BEFORE THE HEARING EXAMINER for the
CITY of MERCER ISLAND

ORDER of SUMMARY DISMISSAL

FILE NUMBER: APL2024-002

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TYPE OF CASE: Appeal from approval of Building Permit No. 2207-019

WHEREAS, the above-entitled appeal relates to Dorothy Strand's ("Strand's") proposal to demolish and replace an existing single-family residence on a lot in Mercer Island whose street address is 6950 SE Maker Street ("6950"). This is the second administrative appeal filed related to Strand's proposal; and

WHEREAS, on October 23, 2023, Daniel Grove *et al*. ("Grove *et al.*") appealed the City of Mercer Island Community Planning & Development's ("CP&D's") approval of Critical Area Review 2 ("CAR 2") application CAO23-011 for the Strand project. On November 17, 2023, CP&D filed a Motion to Dismiss. On December 2, 2023, the City of Mercer Island Hearing Examiner ("Examiner") granted CP&D's Motion to Dismiss; on December 29, 2023, the Examiner denied Grove *et al.'s* Motion for Reconsideration. That appeal is referred to as "Grove I." ; and

WHEREAS, on February 20, 2024, CP&D approved Strand's Building Permit 2207-019 with conditions. On March 5, 2024, Daniel Grove ("Grove") appealed CP&D's approval of Building Permit 2201-019. That appeal (the current appeal) is referred to as "Grove II." On April 24, 2024, Strand filed a Motion to Dismiss the Grove appeal ("Strand Motion"). [1] On May 1, 2024, Grove filed a Response to the Strand Motion; [2] and

WHEREAS, Washington's appellate courts recognize the right of quasi-judicial bodies to act summarily in appropriate situations.

> Since Const. art. 4 and the Superior Court Civil Rules do not exclusively reserve summary procedures to the judiciary, there is no logic that compels us to consider separation of powers as a roadblock to the use of efficient judicial procedures in the field of administrative law. If there does not exist a genuine issue of material fact, there is no reason why an administrative board or agency should be denied an opportunity to handle the matter summarily, passing on the issue of law presented.

[*ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 696-97, 601 P.2d 501 (1979), citations omitted] In *Eastlake Community Council v. City of Seattle* [64 Wn. App. 273, 276, 823 P.2d 1132 (1992)] Division I of

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1 The Strand Motion is contained within a document entitled "Land Use Hearing Memorandum of Applicant Dorothy Strand," the opening two-line sentence of which ends with the following: "submits this motion for summary judgment dismissal of Appellant's claims." The Strand Memorandum is effectively a Motion to Dismiss and has been treated as such by all principal parties.

2 Grove's May 1, 2024, Response refers to "Dorothy Strand and the City of Mercer Island's Request for Dismissal." Also on May 1, 2024, CP&D's counsel submitted an email stating that the Strand Motion was filed by Strand, not also by CP&D but that CP&D did not oppose the Strand Motion. Grove's impression that CP&D was also moving for summary dismissal appears to be based on statements contained in CP&D's Staff Report, which had been issued on April 29, 2024. For example: "Appellant's appeal lacks merit and should be dismissed." (Staff Report, PDF 1, ll. 24-25); "Appellant's appeal should be dismissed." (Staff Report, PDF 9, ll. 7-8); etc. It is abundantly apparent from context that the Staff Report was urging the Examiner to dismiss (deny) Grove's appeal after conducting a hearing, not without a hearing: "the testimony at hearing to demonstrate" (Staff Report, PDF 4, ll. 2-3); "testimony at the hearing to establish" (Staff Report, PDF 6, ll. 4-5); "Testimony is expected to show" (Staff Report, PDF 6, ll. 12-14); etc. It is clear to the undersigned that the Staff Report's use of "dismiss" was not intended to suggest or request summary dismissal.

the Court of Appeals held that even where a quasi-judicial body's regulating procedures do "not contain any provisions authorizing agencies to grant summary judgment", they may do so when acting in a quasi-judicial role under the principle set down in *ASARCO*; and

WHEREAS, summary dismissal requests in the quasi-judicial realm are akin to summary judgment requests in the judicial realm. Washington's appellate courts have explained the standard of review to be applied in summary judgment requests.

> When reviewing a summary judgment order, we engage in the same inquiry as the trial court, affirming summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Staples v. Allstate Insurance Co., __ Wn.2d __, __ P.3d __ (2013)

> A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986); and

WHEREAS, Grove II raises five Assignments of Error in CP&D's approval of Building Permit 2207-019. Each Assignment of Error, the Strand Motion's allegations, and Grove's responses are summarized below:

1. CP&D has incorrectly calculated both "existing grade" and "finished grade" which has led it to incorrectly apply several provisions of the Mercer Island City Code ("MICC") to the proposed new residence.

   Strand asserts that questions relating to existing grade were fully resolved in Grove I and cannot be collaterally attacked in Grove II: Existing grade is to be measured based on the ground level around the existing residence.

   Grove replies that CP&D is mis-applying the Grove I Decision and that the ground level beneath the existing structure controls.

2. CP&D has incorrectly calculated the "basement exclusion area," resulting in an allowable building square footage maximum that is impermissibly large.

   Strand asserts that Grove is applying an incorrect elevation basis.

Grove replies that CP&D has used the wrong data in its calculation.

3. CP&D has allowed an east side setback that is less than required by the MICC based upon an incorrect determination of the height of the east wall of the proposed residence.

   Strand asserts that Grove is using an incorrect elevation basis to determine wall height.

   Grove replies that CP&D's calculation is incorrect and that the wrong MICC section was used.

4. CP&D has incorrectly calculated building height and has incorrectly approved a roof railing system that exceeds allowable height limits.

   Strand asserts that Grove is measuring building height from an incorrect existing elevation.

   Grove replies that CP&D failed to calculate allowed building height based on the furthest downhill elevation as required by the MICC.

5. CP&D has improperly approved a proposed soldier pile retaining wall that exceeds the MICC's maximum 6-foot (72") height allowance.

   Strand asserts that the soldier pile retaining wall was a requirement of the CAO23-011 approval and, thus, was covered by the Grove I summary dismissal and cannot now be collaterally attacked.

   Grove replies that the soldier pile retaining wall relies on a rock-faced downslope and that the height limit applies to the combination of the rock-faced slope and the soldier pile wall; and

WHEREAS, Grove I presented two issues: Issue 1) Strand performed (or had performed for her) "unpermitted exceptional tree removal within a critical area which must be addressed and resolved through the CAR 2 process" and Issue 2) "the current topography of 6950 cannot be accepted as the existing grade for the purpose of building height calculation". (Grove I, Order of Summary Dismissal, PDF 5) Issue 1 is completely unrelated to the issues in Grove II; and

WHEREAS, the Examiner, in dismissing Issue 2 in Grove I, held that "[Administrative Interpretations 04-04 and 12-004] controls [with respect to determination of existing grade for building permit calculation purposes on 6950]: The existing grade is the grade to be used." (Grove I, Order of Summary Dismissal, PDF 6) Strand does not dispute that holding, but cites to a provision in one of the Administrative Interpretations which refers to the grade "underlying" a building as opposed to "the grade of an existing structure"; and

WHEREAS, Grove II Issues 1 – 4 are all based on the question of how to calculate existing grade level, or more precisely, what level represents "existing grade" to be used in various height and area calculations related to single-family residential building permit requirements. The Examiner's Grove I

dismissal did not resolve that question as the Examiner simply said that the Administrative Interpretations controlled. The Examiner did not parse the text of those Interpretations; and

WHEREAS, whether this situation presents a "genuine issue of material fact" or simply a dispute as to interpretation of law, the Examiner concludes that dismissal of Issues 1 – 4 is not appropriate: The parties should be allowed to present their arguments at hearing; and

WHEREAS, while the soldier pile wall may have been present as an element of the project for which the CAR 2 was performed, it was not an element of the Examiner's Dismissal. The rockeries on the western part of 6950 were discussed and the Examiner concluded that they were not retaining walls, but nothing was said about a soldier pile retaining wall. Like Issues 1 – 4, whether the soldier pile wall height question presents a "genuine issue of material fact" or simply a dispute as to interpretation of law, the Examiner concludes that dismissal of Issue 5 is not appropriate: The parties should be allowed to present their arguments at hearing; and

WHEREAS, any Recital herein deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

NOW, THEREFORE, the Hearing Examiner issues the following:

ORDER

The Strand Motion for Dismissal is **DENIED**.

ORDER issued May 5, 2024.

\s\ John E. Galt

JOHN E. GALT
Hearing Examiner