BEFORE THE HEARING EXAMINER
FOR THE CITY OF REDMOND

In the Matter of the Appeal of
GREG WILSON, on behalf of WILMOOR
DEVELOPMENT CORPORATION,

Of an Administrative Decision

NO. HEA-2018-01
NO. LAND-2013-01720
CITY’S REPLY TO APPELLANT’S PRE-
HEARING BRIEF

I. INTRODUCTION

The Hearing Examiner should affirm the City’s decision to deny Wilmoor Development Corporation’s request for an extension to its site plan entitlement. The only issues Wilmoor Development Corporation (“Wilmoor”) identifies in its statement of appeal (and therefore the only issues within the Hearing Examiner’s scope of review) are whether Wilmoor qualifies for an extension because it experienced unanticipated construction and design problems or because of other factors beyond Wilmoor’s control. The answer to both is no. Wilmoor has only encountered vicarious delays (in that its prospective buyer has encountered delays in its separate SPE), and vicarious delays should not qualify an applicant for an extension under the Code. Furthermore, even if Wilmoor could claim credit for another entity’s delays, it has not shown how or why those delays are “unanticipated.” Finally, even if the Hearing Examiner does entertain Wilmoor’s additional arguments—namely, that a September 2017 meeting by the City Technical Committee created a final, irrevocable SPE extension, that argument must fail. The Technical Committee’s
September 2017 meeting was not a final approval because the City did not issue a final, formal
decision following the meeting.

II. STATEMENT OF FACTS

Wilmoor owns a parcel of property within the City of Redmond that it intends to develop
into a 24-unit residential development known as “Rosehill Cottages.” On December 8, 2015, the
City granted Wilmoor a site plan entitlement (“SPE”) for its Rosehill Cottages project. Under the
City code, SPEs expire after two years. See Ex. C-2.¹

In December 2016, Wilmoor entered into a purchase and sale agreement with Toll WA
LP (“Toll”), under which Toll would buy and develop the property pursuant to its own,
independent SPE during a contractual “feasibility period.” See Appellant’s Prehearing Br. (“Br.”)
Ex. 1, Decl. of Greg Wilson, ¶ 4. In the following months, Toll began working on a site design
for its own vision of the Rosehill Project.

In February 2017, Wilmoor representatives reached out to City Planner Sarah Pyle to
discuss the status of the Wilmoor SPE while the Toll SPE was pending. Sarah Pyle informed
Wilmoor that, under her interpretation of the Code, Toll’s permitting process would entitle
Wilmoor to an SPE extension. Br. Ex. 1, Decl. of Greg Wilson ¶ 5; see also Ex. C-7. Planner
Pyle urged Wilmoor to submit an extension request as quickly as possible, and made every effort
over the following weeks to be available to receive and process Wilmoor’s extension. Planner
Pyle left the city on maternity leave in mid-April.

Wilmoor made no effort to seek an SPE extension until months later. On September 18,
2017 Wilmoor formally submitted an extension request. See Ex. C-3. Two days later, and without
sending out a Notice of Application, the City’s Technical Committee met to discuss the extension
request. The meeting minutes for the September 20, 2017 Technical Committee meeting indicate

¹ All exhibit number refer to the exhibits identified in the City’s Witness and Documents list, submitted February 20,
2018.
that the Technical Committee approved the extension request, citing the “transfer of ownership”
criterion as the basis for its decision.

The following day, City Planner Ben Sticka, who was assigned to the application, sent an
unsigned approval letter, clearly identified as a “draft” in the body of his enclosing email, to Greg
Wilson, a Wilmoor representative. See Ex. C-10. On the same day, City staff sent emails to
various public commenters regarding the September 20, 2017 Technical Committee meeting. Ex.
C-11. While these letters indicated that the Technical Committee had “approved” the extension,
they also noted the appeal period would begin when the City mailed a final approval letter to the
applicant. Id. (Email from Steve Fischer to Laura Chan) (“The action that can be appealed is the
Technical Committee decision that is contained in the approval letter.”); id. (Email from Ben
Sticka to Barry Schnell) (“To file an appeal, please complete the form . . . on the last day of the
appeal period, which will be outlined in the letter.”).

Sometime after the September 20, 2017 Technical Committee meeting, the Technical
Committee decided it needed more information in order to process the approval. On November 8,
2017, Ben Sticka informed Greg Wilson that the City would be requiring a notice of application
for the extension request and would allow a 21-day comment period. See Ex. C-12. The City
issued a notice of application on November 13, 2017. Ex. C-6.

On December 1, Ben Sticka emailed Greg Wilson to ask for a letter confirming that
Wilmoor and Toll had entered into a purchase and sale agreement for the property. Ex. C-14.
Wilmoor submitted a letter confirming the existence of the purchase and sale agreement on
December 6. Ex. C-14. The City denied Wilmoor’s extension request at a December 6, 2017,
Technical Committee meeting. Ex. C-13. Planner Ben Sticka sent a letter to Wilmoor on
III. ARGUMENT

A. WILMOOR’S EXTENSION APPLICATION DOES NOT COMPLY WITH THE CODE CRITERIA BECAUSE WILMOOR CANNOT CLAIM CREDIT FOR ANOTHER ENTITY’S DELAYS.

RZC 21.76.090.C.2 governs extensions of permit approvals. Under RZC 21.76.090.C.2, the “approval authority” (i.e., the authority that granted the underlying approval) can extend an approval on a yearly basis if the applicant meets one of the following conditions: (a) economic hardship; (b) 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.

In Wilmoor’s Pre-Hearing Brief, it argues that it qualifies for an extension under subpart (c), unanticipated construction and/or site design problems. In support, it cites only “the unanticipated construction and design issues encountered by Toll on the Property,” Appellant’s Prehearing Br. at 2, offering no detail about what these alleged delays were or why they were “unanticipated.” Even assuming Wilmoor can support these claims with evidence at hearing, under the Code, they should not be able to claim credit for delays in another entity’s permitting process. Wilmoor itself did not encounter any “unanticipated construction and/or design problems” because it took no steps to move forward in any appreciable way on its own SPE, despite knowing as early as February 2017 that Toll might encounter difficulties obtaining an SPE, and despite the fact that Wilmoor, by its own admission, could have proceeded on its own SPE by at least the fall of 2017. See Decl. of Greg Wilson ¶ 9 (“I was in a position at that time to submit civil drawings to meet the requirements of the SPE . . . .”). At most, Wilmoor encountered “unanticipated real estate transactional problems,” and these are not the type of problems that qualify for an extension under the Code. Furthermore, even accepting Wilmoor’s “vicarious delay” theory, Wilmoor has failed to show how any delays Toll encountered were “unanticipated.”

2 In Wilmoor’s appeal statement, Wilmoor cited RZC 21.76.090.C.2.c (unanticipated site design problems) and C.2.d. (“other circumstances beyond the control of the applicant”). In its brief, Wilmoor only cites subsection (c) (unanticipated delays).
or out of the ordinary for a large and complex development. The Hearing Examiner should therefore find that Wilmoor does not qualify for an extension.

B. WILMOOR’S ARGUMENTS ABOUT THE ALLEGED SEPTEMBER 2017 TECHNICAL COMMITTEE “APPROVAL” ARE OUTSIDE THE SCOPE OF THIS APPEAL.

Under the Code, a party appealing a Type II decision must submit a “concise statement identifying each alleged error of fact, law, or procedure” and must identify “the specific relief requested.” RZC 21.76.060.1.2.i, .iii. Implicit in this requirement is the corollary principle that an appeal is limited to the issues raised in the appeal statement. Wilmoor’s appeal statement only argues that “[t]he city erred in its decision on this extension request” because “[t]his extension qualifies under both paragraphs (c) and (d) of the above referenced conditions.” Wilmoor makes no mention whatsoever of the September 20, 2017 Technical Committee meeting, and it does not argue that its extension had already been approved. Because Wilmoor failed to raise this argument in its appeal statement, it cannot raise it now. The Hearing Examiner should therefore dismiss this argument.

C. ASSUMING WILMOOR’S APPROVAL ARGUMENTS ARE WITHIN THE SCOPE OF REVIEW, THE CITY’S SEPTEMBER 2017 TECHNICAL COMMITTEE MEETING DID NOT CONSTITUTE FINAL APPROVAL OF WILMOOR’S EXTENSION APPLICATION.

1. Because the City did not issue a notice of application before the September 2017 Technical Committee meeting, the Technical Committee had no authority to approve the extension request, and the “decision” in that meeting was void.

Under Chapter 4.50 RMC, the chapter governing the creation and powers of the City’s Technical Committee, the Technical Committee has the authority to review land use applications in accordance with RMC 4.50.020. RZC 4.50.020. Under Title 21, notice of application is required for all Type II permit applications (such as this extension request). See RZC 21.76.050.G.1; see also RZC 21.76.050B (flow chart of Type II application process). Here, the City failed to provide a notice of application in connection with Wilmoor’s September 18, 2017 extension request, instead approving that request two days after it was submitted. Because there
was no notice of application, the Technical Committee lacked the authority to issue a decision on the extension request. See RMC 4.50.020; see also Bianchi v. State Dept. of Social and Health Servs., No. 33720-7-II, 2007 WL 657196, at *3 (Wn. App. Mar. 6, 2007) (unpublished op.) (“Thus, the remedy for lack of notice is to void, or render voidable, the underlying State action.”). The Technical Committee’s September 20, 2017 meeting was not a valid “approval” because the Committee had no authority to grant that approval if it didn’t conform with the procedural notice requirements.

Wilmoor argues that the City could not require Wilmoor to submit to a notice of application for their extension request because Wilmoor “vested” to a notice-free extension application process 28 days after it submitted its September 18 extension request (i.e., on October 16). Br. at 12. First, the Hearing Examiner does not have the authority to rule on vested rights issues. See Chaussee v. Snohomish Cnty. Council, 38 Wn. App. 630, 639, 689 P.2d 1084, 1092 (1984) (hearing examiner’s power limited to that granted by legislative body). Second, this argument misconstrues the vested rights doctrine. While the doctrine has constitutional roots, the Washington Supreme Court has held that the doctrine is now entirely statutory. Potala Village Kirkland, LLC v. City of Kirkland, 183 Wn. App. 191, ¶ 1, ¶ 31, 334 P.3d 1143 (2014). The only three types of permit applications to which the doctrine applies are building permit applications, RCW 19.27.095; subdivision applications, RCW 58.17.033; and development agreements, RCW 36.70B.180. There is therefore no way for a site plan entitlement or SPE extension to vest because there is no statute vesting an SPE applicant’s rights. Third, even if an extension request were the type of application that could create vested rights, the only right that vests under the doctrine is the

3 Wilmoor also indicates that it is prepared to argue that the City Planner Sarah Pyle’s February 2017 email should bind the City under equitable estoppel, though it acknowledges that equitable estoppel is outside the HEX’s jurisdiction. See Br. at 13 n.49. The City agrees that the HEX lacks the authority to determine any equitable estoppel issues, but it also notes only that it is prepared to defend any estoppel claims—to the extent Wilmoor relied on Planner Sarah Pyle’s February 2017 assurances regarding the availability of an extension, that reliance was not reasonable. Wilmoor is a sophisticated applicant that is well aware that city interpretations can shift. Moreover, Planner Pyle gave Wilmoor every opportunity, over the course of several months in spring of 2017, to apply for an extension under her interpretation at the time. Wilmoor chose not to do so.
right for an application to be judged under the regulations in effect at the time of submission. The notice of application requirements at issue here (RZC 21.76.050.G.1; RZC 21.76.050B) were in effect at the time of applicant’s application. A vested right would therefore not exempt applicant from the notice-of-application requirement.

Wilmoor attempts to distract from this result by suggesting that the crux of the vesting issue is whether notice-of-application regulations are “land use control ordinances.” See Br. at 13 (quoting Westside Business Park, 100 Wn. App. 599, 606, 5 P.3d 713 (2000)). In Westside Business Park, however, applicants submitted a subdivision plat application, which clearly qualifies for the vested rights doctrine under RCW 58.17.033, and argued that their application vested to storm water drainage regulations because those regulations were “land use control ordinances” under the vesting statute. Here, we don’t even reach this issue of whether the regulations in question are “land use control ordinances” because the SPE applications and extensions are not subject to the vested rights doctrine at all.

2. Only an extension approval letter, not the meeting minutes, is an appealable “approval” under the Code.

Under the provision governing extensions, the “approval authority” can grant extensions to Type I, II, or II permits upon showing proper justification. RZC 21.76.090.C.2. The approval authority in the case of an SPE extension is the Technical Committee, which would grant an extension in a Type II process.

Under the provisions governing Type II permit process review, the City must issue a “written record” of the decision “in the form of a staff report, letter, the permit itself, or other written document indicating approval, approval with conditions, or denial.” See RZC 21.76.060.E.2. A party of record may then appeal the decision to the Hearing Examiner. See RZC 21.76.060.E.1; RZC 21.76.060.E.1. While the code does not explicitly say that it is the written record, rather than the initial oral decision, that is the official, final action on a Type II permit, this has long been the City’s interpretation. See, e.g., Br. Ex. 7 (email from Steve Fischer to Laura
Chan) ("The action that can be appealed is the Technical Committee decision that is contained in the approval letter."). This interpretation is consistent with LUPA case law holding that a decision is "issued" (and therefore appealable) when it is "entered" into the public record—i.e., when a decision is "memorialized such that it is publicly available." See Habitat Watch v. Skagit County, 155 Wn.2d 397, ¶¶ 25–26 & n.5, 120 P.3d 56 (2005). Here, staff emailed members of the public regarding the September 20, 2017 Technical Committee meeting, but emphasized that the written record was not yet available—that it would be forthcoming later in the week. Ex. C-11. There was therefore no appealable decision as of September 20, 2017, and the City was free to reconsider and revise its decision, which it later did.

IV. CONCLUSION

The only issue on appeal in this case is whether Wilmoor has encountered unanticipated permitting delays that entitle it to an SPE extension under the Code. Because Wilmoor has made no discernable progress whatsoever on its own permit (despite being in a position to do so) but instead relies on a separate entity’s permitting process, Wilmoor is not entitled to an extension under the Code. Furthermore, even accepting its premise that another entity’s permitting process can vicariously entitle Wilmoor to its extension request, Wilmoor has not shown how Toll’s process was “unanticipated.” Finally, should the Hearing Examiner decide to consider Wilmoor’s arguments regarding the September 20, 2017 Technical Committee meeting, it must dismiss those arguments because the City’s September 20, 2017 meeting did not create an appealable decision.

DATED this 20th day of February, 2018.

OGDEN MURPHY WALLACE, PLLC

By

James E. Haney, WSBA #11058
Kate D. Hambley, WSBA #51812
Attorneys for City of Redmond

OGDEN MURPHY WALLACE, PLLC
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215
DECLARATION OF SERVICE

I, Charolette Mace, an employee of Ogden Murphy Wallace, PLLC, certify that on the date below, I emailed this document, and mailed the original and one copy to:

Cheryl D. Xanthos
Clerk to the Hearing Examiner
City of Redmond, Hearing Examiner’s Office
15670 NE 85th Street
Redmond, WA 98052
Email: cdxanthos@redmond.gov

and emailed this document only to:

Vicki Orrico
JOHNS MONROE MITSUNAGA
11201 SE 8th Street, Suite 120
Bellevue, WA 98004
Email: orrico@jmmlaw.com
        lamp@jmmlaw.com

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

Executed at Seattle, Washington this  28th  day of February, 2018.

Charolette Mace
Legal Assistant