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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

NO. HEA-2018-02
ROSE HILL COTTAGES

CITY’S REPLY TO APPELLANT’S
POST-HEARING BRIEF

I. INTRODUCTION

The central question in this case is whether the City can supplement its official zoning maps, which are PDF files adopted by reference in the City Code, with the GIS data from which those files were generated. The former Planning Director, relying on her expertise in GIS mapping, in the Code’s legislative history, and in the practicalities of efficient administration, determined the answer was “yes.” Toll’s central argument against this interpretation—that the GIS layer is unreliable because it was created by importing paper maps into the GIS system—is factually unsupported: while the GIS layer was *initially* created by importing pre-2011 paper zoning maps into the GIS system, the City Council later adopted PDF maps generated from the GIS layer, thereby ratifying any inaccuracies in the initial creation of the GIS maps. Toll’s arguments simply ignore this development and attempt to distract with irrelevant points. Toll has failed to provide any reason for the Hearing Examiner to override the deference due to the City’s decision in this appeal, and the Hearing Examiner should affirm it.

1 **II. SUPPLEMENTAL STATEMENT OF FACTS**

2 The City hereby incorporates the statement of facts in its April 2, 2018 Post-Hearing Brief.
3 Because of continued confusion in Toll’s briefing regarding the City’s post-2011 adoption of
4 consolidated zoning maps, the City offers this supplemental statement of facts.

5 In the early decades of City zoning regulation, the City would adopt zoning boundaries by
6 attaching a paper map (or, in some cases, legal description) of the adopted zone to an enacting
7 ordinance. *See, e.g.*, Ord. 887 (1979) (legal description); Ord. 1468 (1989) (map). Before the
8 1990s, City staff would consolidate these formally adopted zones into a single paper “zoning map”
9 maintained at the City Planning Department.

10 In the 1990s and early 2000s, the City undertook the ambitious project of entering all
11 adopted zones (along with many other pieces of geographic data) into a GIS system for the City.
12 The process of importing adopted zones from old paper maps posed occasional interpretive
13 problems for City GIS staff—for instance, the supervisor of the City’s GIS system, Melissa Brady,
14 testified that, where a zoning boundary did not follow parcel lines, she would defer to City
15 Planning Staff to help chart the course of the zoning boundary. Because of these interpretative
16 problems, Ms. Brady could not vouch for the accuracy of the GIS system in representing old zoning
17 boundary maps.

18 In 2009, the City undertook a recodification of the City’s “Planning and Community
19 Development Guide,” then Title 20 of the Redmond Municipal Code, as a separate zoning code.
20 *See Ex. A-13 (Ord. 2584) at 1–2.* In 2011, the City Council adopted this separate code via
21 Ordinance 2584. Ordinance 2584 did not attach a printed copy of the new zoning code to the
22 ordinance. Rather, it incorporated and adopted the Code as “Exhibit 1” to the Ordinance—Exhibit
23 1 contained only a URL link to the website where the new zoning code was hosted.

24 If one types this URL from Exhibit 1 to Ordinance 2584 into a browser today, it takes the
25 user to the current website of the Redmond Zoning Code. It is therefore not possible to tell with
26 certainty what provisions the Zoning Code contained when it was adopted by Ordinance 2854.

1 However, the Redmond Zoning Code as it stands today contains a section—RZC 21.04.020.A—
2 establishing an official zoning map and incorporating the official zoning maps by reference. This
3 reference appears as two links in a blue box below the text of RZC 21.04.020.A. If the user clicks
4 these links, the browser takes the user to two PDF documents, hosted online, that depict
5 consolidated zoning in the City of Redmond. These maps are dated May 18, 2015.

6 In preparation for the hearing in this matter, Toll submitted a public records request for the
7 “official City zoning map.” Toll received a map almost identical to the maps referenced in RZC
8 21.04.020.A, but with a more recent revision date of October 17, 2015. Toll submitted that map
9 in this proceeding as Exhibit A-1 and has consistently referred to it as the “official zoning map.”
10 Aaron Hollingberry, Toll’s representative, testified that this map does not differ from the maps
11 linked in the Zoning Code in any meaningful way.

12 Toll’s brief occasionally states that the City’s official map is the “paper map adopted by
13 Ordinance 2854.” *See* Appellant’s Post-Hr’g Br. (“Br.”) at 5. There was no paper map adopted
14 by reference in Ordinance 2584, nor is it clear what ordinance, if any, adopted Toll’s proffered
15 “official” map. However, because Toll does not appear to challenge the validity of RZC
16 21.04.020.A, adopting the May 2015 maps as the official City zoning maps, and because Toll does
17 not claim these maps differ in any material way from is proffered “official” zoning map, the City
18 assumes that Toll accepts the May 2015 and October 2017 PDF maps (and their paper printouts)
19 as “official” zoning maps. In this brief, the City will refer to all three maps, collectively, as the
20 City’s official PDF maps.¹

21 Melissa Brady testified that the City’s official PDF maps were generated from the GIS
22 system—in other words, they are a static representation of the zoning boundaries as mapped and
23 depicted in the City’s GIS zoning boundary layer. The official PDF maps therefore perfectly

24 ¹ Toll occasionally refers to these as “paper” maps. The Hearing Examiner may take judicial notice of the fact that
25 there is no material distinction between a PDF file and a paper printout of that file, since the purpose of PDF file is to
26 be a static, un-editable visual representation of a document (in other words, the nearest thing to paper that a digital file
affords). The City chooses to refer to these maps as PDF maps because the Code links to PDF files (rather than
presenting paper maps). The distinction is not material, however, given the properties of a PDF file.

1 mirror the GIS system’s zoning boundary layer. The duly adopted official PDF maps were
2 therefore not, as Toll claims “imported” into the GIS system—to the contrary, the PDF maps were
3 *exported from* the GIS system.

4 III. ARGUMENT

5 A. The Director’s interpretation was a matter of policy and is entitled to 6 deference.

7 In Director Anderson’s administrative interpretations, the Director employed her
8 considerable expertise in GIS mapping, in the Code’s legislative history, and in the practicalities
9 of efficient planning administration to determine that the City could rely on the GIS data from
10 which the official PDF zoning maps were generated to add detail and precision to the City’s
11 application of zoning boundaries. From this principle, she reached the inevitable conclusion that
12 using GIS “significantly reduces the likelihood” that a zoning boundary will be uncertain. Under
13 basic administrative deference principles, this is precisely the kind of agency determination that is
14 entitled to deference because it is a statement of agency policy based on agency expertise.

15 In Toll’s brief, Toll argues that a contrary decision by the City two-and-a-half years ago on
16 a different property means the Department’s interpretation is not really a matter of “policy,” and
17 not entitled to deference. This argument warps deference case law. It is true that courts defer to
18 agency policies but owe no deference to agencies’ litigation positions. *See Cowiche Canyon*
19 *Conserv. v. Bosely*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). It is also true that agencies will
20 sometimes attempt to claim deference for mere *actions*, rather than policies, by “bootstrap[ing]
21 legal argument into the place of an agency interpretation.” *See Cowiche Canyon v. Bosely*, 118
22 Wn.2d 801, 815, 828 P.2d 549 (1992). Therefore, when an agency claims that its litigation position
23 is a matter of policy, but there are no policy documents pre-dating litigation, adjudicators require
24 a “pattern of past enforcement” to demonstrate that the agency position is truly a matter of policy.
25 *See Sleasman v. City of Lacey*, 159 Wn.2d 639, ¶ 44, 151 P.3d 990 (2007) (holding that an agency’s
26 interpretations of an undefined term advanced in an enforcement action were not a “policy”
deserving deference because they were not supported by a pattern of similar enforcement actions).

1 That is not what happened here. Here, Director Anderson issued a formal interpretation
2 announcing the Department’s interpretation of the word “certainty” in RZC 21.04.020.B. This
3 document, while prompted by Toll’s application, was meant to guide the entire Department and
4 apply to all applications going forward. This interpretation was therefore clearly a “policy,” and
5 the fact that it differs from earlier policy does not mean it gets no deference. *See Chevron, U.S.A.,*
6 *Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984). (“The fact that the agency has
7 from time to time changed its interpretation of the term ‘source’ does not, as respondents argue,
8 lead us to conclude that no deference should be accorded to the agency’s interpretation of the
9 statute. An initial agency interpretation is not instantly carved in stone.”). While the long standing
10 of an agency’s interpretation can increase the degree of deference given, it is not a prerequisite to
11 making an interpretation a “policy” entitled to deference.

12 **B. Toll’s “digital zoning code” argument is a distraction; the parties agree the**
13 **City’s PDF zoning maps were validly adopted, and the question is whether**
14 **the City may use the data upon which the maps are based.**

15 Toll argues that “[a]s a matter of law the City does not have a digital zoning code.” Br. at
16 3. The thrust of this argument is that the City has not adopted the GIS layer as an official zoning
17 map. But the City does not claim that it has. What the City claims, and what Toll does not appear
18 to dispute, is that the City has validly adopted zoning maps through section 21.04.020.A of its
19 Code and that these maps are perfect representations of the GIS data from which they were
20 generated. Despite Toll’s “digital code” argument, they do not appear to argue that the Code or
21 the official maps are invalid. The Hearing Examiner therefore does not need to address Toll’s
22 “digital zoning code” argument to resolve this appeal.²

23 **C. There is no question that the text of RZC 21.04.020.B governs this appeal—**
24 **the question is what that text means.**

25 Toll next points to RZC 21.76.070.D.4.c, which provides, “In the case of conflicts between
26 the text, maps and charts of the RZC the text shall govern.” *See* RZC 21.76.070.D.4.c. It argues

² Should the Hearing Examiner be inclined to address this argument, the City notes that RCW 35A.12.150 simply requires the City Clerk to maintain a “properly indexed book” of all ordinances and resolutions adopted by the City Council. It does not prohibit cities from adopting provisions via web link, only requires them to print out the adopted text.

1 that there is a “conflict”³ between the zoning map and the text of the R-1/R-4 interpretive rule,
2 and that the R-1/R-4 rule therefore “governs” this appeal. But what Toll really means is that the
3 R-1/R-4 rule should apply across the board, regardless of whether the relevant boundary is
4 uncertain. Thus, Toll is not asking for the text of RZC 21.02.040.B to “govern,” but for the Hearing
5 Examiner to ignore part of that text. This violates basic principles of statutory construction, and
6 the Hearing Examiner should reject this argument.

7 **D. Toll’s attempts to undermine Melissa Brady’s clear testimony that the GIS
8 layer is accurate are unconvincing.**

9 Toll attempts to confuse the clear testimony of the City’s GIS witness that the GIS system
10 accurately portrays the City’s official PDF zoning maps by (1) redefining the word “accuracy,”
11 (2) conflating the GIS layer’s conformity with pre-2011 maps to its conformity with post-2011
12 zoning maps; (3) conflating “certainty” with “surveyability”; and (4) arguing that the zoning
13 boundary at issue is really an arc, and that the PDF maps are therefore uncertain; and (5) asserting
14 a legislative history argument based on an over-generalization.

15 **1. “Accuracy” versus “certainty.”**

16 At hearing, Melissa Brady testified that that the GIS layer accurately represents the City’s
17 official PDF zoning maps because those zoning maps were generated from the GIS layer. Toll
18 attempts to undermine this testimony by redefining the word “accuracy.” In Toll’s definition,
19 “accuracy” is the extent to which data “reflect[s] the data incorporated into the system” (as
20 distinguished from “certainty,” which, Toll argues, means the conformity of the data to the source
21 material). *See* Br. at 6.

22 Toll’s redefinitions are a perversion of the distinction between “accuracy” and “precision”
23 commonly noted in scientific texts. In the scientific community, the term “accuracy” means
24 “degree of conformity of a measure to a standard or true value,” while “precision” means “the
25 degree of refinement with which an operation is performed or measurement stated.” *See* Merriam-

26 ³ It is illogical to say there is a “conflict” in this situation. Section 070.D.4.c is meant to address conflicts between
substantive textual and graphic standards. To try to apply this rule to an interpretive standard is illogical, since the
interpretive rules in RZC 21.04.020.B are meaningless if isolated from the maps they refer to.

1 Webster's Dictionary, *Accuracy, Precision* <https://www.merriam-webster.com/dictionary>.⁴ Toll
2 attempts to borrow this distinction, except its version of "accuracy" really means "precision,"
3 while its version of "certainty" really means "accuracy." In reality, accuracy and certainty are
4 synonymous—they mean the conformity of a measurement to the truth. Here, the "truth" is the
5 boundaries duly adopted by City Council on the City's official zoning maps. Ms. Brady testified
6 that the GIS layer represents these boundaries with *perfect* accuracy (in the correct sense of the
7 word) because the PDF maps were generated from the GIS layer itself.

8 **2. Alleged "importation" of PDF zoning maps.**

9 Toll next points to a portion of Ms. Brady's cross-examination testimony regarding the
10 City's *initial* importation of zoning boundaries into the GIS layer as evidence that the GIS layer is
11 not accurate. Ms. Brady testified that the City first created its GIS zoning boundary layer in the
12 late 1990s and early 2000s by importing the paper maps formally adopted by City ordinance into
13 the GIS system. She testified that this importation process involved certain interpretive challenges
14 (where, for instance a zoning boundary split a parcel), and that GIS staff relied on the City Planning
15 Department to make these judgments. Ms. Brady therefore could not testify to the accuracy of this
16 initial importation. Toll attempts to use this testimony to show that the GIS layer is not an accurate
17 depiction of the current official PDF maps. This argument completely ignores the key fact of this
18 case: that the City Council later adopted zoning maps generated from the GIS layer, and the duly
19 adopted zoning maps therefore perfectly conform to the GIS layer. Through this adoption, the
20 City Council effectively ratified any inaccuracies in the initial importation. By conflating pre- and
21 post-2011 accuracy of the GIS layer, Toll fails to address the heart of the City's argument.⁵

22
23 ⁴ Merriam-Webster's dictionary also observes this distinction in its usage notes: "Many of us often use *precision* and
24 *accuracy* as synonyms, but not scientists and engineers. For them, accuracy describes a measurement—that is, how
close it is to the truth. But precision describes a measurement system—that is, how good it is at giving the same result
every time it measures the same thing." See Merriam-Webster's Dictionary, *Precision*.

25 ⁵ Toll's conflation may be due to a simple misapprehension of the facts—Toll continues to assert, despite clear
26 testimony to the contrary, that the GIS layer was created by "importation" of the current paper zoning maps into the
GIS system. To the contrary, the official zoning maps were created by exporting the GIS data to static file.

1 **3. “Certainty” versus “surveyability.”**

2 Toll points to testimony from its surveyor, Shane Barnes, saying that Mr. Barnes would
3 not rely on GIS data in surveying because GIS data is not accurate because it is simply a
4 “warehouse” of information. As recognized in the disclaimer on the City’s GIS maps, it is
5 generally true that most information compiled in the City’s GIS system is an amalgamation of
6 other public records, pieced together into a single mapping system. But the zoning boundary layer
7 of the GIS is different because it is the only GIS layer specifically blessed by the City Council.
8 Unlike the other GIS layers, therefore, the zoning boundary is a perfect representation of legally
9 operative boundaries. Furthermore, this testimony is not determinative because “surveyability”
10 should not be the standard for “certainty” under RZC 21.04.020.B.⁶

11 **4. The “arc” of the R-1/R-4 Boundary.**

12 In the City’s cross-examination of Mr. Barnes at hearing, the City demonstrated that the
13 PDF zoning maps can provide certainty even without GIS supplementation because the zoning
14 boundary passes through more than one surveyable point, and one can simply connect these points
15 with a straight line. Therefore, even if the City may not use its GIS data to supplement the official
16 PDF maps, the zoning boundary on the Willows parcel is still “certain,” and the R-1/R-4 rule does
17 not apply.

18 In section E of its brief, Toll attempts to rebut this argument by showing that the boundary
19 on the official PDF maps is really an arc, meaning, Toll argues, that one cannot accurately chart
20 the boundary by connecting two surveyable points. But Toll’s basis for this argument is testimony
21 from their GIS expert explaining that *the GIS data* reveals this PDF boundary is really an arc. This
22 argument attempts to eat cake and have it too. If, as Toll argues, the GIS data is not a valid
23 representation of the PDF boundaries, then the fact that the GIS data shows the boundary as an arc
24 is meaningless. Conversely, if, as the City claims, the GIS data is a reliable supplement to the PDF

25 ⁶ The fact that the City requires surveys for plats and other land use approvals, as discussed in Toll’s questioning of
26 Mr. Barnes, does not alter this. Mr. Fischer testified that the Planning Department would generally require a survey
for these land use approvals, but not that they would require the *zoning boundary* to be surveyed.

1 boundaries, one can use the data to determine the precise coordinates along any point in the
2 boundary with complete accuracy, whether the boundary is an arc or not. Either way, the boundary
3 on the Toll property is certain.

4 **5. Legislative history.**

5 Finally, Toll argues that the Council adopted the R-1/R-4 rule at the same time it adopted
6 the official zoning map and that, if the zoning map provides certainty, the addition of the R-1/R-4
7 rule would have been meaningless. But the City has never argued that the official PDF zoning
8 maps, as supplemented by GIS, provides certainty *in every case*. See Ex. C-2, Dec. 13, 2017
9 Administrative Interpretation, at 1 (“[GIS] *significantly reduces the likelihood* that uncertainty as
10 to the location of zoning boundaries exists.” (emphasis added)). Even with the GIS data, a zoning
11 boundary could still be uncertain—for instance, if GIS coordinate data conflicted with point-to-
12 point measurement data. In these situations, the R-1/R-4 rule would still be operative.

13 Toll’s argument, on the other hand, would render Code text meaningless. Accepting Toll’s
14 arguments renders *every* zoning boundary in the City uncertain because they argue the only valid
15 source of zoning boundary information is the official PDF zoning maps, and those maps are
16 unreliable. If this is so, the opening paragraph of RZC 21.04.020.B, which provides that the rules
17 only apply “when uncertainty . . . exists,” has no purpose. As Toll points, out the Hearing
18 Examiner should avoid interpretations that render code text meaningless. See Br. at 10 (citing *JRR*
19 *Inc. v. City of Seattle*, 126 Wn.2d 1, 10, 891 P.2d 720 (1995)).

20 **E. The Director’s decision was not *ultra vires*, but a valid exercise of her
interpretive powers.**

21 Finally, Toll argues that the Director’s initial title for her December 13, 2017 administrative
22 interpretation—“Amending the definition of a Zoning Map Interpretation”—was a Freudian slip
23 that revealed the Director’s true intent to act *ultra vires* and amend the Code. Whatever nefarious
24 intent Toll wishes to attribute to Director Anderson’s interpretation is irrelevant—that document
25 was limited to an interpretation of a Code provision under the Director’s clearly defined
26

1 interpretive powers. The caption of the document does not change this and should not render the
2 decision invalid.

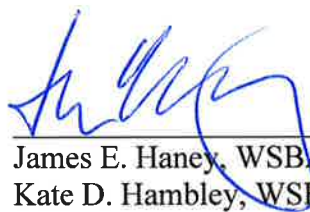
3 **IV. CONCLUSION**

4 In summary, Toll refuses to grapple with the core issue in this case: whether the City may
5 supplement its duly adopted PDF zoning maps with the underlying data those maps were generated
6 from. The former Department has said “yes.” This is based on the Department’s unique expertise
7 with the history of Redmond Zoning Code, the GIS mapping system, and the practical realities of
8 administering a planning department. These are precisely the kind of judgments within the
9 Department’s expertise, and Toll has offered no persuasive reason for overriding the Department’s
10 judgment on this issue. The Hearing Examiner should therefore dismiss this appeal and affirm the
11 City’s administrative interpretation.

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16 DATED this 9th day of April, 2018.

17 OGDEN MURPHY WALLACE, PLLC

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19
20 By



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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:


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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 9th day of April, 2018.

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Charolette Mace
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