BEFORE THE HEARING EXAMINER for the
CITY of MERCER ISLAND

ORDER REVISING A DECISION AFTER RECONSIDERATION

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

WHEREAS, the Examiner [1] issued a Decision in the above-entitled matter on June 10, 2024; and

WHEREAS, at 4:27 p.m. on June 20, 2024, Grove filed a timely Motion for Reconsideration ("Reconsideration Motion") which alleges that the Examiner erred in the outcome of Appeal Issues 1 and 2. The Reconsideration Motion was accompanied by a Declaration from Grove with attached Exhibits A - F; and

WHEREAS, at 5:15 p.m. on June 20, 2024, the Examiner sent an email to the principal parties advising that comments on the Reconsideration Motion would not be accepted; and

WHEREAS, for record-keeping purposes, the June 10, 2024, Decision is Exhibit 9004, the Reconsideration Motion is Exhibit 1015, the Grove Declaration is Exhibit 1016, and the Examiner's June 20, 2024, email is Exhibit 9005; and

WHEREAS, the Reconsideration Motion does not cite specific Findings of Fact or Conclusions of Law for which error is alleged. Rather, the Reconsideration Motion uses what the Examiner would describe as an "overview" approach: It challenges the Examiner's analysis and outcome on an issue-by-issue basis without asserting error to specific Findings of Fact or Conclusions of Law. This Order will generally echo that same "overview" approach; and

WHEREAS, the code provisions regarding reconsideration are contained in MICC 3.40.110. A 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 interests of persons directly affected by the decision." [MICC 3.40.110(A)] The MICC does not address submission of new evidence through the reconsideration process. Many municipalities allow submittal of new evidence with a reconsideration request only if the evidence could not reasonably have been provided at the hearing. Grove filed two Public Records Act ("PRA") requests with the City, one on October 3, 2023, the second on March 25, 2024. The City responded to and closed out the first request on October 4, 2023. The City provided approximately 1,000 documents responsive to the second PRA request between April 22 and May 3, 2024, with approximately 500 provided on May 3, 2024. (Exhibit 1015, PDF 5 & 6) The Examiner's hearing was held on May 9, 2024. (Exhibit 9004, PDF 2) While the Examiner recognizes that the PRA process is wholly separate from the Examiner's discovery process, the reality is that in this day and age one can't simply go to a counter in City Hall (pretty much anywhere) and be given access to records; a PRA request is required to see records in most cases. The Examiner, therefore, accepts without

[1] This Order uses the same acronyms/short-hand references to people and things as were used in the June 10, 2024, Decision.

individualized investigation as to the date that each record was provided to Grove that Exhibits A – F to Exhibit 1016 could not reasonably have been produced during the hearing; they are appropriately part of the reconsideration record; and

WHEREAS, Appeal Issue 1 is addressed in the Decision in Part B of the Findings of Fact and Conclusions of Law, Exhibit 9004, at PDF 7 – 9 and 18 – 19, and in the Reconsideration Motion, Exhibit 1015, at PDF 8 – 12; and

WHEREAS, AI 04-04 addressed existing site elevation for the purpose of establishing average building elevation in the absence of a site survey conducted prior to any development of a site. It holds that "existing grade" will be used in that case to make the necessary calculations to arrive at average building elevation. (Exhibit 89); and

DCI 12-004 addressed calculation of basement area exclusion. (Exhibit 9004, PDF 8) Harper said that the Terrane survey could not be used to ascertain original, before any development, site grade by interpolation. Harper did not say that the spot elevations provided by the Terrane survey could not be used to determine current elevations at points between the surveyed spots. (Exhibit 82) In fact, the Terrane survey provides a plethora of existing elevation points across 6950. Since AI 04-04 holds that in the absence of a pre-development survey of the site existing elevations control, and since the Terrane survey provides detailed information about existing elevations at many points across 6950, the Harper letter does not bar interpolating points between those spot elevations to get an existing elevation for a spot between surveyed spot elevations; and

WHEREAS, Grove still seems to be arguing that the elevation beneath the basement floor slab of the existing structure should be used in determining average building elevation. The Examiner disagrees. It should initially be noted that the Harper letter (Exhibit 82) does not address this issue; Harper was asked to opine on the calculation of basement area exclusion, not average building elevation. Harper doesn't mention the use of the word "underlying" in DCI 12-004's Conclusion 1. The impracticality of using a ground elevation beneath an existing basement slab to determine anything is apparent if one considers a situation where an owner wants to construct an addition as opposed to demolish and replace. One could not determine the elevation of the bottom of the basement floor slab without drilling or cutting a hole through the slab to determine its thickness. The notion of having to destroy something one intends to preserve just to find an elevation lacks common sense and logic. Even if one did that, it would make absolutely no sense to conclude that the elevation of the bottom of the slab represented original grade. It would be entirely probable that the basement slab rested on excavated ground, not on original ground surface. Even the contemporaneous pictures of construction of the residence on 6950 that Grove submitted at hearing could not be used to determine original grade because the pictures do not indicate whether the foundation walls in the picture were sitting on excavated ground or pre-development ground; and

WHEREAS, the Examiner concludes that remand is not necessary for Appeal Issue 1; and

WHEREAS, Appeal Issue 2 is addressed in the Decision in Part C of the Findings of Fact and Conclusions of Law, Exhibit 9004, at PDF 9 - 12 and 19, and in the Reconsideration Motion, Exhibit 1015, at PDF 14 - 17; and

WHEREAS, the Examiner based his conclusions regarding this issue in significant part on his belief that it would not be logical to count window wells in the BFA exclusion calculation. (Exhibit 9004, PDF 19, Conclusion of Law C.2) Unfortunately, the Examiner overlooked the statement in the hearing record made by Planner McGuire in another building permit application which specifically stated that window wells had to be factored into the BFA exclusion calculation. (Exhibit 1013, PDF 1, September 27, 2022 email) Grove has now produced evidence that window well exclusion for BFA exclusion calculations is the norm for CP&D, not a one-off aberration. (Exhibit 1016, Exhibits A – D) A procedure that is customarily applied by the agency responsible for determination of the accuracy of BFA exclusion calculations must be accorded due deference. If a window well must be considered, then a "door well" certainly must be considered; and

WHEREAS, there are two exterior stairwells along the west face of the proposed residence: One providing access from the garage level up to the west yard (the southern stairwell); and one providing access from the west yard down to the ADU exterior entrance (the northern stairwell). (Exhibit 6r, PDF 9 *et al.*) The southern stairwell provides no access into the basement – it does not have to abut the western foundation to achieve its purpose. The northern stairwell, on the other hand, leads to a 12' wide gap in the foundation wall within which will be a sliding door (with abutting "dog door") providing the only direct exterior access into the ADU. [2] (Exhibit 6r, PDF 12, 16, & 23) The Examiner erred in holding that the northern stairwell did not have to be accounted for in the BFA exclusion calculation. The first paragraph in Conclusion of Law C.2 must be revised; and

WHEREAS, the Examiner concludes that remand is necessary for Appeal Issue 2; and

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

WHEREAS, the Examiner concludes for the reasons set forth above that the Decision as issued on June 10, 2024, should be revised.

NOW, THEREFORE, the Examiner **GRANTS IN PART** the request for reconsideration and **REVISES** the Decision (Exhibit 9004) as follows:

1. Conclusion of Law C.2, paragraph 1, is revised to read:

> 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

[2] The basement plan on Exhibit 6r at PDF 12 clearly depicts a sliding door labelled as door 005C. The door schedule on Exhibit 6r at PDF 18 lists door 005C as a wood bi-fold door. The door schedule is clearly in error.

the entire length of the west face of the proposed building. However, the northern stairwell provides access to a 12' wide opening in the foundation for access to the basement ADU. Evidence shows that CP&D has historically required inclusion in the BFA exclusion calculation of window well openings. The door opening here, extending from the basement floor to the basement ceiling, and the stairwell leading to it are clearly analogous to window wells and must be factored into the BFA exclusion calculation. The southern stairwell provides no access to the interior and does not even need to abut the foundation wall. It need not be included in the BFA exclusion calculation.

2. Conclusion of Law C.3 is revised to read:

Grove has proven error with respect to the northern stairwell in Appeal Issue 2.

3. The Decision paragraph on PDF 22 is revised to read:

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

ORDER issued June 27, 2024.

\s\ John E. Galt (Signed original in official file)
John E. Galt
Hearing Examiner

NOTICE OF RIGHT OF APPEAL

The initial Decision, as revised by this Order Revising a Decision after Reconsideration, is the final and conclusive action for the City. Any appeal must be filed within 21 days of the date of issuance of this Order. (See RCW 36.70C.020(2) and 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."