

**BEFORE the HEARING EXAMINER for the
CITY of MERCER ISLAND**

DECISION

FILE NUMBER: APL24-002
(Reference Building Permit File No. 2207-019)

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

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EXAMINER DECISION: REMAND

DATE OF DECISION: June 10, 2024

INTRODUCTION ¹

Daniel Grove (“Grove”) appeals from the administrative decision of the City of Mercer Island (“City”) Department of Community Planning & Development (“CP&D”), issued on February 20, 2024, to approve Building Permit application 2207-019 of Dorothy Strand (“Strand”). (Exhibits 1; 3; 4; 6r ²)

Grove filed the appeal (“*Grove I*”) on March 5, 2024. ³ (Exhibit 86)

The subject property is located at 6950 SE Maker Street (“6950”). Its Assessor’s Parcel Number is 935090-0620. (Exhibit 6r, PDF 1)

The Examiner held a remote open record appeal hearing pursuant to MICC 3.40.060 on May 9, 2024, using the “Zoom” platform. The City gave notice of the hearing as required by the MICC. (Exhibit 91)

Pursuant to Hearing Examiner Rule of Procedure (“RoP”) 224(c), the Examiner entered the following administrative exhibits into the hearing record:

- Exhibit 9001: Exhibit 9001: Letter, Hearing Examiner to Principal Parties, March 8, 2024 (Scheduling letter)
- Exhibit 9002: Email, Keiffer to Principal Parties and Examiner, May 1, 2024 (City did not file a motion to dismiss)
- Exhibit 9003: Order of [on] Summary Dismissal, May 5, 2024

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

CP&D initially scanned the approved building permit plan set configured with two plan sheets per PDF page. (Exhibit 6, 13 pages) When CP&D became aware that the two sheets per page PDF format resulted in extreme, unreadable pixelation when enlarged on a computer screen, it re-scanned the plan set at one sheet per PDF page. It added that PDF to the on-line exhibit folder as a second copy of Exhibit 6 denoted “resized” (24 pages). (Testimony) The Examiner will refer to it as simply “Exhibit 6r” and will use it exclusively throughout the Decision in references to the approved building permit plan set.

³ This is the second appeal that Grove has filed related to Strand’s proposed development on 6950. Appeal APL23-009 was filed by Grove *et al.* in 2023. That appeal is referred to as *Grove I*. The current appeal is referred to as *Grove II*.

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Pursuant to RoP 224(d), Respondent CP&D pre-filed Exhibits 1 – 24 and 26 - 97 and provided an index list of those exhibits. ⁴ No principal party objected to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

Pursuant to RoP 224(e), Appellant Grove pre-filed Exhibits 1001 – 1012 and Supplemental Exhibit 1013 and provided an index list of those exhibits. No principal party objected to entry of those exhibits. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i), during the hearing the Examiner accepted an additional exhibit from the Appellant as follows:

Exhibit 1014: Demonstrative exhibits (Four PDFs bearing page numbers 12, 17, 27, & 30)

Pursuant to RoP 224(e), Applicant Strand pre-filed Exhibits 2001 – 2008. Strand did not provide an index list of those exhibits. The Examiner prepared a list of Strand's exhibits for use by the parties; that list is in the City's on-line exhibit folder. No principal party objected to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

At the close of the hearing, the principal parties agreed to submit written closing statements and agreed to a submittal schedule. ⁵ The following documents were admitted in accordance with the agreed schedule. (The Examiner has assigned exhibit numbers to the closing statements using the next available exhibit number for each principal party.)

Exhibit 2009: Applicant Dorothy Strand's Written Closing Argument, filed May 17, 2024
Exhibit 98: City of Mercer Island's Closing Argument, filed May 24, 2024
Exhibit 1015: Appellant Daniel Grove's Closing Argument, filed May 31, 2024, with Appendices A and B (to be cited as Exhibits 1015.A and 1015.B) ⁶

The City has the record copy of the exhibits and the exhibit index lists. ⁷

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

⁴ Exhibit number 25 was not used.

⁵ One principal party had requested written closing statements before the hearing; the other principal parties agreed.

⁶ Appendix A is an unofficial transcript of the May 9, 2024, open record hearing prepared by Grove's counsel's staff. The Examiner expects that the transcript is generally accurate, although the Examiner has found errors in some of the transcription of the Examiner's opening remarks. (The Examiner has not checked the entire transcript for errors.) The reader is advised to remember that Appendix A is not an officially approved transcript.

⁷ There are a number of duplicating exhibits. The Examiner's choice as to which copy to cite is based solely on convenience and has no other basis.

FINDINGS OF FACT

A. *Background*

- A.1. *Grove II* challenges a building permit issued by CP&D to Strand to demolish an existing single-family residence on 6950 and replace it with a new, larger single-family residence with an included accessory dwelling unit (“ADU”). Grove resides in the single-family residence abutting the east side of 6950: 3515 72nd Avenue SE (“3515”). Grove believes that the Strand project as approved by CP&D exceeds adopted MICC provisions in five areas. Thus, Grove has appealed issuance of the building permit. Each area of contention will be addressed in Finding of Fact sections B through F, below.
- A.2. 6950 is a roughly square parcel, consisting of 3.5 25-foot wide lots in the *White Bros. 1st Addition to East Seattle* plat, situated on the north side of SE Maker Street.⁸ It has 87.5 feet of frontage on SE Maker Street and a north-south depth of 100 feet. 6950 is a sloping lot: The elevation drop from east to west along the north property line is on the order of 22 feet (242 feet on the east to 220 feet on the west); the elevation drop from north to south is on the order of 10 feet along the north property line (242 feet at the northeast corner to 232 feet at the southeast corner) and on the order of 6 feet along the south property line (220 feet at the northwest corner to 214 feet at the southwest corner). Most of the east-west elevation drop occurs on the western quarter of 6950. (Exhibit 6r, PDF 2 & 4⁹)
- A.3. In the early to mid-1950s a previous owner constructed a single-family, Mid-Century Modern style residence on 6950. It is that residence that Strand desires to demolish and replace. The east wall of that residence is more or less parallel with and approximately 4 feet west of the east property line. That residence is a single-story structure with a footprint of approximately 2,029 square feet (“SF”). The existing residence, based on Terrane survey spot elevations, appears to have at least four different floor elevations: 228.7 feet (northeast section), 231.3 (southwest section), 234.4 (central section), and 236.8 (southeast section). (Exhibits 6r, PDF 4; 28, PDF 3)
- 6950 was terraced before or at the time the residence was built, resulting in a fill slope along the west side of the lot. The fill slope was not initially rocked. (Exhibit 28, PDF 3) The fill slope rises about 14.5 feet over a horizontal distance of about 30 feet, for an average slope of about 49 percent. The western fill slope has since been rocked.¹⁰ (Exhibit 6r, PDF 4)
- A.4. 3515 also appears to have been terraced at some time in the past. The west edge of 3515, immediately east of the common boundary line with 6950, consists of a 5-foot tall Keystone wall

⁸ Only those physical characteristics of 6950 essential to understanding the case will be presented here.

⁹ Exhibit 6r, PDF 4, is a survey prepared on May 27, 2021, under the aegis of a licensed Professional Land Surveyor employed by Terrane.

¹⁰ Modified from Exhibit 2002, PDF 4, Recital 3, # 7 – 9.

topped by up to a 5-foot rockery in some places. (Exhibits 44, PDF 10, Figure 8; 86, PDF 50¹¹ & 73)

A.5. In the Fall of 2017 the City Council concluded a year-long study by adopting zoning code amendments intended to restrict the size of future residences in the City. The study and amendments were the result of numerous citizen complaints about the changing character of the City. With respect to residence size, those amendments made the following changes:

- o Reduc[ed] allowed gross floor area from 45% to 40% of the lot
- o Implement[ed] a maximum house size for each residential zone
- o Height limited to 30' on downhill side (reduced from 35')
- o Side setback increased to 17% of lot width for lots wider than 90 ft, with additional increases for homes with a "tall wall"

(Exhibit 1001)

A.6. Strand acquired 6950 in or around 2018.¹² At that time she explored the possibility of adding a second story onto the existing residence. When she found that not to be feasible, she decided to replace the existing residence with a wholly new structure. She retained the services of an architect, Jeffrey Almeter (whose name appears on many of the record documents), and other construction specialists to develop plans for a new house. She advised Almeter that she wanted to construct the new residence (with an ADU) as large as the MICC would allow. When asked by Grove's counsel during the hearing why she wanted the new residence to be as large as allowed, Strand stated because that was what she wanted and it was her right to build up to the MICC's limits. (Testimony)

A.7. Strand proposes to replace the existing residence with a three-story (basement plus two stories) residence (with a garage and an ADU in the basement level) that will be skewed on the lot (in other words, not parallel with the lot lines).¹³ For example, the east wall will vary from 7'-6" (7.5') at the southeast corner to approximately 14 feet at the northeast corner.¹⁴ The proposed residence will have a basic 4-sided rectangle shape: 1,610 SF basement footprint (garage and ADU); first floor gross floor area ("GFA") of 1,649 SF; second floor GFA of 1,529 SF. The total GFA as calculated by CP&D, including exclusions allowed by CP&D under its reading of the MICC, is 3,936 SF. The first and second floors will cantilever 4 feet over the south wall of the basement garage/ADU level. Two exterior stair wells, one going from the garage/driveway level up to the west side lawn and the

¹¹ The residence on 6950 is partially depicted in the center-left portion of the drawing with the start of what is described as a 4-foot retaining wall just east of the residence. (North is to the right on this drawing.)

¹² Prior to Strand's purchase of 6950, Grove explored acquisition of a view protection easement over 6950 and purchase of 6950 but was unsuccessful in both endeavors. (Testimony)

¹³ For the sake of simplicity, the walls will be referred to simply as the east, south, west, and north walls, ignoring the slight skewing of the building on the lot.

¹⁴ Southeast corner distance based on agreed evidence and testimony regarding Appeal Issue 3; northeast corner distance scaled from Exhibit 6r, PDF 9, based on the agreed southeast corner distance of 7.5 feet.

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other going down from the west side lawn to the external ADU entrance, will be on the west side of the house. (Exhibit 6r, PDF 2 & 9)

- A.8. Strand filed building permit application 2207-019 on or about July 4, 2022; CP&D determined the application to be complete on August 30, 2022; CP&D issued a Notice of Application on September 6, 2022. (Exhibits 46; 84) CP&D's review of application 2207-019 involved several review rounds (or cycles), with revisions requested/required after each review, and revised plans/information subsequently submitted to CP&D. (Exhibits 7; 24; 42; 47 - 49; 58; 62; 68; 94 - 96) CP&D received and responded to numerous public comments during its review of the application, most from neighboring residents. (Exhibits 8 - 18; 21; 26 - 39; 70 - 81)
- A.9. Because 6950 includes sloping terrain, a Critical Area Review 2 ("CAR 2") was required. CP&D assigned file number CAO23-011 to that review. (Exhibit 2002, PDF 2, reference to CAO23-011 Exhibit 9001.A) CP&D completed that review on October 9, 2023; Grove appealed CP&D's CAR 2 decision on October 23, 2023. (Exhibit 2002, PDF 2, reference to CAO23-011 Exhibits 9001.A and 9001.B, respectively; that appeal is referred to as *Grove I*) A hearing before the undersigned Examiner was set for December 7, 2023. (Exhibit 92, PDF 2, 2nd Recital) On November 17, 2023, CP&D filed a Motion for Summary Dismissal. (Exhibit 1002) Responses were filed by Grove and Strand. (Exhibit 2002, PDF 2, 1st Recital) On December 2, 2023, the Examiner granted the Motion for Summary Dismissal. (Exhibit 2002) Grove filed for reconsideration; responses to that request were filed. (Exhibit 92) On December 29, 2023, the Examiner denied the request for reconsideration. (Exhibit 92)
- A.10. *Grove I* presented two issues, summarized by the Examiner as:

Issue 1 ("Part 1") asserts that Strand performed unpermitted exceptional tree removal within a critical area which must be addressed and resolved through the CAR 2 process. Issue 2 ("Part 2") asserts that the current topography of 6950 cannot be accepted as the existing lot grade for the purpose of building height calculation

(Exhibit 2002, PDF 5, 1st Recital) Issue 1 is not relevant to the issues now before the Examiner and will not be addressed. With respect to Issue 2, the Examiner concluded

WHEREAS, 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. Grove argues that one must go back in history to pre-development times (whenever that might be), with the topography of the lot at that time constituting "existing grade" for current building height calculation purposes. Grove further asserts that the current rockery on the west side of 6950 was constructed after 1963 and was illegal when constructed. Issue 2 can be resolved by applying applicable law to the agreed facts. Issue 2 is, thus, appropriate for summary dismissal consideration; and

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WHEREAS, the 1955 photograph (Exhibit 9005.D) shows clearly that the slope on the west side of 6950 has existed in its current configuration since at least 1955, five years before the City became incorporated. The slope was created before any Mercer Island zoning existed. It is clear from the current topography and the 1955 photograph that the rocks covering the western slope were placed on the slope as it existed in 1955. The 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. Further, years ago CP&D issued two Administrative Interpretations regarding the determination of “existing grade.” (Exhibits 9001.E; 9001.F) Both reach essentially the same conclusion:

without concrete evidence or verification from a previous survey document, as determined by the City Building Official, the existing grade of an existing structure or it’s various wall segments on a site will be used as the elevation for measuring average building elevation “prior to any development”.

(Exhibit 9001.F, PDF 3) 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. Issue 2 must be dismissed based upon application of applicable law to the undisputed facts;

(Exhibit 2002, PDF 5 & 6, 4th and 5th Recitals, emphasis added)

- A.11. Building Permit 2207-019 was approved by CP&D on February 20, 2024. (Exhibits 1 – 4; 6r; 85) Exhibit 6r is the approved plan set for Building Permit 2207-019. Grove timely appealed that approval on March 5, 2024. (Exhibits 86; 87) As previously noted, this appeal is referred to as *Grove II*. *Grove II* asserts that CP&D made five errors which resulted in approval of a residence larger than allowed by the MICC. Each issue will be stated as set forth in the appeal in Findings of Fact B.1, C.1, D.1, E.1, and F.1, below.
- A.12. Exhibit 4, Residential Conditions of Permit Approval, was issued on February 20, 2024, to accompany issuance of Building Permit 2207-019. That document states that a separate permit is required for retaining walls. (Exhibit 4, PDF 1, General Condition D) CP&D testified that Exhibit 4 is largely a form document and that the building permit as issued covered construction of all depicted retaining/shoring walls as shown on Exhibit 6r; no additional permit is required.
- A.13. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

B. *Appeal Issue 1*

- B.1. Appeal Issue 1 reads as follows:

The City relied on an incomplete record and erroneously approved the “existing grade” and “finished grade” calculations in the Final Plan Set skewing several key metrics in the plan set

(Exhibit 86, PDF 3, ll. 23-25, bold font omitted)

B.2. The outcome of this issue depends in large measure on either or both of two Administrative Interpretations and *Grove I*.

B.2.a Administrative Interpretation 04-04. Administrative Interpretation 04-04 (“AI 04-04”) was issued by the Development Services Group (“DSG”) on August 9, 2004.¹⁵ (Exhibit 89) “The purpose of this administrative interpretation [was] to clarify how the City interprets the code definition of average building elevation prior to any development.” (Exhibit 89, PDF 1) After discussing the issues involved, AI 04-04 reached the following conclusion:

Thus, the City will interpret the existing code language and definitions to mean that, without concrete evidence or verification from a previous survey document, as determined by the City Building Official, the existing grade of an existing structure or it’s various wall segments on a site will be used as the elevation for measuring average building elevation “prior to any development”.

(Exhibit 89, PDF 2)

B.2.b. Administrative Interpretation DCI 12-004. Administrative Interpretation DCI 12-004 (“DCI 12-004”) was issued by DSG on January 9, 2013. (Exhibit 90) “The purpose of this Administrative Code Interpretation [was] to clarify existing grade as it pertains to basement area exclusion from Gross Floor Area calculations.” (Exhibit 90, PDF 1) DCI 12-004 ends with four Conclusions:

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.

¹⁵ The organization now known as CP&D was known as DSG at the time the Administrative Interpretations were issued.

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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.

(Exhibit 90, PDF 2)

B.2.c. *Grove I*. *Grove I* has been summarized in Finding of Fact A.10, above. Grove does not contest the holding in *Grove I*. (Testimony)

B.3. Grove argues, based on an August 14, 2023, letter from James Harper (“Harper”), a licensed Professional Land Surveyor employed by the surveying/engineering firm of Bush, Roed & Hitchings, Inc., that no interpolation of elevations should be allowed. (Exhibit 1015) Harper was asked by CP&D to review the 2022 Terrane survey of 6950, a 1989 survey of a parcel to the north, and a 2005 survey of a parcel to the south and to opine on whether those surveys provided evidence of the original site topography on 6950. Harper concluded that they could not do that as they were all prepared well after the 1950s site development work occurred on 6950 and “cannot be relied on for interpolation or other such formulaic determinations of any *past, original grade*. (Exhibit 82, PDF 1, italic in original)

B.4. Grove argues, based on DCI 12-004’s Conclusion 1, that the elevation of the ground surface beneath the lowest concrete floor slab of the existing residence should be used to determine existing grade, thus affecting the determination of average building elevation. (Exhibit 1015)

B.5. CP&D argues that the elevation of the ground surface around the existing residence’s foundation walls should be used to determine existing grade. (Exhibit 98)

C. *Appeal Issue 2*

C.1. Appeal Issue 2 reads as follows:

The City substantially erred in approving a Gross Floor Area larger than permitted and a home substantially larger than the code allows.

(Exhibit 86, PDF 7, ll. 15-16, bold font omitted)

C.2. The MICC imposes a maximum gross floor area (“GFA”) for new residences. [MICC 19.02.020(D)] The maximum allowed floor area depends upon the size of the lot and its zoning. [MICC 19.02.020(D)(1)] The calculation of GFA involves a number of factors, one of which is referred to

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as the basement floor area (“BFA”) exclusion. Appeal Issue 2 involves the calculation of the BFA exclusion for the proposed Strand residence.

C.3. Instructions for calculation of the BFA exclusion are contained in Title 19 MICC, Appendix B:

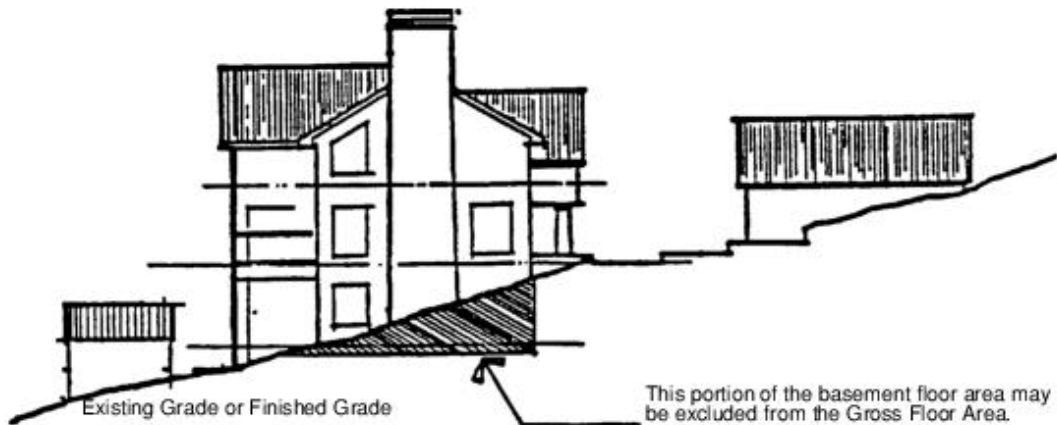
The Mercer Island Development Code excludes that portion of the basement floor area from the gross floor area which is below the existing or finished grade, whichever is lower. That portion of the basement which will be excluded is calculated as shown.

$$\text{Portion of Excluded Basement Floor Area} = \frac{\text{Total Basement Area} \times \sum(\text{Wall Segment Coverage} \times \text{Wall Segment Length})}{\text{Total of all Wall Segment lengths}}$$

Where the terms are defined as follows:

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.)

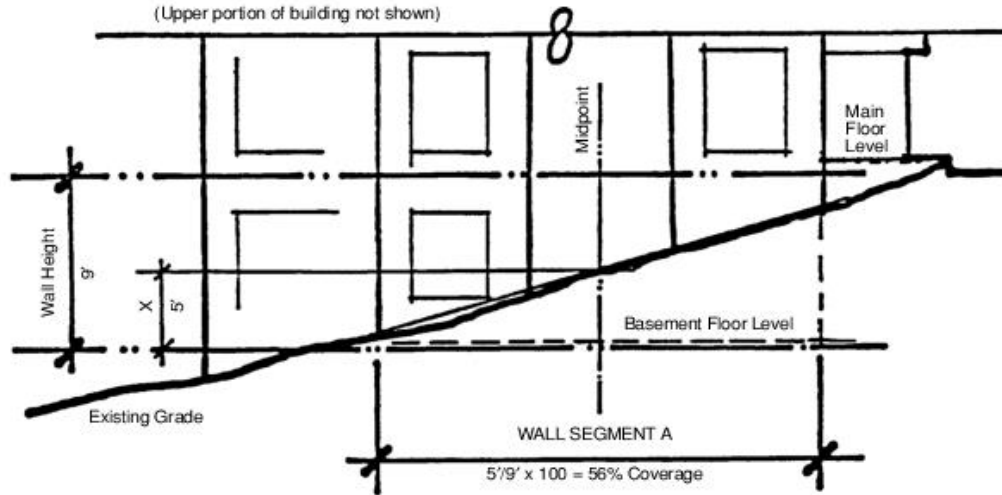
WALL SEGMENT LENGTH is the horizontal length of each exterior wall in feet.



[MICC Title 19, Appendix B] Appendix B includes a sample calculation, one part of which addresses the situation of a sloping lot:

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. (Refer to illustration.)



[MICC Title 19, Appendix B, underlining added to text]

C.4. Strand’s BFA exclusion calculation, which CP&D accepted, measured existing (based on the Terrane survey) or proposed (based on the project plans) elevations, whichever was lower, on the four sides of the rectangular foundation (using the mid-point on sloping sides) and calculated the BFA exclusion from those numbers. The basement walls are 8 feet tall. (Exhibit 6r, PDF 16, North Elevation (among others)) Strand concluded that 937.5 SF of the basement’s 1,610 SF could be subtracted from GFA because of the BFA exclusion:

Wall Segment ¹⁶	Length	Below grade depth at mid-point ÷ wall height	Coverage	Result
A (South wall)	35'	0' ÷ 8' =	0 %	0
B (West Wall)	46'	4'-9" ÷ 8' =	59.37 %	27'-3"
C (North wall)	35'	4'-10" ÷ 8' =	60.42 %	21'-1"
D (East wall)	46'	8' ÷ 8' =	100%	46'
Totals	162'			94'-4"

Strand’s calculations were: $94'-4"/162' = 58.23\%$; $1,610 \text{ SF} \times 58.23\% = 937.5 \text{ SF}$ BFA exclusion. (Exhibit 6r, PDF 2 & 16)

¹⁶ The Examiner has added the identification of each wall segment based on the plans as shown on Exhibit 6r: No part of the south wall is below grade as that is the garage entrance, thus “A” is the south wall and “C” must be the north wall; all of the east wall is below grade, thus “D” is the east wall and “B” must be the west wall.

- C.5. Grove argues that the west wall should have been divided into five segments to account for the two exterior stair wells with the formula being applied to each segment rather than using the midpoint of the west wall. Grove's argument is that the foundation wall where the stairs are located is only partially below grade and that the stair wells should have been treated as separate segments with their mid-points individually calculated. (Exhibit 1015; testimony) Grove estimates that the BFA exclusion, using his calculation method, would be some $300 \pm$ SF less than Strand's BFA exclusion, thus commensurately requiring a reduction in total allowed GFA. (Exhibit 86, PDF 7 & 8)
- C.6. CP&D did not segment the west wall for BFA exclusion calculations because it considered the two exterior stairwells to not be part of the basement. (Exhibit 98)

D. *Appeal Issue 3*

- D.1. Appeal Issue 3 reads as follows:

The City substantially erred by misapplying the code allowing a structure to encroach into the required side yard, resulting in a side yard smaller than required by the code.

(Exhibit 86, PDF 8, ll. 8-10, bold font omitted)

- D.2. Side yard setbacks for residentially-zoned properties are regulated at MICC 19.02.020. The provisions at issue in this case are found in MICC 19.02.020(C)(1)(c) which reads in its entirety as follows:

- c. Side yards shall be provided as follows:

- i. Total width.

(a) For lots with a lot width of 90 feet or less, the sum of the side yards' width shall be at least 15 feet.

(b) For lots with a lot width of more than 90 feet, the sum of the side yards' width shall be a width that is equal to at least 17 percent of the lot width.

ii. Minimum side yard width. The minimum side yard width is five feet or 33 percent of the aggregate side yard total width, whichever is greater.

iii. Variable side yard depth requirement. For lots with an area of 6,000 square feet or more, the minimum side yard depth abutting an interior lot line shall be the greater of the minimum side yard depth required under subsection (C)(1)(c)(ii) of this section, or as follows:

(a) Single-family dwellings shall provide a minimum side yard depth of seven and one-half feet if the building:

(1) For nongabled roof end buildings, the height is more than 15 feet measured from existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard; or

(2) For gabled roof end buildings, the height is more than 18 feet measured from existing or finished grade, whichever is lower, to the top of the gabled roof end adjoining the side yard.

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(b) 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 shall provide a minimum side yard depth of ten feet.

(Emphasis added) The word “façade” is defined as “[a]ny 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 19.16.010, “F” definitions]

- D.3. The side yard setback in dispute is the east side yard abutting 3515. As previously noted, unlike the existing residence which is essentially parallel with the east property line, the east wall of the proposed Strand residence will vary from 7.5 feet to approximately 14 feet from the east property line. Also as previously noted, the south face of the upper two stories of the proposed residence is cantilevered 4 feet over the south face of the garage below. The grade difference between the ground surface along the un-cantilevered part of the east wall and the cantilevered portion is about 8.73 feet. (Exhibit 6r, PDF 16) A concrete retaining wall extension of the south face of the foundation wall extends easterly from the southeast corner for approximately 4 feet at which point it turns south to essentially parallel the east property line. (Exhibit 6r, PDF 5 or 12) At the southeast corner of the proposed residence, the top of that retaining wall is essentially equal to the height of the ground behind it, which, adjacent to the proposed building, is essentially the same height as the ground along the un-cantilevered portion of the east wall. Thus, when viewed on the elevation drawing of the east wall, the ground level appears to be the same across the entire length of the east wall (because of the retaining wall). If one depicted a east-west site section anywhere between the east foundation wall and the east-west portion of the retaining wall (for example, say at a distance of 2 feet east of the foundation), the grade along the east side of the house would drop 8.73 feet 4 feet from the south end of the wall. (Exhibit 6r, PDF 5 or 12)
- D.4. Grove asserts that CP&D should have considered the grade change that occurs where the building is cantilevered. Since MICC 19.02.020(C)(1)(c)(iii)(a)(1) and (iii)(b) require building height for the purpose of determining side setback to be “measured from existing or finished grade, whichever is lower” without mentioning any averaging, and since the southerly 4 feet of the east wall is 8.73 feet above the grade below it, Grove asserts that the building height must be measured from the finished grade of the driveway, the grade of the ground below the south end of the east wall. (Exhibit 1015; testimony)
- D.5. CP&D, on the other hand, perceives the east wall as beginning at the grade of the surface adjacent to it without considering the area beneath the cantilever. (Exhibit 98)
- E. *Appeal Issue 4*
- E.1. Appeal Issue 4 reads as follows:

The City substantially erred in allowing the home’s rooftop railings on the southern side to exceed maximum height limits set by the code.

(Exhibit 86, PDF 9, ll. 15-16, bold font omitted)

E.2. The code sections at issue in this appeal issue are subsections (2) and (3)(b) in MICC 19.02.020(E):

1. *Maximum building height.* No building shall exceed 30 feet in height above the average building elevation to the highest point of the roof.
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.
3. 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:
 - a. Solar panels shall be designed to minimize their extension above the maximum allowed height, while still providing the optimum tilt angle for solar exposure.
 - b. Rooftop railings may not extend above the maximum allowed height for the main structure.

[Italics in original] A fourth subsection contains “[t]he formula for calculating average building elevation”. Subsection (3) applies to both Subsections (1) and (2).

E.3. The west wall is the primary downhill façade of the proposed structure based solely on existing grade, but the south wall has the furthest downhill extent because it will be excavated for the garage/basement level. (Exhibit 6r, PDF 15 & 16)

E.4. “[T]he top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.” is the upper surface of the top wall plate: The wall plate consists of doubled 2 x 6s on top of the 2 x 6 wall studs. The proposed structure has a flat roof composed of TJIs topped with sheathing.¹⁷ The roof TJIs rest on the top wall plate. (Exhibit 6r, PDF 22, Plan Sec. 303)

¹⁷ “TJI,” which is the acronym for “Truss Joist I-Joist,” is the trademarked name for an engineered wood I-joist, used for floor and ceiling/roof joists. [Official notice]

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- E.5. Strand’s plans show a height of 29’-6” from the proposed garage floor (elevation 226.47’) to the top of the double top wall plate (elevation 256.00’), with the roof TJIs, deck, deck curb, and railing above that elevation. The plans also show a maximum building height, including the roof deck railing, of less than 30 feet measured from the average building elevation of 231.62 feet. (Exhibit 6r, PDF 16 & 17, Plan Section A-A)
- E.6. Grove contends that the evidence shows that the roof deck railings exceed the 30 foot height limit for the downhill façade since Strand measured the height as 29’-6” but that was only to the bottom of the TJI trusses, ignoring their height and the railing’s height. (Exhibit 1015)
- E.7. CP&D argues that Grove’s interpretation of the MICC leads to an illogical situation because roof deck railings would always be above the roof structure which is always above the top plate. (Exhibit 98)

F. *Appeal Issue 5*

- F.1. Appeal Issue 5 reads as follows:

The City substantially erred in allowing retaining walls/rockeries that do not comply with the height requirements set by the code.

(Exhibit 86, PDF 11, ll. 1-2, bold font omitted)

- F.2. The code section at issue here is MICC 19.02.050(D)(5)(b):

D. Retaining walls and rockeries—Requirements.

...

5. Maximum height in required yard—Fill slopes.

...

- b. All retaining walls and/or rockeries within a required yard shall be included in calculating the maximum height of 72 inches.

[Italic in original]

- F.3. The retaining wall at issue here is a shoring wall proposed to be constructed on the western slope of 6950. The west shoring wall will start near the northwest corner of 6950 at a distance of approximately 6 feet from the west property line (west side lot line), run south more or less parallel with the west property line for a distance of approximately 85 feet where it will make a 45° turn to the southeast for a distance of approximately 10 feet where it will make another 45° turn to the east for a distance of about 25 feet to its end.¹⁸ (Exhibit 6r, PDF 9) The exposed height of the western

¹⁸ The western shoring wall has been “stationed” by the engineer who designed it. Stationing is a system used by engineers to indicate points on a linear feature (wall, highway center-line, etc.). The standard stationing format is x + yy.zz where: x = hundreds of feet; yy = 0 to 99 feet; and zz = hundredths of feet. For example, a point on a line that was 125.39 feet

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shoring wall, viewed from its downhill side, will range from less than 1 foot (at Sta. 0+00, its eastern end) to a maximum of 6 feet (at approximate Sta. 0+17), with the majority of the wall having an exposed height of about 3 feet (approximately between Sta. 0+32 and Sta. 1+04). Approximately the northern 18 feet of the west shoring wall (from Sta. 1+11.04 to the end at Sta. 1+21.19) will be at grade. (Exhibit 6r, PDF 10, West Shoring Wall Profile) The west shoring wall will be just upslope of the lower portion of the existing slope which is covered by rocks. (Exhibit 6r, PDF 9)

F.4. In *Grove I* the Examiner concluded

that the rocks covering the western slope were placed on the slope as it existed in 1955. The 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.

(Exhibit 9001.F, quoted in Finding of Fact A.10, above)

F.5. Once the west shoring wall is installed, the rocks below (west of) the shoring wall will not be retaining anything, if they ever did: “The remaining lower approximately 5 feet of the rockery will no longer have to resist any lateral soil load, as this will be accomplished by the stabilization piles.” (Exhibit 60, PDF 1; report prepared for Strand by a Registered Professional Engineer with Geotech Consultants, Inc.)

F.6. Grove contends that the height of the rock covered slope west of the proposed shoring wall must be included in the height of the retaining wall which would make the total height (rock covered slope plus shoring wall) greater than 6 feet, the allowed maximum height limit (72” = 6’). (Exhibit 1015)

F.7. CP&D responds that the rock covered slope west of the proposed shoring wall is not a retaining wall and need not be included when determining the height of the shoring wall. Thus, CP&D concludes that the west shoring wall will have a maximum height of 6 feet as allowed by code.

LEGAL FRAMEWORK ¹⁹

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A major building permit application is a Type III administrative land use action. [MICC 19.15.030(E), Table A] An appeal from a Type III action is subject to an open record hearing before the Examiner. [MICC

from the starting point of the line would be noted as Sta. 1+25.39. The stationing for this shoring wall runs from 0+00.00 at its southeast end to Sta. 1+21.19 at its northwest end. (Exhibit 6r, PDF 9)

¹⁹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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19.15.030(E), Table B] The Examiner’s decision on the appeal is final subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Table B; MICC 3.40.110]

Review Criteria

1. If the [Examiner] finds that there has been substantial error, or the proceedings [below] were materially affected by irregularities in procedure, or the decision [below] was unsupported by material and substantial evidence in view of the entire record, or the decision [below] is in conflict with the city’s applicable decision criteria, it may:
 - a. Reverse the decision.
 - b. Modify the decision and approve it as modified.
 - c. Remand the decision back to the decision maker for further consideration.
2. If the [Examiner] finds that none of the procedural or factual bases listed above exist and that there has been no substantial error, the [Examiner] may adopt the findings and/or conclusions of the decision body, concur with the decision of the decision body and approve the development proposal as originally approved, with or without modifications.

[MICC 19.15.130(G)(1) & (2)]

Vested Rights

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

The City has adopted local regulations governing vesting of land use applications.

Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department’s issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[MICC 19.15.170(B)]

The vesting date of the Strand application is August 30, 2022. (Exhibit 84)

Standard of Review

The standard of review is preponderance of the evidence. The appellant has the burden of proof. [MICC 19.15.130(C)]

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.

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

A. *Summary Conclusions*

- A.1. Applying the evidence and the arguments of the parties to the applicable regulations, the Examiner concludes that Grove has met his burden with respect to Appeal Issues 3 and 4, but not with respect to Appeal Issues 1, 2, and 5.
- A.2. One of the Examiner's decision options is to "[r]emand the decision back to the decision maker for further consideration." That is the only option appropriately available to the Examiner in this case as the changes that will be necessary involve significant design choices and discretionary decisions that can properly be made only by Strand.
- A.3. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

B. *Appeal Issue 1*

- B.1. As the Examiner held in *Grove I*, in the absence of a survey of a site before any development occurred, the existing surface elevations/contours around the perimeter of an existing structure are the proper measure of existing/pre-development grade. The ground elevation beneath an existing basement/ground floor concrete slab is not relevant; it does not represent a site's grade.²⁰
- B.2. Harper's position against interpolation of contours has been mis-applied by Grove. Harper was addressing a situation where the parcels to the north and south of a parcel had been surveyed, but the subject parcel had not been surveyed. Harper opined that it was wrong to interpolate contours across a site to seek to determine a site's original contours, especially where the surveys being relied upon were performed long after the subject site had been altered by prior development.

In the present case we have a detailed, current survey of the site by a licensed professional (the 2022 Terrane survey, Exhibit 6r, PDF 4) with many spot elevations around the walls of the existing

²⁰ Grove encourages the Examiner to rely on photographs taken while the original house on 6950 was under construction to prove original grade. (Exhibit 86, PDF 124 – 126) Other than annotations placed on those pictures by Grove (Testimony), they contain no benchmark from which any elevation could be determined. Grove's annotations are not based on any survey benchmark. The pictures are not valid for the purpose urged by Grove.

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structure provided. Using those spot elevations and site contours to determine existing elevations of the grade around the perimeter of a new structure on that site is eminently reasonable. No one is trying to use the Terrane survey to determine original, pre-development grade.

B.3. Grove's reliance on the word "underlying" in DCI 12-004 is misplaced. "Underlying" appears only in DCI 12-004's Conclusion 1, but not in Conclusions 2 or 3. And yet, all three of those Conclusions address determining pre-development grade where no pre-development survey of the site exists. Both Conclusions 2 and 3 call for use of the existing ground elevations abutting a structure, not underlying a structure. In *Grove I* the Examiner consciously did not quote or reference DCI 12-004's Conclusion 1 because he concluded that it was an outlier and did not represent the ultimate holding of the Administrative Interpretation.

B.4. Grove has not proven error with respect to Appeal Issue 1. Therefore, any implied challenge to building height based on alleged errors in determining average building elevation must fail.

C. *Appeal Issue 2*

C.1. The only part of the BFA exclusion in dispute is the depth that the basement wall is buried along the west wall of the proposed structure. (Wall Segment B on Exhibit 6r, PDF 2.) Grove asserts that the two exterior stair wells must be treated as separate foundation wall segments with depth of cover measured separately for each; CP&D disagrees. CP&D is correct.

C.2. The two stairwells are exterior to the foundation wall. The grade of the west side of the yard does not undulate as it passes the stairwells. Rather, it is rather level along the entire length of the west face of the proposed building. If exterior stairwells were treated as separate segments for basement ground coverage calculations, then one would logically have to also treat exterior window wells as separate segments, even if the grade never changed as it passed them. Such an interpretation is unreasonable.

The south 4 feet of the west wall is cantilevered and the grade below those 4 feet is 8 feet lower than the rest of the west wall. If one were calculating the height of the west wall, instead of the BFA exclusion, the 4 foot cantilever would have to be taken into consideration. (See Appeal Issue 3.) That cantilever does not have an effect on calculation of the BFA exclusion since the space beneath the cantilever is not within the basement.

C.3. Grove has not proven error with respect to Appeal Issue 2.

D. *Appeal Issue 3*

D.1. Subsection 19.02.020(C)(1)(c)(iii)(b) MICC says that "[s]ingle-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 shall provide a minimum side yard depth of ten feet." This building height measurement is from the ground to the top of the wall facade as defined. (The word "façade" is used in a limited, qualified way in the case of Appeal Issue 4.) Strand's plans use the correct upper limit in their depiction of the east side building height. (Exhibit 6r, PDF 16, South

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Elevation) However, the bottom starting point of Strand's building height measurement is not correct.

- D.2. The required building height is to be "measured from the existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard." [MICC 19.02.020(C)(1)(c)(iii)(b)] Nothing in that provision requires or allows averaging of the grade to determine building height. If the top of the wall is higher than 25 feet above the applicable grade at any point, then a 10-foot side setback is required.
- D.3. The east wall of the proposed residence varies between 7.5 and approximately 14 feet from the east property line. Therefore, the 25-foot building height limit applies because part of the wall is within 10 feet of the property line.

Strand has measured building height at the east wall from the elevation of the earth behind (east of) the new retaining wall that will be built to allow the garage to be cut into the grade. That wall is about 8.73 feet tall in the area beside the residence and, as stated in Finding of Fact D.3, above, is offset to the east approximately 4 feet at the start of the cantilever. Thus, the southerly 4 feet of the building measured at the east wall has a height that is approximately 9 feet taller than when measured along the rest of the east wall. If the rest of the east wall is 24'-11" as shown on Exhibit 6r, PDF 16, South Elevation, then the maximum height of the building measured at the east wall is slightly more than 35 feet as the elevation difference between the surface beneath the cantilever at the southeast corner and the grade at the top of the retaining wall is 8.73 feet. (Exhibit 6r, PDF 16, South Elevation)

- D.4. The current design does not comport with the interplay of MICC regulations for side yard setback and building height. If the southeast corner of the structure were rotated or shifted west such that the entire east wall was 10 feet or more from the east property line, the code would be met with regard to the east side setback. Another approach would be to eliminate the retaining wall offset at the southeast corner of the structure such that the east wall was atop a solid foundation for its full length with earth behind that wall. There are undoubtedly other solutions. Because there are obvious solutions, denial of the building permit is not appropriate; remand for correction is all that is required.
- D.5. Grove has proven error with respect to Appeal Issue 3.

E. *Appeal Issue 4*

- E.1. Subsection 19.02.020(E) MICC contains four subsections. (As previously noted, Subsection (4) contains instruction on how to calculate the average building elevation. It has no other regulatory function.) Subsection (1) reads : "*Maximum building height*. No building shall exceed 30 feet in height above the average building elevation to the highest point of the roof." [Italics in original] Compliance with this requirement has been challenged in Appeal Issue 1. (Exhibit 1015)

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- E.2. Subsection 19.02.020(E)(2) MICC contains two very important qualifying provisions. First, the downhill façade height must “be measured from the existing grade or finished grade, whichever is lower, at the furthest downhill extent of the proposed building” The façade height is not measured from the average building elevation or from the average elevation of any particular wall segment. It is measured from the furthest downhill point of the building. In the present case, that is the southwest corner of the building: Any portion of the driveway is lower than the existing grade and the southwest corner grade is lower than the southeast corner grade.
- E.3. Second, the upper limit of the measurement is “to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.” The “supporting the roof framing, rafters, trusses, etc.” clause modifies for use in this context the basic definition of “façade” which otherwise would include the entire wall which, in a flat roof structure as proposed here, typically extends some distance above the top wall plate (for the roof structure and curb).
- E.4. CP&D’s argument that Grove’s reading of MICC 19.02.020(E)(2) & (3) nullifies the ability to ever have a roof deck railing because such a railing would always be above the top wall plate and, thus, above the point where the top of the façade is measured, is not compelling or realistic.

On the contrary, CP&D’s interpretation nullifies the requirement in MICC 19.02.020(E)(3)(b) that roof deck railings must comply with the 30-foot height limits in both Subsections (1) and (2). The supposed conflict between MICC 19.02.020(E)(2) and MICC 19.02.020(E)(3)(b) can be easily reconciled to give meaning to both provisions. The conflict only occurs when the top wall plate of the downhill façade is so close to the maximum 30-foot height limit that no room above the top plate is left for a deck railing. A 3-foot deck railing may exist within the 30-foot height limit so long as the top point of the measured downhill façade (the top wall plate) is far enough below the 30-foot limit to allow for the roof structure and a railing. For example, a 25-foot downhill façade height would leave room for a 2-foot tall roof structure²¹ plus a 3-foot roof deck railing.

- E.5. The plans as approved do not comply with MICC 19.02.020(E)(2) & (3). The permit must be remanded to correct downhill façade height such that it is below the 30-foot limit, including any roof deck railing.
- E.6. Grove has proven error with respect to Appeal Issue 4.

F. *Appeal Issue 5*

- F.1. The Examiner’s conclusion in *Grove I* that the rocks covering the western slope are not a retaining wall was not challenged after that Summary Dismissal was issued. Therefore, it is the law of the case. It cannot now be challenged.

²¹ The proposed Strand roof structure would be just over 16” tall: 16” TJIs with 5/8” T & G plywood decking. (Exhibit 6r, PDF 24, Roof Framing plan) The 24” example roof system height is a generous figure.

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- F.2. Since the rocks covering the lowest portion of the west slope have been determined to not constitute a retaining wall, the plans show that the west shoring wall will not exceed the 6-foot height limit. Therefore, the west shoring wall complies with MICC 19.02.050(D)(5)(b).
- F.3. Grove has not proven error with respect to Appeal Issue 5.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner **REMANDS** Building Permit 2207-019 to Community Planning & Development to allow Applicant Strand to correct the errors identified in Appeal Issues 3 and 4; no corrections are required regarding Appeal Issues 1, 2, and 5.

Decision issued June 10, 2024.

/s/ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ²²

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NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: “1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the

²² The official Parties of Record register is maintained by the City’s Hearing Clerk.

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interests of persons directly affected by the decision.” [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

“Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”