

APPENDIX A

TRANSCRIPT OF APL24-002 – Part 1
[00:00:00 – 03:57:51]

Speaker: And the recording is live.

Examiner: Okay. Thank you very much. The hearing will please come to order. Good morning. I'm John Galt. The Mercer Island hearing examiner. It is now 9:01 A.M. on May 9, 2024. We have one item scheduled for hearing today. It is an appeal from issuance of a building permit. The appeal file number is APO24-002. The appellant is Daniel Grove. Mr. Grove is represented by Zachary Davison and Gabrielle Gurian. Mr. Davison is with us this morning. The respondent is the city of Mercer Island Community Planning and Development Department. It is represented by Bio Park City Attorney and Eileen Keiffer and Kim Adams Pratt. Ms. Keiffer is present today. The applicant, the person who's building permit is at issue in this case is Dorothy Strand. And she is represented by David J. Lawyer. Mr. Lawyer is present today.

Our hearing today is going to follow the sequence set out in hearing examiner Rule of Procedure 304 sub E as in echo. The far-right hand column labeled all other appeal hearings with one minor, but I think kind of important change. The change is that the applicant will get a, if you will, place of honor to speak during this hearing. And the way that that will be fitted in is that direct testimony and rebuttal testimony will be in the order of appellant, respondent, applicant, parties of record. Then when we get the closing statements which are going to be written at the request of one of the parties and agreement of the other parties. The order will be applicant, respondent, appellate. So that's sort of the simple basic flow plan for the hearing.

What's called a major single-family residential building permit is classified by the city as a Type 3 land use action. Type 3 land use actions are administrative in nature. They are subject to the right of appeal to the hearing examiner. My decision is a final decision subject to the right of reconsideration and an appeal to Superior Court. I have up to 14 days after the close of the hearing in which to render that decision. In the case where we have written closing statements, the hearing for the purpose of calculating the 14 days concludes when the last closing statement is submitted or when the deadline for that passes without one having been submitted.

There will be a couple of paragraphs near the end of the decision shortly after my signature block, which will explain first the reconsideration process and then sort of a summary of the appeal process. So, I will not go over that at this time. The copy of the decision is sent electronically to the city, once I've reached it. The city then disseminates it to parties of record. All of you folks as being principal parties in this are parties of record. I see that we have Jim and/or Sue Madison with us. They haven't turned on their picture yet, so I don't know whether they're both there or just one, but that doesn't matter for what I'm about to say, and that simply they're

both there. What I was about to say is that the Madison's have submitted written comments which will be entered into the record as part of pre-filed exhibits and they too, as a party of record and others who have submitted written comments, will receive a copy of the decision. The city issues the decisions, if it can, electronically and I hope that all of you will be willing to accept electronic service of the decision from the city. It's faster and easier that way, so I trust that you will. If not, let Ms. Estrada, the deputy city clerk, know and she could send you a paper copy.

This is an appeal case, and so the issue that's before me is did the city err in issuing this building permit with regard to any one or more of the five issues that are set forth in Mr. Groves' appeal? Briefly put in my own words, not trying to read from anybody's paperwork: Appeal Issue 1 alleges an incorrect calculation of existing and finished grades; Appeal Issue 2 alleges an incorrect calculation of the basement exclusion area, based on Issue 1 essentially; Issue 3 alleges an incorrect application of the east side yard setback, based on an incorrect interpretation of building height; Appeal Issue 4 alleges an incorrect application of building height limit to the south facade, specifically with respect to rooftop railings; and Appeal Issue 5 alleges an incorrect determination of the maximum retaining wall height on the west side of the property, let me put it that way.

In deciding the case, I will be considering all of the code sections that are cited by the parties in the paperwork and here at hearing and any other provisions of the code that I find to be relevant to the issues presented. I reserve the right to take official notice of applicable case law, provisions of state laws and rules, and provisions of the city code. I explained before we went on the record how the oath procedure works, and while we've been on the record, I told you the sequence in which the hearings going to occur. Are there any questions regarding hearing procedures?

Speaker: Not at this time.

Examiner: Any objections on jurisdictional grounds or concerns regarding conflict of interest. Hearing none, we will move right along. At this point in a regular hearing, I tell people when I viewed the property and how I viewed the property. I will tell you here I have not viewed the property. I generally do not like to make site visits on appeal cases. There's a variety of reasons for that. Some of you may be able to figure out, some you may not, but anyway, for a variety of reasons, I think it not appropriate that I go visit sites that are involved in an appeal. So, I have not. You have provided me with a lot of pre-filed exhibits, and I have gone through them in preparation for our hearing. In doing that, I determined that there were three documents that I believed were procedurally important to our hearing and to the record that for various reasons had not been pre-filed by any of the principal parties. And so, a couple of days ago, I sent principal parties an e-mail listing those three documents as pre-filed administrative exhibits 9001 through 9003. And just for the record, let me indicate that 9001 is the initial scheduling letter that I sent to the parties on March 8th. 9002 is Ms. Keiffer's e-mail to us of May 1st and the only

reason I put that in is because there is a statement stating that the city was not filing a motion to dismiss but did not oppose the applicant's motion. And then 9003 is the order of summary dismissal issued by me on May 5th Sunday. I trust there's no objection to the entry of those 3 exhibits into the record.

Speaker: No objection.

Speaker: No objection.

Examiner: Thank you.

Speaker: No objection.

Examiner: Too many papers here. Pursuant to Rule of Procedure 224 D as in delta, the respondent city pre-filed exhibits 1 through 24 and 26 through 97. If you look at your exhibit list that the city submitted with it, you'll note that #25 is listed as reserved. Ms. Keiffer advised in response to an e-mail that I sent out yesterday that there was no exhibit 25, so we'll just use that number as not used. Are there any objections to the entry of exhibits 1 through 24 and 26 through 97?

Speaker: No objection.

Speaker: No objection.

Examiner: No objection exhibits 1 through 24 and 26 through 97 are entered. I would note that the city's pre-filed exhibits have a sequential Bates number on all of their pages. I usually cite materials in electronic exhibits using the PDF page number that shows up on your screen when you bring up a document. However, when a party has Bates numbered their documents, that's just a real neat way to identify pages, and so I will plan to use the Bates numbering in citing to the city's exhibits. Pursuant to Rule of Procedure 224E, Appellant Grove pre-filed exhibits 1001 through 1012 and then subsequently supplemented that with proposed exhibit 1013. Are there any objections to the entry of any of the appellants' exhibits?

Speaker: No objection.

Speaker: No objection.

Examiner: There'll be no objections. Exhibits 1001 through 1013 are admitted. Again, pursuant to Rule 224E, applicant Strand pre-filed exhibits 2001 through 2008. I would note that Ms. Strand did not provide a formal exhibit list, at least not that I was able to find. And so, the other day, since there were only 8 exhibits, I created one for my own use and then I sent it to all of you folks so that you could use it if you wanted to or throw it away if you wanted to. Whatever. Are there any objection to the entry of exhibits 2001 through 2008?

Speaker: No objection.

Speaker: No objection.

Examiner: Hearing no objection, 2001 through 2008 are entered. Now I have a question and it's I think an important question. It goes to jurisdiction on issue 5. Exhibit 4. The residential conditions of permit approval that were issued [00:15:00] with the building permit state at Bates page 5, general condition D, that a separate permit is required for retaining walls and rockeries. That is repeated again on Bates 10 I think it is under planning and zoning conditions which says a separate permit is required. My question is does the building permit as issued under #2207-019 include approval of the retaining wall on the West side of the property? Or is it as the permit condition state something that's to be done as a separate permit presumably subsequently? Ms. Keiffer.

Keiffer: Mr. Galt, I think this is a question that, frankly, should be answered by city staff. They're able to, we have Ms. Molly McGuire here who's a senior planner with the city. Perhaps that's something we can address through testimony as to, you know, what? There's with respect to permits there's of course there are walking permits for projects such as this. And then also within any one permit, there's often different disciplines that review for different items. So, I think this is something that we can address through Ms. McGuire's testimony, if that's acceptable to the Examiner.

Examiner: I think frankly, I would rather hear from Ms. McGuire now on that singular point. Because when I looked at this and read that condition, I thought oh now wait a minute. If the city has not officially issued a permit for the wall, then there's nothing for me to hear as an appeal. The appeal as to that issue would be premature cause there is no permit. The conditions seem to say there is no permit and that's my uncertainty. If there is no permit, then I have no jurisdiction on that, and we will eliminate Issue 5 and that will shorten the proceedings to some extent. But since the appellant goes first, if I went your way, we get all through their stuff, perhaps including discussing Issue 5, and then we subsequently find out that, well, there really wasn't a permit issued for it and at that point I'd be throwing it out. So I'd rather decide it up front.

Keiffer: Certainly, I think then as Ms. McGuire is here and so she is ready to be sworn in.

Examiner: Okay, Ms. McGuire, do you swear or affirm that the testimony you'll be offering in this hearing will be the truth, the whole truth, and nothing but the truth?

McGuire: Yes, I do.

Examiner: Thank you. Would you state your name and spell it for the record, please.

McGuire: Molly McGuire M-O-L-L-Y M-C-G-U-I-R-E.

Examiner: Thank you, Ms. McGuire. Your witness, Ms. Keiffer.

Keiffer: Thank you, Mr. Galt and I will just ask her questions about the examiners jurisdictional questions that that you've raised and for just for those following

along, I am going to share my screen with Exhibit 4. Ms. McGuire, are you able to see my screen here?

McGuire: Yes.

Keiffer: Okay. And Ms. McGuire, can you just tell us what position you hold with the City of Mercer Island.

McGuire: Senior planner.

Keiffer: Okay. And how long have you been in that position?

McGuire: Almost 2½ years.

Keiffer: Okay. And so, this Exhibit 4, would it be accurate to characterize it as the residential conditions of the permit approval?

McGuire: Yes.

Keiffer: And did you draft this document?

McGuire: And I edited the land use conditions of approval.

Keiffer: Okay. With respect to the retaining wall question that the Examiner expressed earlier, are you able to speak to whether or not that requires a separate permit?

McGuire: Yeah. Would you be able to point out the condition?

Keiffer: I believe it was on this page here. It's Condition D I've highlighted.

McGuire: I don't believe another separate permit would be required for the construction of the wall. At least not in what we've done in the past.

Keiffer: So, you don't have any explanation for why this language is in the conditions of permit approval?

McGuire: I do not.

Keiffer: Okay. And you didn't draft this portion?

McGuire: I did not.

Keiffer: Okay. Could it perhaps be boilerplate to staff start from a template when it drafts conditions of approval?

McGuire: It could be and administered by the building department.

Keiffer: Okay. And Ms. McGuire is it your understanding that appellant is alleging an error with respect to height of the retaining wall in this appeal proceeding?

McGuire: Yes.

Keiffer: Okay. And is the height of the retaining wall or shoring wall, whatever we want to call it, was that something that you reviewed with respect to your review of the building permit?

McGuire: Yes.

Keiffer: Mr. Galt, I don't have any other questions, but I'm happy to tender the witness if others do on this issue.

Examiner: I would normally ask if the other parties want to cross examine, but the question here is simply is it the city's position that the building permit has issued included the locker/retaining wall and the principal person who's involved in that for the city had said yes it does and I am willing to accept that. So, appeal Issue 5 is still before us. Now, having disposed of that, let's jump to our regular order and we begin with the appellants presentation of testimony and witnesses. Mr. Davison, you may call your first witness.

Davison: Thank you hearing Examiner Galt, we call Mr. Daniel Grove.

Examiner: Okay. Thank you. Mr. Grove if you raise your right hand, please. Do you swear or affirm that the testimony you'll be offering in this hearing will be the truth, the whole truth, and nothing but the truth?

Grove: I affirm that.

Examiner: Can you speak up a little bit more.

Grove: I affirm that.

Examiner: Thank you. Tell us your name and how to spell it please.

Grove: My name is Daniel Grove, spelling D-A-N-I-E-L. Last name G-R-O-V-E.

Examiner: Thank you, Mr. Grove. Your witness, Mr. Davison.

Davison: Thank you. Good morning, Mr. Grove. Can you please tell us where you live and what you do?

Grove: Yeah. So, I am a 20-year resident of Mercer Island. I've been there for, like two older daughters and they have lived there almost their entire lives. I'm a computer engineer. I've been doing that job for a number of decades at this point. I've seen many interesting things happen.

Davison: And you are the appellant in today's matter. Correct.

Grove: I am, yes.

Davison: Okay. And in your own words can you please tell us why we're here today?

Grove: Yeah, we're here because the project as proposed significantly violates the building code of Mercer Island. Mercer Island has gone through many iterations of trying to understand its building code over the years, and during a time that I've been there back in 2017, there was a really large-scale overview or overhaul of the building codes. City spent a year gathering feedback and the reason it gathered that feedback was that it was hearing from residents, that they were worried about the rapid pace of change at Mercer Island neighborhoods. As a result of that, the city actually put a number of limits on homes that could be built. I took part in that. I was friends with a number of people on the Council at that point. I took part in the meetings, and it is wrong to see projects that are being proved that violate the standards that were set out. So, I'm here because this project violates a number of those standards.

Davison: You mentioned overhauls that took place in 2017. Can you give us a bit more description of what those overhauls were and what was included?

Grove: Yeah, there were a bunch of things that were included. One was reducing the square footage of houses that were available that could be built on a given size lot. Another one reduced the reduced the height that was allowed on the downhill facade of the buildings. Another one was -- what was the third one? Oh yes, another change was about rooftop railings that was made and then a third one, another one that was really important at the time was that CP&D had gotten a reputation for approving a large set of variances, and in fact there was a standard set that the CP&D director could approve a 5% variance on any numeric standard, and there were many variances being issued by the city. The 2017 code actually eliminated that ability entirely. And in fact, I'm bringing the hearing examiner into these kinds of cases with another reform that happened in 2017. So, there were a lot and they were all shaped around let's restrict the size of houses that are being built on the islands. And let's build to the actual code, not to, you know, arbitrary variances that are being [inaudible 00:26:06].

Davison: I'll ask my associate to pull up exhibit 1001 and share her screen if that function is available. We are pulling that up right now. Mr. Grove, are you familiar with this document that's being shared on the screen?

Grove: Yeah, 1000.

Davison: What is this?

Grove: So, this was the end result of the city's press release that they put out after spending a year getting community feedback on the building code. And it talks about the kinds of changes that I was just discussing. So, things like reducing the allowable floor area, reducing the height on the downhill side, increasing side setbacks. So, if you look at those top three items, three of four are things that we're discussing here today that this project violates.

Davison: And when you say those top three items, are you referring to the top three sub bullet points...

Grove: Yes.

Davison: ...on the new limits on house size and bulk?

Grove: Precisely.

Davison: Okay. Can you explain to us those three restrictions?

Grove: Sure. So, in number one, they reduced the allowed gross floor area relative to the lot. So, the gross floor area is a way that the city measures the square footage houses and so they reduced that. Number two, it's not really relevant for this case. Number three, the height limited to 30 feet on the downhill side was an explicit choice that the City made. And it's also relevant here in the rooftop railing side of the. And then the side set back increase is also at issue here on with the east side yard set.

Davison: Let's take this exhibit down. I want to turn to the five issues in this appeal, which we'll go ahead and discuss one by one. I want to start with the first issue and that's the incorrect calculation of existing grade and the incorrect application of finished grade with respect to the subject permit. Let's start with existing grade only. Can you describe the first issue related to existing grade?

Grove: Yeah. So existing grade is complicated, and the city has noted that in a series of administrative interpretation that's made. Existing grade is supposed to be the grade of a property prior to any human alteration other than things like walking or fishing or other like very passive activities. Like any grading, you know, building out all those things would not be considered existing grade under the code. That's really hard to do, as [inaudible 00:28:53] ever built probably remembers from the Group 1 appeal. We actually spent a tremendous amount of time trying to understand what the predevelopment condition of the site was and, you know, we went as far as we hired someone to track down the pictures in Alaska that were in a warehouse that have been taken early in the 1940s. Unfortunately, the resolution wasn't good enough for us to really determine what the existing grade looks like. So, this is a common problem for the city and in administrative interpretation 1204 that is Exhibit #90, the city and so this is a 12 year old with interpretation. They talked at length about this. And in fact, that built on administrative interpretation 0404, which is a 20-year-old interpretation. So Okay, what do we do when we don't understand what the what the original condition of the lot was? And what the city concluded was that there were basically two options. So either you're going to use the grade that's on the site, including the grade that underlies any existing structure on the site. Or in certain cases, interpolation of the existing grade could be permitted. [00:30:00] So that's what the city said.

We got a better view of how this should work in the Grove 1 appeal because the city actually had hired a surveying expert, James Harper, and that is Exhibit 82. Harper took a look at this, and he concluded that surveys cannot be relied on for

interpolation or any other formulaic determinations of past original grade. So that was the city's expert. The city then endorsed that in their motion to dismiss the critical area review in Grove 1. In Exhibit 1002, page 8 and 9, the city said existing grade on the site has been determined to be the current grade on site after review by qualified expert that's James Harper and in accord with prior practice at City and two prior administrative interpretations. Those administrative interpretations are the 0404 and 1204 that I've just discussed. So that's the heart of the existing grade issues, how do you determine when you have imperfect information, what the grade on the site is.

Davison: How did the city determine existing grade in this project for this permit?

Grove: It appears that despite rejecting and having their expert reject interpolation that the city allowed interpolation of part of the site, they allowed interpolation under the existing house, and they used the contours that existed outside the house or the existing rate.

Davison: And if someone was going to look in the record and try to determine as a factual matter where it reflects this interpolation, where would they look?

Grove: So, I believe that's in -- let's see. It's in the site plans.

Speaker: Gabrielle pull up 2007. Go to page C2 I believe.

Speaker: Which exhibit?

Davison: This is 2007.

Speaker: Thank you.

Grove: Yeah. So, if you look in the upper right, if you look in the inside that circle in the upper right, what you'll see is you will see some elevations in the existing house footprint in 234 and 236 that are floating in the air. They're not connected to contours at all. And that's where like, those are indicative of interpolation, because those grades are made-up, they are not, they are literally, if you were to go to 234 feet at that spot on the site today, you would be in the middle of the air. Does that make sense?

Davison: It does, and so based on what you've told us, what methods should have been applied or used here with respect to what determining existing grade?

Grove: So administrative interpretation 1204 is super clear on this and what it says is it says the elevation to be used is the grade underlying the existing structure. It uses that word underlying and in fact the City made some sort of bizarre comments, and I'm not using the plain language of underlying in their staff report. 'Underlying' in the Merriam Webster dictionary means below, and they actually use an example that's like the shale underlying, you know, underlying a structure. So, the grade underlying the house is to be used as the elevation and then Conclusion 2 ties into

that and Conclusion 2 says “we will use the elevation and the proposed structure boundaries.” So that’s not the existing structure and I’ll note that in Exhibit 2001, her attorney actually twisted the words and said that you used the grade of the soil at the edge of the existing structure, and that’s not the language of the administrative interpretation. The language of the administrative interpretation says at the edge of the proposed structure, and that’s relevant here because the northeast corner of the proposed structure sits within the footprint of the current house. So, it sits within the footprint of the existing house. So, it’s very different to use the grade at the existing at the edge of the existing structure versus the grade at the edge of the proposed structure, which is what the administrative interpretation says to do.

Davison: In your opinion what is the correct existing grade?

Grove: That is the correct existing grade.

Davison: Okay.

Grove: I’ll point out that there’s a there’s an alternative suggested in administrative interpretation 1204, which is that interpolation may be permitted. The issue here is that the city in the in the Grove 1 appeal rejected using interpolation, and so the city has been this and we were right on that actually and choosing not to appeal it. The city has argued two ways here. It’s argued that interpolation cannot be used in the Grove 1 appeal and now it has greenlit a project using interpolation on the same site in this appeal. Which seems problematic too.

Davison: What is the impact of the improper use of interpolation as a practical matter?

Grove: So, and as a practical matter, Mercer Island has a concept of basement exclusion area that is that you take the gross floor area of the house and the portion of the of the basement that is below the lower of existing or finished plate is subtracted from the square footage of the house. In this case, about 200 to 250 square feet and we don’t have exact numbers because the record is incomplete about the interior of the grades underneath the existing house. But somewhere around 200 to 250 square feet is incorrectly available to this house, and I’ll point out that this structure is being built at the absolute limit of the allowable square footage. The allowable square footage based on the lot size is 3937.5 square feet. The current project is listed at 3936 square feet, so it’s 1.5 square feet different. So, when there’s a 200 to 250 square foot like error that’s large. And I also want to point out that back in 2006, the city wrote an administrative interpretation when it started getting projects that were being built right up against the edge of permit limits, and their conclusion was that an error up to half a percent of the lot size. So, in this case 42 square feet was permissible. 200 to 250 square feet just from this error is far beyond the 1/2 percent error margin that the city stated was permissible. And we have that exhibit filed, I forget like the margin of error one, if it’s important we can find it.

Davison: Ok. I want to shift away from basement exclusionary and I want to pull up Exhibit 86 and have you walk us through that.

Grove: Yeah.

Davison: Gabby let me know when that's ready, 86. Yeah. Okay. So yeah, what are we looking at here? What are these construction photos?

Grove: It's actually amazing that we got these. So, the existing structure was built by the prior owner of 6950 southeast maker. It was built by hand by the prior owner, and these are pictures that we got from the son of the prior owner. And what is really important here to note that the grade has been changed everywhere. And so, what you can see is that the red says 228 foot grade with the three arrows on it. That's actually showing where the basement in the existing structure is. What's important though, is that if you look closer to you where it has the one arrow from the 228-foot grade, that's actually 231 feet today. What has happened is that the whole site has been modified. Whether the property is inside or outside, there's clear evidence and Harper actually talked about this. Harper went and said there's no evidence of the existing grade of the original grade. That's exactly what he's talking about, because in fact what we see is there was a lot of fill added on top of the existing grade, you know. And so, the grade was modified everywhere. And what the city is proposing is to allow interpolation where it's convenient for them and the inside the house and not allowing interpolation outside, and there's no reason at all to believe that one portion of this site is more existing than another site. This is showing that the entire site was heavily modified. So, this is a picture from like 1951 or 1952 and it's amazing good quality of picture obviously.

Davison: Let's go down one page.

Grove: Yeah, this is another example. This is the current western side of the house. The picture on the left is earlier in the construction of it. The picture on the right construction still not finished, but what you can see is that about two feet of soil was added there. What's being used is the existing grade today in the building permit is what's on the right-hand side even though there's been clear modifications. So, if you're trying to get back to the original grade, which is what the goal of the city is, it's important to note that the entire site has been modified and there is no reason to consider any point on that site to be better than any other point, and that's why using the grade underlying structure is the correct answer.

Davison: And using the grade underlying the structure, what does that get you to feet wise?

Grove: Well, the record is incomplete itself. The basement that's in that northern section of the existing structure is at approximately 228 feet. It's 228.7 on top of the concrete. That's not actually the code or the administrative interpretations that's underlying that grade. Someone needs to go figure out. It's probably 6 inches. It's probably right around 228 feet.

Davison: And so, to put a finer point on, is it your opinion and your conclusion that the city erred with respect to calculating existing grade.

Grove: Yeah, absolutely. There's no question there. There's no grade on the site that actually represents the true original grade. And by cherry picking and picking like some parts of the site to say, oh, those are existing grade and then interpolating in other parts, that's a very inconsistent viewpoint, and heck, it's inconsistent with what the city argued in Grove 1 one as well. So that inconsistency is a deep problem.

Davison: Let's shift gears and talk about finish grade.

Grove: Yeah.

Davison: What are the errors related to subsidies, interpretation of finish grade?

Grove: So, finished grade on the western basement wall is also relevant for the basement exclusion area and the reason is that at any point along the wall you have to use the lower of the finished store existing grade. The applicant appears to have used a midpoint elevation along that wall, so the wall is 46 feet long. The applicant used a single point along that wall and said that 23 feet and said the elevation at that point is the we use that as the finished rate across the whole space. That's wrong, though. It's actually inconsistent with the city, the city code and Mercer Island and Title 19, Appendix B says that when you have a complex finished an existing finished grade, you actually have to use an averaging system across it. So, they used a median elevation rather than calculating a mean elevation. And in fact, do we have is Exhibit 1013, a relevant one?

Davison: Let's pull it up. Can we pull up Exhibit 1013?

Speaker: Mm hmm.

Davison: And just to be clear...

Speaker: Excuse me, which Exhibit is that?

Davison: Yes, this is the right one. So, this is exhibit 1013.

Speaker: Thank you.

Grove: And here this question from Ms. McGuire basically is like to Ms. McGuire, and her response was actually asking if you have an articulated kind of finished grade where you have a window well that goes lower than the rest of the fished grade, how would that be counted? And in her response, she actually says that where the window well meets the ground, there would be no basement and there would be no solution for that portion of the basement. So we basically you have to take an average of basement of the finished grade across it. You can't take a simple medium because in this case that median added using a median rather than using the correct average as is defined by the by the code adds about 100 square feet to the base and exclusionary improperly. So, you know, some are here is that three of the four basement walls were calculated incorrectly.

Davison: Okay. And if someone were going to look at the final plan set and identify where those problems exist, where would they look? Yes, let's pull up the final plan set Gabby and go to the right page here.

Grove: Yeah, so if you look at page 15 of the final plan set.

Speaker: And which exhibitor is the final plan set?

Grove: 2007 so the West elevation if you could zoom in on that, Gabby, the bottom of it, you can see it says 4 feet, nine at midpoint. This is where the midpoint grade was used to calculate coverage. And you can see that there are steps going up and down, there's actually a well for doors on the left of this. And so that's the grade that they use that 4-foot nine grade even though the building is clearly not covered, you know at below 4 feet nine at many points on this and it's not covered above 4 feet 9 anywhere. So, this midpoint number it just it simply doesn't comply with the code and that's what, you know, Ms. McGuire's e-mail and the different you know on a different project confirmed. If you zoom back out, Gavin. If you look at the, if you scroll towards the bottom, the West of the north elevation there the left-hand side of it shows the grade going up the existing elevation as we described is incorrect there. And then on the right hand on the lower right side of the slide, that's the north elevation and the existing grade is also long there. **[00:45:00]** So that's where you look.

Davison: What's the practical implication of these errors?

Grove: Well, it's about 200 to 250 square feet for the existing grade error and about 198 square feet for the finished grade error, so about 300 to 350 square feet or you know something like 8 or 9% of the project square footage.

Davison: Okay.

Grove: And because the project is being built exactly at the limit, that's eight or nine like it, that's all...

Davison: Pushes it over.

Grove: Yeah.

Davison: Okay. Let's shift gears and turn back to the basement exclusion area. Which results in an allowable building square footage maximum of larger than what's allowed. Can you explain that error for us?

Grove: Sure. So, the city defines a maximum gross floor area for the house, and there are a variety of complex computations here involved. There are higher ceilings, all kind of, you know, what are where stairwells? One of the things that comes is subtracted from the gross for a house is the percentage of a basement that is covered by the lower of existing condition rate. I'm going to call it the lower grade because the city uses lower than finished or existing almost everywhere. And where it does, I'm

going to just say lower grade for simplicity. So, if you mentioned a basement that had 25% of each of its walls covered by the lower grade. Imagine that basement was 1000 square feet. The city would then exclude 250 square feet of that basement, so would subtract 250 from the gross floor area of the house before it determined whether or not that gross floor area complied with the code. So that's what it does. And so in this case by having a wall coverage that it's higher than it should be under code and under administrative interpretations, a number that is too large, about 300 to 350 square feet too large, is subtracted from the gross floor area before that's compared with what the code allows.

Davison: And you've used this term gross floor area and we saw that term as well in the 2017 press release we looked at.

Grover: Yeah.

Davison: Again this morning. What is that and how does that fit into the overall picture?

Grove: So gross floor area is like and it's actually a relatively complex formula, but at its core what it is, is you take the number of floors of the house. You then take the area at the edge of the structure so the exterior perimeter of the house, so then you have a size of each floor, you add up each of the floors. That gives you the gross floor area minus some things like staircases and the other, you know, other like, you know, pieces of it. But that at a fundamental level is the square footage of the house and it includes things like garages that are attached that are part of the structure.

Davison: And if someone wanted to look in the record. To identify where this error exists, where would they look? Would they look at a final plan set?

Grove: Yeah, in Exhibit 2007, page one that talks and shows...

Davison: Let's pull that up.

Grove: Yeah, so that shows the gross the floor area. It also shows what the basement exclusionary computations were. So, it's basement exclusionary computations that are long.

Davison: So, the floor area is the right, lower right of the drawing? And then the basement floor exclusion calculations are below that.

Grove: Let's zoom in a bit more. Yeah. And one point I'll make is that on wall segment, is it B?

Davison: Yeah.

Grove: On wall segment B, it says there's a basement exclusionary of 59.37. Remember I told you the midpoint was 4 feet 9 inches. The basement is 8 feet high, 4 feet 9 divided by 8 is 59.37. So that's where the number comes from and it's wrong.

Davison: And then at the bottom here I see it says 937.5 square feet excluded. Do you see that?

Grove: I do.

Davison: Okay and in your opinion is that correct?

Grove: No, that should be around 600.

Davison: Okay. And perhaps you already said this, but how do you get to the 600?

Grove: So, if you take the basement at 1610 square feet, you then use the correct wall segment coverages and the wall segment -- I think they estimated the wall segment coverage of 58.2%. The correct number is actually 38%, and so that's the difference. It's the 20% of 1610, which is about 320, 330 square feet and we don't have the exact numbers again because the record is incomplete. The record doesn't actually contain the grade underneath the house and that is the problem.

Davison: In the notice of appeal we use the term 'manual inspection'. You perform manual inspection of this issue and with Ms. Strands attorney in the request for dismissal took issue with that term. What did you mean when you said you performed manual inspection?

Grove: Yeah. So, what I did was I actually -- so there are a couple of different segments of that western wall that you can look at. One of them is on the far-left hand side where the top of that is flat. Then there's the door well, then there's a stairwell staircase. And then there's a flat side wall and another staircase. I looked at each of those five segments and looked at what portion of it was covered. And you have to do a manual inspection because the actual the correct data is not revealed in the in the record. And there's no shortcut. City says you have to use an averaging system. You can't use a medium.

Davison: And by failing to do that correctly.

Grove: They have 100 square feet to the house.

Davison: Okay. Let's shift gears and talk about the third issue. The city has allowed an east side setback that is less than required based upon an incorrect determination of the height of the east wall. Can you describe that issue for us?

Grove: Yeah, it's really simple. So, the same...

Speaker: Did Mr. Grove get his picture back?

Grove: Oh. I'm sorry. Something happened. Yes. Hold on. Sorry about that. I didn't tell.

Speaker: Thank you. Appreciate that.

Grove: Thank you Examiner Galt. I appreciate you noticing. And then you can see me now. I can see that, okay, this is the side yard issue, correct?

Davison: Yes.

Grove: So, the city and in the 2017 reforms added a variable side yard setback depending on the height of a wall that it was next to that had joined the side yard. And the height of the height of the wall is measured from the top of the facade to the finished grid. Now one thing that's important to note is that this house actually has multiple facades on the side that is closest to my house. So, on the eastern side. And the applicant tried to make use of that, but the city in multiple consistent rulings has ruled that facades are considered singular facades, regardless of how far they're set back. So, you have to measure from the top of the facade to the finished grade below which is a 33 foot -- that's 33 feet. The rule says that if there's a facade height more than 25 feet above the lower grade, you have to have a 10-foot setback here, 7 feet 8 inches. So, it doesn't. And. Yeah, but does that make sense and do we have a picture of that?

Davison: That's what I was going to ask you. Where are the final plan set would you, would someone identify this error?

Grove: Let's see. So that would go back to the elevations on page 15. Let's pull that up. So, if you look at the at the south elevation for instance, you actually have to measure all the way to the top of the building. You can see that they haven't measured to the top of the building, despite the fact that there is a single -- the facade is considered a single facade. So, you actually have to measure from the top of the building to the ground and that is 33 feet.

Davison: Okay. Do we have a better picture of that? I think we do Gabby in one of the things that I sent you.

Gabby: [inaudible 00:53:24].

Davison: Yeah, like if you pulled up my slide 30. This is not as an exhibit? No. Well, no it's not. We don't have to put it up.

Speaker: Here Examiner Galt, we have some demonstratives that Dan prepared in advance of today. I think it's a few slides we'd like to mark them as a new Exhibit 1014. I realize the other parties haven't seen them yet, but they're merely demonstratives and...

Davison: Yeah, they're just markups of the they're just markups of the site plan of Exhibit to 2007.

Examiner: Well let's bring one of them up and give the other parties a chance to at least see what you're talking about, and then they can decide if they want to object.

Davison: Okay. Go ahead Gabby.

Gabby: Yeah.

Grove: Yeah, so this is the left-hand side.

Keiffer: Mr. Galt, can we have a moment to look at this? We haven't made any objections. I just don't want the witness to waste time testifying if this is ultimately excluded.

Davison: We'll drop it in the chat as well Ms. Keiffer so you can have a full copy of it.

Keiffer: Is there a reason this wasn't pre-filed?

Davison: It was just something that was created a day or two ago. It's purely demonstrative. I can also just describe it based on the things that's easier.

Examiner: Where did it go? Why can't we see it?

Davison: Oh, Gabby.

Gabby: In order to put it in the chat, it's just not sharing.

Davison: It's coming back up here. And let's start at the top, Gabby, and just let everyone take a look starting on page one.

Examiner: How many -- oh, it's 5 pages?

Davison: It's just 5 pictures, 5 slides.

Keiffer: Mr. Galt, we did not get this. I am going to object just because this is late. If they want to try to bring it in on rebuttal, that's one thing. But the hearing examiners rules clearly establish a pre-filing schedule which, with the exception of one late filed exhibit. The appellant followed and again the city didn't object to the supplemental, even though that was out of schedule, but we haven't had a chance to review this. We haven't had a chance for staff to review this, so I really do object to it coming in on direct because again, this is sort of this is exhibit by ambush in contravention of the hearing examiners rules.

Speaker: We echo that objection. I think that what we're looking at it that we haven't had a chance to study it is really just a bunch of editorializing of an original document that could be done orally, and we don't really need the visual aid in addition to the testimony.

Examiner: I believe the first page that's on the screen right now definitely is. I don't know whether the parties would consider editorializing to be a pejorative descriptor, but it is basically showing what Mr. Grove has already testified to with respect to the northeast corner so that I see nothing new there just notes about what he's already said. What's on page 2?

Grove: Very similar. That's also what he said, and it's also showing this west elevation.

Examiner: I basically, I think we've seen that drawing some previously on another exhibit.

Speaker: Agreed.

Davison: And we'll see the other ones as well. Gabby if you want to go to page 3. Again, it's just a markup of one of the final plan set drawings. You see the citation of the record at the bottom. Let's go to page 4, which was the one that he was about to talk about. Again, it's just showing the visually the more than 33 feet. Again, I don't think we disagree. These are purely demonstrative. You know, if someone has an issue with them, Mr. Grove's here to be cross-examined on these on these but we think they're pretty noncontroversial.

Examiner: What's #5?

Davison: Go ahead, Gabby this is going to pertain to the Issue #5. Again, just markups of the final plan set.

Keiffer: That's markups, but it's also a new chart.

Grove: That that is new. It's something that we can explain.

Keiffer: Again, Mr. Galt, we're going to resume our objection just because, again, there's a schedule and it wasn't followed.

Examiner: I will sustain your objection with respect to page 5 of 5. The other four, I believe either are already part of Mr. Groves materials cause I some of them looked familiar as we went by, and the one that one or two that might not be at least the first one he's already testified to everything that's shown on that page. So, I will allow pages 1 through 4 to be entered as Exhibit 114.

Keiffer: Thank you.

Davison: Thank you. And I guess we'll just take Ms. Keiffer up on her offer to have the opportunity to submit page 5 in rebuttal. Let's ship it back to...

Examiner: That's fine.

Davison: Okay, thank you. Tell us what we're looking at here.

Grove: So, what we're looking at here is on the left-hand side of this, we're looking at the southeast corner of the house that is actually closest to the property line. And because the city considers the facade to be a singular facade, whether it's set back or not, you have to measure from the top of the facade to the finished grade to the lower grade below. In this case the finished grade is 226.7 feet, and that's what you're seeing on the right-hand side. You can see that the building corner is actually above the finished grade of 226.7 feet. [01:00:00] So that's what the pink is showing. So, all this is showing is that there is a facade more than 33 feet height

and under the code. A facade of over 25 feet requires a 10-foot side yard setback. And that's in this case.

Davison: I want to pull up a different exhibit. I want to pull up -- one second. Figure 3 of our notice of appeal, which is Exhibit 86. Gabby if you could pull that up. It'll be figure 3 on page 9 of the -- let's zoom in on that a little bit. Mm-hmm. Yeah. Okay, Mr. Grove what are we looking at here and how does this relate to what you were just talking about?

Grove: So, the yellow here is showing where the 7-foot 6 required setback would be if the facade were less than 25 feet. The red is showing the difference between a 7-foot, 7 foot 5, and a 10-foot setback. And when you see with the cyan is the exterior of the house, and you can see that the -- you were looking before at the southeast corner, so that's the corner of that cyan block. And you can see that that's impinging on the template.

Davison: And I'll ask the obvious question before we wrap up this topic. What's the practical implication? Why is this important?

Grove: Well, the city actually laid out increasing side yard setbacks for tall structures as one of its goals in 2017. This violates that.

Davison: We can take this down. Gabby, let's shift to the 4th issue on appeal, which is that the rooftop railings exceed allowable heights. Can you describe the error made here?

Grove: Yeah, I can and the applicants lawyer actually addressed half of the question here. The city code that talks about maximum building height and when it talks about maximum building height, it's actually talking about two different pieces of code. One of them is about the average building elevation and basically there's a fairly complicated calculation on average building elevation and this project meets the requirements. So, you cannot have anything with a few exceptions above 30 feet above the average developers. So that's fine. But maximum building height, also referred in the code also refers to the maximum building height on a downhill facing facade. A downhill facing facade is limited to 30 feet and the code actually says rooftop railings are limited to the maximum building height. Therefore, rooftop railings on a facade are limited, are on a downhill facade, are limited square feet. And I'll point out that the city code is actually very clear that the facade is defined in definition section, MICCIT (16) and that includes all projections on the exterior building, including decks, porches, all kinds of things like that. So, in this case, the southern rooftop railings are directly connected. They're right on top of the facade, they're in the facade line and they're part of the facade. Therefore, they have to be less than 30 feet above the finished grade or below a grade. In this case the finished grade is about 226.7 feet, and the top of the rooftop railings is about 33.9 feet above that, which is in excess of the 30 foot limit. So, and in Strands memorandum they talked about one of scriptures we didn't exceed the average

building elevation. We totally agree with that, but they totally left out the piece where it also has to meet the facade requirement and it doesn't.

Davison: And if someone were looking at the final plan set, where would they look to see this error?

Grove: I think you would go back to like, yeah, you go back to page 15. First of all, you look at page 14 showing rooftop which make demonstrate...

Davison: Let's go to page 14 first. Gabby, let me know so we have that up and let's...

Grove: So, 14, if you looked just above where it says roof plan, you'll see the edges of the -- you'll see where the rooftop railings are and you can see that they're directly on top of the their part and building facade. They're just vertical with the rest of the building facade. And then if you go to page 15. And you were to look at the south elevation, you would see that the finished grade is about 226 point some odd feet like 226.5 feet.

Davison: And there you see that you see that right in the center there right above.

Grove: Yeah, right. Right there. And then they actually didn't label the elevation at the top, you know, using a lower manual inspection, again because this wasn't, it wasn't part of record, it's around 200 and I forget exactly how high it is, but it's about 33.8 or 9 feet above the finished grade which is more than 30.

Davison: Right. And the top of the rings. What are they at?

Grove: They're, well, that's the thing that's not revealed. I think that they are somewhere around 260.5 feet or so.

Davison: Okay. And so, you take the 260.5 or so subtract the 226.77

Grove Yes.

Davison: and you get to

Grove: You get around 33.9 like or 34 feet and it's, the limit is 30 feet.

Keiffer: Okay.

Davison: And the point is that you actually have to meet both pieces, both the average building elevation piece and the height on the downhill slide.

Grove: Right.

Davison: And what's the practical impact on the project? Why is this important?

Grove: Well, it's actually interesting. So, the city back in 2020, so this is a relatively new thing that they've done. And the city in 2020, the City Council actually took up a

measure about loosening these restrictions. And I went back and watched the video and it's actually somewhat entertaining. They were looking at a possibility of allowing higher railings if they were set back more than six feet from the edge. And the reason for that was they said neighbors didn't want to see these things. And they concluded that even 6 feet from the edge was not high enough to allow an excess here. And although they rejected the amendment, they didn't need to, or the ordinance, and they didn't need to vote on it because they weren't adding it to the city code. They explicitly took a vote to say we want to be on the record so that people will know in the future why we rejected this. And so, they passed it six to one. This was just four years ago. So, for all the reasons the city rejected that, that's why this should be rejected.

Davison: Okay. Okay. And let's put that on the screen, Gabby, the 4th page of the new exhibit, Exhibit 1014, that was admitted. And I just wanna make sure we've covered, adequately covered that slide.

Grove: Yeah.

Davison: So, Mr. Grove, you, prepared this

Grove: Yes.

Davison: this monster?

Grove: Yes.

Davison: Tell us we're looking at here.

Grove: Well, we're looking at just what I said, where I measured the top of the railings to be approximately 260.4 feet. The finished rate is 226.47. And so, there's about a 33.9 foot difference between those.

Davison: We can take that down. And let's, I want to talk about the last and final

Grove: Yes.

Davison: issue on in the appeal

Grove: Yeah.

Davison: which is the retaining walls block way issue

Grove: Yeah.

Davison: which we've assigned Area 2 and I'd like you to explain that area please.

Grove: So, this is actually, a very complicated area. And it's also related to rulings that were made in the Grove One appeal by [inaudible 01:08:06]. So, there are very, this house has a very large fill slope on the western side. Under the Grove One appeal

it was measured, it was estimated to be around 14 ½ feet. It was also ruled by [inaudible 01:08:22] to be a fill slop. There are rocks on the edge of that fill slop and in Grove One, the ruling was the rocks are not allowed. In fact, it was ruled that the rocks were placed on the grade as it existed in 1950 or approximately then. So, the city, so there's, that means a couple of things because the city defines retaining walls and rockeries as types of walls. The ruling in Grove One meant that there is no pre-existing rockery then. That's important because if there was a pre-existing rockery, it might be eligible for modification under Ms. Gurian's rules around modifying non-[inaudible 01:09:00] structures. Because there is no non-conforming structure any structure that gets built as part of this has to conform to the rules and the rules are fairly strict on fill slops and the required side and required rear yard, they limit you to 72 inches. They also do it in the front yard. Interestingly, front yard actually has a second restriction that the city failed to enforce in this project, which is 42 inches. And we actually we have we found through records requests that the city has enforced this on other projects at 42 inches. They did not do so here, and we don't really understand why. This project requires a retaining wall and rockery combination that is much higher than is permitted in this case because there is no non-confirming structure.

Keiffer: Mr. Galt, I'm going to stop here and object. This allegation about the 42 inches wasn't in the original appeal assignment of error. I have the notice of appeal exhibit 86 up, talks about 72 inches, 6 feet consistently, but not 42 inches. So, I think this is a new appeal issue that was not appropriately preserved by the appellant.

Examiner: Mr. Davison, any response?

Davison: I think it's the same issue that the rockeries and retaining walls here exceed the allowable limit. It's a legal issue. It's clearly within the scope of the appeal and it's clearly within the scope of our argument.

Grove: Yeah. So, the combined height exceeds

Keiffer: Oh, Mr. Galt, can we have a ruling before

Examiner: Can, Mr. Grove, wait until I've ruled on the objection, please. I'm interested in hearing from the attorneys, but not from the witnesses at this point.

Davison: Just one final comment here. It's the same issue. I believe what Mr. Grove is testifying about and we're happy to lay some more foundation for this if the hearing examiner would like us to. I believe it's the same issue, but it's new information that was received from a Public Records Act request that was received after we filed the notice of appeal.

Keiffer: Mr. Galt, the code's really clear about what has to be filed with respect to an appeal. This wasn't filed. This is brand new. Again, the parties haven't had a chance to react to this. This is just, you can't say, well, we broadly said we have a concern here and then just load it up like a Christmas tree. That's just not how the code

works nor the rules. So again, we would object this hasn't been preserved as part of appellant's appeal.

Davison: I'll, this, just

Examiner: Hold on a minute. Hang on a minute, everybody. There's another attorney here that has not been allowed an opportunity to chime in if he wishes to, and I'd like to hear from him if he wishes to. Mr. Lawyer, do you want

Lawyer: Yes.

Examiner: to say something on the motion? [crosstalk 01:12:00]

Lawyer: Yes. We have the same concern. We have not been told about a separate and additional height restriction that they are alleging is not in compliance. And so we feel somewhat side or, you know, ambushed by introduction of a new idea, even if it's on the same general topic.

Examiner: Thank you.

Davison: If I could

Examiner: Objection sustained.

Davison: I'd just like to state for the record and it's something that has been raised already, exhibit 1006, which is an exhibit that was furnished within the timeline specified in the Rules of Procedure, clearly talks about this 42-inch retaining wall issue and it was presented to the parties well in advance of this hearing today. But objection noted, and we'll move forward.

Examiner: Thank you.

Davison: Let's pull up exhibit 1006, Gabby, if we can. All right, Mr. Grove are you familiar with this document?

Grove: I am.

Davison: Okay and can you tell us what's being discussed in this

Grove: Yeah, so there are two different pieces of the code that talk about, actually three, that talk about retaining wall heights. The two that are relevant here, well, one for fill slopes and required yard. The second one for front yards. And this was an inquiry on a different project in 2022, where the city actually enforced the 42-inch front yard limit. It's a little strange that they there are two different limits and so and the wording in this wasn't, the wording in the code wasn't clear to me, which is why I did not include this initially until I was able to get data from the city. And what this

Examiner: How did I just sustain the objection to this being discussed.

Davison: Oh.

Examiner: Why? Why?

Davison: This is, I was asking him to describe this e-mail that was part of the record but we'll, yeah, we'll move on to a different topic, yeah.

Examiner: Thank you.

Grove: So, okay, so, let's assume the 72-inch limit. In this case the front yard actually has a combined, it has a rockery and retaining wall height that is combined to be about 160, 170 inches. And on the side of rear yards, it's lower because of the slope, but it's still above 72 inches every. And the important thing here is that because that, the soldier firewall that is proposed is quite close to the property line, there is a problem in that you cannot, the building code requires that the soil to the West of the retaining wall be retained through a retaining structure of some sort because it's a fill slope. The planning code requires that there not be a rockery there because the planning code measures from the bottom of the rockery to the top of the retaining wall. **[01:15:00]** And so there's a problem. The building code requires retaining all the way from the top of that wall to the bottom because the retaining wall is only about 6 feet from the property line and about 12 or 13 feet above the grade at the property line. So, it requires a very steep structure. With the building code you can't have that be loose ground, but for the planning code, the planning code requires that the rockery not be considered the rockery because the planning code only allows 72 inches of height of the retaining wall. And so, there's a, the issue here is that while this could meet the planning code, they can't meet the building code and if it meets the building code, it can't meet the planning code.

Keiffer: Mr. Examiner, again, I'm going to object about the discussion of the building code. This is not, again, this was not an issue that was preserved for appeal. We understand Mr. Groves appeal issue to be relating to the height and so. But he's testifying about whether or not this is permissible under building code not preserved under the original appeal.

Examiner: But as I hear what he's saying, the argument that he's made in his appeal is that the height of this facility has to, the starting point for determining the height, has to start at the bottom of the rockery and extend to the top of the soldier pile wall. And I think all he's doing here is giving me an explanation for why he thinks it's required that there be that rockery below the bottom of the soldier pile wall. Now, whether I whether I agree with him that you count that in the height, that's another question for me to decide someplace along the way here. But I'm going to overrule that objection.

Keiffer: Okay, thank you, Mr. Galt.

Davison: I want to shift gears Mr. Grove. We've talked about some of the highly technical aspects of the various issues on appeal here. I want to zoom back out, and I want to ask a more general question.

Grove: Mmm, mmmm.

Davison: Through this appeal, what are you seeking to accomplish?

Grove: I believe that the city should not be allowing out of compliance projects to be built. And the planning department appears to have cited that they're willing to have out of compliance projects built and that was literally a problem in 2017 where the citizens said that that was not acceptable. It was not acceptable then. It's not acceptable now.

Davison: What are the implications if this project is to move forward?

Grove: Well, I mean you'd have developers buying up things and going off and violating the rules. You'd have inconsistent application of rules. You know, there are a number of different places where you'll have that happen and you'll have a race to the top, which is exactly what the code rewrite was intended to stop.

Davison: No further questions from us.

Examiner: Give me one moment please. In the sequence for cross examination, I always let the other principal party start and then the applicant will follow. So, Ms. Keiffer, do you wish to cross examine Mr. Grove?

Keiffer: Just a few questions. Thank you.

Examiner: Certainly, proceed.

Keiffer: Thank you. Good morning, Mr. Grove. I'm glad to meet you [crosstalk 01:19:06]. I'm sorry.

Lawyer: Excuse me for interrupting. Would it be possible to take a bio break for just a couple of minutes?

Keiffer: No objection here.

Examiner: Okay, 10 minutes.

Lawyer: You could do five and it would be fine with us.

Examiner: Well, since my little upstairs office doesn't have any facilities which means I have to go downstairs and back into the regular house, ten minutes it is.

Lawyer: All right. Thank you.

Examiner: We are at recess until 10:30.

Speaker: And we are recording.

Examiner: Thank you. Just for the record, this is the May 9, 2024 hearing in APL24-002. The second part of the morning session. We begin this part of our hearing with cross examination of Mr. Grove by Ms. Keiffer. Mr. Grove, just a reminder, you're still under oath, sir. Ms. Keiffer, go ahead.

Keiffer: Thank you, Mr. Galt. Good morning, Mr. Grove. Oh, Mr. Grove, you're muted.

Grove: Yes, okay, something went wrong there. So, I'm back.

Keiffer: I'm glad you figured it out. It's hard to testify on mute. Thank you for speaking with me. I'm Arlene Keiffer. I represent the city of Mercer Island in this proceeding. I understood your testimony earlier to indicate that you are a software or computer engineer. Was that, did I hear accurately?

Grove: That's right, yes.

Keiffer: Okay. Are you a professional surveyor, by any chance?

Grove: No.

Keiffer: No? Okay. What about a [inaudible 01:20:58] planner?

Grove: No.

Keiffer: Okay. Building official? Have you ever served in that capacity?

Grove: No.

Keiffer: Okay. Okay. Did you hire a surveyor as part of this appeal?

Grove: I actually tried to, I attempted to hire one. In fact, I attempted to hire the surveyor that the city had suggested to give ideas but the surveyor, after looking into that, concluded they were conflicted because you all had hired them at this much.

Keiffer: Okay. Alright. It looks like you put a lot of work into your appeal. Did you go onsite to do any of the work that went into your appeal?

Grove: Yes. I was on the site prior to it being owned by Ms. Strand. But I was never there afterwards.

Keiffer: Okay. Thank you. Those are all of my questions.

Examiner: Oh, okay. Thank you. Mr. Lawyer, do you wish to cross examine?

Lawyer: I do, Your Honor.

Examiner: Thank you.

Lawyer: Okay. Mr. Grove, I want to start by referring to the very end of your direct testimony, where you were asked to explain what your objective is in initiating and pursuing this appeal. I think, and you can tell me if I am stating it incorrectly, that your answer was to prevent construction that is not compliant with the code and is in fact larger than you say the code permits. Is that correct?

Grove: That's correct.

Lawyer: Is it also correct that you attempted to buy the Strand lot before Ms. Strand did?

Grove: That's correct.

Lawyer: And is it also correct that you attempted, in the absence of purchasing the lot, to purchase a view covenant to restrict the construction that would be permitted to be more restrictive than the code allows?

Grove: That's correct.

Lawyer: And isn't it true that really your objective is to prevent Ms. Strand from building a house that is perhaps code compliant but will interfere with your West facing butte?

Grove: No, that's not correct. I'll also point out that when

Lawyer: There's no question before you. Now, you have testified with regard to your appeal issue number one, that the existing grade has been incorrectly calculated or determined. Now, do you disagree that the question of how to find existing grade is a question that was answered to finality in your first appeal?

Grove: Absolutely. Just it was with respect to well, actually, let me let me state that I agree that the city concluded the interpolation was not permitted and the city said that the existing grade was the current grade on the site. And that I actually agree with, that was why we did not appeal.

Lawyer: Okay. And so, the current grade on the site by reference to the city's administrative interpretation is what we use when we don't have a survey that will tell us what the grade looked like before any human alteration, right?

Grover: That's correct.

Lawyer: Okay. And you are testifying today that what we need to do is somehow find out what the grade is below the slab of the structure that is currently sitting on the site. Is that right?

Grove: Yes, that is actually administrative and interpretation 1204 conclusional one states that precisely.

Lawyer: Okay. And do you contend that that is what the city has done as it has considered and issued building permits across the city over the years since the adoption of administrative interpretation 0404?

Grove: Actually, it's not 0404, it's 1204 [inaudible 01:25:20]. And I have no idea what they have done. That the conclusion is still alive and was one that the city cited in the critical review.

Lawyer: Let's talk about the practical application of your theory. Are you saying that what we need to do is pick up the existing structure and figure out an elevation below it and then put it back down before the applicant can get a building permit to build something new there?

Grove: I didn't write the administrative interpretation. The city wrote it.

Lawyer: Well, you've testified a lot about what you think the existing grade should be. How do you do it?

Grove: You drill through it, and you find out the answer. It's not that difficult. And the city could certainly order that. Like I said, I didn't write the administrative interpretation. The city did.

Lawyer: Okay. When we're just trying to find the existing grade on a building site, don't we start under cases like this where we don't have an ancient survey that tells us what it looked like many, many decades ago? Don't we start with administrative interpretation 0404?

Grove: I'm sure the base and exclusion area.

Lawyer: Well, I'm only talking about trying to determine that thing we call existing grade.

Davison: I'm just going to object. I'd like Mr. Lawyer to let Mr. Grove answer the question that he's asking without interrupting.

Grove: There are two different administrative interpretations, one for determining average building elevation, which we did not challenge in this case, that's 0404. Not relevant to this case. And then 1204, which was used for base and exclusion, which is what we're talking about, that is relevant to this case.

Lawyer: So, your testimony is that average building elevation has no relevance to any of the challenges that you're making here?

Grove: That's correct. In fact, every elevation doesn't appear in our appeal.

Lawyer: Would you agree that certain height measurements? For determining the maximum height that a building can be built do in fact get measured from average building elevations?

Grove: But it's still, we did not challenge any of this.

Lawyer: Okay. So now let's talk about administrative interpretation 1204, which you have also talked about and that is a calculation of quote existing grade with respect to building area or to the basement area exclusion, right?

Grove: Base exclusion area.

Lawyer: Okay. So, if I can, I'm going to try and pull up that particular--I'm going to screen share--if I can successfully do it, the actual document. Okay. Do I have it there where you can see it?

Grove: Yeah, I can see it.

Lawyer: Alright. So, in the preamble, the issue here, as it's stated, is under certain circumstances, when a lot has already been developed, we're trying to figure out the grade to be used for calculating the basement area exclusion, right?

Grove: Yes, that's right. Okay.

Lawyer: There's a series of findings followed by a couple of conclusions. Correct?

Grove: Correct.

Lawyer: So, I'm going to scroll down now to the conclusions, and there are four of them, but really, we're talking about numbers one and two, right?

Grove: One feeds into two. If you parse it correctly, you'll see that one that generates the elevation and two uses the elevation.

Lawyer: Okay. So, [inaudible 01:29:30]

Grove: the elevation of underlying existing structure just as I discussed.

Lawyer: Right. And so, part of our challenge, isn't it, whether we're an applicant or a challenger or a city is to say how exactly do we determine the existing grade underlying an existing structure. Is that our challenge?

Grove: Yeah, I think that is the, I don't think that's a big challenge, actually. I think it's a requirement.

Lawyer: Whether you think it's easy or hard, that's what we're trying to do, right?

Grove: That's a requirement.

Lawyer: Okay. [01:30:00] And doesn't conclusion two answer that question for us precisely?

Grove: It doesn't, and in fact your brief twisted the words of conclusion two. What it says is that you use the elevation touching the surface of that – of a point of the surface of the earth touching a point on the exterior wall of the proposed structure. I'll point out in your brief you actually used the word existing structure in the place of proposed structure. Those are very different, and that is that is where we went on.

Lawyer: Thank you for that correction. So what we need to do then—don't we?—is we apply conclusion number two and say that if we can find it, we look for the surface of the Earth immediately adjacent to or touching a point on the exterior wall of a proposed structure.

Grove: That's correct.

Lawyer: Okay. Now, you understand, don't you, that, generally speaking, Ms. Strand's lot slopes from east to west in a downward direction, correct?

Grove: It actually slopes in two directions. It slopes east to west and north to south.

Lawyer: Okay. But in the east to west direction, it slopes downward as it goes away from your lot, correct?

Grove: As it's currently graded, that's correct. We have – but the point here is that it's actually been so heavily graded, but there's not really a clear idea.

Lawyer: So around the existing structure, we have higher elevations at the east wall of it than we do at the west wall of it. Is that true?

Grove: As it's been currently modified, that's true.

Lawyer: And are you of the opinion that before that structure was built there was a hole in the topography?

Grove: I don't have any opinion at this point. What I know is that the city's experts said that interpolation, which is what you're proposing, is not valid on this site.

Lawyer: Okay, let's go to the city's expert. You're talking about Mr. Harper, correct?

Grove: Yep.

Lawyer: Okay. And I'm gonna find that document, but if Ms. Keiffer has a shortcut for me I will appreciate the help as to which exhibit number it is.

Grove: 82.

Keiffer: Thank you. You got there before I could.

Grove: Oops.

Lawyer: Bear with me for a second. I'm in the wrong keys. Okay, 82. Alright. Sorry for how long it took, but I think I have it. Do you see it?

Grove: Yup, I see it.

Lawyer: Okay. So I know you've read this before and so I won't go through the first couple of paragraphs. It's the last paragraph that I'm focusing on. Mr. Harper, after consideration of everything that was presented to him, rested on the opinion that the existing grade for purposes of permitting considerations should be the surface elevation immediately adjacent to or touching a point on the exterior wall of a proposed structure in accordance with conclusion to of administrative interpretation 12004. And do you agree with that?

Grove: So, first off Harper is not writing the administrative interpretation. Harper is a surveyor who's making a decision about what the – whether or not there is evidence of an of an original grade. What Harper decided about, you know, his interpretation 12004. I don't have an opinion. The Administration 12 – administrative interpretation 12004. States the rule.

Lawyer: Do you think Mr. Harper misstated it?

Grove: Harper stated that there is a lack of concrete evidence of any original grade. I don't have any opinion on how he personally interprets administrative interpretation. 12004. He's not someone who would do that.

Lawyer: So your—I'll call it your thesis—under this issue number two about the basement area exclusion is that if you start at an elevation that you're going to call existing grade, that is something you consider to be too high. You end up with an exclusion of too much basement. Is that true?

Grove: That's correct.

Lawyer: Okay. You referred to exhibit 86, which was a series of photos of the site.

Grove: Correct.

Lawyer: During a period of construction? \

Grove: Yes, that's right.

Lawyer: And I'd like to just clear with you were those photos – those are embedded in your notice of appeal, correct?

Grove: That's correct. As I think you said, the G or F.

Lawyer: Okay.

Grove: Around page 125.

Lawyer: Yeah, and those photos are not in their original, unaltered form, right?

Grove: They're digitized and I added some notes to – I added some notes. We have the originals.

Lawyer: Okay. So things like these little text boxes and arrows?

Grove: Those were added.

Lawyer: Those were not what the camera depicted, those are what you added?

Grove: That's correct.

Lawyer: Okay. And you said you have not walked upon the Strand property and yet you have identified what you consider to be very specific elevations at very specific locations of a 50 some odd year old photo?

Grove: Well, I didn't say – I had not walked on it while was Strand's property. I have walked on it prior to it being Strand's property.

Lawyer: So.

Grove: So I have been on that property. Let's be clear.

Lawyer: You've been on the property. Okay.

Grove: But not while it was Ms. Strand's.

Lawyer: But you were not the photographer who took these pictures, right?

Grove: This was taken by the son of the builder of the house. I have his agreement that these are original.

Lawyer: Okay. And so we don't have today with us as a testifying witness the person who took those photographs because we have you and you didn't take them, right?

Grove: That's correct.

Lawyer: Okay. And so you have imposed upon photographs that you didn't take a series of elevations based upon your general familiarity with the ground at that location. Is that true?

Grove: That's true. It's not just general familiarity. I also have pictures of the site from when – from prior to being the Strand property. So it's not just general familiarity. I can compare those pictures to what exists today.

Lawyer: Okay. So I take it your conclusion is that by reference to a bunch of construction photographs that you have – to which you have added your own calculations and

opinions on elevations, you say the existing grade below the structure that's there today is lower than what has been calculated for purposes of the application.

Grove: So I state that based on – not on those pictures, but based on my knowledge, having been in the basement, knowing what the elevation at the entrance of the basement is and what's on the survey and what's in the King County records around the basement, approximately what the basement elevation is. And I am suspecting it's maybe like the grade underlying is maybe 6 inches lower. Someone else is going to need to figure that out.

Lawyer: Let's talk about issue number three, which is the setback.

Grove: Yeah.

Lawyer: I understand your testimony to be that you say that the actual structure facade facing you is taller than 25 feet and therefore the set back under the code is required to be not less than 10 feet. Is that right?

Grove: That's correct.

Lawyer: Okay. And the facade that we're talking about is the facade facing your lot? In other words, the east facade, right?

Grove: That's yes, that's correct.

Lawyer: Okay. Now I'm going to try and bring back the actual elevations. And I'm referring to exhibit 2007 but I realized there are several plan sets in evidence here. And so if we look at page 15 of Exhibit 2007 I'm going to try and screen share it here with you now we are going to get back to those elevations.

Grove: Yep.

Lawyer: Do I have it there?

Grove: Yes.

Lawyer: Okay. So you agree with me that your house is located to the east of the proposed Strand structure, correct.

Grove: That's correct.

Lawyer: So would I be correct that the east elevation where my cursor is moving around right now that that's the facade that would face you?

Grove: That's correct.

Lawyer: Okay. And this particular facade does not show us—does it?—what the vertical measurement is from the lower of existing grade or finished grade along that facade up to the top of the rooftop railing?

Grove: That's right. That's missing from the record.

Lawyer: Okay. However, if we look at the south elevation, we have that measurement, don't we?

Grove: Could you use the amended?

Lawyer: Okay, I will.

Grove: Because I don't – I believe the answer is no. You still don't have that measurement. There's no measurement listed for the top of the railings.

Lawyer: Okay. And zeroing in on it.

Grove: Yep. Yeah, you'll see that there's no elevation listed at the top.

Lawyer: There's no elevation, but isn't there a vertical distance if you?

Grove: Yeah. But it's on the...

Lawyer: Don't tell me anything until I ask you a question.

Grove: Sure. Yeah.

Lawyer: Don't you see a vertical distance on this illustration?

Grove: I do.

Lawyer: Okay. And wouldn't you agree with me that the distance shown on this illustration is a distance from the finished grade, which is the bold line where my cursor is hovering, up to the top of the rooftop railing.

Grove: No, your – that is incorrect. The finished grade is actually – and I demonstrated this in slide – in one of the – in Exhibit 1014. The finished grade under that corner is actually at the 226.7. The building cantilevers out over a finished grade, and so you have to measure for the finished grade, which is down at the bottom of the dry float. So it's another 8 feet or so below that 20 here.

Lawyer: But you're looking at the south facade when you make that statement, you're not looking at the east facade, are you?

Grove: No, that's not true. I am. I'm looking at the east facade.

Lawyer: My cursor is on it.

Grove: And, well your cursor. You're – like the problem that you're having is that the building actually cantilevers towards you. And so when you're measuring that east facade, you actually have to go from the bottom of the driveway 226.7 feet to the top of the railings, which is about 33 or 34 feet above that.

Lawyer: But isn't it true that it cantilevers on the south facade?

Grove: The cantilever is actually, if you would go to like – [01:45:00] in some - you're incorrect. I could demonstrate it to you if you would like me to.

Lawyer: Well, what I'd like to do is have you tell me where the finished grade is on the east facade that faces your house.

Grove: 226.7 feet.

Lawyer: So if we look at the east facade.

Grove: Yeah. So it's not – and this is where the problem is. You see the basement in the – with the dashed lines there? You see how it cantilevers out over it? And if you – that cantilever is going down to a finished grade of 226.7 feet.

Lawyer: Now, wouldn't you agree with me that if a person – if this house were already built and a person were standing right where my cursor is? They would not be able to see any of this subterranean measurement that you're talking about would they?

Grove: That's not true. The finished grade on the driveway side is 226.7 feet, and when the city considered this variable side yard setback, they explicitly talked about the case of people digging out and that they didn't want to enable them. And so this is violating precisely a point that that that was made in the planning code.

Lawyer: Okay, you're arguing with me about what people intended, and I'm just asking you if you could just imagine you're....

Grove: Yeah, so...

Lawyer: Hey, let me finish. You could just imagine yourself walking outside of your house and looking west at the structure that is proposed here, the place that you're suggesting should be the starting point for measuring height would be below the surface of the ground wouldn't it?

Grove: No, that's not correct. If you're under the left hand side of that, the surface of the ground is at 226.7 feet. Under the left hand side to the, like, that first railing that you see – the first fence line you see there, the ground there is 226.7 feet. And I demonstrated that in my, you know, in my slides.

Lawyer: Okay, let's move along to the rooftop railing issue number four.

Grove: Yep,

Lawyer: And you have taken issue with the railing being proposed to be built to an elevation that is higher than the code will permit. Is that correct?

Grove: That's correct.

Lawyer: Now you will agree with me that we'll find definitions of the maximum building code in Mercer Island City Code, section 1902020 capital E true?

Grove: Sorry I need to pull up the code. Like, can you, like? I believe that's right, but I want to make sure that I'm looking at what you are, because it – like, getting it right matters. Yes, E. E1 and E2.

Lawyer: Okay. I'm going to do another screen share here where I've got a section of the code and internet feed that I hope will work just fine. Okay. Do – are you looking at it here?

Grove: I'm looking at it.

Lawyer: Okay. So if we go to 020E1, I'm at C so I'm going to scroll down a little bit more. We have building height limit right?

Grove: That's correct.

Lawyer: So the first subsection talks about the maximum building height, which simply says that no building will exceed 30 feet in height above average building elevation to the highest point of the roof, right?

Grove: That's right.

Lawyer: And you've said earlier in your cross examination that you are not challenging the average building elevation in this application. Correct?

Grove: That is correct.

Lawyer: So the overall building height can be 30 feet above the average building elevation at a max.

Grove: And item 2 applies.

Lawyer: Well, before we get to item two, you're with me that far, right?

Grove: It must comply with number one, yes.

Lawyer: Okay. Now item two talks about how tall from whatever we're gonna define as the top to the bottom or bottom to the top and the downhill building facade. True?

Grove: Mm-hmm.

Lawyer: So now – and that is written there as it's going to be 30 feet or no more than 30 feet, measured from existing 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 and trusses, etc.

Grove: That's right.

Lawyer: Okay. Now when we get down to section 3B, where it talks about rooftop railings, you see the language there that says rooftop railings may not extend above the maximum allowed height for the main structure.

Grove: Correct.

Lawyer: Don't you agree with me, that subsection one talks about the maximum allowed height for the main structure.

Grove: Absolutely not. In fact, if you were to look at three and parse it correctly. What you...

Lawyer: You've answered my question and you don't agree with that.

Grove: Like, that's wrong.

Lawyer: Okay. Let's talk about issue number five.

Grove: Okay.

Lawyer: In what we've sometimes referred to as Grove Appeal 1. You argued that the lot itself has a large amount of fill on it, and that the rockeries on the lot were in excess of the code limit of 72 inches in height true?

Grove: I argued that illegal development had happened because the lot had been increased more than 72 inches from the grade. That was the argument, if I recall correctly.

Lawyer: Okay, but the code that you're referring to talks about a 72 inch vertical height limit for a retaining wall, right?

Grove: If you're talking about this, are you talking about this appeal or rogue one? I'm not sure what?

Lawyer: I'm talking about the code. You're very familiar with it.

Grove: So the code refers to the height of a – of all retaining walls and rockeries within an acquired yard combined. From the ground.

Lawyer: And do you agree with me that Grove Appeal 1 concluded that those rockeries existing on that site, because of how long they've been there, were not a retaining wall for purposes of the code?

Grove: Actually, for the purposes of the code, they were not retaining wall or a rockery under [inaudible 01:52:46] like [inaudible 01:52:49] ruled that "these rocks are not a wall" and retaining walls and rockeries are both types of walls under MICC 19.

Lawyer: Okay, so we're settled then that the Strand rockery was determined not to be a retaining wall under Grove Appeal 1.

Grove: Actually, it's the Strand rocks on the slope were determined to not be retaining wall or a rockery [inaudible 01:53:11]

Lawyer: Okay. But today, you're claiming that the same rocks which haven't moved and aren't being proposed to be moved are part of a retaining wall. Is that true?

Grove: I'm saying that you can't build the retaining wall as proposed and meet the planning code unless those are – unless those rocks are a rockery. And I would point out that the construct of a rockery versus retaining wall can change depending on the land around it, and there is Washington state precedent of exactly this.

Lawyer: So I think your answer to my question is yes. Today you're claiming that despite Grove 1, those rocks down there at the bottom are part of a retaining wall per code.

Grove: Yes. I'm saying that they now must be – in order to build the retaining wall that's there they must be considered a rockery.

Lawyer: And so your view is that the vertical measurement we are looking for is to take the elevation of the ground at the very bottom of the rocks that are there and measure upward to the elevation of the top of the proposed soldier piles, and then we have a vertical elevation that is relevant to the code.

Grove: Correct.

Lawyer: And you will agree with me, won't you, that although that would be a vertical measurement, those rocks are not vertically beneath the proposed location of the soldier piles.

Grove: I would say that that's irrelevant.

Lawyer: Whether you think it's relevant or not, factually those rocks are located to the West of the proposed soldier pilots true?

Grove: That's true.

Lawyer: Okay. And you will agree with me that as designed and proposed, there's no physical mechanical connection between the rocks that will be left there and the soldier piles that will be drilled there.

Grove: I'm not an engineer for – I'm not that type of engineer. I couldn't tell you.

Lawyer: So you don't know if those are connected?

Grove: I do know that the building code prevents a steep slope from being built on a fill slope west of those, and so I, like, I know there's a building code problem here if they are not – if there's not a retained slope west of the soldier pile wall. That's in Washington state building code.

Lawyer: Okay. Let's go back to the plan set. And I'm gonna share it with you in a second. I'm going to go fairly deep into the document to look at a diagram. Looking for a sheet C3 I think.

Grove: Yeah, I see it.

Lawyer: Okay, so maybe you can help me out and tell me which page of 23 it's on.

Grove: Page nine.

Lawyer: Oh. I went way past it. Okay. We have some engineering sketches there. And would you agree with me that what is depicted in the upper - oh I forgot to screen share. Just a second? Okay. Can you see the diagram there?

Grove: I can. Yeah.

Lawyer: Okay. Would you agree with me that this is a depiction of a cross section of the shore – the proposed shoring wall viewed from the west looking east?

Grove: It's a little more complicated than that because it wraps and so this includes both the south and the west walls.

Lawyer: Okay, so it may include more than just...

Grove: Yeah. So it's – I think at that B point there it, if I remember correctly B is where it actually wraps – where it starts wrapping to the to the west, so.

Lawyer: Okay. Now do you see where my cursor is hovering that there is a reference to exposed shoring wall.

Grove: I do. Yeah.

Lawyer: And then that area is shaded.

Grove: Yes.

Lawyer: And then if you go over to the left a little bit where my cursor is hovering, you see a dimension of two feet zero inches.

Grove: I do.

Lawyer: Okay. And then if you follow along to the left, you'll see another reference to 4 feet 6 inches.

Grove: Yep, I see that.

Lawyer: Okay. And then if you go down to the lowest point in the artwork here, you will see a reference that if you interpret it, I guess you're looking at a six foot distance from where the arrow is to that horizontal line at the top of the shaded area.

Grove: Yes, correct.

Lawyer: Okay, now isn't this a depiction of how much shoring wall will actually be exposed to the downhill side if it is built?

Grove: Yes, but that is not actually the definition in the code. The definition in the code includes all...

Lawyer: I didn't ask you the definition of the code.

Grove: Yeah. Looking at the shoring wall definition, yes, that's exactly what would be exposed.

Lawyer: Okay And you're not an engineer or a surveyor, but do you have a general understanding of what a shoring wall is designed to do?

Grove: I have an excellent understanding of it.

Lawyer: Then you will confirm for me, won't you that it is designed to [02:00:00] hold back soil that is on the uphill side of the wall, right?

Grove: That's correct.

Lawyer: It is to resist the lateral forces that have pushed downward by gravity to keep it from sloughing or subsiding.

Grove: That's correct.

Lawyer: Okay. Would you agree with me that, as depicted in the artwork no portion of the exposed shoring wall exceeds 72 inches in vertical height.

Grove: That is correct.

Lawyer: Okay. Would you also agree with me that this very same artwork was part of the record and was reviewed in the Grove Appeal 1?

Grove: That was not reviewed because the critical area review is not about work that is being proposed. It is about the existing condition of the site.

Lawyer: So you agree with point 1 and you disagree with point 2 is that right?

Grove: It may have been there. It wasn't reviewed as part of the critical area review. And in fact, let me point out that the critical area review is scoped specifically to Mercer Island code 19.07. There are...

Lawyer: Question before you. Those are all the questions I have.

Grove: Okay.

Examiner: Thank you, Mr. Lawyer. Mr. Davison, do you have any redirect?

Davison: Two brief topics.

Examiner: Proceed.

Davison: Thank you. Mr. Grove, a few minutes ago you were asked about a series of photos that were attached to the notice of appeal you submitted in this matter. You remember that?

Grove: Yes, Sir.

Davison: What else beyond those photos did you rely on for purposes of compiling the information you used in support of your appeal.

Grove: I used information from King County, I used mostly the issue – mostly the code, the administrative interpretations, and the site plan. So those and my personal knowledge of the layout of the existing structure.

Davison: And along those same lines, you were asked questions about your site visits and familiarity with the subject property, and just for the sake of the complete record could you please describe in your own words your familiarity and your experience with the subject property?

Grove: Yeah, I walked through it as I considered buying it. So I did a full walkthrough of it.

Davison: You mentioned reviewing King County records and the process you went through for purposes of compiling information for your appeal, you also mentioned earlier today some public records, that request that you submitted. Can you give us some more information on that?

Grove: Yeah. So I found public records requests to understand a couple of things. How the city was treating facades, whether it was treating facades that were stepped back as separate or not. I filed records request to understand what rules were being put in place for retaining walls. Those are the two ones that – those are two things I think.

Davison: No further questions, thank you.

Examiner: Ms. Keifer, any recross?

Keiffer: No recross from me.

Examiner: Thank you. Mr. Lawyer, any recross?

Lawyer: No. None.

Examiner: Thank you. Thank you, Mr. Grove. Mr. Davison, who would you have next?

Davison: We do not have anyone else.

Examiner: Okay. Thank you. That brings us, then, to the respondents direct testimony. Ms. Keiffer, Are you ready to proceed?

Keiffer: I am.

Examiner: Okay. Who would you like to call first?

Keiffer: Thank you. The city will be calling Ms. McGuire again.

Examiner: Okay. Ms. McGuire, let's see. I swore you in before?

McGuire: Yes.

Examiner: You remain sworn, and you've already told us your name. So, Ms. Keiffer, you may go ahead.

Keiffer: Thank you. Ms. McGuire, I think I asked this earlier, but just to refresh memories, what is your current position at the City of Mercer Island?

McGuire: City Planner

Keiffer: Okay. And how long have you held that position at the city of Mercer Island?

McGuire: I've held their senior planner position since May 1st.

Keiffer: Of this year?

Davison: Yes.

Keiffer: Okay. And prior to May 1st of this year were you still working for the city?

McGuire: Yes.

Keiffer: Okay. And what capacity were you working for the city?

McGuire: Assistant Planner and Planner.

Keiffer: Okay. And so total, about how long have you worked for Mercer Island?

McGuire: 2 1/2 years.

Keiffer: And was Mercer Island your first job as a planner?

McGuire: No.

Keiffer: Okay. So where were you at before Mercer Island?

McGuire: I worked for Chelan County Community development.

Keiffer: Okay. And what role did you have at Chelan County?

McGuire: Assistant planner.

Keiffer: Okay. About how long were you there?

McGuire: One year.

Keiffer: And before that is, as I understand it, you were in school. Is that right? Okay. And so what kind of school or training did you undertake in order to become a planner?

McGuire: I have a bachelor's degree in urban planning and sustainable development.

Keiffer: And so, Ms. McGuire, you testified earlier that that you did review of the building permit that's subject to this appeal. Is that right?

McGuire: Yes.

Keiffer: Okay. And So what was your role with respect to the proposed project.

McGuire: Yeah, I reviewed the proposed project for compliance against title 19, the residential development standards.

Keiffer: And so I'm hoping you can help us just sort of walk through, you know, what the permit application process is like at the city. So it's my understanding that this permit was submitted, gosh, I think back in 2022, is that right?

McGuire: Yes.

Keiffer: Okay. So once a building permit gets filed with the city – a permit application gets filed with the city, what happen?

McGuire: Yeah, once the application is determined to be complete, has all the materials necessary for us to review it, it will get routed to all of the review disciplines in the city. So that includes building, fire, engineering, planning, and arborist. And the permit will go through several rounds of corrections in order to ensure that the project complies with the code.

Keiffer: Okay. And if I can recall correctly as well from the record the proposed permit wasn't approved until, I believe, February of this year is that right?

McGuire: Yes.

Keiffer: So would it be fair to say that this permit was under review for, I guess gosh, over a year and a half?

McGuire: Yes.

Keiffer: Okay. I think it's been noted to that there is a number of different plans sets in the record. I'm hoping you can help us explain why there might be more than one set of plans in this particular record?

McGuire: Yeah, I know that one of the exhibits contains the officially stamped, approved plan sets. I'm not sure what the other ones – I didn't see stamps on the other ones.

Keiffer: Okay. As part of a project permit application, is it normal for an applicant to make corrections to plans and then perhaps do a resubmittal?

McGuire: Yes.

Keiffer: Okay. And did that happen in this case?

McGuire: Yes, several times.

Keiffer: Okay. Do you recall just how many different revisions this permit went through?

McGuire: I don't recall the exact number. I know it was more than three.

Keiffer: More than three. Okay. Okay, so to get back to your role in particular, you review for one discipline only, is that right?

McGuire: Correct.

Keiffer: Okay. So I'm hoping you can help us walk through what your review looked like with respect to this permit application.

McGuire: Yeah. So I start by reviewing it against the residential development standards, specifically in 1902. That includes 1902020, 030, 040, 050. For all of the standards that include things like building height, gross floor area, lot coverage, hardscape, yeah.

Keiffer: Did you issue any permit comments to the applicant with respect to this proposed project?

McGuire: Yes.

Keiffer: And so what happens when staff submits comments to an applicant?

McGuire: The comments will be sent to the applicant and they are required to respond via the online Adobe software in the form of publishing comment replies to our comments, and the applicant did that at each resubmittal.

Keiffer: Okay. So is it fair to say by the time staff issues a permit decision, presuming approval is the decision, that it's fair to say that that the applicant will have responded to all the comments?

McGuire: Yes.

Keiffer: Okay, thank you, Ms. McGuire. I want to talk first about the issue of existing grade. We heard a lot of testimony earlier about existing grade in this hearing. And in fact, we also heard a lot of testimony about what folks are terming the Grove Appeal 1, do you recall that testimony?

McGuire: Yes.

Keiffer: Okay. Are you familiar with Grove Appeal number 1?

McGuire: Yes.

Keiffer: Okay. So are you familiar with the hearing examiner's decision in that case?

McGuire: Yes.

Keiffer: Okay. And it's fair to say that you reviewed the administrative interpretations and specifically administrative interpretation 12.004?

McGuire: Yes.

Keiffer: Okay. And was also mentioned earlier that the city had a third party surveyor who opined on this particular application is that right?

McGuire: Yes.

Keiffer: Okay. And so they issued a memo in this proceeding, isn't that right?

McGuire: Yes.

Keiffer: Okay and so with respect to, I guess existing grade, I'm hoping you can help us walk through what you were looking at to determine existing grade when you were reviewing the project application?

McGuire: Yeah. So I reviewed the application materials that were submitted and prepared by a qualified professional in terms of determining existing and finished grade for the proposed residence. We reviewed that against the code and the administrative interpretations.

Keiffer: Was it also reviewed against Mr. Galt's ruling in EPL23-009?

McGuire: Yes.

Keiffer: Okay. Okay, so Ms. McGuire, I am going to pull up, this is city exhibit 6 resized. And just to orient us here – well, first of all, are you able to see my screen okay?

McGuire: Yes.

Keiffer: Okay. Can you testify as to what City exhibit 6 resized is?

McGuire: Yes, this is the approved plan set for the permit.

Keiffer: Okay. So I've scrolled down one page to see a 1.0. You mentioned that that there is a stamp on approved plan sets, is that right?

McGuire: Yes.

Keiffer: Sorry, let me stray cursor here. Do we see that stamp on this plan sheet?

McGuire: Yes, in the lower right corner.

Keiffer: Okay. And so kind of where my where my cursor is right here?

McGuire: Yes.

Keiffer: Okay, thank you. And so this is how we would know this is the final approved plans?

McGuire: Yep.

Keiffer: Okay, so plan sets without this might have been from, you know, a previous iteration is that – could that be true?

McGuire: That could be true, yes.

Keiffer: Okay. So. then, looking at existing grade, where would we find that within exhibit 6?

McGuire: The existing grade is – can be found both on the topographic survey prepared by terrain and the elevation drawings.

Keiffer: Okay. So let's start with the – let's start with the elevation drawings first. Okay. Is this the elevation drawings you were referring to?

McGuire: Yes.

Keiffer: Okay. Oh, sorry again. And so where would we find existing grade on the elevation drawings?

McGuire: Yeah, existing grade is depicted using the dashed line across the elevations.

Keiffer: Okay, so I'm going to pick the south elevation. We've talked a lot about that today. Okay. And so where do [02:15:00] we find existing grade? You said there's a dashed line, but there's – I'm seeing a lot of dashed lines here.

McGuire: Yeah. It is the one labeled existing grade at building phase and kind of going across any slope across the elevation.

Keiffer: Okay, so this is where we find that?

McGuire: Yes.

Keiffer: Okay. And so was this something you reviewed when you reviewed for existing grade as part of your project permit review?

McGuire: Yes.

Keiffer: Okay. And then you said that existing grade is also shown elsewhere in the approved plan set, is that right?

McGuire: And yes, on the topographic survey.

Keiffer: Okay. So it would be this sheet, is that correct?

McGuire: Yes.

Keiffer: Okay. So I'm going to zoom in again. Where do we find—again, sort of looking at the South end—where do we find existing grade on the topographic survey?

McGuire: It can be found by the elevation lines across the entire survey.

Keiffer: And so when you say elevation lines, are you referring to you know these for example 2:26, 2:28? I'm sorry. Can you repeat that?

McGuire: Yes.

Keiffer: Okay. Thank you.

McGuire: Okay.

Keiffer: Did you. You've been here all morning, right, Ms. McGuire?

McGuire: Yes.

Keiffer: Okay. So, you heard Mr. Groves testimony?

McGuire: Yes.

Keiffer: Okay and do you recall him testifying that the city is supposedly allowing interpretation inside of the proposed structure but not outside?

McGuire: Yes, I did hear that.

Keiffer: Okay. Did you agree with his characterization of the City's position in this case?

McGuire: I don't agree.

Keiffer: Okay. And why is that? What did the city do with respect to existing grade in this case?

McGuire: So 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 residents.

Keiffer: Okay and as I understand this, is the I think we heard testimony earlier that the existing footprint of the existing house is not the same as the footprint of the proposed House—is that right?

McGuire: Correct.

Keiffer: Okay. Does that pose any challenges with respect to calculating existing grade for a building that's not built yet?

McGuire: Yes, it did.

Keiffer: Okay. And so how does the city solve that? I guess that peculiarity in this case?

McGuire: And 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.

Keiffer: Okay. In which administrative interpretation again?

McGuire: At 12, four or 12-04.

Keiffer: And with respect to existing grade. Did staff give particular—let me rephrase that. Coming out of the Grove one appeal, which centered on existing grade, did you pay particular care to existing grade with respect to your review in this case?

McGuire: Yes.

Keiffer: Okay, I'm going to move on to finished grade and Ms. McGuire, again, you were here for Mr. Groves testimony. You heard him allege there's mistakes with finish Grade 2, is that right?

McGuire: Yes.

Keiffer: Okay. And so how does the city check for finished grade of a of a building that hasn't been built yet?

McGuire: We rely on the applicant's proposal for finished grade. Finished grade can be pretty much whatever the applicant proposes.

Keiffer: And is there a check of finished grade once a project is completed?

McGuire: Yes, that will be included in the final building inspection.

Keiffer: And so, where do we—I'm going to go back to Exhibit 6. Which is the approved plan set. I'm on the elevation sheet A3.1. Is finished grade shown here as well?

McGuire: Yes, it's the dark line.

Keiffer: Okay, I'm going to zoom in so we can see and have a record here. So again, just using the South elevation for consistency. You say the dark line. Well, what do you mean by that?

McGuire: The dark line that kind of goes around along the bottom of the proposed residence.

Keiffer: So if I'm tracing it with my cursor is that accurate?

McGuire: Yes.

Keiffer: Okay. And so how are you when, again, when staff is verifying finished grade? What are you looking at in order to make sure that the applicants not kind of pulling a fast one here? How do you check for code consistency.

McGuire: And well, like I said, we rely that on the fact that the applicant's proposal should be accurate depending on what they propose the finished grade to be. And we'll look at the elevation number and see if there's anything that looks new but all in all, it's on the applicant to pick that.

Keiffer: Okay. But do you cross check materials within the application for example?

McGuire: Yes.

Keiffer: And again, that would be verified upon building inspection as well, correct?

McGuire: Yes.

Keiffer: Okay, what happens if a building is ultimately built too tall outside of the plans?

McGuire: And that would be a case for code enforcement.

Keiffer: Okay. Or would it be—would an applicant be able to pass final inspection if they build something that's not according to the approved plan set?

McGuire: They would need to submit for a revision to application and that would be reviewed and ultimately if it was approved then they would be able to pass building inspection.

Keiffer: Okay. But that's only if the revision meets the code. Is that right?

McGuire: Correct.

Keiffer: Okay. Is it feasible that if a building gets built too tall that they may have to do additional construction if the revision will not work?

McGuire: Yes.

Keiffer: And Ms. McGuire with respect to finish grade versus existing grade isn't it true that the Mercer Island Code errors on the side of the less height rather than more height.?

McGuire: Yes.

Keiffer: Okay, I am going to move on to the basement's exclusion area and I think I'm first going to pull up and exhibit. One second, please. I'm pulling up exhibit 1005. Are you able to see my screen, Ms. McGuire?

McGuire: Yes.

Keiffer: Okay. Are you familiar with this Exhibit 1005?

McGuire: Yes.

Keiffer: Okay. And I see up here that there are segment designations this see count 1, 2, 3, 4 and five. Are you seeing that?

McGuire: Yes.

Keiffer: Okay. Were there 5 wall segments for purposes of basement floor area exclusion for this proposal?

McGuire: No, there is one wall segment.

Keiffer: Okay. Do you have any idea where these segments come from or why there might be 5?

McGuire: I don't.

Keiffer: Okay. I am going to move to exhibit or to Appendix B of Title 19 of the Mercer Island City code. Okay, Ms. McGuire, are you able to see my screen?

McGuire: Yes.

Keiffer: Okay. And this is Appendix B, is that correct?

McGuire: Yes.

Keiffer: Okay. So with respect to basement floor area does this give us our formula as to how we do that math?

McGuire: Yes.

Keiffer: Okay, so I'm going to scroll. What's helpful I think about this code is it gives you visuals for lawyers like me who don't always understand the math. And so isn't it true that we see a house with, doesn't have perhaps a square shape. Is that right?

McGuire: Correct.

Keiffer: Okay. And so here we would see, for example, on the West side of the house, assuming this is, you know, oriented North and South, can we see multiple wall segments on the West side of this example?

McGuire: Yes.

Keiffer: Okay. And why is that?

McGuire: That's just due to the shape of the proposed building walls. In this case, there seems to be some kind of bump out on the West side.

Keiffer: Really, it's on the east side. We've got segment H here. It looks like that wall is counted as one segment entirely, is that right?

McGuire: Yes.

Keiffer: Okay, so if. You didn't have a bump out if you just had a straight line wall you would just have one segment, is that right?

McGuire: Right.

Keiffer: Okay. Is it conceivable that perhaps the square house would have only four wall segments for purposes of this calculation?

McGuire: Yes.

Keiffer: Okay, I'm going to Scroll down here. This is another...does this show us sort of a cross section of a house on a downhill slope?

McGuire: Yes.

Keiffer: Okay. And I can zoom out a little bit here. So here. Where I am, we're looking at wall segment A and you can see sort of down here we like... I'm sorry I'm going to restart my questions. You're not. It's not a coherent question. Okay, wouldn't it be true that this schematic shows us how to measure A wall segment.

McGuire: Yes.

Keiffer: Okay. And so this shows there's a label here or it says midpoint. Can you help fill in kind of what is the midpoint and why would you use it?

McGuire: Yeah, so the this image shows how to calculate the wall segment coverage on a lot that has complex like it says finished or existing grade contours and refers you to the illustration that shows the midpoint of wall segment A and how to calculate that in terms of the amount covered versus the wall height. So you can see that the amount covered there is five feet and the wall height is 9 feet. So 5 divided by 9 would give you the percent coverage.

Keiffer: Okay. And so to go back, so we were looking at sort of hypotheticals in the code. Gonna go back to Exhibit 6, which is the plan set for the actual project here. Okay, Ms. McGuire. Where would we see the basement exclusion?

McGuire: The basement exclusion calculation is on sheet A1.0.

Keiffer: I'm going to zoom in here. Okay. So does this show us the calculations for the basement for exclusion?

McGuire: Yes, it does.

Keiffer: Okay. And does this show that we have 4 wall segments consistent with your testimony regarding a square building?

McGuire: Yes.

Keiffer: Okay. And was this part of your review when you're reviewing the application?

McGuire: Yes, it was.

Keiffer: Okay. And did you just take applicant's word for this or did you check this against other parts of the application materials?

McGuire: I checked against other parts of the application materials.

Keiffer: Which parts specifically?

McGuire: Yes, I looked at the [02:30:00] floor plans for the basement as well as the elevation drawings and the site plan.

Keiffer: Okay. And everything checked out?

McGuire: Yes.

Keiffer: I'm going to pull up exhibits 1013. Doesn't seem to be on in my E plan. Hang on one second, please. Okay, Ms. McGuire, are you able to see my screen?

McGuire: Yes.

Keiffer: Okay. And do you recognize this e-mail?

McGuire: Yes, I do. Okay.

Keiffer: Did you author this e-mail?

McGuire: I did.

Keiffer: But just to confirm, this is an e-mail with respect to a different project than Strands proposed residence. Is that right?

McGuire: Correct.

Keiffer: Okay. Did you agree with Mr. Groves characterization of your e-mail here?

McGuire: I do not.

Keiffer: And why is that?

McGuire: I don't remember the exact scenario for the topic of the window well in terms of calculating coverage, it's possible that the window well could have been its own segment, which would be 0% below grade for that wall segment, similar to kind of the bump out scenario that we talked about in Appendix B.

Keiffer: Okay, so would it be your position that out of context, this e-mail just doesn't apply to the new Strands proposed residence?

McGuire: Yes, I would agree.

Keiffer: Thank you. Okay, I'm going to move on to the side yard issue. Ms. McGuire, were you the staff reviewer for compliance with the side yard setbacks?

McGuire: Yes.

Keiffer: Okay. And can you explain for us how the code treats the variable side yard setbacks?

McGuire: Yeah, variable side and setbacks are applied on wall facades abutting side yards, so the it's relied on the height of the proposed wall façade. If it's over 15 feet for a non gabled roof and then a 7 1/2 foot side yard setback would apply, and if it's over 25 feet, then a 10 foot side yard setback would apply.

Keiffer: And so which side yard setback applied in this case?

McGuire: This would be the east side.

Keiffer: Yes, on the east side. Thank you. So what size side yard setback is required for the east side?

McGuire: Sorry. The wall facade was below 25 feet, but above 15 feet, so 7 1/2 foot side yards set back would apply.

Keiffer: Okay. I'm going to pull up Exhibit 6 again. And Ms. McGuire, where in the plan set would we be able to confirm the elevation of the facade on the east side of the proposed residence?

McGuire: You can see the measurement on the South elevation drawing.

Keiffer: I'm trying to get there, I don't want to waste the party's time watching me scroll through to that drawings. Okay. Ms. McGuire, you will see my screen I presume. And is this the east elevation?

McGuire: Yes.

Keiffer: Okay. Is this where we would confirm the size of the facade, the height of the facade?

McGuire: So the measurement is actually found on the South facade and that you can orient it to this East facade based on the existing and finished grades.

Keiffer: Okay. So I'm scrolling up to the South elevation here. And so where do we measure from? What points on this do we measure from for the facade height?

McGuire: Yeah. So it's measured from the lower of existing or finished grade. In this case it would be finished grade and to the top of the wall facade abutting that side yard.

Keiffer: Okay. And so did you agree with I guess applicant that this is where you measure from? Right here 24, I believe an 11 and some change wall facade?

McGuire: Yes. Okay.

Keiffer: Do you agree with the appellant that there's a cantilever issue here on the east side?

McGuire: I agree that the building is cantilevered. When you look at the east elevation to apply the variable side yard set back, you would apply it looking at that east elevation not from the South elevation where the cantilever is.

Keiffer: Thank you. Okay, let's talk now about the building height railings. Ms. McGuire, did you also review the proposed application for compliance with building height?

McGuire: Yes.

Keiffer: Okay and the discussion this morning, is it accurate to say there's two measures of height, total building height and then the downhill facing facade height?

McGuire: Correct.

Keiffer: So let's start with total building height. Do you remember what the code says about total building height for this case?

McGuire: Yes, buildings are limited to 30 feet from average building elevation to the highest point of the roof, Okay.

Keiffer: And so average building elevation that's different than existing or finished grade. Is that right?

McGuire: Correct.

Keiffer: Okay how do we calculate average building elevation under the code?

McGuire: It's taken using a formula that's in the code using the average building or using the building elevations on each wall facade of the building and taking an average of those elevations.

Keiffer: Okay. And so how did you confirm that average building elevation was calculated correctly for this project?

McGuire: So the average building elevation is for the proposed building and based on existing or finished grades. So we determined that those were all calculated correctly for the proposed residents.

Keiffer: Okay, so what portions of the application would have been reviewed? Presumably ABE shows, or average building elevation, shows up in multiple places.

McGuire: Yeah, the calculation where it shows up on sheet A1.0 in the site plan.

Keiffer: Would there be another way to I guess independently verify that this was correct within the application itself?

McGuire: I'm not sure what you mean.

Keiffer: Okay with the plan sheet also show us you know the elevation sufficient to show us what average building elevation would be?

McGuire: Yes, the calculation the elevation that comes out of the calculation for average building elevation would be shown on the elevation drawings.

Keiffer: Okay. So did staff do a check that way? Would you check the elevation drawings against the plan set?

McGuire: Yes.

Keiffer: And so did you confirm that the railings did not exceed the average building elevation in this case?

McGuire: Correct.

Keiffer: Okay, so let's move then to downhill facing facade. Do you recall, and I can bring up the code if it's helpful, do you recall what the code says about downhill facing facades?

McGuire: Yes, it is measured from the lower of existing or finished grade at the furthest downhill extent of the proposed building and to the top of the wall facade that supports the roof.

Keiffer: And do you recall the max feet of in height for downhill facing facade?

McGuire: Yes, and 30 feet maximum.

Keiffer: Okay. So I'm going to pull up again, exhibit 6. Okay. And so we're looking still at the South elevation is that the portion of the home that's the downhill facing side?

McGuire: Yes, that's the furthest downhill extend.

Keiffer: Okay. And so when would we measure the facade height on this drawing?

McGuire: So be measured from the lower of existing or finished grade. In this case it would be finished grade at the finished grade to the 26.47 elevation.

Keiffer: Sorry, I don't know what happened to you. Now scroll up. Okay. So approximately here, is this where you would start?

McGuire: Lower at the bottom of the stairs.

Keiffer: The bottom. Okay, so right here. So we start measuring here. How far up do we go?

McGuire: And then we go to where that wall façade supports the roof framing.

Keiffer: Okay. And so where on this drawing would that be?

McGuire: It would be up to above those windows a little bit above the windows.

Keiffer: Okay so here this is where you stop measuring.

McGuire: Yes.

Keiffer: Okay. Why would you stop measuring there?

McGuire: When we look at the section drawings which is on the next page down, we can see where the roof framing is for the elevation. There you go. And so that measurement is where that wall supports the roof of the home.

Keiffer: So is this the roof, Ms. McGuire? Right here.

McGuire: Yes.

Keiffer: Okay, I see. So this is where we stop for downhill facing façade? Okay.

McGuire: Yes.

Examiner: Could, could I ask a question?

Keiffer: Absolutely.

Examiner: Would that elevation correspond to the top of the top plate of the wall?

McGuire: Yes.

Examiner: Yeah. Okay.

McGuire: Okay.

Keiffer: I am going to pull up your code we've been discussing. Just a second. Okay, Ms. McGuire, are you able to see my screen?

McGuire: Yes.

Keiffer: Okay. So at the tallest position that is that railings would not be included for downhill building facades. Or are included—I'm sorry—in downhill building facades. Is that right?

McGuire: Yes, that's how I understand it.

Keiffer: Okay. Was that staff's position in this case?

McGuire: No, it is not.

Keiffer: Okay. And why is that?

McGuire: So the rooftop railings, it says in the code there that it may they may not extend above the maximum allowed height for the main structure, which appears to be different than the maximum building facade height on the downhill elevation and the maximum building height is based on average building elevation to the highest point of the roof, whereas the facade is where the wall supports the roof framing.

Keiffer: And so again, did you confirm that the proposal has rooftop railings that do not extend above the maximum allowed height for the main structure?

McGuire: Correct.

Keiffer: Okay. And then finally, Ms. McGuire, [02:45:00] I'm going to address with you the rockery or the shoring wall issues. Are you familiar with Mr. Groves' alleged assignment of error with respect to the shoring wall?

McGuire: Yes.

Keiffer: Okay. And first, can you just help clarify for the record here, what is proposed with respect to rockeries or shoring walls like how many walls are proposed?

McGuire: One wall, one shoring wall is proposed.

Keiffer: Okay. And where on the site is that proposed to be.

McGuire: On the western side, kind of going down to the South.

Keiffer: Okay.

Examiner: Just a point of clarification, isn't there also a shoring wall on the East property line?

McGuire: Yes, there is a temporary shoring wall.

Examiner: Totally unrelated, totally unrelated to the one on the West, but don't the plan show one on the East property line?

McGuire: Yes, there are several retaining walls shown on the east property line.

Examiner: Okay, so there's more than one retaining wall shoring wall in the project.

McGuire: Right.

Examiner: But we've all been talking about the one in the West?

McGuire: Yes.

Examiner: Okay, sorry to interrupt.

Keiffer: Thank you for the clarification. And So what does the code say Ms. Maguire, with respect to how tall shoring walls can be?

McGuire: Shoring walls are limited to 72 inches on fill slopes in required yards.

Keiffer: Okay. And so is the Western property shoring wall a fill slope?

McGuire: Yes.

Keiffer: And so do you agree with Mr. Groves appeal that you have to include within those 72 inches the locks on the existing slope of the property?

McGuire: I do not agree with that.

Keiffer: And why is that?

McGuire: The rocks on the West side of the property were determined not to be a wall and so they would not be included in that multiple retaining wall height requirement or measurement requirement in the code.

Keiffer: Okay. Does the code otherwise have you I guess stack walls or rockeries for purposes of the height measurement?

McGuire: Yes, there is a code provision that requires you to count multiple retaining walls if they are separated by a certain degree of separation.

Keiffer: I'm looking through my notes here. One second. So Ms. McGuire, with respect to I guess the entire thing with respect to the whole project in your review, would you

say that—how would you characterize your review of you took not very much time, medium amount of time, large amount of time? How long did this review take you?

McGuire: This review took a large amount of time compared to other building permits.

Keiffer: Do you have an estimate of maybe it takes twice as long three times as long?

McGuire: I would say that most building permits that I review take anywhere from four to six months. Obviously, this one took over a year and a half.

Keiffer: And you carefully studied Mr. Grove's appeal in this case, in preparation for today. Is that right?

McGuire: Yes.

Keiffer: Do you agree with any of Mr. Grove's appeal? Do you think you made any errors on this building permit application?

McGuire: I don't.

Keiffer: If you had read his appeal and concluded that you did make a mistake, would it be your testimony that it that it was a mistake?

McGuire: Yes.

Keiffer: But despite Mr. Grove's testimony and his appeal, you feel confident in staff's permitting decision here?

McGuire: I do.

Keiffer: Okay. And finally, Ms. McGuire, based on the discussion this morning, are there any other aspects of your review of this building permit application that you specifically want to mention that I didn't ask you about.

McGuire: No, I think we covered everything.

Keiffer: Thank you. Those are all the questions I have.

Examiner: Thank you, Ms. McGuire, and thank you, Ms. Keiffer. We have a choice. It's 12:00. We could take our lunch now. We took our mid morning break at 10:30 which was an hour and a half into the hearing. If the parties want to go for say another half hour and get at least some of the cross examination of Ms. McGuire and I'd be happy to do that. Let me start with Mr. Davison cause he's the one who's gonna get across first. Do you wanna do lunch now or do cross examination now?

Davison: We prefer lunch now and just one clarification. My associate, Gabrielle Guerin will be doing the cross exam of Ms. McGuire.

Examiner: Very good. Just for everybody's notation. My theory always has been if a person's represented by more than one counsel, they can split cross examination between the counsel, but you can't what I call tag team. In other words, if she starts, you don't get to finish it unless something physically happens to her during her cross examination. And you're all that is left. Okay. I have 12:01 PM. Do you want to take an hour or just 45 minutes? What's the sentiment?

Davison: 45 is good with us.

Examiner: 45, Okay?

Lawyer: Fine with us.

Examiner: Okay. Then we stand at recess until 12:45 PM.

[Lunch break]

And we are recording.

Examiner: Thank you and good afternoon. This is the afternoon continuance. Excuse me. How do I kill that? This is the afternoon session of our May 9, 2024 hearing in case APL24-002. We are beginning cross examination of Ms. McGuire by Ms. Gurian, Mr. Davison's associate. Ms. Gurian have at it.

Gurian: Right. Good afternoon. I'm going to check just to make sure we don't have an echo there.

Examiner: No.

Gurian: Okay.

Examiner: At least not one that I can hear.

Gurian: Great. Ohh maybe. Okay. Hi, Ms. McGuire. Great to meet you. My name is Gabby Garian and I represent the appellant, Dan Grove in this case. I just had a few questions for you based on your testimony. So I'll get started. Just generally, you had mentioned that you've been a planner with Mercer Island for roughly 2 years. Is that right?

McGuire: 2 and a half, yes.

Gurian: 2 1/2 awesome. How many residential permits have you processed during that time, do you think?

McGuire: I honestly don't think I could come up with a number.

Gurian: Okay.

McGuire: An accurate number.

Gurian: How many do you think you do a year?

McGuire: And again, I don't know if I could come up with an accurate number. I know that I have probably 10 to 15 on my desk at any given time. They all take different lengths to process.

Gurian: Okay. Thank you. So would you say more than 50 more than like a hundred a year or?

McGuire: 50 sounds more accurate.

Gurian: Okay. I was wondering, do you ever do site visits for during your reviews or?

McGuire: I do occasional site visits, mostly for shoreline development.

Gurian: Okay. Did you do one here for this appeal?

McGuire: I did not.

Gurian: Sorry, this permit. Okay. So you haven't seen the site in person?

McGuire: That's correct.

Gurian: Okay. Okay. I just wanted to jump into a couple questions based on the issues raised in the appeal. First, starting with existing grade. So, during your direct examination, you were asked a series of questions related to the interpolation issues. Is that right?

McGuire: Yes.

Gurian: And you mentioned you were familiar with the Grove One decision. Is that right?

McGuire: Yes.

Gurian: Okay. So from your testimony, is it correct to say that the city agrees with the applicant's use of interpolation in this case?

McGuire: Yes.

Gurian: Okay. So I just wanted to confirm—was going to pull up I believe it's exhibit 2001 on page 6. I will share my screen here. Okay. Can you see that okay?

McGuire: Yes.

Gurian: Okay. Just confirming, you see the appeal?

McGuire: Yes.

Gurian: Okay. And looking at page 6. It notes that all of these average of elevations, as noted on the site plan are based on the survey data and interpolations of existing grade where the structure contacts the ground. Is that right?

McGuire: That's in a sense, yes.

Gurian: Okay. And so that's the position the city is taking here, that that's correct.

McGuire: Yes, I believe so.

Gurian: Okay. Going to stop sharing there. Okay, so I'm going to move on to the rooftop railing issue real quick. And so do you agree that the lot for this site is sloping?

McGuire: Yes.

Gurian: All right. Okay. And so you mentioned earlier that even for sloping lots, the maximum building facade height, it can't exceed 30 feet, is that right?

McGuire: From existing or finished grade, whichever one is lower to the top of the wall facade supporting the roof, yes.

Gurian: Okay. And here you did determine that that height was less than 30 feet.

McGuire: Yes, I don't know the exact measurement. I believe it was less than 30 feet.

Gurian: Okay. So the existing grade or finished grade, whichever is lower, to the top of that downhill sloping facade height to the rooftop railing—that was less than 50, or sorry 30 feet? If that makes sense.

McGuire: To the top of the wall facade that supports the roof framing, that was less than 30 feet.

Gurian: Okay. And you determine that by looking at the—sorry, can you confirm the finished grade, the existing grade or based on looking at the average building elevation?

McGuire: I'm sorry, I don't—what Code Section are you talking about? Are you talking about maximum building height or the downhill façade height?

Gurian: Yeah, I guess what I'm trying to do here, I'm just gonna share the code section here real quick. What I'm trying to do is [03:00:00] understand what the city...so you had some testimony earlier about we're looking at this code, section 1902020 Section E on building height. And the questions were about looking at either the maximum building facade height or the sorry, the maximum building height, and then we also had this section about maximum building height on downhill building facades, right?

McGuire: Right.

Gurian: Okay. And so the appellant's position is that this section E2 should have been applied. Is that right? Or is that your understanding?

McGuire: That's my understanding.

Gurian: Okay, but the city's position is that this Section 1 we're looking at just the maximum building height based on the average building elevation to the highest point of the roof. Is that right?

McGuire: In relation...

Gurian: When we're looking at the rooftop railing issue.

McGuire: Yes, the railing cannot exceed maximum building height.

Gurian: Right. Okay. And the city is measuring from the average building elevation to the highest point on the roof. That's what I'm trying to understand, because earlier you said.

McGuire: Earlier I thought you were talking about downhill facade height because you said it was at the downhill of the sloping lot and was measured from below wherever existing or finished grade to the top of the wall façade supporting the roof. I thought we were talking about downhill facade height.

Gurian: Okay, apologies for confusing that. I guess what I'm trying to do is understand the city's reasoning for applying E1 here instead of E2?

McGuire: Both E1 and E2 apply for building for the proposal. Are you saying in relation to the railings?

Gurian: Right.

McGuire: So what's the question?

Gurian: Okay, so in relation to the railings? It's, I guess, correct me if I'm wrong. It's my understanding that the city determined that the railings did not exceed the maximum height limit because we were looking at the average. We were measuring the building height from the average building elevation.

McGuire: The railings did not exceed the maximum building height measured from average building elevation to the highest point of the roof.

Gurian: Okay. And so, apologies for going in circles here, perhaps, but is it true that? So the city is looking at that maximum height of the rooftop railings. Based on the average building elevation and I think earlier we were talking about this section. Or here give me one second. I might have shared the wrong item. Apologies, so give me one sec. I want to make sure I have the right section I'm thinking of. Okay, so I think that is right. I was pulling up the code here but okay, so in looking at this.

Did you see—I guess the question is, did you analyze when you were looking at that, this subsection 3, do you see here that Subpart 3 actually does refer to subsections E1 and E2?

McGuire: Yes, I see that.

Gurian: Okay. And so earlier I heard your testimony to focus on the maximum building height. Just based on E1. But this section is focused on, I guess correct me if I'm wrong, but this section is focused on the items that could exceed. The maximum could go above the height limit allowed for the main structure. And that main structure is detailed in both sections E1 and E2. Is that correct?

McGuire: Yes.

Gurian: Okay. And does that change or inform your analysis at all? From previously.

McGuire: It does not change my analysis. I think the maximum allowed height for the main structure is clearly detailed in E1. E2 is a maximum height dependent on the facade that goes to the top of the roof framing.

Gurian: Okay. But isn't it true based on this language that 3B applies equally to E1 and E2? So it's talking about the height allowed for the main structure in subsections E1 and E2.

McGuire: I do see that it calls out E1 and E2 for the similar appearances, extending a maximum of five feet above the height.

Gurian: Okay. So. That's a yes, right?

McGuire: Would you restate the question?

Gurian: That subsection E3 applies equally to subsections E1 and E2. Based on your understanding?

McGuire: Yes.

Gurian: Okay. Gonna stop sharing. Okay, so I think of those are the main questions I had on the issues kind of just wanted to ask you generally based on your experience as a planner. So you had mentioned I guess ask you a bit about timing. So you had mentioned that this project took longer than others, is that correct?

McGuire: Yes.

Gurian: Okay. And I think you had mentioned or? Or maybe it was in the record itself that it had taken roughly a year and a half, two years?

McGuire: And the original application date was in July of 2022.

Gurian: Okay. Is there a time frame that the city is supposed to process applications in or is there a time frame that it times out or hits a limit?

McGuire: There are expiration dates for inactivity, and this permit was active and being worked on the entire time.

Gurian: Okay. When these applications take a really long time, do planners or do, did you feel any pressure to move it forward? Do you get pressure? Internally or from applicants?

McGuire: We are always trying to process the permits in a timely manner. But there are no code provisions requiring permits to be processed in a certain amount of time.

Gurian: Okay. So you spoke a bit about just going more into that, the process, the revisions kind of the level of care and reviewing this plan set. So regardless of the number of revisions to the plan set, if there are errors in them is it your opinion that they should be corrected?

McGuire: Yes, they should be corrected to meet the code.

Gurian: And regardless of the number of comments from the applicant or from others, those errors should be corrected as well, correct?

McGuire: I'm not sure I understand the relation between comments from the applicant in terms of Corrections.

Gurian: Yeah. I guess just if there's similar point that you know, depending on even if there's a bunch of comments from the applicant or from others outside, if there are true errors in the plan set, those should be corrected.

McGuire: Are the comments saying that they shouldn't be corrected?

Gurian: No apologies. We can move on, I guess regardless of the amount of time that the permit or the plans will take to approve or review any errors within them should be corrected, correct?

McGuire: Yes.

Gurian: Okay. And is it also true or would it also be your opinion that provisions of the code should be applied uniformly across projects?

McGuire: Yes.

Gurian: And if someone needed to deviate from the code there are specific processes for that that wouldn't be able to be done within the permit process?

McGuire: Yes.

Gurian: Okay. And would you agree that any changes to the code should be legislated and go through that type of approval process that can't be done through the permit process?

McGuire: Code amendments have their own separate process, that's correct.

Gurian: Okay. So yes, to be your answer?

McGuire: Yes? Are you? If you're talking about amendments to the code or amendments or variations from the code for a project.

Gurian: I guess both. If you're trying to deviate from the code within a project or amend the code itself.

McGuire: Those are two separate processes, yes. So there's a variance process. And then there's a code amendment process.

Gurian: Right. And so an applicant would need to apply for a variance process in order to deviate from the code.

McGuire: Yes.

Gurian: Okay. That couldn't just be done affirmatively?

McGuire: Right.

Gurian: Okay. Just going to check...I think that's all the questions I had, so thank you.

Examiner: Thank you. Mr. Lawyer, do you have any cross examination questions?

Lawyer: A little bit. Ms. McGuire, I think you said that you were not sure how many iterations of the application were made. If I suggested to you that it was 7 revisions, does that sound approximately correct?

McGuire: Yes, that sounds...we'll get that, yeah.

Lawyer: And just for the benefit of the listeners here, would that process be one in which the city, through its evaluation, goes back to the applicant and says, hey, either you did this wrong or we need more information or you forgot a step, so fix it and bring it back to us.

McGuire: Yes, that is how we do our review for reference.

Lawyer: Okay. And if you are ever at a point where you ask the applicant to change the application in some respect in order to be code compliant, would you always refrain from approving the permit until the applicant has complied with your request?

McGuire: Yes.

Lawyer: You talked a little bit about this question of existing grade, which we have talked about quite a bit already today and you made reference to Mr. Harper's opinion. And then this question of, you know, interpolating elevations. Were you ultimately satisfied that the elevations shown on the application by Ms. Strand were compliant with the calculation of existing grade as these administrative interpretations applied to projects where you do not have ancient survey data?

McGuire: Yes, that's correct.

Lawyer: You were asked just a few moments ago about whether you believe it's important or whether it's the city's policy to apply its code provisions uniformly across various applications. Is the interpretation given to the elevation considerations in this case consistent with the interpretations, as far as you know, of these administrative interpretations we're considering elevation our existing grade elevations in other projects?

McGuire: Yes, I believe so.

Lawyer: Are you aware of any other applications where someone was proposing to demolish an existing structure and build a new one in this place?

McGuire: I couldn't name specific projects, but yes.

Lawyer: Are you aware of any instances in which the city, either on its own or by direction to the applicant, said, go figure out what the elevation of the dirt is below an existing structure before we're going to process your permit?

McGuire: I am not aware of that specific circumstance.

Lawyer: With regard to the basement exclusion area, is the approach that was used by the applicant in this case where a single wall on one plane wound up being one wall segment for purposes of calculating the grade and the portion of it that is below [03:15:00] the lower of finished or existing grade?

McGuire: Yes.

Lawyer: Have you ever processed any permits in which a wall that is not jogged or jagged was broken up into more segments for purposes of making that calculation?

McGuire: Yeah.

Lawyer: I don't want to beat a dead horse, but on this issue of, you know, the interplay between the maximum building heights and the downhill facade height, are we measuring two different things between those two different subsections of section 020?

McGuire: Yes.

Lawyer: If you know, what's the purpose behind imposing a maximum facade on the South or excuse me on the downhill facing facade of a structure.

McGuire: I don't think I can speak to the intent of the code in that respect.

Lawyer: Okay. With regard to the subsections that deal with, I'll call them protrusions that are allowed to exceed the maximum height, do you understand that subsection to be saying that certain kinds of features of construction can extend as much as five feet above the what would otherwise be the maximum?

McGuire: I believe that's correct.

Lawyer: Yeah, and that would include antennas and chimneys and you know miscellaneous construction.

McGuire: Yes.

Lawyer: Okay. But at the very bottom of that section, we have a subsection that says when it comes to rooftop railings, they cannot exceed the maximum building height of the main structure. Do you know of any instances in which that analysis, the analysis of a rooftop railing, was applied to the downhill building facade measurement?

McGuire: I can't think of any instances.

Lawyer: And does it sound like common sense to say that if the downhill facade measurements stops at the point at which the exterior wall meets the roof framing any rooftop railing would have to be well above that top location?

McGuire: Correct.

Lawyer: Okay. Did you hear this morning, Mr. Grove's testimony that in this appeal he is not quarrelling with the average building elevation calculations that were done for this project?

McGuire: Yes.

Lawyer: And if we are referring to the subsection of the maximum building height, dealing with the main structure. Would that indicate that Mr. Grove does not quarrel with the city's determination that the main structure is in compliance with the maximum building height?

McGuire: Yes.

Lawyer: And would that, per the plans, include the rooftop railing?

McGuire: Yes.

Lawyer: You may have heard some testimony from Mr. Grove on cross examination by me about a page within the plan set that shows a cross section of the West shoring wall. Do you remember that?

McGuire: Yes.

Lawyer: Okay, I'm gonna try and screen share here. The plan set and I have found and now I am looking at the plan set that is stamped so we won't have to worry about. That part of the puzzle. Okay. Do you see it there?

McGuire: Yes.

Lawyer: Okay. Referring your attention to the upper left-hand illustration of the set here, do you agree that this is a cross section of the proposed shoring wall that is depicting that portion of it that would be exposed on the downward side?

McGuire: Yes.

Lawyer: Did the city evaluate the vertical height of that structure in processing this permit?

McGuire: Yes.

Lawyer: Did you find it to be in compliance or out of compliance with the maximum height allowance of a retaining wall?

McGuire: It was in compliance.

Lawyer: Okay. You were asked on cross examination a few minutes ago whether an applicant who is—where errors are called to an applicant's attention that they need to be corrected. Is that roughly accurate?

McGuire: Yes.

Lawyer: In this particular application, were there any errors or incomplete items that were called out to the applicant that were not corrected?

McGuire: No.

Lawyer: If a member of the public, a neighbor or some other interested person writes to the city and complains that a proposed application in fact violates the code, but if your office decides that person's wrong, do you instruct the applicant to correct the application to comply with a request by a member of the public to just make it different, even though you don't agree?

McGuire: No.

Lawyer: Were there aspects of Mr. Groves's complaints prior to this appeal where you simply did not agree with his assertions and therefore did not ask the applicant to make changes consistent with his assertions?

McGuire: Yes, the comments were reviewed and if changes were needed to be made then they were asked of the applicant.

Lawyer: Can you think of any changes that were requested of the applicant where the origin of the request came from some member of the public in comment versus some internal review by city folks?

McGuire: It's possible that there was overlap with comments coming from the city with the public comments, but there were no comments from the city solely based on public comments received.

Lawyer: Did the applicant in this case, based on your experience, appear to be fairly cooperative with the city's requests and compliant with the city's requirements?

McGuire: Yes.

Lawyer: No further questions.

Examiner: Thank you. Before asking Ms. Keiffer if she has any redirect I have a few questions that I wrote down as I was going through the materials. Frankly, most of them are trying to help me better understand what some of the exhibits are and Ms. McGuire, I figure you may be the best of our potential witnesses today to help me with that. So, if you don't mind. Exhibit—and I am not in a position to screen share with you folks. I could explain it, but it would take too much time, but I can't.

Keiffer: And Mr. Galt, I'm happy to screen share if you if call out the Exhibit number I'm happy to pull them up.

Examiner: Okay. Thank you, miss Keiffer. I think at least the first one can be answered without that Exhibit 4. In the catalog listing, residential conditions of permit approval. Is that—this is my word, not the cities, is that not a boilerplate document, essentially?

McGuire: Yes.

Examiner: Okay. Next question. Explain what SUB1, SUB2, SUB3, SUB4 mean. Sub one, sub two, sub three, sub four. There's all kinds of references to it. For example, the references to one or more of those acronyms show up in exhibits 7, 11, 13, 14, 15, 16, 24, 26, 29, 32, 35, 37, 94, 95 and 96. I'm guessing maybe it means submittal 1, 2, 3 and four, but I don't know, so I don't want to guess. What's sub one?

McGuire: Yes, SUB1 would be the first submittal of the building permit.

Examiner: Okay. And this is probably going beyond what I really need to know, but just so I get it, when you folks do all of these reviews that you've talked about in your prior testimony. When you finished a review, do you send comments to the applicant.

McGuire: Yes.

Examiner: Telling them what you want them to change? What you think? Not so much what you want them to change, but what you believe they have to change to comply?

McGuire: Yeah, we send a link to a shared document that contains comments from all review disciplines.

Examiner: Okay. And when you when you send out the first thing is that reference to cell one?

McGuire: Yes.

Examiner: So when they come back with new stuff and you review it again, if you send them another letter is that referenced as relating to SUB2?

McGuire: Yes.

Examiner: That's how it works, okay.

McGuire: Yep.

Examiner: My guess was right, but I just wanted to know. This is one you may not be able to help me with. It may just be a scribner's error somewhere along the line. The catalog listing of Exhibit 7, which is a copy of SUB1 plans. That's what it says it is. List its date is May 27, 2021. However, when I opened the exhibit the first page of it in the preparers legend material off on the right hand side of all the pages where they issue list the date that it was prepared and the date of any revisions and all that good stuff—that show March 21, 2022. So the date on their plan is about ten months later than the date that the catalog says the document was submitted. I know that can't happen, so I'm just wondering.

Keiffer: Mr. Galt, just for my clarification, when the Examiner says the catalog, does that mean the City's?

Examiner: The city's exhibit list. I should have made that clear, the city's exhibit list says it was dated May 27th of '21, but the document itself shows a revision date of whatever I said...March 21, 2022. Should I count that date as the more accurate one?

McGuire: The revision date would be the more accurate one I believe.

Examiner: Okay. Exhibit 62 and 68 are both plan sets dated June 2nd, 2023. Is there a difference? I mean, the plans are like 13, 14 pages with zillions of details and I just decided I was not going to try and sort through and figure out what might have changed. Are they just duplicate copies of the same thing?

McGuire: It's possible that they duplicate copies of the same thing. The approved plan set is exhibit 7.

Examiner: Okay. Exhibit 7?

McGuire: Oh, sorry. Exhibit 6, yes.

Examiner: Yes. Exhibit 7 is the SUB1 plans.

McGuire: Yes.

Examiner: Okay. [03:30:00] How are exhibits 3, the cover sheet, Exhibit 6, another copy of the cover sheet and exhibit 41, another copy of the cover sheet different? Let me rephrase that entirely. For purposes of knowing what's been approved is the only one of those three that I need to worry about the one that's part of Exhibit 6?

McGuire: Yes.

Examiner: Okay, so I'll ignore the others. Unless I'm curious for some historical thing. Same kind of question regarding exhibits 49 and 69. And these do have different numbers on them and they've got different colored typing in the blanks that were filled in. Exhibit 49 is site development information worksheet. Exhibit 69 is site development information worksheet. If memory serves me correctly, at the top of them, neither one of them has a date on it so. Which one's newest, which is relevant, which is irrelevant. Can you help me out?

McGuire: Yeah, the site development worksheet was updated several times throughout the review process as far as...I would need to confirm and compare the number to the numbers that are on the approved plans themselves to know which one corresponds to the approved plans and which one is the most accurate. All the information that is on the site development worksheet is in the proposed in the approved plans though.

Examiner: Okay. Exhibit 49 says it's July 4th. And I can't for the life of me believe that the city was actually open on July 4th to receive anything from anybody and then 69 says that that one's May 11th of 2022, so. The one with the higher exhibit number is the one with the earliest date, so I just didn't find any logic in it and I didn't know what to trust.

McGuire: Yeah, the dates on the site development worksheets are put in by the applicant when they prepared that worksheet.

Examiner: Okay. Thank you. Yeah. I don't know that you know the answer to this one. This is 1 Ms. Keiffer I think I'm going to take up your offer. Could you share exhibit 12 with us.

Keiffer: Yes, indeed.

Examiner: And I think it's a two page document and I'm interested in the second page. If my memory serves me correctly, the first page is just a transmittal e-mail and the second page is actually the...yeah. Let's go to the second page. And you'll probably have to shrink it some to get it on the screen.

Keiffer: Indeed.

Examiner: This is the DR Strong survey. While she's bringing it up, what I'm trying to make sure I understand correctly is the relationship of the items on this survey to the subject property. Can we—I hate to ask you to shrink it a little bit more but there we go. I note that down in the essentially right hand corner, we have the North arrow, so that tells me that North on this diagram is off to our right. And I see 72nd Ave. listed going across the bottom and that is a north-south Street. So as I look at this, I'm tilting it and what I'm trying to make sure I understand correctly is where the subject property 6950 Maker is relative to the things in this picture this survey drawing. There is just up and to the left of the north Arrow a notation within that pair of straight lines that says Conc. Drive. Is that drive what is now referred to as 35th St.? And then is the building, which is only partially visible in the left center that says existing house basement floor level 227.6. Is that the subject house is that the old Strand? The old house on the Strand property?

McGuire: So this survey document lists admitted as part of a public comment from one of the neighbors, and I do believe that because of the lack of information and ability to orient the subject, property was one of the reasons that this wasn't able to be used to determine existing grade.

Examiner: Okay. So you folks gave up before I did?

McGuire: It would seem that way.

Examiner: It would seem. Okay.

Davison: Examiner Galt, Mr. Grove has a couple of additional comments on this page if...yeah.

Examiner: Mr. Grove, if you can confirm or improve my understanding of directions and places, I'll take your testimony now. I don't want you to get into. I don't want you to get into testimony about extrapolating terrain. Anything like that. Just am I right that that concrete drive is now shown on maps as 35th and the house in the center left that says existing house, basement floor elevation 227.6 is the old house on the Strand property.

Keiffer: Mr. Galt, before we start, I don't know that we have a foundation. Essentially, what's being asked of Mr. Grove is expert testimony. As far as I know, he didn't submit this survey. I have no reason to understand why he would have any knowledge as to what this survey shows.

Examiner: I'm only listening to his testimony cause he lives in that area.

Grove: Yes, this, this survey was done for the house that doesn't exist right now. That's immediately to the right of the Strand House on it. And that is the Strand House on the left and 35th on the that is the concrete drive. You are correct.

Examiner: Thank you. Back to Ms. McGuire. I'm talking about for measuring facade height for side yard setback purposes. If the grade along the side yard wall is not level if it tilts one way or another or goes up and down has high points, low points, at what point along that wall do you measure to see if it's a 25 foot high wall or less.

McGuire: So it would be mostly at the tallest point. Once it drops down past that brush and we can jog side yard setbacks so, if it goes past the threshold or below the threshold, then the variable side yard setbacks might not apply anymore.

Examiner: Well, let's take a simple one. Let's say the slope along the side wall of a house has an elevation drop of 10 feet over the length of that wall and at the high point, let's say the wall is 23 feet high, which would mean that the low point would be 33 feet high. At which point does the city...how do you measure? Life is simple. If it's a straight line.

McGuire: Yes.

Examiner: And if it's slopes going in another direction, it doesn't matter for the side yard count. But what if the side yard is sloping? That's what I'm trying to understand.

McGuire: Yes. Once it hits 25 feet, as you're going down that facade, that's where the 10 foot side yard setback would be enacted.

Examiner: Okay. So it's measured basically at every point.

McGuire: Right. Yes.

Examiner: On the wall. Okay. Yeah. Code section 19.02.020 sub E2 is quote furthest downhill extent of proposed building unquote the lowest point. of the downhill side. So again, if the lot is sloping is that what it means? The furthest downhill extent of the proposed building? Would that mean the lowest point along that wall, or the part of that wall that's furthest downhill, irregardless of the slope?

McGuire: So I think we also need to take in the first part of that sentence, which is the lowest of existing or finished grade at the furthest downhill extent of the proposed building. So however far the building goes down right where that wall meets the ground at the lower of existing or finished grade is where the furthest downhill extend is.

Examiner: Now in the case of this proposed structure we've had testimony that the property slopes both from east downhill to West and from North downhill to South. How did the city determine? Which was the furthest downhill extent when it's sloping in two different directions?

McGuire: Yeah, I believe it was the southeast corner that was...or southwest corner, sorry, that is the tallest possible downhill extent of that 30 feet.

Examiner: And that's because the driveway is cut into the ground.

McGuire: Yes, that's correct.

Examiner: Okay. Got it. I think I understand your position on the railing and the facade height. The facade height question, correct or not correct, would only apply in this case to the South face of the building. Is that facing the street. Is that right?

McGuire: That it applies to the downhill facing facade, which is the southwest corner of the building.

Examiner: I would argue that a corner is not a facade.

McGuire: Right. When you go walk along the corner to the West, no portion of that exceeds the 30 feet. So we took the measurement from the South facade which would be the tallest possible on the downhill side.

Examiner: So no portion of the West wall. Is greater than 30 feet?

McGuire: Right, to the top.

Examiner: If one were to count it, including the railing.

McGuire: I am not sure. We looked at it to the top plate, so I...

Examiner: And your interpretation of E1, 2 and 3 in that code section is if I'm getting it correctly, E1 pertains to building height where we're measuring from the average grade, finished, you know, let's forget about all that lingo, but we're measuring the building from a point called the average grade. SUB2 he's talking about facade. And that's measured differently. It's not measured from the average, right. And then I think it's the one that comes after that talks about having to comply with both one and two. But then you go down a little lower and there's the one liner about railings. So even though that section starts out you comply with one and two, community planning and developments position is that doesn't refer to well the part about the railing does refer to it, but you don't have to comply with both of them, because the railing. Is having to do with a facade height issue, not an overall building height issue. Is that right?

McGuire: I believe so. All railings, all rooftop railings would be above the wall facade supporting the roof.

Examiner: Okay. And so, since we're measuring a facade, you're saying that all the rules about the facade basically end at the top plate of the wall. That's the upper limit. For consideration is the top plate. That's an easier one for me to think than this structure holding up the drafters and all that jazz.

McGuire: Yes.

Examiner: To me, it's the top plate and the roof stuff sits on top of the top plate.

McGuire: Right, yes. Could you restate the question? I'm sorry.

Examiner: No, but I'll say a different one. I don't know that I could restate that. Is it CP and D's position then that the rooftop railing does not factor into compliance with the facade height rule because it is physically above the upper limit of measuring what's called a façade?

McGuire: Yes.

Examiner: Okay, you've helped me out a great deal. Thank you. Does Ms. Keiffer have any redirect?

Keiffer: I do not have any redirect.

Examiner: Okay. Does the city have any additional witnesses?

Keiffer: Ms. McGuire is our sole witness. Thank you.

Examiner: Okay. Thank you. We can then turn to our applicant. Mr. Lawyer, do you have any witnesses.

Lawyer: Thank. Well, we're going to have two and we'll start with Ms. Strand and then we'll move on to Jeffrey Almeter, the architect and co-applicant.

Examiner: Okay. And is that she sitting beside you?

Lawyer: Exactly right, yes.

Examiner: Okay. Then would you raise your right hand please? Do you swear or affirm that the testimony you'll be offering in this hearing will be the truth, the whole truth, and nothing but the truth?

Strand: Yes.

Examiner: Thank you. Now you may need to speak up a bit. I don't know where the mic is that you two are using, but your answer was a little bit weak for my taste.

Strand: Okay. Is that better?

Examiner: How was your name and? How to spell it please?

Strand: Dorothy A. Strand. D-o-r-o-t-h-y. A. S-t-r-a-n-d.

Examiner: Thank you, Ms. Strand. Your witness, Mr. Lawyer.

Lawyer: Dorothy, can you give us your current residence address?

Strand: I'm not living in 6950 Maker, as all the utilities have been turned off, so I'm living in a rental on Mercer Island.

Lawyer: The address of the property that is the subject of this appeal, which is not the location where you currently reside, has what address?

Strand: 6950 SE Maker St.

Lawyer: And are you the fee title owner of that property?

Strand: Yeah until the name of my family trust.

Lawyer: Okay. I don't need the exact date, but what year did you acquire title to that property?

Strand: 2021.

Lawyer: Okay. And describe from your recollection the process by which it came to your attention that the property was available for sale.

Strand: I've been a Washington state certified appraiser for 23 years, which is the highest level of residential appraising, and I was interested after moving in as a rental, a renter when I was building a home in Queen Anne and when I looked up to see who owned it, I saw that it was titled incorrectly. The estate had never been settled. The owner had passed away about seven years earlier, and so I contacted the landlord, whom I was paying rent to and told him that I was interested in buying. And without obviously wasn't listed in MLS, of which I am a member again for 23 years. So I'm very familiar with how MLS works and all of the county records. I have a private database that I have to subscribe to as well for my job. That's separate from the county records and separate from MLS and I gathered all the information. I ran my comps and I made an offer and at that point the Landlord responded that he had another offer and that was from Mr. Grove, and then at that point, I'm not a realtor, and I obtained the services of a realtor and then we drafted another contract on MLS forms. Instead of just an off market memo and I purchased it that she then contacted the Landlord and I purchased it.

Lawyer: And I think you've testified that your purchase occurred or closed in 2021.

Strand: Mhm.

Lawyer: Okay, so what brought you to making the application that eventually became the subject of this appeal? I mean, when did your plans meld to the point of proposing to demolish the existing structure and build a new one on the same lot?

Strand: Well, one of the requirements of Mercer Island is to have a pre-construction meeting and Jeffrey and I had that zoom meeting. This is during COVID so everything was Zoom at the time. Jeffrey and I had that meeting in August of 2021 with a planning director who's no longer with Mercer Island and our initial steps, so when you do a pre-construction meeting, it's very loose and you're just proposing very informally, I would like to build a garage. I would like to, you know, it's very informal and I wanted to put on a second story. And so and we had other

questions, this is '21. So this is three years ago. We had other questions about I think could we have a bigger garage or move the garage? There was a lot of other questions that we have, but we were told that since the home was built without permits and before the city was incorporated that they could and it, and it sits grandfathered. It's too far back and the rare set back that the whole house would have to be demolished if I wanted to do anything to it at all. And so after that meeting with the city in August of 2021, at the pre-construction meeting. That's when everything had to change.

Lawyer: So when you eventually decided to make application for demolition and construction of a new structure. Did you from the beginning of that process, have Mr. Almeter engaged to assist with the application?

Strand: Yes.

Lawyer: Okay. And did you engage other professionals besides Mr. Almeter to assist in aspects of the application?

Strand: The first thing I did within 30 days, maybe even less of purchasing the property was I had it surveyed by Terrain which is third generation surveying company and they told me that they had—I had used them on two other homes that I'd lived in—and they told me that they had surveyed through this multi generational time, most of them are [inaudible 03:55:40], so I felt very comfortable hiring them again. So the first thing I did was do this survey, then I hired Jeffrey and then from there you know I've hired two different structural engineers have contributed to the project, two different civil engineers have contributed, I think 2 geotechnical engineers. Jeffrey am I missing out on anyone—that's 7 licensed individuals?

Lawyer: We'll get to Jeffrey in a minute, but did you try to do any of this yourself? In other words, drawings, measurements, calculations.

Strand: No. That's out of my license scope.

Lawyer: All right. Who were you primarily relying upon to design and submit an application that would comply with the many pieces of the Mercer Island City code?

Strand: My architect and he took out the permit. His name is on the permit of public record.

Lawyer: Okay. Did you at any point in the process seek to avoid or fail to comply with any sections of the code?

[silence from 03:57:00 to 03:57:51]

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[00:00:00 - 01:48:04]

Strand: No, it's impossible. They tell you what you have to do, and you have to do it.

Lawyer: Okay. Do you recall how many submissions were ultimately made before issuance of the permit?

Strand: I believe seven, but we were having a lot... between the pre-construction meeting and actually getting to the point of getting a full construction plan set in, we had gone back several times back and forth with Molly saying, can we do this, can we do this? There was a lot of discussion because we really didn't want to waste time or money designing something over and over and over and over. So, we were trying to gather as much information ahead of time before we actually submitted the full plan set.

Lawyer: Okay. As far as you understand the process, if the city tells you at any point in the process that the code requires you to change or add to or delete from the application, is there anything you can do besides simply to acquiesce and comply?

Strand: You have to comply.

Lawyer: Describe for me, well, let me back up a second and say we're aware because we talked about the Grove 1 appeal, that there were actually two permits issued, including the one that we're talking about today. What was the first permit for?

Strand: Demolition and reconstruction.

Lawyer: And did it include this plan set that we've been looking at?

Strand: The original. It also has a separate permit that's already been recorded over a year ago for the basement ADU that had to be completely separate. It's recorded on title already, even though it's not there. It's not there in the old structure.

Lawyer: Okay. With regard to the final, or I should say the completed first version of the application, did you rely primarily upon Mr. Almeter and his expertise in scoping out what the code required and documenting it in those plans?

Strand: Yes.

Lawyer: Did you have any of your own input or research that suggested you could deviate from what was being recommended?

Strand: No.

Lawyer: Did you have any contemplation as to how long the process for issuance of the building permit that is under challenge today was likely to take?

Strand: I agree with what Molly said about the four to six months because I'm using a builder that lives on the island, his father lives on the island, and their business is a second generation business. And he estimated to me three to six months. Three months he said would be lucky depending on how much business was going on, but he wasn't sure how COVID was gonna impact the pipeline. But he had said to me three to six months and he has current projects right now on the island.

Lawyer: Now we know that it's taken much, much longer than that. To what degree was neighborhood input a factor in elongating the process of going from initial application to permit approval?

Strand: It's been significant. My builder, they've never had this happen before. I've heard that some of the neighbors called the Mayor, called the city council member and had been significantly in communication with any and all city staff who would listen. Comments were sent out to all my surrounding neighbors trying to enjoin them in participating in Mr. Grove's fight against the house. And I've had independent neighbors that I had made friends with tell me that they had been contacted.

Lawyer: So, would you describe the opposition to your plans and proposal to have been pretty aggressive?

Strand: Very aggressive. When the surveyor came when I first bought the property, Susan Madison ran into my backyard with a survey in her hand, uninvited, as I stood there with my surveyor while she was trying to talk to my surveyor or control the situation about what was happening, so I was kind of caught off guard. But I could see from that very moment of her running into my backyard that there was going to be involvement from the people that lived around me.

Lawyer: There's been a little bit of testimony this morning about the fact that the plan set as submitted takes your proposed structure up to approximately maximum height, maximum size, maximum proximity to adjoining boundaries. Is that a fairly accurate analysis?

Strand: The house is built within the code.

Lawyer: Were you aware that you were proposing to build it as high and as big as the code would permit?

Strand: That's what I'm allowed to do.

Lawyer: Was there any point at which you refused to acquiesce to any requirement by the city to revise the plan application in any respect?

Strand: If you don't revise it, you don't get a permit.

Lawyer: Okay. Are there aspects of the design and the proposed build that you considered to be perhaps unnecessary but required by the city?

Strand: No, I don't... no.

Lawyer: So, wherever the city got back to you with some request for corrections or changes, did you agree with whatever it was they were requesting or requiring?

Strand: Yep. And we made the changes and resubmitted again, and again, and again, and again.

Lawyer: You heard Mr. Grove testify this morning mainly in reference to this basement area exclusion and some elevations that he was very familiar with the site. Did you ever see Mr. Grove on the property during the period that you've occupied it or owned it?

Strand: The only time he was there was right when COVID had happened when he was... He made an appointment and he and the landlord came, they walked through the inside of the house. It was the middle of COVID; it was very brief. I would say he was inside the house for four to five minutes, that was it and they maybe looked in the backyard, that was it. There was no professionals, there was no surveyor, there was no measuring equipment, there was no discussion of looking at any undulating topography, nothing. It was more that he wanted to buy it.

Lawyer: You saw in one of the exhibits and heard some testimony about some photographs that were allegedly taken during the construction of the existing residence on the house. I can't remember exactly, but I think it was represented that these photographs came into Mr. Grove's possession by the son of somebody who actually took the photos. Is that right?

Strand: When Maxine died, who was the wife of the man who built the house, she had two kids and the son lived up in Snohomish County, and I met them when they moved out. All the belongings were still in the house when I was there, quite significant number of belongings. And so, when they moved in, the son wasn't born, or he was a toddler. It was that he didn't take those pictures.

Lawyer: So, do we know for certain who actually took those pictures or are we just left assuming that it was the parents of the son we've been referencing?

Strand: It could have been the parents, it could have been... who knows who took them? It could have been the parents, it could have been a friend, it could have been the neighbor that lived next door or catty-corner because Maxine used to... they used to own the lot to the north. They used to own part of Mr. Grove's property.

Lawyer: We've talked a little bit about the shoring wall to the west of the existing and proposed structures. Was that something that these, I'll describe as the soldier piles that are connected by some lagging, was that part of the original application?

Strand: No. That was never part of the original application. We weren't told that we needed a separate critical area permit until maybe after submission five, six?

Lawyer: Okay. By the time you got around to issuance of the permit that resulted in the Grove Appeal No. 1, was the soldier pile and shoring wall design in place by then and part of your application?

Strand: Yes.

Lawyer: Do you interpret the issuance of that permit, that critical area permit, to have been essentially the city's blessing on that design and that feature?

Strand: Yes, and it was even reviewed by an outside civil engineer that the city had hired.

Lawyer: Those are all the questions I had?

Examiner: Thank you. Mr. Davison, do you have any cross examination?

Grove: Just a few questions.

Examiner: Go ahead.

Grove: Thank you. Good afternoon, Ms. Strand. I believe you testified a few moments ago, or minutes ago, that you purchased this property in 2021. Is that accurate?

Strand: Yes.

Grove: Did you purchase this property as an investment property or for use as a primary residence?

Strand: Use as a primary residence.

Grove: Did you purchase the property with the primary residence mortgage or an investment property loan?

Strand: I used an investment property loan because I had a primary residence in Queen Anne.

Grove: You purchase the property with an investment loan, correct?

Strand: Because I had Queen Anne as my personal residence mortgage. You only get one personal residence mortgage.

Grove: You testified earlier that you are a Washington state residential appraiser. Is that accurate?

Strand: Certified.

Grove: Certified. You've held that title for 23 years?

Strand: Yes. The first two years to get your license, you do act... they've now instituted a training license, but a long time ago when I did it, you just apprenticed under somebody else. So, for the first two years, I was earning my hours before I could sit for the exam.

Grove: So, it's safe to say you're familiar with how properties are valued.

Strand: Yes.

Grove: And you're familiar with how residential properties are valued, correct?

Strand: Yes.

Grove: As a general matter and all else equal, is it fair to say that a building with more square footage would have a higher resale value? **[04:15:00]**

Strand: No.

Grove: Why not?

Strand: There's a lot of different factors. Number one would be location, view, age, quality of construction, above grade, below grade, to name how many bedrooms, how many bathrooms, the factors are many. And when you look at an appraisal sheet, square footage is dead in the middle, and as we learned, the very top is the most important thing, and it goes all the way down. Square footage isn't until the middle of the whole form.

Grove: Right. And if all of those factors were equal for this project, would you agree with me that a building with more square footage would have a higher resale value?

Strand: Again, no, because it depends on the view, it depends on the quality. And on Mercer Island, it also depends on the location on the island. No, I don't agree with that. There's plenty of homes that have significant square footage that are sitting on the market right now because nobody wants to buy something with 11,000 square feet.

Grove: I hear you on that. My question is a little bit different. I'm focused on the subject property, right, the property we've been discussing today. And if all of those factors were equal on the subject property, wouldn't you agree with me that a larger building would result in a higher resale value?

Keiffer: Mr. Galt, I'm going to object at this point just because this is not relevant. The value of the property is not part of the appeal, and so this just frankly is kind of a waste of the examiner's and the parties' time.

Examiner: Objection sustained.

Grove: You mentioned earlier, Ms. Strand, that you've intended to comply with the code for purposes of the project at issue. Is that fair to say?

Strand: Yes.

Grove: Okay. And is it also your testimony today that you would prefer to construct this project as close to the legal limit as possible?

Strand: That's my right.

Grove: So that's a yes, correct?

Strand: Yes.

Examiner: Okay.

Strand: Can I add that there's no longer an investment mortgage on it and once I sold Queen Anne, I have a residential primary mortgage on it.

Grove: I'll move to strike that answer as being nonresponsive. You mentioned that you are relying exclusively on your architect for purposes of code compliance. Is that correct?

Strand: Yes.

Grove: And you have no independent basis or opinion regarding your project's code compliance, is that correct?

Strand: Correct.

Grove: Okay. You spoke about the photos that Mr. Grove submitted in connection with this appeal do. Do you remember that?

Strand: Yes.

Grove: Okay. Do you have any basis to dispute the validity of those photos?

Strand: Define validity.

Grove: Do you believe that those photos are not actually photos of the subject property?

Strand: I believe their photos of the subject property. What I disputed was who took them.

Grove: Aside from disputing who took them, do you have any disputes with respect to those photos?

Strand: They've been altered as far as color and all the markings and all the other... it's difficult. They are not the photos that came into possession as-is.

Grove: No further questions. Thank you for your time.

Examiner: Thank you. Ms. Keiffer, any cross examination?

Keiffer: Not for Ms. Strand. Thank you.

Examiner: Thank you. Mr. Lawyer, any redirect?

Lawyer: No redirect.

Examiner: Thank you. Thank you, Ms. Strand. Mr. Lawyer, you may call your next witness.

Lawyer: Okay. We'll call Jeffrey Almeter.

Examiner: Raise your right hand, please, sir.

Almeter: Yes.

Examiner: Do you swear or affirm that the testimony you'll be offering in this hearing will be the truth, the whole truth, and nothing but the truth?

Almeter: I do.

Examiner: Thank you. Tell us your name and how to spell it, first and last.

Almeter: Jeffrey Almeter, J-E-F-F-R-E-Y, last name Almeter, A-L-M-E-T-E-R.

Examiner: Thank you, Mr. Almeter. Your witness, Mr. lawyer.

Lawyer: Okay. Jeffrey, can you tell the group here where you currently practice your trade?

Almeter: In my house, currently, in North Seattle.

Lawyer: Okay. What is it that you do?

Almeter: I'm a licensed architect. So, focusing mostly on residential architecture.

Lawyer: And when did you first become a licensed architect?

Almeter: That would have been in, let's see, 2012 I believe is when I got my license.

Lawyer: Do you do any nonresidential architectural services or are you strictly residential?

Almeter: I have done a small amount of commercial, ten-ish, but primarily residential.

Lawyer: Okay. How did you come into contact with Ms. Strand for the first time?

Almeter: I believe that was a recommendation from a structural engineer working on the basement of her Queen Anne home for permitting for some shoring up of the basement wall. There was some settling on the house, so we needed some permits, so it was a referral from the structural engineer.

Lawyer: And was that referral for work to be done on the Queen Anne project as opposed to this one?

Almeter: Correct.

Lawyer: Okay. And so, did that engagement eventually lead to a conversation about the project here on Maker Steet?

Almeter: That is correct.

Lawyer: What do you recall about the initial kind of scope conversation that you had with Ms. Strand and how she could use your assistance?

Almeter: Dorothy initially mentioned remodeling and putting an addition on the current house that was there and through exploring, as she has mentioned, the current location of the house and where it is in relation to some of the existing requirements for setbacks at the rear and the mainly east side, doing an addition that would conform to the current codes became quite cumbersome, if not impossible. So, we then discussed what she could do with the property as a demolition and rebuild for a new residence.

Lawyer: Okay. Have you handled architectural plans for applications within the city of Mercer Island before this one?

Almeter: I have.

Lawyer: Do you have any estimate as to how many times you've been through the process with the city of Mercer Island?

Almeter: Probably four or five at least.

Lawyer: And comparing Mercer Island to other municipalities, have you drawn any conclusions about how exacting or lax the city is in reviewing and approving permit applications?

Almeter: I would say of the different jurisdictions I've worked in, Mercer Island is one if not the most rigorous in the review process.

Lawyer: Did you know that before the Strand application was submitted?

Almeter: Yes.

Lawyer: So, help us understand how the project essentially gets built and conceived. And what I'm referring to is the project in its current iteration, not the remodel that was a no go, but the demo and rebuild option. How do you come to drawing something that has a particular size, shape, architectural style, etc.?

Almeter: There's a number of factors, but namely starting with Ms. Strand's desires for what she wants the project to have, how many bedrooms, bathrooms, certain aspects of the home that she wanted to have, and then figuring out from there what size the rooms or kind of shape, just kind of more general conversations and then one of the my first steps is looking at the different codes and figuring out where we are limited and how we can fit those requirements of those requests into the property.

Lawyer: Okay. So approximately how much time passed from the first conversation that you can recall about the demo and rebuild project to the point at which you were at least preparing a set of draft drawings for eventual submission to the city? Was it a week, was it three months, was it a year?

Almeter: From that initial conversation, I would say between three and six months. I think there was quite a bit of initial looking at designs and making sure that we were meeting things as accurate as we knew them to be before we submitted.

Lawyer: Okay. Do you have clients who sometimes get back to you that they're not real happy with a set of drawings or a set of draft materials simply on the basis of the look, meaning the style, the architectural style?

Almeter: Yes.

Lawyer: In this case, was that an issue or was Ms. Strand happy with what you were conceiving in terms of how the building was going to look?

Almeter: I believe she was pleased with the outcome. There was a little bit of back and forth, but generally speaking, she was pleased with the initial design.

Lawyer: Okay. Now, do some clients come to you and tell you what they would like and then you have to go back to them and give them the bad news that for various reasons, a code will not allow them to have what they might like?

Almeter: Yes, that happens sometimes.

Lawyer: Okay. So, we can probably think of some obvious examples, but would the height of a structure be one such thing, that the client wants it to be a certain height and you just have to tell them, well, you can't go that high, the code won't allow it.

Almeter: That's correct. That happens.

Lawyer: Okay. And how about things like how close in proximity the perimeter of a building can be to adjoining properties, in other words, setbacks. Are there clients

who are ultimately disappointed to learn that they can't build as close to or as wide as they would like?

Almeter: Yes.

Lawyer: Can you think of any other kind of general categories of design where you have to go back to the client and sort of rope them in to make the project ultimately compliant with what the code will permit?

Almeter: Those are probably the two biggest issues, height and location on the property and then overall size whether it's, yeah, just overall square footage. Those are kind of the three biggest code and noticeable things for most people.

Lawyer: So, when you got to the point of a set of drawings that were ready for the first submission to the city, had you and Ms. Strand essentially resolved that kind of back and forth, with her perhaps wanting things and you telling her the code won't allow it or her having an aesthetic view and you either adjusting or telling her she couldn't do it and essentially getting to a point where you were at an equilibrium, if you will?

Almeter: Yes.

Lawyer: So, when you made that first application, did you have any concerns about whether it was in fact compliant with the code in every respect that you either knew about or thought about?

Almeter: I did not have concerns, no.

Lawyer: Did you try and slip anything past the city that you knew the code wouldn't allow but you just tried to see if you could get it through anyway?

Almeter: No.

Lawyer: We've talked about the grade at some length here today and even prior to today, and I want to ask you, was that determination, meaning the existing grade of the site, something that was sort of way at the starting point of your analysis or was that something that kind of came up later?

Almeter: That's one of the first things I look at. So, it's very early on.

Lawyer: And so, in this particular case to the best of your recollection, what information did you have to try and look at that?

Almeter: The initial process of looking at that is the survey from Terrane.

Lawyer: Okay. And we've heard the name Terrane, T-E-R-R-A-N-E. Are you familiar with them?

Almeter: Yes.

Lawyer: Okay. And is a copy or a piece of the Terrane survey included in the plan set?

Almeter: Yes, it is. That a requirement of the building permit.

Lawyer: So, I think I'm going to try and screenshare that. And I hope I'm looking at the actual stamped copy of the plan set. I want to say that it's toward the beginning of the document. You can help me if you know for sure.

Almeter: That is correct, I believe it's the next page. Yes.

Lawyer: Alright. So, looking at page 4 of 24 on what is Exhibit 6, [04:30:00] I think, we have a copy of the Terrane survey and I think I may have to, you know, zoom this in quite a bit, but there are some elevation calls and some topographical lines around the building. Can you see them there, where I'm...

Almeter: Yes.

Lawyer ...displaying it. Did you take note of those elevations?

Almeter: Yes. That's the information that I used to determine what I believe to be the average building elevation which sets our maximum height and then go from there.

Lawyer: Alright. Now, in his testimony this morning, Mr. Grove hovered his cursor over a couple of elevation calls that I'm putting my cursor now in it to rough area that I recall him pointing out. And there are no such calls on this document. Did you use the information that he was referring to when you were preparing the plan set or, I guess, the submission?

Almeter: No, I did not.

Lawyer: So how did you determine average building elevation in this case?

Almeter: So, I took this survey document and then overlay the proposed footprint of the building on this in using anywhere where the proposed building is contacting, well, anywhere on that survey. If there is actual survey points or contour lines, it's very obvious to know what the elevation would be at the proposed corner. In areas where the proposed building was in the footprints of the existing building, I have used the elevation on two sides. So, in this case mainly to produce the elevation of the east side of the proposed structure, which falls in the existing footprint, I took the elevation on the east side of the existing building and an elevation on the west side of the existing building and essentially drew a line and interpolated what the contour, or what the elevation would be going from east to west in sections and that would then determine what the point would be were the grade to be continuous between those two points.

Lawyer: Okay. Now, is there... strike that. I'll characterize Mr. Grove's testimony about this subject this morning as being rather unapologetic that the city's administrative interpretations could be said to call for determining an elevation that is not easily determined if it's underneath the structure. Have you encountered that before?

Almeter: I have not.

Lawyer: So, what you did then was to take a known elevation from the Terrane survey on the outside of the existing structure on one side and on the other side, and then essentially used arithmetic to calculate what the elevation would be at the perimeter of the proposed structure.

Almeter: Correct.

Lawyer: Can you think of any way to get any more precise than that?

Almeter: Not without damage to the existing structure, no.

Lawyer: Okay. And am I correct in my belief that the elevations from the Terrane survey that are east of the existing structure are higher than the elevations west of the existing structure?

Almeter: That's correct.

Lawyer: Would it be true that if you had designed the Strand proposed structure with an east wall that was coextensive with the existing structure, your math would have led you to believe that you could actually build the structure a little bit higher than what you've actually proposed?

Almeter: Potentially, yes.

Lawyer: So, when you do this calculation, you were in fact referring to the Terrane survey, right?

Almeter: Correct.

Lawyer: And the Terrane survey I think was a 2022 document, is that right?

Almeter: I'm not... There's a date on it, but I'm not entirely sure if it was 2021 or 2022.

Lawyer: Okay. And I'm not sure either. It looks like it's got a date of May 27, 2021, down in the lower right hand corner.

Almeter: Yes.

Lawyer: So, would you agree with me that the Terrane survey is not something that we might refer, as we have to others, as any kind of ancient survey?

Almeter: Correct. I would not classify it as an ancient survey.

Lawyer: And I think this was not a survey that was intended to predict or conclude what the surface of the lot looked like at some point decades ago? True.

Almeter: True. Correct.

Lawyer: So, would this be a current survey under the code that the city could accept as being useful for purposes of these calculations?

Almeter: Yes.

Lawyer: And under that subsection (3) of Administrative Interpretation 12-004, there is reference to interpolation. Is it your view that what you did here is what that section of the administrative interpretation allows you to do?

Almeter: Yes. I'm just looking over here to make sure I had that in front of me, but yes, that's correct, I agree with you.

Lawyer: Okay. I know that you certainly didn't take them and probably didn't have much knowledge of them until this dispute arose, but these photographs that have been referred to as depicting the existing structure at the point at which it was being constructed, does that as an architect provide you with any useful information in determining what the grade is or was on the site?

Almeter: By themselves, no.

Lawyer: So, let's change gears a little bit now and start talking about the basement exclusion area. On this Exhibit 6, I think way up at the beginning, there were some boxes that calculate various areas including the basement floor exclusion. So, my cursor is now hovering around a section on page 2 of 24 in Exhibit 6 that contains that table. Do you see that?

Almeter: I do.

Lawyer: Okay. Now, you have used four wall segments in this table. Why did you do that?

Almeter: Because there are four wall segments on the proposed structure.

Lawyer: Okay. Now if we look to the left and a little bit down the page on this particular page, is the dark shaded object there an aerial depiction of the proposed structure?

Almeter: It is.

Lawyer: And what are these pieces that jut out from that geometry?

Almeter: Those two particular boxes are the exterior stairs outside their proposed structure.

Lawyer: And so, I think you already just answered this, but are the stairs part of the structure?

Almeter: No.

Lawyer: Okay. So, if we don't include the stairs that jut out from the structure, are we essentially looking at a nice right angled rectangle of a structure?

Almeter: Yes.

Lawyer: As you know, in this appeal, Mr. Grove has suggested that the west facade should be split into a number of wall segments, I think I counted five, and do you agree with that approach?

Almeter: I do not.

Lawyer: Why not?

Almeter: Based on my understanding of Appendix B in Chapter 19 of the Code, a wall segment is a surface of the wall, and if there are no jogs or steps in that wall, it's to be treated as one wall segment.

Lawyer: Okay. And what is the goal in making this calculation? What are you, when you're finished, informing the city about this proposed construction?

Almeter: That particular calculation is to show how much of the proposed structure, the gross floor area of the basement, should be excluded from the calculations of the maximum allowable gross floor area.

Lawyer: And why should it be excluded?

Almeter: Because it's below grade.

Lawyer: Okay. If we were to look at the artwork of that, I think it's called Appendix B, I'm going to stop sharing this for a moment and come back to it. I'm not sure how easily I'm going to find it, unfortunately, but when you look at Appendix B, you previously sought...

Examiner: Appendix B to what?

Lawyer: To Chapter, it's to Mercer Island code.

Examiner: Oh, in the code.

Lawyer: Yes.

Examiner: Okay. Appendix B to Title 19.

Lawyer: Yes. So, I'm consulting a... so we have the Unified Development Code in Title 19.

Examiner: The appendices are at the very bottom of the list of the chapters.

Lawyer: Yep. I'm on them right now and so I've called up Appendix B. I will now share that with you. Okay, can you see the illustrations there?

Almeter: Yes.

Lawyer: Ignoring the differences in the architectural style, would this illustration showing on the screen right now be a fair representation of how the proposed Strand residence sits on a lot that from the vantage point of Maker Street, in other words from the South looking north?

Almeter: Generally speaking, yes.

Lawyer: Okay. And you'll see a dark shaded area that is right above an arrow that says this portion of the basement floor area may be excluded from gross floor area.

Almeter: Yes, you can say that.

Lawyer: Okay. Now, was the methodology that you followed an attempt to actually do what is called for here in Appendix B?

Almeter: Yes.

Lawyer: Okay. And if we go down a little bit, we will see another diagram but this time it's an aerial view of a structure that's not quite a straight rectangle like the proposed Strand residence. Is every one of the segments called out in that diagram, by way of example, just a straight wall without any undulations or jogs?

Almeter: Yes.

Lawyer: Okay. And is that the approach that you took, that in other words where a wall of the proposed Strand residence is straight, that becomes a wall segment?

Almeter: Yes, that's correct.

Lawyer: Okay. Now we go down to the next illustration which has a little bit of information about how to do the math. So, can you in your own words just say what it is you do when you are confronted with a wall segment that has some portion below grade?

Almeter: Using the language in this appendix and that diagram, measure the length of the wall horizontally, determine what the midpoint of that wall is and take the elevation of the existing or finished grade, whichever one is lower, and take the height at that point and divide it by the overall height of the basement, or that

floor, and divide it by the length of the wall to determine the percentage of coverage that would be below grade.

Lawyer: And did you perform that calculation in this particular case?

Almeter: Yes, one on each of the four walls.

Lawyer: Now, Mr. Grove has testified that that [00:45:00] calculation was in error and that you came up with a percentage of the basement that is represented to be below grade that is higher than it should be. Do you disagree with him?

Almeter: I do disagree.

Lawyer: Okay. And is it true that the ultimate calculation of the percentage or the floor area of the basement floor that is below grade, ends up being excluded from the total floor area of the structure?

Almeter: That's correct.

Lawyer: Do you think you correctly did the math there, that you found the right number of excluded square feet and correctly subtracted them from the total square footage to get at the part or the square footage that counts for maximum allowable square footage?

Almeter: I do.

Lawyer: Let's talk about the side yard setback. I'm gonna direct your attention to the plan set and search for the page that has the elevations on it. I think I just went back to the code, sorry about that. Okay, we're back.

Examiner: While you're scrolling there, I brought up Exhibit 6 on my other computer, which is where I have my exhibits. And my Exhibit 6 is only 13 PDF pages long; yours is 24.

Keiffer: Mr. Galt, I can speak to that, if I may.

Examiner: Please.

Keiffer: This is the... there's an Exhibit 6 and then there's an Exhibit 6 refiled, which is what we circulated and uploaded yesterday. They are the exact same. The original Exhibit 6 has essentially two pages per page, if that makes sense, within the PDF, two plan pages per page. What we discovered is that if you try to zoom in as you need to with all of the very, very small text on these plans, it becomes like three pixels, and you couldn't read it. So, what we did was, Exhibit 6 resized. Same file, one plan page per PDF page and the Bates will be--it's like A or B based on the original Exhibit B. And we do apologize for that, but we figured, considering these are the approved plans, the examiner needed one he could read.

Examiner: Okay. Thank you for the clarification. I do admit when I enlarge these, they do get a little bit hard to read, shall I say? I ignored 6A when it came in yesterday and I won't ignore it in the future, thank you.

Lawyer: And I do think that the 6A, or the resized version, it does zoom in and remain pretty sharp, so I'm gonna refer to it here.

Examiner: Please do. I'm shifting over right now even as you speak.

Lawyer: Okay.

Examiner: And mine now has 24 pages.

Lawyer: So, looking at page 16 of 24, Jeffrey, I'm focused here on the east elevation because we're talking about the side yard setback to the east of the proposed structure. First of all, for purposes of determining the variable setback under the code, is this the right facade of the building to be concerned about to determine how tall it is and then from that, to determine what setback applies?

Almeter: Yes.

Lawyer: Okay. And here, can you tell us where on the document we look to determine what you concluded to be the height of this facade?

Almeter: The dimension that I used was on the south elevation which is on the right side of the south elevation, which is the furthest east point of the proposed structure.

Lawyer: So, I've scrolled up a little bit to show the south elevation and if we're kind of looking at what would be the southeast corner of the proposed structure, would that vertical measurement be the same whether you're right on the south edge of that corner or the east edge of that corner?

Almeter: Yes. The intended finished grade elevation would be the same at the corner from the south or the east.

Lawyer: Okay. So, you've probably heard Mr. Grove's testimony that the correct way to measure this is to find your way all the way down to the finish elevation that is about even with the garage door on the south elevation. See that?

Almeter: I do see that.

Lawyer: But is that elevation anything that can be seen from the vantage point of someone standing to the east looking west at the proposed structure?

Almeter: No.

Lawyer: So, is it correct that--I've now got my cursor sort of up a little bit from the bottom where there is a bold line that runs horizontally below what I think is a staircase,

and then if you move over to the left a little bit, there's a dashed line that eventually finds its way to an arrow that says existing grade.

Almeter: I see that, yes.

Lawyer: Okay. So, which of the two lines, the dashed line or the bold line, is the lower of the two?

Almeter: The bold line.

Lawyer: Okay. And so now we have a vertical measurement that is 24 feet 11½ inches measured from a starting point to an ending point. So, let's first of all zero in on that number and I've got my cursor on it there, do you see it?

Almeter: I do.

Lawyer: Okay. What is the starting point of that vertical measurement?

Almeter: That would be the intended finished grade at that southeast corner.

Lawyer: So, the lower of the two grades shown at that location?

Almeter: Correct.

Lawyer: And then what would be the top of that measurement?

Almeter: The top of the railing.

Lawyer: Okay. And so, since we're looking at the south elevation but we're looking at the, I guess, eastern corner or the southeastern corner, would that distance, that vertical distance, 24 feet, 11½ inches be the same if you simply orient yourself around the corner and start to look at the facade from the east looking west?

Almeter: It would be the same, yes.

Lawyer: Do you believe that this method of computing that height is what the code calls for in determining the height of a facade that adjoins a neighboring property when you're trying to determine what the setback has to be?

Almeter: That is my understanding, yes.

Lawyer: Okay. And under the code, if you're under 25 feet, what is the setback?

Almeter: 7½ feet.

Lawyer: Did you know that when you were designing this particular project?

Almeter: Yes.

Lawyer: And if we're talking about, you know, inches here, could you have moved the proposed structure a little bit to the west if it would help by, you know, moving down the hill a little bit?

Almeter: Possibly. At the time that we initially did this, it's a little bit complicated, so I don't necessarily need to get into it if we don't need to, but we were trying to stay as far east away from the western edge of the property.

Lawyer: Okay.

Almeter: So, we kept the building as far to the east. Technically speaking, yes, the building could move to the west.

Lawyer: But if as you've designed it, it's going to be slightly, ever so slightly, less than 25 feet tall at the eastern facade, was there any need to relocate the building anywhere?

Almeter: No.

Lawyer: I think we talked before and not in this hearing, but you and I have talked before about the fact that the rooftop railing that's called for under these plans is three feet tall, is that right?

Almeter: Correct.

Lawyer: Do you know whether they can be shorter under the code?

Almeter: They cannot. Thirty-six is the minimum height for a guard rail.

Lawyer: Okay. So, your design calls for a rooftop railing that is as low as the code will permit and a building that is in its location as high as the code will permit and keeps the railing below 25 feet at that facade?

Almeter: Correct.

Lawyer: Now let's talk a little bit more about the rooftop railing itself, and we've had some discussions about the code and we're talking about Section O2O(E)(1) and (2) and a little bit of (3). So, if we refer first to subsection (3), am I correct in my understanding that the code allows certain kinds of features on the building to extend upward and beyond a roof.

Almeter: Yes, that's correct.

Lawyer: And does the subsection (3), and I'm going to get it up on the screen here in just a second. Okay, now I'll share. Alright. If we look, first of all, can you see it there on the screen?

Almeter: Yes.

Lawyer: Alright. If we look at subsection (3), we have a series of features or components of a structure that are referred to as appurtenances, so antennas, lightning rods, plumbing stacks, flagpoles, are those things part of the, you know, sort of the structural element of the construction or are they something that isn't structural?

Almeter: Nonstructural.

Lawyer: Okay. And it looks as if, in general, subsection (3) allows those nonstructural elements to extend as much as five feet above the height that is otherwise allowed, right?

Almeter: That's my understanding, yes.

Lawyer: And that means otherwise allowed in subsections (E)(1) and (E)(2), true?

Almeter: Correct.

Lawyer: So, in theory, I guess, when you're talking about the maximum building height, let's just take an antenna, an antenna could stick up five feet above the highest point of the roof if the building was designed to its maximum height, true?

Almeter: Yes.

Lawyer: And on the downhill building facade, though, that same antenna could extend five feet above the facade, but the facade doesn't go to the highest point of the roof, right?

Almeter: That's my understanding, correct.

Lawyer: And so, this subsection (3) takes a collection of things that are allowed to be as much as five feet above these two maximum [05:00:00] heights, because they're not structural elements and they're not particularly or they're not as important as like a roof or a wall.

Almeter: Is there a question, sorry?

Lawyer: If you know, why does this city or any city allow anything to stick up above what is otherwise described as the maximum height of the structure?

Almeter: To the best of my knowledge, the things listed there, or similar things, sometimes are required just for their pure functionality to stick above plumbing or other venting stacks. Chimneys and fireplaces are required, just for their pure function, to be above other things so that you either get draft or something like that so that the smoke, if it was a wood burning fireplace, the smoke would actually get drawn out of the chimney. So, it cannot be leveled with something else. It must stick past, similarly with solar panels and other things.

Lawyer: Okay. So, when we get down to subsection (B) of subsection (3), which refers specifically to rooftop railings, here we have something that might be said to limit that structure, a rooftop railing, to less than five feet above the height because that subsection (B) says that rooftop railings may not extend above the maximum allowed height for the main structure. Do you understand it to say that?

Almeter: I do.

Lawyer: And so, if you had designed the building so that under subsection (1), the highest point of the roof would be exactly 30 feet, how much rooftop railing would subsection (3) be allowed?

Almeter: Zero.

Lawyer: Okay. So, if you build the maximum building height to something 3 feet or more below 30 feet, how high can you have a rooftop railing?

Almeter: You could go up to the maximum building height.

Lawyer: Do you interpret subsection (E)(2) to factor into where and how high a rooftop railing can be?

Almeter: No.

Lawyer: Let's move on to the west shoring wall. We talked about this a little bit already and I'm gonna take you back to our Exhibit 6 resized, and I think I need to go up one more page. Do you see this illustration here in the upper left hand corner of page 10 of 24 on Exhibit 6?

Almeter: Yes.

Lawyer: In your view, what does this depict?

Almeter: It's the exposed portion of the shoring above the finished grade. That's the gray hatch stick area.

Lawyer: Now you've heard some testimony from Mr. Grove that the city code maximum vertical height of a retaining wall is 72 inches. Do you remember that?

Almeter: I do.

Lawyer: Were you aware of that as this plan was getting drawn and submitted?

Almeter: Yes.

Lawyer: Okay. Now, I realize that you as the architect were not the artist who drew this illustration or perhaps even who made these measurements, but did you receive them as part of the collection of documents that were submitted to the city for permit approval?

Almeter: I did receive them, yes.

Lawyer: Okay. Did you look at them?

Almeter: I did.

Lawyer: As far as you understand the code and the maximum height of a retaining wall, does this illustration of the west shoring wall profile on page 10 of 24 in exhibit 6 comply with the code maximum of a 72 inch retaining wall.

Almeter: It does.

Lawyer: Do you understand Mr. Grove's argument today that the actual vertical measurement of the shoring wall should begin at the top of the soldier piles, which are depicted on this illustration, but then should extend all the way down to the bottom of the rocks that are lower than anything shown on this illustration and west of them?

Almeter: I agree that that's what he's asserting, but I disagree with that's how they should be measured.

Lawyer: Okay. Did that conversation ever arise in the course of discussions with the city as this application was going through its various iterations?

Almeter: I don't believe so.

Lawyer: Okay. Did the city ask you any questions about, well, what are you going to do about those rocks down there to the west and below this elevation?

Almeter: Yes, there was a discussion about them as part of the permit review.

Lawyer: Okay. And what was discussed?

Almeter: That initially came about as needing to do something. What exactly was done was not given, but some something to stabilize or mitigate in that area. And then there were options and we discussed options, but the main point was that the rocks on that were to remain as they are.

Lawyer: So, was there something that was proposed or required and designed that would satisfy the city's concerns and then allow the rocks to remain where they stand?

Almeter: Yes. The shoring that is in the approved plan set and as was part of the critical area review, that shoring is satisfactory as far as I understand, since it is approved.

Lawyer: So, is it your understanding that this portrayal of a proposed shoring wall was actually inserted into the application to deal with the city's concerns about this slope and the rockery down below?

Almeter: That's correct. This is a response to a request from them.

Lawyer: And do you believe that as it is drawn and designed, the shoring wall here complies with the city code with respect to the height of a retaining wall?

Almeter: That is my understanding, yes.

Lawyer: Start to finish, is there anything in the final application after all the iterations that you believe is in any way not compliant with city code?

Almeter: No.

Lawyer: No further questions.

Examiner: Before you take that... leave it on the screen please. I think if I recall correctly, I've heard some folks in discussing the exhibit that's now being shown as referring to the left end of it, as being the south end of the retaining wall and the right end of it being the north end of the wall. And that bothered me at the time I was listening to it and while Mr. Almeter's been talking about it, I brought up sheet 9 of Exhibit 6 resized. And sheet 9 shows us where the stationing starts and ends for the wall. You note down at the bottom of the drawing, you have station 0+00 going over to whatever the end is. And if you look at page 9, you'll see that station 1+21.19 is at the northwest corner of the property and Station 0+00.00 is at the southeast corner of the pile wall. So, the view you're looking at on the next page is as if you were standing uphill looking into the backside of the retaining wall. It's not what you would see if you were west of the property looking back at the property because station 0+00 is up near the driveway, it's not on the west edge of the property. So, just an observation because I think I heard other testimony that suggested this was from west to east and it's not, it's from east to west the way it's drawn up. Anyway, Mr. Lawyer, you said you have no further questions for Mr. Almeter, right?

Lawyer: Well, based on your observation, I would just ask Mr. Almeter if he concurs that what we're looking at here on page 10 would actually be a westward facing view of that amount of the shoring wall that is exposed if you were on the other side of it.

Almeter: Yes. But as Mr. Galt mentioned, I do think that he is correct that the left side of that drawing is the south of the wall and the right side is the north.

Lawyer: Right. Okay. No further questions.

Examiner: Okay. Thank you. It being a little after 3:00, shall we take a brief mid-afternoon break before we ask for cross examination? Would that be okay?

All: Yes.

Examiner: Okay. Let's do ten minutes again. My computer says 3:01, we'll round it off to 3:10. We are recess until 3:10.

Speaker: We are now, sir.

Examiner: Our afternoon recess having run its course we are now back in session. This is the second half of the afternoon portion of the May 9, 2024, appeal hearing in APL 24-002. Mr. Davison, do you have any cross examination for Mr. Almeter?

Davison: I do.

Examiner: Please proceed.

Davison: Thank you and good afternoon, Mr. Almeter.

Almeter: Good afternoon.

Davison: You spoke earlier this afternoon about your experience as an architect and your involvement in the project at issue today. And you testified about your experience in Mercer Island specifically, correct?

Almeter: Yes.

Davison: Okay. In your experience, when does a CAR2 review typically occur in a project like this or a case like this?

Almeter: I believe anytime that there is a critical area noted on the city mapping, whether it's steep slope or a landslide hazard, those are the two that I'm aware of. There might be other critical areas, a shoreline might be another one.

Davison: But is that, is that type of issue typically flagged at the beginning of the permitting process or closer to the end, as a general matter based on your experience?

Almeter: Generally, at the beginning of the project.

Davison: Okay. And when was, when was that CAR2 review done in this in this case?

Keiffer: Objection. Mr. Galt, this is not relevant, the first of all, to the direct, but also to the issues at appeal. The CAR 2 was already appealed. That appeal is done and disposed of.

Examiner: How is it relevant?

Davison: I'm trying to get a better sense of the timeline of the project. Both Mr. Almeter and Ms. Strand testified about certain delays. In fact, Ms. McGuire did as well about certain timing considerations. And so, I'm trying to just build out a bit more of that timeline to try to figure out the context with respect to some of these key events.

Examiner: I don't really see that the timeline will have any bearing on the five questions that I've been asked to answer. So, I am inclined to sustain the objection. [05:15:00]

Davison: Okay. We'll move on. There came a time, Mr. Almeter, that you submitted a first set of initial plans in this matter, correct?

Almeter: Yes.

Davison: When was that?

Almeter: I believe that was in March of 2022.

Davison: And isn't it true that those initial plans included a basement exclusion area that was 100 percent?

Almeter: At that time, I believe that's what I had submitted.

Davison: And would you agree with me that that basement exclusion area of 100 percent is more than what's allowed in the code?

Almeter: I would agree with you, yes.

Davison: Okay. And, of course, that basement exclusion area resulted in a design that was larger than what's permitted, correct?

Almeter: Correct. But the calculation was incorrect, so that's why that was the result.

Davison: But eventually that calculation was modified, it was changed, right?

Almeter: Correct.

Davison: In a subsequent plan set submission, right?

Almeter: Yes.

Davison: Okay. And so, what I'm trying to determine here is, in the initial plan set, we had this basement exclusion area that was more than what was allowed and so it resulted in a design, right off the bat, that was larger than what's allowed under the code. Is that fair to say?

Almeter: I guess so, yeah.

Davison: Okay. At what point in the process, either before or after you made this initial submission, did you begin your determination of existing and finished grade?

Almeter: That would have been prior to the first submittal.

Davison: Okay. Okay. And I believe you testified earlier that you relied on the Terrane survey, is that accurate?

Almeter: That's correct.

Davison: Okay. And you did an overlay?

Almeter: That's correct.

Davison: And found the survey points and the contact lines based on that overlay?

Almeter: Yes.

Davison: And then you interpolated the elevation lines based on that, correct?

Almeter: Yes.

Davison: Okay. And those interpolations are what ended up in the final plan set that we've been discussing today, right?

Almeter: Correct.

Davison: Okay. I believe you testified earlier that Administrative Interpretation 12-004, Conclusion 3 could apply in this case. Is that accurate?

Almeter: I believe so. I don't remember what that was off top of my head, but that sounds correct.

Davison: Actually, we can pull that up. Gabby, would you mind pulling up exhibit 90, page 2. We need to take a look at it. You can scroll down to Conclusion 3. The current survey document is available. The applicant may establish existing grade by interpolating elevations. Do you see that?

Almeter: Yes. Yep. That is correct.

Davison: Okay. Does that refresh your recollection?

Almeter: Yep. It does.

Davison: And to confirm, this conclusion allows interpolation if a current survey exists that can be used to interpolate, correct?

Almeter: That's correct.

Davison: Okay. Let's pull this down and pull up Exhibit 82 please. Are you familiar with this document, Mr. Almeter, which is the, well, are you familiar with this document?

Almeter: I am, yes.

Davison: Okay. This is the report drafted by James Harper from Bush Roed Hitchings, is that accurate?

Almeter: Yes.

Davison: Okay. And would you agree with me that Mr. Harper analyzed the Terrane survey as well?

Almeter: That's my understanding, yes.

Davison: And that's, of course, the same survey that you were reviewing in connection with your analysis for this project, right?

Almeter: Yes.

Davison: Okay. And isn't it true that Mr. Harper concluded that none of the surveys, including the one from 2022 he analyzed, could be used for interpolation?

Almeter: I'm not entirely sure that was the conclusion, but I know his conclusion is at the bottom of this memo.

Davison: Okay. And I just want to focus your attention on the very last sentence here where it says these do not serve as a snapshot of original grade conditions and cannot be relied on for interpolation or other such formulaic determinations of any past original grade. You see that?

Almeter: I do see that, yes.

Davison: Did I read that correctly?

Almeter: Yes, you did.

Davison: Okay. Let's pull this down and shift gears. I want to talk about wall segments, and you were discussing wall segments during your direct examination a few minutes ago. And I want to look back to Appendix B of the code, the code that you were looking at. Gabby, can you pull that up? Okay. And I believe you testified earlier that in reviewing wall segment coverage calculations, you looked at Appendix B of the code, is that fair to say?

Almeter: Yes.

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.

Davison: And you used that midpoint elevation to compute basement wall coverage. I believe that was your testimony, right?

Almeter: The midpoint in conjunction with the length of the wall, correct.

Davison: Right. But this language right here, and I'll zoom in on it, its wall segment coverage is the portion of an exterior wall below existing or finished grade, whichever is lower. It is expressed as a percentage. Do you see that?

Almeter: I do see that.

Davison: That language does not allow you to use the midpoint, correct?

Almeter: It does not say anything about a midpoint in that, but it does say refer to example.

Davison: I want to pull this down and I want you to take a look back at Exhibit 6, page 16. And I want to turn your attention back to the discussion of rooftop railings. And I'll wait a second while we pull that page back up here and. Yeah, let's zoom in on that south elevation image that we were focused on. Okay. I believe you mentioned earlier that the rooftop railings as depicted in this image are three feet high, correct?

Almeter: Correct.

Davison: Okay. And would you agree with me that the height at the top of the railing depicted in the final plans that we're looking at here is approximately 260.4 feet?

Almeter: I believe so.

Davison: Okay. And you would agree with me that the finished grade, I believe this was your testimony earlier, the finished grade right below the bottom of the garage door is 226.47 feet, right? You can see that image or that number.

Almeter: I do see that, yes.

Davison: Mr. Lawyer asked you questions earlier about whether you could see that finished grade from the vantage point when you were standing from a different location. Do you remember that testimony in those questions?

Almeter: I do.

Davison: Can you explain for the benefit of the record how visibility of the finished grade from a different vantage point is relevant to the height computations you've been discussing today?

Almeter: I believe it's relative to the side yard, the elevation or the facade that's facing the side yard. So, your view of that wall height is the intent of the code. So, something you cannot see is... it's not codified, but if you can't see something, it's

irrelevant in the sense of the intended height of that facade facing. But obviously there's lots you can't see from that point so that's my understanding of the intent of the code is that the height of that wall facade at the side is the relevant portion of the code.

Davison: So, when you say this discussion is codified, what you're saying is that it's not found in the code itself, right?

Almeter: The point of whether you can see something or not is not in the code, correct.

Davison: This is something just that you are applying based on what?

Almeter: Based on the way, well, I was responding to your question about whether you can see it. But the height is referenced in the code. So yeah, I'm sorry, maybe you could say the question again. I'm not sure, I'm confused myself with my answer.

Davison: I was just trying to figure out what you meant by saying that this consideration about the visibility from different vantage point was not codified. And I think you answered my question by saying it's not in the code, it's based on something else.

Almeter: Correct.

Davison: Okay. Okay. I want to focus your attention on the, we'll call it the lower right hand corner of the south elevation image, and I think you testified a bit about this earlier and you were here for, and present for, Ms. McGuire's testimony, is that accurate?

Almeter: That's correct.

Davison: Okay. And you heard her testimony about the cantilevered aspect of the proposed building, right, this area here?

Almeter: Yes.

Davison: Okay. And can you tell me what the finished grade is directly underneath the cantilevered portion of the building right on this lower right hand corner of the image is?

Almeter: I can't see the actual number there, but the height of that finished grade below the cantilevered portion would be that number in the corner, 226.7.

Davison: Okay. So, you'd agree with me that it was 226.7 on this lower right hand corner of the image.

Almeter: I agree that's what it says, yes.

Davison: I want to take a step back--we can take this down--and ask you a few questions about your engagement in this matter. We discussed that in the initial plan set the

building, excuse me, the basement exclusion area rendered the design larger than what was permitted. And I want to ask you, what professional standards do you apply to a client request when they ask you to design a building or a project that is as close to the maximum legal size as possible? Are there any standards that go into that consideration?

Almeter: I'm not sure that there would be any standards other than fully understanding the code and then working within the confines of the code. So, I guess that's the standard.

Davison: In what circumstances would you tell a client, hey, I'm not going to design to the maximum legal size? Is there ever a circumstance that that would arise?

Almeter: No. I can't think of one.

Davison: And you would agree with me that inherent in your job and your profession is the risk that you may have a code interpretation wrong?

Almeter: That's correct. That's a risk.

Davison: How do you adjust for that risk when you are designing or discussing a project that is reaching the maximum legal size permissible?

Almeter: Can you rephrase that question?

Davison: Yeah, it was a poorly worded question. Let me try again. How do you adjust for the risk that your design or calculations and code interpretations may be incorrect?

Almeter: Typically, I start with a little underestimating, I would say, probably with the initial design and then fine tuning going from there. So, I guess the conversation with clients would be, if we understand that this is the limit, we design for something under that and then understanding what that limit could be and making sure that we're as accurate as possible with all of the information that we have, knowing that that's part of the permit review process is, if there was an error in assumption or something else that that's part of that review process.

Davison: And you agree that through that process if an error is uncovered or identified, it should be corrected?

Almeter: Yes, I agree with that.

Davison: When you encounter a code provision that's ambiguous, do you interpret that ambiguity in favor of your client?

Almeter: Not necessarily. I would say that if there's a possibility of getting a clarifying answer to that, whether it be from the jurist, somebody at the whatever

jurisdiction it may be, we can clarify ahead of time, and I try to do that. But I wouldn't necessarily just default to whatever would be a positive for our client.

Davison: Is there a professional standard or rule that you would apply to govern that type of decision?

Almeter: Not that I'm aware of.

Davison: Okay. Would you agree with me that code amendments should be made through the legislative process? [05:30:00]

Almeter: Yes.

Davison: No further questions. Thank you.

Examiner: Thank you. Any redirect, Mr. Lawyer.

Keiffer: Mr. Galt, I think I had one clarifying question.

Examiner: Pardon?

Keiffer: I had a clarifying question. I haven't had a chance to have questions...

[inaudible crosstalk – 01:18:11]

Examiner: ... my apology.

Keiffer: Oh good. I really just have one clarifying question for you, Mr. Almeter. Do you recall, it was really at the beginning of your testimony, visiting with Mr. Lawyer about the Terrane survey and kind of the math that you did to impose the proposed structure on the Terrane survey?

Almeter: I recall that, yes.

Keiffer: Okay. Do you recall him prefacing it by asking about average building elevation?

Almeter: I don't remember if he prefaced it... I don't recall if he asked about average building elevation or not, but I think he may have.

Keiffer: Okay. If he did, would that perhaps be mistaken?

Almeter: Possibly. Yes, because to, well, yeah, using that survey is finding existing points which then leads into the average building elevation.

Keiffer: So, would it be fair to characterize your discussion with Mr. Lawyer on that point as relating to existing grade?

Almeter: Yes.

Keiffer: Okay. Thank you. Those are the questions I have.

Examiner: Alright. Thank you. I wasn't going to, but now based on those last two questions and the answers, I've got a question. Mr. Almeter, did you at any point in this process try to determine what the terrain, not the Terrane the surveyors, but the terrain, the land shape, what the terrain was on this property before there was any development?

Almeter: I did not.

Examiner: Thank you. Now I think I can ask Mr. Lawyer, do you have any redirect?

Lawyer: I have a few.

Examiner: Proceed.

Lawyer: Mr. Almeter, I think you were asked on cross examination whether you design something that contains errors or assumptions that are incorrect and that you get corrected or called out on that. Is that a fair characterization?

Almeter: Yes, sometimes by myself when I notice something I've done.

Lawyer: Okay. And because we know that this particular application went through a series of iterations, were those iterations changes that Ms. Strand simply wanted to do and either change something or add something or were you always responding to some notation or some feedback from the city saying you need to change this.

Almeter: The submittals back to the city would be a response to comments or corrections that they brought forth.

Lawyer: Okay. You were asked a little bit about that Harper letter where he referenced that several surveys that he looked at could not be used to determine, and I'll quote the language that he used about any past original grade. Did you interpret the Terrane survey as trying to represent what a past original grade of the Strand lot might have looked like?

Almeter: No.

Lawyer: You were asked a series of questions about whether there were any professional standards that require or suggest to you that you should sort of build into your application some kind of contingency for potential errors or for miscalculations and so on and I think your answer was no. But you made some comment about how you, you know, you may talk with the client about not designing up to the absolute last possible inch of size or height, etc. Is that a fair characterization of your approach?

Almeter: Yes.

Lawyer: In this particular case, did you go closer to the limit than you would normally or customarily go?

Almeter: No.

Lawyer: So, although the design here was built to be very close to maximum limits under the code, this was kind of in keeping with other applications that you've made for other clients?

Almeter: Some, yes.

Lawyer: If a client is willing to pay you to revise the drawings if called upon by the city to do so, are you willing to go ahead and design a building that is code compliant but up to whatever the code maximally allows?

Almeter: Yes.

Lawyer: And in the case of this application, when the city did come back and ask you to make corrections, did those corrections have the impact of essentially shrinking either the size of the building, the height of the building, or the proximity of the building to Mr. Grove's lot?

Almeter: Yes. There were some changes that resulted in decreases.

Lawyer: Give me an example of something that was changed in the application that either made the proposed building smaller or farther away from Mr. Grove's lot or shorter in height.

Almeter: One example was that the top level of the proposed house steps further to the western wall steps further to the east, so the upper floor square footage reduced. I believe also the overall footprint of the building was revised at one point to be smaller from the initial submittal to the approved.

Lawyer: And so, the first of those two examples where the upper floor of the building was stepped farther to the east so as to make it smaller in dimension, was that to bring the overall design into compliance with a maximum floor area?

Almeter: That was... yes.

Lawyer: It wasn't just, I guess, a design change for aesthetic reasons?

Almeter: No.

Lawyer: Okay. And then what was the other example you gave besides moving the western, the upper story of the western wall a little bit to the east?

Almeter: I don't recall exactly what the dimensions were, but I believe at one point in the initial design, the overall width or length of the house may have been slightly

larger and then by taking a slice out of it, essentially, the overall footprint was reduced.

Lawyer: And was that change a change that was intended to reduce the total square footage of the house to bring it into compliance, or was it to respect the setback, or was it for some other reason?

Almeter: I believe that particular instance was in reducing the square footage to come into compliance.

Lawyer: Okay. Those are all the questions I have.

Examiner: Thank you, Mr. Davison, any recross?

Davison: Nothing further from us. Thank you for your time.

Examiner: Thank you. Ms. Keiffer?

Keiffer: None from me, thank you.

Examiner: Thank you. Thank you, Mr. Almeter.

Almeter: Thank you.

Examiner: Mr. Lawyer?

Lawyer: Nothing further from us.

Examiner: Nothing further. Alright. Is there any member of the general public who is here and who wishes to testify regarding this appeal? The record will show there is no response. We are then ready for rebuttal. At least I'm ready. Are the parties ready for rebuttal?

Davison: Could we take a two-minute recess? We'll stay in our chairs. I just want to confer with my client before we proceed.

Examiner: Very good. Let's make it 5:00 just to round things off. It's now 3:37, we'll reconvene at, well, it's 3:38 now, 3:43.

Speaker: We are now, sir.

Examiner: We are now. Thank you. Our recess having run its course, we are back in session. This is the second, I don't know, third, whatever it is, it's the last afternoon session for May 9, 2024, in APL 24-002. We are at the point in the process where we can begin the rebuttal stage of our hearing. So, it's the same order as before. We start with the appellant. Mr. Davison, do you wish to present any rebuttal testimony or evidence?

Davison: Yes, we will call Mr. Grove for a brief rebuttal.

Examiner: Okay. Thank you. Mr. Grove, you're still under oath.

Grove Yes.

Examiner You may begin, Mr. Davison.

Davison: Thank you. I want to pull up Exhibit 1005 and ask you a few questions about this, Mr. Grove. You were here during Ms. McGuire's testimony earlier today, okay, and you were present when she was being asked questions about this document?

Grove: Yes.

Davison: Okay. And she was asked a certain set of questions about the use of the word segment in this document. Do you believe that she interpreted this document correctly?

Grove: Well, I think... I added the segments to this because I was trying to measure the percentage of the wall that was below finished storage system grade. So, I chose the word segment but that's not the right... that, that word, you know, is used elsewhere in the code for other things. So, I should have used the word portion or part of the wall or something like that. So, I think that segment may have turned her off and that the choice of words I made was not ideal.

Davison: Okay. And with that clarification, what is depicted on this segment?

Grove: So, what is what is depicted here is basically a look at the coverage line which is measured, which is that kind of magenta line that is at the midpoint height of that 4 foot 9 midpoint elevation on the wall. The area in red above it is what's considered or what was measured by the applicant as above the lower existing or finished grade. The cyan pieces of this picture are treated as, are considered below grade and are treated properly as below grade. And then the black pieces were treated as below grade even though they are actually above grade. So, that's what this shows, and it shows that the percentage of wall that's covered on the western wall is actually significantly higher than what's in segment.

Davison: No further questions. Thank you.

Grove: Thank you.

Examiner: Thank you. Any cross examination, Ms. Keiffer?

Keiffer: No. Thank you.

Examiner: Mr. Lawyer?

Lawyer: No questions.

Examiner: Thank you. Since Mr. Grove was your only witness on direct, I presume he'll be your only one on rebuttal as well.

Davison: Correct.

Examiner: Okay. Thank you. Ms. Keiffer, any rebuttal testimony from your witnesses?

Keiffer: No. No rebuttal from the city. Thank you.

Examiner: No rebuttal. Thank you, ma'am. Mr. Lawyer?

Lawyer: No rebuttal.

Examiner: No rebuttal. Then for today, we are finished, except for deciding when you folks submit your written closing, which you have all indicated a desire to do. Let me pull my calendar out here so it's handy. As I mentioned in, I think, the response email that I sent when the request came in for written closing, I think it's Rule 320, has a suggested submittal scheme of one week per party. I can be flexible. I think in some prior hearings, Ms. Keiffer would agree with me, that I've gone for longer periods and shorter periods, gone both ways depending on what people wanted. So, I can be flexible on when you want to submit them. The first one to submit would be the applicant, followed by the respondent, followed by the appellant. So let me start with, let me make a note here: closing--applicant, respondent, appellant. Mr. Lawyer, how much time would you like to have, if you had your druthers, to submit your closing statement? You might have your druthers, but then again [laughter].

Lawyer: Well, I have a couple of thoughts on that. One is just my own calendar, [05:45:00] but the other is that the longer I wait, the harder it's going to be to remember what everybody said and so I'm not a big fan of taking a long time. So, and by the way, you don't know me well, but that's uncharacteristic of me.

Examiner: I don't know you at all, so, I've enjoyed interacting with you today.

Lawyer: Okay.

Examiner: And with Mr. Davison, whom I've never met officially yet either.

Lawyer: Yeah, I think you mentioned a week, that would be the 17th of May. I'm trying to remember now what my...

Examiner: Actually, it would be the 16th, but I'm not going to quibble.

Lawyer: Oh, a week from today would be the 16th, yeah, you're right.

Examiner: Yeah.

Lawyer: And that would be okay with me. I've got a short trip out of town over the weekend that follows that and so I was gonna beg your indulgence to wait several days, but I don't know that that's a good idea for me. I'll just make it harder on myself.

Examiner: Is your trip out of town leaving before Friday the 17th? Because if it's not, I'm willing to give you till the end of the week. It makes sense.

Lawyer: Okay. Yeah. I think that would work.

Examiner: Ms. Keiffer?

Keiffer: Okay. So as I have it, it looks like an applicant would file their closing on the 17th. If we go a week out, that would give the city until the 24th. We're agreeable to that.

Examiner: You're okay with that? This is going too easily. Mr. Davison?

Davison: Well, we'll round it out and take the 31st, if that's agreeable.

Examiner: Okay. I appreciate that ease of establishing this. Okay. One thing I wanted to remember to mention before we close, if memory serves me correctly, way back this morning around probably 9:05 or so, I said something to the effect that since the city had Bates stamped all of its exhibits, I would use Bate stamp numbers in doing page references. Having listened to all of the testimony today, everybody has been using PDF numbers, nobody has cited a Bates number. And I think if I were to start using Bates numbers in citation, somebody listening or looking at the at the recording later could get horribly messed up trying to figure out what in the heck page is this crazy guy referring to? So, I retract my statement at the beginning. I will use PDF page numbers in any page number citation that I use for everything, which is what I'm used to doing now anyway. I think that's the only mechanical thing that I need to indicate. I would note and apologize for the terrible typo error on the order that I issued last Sunday where I said Order of Summary Dismissal. It's clear from the content that that was a mistake on my part. And I also want to apologize to the Madrona Law Group that I put Group with a lowercase "g" instead of a capital "G". So, I will try to correct these stupid silly mistakes that some little gremlin gets in there with them, I don't know how it happens. Anyway, it is 3:52 according to my computers. The oral part of our hearing is now adjourned. I will be expecting a closing statement from the applicant not later than May 17th; from the respondent, not later than May 24th; and from the appellant not later than May 31st. My decision making period will begin on the earlier of the submittal by the appellant of his closing statement or close of business on May 31. So, if you get it in earlier, I'll start counting my time earlier. If somebody fails to submit a closing statement by the deadline, we'll just move on past them, and they will have lost their opportunity. I think that's all I need to say. It's now 3:53 and we are finished for the day. I thank you all very much. I appreciate the testimony and the evidence that's before me that I now

have to make a decision based on, plus the closing statements. Thank you all very much.

All: Thank you

Examiner: You may turn off the recorder and we may all go on our way.

END [05:48:04]