BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: Livable Phinney, a Washington non-profit corporation From a Department of Construction and Inspections decision.	No. MUP 17-009 (DR, W) SDCI Reference: 3020114 REPLY ON MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

I. INTRODUCTION

In its response brief, Appellant Livable Phinney ("Appellant") fails to establish facts or demonstrate as a matter of law that the Hearing Examiner has jurisdiction over the vesting issue. Specifically, Appellant fails to show that a vesting decision by the City of Seattle ("City") under SMC 23.76.026.C is subject to administrative appeal under Seattle Municipal Code ("Code" or "SMC") 23.76.006.C.

Appellant also attempts to distract the Hearing Examiner from the jurisdictional defects of its vesting claim by raising a brand new claim that the Applicant Johnson & Carr, Inc. ("Applicant") did not vest to the Code in effect on September 3, 2015, because its Early Design Guidance ("EDG") Application was not "complete." Not only do the Hearing Examiner's rules prohibit Appellant from raising a new claim that was not included in its appeal, but Appellant is also wrong. There are no issues of *material* fact related to the conclusion that the EDG Application was considered complete by the City of Seattle on September 3, 2015. Appellant

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does not raise any *material* disputed fact to the contrary.

Moreover, in its response, Appellant ignores well-established precedent that a project vests only to the development standards of the Code. *See Graham Neighborhood Ass'n v. F.G. Assocs.*, 162 Wn. App. 98, 116, 252 P.3d 898, 907 (2011) (a vesting ordinance cannot itself be subject to the vested rights doctrine); *Goat Hill Homeowners Ass'n v. King Cty.*, 686 F. Supp. 2d 1130, 1135 (W.D. Wash. 2010) (a reasonable use exception process provision is not subject to the vesting doctrine).

Applicant asks the Hearing Examiner to dismiss Appellant's claims regarding the date the Applicant's project application vested to the development standards of the City Code ("Project Vesting Date"),[1] and in the alternative, grant summary judgment in favor of the Applicant on the issue of vesting, and determine that the Project Vesting Date is September 3, 2015.

II. ARGUMENT

A. Appellant failed to establish that the City's determination of the date a project vests to the Land Use Code is a Type II determination appealable to the Hearing Examiner

Appellant provided no valid legal reason why the City's determination of the Project Vesting Date is an issue appealable to the Hearing Examiner. Decisions that are appealable to the Hearing Examiner are listed in SMC 23.76.006.C. This is an exclusive list. If a decision, such as the vesting determination, is not included on the list, the decision is not appealable to the Hearing Examiner. *See, e.g., In the Matter of the Appeal of EPIC, et. al,* Hearing Examiner File MUP-17-001 (Order on Respondents' Joint Motion to Dismiss) (March 1, 2017) (determining

[1] Appellant takes issue with the Applicant's use of the shorthand reference of "Project Vesting Date." As is more than evident from the motion to dismiss, Applicant's use of the term was simply to shorten the phrase, "the date the Applicant's project application vested to the development standards of the City's Land Use Code." For the sake of brevity, Applicant will continue to use the term Project Vesting Date.

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that the City's decision to modify or waive development standards, identified as a Type II decision, is not appealable because it is not identified as a Type II decision that may be appealed to the Hearing Examiner under SMC 23.76.006.C). The inquiry must end here and Appellant's claim regarding vesting must be dismissed.

Appellant argues that the City's determination of a Project Vesting Date can piggyback onto the City's design review decision, a Type II decision, because it is somehow a procedure for design review. There is zero basis for this wild interpretation of the code. The City's determination of a Project Vesting Date is a procedural decision; it is not a procedure *for* a design review decision and has nothing to do with design review. SMC 23.76.022.C accordingly does not apply here and Appellant's claim must be rejected.

Indeed, the Design Review Board reviews compliance with Design Guidelines, and does not conduct a detailed zoning review or make decisions regarding vesting; nor can they. The Design Review Board's jurisdiction is limited to review of the design and its compatibility with citywide and neighborhood specific design guidelines. *See* SMC 23.41.008.A. The Design Review Board has nothing to do with vesting, and the design review process has nothing to do with vesting. Appellant's claim reaches well beyond the Code.

It appears that Appellant's "evidence" that design review involves vesting are emails between the Planner Michael Dorcy and Supervisor Roberta Baker stating that planner intends to inform the Design Review Board ("DRB") that the planner anticipates the community will raise concerns about the City's decision on the Project Vesting Date. These courtesy emails are of no moment, and certainly cannot remedy the fact that the City's decision on a Project Vesting Date is not an appealable decision listed in the Code.

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Despite Appellant's attempts to obfuscate the Code, the Code is very simple. City's determination of the Project Vesting Date is not a Type II decision listed in SMC 23.76.006.C and is not appealable to the Hearing Examiner.[2] Because the Hearing Examiner "has only the authority granted it by statute and ordinance," the Hearing Examiner must dismiss Appellant's vesting claim. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003); SMC 3.02.115; SMC 3.02.120; HER 2.03.

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

Despite Appellant's attempts to create an illusion of disputed facts, the material facts to determine the vesting date are clear and undisputed. The complete EDG application was submitted on September 3, 2015. Appellant never disputed this fact in its appeal. Under SMC 23.76.026.C, the Project was vested to the development standards in effect on this date. If the Hearing Examiner determines he has jurisdiction to review the City's decision on the Project Vesting Date, he must grant summary judgment in favor of the Applicant.

1. Appellant has raised an additional issue in its Response; this issue is untimely, not properly before the Examiner, and must be dismissed

Appellant raises an entirely new claim questioning, for the first time, whether the EDG application was considered "complete" as of the application date—September 3, 2015.[3] Because this new claim is not properly before the Examiner, it must be dismissed.

[2] Appellant argues that it does not have an avenue to appeal the Project Vesting Date if it is not allowed to appeal the City's decision to the Hearing Examiner. This is untrue. As the Appellant well knows, for those determinations that are not subject administrative appeal, the proper recourse is to file an appeal under the Land Use Procedures Act. Appellant failed to timely do so.

[3] Appellant takes issue with the fact that the Applicant's motion does not use the word "complete" to describe the September 3, 2015, application. Due to the fact that the application was accepted by the City on September 3, 2015 and an EDG meeting is scheduled, the "completeness" of the application is inherent in the application moving to the next step.

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According to the Hearing Examiner Rules, to be timely, an appeal must be filed by 5:00 p.m. on the last day of the appeal period. Hearing Examiner Rule 3.01(b). The appeal must contain a statement of the Appellant's issues on appeal. Hearing Examiner Rule 3.01(d). Here, neither Appellant's appeal nor Interpretation request, which was included as part of its appeal statement and timely filed, raised a claim regarding whether the application is considered complete. Indeed, Appellant noted in its request for Interpretation that the date of the Application was September 3, 2015. Notwithstanding the fact that this issue is beyond the jurisdiction of the Examiner to consider, Appellant cannot be allowed to continuously revise its appeal; indeed, the Hearing Examiner Rules give leave to an Appellant to amend its claim only within 10 days of the initial filing for this exact reason. HER 3.05. This claim is untimely under the rules and cannot be considered by the Examiner. It must be dismissed.

2. Even if the Hearing Examiner entertains Appellant's new claim, there are no genuine issues of material fact with regard to the September 3, 2015, Project Vesting Date

Appellant further attempts to obfuscate the fact that it failed to timely raise this claim in its appeal by introducing nitpicking items that have no consequence to the fact that the Project is properly vested. The undisputed facts demonstrate that the Applicant submitted its EDG application on September 3, 2015, the City accepted the application because payment was made to the City, and an EDG meeting was scheduled. *See* Declaration of Katie Kendall for Reply on Motion to Dismiss ("Kendall Decl."), Exhs. A and B. The City's actions are the hallmarks of a complete application. *See* SMC 23.76.010.E; Tip 238, p. 6. Appellant did not dispute these facts in its appeal or its response. Only now does Appellant raise a question as to whether the application was deemed "complete."

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To challenge the "completeness" of the application, Appellant nitpicks the Applicant's EDG Application and argues it does not include small subsets of the City's suggestion (not requirement) on how to complete an EDG Analytic Design Proposal Packet, found under the Department of Planning and Development's "Tip" 238.[4] This factual allegation is immaterial and does not warrant a response. The Tip is guidance; it is not law or regulation.[5] Even if it were, the Tip does not tightly prescribe what the City of Seattle Department of Construction and Inspections ("SDCI") may determine as a "complete" application.[6] Indeed, the only guidance provided by the Tip that discusses the SDCI's determination of completeness suggests that that once SDCI determines the application is complete, payment will be due to the cashier. Tip 238, p. 6. Payments for the EDG application and the beginning of the EDG process were made on September 3, 2015. Kendall Decl., Exh. B. Appellant's new claim must be dismissed.

3. A project can only vest to development regulations—not procedural provisions

In its response, Appellant does not dispute that the City's decision on the Project Vesting Date is a procedural decision; Appellant simply argues that a project vests to all provisions, including procedural provisions, of the Code at the time of vesting. This conclusion runs contrary to the well-established vesting doctrine precedent. *Goat Hill*, 686 F. Supp. 2d at 1135.[7]

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[4] Appellant misnames the Tip a CAM and provides as its Attachment 6 an outdated CAM dated March 13, 2008. The most recent Tip is attached as Exhibit C to the Kendall Declaration.

[5] Please see the SDCI website: "Tips are designed to provide user-friendly information on the range of City permitting, land use and code compliance policies and procedures you may encounter while conducting business with the City." http://web6.seattle.gov/DPD/CAMS/camlist.aspx (last visited April 14, 2017). These are certainly not regulatory documents.

[6] Appellant implies that that Design Review Board has the authority to determine whether an application is complete. They do not. See SMC 23.41.008.A; Tip 238, p. 6 (noting that the payment is due once SDCI determines the application is complete).

[7] Appellants attempt to distinguish *Goat Hill* by arguing that the court did not determine that a reasonable use exception is not a "land use ordinance." Appellants misunderstand both the case and the wealth of caselaw defining a "land use ordinance" in the State of Washington. Indeed, in the very next sentence, Appellants argue that the *Goat Hill* court concluded that "these requirements were procedural requirements, not development regulations because they were not controls placed on the development of land or land use activities." Response, at p. 19. Controls

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Vesting provisions are a process by which land use applications will be considered under the land use controls in effect at the time of the application's submission. *See Noble Manor v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997). They are not a land use control to which a project may vest. *Graham Neighborhood Ass'n*, 162 Wn. App. at 116 (holding that a county ordinance defining and limiting a vesting ordinance itself is "neither a restraining nor a directing influence over land use projects" and cannot itself be subject to the vested rights doctrine). Appellant has provided no legal support for its assertion, and its arguments fail.

Appellant's arguments completely misconstrue *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 434, 105 P.3d 94, 96 (2005) in its attempt to argue that the Applicant must be subject to all laws, including procedural laws, in effect at the time of the EDG application. *East County Reclamation* stands for the proposition that an applicant or a Hearing Examiner may not selectively waive particular development regulations upon which the applicant is vested. But this is only true if the law at the time of application applies in the first place. In *East County Reclamation*, the applicant improperly sought to take advantage of a current regulation that allows its proposed land use while utilizing other development regulations from the code upon which the application vested. *Id*. This is not the case here—because the Applicant cannot vest to procedural provisions, there is nothing for Applicant to selectively waive. Restriction of land use is a development regulation. *See, e.g., East County Reclamation, supra; Graham Neighborhood, supra.* Determinations under a vesting ordinance are not; rather

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placed on development of land is precisely the definition of a land use control ordinance. *Graham Neighborhood, supra*. The vesting provision, just like the Reasonable Use Exception ("RUE") provisions, are both procedural decisionmaking processes. Appellant has pointed to no case or statute that says otherwise. Appellant's reliance on the fact that a RUE is a Type II decision that is excluded from the King County vested rights statute is of no moment. In addition to the court's reliance on this statutory provision, the court found that a RUE is a procedural provision is not considered a land use ordinance and cannot properly be described as a development regulation subject to the vested rights doctrine. *See Goat Hill, supra*, p. 1135.

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they are the process that dictates when the land use controls are applied. *See Graham Neighborhood, supra; Noble Manor, supra.* In this case, the City allowed exactly what the court in *East County* required: review its application under the development regulations existing at the time the complete EDG application was filed in accordance with SMC 23.76.026.C.

Because a project application cannot vest to procedural provisions such SMC 23.76.026.C.2, the Hearing Examiner must consider the Code in effect today as it relates to process and policy.[8] *See Goat Hill, supra; Graham Neighborhood, supra.*

III. CONCLUSION

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

DATED this 14th day of April, 2017.

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[8] Appellant argues that the fact that procedural provisions are not subject to the vesting doctrine would lead to absurd results. It is not absurd to follow judicial precedent.

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