

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

In the Matter of the Appeal of)	No. LAND-2018-00376
)	
)	
Albert Rosenthal)	
)	
Of the March 6, 2019)	ORDER GRANTING APPLICANT'S
Notice of Decision approving)	MOTION TO DISMISS
LAND-2018-00376, the)	
Modera River Trail mixed use project at)	
<u>15801 NE 85th Street, in Redmond</u>)	

Albert Rosenthal (Appellant) owns real property at 15955 NE 85th Street. He filed a timely appeal alleging the following errors in the City of Redmond Technical Committee’s March 6, 2019 Notice of Decision approving a development project known as the Modera River Trail mixed use project at 15801 NE 85th Street (subject property), which is adjacent to Appellant’s real property.

1. The approval does not require subterranean parking as required per RZC Table 21.10.130.A, resulting in the following errors:
 - a. The project will create fewer dwelling units than it would if subterranean parking were provided, which adversely affects housing affordability, which is a key goal of the City of Redmond; and
 - b. Not requiring subterranean parking in this case results in inconsistent application of the City’s code, which is error;
2. The approval required a public pedestrian throughway per RZC 21.10.150, which should not be required because:
 - a. It was not required of the Lions Gate Apartments development in 1996 and requiring it here is an inconsistent application of the City’s code; and
 - b. As proposed, would result in deleterious conditions for his property (15955 NE 85th Street); and
 - c. It violates RCW 8.12.030 (Eminent Domain, Condemnation by Cities) by taking private land from the subject property (and from his in the future if it redevelops), which would not be used by the public but solely by the residents of adjacent private property.

The relief requested was that subterranean parking per be required RZC Table 21.10.130.A and that the public pedestrian throughway not be required.

Following the April 3, 2019 pre-hearing conference and consistent with the Pre-Hearing Scheduling Order of the same date, NE 85th Street Development LLC (Applicant) submitted a motion to

dismiss the appeal in its entirety on the following grounds: that the Redmond Zoning Code (RZC) contains no provision requiring underground parking at the subject property; that the Appellant lacks standing to challenge the proposed density/the affordability of the approved units, or to claim takings under an Eminent Domain theory; and that Appellant's failure to appeal the Technical Committee's SEPA determination of non-significance (DNS) bars his claims as to impacts resulting from the approved pedestrian throughway easement. The Applicant's arguments are detailed in full in the Applicant's April 10, 2019 motion for summary judgment and dismissal and in the April 22, 2019 final reply to Appellant's response to the motion.

Counsel for the Appellant opposed the motion in an April 17, 2019 response, to which several supporting documents from the City's records were attached. The Appellant alleged standing based on his being a party of record who commented on design review and the notice of application and, among other items, challenged the FEMA Base Flood Elevation reflected for the subject property in the notice of decision.

The City joined in the Applicant's motion in all particulars and also forwarded two additional theories in its April 10, 2019 memorandum in support of the Applicant's motion and its April 22, 2019 reply brief.

Jurisdiction

The Hearing Examiner is authorized to hear and decide appeals of environmental threshold determinations by the Technical Committee pursuant to RZC 21.76.050.G.

Pursuant to Hearing Examiner Rule of Procedure V.2.A.g, the Hearing Examiner has the authority to consider and rule upon all procedural and other motions appropriate to the proceeding.

Discussion

Standing

Pursuant to RZC 21.76.060.I.2.B, in order to perfect an appeal, a would-be appellant must challenging a Type I or II decision must submit a completed appeal form that sets forth:

- i. Facts demonstrating that the person is adversely affected by the decision;
- ii. A concise statement identifying each alleged error of fact, law, or procedure, and the manner in which the decision fails to satisfy the applicable decision criteria;
- iii. The specific relief requested; and
- iv. Any other information reasonably necessary to make a decision on the appeal.

Based on this provision, in order to have standing, an appellant must allege that they are adversely affected, or as that phrase is typically interpreted, "injured" by the decision.

The Appellant alleged the following injuries: that homeless people will use the pedestrian throughway for illegal purposes to the detriment of his adjacent property; that the City's interpretation of its codes in the instant decision would harm him if he redevelops his property in the future; and that the Technical Committee's failure to require underground parking will have the impact of reducing the number of units created in the Applicant's project, which would harm him in

(at least) three primary ways: financially due to reducing the value of the subject property and thus his property values; by reducing dwelling units and resultant “eyes on the street” capable of witnessing and reporting illegal activities on the pedestrian thoroughway; and reducing the number of customers for the businesses on his property. The Appellant also alleges that the City required the Applicant to propose above ground parking, as evidenced by three earlier project iterations considered by Redmond’s Design Review Board, and that the City’s requirement for above ground parking is based on erroneous calculation of the base flood elevation in the project vicinity.

Pursuant to RZC Table 21.10.130.A, density on site is regulated as follows:

Density shall not be regulated by a maximum number of dwelling units per acre, but by the application of bulk, height, parking, and all other development standards. For example, developments may achieve as many dwellings as possible when the development provides all of the necessary parking, open space, etc., for the number of units proposed, and the building(s) meet all of the prescribed standards. 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 amenities along the street front.

The Appellant argues that the final sentence of this section requires subterranean or semi-subterranean parking. It does not. It allows subterranean/semi-subterranean parking as one option. The Appellant’s brief makes an argument based on editorial changes to the language of this provision at the time the adopted ordinance was codified. However, it is not necessary to resort to/inquire of legislative intent when the plain language of the code is unambiguous. The argument that underground parking is required fails as a matter of law.

Pursuant to RZC Table 21.10.070.A, the minimum building height allowed in the Sammamish Trail zone is two stories. The Appellant failed to cite to any provision requiring an applicant to develop the maximum possible number of units for a given property. After consideration of the undisputed facts, the undersigned is not persuaded that the approved parking is inconsistent with RZC Table 21.10.130.A, or that the approved density is inconsistent with densities required in the underlying Sammamish Trail zone, or that the Appellant has a right conferred by any code provision to insist on more “eyes on the street” or more would-be customers for his tenants.

Pedestrian Thoroughway

The approved project includes pedestrian amenities that the Appellant referred to as a pedestrian thoroughway. The Applicant proposed these improvements and the City found them to be consistent with the applicable provisions of RZC 21.10.150, Pedestrian System.

The Appellant alleges various errors in the pedestrian thoroughway, including: that the pedestrian amenity constitutes an unconstitutional taking of the Applicant’s private property for the benefit of another private property owner because the thoroughway dead ends at the adjacent Lions Gate Apartments; that the Lions Gate Apartments, approved in 1996, were not required to provide such a pedestrian facility and that therefore the instant decision represents an inconsistent application of

the law; that the throughway as approved is inconsistent with the principles of crime prevention through environmental design (CPTED); and that the approved pedestrian throughway would result in increased criminal activity on or adjacent to his property.

The City's hearing examiner lacks jurisdictional authority to rule that RZC 21.10.150, Pedestrian Systems, results in unconstitutional takings. Notwithstanding this, the Appellant has not demonstrated injury as to a potential takings claim arising from RZC 21.10.150. The undersigned is not persuaded that the question of why the Lions Gate Apartments were not required to develop a pedestrian throughway is relevant to whether the pedestrian amenity proposed by the Applicant is consistent with code and properly approved by the City. The Appellant has not put forward facts demonstrating that he is injured if the City's approval of the Applicant's pedestrian facility is "inconsistent" with the 1996 permits for the adjacent property. The principles of CPTED are not included in any criteria for approval applicable to the instant project. As concluded above, the Appellant has not shown that the density and the parking in the approved project are inconsistent with code. It is not necessary to reach the question of whether the base flood elevation relied on by the City is in error, because there is no code provision requiring underground parking with which the critical areas ordinance might be in conflict.

The only issue raised that points to injury to the Appellant is the issue of potential future illegal use of the dead end pedestrian throughway next to Appellant's property. However, because the Appellant has neither argued nor demonstrated that the approved pedestrian throughway is inconsistent with the applicable code, the proper context for consideration of that potential injury would have been an appeal of the project's environmental impacts under SEPA. The Appellant did not timely challenge the DNS. Even had that issue been timely raised in a SEPA appeal, the assertion that unknown persons would commit future crimes adjacent to his property may well have been insufficient grounds to support standing in a SEPA appeal.

Ruling

1. The Applicant's motion to dismiss is granted. The argument that underground parking is required fails as a matter of law. As to all other claims, the Appellant did not demonstrate injury sufficient to establish standing under RZC 21.76.060.I.2.B.
2. The appeal is dismissed. The hearing scheduled for May 24, 2019 is canceled, as are all further submittal requirements of the April 3, 2019 pre-hearing order setting hearing and pre-hearing schedule.

Decided April 25, 2019.

By: 

Sharon A. Rice
Redmond Hearing Examiner

Note: Decisions of the hearing examiner in appeals of Type II Technical Committee decisions are appealable to the King County Superior Court pursuant to RZC 21.76.060.M.