

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

DANIEL GROVE; MARTIN SNOEY; JIM MATTISON; SUSAN MATTISON; PAM FAULKNER; BRIGID STACKPOOL; and LYNN MICHAEL,

Appellants,

v.

CITY OF MERCER ISLAND,

Respondent.

Case No. APL23-009

APPELLANT, DANIEL GROVE’S MOTION FOR RECONSIDERATION

I. RELIEF REQUESTED

Pursuant to Section 3.40.110 of the Mercer Island City Code (“MICC”), and City of Mercer Island Hearing Examiner Rules of Procedure (“ROP”) 504, Appellant, Daniel Grove, respectfully requests the Hearing Examiner reconsider the Order of Summary Dismissal issued on December 6, 2023 (the “Order”). The Order assumes facts that are in dispute, ignores evidence in the record, misapplies the applicable legal standard, and involved several errors in procedure, as further detailed below.

II. LEGAL AUTHORITY

MICC 3.40.110 and ROP 504 authorize the Hearing Examiner to reconsider a final decision when a motion requesting same is filed within 10 days of the date of the final decision. Reconsideration is appropriate when the final decision (1) was based in whole or in part on erroneous facts or information, (2) the decision failed to comply with existing laws or regulations, or (3) there was an

1 error in procedure. MICC 3.40.110.A. Mr. Grove respectfully requests reconsideration of the Order
2 pursuant to each prong: erroneous facts and information, that the decision failed to comply with
3 existing laws and regulations, and errors in procedure.

4 III. SUMMARY OF FACTS

5 On October 23, 2023, Mr. Grove filed an appeal of the City’s decision to approve Project
6 No. CAO23-011, Critical Area Review 2 for the demolition and rebuild of Ms. Dorothy Strand’s
7 home located at 6950 SE Maker Street, in the City of Mercer Island, Washington. Ex. 9001.B.
8 (Appeal 23-009); Ex. 9001.B. (Staff Report). Ms. Strand’s property is located within critical areas,
9 including geologically hazardous areas defined as “areas susceptible to erosion, sliding,
10 earthquake, or other geological events based on a combination of slope (gradient or aspect), soils,
11 geologic material, hydrology, vegetation, or alterations, including landslide hazard areas, erosion
12 hazard areas and seismic hazard areas.” MICC 19.16.010. Ex. 9001.B. at 1. The Critical Area
13 Review 2 process sets forth standards for new development located in critical areas to avoid
14 impacts to critical areas, maintain functions, enhance the quality of habitat and vegetation in the
15 critical areas, and “to avoid increasing the risk of harm to people, property, and public
16 infrastructure from natural hazards.” MICC 19.07.010.

17 Mr. Grove’s appeal presented two main issues with the CAO23-011 approval. **First**, that
18 unpermitted “cutting” of an Exceptional Tree located within the critical area took place to enable
19 the proposed development in violation of MICC 19.07.030(A) and MICC 19.10.060(A)(3). Ex.
20 9001.B. at 1–5. MICC 19.07.030(A) requires that when more than one regulation applies to a given
21 property, the regulation that provides the greatest protection to the critical area be applied. Here,
22 MICC 19.10.060(A)(3) provides that greater protection.¹ **Second**, that illegal development in the
23 form of retaining walls/rockeries took place on the property around 1963, and that due to the
24 illegally nonconforming development placed on site,² the Mercer Island Code prohibits approval

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26 ¹ MICC 19.10.060(A)(3) sets forth that single family development proposals shall retain exceptional trees with a diameter of 24 inches or more. Exceptional trees are the highest priority for protection.

² “Nonconforming structure, legal” is defined as “a structure that *lawfully* existed prior to September 26, 1960, or

1 of the CAO23-011 without bringing the site into compliance (*i.e.* bringing the heights of the
2 retaining walls/rockeries into compliance and reducing the amount of fill retained by these
3 retaining wall/rockeries) under MICC 19.15.210(B). Ex. 9001.B. at 5–10.

4 On November 17, 2023, the City of Mercer Island (“City”) filed a Motion to Dismiss
5 requesting dismissal of two discrete sub-issues related to (1) the 2021 tree cutting violating the
6 geological hazardous area criteria, and (2) the fill material on Strand’s property exceeding the
7 maximum fill depth under MICC. Ex. 9001 at 1–2 (Mot. to Dismiss). The City first alleged that
8 Mr. Grove misinterpreted MICC 19.07 by arguing that a tree cutting is an adverse impact from an
9 “alteration” of geologically hazardous areas. The City then alleged that there was a lack of credible
10 evidence as to the “original grade” of Strand’s property so that the current grade had to be
11 considered “existing grade” under the MICC and based on two City Administrative Interpretations.
12 MICC. Ex. 9001 at 3–6.

13 Mr. Grove responded to the City’s Motion to Dismiss on November 27, 2023, outlining
14 the reasons why both of those sub-issues should not be dismissed and should be heard at the
15 scheduled hearing. Ex. 9003, Exs. A–C. Project proponent, Ms. Strand, responded to the City’s
16 Motion to Dismiss as well, on the same day, supporting the dismissal for various reasons. Ex.
17 9004; 9005. Ms. Strand’s response to the Motion to Dismiss presented new issues, arguments, and
18 facts beyond what was presented in the City’s Motion. *Id.* Afterwards, the parties prepared for
19 hearing and submitted their witness lists and exhibits to support said hearing scheduled for
20 December 7, 2023.

21 On Saturday, December 2, 2023, Hearing Examiner Galt emailed the parties an “informal”
22 Order cancelling the hearing and dismissing all issues. Declaration of Daniel Grove in Support of
23 Motion for Reconsideration (“Grove Decl.”), Ex. A (Email from Hearing Examiner Galt dated
24 Dec. 2, 2023). The Order was “officially” issued on December 6, 2023. Grove Decl., Ex. B (Email

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26 conformed to the applicable code requirements in effect *at the time it was constructed* but no longer conforms to the
current regulations of the zone in which it is situated due to subsequent changes in code requirements. MICC
19.16.010. (Emphasis added).

3- APPELLANT, DANIEL GROVE’S MOTION
FOR RECONSIDERATION

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1 from Hearing Examiner Galt dated Dec. 6, 2023). The Order dismissed what was characterized as
2 “Issue 1”³ for lack of jurisdiction, and summarily dismissed “Issue 2”⁴ based upon “application of
3 applicable law to the undisputed facts.” Order at 6.

4 This motion requests the Hearing Examiner reconsider those determinations and fully
5 review all issues set forth in Mr. Grove’s appeal.

6 **IV. STATEMENT OF ISSUES**

- 7 **1.** Should the Hearing Examiner reconsider its Order pursuant to MICC 3.40.110 and
8 ROP 504 and find that the Hearing Examiner has jurisdiction to hear the illegal tree
9 cutting issues? *Yes.*
- 10 **2.** Should the Hearing Examiner reconsider its Order pursuant to MICC 3.40.110 and
11 ROP 504 and find that there are material facts are in dispute precluding summary
12 dismissal of the grade and fill issues? *Yes.*

13 **V. POINTS FOR RECONSIDERATION**

14 Reconsideration is appropriate when the final decision (1) was based in whole or in part on
15 erroneous facts or information, (2) failed to comply with existing laws or regulations, or (3) there
16 was an error in procedure. MICC 3.40.110.A. Each of these grounds alone—and certainly
17 together—support reconsideration in this case.

18 **A. The Hearing Examiner has Jurisdiction to Hear Mr. Grove’s Claims Related to the
19 Illegal Tree Cutting that Took Place to Enable the Proposed Development**

20 The Order dismissing Issue 1 relies on the incorrect assertion that because Tree #5’s trunk
21 is located on Grove’s property (3515), rather than on Strand’s (6950), “a permit for work on 6950
22 cannot require Strand to do anything on a different lot which she doesn’t own. For example, CP&D
23 could not require Strand to preserve Tree #5 because Tree #5 is not Strand’s tree on Strand’s
24 property.” Order at 5. First, this statement (for which no citation or authority is provided) is
25 contrary to the code and inaccurate. Second, the actions at issue *did*, as a matter of fact, take place

26 ³ The Order describes Issue 1 as asserting “that Strand performed unpermitted exceptional tree removal within a critical
area which must be addressed and resolved through the CAR 2 process.”

⁴ The Order describes Issue 2 as asserting “that 6950’s topographic configuration which has existed for at least the
last 68 years cannot be considered as the “existing grade” of the lot.”

1 on Ms. Strand’s property. The Hearing Examiner has jurisdiction to hear these issues. And, third,
2 the Hearing Examiner mischaracterizes Mr. Grove’s argument.

3 **1. The Mercer Island Code contemplates review of actions taken in critical**
4 **areas including impacts on adjacent properties**

5 Because the tree is located within the critical areas at issue, the tree cutting must be
6 reviewed here. Critical area review 2 applies to any “development and/or activity” within a
7 proposed geologically hazardous area. MICC 19.07.090. Any “alteration within a geologically
8 hazardous area or its buffers” is required to meet the critical area review standards.⁵ *Id.* Such
9 standards include a critical area study that demonstrates the development will not adversely impact
10 other critical areas, the subject property *or adjacent properties*. MICC 19.07.160. Because the
11 code contemplates the opposite of the Hearing Examiner’s determination, Mr. Grove respectfully
12 asks that this issue be reconsidered and reopened for review.

13 **2. Tree #5 was illegally cut on Ms. Strand’s property to facilitate Ms. Strand’s**
14 **development**

15 The Hearing Examiner also has authority to hear and decide appeals as designated by the
16 code. MICC 3.40.020. A Critical Area Review 2 approval is a Type III land use decision that may
17 be appealed, and is to be heard at a public hearing pursuant to MICC 19.15.130.⁶ MICC
18 19.07.090.B; MICC 9.15.130.A. Tree removal itself also requires a permit, unless exempt under
19 the code (which this cutting was not). MICC 19.10.020. The failure to obtain a permit, resulting in
20 the illegal cutting of a tree (let alone one within a critical area) is absolutely within the Hearing
21 Examiner’s jurisdiction, regardless of the property the tree is on.

22 Mr. Grove argues, and presented evidence, that Tree #5, an Exceptional Tree was “cut”
23 without appropriate permits to *facilitate the development* that Ms. Strand is attempting to permit
24 here in this application.⁷ Ex. 9001.C. (Selby Report). MICC 19.10.010 states “Development tree

25 ⁵ “Alteration” includes any human-induced action which impacts the existing condition of the area. MICC 19.16.010.

⁶ Type III reviews require the exercise of discretion about nontechnical issues. MICC 19.15.030.

26 ⁷ “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.” MICC 19.10.020(B)(3). “Cut or cutting:
The intentional cutting of a tree to the ground (excluding acts of nature), any practice or act which is likely to result

1 removal: If the tree is being removed as part of a development (for example, to allow for
2 construction of a new home), then: a full application is required.” The code does not state
3 anywhere that the tree must be on the applicant’s property, it states “*as part of development.*”
4 (Emphasis added). MICC 19.10.090 also requires both the development plan and any tree retention
5 plan or arborist report include trees on the applicant’s property, as well as *adjacent properties*,
6 including critical root zones that extend into the development site. MICC 19.10.01.C.

7 In sum, although the trunk of the tree is located on Mr. Grove’s property, the code does not
8 take such a narrow view. *Id.* Branches and roots often expand beyond property or development
9 site lines, resulting in mitigation and permitting requirements, such as those that should have been
10 applicable here. *Id.* Even if it did, the actions at issue here – the illegal cutting of the tree – took
11 place on Ms. Strand’s property, further exemplifying the need to reconsider the dismissal of this
12 issue and the plain jurisdiction that the Hearing Examiner has to consider this issue.

13 **B. The Hearing Examiner Erroneously Applied the Facts and Law in Summarily**
14 **Dismissing Issue 2**

15 Although quasi-judicial bodies may act summarily in appropriate situations, such situations
16 exist only if there is no genuine issue of material fact such that the moving party is entitled to
17 judgment as a matter of law.⁸ *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 696–97, 601
18 P.2d 501 (1979). On a motion for summary dismissal, the court cannot try issues of fact; it must
19 determine only whether or not factual issues are present which should be tried. *Regelbrugge v.*
20 *State*, 7 Wn. App. 2d 29, 432 P.3d 859 (2018) *review denied*. A genuine issue of fact exists when
21 reasonable minds could reach different factual conclusions after considering the evidence. *Klinke*

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23 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*
24 *pruning.*” MICC 19.16.010 (emphasis added). “Prune or pruning: The pruning of a tree through crown thinning, crown
cleaning, windowing or crown raising but not including crown topping of trees or *any other practice or act which is*
likely to result in the death of or significant damage to the tree. MICC 19.16.010 (emphasis added).

25 ⁸ See Order at 3. (“summary dismissal requests in the quasi-judicial realm are akin to summary judgment requests in
26 the judicial realm”). When reviewing a request for summary dismissal, a court must view the evidence and all
reasonable inferences from the evidence in the light most favorable to the nonmoving party such that any doubts as to
the existence of a genuine issue of material fact are resolved against the moving party, and in favor of allowing the
case to go to trial. *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994).

1 | *v. Famous Recipe Fried Chicken, Inc.*, 94 Wash. 2d 255, 616 P.2d 644 (1980). A material fact is
2 | one on which the outcome of the litigation depends. *Capitol Hill Methodist Church of Seattle v.*
3 | *City of Seattle*, 52 Wash. 2d 359, 324 P.2d 1113 (1958). A court may only deviate from the rules
4 | governing summary judgment procedure when doing so does not prejudice the challenging party.
5 | *See, e.g., State ex rel. Citizens Against Tolls v. Murphy (CAT)*, 151 Wash.2d 226, 236, 88 P.3d 375
6 | (2004).

7 | Here, material facts upon which litigation depend are present and still in dispute such that
8 | reasonable minds (including expert opinions) do differ as to the factual conclusions, thus
9 | precluding summary dismissal. *Klinke*, 94 Wn. 2d at 257 (“In ruling on a motion for summary
10 | judgment, the court must consider the material evidence and all reasonable inferences therefrom
11 | in favor of the nonmoving party. If reasonable persons might reach different conclusions, the
12 | motion should be denied.”). Mr. Grove presented concrete material evidence establishing the
13 | “existing grade” of the site. The Hearing Examiner (and the City for that matter) cannot ignore the
14 | photographic evidence, reports, and historic surveys which are to be considered under the
15 | applicable administrative interpretations. Summarily deciding the existing grade now “is the grade
16 | to be used,” despite this dispositive evidence, is in error. Order at 6; Grove Decl., Ex. C. Further,
17 | Mr. Grove presented concrete evidence in support of the argument that the fill slope was
18 | augmented, and the large southern rockery was built, in or after 1963. Grove Decl., Ex. C
19 | (submitted as Ex. 1026). The Hearing Examiner’s focus on one portion of the development site
20 | (the west side) to dismiss the entire issue is in error, and ignores this evidence. Order at 5.

21 | **1. Mr. Grove Submitted, and the Hearing Examiner Ignored, Concrete**
22 | **Material Evidence in Support of the “Existing Grade” of the Development**
23 | **Site**

24 | The Hearing Examiner’s decision that no ancient survey was presented to show the terrain
25 | on 6950 before any development occurred on the lot, therefore “the existing grade is the grade to
26 | be used” entirely ignores the code’s definition of existing grade, the language of the administrative
interpretations relied on, as well as the concrete evidence submitted by Mr. Grove. Order at 6. Mr.

1 Grove does not “argue that one must go back in history to pre-development times (whenever that
2 might be)” to determine existing grade. *Id.* Instead, Mr. Grove argues, by relying on the full
3 language of Administrative Interpretation 12-004 and 04-04 and the code, that either “concrete
4 evidence” or “verification from a previous survey” are to be used for determination of the “existing
5 grade.” Ex. 9001.E., Ex. 9001.F.

6 MICC 19.16.010 defines “existing grade” as “the surface level at any point on the lot *prior*
7 *to alteration of the ground surface.*” Alteration includes “any human-induced action which impacts
8 the existing condition of the area, including but not limited to grading, filling, dredging, draining,
9 channeling and paving (including construction and application of gravel).” MICC 19.16.010
10 (Emphasis added). As the administrative interpretations state that, often times, when a lot has been
11 developed it is difficult to establish “existing grade.” Ex. 9001.E.; 9001.F. Therefore, one may use
12 “concrete evidence *or* verification from a previous survey document” to establish existing grade.
13 *Id.* (Emphasis added). Analyzing these resources becomes “critical when an existing structure is
14 demolished and replaced with a new structure,” such as here. Ex. 9001.F. Only if those resources
15 do not exist, then is the current existing grade underlying the existing structure used as the
16 elevation for development. *Id.*

17 Here, Mr. Grove presented concrete evidence in the form of historic photos and a
18 geotechnical report which analyzed the elevation of the site, including the fill placed over topsoil.
19 Ex. 9001.B. at 6–7. Mr. Grove also submitted a topographical base map from 1963.⁹ Exs. 1007;
20 1007.1. The Hearing Examiner ignored this, and concluded that there is “[n]o ancient survey” that
21 can “show what the terrain on 6950 was before any development occurred on the lot” and therefore
22 the existing grade is the grade to be used. Order at 6. The Hearing Examiner did not evaluate the
23 evidence Mr. Grove submitted. Order at 5-6. Instead, he skipped this essential step in the analysis,
24 ignored the evidence submitted, and the language of the administrative interpretations
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26 ⁹ The administrative interpretations state that in addition to a survey, it may also be “feasible to interpolate the approximate topographic elevations of the lot previous to the most recent development.” Ex. 9001.E.

1 themselves.¹⁰

2 Further, Mr. Grove received additional supporting evidence in the form of historic photos
3 from the construction of the original home that show the existing grade of the site. Grove Decl.,
4 Ex. D. Those images were to be submitted as supplemental exhibits at hearing because they were
5 not received until the day after the parties hearing memoranda were due, and they are critical to
6 the analysis of Mr. Grove’s existing grade issues. Grove Decl., Ex. D. Mr. Grove requests the
7 Hearing Examiner review this evidence and reconsider the determination made as to Issue 2.

8 **2. Mr. Grove Submitted Concrete Evidence that the Rockeries/Retaining**
9 **Walls Were Illegally Developed after 1960 Requiring the Site be Brought**
10 **Into Compliance with the Mercer Island Code**

11 The Hearing Examiner’s summary ruling on the slope, fill and rockery/retaining walls on
12 site was in error. Order at 5. The ruling further contradicts the very evidence Mr. Grove provided,
13 which specifically includes both concrete evidence in the form of historic photos and verification
14 from the 1963 survey showing no retaining wall was present on the southern side of the lot at that
15 time. Ex. 1007; Ex. 1007.01. This indicates it was developed after the 1960 code was in effect, and
16 contradicts the Hearing Examiner’s conclusions, further supporting Mr. Grove’s initial argument
17 that because the southern retaining wall was built after 1963 without permit or approval (*i.e.*
18 constituting illegally nonconforming development), the Mercer Island Code prohibits approval of
19 the CAO23-011 without bringing the site into compliance with current code and safety standards.¹¹

20 Further, the assertion that the current topography and the 1955 photograph shows that the
21 rocks covering the western slope were placed in 1955 is not only a disputed material fact, but is
22 inaccurate. Ex. 9005.D. The picture does not demonstrate this, yet it is relied on to summarily
23 dismiss Issue 2. Order at 5. At hearing, Mr. Grove planned to testify as to the content of the various

24 ¹⁰ Mr. Grove also argued that the City’s analysis cannot be relied on because it was incomplete – it did not include
25 this evidence. Ex. 9001.B. at 8. (In its determination of “existing grade,” the City should be required to consider the
26 evidence that has been collected during geotechnical studies. Instead, it permits the applicant to treat as
“existing grade” the current “finished grade” (which photographic evidence above proves is not the “existing grade”
as MICC defines it”).

¹¹ Note, the City previously has analyzed and agreed with this assessment. Grove Decl., Ex. D.

1 photos submitted. Such evidence should not be ignored, and facts that are in dispute should not be
2 “tried” or assumed under applicable summary judgment standards. Additionally, the Hearing
3 Examiner’s inaccurate determination that the rocks covering the western slope are not “a wall” not
4 only improperly goes far beyond the City’s Motion to Dismiss, but also entirely ignores the
5 language of the code and the purpose of rockeries/retaining walls.¹² It also ignores the expert
6 reports and City correspondences in the record that call it a rockery/retaining wall. *See e.g.* Exs.
7 1017, 1010

8 Because there remain genuine issues of material fact, Mr. Grove requests the Hearing
9 Examiner reconsider and re-open judgment as to Issue 2.

10 **C. Procedural Errors Occurred that Preclude Dismissal at this Stage**

11 In addition to the errors described above, the procedural errors should further preclude
12 dismissal. First, the hearing’s cancellation resulted in the exclusion of substantial evidence which
13 is material to the outcome of this case – namely the additional historic photos. Grove Decl., Ex. C.
14 Second, Ms. Strand was permitted to raise various new arguments in her response to the City’s
15 Motion to Dismiss that Mr. Grove had no opportunity to respond to. “Allowing a moving party to
16 raise new issues in its rebuttal materials is improper because the nonmoving party has no
17 opportunity to respond.” *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991).
18 The Order does not address this impropriety, and at the same time, relies heavily on Ms. Strand’s
19 response and supporting documents. Order at 2. So much so that the “agreed” facts (which are not
20 agreed, and many are in dispute) listed on page 3–4 of the Order are almost entirely made up of
21 Ms. Strand’s exhibits and submittals. Only three documents referenced in the Order relate to Mr.
22 Grove’s submittals out of roughly twenty. At a minimum, Mr. Grove requests and opportunity to
23 fully respond to Ms. Strand’s submittal, as several errors and misrepresentations require
24 addressing.

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26 ¹² “Retaining walls/rockeries” are defined as “a wall of masonry, wood, rock, metal, or other similar materials or
combination of similar materials *that bears against earth or other fill surface for purposes of resisting lateral or
other forces in contact with the wall, and/or the prevention of erosion.*” MICC 19.16.010. (Emphasis added).

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VI. CONCLUSION

Mr. Grove respectfully requests the Hearing Examiner reconsider its December 6, 2023 ruling, find that it has jurisdiction to hear Issue 1, and reopen the judgment to decide the remaining issues related to the implications of the illegal fill and walls at the development site.

DATED: December 18, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT, DANIEL GROVE’S MOTION FOR RECONSIDERATION on the following:

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to be sent by the following indicated method or methods, on the date set forth below:

- by **sending via the court’s electronic filing system**
- by **email**
- by **mail**
- by **hand delivery**

DATED: December 18, 2023

PERKINS COIE LLP

By: /s/Zachary E. Davison

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