

Exhibits:

The following exhibits were admitted into the record at the hearing:

Appellant Exhibits:

- A-1. Declaration of Greg Wilson, dated February 12, 2018
- A-2. Technical Committee Transmittal Letter, dated December 8, 2015, with Technical Committee Decision, dated December 8, 2015 (same as C-2)
- A-3. Email from Sarah Pyle to Greg Wilmoor, dated February 8, 2017 (same as C-7)
- A-4. Email from Benjamin Sticka to Greg Wilson, dated September 21, 2017, with email string; Letter from Karen Haluza and Linda DeBoldt to Greg Wilson, dated September 21, 2017
- A-5. Letter from Gregory Wilson to Benjamin Sticka, dated September 18, 2017 (same as C-3)
- A-6. Technical Committee Meeting Minutes, dated September 20, 2017, with Project Comments (same as C-9)
- A-7. Email from Steven Fischer to Laura Chan, dated September 22, 2017, with email string
- A-8. Email from Benjamin Sticka to Laura Chan, dated September 22, 2017
- A-9. Email from Benjamin Sticka to Barry Schnell, dated September 22, 2017
- A-10. Email from Benjamin Sticka to Greg Wilson, dated November 8, 2017
- A-11. Notice of Application, dated November 13, 2017
- A-12. Email from Laura Chan to Benjamin Sticka, dated December 1, 2017, with attached comments
- A-13. Email from Benjamin Sticka to Greg Wilson, dated December 1, 2017, with attached comments
- A-14. Email from Benjamin Sticka to Greg Wilson, dated December 5, 2017
- A-15. Letter from Gregory Wilson to Benjamin Sticka, dated December 6, 2017 (same as C-14)
- A-16. Letter from Karen Anderson and Linda DeBoldt to Greg Wilson, dated December 8, 2017 (same as C-4)
- A-17. Email from Benjamin Sticka to Greg Wilson, dated December 11, 2017
- A-18. Appeal, received December 21, 2017
- A-19. Appellant's Prehearing Brief, dated February 10, 2018
- A-20. Project Map, undated
- A-21. Email from Benjamin Sticka to Barry Schnell, dated September 28, 2017

City Exhibits:

- C-1. General Application, undated
- C-2. Technical Committee Transmittal Letter, dated December 8, 2015, with Technical Committee Decision, dated December 8, 2015
- C-3. Letter from Gregory Wilson to Benjamin Sticka, dated September 18, 2017
- C-4. Letter from Karen Anderson and Linda DeBoldt to Greg Wilson, dated December 8, 2017

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- C-5. Appeal, received December 21, 2017
- C-6. Notice of Application, dated November 13, 2017, with email attachments
- C-7. Email from Sarah Pyle to Greg Wilmoor, dated Feb. 8, 2017
- C-8. Parcel Information, undated
- C-9. Technical Committee Meeting Minutes, dated September 20, 2017, with Project Comments
- C-10. Email from Benjamin Sticka to Greg Wilson, dated September 21, 2017, with email string
- C-11. Email from Steve Fischer to Laura Chan, dated September 22, with email string; email from Benjamin Sticka to Barry Schnell, dated September 22, 2017
- C-12. Email from Benjamin Sticka to Greg Wilson, dated November 8, 2017
- C-13. Technical Committee Meeting Minutes, dated December 6, 2017, with Project Comments
- C-14. Letter from Gregory Wilson to Benjamin Sticka, dated December 6, 2017
- C-15. Staff Report, dated February 20, 2018
- C-16. City's Reply to Appellant's Pre-Hearing Brief, dated December 20, 2017
- C-17. City's PowerPoint Presentation, dated February 27, 2018

Orders, Motions, and Pleadings

- Notice of Appearance, Attorney Vicki E. Orrico, dated January 5, 2018
- Pre-Hearing Order, dated January 16, 2018
- Pre-Hearing Order (Revised), dated January 19, 2018
- Appellant's Witness and Document List, undated
- City's Witness and Document List, dated February 20, 2018

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Background

1. On August 18, 2015, Greg Wilson, on behalf of Wilmoor Development Corporation (Appellant),² applied for a Site Plan Entitlement (SPE) to develop a site for 24 cottage homes, with associated improvements, on an approximate 8.37-acre parcel at the northeast corner of 132nd Avenue NE and NE 112th Place.³ On December 8, 2015, the City's Technical Committee issued its decision approving the SPE, with conditions. The decision stated that the SPE approval would expire within two years unless an approval extension was requested and granted, and that interested parties would have until December 22, 2015, to appeal the decision. The decision was not appealed. A cover letter accompanying the decision also noted that the "next steps" toward development of

² Greg Wilson serves as Wilmoor Development Corporation's President. *Exhibit A-1.*

³ The site is identified by King County Tax Parcel No. 3426059071, and is owned by Kjell Olsson, Bernd and Florence Walter, and ME Bergstrom, LLC (Property Owners). *Exhibit A-1.*

the proposal would entail going through the coordinated civil drawing review process, which would “include review and approval of construction and landscape drawings, as well as collection of performance bonds and Development Engineering review and inspection fees” and the building permit review process. *Exhibit A-3.*

2. On December 6, 2016, approximately one year after receiving the SPE approval, the Appellant entered into a Purchase and Sale Agreement (PSA) to sell the property to Toll WA LP (Toll). The PSA granted Toll a feasibility period, which would allow it to work with the City to pursue its own permits, including seeking its own SPE approval. The Appellant did not actively work on the “next steps” for its own SPE approval during this time. *Exhibit A-1; Exhibit C-15.*
3. On February 7, 2017, Greg Wilson attended a meeting between Toll’s representatives, Aaron Hollingbery and Will Greene, and City Senior Planner Sarah Pyle, related to Toll’s own application for an SPE. Mr. Wilson asked Ms. Pyle what would happen if the Appellant’s SPE approval expired before Toll received approval of its own SPE, because the Appellant wished to preserve its right to develop the property in the event the PSA between it and Toll fell through. Ms. Pyle told Mr. Wilson that it would be possible that the Appellant’s SPE approval would expire prior to Toll receiving approval for its own SPE and explained what would need to happen for the Appellant to receive a one-year extension on its SPE approval. *Exhibit A-1; Exhibit C-15.*
4. The next day, on February 8, 2017, Ms. Pyle emailed Mr. Wilson about their conversation. The email included information about the typical timelines for a proposal like Toll’s request for SPE approval. It also stated:

Your current entitlement for Rosehill Cottages Approval will remain in effect until at which time you voluntarily request for them to be withdrawn and they are followed [by] a new application approval for Entitlements for the parcel or at which [time] the current entitlements expire.

The work with Toll Brothers on the site and feasibility analysis with staff regarding a possible new SPE proposal would substantiate as working to resolve unanticipated construction or design problems and substantial effort to make progress on the entitlements/project towards a single one year extension. This would need to be revisited for each additional year an extension is requested.

Exhibit A-3.

5. Several months then passed while Toll worked with the City on its own request for SPE approval. On September 15, 2017, City Planner Benjamin Sticka informed Mr.

Hollingsbery and Mr. Greene that the Appellant's SPE would expire on December 8, 2017. The same day, Mr. Greene emailed Mr. Wilson to let him know that Mr. Sticka

confirmed that the city has not changed its position from when we confirmed with [Ms. Pyle] that our [Toll's] current work on the property qualifies us for extension of the previous SPE approval. [Mr. Sticka] requested that you [Mr. Wilson] apply for the extension more than a month prior (so mid-late October) to give time to schedule the technical committee.

Exhibit A-4.

6. Mr. Sticka was cc'd on the email from Mr. Greene to Mr. Wilson. Later that day, Mr. Wilson informed Mr. Sticka, in the same email chain, that the Appellant would like to seek an extension of its own SPE approval. Mr. Sticka replied that a copy of Ms. Pyle's email should be included and that the Appellant would need to justify its request based upon the criteria in RZC 21.76.090.⁴ *Exhibit A-4.* On September 18, 2017, Mr. Wilson provided Mr. Sticka with a request for an extension of the Appellant's SPE approval. In the request, Mr. Wilson noted that "Toll Brothers has been working on the site and feasibility analysis with city staff and has submitted a new SPE application for the property" and that the "work to resolve construction and design issues along with substantial effort toward the new SPE should qualify this approval for the requested extension." *Exhibit A-5.*
7. On September 20, 2017, the Technical Committee met at 9:30 AM to discuss several pending projects, including the Appellant's request for a one-year extension of its SPE approval. Meeting notes state that the "Technical Committee determined that the request meets the criteria for the extension to be granted based on the recent change in ownership of the property this year" and that the "Technical Committee **approved** a one year extension request." *Exhibit A-6 (emphasis in original).*

The evening of the same day, Mr. Wilson attended Toll's community meeting with neighbors about its SPE application. At the meeting, Karen Anderson, the City's Director of Planning and Community Development (and one of two members of the Technical Committee)⁵ and Mr. Sticka both informed Mr. Wilson that his request for an extension of the SPE approval had been approved. The next day, on September 21, 2017, Mr. Sticka emailed Mr. Wilson about the approval at approximately 1:12 PM, explaining

⁴ RZC 21.76.090.C.2 requires a showing that either (a) economic hardship, (b) a change of ownership, (c) unanticipated construction and/or site design problems, or (d) other circumstances beyond the control of the applicant determined acceptable by the Technical Committee exist to justify an extension.

⁵ The City's Director of Public Works, Linda DeBoldt, serves as the other designated member of the Technical Committee. *Exhibit A-4.*

that, “I have attached a draft of your approval letter from the Technical Committee. Once both Directors have reviewed and signed the letter you will receive a copy in the mail.”
Exhibit A-4.

8. The attached letter, which included a place for signatures from the two members of the Technical Committee, but was unsigned, stated:

Thank you for your letter requesting an approval extension for the Rose Hill Cottages – Site Plan Entitlement. The original approval for this project was issued by the Technical Committee on December 8, 2015. The Technical Committee approved your request for an extension on September 20, 2017. . . . Per your request, the Technical Committee is granting your request for an extension to December 8, 2018.

Exhibit A-4.

9. Later that same day (September 21, 2017, at approximately 2:37 PM), a concerned neighbor, Laura Chan, emailed Mr. Sticka with concerns about the extension request and asked about the “City’s position on the developer’s extension request” and the “anticipated decision date for the extension request.”⁶ At 3:32 PM, Ms. Chan then emailed Ms. Armstrong and Steven Fischer, the City’s Development Review Division Manager. That email stated that Ms. Chan had received a voice message from Mr. Sticka indicating that the Appellant’s request to extend its SPE approval had been granted. Ms. Chan went on to state:

I would like to formally appeal the decision.

The plan has clear errors on it, and should NOT have been extended. . . I am unsure if either of my messages below [the messages to Ms. Pyle and Mr. Sticka] reached the appropriate parties involved in the decision process, and request the following information:

1. When the decision was actually made.
2. Who (names and titles) made the decision to approve the extension.
3. A copy of the approval communication.

Please advise me if it is possible the decision be reversed as I understand the letter has not yet been sent out to the applicant, and or the appeal

⁶ Ms. Chan’s email to Mr. Sticka included a previous email, sent to Ms. Pyle on September 20, 2017, at approximately 4:09 PM, requesting the same information. Her email to Mr. Sticka indicates that she had not heard back from Ms. Pyle. *Exhibit A-7.*

process.

Exhibit A-7.

10. At 4:57 PM, Ms. Chan also emailed Redmond Mayor John Marchione. In that communication, Ms. Chan reiterated her concerns about the extension request and stated that she “would like to understand your Planning Department’s Technical Committee’s considerations in making their decisions” and would “also like to formally challenge the granting of the extension.” Mayor Marchione replied that he would attempt to get someone to contact Ms. Chan the next day, on September 22, 2017. *Exhibit A-7.*
11. On September 22, 2017, Mayor Marchione forwarded his communication with Ms. Chan to Ms. Armstrong, Mr. Fischer, Mr. Sticka, and Ms. Pyle and asked whether someone would be able to promptly reply to her. Ms. Armstrong responded that Mr. Fischer would send a reply “with the information about the extension of the original project recently approved by the Technical Committee.” Ms. Armstrong also noted that the City had received a similar request for information from another resident, Barry Schnell, and that staff was also preparing a response to his inquiry about the extension. *Exhibit A-7.*
12. Mr. Fischer responded to Ms. Chan later that day. In his response, he stated:

You are correct that there is a previous land use permit approval on this site for 24 cottage units and that this approval is set to expire on December 8, 2017. The current developer has applied for a project extension and that the Technical Committee granted the extension on September 20 following a review of the request. . . . The Committee found that request meets the decision criteria for b.) Change of ownership [under RZC 21.76.090]. The official approval letter is not expected to be mailed out until next week and we can make certain that you receive a copy of the letter.

The action that can be appealed is the Technical Committee decision that is contained in the approval letter. Once it is issued, you must file an appeal within the prescribed time period described in the letter. To file an appeal, please complete the form in the attached hyperlink and pay the [applicable appeal fee] on or before the last day of the appeal period, which will be outlined in the letter.

Exhibit A-7.

13. Also on September 22, 2017, Mr. Sticka sent a letter responding to similar concerns raised by area resident Barry Schnell. In that email, Mr. Sticka noted that the Technical Committee had “approved the Extension request for Rose Hill Cottages, Site Plan Entitlement (LAND-2013-01720) at their meeting on September 20, 2017,” and that the

letter of decision had not yet been mailed but “staff expects to mail it sometime next week,” and he explained the appeal process for challenging the approval. *Exhibit A-9*. On September 28, 2017, Mr. Sticka responded to further communication from Mr. Schnell about the process that occurred related to the extension approval and further noted that he was waiting on signatures “of both members of the Technical Committee” but that he would send the approval letter to Mr. Schnell once it had been signed. *Exhibit A-21*.

14. A signed approval letter was never sent to Mr. Wilson. Instead, approximately six weeks later, on November 8, 2017, Mr. Sticka emailed Mr. Wilson, stating:

I have an answer regarding the extension of LAND-2013-01720. A Notice of Application will be sent out for the extension of LAND-2013-01720, including a 21 [day] comment period. After that 21 day period, the project will be taken to the Technical Committee and a decision will be rendered, followed by an appeal period.

Exhibit A-10.

15. On November 13, 2017, the City sent notice to property owners within 500 feet of the subject property describing the proposal and soliciting comments. Several public comments expressing opposition to the extension were received during the 21-day comment period and forwarded to Mr. Wilson. After the conclusion of the comment period, Mr. Sticka then requested that Mr. Wilson send a letter explaining the ownership status of the property. On December 6, 2017, Mr. Wilson provided Mr. Sticka with a letter confirming that Toll remained under contract to purchase the property.
16. The same day, December 6, 2017, the Technical Committee met a second time to reevaluate the proposal. Meeting minutes state:

[Mr. Sticka] noted that this project was approved on 12/8/2015 and will expire on 12/8/2017 unless a project extension is granted. The request for an extension was previously before the Technical Committee [at] the September 20, 2017 meeting. The comment period for the extension request closed on December 4, 2017. Five comments were received and all spoke of the failure of this project to extend sewer out to 132nd Avenue.

The code provides four criteria, and previously the Committee had considered the “change in ownership” as a possible means to grant the extension. Staff has since discovered that the ownership has not changed but instead that there is only a contract purchase agreement.

Based on the fact that the applicant has failed to demonstrate compliance any of the criteria, the Technical Committee **denied** the request to extend the land use permit for this project.

Exhibit C-13.

17. On December 8, 2017, the Technical Committee sent a signed letter to Mr. Wilson, now denying the request for a one-year extension of the Appellant's SPE approval. The letter indicated that Mr. Wilson had requested such an extension on December 6, 2017. It also noted that the request was being denied because the Appellant failed to meet any of the criteria for an extension under RZC 21.76.090. *Exhibit A-16.* Mr. Wilson called Mr. Sticka in response to the new decision and, apart from his concerns about why the extension was now being denied, he questioned why the second decision referenced an extension request he made on December 6, 2017, because the only extension request he ever made was the original request, back on September 18, 2017. On December 11, 2017, Mr. Sticka emailed Mr. Wilson and stated that, after speaking with his supervisor, "the date in the denial later will not be changed" as the "date reflects the most recent correspondence received, which was need in-order to make a determination on your extension request." *Exhibit A-17.*

Appeal

18. On December 21, 2017, Mr. Wilson timely appealed the City's denial of the request to extend the Appellant's SPE approval. In the appeal statement, Mr. Wilson argued that the "city erred in its decision on this extension request" because it should qualify under the "unanticipated construction and/or site design problems" justification or the "other circumstances beyond the control of the applicant" justification under RZC 21.76.090. The appeal statement also noted that the "extension request of the Site Plan Entitlement approval will be demonstrated through evidence presented during the appeal hearing." *Exhibit A-18.*
19. On January 5, 2018, the Appellant retained council, Attorney Vicki Orrico, to handle the appeal. *Notice of Appearance, Vicki E. Orrico, dated January 5, 2018.* An appeal hearing was then scheduled for February 27, 2018. The Hearing Examiner issued a pre-hearing order (revised on January 19, 2018), directing that all pre-hearing motions be filed by February 6, 2018; that the Appellant submit a brief by February 13, 2018; and that the City submit a reply brief by February 20, 2018. No motions were received. Both the Appellant and the City provided briefs, as requested. *Pre-hearing Order (Revised), dated January 19, 2018; Exhibit A-19 (Appellant's Brief); Exhibit C-16 (City's Brief).*
20. In summary, the Appellant's Brief argues:
- Pursuant to staff's recommendations, the Appellant cited the unanticipated construction and design issues encountered by Toll as the basis for the extension request. This falls squarely within the justification for extension approval under

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RZC 21.76.090.C.2.c related to “unanticipated construction and/or site design problems.”

- The Technical Committee recognized that the Appellant had met the requirements for an extension and validly issued an approval on September 20, 2017.
- RZC 21.76.060.E.2 requires only that a “written record of the Technical Committee’s decision” be prepared and that it may be “in the form of a staff report, letter, the permit itself, or other written document indicating approval.” There is no requirement in the code that the Technical Committee’s approval be signed by the Committee’s members.
- RZC 21.76.090.B provides that approval decisions “are assumed valid unless overturned by an appeal decision.” In addition, RZC 21.76.060.E.4 states that Type II decisions may be appealed to the Hearing Examiner but that such decisions “are final upon expiration of the appeal period or, if appealed, upon issuance of the Examiner’s final decision on the appeal.” Here, the Technical Committee issued its (first) decision on September 20, 2017. The appeal period would have expired on October 4, 2017. No appeal was filed by the City or any other interested party.
- The Doctrine of Finality prohibits municipalities from revoking land use approvals, even if a municipality believes the approval was improperly issued: a city that believes it erroneously issued a permit must follow its own applicable appeal requirements, or be foreclosed from challenging the approval. An untimely challenge made after an appeal period has run precludes collateral attack of the land use approval and renders the purportedly improper approval valid.
- The September 20, 2017, approval was not properly revoked. Under RZC 21.76.090.E, an approval may be revoked only if: (a) the permit “was issued in error and the revocation is made within the 21-day appeal period under the Land Use Petition Act,” or; (b) the approval was “obtained by misrepresentation of a material fact,” or; (c) the permit is being exercised contrary to the terms of approval. Here, the City did not make a finding that the (first) decision was issued in error, was obtained by misrepresentation, or that the permit was being exercised contrary to the terms of approval.

*Exhibit A-19.*⁷

21. The City’s Reply Brief argues:

- The Appellant’s only justification for an extension related to activity undertaken by Toll—not the Appellant itself. The Appellant should not be able to claim credit for delays in another entity’s permitting process as justification for extending the SPE approval. At most, the Appellant “encountered ‘unanticipated

⁷ The Appellant’s Brief also makes an argument about the vested rights doctrine that need not be addressed in this decision. In addition, the Appellant’s Brief makes an argument about equitable estoppel and fundamental fairness but recognizes, in a footnote, that the Hearing Examiner does not have the authority to consider equitable claims. *Exhibit A-19.*

real estate transactional problem,’ and these are not the type of problems that qualify for an extension under the Code.” Moreover, the Appellant failed to show or explain how Toll’s delays were unanticipated – a further requirement of the code.

- The Appellant’s arguments about the “alleged” September 2017 “approval” by the Technical Committee are outside the scope of the appeal because Mr. Wilson’s appeal statement did not explicitly make such arguments or reference the September 2017 decision.
- If arguments concerning the September 2017 decision were considered, however, they should fail. First, because the City did not properly issue notice of the application prior to the September 2017 decision, the Technical Committee lacked authority to issue such a decision. Second, it has long been the City’s interpretation of RZC 21.76.060.E.2 that a letter signed by the Technical Committee constitutes a “final” decision that would be appealable. Meeting minutes or draft decisions do not qualify.
- This interpretation is consistent with case law holding that a decision is “issued” and therefore appealable when it is “entered” into the public record, i.e., when it is “memorialized such that it is publicly available.” *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005).

Exhibit C-16.

Appeal Hearing

Appellant Witness

22. Greg Wilson testified that the Appellant, Wilmoor Development Corporation, does not own the property subject to this appeal but was hired by the property owners in order to obtain SPE approval for future development. He explained the timeline that occurred in obtaining the initial SPE approval in 2015 and Toll’s later involvement with the property. Mr. Wilson stressed that, although he did not actively pursue development of the property under the Appellant’s SPE approval after Toll became involved, he maintained close contact with Toll as it moved forward with its own application. He did note, however, that, prior to Toll’s involvement, Core Design had already begun work on the civil design and engineering for the civil design review process. In addition, Mr. Wilson testified that, in his understanding, both Ms. Pyle and Mr. Sticka indicated that an extension request for the Appellant’s approved SPE would be granted on the grounds that Toll had encountered unanticipated delay in obtaining approval for its own SPE.

By the summer of 2017, it became apparent to him that Toll may not receive its own approval prior to the expiration of the Appellant’s SPE and, accordingly, he applied for an extension request on September 18, 2017. Mr. Wilson testified that, on September 20, 2017, both Mr. Sticka and Ms. Anderson told him that the request had been approved by the Technical Committee and that he later received the unsigned, draft letter from Mr. Sticka about the approval. He called Mr. Sticka a few times about the approval over the

next few weeks but did not think much of it because he believed that the Appellant's request for an extension had already been approved.

Mr. Wilson testified that, in early November of 2017, Mr. Sticka then reached out and told him that a 21-day comment period would be required for the extension request. He asked whether this was the usual process for requesting an extension and was told by Mr. Sticka that the City would be requiring notice for such extensions moving forward, beginning with the Appellant's request. Despite this, Mr. Wilson believed that this was about "dotting 'i's and crossing 't's" and did not believe it was anything to worry about because, again, he believed the request had already been approved. Later, Mr. Sticka requested a copy of the PSA between the Appellant and Toll. Mr. Wilson testified that he declined to provide a copy, because PSAs contain confidential information, but promptly provided a letter on December 6, 2017, indicating that Toll still had the property under contract to be purchased.

Finally, on December 8, 2017, Mr. Sticka provided Mr. Wilson with a new decision of the Technical Committee, denying the extension request. Mr. Wilson testified that he called Mr. Sticka and, apart from his confusion about why the Technical Committee had changed its decision, asked why the new decision referenced him (Mr. Wilson) requesting an extension on December 6, 2017, as the only request for an extension he had ever made occurred on September 18, 2017. Mr. Sticka told Mr. Wilson that the date in the denial letter would not be changed and that no corrected letter would be issued. Mr. Wilson testified that he then did his best to appeal the second decision but, by that point, was confused by the entire process.

Mr. Wilson also noted that, had the Technical Committee denied his request back in September 2017 (as opposed to approving it), Core Design would have been in a position to move forward with the requirements for the civil design review process such that substantial progress on the approved PSE could be made prior to its expiration.

On cross-examination, Mr. Wilson stated that, between December 2016 and February 2017, he did not submit any plans to the City or contact the City about the proposal. He also acknowledged that, at the February 2017 meeting with Ms. Pyle, she encouraged Toll to submit its application as soon as possible so that a decision on it would be reached prior to the Appellant's SPE approval expiring. *Testimony of Mr. Wilson.*

City Witnesses

23. Senior Planner Sarah Pyle testified that, after the Appellant received approval for the SPE in 2015, the City did not receive any communication from Mr. Wilson or any civil review plans. She stated that, typically, the next steps after receiving SPE approval would be obtaining civil design review approval to grade the site and install improvements, such as curb cuts, utilities, and landscaping. She explained that, in February 2017, she did meet

with Toll’s representatives and Mr. Wilson to discuss Toll’s own SPE application. Ms. Pyle stated that, although the requirements for an extension were discussed with Mr. Wilson, she believed the conversation was mostly about timing for the projects. She was under the impression that Toll would be applying for SPE approval soon and she wanted to clarify for Mr. Wilson what might happen if there were “loose ends” with Toll’s application that had not been addressed prior to the expiration of the Appellant’s own SPE approval. Ms. Pyle stated that, with that context in mind, she thought that planning staff would consider the progress Toll had made as substantial and that such progress—an application submitted with all appropriate fees that had been worked on for six months—would serve as appropriate grounds for the Appellant to receive an extension of its own SPE approval.

On cross-examination, Ms. Pyle noted that Mr. Wilson was present at all of the meetings that staff had with Toll and its representatives. She stated that it was not uncommon to have a property owner receive SPE approval then sell the property to another developer. Ms. Pyle then reiterated that she believed that, if Toll had made substantial progress on the application as they had discussed, such circumstances could be grounds for the Appellant to receive an extension. On redirect, Ms. Pyle then stated that any approval for an extension for the Appellant would have to have been related to its own progress on its own SPE approval. She clarified this discrepancy by stating that, at the time of the February meeting with Mr. Wilson and the Toll representatives, she thought the two parties were working “in tandem” but later realized that was not the case, and, because of this, the Appellant would have to show that it had made substantial progress on its own SPE approval to keep the permit from expiring or would have to meet the justification criteria independently of the work (or problems) associated with Toll’s efforts.

Testimony of Ms. Pyle.

24. Development Review Division Manager Steven Fischer testified that he has worked for the City for over 20 years and that he oversees Ms. Pyle’s and Mr. Sticka’s work. He stated that Technical Committee decisions are not considered final at the time the Committee votes on a particular proposal and that, instead, an official, signed document on City letterhead serves as the final decision. He said that, because applicants are often anxious to know what happened at Technical Committee meetings—which are internal staff meetings not open to the public—there are some situations, especially on larger projects, where staff may share a draft decision of the Technical Committee. Mr. Fischer stressed, however, that such correspondence are merely a courtesy and that, when shared, staff explains that further review is still necessary. He explained that it is not uncommon for members of the Technical Committee to review a draft decision, prepared by staff members, and make substantial changes prior to signing a final decision. In the present case, the City only ever issued one “official” decision on the extension request: the December 2017 letter denying the request.

On cross-examination, Mr. Fischer acknowledged that the meeting minutes he prepared from the Technical Committee's first meeting (in September 2017) stated that the extension request had been approved and that Mr. Fischer emailed Ms. Chan shortly thereafter and told her the decision had been approved. He also acknowledged that, while he is aware of situations where significant changes to a draft decision have occurred, he is unaware of any other instance where a preliminary decision of the Technical Committee was reversed. On redirect, Mr. Fischer stressed that, although several members of the public were told the Technical Committee had approved the extension request, the same correspondence noted that the decision had yet to be mailed and that the mailed decision would be what would serve as grounds for an appeal. The only decision, however, that was actually mailed was the December 2017 decision denying the approval request.

Testimony of Mr. Fischer.

25. Director of Planning and Community Development Karen Anderson testified that the Technical Committee is a formalized way to make ministerial decisions. She stated that she agrees with Mr. Fischer's assessment of what constitutes a final decision. Ms. Anderson explained that, at the meeting on September 20, 2017, the Technical Committee discussed the four criteria for granting an extension request and did not think the Appellant would meet any of the criteria except the criteria related to change in ownership. She said that, although the Technical Committee would need more information on the ownership status of the property, it is not uncommon for the Technical Committee to "not continue the item" but, instead, to request the additional information that was needed and have that reflected in the final approval letter that is sent.

Ms. Anderson testified that the City was contacted by adjacent property owners who expressed concern about the lack of notice that occurred prior to the Technical Committee making its initial decision. After reviewing the code, Ms. Anderson determined that notice should have been provided because the extension request would constitute a Type II application requiring public notice. Accordingly, she instructed Mr. Sticka to provide notice of the extension request. After the notice period, the Technical Committee then met a second time (in December 2017) to discuss the application. By then, Mr. Wilson had provided a letter that indicated that property ownership had not yet changed. Accordingly, the Technical Committee decided that none of the criteria for an extension were met and that the request should now be denied.

On cross-examination, Ms. Anderson stated that her tenure as planning director began in June 2017 and, accordingly, she is unable to speak to the process that was used for extending approvals of applications in the past. But she believes that the code requires notice of such requests. In the present instance, the City identified that it had made an error in this regard, corrected the error, then moved forward with a final decision on the application. *Testimony of Ms. Anderson.*

Closing Arguments

26. Attorney Vicki Orrico presented a closing argument on behalf of the Appellant at the conclusion of testimony. She reiterated the points made in the Appellant's pre-hearing brief, stressing in particular that the September 20, 2017, decision of the City was validly issued, especially because nothing in the municipal code requires that such a decision be signed by the Technical Committee and because staff members told the public-at-large that the extension request had been approved. Ms. Orrico also argued that the City lacked the authority to repeal or revoke the September 20, 2017, once it decided that it had failed to appropriately provide notice of the request, because the appeal period had already run. In addition, she argued that, even if the September decision was not validly issued, the December decision denying the request was not valid either because it failed to provide any specific information on how the proposal did not meet any of the criteria required for extension approval. Finally, she argued that the City's ad hoc approach to its own code and the requirements for notice and final decisions are so unpredictable that applicants have no way of knowing how to move forward with proposals. *Argument of Ms. Orrico.*
27. Attorney James Haney presented a closing argument on behalf of the City. He stressed that no evidence presented showed that the Appellant met the criteria for an extension of its SPE approval. This is especially true because the Appellant made no effort to work on its own SPE approval and, instead, relied solely on the work and issues encountered by Toll. Mr. Haney argued that it was clear that the September 20, 2017, letter provided to Mr. Wilson was only a draft and should not be viewed as a final decision and that the City's practice has long been to issue final decisions that are signed. Finally, Mr. Haney noted that the Appellant sat on its approval and did nothing to perfect its rights prior to requesting an extension. *Argument of Mr. Haney.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is authorized to hear and decide appeals of Type II decisions. The Hearing Examiner may issue a decision granting the appeal, grant the appeal with modifications, or denying the appeal. *RZC 21.76.060.I.4.*

Review Authority

The Hearing Examiner's duty is to review the entire record before him to determine whether an appellant has met his or her burden of proving that the City's decision was erroneous. To properly review the City's action, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 (1994).

The Hearing Examiner must accord substantial deference to the City's interpretation of its own ordinances. *RCW 36.70C.130(1)(b); Nw. Sportfishing Indus. Ass'n v. Washington Dept. of*

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Ecology, 172 Wn. App. 72 (2012); *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180 (2002). The Hearing Examiner reviews the City’s decision to determine if it is clearly erroneous, after allowing for such deference as is due the construction of municipal statutes by the City, or that the decision is not supported by evidence that is substantial when viewed in light of the whole record. *See RZC 21.76.060.I.4*. Under the “clearly erroneous” standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if he has a definite and firm conviction that the City made a mistake. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 (2002). When applying the clearly erroneous standard, the Hearing Examiner may not substitute his own judgment for the judgment of the City. *See Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 202 (1994).

Conclusions Based on Findings

1. **Under RCZ 21.76.060.E.2, the Technical Committee issued a valid decision on September 20, 2017, when it provided Mr. Wilson with a “written document indicating approval” of the extension request.**⁸ Apart from the fact that both Ms. Pyle and Mr. Sticka indicated to Mr. Wilson—in advance of his applying for an extension of the SPE approval—that Toll’s unanticipated construction and/or site design problems would serve as sufficient grounds to obtain an extension, several staff members told Mr. Wilson that the actual request was approved by the Technical Committee. Specifically, both Ms. Anderson and Mr. Sticka told Mr. Wilson several hours after the Technical Meeting on September 20, 2017, that the request had been approved. The next day, Mr. Sticka sent Mr. Wilson a draft of the approval letter and indicated that a signed copy of the approval would arrive in the mail. In addition, apart from indicating to Mr. Wilson that the approval had been granted, staff members also indicated to the mayor and the public-at-large that such approval had been granted.

Although the City argues that such approval was provisional and that it has been the City’s custom to treat only a signed decision of the Technical Committee as final, nothing in RCZ 21.76.060.E.2 requires a signed document. Instead, as the Appellant correctly points out, that code provision merely requires that the Technical Committee prepares a written record of its decision that “may be in the form of a staff report, letter, the permit itself, or other written document indicating approval.” Here, between the unanimous

⁸ The City argues that most of the issues raised by the Appellant in its prehearing brief should be ignored as outside the scope of the appeal because the Appellant failed to specifically argue such issues in its appeal statement. Washington’s courts, however, long ago abandoned code pleading and “determined that substance should prevail over form and that actions should be determined on the merits, not by technical rules that prevent such determinations.” *First Fed. Savings & Loan Assoc. v. Ekanger*, 22 Wn. App. 938, (1979). Moreover, the purpose of the requirement that issues be addressed in an appeal statement is to ensure that the City (and Hearing Examiner) are adequately prepared to address and respond to an Appellant’s arguments at an appeal hearing. In this instance, because prehearing briefs were requested, the City suffered no prejudice from the Appellant further elaborating on its arguments well in advance of the appeal hearing.

view expressed by staff (to Mr. Wilson, the mayor, and several members of the public as well as in the meeting minutes) about the approval granted by the Technical Committee and the “written document indicating approval” sent to Mr. Wilson by Mr. Sticka, it is clear that the Technical Committee approved Mr. Wilson’s request on September 20, 2017.

Mr. Fischer’s testimony in this regard was particularly persuasive. Although he did testify that it has long been the City’s stance that a final decision of the Technical Committee must be signed, especially because the Committee sometimes makes substantive changes to the draft decision, he could not recall a single instance in his over 20 years of working for the City whereby the Technical Committee later reversed the position it had taken in a draft approval decision. This assertion, coupled with the strong policy supporting administrative finality in land use decisions long recognized by Washington courts, bolsters the conclusion that the Technical Committee granted the Appellant its SPE approval extension request on September 20, 2017. *See, e.g., Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30 (2001). *Findings 1 – 17, 20 – 25.*

2. **Because the extension approval was not appealed or revoked, it remains valid.** RZC 21.76.090.B provides that permit approvals are assumed valid unless overturned by an appeal decision. RZC 21.76.060.E.4 further provides that all Type II decisions “are final upon expiration of the appeal period” or upon issuance of the Hearing Examiner’s final decision on the appeal. Here, as discussed in Conclusion 1, the City indicated to Mr. Wilson that the Appellant’s request for an extension had been approved on September 20, 2017. Although the City later determined that it had erred and that public notice should have been provided, this occurred after the appeal period should have expired in October 2017: Mr. Sticka informed Mr. Wilson that notice would need to be provided on November 8, 2017. As explained in *Chelan County v. Nykreim*, 146 Wn.2d 904 (2002), even when a city believes it has erred in issuing a permit, it must follow its own applicable appeal requirements or be foreclosed from challenging its decision. This is because leaving “land use decisions open to reconsideration long after the decisions are finalized place property owners in a precarious position” and undermines attempts to ensure that appeal procedures are consistent, predictable, and timely. The City also did not revoke its decision in accord with RZC 21.76.090.E. Accordingly, because the September 20, 2017, decision was not appealed or revoked, it remains valid. *Findings 1 – 27.*

3. **The December 8, 2017, decision denying the extension request constitutes an invalid reconsideration of the initial decision.** As explained in Conclusions 1 and 2, the initial decision granting the extension was validly issued and was neither appealed nor revoked. Accordingly, that decision was final. This remains true even if the City 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.” *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005). The *Habitat Watch* case is particularly relevant as it involved a situation where a group that was party to previous public hearings on a land use proposal appealed the approval of a later extension request on the grounds that notice and a public hearing were not provided. *155 Wn.2d at 397*. The Washington Supreme Court ruled that, despite the deficiencies with notice, the decision was not timely challenged and, therefore, final. Here, because the September 20, 2017 decision was neither appealed nor revoked, it became final and the Technical Committee’s second decision denying the request constituted an invalid reconsideration of the initial decision. *See, e.g., Nykreim*, 146 Wn.2d 904 (2002). This is especially true in light of long-standing policies and jurisprudence in Washington favoring the finality of land use decisions. *See, e.g., Samuel’s Furniture v. Dep’t of Ecology*, 147 Wn.2d 440 (2002). *Findings 1 – 27*.

DECISION

Because the Technical Committee sent the Appellant a “written document indicating approval” of the project on September 20, 2017, as required by Redmond Zoning Code (RZC) 21.76.060.E.2, and because that decision was neither appealed by any interested party nor properly revoked by the City, the decision was, by default, a final decision of the Technical Committee. Accordingly, the Technical Committee’s subsequent decision denying the proposal was invalid, and the appeal to overturn the denial of the extension is **GRANTED**.

Decided this 20th day of March 2018.



Andrew M. Reeves
Hearing Examiner Pro Tempore
Sound Law Center