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6 BEFORE THE HEARING EXAMINER  
7 FOR THE CITY OF SEATTLE

8 In the Matter of the Appeal of:

No. MUP 17-009 (DR, W)

9 Livable Phinney, a Washington non-profit  
10 corporation

SDCI Reference: 3020114

11 From a Department of Construction and  
12 Inspections decision.

MOTION TO DISMISS OR FOR SUMMARY  
JUDGMENT

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14 **I. INTRODUCTION**

15 Appellant Livable Phinney (“Appellant”) raises an issue in its appeal that is outside the  
16 subject matter jurisdiction of the Hearing Examiner. Applicant Johnson & Carr, Inc.  
17 (“Applicant”) respectfully requests that the Hearing Examiner dismiss Appellant’s claims  
18 regarding the date the Applicant’s project application vested to the development standards of the  
19 City’s Land Use Code (“Project Vesting Date”). The Hearing Examiner lacks jurisdiction to  
20 consider the City’s determination of the Project Vesting Date because it is not a Type II decision  
21 appealable under SMC 23.76.022. In the alternative, the Applicant requests that the Hearing  
22 Examiner grant summary judgment in favor of the Applicant on the issue of vesting, and  
23 determine that the Project Vesting Date is September 3, 2015.  
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25 **II. FACTS**

26 Applicant proposes to construct a 4-story structure containing 55 apartment units, two  
27 live-work units, and retail space totaling 2,900 s.f. at 6726 Greenwood Avenue North in Seattle  
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1 (“Project”). *See* Appeal of Livable Phinney (“Appeal”), Exh. A.

2 Applicant submitted its Early Design Guidance (“EDG”) application on September 3,  
3 2015. Declaration of Katie Kendall (“Kendall Decl.”), Exh. A. The Applicant held its first EDG  
4 meeting on October 19, 2015, and its second EDG meeting January 11, 2016. Kendall Decl.,  
5 Exh. B. The MUP application was deemed complete on February 29, 2016. *Id.*

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7 On September 21, 2015, the City of Seattle amended the Land Use Code (“Code”) under  
8 Ordinance 124843. One provision relevant to this motion—SMC 23.76.026.C.2—was amended  
9 on this date. This Code amendment changed the date on which a project vests to the  
10 development standards in the Code. As amended, a project is considered by the City to vest to  
11 the development standards in the Code on the date that an EDG application is submitted to the  
12 City of Seattle Department of Construction and Inspections (“SDCI”), provided certain  
13 timeframes are met.

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15 SDCI determined that the Project vested as to September 3, 2015, which is the date the  
16 Applicant submitted its EDG application. The City, upon thorough review of the Project for  
17 compliance with the development standards in the Code, published its decision on Design  
18 Review and its State Environmental Policy Act determination (“MUP Decision”) on January 23,  
19 2017.  
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21 Appellant filed an appeal and a request for interpretation on February 6, 2017. Appellant,  
22 in its interpretation, sought SDCI’s interpretation on the vesting date. Appellant acknowledged  
23 in its interpretation request that procedural vesting provisions are likely not part of the  
24 interpretation because SMC 23.88.020.A specifically states that “[p]rocedural provisions and  
25 statements of policy are not subject to the interpretation process.” Request for Land Use  
26 Interpretation, dated February 6, 2017 (“Interpretation Request”), p. 5. Appellant’s appeal asks  
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1 that all issues not amenable to interpretation be incorporated into the appeal as if separately set  
2 forth herein. Appeal, ¶ 2.e. This motion to dismiss and motion for summary judgment followed.

### 3 4 **III. ISSUES**

5 1. Should the Hearing Examiner dismiss Appellant’s claim related to the vesting  
6 date of the Project, when the Hearing Examiner lacks jurisdiction to adjudicate the vesting date  
7 under the SMC?

8 2. In the alternative, should the Hearing Examiner grant summary judgment in favor  
9 of the Applicant and determine that the vesting date is September 3, 2015?

### 10 11 **IV. EVIDENCE RELIED UPON**

12 This motion relies on the pleadings and papers on file in this action and the Declaration  
13 of Katie Kendall filed concurrently with this motion.

### 14 15 **V. ARGUMENT**

16 **A. The Hearing Examiner must dismiss issues if it lacks subject matter jurisdiction and**  
17 **grant summary judgment if there is no genuine issue of material fact and a party is**  
18 **entitled to judgment as a matter of law.**

19 “An appeal may be dismissed without a hearing if the Hearing Examiner determines that  
20 it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is  
21 without merit on its face, frivolous, or brought merely to secure delay.” Hearing Examiner Rules  
22 of Practice and Procedure, Rule 3.02. “Any party may request dismissal of all or part of an  
23 appeal by motion.” *Id.*

24 A party moving for summary judgment may meet its burden to show there are no genuine  
25 issues of material fact by pointing out to the Board that there is an absence of evidence to support  
26 the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L.  
27 Ed. 2d 265 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187

1 (1989), *rev'd in part on other grounds*, 130 Wn.2d 160, 179, 922 P.2d 59 (1996). Once the  
2 moving party has made this prima facie showing, the burden shifts to the non-moving party to  
3 show a genuine issue of material fact exists. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 811, 213  
4 P.3d 910 (2009).

5  
6 Here, the Hearing Examiner does not have jurisdiction to determine the Project's vesting  
7 date. In the alternative, if the Hearing Examiner determines he has jurisdiction to consider the  
8 vesting date, there are no genuine issues of material fact and the Applicant is entitled to  
9 judgment as a matter of law with regard to the Project Vesting Date. The Examiner must  
10 accordingly grant partial dismissal and partial summary judgment in favor of the Applicant.

11 **B. The Hearing Examiner lacks jurisdiction to consider the Project Vesting Date.**

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13 In the City of Seattle, a Master Use Permit must be obtained for all development projects  
14 that require "Type I," "Type II," and/or "Type III" decisions. Type I decisions are administrative  
15 decisions made by SDCI which are not appealable to the Hearing Examiner. SMC  
16 23.76.022.A.1. Instead, Type I decisions must be challenged administratively, if at all, through a  
17 land use interpretation request under SMC 23.88.020. *Id.* Type II decisions are discretionary  
18 decisions made by SDCI that are subject to appeal to the Hearing Examiner. SMC 23.76.004.B;  
19 SMC 23.76.022A.2. Accordingly, if a MUP decision contains Type I and Type II decisions, only  
20 the Type II components of the decision may be appealed to the Hearing Examiner.

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22 Here, the determination of the Project Vesting Date is not identified as a Type II decision,  
23 and is accordingly considered a Type I decision. Administrative review of a Type I decision is  
24 allowed only if an interpretation request is timely filed and the request is an interpretable issue.  
25 SMC 23.88.020. Here, it is undisputed that the City's determination of the project vesting date is  
26 a procedural determination that is not subject to interpretation under SMC 23.88.020.A. The  
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1 Appellant notes as such in its interpretation request. Interpretation Request, p. 5. The City’s  
2 determination of the Project Vesting Date is accordingly not subject to appeal to the Hearing  
3 Examiner.

4 **1. The Project Vesting Date is not a decision amenable to an Interpretation**  
5 **under SMC 23.88.020.A.**

6 The City Code provides for an interpretation process whereby any person may request  
7 that SDCI issue a decision related to the “meaning, application or intent of any *development*  
8 *regulation* in Title 23.” SMC 23.88.020.A (emphasis added). Appellant concedes that the  
9 determination of a project vesting date is a procedural provision and is not a development  
10 regulation. Interpretation Request, p. 5 (acknowledging, but not citing, a Hearing Examiner  
11 decision determining that SMC 23.76 is not subject to interpretation). Indeed, the Code  
12 specifically excludes procedural provisions from interpretation. SMC 23.88.020.A (“[p]rocedural  
13 provisions and statements of policy are not subject to the interpretation process.”).

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16 To the extent Appellant seeks to delay the Hearing Examiner’s decision on this motion to  
17 dismiss until SDCI issues its interpretation, its attempt must fail. Appellant has asked that all  
18 issues not amenable to interpretation be incorporated into the appeal as if separately set forth  
19 therein. *Id.* The plain language of the Code clearly prohibits SDCI from issuing an interpretation  
20 on procedural issues such as the determination of the Project Vesting Date. The Hearing  
21 Examiner accordingly cannot wait for SDCI to affirmatively cite their Code to determine, as a  
22 matter of law, that a procedural vesting provision is not a development regulation subject to an  
23 interpretation request under SMC 23.88.020. The issue is simply not open to interpretation  
24 under the Code. As a result, the Appellant’s request fails.

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1                   **2. The City’s decision regarding the Project Vesting Date is not a Type II**  
2                   **decision appealable to the Hearing Examiner**

3                   The Hearing Examiner should dismiss Appellant’s vesting claims because the Examiner  
4 does not have jurisdiction to consider the date a project vests to the Code’s development  
5 standards. As a quasi-judicial official, the Hearing Examiner “has only the authority granted it  
6 by statute and ordinance.” *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61  
7 P.3d 1141 (2003); SMC 3.02.115; SMC 3.02.120; HER 2.03. The Seattle Land Use Code (SMC  
8 Chapter 23) provides that only some land use decisions classified as “Type II” decisions are  
9 subject to appeal to the Hearing Examiner. SMC 23.76.006.C.

10                   The determination of a project vesting date is not subject to appeal under SMC  
11 23.76.006.C.2 because it is not one of the decisions identified in Section 23.76.006.C1 and C.2.a-  
12 n. The Hearing Examiner must interpret and apply the City Code according to its plain meaning.  
13 *Post v. City of Tacoma*, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). Under the plain meaning of  
14 SMC 23.76.006.C, the decision regarding the vesting date is not subject to administrative appeal.  
15 *See, e.g., In the Matter of the Appeal of EPIC, et. al*, Hearing Examiner File MUP-17-001 (Order  
16 on Respondents’ Joint Motion to Dismiss) (March 1, 2017) (*currently on motion to reconsider*)  
17 (determining that the City’s decision to modify or waive development standards is not listed as a  
18 Type II decision that may be appealed to the Hearing Examiner). Because determination of a  
19 Project Vesting Date is not a listed Type II decision subject to appeal to the Hearing Examiner,  
20 the Hearing Examiner does not have jurisdiction to consider the vesting date. Appellant’s claims  
21 regarding the vesting date should accordingly be dismissed.

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1 **C. In the alternative, the Hearing Examiner should grant summary judgment in favor**  
2 **of the Applicant and determine that the vesting date is September 3, 2015.**

3 If the Hearing Examiner determines he has jurisdiction to consider the Project Vesting  
4 Date, Applicant seeks, in the alternative, judgment as a matter of law as to the date that the  
5 Project vests to the Code's development standards. The undisputed facts indicate that the Project  
6 vested to the Code's development standards on September 3, 2015—the date the Applicant  
7 submitted its EDG application. Appellant's arguments to the contrary must fail.

8 In its Interpretation request,<sup>1</sup> Appellant argues that a project vests to all land use  
9 procedures—and not just development standards. Interpretation Request, p. 6. This argument is  
10 belied by well-established precedent. Land use applications vest only to development  
11 regulations; they do not vest to process or procedures. *Goat Hill Homeowners Ass'n v. King*  
12 *Cty.*, 686 F. Supp. 2d 1130, 1135 (W.D. Wash. 2010) (holding that a reasonable use exception  
13 provision is not a "land use ordinance" subject to the vested rights doctrine because it was a  
14 process by which land use controls could be removed under certain circumstances).

15 Appellant does not dispute that vesting provisions are procedural tools—not development  
16 regulations. See Interpretation Request, p. 5. Indeed, development regulations are considered  
17 the controls placed on development or land use activities. *Goat Hill*, 686 F. Supp. 2d at 1135.  
18 Vesting provisions, on the other hand, are a process by which land use applications will be  
19 considered under the land use controls in effect at the time of the application's submission. See  
20 *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997).

21 Here, the Applicant submitted an EDG application on September 3, 2015. Kendall Decl.,  
22 Exh. A. At the conclusion of the first EDG meeting on October 19, 2015, it was determined that  
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<sup>1</sup> As noted *supra*, the Appellant requested that all issues that are not subject to interpretation be considered in  
28 Appellant's appeal.

1 a second EDG meeting was required. Appeal, Exh. A, p. 14. On September 21, 2015, the Code  
2 was amended to change the date on which a project vests to its development standards. As  
3 amended, a project requiring more than one EDG meeting is considered under the Code to vest  
4 to the development standards on the date that an EDG application is submitted to SDCI, provided  
5 that the MUP application is submitted within 150 days of the first EDG meeting.<sup>2</sup> Here, the  
6 MUP Application was deemed complete on January 29, 2016, well within the required 150-day  
7 timeframe.


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9 Because a project application cannot vest to procedural provisions such SMC  
10 23.76.026.C.2, the Hearing Examiner must consider the Code in effect today as it relates to  
11 process and policy. *See Goat Hill, supra.* Under the new vesting language of SMC  
12 23.76.026.C.2, the Project vests to the development regulations in effect on September 3, 2015.

#### 14 VI. CONCLUSION

15 For these reasons, the Applicant and the City request that the Hearing Examiner enter an  
16 order dismissing Appellant's claims regarding the City's determination of the Project Vesting  
17 Date, and in the alternative, grant summary judgment in favor of the Applicant and determine  
18 that the Project Vesting Date is September 3, 2015.

19  
20 DATED this 17<sup>th</sup> day of March, 2017.

21 MCCULLOUGH HILL LEARY, P.S.

22  
23 By:   
24 Jessica M. Clawson, WSBA #36901  
25 Katie Kendall, WSBA #48164  
26 Attorneys for Applicant

27 <sup>2</sup> The previous version of the Code stated that, in situations where more than one EDG meeting is required, that the  
28 project application vests to the development standards in effect at the time of the first EDG meeting.