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BEFORE THE HEARING EXAMINER FOR THE CITY OF REDMOND

In the Matter of the Appeal of)	
)	
ALBERT F. ROSENTHAL)	Department Reference:
)	LAND-2018-00376/
From a decision issued by the Technical)	PR-2017-02523
Committee of the City of Redmond)	
)	APPLICANT’S MOTION FOR
)	SUMMARY JUDGMENT AND
)	DISMISSAL OF APPEAL
)	
)	

I. INTRODUCTION AND RELIEF REQUESTED

NE 85th Street Development LLC (the “Applicant”) proposes to redevelop two parcels of real property located across the street from Redmond City Hall at 15801 and 15945 NE 85th Street by constructing a mixed-use apartment building with ground floor retail uses. The development site is zoned Sammamish Trail.

The Appellant, Albert D. Rosenthal, owns real property adjacent to the development site to the east, also zoned Sammamish Trail. Mr. Rosenthal has taken issue with the City’s actions in response to the proposed development by raising objections to the manner in which the City has applied zoning regulations. Mr. Rosenthal has expressed concern that by not requiring parking for the Project to be located underground, and by approving inclusion of a public walkway along the east side of the development site in an

1 area that could otherwise be occupied by a larger building, the Project will contain fewer
2 residential units than the potential maximum that could be achieved under the Zoning
3 Code. Mr. Rosenthal is appealing the Applicant’s project in the effort to shape precedent
4 with an eye to future development capacity of his property. As explained below, the law
5 does not support Mr. Rosenthal’s claims and he does not have the legal right to assert these
6 claims.

7 **II. PROCEDURAL BACKGROUND**

8
9 On March 6, 2019 the City of Redmond Technical Committee issued its Notice of
10 Decision approving Site Plan Entitlement (“SPE”) for the Applicant’s proposed mixed-use
11 development project (the “Project”) as described and depicted in the notice of approval and
12 the application documents on file with the City (the “Application”). On March 19, 2019,
13 Mr. Rosenthal filed a City Notice of Appeal form accompanied by a 34-page statement
14 challenging the City’s SPE approval (the “Appeal”).

15
16 Following a pre-hearing conference, the Examiner issued an Order setting Hearing
17 and Pre-Hearing Schedule dated April 3, 2019 (“Pre-Hearing Order”). In the Pre-Hearing
18 Order, the Examiner identified the errors alleged by the Appeal, grouped into two
19 categories:

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1. *The approval does not require subterranean parking as required per RZC Table 21.10.130.A*
 2. *The approval required a public pedestrian throughway per RZC 21.10.150, which should not be required*

23 Applicant hereby moves to dismiss each of Mr. Rosenthal’s claimed errors related to
24 subterranean parking and the public pedestrian throughway (collectively, the “Parking
25 Claims,” and the “Walkway Claims”, respectively), and the Appeal in its entirety, on the
26

1 grounds there is no genuine dispute as to any material fact and the Applicant is entitled to
2 judgment dismissing the Appeal as a matter of law.

3 **II. BACKGROUND AND JURISDICTION**

4 The Redmond Zoning Code (“RZC or “Zoning Code”) classifies Site Plan
5 Entitlement decisions as “Type II Administrative” permits. *See* RZC Table 21.76.050A
6 “Permit Types”. The Type II review process “is an administrative review and decision by
7 the Technical Committee.” RZC 21.76.050.G. The Technical Committee’s decision is
8 made based on criteria set forth at RZC 21.76.070.B and .Y.3. Such decisions may be
9 appealed to the Examiner. *Id.*

10 The Appeal was received at the City of Redmond (the “City”) on March 19, 2019.
11 As noted in the Appeal, Mr. Rosenthal appealed the Technical Committee’s Type II
12 decision, but did not appeal any SEPA determination. Notice of Appeal form at page 2 of
13 4.
14

15 As directed by Redmond Municipal Code (“RMC”) 4.28.060, the Examiner has
16 adopted, and the City Council has approved, rules to govern appeals including appeals of
17 Type II decisions. The Examiner’s rules authorize the Examiner to “consider and rule upon
18 all procedural and other motions appropriate to the proceeding.” VI.A.2.g.
19
20

21 **III. ISSUES PRESENTED**

- 22 **1. Does the Zoning Code require underground parking for the Project? (No).**
- 23 **2. Do lack of legal standing and ripeness, and failure to appeal SEPA**
24 **preclude the Examiner from granting the Walkway Claims? (Yes).**
25
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IV. STANDARD OF REVIEW

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2 The purpose of the summary judgment procedure is "to examine the sufficiency of
3 the evidence behind the plaintiffs formal allegations in hope of avoiding unnecessary trials
4 ..." Young v. Key Pharm., 112 Wn.2d 216, 226, 770 P.2d 186 (1989) (quoting Celotex
5 Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 1548, 91 Law. Ed. 2d 265 (1986) (internal citation
6 omitted)). Summary judgment should be granted if the pleadings and supporting materials
7 indicate that there is no genuine issue of material fact and that the moving party is entitled
8 to judgment as a matter of law. Meaney v. Dodd, 111 Wn.2d 174, 177-78, 759 P.2d 455
9 (1988). While the moving party bears the initial burden of demonstrating that there is no
10 genuine issue of material fact, once that burden is met, "the nonmoving party must present
11 evidence that demonstrates that material facts are in dispute." Atherton Condo. Apartment-
12 Owners Ass 'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)
13 (quoting Baldwin v. Sisters of Providence in Wash., Inc., 112 Wash.2d 127, 132, 769 P.2d
14 298 (1989). If the nonmoving party fails to demonstrate that material facts are in dispute,
15 then summary judgment is proper. Atherton, 115 Wn.2d at 516.
16
17

V. ARGUMENT

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19 **1. Undisputed material facts.** Without prejudice to any other arguments or
20 factual issues, Applicant does not dispute the following facts asserted by the Appeal:

- 21
- 22 • The zoning classification of the Project site is Sammamish Trail.
 - 23 • The Project as approved will exceed 66 units per acre.
 - 24 • The Project as approved includes above-grade parking and will not include
25 subterranean or semi-subterranean parking.
26
27

- The Project as approved includes a certain feature or set of features that Mr. Rosenthal terms a “pedestrian throughway,” or for purposes of this motion, the “Walkway.”
- Portions of the Project will be constructed within the 100-Year Floodplain.

2. The Zoning Code does not require underground parking.

A. The table cited by Mr. Rosenthal does not support the Parking Claims.

Mr. Rosenthal claims the City’s SPE approval is in error because it does not require that the Project include underground parking. As his basis for the purported underground parking requirement, Mr. Rosenthal cites RZC Table 21.10.130A titled “Downtown Residential Densities Chart” (the “Table”). Specifically, he cites the following language in the Table (“Features List”):

All developments with proposed densities exceeding 66 dwelling units per acre, inclusive of density bonuses allowed per RZC 21.10.130.B.4, Residential Density Bonus, shall be required to have at least one level of semi-subterranean or subterranean parking, structured parking hidden behind ground floor commercial space, or other pedestrian features along the street front.

The City determined that the Project satisfies this requirement in its SPE approval:

E. Parking

The proposed project satisfies the requirement in RZC 21.10.130A Downtown Residential Densities Chart that “developments with proposed densities exceeding 66 dwelling units per acre shall be required to have at least one level of semi-subterranean or subterranean parking, structured parking hidden behind ground floor commercial space, or other pedestrian features along the street front.” Additionally, the at grade and above grade parking configuration is permitted based on RZC 21.64.010F.

Notice of Decision at Page 6. The City correctly applied the Features List by treating it as a disjunctive list in that it requires that the Project be designed to include either (a) “semi-subterranean or subterranean parking” or (b) “structured parking hidden behind ground floor commercial space, or other pedestrian features along the street front.” Mr. Rosenthal

1 apparently reads the comma following “semi-subterranean parking” as “and”. He treats
2 the Features List as a *conjunctive* list that requires the Project to provide both underground
3 and above-ground parking. This is an incorrect reading of this regulation. It ignores the
4 mandatory language “shall be required to have at least one level” and substitutes a reading
5 that would require parking to be located on two levels—one below-grade and one at-
6 grade—even if all required parking could be accommodated on one level. The reading
7 misses the obvious intent of the regulation—to enhance the experience of pedestrians and
8 others viewing the project from the street level.
9

10 Mr. Rosenthal’s reading is not consistent with rules of grammar. The proper
11 interpretation of this language is as a *disjunctive* list that requires only one of the types of
12 parking—either parking must be below-grade, or above-grade concealed from view along
13 the public street front. A strict grammatical reading would be that one of three features
14 must be included in the development: (1) below-grade parking, (2) above-grade parking
15 concealed by commercial space, or (3) other pedestrian amenities.
16

17 In *Reading Law: The Interpretation of Legal Texts* (2012), Justice Antonin Scalia
18 and Professor Bryan A. Gardner (editor-in-chief of *Black’s Law Dictionary*) include the
19 below table and in-line text:

CONJUNCTIVE	DISJUNCTIVE
You must do A, B, and C.	You must do A, B, or C.

20
21
22
23 “With the conjunctive list, all three things are required—while with
24 the disjunctive list, at least one of the three is required, but any one
(or more) of the three satisfies the requirement.”

25 *Id.* at 116. The principal is axiomatic in both common usage and legal English. The Zoning
26 Code’s use of “or” in the cited list indicates that only one of the three listed features is
27

1 required. This principal is as widely understood in Washington State as anywhere else.
2 Our Supreme Court has noted, “[o]rdinarily, the word “or” does not mean “and” unless
3 there is clear legislative intent to the contrary.” *HJS Dev., Inc. v. Pierce Cty. ex rel. Dep't*
4 *of Planning & Land Servs.*, 148 Wn.2d 451, 474, 61 P.3d 1141, 1152 (2003) (n.95); *see*
5 *also Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201, 204 (1978) (“We have said
6 ‘or’ does not mean ‘and’.”).

7
8 B. *Even if the Amenity List could reasonably be interpreted to require*
9 *Underground Parking (it cannot) the City’s Critical Areas Regulations*
10 *control over the Amenity List and require the parking to be above-grade.*

11 Mr. Rosenthal asserts that the City improperly interpreted its flood plain regulations
12 as prohibiting underground parking in frequently flooded areas and that the City has
13 allowed underground parking in the case of other projects located in frequently flooded
14 areas. This assertion is irrelevant. The City did not prohibit underground parking in
15 connection with the Project. In its application for SPE approval submitted to the City on
16 November 27, 2018, which is on file with the City (“Application”), Applicant did not
17 propose or request any underground parking. The permissibility of underground parking
18 in areas designated as flood plain is thus immaterial to this Appeal, with one possible
19 exception. The only instance in which the flood plain regulations could be relevant to this
20 Appeal would be if the Examiner finds the Features List to be conjunctive, and that it
21 thereby requires underground parking. *See generally supra V.2.A.* In that event, the flood
22 plain regulations would be relevant because they would conflict with the underground
23 parking requirement, and as explained below, by their terms the flood plain regulations
24 would prevail over the Zoning Code requirement with the result that underground parking
25 is not required.
26
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1 The City's flood plain regulations are part of its Critical Areas Regulations, RZC
2 21.64. The Critical Areas Regulations were enacted as required by the Growth
3 Management Act to serve a range of purposes generally related to preserving "the City's
4 important environmental features while allowing development to occur if compatible with
5 and in consideration of these critical areas." RZC 21.64.010.A.1. The pertinent provisions
6 of the Critical Areas Regulations are densely and delicately interwoven. However, upon
7 careful systematic review, it is clear that the Critical Areas Regulations unmistakably (1)
8 apply to the Project site; (2) require that impacts to the flood plain (such as those created
9 by new underground parking) be avoided where possible; and (3) in the event of a conflict
10 with any other City code and regulations, including the Zoning Code, the Critical Area
11 Regulations prevail to the extent they provide more protection to the critical area.
12

13 Mr. Rosenthal does not contest the fact that the Project site is located in an area
14 designated as 100-Year Floodplain per the map adopted at RZC 21.64.010.E.3. The 100-
15 Year Floodplain is classified as a "Frequently-Flooded Area" which is one of the
16 environmentally critical areas protected by the Critical Areas Regulations. RZC 21.78.F
17 and RZC 21.64.040.A. In such areas, the Critical Areas Regulations require developers to
18 mitigate the impacts of their projects.
19

20 *All significant adverse impacts to critical areas functions and values shall be mitigated.*
21 *Mitigation actions by an applicant or property owner shall occur in the following*
22 *sequence:*

- 23 *a. Avoiding the impact altogether by not taking a certain action or parts of actions;*
24 *b. Minimizing impacts by limiting the degree or magnitude of the action and its*
25 *implementation, by using appropriate technology, or by taking affirmative steps,*
26 *such as project redesign, relocation, or timing, to avoid or reduce impacts;*

27 RZC 21.64.010.I. The Critical Areas Regulations require that "[a]ll feasible and
reasonable measures will be taken to avoid impacts," RZC 21.64.010.I. Therefore, in the

1 unlikely event that Mr. Rosenthal’s tortured reading of the Features List is ruled to be
2 correct, the underground parking requirement would conflict with the Critical Areas
3 Regulations’ mitigation requirements, which require that impacts to the flood plain such as
4 placing parking underground and thereby creating increased likelihood of flood damage
5 and danger to life and property be avoided.

6 The Zoning Code clearly states that the requirements of the Critical Areas
7 Regulations prevail in the event of a conflict with other City regulations when the Critical
8 Areas Regulations provide more protection to the environmentally critical area:
9

10 *[The Critical Areas Regulations] shall apply as an overlay and in addition*
11 *to zoning, land use, and other regulations established by the City of*
12 *Redmond. In the event of any conflict between these regulations and any*
13 *other regulations of the City, the regulations which provide greater*
14 *protection to environmentally critical areas shall apply.*

15 RZC 21.64.010.F.1. This section was cited by the Technical Committee in its approval
16 of the SPE. Notice of Decision at page 6.

17 The Project avoids the impacts of increased risk of flood damage and risk of loss
18 of life by placing the garage at grade, above the flood elevation. Notwithstanding Mr.
19 Rosenthal’s desired reading of the Features List, the Project is located in a critical area
20 where underground parking must be avoided for flood safety and management reasons.¹

21 **3. The Walkway Claim is fatally deficient for several independent reasons.**

22 *A. Mr. Rosenthal has no standing to raise this claim.*

23 Mr. Rosenthal’s unorthodox Walkway Claim can be characterized as an “inverse
24 condemnation” claim. Mr. Rosenthal asserts that the City’s approval of the Application is
25

26 ¹ Mr. Rosenthal’s arguments are not relevant to the extent that they compare the underground parking or pedestrian
27 walkways that neighboring development projects do or do not provide. Only the legality of the instant Decision is at
issue in this appeal.

1 a taking or damaging of the Applicant’s property without a proper public purpose and
2 without condemnation process or payment of compensation. *Dickgieser v. State*, 153
3 Wn.2d 530, 534, 105 P.3d 26, 28 (2005). However, Mr. Rosenthal has no standing to raise
4 a takings claim of any kind, whether classified as a claim for inverse condemnation or
5 otherwise. He has asserted no cognizable property right to the premises underlying the
6 Walkway. Without such a property right, he has no standing to raise this takings claim.
7 Both across Washington and throughout sister jurisdictions,

8
9 “[t]he general rule, both under the statutes and in the absence of statutory
10 provision, is that where property is taken or injured under the exercise of
11 the power of eminent domain, the owner thereof at the time of the taking or
12 injury is the proper person to initiate proceeding or sue therefor.”
13 29A C.J.S., Eminent Domain, § 383, p. 757 (ed. 1992) (quoted with approval in *Hoover v.*
14 *Pierce Cty.*, 79 Wn. App. 427, 433, 903 P.2d 464, 468 (1995); *see also Orion Corp. v.*
15 *State*, 103 Wn.2d 441, 455, 693 P.2d 1369, 1377 (1985) (To have standing, one must have
16 some protectable interest that has been invaded or is about to be invaded.); *Orion Corp. v.*
17 *State*, 109 Wn.2d 621, 637, 747 P.2d 1062, 1071 (1987) (rejecting a plaintiff’s claim for
18 “standing to bring an inverse condemnation suit to challenge land-use regulations . . .
19 [where the plaintiff had] no right to make any use of the subject property.”).

20 B. *Even if Mr. Rosenthal alleges harm to his property interests, the claim is*
21 *unripe.*

22 In the Appeal at page 5, Mr. Rosenthal also complains of a taking “from my
23 adjacent land some day when it is redeveloped” and asserts that the City “cannot take land
24 . . . possibly from my adjacent property in the future.” *Id.* In so doing, Mr. Rosenthal seeks
25 to assert a property interest in the Walkway area of the Applicant’s Project, where he
26 clearly has none. However, even if his status as an abutting landowner somehow gives him
27 standing to challenge this purported “taking” of the Walkway area (it does not) no claim

1 of purported damage to his property rights is ripe at this time. Federal and Washington
2 State courts clearly and consistently hold that in the context of purported takings violations,
3 “the claim of the landowner . . . is not yet ripe for adjudication [where the landowner] has
4 not yet applied for a development permit.” *Presbytery of Seattle v. King City.*, 114 Wn.2d
5 320, 339, 787 P.2d 907, 917 (1990) (string cite omitted); *Williamson City. Reg'l Planning*
6 *Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87
7 L. Ed. 2d 126 (1985) (“[A] claim that the application of government regulations effects a
8 taking of a property interest is not ripe until the government entity charged with
9 implementing the regulations has reached a final decision regarding the application of the
10 regulations to the property at issue.”)

12 No government decision has been made with respect to the claimed inverse
13 condemnation of Mr. Rosenthal’s property “some day when it is redeveloped” or “possibly
14 . . . in the future.” Appeal at page 5. Accordingly, even if his ownership of abutting land
15 provides some standing to assert an inverse condemnation claim (it does not) that claim is
16 not yet ripe.

18 *C. The Examiner does not have jurisdiction to decide claims based on impacts to Mr.*
19 *Rosenthal’s property because he did not appeal SEPA.*

20 To the extent Mr. Rosenthal bases his Walkway claim on impacts to his property
21 that may result from illegal or other objectionable activity on the Walkway, the Examiner
22 does not have jurisdiction to consider the claim because such impacts are within the scope
23 of the City’s SEPA process, which Mr. Rosenthal has not appealed. The SEPA Checklist
24 filed by the Applicant attached to the Declaration of Joshua E. Friedmann submitted with
25 this Motion demonstrates that consideration of these impacts is part of the SEPA process.
26
27

1 (See Checklist questions and responses under the headings "8. Land and Shoreline Use",
2 "14. Transportation" and "15, Public Services).

3 **VI. CONCLUSION**

4 There is no genuine issue of fact that is material to the claims asserted by Mr.
5 Rosenthal in this appeal. The Parking Claim is not supported by the Redmond Zoning
6 Code as a matter of law. Mr. Rosenthal does not have legal standing to assert the Walkway
7 Claim, it is not ripe for adjudication and it is barred by failure to appeal SEPA. Applicant
8 is entitled to judgment dismissing all of Appellant's claims. Accordingly, the Applicant
9 requests that the Examiner dismiss the Appeal for failing to present any claim upon which
10 the Examiner can grant relief.
11

12 DATED this 10th day of April, 2019.

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14
15 Davis Wright Tremaine LLP
Attorneys for NE 85th Street Development, LLC

16
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1 CERTIFICATE OF SERVICE

2 I, Antoinette Gilbert, hereby certify and declare:

3 I am over the age of 18, make this declaration based upon personal knowledge, and am
4 competent to testify regarding the facts contained herein. On the date below, I caused to be
5 served true and correct copies of the foregoing Applicant's Motion for Summary Judgment
6 and Dismissal of Appeal and Declaration of in Support of Motion for Summary Judgment
7 and Dismissal of Appeal via email only to:

8 **Hearing Examiner:**

9 Office of the Hearing Examiner,
10 Attention Cheryl Xanthos, Deputy City Clerk
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22
23 *Rosenthal Appeal, Land-2019-00252, of the Modera River Trail Notice of Decision, Land 2018-00376
Declaration of Joshua E. Friedmann Providing Copies of Redmond Ordinances and Exhibits*

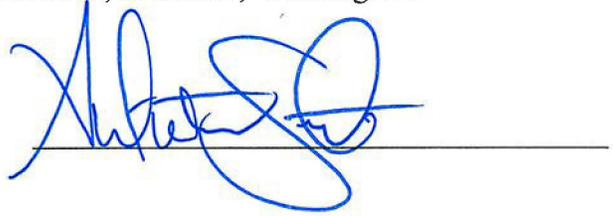
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of April 2019, at Seattle, Washington.



*Rosenthal Appeal, Land-2019-00252, of the Modera River Trail Notice of Decision, Land 2018-00376
Declaration of Joshua E. Friedmann Providing Copies of Redmond Ordinances and Exhibits*