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2 **BEFORE THE HEARING EXAMINER**
3 **FOR THE CITY OF REDMOND**

4 In the Matter of the Appeal of
5 Barry Schnell,
6 Of an Administrative Decision

NO. HEA-2018-03
NO. LAND-2013-01720
Rose Hill Cottages

7 **MOTION AND PROPOSED ORDER**
8 **OF SUMMARY DISMISSAL**

9 **I. MOTION**

10 Applicant Wilmoor Development Corporation (“Wilmoor”) moves for an Order of
11 Summary Dismissal of Appellant Schnell’s Appeal for failure to state a claim for which the
12 Examiner has jurisdiction to grant relief. Appellant Schnell attempts to recast his appeal of this
13 Examiner’s decision of March 20, 2018 (“HE Decision”)¹ as an appeal of the Technical
14 Committee Decision made on September 21, 2017 (“TC Decision”).² This Examiner may not
15 hear appeals of his own decisions; those must be heard by the Superior Court pursuant to
16 Redmond Zoning Code (“RZC”) 21.76.050 and the Land Use Petition Act (“LUPA”).³ Even
17 if this action is determined to be an appeal of the TC Decision rather than the HE Decision, the
18 appeal period for the TC Decision ran long ago. As such, the Examiner does not have
19 jurisdiction to hear this matter, and must dismiss it.
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24 ¹*In the Matter of Appeal of Greg Wilson, on behalf of Wilmoor Development Corp.*, NO. HEA- 2018-01/LAND-
2013-01720, Findings, Conclusions, and Decision (March 20, 2018) (“HE Decision”).

25 ²Ex. 4 to Appeal.

³RCW Ch. 36.70C.

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II. ANALYSIS

A. Appellant is Appealing the HE Decision, not the TC Decision, and the Appeal Must Be Heard By the Superior Court.

Appellant claims he is appealing the Technical Committee Decision. However, it is clear that he is appealing the HE Decision that reinstated the TC Decision. The Examiner may not hear appeals of his own rulings.

RZC 21.76.050.F.1, 21.76.050.G.1, and Table 21.76.050A, mandate that appeals of hearing examiner decisions on Type I and Type II permits must be appealed to the Superior Court. In spite of his creative characterization, Appellant is clearly disputing the decision of this Examiner that the TC Decision was a final land use decision.

The HE Decision was the decision that triggered Appellant’s purported injuries. The “Facts Demonstrating that Appellant Will Be Adversely Affected” all stem from the fact that the Examiner ruled that the September 2017 TC Decision was the City’s final land use decision rather than the December 8, 2017 letter from the Technical Committee.⁴ As discussed in more detail below, the appeal period for that TC Decision expired long ago. Appellant may not use the new HE Decision to reinstate the long-ago expired appeal period for the TC Decision.

This is not the first time an appellant has tried to circumvent appeal periods by using later permitting actions to reinstate long-expired appeal deadlines. The Supreme Court has repeatedly rejected such attempts. For example, in *Wenatchee Sportsmen*,⁵ appellants attempted to challenge a rezone decision, made years earlier, through an appeal of the final

⁴ Had the Examiner ruled that the December 8 letter was the City’s final land use decision, Wilmoor would be the “injured party”, and its only recourse would be to appeal the HE Decision to the Superior Court; not to file a second appeal to the Hearing Examiner.

⁵ *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 4 P.3d 123 (2000).

1 plat approval. The Supreme Court held that the rezone could not be “collaterally challenged”
2 by way of an appeal of the plat approval when the period for challenging the initial rezone
3 decision had already passed.⁶

4 The Supreme Court rejected a similar attempt in *Habitat Watch*.⁷ There, the plaintiff
5 attempted to challenge a previously issued special use permit and its extensions through a
6 challenge of a later-issued grading permit. The Supreme Court held,

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8 In *Wenatchee Sportsmen*, this court held that a petitioner could not collaterally
9 challenge a rezone decision by way of its LUPA petition that challenged a plat approval
10 when the period for challenging the initial rezone decision had already passed. The rule
11 applied in *Wenatchee Sportsmen* controls the present issue. In challenging the grading
12 permit, Habitat Watch actually (and exclusively) challenges the validity of the special
13 use permit and its extensions. Because appeal of the special use permit and its
14 extensions are time barred under LUPA, Habitat Watch cannot collaterally attack them
15 through its challenge to the grading permit.⁸

16 Similarly, Appellant Schnell cannot collaterally challenge the September 2017 TC
17 Decision by mischaracterizing his appeal. It is clear that the appeal is actually challenging the
18 HE Decision; in fact, Appellant uses the HE Decision as the decision that started the 14 day
19 appeal clock running.

20 Appeals of hearing examiner decisions must be made to the Superior Court under
21 LUPA and the RZC. The Examiner simply has no authority to hear appeals of his own rulings.
22 Therefore, the Appeal must be dismissed for lack of jurisdiction.

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25 ⁶*Id.*, 141 Wash.2d at 181.

⁷*Habitat Watch v. Skagit Cty.*, 155 Wn.2d 397, 120 P.3d 56 (2005).

⁸*Id.*, 155 Wn.2d at 410–11 (internal citations omitted).

1 B. The Appeal Period for the Technical Committee Decision Ran October 4, 2017.

2 Even if the Examiner determines that this Appeal is truly an appeal of the TC Decision,
3 rather than an Appeal of the HE Decision, the time for appealing the TC Decision expired long
4 ago. RZC 21.76.060.I.2.c provides that such appeals must be filed “no later than 5:00 p.m. on
5 the fourteenth day following the date the decision of the Technical Committee/Design Review
6 Board Decision is issued.” The fourteenth day following the September 20, 2017, TC Decision
7 was October 4, 2017.
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9 As the Examiner noted in the HE Decision, this case closely resembles the *Habitat*
10 *Watch* case discussed above. In that case, plaintiff challenged the county’s extension of an
11 applicant’s permits that had been granted without the required public notice. The Supreme
12 Court held that challenges to extensions of the permits were time-barred even though the last
13 two extensions were granted without the required public notice.⁹
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15 The facts in *Habitat Watch* are nearly identical to the facts in the matter at hand. Here,
16 Appellant is challenging a decision for which the appeal period has expired. The Redmond
17 Zoning Code provides that permit approvals are assumed valid unless overturned by an appeal
18 decision,¹⁰ or properly revoked by the City.¹¹ All Type I and II decisions are final upon
19 expiration of the appeal period, or upon issuance of the Hearing Examiner’s final decision on
20 the appeal.¹²
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22 As the Examiner noted in the HE Decision,
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24 ⁹*Habitat Watch*, 155 Wn.2d at 409.

¹⁰RZC 21.76.060.D.4 and E.4.

25 ¹¹RZC 21.76.090.E.

¹² RZC 21.76.060.D.4 and E.4.

1 the initial decision granting the extension was validly issued and was neither appealed
2 nor revoked. Accordingly, that decision was final. This remains true even if the City
3 erred in failing to provide notice prior to the Technical Committee's first consideration
of the extension request because, in the context of land use decisions in Washington,
"even illegal decisions must be challenged in a timely, appropriate manner."¹³

4 Thus, the TC Decision remains valid, and the appeal period for it has long since expired. The
5 Examiner's ruling follows the "the strong policy supporting administrative finality in land use
6 decisions long recognized by Washington courts."¹⁴ The Examiner's Decision held that,
7 "because [the Technical Committee] decision was neither appealed by any interested party nor
8 properly revoked by the City, the decision was, by default, a final decision of the Technical
9 Committee."¹⁵

11 Appellant implies that an appeal of the TC decision to the Examiner is his only
12 recourse. That is simply not true. He has the right to appeal the HE decision to the Superior
13 Court under LUPA, which he has done.¹⁶ He may not appeal to the Examiner the TC Decision
14 for which the appeal period expired more than six months ago.

16 C. Examiner May Not Hear A Case Over Which He Has No Jurisdiction.

17 A hearing examiner may "exercise only those powers conferred either expressly or by
18 necessary implication."¹⁷ Here, the Examiner's jurisdiction is granted by Redmond Municipal
19 Code 4.28.020, which gives the Examiner the authority to conduct public hearings as described
20 in RZC Chapter 21.76, Review Procedures. RZC 21.76.060 authorizes the Examiner to hear
21 timely appeals of Type I and Type II permits. If the Examiner finds the Appeal is truly an
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23 ¹³He Decision, pp. 17-18, citing *Habitat Watch*.

24 ¹⁴HE Decision p. 17, citing *Skamania County v. Columbia River Gorge Comm 'n*, 144 Wn.2d 30 (2001).

¹⁵*Id.*, p. 18.

25 ¹⁶See *Schnell v. City of Redmond*, King County Superior Court Land Use Petition, No. 18-2-09343-1 SEA (2018).

¹⁷*Chaussee v. Snohomish County Council*, 38 Wash. App. 630, 689 P.2d 1084 (1984) (citing *State v. Munson*,
23 Wash. App. 522, 524, 597 P.2d 440 (1979)).

1 appeal of the TC Decision, it was not timely filed. If the Examiner determines that, in spite of
2 Appellant's characterization, this is actually an appeal of the HE Decision, such an appeal must
3 be made to the Superior Court.¹⁸ In either case, the Examiner does not have jurisdiction to
4 hear the matter.

5 **IV. CONCLUSION**

6 Wilmoor respectfully requests that the Examiner grant Wilmoor's motion for Order of
7 Summary Dismissal for failure to state a claim for which the Examiner has jurisdiction to grant
8 relief.
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10 DATED this 2nd day of May, 2018.

11 **JOHNS MONROE MITSUNAGA &
12 KOLOUŠKOVÁ, PLLC**

13 By 
14 Vicki E. Orrico, WSBA #16849
15 Attorneys for Appellant Greg Wilson, on
16 behalf of Wilmoor Development Corp.
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17 *2356-1 Motion to Dismiss Schnell Appeal 4-26-18*

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¹⁸RZC 21.76.050.

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DECLARATION OF SERVICE

I, Benita K. Lamp, am a citizen of the United States, resident of the State of Washington, and declare under the penalty of perjury under the laws of the State of Washington, that on this date, I caused to be served a true and correct copy of the foregoing MOTION AND PROPOSED ORDER OF SUMMARY DISMISSAL, upon all counsel and parties of record at the address and in the manner listed below.

Cheryl D. Xanthos, Clerk to Hearing Examiner
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Dated this 2nd day of May, 2018, in Bellevue, Washington.



BENITA K. LAMP