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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

1 September 2017 meeting was not a final approval because the City did not issue a final, formal
2 decision following the meeting.

3 II. STATEMENT OF FACTS

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

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

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

20 Wilmoor made no effort to seek an SPE extension until months later. On September 18,
21 2017 Wilmoor formally submitted an extension request. *See* Ex. C-3. Two days later, and without
22 sending out a Notice of Application, the City’s Technical Committee met to discuss the extension
23 request. The meeting minutes for the September 20, 2017 Technical Committee meeting indicate
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25 _____
26 ¹ All exhibit number refer to the exhibits identified in the City’s Witness and Documents list, submitted February 20,
2018.

1 that the Technical Committee approved the extension request, citing the “transfer of ownership”
2 criterion as the basis for its decision.

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

13 Sometime after the September 20, 2017 Technical Committee meeting, the Technical
14 Committee decided it needed more information in order to process the approval. On November 8,
15 2017, Ben Sticka informed Greg Wilson that the City would be requiring a notice of application
16 for the extension request and would allow a 21-day comment period. *See* Ex. C-12. The City
17 issued a notice of application on November 13, 2017. Ex. C-6.

18 On December 1, Ben Sticka emailed Greg Wilson to ask for a letter confirming that
19 Wilmoor and Toll had entered into a purchase and sale agreement for the property. Ex. C-14.
20 Wilmoor submitted a letter confirming the existence of the purchase and sale agreement on
21 December 6. Ex. C-14. The City denied Wilmoor’s extension request at a December 6, 2017,
22 Technical Committee meeting. Ex. C-13. Planner Ben Sticka sent a letter to Wilmoor on
23 December 8, 2017 informing it of the City’s denial. Ex. C-4.

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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.² 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).

1 or out of the ordinary for a large and complex development. The Hearing Examiner should
2 therefore find that Wilmoor does not qualify for an extension.

3 **B. WILMOOR'S ARGUMENTS ABOUT THE ALLEGED SEPTEMBER 2017**
4 **TECHINCAL COMMITTEE "APPROVAL" ARE OUTSIDE THE SCOPE**
5 **OF THIS APPEAL.**

6 Under the Code, a party appealing a Type II decision must submit a "concise statement
7 identifying each alleged error of fact, law, or procedure" and must identify "the specific relief
8 requested." RZC 21.76.060.I.2.ii, .iii. Implicit in this requirement is the corollary principle that
9 an appeal is limited to the issues raised in the appeal statement. Wilmoor's appeal statement only
10 argues that "[t]he city erred in its decision on this extension request" because "[t]his extension
11 qualifies under both paragraphs (c) and (d) of the above referenced conditions." Wilmoor makes
12 no mention whatsoever of the September 20, 2017 Technical Committee meeting, and it does not
13 argue that its extension had already been approved. Because Wilmoor failed to raise this argument
14 in its appeal statement, it cannot raise it now. The Hearing Examiner should therefore dismiss this
15 argument.

16 **C. ASSUMING WILMOOR'S APPROVAL ARGUMENTS ARE WITHIN**
17 **THE SCOPE OF REVIEW, THE CITY'S SEPTEMBER 2017 TECHINCAL**
18 **COMMITTEE MEETING DID NOT CONSTITUTE FINAL APPROVAL**
19 **OF WILMOOR'S EXTENSION APPLICATION.**

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

24 Under Chapter 4.50 RMC, the chapter governing the creation and powers of the City's
25 Technical Committee, the Technical Committee has the authority to review land use applications
26 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

1 was no notice of application, the Technical Committee lacked the authority to issue a decision on
2 the extension request. *See* RMC 4.50.020; *see also* *Bianchi v. State Dept. of Social and Health*
3 *Servs.*, No. 33720-7-II, 2007 WL 657196, at *3 (Wn. App. Mar. 6, 2007) (unpublished op.) (“Thus,
4 the remedy for lack of notice is to void, or render voidable, the underlying State action.”). The
5 Technical Committee’s September 20, 2017 meeting was not a valid “approval” because the
6 Committee had no authority to grant that approval if it didn’t conform with the procedural notice
7 requirements.

8 Wilmoor argues that the City could not require Wilmoor to submit to a notice of application
9 for their extension request because Wilmoor “vested” to a notice-free extension application
10 process 28 days after it submitted its September 18 extension request (*i.e.*, on October 16). Br. at
11 12.³ First, the Hearing Examiner does not have the authority to rule on vested rights issues. *See*
12 *Chaussee v. Snohomish Cnty. Council*, 38 Wn. App. 630, 639, 689 P.2d 1084, 1092 (1984)
13 (hearing examiner’s power limited to that granted by legislative body). Second, this argument
14 misconstrues the vested rights doctrine. While the doctrine has constitutional roots, the
15 Washington Supreme Court has held that the doctrine is now entirely statutory. *Potala Village*
16 *Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, ¶ 1, ¶ 31, 334 P.3d 1143 (2014). The only
17 three types of permit applications to which the doctrine applies are building permit applications,
18 RCW 19.27.095; subdivision applications, RCW 58.17.033; and development agreements, RCW
19 36.70B.180. There is therefore no way for a site plan entitlement or SPE extension to vest because
20 there is no statute vesting an SPE applicant’s rights. Third, even if an extension request were the
21 type of application that could create vested rights, the only right that vests under the doctrine is the

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23 ³ Wilmoor also indicates that it is prepared to argue that the City Planner Sarah Pyle’s February 2017 email should
24 bind the City under equitable estoppel, though it acknowledges that equitable estoppel is outside the HEX’s
25 jurisdiction. *See* Br. at 13 n.49. The City agrees that the HEX lacks the authority to determine any equitable estoppel
26 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.

1 right for an application to be judged under the regulations in effect at the time of submission. The
2 notice of application requirements at issue here (RZC 21.76.050.G.1; RZC 21.76.050B) were in
3 effect at the time of applicant's application. A vested right would therefore not exempt applicant
4 from the notice-of-application requirement.

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

14 **2. Only an extension approval letter, not the meeting minutes, is an**
15 **appealable "approval" under the Code.**

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

20 Under the provisions governing Type II permit process review, the City must issue a
21 "written record" of the decision "in the form of a staff report, letter, the permit itself, or other
22 written document indicating approval, approval with conditions, or denial." See RZC
23 21.76.060.E.2. A party of record may then appeal the decision to the Hearing Examiner. See RZC
24 21.76.060.E.1; RZC 21.76.060.E.1. While the code does not explicitly say that it is the written
25 record, rather than the initial oral decision, that is the official, final action on a Type II permit, this
26 has long been the City's interpretation. See, e.g., Br. Ex. 7 (email from Steve Fischer to Laura

1 Chan) (“The action that can be appealed is the Technical Committee decision that is contained in
2 the approval letter.”). This interpretation is consistent with LUPA case law holding that a decision
3 is “issued” (and therefore appealable) when it is “entered” into the public record—*i.e.*, when a
4 decision is “memorialized such that it is publicly available.” *See Habitat Watch v. Skagit County*,
5 155 Wn.2d 397, ¶¶ 25–26 & n.5, 120 P.3d 56 (2005). Here, staff emailed members of the public
6 regarding the September 20, 2017 Technical Committee meeting, but emphasized that the written
7 record was *not* yet available—that it would be forthcoming later in the week. Ex. C-11. There was
8 therefore no appealable decision as of September 20, 2017, and the City was free to reconsider and
9 revise its decision, which it later did.

10 IV. CONCLUSION

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

20 DATED this 20th day of February, 2018.

21 OGDEN MURPHY WALLACE, PLLC

22
23 By 

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

1 **DECLARATION OF SERVICE**

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

4 Cheryl D. Xanthos
5 Clerk to the Hearing Examiner
6 City of Redmond, Hearing Examiner's Office
7 15670 NE 85th Street
8 Redmond, WA 98052
9 Email: cdxanthos@redmond.gov

10 and emailed this document only to:

11 Vicki Orrico
12 JOHNS MONROE MITSUNAGA
13 11201 SE 8th Street, Suite 120
14 Bellevue, WA 98004
15 Email: orrico@jmmlaw.com
16 lamp@jmmlaw.com

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 20th day of February, 2018.

20 
21 _____
22 Charolette Mace
23 Legal Assistant
24
25
26