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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 DISPOSITIVE
MOTION TO DISMISS ERRORS OF
PROCEDURE, FACT AND LAW
NOS. 1 THROUGH 6, 8, 9, AND 13

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11 **I. RELIEF REQUESTED**

12 Pursuant to the Prehearing Order in the above-captioned matter, Andorra Ventures
13 LLC (referred herein as "Andorra") respectfully moves the Hearing Examiner to dismiss
14 specific issues raised by Appellant WPDC Cleveland LLC ("Appellant") in its appeal
15 ("Appeal") of the City's issuance of Building Permit BLDG-2016-09802 ("Building Permit")
16 and BPLN-2016-02092 ("Change of Occupancy Permit") (the Building Permit and Change
17 of Occupancy Permit are referred to collectively as "Permits"). Appellant's Errors of
18 Procedure, Fact and Law ("Errors") 1 through 6, 8, 9, and 13 improperly raise issues that
19 exceed the scope of the Permits issued by the City that are the subject of the pending Appeal.
20 Therefore, they are beyond the scope of the Appeal and the authority of the Hearing
21 Examiner, and should be dismissed.¹

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24 ¹ While Andorra respectfully submits that the remaining issues will not have substantive merit, those raise
25 questions of fact regarding change of occupancy and nonconforming use issues, which Andorra recognizes are
better suited for the Examiner's determination on the merits.

1 **II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

2 The facts contained herein are specific only to this Motion to Dismiss Errors of
3 Procedure, Fact and Law Nos. 1 through 6, 8, 9, and 13. Other facts, though pertinent and
4 relevant to the overall matter, will be provided as part of the administrative record and
5 subsequent briefings and/or are unrelated to the arguments presented herein, and thus are
6 excluded from this brief.
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8 The building for which the Permits were issued is located at 16390 Cleveland Street,
9 Redmond, Washington (“Building”). The Building was constructed in 1956. It is currently
10 designated as “warehouse”, and is a legal nonconforming use under RZC 21.76.100.F.
11 Andorra purchased the Building in November 2016, at which time it was occupied by
12 Raparatur LLC, under a lease whose term ran from April 16, 2012, through May 15, 2017.
13 *See Declaration of Sean Miller.* Andorra terminated the lease early in February 15, 2017
14 when it began its process for making tenant improvements. *Id.*
15

16 On December 9, 2016, Andorra submitted an application for tenant improvements
17 and change of occupancy to the Building. The change of occupancy permit involved a
18 change from the current warehouse to retail pursuant to IBC Section 105.1, as adopted in
19 RMC Chapter 15.08, Building Code and RZC 21.76.020.H.2. Most importantly, Andorra *did*
20 *not* apply for a *change in use* to marijuana retail sales. Although Andorra was forthright in
21 its discussions with City staff that it ultimately intends to use a portion of the Building for
22 retail marijuana sales (along with separate spaces for other general retailers), such change in
23 use is triggered by a separate business license application which would be submitted by a
24 tenant seeking to establish a retail marijuana business at the location. Andorra will not be
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1 applying for a retail marijuana license, and no such license is part of the Permits or this
2 Appeal.²

3 On January 25, 2017, City issued the Permits.³ On March 2, 2017, Appellant filed its
4 appeal of the Permits. At that point, the City recognized that a portion of the tenant
5 improvements contemplated by Andorra – namely the addition of a mezzanine for office
6 space – required a site entitlement permit. Andorra agreed that, if it desired to do that work,
7 it would submit a separate site entitlement application. On March 23, 2017, Andorra did
8 submit a site entitlement application, but due to delays resulting from the site entitlement
9 application process, on April 12, 2017, Andorra withdrew its site entitlement application.
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11 In their appeal, Appellants raise 13 Errors. The vast majority (all except Errors 7, 10,
12 11 and 12) are beyond the scope of this Appeal because they pertain to business or site
13 entitlement permits for which no application is pending. To be clear, this is not a timing
14 maneuver on the part of Andorra: (1) Andorra made a sound business decision that the site
15 entitlement permit had become too cumbersome and, as was its absolute right, determined
16 not pursue that permit to expand the mezzanine and withdrew that application; and (2)
17 Andorra *cannot* apply for a retail marijuana business license – only the retail marijuana
18 tenant may apply for such a license. Thus, the only issues subject to Appeal are those
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23 ² Permits subject to appeal were attached to the Appellant's appeal statement.

24 ³ Although Andorra Ventures LLC was the applicant, the City erroneously issued the Permits in the name of
25 Origin's, the anticipated tenant for the retail marijuana sales portion of the building. It is important to note that
(1) there is as yet no lease to or business permit application by Origins; and (2) other tenants besides Origins
will occupy portions of the building.

1 pertaining to the Building Permit for interior ground floor improvements and the change of
2 occupancy from warehouse to retail.

3 III. ISSUES

4 A. Should Errors 1, 2, 4, and 6 of the appeal be dismissed because the issues
5 concern code requirements for site entitlement permits for which no application is pending?
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7 B. Should Errors 3 through 6, 8, 9 and 13 of the appeal be dismissed because the
8 issues concern code requirements for change of use resulting from a business license for
9 which no application is pending?

10 IV. EVIDENCE RELIED UPON

11 Declaration of Sean Miller in Support of Respondent Andorra Ventures Llc's
12 Dispositive Motion To Dismiss Errors Of Procedure, Fact And Law Nos. 1 Through 6, 8, 9,
13 And 13.

14 V. LEGAL AUTHORITY AND ARGUMENT

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16 A. **The Hearing Examiner Has No Authority to Hear Issues Beyond the Scope of
the Appealed Permits.**

17 The majority of Errors alleged by Appellant are beyond the scope of the Permits, and
18 thus beyond the scope of this Appeal and, respectfully, the authority and jurisdiction of this
19 Hearing Examiner. A hearing examiner may "exercise only those powers conferred either
20 expressly or by necessary implication."⁴ The Examiner does not have the power to
21 adjudicate in any equitable capacity.⁵ The Examiner's authority is strictly limited to that
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25 ⁴*Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984) (citing *State v. Munson*,
23 Wn. App. 522, 524, 597 P.2d 440 (1979)).

⁵*Chaussee*, 38 Wn. App. at 638.

1 which is given in the local regulations.⁶ RMC 4.28.020 grants the Examiner the power to
2 conduct hearings as described in RZC Chapter 21.76. RZC 21.76 authorizes the Examiner to
3 hear appeals on permits issued by the City. RZC 21.76.060.D.4 grants the Examiner the
4 authority to hear appeals on permits:

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6 Appeal. Type I decisions may be appealed to the Hearing Examiner as provided in
RZC 21.76.060.I, *Appeals to Hearing Examiner on Type I and II Permits*.

7 The Examiner has no authority to hear issues that are not within the scope of permits issued
8 by the City. The Errors alleged by Appellant that do not apply to the Permits that are the
9 subject of this Appeal must therefore be dismissed.

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11 **B. Errors 1, 4, and 6 of the Appeal Be Dismissed Because the Issues Concern Code**
12 **Requirements For Site Entitlement Permits For Which No Application is**
Pending.

13 Several of the Errors alleged by Appellant are based on the assumption that there was
14 a pending site entitlement permit for the Building. As noted above, there is no site
15 entitlement permit pending. These Errors should be dismissed.

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17 1. The Notice Provisions Referenced in Error 1 Do Not Apply to the Permits and
Should Be Dismissed.

18 Appellant complains in Error 1 that the City failed to provide proper notice of the
19 Permits pursuant to “RZC 21.76.020, .050, .060, & .080 and as required by RCW
20 36.70B.110, Washington common law and state and federal constitutional due process
21 clauses.” RZC 21.76.020, .050, .060, & .080 pertain to Type II permits, such as site
22 entitlement permits. The Permits were Type I permits which do not have any notice
23 requirements. RZC 21.76.080. Moreover, RCW 36.70B.110 does not require notice for
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⁶*In re King County Hearing Examiner*, 135 Wn. App. 312, 319-320, 144 P.3d 345 (2006).

1 project permits that are exempt under the State Environmental Policy Act (“SEPA”); the
2 Permits were exempt from SEPA under RZC 21.64.010.D.1.e. As such, there are no
3 common, state, or federal due process requirements for notice for Type I building permits.

4 Error 1 should be dismissed.

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6 2. There has Been No “Piecemealing” Andorra Withdrew Its Site Entitlement
Application; Error 2 Should Be Dismissed.

7 Appellant alleges in Error 2 that the City impermissibly allowed for “piecemealing”
8 of the permit process by allowing for the occupancy of, and approving a change of use to,
9 marijuana retail sales use in a building that does not comply with the building code. First,
10 “piecemealing” implies multiple permits. As noted above, Andorra withdrew its site
11 entitlement permit application; thus there could be no piecemealing. Moreover, as discussed
12 more fully below, there has been no change of use to marijuana retail sales. Therefore,
13 Error 2 should be dismissed.
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15 3. There is No Application to Expand the Leasable Floor Area; Errors 4 and 6
16 Should Be Dismissed.

17 Errors 4 and 6 allege, in part⁷ that the City failed to follow City Code criteria and
18 requirements for additional parking due to “an enlargement of leasable floor area.”
19 However, as noted above, Andorra withdrew its site entitlement application to expand the
20 mezzanine, as was its right. Therefore, there is no expansion or enlargement of leasable floor
21 area before the Examiner, and these claims should be dismissed.
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25 ⁷The remainder of the allegations in Errors 4 and 6 are addressed in Section V.C.1, below.

1 **C. Errors 2 through 6, 8, 9 and 13 Should Be Dismissed Because the Alleged Errors**
2 **Pertain to Retail Marijuana Change of Use for Which No Application Is**
3 **Pending.**

4 The majority of Errors raised by Appellant pertain to a *change in use* to retail
5 marijuana. As noted above, the Permits pertain to a *change in occupancy* under the
6 International Building Code and Redmond Building Code. IBC Section 105.1, as adopted in
7 RMC Chapter 15.08, Building Code and RZC 21.76.020.H.2. The change in *occupancy* is
8 triggered by the change from a warehouse to general retail. It is important to note that
9 Andorra intends to lease the Building space to multiple retail tenants, only one of which will
10 be a marijuana retailer. Thus, the Permits included a change in occupancy application.

11 A *change in use*, on the other hand, is triggered by a business license application
12 which would be submitted by a tenant seeking to establish a retail marijuana business in the
13 Building. Andorra did not and legally *cannot* apply for a *change in use* to marijuana retail
14 sales. A retail marijuana business license cannot be issued, or even considered by the City,
15 until (1) a retailer (Andorra's planned tenant) has procured a location and lease; (2) the
16 Washington Liquor and Cannabis Board has issued a retail cannabis state license for that
17 location (RCW 69.50.325(3) and WAC 314-55-020); and (3) the City conducts its own
18 review and issues a city business license (RZC 21.41.030 and RMC Ch. 5.04). None of these
19 prerequisites has occurred. As such, all of the Errors complaining of violation of *change in*
20 *use* regulations are not part of the Permits that are the subject of this Appeal, are not before
21 the Hearing Examiner, and should be dismissed.
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1 1. Errors 3, 4, 5, and 6 Pertain to Parking Requirements That Will Not Be
2 Triggered Until There is Change in Use of the Building; These Claims Should
3 Be Dismissed.

4 In Errors 3 through 6, Appellant claims that the City failed to follow the parking
5 requirements that are triggered by a change in *use*. Errors 3 and 5 allege that the City failed
6 to follow City Code criteria and requirements because the proposed marijuana retail sales
7 establishment is a change in land use and such change in use requires the provision of onsite
8 parking spaces. Similarly, Errors 4 and 6 allege that the City failed to follow City Code
9 criteria and requirements because the proposed marijuana retail sales establishment will
10 result in an enlargement of the leasable floor area.⁸

11 Errors 3 through 6 cite RZC 21.10.030.D and Table 21.10.030C which require a
12 minimum of 2 and maximum of 5 parking spaces per 1,000 square feet of floor space for
13 marijuana retail sales. However, as noted above, there has been no change in use or
14 application for a marijuana retail sales business license. These claims are not part of the
15 Permits or the appeal at hand and should be dismissed.

16 2. Error 8 Pertains to Off-Street Loading Space Requirements That Will Not Be
17 Triggered Until There is Change in Use of the Building; These Claims Should
18 Be Dismissed.

19 Similarly, in Error 8 Appellant claims that the City failed to follow City Code criteria
20 and requirements because the proposed marijuana retail sales establishment requires
21 provision of off-street parking facilities for service vehicles. Error 8 cites RZC
22 21.40.010.E.8 as the basis for this claim. First, RZC 21.40.010.E.8 does not require service
23 vehicle off-street parking; it merely states:
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25 ⁸The portions of Errors 4 and 6 regarding enlargement of leasable area are addressed in Section V.B.3, above.

1 Off-Street Loading Space. Parking facilities for service vehicles shall be
2 designed to avoid encroaching on other parking areas or public streets
while loading vehicles are parked or maneuvering to park.

3 Moreover, there is no proposed change in use to a marijuana retail sales establishment before
4 the Examiner in this Appeal. As such Error 8 should be dismissed.

5 3. Errors 9 and 13 Pertain to Buffer Requirements for Marijuana Retail Sales
6 Establishment Which Is Not Part Of This Appeal; These Claims Should Be
7 Dismissed.

8 Error 9 alleges that the City failed to follow City Code criteria and requirements for
9 marijuana retail sales buffers. Appellant cites RZC Chapter 21.41 governing marijuana-
10 related uses. RZC 21.41.030 provides:

11 No marijuana processor, marijuana producer, or marijuana retailer shall locate in the
12 city without a valid license issued by the Washington State Liquor and Cannabis
Control Board, and must at all times conform with state law and city regulations.

13 Appellant also cites WAC 314-55.050 which governs denial of a marijuana license by the
14 Washington State Liquor and Cannabis Control Board.

15 There are no City or State licenses before the Examiner. As discussed above,
16 Andorra is the applicant under the *Permits*. It is anticipated that Andorra will lease a portion
17 of the Building to a marijuana retail sales tenant. Andorra does not itself hold a retail
18 cannabis state license issued by the Washington State Liquor and Cannabis Board, and has
19 no intention of applying for such a license. Andorra cannot legally apply to the City for a
20 marijuana retail sales license without a State license. It is anticipated that a tenant in
21 Andorra's Building will apply to the City for a retail marijuana business license. However,
22 any such license by law must be applied for by, and issued to, the holder of a State license.
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1 No such license or application is part of the Permits, or subject to this Appeal. Errors 9 and
2 13 should be dismissed.

3 **VI. CONCLUSION**

4 Appellant's Errors of Procedure, Fact and Law Nos. 1 through 6, 8 through 9, and 13
5 are beyond the scope of the Permits and the Appeal, and thus are beyond the scope and
6 authority of the Hearing Examiner. Therefore, Andorra respectfully requests the Hearing
7 Examiner dismiss Errors of Procedure, Fact and Law Nos. 1 through 6, 8 through 9, and 13
8 of the Appeal.
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10 DATED this 15th day of May, 2017.

11
12 JOHNS MONROE MITSUNAGA
13 KOLOUŠKOVÁ PLLC

14 By 

Vicki E. Orrico, WSBA 16849
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Attorneys for Andorra Ventures LLC

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16 *156-1 Motion to Dismiss 5-1-17 Final*

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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 DISPOSITIVE MOTION TO DISMISS ERRORS OF PROCEDURE, FACT AND LAW NOS. 1 THROUGH 6, 8 THROUGH 9, AND 13; and the DECLARATION OF SEAN MILLER 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
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Dated this 1st day of May, 2017, in Bellevue, Washington.



EVANNA L. CHARLOT