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 CLOSING ARGUMENT

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I. INTRODUCTION

Mr. Daniel Grove appeals Building Permit 2207-019 (the "Project"), an illegal construction project that, as shown in the record evidence and testimony presented at the May 9, 2024 hearing, grossly violates both the text and the goals of the Mercer Island City Code ("Code"). Mr. Grove respectfully asks the Hearing Examiner to remand this matter to the City of Mercer Island (the "City") so that those errors can be corrected before the Project is allowed to proceed.

In 2017, the City of Mercer Island pursued several code amendments to address its residents' concerns about limits on housing sizes and bulk. These changes were in direct response to fears "about the rapidly changing character of Mercer Island's Neighborhoods" and the City's permitting of projects that exceeded set code limits. Ex. 1001; Grove Testimony, TR at 7.[1] To address these concerns, the Code updates set new standards to reduce the allowed gross floor area, reduce maximum house sizes, reduce height limits, and increase side yard setbacks, and ensure the City was doing its job in enforcing these standards. *Id.*

Not long after the City implemented those amendments (which became effective on November 1, 2017), Ms. Dorothy Strand submitted her first application for a building and demolition permit for the subject Project that proposed a structure that *vastly* exceeded the standards set forth in the amended Code.[2] Ms. Strand sought to shoehorn this project which would enable her to build the largest and highest structure that she possibly could—which, as Ms. Strand argues, was her legal "right" to do. Strand Testimony, TR at 84.[3] Unfortunately, Ms. Strand got her way when, on February 20, 2024, the City approved the most recent permit application that forms the basis of this appeal. Ex. 4. Despite the review process that Ms. Strand's permit went

[1] Citations to "Ex." and "Exs." refer to exhibits admitted by the Hearing Examiner at hearing. Perkins Coie, LLP transcribed the video recording of the May 9, 2024 open record hearing, and attaches that transcription as Appendix A to this submission. Citations to the transcript are designated as "TR" and, for ease of reference, identify the witness who is providing the cited testimony and the specific pages on which the testimony appears.

[2] As detailed below the initial application calculated the basement exclusion area at 100% making the house much larger than permitted. Ms. Strand also attempted to leave in place an unsafe retained fill slope.

[3] While applicants may have a legal right to build to the maximum allowable limits, they do not have a right to build the largest structure they can build in disregard of the nuanced limits contained in the Code.

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through, the City's approval of the most recent permit application was in substantial error in at least five ways: (1) by relying on an erroneous calculation of existing grade and use of finished grade, the Gross Floor Area is much larger than permitted, resulting in a home that is substantially larger than allowed; (2) by incorrectly calculating basement exclusion area the allowable building square footage is impermissibly large; (3) the required side yard depth is less than the 10 feet required on the east side of the proposed home; (4) the City has allowed rooftop railings that exceed the height limits as part of a downhill facade; and (5) the proposed retaining wall/rockeries exceed code height limits.

Through this appeal, Mr. Grove seeks to correct those errors and asks the Hearing Examiner to enforce the City's code as recently amended in response to resident feedback. The burden of establishing those errors is to show that there has been a substantial error, that the City's decision was unsupported by at least some evidence in the record, or that the decision is in conflict with the standards of review. Mr. Grove is not required to rationalize or justify the City's reasons for approving the permit, as the City seems to suggest—in fact, such considerations are immaterial to the burden of proof at issue in this appeal. It makes no difference whether the City *believed* its approval of the subject permit was correct. If errors exist or the decision is unsupported or conflicts with the governing standards, it is the Hearing Examiner's role to serve as a gatekeeper, enforce the code as written, and remand any errors to the City for correction before any project proceeds. And that is precisely what Mr. Grove is seeking here—that Building Permit 2207-019 be remanded to correct the errors that Mr. Grove unquestionably established through documentary evidence and testimony at the hearing.

By remanding this matter, the Hearing Examiner will ensure that the applicant and future applicants will closely adhere to the updated code as written when seeking to proceed with residential construction projects on Mercer Island. But approving this project in its current form may set a dangerous precedent for future developers seeking to skirt the important limitations that the City has imposed through the legislative process. In sum, there is no basis for allowing this

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project to continue on its current course without first correcting the errors that Mr. Grove has met his burden on, and identified through this appeal.

II. TESTIMONY AND EVIDENCE PRESENTED

At the May 9, 2024, open record hearing, the Hearing Examiner heard testimony and saw evidence presented by the principal parties in this case: (a) Mr. Daniel Grove, Appellant, (b) the Project Architect, Jefferey Almeter on behalf of the Project Proponent, Ms. Dorothy Strand and (c) the City's Planner, Ms. Molly McGuire. The testimony and evidence at hearing demonstrated the substantial errors the City made in approving Building Permit 2207-019. The permit should be remanded to the City for further review, consideration, and correction.

A. Overview of Testimony from Appellant, Daniel Grove

Mr. Grove is a 20-year resident of Mercer Island and computer engineer who lives directly next door to the subject property. Mr. Grove is intimately familiar with the project at issue in this appeal and has spent countless hours reviewing Ms. Strand's submissions to the City and all publicly available data concerning the subject property. It is undisputed that Mr. Grove is the most knowledgeable witness of the various individuals who testified at the hearing—including Ms. Strand herself. Mr. Grove testified in support of the code violations raised in this appeal and the supporting exhibits, all of which were admitted into testimony. Mr. Grove also testified as to his extensive history and experience with the Mercer Island City Code through his involvement in the 2017 Code updates. Grove Testimony, TR at 7. As Mr. Grove demonstrated, Building Permit 2207-019 violates many of the same standards the 2017 updates were attempting to enforce.

The City appears to reject Mr. Grove's analyses on the basis that he is not "an architect, a planner, or a surveyor." City's Closing at 2. Putting aside the City's failure to timely assert this baseless objection,[4] Mr. Grove is not required to qualify as an expert witness for purposes of

[4] In conformance with RoP 224, Mr. Grove timely submitted his witness disclosure on May 2, 2024. At no point before or during the hearing did the City move to exclude any portion of Mr. Grove's testimony, and any objection along these lines is waived. Likewise, the City did nothing to discredit Mr. Grove's extensive knowledge of the subject property and applicable code provisions during cross examination, and there is absolutely no legitimate basis to discount or otherwise call into question Mr. Grove's credibility.

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eliciting testimony that is rationally based on his personal perception. *See* ER 701. Mr. Grove's testimony concerning the factual errors in Ms. Strand's project application and the City's errors in approving that application are not based on scientific, technical, or other specialized knowledge as contemplated in ER 702. To the contrary, application of the plain code language to the undisputed facts does not require one to be a surveyor, or architect.[5] *See also* ER 704 ("Testimony in the form of an opinion otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). Mr. Grove testified to his personal knowledge of the site and, based on his site visit and familiarity with the documentary evidence in the record, provided the most credible testimony that identified the specific areas where, and reasons why, both the City and the Applicant have deviated from the clearly established Code procedure.

B. Overview of Testimony from Ms. Strand's Architect, Jeffrey Almeter

Further confirming the credibility of Mr. Grove's testimony, Ms. Strand's own witness, Mr. Jeffrey Almeter, the Project Architect, ultimately *agreed* with most, if not all, of Mr. Grove's dispositive conclusions. Mr. Almeter testified as to his preparations of the designs, plan set and specifications for the illegally large home. He also testified to revisions and iterations of plan sets. Mr. Almeter, the only semi-neutral witness to testify, confirmed that from the beginning, Ms. Strand intended to start out with a building that was at the very maximum size the code could allow. He also confirmed that errors were made at the outset putting the Project over the maximum allowed by the code from its inception. Almeter Testimony, TR at 103. Very few errors were in fact corrected despite three iterations of the plans.

C. Overview of Testimony from Ms. Strand, Project Applicant

Ms. Strand testified as owner of the property, and proponent of the project at issue. Ms. Strand admitted to relying on Mr. Almeter exclusively as it related to the project's plans, and otherwise did not provide relevant testimony on the underlying legal or factual issues. Ms. Strand's

[5] The irony with the City's argument is that, even if the Hearing Examiner is inclined to give Mr. Grove's testimony less weight (and it should not), Mr. Grove should and can still prevail by looking at Mr. Almeter's and Ms. McGuire's testimony as discussed in greater detail below.

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testimony and closing both contain several misrepresentations of the record and facts in this case. To the extent the Hearing Examiner is inclined to consider any of Ms. Strand's testimony, it should be given very little weight in light of these serial mischaracterizations made. *See* Appendix B (summarizing the key mischaracterizations that Ms. Strand has made in the record).

D. Overview of Testimony from the City

Ms. Molly McGuire, Senior Planner for the City, testified as to her approach in reviewing and approving the building permit application. Ms. McGuire testified to being a Planner with the City for roughly two and a half years. Ms. McGuire claims to process about fifty applications per year. McGuire Testimony, TR at 61. Yet her testimony failed to recall basic facts about the project, parroted yes or no to various leading questions proffered by the City's attorney, and recounted internally inconsistent testimony on dispositive issues. For example, Ms. McGuire could not explain why Condition D, which requires a separate permit for a rockery or retaining wall, was included in the permit. Ex. 4 at 1; McGuire Testimony, TR at 5. She also stated she did not know what the non-final project plan exhibits were in the file, nor could she recall how many revisions the plans went through. McGuire Testimony, TR at 44. Ms. McGuire also failed to identify various permit requirements until the Appellant or other neighbors pointed them out, the need for a Critical Area Review 2 permit being one of them.[6] Ms. McGuire has never conducted a site visit of this property, and therefore has no on the ground knowledge. McGuire Testimony, TR at 61. Instead, she has relied solely on submittals by Ms. Strand who, in turn, has relied on exclusively on Mr. Almeter. McGuire Testimony, TR at 48; Strand Testimony, TR at 79.

Regardless of credibility, none of these witnesses actually dispute the key underlying facts in this case. Each witness during testimony relied on the Final Plan Set to identify relevant measurements and elevations. Ex. 6. The Hearing Examiner can look to that document alone to

[6] As Mr. Almeter confirmed in his testimony, this is general identified early on in the permitting process. Almeter Testimony, TR at 102. Here, the permit process was not initiated until about 10 months, and only after Mr. Grove pointed it out several times.

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identify the errors made and remand those errors to the City.[7]

III. ANALYSIS

A. Testimony and Evidence Supports Mr. Grove's Assignments of Error and the Need for Remand

The balance of the evidence and testimony presented at hearing confirmed the five main assignments of error Mr. Grove raised in in his appeal. Mr. Grove carried his burden to show that the City: (1) erroneously calculated existing grade and erroneously applied finished grade to the Project, (2) applied those incorrect calculations to a basement exclusion area and gross floor area calculation that exceeds code limits and results in a proposed home that is substantially larger than allowed, (3) incorrectly approved a side yard setback that is less than the 10 feet as required on the east side of the proposed home, (4) erroneously approved rooftop railings as part of the downhill facade that exceed code height limits, and (5) allowed proposed retaining walls/rockeries that exceed height limits. Each of these issues is addressed in turn below.

1. Issue 1: The City Incorrectly Calculated "Existing Grade" and Incorrectly Applied "Finished Grade"

a. Interpolation was Erroneously Used to Establish Existing Grade

Mr. Grove clearly established that the City allowed Ms. Strand to interpolate to establish existing grade contrary to the City's previous determination that interpolation could not be used for this site. *See, e.g.*, Grove Testimony, TR at 9. Neither the City nor Ms. Strand deny using interpolation, and Mr. Almeter in fact confirmed he used interpolation. Almeter Testimony, TR at 91, 105. Ms. McGuire further testified that existing grade was based on "the survey data and interpolations of existing grade." McGuire Testimony, TR at 62. But the City took the exact opposite position in Grove I, and rejected interpolation for this site based on the opinion of its own expert, Mr. James Harper.[8] Ex. 82; Ex. 1002 at 6.[9] The question becomes then, can the City change

[7] At hearing, the witnesses referred to both Ex. 6, the final stamped plan set submitted by the City, and Ex. 2007, the final plan set submitted by Ms. Strand. Other than the City's stamp, these two documents are identical.
[8] The Hearing Examiner also rejected this approach in his ruling in APL 23-009 ("Grove I").
[9] There is a direct contradiction between the City's statement in APL23-009 that "the existing grade is the current

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course now and apply an interpretation it previously rejected? The answer should be no.

At hearing, Ms. McGuire testified that the City allowed interpolation based on review of Administrative Interpretation 12-004's Conclusions 1 through 3 and application of Conclusion 3. Ex. 90 at 2. Specifically, Ms. McGuire explained that:

> The city reviewed the materials provided by the applicant and the qualified professional that prepared them and reviewed that against the administrative interpretation, which allows for interpolation across the footprint of the proposed residence.

McGuire Testimony, TR at 48. Mr. Harper's report specifically rejected the use of interpolation at this site. Ex. 82. Mr. Harper was hired by the City as an expert to review surveys applicable to the property, and to review the application of Administrative Interpretation 12-004, Conclusion 3, to determine when interpolation could be used at the site. (Ex. 83, Scope of Work):

> The City of Mercer Island Community Planning and Development Department requests Bush, Roed, & Hitchings services as an independent third party to review the information in the scope of work below: Attachment F - ***Administrative Interpretation for Existing Grade, Conclusion 3 for when a current survey is available to establish existing grade by interpolating elevations*** within the proposed footprint from existing elevations outside of the proposed footprint.

(emphasis added). Mr. Harper reviewed three surveys to analyze this question: (1) the Terrane Survey dated August 28, 2022, (2) the D.R. Strong survey dated May 1989, and the (3) W.M. Marshall survey dated August 21, 2005. (Ex. 82). He concluded that *none* of the surveys allow for interpolation. He stated: "**These surveys** do not serve as a 'snapshot' of original grade conditions and **cannot be relied on for interpolation**[10] or other such formulaic determinations of any *past, original grade*." Ex. 82 at 1 (bold emphasis added). Harper went on to conclude that the existing grade should be the surface elevation immediately adjacent to or touching a point on the exterior wall of the structure. Ex. 82 at 2. He therefore applied Conclusion 2 and expressly rejected the current survey for the purposes of using Conclusion 3's method of interpolation. Mr. Almeter's

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grade on the site" while at the same time still using interpolation (Ex. 1002 at 9).

[10] Note, the City erroneous use of the term "interpretation" in place of the term "interpolation." City's Closing at 4.

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testimony ultimately agreed with this reading, Almeter Testimony, TR at 105, and neither Ms. McGuire nor Ms. Strand provided any relevant or credible testimony to rebut his agreement.

Conclusion 1 of Administrative Interpretation 12-004 sets out the baseline. If no concrete evidence or verification from a previous survey document exists, the existing grade "***underlying the existing structure***" will be used as the elevation for the proposed development. Ex. 90 at 2. (emphasis added). Conclusion 2 then builds on Conclusion 1 as to the existing grade for the purpose of calculating basement exclusion area.[11] Conclusion 3 applies as a catch all when a current survey document is available, and can be used. But again, the Conclusion 3 approach was specifically rejected by Harper for this site. And the City rejected interpolation in Grove I. Only Conclusion 1 and Conclusion 2 could thus apply here.

Further, in applying Conclusion 1, the City cannot simply ignore the plain language of the same Administrative Interpretation they otherwise claim to rely on. "Underlying" is the term the City uses in the Administrative Interpretation. And "potential damage" to a structure that is already going to be demolished is an odd reason to ignore it. *See* City's Closing at 4. The City points to Mr. Almeter's testimony on this subject, but what Mr. Almeter said was that he couldn't think of another way to get a precise measurement than damaging the structure. Almeter Testimony, TR at 90. His conclusion did not account for the ability to use the undisclosed basement floor measurement within the existing structure, and ground penetrating radar, both of which are easily achievable. It also did not account for the City's obligation to apply its own Code as is written. Further, there is an existing basement clearly visible in the plans at 228.7' extending the full east-west width of the northeast portion of the existing structure. Ex. 6 at 9.[12]

[11] Conclusion 2 reads "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." "Immediately" is defined as without any intervening time or space, while adjacent is defined as next to or very near something else; neighboring; bordering, contiguous; adjoining. Therefore, immediately adjacent is "next to or very near something else, and without any intervening space." *See* Oxford English Dictionary (Third Edition, March 2024).

[12] *See* Ex. 6 at 4 (finished floor level of 228.7'), Ex. 6 at 5 (temporary shoring plan shows existing basement at 228.7' on east side of same portion of the house).

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The Hearing Examiner should reject the City's argument that the existing grade is what the City says it is, when it says it is (*i.e.*,"[t]he final determination for existing grade on a lot shall be the decision of the Code Official" and therefore the final say is subject to City discretion). Not only did the City fail to mention this in its analysis at hearing,[13] the City *already* decided what the existing grade would be for this site in Grove I based on its expert's conclusions and Administrative Interpretations 04-04 and 12-04. Further, "the Code Official" is specifically defined as the director of the community planning and development department for the city of Mercer Island or a duly authorized designee. MICC 19.16.010(C). This language in the Administrative Interpretation is in no way meant to allow the City to flip flop its determination ***on the same project*****,** or whenever is convenient.

Mr. Grove has carried his burden to show that the use of interpolation to establish existing grade here was erroneous.

b. Finished Grade Cannot Be "Whatever the Applicant Picks" and then "Fixed" After the Fact

The City admitted under oath that it made minimal efforts to "check for code consistency" when it came to finished grade. McGuire Testimony, TR at 49. Ms. McGuire testified that she "relies on the fact that the Applicant's proposal should be accurate depending on what they propose the finished grade to be" and she'd "look at the elevation number" but "all in all, it's on the applicant to pick that." *Id.*

Mr. Grove established that "finished grade" is determined at each spot across a wall segment. Ex. 1014 at 2. This is consistent with the Code definition of finished grade which is defined as the "surface level at any point on the lot at the conclusion of development." MICC 19.16.010(F). However, the Plan Set shows that the finished grade in this case is a nearly straight line across the west elevation, despite much of the wall being exposed below that line for stairs

[13] McGuire Testimony, TR at 48 ("so we looked at the materials provided by the applicant and where existing grade hits the walls of the proposed residence and we took into consideration *conclusions one through three* of that administrative interpretation"). (emphasis added).

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and the door well. Ex. 6 at 16, "West Elevation"; McGuire Testimony, TR at 49.

The City's approval of the application, and failure to correct this error, is unsupported by the evidence and requires correction. Yet the City seems intent on ignoring it, or pushing that off until after the building has already been built. Ms. McGuire testified that if the City did err, and the building ended up being built too tall or outside of the plan set, "that would be a case for code enforcement." The time is now to enforce the code and remand this matter so that the error can be corrected.

2. Issue 2: The City Incorrectly Calculated "Basement Exclusion Area," Resulting in an Allowable Building Square Footage Maximum That Is Impermissibly Large

a. Mid-Point Finished Grade Elevation was Erroneously Used to Determine Wall Segment Coverage

Mr. Grove provided undisputed evidence that the City incorrectly calculated the "Basement Exclusion Area" in violation of Title 19, Appendix B by allowing Ms. Strand to use a midpoint elevation to determine wall segment coverage. Grove Testimony, TR at 12. In response, the City argues that Title 19 Appendix B does "authorize the utilization of midpoints" by relying on a simplified diagrammatic example rather than the language in the code. City's Closing at 5. This argument fails. First, it defies reason and logic to suggest that a simplified, exemplary diagram should override the language of the Code. It cannot. Second, the code language *does not allow* for use of a midpoint elevation as doing so does not provide a percentage below the lower of finished or existing grade as required.

Appendix B clarifies: "The Mercer Island Development Code excludes that portion of the basement floor area from the gross floor area which is below the existing or finished grade, whichever is lower. That portion of the basement which will be excluded is calculated as shown:"

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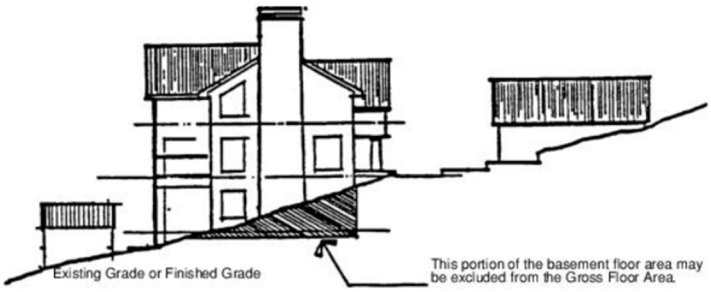
Figure 1: Snip from Title 19, Appendix B

TOTAL BASEMENT AREA is the total amount of all basement floor area.

WALL SEGMENT COVERAGE is the portion of an exterior wall below existing or finished grade, whichever is lower. It is expressed as a percentage. (Refer to example.)

WALL SEGMENT LENGTH is the horizontal length of each exterior wall in feet.



The Appendix B goes on to provide an example of how to calculate Basement Floor Area:

- **Step 1**: Determine the number and lengths of the Wall Segments;
- **Step 2**: Determine the Wall Segment Coverage (**in %**) for each Wall Segment. In most cases this will be readily apparent, for example a downhill elevation which is entirely above existing grade or will be entirely above finished grade. In other cases where the existing or finished grade contours are complex, an averaging system shall be used;
- **Step 3**: Multiply each Wall Segment Length **by the percentage** of each Wall Segment Coverage and add these results together. Divide that number by the sum of all Wall Segment Lengths. This calculation will result in a percentage of basement wall which is below grade;
- **Step 4**: Multiply the Total Basement Floor Area by the above percentage to determine the Excluded Basement Floor Area. (emphasis added).

The City points solely to the example in Appendix B, and appears to be confused by that illustration, relying on it as the end all be all when it merely shows a case where a midpoint matches the output of an averaging system. The example does not eliminate the operative, plain language

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requirement to use an averaging system in the first place. Further, contrary to the City's argument that the Applicant "correctly followed the methodology set forth in Appendix B", Mr. Almeter confirmed in his testimony that he did not in fact follow the correct approach and instead used a midpoint, which he confirmed does not give you a percentage. City Closing at 5. Almeter Testimony, TR at 105).[14]

> Davison: And isn't it true that the section, the language that you referred to, requires the calculation to look at the percentage below grade?
>
> Almeter: Right. It does mention that in Appendix B, yes.
>
> Davison: Okay. Okay. You said, or I believe you testified earlier that you looked at the midpoint, correct?
>
> Almeter: That is correct.
>
> Davison: Okay. And by looking at the midpoint doesn't give you a percentage, does it?
>
> Almeter: Not by looking solely at the midpoint, no.

Additionally, the City already addressed this issue in a nearly identical project, in which it concluded that midpoints could not be used on a wall segment with complex contours. *See* Ex. 1013. That prior instance—and the precedent the City created—cannot and should not be ignored. At hearing, Ms. McGuire stated she could not recall this project or the email despite being the planner on it (Project 2205-096).[15] McGuire Testimony, TR at 53. Regardless, the guidance she provided in the email speaks for itself and provides compelling evidence that discredits the City's self-serving (and plainly incorrect) analysis here.

Mr. Grove's use of wall segments or portions for the western basement wall is also consistent with this guidance, and consistent with the code. Mr. Grove identified the finished grade along the exterior stairs outside the wall. *See* Ex. 1005. The City provides no justification for why

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[14] *See also* Ex. 1013.

[15] This project can be accessed at https://mieplan.mercergov.org/public/2205-096/SUB2/helix%206922_plan%20set%2010-20-22_sub2.pdf.

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the finished grade should not follow the exterior stairs next to the western basement wall. City's Closing at 6; Ex. 1013.

Further, the use of midpoints makes a significant impact, especially given that the Project has already been designed to the absolute maximum constraints (and actually, beyond them). Grove Testimony, TR at 13. When wall segment coverage is calculated using the correct averaging system and finished and existing grades, the basement exclusion area ends up close to 38%, not 59.37% as shown in the Plan Set. Ex. 1012 at 8; Ex. 6 at 2. This results in an exceedance of roughly 300 to 350 square feet—200 to 250 feet for existing grade, and roughly 100 square feet for the finished grade errors, or 8 to 9% of the Project's square footage. Grove Testimony, TR at 9. Using a correct calculation for basement exclusion area would result in a gross floor area for this house of approximately 4,240 to 4,290 square feet, which is larger than the permitted 3,937.5 square feet. Ex. 1012 at 8.[16]

Mr. Grove has easily carried his burden to show that the use of a midpoint grade elevation was erroneous, resulting in a home larger than allowed under the Code.

3. Issue 3: The City Allowed an East Side Setback Less than the Required 10 Feet by the Code

a. The City Erroneously Allowed the Applicant to Cherry Pick Facade Heights

Mr. Grove established that the City has allowed an east side setback less than 10 feet in violation of MICC 19.02.020.C.1.c.iii.b by using an incorrect determination of the height of the east facade of the proposed residence. Grove Testimony, TR at 16. The City argues that the height of the eastern facade of the proposed residence is only 24 feet, 11.5 inches, requiring the side yard setback be 7.5 feet. City's Closing at 7. But this argument fails because the City relies solely on

[16] Gross Floor Area ("GFA") is defined as "the total square footage of floor area bounded by the exterior faces of the building." MICC 19.16.010.G. GFA is important because it essentially sets out the limits of the size of the home in relation to the size of the lot. A correct GFA calculation relies on a correct calculation of "existing grade" and "finished grade." See MICC Title 19, Appendix B.

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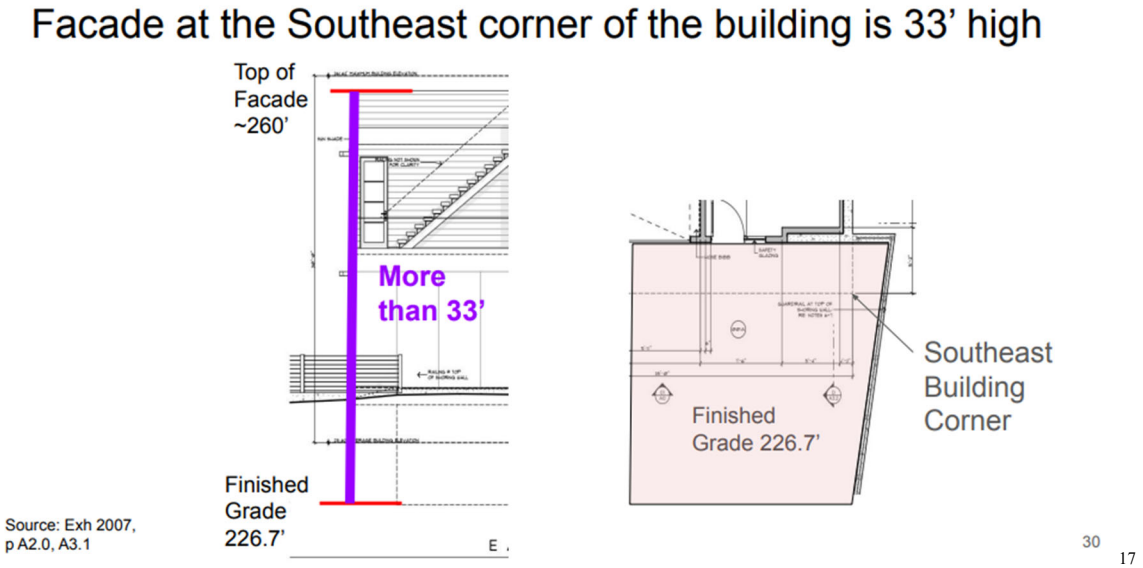
Ms. Strand's measurement on the eastern side without requiring Ms. Strand to measure from the top of the building to the finished grade immediately below the south end of the eastern facade.

The City agrees with Mr. Grove that single-family dwellings with a height of more than 25 feet measured from the existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard must provide a minimum side yard depth of 10 feet. MICC 19.02.020.C.1.c.iii.b; McGuire Testimony, TR at 53; Grove Testimony, TR at 16. The 2017 Code reforms specifically added this concept of a variable side yard setback depending on the height of a facade that adjoins the side yard. Ex. 1001. As shown at hearing, the top of the eastern facade is approximately 260.4'. Ex. 6 at 16 (South Elevation shows 235.43' + 24.96'). And the finished grade immediately beneath the southern end of the eastern facade is located at 226.7'. Ex. 6 at 16 (Figure 2). The distance from the finished grade below the southern end of the eastern facade to the top of the facade is thus more than 33'.

Figure 2: Snip from Ex 1014



[17] Ex. 1014 at 4.

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As shown on the right-hand side of Figure 2, the building's cantilever is above a 226.7' grade on *both* the south and east sides of the cantilever. Yet, the City relies on only the south side of the cantilever, ignoring the east side completely. City Closing at 7. The east side of the cantilever adjoins the east side yard. Ms. Strand attempted to wiggle out of this by arguing that the sightlines of building were relevant to this determination. But Ms. McGuire agreed that the building is cantilevered and Mr. Almeter agreed that taking into account visibility from different vantage points was not codified and not found anywhere in the Code. Almeter Testimony, TR at 107-108. Mr. Almeter also agreed that the finished grade right below the cantilevered portion of the proposed residence was 226.47 feet. *Id.*

Mr. Grove clearly carried his burden to show that the east side yard setback must be at least 10 feet consistent with MICC 19.02.020.C.1.c.iii.b.

4. <u>Issue 4: The City Incorrectly Calculated Building Height and Approved a Rooftop Railing System that Exceeds Height Limits</u>

a. The City's Applied the Wrong Code Section Related to Rooftop Railings

Mr. Grove clearly established that the City incorrectly approved a rooftop railing system that exceeds the 30 foot height limit set by MICC 19.02.020(E). The City argues, based on a flawed and strained reading of the Code, that certain appurtenances will "naturally exceed" the maximum building height by being placed on top of the building. City Closing at 9. This reads out of the Code an entire section that specifically requires rooftop railings not exceed the maximum building facade height on the downhill side on a sloping lot. Here, despite the lot sloping, the City stopped measuring at the top of the roof structure, and failed to measure to the top of the railings on the downhill side of the proposed residence as required by MICC 19.02.020(E)(2). As a result, the City erroneously approved rooftop railings that exceed the 30 foot limit.

MICC 19.02.020(E) governs building height limits generally and sets forth two methods of measuring building height. The first applies to the maximum building height of a structure above the structure's *average building elevation*. MICC 19.02.020(E)(1) ("no building shall exceed 30

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feet in height above *the average building elevation* to the highest point of the roof.") (emphasis added). The second applies to the maximum building height on downhill building facades for sloping lots, such as this one. MICC 19.02.020(E)(2). In these cases, "the maximum building facade height on the downhill side of a sloping lot shall not exceed 30 feet in height" "measured from *the existing grade or finished grade*, whichever is lower." *Id.* (emphasis added). Here, (E)(2) applies and the maximum building facade height on the downhill side of a sloping lot shall not exceed 30 feet in height.

Certain appurtenances, like antennas, flagpoles or solar panels, may extend a maximum of five feet above either of those heights, depending on which applies, **but rooftop railings may not in either scenario**:

> Antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces, solar panels, and other similar appurtenances may extend to a maximum of five feet above the height allowed ***for the main structure in subsections (E)(1) and (2) of this section***; provided: ***Rooftop railings may not*** extend above the maximum allowed height for the main structure. MICC 19.02.020(E)(3)-(3)(b). (emphasis added).

The City initially argued at hearing that only MICC 19.02.020(E)(1) applied – meaning the rooftop railings could not extend beyond the maximum allowed height for the main structure based on the average building elevation. McGuire Testimony, TR at 57. But on cross examination the City ultimately admitted that the measurement must be different on sloping lots and because MICC 19.02.020(E)(3) references both MICC 19.02.020(E)(1) and (2), it applies equally (meaning one must measure to the top of the railings themselves and the railings cannot exceed the maximum building facade height on the downhill side of the sloping lot (30 feet)). McGuire Testimony, TR at 62, 64. The City thus ultimately agreed that (E)(2) applied but in the end still claimed that (E)(2) ended at the rafters. They therefore just stopped measuring at the top of the rooftop structure regardless of what is above it. The City argues that they can disregard the railings here because "rooftop railings will always sit above the roof structure." City Closing at 9.[18] But this ignores the

[18] Although the City's argument is not entirely clear, Appellant must note the absurd result if the City's approach were

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language of MICC 19.02.020(E)(1)-(3) read together and reads out of the code an entire section. (E)(3)(b) must be read to apply to both (E)(1) and (E)(2) equally—here with (E)(2) being the applicable provision.

This also appears to be yet another attempt to justify the City's improper approval of the Project. This new argument should be rejected—the language and intent of the Code is clear that although some appurtenances may exceed the applicable height limit by five feet in limited circumstances, Mercer Island specifically chose to exclude rooftop railings from that list. *In re Det. of Williams,* 147 Wn.2d 476, 491, 55 P.3d 597, 604 (2002) ("Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions.").

Rooftop railings ***may not*** extend the maximum allowed height of the structure, here measured from the existing or finished grade, whichever is lower. Further, the railings are, by definition, part of the facade. MICC 19.16.010(F) (Facade is "Any exterior wall of a structure, including projections from and attachments to the wall."). Here, Mr. Almeter confirmed Mr. Grove's testimony that the railings on the southern facade sit at 260.4' above finished grade. Almeter Testimony, TR at 107. This places the railings at approximately 33.9' above finished grade, higher than the 30-foot limit and, therefore, in exceedance of the code.

Mr. Grove easily carried his burden with respect to the height of the rooftop railings.

5. Issue 5: The City Improperly Approved a Proposed Soldier Pile Retaining Wall that Exceeds the MICC's Maximum 6-Foot (72") Height Allowance

Mr. Grove established that the City allowed Ms. Strand to avoid a full measurement of the soldier pile walls, resulting in a retaining wall system that exceeds the applicable code limits set by MICC19.02.050.D.5.b. Grove Testimony, TR at 24. There is no dispute that the soldier piles are an aspect of this project proposal and must conform to current code requirements, including a

applied. There would be essentially no limit to the height of the wall on the downhill facade other than E1. On very steep lots, this could result in walls well over 40 feet, contrary to the text and intent of the Code.

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height limit of no more than 72".[19] Almeter Testimony, TR at 101; McGuire Testimony, at 58. There also can be no dispute that the rocks on the existing slope must have been converted into a rockery to satisfy the building code. Grove Testimony, TR at 24; *See Woldson v. Woodhead,* 159 Wn.2d 215, 217, 149 P.3d 361, 362 (2006) (where a rubble masonry wall became a retaining wall for the extra dirt on Woodhead's land, a use not contemplated by its original design). The nature of the rocks clearly changed by virtue of the alterations that will need to be made to accommodate the rest of the Project. Because the soldier pile wall is so close to the property line (about 6 feet from the western property line and 12 to 13 feet above grade) the building code requires the soil to the west of the retaining wall be retained all the way from the top of that wall to the bottom.[20] *Id.* This results in a steep structure to avoid overly loose ground.[21]

The City argues that the maximum exposed portion of the proposed new shoring wall will be less than 6 feet in height, and any attempt to add height for the rocks there is contrary to the Hearing Examiner's holding in Grove I. City's Closing at 9. But the Hearing Examiner previously ruled in Grove I that the existing rocks are "not a wall", therefore not "retaining walls/rockeries" under the Code. The City's argument fails because the slope immediately west of the soldier piles (which have to be treated as new retaining walls/rockeries) relies on the rocks on the existing slope to function. Grove Testimony, TR at 24. In such cases, height must be measured from the top of the retaining wall or rockery to the existing grade or finished grade below it, whichever is lower.

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[19] Note, as Mr. Grove testified, City comments on Submittal 3 to the Project Plans (Ex. 60, SUB 3) specifically requested that the applicant to meet the requirements in MICC 19.02.050.E requires a 42" height limit in the front yard (MICC 19.02.050.E.1.a.ii). Ms. McGuire stated: "Provide top and bottom elevations of the shoring wall within the side and front yards. Fences atop walls count toward maximum heights per MICC 19.02.050(D) & (E)". (E) specifically limits front yard to 42". Ms. McGuire never followed up and never required the Applicant to correct the exceedance in the front yard as well. Appellant raised this at hearing but was unable to testify on the subject. Grove Testimony, TR at 23.

[20] Mercer Island has adopted the Washington State Building Code at MICC 17.01.010. See J107.6 of the Washington State Building Code. The standard limit for fill slopes is 1 vertical: 2 horizontal.

[21] *See* Ex. 6 at 9. "West Shoring Wall Profile" shows the bottom of the exposed portion of the shoring wall along the western edge of the lot is at approximately 226'. The shoring wall is approximately 6' west of the property line (Ex 6 at 8), and the elevation along the west property line is approximately 216' (Ex. 6 at 3). As a result, the slope west of the rockery in the required front yard is approximately 10 vertical to 6 horizontal (226' – 216'' vertical, and 6' horizontal), or a slope of 1.67 vertical to 1 horizontal.

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See MICC 19.02.050.C.2. And, the measurement must be taken from the bottom of the rockery (~216') to the top of the retaining. This places the wall at closer to 8 to 15 feet, well in exceedance of the 6-foot limit, which is not code compliant. This error should also be remanded for correction.

IV. CONCLUSION

Mr. Grove has more than sufficiently carried his burden to show substantial error in this case and respectfully requests the Hearing Examiner remand Building Permit 2207-019 to the City for further consideration. To clarify, Mr. Grove is not asking the Hearing Examiner cancel or deny this permit. Instead, Mr. Grove asks that the City correct the violations established in these proceedings and enforce the Code that has been adopted and amended through the legislative process.

Respectfully submitted: May 31, 2024

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