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

5 In the Matter of the Appeals of:

6 **Keith Brewe; Rosemarie Ives;**
7 **Nokomis Club of Redmond; Redmond**
8 **Historical Society; and Curtis Nelson,**
9 **Appellants,**

SEPA-2015-00017
LAND-2014-01610/SPE

162Ten Appeal

APPLICANT NATURAL AND BUILT
ENVIRONMENTS' PREHEARING BRIEF

10 Of the February 17, 2015, Determination of
11 Non-Significance (SEPA-2015-00017) and
12 the April 22, 2015 Technical Committee
13 approval of a Site Plan Entitlement (LAND-
2014-01610/SPE)

14 Applicant Natural and Built Environments, LLC (hereinafter the "Applicant") hereby
15 submits this brief in opposition to the Nokomis Club of Redmond's pending appeals of the
16 City's SEPA determination and Technical Committee decisions.

17 **A. Standard of Review.**

18 The purpose of review under the State Environmental Policy Act ("SEPA"), chapter
19 43.21c RCW, is to identify any likely significant adverse environmental impacts of a proposed
20 project and, in certain circumstances, to impose mitigation measures to address any such
21 impacts. RCW 43.21C.060. SEPA requires a threshold determination by the responsible
22 official of the lead agency prior to a local government's processing of a permit application for a
23 private land use project. RCW 43.21C.030.

24 Once the City issues an environmental determination, in this case the DNS, the
25 decisions made in the DNS, including any requirements or "the absence of a requirement", are

1 entitled to substantial weight. RCW 43.21C.090. An agency's decision to issue a DNS and not
2 to require an EIS is reviewed under the “clearly erroneous” standard. RCW 43.21C.090;
3 *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (citing *Indian Trail Property*
4 *Owner's Assoc. v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994)); *Chuckanut*
5 *Conservancy v. Dep't of Natural Resources*, 156 Wn. App. 274, 286, 232 P.3d 1154 (2010). A
6 finding can only be “clearly erroneous” when, although there is evidence to support it, the
7 reviewing court on the record is left with the definite and firm conviction that a mistake has
8 been committed. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87
9 Wn.2d 267, 274, 552 P.2d 674 (1976) (citing *Ancheta v. Daly*, 77 Wn.2d 255, 259–60, 461
10 P.2d 531 (1969)). The same standard holds true for administrative review by a Hearing
11 Examiner. The burden is on Appellant, Nokomis Club, to prove its case.

12 Of equal importance, community displeasure with a project does not constitute adequate
13 grounds for overturning the County’s decision to issue the MDNS or for denial of a project.
14 See, e.g., *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985
15 (1990). Regardless of generalized fears of development, a DNS cannot be overturned unless it
16 is found to be “clearly erroneous.”

17 With respect to the Site Plan Entitlement, Redmond Zoning Code 21.76.060 (I)(4)
18 provides that the Hearing Examiner “shall accord substantial weight” to the decision of the
19 Technical Committee.

20 **B. Nokomis Club’s Appeal Related to the Applicant’s Authority to Apply for Land**
21 **Development Applications for the Site Should be Denied.**

22 Nokomis Club challenges the Technical Committee decisions on the basis of whether
23 the Applicant has authority to apply for the Site Plan Entitlement. The Applicant’s ability to
24 apply for the Site Plan Entitlement with respect to the property cannot rationally be disputed
25 based on the application materials submitted to the City. *See City’s Exhibit 8 and Applicant’s*
Exhibits 13 and 14. Because this question must be resolved on the basis of documentary

1 evidence, any testimony related thereto is unnecessary. The Applicant hereby respectfully
2 requests that the Hearing Examiner deny, as a matter of law, Nokomis Club's appeals of
3 Technical Committee decisions as those relate to the Applicant's legal authority to apply for the
4 Site Plan Entitlement and other land development actions be denied.

5 **C. To the extent Nokomis Club wishes to assert a Use Restriction Based on**
6 **Equitable or Restrictive Covenants, Such Issue(s) Exceed the Hearing Examiner's**
7 **Jurisdiction.**

8 Case law has firmly established that a Hearing Examiner does not have jurisdiction to
9 consider or adjudicate questions of recorded land title documents such as equitable or
10 restrictive covenants on the use of land. *Viking Properties Inc v. Holm*, 155 Wn. 2d 112, 130,
11 118 P.3d 322, 331 (2005). Instead, this City, and this Hearing Examiner, may only base its
12 decision on the City's adopted zoning regulations, state statute and case law; the Hearing
13 Examiner's jurisdiction does not include the authority to adjudicate common law or equitable
14 issues. *See e.g. Martel v. City of Vancouver*, 35 Wn. App. 250, 666 P.2d 916 (1983); *Chaussee*
15 *v. Snohomish County*, 38 Wn. App. 630; 689 P.2d 1084 (1984).

16 To the extent Nokomis Club also wishes to assert some particular expectation it may
17 have had when it sold the property, or that it created some equitable or restrictive covenant on
18 the use of the property after Nokomis Club sold it, any such assertion exceeds the Examiner's
19 jurisdiction and should not be the subject of testimony. However, the Applicant notes that the
20 title commitment does not show any recorded restriction on use of the property or other
21 covenant. *See City's Exhibit O and Applicant Exhibits 10 and 12.*

22 Respectfully, the Hearing Examiner does not have jurisdiction to review whether
23 Nokomis Club had some intent to restrict the use of the land when it sold the land in 1972.
24 Any testimony related to the issue cannot change affect this law, would exceed the Examiner's
25 jurisdiction and would be prejudicial to the Applicant. The Applicant hereby respectfully

1 requests that the Hearing Examiner deny, as a matter of law, Nokomis Club's appeals of the
2 DNS and Technical Committee decisions as those relate to equitable or title restrictions.

3 **D. Nokomis Club's SEPA and Site Plan Entitlement Appeal Issue Regarding**
4 **Preservation of the Building Must Be Denied for Lack of Evidence.**

5 Nokomis Club has failed to present evidence to support any legal restriction on the
6 existing building or site such as being listed on a historic register. There is no witness
7 testimony that can be presented which could legally restrict use of the property in light of the
8 lack of substantive documentary evidence. Because the evidence does not show any legal
9 restriction on the property, it is impossible for Nokomis Club to demonstrate to the Examiner a
10 definite and firm conviction that a mistake has been committed by the City in issuing the DNS.
11 Likewise, the Site Plan Entitlement Technical Committee decision was properly decided with
12 respect to this issue and substantial weight must be given to that decision. As a result, the
13 Applicant respectfully requests the Hearing Examiner deny Nokomis Club's SEPA and Site
14 Plan Entitlement appeal issue regarding preservation of the building.

15 As shown in various exhibits, Nokomis Club owned this site for several decades during
16 mid-1900s. During that time, Nokomis Club had ample opportunity to register the building
17 and/or site on the national historic register. For reasons unknown, Nokomis Club did not. To
18 the contrary, Nokomis Club deliberately cleared title by judicial order in 1958 to ensure its
19 ownership was exclusive and use of the site unrestricted. *See Applicant's Exhibit 11.* In 1972,
20 Nokomis Club then sold the property without restriction to the Greater Redmond Chamber of
21 Commerce (to which One Redmond is successor in interest). *See Applicant's Exhibit 12.* Even
22 so, Nokomis Club continued to use the site for several years, again without attempting to
23 preserve it on any register. As discussed in the City's staff report, in the early 2000's there was
24 City review regarding whether to preserve the existing building but the City ultimately
25 determined the building and site would not be placed on a preservation register or otherwise be
restricted.

1 While Nokomis Club presents circumstantial evidence reflecting Nokomis Club and its
2 members' perceived value of the site and structure, none of that evidence demonstrates any
3 legal restriction on the building or property. As a result, the property and the existing structure
4 on site are legally unrestricted either by historic preservation registration or covenant on title or
5 in equity.

6 Preservation of an unprotected or unregistered building is not a criterion for the land
7 development process under appeal. Neither SEPA nor the Site Plan Entitlement set forth
8 criteria requiring evaluation or preservation of the structure existing on site today. Instead,
9 both SEPA and the Site Plan Entitlement deal with the proposed future use of the property –
10 they are prospective in nature.

11 Absent a legal restriction requiring preservation of the existing structure on the site,
12 which does not exist in this case, there is simply no legal basis for the Hearing Examiner to
13 further consider the issue under the SEPA appeal or under the Site Plan Entitlement appeal.

14 Nokomis Club has failed to present any evidence demonstrating a legally binding
15 historic preservation restriction on the structure or site. No verbal testimony can operate to
16 legally bind the property or existing building beyond the evidentiary material submitted.
17 Therefore, the Applicant hereby requests that the Hearing Examiner deny, as a matter of law,
18 Nokomis Club's SEPA appeal and Technical Committee decisions appeals as those relate to
19 historic preservation of the building.

20 **E. Nokomis Club Has Not Shown An Interest in Appeal Issues Unrelated to the**
21 **Existing Building.**

22 Under its SEPA appeal, Nokomis Club has purely raised the issue of whether the
23 existing building should be preserved. SEPA issues and arguments are strictly limited to those
24 listed in the SEPA appeal document.

25 As discussed above, the question of whether the existing building is legally protected as
a historically registered building (or site) is conclusively resolved in the record. There is no

1 criterion in City Code that requires an analysis of whether to preserve any existing building on
2 site that is not registered. As a result, there is no further basis for the Hearing Examiner to go
3 beyond this legal question and engage in testimony or analysis regarding the existing building.

4 With respect to its appeals of the Technical Committee decisions, Nokomis Club filed
5 the same form appeal statement as the other appellants who have since been dismissed or have
6 withdrawn their appeals. However, Nokomis Club has not shown how its mission or goals are
7 furthered by, or would support pursuit of appeal issues totally unrelated to the existing building.
8 The Applicant would strongly object to the use of Nokomis Club's appeal by any other party or
9 witness as a guise to pursue appeal issues that otherwise have been dismissed or withdrawn.
10 To the extent Nokomis Club intends to pursue appeal issues pertaining to the new proposed
11 building, the Applicant respectfully requests that Nokomis Club be required to demonstrate
12 what independent interest it has in pursuing such issues.

13 DATED this 7th day of July, 2015.

14 JOHNS MONROE MITSUNAGA KOLOUŠKOVÁ, PLLC

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