

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF REDMOND**

In the Matter of the Appeal of)	No. HEA-2018-03
)	No. LAND-2013-01720
)	
Barry Schnell)	Rosehill Cottages
)	
)	FINDINGS, CONCLUSIONS,
<u>Of an Administrative Decision</u>)	AND DECISION

SUMMARY OF DECISION

The motion to summarily dismiss the appeal to overturn the Technical Committee’s decision granting Wilmoor Development Corporation (Applicant) a one-year extension of the Rosehill Cottages Site Plan Entitlement is **DENIED**. The current appeal does not present a collateral attack on the previous decision issued by the Hearing Examiner on March 20, 2018, but, instead, directly addresses the decision of the Technical Committee from September 20, 2017. Moreover, the decision from September 20, 2017, was never formally “issued” by the Technical Committee. Because of this, the appeal period was not triggered until the Hearing Examiner’s previous decision was issued on March 20, 2018. Accordingly, the present appeal was timely filed.

The Hearing Examiner did not previously address the substantive issue at the heart of the appeal—whether the Technical Committee erred in granting a one-year extension of the Rosehill Cottages Site Plan Entitlement on the grounds that change of ownership had occurred. Reviewing the substance of the Technical Committee’s September 20 Decision for the first time, the evidence supports the conclusion that the Technical Committee erred in approving the Site Plan Entitlement under Redmond Zoning Code (RZC) 21.76.090.C.2 because of a change in ownership. Accordingly, the appeal is **GRANTED**.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the appeal on May 30, 2018, including oral argument on the motion and the proposed order of summary dismissal.

Testimony:

The following individuals presented testimony under oath at the open record appeal hearing:

*Findings, Conclusions, and Decision
City of Redmond Hearing Examiner
Schnell Administrative Decision Appeal
Nos. HEA-2018-03 & LAND-2013-01720*

*Appellant Witnesses:*¹

Barry Schnell, Appellant
Greg Wilson, Applicant Representative
Ben Sticka, City Planner
Steven Fischer, Planning Manager

Attorney Bryan Telegin represented the Appellant.

Exhibits:

The following exhibits were admitted into the record at the hearing:

Appellant Exhibits

- A-1. City of Redmond Resolution No. 1380: Rules of the Technical Committee
- A-2. City of Redmond Planning Department, Staff Report to Hearing Examiner Pro-Tem, *In the Matter of Appeal of Greg Wilson*, No. HEA-2018-01/LAND-2013-01720 (“Wilmoor Appeal”)
- A-3. City of Redmond Response to Appellant’s Pre-Hearing Brief (Wilmoor Appeal)
- A-4. Site Plan Entitlement for Rose Hill Cottages (Wilmoor Appeal)
- A-5. Site Plan Entitlement Approval Letter and Notice of Decision, dated December 8, 2015
- A-6. Site Plan Entitlement Extension Request, dated September 18, 2017
- A-7. Denial of Extension Request, dated December 8, 2017
- A-8. Appeal of December 8, 2017, Denial of Extension Request, dated December 21, 2017
- A-9. Notice of Application for Site Plan Entitlement Extension Request, dated November 13, 2017
- A-10. Email from Sarah Pyle to Greg Wilson, dated February 8, 2017
- A-11. Screenshot of Assessor Information for Rose Hill Cottages Parcel
- A-12. Technical Committee Meeting Minutes, dated September 20, 2017
- A-13. Email from Ben Sticka to Greg Wilson, with attached draft Technical Committee Approval Letter, dated September 21, 2017
- A-14. Email from Steve Fischer to Laura Chan, dated September 22, 2017; Email from John Marchione to Karen Anderson, dated September 22, 2017, with email string; Email from Laura Chan to John Marchione, dated September 21, 2017; Email from Laura Chan to Steven Fischer and Karen Anderson, dated September 21, 2017; Email from Laura Chan to Ben Sticka, dated September 21, 2017; Email from Laura Chan to Sarah Pyle, dated September 20, 2017; Email from Ben Sticka to Barry Schnell, dated September 22, 2017
- A-15. Email from Ben Sticka to Greg Wilson, dated November 8, 2017
- A-16. Technical Committee Meeting Minutes, dated December 6, 2017

¹ The Applicant and the City elected not to present any witnesses or cross-examine any of the witnesses presented by the Appellant. In addition, the Applicant and City elected not to be represented by legal counsel at the appeal hearing.

- A-17. Letter from Greg Wilson to Ben Sticka, dated December 6, 2017
- A-18. Appellant's Pre-Hearing Brief (Wilmoor Appeal), dated February 10, 2018, with attached exhibits
- A-19. *In the Matter of Appeal of Greg Wilson, on behalf of Wilmoor Development Corp.*, No. HEA-2018-01/Land-2013-01720, Findings, Conclusions, and Decision, dated March 20, 2018 ("Wilmoor Decision")
- A-20. Declaration of Barry Schnell, dated May 8, 2018, with attachments
- A-21. Declaration of Steven Fischer, dated May 8, 2018
- A-22. Wilmoor Appeal Hearing Transcript from hearing on February 27, 2018
- A-23. Redmond Community Development Guide, Appendix 20F-1, Current Technical Committee Rules
- A-24. Redmond Community Development Guide, Appendix 20F-1, Former Technical Committee Rules

City Exhibits:

- C-1. Planning Department Report, dated May 30, 2018, with attachments²

Orders, Motions, and Pleadings

- Appeal, received April 3, 2018
- Pre-Hearing Order, dated April 12, 2018
- Notice of Appearance, Attorney Vicki E. Orrico, dated April 18, 2018
- Motion and Proposed Order of Summary Dismissal, dated May 2, 2018
- Response to Motion for Summary Dismissal, dated May 9, 2018, with attachments³
- Pre-Hearing Order (Revised), dated May 13, 2018
- Second Revised Pre-Hearing Order, dated May 21, 2018
- Appellant's Pre-Hearing Brief, dated May 22, 2018
- Pre-Hearing Statement of City of Redmond, dated May 23, 2018 (CITY FEELS BOUND BY DECISION)
- Appellant's Witness and Document List, dated May 22, 2018

² The City included several attachments with its report. All of these attachments, however, overlap with exhibits submitted by the Appellant and need not be assigned separate exhibit numbers.

³ The Appellant included several attachments to the response to the motion for summary dismissal (titled as Exhibits A through P). The Appellant later submitted all of these attachments, with the exception of attachments L, M, N, and O, with its witness and document list under different exhibit numbers. To avoid confusion, these attachments to the motion for summary dismissal will not be separately labeled here and the exhibit numbers detailed above (i.e., Exhibit A-1) will be used when referring to these attached documents. The four attachments not resubmitted by the Appellant include: a pre-hearing order from a previous appeal that denied the Appellant intervenor status in that appeal (Exhibit L); and dictionary definitions for the words "issue" and "official" (Exhibits M, N, and O).

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record appeal hearing:

FINDINGS
Background⁴

1. Greg Wilson, on behalf of Wilmoor Development Corporation (Applicant), applied for a Site Plan Entitlement (SPE) to develop 24 cottage homes, with associated improvements, at the northeast corner of 132nd Avenue and NE 112th Place. On December 8, 2015, the City's Technical Committee issued a decision approving the SPE. The decision was not appealed. Approximately one year later, the Applicant entered into a Purchase and Sale Agreement (PSA) to sell the property to Toll WA LP (Toll) following a feasibility period, which would allow Toll time to work with the City of Redmond (City) to pursue its own permits, including seeking its own SPE approval. The Applicant retained the right to continue pursuing its own development of the property during Toll's feasibility period. *Exhibit A-19.*
2. On September 15, 2017, City Planner Ben Sticka informed the Applicant by email that its SPE would expire on December 8, 2017, and detailed the necessary steps the Applicant must take to obtain approval of a one-year extension for the SPE. Mr. Sticka noted that the Applicant would need to justify its request for an extension based on the approval criteria in Redmond Zoning Code (RZC) 21.76.090.⁵ In response, the Applicant requested an extension, citing work to resolve construction and design issues performed by Toll along with the substantial effort toward obtaining a new SPE that Toll had completed as grounds for approving the Applicant's extension request. *Exhibit A-19.*
3. On September 20, 2017, the Technical Committee met to discuss several pending proposals, including the Applicant's extension request. Meeting notes state that the Technical Committee determined that the request would meet the criteria for an extension based on a change in ownership. Later that evening, Mr. Wilson attended Toll's community meeting with neighbors about Toll's SPE application. At the meeting, Karen Anderson, the City's former Director of Planning and Community Development (and one

⁴ The facts underlying the appeal are well known to the parties and are detailed, at length, in the Hearing Examiner's decision from March 20, 2018, on *In the Matter of Appeal of Greg Wilson, on behalf of Wilmoor Development Corp.*, No. HEA-2018-01/Land-2013-01720, Findings, Conclusions, and Decision (Ex. A-19; "Wilmoor Decision"). The background facts provided herein are not meant to be exhaustive but, merely, to set the stage for the current appeal.

⁵ RZC 21.76.090.C.2 requires a showing that either (a) economic hardship, (b) a change of ownership, (c) unanticipated construction and/or site design problems, or (d) other circumstances beyond the control of the applicant determined acceptable by the Technical Committee exist to justify an extension.

of two members of the Technical Committee),⁶ and Mr. Sticka both informed Mr. Wilson that the Applicant's request for an extension of the SPE approval had been approved. The next day, Mr. Sticka emailed Mr. Wilson and provided an unsigned, draft approval letter ("September 20 Decision") from the Technical Committee, noting: "I have attached a draft of your approval letter from the Technical Committee. Once both Directors have reviewed and signed the letter you will receive a copy in the mail." *Exhibit A-19.*

4. On September 21, 2017, Laura Chan and Barry Schnell communicated with several members of the City's planning staff and Redmond Mayor John Marchione with concerns about the proposed extension. Planning staff told Ms. Chan and Mr. Schnell that the extension request had been approved by the Technical Committee but that Ms. Chan and Mr. Schnell would not be able to appeal that action until the Technical Committee issued its decision in an approval letter. *Exhibit A-19.*
5. The City, however, never issued a signed approval letter. Instead, approximately six weeks later, the City informed the Applicant by email it would be mailing a notice of application with a 21-day comment period and, following that, the extension request would be heard (again) by the Technical Committee. The Technical Committee again reviewed the extension request and determined that the Applicant's request met none of the criteria from RZC 21.76.090.C.2. On December 8, 2017, the Technical Committee mailed a signed letter to the Applicant reversing its previous decision ("December 8 Decision"). *Exhibit A-19.*
6. On December 21, 2017, the Applicant timely appealed the City's denial of the request to extend the SPE approval. Barry Schnell sought to intervene in the appeal of the December 8 Decision, but the Hearing Examiner denied the request because nothing in the municipal code or the Hearing Examiner's Rules of Procedure explicitly allow for intervention. *Exhibit A-19.*
7. Several people testified at the Wilmoor appeal hearing on February 27, 2018, including Mr. Wilson, Senior Planner Sarah Pyle, Planning Manager Steven Fischer, and Karen Anderson. Of particular note, Mr. Fischer testified that it is not uncommon for the City to share draft decisions of the Technical Committee with an applicant but that an official,

⁶ The City's Director of Public Works, Linda DeBoldt, serves as the other designated member of the Technical Committee. *Exhibit A-19.* Planning Manager Steven Fischer testified that Ms. Anderson no longer works at the City. *Testimony of Mr. Fischer.*

signed decision is always required.⁷ On cross-examination, Mr. Fischer acknowledged that, although he is aware of situations where significant changes to a draft decision have occurred, he is unaware of any other instance where a preliminary decision of the Technical Committee was reversed. Ms. Anderson concurred with Mr. Fischer's assessment that a final decision of the Technical Committee must be signed and that the only final "decision" that the Technical Committee made on the SPE extension request was the signed, December 8 Decision formally denying the request. *Exhibit A-19*.

8. Attorney Vicki Orrico, representing the Applicant, advanced several arguments in advance of and throughout the course of the hearing. Of consequence, she argued that RZC 21.76.060.E.2 does not require that the Technical Committee issue a signed decision but, instead, requires only that a "written record of the Technical Committee's decision" be prepared and that it may be "in the form of a staff report, letter, the permit itself, or other written document indicating approval." Because of this, she argued, the September 20 Decision was validly issued, and the Technical Committee erred in later issuing a second decision on the matter (the December 8 Decision). Attorney James Haney, representing the City, argued that the Applicant presented no evidence showing how it met the criteria for extension approval because it relied solely on the work being performed by Toll as its justification and, further, that it was clear that the approval letter from September 20, 2017, provided to Mr. Wilson was only a draft and should not be viewed as a final decision of the Technical Committee. *Exhibit A-19*.

Wilmoor Decision and Current Appeal

9. On March 20, 2018, the Hearing Examiner issued his decision granting the Applicant's appeal (Wilmoor Decision). Specifically, the Hearing Examiner noted:
 - Several staff members told Mr. Wilson that the Applicant's extension request had been granted on September 20, 2017. In addition, staff members also indicated to the mayor and the public-at-large that such approval had been granted.
 - Although the City argued that such approval was provisional and that it has been the City's custom to treat only a signed decision of the Technical Committee as final, nothing in RZC 21.76.060.E.2 requires a signed document. The code itself merely requires that the Technical Committee prepare a written document of some kind indicating approval. From the unanimous view expressed by staff—to Mr. Wilson, the mayor, and several members of the public—that the extension had been approved on September 20, 2017, as well as the "written document indicating approval" sent by Mr. Sticka to Mr. Wilson, it was clear the Technical Committee approved the extension request.

⁷ At the Wilmoor appeal hearing, the Hearing Examiner asked Mr. Fischer about Redmond Municipal Code (RMC) 4.50.040, which requires that the Technical Committee promulgate rules approved by the City Council, and whether such rules addressed whether decisions of the Technical Committee must be signed. Mr. Fischer acknowledged that such rules had been produced but that he could not recall them with specificity. *Exhibit A-22*.

- Because the September 20 Decision was neither appealed nor revoked, it remained a valid final decision of the Technical Committee, and the later decision issued on December 8, 2017, constitutes an invalid reconsideration of the initial decision that must be vacated.

Exhibit A-19.

10. On April 3, 2018, Barry Schnell (Appellant) filed an appeal of the September 20 Decision of the Technical Committee which was deemed a valid, final decision by the Hearing Examiner in the Wilmoor Decision. In materials accompanying the appeal, the Appellant argued that the “Technical Committee’s September 20 Decision was clearly erroneous and otherwise not in accordance with the law” because RZC 21.76.090.C.2 “requires a change of ownership, not a prospective change of ownership that has not, and may never, occur” and the Technical Committee voted to approve the extension “on the sole basis of an alleged change of ownership.” *Appeal, received April 3, 2018.*

Motion for Summary Dismissal

11. On May 2, 2018, the Applicant filed a motion for summary dismissal of the current appeal. Specifically, the Applicant argued that:
 - The Hearing Examiner may not hear appeals of his own decisions; such appeals must be heard by the Superior Court under RZC 21.76.050 and the Land Use Petition Act (LUPA), Chapter 36.70C Revised Code of Washington (RCW).
 - The Appellant has attempted to recast his appeal of the Hearing Examiner’s Wilmoor Decision as an appeal of the Technical Committee’s September 20 Decision. However, even if the appeal could be properly construed as an appeal of the Technical Committee decision, the appeal period for that decision has long passed.
 - Under both *Wenatchee Sportsmen Ass’n v. Chelan Cty.*, 141 Wn.2d 169, 4 P.3d 123 (2000) and *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), collateral challenges to decisions with expired appeal periods are not allowed.

Motion and Proposed Order of Summary Dismissal, dated May 2, 2018.

12. The Appellant filed a detailed response to the motion for summary dismissal, arguing that dismissal would be inappropriate because:
 - The September 20 Decision was not directly at issue in the Wilmoor appeal hearing. Instead, the Wilmoor appeal hearing involved a challenge to a later decision by the Technical Committee purporting to deny the same site plan extension that was granted by the September 20 decision. The Wilmoor Decision was about whether the Technical Committee could unilaterally reverse its earlier decision.
 - Unlike the Wilmoor appeal hearing, the current appeal relates directly to the September 20 Decision. The September 20 Decision was made in error and

should be reversed, not by the Technical Committee, but by the Hearing Examiner, acting in his appellate capacity. This is not a collateral challenge to the Hearing Examiner's Wilmoor Decision.

- *Wenatchee Sportsmen* is not applicable because that case involved petitioners missing an appeal deadline on a rezone decision and, later, attempting to litigate the validity of the rezone through an appeal challenging preliminary plat approval on one of the properties subject to the rezone. Similarly, *Habitat Watch* is inapplicable because it involved a missed deadline to challenge a special use permit and a later attempt to litigate the validity of the special use permit through a challenge to a later-issued grading permit. If the Appellant was attempting to challenge the original SPE and its terms, the cases could be on point, but here, the Appellant is only challenging the validity of the SPE extension.
- Neither res judicata nor collateral estoppel bar the current appeal because both doctrines are equitable doctrines inapplicable to the Hearing Examiner, and further, even if they were applicable, they would require Mr. Schnell to have been a party to the Wilmoor appeal or in privity with a party involved in that appeal. Here, the Appellant was not a party to the Wilmoor appeal hearing—he was even denied intervenor status—and did not have a full and fair opportunity to contest issues as part of the Wilmoor appeal hearing.
- RZC 21.76.060.I.2.c governs whether the current appeal is timely—a provision of the code that was hardly mentioned or addressed in the Wilmoor appeal hearing or Wilmoor Decision. That provision requires that an appeal be filed within 14 days of a decision of the Technical Committee being “issued.” Here, the September 20 Decision was never issued within the meaning of RZC 21.76.060.I.2.c, so the appeal period never began or, conversely, the decision was constructively issued when the Hearing Examiner vacated the later decision of the Technical Committee on March 20, 2018. Either way, the appeal is timely.
- Contrary to the implications of the Hearing Examiner's Wilmoor Decision, the Technical Committee has adopted rules, under Redmond Municipal Code (RMC) 4.50.040, requiring that Technical Committee decisions be reviewed and signed by the Director of Public Works and the Director of Planning to be considered final prior to being issued.
- Moreover, just because a decision is final does not mean it has also been issued for purposes of triggering an appeal period binding third parties. For instance, under provisions of LUPA (RCW 36.70C.040(4)(a)), a final, written decision is not “issued” until it is mailed or notice is provided that the decision is available. Here, the Technical Committee may have made a decision that was “final” on September 20, 2017, but that decision was never “issued” for purposes of commencing the appeal period.

Response to Motion for Summary Dismissal, dated May 9, 2018

13. The City did not file anything in response to the motion for summary dismissal but, instead, mentioned in the staff report provided in advance of the appeal hearing that it did “not appeal the March 20, 2018 decision by the Hearing Examiner Pro-Tempore and therefore considers itself bound by that decision.” *Exhibit C-1*.
14. The Hearing Examiner issued several pre-hearing orders in advance of the appeal hearing. In the last such order, the Hearing Examiner noted that the motion for summary dismissal and the Appellant’s response “raise legal issues that would benefit from oral argument, which will be heard at the onset of the hearing already scheduled for May 30, 2018.” *Second Revised Pre-Hearing Order, dated May 21, 2018*.

Oral Argument on Motion for Summary Dismissal

15. As noted in the Second Revised Pre-Hearing Order, the parties were given an opportunity to present argument on the motion for summary dismissal at the outset of the appeal hearing. Attorney Bryan Telegin, representing the Appellant, repeated the arguments made in the Appellant’s response brief, summarized above. He stressed that, in land use law, there is often a clear distinction between when a decision is made, for purposes of finality, and when the decision is issued, for purposes of triggering an appeal period. Here, the Wilmoor Decision (erroneously) determined that a final decision “occurred” on September 20, 2017, but the Wilmoor Decision failed to explicitly speak to or address whether the final decision was ever “issued” by the Technical Committee. Mr. Telegin argued that, although the Hearing Examiner requested information about the Technical Committee’s rules, the City and Applicant failed to provide such information. Those rules, however, clearly state that all “preliminary review and final approval letters must be reviewed and signed by the Director of Public Works and the Director of Planning or their designated representatives.”⁸ Accordingly, the decision was never issued in this case for purposes of triggering the appeal period. *Argument of Mr. Telegin*.
16. Both the City and the Applicant elected not to have counsel present at the appeal hearing and offered no arguments in support of the motion for summary dismissal. *Testimony of Mr. Sticka; Testimony of Mr. Wilson*.

Testimony⁹
Appellant Witnesses

17. Appellant Barry Schnell testified that he owns the parcel immediately to the west of the Rosehill Cottages parcel and has concerns about how the proposed development would impact him. He explained that he first learned about the SPE extension request through

⁸ Exhibit A-1.

⁹ At the outset of the hearing, the parties agreed that the Hearing Examiner could take notice of the testimony heard during the Wilmoor Appeal and that witnesses need not be recalled to make duplicative points covered during testimony from the previous appeal.

communication with his neighbor, Laura Chen. They were both surprised to learn that the Technical Committee had granted the extension request in the September 20 Decision without providing notice of the request, as required by the zoning code. When Mr. Schnell asked about appealing the decision, he was told by several members of the planning department that he would need to wait until a final, signed decision was issued before he could appeal that decision. He felt that the extension request should not have been granted on the grounds that a change of ownership had occurred because the property has not actually changed ownership—Toll has merely entered into a PSA to potentially purchase the property at some time in the future. Further, RZC 21.76.090.C.2 grants the Technical Committee authority to deny an extension request even if one of the four criteria has been met. Because several problems with the SPE have come to light, including issues with waiving the requirement to extend the municipal sewer and mistakes on density calculations, Mr. Schnell believed the extension request should be denied. Mr. Schnell testified that, after the Technical Committee issued its second decision on the matter now denying the extension request, he attempted to intervene in the Wilmoor appeal hearing because he was concerned that the City would not protect his interests as a property owner in defending the Technical Committee’s decision or adequately defend its own position before the Hearing Examiner. That request, however, was denied. *Testimony of Mr. Schnell.*

18. Mr. Wilson testified that he drafted the request for the SPE extension himself and that he did not review the Technical Committee’s rules prior to submitting the extension request. He concurred that he never sought an extension based on a change of ownership and that the ownership of the property has still not changed. Mr. Wilson testified that, when Mr. Sticka sent him the draft letter indicating that, on September 20, 2017, the Technical Committee had decided that his request had been granted, he believed the decision was final. *Testimony of Mr. Wilson.*
19. Mr. Sticka testified that he told Mr. Schnell the decision of the Technical Committee from September 20, 2017, could not be appealed until a signed, final decision had been issued. He explained that, in his time working at the City, it has been his understanding and common practice that actual signatures are needed from the members of the Technical Committee before a decision is deemed final. *Testimony of Mr. Sticka.*
20. Mr. Fischer testified it is the City’s position that what constitutes a final decision is a decision signed by the Technical Committee and that such a decision can only be appealed after it has been issued. He could not recall offering comments at the September 20, 2017, meeting of the Technical Committee but had no reason to believe Ms. Anderson’s testimony during the Wilmoor Appeal, in which she mentioned that the committee decided the only criteria that could be met would potentially be change of ownership, misstated what occurred at the September 20 meeting. *Testimony of Mr. Fischer.*

Appellant and City Witnesses

21. Mr. Sticka reiterated the position taken by the City in the staff report it submitted in advance of the appeal hearing, noting that the City would not call or cross-examine witnesses or otherwise submit additional evidence during the course of the appeal. *Testimony of Mr. Sticka.*
22. Mr. Wilson stated that the Applicant, like the City, would not be calling additional witnesses or otherwise submitting evidence. *Testimony of Mr. Wilson.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is authorized to hear and decide appeals of Type II decisions. The Hearing Examiner may issue a decision granting the appeal, grant the appeal with modifications, or denying the appeal. *RZC 21.76.060.I.4.*

Review Authority

The Hearing Examiner's duty is to review the entire record before him to determine whether an appellant has met his or her burden of proving that the City's decision was erroneous. To properly review the City's action, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 43 (1994).

The Hearing Examiner must accord substantial deference to the City's interpretation of its own ordinances. *RCW 36.70C.130(1)(b)*; *Nw. Sportfishing Indus. Ass'n v. Washington Dept. of Ecology*, 172 Wn. App. 72, 288 P.3d 677 (2012); *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180, 61 P.3d 332 (2002). The Hearing Examiner reviews the City's decision to determine if it is clearly erroneous, after allowing for such deference as is due the construction of municipal statutes by the City, or that the decision is not supported by evidence that is substantial when viewed in light of the whole record. *See RZC 21.76.060.I.4.* Under the "clearly erroneous" standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if he has a definite and firm conviction that the City made a mistake. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002). When applying the clearly erroneous standard, the Hearing Examiner may not substitute his own judgment for the judgment of the City. *See Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994).

Conclusions Based on Findings

- 1. The motion for summary dismissal must be denied because the current appeal does not represent a collateral challenge to the previous decision of the Hearing Examiner in the Wilmoor Appeal.** The current appeal seeks, specifically, to challenge the September 20 Decision of the Technical Committee on substantive grounds. The Wilmoor Decision did not address the substance of the September 20 Decision.¹⁰ Instead, the Wilmoor Decision sought to unravel the procedural morass that was created when, following a meeting of the Technical Committee on September 20, 2017, several members of the planning department told the Applicant, the mayor, and the public-at-large that the Technical Committee had approved the Applicant's request for a one-year extension of its SPE, and, on December 18, 2017, the Technical Committee then issued a signed, final decision conveying the opposite conclusion (and denying the extension request). The Wilmoor Decision vacated the later decision of the Technical Committee on the grounds that nothing in RZC 21.76.060.E.2 requires a final decision of the Technical Committee be signed.¹¹ This led to the initial September 20 Decision being deemed, "by default, a final decision of the Technical Committee." *Exhibit A-19*. Again, though, the Wilmoor Decision did not address the merits of the September 20 Decision.

Here, the appeal centers on the merits of the September 20 Decision. Moreover, as the Appellant persuasively argued without opposition from the City or the Applicant, neither *Wenatchee Sportsmen* nor *Habitat Watch* are on point because both decisions involve challenging an earlier permit decision through an appeal of a later permit decision. In this instance, the Appellant seeks to challenge the initial permit decision—the Technical Committee's initial approval of the SPE extension from September 20, 2017—for the very first time. In addition, the doctrines of *res judicata* and collateral estoppel are inapplicable because both doctrines would have required Mr. Schnell to have been a party to the Wilmoor appeal hearing or in privity with a party involved in that appeal. Mr. Schnell, however, was denied intervenor status, could not participate in the Wilmoor Appeal, and did not have a full and fair opportunity to contest issues as part of the Wilmoor Appeal. *Findings 1 – 22*.

- 2. The current appeal is timely because the City never formally issued the final decision of the Technical Committee from September 20, 2017.** RZC 21.76.060.I.2.c governs whether an appeal is timely filed and requires that an appeal be filed within 14 days of a decision of the Technical Committee being "issued." After planning staff told

¹⁰ The Wilmoor Decision did not, in fact, address the substance underlying *either* decision of the Technical Committee.

¹¹ As discussed more fully throughout this decision, the rules adopted by the Technical Committee and approved by the City Council under RMC 4.50.040 do require that final decisions of the Technical Committee be signed. The City, however, failed to provide these rules or argue this point at the Wilmoor appeal hearing, despite the Hearing Examiner explicitly inquiring about the rules. *See, e.g., Exhibit A-22*.

the Appellant (and several others) that the Technical Committee had approved the SPE extension of September 20, 2017, it also told the Appellant that the decision could not be appealed until the final, signed copy of the decision had been issued. The City, however, never issued that decision within the meaning of RZC 21.76.060.I.2.c, so the appeal period never began or, conversely, the decision was constructively issued when the Hearing Examiner vacated the later decision of the Technical Committee in the Wilmoor Decision. Either way, the appeal is timely. In addition, it is not uncommon in land use to treat a final decision and the date a decision is issued separately. While the Wilmoor Decision determined (rightly or wrongly) that the September 20 Decision was final, the Hearing Examiner never addressed whether the decision was properly “issued” for purposes of triggering an appeal period. Now that the Rules of the Technical Committee are before the Hearing Examiner for the first time, it is clear that the City Council has directed the Technical Committee to “issue” decisions only after they are signed by the Committee members themselves. *Findings 1 – 22.*

- 3. The Technical Committee erred in granting the SPE extension request under RZC 21.76.090.C.2 on the grounds that change of ownership had occurred on the property.** The evidence is undisputed that, although a third party signed a PSA to potentially purchase the Rosehill Cottages property in the future, ownership of the property has not changed hands since the Applicant first obtained its SPE. Mr. Wilson himself testified to this point at the current hearing. Moreover, the evidence reveals that Applicant requested an extension on the grounds that Toll had been working with the City to resolve construction and design issues as well as on the grounds that Toll had made substantial efforts toward obtaining its own SPE. The Technical Committee did not address these potential grounds for an extension in the September 20 Decision. *Findings 1 – 22.*

DECISION

Because the present appeal does not represent a collateral attack on the Wilmoor Decision and the September 20 Decision was never formally issued, thereby triggering the appeal period, the motion for summary dismissal is **DENIED**.

In addition, neither the City nor the Applicant challenged the evidence presented regarding the substantive issue at the heart of the current appeal: whether the Technical Committee erred in granting a one-year extension of the Rosehill Cottages SPE on the grounds that change of ownership had occurred. Because the evidence supports the conclusion that the Technical Committee erred in approving the SPE on the grounds of change of ownership, the appeal is **GRANTED**.

Accordingly, the September 20 Decision of the Technical Committee is vacated, and the matter is remanded back to the Technical Committee for additional review consistent with all requirements of the municipal code and all adopted regulations of the Technical Committee, as

approved by the City Council, including all requirements related to notice, public comments, and requirements for properly issuing a final decision of the Technical Committee.

Decided this 13th day of June 2018.



Andrew M. Reeves
Hearing Examiner Pro Tempore
Sound Law Center