

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

LIVABLE PHINNEY ET AL.

from a decision issued by the Director,
Seattle Department of Construction and Inspections

Hearing Examiner File:

MUP-17-009 (DR, W)

Department Reference:

3020114

**ORDER ON MOTION TO
DISMISS AND SUMMARY
JUDGMENT**

The Department of Construction and Inspections (“Department”) issued a design review decision on January 23, 2017 (“Decision”) to Jay Jannette for Johnson Carr, LLC (“Applicant”). The Appellants, Livable Phinney et. al. (“Appellants”), appealed the Decision. The Applicant filed a motion to dismiss a portion of the appeal. The Appellants filed a response to the motions, and the Applicant filed a reply to the response. The Hearing Examiner has reviewed the file in this matter including the motion documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code (“SMC” or “Code”) unless otherwise indicated.

The Applicant moves to dismiss Appellants’ claims regarding the date the Applicant’s project application vested to the development standards of the Code. The motion to dismiss presents two arguments in the alternative: 1) that the Hearing Examiner lacks jurisdiction to consider the City’s determination of the application vesting date because it is not a Type II decision appealable under SMC 23.76.022; and 2) that the Applicant be granted summary judgment on the issue of vesting.

Hearing Examiner Jurisdiction

The Applicant argues that the Hearing Examiner does not have jurisdiction to consider appeal issues concerning application vesting dates. Motion to Dismiss (“Motion”) at 5-6. The Applicant argues that the determination of what it labels as the Project Vesting Date is a decision by the City that is not identified as a Type II decision appealable to the Hearing Examiner, because it is not identified as such in SMC 23.76.006.C1 and C.2.a-n.

Design review decisions are Type II decisions that are appealable to the Hearing Examiner pursuant to SMC 23.76.006.C.2.e. SMC 23.76.022.C.6 indicates the Hearing Examiner’s scope of review includes “issues cited in the appeal that relate to compliance with the *procedures* for Type II decisions as required in this Chapter 23.76.” (emphasis added)

The process for identifying the vesting date for the design review component of a Master Use Permit is set forth SMC 23.76.026.C. Thus, determination of the vesting date is a Chapter 23.76

procedure required for the Type II design review decision that is the subject of this appeal.¹ Therefore, the Appellants' issues concerning vesting are within the Hearing Examiner's jurisdiction.

Summary Judgment

"Summary judgment is proper if there is no genuine issue of any material fact, if the moving party is entitled to judgment as a matter of law, and if reasonable minds could reach only one conclusion from the evidence presented." *Estate of Becker v. Avco Corporation*, 187 Wash.2d 615, 387 P.3d 1066, (2017)(citations omitted). The Applicant argues that it should be granted summary judgment determining that the vesting date for the matter under appeal is September 3, 2015. Motion at 7.

The parties do not dispute the following facts: (1) that the Applicant filed an Early Design Guidance meeting application on September 3, 2015 ("Application Date") *Id.* at 2; (2) a design guidance meeting was held on October 19, 2015 *Id.*; and (3) a second design guidance meeting was also required *Id.* at 8. In this same time frame, the City adjusted its Code requirements for vesting applicable to design review. According to the Appellants, on the Application Date, SMC 23.76.026.C.2 required with regard to vesting:

If more than one early design guidance public meeting is held, then a complete application for a Master Use Permit that includes a design review component shall be considered under the Land Use Code and other land use control ordinances in effect at the time of the first meeting.

Under this version of the Code, the application would have been considered vested to the Land Use Code in effect on October 19, 2015, the date of the first design review meeting.

As a result of a Code amendment effective on September 21, 2015, SMC 23.76.026.C.2 was modified to require:

If more than one early design guidance public meeting is held, then a complete application for a Master Use Permit that includes a design review component shall be considered under the Land Use Code and other land use control ordinances in effect on the date a complete application for the early design guidance process is submitted to the Director.

Interpretation Request by Livable Phinney at 7 (incorporated into the Appellants' Notice of Appeal by reference).

Under the amended Code, the application would be considered vested to the Land Use Code in effect on September 3, 2017, the date the early design guidance application was submitted to the Director.

¹ "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." Motion at 7.

The Applicant argues that projects cannot vest to procedural provisions of the code, and that with the amendment of SMC 23.76.026.C.2 on September 21, 2015, the date on which the project would be considered vested changed from October 19, 2015 to September 3, 2017. Motion at 7-8. The Appellants argue for a more expansive definition of vesting, and represent that a project vests to all code provisions – both substantive and procedural – in effect at the time vesting is determined to apply. Appellants Response to Motion (“Response”) at 16.

It is a general principle “that the vested rights doctrine not be applied more broadly than its intended scope, lest the expense to the public interest become too great.” *Graham Neighborhood Association v F.G. Associates*, 162 Wn.App. 98, 116, 252 P.3d 898 (2011). “Not all regulations relating to land use are land use control regulations . . . Rather land use control ordinances are those that exert a restraining or directing influence over land use. . . . [t]he vested rights rule is generally limited to those laws which can loosely be considered zoning laws” *Id.* at 115 (citations omitted). *See also Goat Hill Homeowners Assoc. Inc. v. King County*, 686 F.Supp.2d 1130, (2010)(wherein a reasonable use exemption application was held not to be a control placed on land use activities, but was a *process* by which such controls may be removed).

SMC 23.76.026.C.2 exercises neither a restraining nor a directing influence over land use projects, instead it defines the City’s vesting procedures. SMC 23.76.026.C.2 simply dictates the date from which the City will determine which land use control ordinances will apply to a project. *Id.* at 116. Therefore, applicants cannot vest to the procedural provisions of SMC 23.76.026.C.2.

The Appellant also raises for the first time the issue that the early design guidance process application submitted on September 3, 2017 was not “complete,” and therefore could not meet the requirements of SMC 23.76.026.C.2 to set the vesting date. Response at 13. This issue was not raised by the Appellants in either their notice of appeal or in the requested director’s interpretation which was incorporated into the notice of appeal by reference. This issue cannot be raised at this late date. *See e.g.* SMC 23.76.022.C.3.a (“The appeal shall be in writing and clearly identify each component of the Type II Master Use Permit being appealed. . . . Specific objections to the Director's decision and the relief sought shall be stated in the written appeal.”); and HER 3.01.d (“An appeal must be in writing and contain the following . . . A brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed.”).

As there is no genuine issue of any material fact, the Applicant is entitled to judgment as a matter of law, that pursuant to SMC 23.76.026.C.2, as amended, the vesting date for the design review application at issue in this case is September 3, 2015.

The Applicant’s motion to dismiss based on lack of Hearing Examiner jurisdiction is **DENIED**.

The Applicant’s motion for summary judgment concerning the vesting date for the design review application is **GRANTED**.

Entered this 26th day of April, 2017.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss and Summary Judgment** to each person listed below, or on the attached mailing list, in the matter of **Livable Phinney**. Hearing Examiner File: **MUP-17-009 (DR, W)**, in the manner indicated.

Party	Method of Service
Livable Phinney c/o Jeff Eustis Aramburu & Eustis LLP eustis@aramburu-eustis.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Applicant c/o Jessica Clawson and Katie Kendall McCullough Hill Leary, P.S. jessica@mhseattle.com kkendall@mhseattle.com Laura Counley lcounley@mhseattle.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Patrick Downs Assistant City Attorney Patrick.Downs@seattle.gov Michael Dorcy SDCI Michael.Dorcy@seattle.gov Alicia Reise Alicia.Reise@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: April 26, 2017



 Tiffany Ku
 Legal Assistant