

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
26

BEFORE THE HEARING EXAMINER FOR THE
CITY OF REDMOND

In the Matter of the Appeal of
Aaron Hollingbery, on behalf of
Toll WA LP
Of an Administrative Interpretation

FILE NO. HEA-2018-02
Rosehill Cottages
TOLL’S POST-HEARING BRIEF

I. INTRODUCTION

The Appellant Toll WA LP (“Toll”) is the project applicant and contract purchaser of the Rosehill Cottages property (“Toll Property”). The Toll Property is a single parcel that is split between the R-4 and R-1 zones, and it contains critical areas on both the western and eastern area of the site (including the area the City would include in the R-4). Toll believes that the zoning boundary is uncertain and that the boundary should be determined by the application of RZC 21.04.010B.7. The former Planning Director Karen Anderson¹ issued two Administrative Interpretations related to the application of RZC 21.04.010B: one in December that Appellant Toll did not request, and one in March that Toll did request. The Interpretations are identical except for their subject lines: the December 13, 2017 Interpretation, which Toll appealed on December 27, 2017, states that its subject is “Amending the definition of a Zoning Map Interpretation,” while the February 9, 2018 Interpretation, which Toll appealed on March 13,

¹ The Hearing Examiner can take official notice of the fact that Ms. Anderson is no longer with the City.

1 2018, states that its subject is “Interpretation of a Zoning Map”. The March Interpretation was
2 accompanied by a letter and a map that located the zoning boundary on the Toll Property using
3 the City’s GIS software. Neither Interpretation is supported by substantial evidence and both
4 Interpretations are clearly erroneous for the multiple reasons discussed below.

5 **II. ARGUMENT**

6 **A. The Hearing Examiner need not decide whether Toll can appeal the December**
7 **Interpretation.**

8 Toll did not request the December Interpretation, but filed an appeal to preserve its rights.
9 At the first day of the hearing, on February 27, 2018, the Department’s attorney argued that
10 Toll’s appeal of the December Interpretation was not ripe because Toll had not requested the
11 Interpretation. The Department made this argument after the deadline for dispositive motions
12 had passed. However, the Department’s argument is mooted by Toll’s appeal of the February 9,
13 2018 Interpretation and by the Hearing Examiner’s grant of Toll’s motion to consolidate both
14 appeals at the hearing on March 13, 2018.

15 Thus, the Hearing Examiner need not decide whether the first appeal was ripe: the two
16 appeals raise the same issues, and the Hearing Examiner’s decision on the merits of the second
17 appeal will necessarily decide the merits of the first appeal as well.

18 This brief will refer to both Interpretations together as the Interpretation, except when
19 specifically stating otherwise.

20 **B. No deference is due the Interpretation.**

21 RMC 21.76.060.I.4 states in pertinent part:

22 The Hearing Examiner shall give substantial weight to the decision of the
23 department director (Type I) or Technical Committee (Type II). The Hearing
24 Examiner may grant the appeal or grant the appeal with modifications if the
25 Examiner determines that the appellant has carried the burden of proving that the
26 Type I or Type II decision is not supported by a preponderance of the evidence or
was clearly erroneous.

Sections A through F below demonstrate all the reasons that the Interpretation is not supported by a preponderance of the evidence and is clearly erroneous. The Interpretation also is

1 not entitled to deference, however, for the simple but conclusive reason that just two-and-one-
2 half years ago the City applied RZC 21.04.020.B.7 according to its terms when approving the
3 nearby plat of Terrene at 132nd Ave NE (“Terrene”). As depicted in Exhibit A-4, and as required
4 by RZC 21.04.020.B.7, the zoning boundary on this property follows the “outermost boundary of
5 the critical area buffer” between the steeply-sloped R-1-zoned property to the east and the more
6 level R-4-zoned property to the west. In order for a court to give deference to the Director’s
7 Interpretation, she would have to have established at the hearing that her Interpretation reflects
8 established City policy, *Sleasman v. City of Lacey*, 159 Wn.2d 639; 151 P.3d 990 (2007);
9 *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); but in fact
10 the Interpretation is directly contrary to how the City applied the code when it approved the
11 preliminary Plat of Terrene on August 31, 2015. Thus no deference is due to the Interpretation.

12 **C. As a matter of law the City does not have a digital zoning code.**

13 The City’s witnesses testified that the City now has a “digital code” and a digital zoning
14 map. For example, Karen Anderson, the former Director of Planning & Community
15 Development testified that “we went to this fully digital code a number of years ago as previous
16 witnesses have testified.” There is no legal basis for this assertion. It is wrong as a matter of law
17 as well as fact: there is no such thing as a “digital” code because applicable State statutes and
18 City ordinances do not allow for one.

19 Savanna Nagorski, Appellant’s GIS expert, testified that she researched the City’s
20 ordinances to see whether the Council had ever adopted any zoning map other than the paper
21 map that is Exhibit A-1: “I found no mention of GIS or geographic information systems or
22 Property Viewer within the code.”

23 The only evidence offered by the City to support the argument that the City Council has
24 adopted a digital code was a link reference in Ordinance 2584, which adopted the City’s 2011
25 code update, to the City’s website. However, there is no language in Ordinance 2584 that states
26 that the link reference constitutes an adoption of a digital only code and a digital only zoning

1 map. In fact, Section 8 of the Ordinance contains explicit language to the Codifier as to what
2 changes the Codifier was authorized to make “. . . to compile and publish the Zoning Code as a
3 single, consolidated Title 21 of the Redmond Municipal Code and to publish the Zoning Code
4 Appendices” The City Council, moreover, does not adopt a “code”. It adopts ordinances
5 that are later codified by a private publishing company, as set forth in Section 8 of Ordinance
6 2584 and in RMC 1.01.005:

7 Pursuant to the provisions of RCW 35.21.500 through 35.21.570, there is hereby
8 adopted the “Redmond Municipal Code” as published by Book Publishing
9 Company, Seattle, Washington.”

9 RMC 1.01.020 states:

10 This Code consists of all of the regulatory and penal ordinances and certain of the
11 administrative ordinances of the city, codified pursuant to RCW 35.21.500
12 through 35.21.570.

12 A code is a compilation of ordinances, and ordinances are paper documents because they
13 must be signed and kept in paper form, as required by both State and City law. RMC 1.02.010
14 states that Redmond is a “noncharter Code city operating under the Mayor-Council plan of
15 government as set forth in RCW 35A.12” Pursuant to this statute, ordinances must be
16 “signed by the mayor and attested by the clerk,” RCW 35A.12.130, and the city clerk must keep
17 a book of such ordinances so that they may be inspected by the public, as stated in RCW
18 35A.12.150:

19 The city clerk shall authenticate by his or her signature and record in full in a
20 properly indexed book kept for the purpose all ordinances and resolutions adopted
21 by the council. Such book, or copies of ordinances and resolutions, shall be
22 available for inspection by the public at reasonable times and under reasonable
23 conditions.

22 Similarly, RCW 35.21.530 states:

23 When a city or town codifies its ordinances, it shall file a typewritten or printed
24 copy of the codification in the office of the city or town clerk. . . .

25 Neither State statute nor City code authorizes a “digital code,” and no such code exists.
26 The “digital code” that the Department’s witnesses testified about is a fiction, and the Official

1 Zoning Map at issue in this case is not a digital map but the paper map adopted by the Council in
2 2011 as part of Ordinance No. 2584, a portion of which is Exhibit A-13.

3 **D. The text of the zoning code governs.**

4 The City's Official Zoning Map is not scaled and does not include coordinates: it
5 therefore is necessarily uncertain in its depiction of boundaries, as further discussed in section E
6 below. RZC 21.76.070.D.4.c addresses this uncertainty by stating:

7 In the case of conflicts between the text, maps and charts of the RZC the text shall
8 govern unless otherwise stated.

9 The next subsection of RZC 21.76.070.D.4, subsection d, then states:

10 Interpretation of the Official Zoning Map shall be as set forth in RZC
11 21.04.020.B.

12 RZC 21.04.020.B sets forth the text that governs interpretation of the Zoning Map, and
13 therefore governs this appeal of the Interpretation. As illustrated by the facts that gave rise to
14 this appeal, there is inescapable conflict between a zone boundary drawn on a map at an
15 unidentified angle through a series of split-zoned lots that contain critical areas, and the text in
16 subsection B.7 that states that in this very situation the zone boundary shall be the "outermost
17 boundary of the critical area buffer." Pursuant to RZC 21.76.070.D.4.c, the text governs, as it
18 does in all the situations addressed in RZC 21.04.020.B:

19 **B. Zoning Map Interpretation.** Where uncertainty exists as to the location
20 of any boundaries of the zones as shown in RZC 21.04.020, *Zoning Map*, the
21 following rules shall apply:

- 22 1. Where boundaries are indicated as following approximately the
23 centerline of the streets, alleys, highways, railroads or watercourses,
24 the actual centerlines shall be considered the boundaries;
- 25 2. Where boundaries are indicated as following approximate lot lines and
26 are map scaled at not more than 20 feet from the lines, the actual lot
lines shall be considered the boundaries;
3. Where the land is not subdivided or where a zone boundary divides a
lot, the boundary shall be determined by map scaling unless the actual
dimensions are noted on the map;
4. Where boundaries are indicated as following lines of ordinary high
water, government or meander line, the lines shall be considered to be

1 the actual boundaries, and, if they should change, the boundaries shall
2 be considered to move with them;

- 3 5. Where a public right-of-way is vacated, the vacated area shall have the
4 zone classification of the adjoining property that it merges with;
- 5 6. Where an area with one owner is divided into more than one zone,
6 each portion of the property shall have the zone designation indicated,
7 unless subsection B.2 applies.
- 8 7. Where a single parcel is split between two zones and a portion of the
9 parcel is zoned R-1 and contains critical areas, the outermost boundary
10 of the critical area buffer shall be considered the boundary between the
11 two zones.

12 The Director's assertions, in the Interpretation and at the hearing, that this text does not
13 govern because there is no uncertainty, is wrong as a matter of law because the Official Zoning
14 Map is the paper map adopted as part of Ordinance 2584. Staff's importation of that paper map
15 into the City's GIS system can have no effect on the certainty of the line adopted by the City
16 Council on a paper map that is part of a paper ordinance, as required by State and City law.

17 The Director's assertions that there is no uncertainty are also repudiated by the facts, as
18 discussed in the following sections of this brief.

19 **E. The GIS system provides accuracy, not certainty.**

20 A GIS system is a digital system, so it will of course accurately reflect the data
21 incorporated into the system, but the certainty of that data depends on the certainty of the source,
22 which in this case is the paper map approved by the City Council.

23 Melissa Brady is the City's Technology and Information Services Operation Manager,
24 and the City Attorney questioned her at length about the "accuracy" of the GIS system. She
25 repeatedly stated that it is accurate, but the City Attorney did not question her about "certainty,"
26 and on cross Ms. Brady acknowledged that she could not attest to the certainty or lack of
certainty to zoning boundaries that do not follow parcel boundaries because she relied on the
Planning Department to provide the information that is entered into the GIS system:

SCHNEIDER	... What outside data, you know such as surveys or anything, could you go to to confirm the accuracy of that line on the zoning map?
BRADY	In our case we went back to the Planning Department and pointed out

1		the issues, the areas that didn't follow the parcels, and they came back and let us know that they felt it was accurate and we depicted it or left it like that in the GIS.
2	SCHNEIDER	Okay, so the accuracy... again don't let me misstate what you're saying, but so the accuracy of the split zone zoning boundary was based on not on a survey or any recorded data or anything like that but on the representation of the Planning Department?
3	BRADY	I can't speak to how those boundaries were initially put in. They could have been put in from surveys. All I'm saying is that I was looking at the parcel boundaries and the zoning boundaries where they were coincident and pointed out the areas where they weren't coincident.
4	SCHNEIDER	Okay. And so that line is the result of information you received from the Planning Department?
5	BRADY	That is correct.

6 * * *

7	BRADY	As far as the uncertainty, I'm relying on the Planning Department to give us accurate information to put into the GIS.
8	SCHNEIDER	Okay. Thank you. That's all.

9
10
11 The only lawful source of information for these zoning boundaries is the paper zoning map approved by Ordinance No. 2584, and for the reasons discussed above, it does not provide certainty.

12
13
14
15 Shane Barnes was the only surveyor to testify at the hearing, and he confirmed that the GIS system does not provide certainty. For example:

16	SCHNEIDER	Mr. Barnes, I'm reminding everyone that you're a surveyor. And how do you as a surveyor make use of the City of Redmond's GIS system?
17	BARNES	As a surveyor whether it's the City of Redmond or any other GIS system we use it as a general very high high overview. Approximate information. GIS systems are usually or publicly available. GIS systems are usually a good place to start your research into finding precise information about projects due to links and to other documented things. It's never... It's always an approximation. We never rely on GIS for anything that matters.
18	SCHNEIDER	And we heard testimony from Mr. Fischer that the City requires surveys with most, perhaps all, applications for land use approvals. Would you as a surveyor attest to the accuracy of a site plan or a zoning boundary such as is an issue in this case using only the GIS system?
19	BARNES	No.
20	SCHNEIDER	And why not?
21	BARNES	It's not accurate. GIS systems are databases, they're warehouses of information that were compiled by various, various levels of input. Sometimes it's, sometimes it's survey grade material meaning it's a

1 recorded boundary survey or recorded plat. Sometimes it's
2 geographical information gathered by a handheld GPS receiver that
3 have, you know, ten to thirty foot levels of accuracy. Sometimes it's
4 contours generated from an aerial survey or LIDAR-based survey. It's
5 just not survey grade material. It's not reliable for any sort of survey
6 grade map.

7 The Department's own actions demonstrate that the GIS system does not provide
8 certainty: Mr. Fischer testified the City requires applicants for land use approvals to submit
9 surveys, not printouts from the GIS system.

10 Three of the exhibits from the hearing further demonstrate this lack of certainty by
11 disagreeing about the areas of the R-1 and R-4 zones on the Toll property even though these
12 exhibits calculate these areas by using the zoning boundary drawn on the map instead of by
13 performing the survey of critical areas required by RZC 21.04.020.B.7.

14 These exhibits are: Exhibit A10 (Ben Sticka's letter dated March 9, 2018 to Aaron
15 Hollingbery, which accompanies the March 9th Interpretation); Exhibit A2 (The
16 Bergstrom/Olsson/Walter PRD Plan); and Exhibit A3 (the Wilmoor Development Site Plan
17 Entitlement). None of the zone areas calculated on these documents are the same, and the sum
18 of the two zones in Mr. Sticka's letter does not even agree with the sum of the areas in the other
19 two documents:

HE Exhibit	A10	A2	A3
R1	8.402965929	8.18	8.37
R4	2.463251661	2.67	2.48
Total	10.86621759	10.85	10.85

20 That the GIS system does not provide certainty is further demonstrated by the fact that
21 the zoning boundary at issue is not, contrary to the testimony of the Department's witnesses, a
22 straight line between two fixed points. Savanna Nagorski is the only witness to review the line
23 in the City's GIS system, and she testified:
24
25
26

1	SCHNEIDER	So we've heard testimony about the zoning boundary at issue in this case being a straight line from a point on the northern boundary of the subject lot to a point some lots to the south. Based on your review of the GIS system, is that a straight line?
2		
3	NAGORSKI	That is not a straight line.
4	SCHNEIDER	What is it?
5	NAGORSKI	It's a series of lines that were created with different angular... angles along a general line, but it's not strictly a straight line, and I don't mean strictly vertical. I mean it's not straight.
6	SCHNEIDER	So you mean in addition to the fact that it's, it's at an angle not strictly north-south. It has multiple vertexes or vertices in it?
7	NAGORSKI	Yes.
8	SCHNEIDER	Okay. And is there anything in the information you reviewed in the GIS system or in the metadata or in the zoning codes that would indicate that the City Council ever approved or was even aware of that series of lines that connect the vertexes?
9	NAGORSKI	No.

Similarly, surveyor Shane Barnes testified:

11	SCHNEIDER	Thank you. So Mr. Barnes, I'm going to direct your attention to this zoning boundary map that has been, that is part of Exhibit A-10 that the City provided last Friday. And you were here for Ms. Brady's testimony. Did you at my request look to see whether or not the, it's a straight line from the angle point here that we've been talking about on the property to another angle point on the property to the south?
12		
13		
14	BARNES	Yes. I've look at that both, I've looked at that both on the full size paper zoning map. I've looked at that on the City of Redmond online Property Viewer, and in my opinion it's not a straight line. I actually believe that it initially was an arc at one time and then maybe through time has evolved into a series of line segments, but I don't believe it to be a straight line from that point to the southern terminus we were talking about on the like maybe five to six parcels south.
15		
16		
17	SCHNEIDER	Okay. Assuming it's not a straight line and it's a series of angles, as Ms. Nagorski testified, would it be possible for you as a surveyor to determine with certainty the point where the zoning boundary crosses the southern boundary of the subject property?
18		
19	BARNES	No. Not with a... Without a legal description or a map with mathematically calculatable numbers on it, I can't with certain put any line anywhere. And if I were to show it on a map, it would say approximate.
20		
21		

The preponderance of the evidence presented at the hearing is that the zoning boundary on the Toll property is not certain, and cannot be certain no matter how "accurate" the GIS system is, because the only certainty that matters is the certainty (or lack of it) on the Official Zoning Map approved by Ordinance 2584, and City Council's own Ordinance demonstrates the

1 uncertainty of that paper boundary: in the same Ordinance that adopts the current Official Zoning
2 Map, the Council added subsection 7 to RZC 21.04.020.B, as Mr. Fischer testified and as Exhibit
3 A-12 (the Staff Report for the Ordinance) demonstrates. Adding subsection B.7 would have
4 been a meaningless act if the Zoning Map provided certainty, and the Hearing Examiner cannot
5 assume that the City Council did a meaningless act. *See JJR Inc. v. City of Seattle*, 126 Wn.2d 1,
6 10, 891 P.2d 720 (1995) (“When interpreting statutes, the court must assume that the Legislature
7 does not engage in meaningless acts.”).

8 The City includes disclaimers on both the Official Zoning Map and in its GIS system, and
9 the evidence at the hearing demonstrates that both disclaimers are appropriate, just as both are
10 inconsistent with the Interpretation.

11 **F. The first Interpretation admits what the Director was attempting to do: act in an**
12 ***ultra vires* manner by amending the code.**

13 As discussed in Section II.B above, the December Interpretation stated that its subject
14 was “Amending the definition of a Zoning Map Interpretation.” The March Interpretation
15 changes this subject line, but the evidence presented at the hearing and summarized above
16 demonstrates that is exactly what both Interpretations attempt to do.

17 The code says that “Interpretation of the Official Zoning Map shall be as set forth in
18 RZC 21.04.020.B,” and Toll’s appeal simply asks that the Map be interpreted as set forth in
19 subsection B.7, which addresses the actual facts on the Toll property: a lot that is split-zoned
20 between the R-1 and R-4 zones, with critical areas on a portion of the property. In order to avoid
21 applying RZC 21.04.020.B.7 to the Toll property, the Interpretation amends the code by
22 transforming it into a digital code that includes a digital zoning map that purports to provide
23 survey-grade certainty. The evidence presented at the hearing, and the law summarized in this
24 brief, together demonstrate that such a code and such certainty do not exist, as the City Council
25 itself recognized when the Council enacted subsection B.7 at the same time that it enacted the
26 Official Zoning Map.

1 As stated in RZC 21.76.070.D.1 (and in many Washington cases addressing delegations
2 of legislative authority), "Administrative interpretation shall not be used to amend or change the
3 code." Ms. Anderson, as the former Director, did not have the authority to amend the code, and
4 both her Interpretations are *ultra vires* as well as clearly erroneous, and not supported by a
5 preponderance of the evidence.

6 III. CONCLUSION

7 Toll requests that the Hearing Examiner invalidate both Interpretations; find and
8 conclude that the Official Zoning Map does not provide certainty in the circumstances addressed
9 in RZC 21.04.020.B; and remand this matter with directions that the Department apply
10 subsection B.7 to the Toll property.

11 DATED this 2nd day of March, 2018.

12 FOSTER PEPPER PLLC

13
14 By: 

15 Patrick J. Schneider, WSBA #11957
16 1111 Third Avenue, Suite 3000
17 Seattle, WA 98101
18 (206) 447-4400
19 schnp@foster.com

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I filed a copy of Toll's Post-Hearing Brief with the City of
3 Redmond Hearing Examiner.

4 I also certify that on this date, a copy of the same document was sent to the following
5 parties listed below in the manner indicated:

6 Cheryl D. Xanthos [] Via Facsimile
7 Clerk to the Hearing Examiner [] Via Legal Messenger
8 P.O. Box 97010 [X] Via Efile/Email
9 M/S 3NFN [] Via US Mail, postage prepaid
10 Redmond, WA 98073
11 cdxanthos@redmond.gov

12 Jim Haney, City Attorney [] Via Facsimile
13 Ogden Murphy Wallace [] Via Legal Messenger
14 901 Fifth Avenue, Suite 3500 [X] Via Email (per agreement)
15 Seattle, WA 98164 [] Via US Mail, postage prepaid
16 jhaney@omwlaw.com

17 Dated this 2nd day of April, 2018, at Seattle, Washington.

18 

19 _____
20 Brenda Bole