner of a SEPA determination** - Any interested person may appeal a threshold determination, adequacy of a final EIS, and the conditions or denials of a requested action made by a nonelected City official based on SEPA. No other SEPA appeals shall be allowed.
- **Appeal to the Hearing Examiner of an Administrative, Technical Committee or Design Review Board Decision (Type I or II)** - the project applicant, owner, or any person who submitted written comments (party of record) prior to the date the decision was issued may appeal the decision. The written appeal and the applicable fee must be received by the City of Redmond's Office of the Hearing Examiner no later than 5:00 p.m. on the 14th calendar day following the date of the decision.
- **Appeal to the City Council of a Hearing Examiner (or Landmarks and Heritage Commission) decision on an application (Type III)** - the project applicant, owner, City staff, or any person who established themselves as a party of record prior to or at the public hearing. The written appeal and the applicable appeal fee must be received by the City of Redmond's Office of the Hearing Examiner no later than 5:00 p.m. 10 business days following the expiration of the Hearing Examiner's (or Landmarks and Heritage Commission's) reconsideration period.

Should the appellant prevail in the appeal, the application fee will be refunded (City of Redmond Resolution No. 1459). The application fee will not be refunded for appeals that are withdrawn or dismissed.

Hearing Examiner or City Council decision on appeal may be appealed to Superior Court by filing a land use petition which meets the requirements set forth in RCW Chapter 36.70C. The petition must be filed and served upon all necessary parties as set forth in State law and within the 21-day time period as set forth in RCW Section 36.70C.040. Requirements for fully exhausting City administrative appeal opportunities must be fulfilled.

Please continue to page 2 to select your appeal type.

| | |
|-----------------------------------|------------------|
| File No: <u>LAUD - 2017-00888</u> | (Staff Use Only) |
| Date Received: <u>9/7/17</u> | |
| Receipt No. _____ | |

- Appeal to the Hearing Examiner of a SEPA determination RZC 21.70.190(E). **(Please be sure to understand the type of SEPA appeal you are filing, and if a further appeal to the underlying action is needed.)**
- Appeal to the Hearing Examiner of an Administrative, Technical Committee or Design Review Board Decision (Type I or II) RZC 21.76.060(I)
- Appeal to the City Council of a Hearing Examiner (or Landmarks and Heritage Commission) decision on an application (Type III) RZC 21.76.060(M)

Section A. General Information

Name of Appellant: Deal Investment LLC, c/o G. Richard Hill, McCullough Hill Leary, PS

Address: 701 5th Avenue, Suite 6600

City: Seattle State: WA Zip: 98104

Email: rich@mhseattle.com

Phone: (home) _____ (work) 206-812-3388 (cell) _____

Name of project that is being appealed: Blackbird

File number of project that is being appealed: LAND-2016-01438/PR-2016-00461

Date of decision on project that is being appealed: August 24, 2017

Expiration date of appeal period: September 8, 2017

What is your relationship to the project?

- Party of Record Project Applicant Government Agency

Pursuant to the Redmond Zoning Code, only certain individuals have standing to appeal a decision on application or appeal (See page 1 above). Below, please provide a statement describing your standing to appeal, and reference all applicable City Code citations.

Deal Investments is the project applicant and property purchaser. See RZC

21.76.060.9.2

Section B. Basis for Appeal

Please fill out items 1-4 below. Reference all applicable City Code citations and attach additional sheets if necessary.

1. Please state the facts demonstrating how you are adversely affected by the decision:

See Attachment A

2. Please provide a concise statement identifying each alleged error of fact, law, or procedure, and how the decision has failed to meet the applicable decision criteria:

See Attachment A

If appealing a Hearing Examiner decision: Please provide the findings of fact or conclusions (as outlined in the Hearing Examiner’s decision) which are being appealed:

3. Please state the specific relief requested:

See Attachment A

4. Please provide any other information reasonably necessary to make a decision on the appeal:

See Attachment A

Do not use this form if you are appealing a decision on a:

- Shoreline Permit (must be appealed to the State Shoreline Hearings Board *RZC 21.68.200(C)(6)(b)*)
- Shoreline Variance or a Shoreline Conditional Use Permit (must be appealed to the State Shoreline Hearings Board *RZC 21.68.200(C)(6)(c)*)
- Hearing Examiner decision on a SEPA appeal (not an appealable action as successive appeals are not allowed *RZC 21.70.190(D)*)
- City Council approval or denial (must be appealed to Superior Court *RZC 21.76.060(Q)*)

ATTACHMENT A

Section B. Basis for Appeal

1. Please state the facts demonstrating how you are adversely affected by the decision:

Deal Investments LLC “Deal” is the purchaser of the property affected by, and the proponent of, the project (“Project”) approved with conditions by the City of Redmond (“City”) Technical Committee LAND-2016-01438 Site Plan Entitlement Notice of Decision dated August 24, 2017 (“Final Decision”). A copy of the Final Decision is set forth at Exhibit A. Deal is also the purchaser of the property affected by, and the proponent of, the Project approved with conditions by the City Technical Committee Land-2016-01438 Site Plan Entitlement Notice of Decision prepared by the City Planning Department and with terms approved by the City Technical Committee as of July 5, 2017, awaiting only the final official signature of the signature of the City Planning and Public Works representatives on the Technical Committee (“Final Draft Decision”). A copy of the Final Draft Decision is attached as Exhibit B.

The Final Draft Decision was drafted by Gary Lee, the Project planner, and forwarded to Deal for approval. Deal approved the form of the Final Draft Decision on July 3, 2017. The conditions set forth in the Final Draft Decision incorporate all material terms of the City Design Review Board’s decision approving the Project and its requested deviations. The conditions set forth in the Final Draft Decision also correctly incorporate all material terms of the Technical Committee’s decision approving the Project and affirming the Design Review Board’s decision approving the Project’s requested deviations. On July 5, 2017, Mr. Lee advised Deal that the only remaining step remaining before the Final Decision was issued was to obtain the approval of the form of the Final Draft Decision by the Planning Director and the Public Works Director.

At that time, Mr. Lee expected to obtain that approval on or before July 12, 2017. Mr. Lee stated that he would then promptly issue the final decision.

Unfortunately, however, Robert Odle, who served as the City Planning Director throughout the City's review process relating to the Project, and who served on the Technical Committee at the time that it approved the Project with its proposed deviations, retired as Planning Director shortly before the Final Draft Decision had been forwarded to his desk. To the best of Deal's knowledge, Mr. Odle fully supported all terms of the Final Draft Decision, including the Project's proposed deviations, and would have been fully prepared to sign it had it been available for his approval prior to his retirement.

Following the date of Mr. Lee's drafting of the Final Draft Decision, Mr. Odle's position as Planning Director was filled by Karen Haluza ("New Planning Director"). Ms. Haluza had no prior experience with the City of Redmond, and had no prior knowledge, experience, or facility with the Redmond Zoning Code or development approval process. Ms. Haluza had only just moved to Redmond from a position as Planning Director of the City of Fullerton, California. To the best of Deal's information and belief, Ms. Haluza has no prior experience as a planner in any jurisdiction in the state of Washington. In addition, prior to her filling of Mr. Odle's position, Ms. Haluza had no prior knowledge of any aspect of the Project, its review and approval by the Design Review Board, or its review and approval by the City Technical Committee.

Following Mr. Odle's retirement in July 2017, and her ascension to the position of City Planning Director, Ms. Haluza advised Mr. Lee, but not Deal, that she had "concerns" with the Final Draft Decision. Only after Deal inquired of Mr. Lee why the Final Draft Decision had not yet been signed, did Mr. Lee indicate that Ms. Haluza had "concerns," and that Deal should contact Ms. Haluza. Ms. Haluza never shared her "concerns" at any time in writing with Deal,

despite Deal's numerous requests. Deal hoped to understand her concerns so that Deal could seek to resolve them. When Deal was finally able to meet with Ms. Haluza, she expressed varying and vague concerns, with no reference to applicable review criteria in the Redmond Zoning Code. Ultimately, Ms. Haluza advised Deal that she would provide Deal with a list of her concerns in writing. Ms. Haluza never did so. Instead, without prior notice to Deal, Ms. Haluza altered key material terms of the Final Draft Decision and issued it with no prior notice to Deal on August 24, 2017, with an appeal deadline of September 8, 2017. This revised version of the Final Draft Decision, referred to as the "Final Decision" in this Appeal Application, is the subject of this appeal.

The Final Decision arbitrarily and capriciously alters two material conditions of the Final Draft Decision. Ms. Haluza altered these two material conditions unilaterally, without (on Deal's information and belief), consulting with Mr. Odle, the Planning Director with many years of experience in the City and who presided over the months-long process leading to approval by the Design Review Board and the Technical Committee (he was also a member of the Technical Committee that reviewed and approved the Project). The New Planning Director also altered these two material conditions without consulting with either the City Design Review Board or with the City Technical Committee. Both of these entities had approved the conditions altered by Ms. Haluza. On information and belief, in altering these conditions, she also overruled the recommendation of Mr. Lee, the City's senior planner who has well over ten years' tenure with the City and is thoroughly familiar with City Zoning Code and development processes, and who personally oversaw the Project's compliance with Design Review Board and Technical Committee approval processes, and who drafted the Final Draft Decision document.

The Final Draft Decision, at Section II.C, sets forth the deviations requested by Deal that were approved by the Design Review Board pursuant to RZC 21.76.070.C.8. This RCZ provision states that the Design Review Board may grant deviations when the overall design of the proposed development is found to be superior, with the inclusion of certain design elements.

Section II.C.2 of the Final Draft Decision states, in pertinent part:

Allow (substandard) decorative Juliet balconies **without the requirement to pay in-lieu fees**, as the proposed window/glazing arrangement (mostly window-wall) in the subject rooms provides a superior interior design with regard to natural lighting in the units, and the design of the balcony railings provides interest on the building façade... (“Juliet Balcony In-Lieu Fee Deviation”) (emphasis added).

The New Planning Director unlawfully, and unilaterally, altered the Juliet Balcony In-Lieu Fee Deviation by eliminating the phrase “without the requirement to pay in-lieu fees.” See Final Decision at Section II.C.2. This unlawful change will increase the cost of the Project by more than \$200,000.

Section II.C.6 of the Final Draft Decision, also a component of the Design Review Board’s decision on the Project pursuant to the authority of RZC 21.76.070.C.8, sets forth the Design Review Board’s approval of the deviation requested by Deal pertaining to uses at street grade:

Allow live-work units along the street to be at grade. This found to be acceptable as the live-work units will be required to be convertible, in terms of building occupancy, for future commercial/retail use (“At-Grade Use Deviation”).

The New Planning Director unlawfully, and unilaterally, altered the Final Draft Decision by eliminating the At-Grade Use Deviation. See Final Decision (eliminating Section II.C.6 of the Draft Final Decision). The inability of the Project to include live/work units at street grade, combined with the absence of any reasonable market demand for retail uses at street grade, will

reduce the value of the Project by over \$3,000,000, and seriously threatens the Project's economic viability.

Both the Juliet Balcony In-Lieu Fee Deviation and the At-Grade Use Deviation were approved by the City Design Review Board and Technical Committee. Similar deviation requests related to modification of balcony design standards and at-grade use requirements have recently been approved for other projects in the same downtown zone -- including another project also developed by Deal in the immediate vicinity. The New Planning Director, in making these alterations to the Final Draft Decisions, made no effort to distinguish these recent precedents and provided no rationale explaining her unlawful efforts to reverse the well-considered prior decisions of the Design Review Board and the Technical Committee.

2. Please provide a concise statement identifying each alleged error of fact, law, or procedure, and how the decision has failed to meet the applicable decision criteria.

(a) The New Planning Director is without authority to alter the decision of the Design Review Board to approve the requested Juliet Balcony In-Lieu Fee Deviation and the At-Grade Use Deviation, because the decision of the Design Review Board as to deviations is the final decision of the City, subject to appeal to the Hearing Examiner. “The Design Review Board’s determination shall be given the effect of a final decision on design standard compliance for Type II applications...” RZC 21.76.060.7. The Design Review Board is afforded this final decision authority because it is considered the entity with expertise in the City to address the decision criteria set forth in RZC 21.76.070.C.8 – namely, whether deviation requests will better meet the intent of applicable City goals and policies, will result in superior design, and will provide benefit in desired use and activity.

(b) In eliminating the Juliet Balcony In-Lieu Fee Deviation and the At-Grade Use Deviation, the New Planning Director violated the requirements of RZC 21.76.070.C.8, because the applicant demonstrated to the satisfaction of the Design Review Board that the two deviations would result in a development which better meets the intent of the applicable City goals and policies, is superior in design, and provides benefit in desired use and activity. The New Planning Director failed to identify any basis justifying reversing this well-considered decision by the Design Review Board, and affirmed by the Technical Committee.

(c) The New Planning Director’s Final Decision is not supported by substantial evidence and is clearly erroneous. Indeed, her Final Decision fails to provide any factual or legal justification for her elimination of the deviations approved by the Design Review Board and the Technical Committee.

(d) The Director's Final Decision violates both the letter and the intent of the City's Review Procedures as set forth in RZC 21.76. These well-considered review procedures are explicitly designed to provide applicants with early and continuous guidance from the City as to City requirements that will be imposed on project developments, and the extent to which deviations from those requirements will be allowed. These review procedures are intended to provide a collaborative process between the applicant, on the one hand, and City reviewers on the other, to assure that applicable City criteria are incorporated early into project design, and to provide "early warning" to project applicants of City issues and concerns so that any such issues and concerns will be addressed fully at early design stages. To that end, Deal worked closely and in good faith with all City representatives, and designed its project in accordance with the specific direction and approval of the City's Design Review Board and Technical Committee. Indeed, City staff provided explicit affirmations that both the Juliet Balcony In-Lieu Fee Deviation and the At-Grade Use Deviation had been approved and that Deal could rely on that approval. As a result, the Project has been fully designed, at the cost of well over \$1,000,000, and is ready for building permit submittal. The New Planning Director's Final Decision turns that process on its head, and, if affirmed, will render meaningless the over twelve months' worth of City representations to Deal, as well as belie the integrity of every step in the City's extensive and complex review process designed to provide certainty. If affirmed, the New Planning Director's Final Decision betrays not only Deal's good faith, but also the letter and intent of the City's carefully wrought RZC 21.76 development review processes.

(e) The New Planning Director's decision to eliminate the Juliet Balcony In-Lieu Fee Deviation is in violation of RZC 21.62.020.E. This code provision states that projects that do not provide balconies must pay in-lieu open space fees. However, both the Draft Final Decision and

the Final Decision acknowledge that the Project will provide balconies. See Section II.C.2 of both Decisions. Because the Project includes balconies, the Director has no discretion to require the payment of in-lieu open space fees.

(f) By unilaterally altering the Design Review Board and the Technical Committee decisions, and without providing prior material notice to Deal, the New Planning Director violated Deal's rights to due process guaranteed in RZC 21.76.

(g) The New Planning Director failed to make findings of fact or conclusions of law to justify her decision to unilaterally change the decisions of the Design Review Board and the Technical Committee. In addition, the New Planning Director has no prior experience as a planner in the State of Washington and no prior knowledge or experience with the City of Redmond Zoning Code or development processes. Accordingly, no weight should be afforded to her decision to eliminate the two deviations.

(h) As set forth in this Appeal Application, and as will be demonstrated at the hearing on the merits, the New Planning Director is estopped from eliminating the Juliet Balcony In-Lieu Fee Deviation and the At-Grade Use Deviation.

(i) The decision of the New Planning Director to eliminate the Juliet Balcony In-Lieu Fee Deviation and the At-Grade Use Deviation violates the requirements of RCW 82.02.020. There is no lawful nexus or reasonable proportionality between impacts of the Project, on the one hand, and the New Planning Director's efforts (i) to impose in-lieu fees in connection with the Juliet Balconies, and (ii) to deny the right to include at-grade live/work lofts, on the other.

(j) Deal understands that the Hearing Examiner may not have jurisdiction to address statutory or tort damages, or constitutional claims. Nonetheless, Deal does feel the responsibility

to place the City on formal notice that if the New Planning Director's decision to eliminate the deviations is upheld, Deal will hold the City responsible for its damages under RCW 64.40, and that the City will be liable for damages for tortious interference and for violation of its civil rights under the state and federal constitutions.

(k) Deal has submitted a public records request to the City. Deal respectfully asks the Hearing Examiner for leave to amend this Appeal Application to raise additional claims based on facts set forth in the public records to the extent that they were not reasonably available to Deal during the 14 days allowed to file the Appeal Application.

3. Please state the specific relief requested:

(a) Deal asks the Hearing Examiner to reinstate the Juliet Balcony In-Lieu Fee Deviation and the At-Grade Use Deviation, consistent with the terms of the Final Draft Decision.

(b) Deal asks the Hearing Examiner, pursuant to Hearing Examiner Rule VII, to schedule a pre-hearing conference to address a schedule for exchange of witness and exhibit lists, dispositive motions schedule, briefing schedule, and discovery issues.

(c) Deal submitted a Public Records Request to the City on September 5, 2017. Deal asks the Hearing Examiner to require the City to produce the records requested on a schedule consistent with that of Superior Court discovery time requirements, and to schedule the hearing on the merits for a date subsequent to the City's production of these records.

(d) Deal asks the Hearing Examiner for leave to issue notices of deposition and subpoenas to discover facts relevant to the issues raised in this Appeal Application.

(e) Deal asks the Hearing Examiner for leave to amend the allegations and claims set forth in this appeal to accommodate facts contained in the City's public records and in other discovery that were not reasonably available prior to the filing of this Appeal Application.

4. Please provide any other information reasonably necessary to make a decision on the appeal.

A summary of the chronology of the Project follows. The facts set forth in this Appeal Application will be supplemented at the hearing on the merits, in accordance with the provisions of the RZC and the Hearing Examiner Rules.

9/3/15 Deal enters into Purchase and Sale Agreement to acquire Project property

9/3/15 through 6/6/17 Robert Odle is City Planning Director throughout the Project's substantive entitlement review process, including the Design Review Board and Technical Committee substantive entitlement review processes. Mr. Odle was a member of the Technical Committee that granted approval of the Project and affirmed the Design Review Board's approval of the Project with proposed deviations.

6/2/16 PREP 1 -- Pre-App meeting

6/16/16 DRB 1 -- 30% Pre-App Meeting

8/1/16 PREP 2 -- 30% Meeting

10/6/16 PREP 3 -- 60% (Submittal includes at-grade live/work units)

10/20/16 DRB 2 -- 60%

1/19/17 PREP 4 -- 90%

2/2/17 DRB 3 -- 90%

2/19/17 Gary Lee email to Brandon Deal: "We have decided to support your deviation request for the Juliet 'balconies,' based upon the window pattern/ and amount of

glazing on those walls/rooms where those ‘balconies’ are proposed. **Thus, you will not have to pay a fee in-lieu for that combination of ‘balcony’ and window walls”** (emphasis added).

3/22/17 PREP 4 100% Submitted

4/4/17 City approves PREP plans

4/4/17 Formal application is submitted and accepted by City

4/14/17 Notice of Application is posted/mailed

4/20/17 DRB 100% -- Requested deviations including Juliet Balconies and at grade live/work lofts are approved, as set forth in the 4/20/17 DRB Staff Memorandum: “In summary, Per RCZ 21.76.070.C.8, the above listed Administrative Design Flexibility requests are acceptable as the provision and combination of these departures is creating a more superior design and development.”

5/8/17 In response to inquiry from Deal, Gary Lee confirms Project has received “Tentative Project Approval” from the Technical Committee: “Brandon, They [the Technical Committee] have tentatively approved it, but we need to wait for SEPA to be completed and I need to get the approval letter drafted. We will be issuing SEPA tomorrow.” All that remained for final approval were the non-substantive, ministerial steps to (a) issue SEPA, and (b) draft the approval letter to incorporate the Design Review Board and Technical Committee approvals.

5/9/17 City issues DNS

5/22/17 Deal asks Gary Lee about timing for preparation of final decision documenting approval decisions of Design Review Board and Technical Committee

5/23/17 No DNS appeal filed

5/31/17 Senior Planner Gary Lee provides Deal, for its review and comment, with first draft of Final Draft Decision that incorporates terms of Design Review Board and Technical Committee prior approvals

6/6/17 New Planning Director Karen Haluza hired to replace retiring Robert Odle

6/15/17 Deal submits CCR Plans, in reliance on City approvals to date

6/16/17 Project architect provides non-substantive comments on Gary Lee 5/31/17 draft of Final Draft Decision

6/27/17 City accepts Project's CCR Intake Fees

7/3/17 Senior Planner Gary Lee provides Deal with form of Final Draft Decision – Live/Work approved at grade, Juliet Balconies approved with no in-lieu fees required

7/3/17 Deal immediately approves form of Final Draft Decision

7/5/17 Gary Lee advises that Final Decision signing by Planning Director is imminent: “Brandon, The next step is that I need to get the Planning Director’s and Public Works Director’s approval of the draft letter. Then I will officially issue it. Hopefully I will get that next week. I forwarded the letter to them for their approvals Monday. In the meantime, we will proceed with the CCR meetings and review.”

7/6/17 CCR Intake accepted by City

7/25/17 Deal requests update on signing of Final Draft Decision

7/26/17 Gary Lee advises Deal that the New Planning Director has “concerns” regarding approved deviations and that Deal should contact her

8/3/17 At Deal's request following Gary Lee's 7/26/17 advice, New Planning Director finally meets with Deal for first time and informs Deal of a myriad of potential concerns relating to the already approved Project deviations, and advises Deal she will send a list of her concerns and would schedule a meeting with Deal to discuss those concerns, prior to issuing any formal Project decision

8/7/17 Deal submits follow up email to New Planning Director asking for her promised written list of concerns

8/11/17 Deal submits an additional follow up email to New Planning Director asking for her promised written list of concerns

8/14/17 Deal inquires of New Planning Director's assistant for an update on New Planning Director's promised list of concerns

8/17/17 Deal submits a third follow up email to New Planning Director asking for her promised written list of concerns

8/18/17 New Planning Director finally responds, but without providing promised written list of concerns: "Hi Michelle, I'm sorry for the delay in my response. I'm working with Gary to finalize my comments and will contact you to set up a meeting some time next week. Thanks so much, Karen"

8/21/17 Deal emails Gary Lee to see if Mr. Lee could discuss with Deal the concerns of the New Planning Director, since the New Planning Director had not seen fit herself to provide Deal with the promised list of written concerns

8/21/17 Gary Lee responds: "OK. Brandon. We will see what happens.

Hopefully we can get a revised letter out this week."

8/24/17 Without providing Deal with the promised written list of concerns, and without providing the courtesy of the promised meeting with Deal to discuss the promised written list of concerns, the New Planning Director issued the Final Decision, unilaterally reversing the decisions of the Design Review Board and the Technical Committee that had approved the Juliet Balcony In-Lieu Fee Deviation and the At Grade Use Deviation. The Final Decision provides no factual or legal justification for overturning the prior City decisions upon which Deal was fully entitled to rely.

DATED this 7th day of September, 2017.

MCCULLOUGH HILL LEARY, PS



G. Richard Hill, WSBA #8806
Attorney for Appellant