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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
MOTION TO EXCLUDE CERTAIN
EXHIBITS

I. RELIEF REQUESTED

The City of Mercer Island (“City”) respectfully requests that the Hearing Examiner exclude exhibits 1004, 1005, 1006, 1007, and 1008 identified in Appellant’s Exhibit List because they are irrelevant to the appeal at hand and offered only for the purposes of prejudice to the City. Exhibits 1004 and 1008 relate to a separate Code Interpretation request by the Appellant that was not timely appealed. Similarly, Exhibits 1005, 1006, and 1007 appear to be related to a dispute Appellant has with respect to the City’s fee schedule and again, are not relevant to the Critical Area Review 1 determination that was appealed in this proceeding. Accordingly, pursuant to Hearing Examiner rule 316(b), these exhibits should be excluded. Further, the Hearing Examiner should issue an order precluding eliciting testimony on the City’s decision on the separate Code Interpretation request and the application of the City’s fee schedule.

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II. FACTS

The facts presented are only those relevant to the City’s Motion to Exclude Certain Exhibits. On March 3, 2021, Appellant appealed the City’s Critical Area Review 1 (“CAR 1”) Determination. Exhibit 12. That Appeal only appeals the City’s CAR 1 determination, and does not challenge other decisions, such as requests for code interpretation or the City’s fee schedule. *Id.* at 2-4. Appellant prefiled a number of exhibits on April 20, 2021.

Exhibit 1004 is a letter from Interim Community Planning and Development Director Jeff Thomas to Appellant’s counsel, Ms. Reid, declining a request for Code Interpretation pursuant to MICC 19.15.160(A). Exhibit 1008 is an email string between Ms. Reid and Patrick Yamashita, then the City’s Interim Community Planning and Development Director, regarding the same requested Code Interpretation. The City declined to issue a code interpretation pursuant to MICC 19.15.160(A) on October 23, 2020. Exhibit 1004. Appellant did not appeal the Director’s determination not to issue a code interpretation pursuant to MICC 19.15.160(B). Declaration of Jeff Thomas In Support of City’s Motion to Exclude (“Thomas Decl.”).

Exhibit 1005 is an email string between Senior Planner Robin Proebsting and Appellant’s counsel, Ms. Reid, regarding a site visit for the City’s third-party peer review. Exhibit 1006 is the City’s current Fee Schedule. Exhibit 1007 is an invoice from the City’s third-party technical reviewer, Environmental Science Associates (ESA). Again, Appellant’s appeal did not include any issues with the City’s fee schedule. Exhibit 12.

III. EVIDENCE IN SUPPORT OF MOTION

The City relies upon the materials on file in this proceeding, as well as the Declaration of Jeff Thomas In Support of City’s Motion to Exclude, submitted herewith.

IV. DISCUSSION

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

1 probable than it would be without the evidence.” Washington Rules of Evidence (“ER”) 401.
2 ER 401 provides that irrelevant evidence is inadmissible. Similarly, Hearing Examiner Rule
3 316(b) provides that “[i]rrelevant, immaterial, unreliable, or unduly repetitious evidence may
4 be excluded.”

5 Appellant offers exhibits 1004 and 1008 only for the purpose of prejudice—namely,
6 in an attempt to cast the City in a negative light. While Appellant may not like the fact that
7 the City exercised its discretion under MICC 19.15.160(A) to decline the code interpretation
8 request, Appellant had the option to appeal that decision under MICC 19.15.160(B).
9 Appellant did not appeal the City’s decision. Thomas Decl. That decision is final. Appellant
10 cannot now attempt to collaterally attack the City’s decision on its Code Interpretation having
11 missed the deadline to so appeal. Exhibits 1004 and 1008 only evidence that the City declined
12 a request for Code Interpretation. As such, they have no bearing on whether the City’s CAR
13 1 determination is correct. Accordingly, they must be excluded.

14 Similarly, Exhibits 1005-1007 relate to an apparent complaint of the Appellant about
15 the City’s implementation of its fee schedule with respect to the third-party review required
16 in this proceeding. This appeal relates solely to the City’s CAR 1 determination. Appellant’s
17 displeasure with the City’s application of its fee schedule is not included in Appellant’s appeal,
18 and irrelevant to the CAR 1 determination even had it been included. Whether the City
19 correctly determined costs under its fee schedule is wholly and completely irrelevant to the
20 question of the accuracy of the City’s CAR 1 determination, which is likely why it was not
21 included in Appellant’s Appeal Exhibit 12. Pursuant to ER 402 and Hearing Examiner Rule
22 316(b), Exhibits 1005-1007 are inadmissible and should be excluded.

23 V. CONCLUSION

24 The City respectfully requests that the Hearing Examiner exclude Exhibits 1005,
25 1006, 1007, and 1008 because they are not relevant to the instant proceeding and are offered
26 solely for the purposes of prejudice to the City. The City also requests the Hearing Examiner

1 strike all portions of Appellant’s Prehearing Memo relating to those exhibits and issue an
2 order preventing the eliciting of testimony on the issue of the City’s decision on Appellant’s
3 previous request for Code Interpretation or the City’s application of its fee schedule.

4
5 DATED this 22nd day of April, 2021.

6 MADRONA LAW GROUP, PLLC

7
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12 Bellevue, WA 98006
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1 **DECLARATION OF SERVICE**

2 I, Tori Harris, declare and state:

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

5 2. On the 22nd day of April, 2021, I served a true copy of the foregoing City of
6 Mercer Island’s Motion to Exclude Certain Exhibits on the following counsel of record using
7 the method of service indicated below:

8 Kristen C. Reid, WSBA No. 38723 9 Belcher Swanson, PLLC 10 900 Dupont Street 11 Bellingham, WA 98225 Counsel for Petitioner	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: kristen@belcherswanson.com <input type="checkbox"/> EService pursuant to LGR
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12 I declare under penalty of perjury under the laws of the State of Washington that the
13 foregoing is true and correct.

14 DATED this 22nd day of April, 2021, at Seattle, Washington.

15 **MADRONA LAW GROUP, PLLC**

16 *Tori Harris*

17 _____
18 Tori Harris