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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF REDMOND

In the Matter of the Appeal of  
Tom and Andrea Short and Hamid  
Korasani

No. DEVREQ-2017-00464/BLDG-2015-02128

**APPELLANTS’ BRIEF ON THE MERITS**

of a May 18, 2017 Decision by the  
Technical Committee to Deny a  
Deviation Request for a project at  
13404 NE 100th Street, Redmond

The Appellants, Tom & Andrea Short, and Hamid Korasani, submit the following legal  
brief in support of the merits of their appeal per the Order Setting Pre-Hearing Document  
Exchange Schedule, dated June 13, 2017:

**ANALYSIS**

**1. The Project is Exempt from the Requirement to Underground Utilities**

Appellants’ project should not require a deviation or modification, as it is exempt from  
the requirement to underground utilities under RZC 21.17.020. The City’s attempt to impose  
such a requirement here contravenes applicable City Code.

Specifically, the subject property is located within the Residential Innovative Zone (“RIN  
Zone”). The express purpose of the RIN Zone is to “promot[e] diversity in the size, **type**, and  
**price** of new single-family homes.” RZC 21.08.070 (emphasis added). Critically, for purposes

1 of the RIN Zone, duplexes are expressly considered single-family homes. *See* RZC  
2 21.08.360(A)(2) (defining “single-family housing” in the RIN Zone to include “smaller dwelling  
3 units such as a cottage, size-limited dwelling or **duplex**.”)(emphasis added). *Cf.* RZC  
4 21.08.070B (allowing duplexes as a permitted use in the RIN Zone). Categorizing duplexes as  
5 single-family homes in the RIN Zone is presumably for the purpose of ensuring the desired and  
6 aforementioned diversity of the **type** and **price** of housing stock available in the RIN Zone.

7         Moreover, the legislative history of ordinance requiring, in certain circumstances, the  
8 undergrounding of utilities, confirms that its exemptions were designed to be consistent with the  
9 purposes of the underlying zoning districts: “WHEREAS the City of Redmond desires to amend  
10 the Zoning Code as it pertains to...[the] undergrounding of utilities in order to relieve minor  
11 residential development from high cost burdens *without compromising existing...Zoning Code*  
12 *objectives*. Ord. No. 2662, Findings (emphasis added). In short, the objectives of the RIN Zone,  
13 which is to provide affordable, smaller housing units, was preserved by the exemptions to  
14 chapter 21.17 RZC. The City is hard-pressed to explain how the undergrounding of utilities at  
15 the subject property, at a cost in excess of \$100,000, preserves the affordable housing purpose of  
16 the RIN zone, when the cost of construction for the proposed duplex is approximately \$500,000.

17         As indicated, the undergrounding of utilities is governed by RZC 21.17.020. The City  
18 has a past pattern or practice of interpretation and application of RZC 21.17.020 that has  
19 excluded the construction of single-family residences or minor residential development from its  
20 requirements. Indeed, the City’s prior denial<sup>1</sup> of the Appellants’ deviation request, dated March  
21 3, 2017, reflects the City’s longstanding interpretation of RZC 21.17.020: “Per Redmond Zoning  
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<sup>1</sup> In a letter, dated April 15, 2017, the City “rescinded” its prior denial of the deviation request.

1 Code 21.17.020, undergrounding overhead utilities is required except for single-family house or  
2 minor residential development.” However, as indicated above, for purposes of the zone in which  
3 the Subject Property is situated, duplexes are expressly defined as single-family residences. *See*  
4 RZC 21.08.360(A)(2) (defining “single-family housing” in the RIN Zone to include “smaller  
5 dwelling units such as a cottage, size-limited dwelling or **duplex.**”)(emphasis added). As such,  
6 the Appellants’ project should be exempt from any requirement to underground overhead  
7 utilities.

8 **2. If the Project is Not Exempt from the Requirement to Underground Utilities, it is**  
9 **Eligible for a Deviation Under the Deviation Criteria that the City Directed the**  
10 **Applicants to Comply With**

11 Alternatively, if the Examiner concludes that the project is not exempt from the  
12 requirement to underground overhead utilities in RZC 21.17.020, the Appellants are eligible for a  
13 deviation *under the very criteria that the City invited Appellants to comply with*, specifically the  
14 following<sup>2</sup>

- 15 • The deviation produces a comparable or improved result, which is in the  
16 public interest.
- 17 • The deviation meets requirements for safety, public health, function, fire  
18 protection, transit needs, appearance, maintainability, and any other  
19 criteria deemed relevant by the City.
- 20 • The deviation provides substantially equivalent (or improved)  
21 environmental protection as would be provided if the standard  
22 requirements were met.
- 23 • The deviation needs to reflect sound engineering practices.
- The deviation needs to avoid damage to other properties in the vicinity of  
and downstream of the proposal.
- Any deviation from the standards that does not meet the Fire Code will  
require concurrence by the City Fire Marshal.

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<sup>2</sup> *See* City of Redmond, Procedures for Requesting and Approving Engineering Deviation  
Requests, located at <http://www.redmond.gov/common/pages/UserFile.aspx?fileId=206032>  
(revised December 14, 2016).

- As applicable for Overlake and Downtown RZC 21.76.070C Administrative Design Flexibility.

The City has opposed the Appellants' project ever since the Appellants applied to construct a duplex. Apparently, after having realized that the Appellants were well-positioned to meet the above criteria, the City unilaterally revoked its prior deviation denial, proffered false pretenses for its revocation (*i.e.*, the City "wanted an opportunity to review the request more in-depth"), and then, without explanation or notice to the Appellants, decided to review the project under different criteria altogether. The City's pattern of conduct was neither fair nor ethical. Nor should the conduct be tolerated by the Hearing Examiner.

For purposes of this legal brief, and to avoid duplication, it is sufficient to state that the Appellants intend to demonstrate how their proposed project meets the above criteria utilizing the same analysis provided in the revised deviation application.

**3. Alternatively, if the Project is Not Exempt from the Requirement to Underground Utilities, It is Eligible for a Modification Under RZC 21.17.030.**

Alternatively, if the Examiner concludes that the project is not exempt from the requirement to underground overhead utilities in RZC 21.17.020, the Appellants are eligible for a modification under RZC 21.17.030, which states in relevant part as follows:

....

2. The applicant shall explain what condition justifies the modification or rescission...
3. The decision maker shall adopt written findings and conclusions documenting its decision to approve or deny the request. The findings and conclusions shall document whether (i) the development contributes to the need for the required improvement or dedication and (ii) the required improvement or dedication is roughly proportional to the impact from the development. The decision maker shall consider whether credits, latecomer's fees, or other measures can be used to modify the required improvement, dedication, or transfer so that it is roughly proportional to the impact from the development.

1 RZC 21.17.030.

2 The above provisions appear to be a straightforward codification of what are commonly  
3 known as the “nexus” and “rough proportionality” tests imposed by the U.S. Supreme Court in  
4 *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512  
5 U.S. 374 (1994), respectively. In Washington, the tests from *Nollan* and *Dolan* have been  
6 codified in 82.02.020.

7 The best explanation of these doctrines in Washington State is contained in *Burton v.*  
8 *Clark County*, 91 Wn. App. 505 (1998), which states as follows:

9 In our view, *Nollan*, *Dolan*, and their Washington progeny stand for at least  
10 four propositions. **First, when the government conditions a land-use  
11 permit, it must identify a public problem or problems that the condition  
12 is designed to address....**

13 **Second, the government must show that the development for which a  
14 permit is sought will create or exacerbate the identified public problem.**  
15 This is the same as to say that there must be a relationship (nexus) between  
16 the development and the identified public problem; that the necessary  
17 relationship will exist if the development will create or exacerbate the  
18 identified problem; but that the necessary relationship will not exist if the  
19 development will not adversely impact the identified public problem. Thus,  
20 the *Nollan* Court rejected an easement that would have improved public  
21 access to the beach, even though the Commission’s staff report said  
22 improved public access was needed, because the *Nollans*’ project, replacing  
23 a bungalow with a new house, would not make the identified public  
problem, lack of public access, any worse than before. Similarly, the *Dolan*  
court rejected *Tigard*'s exaction of a floodplain easement that would have  
enhanced the public's recreational opportunities, even though such  
opportunities were needed, because *Dolan*'s project, a larger retail outlet,  
would not make the identified public problem, the public’s lack of  
recreational opportunities, any worse than before...

24 **Third, the government must show that its proposed condition or  
25 exaction (which in plain terms is just the government’s proposed  
26 solution to the identified public problem) tends to solve, or at least to  
27 alleviate, the identified public problem.** In other words, the government  
must show a relationship (nexus) between the proposed solution and the  
identified problem, and such relationship cannot exist unless the proposed  
solution has a tendency to solve or alleviate the identified problem. Thus,

1 the Nollan Court rejected the exaction of an easement along the beach, even  
2 though the Nollans' new house would exacerbate the inability of passersby  
3 to see the ocean from the road, because allowing people to walk on the  
4 beach had no tendency to restore the view from the road...

5 **Fourth, the government must show that its proposed solution to the**  
6 **identified public problem is “roughly proportional” to that part of the**  
7 **problem that is created or exacerbated by the landowner’s**  
8 **development.** Thus, as already seen, the Dolan Court posed the question,  
9 “[W]hat is the required degree of connection between the exactions imposed  
10 by the city and the projected impacts of the proposed development.” It  
11 answered by saying that the required connection was a “reasonable  
12 relationship” best described by the term “rough proportionality,” and that  
13 the government “must make some sort of individualized determination that  
14 the required dedication is related both in nature and extent to the impact of  
15 the proposed development.” The Washington Supreme Court ruled  
16 similarly in *Sparks v. Douglas County*, where it noted that a regulatory  
17 exaction must be “reasonably calculated to prevent, or compensate for,  
18 adverse public impacts of the proposed development.” The purpose, once  
19 again, is “to bar Government from forcing some people alone to bear public  
20 burdens which, in all fairness and justice, should be borne by the public as  
21 a whole,” while at the same time leaving government free to require a  
22 developer to rectify public problems insofar as the developer has created  
23 such problems.

*Id.* at 520-24 (emphasis added).

14 With respect to the above analysis, the City’s decision does not explain what the public  
15 problem is that it seeks to remedy by requiring the undergrounding of utilities. Overhead  
16 utilities cannot be a public problem, as the City Code expressly exempts single-family  
17 residences from undergrounding, and the vast majority of the residences in the RIN Zone, a  
18 single-family zone, are indeed single-family residences. Likewise, to the extent that the City  
19 relies on an alleged public problems identified in RZC 21.17.020(A), specifically public safety,  
20 aesthetics, hazards of proliferating utility poles, etc., the Appellants can demonstrate that those  
21 issues are exacerbated by the requirement to underground utilities at the subject property. Here,  
22 because of unique circumstances of the subject property, the undergrounding of existing utilities  
23 would require the addition of utility poles. Rather than removing safety hazards, the addition of

1 such poles would actually decrease public safety and create new hazards. Moreover, the  
2 addition of three new unsightly utility poles would not improve the appearance and aesthetics of  
3 the public ways, but would only serve to exacerbate any real or perceived public concern  
4 regarding aesthetics. As such, there is no evidence that the Appellants' project will create or  
5 exacerbate an identified public problem. Rather, it is the requirement to underground the  
6 utilities that will exacerbate any perceived or actual public problem.

7         Moreover, the existing residence on the subject property is already served by existing  
8 utilities and the replacement of that residence will not require additional overhead utilities. As  
9 such, the project does not create or exacerbate an identified public problem.

10         Finally, the City cannot demonstrate that its requirement to underground utilities is  
11 “roughly proportional” to the alleged problem that is created or exacerbated by the Appellants’  
12 proposed project. As indicated above, the cost of the undergrounding is grossly disproportionate  
13 to any perceived or real impact, if any, of the Appellants’ proposal. Additionally, requiring the  
14 Applicants to pay to remove a utility pole that the City just recently allowed an adjoining property  
15 owner to install on the frontage of the Property is *per se* disproportionate to any impacts of the  
16 Applicants’ project. Instead, the City appears to be requiring the Appellants to mitigate the  
17 impacts of a third-party’s development.

18         The City’s position in this case appears to be akin to the situation described in *United*  
19 *Development v. Mill Creek*, 106 Wn. App. 681 (2001). There, the City of Mill Creek required  
20 a developer to make frontage improvements for drainage along a street in order to bring it “up  
21 to code.” However, it was undisputed that the proposed project would have no effect upon  
22 drainage at the adjacent street. The court stated as follows:

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