BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

IN RE: NOTICE OF DECISION: FILE NO. 2207-019 DANIEL GROVE, Appellant, v. CITY OF MERCER ISLAND, Respondent.	Case No. APL24-002 APPELLANT DANIEL GROVE'S PRE-HEARING MEMORANDUM AND RESPONSE TO DOROTHY STRAND AND THE CITY OF MERCER ISLAND'S REQUEST FOR DISMISSAL

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

I. INTRODUCTION

Appellant, Daniel Grove, brought this action to stop an illegal construction project that grossly violates the Mercer Island City Code. Building Permit 2207-019 proposes to build a new, much larger home immediately next door to Mr. Grove's home. The Project Applicant, Ms. Dorothy Strand, asks the Hearing Examiner to ignore blatant code violations in her campaign to steamroll this major residential construction project through the required building and land use permit process without sufficient legal review. At a minimum, either an open record hearing or remand to the City is warranted. Not only has Mr. Grove sufficiently pled his case, the substance of Ms. Strand's project application and the request to dismiss are replete with miscalculations and incorrect applications of the Mercer Island City Code. The City appears to take Ms. Strand's inaccurate calculations at face value without any independent analysis. Neither Ms. Strand nor the City come anywhere close to meeting the burden for dismissal in this action and Mr. Grove should be entitled to present his case on the merits.

II. BACKGROUND

Mr. Grove detailed the procedural and factual background leading up to this appeal in his Notice of Appeal filed March 5, 2024. For the sake of brevity, Mr. Grove relies upon that statement of facts. Subsequent to the filing of the Notice of Appeal, Ms. Strand filed a Land Use Hearing Memorandum on April 24, 2024, which included a request for dismissal. *See* Land Use Hearing Memorandum of Applicant Dorothy Strand ("Strand Motion") at 3. The City of Mercer Island ("City") also requested dismissal in its Staff Report, filed with the Hearing Examiner on April 29, 2024. For the sake of efficiency, this brief responds to both requests, as further detailed below.

III. LEGAL STANDARD FOR DISMISSAL

A. None of the Applicable Dismissal Criteria Apply to This Case.

Under Hearing Examiner Rule of Procedure ("RoP") Rule 228, the Hearing Examiner may only summarily dismiss an appeal if the Examiner concludes that: the appeal (1) was untimely

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

filed, (2) fails to state a claim for which the Examiner has jurisdiction to grant relief, (3) is without merit on its face, is frivolous, or has been brought merely to secure delay; or (4) the appellant lacks standing to appeal. Under *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 696-97, 601 P.2d 501 (1979), the Hearing Examiner may also dismiss (5) where there is no genuine dispute of material fact.[1] The record and anticipated testimony clearly establish the need for remand to the City to review the code discrepancies. But at the very least, issues of fact exist sufficient to survive any request for dismissal of Mr. Grove's claims, for which this Hearing Examiner has jurisdiction to grant relief.

IV. ARGUMENT

A. Neither the City nor Ms. Strand Come Close to Meeting the Legal Standard for Dismissal

In support of her request for dismissal, the Ms. Strand principally argues that (1) the facts alleged in Mr. Grove's appeal are legally insufficient to support his claims and that Mr. Grove failed to state a claim for which relief can be granted, (2) Mr. Grove is attempting a "second bite at the apple" because certain claims are barred by the doctrine of res judicata, and (3) the evidence and calculations set forth in Mr. Grove's appeal are incorrect based on a reading of the Final Plan Set. The City's conclusory Staff Report seems to mirror Ms. Strand's general arguments and does not do more than make general conclusions based on calculations already disputed by Mr. Grove. The City provides no additional evidence or analysis.

Neither Ms. Strand nor the City have come anywhere close to proving the very high standard that would apply to dismissal of this action. **First**, Mr. Grove's claims are plainly sufficient. Mr. Grove has presented facts and considerable evidence to show the City substantially erred by approving Permit 2207-019 and that the proposal fails to comply with existing rules and regulations. **Second**, the doctrine of res judicata is not triggered here. The claims raised by Mr.

[1] Where a party moves to dismiss based on failure to state a claim, but brings in evidence outside of the pleadings, the motion is often treated as a motion for summary judgment under CR 12(b). *See, e.g.*, *Singh v. Federal National Mortgage Association*, 4 Wash. App. 2d 1, 428 P.3d 373 (Div. 1 2018).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

Grove in this appeal are independent from the claims raised APL 23-009, deal with distinct issues related to the building permit's approval, and were not decided in APL 23-009. **Third**, the evidence and calculations presented by Mr. Grove are consistent with the plain language of the code provisions, the applicable administrative interpretations, and the Hearing Examiner's previous determinations. **Fourth**, the Hearing Examiner should reject the City's attempts to shift focus away from the required land use review process that applies under MICC Title 19, to a more limiting review under MICC Title 17. That reading flatly contradicts the City's code provisions and own notices and publications, which require an administrative land use review for major single-family dwelling building permits, such as this one.

1. Ms. Strand's motion to dismiss for failure to state a claim fails to pass muster under Washington law.

Ms. Strand primarily argues that Mr. Grove's appeal should be dismissed under the second criterion laid out above—for failure to state a claim for which relief can be granted. Strand Motion at 3. Ms. Strand cites solely to *Doe v. Benton County,* 200 Wn. App. 781, 787, 403 P.3d 861 (2017) to allege that the facts in Mr. Grove's appeal are "legally insufficient." *Id. Doe v. Benton County,* dealt with a request for dismissal under Civil Rule 12(b)(6). To prevail on a motion of that type, the moving party must show that there is an insurmountable bar to relief (*i.e.*, no remedy available), even if the facts which the plaintiff alleges are proven true. *Markoff v. Puget Sound Energy, Inc*., 9 Wn. App. 2d 833, 839, 447 P.3d 577, 582 (2019). Ms. Strand does not meet that high bar here.

The Washington Supreme Court has reiterated that motions for failure to state a claim are granted only "very sparingly and with care." *State v. LG Elecs., Inc*., 186 Wn.2d 169, 183, 375 P.3d 1035 (2016), *cert. denied*, 137 S. Ct. 648 (2017) ("[o]ur liberal notice pleading rules are intended 'to facilitate the full airing of claims having a legal basis"). Not only is there a presumption in these types of cases "that the plaintiff's factual allegations are true," the applicable court draws all reasonable inferences from the factual allegations in the appellant's favor. *Trujillo v. NW Tr. Servs., Inc*., 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Further, "dismissal is warranted

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014) (quoting *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)). And, "[a]ny hypothetical situation conceivably raised by the complaint defeats [such a] motion if it is legally sufficient to support plaintiff's claims." *Id.*; *accord Halvorson v. Dahl*, 89 Wn.2d 673, 674–75, 574 P.2d 1190 (1978).[2]

Here, Mr. Grove has stated a claim upon which relief can be granted by presenting facts and evidence in support that show the City substantially erred in approving Building Permit 2207-019. Merely asserting disagreement with the claims and facts Mr. Grove has presented, without support, as Ms. Strand has done here, simply cannot pass muster under Washington law to warrant dismissal.

2. The City's and Ms. Strand's incorrect calculation of "existing grade" has not been previously litigated and is ripe for Hearing Examiner review in this case.

The Hearing Examiner's final decision in APL 23-009 generally dealt with the critical area review permit. The instant appeal relates to the approval of the building permit for the project. Although the two permits relate to the same disputed illegal construction project, that does not alone trigger res judicata. Mr. Grove's claims in this appeal are independent from the claims raised in APL 23-009, were not decided in APL 23-009, and deal with distinct issues related to the building permit's approval.[3]

Specifically related to "existing grade," Ms. Strand argues that Mr. Grove's interpretations of the code are incorrect and that the issue of existing grade has been "exhaustively challenged" already. Strand Motion at 3. Neither assertion is correct.

First, in APL 23-009, Mr. Grove argued that material evidence, not fully evaluated by the

[2] Further, generally the remedy for finding an appellant did fail to state a claim is allowing him to amend the complaint, in lieu of granting a dismissal. CR 15(a).

[3] Further, APL 23-009 dealt specifically with the critical area review of the development site under MICC 19.07, while the building permit issues raised here are separate and arise under a different administrative process arising under the land use review processes of MICC 19

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

City, showed that the "finished grade" of the site differed from the "existing grade" of the site because large portions of site were built on top of illegal fill that was placed over topsoil.[4] The question there was whether the "existing grade" (built up on fill) could be treated as the "finished grade" of the site as a whole, and whether the City could exclude certain evidence, like geotechnical information and a historical survey, from the determination of existing and finished grade.[5] The Hearing Examiner summarily decided the fill/grade issue by rejecting the geotechnical report as evidence, finding that because no ancient survey existed, "the existing grade is the grade to be used."[6]

The Hearing Examiner found the existing grade is the grade to be used:

> Issue 2 asserts 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 . . . . No ancient survey has been presented to show what the terrain on 6950 was before any development occurred on the lot. (The lack of any such ancient survey is not unexpected given that the lot was developed before the City was incorporated.) The code interpretation controls: The existing grade is the grade to be used.

Ms. Strand, and the City for that matter, appear to misinterpret Mr. Grove's argument related to "existing grade." Mr. Grove does not dispute the Hearing Examiner's previous determination and did not appeal that ruling. Instead, Mr. Grove is explaining that the City and the Ms. Strand have deviated from the Hearing Examiner's determination by ignoring specific information related to the existing grade to determine the grade of the existing structure. The City and its expert, Mr. James Harper, and the Hearing Examiner all determined that no survey of the site's pre-development conditions exists.[7] Therefore, the existing grade underlying the existing structure controls:

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[4] Response of Dan Grove to City's Motion to Dismiss, at 5–10 (Nov. 27, 2023).
[5] *Id.*
[6] Order of Summary Dismissal (APL23-009) at 6.
[7] *See* Notice of Appeal at 5 ("The City's expert, Mr. Harper, specifically stated that: the existing surveys "do not serve as a "snapshot" of original grade conditions and cannot be relied on for interpolation or other such formulaic determinations of *any past original grade*." Exhibit G at 1).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

> **Conclusion 1**. Without concrete evidence or verification from a previous survey document…. ***The existing grade underlying the existing structure*** will be used as the elevation of the proposed development.

Administrative Interpretation 12-004. (emphasis added). "Underlying" is defined as "lying beneath or below." [8]

But Ms. Strand and the City ignore the grade of the existing home entirely (beyond spot elevations at its entrances). *See* Grove Appeal at 4. Instead, the City is now permitting Ms. Strand to interpolate the grades within the footprint of the existing structure.[9] This is contrary to its own expert's determinations, to what the City argued in front of the Hearing Examiner in APL 23-0009, and to the Hearing Examiner's own ruling. The City has flip-flopped and is now focused on Conclusion 3 of Administrative Interpretation 12-004 despite its expert's rejecting this approach. Staff Report at 5.

For clarity, Conclusion 2 deals with determining existing grade for basement exclusion areas and is measured on the proposed surface of the earth immediately adjacent to or touching a point on the exterior wall of the structure:

> **Conclusion 2.** Existing grade, for the purpose of calculating basement area exclusion without a survey of the pre-development conditions, shall be interpreted as the elevation of a point on the surface of the earth immediately adjacent to or touching a point on the exterior wall of a proposed structure.

Conclusion 3 deals with interpolation if a current survey document is available. In theory, this conclusion could apply where a current survey is available, but not to this project. In practice, the City already flatly rejected this approach in APL 23-009. The City's expert, Mr. Harper,

[8] The City oddly argues against Mr. Grove "take[ing] the word "underlying" literally," insinuating that a plain reading of the code is not sufficient. Staff Report at 5. Merriam Webster Dictionary (accessed May 2024).

[9] Ms. Strand specifically admits to interpolating. Strand Motion at 6. And the City appears to now insinuate that this is sufficient under Conclusion 3 of Administrative Interpretation 12-004. Staff Report at 5.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

specifically stated that the existing surveys [including 2022, 1989, 2005][10] all "do not serve as a "snapshot" of original grade conditions and cannot be relied on for interpolation or other such formulaic determinations of any past, original grade." (emphasis added).

> **Conclusion 3.** If a current survey document is available, the applicant may establish existing grade by interpolating elevations within the proposed footprint from existing elevations outside **of** the proposed footprint. The survey document must be prepared by either a Washington registered civil engineer or land surveyor, and must be accepted by the City Code Official.

Conclusions 1 and 2 apply here. Conclusion 3 does not. Neither Ms. Strand nor the City is allowed to cherry pick and cannot be allowed to re-litigate what has already been decided in APL 23-009. The case cannot be dismissed on this basis.

B. The incorrect calculation of "existing grade" and misuse of "finished grade" skew several key metrics in the Final Plan Set.

The incorrect calculation of "existing grade" has skewed various other essential metrics, including the wall segment coverage and basement exclusion area. Both of these metrics are used to calculate the gross floor area to determine the resulting size of the home.[11] As described in Mr. Grove's appeal, wall segment coverage calculations are linked to and influence the basement exclusion area calculations (used to calculate the gross floor area). As the following paragraphs explain, when these are off, they result in a home substantially larger than the code allows, which is the case here—both with respect to wall segment coverage and gross floor area.

1. Incorrect calculations for wall segment coverage and basement exclusion area.

Ms. Strand incorrectly attacks Mr. Grove's measurements for wall segment coverage. Strand Motion at 5. But these attacks highlight the very issues Mr. Grove is trying to raise—

[10] Grove Appeal, Exhibit G at 1. Harper refers to a 2022, 1989 and 2005 survey of the property.

[11] In response to Ms. Strand's question related to "existing grade" being 3 to 7 feet lower than shown in the plans, Mr. Grove presented evidence in the form of photographic evidence of the existing structure (both when it was under construction, and as it exists today), and the elevation measured by Ms. Strand at the northwest entrance to the existing structure. *See* Grove Appeal, Exhibit D (Final Plan Set) and Exhibit F (Construction Photos).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

inaccurate and incorrect calculations leading to a non-compliant project.

First, Ms. Strand misstates Mr. Grove's analysis—at no point did Mr. Grove attempt to "link" the basement exclusion area to ABE. Strand Motion at 6. Instead, Mr. Grove explained that incorrect determinations of both "existing grade" and "finished grade" resulted in a larger gross floor area ("GFA") than permitted. Grove Appeal at 7. A correct GFA calculation relies on both a correct calculation and correct use of "existing grade" and "finished grade." *See* MICC Title 19, Appendix B. Again, this is because a portion of the basement floor area (called the basement exclusion area, which is used as part of the GFA calculation) can be excluded by the developer depending on which is lower—the existing or finished grade. *Id.* The Final Plan Set calculated a basement floor exclusion area of 937.5 square feet, Final Site Plan at A1.0, while the actual basement exclusion area to be used is closer to 613 square feet. Thus, the incorrect calculations and use of existing and finished grade resulted in a smaller basement floor exclusion area than is used in the Final Plan Set.

Second, Ms. Strand incorrectly uses midpoint elevation to compute a basement wall coverage of 59.37% (4'9" / 8'), rather than the "the portion of an exterior wall below existing or finished grade, whichever is lower." This is a difference of 21.36% (59.37% minus 38.01%). This error alone results in 98 square feet being impermissibly added to the allowable gross floor area.

Third, the "manual inspection" that Mr. Grove refers to was necessary because Ms. Strand continuously refused to provide information necessary to fully compute the wall segment coverage, another reason why Mr. Grove requests the Hearing Examiner remand to the City for further review. To make the above clear, below is a summary of the basement coverage area of the western basement wall based on manual inspection:

Segment length	Average height of basement below finished/existing grade	Segment Length (avg height below finished/existing grade)
5 ft	4.8 ft	23.8

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

9.7 ft	0.0 ft	0.0
7.4 ft	2.4 ft	17.6
16.7 ft	4.8 ft	79.3
7.2 ft	2.7 ft	19.2
	Average Covered Height	3.04
	Basement height	8
	Percent covered	38.01%

2. Incorrect calculations for gross floor area.

As to gross floor area, Ms. Strand again appears to mistake the relationship under the code between gross floor area elevation and ABE. Ms. Strand incorrectly argues that "this is ultimately just a piece of arithmetic, but it begins with verification of average building elevation." Strand Motion at 7. Although Mr. Grove agrees that this is a matter of arithmetic, Ms. Strand is, once again, using an incorrect formula. Misapplication of an incorrect formula has serious impacts on the project's specification and as a result, its code compliance too. To be clear, ABE is used to calculate allowable building height, while "wall segment coverage" is used to compute GFA. The two are not interchangeable.

3. The City's Staff Report repeats these errors.

The City's Staff Report appears to support Ms. Strand's erroneous calculations detailed above, without additional analysis or evidence. Instead, the City merely re-states almost identical arguments and states that it has relied on Ms. Strand's plans and materials. But those same plans include the various inaccuracies and deficiencies identified by Mr. Grove. The City's request for dismissal therefore fails for the same reasons. The City has not come close to meeting the burden for dismissal in this action and Mr. Grove should be entitled to present his case on the merits.

C. The structure encroaches into the required side yard, resulting in a side yard smaller than required by the code.

Disagreement regarding which code provision applies to the side yard issue is not sufficient

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

to warrant dismissal and instead should trigger deeper review. As explained in Mr. Grove's appeal, MICC 19.02.020.C.1.c.iii.b. should apply in this situation. Ms. Strand appears to argue that subsection c.iii.a applies because the overall building height at the side of the property facing Mr. Grove's property is less than 25 feet. Strand Motion at 8. The City appears to agree without providing any additional analysis on the subject. Staff Report at 7. However, these conclusions rely on an inaccurate calculation of facade height. When correctly calculated, the facade height exceeds 25 feet and is closer to 33 feet, meaning the side yard depth must be at least 10 feet. Since 2022, the City has consistently ruled that the entire facade must be used for the calculation.[12]

The facade is measured from the lower of the existing grade or finished grade to the top of the facade (regardless of setback from the building edge).[13] As the City states in its Staff Report, the MICC generally errs in favor of less, rather than greater, height by generally requiring the lower of a calculation to be used. Staff Report at 6.[14]

Ms. Strand and the City should not be allowed to deviate from that premise here, and their attempt to do so is not a basis for dismissal.

D. The home's rooftop railings on the southern side to exceed maximum height limits set by the code

The City and Ms. Strand's interpretation of the code related to rooftop railings in this case is simply inconsistent with a plain reading of the applicable code provisions. As the City acknowledges, pursuant to MICC 19.02.020(E)(2):

> [t]he maximum building facade height on the downhill side of a sloping lot shall not exceed 30 feet in height. The building facade height shall be measured from ***the existing grade or finished grade*****,**

[12] *See* **Exhibit A** (emails between the City and Medici Architects regarding facade calculations dated October 6, 2022) (Exhibits 1010, 1011). For example, the City recently stated on another project "There is no distance at which an upper floor can be set back and be considered a different façade from the lower floors." Exhibit A.

[13] *Id.*

[14] In fact, the City's general position in this case to allow a more expansive reading is contrary to the code changes it has made in the past. Testimony is expected to demonstrate that the City has placed importance on compliance with these provisions, including in recent changes it has made. *See* **Exhibit B**, Residential Development Standards, Adopted Code Updates 2017. (Exhibit 1001).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

> ***whichever is lower, at the furthest downhill extent of the proposed building***, to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc." Staff Report at 8. It is not disputed that the property at issue in this case slopes downhill primarily from east to west. The rooftop railings attached to the southern exterior wall and the southern end of the western wall both exceed maximum allowed heights.

Certain appurtenances may exceed that 30-foot height limit, but rooftop railings are not one of them. MICC 19.02.020(E)(3)(b). *Id.* Ms. Strand appears to rely on a measurement from the "Average Building Elevation" to determine a height of below 30 feet. *See* Strand Motion at 8. But this is not consistent with the language of MICC 19.02.020.E., as explained above. The City appears to rely on Ms. Strand's inaccurate calculations to come to a similar conclusion that the height has not been exceeded. Mr. Grove requests the Hearing Examiner review these determinations and remand to the City for further consideration.

E. The proposed retaining walls/rockeries do not comply with height requirements set by code.

Mr. Grove does not object to the soldier piles *per se*, as Ms. Strand suggests. Strand Motion at 9. Instead, the crux of his disagreement is that, due to the slope of the site, Ms. Strand must build a retaining wall behind the soldier piles to support them. *See* City Exhibit 60. That retaining wall is a full 12 feet. Without it, the retaining wall would have to be moved away from the west property (it currently lies approximately 6 feet from the property line). Strand Exhibit 2007, p. SH3. Ms. Strand cannot avoid regulatory review by characterizing the soldier piles (new retaining walls/rockeries) as independent structures when they clearly rely on the rocks on the existing slope to function. And since they are part of this proposal, they must conform with the current, applicable code requirements, which the City agrees is a height restriction of 72 inches (or 6 feet) per MICC 19.02.050.D.5.b. Staff Report at 9. Height is measured from the top of the retaining wall or rockery to the existing grade or finished grade below it, whichever is lower. *See* MICC 19.02.050.C.2. The City appears to rely on Ms. Strand's inaccurate elevation drawings to determine the height is

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

adequate, when it is not. Staff Report at 8. Here the measurement must be taken from the bottom of the retaining wall (~216') to the top of the rockery, placing the wall at closer to 8 to 15 feet. This is not code compliant.

Further, this issue is in no way precluded by res judicata as Ms. Strand claims. The claim brought and determined in APL 23-009 dealt with whether the existing rockery on the west side of the property located within the critical areas was constructed after 1963 and was illegal when constructed. The Hearing Examiner found that the existing rocks "may well be protecting the slope from erosion, but they are not retaining the slope in the normal sense of a typical, near-vertical retaining wall; they are not a wall and that the dirt beneath the western and southern property perimeter is the "existing grade."[15] Mr. Grove does not dispute this finding in this appeal. Instead, Mr. Grove is explaining that the proposed heights of the proposed retaining walls/rockeries greatly exceed the height limit set forth in 19.02.050.D.5.b. These claims are distinct, were not previously raised and did not need to be, and were not decided to finality in APL 23-009. *Muma v. Muma*, 115 Wn. App. 1, 6, 60 P.3d 592, 595 (2002) (res judicata does not apply where the issues have not been fully litigated to their finality.)

F. MICC Title 19's standard of review applies to this appeal of a Type III Permit.

The City argues that Title 17 alone should apply to the review of this appeal. But major single-family dwelling building permits,[16] such as this one, are specifically reviewed under Title 15, Water, Sewer and Public Utilities; Title 17, Construction Codes and Title 19, the Unified Development Code as Type III Permits issued by the Planning Department. MICC 19.15.030 (emphasis added). The City's own exhibits say as much. *See* City Exhibit 85. Further, the issues raised in this appeal arise under Title 19, not Title 17. Therefore, prematurely limiting the scope of this appeal to Title 17, which applies to the application of the Construction Code by the Building Code Official, would be nonsensical and would avoid review of the main issues raised in this

[15] *See* APL23-009, Order of Summary Dismissal at 6.

[16] Major single-family dwelling building permit are defined under the land use code, Title 19 as building permits for new single-family dwellings or replacement dwellings that meet certain criteria, as this one does. MICC 19.16.010.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

appeal.

Under MICC 19.15.130, *any decision* under the land use code may be administratively appealed by filing a written appeal on the decision. (emphasis added). The burden of proof is on the appellant to demonstrate that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by evidence in the record, or that the decision is in conflict with the standards for review of the particular action. *Id.* As described in Mr. Grove's appeal, this burden is easily met. Testimony at hearing will show that the Final Plan Set contains four main errors in violation of Mercer Island Code's development code resulting in substantial error and a decision unsupported by the evidence in the record. *See* Appeal at 3.

V. CONCLUSION

Mr. Grove respectfully requests the Hearing Examiner deny Ms. Strand's (and the City's) request to dismiss this case before testimony and evidence can be heard. None of the appropriate dismissal criteria are met and testimony at hearing will demonstrate that the Final Site Plans are flawed, and that the City erred in approving the construction project in this case. At a minimum, Mr. Grove respectfully requests the Hearing Examiner remand Permit 2207-019 to the City for further consideration.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

Respectfully submitted: May 1, 2024

PERKINS COIE LLP

By: */s/Zachary E. Davison*

Zachary E. Davison, WSBA No. 47873
ZDavison@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Telephone: +1.206.359.8000
Facsimile: +1.206.359.9000

Gabrielle Gurian, WSBA No. 55584
GGurian@perkinscoie.com
10885 N.E. Fourth Street, Suite 700
Bellevue, Washington 98004-5579
Telephone: +1.425.635.1400
Facsimile: +1.425.635.2400

Attorneys for Appellant Daniel Grove

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT DANIEL GROVE'S PRE-HEARING MEMORANDUM AND RESPONSE TO DOROTHY STRAND'S REQUEST FOR SUMMARY DISMISSAL on the following:

David J. Lawyer
Inselee Best Doezie & Ryder, P.S.
10900 NE 4th Street, Suite 1500
Bellevue, WA 98004
dlawyer@insleebest.com
Attorneys for Applicant Dorothy Strand

Bio Park
Office of the City Attorney
City of Mercer Island
9611 SE 36th St
Mercer Island, WA 98040
biopark@mercerisland.gov
City of Mercer Island

Eileen M. Keiffer
Madrona Law Group, PLLC
14205 SE 36th St, Suite 100
Bellevue, WA 98006
eileen@madronalaw.com
Attorneys for the City of Mercer Island

John Galt
Hearing Examiner
City of Mercer Island
927 Grand Ave.
Everett, WA 98201
Jegalt755@gmail.com
Hearing Examiner

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

DATED: May 1, 2024

PERKINS COIE LLP

By: s/ *Zachary Davison*

Zachary E. Davison, WSBA No. 47873
ZDavison@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Telephone: +1.206.359.8000
Facsimile: +1.206.359.9000

Gabrielle Gurian, WSBA No. 55584
GGurian@perkinscoie.com
10885 N.E. Fourth Street, Suite 700
Bellevue, Washington 98004-5579
Telephone: +1.425.635.1400
Facsimile: +1.425.635.2400

Attorneys for Appellant Daniel Grove

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

EXHIBIT A

From:	Andrew Leon <andrew.leon@mercerisland.gov>
Sent time:	2022/10/06 10:40:06 AM
To:	Jackie <jackie@mediciarchitects.com>
Cc:	Schuyler Tutt <schuyler@mediciarchitects.com>; Ryan Harriman
Subject:	RE: PRE22-038: 2430 74th Ave SE
Attachments:	image001.png

Hello,

There is no distance at which an upper floor can be set back and be considered a different façade from the lower floors. In essence, the highest point of the wall on the downhill side of the house would need to be less than 30 feet above the bottom of the wall at its lowest point, where the top of the wall is measured from the bottom of the roof framing and the bottom of the wall is measured at the existing or finished grade, whichever is lower. This would apply regardless of how far the upper floors are set back from the lower floors.

Thanks,

Andrew Leon
Planner
City of Mercer Island – Community Planning and Development Department
206-275-7720 | mercerisland.gov/cpd

From: Jackie <jackie@mediciarchitects.com>
Sent: Wednesday, October 5, 2022 5:48 PM
To: Andrew Leon <andrew.leon@mercerisland.gov>
Cc: Schuyler Tutt <schuyler@mediciarchitects.com>
Subject: RE: PRE22-038: 2430 74th Ave SE

Hi Andrew,

Thank you for the response. At what distance would a façade be considered separate? If the furthest downhill exterior wall supports a roof then should it not be considered its own façade and separate from subsequent stepping back?
The code section seems to speak only of a roof, not the highest roof of the overall building.

We appreciate a second look at this, as our intent is to lessen the bulk of the building on the downhill side of the slope while still maintaining reasonable interior heights and presence at the street side of the lot.

Thank you,

- Jackie

Jackie McDowell-Logen, Assoc. AIA
Lead Project Designer
425.453.9298 ex 135 | Office
509.680.1651 | Mobile
jackie@mediciarchitects.com

MEDICI ARCHITECTS

Washington
11711 SE 8th Street, Suite 100
Bellevue, WA 98005

Idaho
PO Box 6156
200 West River Street, Suite 301
Ketchum, Idaho 83340

Website | Houzz | Facebook

From: Andrew Leon <andrew.leon@mercerisland.gov>
Sent: Wednesday, October 5, 2022 5:19 PM
To: Jackie <jackie@mediciarchitects.com>
Cc: Schuyler Tutt <schuyler@mediciarchitects.com>
Subject: RE: PRE22-038: 2430 74th Ave SE

Hello,

MICC 19.16.010 defines façade as any exterior wall of a structure, including projections from and attachments to the wall. Projections and attachments include balconies, decks, porches, chimneys, unenclosed corridors, and similar projections. MICC 19.02.020(E)(2) does not contemplate multiple building facades or exterior wall facades on the downhill side of a sloping lot, only the maximum building façade height as a single exterior wall supporting the roof. As such, the downhill façade for the diagram you provided in your email would include all three floors of the house.

Thanks,

Andrew Leon
Planner
City of Mercer Island – Community Planning and Development Department
206-275-7720 | mercerisland.gov/cpd

From: Jackie <jackie@mediciarchitects.com>
Sent: Wednesday, October 5, 2022 2:54 PM
To: Andrew Leon <andrew.leon@mercerisland.gov>
Cc: Schuyler Tutt <schuyler@mediciarchitects.com>
Subject: PRE22-038: 2430 74th Ave SE

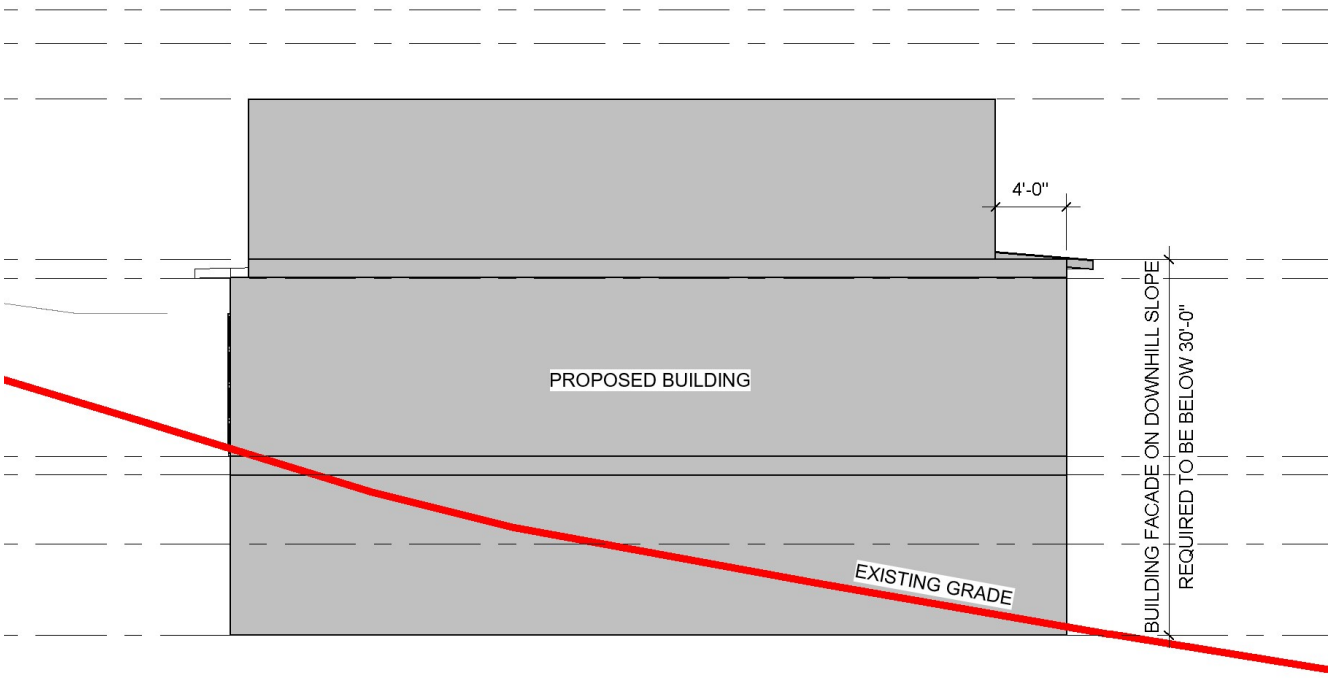
Hello Andrew,

This is Jackie with Medici Architects, and I just had a follow up question regarding the building height requirements on the downhill side of the building.
Section 19.02.020.E.2 requires that the maximum building façade height on the downhill side of a sloping lot shall not exceed 30 feet in height. The building façade height shall be measured from the existing grade or finished grade, whichever is lower, at the furthest downhill extent of the proposed building, to the top of the exterior wall façade supporting the roof faming, rafters, trusses, etc.

We are proposing a setback of the building in order to follow the topography of the site and would like to confirm that our intent is correct. Below is a diagram depicting the setback and conforming façade height.

Thank you for your time,

- Jackie



Jackie McDowell-Logen, Assoc. AIA
Lead Project Designer
425.453.9298 ex 135 | Office
509.680.1651 | Mobile
jackie@mediciarchitects.com

MEDICI ARCHITECTS

Washington
11711 SE 8th Street, Suite 100
Bellevue, WA 98005

Idaho
PO Box 6156
200 West River Street, Suite 301
Ketchum, Idaho 83340

Website | Houzz | Facebook

From:	Jeff Thomas <jeff.thomas@mercerisland.gov>
Sent time:	2022/06/16 09:36:26 PM
To:	Kate Miller <kate@brandtdesigninc.com>
Cc:	Colin Brandt; Bree Medley <bree@brandtdesigninc.com>; Andrew Leon
Subject:	RE: Building Permit No. 2109-150
Attachments:	FW: Building face /height question RE: Permit # 2109-150 Clarifications 220510_2109-150_HeightCoordinationPackage.pdf

Kate,

This message is responsive to your request for clarification related to Building Permit No. 2109-150, specifically the application of Mercer Island Municipal Code (MICC) 19.02.020(E)(2) for maximum building height on downhill building façade. We discussed the matter at issue during a video meeting on May 26, 2022. MICC 19.02.020(E)(2) requires maximum building height on downhill building façade as follows:

> 2. *Maximum building height on downhill building facade.* The maximum building facade height on the downhill side of a sloping lot shall not exceed 30 feet in height. The building facade height shall be measured from the existing grade or finished grade, whichever is lower, at the furthest downhill extent of the proposed building, to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.

While a plain reading of this code requirement is clear, there has been an attempt to construe it in a manner that would allow another and/or perceived façade of lesser height located closer to a property line to be used to meet the requirement of MICC 19.02.020(E)(2), provided "structural independence" was achieved. This was further qualified by a former employee that such structural independence was acceptable provided, "The lower roof must include framing, rafters or trusses. In other words, it cannot be simply a projection." (see attached McHarg 11-12-2021). Furthermore, it was noted that structural independence would need to be determined by a Building Plans Examiner, not a Land Use Planner (see attached McHarg 02-09-2022).

Based on a review of applicable provisions of the MICC, relevant information submitted as part of Building Permit No. 2109-150, information exchanged at our May 26 video meeting and discussion with Mercer Island staff, I've concluded the following as the designated Code Official by definition of the MICC for the City:

1. The legislative intent of MICC 19.02.020(E)(2) is clear - the maximum building facade height on the downhill side of a sloping lot shall not exceed 30-feet in height, measured as described.
2. The application of MICC 19.02.020(E)(2) to the proposal contained within Building Permit No. 2109-150 results in a building height on the downhill building façade of 33-feet, 6-inches (see attached).
3. MICC 19.02.020(E)(2) does not contemplate multiple building facades or exterior wall facades on the downhill side of a sloping lot – only the maximum building façade height as a singular treatment, the exterior wall façade supporting the roof framing, rafters, trusses etc.
4. The phrases "structural independence" and "structurally independent" are not contemplated anywhere in the MICC, including MICC 19.02.020(E)(2).
5. The attempt to construe MICC 19.02.020(E)(2) in the manner that has occurred has left this code requirement looking like a shell of itself, leaving a completely unchecked exterior wall façade height in favor of another lesser exterior wall façade height on the downhill side of a sloping lot. This is far outside the bounds of what I believe to be the legislative intent.
6. Therefore, in the absence of further direction in the MICC, there are two options to resolve the building height on the downhill building façade of 33-feet, 6-inches for Building Permit No. 2109-150:
   A. Revise this application to comply with MICC 19.02.020(E)(2) 30-foot requirement; or
   B. Apply for a Zoning Variance to seek relief from this requirement.

I appreciate your patience waiting for a final response to this matter. As you're likely aware the planning division has been significantly short staffed in recent weeks, but work volumes have continued to increase.

Thanks, Jeff

EXHIBIT B

RESIDENTIAL DEVELOPMENT STANDARDS

Adopted Code Updates

What is Happening and Why?

The City of Mercer Island is changing the rules for building and remodeling homes throughout the island. The City Council has heard concerns from residents about the rapidly changing character of Mercer Island's neighborhoods. Over the last year, the Planning Commission and City Council have undertaken an extensive process focused on analyzing and reviewing potential updates to the development code. The process has included a substantial effort to reach out to a broad cross section of the community, using a variety of outreach tools including traditional meetings and public hearings, as well as social media. We have heard from many in the community, receiving over 475 written comments. On September 19th, the City Council adopted a series of code amendments, summarized below. **These provisions will go into effect on November 1, 2017.**

Summary of Proposed Changes

- **NEW LIMITS ON HOUSE SIZE AND BULK**
  - Reducing allowed gross floor area from 45% to 40% of the lot
  - Implementing a maximum house size for each residential zone
  - Height limited to 30' on downhill side (reduced from 35')
  - Side setback increased to 17% of lot width for lots wider than 90 ft, with additional increases for homes with a "tall wall"
- **INCREASED TREE PROTECTION**
  - A minimum of 30% of large trees must be retained when a lot undergoes major construction
  - Priority for retention of large, healthy trees
  - Exceptional trees are provided additional protection, including requirements to re-design
  - Tree removal on any lot will require a permit (exceptions for trees that are hazardous, very small or noxious/invasive)
- **NEW LIMIT ON HARDSCAPES**
  - Up to 9% of the net lot area may be used for hardscape surfaces (decks, patios, etc.)
- **CONSTRUCTION IMPACTS ARE LIMITED**
  - Construction hours reduced to 7am-7pm on weekdays and 9am-6pm on Saturdays
  - Require construction management plans and a construction schedule for larger projects and permit renewals
  - Limit permit renewal and extensions to a total of 3 years
- **FEWER DEVIATIONS AND VARIANCES**
  - Eliminate impervious surface and fence height deviations
  - Toughen standards on all other variances and deviations

20 September, 2017

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