Hearing Examiner Galt

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of Notice of Decision: File No. 2207-019: DANIEL GROVE, Appellant, v. CITY OF MERCER ISLAND, Respondent.	No. APL24-002 CITY OF MERCER ISLAND'S CLOSING ARGUMENT

I. INTRODUCTION

The City of Mercer Island ("City") respectfully requests the Hearing Examiner affirm the City's decision to approve building permit BLD 2207-019 with conditions. Appellant failed to meet his burden of proof with respect to all five purported assignments of error. The testimony at hearing and the record evidence definitively establish that City Staff carefully and methodically reviewed the application in question, and correctly approved it with conditions. City did not err in its permitting decision and the Hearing Examiner should affirm the City's decision to approve BLD 2207-019 with conditions.

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II. ARGUMENT

a. The City Correctly Confirmed Applicant's Calculation of Existing and Finished Grade

The Appellant did not meet his burden of proof with respect to his assertions as to the calculation of existing and finished grades. Appellant presented one witness only—himself—and only as a lay witness, not an expert witness. Appellant testified that he is not an architect, not a planner, and not a surveyor—he is instead a computer engineer. While Appellant made speculations as to where he believes existing grade to be, upon cross examination, Appellant testified that such speculations were based mainly upon his walk through of the current residence when he was considering whether to purchase it. He also testified that he did not take the photographs upon which he superimposed his estimates as to grade level. The Applicant testified that she was present for Appellant's walk through, that he was not within the residence for very long, and that he did not bring in special equipment for measuring grade. Appellant admitted that his speculations as to existing grade are not scientific or exact, but instead, claimed that exact existing grade is "for someone else to figure out." This is insufficient to meet his burden of proof as an Appellant.

While Appellant undoubtedly devoted much time and study in support of this appeal, he is ultimately not an expert and he presented no testimony from a retained qualified expert. Accordingly, the Hearing Examiner should afford Mr. Grove's opinions on calculation of existing and finished grade very little weight. By contrast, Applicant presented testimony from architect Jeffrey Almeter, a residential architect who has been in the business for well over a decade. The City presented testimony from Senior Planner McGuire, who routinely processes building permits, averaging approximately 50 per year. These two individuals testified that they are confident in the

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calculations of existing and finished grade. Appellant failed to meet his burden of proof and on this basis alone, his appeal fails.

i. Existing Grade

The record evidence established that the application materials correctly calculated existing grade. Applicant's architect Jeffrey Almeter testified that he calculated existing grade according to the Administrative Interpretations and the opinion provided by the City's third-party surveyor. Administrative Interpretation 12-004 provides:

> 1. Without concrete evidence or verification from a previous survey document, as accepted by the City Code Official, the existing grade underlying the existing structure will be used as the elevation for the proposed development.
>
> 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.
>
> 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.
>
> 4. The final determination for existing grade on a lot shall be the decision of the Code Official.

Ex. 2005. This is consistent with the finding of the City's hired surveyor, James Harper. Mr. Harper confirmed that "in accord with Conclusion 2 of Administrative Interpretation 12-004," that existing grade should be the "surface elevation immediately adjacent to, or touching a point on the exterior wall of a proposed structure…" Ex. 82.

Appellant's testimony appears to misconstrue Mr. Harper's review letter in support of his appeal. Appellant's testimony reflected his belief that there can be ***no*** interpolation applied to the

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property in question. Mr. Harper's review letter does not say this. Instead, it provides that the listed surveys "cannot be relied on for interpretation or other such formulaic determinations of any *past, original grade*." Ex. 82. He did not opine that no interpolation can be applied to the grade as it currently exists on the property. Indeed, to do so is reasonable, given the fact that the eastern façade of the proposed residence will lie within the footprint of the existing residence.

When construed in terms of practicality, the flaws in Appellant's argument become apparent. Appellant's argument appears to hinge on what he believes to be a technicality—that the eastern façade of the proposed residence will be inside of the footprint of the existing structure. Accordingly, Appellant argues that existing grade is ***below*** the basement of the existing residence. Mr. Almeter testified that there is no way to determine existing grade using Appellant's theory without damaging the existing structure. Further, Appellant's argument would result in a hypothetical trench between where the Appellant asserts existing grade for the proposed residence ***should*** be and where the eastern wall of the existing residence currently meets the ground. Appellant's argument literally construes some portions of APL 24-002 (conclusion 1), ignores other portions of APL 24-002 (conclusions 2-4), and also ignores the practical implications of his theory. Appellant's theory should be rejected.

Finally, Administrative Interpretation 12-004 conclusion 4 provides that "[t]he final determination for existing grade on a lot shall be the decision of the Code Official." Ex. 82. Therefore, the final say on existing grade, per the Code, is subject to the City's discretion. Here, Senior Planner McGuire carefully and methodically reviewed the applicant's materials and ultimately agreed with Applicant's calculation of existing grade. Accordingly, the Hearing Examiner should affirm the City's permitting decision.

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ii. Finished Grade

Appellant's argument as to finished grade focused on the western basement wall and the calculations of the basement floor area exclusion. His testimony appeared to quibble with the Applicant's use of midpoints for purposes of the calculation of basement floor area and backs into his argument that finished grade must therefore be incorrect. However, as discussed in section (b) *infra*, Title 19 Appendix B expressly authorizes and demonstrates utilization of midpoints for this calculation.

To the extent Appellant is still arguing that finished grade is incorrect because of his "manual inspection" of Sheet A3.1, Appellant failed to carry his burden on this point. Again, Appellant provided lay testimony, not expert testimony, and therefore, his opinion is entitled to very little weight and he did not explain how his "manual inspection" was accurate. Indeed, as discussed below in section (b), Appellant's manual inspection incorrectly characterizes the western basement wall as having five portions or segments, when it only has one. Appellant's argument as to finished grade is simply incorrect.

b. City Staff Correctly Confirmed the Calculation of the Basement Floor Area Exclusion

Calculation of basement floor area exclusion is a mathematical exercise, prescribed by a formula set forth in MICC Title 19, Appendix B. Both Mr. Almeter, and Senior Planner McGuire testified that the Applicant correctly followed the methodology set forth in Appendix B.

Again, to the extent Appellant's alleged assignment of error on this point relies on his erroneous allegations on calculation of existing/finished grade, as discussed in subsection (a) above, Appellant is incorrect.

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Further, Appellant erroneously testified that there are five separate "wall segments" or "portions" for the western basement wall. He appears to base this assertion on the fact that there will be ***exterior*** stairs outside of this wall. Ex. 1005. However, the exterior stairs are simply not a part of the western basement wall and are appropriately excluded from that calculation.[1] The purpose of the basement floor area calculation is to effectuate the MICC, which "excludes that portion of the ***basement floor area*** from the gross floor area, which is below the existing or finished grade, whichever is lower." Title 19, Appendix B. Appellant's approach includes exterior stairs within basement floor area, which is incorrect based on a plain English reading of the phrase "basement floor area."

Upon Appellant's rebuttal testimony, Appellant testified that when preparing Exhibit 1005, he did not use the term "wall segment" as a term of art as utilized in Title 19, Appendix B and that rather, he should have used the word "portion" or "part" instead of "segment." Nevertheless, Appellant erroneously calculates basement exclusion area using a western basement wall divided into five wall segments, because his calculation includes exterior stairs. Exterior stairs are not walls and are therefore, not included within wall segments for purposes of the basement floor area exclusion based upon a plain language reading of Title 19, Appendix B.

Finally, at hearing Appellant apparently also takes issue with the use of a midpoint for calculation of basement floor area. This is contrary to the diagram in Appendix B, which clearly shows the use of a midpoint for this calculation.

[1] By contrast, if interior stars create jogs in the wall, they would count as additional segments.

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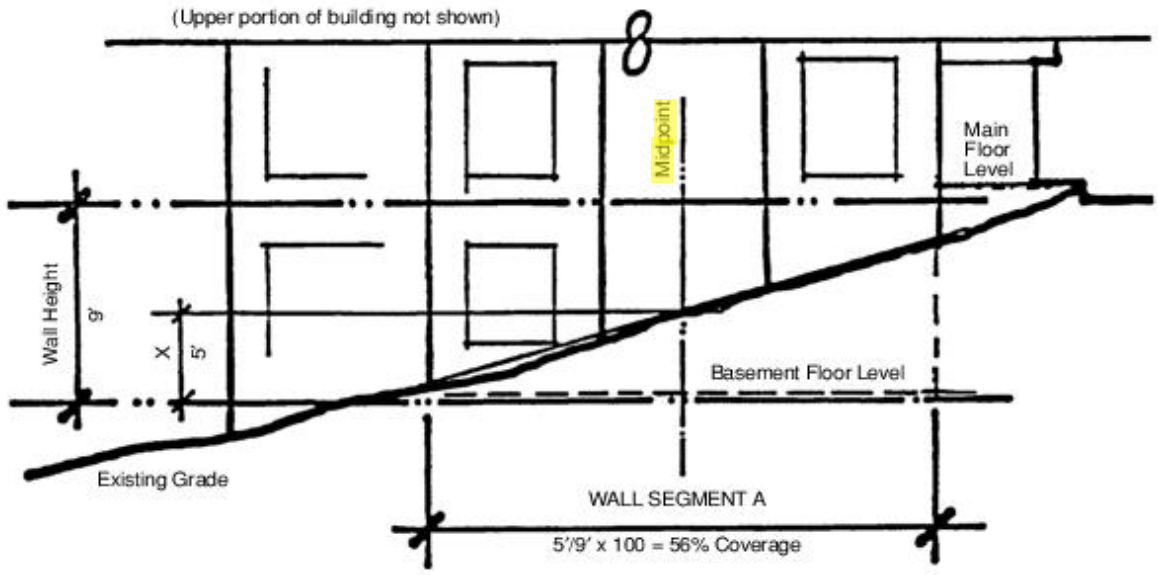

MICC Title 19, Appendix B (highlight supplied). Therefore, it was appropriate for Applicant to utilize midpoints in calculating the basement wall exclusion area.

Mr. Almeter's testimony explained how he followed the formula provided in Appendix B when preparing the application materials. Senior Planner McGuire's testimony confirmed that a careful review of the application revealed the calculations to be in accord with the formula contained within Appendix B. Appellant did not meet his burden of proof—basement floor area was correctly calculated for purposes of the gross floor area exclusion.

c. City Staff Correctly Confirmed the 7.5 Foot Eastern Setback

The City also correctly confirmed the eastern side yard setback for the proposed residence. Senior Planner McGuire testified as to how the MICC provides for variable side yard setbacks. For buildings less than twenty-five feet in height (for the wall adjoining the side yard), a seven and a half foot setback is appropriate. MICC 19.02.020(C)(1)(c)(iii)(a). The height of the eastern facing wall of the proposed residence is 24 feet, 11.5 inches (measured from finished grade, which is lower than existing grade in this instance). Ex. 6 (resized) at p. 16 of 24 (south elevation drawing).

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Because the driveway for the proposed property is dug out, Appellant alleges that the height of the eastern wall is lower, by calculating not from the eastern wall, but the southern wall. This is contrary to the language of the MICC, which provides the height is measured based on the height of the wall adjoining the side yard in question. MICC 19.02.020(C)(1)(c)(iii)(a)-(b). Because the height of the eastern wall technically is less than twenty-five feet in height, City Staff did not err by approving the proposed project with a 7.5 foot eastern setback.

d. City Staff Correctly Approved the Rooftop Railing Height for the Proposed Project

The City correctly reviewed the height of the proposed residence, including the rooftop railings. The MICC caps maximum building height at 30 feet, measured from average building elevation to the highest point of the roof. MICC 19.02.020(E)(1). The proposed residence meets this limit on all sides of the residence. Exhibit 6 (resized) at p. 16 of 24. The same height limit of 30 feet is applicable to the maximum building height on the downhill building façade for buildings on sloping lots (to be measured from existing grade or finished grade, whichever is lower), to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc. MICC 19.02.020(E)(2). As the proposed residence is indeed on a sloping lot, City Staff also confirmed that the maximum building height for the downhill building facade was correct. McGuire testimony.

While the City agrees that MICC 19.02.020(E)(3) references both MICC 19.02.020(E)(1) and (2), by definition, the types of appurtenances listed within subsection (3) typically and naturally exceed the maximum building height on the downhill building facade because they will be placed on the top of a building (antennas, lightning rods, chimneys and fireplaces, solar panels,

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etc). Senior Planner McGuire testified that the code measures to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc. Upon questions by the Hearing Examiner, she explained this means a measurement to the top plate. Rooftop railings would never be placed below the top plate; by definition, rooftop railings will always sit ***above*** the roof structure. Appellant's read of the code would render MCC 19.02.020(E)(3)(b), which specifically references rooftop railings, superfluous. Under the principles of statutory construction, if possible, the use of all words in a statute (or an ordinance in this case) must be accorded meaning, with no portion rendered meaningless or superfluous. *E.g*. *State v. Roggenkamp*, 153 Wash. 2d 614, 624, 106 P.3d 196, 201 (2005). Appellant's argument should be rejected.

e. City Staff Correctly Confirmed The Maximum Shoring Wall Height Conforms to the MICC

Finally, Appellant's fifth assignment of error is also incorrect. The maximum exposed portion of the proposed new shoring wall will be 6 feet in height.[2] Ex. 6 (resized) at p 10 of 24; testimony of Senior Planner McGuire, testimony of Jeffrey Almeter. This height complies with the height limit imposed by MICC 19.02.050(D)(5).

While Appellant attempts to add the height of the shoring wall to the height of the rock faced slope, this is inappropriate in light of the Hearing Examiner's holding in APL 23-009. Ex. 2002. In that case, the Examiner found that "[t]he 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." *Id.* Accordingly, the height of the rock faced wall is not added to the

[2] Again, any argument by Appellant that other portions of the shoring wall are subject to other height requirements under the building code raises new arguments not contained in Appellant's appeal and were not properly preserved for appeal.

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height of the shoring wall per MICC 19.02.050(E)(5)(a) because it is a rock faced slope, and not a retaining wall. The proposed shoring wall complies with the requirements of the MICC and the City's permitting decision should be affirmed.

VI. CONCLUSION

City Staff correctly approved the building permit for the proposed new residence with conditions. Again, Appellant failed to meet his burden of proof. Rather than retaining and presenting expert testimony, Appellant presented only his own speculations as a lay witness. Accordingly, his testimony and suppositions are entitled to very little weight.

By contrast, the Applicant presented the expert testimony of architect Jeffrey Almeter, who testified as to his careful preparation of the application materials, including reworking such upon the multiple rounds of review required by the City. Mr. Almeter testified that in his years of experience, the City of Mercer Island is one of, if not the most rigorous in its development review process.

Senior Planner McGuire testified that she is accustomed to reviewing single family building permit applications. She testified that she devoted an unusually long amount of time in review of the proposed application, and that the application went through several submittals/rounds of review. She also testified as to an unusually voluminous amount of comments submitted from neighbors with respect to this proposal, and that this required City Staff devote extra time and attention to the application in question. Finally, she testified that she did review the appeal filed by Appellant, and checked her work against that Appeal. She testified that had she made a mistake, she would say so; however, in this case, she is aware of no such mistake. City Staff vigorously and thoroughly reviewed the application in question and correctly granted the building permit with

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conditions. The City again respectfully requests the Hearing Examiner affirm the City's permitting decision with respect to BLD 2207-019.

DATED this 24th day of May, 2024.

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DECLARATION OF SERVICE

I, Reina McCauley, declare and state:

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

2. On the 24th day of May, 2024, I served a true copy of the foregoing ***CITY OF MERCER ISLAND'S CLOSING ARGUMENT*** on the following parties using the method of service indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of May, 2024, at Auburn, Washington.

/s/Reina McCauley
Reina McCauley

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