Hearing Examiner Galt

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of: CAROL ANN COOK REVOCABLE LIVING TRUST, Appellant, v. CITY OF MERCER ISLAND, Respondent.	No. APL21-004 (Ref. No. CAO 20-004) CITY OF MERCER ISLAND'S PARTIAL MOTION TO DISMISS

I. INTRODUCTION

The City of Mercer Island ("City") respectfully requests that the Hearing Examiner dismiss Appellant's taking issue as unripe for adjudication. Alternatively, the City requests the Hearing Examiner dismiss Appellant's takings issue as outside of the Hearing Examiner's jurisdiction.

II. STATEMENT OF FACTS

The facts provided herein are only those relevant to this Partial Motion to Dismiss ("Motion"). This case is unusual in that it involves a Critical Area Review 1 ("CAR 1") determination made regarding a watercourse on the property adjacent to Appellant's own property without an accompanying development project proposal. Appellant is attempting to sell the property in question, commonly known as 7025 North Mercer Way, Mercer Island, WA and challenges a watercourse buffer that extends onto the subject property. Appellant is

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not proposing development/redevelopment of the subject property at this time. Exhibit 1, at 1 ("there is no 'project' and therefore, no 'site plan.'"). Appellant has not applied for a building permit or other land use approval other than the CAR 1 review. *Id.*; Declaration of Robin Proebsting in Support of Partial Motion to Dismiss at 1, ¶ 4 ("Proebsting Decl."). Further, Appellant has not applied for buffer averaging, buffer reduction, or a reasonable use exception. Proebsting Decl. at 1-2, ¶¶ 5-7.

Appellant challenges the City's CAR 1 determination on three alternative theories. The third theory put forth by Appellant is a takings claim. Exhibit 12, page 3 of 9. Specifically, Appellant alleges that "[t]he City's interpretation of the definition of a 'Type Ns' watercourse is not proportionate to the impacts of any redevelopment of the Property within the buffer and setback. For this reason, the City's interpretation results in an unconstitutional taking." *Id.* The City files this motion seeking to dismiss Appellant's third theory—its takings allegation.

III. EVIDENCE RELIED UPON

The City of Mercer Island relies on the City's exhibits that were prefiled on April 14, 2021 and the Declaration of Robin Proebsting In Support of City's Partial Motion to Dismiss, submitted herewith.

IV. ISSUES PRESENTED

1. Should the Hearing Examiner dismiss Appellant's takings claim as unripe? Yes.
2. Should the Hearing Examiner dismiss Appellant's takings claim for lack of jurisdiction? Yes.

V. ARGUMENT

Under the City of Mercer Island's Hearing Examiner Rules of Procedures ("RoP"), any party may request dismissal of all or part of an appeal at any time with notice to all parties. RoP 204. If the facts in an appeal are legally insufficient to support the appeal, dismissal under this rule is appropriate. *See Doe v. Benton County*, 200 Wn.App 781, 787,

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403 P.3d 861 (2017), review denied, 190 Wn. 2d 1006 (2018). Put simply, if the Hearing Examiner cannot legally grant the relief sought, the only appropriate remedy is to dismiss the issue or appeal.

A. Appellant's Takings Claim is Unripe for Adjudication

An issue must be ripe before it can be adjudicated, and Appellant's takings claim is not ripe for adjudication. "The ripeness doctrine ensures that regulatory takings claims are not litigated before they are fully developed at the local level." *Thun v. City of Bonney Lake*, 164 Wn.App.755, 756-57, 265 P.3d 207 (2011). "[I]n determining whether a claim is ripe for review, we consider if the issues raised are primarily legal, and do not require further factual development, and if the challenged action is final." *Jafar v. Webb*, 177 Wn.2d 520, 525, 303 P.3d 1042 (2013).

In *Thun*, the plaintiff challenged a rezone as an alleged unconstitutional taking. *Thun*, 164 Wn. App. at 758. The City of Bonney Lake argued that in order to show ripeness, it was necessary for Thun to submit a building permit application to clarify exactly what could be built on the land in question under existing regulations. *Id*. The Washington Court of Appeals, Division 2, found that "Washington courts typically hold that 'as applied' regulatory takings claims are not ripe until 'the initial government decision maker has arrived at a definite position, conclusively determining whether the property owner was denied all reasonable beneficial use of its property.'" *Id*. at 764-65, (quoting *Peste v. Mason Cty.*, 133 Wash.App. 456, 473, 136 P.3d 140 (quoting *Guimont v. City of Seattle*, 77 Wash.App. 74, 85, 896 P.2d 70 (1995))). Put differently, "when there is some uncertainty as to the effect of the challenged regulations, a takings claim is unripe." *Thun*, 164 Wn. App. at 765.[1]

Here, the takings issue raised by Appellant requires substantial further factual development. Appellant alleges that the watercourse buffer as it extends onto the subject property is not proportionate to the impacts of any redevelopment of the Property. In previous

[1] While Appellant may argue further administrative proceedings are futile, there is simply no basis or evidence to support such claims and argument by legal counsel is insufficient in this regard.

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correspondence to the City, Appellant cited to RCW 82.02.020[2] and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Exhibit 1 at 13. Both RCW 82.02.020 and the *Dolan* precedent require proportionality between required dedications of land or easements ***and the impacts of the proposed development***. The issue is not ripe for adjudication because as Appellant stated in its CAR 1 application cover letter, "there is no 'project' and therefore, no 'site plan.'" Exhibit 1 at 1. There can be no proportionality analysis between the buffer and the impacts of any proposed development without an actual development proposal. Put simply, it is impossible to even quantify the impacts of any proposed development without an actual proposal. Therefore, there is substantial uncertainty as to the actual effect of the challenged provision Mercer Island City Code ("MICC") and Appellant's takings claim is unripe.

Further, the MICC provides for several mechanisms of relief from the strictest application of watercourse buffer requirements. For example, the Mercer Island City Code provides for buffer averaging. MICC 19.07.180(C)(4). Similarly, the MICC provides for buffer reduction. MICC 19.07.180(C)(5). Finally, the MICC provides for reasonable use exceptions to the City's critical areas ordinance requirements. MICC 19.07.090(C). The Appellant has not proposed or applied for buffer averaging, buffer reduction, or a reasonable use exception. Proebsting Decl. at 1-2, ¶¶ 5-7. Within the appeal at hand, the Hearing Examiner will lack the requisite facts to make any determination as to whether the City's application of its Critical Areas Ordinance denies the Appellant all reasonable beneficial use of their property. Therefore, Appellant's takings argument is not ripe. Pursuant to *Thun*, the Hearing Examiner should accordingly dismiss Appellant's takings issue.

In the event Appellant is alleging a facial challenge, as opposed to an as applied challenge, Appellant's claims are still not ripe. The Washington Court of Appeals, Division I, in an unpublished opinion, declined to extend the *Nollan/Dolan* nexus and rough

[2] The City notes that Appellant may have waived its RCW 82.02.020 arguments, because it only cites to constitutional protections in its appeal, and does not list RCW 82.02.020 as a basis for its appeal. Exhibit 12 at 3.

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proportionality tests outside of the context of land use permits. *Common Sense Alliance v. GMHB*, Nos. 72235-I, 72236-1-I (Aug. 10, 2015). *Dolan* expressly applied to the City of Tigard's conditioning of a building permit. 512 U.S. at 377. The *Common Sense Alliance* court accordingly held that "[a]n ordinance requiring a buffer zone is a legislative act, not a land use decision. Legislative determinations do not present the same risk of coercion as adjudicative decisions." Further, a facial challenge to the ordinance implicates a remedy of invalidating the subject ordinance, which is beyond the Hearing Examiner's jurisdiction. *See infra* and MICC 3.40.020.

The Hearing Examiner should arrive as the same conclusion as the Washington State Court of Appeals, Division One, in *Common Sense Alliance.* It is undisputed that no application project permit has yet been submitted to the City in this dispute.; Proebsting Decl. at 1, ¶ 4. Appellant's takings claim within the context of this appeal, without a concrete project proposal, is essentially a challenge to a legislative act, not a land use decision. In the absence of a project permit, the *Dolan* case cannot be applied, as recognized by the court in *Common Sense Alliance*. Therefore, Appellant's claim is unripe, even if Appellant alleges a facial challenge.

B. <u>The Mercer Island City Code limits the Hearing Examiner's jurisdiction to matters strictly delegated by the Mercer Island City Code.</u>

The issue of jurisdiction is a foundational one. A court or tribunal must have subject matter jurisdiction in order to decide a case; in the absence of subject matter jurisdiction, a court or tribunal has no power to act. *See Eugster v. Wash. State Bar Assoc.*, 198 Wn. App. 758, 774, 397 P.3d 131 (2017); *see also* MICC 3.40.050. Washington courts have long established that a hearing examiner has very limited subject matter jurisdiction and in fact, may "exercise only those powers conferred either expressly or by necessary implication." *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636 P.2d 1084 (1984), citing *State v. Munson,* 23 Wn. App. 522, 524, 597 P.2d 440

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(1979). *See also, Woodinville Water Dist. v. King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001) ("hearing examiners have only the authority delegated to them by the Council."). An examination of the MICC establishing the Hearing Examiner's authority reveals that Appellant's takings allegations reach beyond the scope of the Hearing Examiner's jurisdiction.

The MICC does not delegate to the Hearing Examiner the authority to determine questions of federal law. Chapter 3.40 MICC, *Hearing Examiner*, creates the office of the hearing examiner and provides in part as follows:

> 3.40.020 Purpose – Function and jurisdiction
> A. The hearing examiner will hear and decide upon applications and appeals as designated in this code.
>
> B. The hearing examiner's decision may be to:
>
> 1. Grant or deny the application or appeal; or
> 2. Grant the application or appeal with such conditions, modifications, and restrictions as the hearing examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the comprehensive plan, the Mercer Island City Code, and other official laws, policies, and objectives of the city of Mercer Island; or
> 3. Remand the decision back to the decision maker for further consideration.

Nothing in this provision grants the Hearing Examiner jurisdiction over takings claims, and especially claims arising out of federal law. In previous correspondence to the City, Appellant has alleged a takings claim under the federal exactions cases, namely *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Exhibit 1 at 13. MICC 3.40.020 confers only limited jurisdiction upon the Hearing Examiner, and no jurisdiction over federal claims. To wit, the Hearing Examiner lacks the jurisdiction to declare a portion of the MICC

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unconstitutional, as Appellant requests. Exhibit 12, page 3. Therefore, Appellant's takings claim should be dismissed for want of jurisdiction.

VI. CONCLUSION

The Hearing Examiner lacks jurisdiction to decide matters that are unripe and matters not delegated to him by the MICC. Appellant's takings claim requires substantial further factual development and is unripe. Further, Appellant's takings claim is based upon federal law, which is outside of the jurisdiction granted to the hearing examiner by the MICC. Accordingly, the City respectfully requests that the Hearing Examiner dismiss Appellant's takings claim.

DATED this 19th day of April, 2021.

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DECLARATION OF SERVICE

I, Tori Harris, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 19th day of April, 2021, I served a true copy of the foregoing City of Mercer Island's Partial Motion to Dismiss on the following counsel of record using the method of service indicated below:

Kristen C. Reid, WSBA No. 38723 Belcher Swanson, PLLC 900 Dupont Street Bellingham, WA 98225 Counsel for Petitioner	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: kristen@belcherswanson.com ☐ EService pursuant to LGR

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of April, 2021, at Seattle, Washington.

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Tori Harris

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