

1  
2  
3 **BEFORE THE HEARING EXAMINER**  
4 **FOR THE CITY OF REDMOND**

5 In the Matter of the Appeal of

6 **WPDC Cleveland LLC**

7 of approved Building Permit authorizing  
8 alterations to the structure at 16390 Cleveland  
9 Street, Redmond, issued February 17, 2017

**BLDG-2016-09802**

**BPLN-2016-02092**

RESPONDENT ANDORRA  
VENTURES LLC'S RESPONSE TO  
APPELLANT'S MOTION FOR  
SUMMARY JUDGMENT

10 **I. RELIEF REQUESTED**

11 Andorra Ventures LLC (referred herein as "Andorra") respectfully requests the  
12 Hearing Examiner to dismiss the Motion for Summary Judgment filed by Appellant WPDC  
13 Cleveland LLC ("Appellant"). The appeal pertains to the City of Redmond's issuance of  
14 Building Permit BLDG-2016-09802 ("Building Permit") and BPLN-2016-02092 ("Change  
15 of Occupancy Permit") (the Building Permit and Change of Occupancy Permit are referred to  
16 collectively as "Permits"). Appellant asks the Examiner for an order and relief that exceeds  
17 the Examiner's jurisdiction and the scope of permits under review. Further, Appellant has  
18 made it abundantly clear it opposes use of the site for retail marijuana and that such  
19 opposition is the primary motivator for its appeal. Appellant has been highly vocal in its  
20 opposition at every turn, taking full advantage of any opportunity for comment at great  
21 length. While Andorra respects Appellant's views regarding retail marijuana, such issues  
22 respectfully are not within the Examiner's jurisdiction under this pending appeal.  
23  
24  
25

**ORIGINAL**

1           **II.     STATEMENT OF RESPONSIVE FACTS AND CIRCUMSTANCES**

2           Consistent with its email correspondence addressing the scope of the project to the  
3           Hearing Examiner, Andorra has submitted revised plans that reduce the scope of the original  
4           project so as to support its prior withdrawal of the site entitlement permit. *See Declaration of*  
5           *Kolouskova*, attachments; *Declaration of Jozanne Moe* (attached to City’s response).<sup>1</sup> As has  
6           already been submitted to the Hearing Examiner, Andorra withdrew its site entitlement  
7           permit when it became clear that such broader scope of improvements would involve more  
8           delay than Andorra could accommodate. *Declaration of Kolouskova*, attachments.  
9           Consequently, Andorra also submitted a formal revision form and plans that revise the  
10          building permit consistent with the decision not to pursue a site entitlement permit.  
11          *Declaration of Kolouskova*, attachments. That form and revisions are attached to the City’s  
12          declaration of Jozanne Moe; in order to limit the volume of material submitted under  
13          Appellant’s motion, Andorra respectfully relies on that declaration for brevity.  
14  
15

16          While Appellant would cast a derogatory light on Andorra’s project and the City’s  
17          permit processing, the bottom line is, there is simply nothing nefarious about Andorra’s  
18          project. Andorra is entitled to obtain its building permit and change of occupancy for general  
19          retail: a smart business decision in the current political climate under the new federal  
20          administration and in light of the Appellant’s vehement objections. As Andorra explained in  
21          its motion, if Andorra decides to lease space to Origins or another marijuana retailer, that  
22          outfit will be able to apply for a marijuana license, and such considerations (including change  
23  
24

25          \_\_\_\_\_  
<sup>1</sup> Andorra respectfully incorporates herein the facts set forth in its Dispositive Motion and Declaration of Miller. Andorra further understands the City is separately responding to Appellant’s Motion for Summary Judgment and joins in the City’s statement of facts and declarations for brevity.

1 of use) can be addressed at that time, including full public comment and appeal opportunities  
2 for Appellant. But Andorra's decision at this juncture to build out a retail-neutral space is  
3 simply that.

### 4 III. LEGAL AUTHORITY AND ARGUMENT

#### 5 A. The Hearing Examiner Has No Authority to Issue a Stop Work Order or 6 Administrative Interpretation.

7 The issues involved in Appellant's motion exceed the scope of the permits under  
8 appeal. Appellant alleges improper piecemealing of permits, asking that the Examiner issue  
9 an administrative interpretation that a Site Entitlement Permit is required and a stop work  
10 order. Fatal to its motion, Appellant fails to provide any authority for the Examiner to take  
11 the steps Appellant demands. Appellant's motion drastically exceeds the scope of the  
12 Examiner's review regarding the permits at issue. Appellant's lengthy motion revolves  
13 around the very jurisdictional question which Andorra argued under its own dispositive  
14 motion: as Andorra explained therein, there are no pending applications, let alone permits or  
15 approvals, for site entitlement, change of use or business license for retail marijuana. See  
16 *Andorra Dispositive Motion*.  
17

18 Appellant would have the Examiner step into the shoes of the City Administrator,  
19 Planning Director, and Code Compliance Officer, and even override her scope of authority  
20 granted by the City Council, in order to direct the City and Andorra to apply for permits that  
21 are not subject to this appeal and to issue stop work orders even though there is no  
22 enforcement action pending or even warranted. Andorra respectfully asks the Examiner to  
23 decline such an improper invitation.  
24  
25

1 A Hearing Examiner may “exercise only those powers conferred either expressly or  
2 by necessary implication.” *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636,  
3 689 P.2d 1084 (1984) (citing *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979)).  
4 The Examiner does not have the power to adjudicate in any equitable capacity. *Chaussee*, 38  
5 Wn. App. at 638. The Examiner’s authority is strictly limited to only that which is expressly  
6 given in the local regulations. *In re King County Hearing Examiner*, 135 Wn. App. 312,  
7 319-320, 144 P.3d 345 (2006). Courts strictly read ordinances to empower a Hearing  
8 Examiner with only the review authority expressly granted by the City or County legislative  
9 body in the given ordinances. *Id.*

11 RMC 4.28.020 grants the Examiner the power to conduct hearings as described in  
12 RZC Chapter 21.76. The appeal issues the Examiner may consider must address “the manner  
13 in which the decision fails to satisfy the applicable decision criteria.” RZC 21.76.060.I.2  
14 (emphasis added). The Examiner has no authority to hear issues that are beyond the scope of  
15 decision(s) issued by the City, doing so would constitute an administrative interpretation or  
16 code enforcement action – both actions addressed under Redmond Code and delegated to  
17 other City officials. Administrative interpretations fall within the purview of the City  
18 Administrator. RZC 21.76.100(D). Code enforcement actions fall within the purview of the  
19 Code Compliance Officer. RZC 21.76.100(B); RMZ 14.050; 1.14.140(a).

22 In making its emphatic arguments, Appellant misses the fundamental requirement to  
23 identify jurisdiction and authority for the Hearing Examiner to act. Contrary to Appellant’s  
24 assumption, the City Council simply has not authorized the Hearing Examiner to grant  
25 Appellant’s desired relief, namely to issue a stop work order and require Andorra to obtain a

1 Site Entitlement Permit. *Appellant's Motion for Summary Judgment*, page 39. Appellant  
2 asks the Examiner to do exactly what Courts have rejected elsewhere: to ignore the strict  
3 limits of her review authority and instead, improperly invite the Examiner to get creative and  
4 order the City to require a Site Entitlement Permit and consequently stop work allowed by  
5 the approved Permits. *In re King County Hearing Examiner*, 135 Wn. App. 312, 319-320,  
6 144 P.3d 345 (2006). In *King County*, the Court rejected exactly the creative approach to  
7 jurisdiction which Appellant improperly proposes here: that the Examiner direct staff to  
8 undertake further administrative actions without express authority supporting such a  
9 directive. *King County Hearing Examiner*, 135 Wn. App. at 321.

11 Apart from the foregoing law, there is also no substance behind Appellant's  
12 allegation of improper piecemealing. Andorra's decision to obtain a building permit and to  
13 edit the scope of that permit so as not to have to undergo the more extensive Site Entitlement  
14 permit process, is strictly within its rights under code. As Andorra explained in its  
15 Dispositive Motion, this is not a timing maneuver on the part of Andorra: (1) Andorra made a  
16 sound business decision to withdraw the site entitlement permit and proposal for mezzanine;  
17 and (2) the retail marijuana tenant would have to apply for a retail marijuana business license  
18 if and when Andorra ever enters into a lease with Origins Cannabis or any other tenant.  
19 Andorra, not the Appellant, has discretion as the property owner to determine how it wishes  
20 to develop, build and use its own property. There is nothing nefarious about Andorra's  
21 permit processes – to the contrary, Andorra has undertaken extraordinary efforts to comply  
22 with the City's permit processing procedures and demands.  
23  
24  
25

1 Appellant invents a somewhat paranoid scenario whereby it implies that Andorra or a  
2 potential tenant is trying engage in retail marijuana sales without complying with Redmond  
3 Code and business license requirements. There is absolutely no evidence to this effect.  
4 Without any authority, Appellant would have the City force Andorra's uses and permitting  
5 into an exclusive box of only retail marijuana sales and preclude use of the entire building  
6 unless/until retail marijuana is permitted.  
7

8 Taking such a myopic view of retail at this site not only would be poor planning for  
9 the property, but would be a risky strategy in light of how federal regulation regarding  
10 marijuana may evolve under the new presidential administration. Andorra clearly explained  
11 the process it has followed for using the building not only or necessarily for retain marijuana  
12 sales but also for other general retail. *Andorra Motion to Dismiss*, pages 2-3. Further, as  
13 discussed in Andorra's motion and to the extent necessary, can be elaborated at the hearing,  
14 Andorra is not going to be an applicant for retail marijuana licensing. Andorra's decision to  
15 maintain flexibility for retail uses of its property through available permitting is, quite  
16 simply, both appropriate and smart decision making.  
17

18 Finally, even if it were within the Examiner's purview to rule on whether a site  
19 entitlement permit is necessary for improvements that Andorra is not proposing, Appellant  
20 has not demonstrated that the improvements authorized under the revised permits are  
21 impossible. Such demonstration would be a matter for open record hearing as discussed  
22 below. Andorra respectfully submits that the evidence to be submitted as part of the City's  
23 administrative record and in response to Appellant's exhibits (list due May 17; documents  
24  
25

1 due May 24) will demonstrate that the improvements under the permit are feasible in and of  
2 themselves.

3 Andorra respectfully requests that the Hearing Examiner dismiss Appellant's  
4 summary judgment issue A and aspects of B-E for exceeding the Examiner's jurisdiction.  
5

6 **B. Redmond Code Does Not Provide a Means to Circumvent the Open Record  
7 Hearing Process by Virtue of Summary Judgment Relying on an Expedited  
8 Motion Schedule.**

9 Appellant's attempt to end-run the open record hearing process through voluminous  
10 declarations during a one week dispositive motion process is not allowed by Redmond  
11 Municipal and Zoning Codes; the Examiner cannot foreshorten the open record hearing  
12 process under the guise of an expedited summary judgment motion. Redmond Zoning Code  
13 requires the Examiner to conduct an open record hearing on any appeal which she has  
14 jurisdiction to hear: "The Hearing Examiner shall conduct an open record hearing on a  
15 Type I or Type II appeal." RZC 21.76.060.I.3 (emphasis added). Further, the Examiner  
16 "shall create a complete record of the public hearing..." *Id.* Only after the Examiner closes  
17 the record can the Examiner then issue a decision. RZC 21.76.060.I.4. Redmond Zoning  
18 Code does not give the examiner authority to make factual findings without first holding an  
19 open record hearing.

20 The Examiner does not have the same powers as a court; the Examiner's powers are  
21 limited to those which are expressly set forth in Redmond Codes. *King County Hearing*  
22 *Examiner*, 135 Wn. App. at 319. As a result, the Examiner cannot automatically assume the  
23 ability to foreshorten review of an appeal issue over which she has jurisdiction (irrespective  
24  
25

1 of which party might ask), thereby restricting the record which may be later subject to  
2 closed-record review by the City Council or a judge.

3 The Examiner has set up the dispositive motion process based on a clear  
4 understanding of this jurisdiction. Rather than provide a summary judgment schedule  
5 consistent with Washington State Superior Court Civil Rule (“CR”) 56, the Examiner set up  
6 an abbreviated motion schedule for dispositive motions that she can decide under the  
7 auspices of Redmond Zoning Code: i.e. whether there are procedural or jurisdictional defects  
8 or considerations that would bar the Examiner from hearing an appeal or appeal issue  
9 entirely. The Examiner’s schedule is consistent with Redmond Code: it only provides time  
10 for the Examiner to determine her jurisdiction to hear an appeal overall or a particular appeal  
11 issue, but not enough time for the Examiner to adjudicate issues on their merits.  
12

13 In contrast this jurisdictional motion process, if the examiner wanted to provide a  
14 summary judgment schedule that would accommodate such a presumptive motion as that  
15 filed by Appellant, the Examiner would have given a 28-day timeline for summary judgment  
16 motions consistent with CR 56 (and which courts often extend even further for particularly  
17 lengthy motions such that presented by Appellant). Instead, the Examiner provided seven  
18 days for a response and only three days for her to make a decision on any motions.  
19

20 The Redmond Code’s instructions to hold an open record hearing and the Examiner’s  
21 scheduling to provide a short motion schedule to address jurisdictional questions is also  
22 logical since the open record hearing process is already a much more expedited process than  
23 a trial in superior court.  
24  
25

1           Once again, Appellant points to absolutely no authority for the Examiner to  
2 abbreviate the Redmond Zoning Code's open record hearing review process regarding appeal  
3 issues that the Examiner has the jurisdiction to hear.

4           Appellant's issue necessarily raises questions of fact that are improper for this  
5 dispositive motion stage. For example, Appellant alleges that the building cannot be suitable  
6 or habitable for any use without a land use permit (a site plan entitlement permit).  
7 *Appellant's Motion*, page 26. While the record and testimony will show that assumption is  
8 incorrect, Appellant's argument raises factual questions which must be considered as part of  
9 the open record hearing. The Appellant cannot circumvent the open record hearing process  
10 and artificially direct this Examiner's review.

11           Appellant disputes whether the construction allowed by the Permits will be sufficient  
12 for Andorra's retail needs (assuming that the primary or only retail use at the site will be  
13 marijuana). The determination of whether the Permits authorize sufficient construction such  
14 that Andorra can operate retail is neither appropriate for Appellant to opine on, nor do  
15 Appellant's questions present a ripe issue for appeal. While there is neither evidence nor  
16 intent on the part of Andorra to exceed construction authorized by the Permits, if such ever  
17 were to happen the City would have the discretion to consider enforcement action under  
18 Chapter 1.14 RMC. Conversely, the Examiner does not have authority to assume a permit is  
19 not sufficient for an applicant's needs, to assume a permit violation is imminent, or to stand  
20 in the shoes of the Code Compliance Officer. RMC 1.14.100.

21           Finally, even if the Hearing Examiner were to conclude that issues of fact can be tried  
22 through a summary judgment motion, the Hearing Examiner should provide a schedule that  
23  
24  
25

1 is consistent with such ruling, i.e. allowing Andorra (and the City) a full summary judgment  
2 response schedule. In such event, Andorra would request the opportunity to which it is  
3 entitled for response to summary judgment. However, in light of the hearing on May 31<sup>st</sup>,  
4 the most appropriate treatment is to allow the parties to complete the record and present  
5 testimony at the open record hearing in an efficient, complete and informative fashion.  
6

7 **C. Appellant's Issues Regarding Redmond Code Requirements for Retail  
8 Marijuana Raise Issues that Are Not Before the Examiner in this Appeal.**

9 As Andorra argued in its Dispositive Motion, there is simply no application for, let  
10 alone issued, business license for marijuana retail nor a change of use for any part of the  
11 building for said purpose. While the City erroneously issued the building permit in the name  
12 of Origins Cannabis, the original application makes it clear that the applicant for building  
13 permit was Andorra. This harmless error is a red herring: irrespective of the name of the  
14 applicant or the entity to which the permit is issued, that identity cannot change the fact that  
15 the building permit does not authorize marijuana retail use. Simply, the name of the  
16 applicant does not affect the terms and substance of the permit. Andorra has never hid its  
17 interest in potentially leasing a portion of the space for retail marijuana; but permits for such  
18 use simply have not been applied for and are not before the Examiner. This is Andorra's  
19 prerogative as a property owner and future landlord over the retail spaces; whenever Andorra  
20 allows a tenant to move forward with applications for marijuana retail use, Appellant will  
21 have, and certainly avail itself, of all public comment and appeal processes available at that  
22 future time.  
23  
24  
25

1 Appellant's summary judgment issues B-E (as well as aspects of A) exceed the scope  
2 of the permits under appeal, and therefore exceed the Examiner's jurisdiction.

3 **IV. CONCLUSION**

4 Andorra respectfully requests the Hearing Examiner deny Appellant's motion for  
5 summary judgment in its entirety.

6 DATED this 8<sup>th</sup> day of May, 2017.

8 JOHNS MONROE MITSUNAGA  
9 KOLOUŠKOVÁ PLLC

10  
11 By 

12 Vicki E. Orrico, WSBA 16849  
13 Duana T. Koloušková, WSBA #27532  
14 Attorneys for Andorra Ventures LLC

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
*156-1 Response to Appellant's Motion 5-8-17*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**DECLARATION OF SERVICE**

I, Evanna L. Charlot, am a citizen of the United States, resident of the State of Washington, and declare under the penalty of perjury under the laws of the State of Washington, that on this date, I caused to be filed with the City of Redmond Hearing Examiner and served on counsel, via email, a true and correct copy of the foregoing RESPONDENT ANDORRA VENTURES LLC'S RESPONSE TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT; and the DECLARATION OF DUANA KOLOUSKOVA in support thereof, upon all counsel and parties of record as stated below.

Office of the Hearing Examiner  
To: Cheryl Xanthos, Deputy City Clerk  
PO Box 97010 – M/S 3NFN  
Redmond, WA 98073-9710

[cdxanthos@redmond.gov](mailto:cdxanthos@redmond.gov)

Aaron M. Laing  
SCHWABE, WILLIAMSON & WYATT, P.C.  
1520 – 5<sup>th</sup> Ave., Suite 3400  
Seattle, WA 98101  
*Attorneys for Appellant*

[alaing@schwabe.com](mailto:alaing@schwabe.com)

James Haney  
Daniel Kenny  
OGDEN MURPHY WALLACE PLLC  
901 – 5<sup>th</sup> Ave., Suite 3500  
Seattle, WA 98164  
*Attorneys for City of Redmond*

[jhaney@omwlaw.com](mailto:jhaney@omwlaw.com)  
[dpkenny@omwlaw.com](mailto:dpkenny@omwlaw.com)

Dated this 8<sup>th</sup> day of May, 2017, in Bellevue, Washington.

  
\_\_\_\_\_  
EVANNA L. CHARLOT