

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

In the Matter of the Appeal of	)	NO. APP_____
	)	
	)	
<b>Carol Rich and William Wurtz</b>	)	<b>Wurtz Appeal</b>
	)	
	)	
of approved Tree Removal Permit	)	
TREE-2017-05720/IVR #-151793	)	RULING ON APPLICANT'S
Authorizing removal of cedar tree at	)	MOTION TO DISMISS APPEAL
17521 38th Court, Redmond	)	
<u>Issued August 4, 2017</u>	)	

**Background**

A pre-hearing conference was convened on September 5, 2017 in the above-captioned appeal. During the conference, Appellant William Wurtz confirmed the following paraphrased summation of the issues argued on appeal and relief requested:

The (paraphrased) errors assigned included:

- Tree removal permit is invalid because it relies on a flawed tree health assessment; and
- The only defect identified in the tree health assessment is insufficient to warrant removal.

Appellants requested the following (paraphrased) relief:

- That the permit be ruled invalid and the Applicant ordered to retain the tree.

During the pre-hearing conference, counsel for the Applicant requested clarification of the alleged errors in the City's decision to approve the tree removal permit, specifically asking which sections of the Redmond zoning code had been violated. During the conference, appeal procedures were explained and Mr. Wurtz indicated he felt the need to retain legal counsel. All parties were informed of the need to adhere to the schedule established during the conference to the maximum extent possible, in order to ensure timely decision issuance per RZC 21.76.040.D.2.

According to the schedule agreed to by the parties during the conference and memorialized in the scheduling order issued September 6, 2017, the first document due was a clarification of the issues by the Appellants:

2. Not later than September 22, 2017, the Appellant shall submit a clarification of the grounds for appeal, providing additional specificity with respect to the two errors alleged in the appeal statement as paraphrased above.

Also during the conference, counsel for the Applicant indicated that he intended to file a pre-hearing dispositive motion. This was addressed in the scheduling order as follows:

3. Any dispositive motions shall be submitted by September 26, 2017.

The required clarification of issues was not submitted on September 22nd. Instead on September 25th, the Appellant contacted the office of the hearing examiner to request more time to submit the clarification. Counsel for the Applicant objected to any extension and requested clarification of when dispositive motions should be submitted in light of the delay. Due to technical problems, the undersigned did not receive these communications until September 26th.

On September 26th, the undersigned determined and communicated to the parties by email from the Clerk's Office that no extension for the clarification would be allowed, as the Appellants had already been given an extended period of time for clarification. This communication required dispositive motions to be submitted as soon as possible and allowed through October 2, 2017 for response to dispositive motions. The Applicant's motion to dismiss the appeal was submitted on September 26, 2017.

On September 27th, Mr. Wurtz submitted a tree assessment memo by a professional arborist. The memo was attached to an email that apologized for its tardiness and for not being familiar with the appeal process due to not being an attorney. There was no clarification of the alleged errors in the tree removal permit. Counsel for the Applicant objected to the submittal by email on September 27th, on grounds of timeliness and because the undersigned had already announced that no extension of the clarification submittal deadline would be granted. Counsel further contended that the tree assessment submitted was not clarification of the errors alleged on appeal, as required, but rather constituted evidence for the Appellants' case in chief.

Responses to dispositive motions were due October 2, 2017. No response was submitted by the Appellants.

Mr. Wurtz has not informed the Office of the Hearing Examiner of having retained legal counsel.

### **Applicant's Motion to Dismiss**

The Applicant requested that the appeal be dismissed without hearing on the grounds that Appellants failed to state a claim upon which the City's Hearing Examiner may grant relief. The parties agree that the tree in question is less than 30 inches in diameter and therefore meets the definition of a "significant tree" under the City's tree preservation ordinance, Redmond Zoning Code (RZC) Chapter 21.72. *RZC 21.78, "S" Definitions.*

The Applicant argued that the City's tree preservation ordinance does not require a showing of necessity or hazard evaluation for the removal of a significant tree. The ordinance limits the number of significant trees that can be removed per acre per year for multifamily properties, and does require that each significant tree removed be replaced at a one to one ratio. *RZC 21.72.020.C; RZC 21.72.080. B.*

The Appellants' stated issues on appeal relate only to tree health, specifically that the tree hazard assessment submitted by the Applicant was defective or inadequate. The Applicant argued that to the extent that this raises an issue of fact, it is not a material fact because poor tree health is not a prerequisite to tree removal. Further, the Applicant contended that to the extent that Appellants' intend their alleged error of failure to consider the health of the tree as an error of law, again, the Applicant argues this is not a material question of law, as tree health is not one of the decision criteria applicable to the removal of significant trees.

During the pre-hearing conference, Appellant Wurtz contended that the tree should remain because Appellant Rich has a property interest sufficient to prevent its removal without her consent. Finally, although the City's hearing examiner lacks jurisdictional authority to hear and decide issues of property ownership, in an abundance of caution the Applicant argued that this issue is not within the scope of these proceedings. In addition to the Examiner's lack of authority to determine property interests, Appellant Rich litigated this issue in the superior court and was unsuccessful. The Applicant argued the Appellants are now barred from raising this claim because it has already been decided by a court of competent jurisdiction.<sup>1</sup>

### **Applicable Provisions of the Redmond Zoning Code**

The Redmond Zoning Code classifies a tree removal permit as a Type I administrative decision. *RZC 21.76.050.B*. Type I decisions are essentially ministerial, non-discretionary permits, involving the lowest level of discretion (*RZC 21.76.050.A*) made by the appropriate department director or designee (*RZC 21.76.050.F.1*) based on the criteria for the application set forth in the Code. *RZC 21.76.060.D.2*.

Pursuant to RZC 21.72.020, Permits Required.

- A. Except as provided in RCZ 21.72.030, *Exemptions*, any person who desires to cut down or remove any significant tree or any stand of trees, or who desires to conduct grading activities on a site that will result in the removal of trees, must first obtain a permit to do so from the Administrator as provided in this section.

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- C. Other Developed Lots. The owners of all other developed commercial, industrial, or multifamily lots must obtain a permit prior to removing any significant tree located on the lot. Permits shall be granted for the removal of no more than five significant trees per acre per year for the purposes of (a) thinning a heavily wooded area where remaining trees may benefit from the thinning and the site's forested look, value, or function is maintained, or (b) maintaining the site's landscaped areas. Trees previously designated for protection or located within a Native Growth Protection Area may not be removed unless they are determined to be hazardous. Hazardous, dead, or otherwise dangerous

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<sup>1</sup> The Motion to Dismiss was accompanied by the Declaration of Samuel Rodabaugh, counsel for the Applicant, to which were attached 10 exhibits, including: 1) Tree removal permit application; 2) City's web page entitled "tree Removal"; 3) City's permitting bulletin entitled "Tree Removal"; 4) Complaint for Declaratory and Injunctive Relief ("Complaint"), filed by Carol Rich in King County Superior Court on or about October 3, 2016; 5) King County Superior Court Judge Ruhl's oral ruling, dated July 27, 2017; 6) Judge Ruhl's Order Granting Defendant Rudolph's Renewed Motion for Summary Judgment, dated July 28, 2017; 7) City's decision granting Ms. Rudolph's tree application permit, dated August 4, 2017; 8) Declaration of Bruce MacCoy (Applicant's arborist); 9) Second Declaration of Cheri L. Rudolph; 10) excerpts of the Declaration of Kathleen Day, Appellant Rich's arborist.

trees are not included in the limits established by this section. Replacement trees shall be planted as provided in RZC 21.72.080, *Tree Replacement*.

Pursuant to RZC 21.72.050, Permit Review Criteria

A. Review Criteria. The Administrator shall review all tree removal permit applications and approve the permit, or approve the permit with conditions, provided that the application demonstrates compliance with the criteria below:

1. The proposal complies with RZC 21.72.060, *Tree Protection Standards*, and RZC 21.72.080, *Tree Replacement*, or has been granted an exception pursuant to RZC 21.72.090, *Exceptions*.
2. All bonds or other assurance devices required per RZC 21.76.090.F, *Performance Assurance*, are posted with the City.
3. Professional Evaluation. In determining whether a tree removal permit is to be approved or conditioned, the Administrator may require the submittal of a professional evaluation and/or a tree protection plan prepared by a certified arborist, where the Administrator deems such services necessary to demonstrate compliance with the standards of this chapter. Such professional evaluation(s) and services may include:
  1. Providing a written evaluation of the anticipated effects of proposed construction on the viability of trees on a site;
  2. Providing a hazardous tree assessment;
  3. Developing plans for, supervising, and/or monitoring implementation of any required tree protection or replacement measures; and/or
  4. Conducting a post-construction site inspection and evaluation.
4. Conditions of Approval. The Administrator may specify conditions for work, at any stage of the application or project as he/she deems necessary to ensure the proposal's compliance with requirements of this division, the Critical Areas regulations, clearing, grading, and stormwater management regulations, or to protect public or private property. These conditions may include, but are not limited to, hours or seasons within which work may be conducted, or specific work methods.

Pursuant to RZC 21.76.060, Process Steps and Decision Makers

I. Appeals to Hearing Examiner on Type I and Type II Permits.

1. Overview. For Type I and Type II permits, the Hearing Examiner acts as an appellate body, conducting an open record appeal hearing when a decision of a department director (Type I) or the Technical Committee (Type II) is appealed. The Hearing Examiner's decision on the appeal may be further appealed to the City Council in a closed record appeal proceeding.
2. Commencing an Appeal. Type I and II decisions may be appealed as follows:
  - a. Who May Appeal. Any party of record may appeal the decision.
  - b. Form of Appeal. A person appealing a Type I or II decision must submit a completed appeal form which sets forth:
    - i. Facts demonstrating that the person is adversely affected by the decision;
    - ii. A concise statement identifying each alleged error of fact, law, or procedure, and the manner in which the decision fails to satisfy the applicable decision criteria;

- iii. The specific relief requested; and
- iv. Any other information reasonably necessary to make a decision on the appeal.
- c. Time to Appeal. The written appeal and the appeal fee, if any, must be received by the Redmond Development Services Center no later than 5:00 p.m. on the fourteenth day following the date the decision of the Technical Committee/Design Review Board Decision is issued.

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- 4. .... The Hearing Examiner shall accord substantial weight to the decision of the department director (Type I) or Technical Committee (Type II). The Hearing Examiner may grant the appeal or grant the appeal with modifications if the Examiner determines that the appellant has carried the burden of proving that the Type I or II decision is not supported by a preponderance of the evidence or was clearly erroneous.

**Applicable Facts**

Attached to her motion, the Applicant offered the declaration of her counsel, Samuel Rodabaugh, with 10 attached exhibits. Exhibit 7 was a copy of the City decision approving the Applicant's tree removal permit TREE-2017-05720, which stated as follows:

Approval to remove (1) healthy 27.5" cedar tree from the south side of property. Tree replacement is required at a ratio of 1:1 for each tree removed and the tree replacement may be planted anywhere within the property. The replacement shall be primarily native evergreens 6-8' tall in height and/or native deciduous trees 2.5" caliper in size.

NUMBER OF REPLACEMENT TREES REQUIRED: 1

**Ruling on Motion to Dismiss**

Per the City's tree preservation regulations, significant trees are removable regardless of their condition, subject only to applicable mitigation. No hazard evaluation is required. The appeal is premised entirely upon the assertion that the health and condition of the tree do not warrant removal. The permit acknowledged that the tree in question is healthy. The appeal fails to identify any error of fact or law. As such, it is not a claim for which the City's Hearing Examiner can grant relief. There is no reason to proceed to hearing before determining that the appeal is without merit for failure to state a claim capable of being granted relief.

The appeal is dismissed.

**Ordered** October 3, 2017.

By:



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Sharon A. Rice  
Redmond Hearing Examiner