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

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

NO. HEA-2018-03
NO. LAND-2013-01720

**APPELLANT’S PRE-HEARING
BRIEF**

This appeal challenges a decision made by the City of Redmond Technical Committee on September 20, 2017, approving a one-year extension of the site plan entitlement for a proposed 24-unit housing development known as Rose Hill Cottages. We refer to that decision as the “September 20 Decision.” A full discussion of the facts and procedural background of this appeal may be found in our response to Wilmoor Development Corporation’s motion to dismiss. *See generally* Response by Appellant Barry Schnell to Wilmoor Development Corporation’s Motion for Summary Dismissal (May 9, 2018).

The substantive validity of the September 20 Decision has never been litigated. Instead, on December 8, 2017, the city issued a new decision denying Wilmoor’s extension request (the “December 8 Decision”). The December 8 Decision effectively rendered any dispute over the substantive validity of the September 20 Decision moot, as it effectively reversed the prior decision.

1 The applicant in this case, Wilmoor, appealed the December 8 Decision to the Hearing
2 Examiner. That appeal—captioned *In the Matter of Appeal of Greg Wilson, on behalf of Wilmoor*
3 *Development Corp.*, No. HEA-2018-01/LAND-2013-01720—was decided on March 20, 2018. We
4 refer that appeal here as the “Wilmoor Appeal.” A copy of the Hearing Examiner’s decision in the
5 Wilmoor Appeal may be found at Exhibit A-19.
6

7 Although Wilmoor’s appeal statement in the Wilmoor Appeal challenged the city’s
8 substantive basis for denying the extension request in the December 8 Decision, that issue was
9 never litigated in the Wilmoor Appeal. Instead, the Hearing Examiner held that the December 8
10 Decision was a procedurally defective attempt to change the outcome of the September 20
11 Decision. Thus, the December 8 Decision was reversed without any analysis of its substantive
12 validity.
13

14 Unlike the Wilmoor Appeal, this appeal directly challenges the substantive validity of the
15 city’s initial decision to grant the extension request in the September 20 Decision. In particular, we
16 do not believe that the extension request satisfies any of the decision criteria at RZC 21.76.090.C.2.
17 That code section provides, in relevant part:

- 18 1. Approval of a Type I, II, or III application shall expire two years from the date
19 approval was final unless significant action proposed in the application has been
20 physically commenced and remains in progress.
- 21 2. The period may be extended on a yearly basis by the approval authority upon
22 showing proper justification. Proper justification consists of one or more of the
23 following conditions:
 - 24 a. Economic hardship;
 - 25 b. Change of ownership;
 - 26 c. Unanticipated construction and/or site design problems;
 - d. Other circumstances beyond the control of the applicant determined acceptable
by the Technical Committee.

1 RZC 21.76.090.C.1-2.

2 In this case, the sole reason cited by the Technical Committee for approving the extension
3 on September 20, 2017 was “change of ownership.” This can be seen in the meeting minutes
4 compiled for the Technical Committee’s meeting of that date, submitted in this appeal as Exhibit
5 A-12. However, it is clear that no “change of ownership” has occurred. While the original applicant
6 for the site plan extension is under contract to sell the property to another development company
7 (Toll WA LP), ownership has yet to change hands. On this basis alone, the September 20 Decision
8 should be reversed. *See* Ex. A-2 at 8 (“The purchase and sale agreement between Wilmoor and Toll
9 Brothers is not a change of ownership, only a prospective change in ownership. Therefore, there is
10 no argument regarding change of ownership as a criterion for granting an extension.”).

11
12 The only other basis for the extension request appears to be a theory of “vicarious delay,”
13 as the city described it in its pre-hearing brief in the Wilmoor Appeal. *See* Ex. A-3 at 4. In essence,
14 Wilmoor alleged that it should be given an extension because Toll—as a potential purchaser of the
15 property—was having difficulty in obtaining its own, separate site plan entitlement for the property.
16 Wilmoor’s theory is apparently that because Toll encountered problems in pursuing its own,
17 separate development plans, Wilmoor should receive an extension on its own development plans
18 in case the Toll deal falls through.
19

20
21 Frankly, we do not believe the Hearing Examiner should reach this issue because the only
22 basis cited for the September 20 Decision was “change of ownership,” and that alleged basis is
23 clearly not supported by the facts (ownership has not changed hands). Nonetheless, even if the
24 Hearing Examiner were to consider Wilmoor’s “vicarious delay” theory, the September 20
25 Decision should still be reversed.
26

1 The problems with Wilmoor’s “vicarious delay” theory are accurately summed up in the
2 city’s staff report for the Wilmoor Appeal (Ex. A-2) and the city’s prior pre-hearing brief in the
3 Wilmoor Appeal (Ex. A-3). As the city notes in both of those documents, Wilmoor has taken
4 virtually no action in furtherance of its site plan entitlement since it was first approved in 2015.
5 Instead, Wilmoor has put all its eggs in one basket—that Toll will eventually decide to purchase
6 the property and develop it under a separate site plan entitlement that has yet to be issued. Under
7 these facts, there is simply no basis to grant the extension under any of the factors enumerated at
8 RZC 21.76.090.C.2. As the city put it in its pre-hearing brief in the Wilmoor Appeal:
9

10 Wilmoor itself did not encounter any "unanticipated construction and/or design
11 problems" because it took no steps to move forward in any appreciable way on its own
12 SPE, despite knowing as early as February 2017 that Toll might encounter difficulties
13 obtaining an SPE, and despite the fact that Wilmoor, by its own admission, could have
14 proceeded on its own SPE by at least the fall of 2017. *See* Deel. of Greg Wilson, 9 (“I
15 was in a position at that time to submit civil drawings to meet the requirements of the
16 SPE”). At most, Wilmoor encountered “unanticipated real estate transactional
17 problems,” and these are not the type of problems that qualify for an extension under
18 the Code. Furthermore, even accepting Wilmoor’s “vicarious delay” theory, Wilmoor
19 has failed to show how any delays Toll encountered were “unanticipated” or out of the
20 ordinary for a large and complex development.

21 Ex. A-3 at 4.

22 Similarly, the city concluded in its Wilmoor Appeal staff report:

23 With respect to a new Site Plan Entitlement [by Toll], a request for a new Site Plan
24 Entitlement is not one of the decision criteria listed as proper justification when
25 granting approval of an extension. The applicant has failed to provide any evidence of
26 unanticipated construction and/or site design problems and/or other circumstances
beyond the control of the applicant, determined acceptable by the approval authority.
The applicant has had two years since receiving approval from the Technical
Committee for their Site Plan Entitlement, which was granted in December 8, 2015.
During that time, the applicant has not demonstrated any efforts made through the
coordinated civil review process, which is required as a next step after receiving an
entitlement. The applicant failed to provide specific examples within their extension
request or appeal to demonstrate compliance with this decision criteria. Therefore, they
do not qualify for an extension under the unanticipated construction and/or site design
problems criterion.

1 Ex. A-2 at 8.

2 In all, we believe there is simply no basis for granting Wilmoor’s extension request under the
3 specific decision criteria at RZC 21.76.090.C.2. There has been no “change of ownership” and issues
4 surrounding Toll’s separate site plan entitlement are not germane to the issue of whether Wilmoor’s
5 site plan entitlement can or should be extended.
6

7 For the reasons above, and to the extent the September 20 Decision represents a final
8 decision by the City of Redmond (an issue that was hotly contested in the Wilmoor Appeal), that
9 decision was clearly issued in error and should be reversed. Wilmoor has not satisfied the decision
10 criteria RZC 21.76.090.C.2 and the extension request should be denied.

11 Dated this 22nd Day of May, 2018.

12 Respectfully submitted,

13 BRICKLIN & NEWMAN, LLP
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