

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 RESPONSE TO THE CITY'S
POST-HEARING BRIEF

I. INTRODUCTION

Appellant Toll WA LP ("Toll") submits this response to the City's Post-Hearing Brief relating to two Administrative Interpretations issued by the former Director of the Planning Department.

Toll incorporates herein the introductory summary and arguments made in Toll's Post-Hearing Brief.¹

II. RESPONSE TO STATEMENT OF FACTS

The Department's argumentative statement of the facts is not accurate, and the arguments embedded within it are not correct, as set out in the Argument section below. Among the factual errors in the brief is the statement that Toll proposes development of a 28-unit subdivision when

¹ Toll erroneously referenced the date of the second Interpretation issued by the Director. It was issued on March 9, 2018 and not February 9.

1 Toll in fact proposes a 28-unit cottage condominium that will be developed under the City's site
2 plan approval process.

3 The statement of facts implies that Toll is making a density grab, asserting that
4 application of RZC 21.04.020.B.7 would shift a significant portion of the Toll Property from
5 what the City contends is the R-1 zone, to the R-4 zone. However, as depicted on Exhibit 5,
6 there are extensive critical areas in the western and southern portion of the site, in the area that
7 City argues is R-4, that would shift to the R-1 zone with the application of RZC 21.04.020.B.7.
8 Additionally, determining allowable density for Toll's proposal is more complicated than
9 calculating theoretical maximum density. There are limiting factors on maximum allowable
10 density under the cottage code that include unit size limitations and bulk requirements, and there
11 is no basis in the record for calculating the allowable density for Toll's proposal.

12 The bulk of the Department's statement of facts focuses on the Department's argument
13 that the GIS-generated R-1/R-4 zoning boundary on the Toll Property, as set out in the letter
14 accompanying the March 3, 2018 Administrative Interpretation, supplants the clear and cogent
15 language of the City's Code.

16 III. ARGUMENT

17 A. The Department's statement of facts ignores contrary evidence presented at the 18 hearing

19 The Department's statement of the facts summarizes the evidence presented by the
20 Department about the "accuracy" of its GIS system, but mostly ignores the evidence discussed in
21 Toll's Post-Hearing Brief regarding the *uncertainty* of the zoning boundary: not only the
22 evidence presented by Shane Barnes and Savanna Nagorski, but also by the City's GIS database
23 supervisor, Ms. Melissa Brady. Her own testimony as set forth on pages 6 and 7 of Toll's brief,
24 e.g., "As far as the uncertainty, I'm relying on the Planning Department to give us accurate
25 information to put into the GIS", makes it clear that the R-1/R-4 boundary line the Department is
26 relying on was in no way endorsed as being certain by the City's own GIS department.

1 The GIS system's depiction of the zoning boundary at issue in this appeal depends upon
2 information provided by the Planning Department, and as a matter of law, pursuant to the
3 statutes and ordinances cited in Toll's Post-Hearing Brief, the Department can only have derived
4 that information from the paper map approved by the Council in Ordinance 2584. Ordinance
5 2584 is the same Ordinance in which the Council enacted RZC 21.04.010.B.7, which tells the
6 Department how to resolve the uncertainties created by the paper zoning map when lots are split-
7 zoned between R-4 and R-1 zones and contain critical areas.

8 It does not matter that the paper map approved by the Council may have been generated
9 by the GIS system: that asserted fact simply means that an earlier paper map was imported into
10 the GIS system, and the accuracy of the GIS system in representing the data entered into it does
11 not increase the certainty of a line drawn on a paper map that lacks a scale and coordinates.

12 **1. The Department cannot disclaim the City's disclaimers**

13 The City's Post-Hearing Brief, page 4, acknowledges the disclaimers on both the zoning
14 map and within the GIS system, but asks the Hearing Examiner to dismiss these disclaimers on
15 the grounds that they are intended to protect the City from lawsuits. The motivation for the
16 disclaimers is irrelevant to the admissions they contain.

17 The disclaimer for the GIS system, which the Interpretation relies upon for "certainty,"
18 states that the GIS system is derived from public records that are constantly changing and do not
19 replace a site survey; states that its data and records are not warranted for accuracy; and states
20 that the files are not a legal representation of the features the GIS system represents. Yet this is
21 the very system that the Director relies upon to provide certainty.

22 The admissions in the GIS system's disclaimer are more than sufficient to invalidate the
23 Interpretation. The City may *maintain* its code and zoning map in electronic databases, but that
24 does not mean that the City Council has adopted a digital code (whatever that means) or a digital
25 zoning map (whatever that means). The City's chosen storage medium cannot increase the
26 certainty of the paper map adopted by the City Council, and the Department's own actions, as

1 described by Aaron Hollingbery, help demonstrate that it is the paper map –Exhibit A-1 – that is
2 the Official Zoning Map.

SPEAKER	NARRATIVE
BEGINNING	17:14
PAT SCHNEIDER	So Mr. Hollingbery, let's talk about Exhibit A-3 for a moment. Actually before we do that, could you locate the property that we're talking about on the City's official zoning map? And you're outlining it in red.
AARON HOLLINGBERY	Correct. It's outlined in red.
SCHNEIDER	Okay. And I referred to this as the City's official zoning map. Can you explain why you believe that to be the case and how you acquired this map?
HOLLINGBERY	We submitted a request to the City for a copy of the City's official zoning map and history of the official zoning maps of the City and this was one of the hard copies that was given to us. And this is the one that had the most current date. It's dated October of 2015.

11 **B. The Department's arguments are without merit.**

12 **1. The Department's Interpretation is not entitled to substantial weight**

13 Remarkably, in its first argument the Department asserts that the Hearing Examiner
14 should give deference to the Interpretation on the grounds that the interpretation is "of long-
15 standing, rather than a by-product of litigation," citing *Ellensburg Cement Prods., Inc. v. Kittitas*
16 *Cty.*, 179 Wn.2d 737, ¶ 35, 317 P.3d 1037, 1046 (2014). The Department ignores the fact that
17 the Interpretation at issue is directly contrary to the Department's interpretation of the same
18 provision of the code less than three years ago when the Department approved the nearby plat of
19 Terrene at 132nd Ave NE (Exhibit A-4). And the case cited by the Department, *Id.*, in fact
20 supports Toll's appeal because paragraph 35 cited by the City is part of a discussion that cites
21 with approval the cases cited by Toll in its Post-Hearing Brief: *Sleasman* and *Cowiche*
22 *Conservancy*.

23
24 The statute does not require a court to show complete deference, but rather, "such
25 deference as is due." *Id.* Thus, deference is not always due—in fact, even a local
26 entity's interpretation of an ambiguous local ordinance may be rejected. *See*
Sleasman v. City of Lacey, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). Instead, the
interpreting local entity "bears the burden to show its interpretation was a matter
of preexisting policy." *Id.* at 647 (citing *Cowiche Conservancy v. Bosley*, 118

1 Wn.2d 801, 815, 828 P.2d 549 (1992)). No deference is due a local entity's
2 interpretation that "was not part of a pattern of past enforcement, but a by-product
3 of current litigation." *Id.* at 646. A local entity's interpretation need not "be
4 memorialized as a formal rule," but the entity must "prove an established practice
5 of enforcement." *Id.* (citing *Cowiche*, 118 Wn.2d at 815).

6 ¶35 Here, Kittitas's interpretation of its zoning ordinance was a by-product of the
7 current litigation. Neither Gibson nor Kittitas has attempted to show that there
8 was any preexisting policy supporting the county's interpretation of those zoning
9 regulations. The transcript of the hearing shows the contrary—that the
10 interpretation was entirely ad hoc. For example, one board member stated, "Well,
11 we can't go back to the county commissioners to get their opinion on this, you
12 know?" CP at 73. Another said, "Well, it's also difficult because this Board is not
13 the Board that created the ordinance." CP at 74. One board member even
14 admitted, regarding the proper interpretation of the ordinance, "I'm confused." CP
15 at 75. The transcript thus reflects the absence of any preexisting policy regarding
16 interpretation of the zoning ordinance at issue. There is no deference due to the
17 hearing board's interpretation in this case.

18 *Ellensburg Cement Prods., Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 753-54, 317 P.3d 1037, 1046
19 (2014). The facts demonstrate that Interpretation is not a matter of pre-existing policy, and in
20 fact is a departure from prior practice. The Interpretation would not be deserving of deference
21 even if it were consistent with the City's code.

22 **2. The Department is usurping the Council's authority by acting as if the GIS
23 system is the official zoning map**

24 In its second argument the Department again selectively refers to the evidence regarding
25 the accuracy of the GIS system; again ignores the evidence about the uncertainty of the zoning
26 boundary; and again discounts the City's own disclaimer within its GIS system. These
arguments are addressed above and in Toll's Post-Hearing Brief, and Toll will not repeat its
arguments here. This section of the Department's argument, however, includes two remarkable
assertions that require further response.

On page 7, the Department states (emphasis in original):

... the City's testimony from Steve Fischer regarding the City's longstanding
interpretation of the GIS maps as the "official" zoning maps, and the Hearing
Examiner should conclude that the GIS zoning boundary layer *is* an official
zoning map for all intents and purposes.

1 The Department argues, in effect, that it has the authority to make the GIS system the
2 City's official zoning map by its practices even though the City Council has never adopted an
3 ordinance making the GIS system the City's official zoning map, and has never delegated to the
4 Department the authority to vary from the adopted zoning map except in the ordinances codified
5 in RZC 21.04.010.B, which is the code section that the Department's Interpretation declines to
6 apply.

7 The Department does not recognize the irony of its position. The City Council's only
8 delegation of authority to the Department to vary from the boundaries drawn on the paper zoning
9 map is the authority delegated by RZC 21.04.010.B to determine the zone line in the event of
10 uncertainty – the very code section that the Director's Interpretation says it will not use because
11 the Department uses the digital map in the GIS system. The lack of an ordinance supporting the
12 Department's position simply confirms that the subject line of the December 13, 2017
13 Interpretation is accurate: the Interpretation is "amending" the code and thus usurping the
14 Council's legislative authority. The Department can only exercise the authority that the City
15 Council has delegated to it, and the City's second Argument demonstrates that the Interpretation
16 is an *ultra vires* act.

17 The Department's second Argument then concludes with another remarkable assertion
18 that begins at the bottom of page 7:

19 Furthermore, the PDF map that Toll concedes is the "official" map contains a
20 similar legal disclaimer. If a legal disclaimer makes a zoning map unauthoritative
or unreliable, then the City is without any binding zoning map at all.

21 The City Council adopted the code section at issue in this appeal, RZC 21.04.010.B.7,
22 precisely because of the uncertainty created by the City's Official Zoning Map, which the map
23 itself appropriately acknowledges. There is nothing unauthoritative about a paper zoning map,
24 but there is uncertainty. A paper map is the kind of map the law requires the City to adopt, as
25 discussed in Toll's Post-Hearing Brief, and the disclaimer on the map is consistent with the code
26 section in which the Council delegates to the Department the standards to use in resolving the

1 uncertainty created by the map. The map, the code section, and Toll's arguments are all
2 consistent with one another: it is the Department's Interpretation that cannot be reconciled with
3 either the official zoning map or RZC 21.04.010.B.7.

4 **3. The accuracy of the GIS system is irrelevant to the legal issues before the**
5 **Hearing Examiner**

6 The Department's third argument is again about the asserted "accuracy" of the GIS
7 system, but as discussed above and in Toll's Post-Hearing Brief, such accuracy cannot diminish
8 the uncertainty created by a zoning line drawn on a paper zoning map: digitizing a paper map
9 does not make the information on the paper map any more certain. And more fundamentally,
10 digital accuracy is not a substitute for legislation, and the Department cannot use the GIS system
11 as the official zoning map when the City Council has never passed an ordinance authorizing the
12 Department to do so.

13 An electronic database of "public records that are constantly changing," as stated in the
14 GIS disclaimer, and a database that is updated often, even weekly, with information that the City
15 Council never sees or approves, as Ms. Brady testified, is not and cannot be an official zoning
16 map or a lawfully adopted regulation. The former Director disagreed with the Council regarding
17 uncertainty, but she lacked the authority to do so, just as she lacked the authority to use the GIS
18 system to displace the official zoning map.

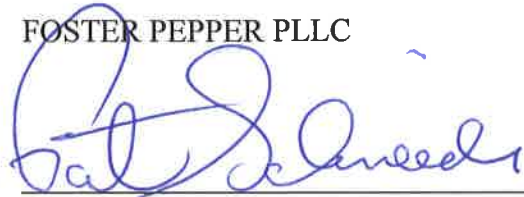
19 **IV. CONCLUSION**

20 For the reasons set forth above and in Toll's earlier Post-Hearing Brief, Toll requests that
21 the Hearing Examiner find and conclude that the Official Zoning Map does not provide certainty
22 in the circumstances addressed in RZC 21.04.020.B, and remand this matter to the Department
23 with directions to apply subsection B.7 to the Toll property.

1 DATED this 9th day of April, 2018.

2 FOSTER PEPPER PLLC

3
4 By:



5 Patrick J. Schneider, WSBA #11957
6 1111 Third Avenue, Suite 3000
7 Seattle, WA 98101
8 (206) 447-4400
9 pat.schneider@foster.com

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I filed a copy of Toll’s Response to the City’s Post-Hearing
3 Brief with the City of 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 [X] Via Hand Delivery (2 copies)
7 Clerk to the Hearing Examiner [] Via Legal Messenger
15670 NE 85th Street [X] Via Efile/Email
8 Redmond, WA 98073 [] Via US Mail, postage prepaid
cdxanthos@redmond.gov

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

12
13 Dated this 9th day of April, 2018, at Seattle, Washington.

14 

15 Brenda Bole