

RE: Appeal of Land Use Approval for CAO23-011
October 23, 2023

To Whom it May Concern:

The document below delves into nuanced detail with supporting evidence, but the overarching concern is a simple one: we, the appellants, strongly disagree with the City's approval of CAO23-011.

In this document, we present a professional opinion that confirms our previously-presented viewpoint that unpermitted cutting of an Exceptional Tree took place to enable CAO23-011. In addition, we present new data about the origin of the 1963 topographic survey, which we had previously submitted to the City.

By approving CAO23-011, we feel that the City is not representing the interests of our community of neighbors, and has improperly approved a Development Proposal that remains in violation of the Mercer Island City Code ("MICC"). It is critical that the City fairly enforce the MICC - otherwise, the code loses its meaning.

The issues in this appeal are not new (they were presented to the City during the public comment period for CAO23-011). However, the City did not address these issues in the [Notice of Decision](#). These issues are relevant, and must be addressed.

As the City has determined, the entire Development Proposal Site ("Site") for CAO23-011 lies within a variety of Critical Areas. Mercer Island City Code ("MICC") imposes specific requirements on Alterations and Development within Critical Areas.

CAO23-011 violates MICC for two reasons, and thus the Approval of CAO23-011 should be overturned:

1. Unpermitted actions taken as part of this Development Proposal violate multiple provisions of MICC 19.07 and the associated MICC 19.10 tree regulations.
2. The Development Site was developed in contravention of Mercer Island Code at the time of development, and CAO23-011 does not propose bringing the site into compliance with MICC, violating MICC 19.15.210(B).

Part 1. CAO23-011 violates MICC 19.07 and MICC 19.10

Overview

1. The Owner carried out unpermitted Removal of an Exceptional Tree in a Critical Area, violating MICC 19.07.020(B) and MICC 19.10.020(B)(1).

2. The Owner carried out this removal to enable this Development Proposal, violating MICC 19.10.060(A)(3) and MICC 19.07.020(B).
3. This removal adversely impacted adjacent property, violating MICC 19.07.160(B)(2)(b).

Section 1 - Owner carried out unpermitted Removal of an Exceptional Tree in a Critical Area

For the purposes of permit approval, MICC 19.10.020(B)(3) defines Tree Removal as follows: **“tree removal includes the cutting** or removing directly or indirectly through site grading **of any tree**, or root destruction that will result in a tree ultimately becoming a hazardous tree.” (my emphasis).

MICC 19.16.010 defines Cut or Cutting as “The intentional cutting of a tree to the ground (excluding acts of nature), any practice or act which is likely to result in the death of or significant damage to the tree or **any other removal of a part of a tree that does not qualify as pruning**”.

I consulted with Scott Selby, an ASCA Registered Consulting Arborist, ISA Board Certified Master Arborist, and ISA Qualified Tree Risk Assessor with over 35 years of full-time experience. Per Selby’s attached report, the actions carried out on Tree #5 (identified in the [Applicant’s Tree Protection Report](#)) on 11/10/2021 by the Owner were unquestionably Cutting, not Pruning, under MICC. Selby states that “The work carried out on the tree unquestionably meets this criterion.” Thus, a removal permit was required for this action.

Tree #5 is a 45-inch DSH Red Oak, and is therefore an Exceptional Tree under MICC 19.16. In fact, according to the Selby report, “At 141 inches circumference (45 inches DSH), this specimen is nearly the exact same size as the largest red oak listed in *Trees of Seattle* Arthur Lee Jacobson (143 inches).”

Unpermitted Removal of Exceptional Tree #5 is a violation of MICC 19.07.020(B) and 19.10.020(B). Violation of 19.10.020(B) is also a violation of MICC 19.07 under MICC 19.07.030(A).

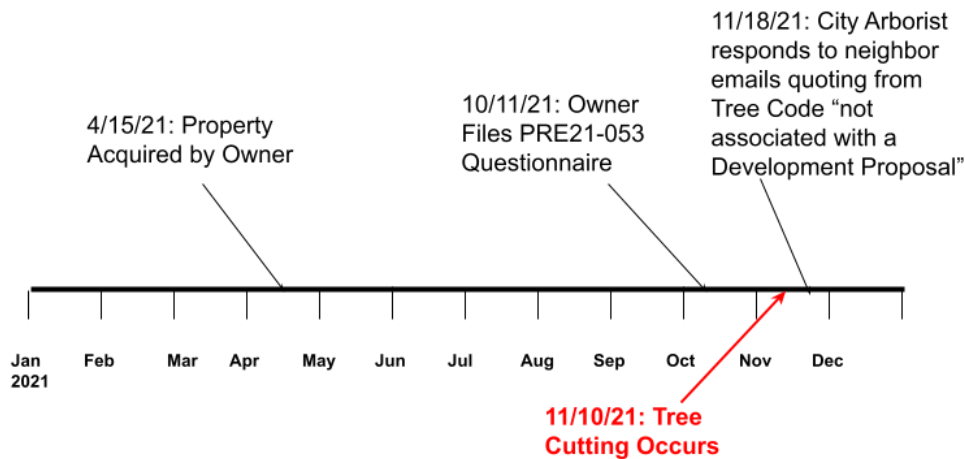
This information has been brought to the attention of the City before, yet these important provisions have been ignored without explanation.

Section 2 - This Removal was performed to enable this Development Proposal

The Removal of Tree #5 was carried out without the required removal permit and the record offers evidence of contradictory communications by the Owner regarding her actions and intentions.

Unpermitted Removal of an Exceptional Tree as part of a Development Proposal violates MICC 19.10.060(A)(3). Violation of 19.10.060(A)(3) is also a violation of MICC 19.07 under MICC 19.07.030(A).

The timeline below shows that the Tree Removal occurred in direct connection with this Development Proposal, underscoring the need for proper permitting (which did not occur). This timeline further affirms that the Tree Removal was caused by the Owner, contrary to representations made in the TPP submitted by the Applicant.



The purchase of the Development Site by the Owner closed on **April 15, 2021**.

On **October 11, 2021** the Applicant filed a Site Development Questionnaire with the City as part of PRE21-053 for a 1471 square foot second floor addition. In this filing, the Applicant stated that “no large trees would be removed as a result of this development activity”.

On **November 10, 2021**, the Owner’s agents Cut the Exceptional Tree. Per Master Arborist Selby’s report (page 2), “approximately 30 percent of the total biomass of the crown” was removed.

On **November 18, 2021**, in response to questions from neighbors about the severe damage done to the tree, City Arborist John Kenney emailed the following:

“Non-Construction work (MICC 19.10.060) – A tree permit with a simple application is required to cut:

1. Trees 10” in diameter or more, measured at 4-1/2 feet above the ground
2. Exceptional Trees (refer to definitions section at the end of this document).
3. Trees located in a Critical Area (refer to definitions section at the end of this document). “

(Note: the City Arborist’s note erroneously referred to MICC 19.10.060 for non-construction work, rather than MICC 19.10.050).

The City Arborist was apparently unaware that the Owner had already submitted a pre-application and was already pursuing a Major Single-Family Dwelling project.

To summarize, the Owner conducted an unpermitted Removal of Tree #5 less than one month after communicating her building intentions to the City’s Planning Department and even one week after the Removal, the City Arborist appeared to lack necessary information about the Owner’s true intentions.

Further muddying the record, the TPP contains two significant mischaracterizations. First, the TPP described the Cutting as a mere Pruning; second, it represented, falsely, that the 6950’s prior owners were responsible for this Action.

“Just prior to selling the property they [*the previous owners*]... arranged to have the neighbor’s large tree pruned back from over their roof.”

This is not true. The Tree was Cut, not pruned, and it was Cut by the current Owner (almost 7 months after acquiring the property, as unmistakably demonstrated in the timeline above). This mischaracterization was shown by Jim and Susan Mattison’s comments on Building Permit 2207-019, more one year ago. The TPP has not been corrected. In fact, the TPP containing this

mischaracterization was resubmitted for CAO23-011, and was approved by the City as part of CAO23-011.

Had the Owner properly followed MICC requirements regarding Tree Removal, she would have been required to obtain a removal permit that was part of a Development Proposal prior to her actions. By proactively engaging in non-permitted Tree Removal, she attempted to circumvent the tree retention requirements that would be imposed on her Development Proposal. The City must hold her to the same standards as those required of all community members. Otherwise, the Owner stands to evade the requirements that would have limited the Development Proposal's size and/or location pursuant to MICC 19.10.060(A)(3)'s Tree Retention Rules.

Section 3. The Owner's Unpermitted Actions Adversely Impacted the adjacent property containing Tree #5.

MICC 19.07.160(B)(2)(b) prohibits approval of Alterations to Critical Areas that will adversely impact adjacent property. The Owner's unlawful actions constituted an unpermitted Tree Removal (see Section 1). The Owner Cut and damaged Tree #5 as part of this Development, and in doing so, adversely impacted the adjacent property.

Summary

The tree retention requirements for development proposals in MICC are clear, and especially important to respect in the case of Exceptional Trees. Unless an exception applies, no removal of Exceptional Trees is permitted as part of a Development Proposal. MICC 19.10.060(A)(3). Exceptions exist, but the Applicant must show that the relevant exception applies rather than ignoring the requirements altogether, as he did. If any Applicant is subject to tree retention requirements, then those requirements apply for a five-year period prior to the application. In this case, the applicant's unpermitted tree removal (on November 11, 2021) predates his application (July 3, 2023), thus falling within the five-year lookback period. The Applicant should be required to show that an exception applies. Alternatively, no application prior to November 11, 2026 should be approved.

Part 2. MICC prohibits approval of this Land Use Application without bringing the Site into compliance with current MICC

Section 4 - Development inconsistent with the purposes and requirements of MICC Title 19 has occurred on the Development Proposal Site without prior City approval

Evidence from aerial photos and surveys demonstrates that the retaining wall on the Western and Southern boundaries of the Development Site was built after January 1963 (see Appendix).

Mercer Island Code, beginning with the [Mercer Island Zoning Code of 1960](#) (MIZC1960), prohibited the installation of fill retaining walls more than 42” tall in the Required Front Yard (MIZC1960 16.01.4), and prohibited the installation of fill retaining walls more than 72” tall in the Required Side or Rear Yard (MIZC1960 16.01.4). All Mercer Island Codes after 1960 contain these restrictions.

The retaining walls on the Development Site today exceed 120” in height in the Required Front Yard, and exceed 100” in the western Required Side Yard. As shown in the [Applicant's 2022 geotechnical survey](#), the retaining wall retains large amounts of fill.

The retaining walls on the south side of the Development Site also encroach on the SE Maker Street right of way, in violation of MICC 19.06.060. No encroachment permit was issued for this encroachment.

In sum, unpermitted development was carried out on the Development Site that was inconsistent with the requirements of Mercer Island Code at the time. Therefore, any Land Use Application cannot be approved without bringing the Development Site into compliance with MICC (MICC 19.15.210(B)).

Section 5 - the Development Proposal does not bring the Development Site into compliance with MICC

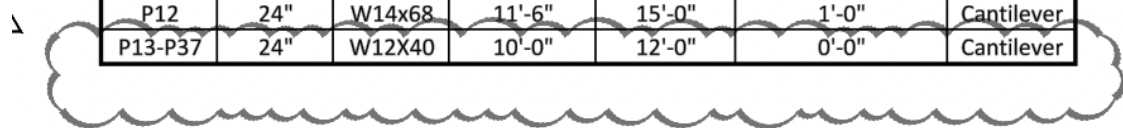
CAO23-011 does not comply with the following MICC regulations:

- 19.02.050(D)(5)(a) - There is at least 11 feet of fill in the Required Front Yard and in the western Required Side Yard (per the [Applicant's 2022 geotechnical survey](#) - Page 3),

exceeding the maximum allowed fill depth of 72 inches above Existing Grade¹ anywhere on the Site.

- 19.02.050(E)(1)(a)(i) - The proposed combined rockery + retaining wall for the fill slope in the western Required Side Yard and Required Rear Yard exceed the maximum allowed height of 72 inches above the lower of Existing Grade or Finished Grade. The proposed retaining wall in these yards is ~120" (Piles 23 through 37 in the table from CAO23-011 SUB2, sheet SH2 below).
- 19.020.050(E)(1)(a)(ii) - The proposed combined rockery + retaining wall for the fill slope in the Required Front Yard exceeds the maximum allowed height of 42 inches above the lower of Existing Grade or Finished Grade. The proposed retaining wall in these yards is ~120" (Piles 13 through 22 in the table from CAO23-011 SUB2, sheet SH2 below).

Pile Schedule						
Pile Mark	Auger Dia.	Wide Flange	Max. Height H (ft.)	Min Embed D (ft.)	Min. X (ft.) Above Top of Excavation	Type
P1	24"	W16x100	11'-6"	20'-0"	1'-0"	Cantilever
P2	24"	W16x100	11'-6"	20'-0"	1'-0"	Cantilever
P3	24"	W16x100	11'-6"	20'-0"	1'-0"	Cantilever
P4	24"	W16x100	11'-6"	20'-0"	1'-0"	Cantilever
P5	24"	W16x100	11'-6"	20'-0"	1'-0"	Cantilever
P6	24"	W14x68	11'-6"	15'-0"	1'-0"	Cantilever
P7	24"	W14x68	11'-6"	15'-0"	1'-0"	Cantilever
P8	24"	W14x68	11'-6"	15'-0"	1'-0"	Cantilever
P9	24"	W14x68	11'-6"	15'-0"	1'-0"	Cantilever
P10	24"	W14x68	11'-6"	15'-0"	1'-0"	Cantilever
P11	24"	W14x68	11'-6"	15'-0"	1'-0"	Cantilever
P12	24"	W14x68	11'-6"	15'-0"	1'-0"	Cantilever
P13-P37	24"	W12X40	10'-0"	12'-0"	0'-0"	Cantilever



7 Pile Schedule

¹MICC 19.16 defines Existing Grade as “The surface level at any point on the lot prior to alteration of the ground surface.”

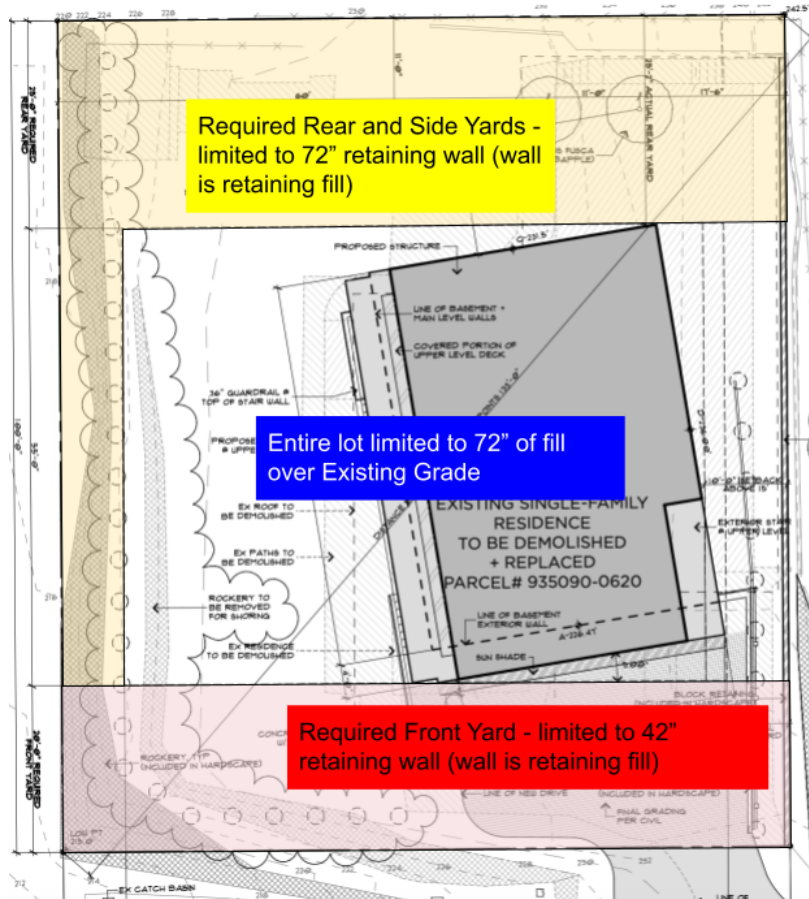
MICC 19.16 defines Alteration as “Any human-induced action which impacts the existing condition of the area, including but not limited to grading, filling, dredging, draining, channeling and paving (including construction and application of gravel). ‘Alteration’ does not include walking, passive recreation, fishing, or similar activities.”

Thus, the Existing Grade here is the elevation of the remnant topsoil found in the 2022 Geotechnical Survey, below as much as 11’ of fill.

In order to comply with MICC regulations of retaining walls and fill, several things need to happen:

1. The heights of retaining walls containing fill in Required Yards must be reduced to 42" in the Required Front Yard, and 72" in the Required Side and Rear Yards. Note that MICC restricts the **combined** height of retaining walls + rockeries in each required yard. Therefore the remaining portions of the existing rockery and the new retaining/shoring walls must have their heights combined for comparison with MICC 19.02.050(E)(1)(a)'s requirements.
2. Fill that raised the Finished Grade to more than 72" above the Existing Grade must be removed.

Below is an illustration showing the MICC requirements that are violated by CAO23-011 :



Section 6 - Because the Site was Development Inconsistently with the purposes and requirements of MICC Title 19, the City may not approve this Land Use Approval unless the Development Proposal bring the Development Site into compliance with MICC

MICC 19.15.210(B) states that “If development inconsistent with the purposes and requirements of this title has occurred on a development proposal site without prior city approval, the city shall not issue any land use review approvals for the development proposal site unless the land use review approval requires that the restoration of the site to a state that complies with the purposes and requirements of this title be addressed.”

The illegal, unpermitted construction of the retaining wall and the installation of 11+ feet of fill after 1963 precisely matches the “development inconsistent with purposes and requirements...” described in MICC 19.15.210(B).

All criteria required by MICC 19.15.210(B) were triggered by this illegal development. As a result, MICC 19.15.210(B) requires that all items in Section 5 of this document be brought into compliance with current MICC as part of any Land Use Approval, including CAO23-011.

Conclusion

Land Use Application CAO23-011 should be rejected, and the City's Approval overturned, because:

1. Unpermitted Exceptional Tree Removal within a Critical Area took place in service of the Development Proposal, in violation of the following:
 - a. MICC 19.07.020(B) - Development Proposals in Critical Areas must comply with MICC 19.07.
 - b. MICC 19.07.030(A) - If more than one regulation applies to a given property, then the regulation that provides the greatest protection to critical areas shall apply.
 - c. MICC 19.07.160(B)(2)(b) - Alteration of landslide hazard areas and seismic hazard areas may not adversely impact adjacent properties.
 - d. MICC 19.10.020(B)(1) - Permit approval is required prior to removing any tree.
 - e. MICC 19.10.060(A)(3) - Development proposals specified shall retain exceptional trees with a diameter of 24 inches or more.

CAO23-011 takes direct advantage of this illegal Tree Removal. The Applicant should be required to show that an exception that allowed removal of an Exceptional Tree exists. Alternatively, any future application should come no earlier than five years after the unpermitted Removal on November 10, 2021.

2. The Development Proposal Site was illegally developed in contravention of the Mercer Island Code at the time of its development. Under MICC 19.15.210(B), any Land Use Application for this Site must bring the Site into compliance with MICC. CAO23-011 does not bring the Site into compliance with MICC.

Failure to insist that development comply with MICC renders those requirements irrelevant.

Appendix - Identifying the Date of Construction of the Retaining Walls at 6950 SE Maker

Two sources of data demonstrate that the Retaining Walls were built after MIZC1960 went into effect in September, 1960:

- Aerial photography from 1963 demonstrates that there was no retaining wall on the western or southern boundaries of the Development Site.
- Comparisons of the official City of Mercer Island Topographic Base Map of 1963 with the 2021 survey of the property shows that the retaining wall was added between 1963 and 2021.

1963 Aerial Photography Shows No Retaining Wall

The 2021 survey of the Development Site shows the distance from the walkway on the western side of the existing house to the top and bottom of the retaining wall west of the house.

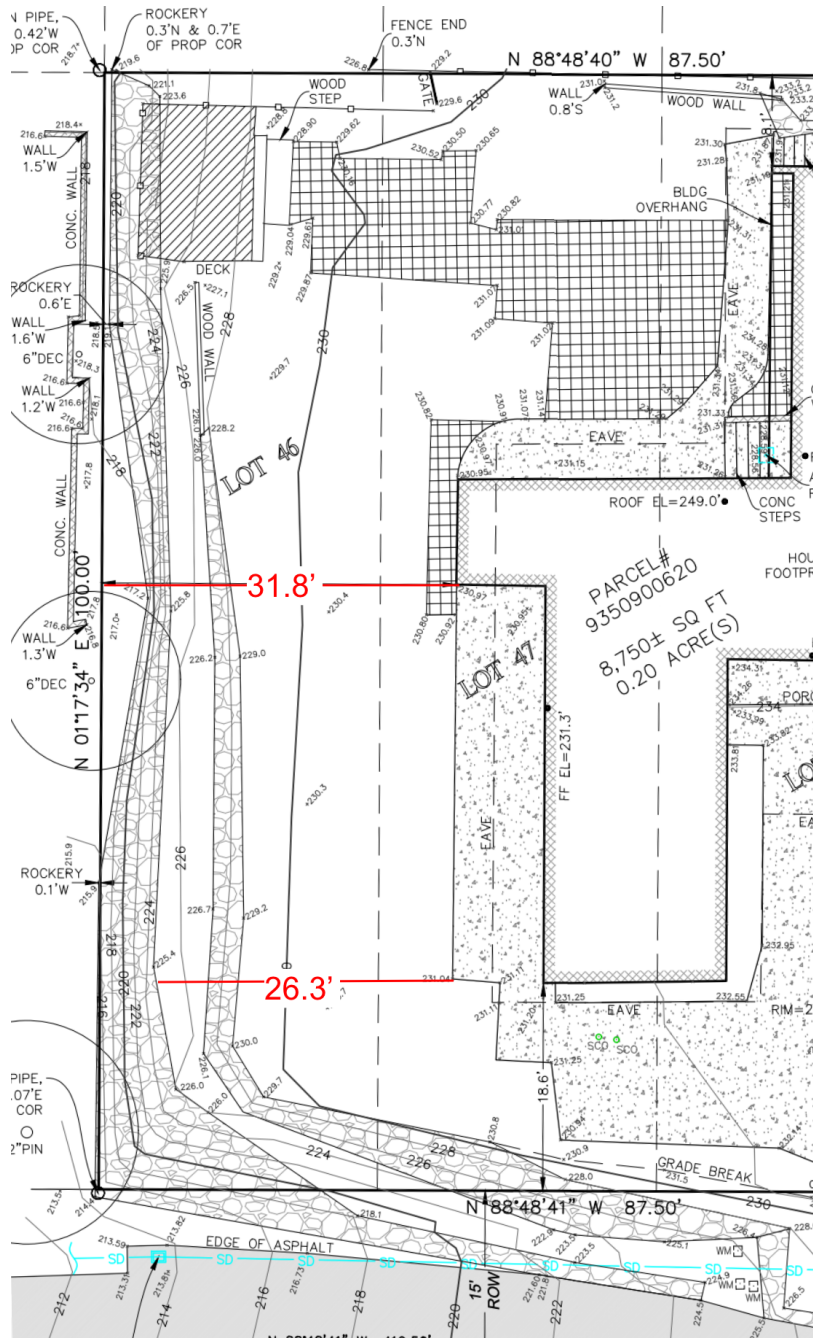


Figure 1. Applicant's 2021 Survey of 6950 SE Maker showing distance from retaining wall to walkway

By using those same measurements on the 1963 aerial photo of the property (from the City of Mercer Island GIS), it's clear that there was no retaining wall in 1963.

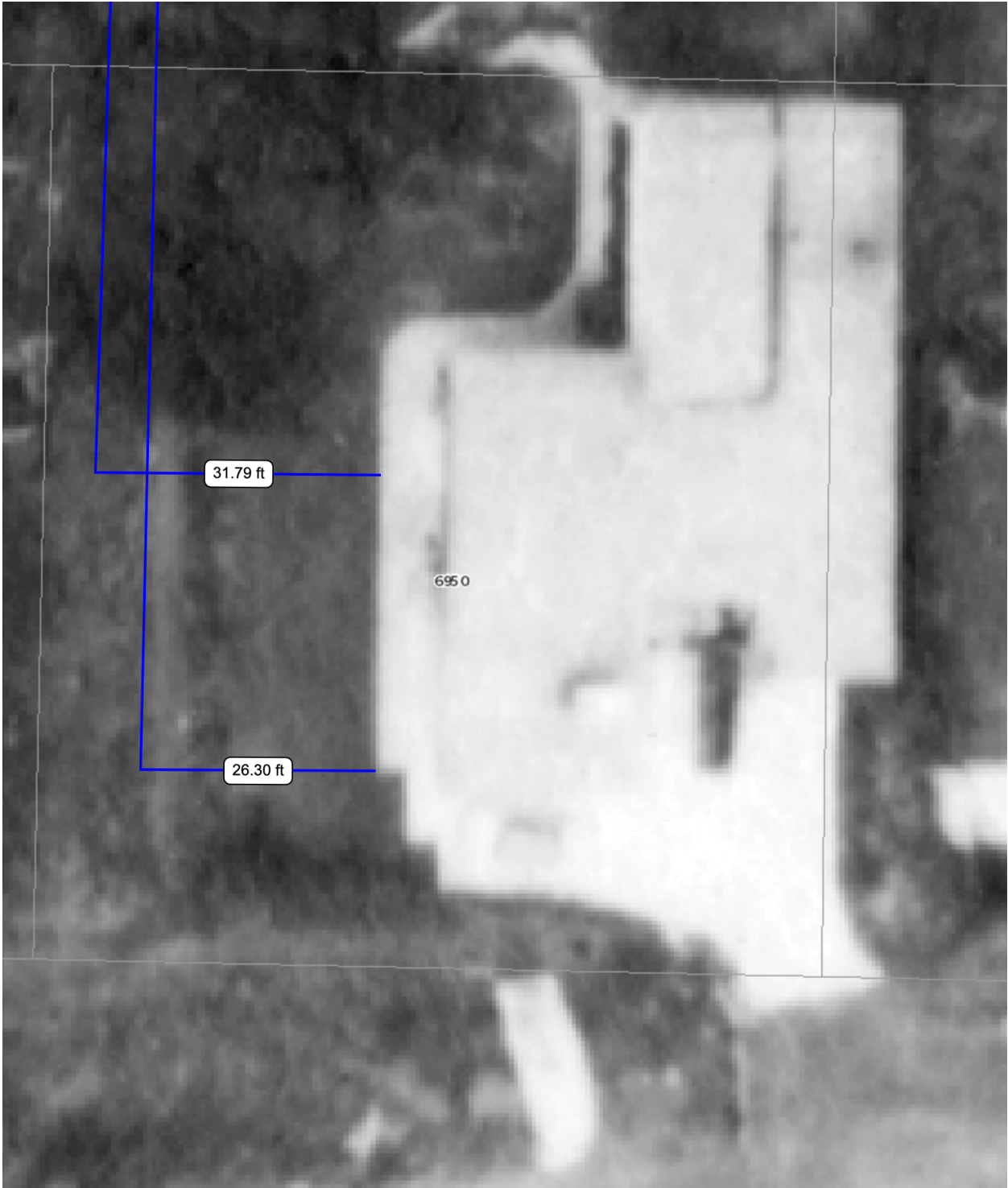


Figure 2. City of Mercer Island 1963 Aerial Photo of 6950 SE Maker Street

Comparison of 1963 and 2021 Topographic Surveys

The [City of Mercer Island Topographic Base Map of 1963](#) ("1963 Map") was created based on the same 1963 aerial photos in the Mercer Island GIS.

Figure 3 is a detail from [1963 Map page C-2](#) that shows 6950 SE Maker Street (I have added the property boundaries of 6950 in red).

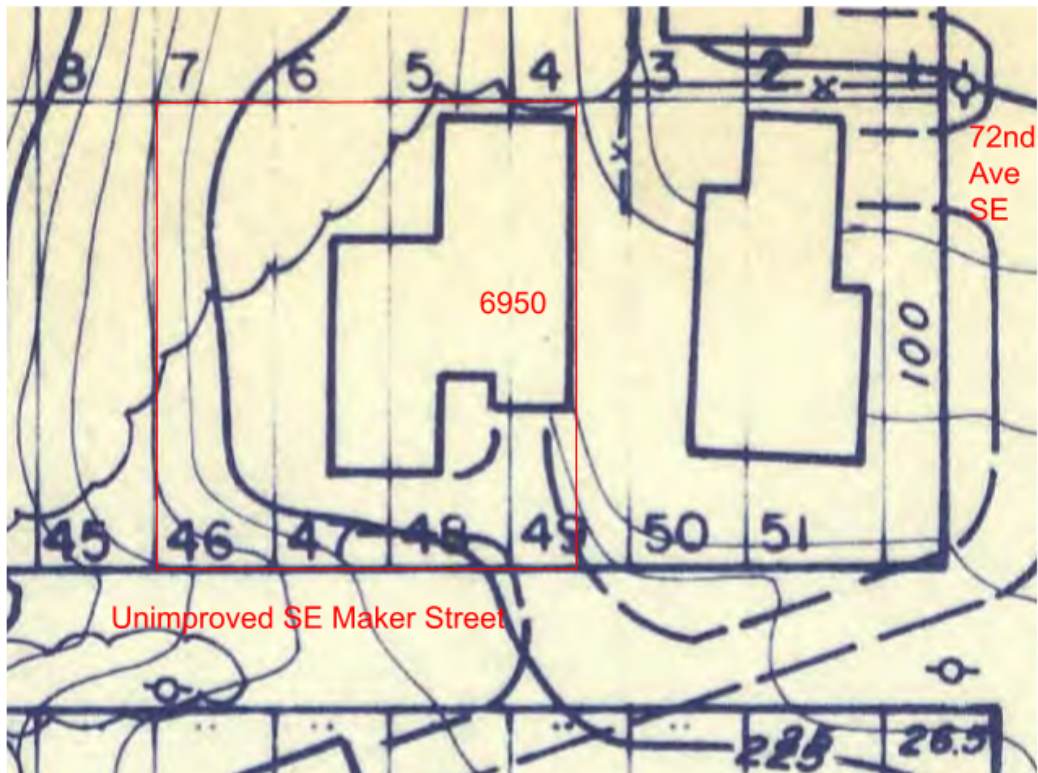


Figure 3. City of Mercer Island Topographic Base Map, 1963

Figures 4 and 5 show comparisons between 3 east-west cross sections (shown below in Figure 4) of the 1963 Survey and the 2021 Survey. These clearly confirm that the retaining wall was installed between the dates of the two surveys. In these two surveys, 60 years apart:

- The elevation of the Maker Street midline (shown in Blue in Figure 4) differs from 1963 to 2021 by only a few inches (despite the street being paved several times between the two surveys).
- At the south boundary of 6950 (in Green in Figure 4), the retaining wall that was added is clearly visible - there are up to 4 feet of difference between 1963 and 2021.
- The cross section 10' north of the boundary (in Red in Figure 4) shows that the retaining wall increased the elevation of the yard by 7.5 feet when comparing 2021 and 1963 elevations.

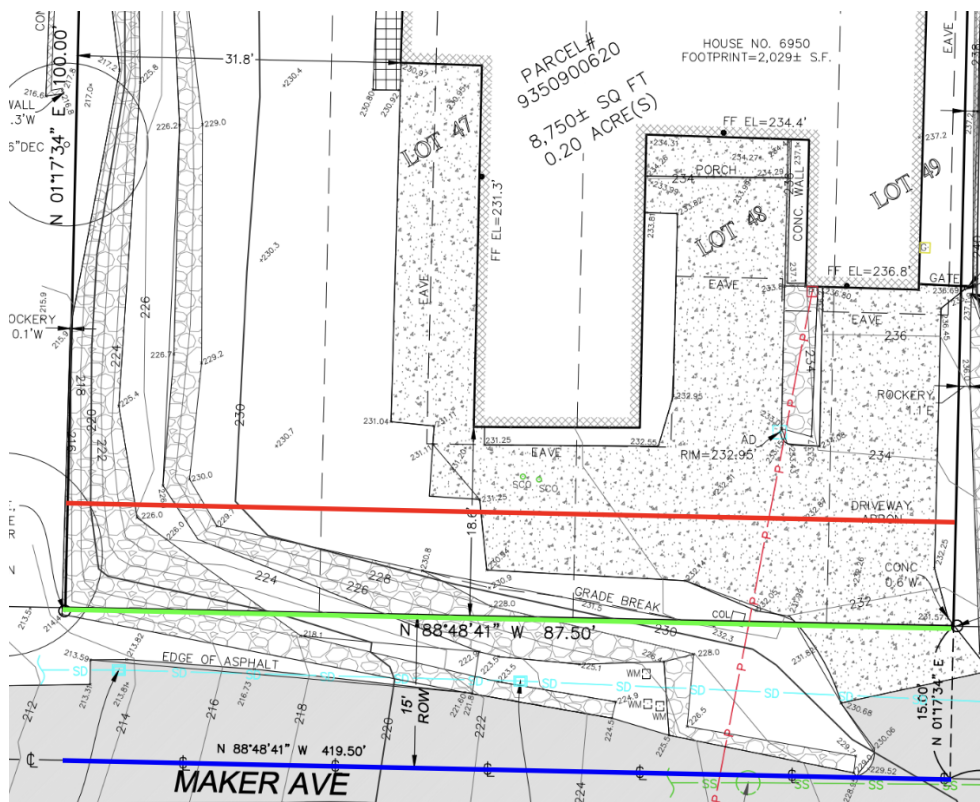


Figure 4. Locations of 3 cross sections of surveys

Difference in Elevations between 1963 and 2021 on 3 Cross Sections

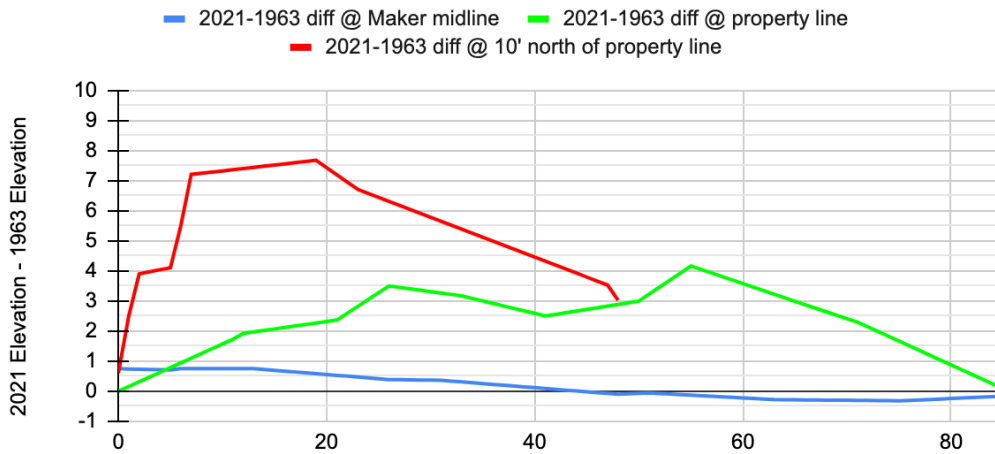


Figure 5. Comparison of cross sections of 1963 and 2021 Survey elevations²³

It is clear from these cross sections that the retaining wall's installation occurred after the 1963 aerial photos were taken for the City.

Appendix Sources:

Figures 1 & 4: [CAO23-011 Survey performed in 2021](#), page 2

Figure 2: 1963 Aerial photo from Mercer Island GIS

Figure 3: 1963 City of Mercer Island Topographic Base Map

² A technical note: changes in the definition of sea level (from NGVD29 vertical datum used in the 1963 survey to the NAVD88 vertical datum used in 2021 survey) mean that [3.56'](#) needs to be added to elevations in the 1963 survey to have the same elevation as 2021. The graph in figure 6 has had this translation performed (more detail is available [here](#))

³Standards for the 1963 Survey ([NMAS](#)) required that its contour elevations be accurate to within 2.5'. Mercer Island requires that the 2021 survey have its contours accurate within 0.5'. As a result, these differences in elevation are not due to measurement error.