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BEFORE THE HEARING EXAMINER FOR THE CITY OF REDMOND

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

**I. INTRODUCTION**

Appellant’s arguments regarding standing miss the point. As a neighboring property owner and party of record, Appellant had the right to appeal the SPE approval. However, as a matter of law, Appellant’s claims must be dismissed.

Mr. Rosenthal’s claim that the Project must include underground parking fails as a matter of law because there is no legal requirement that the Project include underground parking. The Redmond Zoning Code allows alternative parking configurations—underground parking or above-ground parking hidden from view at the street level. Appellant has not provided any persuasive authority to support his contrary interpretation. There are no material issues of fact. Appellant’s underground parking claim must thus be denied as a matter of law.

1 Appellant has raised multiple other issues and asserted many facts, yet it is clear there is  
2 no genuine issue of fact that is material a claim that, if proven, would entitle him to relief. Thus,  
3 Applicant asks the Hearing Examiner to dismiss the remainder of the appeal for failure to state a  
4 claim upon which relief can be granted.

## 5 II. ARGUMENT

6 A. *The Plain Meaning of RZC 21.10.130A is that one of two types of parking must*  
7 *be provided: (1) parking that is all or partially underground, or (2) at-grade*  
8 *parking hidden from view at the street level.*

9 In his Response at page 11, Appellant incorrectly asserts that the Project must include  
10 “1) subterranean or semi-subterranean parking, and 2) structured parking behind commercial  
11 space or behind pedestrian amenities along the street so the parking is hidden.” (Emphasis  
12 added). Appellant’s argument that both types of parking are required conflicts with the plain  
13 meaning of the Zoning Code which is that either underground parking or above-ground parking  
14 is required.

15 The City Council adopted the Zoning Code through enactment of Ordinance 2584. The  
16 text of the new Zoning Code was set forth on Exhibit 1 to the ordinance. The parking  
17 requirement applicable to the Sammamish Trail zoning district appears at page 205 of Exhibit  
18 1 to Ordinance 2584 in a table titled “Downtown Residential Densities Chart”:

19 *All developments with proposed densities exceeding 66 dwelling units per acre . . . shall*  
20 *be required to have at least one level of semi-subterranean or subterranean parking or*  
21 *structured parking hidden behind ground floor commercial space or other pedestrian*  
*features along the street front.*

22 Declaration of Michelle Hart, City Clerk; Excerpt from Exhibit 1 to Ordinance 2584. The City  
23 Council has revised the Chart only once. The revision did not change the pertinent language  
24 regarding parking. Exhibit 1 to Ordinance 2803, pages 66-67. The Zoning Code thus requires  
25 either parking located all or partially below-ground, or above-ground parking hidden from  
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1 view at the street level. It does not require both. As set forth in Applicant’s Motion, “or” does  
2 not mean “and”.

3 *B. The parking requirement as presently codified does not purport to require*  
4 *underground parking and above-ground parking.*

5 Appellant quotes the parking requirement as it appears in the online codification of the  
6 Zoning Code. The punctuation of the online version has been changed as compared to the  
7 actual ordinance language adopted by the City Council. The current online codification reads:

8 *All developments with proposed densities exceeding 66 dwelling units per acre . . . shall*  
9 *be required to have at least one level of semi-subterranean or subterranean parking,*  
10 *structured parking hidden behind ground floor commercial space, or other pedestrian*  
11 *features along the street front.*

12 (<http://online.encodeplus.com/regs/redmond-wa/doc-viewer.aspx#secid-1128>). A  
13 comma has been substituted for the “or” between the clauses “Semi-subterranean or  
14 subterranean parking” and “structured parking hidden behind . . . .” Appellant has cited no  
15 ordinance, resolution or other legislative action that evinces any legislative intention related to  
16 this slightly altered form. If any intent can properly be gleaned from the modified punctuation  
17 it is that the Code actually provides three alternatives: (A) semi-subterranean or subterranean  
18 parking, (B) structured parking hidden behind ground floor commercial space, or (C) other  
19 pedestrian features along the street front. As set forth in Applicant’s Motion, Section V.2, the  
20 grammatically correct reading of a disjunctive list is that any one of the three listed items  
21 satisfies the requirement. “We must meet on Monday, Tuesday or Wednesday” does not mean  
22 “we must meet on Monday, Tuesday and Wednesday”.

23 *C. The meaning of an ordinance must be determined from the language*  
24 *adopted by the City Council and not from editorial changes made during codification.*

25 It is clear from the record that the punctuation change was made in the codification  
26 process. It was not made by the City’s legislative body. Legislative intent cannot be gleaned  
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1 from a clerical change made by codifiers without any legislative input. In Ordinance 2584, the  
2 City Council specified the duties and authority of the codifier of the Zoning Code with respect  
3 to codification of the new Zoning Code:

4           *Section 8. Authority and Direction to Codifier. At the time this ordinance*  
5 *is adopted, a final numbering system for the Redmond Zoning Code has not yet been*  
6 *established and the topic-based packages have not been completely integrated. The*  
7 *codifier of the Zoning Code is therefore authorized and directed, in consultation with*  
8 *the City Clerk and the Planning Director, to establish a numbering system, to insert*  
9 *appropriate cross-references, and to make such minor, editorial changes, and*  
10 *corrections as may be necessary to compile and publish the Zoning Code as a single,*  
11 *consolidated Title 21 of the Redmond Municipal Code and to publish the Zoning Code*  
12 *Appendices as appendices to the Redmond Municipal Code. The codifier is also*  
13 *authorized and directed to provide for all words that are defined in the Redmond*  
14 *Zoning Code to be italicized and to provide for the insertion of all graphics provided*  
15 *for and referred to in the Redmond Zoning Code and Appendices.*

16 (Emphasis added). The codifier’s authority extends only to “minor, editorial changes,  
17 and corrections”. Clearly, no change in the plain meaning of the language adopted by the City  
18 Council can properly be inferred from the punctuation change made during codification of the  
19 Council’s ordinance. The law in Washington is clear: codifiers of local ordinances are not  
20 authorized to change the meaning of legislation. Under RCW 35.21.510, “[a]ny city or town  
21 may prepare or cause to be prepared a codification of its ordinances.” Such authorized  
22 codification may even at times include “[e]diting ordinances to the extent deemed necessary  
23 or desirable, for the purpose of modernizing and clarifying the language of such ordinances,  
24 but *without changing the meaning of any such ordinance.*” RCW 35.21.500 (italics provided);  
25 *Parosa v. City of Tacoma*, 57 Wn.2d 409, 413, 357 P.2d 873, 876–77 (1960) (“In the event of  
26 a discrepancy between the law enacted by the legislature and a compilation, the legislative acts  
27 control.”); *See also United States v. Ryder*, 110 U.S. 729, 740, 4 S. Ct. 196, 201, 28 L. Ed.  
308 (1884) (“It will not be inferred that the legislature, in revising and consolidating the laws,  
intended to change their policy, unless such an intention be clearly expressed.”) (quoted with  
approval in *Redmond-Issaquah R.R. Pres. Ass’n v. Surface Transp. Bd.*, 223 F.3d 1057, 1062  
(9th Cir. 2000)); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 318, 105 S. Ct.

1 3180, 3187, 87 L. Ed. 2d 220 (1985) (“[Where tendered] without substantive comment . . . it  
2 is generally held that a change during codification is not intended to alter the statute's scope.”).

3 *D. Mandatory provisions of the Zoning Code refute Appellant’s argument.*

4 Appellant argues that his strained interpretation should be adopted because it will serve  
5 to promote buildings with a greater number of residential units and that this is consistent with  
6 the purpose of the Sammamish Trail Zone of providing a place for dense residential  
7 development. This argument is not persuasive. The purpose statement sets forth general intent.  
8 The substantive zoning provisions implement that intent. The substantive Zoning Code  
9 provisions pertaining to Sammamish Trail zoning do not require that each site be developed to  
10 the maximum feasible density. To the contrary, the Zoning Code substantive provisions  
11 establish a minimal requirement for building bulk by setting a minimum building height of just  
12 two stories, and in some locations zoned Sammamish Trail single-story buildings are allowed.  
13 RZC Table 21.10.070B. The mandatory language of the Zoning Code controls over a general  
14 purpose statement. The mandatory zoning standard is completely inconsistent with  
15 Appellant’s claim that the parking requirement should be interpreted to mandate underground  
16 parking to maximize the size of the building.

17 *E. The other claims asserted by the Appellant are not claims upon which relief can*  
18 *be granted in this appeal.*

19 Appellant has asserted a number of other claims in addition to the public walkway  
20 easement claim. None of his other claims entitle him to relief:

21 Appellant’s Claim: Requiring the Applicant to convey a public walkway easement to the  
22 City is an illegal taking of property because it benefits only private property.

23 Reply: The City is not seeking to condemn an easement from the Appellant. The  
24 Applicant will be voluntarily providing the easement over its property. The legal issue of whether  
25 or not the public walkway easement serves a valid public purpose in the context of the exercise of  
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1 the City’s power of eminent domain through a condemnation proceeding is simply not relevant to  
2 the SPE approval.

3 Appellant’s Claim : Mr. Rosenthal will not be able to exclude people from the public  
4 walkway easement area.

5 Reply: The right to exclude people from land is a fundamental aspect of ownership of real  
6 property. Mr. Rosenthal does not own the property on which the walkway easement will be  
7 located. He does not have any right to exclude people from the future walkway easement area  
8 today. Following conveyance of the easement, Mr. Rosenthal will continue to have the right to  
9 exclude trespassers from his property by fencing the property line along the property boundary  
10 adjacent to the easement area. He can continue to place signs prohibiting trespassing on his  
11 property. He can install lighting and security cameras. His property right to exclude people from  
12 his property and to protect his property will not be diminished by grant of a public walkway  
13 easement over the Project site.

14 Appellant’s Claim: The public walkway will not comply with crime prevention  
15 environmental design standards (CPTED).

16 Reply: The Redmond Zoning Code does not require compliance with CPTED. This claim  
17 is precluded because Mr. Rosenthal did not appeal SEPA.

18 Appellant’s Claim : The public walkway easement will impact the Appellant’s property  
19 by fostering illegal activity.

20 Reply: Mr. Rosenthal is asserting that the City approval of the SPE should have excluded  
21 the public walkway easement, or perhaps should have included mitigation of impacts that will be  
22 created by the public walkway easement. He alleges that the public walkway easement will impact  
23 the environment by fostering unlawful conduct. This claim is precluded because Mr. Rosenthal  
24 did not appeal SEPA.

25 Appellant’s Claim : FEMA regulations allow underground parking.

26 Reply: The Redmond Zoning Code does not require underground parking. Whether it is  
27 allowed per “FEMA” is irrelevant because underground parking is not included in the Project and

1 the Redmond Zoning Code does not require underground parking.<sup>1</sup> Even if the Hearing Examiner  
2 should conclude that underground parking is required by RZC 21.10.130A, as set out in  
3 Applicant's Motion to Dismiss at Section V.2.B, the City's Critical Areas Regulations (a) require  
4 that impacts to floodplain areas be avoided and (b) prevail over other provisions of the Zoning  
5 Code when the Critical Areas Regulations are more protective of the floodplain. Applicant  
6 elevated the parking structure above the floodplain in compliance with the Critical Areas  
7 Regulations mandate to avoid impacts, including through redesign of the project. This requirement  
8 of the Critical Areas Regulations is more protective and controls over RCZ 21.10.130A.

9 Appellant's Claim : The public walkway easement should not be included in the Project  
10 because the City has not consistently applied its laws by failing to require that a public walkway  
11 easement be provided in the case of other projects that were subject to the RZC 21.10.150.

12 Appellant's Claim : The City's failure to apply its regulations consistently in the case of  
13 other development projects does not preclude it from application of its regulations in the case of  
14 the Applicant's project. The Applicant is voluntarily providing the public walkway. The City  
15 authority to compel grant of an easement for the walkway is not an issue in the case of Applicant's  
16 project. Hence, the authority of the City to require provision of the public walkway easement is  
17 not relevant to this appeal.

18 Appellant's Claim: In his Response at headnote IV. 1. b "Mr. Rosenthal's concerns about  
19 setting precedent for future development" Appellant states: "Mr. Rosenthal requests clarification  
20 and a ruling from the Hearing Examiner addressing this specific issue and making it clear that  
21 below ground parking is required and allowed in this zone and specific area." Appellant's  
22 Response, pages 7-8.

23 Reply: Appellant thus asserts a claim to be entitled to a declaratory ruling applicable to  
24 future development in the area, including a hypothetical future redevelopment of his property. The

25 \_\_\_\_\_  
26 <sup>1</sup> The City regulations of frequently flooded areas modify, and are more stringent than FEMA regulations in that  
27 commercial and mixed-use development such as the Applicant's Project must meet residential standards. RZC  
21.64.040 C.2.f. Residential standards do not permit parking to be located below the 100-year flood level. This is  
plainly stated at page 2 of Technical Bulletin 6-9, attached to Appellant's Reply at Exhibit 9.

1 Hearing Examiner does not have jurisdiction to issue declaratory judgments. The Appellant is not  
2 entitled to bring such a claim in this appeal.

3 *F. The appropriate legal process for Mr. Rosenthal to address his concerns is through*  
4 *a zoning code interpretation.*

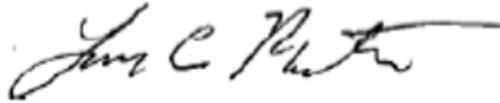
5 Dismissal of Mr. Rosenthal’s appeal will not leave him without a legal process to address  
6 his concerns. The Zoning Code provides that “[a]ny interested person may apply for an  
7 interpretation of this code.” RZC 21.76.070D.3. A Zoning Code interpretation is a Type I action,  
8 appealable to the Hearing Examiner. RZC 21.76.05A. This is the appropriate process for Mr.  
9 Rosenthal to address his concerns as to how the Zoning Code should be interpreted prospectively.  
10 He does not have a legal right to address these concerns indirectly by challenging and delaying the  
11 Applicant’s project, when his real concern is how future redevelopment of his property will be  
12 affected by zoning regulations.

13 **VI. CONCLUSION**

14 Mr. Rosenthal’s parking claim is not supported by the Redmond Zoning Code as a  
15 matter of law. Applicant is entitled to summary judgment of dismissal of the parking claim.  
16 No other claim asserted by Mr. Rosenthal entitles him to relief in this appeal. Applicant is  
17 entitled to judgment dismissing all of Appellant’s remaining claims for failure to state a claim  
18 upon which relief can be granted. Accordingly, the Applicant requests that the Examiner  
19 dismiss the Appeal.

1 DATED this 22<sup>th</sup> day of April, 2019.

2  
3 Davis Wright Tremaine LLP  
4 Attorneys for NE 85<sup>th</sup> Street Development LLC

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6 

7 By \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

1  
2 I, Lisa Carney, hereby certify and declare:

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

8       **Hearing Examiner:**  
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10       Attention Cheryl Xanthos, Deputy City Clerk  
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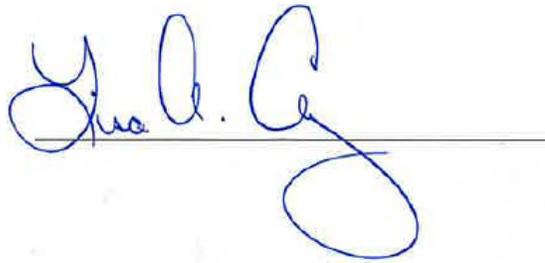
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1 I certify under penalty of perjury pursuant to the laws of the State of Washington that the  
2 foregoing is true and correct.

3 DATED this 22<sup>th</sup> day of April 2019, at Bellevue, Washington.  
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