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BEFORE THE HEARING EXAMINER
FOR THE CITY OF REDMOND

In the Matter of the Appeal of
WPDC CLEVELAND, LLC
of Building Permit BLDG-2016-09802

NO. BLDG-2016-09802

DEFENDANT CITY OF REDMOND'S
RESPONSE TO APPELLANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
AND APPLICANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

I. RELIEF REQUESTED

The City of Redmond ("City") respectfully requests that this appeal be stayed while the City completes review of the pending revision application for the subject building permit. The City opposes WPDC Cleveland, LLC's ("Appellant") motion for partial summary judgment and respectfully requests that Appellant's motion be denied in full. Further, the City agrees with Andorra's ("Applicant") legal analysis and conclusions contained in its motion for partial summary judgment and therefore does not oppose Applicant's motion.

1 decision and a revised building permit before the Hearing Examiner conducts the hearing on the
2 merits.

3 The building permit at issue in this appeal is expected to, though is not guaranteed to,
4 change around the time the Hearing Examiner makes a decision on the pending motions for
5 partial summary judgment and almost certainly before the hearing scheduled for this appeal.
6 Dec. of Moe, ¶7.

7 **III. ISSUES**

8 1. Whether the review and approval of a revised building permit for work not requiring
9 land use review renders the pending appeal moot? [Yes.]

10 2. Whether the Hearing Examiner can decide genuine issues of material fact on summary
11 judgment? [No.]

12 3. Whether there was a sequencing error when the applicant chose not to pursue a scope
13 of work requiring land use permits? [No.]

14 4. Whether the City is required to issue a stop work order? [No.]

15 **IV. EVIDENCE RELIED UPON**

16 The City of Redmond hereby relies upon the Declarations of Gary Lee and Jozanne Moe
17 and attachments thereto.

18 **V. ARGUMENT**

19 **A. Standard of Review.**

20 Summary judgment is appropriate where “the pleadings, depositions, answers to
21 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
22 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
23 matter of law.” CR 56(c). The moving party bears the initial burden of showing the absence of
24 an issue of material fact on summary judgment. *Tender v. Nordstrom, Inc.*, 84 Wn. App. 787,
25 791, 929 P.2d 1209 (1997). A non-moving party may not successfully oppose a motion for
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1 summary judgment with mere allegations or denials of his or her pleadings, but must instead set
2 forth specific facts by affidavit showing the existence of material issues of fact. CR 56(e).

3 It should be noted that while dispositive motions are permitted under the Hearing
4 Examiner's scheduling order, the City has always viewed that allowance as relating to
5 jurisdictional motions rather than requests to wholly dispose of appeal issues in advance of the
6 required open record hearing. The City encourages all issues on appeal, and most certainly all
7 factual determinations, to be dealt with exclusively at the hearing.
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10 **B. Clear Issues of Fact Exist for Every Issue Raised by Appellant.**

11 The primary issues that Appellant brings in its motion for partial summary judgment
12 revolve around genuine issues of material fact and are therefore specifically precluded from
13 summary judgment. The Hearing Examiner does not have the authority to decide issues of fact
14 in a summary judgment motion such as that which Appellant filed here.

15 Each of Appellant's issues on partial summary judgment which cannot be decided by the
16 hearing examiner on summary judgment are outlined below.

17 *i) Whether the City erred by failing to require code-compliant onsite parking for*
18 *the change of use from warehousing/storage to marijuana retail sales of other*
19 *commercial use? Appellant's Motion for Partial Summary Judgment, p.2.*

20 First, this appeal issue is premised upon the incorrect factual assumption that there was a
21 change of use from warehouse/storage to marijuana retail sales of other commercial use. This is
22 a genuine issue of material fact that precludes any decision on summary judgment. At all times
23 relevant to this application and subsequent appeal the use for the subject site has never been
24 warehousing/storage. Declaration of Gary Lee, ¶2. This site's *occupancy* under the building
25 code historically was warehousing, but that was changed through the change of occupancy
26 request made by the applicant at the time the building permit was issued. Dec. of Lee, ¶3. The

1 historical use for this site was not changed as a result of the building permit decision and is not
2 currently (or at any point before) marijuana retail sales. Dec. of Lee, ¶4. The structure on the
3 site historically was an accessory use to a retail feed mill and store located across the street. Dec.
4 of Lee, ¶5. The City has not received any application or request to change the use for this site to
5 marijuana retail sales. Dec. of Lee, ¶6. The City’s building code requirements are governed by
6 the occupancy of a structure while land use regulations are dictated by the use of the site. Dec.
7 of Lee, ¶7. Issues such as parking are land use issues that implicate the use of the site, not the
8 occupancy. This is emphasized by the purpose section of the city wide parking regulations (RZC
9 21.40.010) which seeks to “ensure that parking facilities are properly designed and located in
10 order to meet the parking needs created by specific uses.” (Emphasis added.) The use and
11 occupancy of this site and the City’s actions, if any, related to both are genuine issues of material
12 fact that directly affect the issues on appeal and preclude summary judgment.
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15 *ii) Whether the City erred by failing to require code-compliant onsite parking for*
16 *the increased floor area from warehouse/storage to marijuana retail sales or*
17 *other commercial use? Appellant’s Motion for Partial Summary Judgment,*
18 *p.2.*

19 Similar to the prior appeal issue, this issue is entirely premised upon the incorrect factual
20 assumption that the City has approved a change of use from warehouse/storage to marijuana
21 retail sales or other commercial use. The use for this site has not changed as a result of the
22 building permit issued by the City. This disputed factual issue is central to Appellant’s requested
23 relief and cannot be decided on summary judgment. This appeal issue further assumes parking
24 should have been addressed in the building permit. This depends on factual issues such as
25 historical use and current legal nonconforming status. Whether the use of the site has been
26 changed to marijuana retail is a genuine issue of material fact that precludes summary judgment.

1 iii) *Whether the City erred by failing to require code-compliant onsite*
2 *garbage/recycling, off-street parking for service vehicles and building is not*
3 *code compliant?*

4 Yet again, appellant's entire argument on this appeal issue focuses on the incorrect
5 factual assumption that there has been a change of use to marijuana retail and that marijuana
6 retail will occur in this site. *See* Appellant's Motion for Partial Summary Judgment, p.34. This
7 factual inaccuracy drives Appellant's argument as to what requirements apply to Applicant's
8 project. As discussed in detail above, the use for this site has not been changed to marijuana
9 retail sales and such change was not part of the building permit approval made by the City.
10 There is a genuine issue of material fact that impacts this appeal issue and that precludes
11 summary judgment.

12
13 iv) *Whether the City erred by allowing a marijuana retail use to be located within*
14 *1,000 feet of the downtown park playground? Appellant's Motion for Partial*
15 *Summary Judgment, p.2.*

16 Similarly, this appeal issue is based on the incorrect factual assumption that the City's
17 approval of the building permit in some way allowed a change in use to marijuana retail sales.
18 To be very clear again, the City's review and approval of the building permit did not include any
19 decision to permit a change of use to marijuana retail sales for the subject site. Dec. of Lee, ¶8.
20 The use for the site right now is not marijuana retail. Dec. of Lee, ¶9. This foundational factual
21 determination is improper on summary judgment. Whether the City allowed a marijuana retail
22 use as a result of the approval of the building permit is a genuine issue of material fact that
23 precludes summary judgment.

24 C. **There was No Error in Processing the Building Permit and Any**
25 **Alleged Error is Alleviated with the Review and Approval of the**
26 **Revision Application.**

1 Appellant argues that the City should have reviewed and approved a site plan entitlement
2 before issuing the building permit. Appellant relies upon Redmond Zoning Code
3 21.76.020(H)(4)(a), which states that all land use permits that are required under the code must
4 be obtained before a building permit can be obtained.
5

6 The scope of work approved in the building permit issued by the City is limited to
7 interior work only and was further reduced to exclude the mezzanine following a subsequent
8 inspection. Dec. of Lee, ¶10, Exhibits 1 and 2. The City specifically noted on the building
9 permit that work on the exterior of the structure was not included within the scope of the
10 building permit and exterior work would require additional permits from the City. Dec. of Lee,
11 Exhibit 1.

12 Redmond Zoning Code subsection 21.76.020(H)(4)(a) falls under the Building Permit
13 Review section and does not sequentially prioritize land use permit review for work outside the
14 scope of the subject building permit. That section only requires that land use permits that are
15 required under the code for work included within the building permit be issued first. The work
16 that is part of the building permit issued by the city and subsequently reduced in scope by the
17 inspector does not require land use approval and therefore there was no sequential issue. *See*
18 Redmond Zoning Code, 21.76.020(E)(3)(c). A factual determination of the scope of work
19 associated with the building permit and the scope and timing of exterior work are all material to
20 a determination of this appeal issue.
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22 The scope of work approved by the building permit, the reduction of the scope of work
23 by the inspector, and whether the exterior work was ever a part of the City's building permit
24 approval are all genuine issues of material fact that preclude summary judgment. Further, the
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1 code upon which Appellant relies does not require land use permit review for work not included
2 in the building permit. Therefore, the sequencing issue alleged by appellant does not apply.

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4 **D. The City is Not Required to Issue a Stop Work Order.**

5 First, the section upon which Appellant relies for its primary argument, RZC
6 21.76.090(E), contains *permissive* language not *mandatory* language. “The Administrator **may**
7 determine that any approved permit should be revoked upon a finding that one or more of the
8 following conditions exist...” RZC 21.76.090(E) (Emphasis added). The City was under no
9 obligation to revoke Applicant’s building permit and cannot be forced to do so now.
10 Additionally, RZC 21.76.090(B) provides that permits are assumed valid unless overturned by an
11 appeal decision and project activity may continue at the sole risk of the applicant. This is limited
12 by RZC 21.76.090(B)(2) which allows only project activity that will be unaffected in any way by
13 the outcome of the appeal. This section does not mandate the City issue a stop work order.
14 Rather, this section is directed at the applicant and places limitations on the applicant’s scope of
15 work pending an appeal. Appellant neither points to any code provision that would require the
16 City to issue a stop work order nor any code provision that would give such authority to issue a
17 stop work order to the Hearing Examiner in the context of this building permit appeal.
18 Appellant’s request for a stop work order has no support in the code and should be denied.

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22 **E. The City Agrees with the Applicant’s Legal Analysis and Conclusions.**

23 The City concurs with the legal analysis put forth by Applicant in its motion for partial
24 summary judgment and therefore does not oppose Applicant’s request that Appellant’s Errors of
25 Procedure, Fact, and Law Nos. 1-6, 8, 9, and 13 should be dismissed.
26

1 **DECLARATION OF SERVICE**

2 I, Gloria J. Zak, an employee of Ogden Murphy Wallace, PLLC, make the following true
3 statement:

4 On the 8th day of May, 2017, I provided the attached as follows via email:

5 Office of the Hearing Examiner
6 Cheryl Xanthos
7 PO Box 97010
8 Redmond WA 98073

9 Aaron M. Laing
10 Schwabe Williamson
11 1520 5th Avenue Suite 3400
12 Seattle WA 98101

13 Duana Kolouskova
14 JOHNS MONROE MITSUNAGA
15 11201 SE 8th St., Suite 120
16 Bellevue WA 98004

17 I declare under penalty of perjury under the laws of the State of Washington that the
18 foregoing is true and correct.

19 EXECUTED at Seattle, Washington this 8th day of May, 2017.

20 

21 Gloria J. Zak