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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of Notice of Decision File No. 2207-019:

No. APL24-002

DANIEL GROVE,

Appellant,

CITY OF MERCER ISLAND'S  
STAFF REPORT

v.

CITY OF MERCER ISLAND,

Respondent.

**I. INTRODUCTION**

The City of Mercer Island (“City”) submits the following pursuant to Hearing Examiner Rules of Procedure (“RoP”) 224(g). Appellant Daniel Grove (“Appellant” or “Grove”) brings this second appeal of a City of Mercer Island approval relating to a proposal by Applicant Dorothy Strand’s (“Applicant” or “Strand”) proposal to build a new single-family residence. Appellant’s second appeal again centers Appellant’s continued belief that the proposed project incorrectly calculates grade. Appellant’s arguments are again misplaced. City Staff diligently reviewed the building permit application at issue, and correctly approved building permit 2207-019 with conditions. Appellant’s appeal lacks merit and should be dismissed.

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## II. FACTS

On July 6, 2022, property owner Dorothy Strand, through her architect Jeffery Almeter, applied for a building permit for construction of a new single-family residence. Ex. 46 (Bates 00253-00254). That permit was deemed complete on August 30, 2022. Ex. 84 (Bates 00791-00792).

On October 23, 2023, Appellant appealed a related City approval of the same single-family residence, Critical Area Determination CAO23-011. Ex. 86 (Bates 00924-00930). That appeal was dismissed by the Hearing Examiner on summary judgment on December 2, 2023. *Id.* The Hearing Examiner denied reconsideration of the order on summary judgment. Ex. 92 (Bates 00957-00959).

On February 20, 2024, City Staff issued a notice of decision approving Building Permit 2207-019 with conditions. Ex. 85 (Bates 00793). On March 5, 2024, Appellant challenged the building permit decision by filing the instant appeal. Ex. 86, 87 (Bates 00794-00948, 00949).

## III. LEGAL STANDARD

Per Hearing Examiner letter APL24-002a issued on March 8, 2024, the instant appeal is a challenge to a building permit, subject to Mercer Island City Code (“MICC”) Title 17. Pursuant to MICC 17.14.020(B), the “scope of the appeal is limited to the specific elements of the building or fire code official's order, decision or determination disputed by the appellant and the hearing examiner shall only consider comments, testimony and arguments on these specific elements.” Appellant cites to the standard of review contained in MICC 19.15.130. Ex. 86 (Bates 007958). While the City understands Appellant’s confusion

1 on this point due to major single family building permits being listed in MICC 19.15.030,  
2 Table A, here, the more specific provisions of Title 17 should control.

3 The same principles of statutory interpretation apply to municipal ordinances, such  
4 as the MICC. *Ellensburg Cement Prod., Inc. v. Kittitas Cty.*, 179 Wash. 2d 737, 743, 317 P.3d  
5 1037 (2014). Under the principles of statutory interpretation, in the event of conflicting  
6 provisions, the specific will prevail over the general. *Washington State Ass'n of Ctys. v. State*,  
7 199 Wash. 2d 1, 13, 502 P.3d 825, 833 (2022). “This does not mean that the more specific  
8 statute invalidates the general statute. Instead, ‘the [specific statute] will be considered as an  
9 exception to, or qualification of, the general statute, whether it was passed before or after such  
10 general enactment.’ *Id.*, quoting *Wark v. Wash. Nat'l Guard*, 87 Wash.2d 864, 867, 557 P.2d  
11 844 (1976).  
12

13 MICC 17.14.020 is more appropriate for appeal of a building permit because it is  
14 more specific to building permit issuance. Title 17 MICC adopts the International Building  
15 Code, the International Residential Code, the International Energy Code, and the Construction  
16 Administrative Code (among others). By contrast, MICC Ch. 19.15 applies to a wide variety  
17 of land use entitlement type processes, from legislative actions such as development code  
18 amendments, land use review type processes, consolidated permit processing procedures,  
19 design review processes, and even comprehensive plan and development regulation docketing  
20 processes. Title 17 is certainly the more specific portion of the MICC and best applies to  
21 appeals of building permits—under the principles of statutory interpretation, it serves as an  
22 exception to or qualification of Title 19 MICC.  
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1 As to this site and project in particular, Appellant’s first appeal related to this  
2 project established that there is no historical survey to determine existing grade prior to any  
3 development.<sup>1</sup> Ex 86 (Bates 00929). The Hearing Examiner concluded that “[t]he lack of any  
4 such ancient survey is not unexpected given that the lot was developed before the City was  
5 incorporated.” *Id.* Therefore, the Hearing Examiner expressly held that with respect to this  
6 property in particular, “[t]he code interpretation controls: The existing grade is the grade to  
7 be used.” *Id.*

9 Appellant’s argument appears to ignore major portions of Administrative  
10 Interpretation 12-004, focusing narrowly on Conclusion 1’s provision that “the existing grade  
11 underlying the existing structure will be used as the elevation for the proposed development.”  
12 Ex. 86 (Bates 00798). Appellant takes the word “underlying” literally, despite the plain  
13 instruction of Conclusions 2 and 3 of the same Administrative Interpretation:

14 2. Existing grade, for the purpose of calculating basement area exclusion  
15 without a survey of the pre-development conditions, ***shall be interpreted as***  
16 ***the elevation of a point on the surface of the earth immediately adjacent***  
***to or touching a point on the exterior wall of a proposed structure.***

17 3. If a current survey document is available, the applicant may establish  
18 existing grade by ***interpolating elevations within the proposed footprint***  
19 ***from existing elevations outside of the proposed footprint.*** The survey  
20 document must be prepared by either a Washington registered civil engineer  
21 or land surveyor, and must be accepted by the City Code Official.

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<sup>1</sup> To wit, Appellant’s appeal again contains photos of the house during its 1950s construction, contrary to the  
25 directions of the Administrative Interpretation and the Hearing Examiner’s order in APL 23-009 appear to  
26 be an attempt at relitigating existing grade for this site. Ex. 86 (Bates 00917-00919) This is an impermissible  
collateral attack on the Hearing Examiner’s decision in APL 23-009, which was not appealed, and is now  
final under the doctrine of administrative finality. RCW 36.70C.040(2); *Chelan Cty. v. Nykriem*. 146 Wash.2d  
904, 933, 52 P.3d 1 (2002).

1 Ex. 90 (Bates 00953-00955) (emphasis supplied). Appellant’s apparent assertion that existing  
2 grade for this project is subterranean, is contrary to the plain language of Administrative  
3 Interpretation 12-004.

4 The City expects testimony at the hearing to establish that Staff correctly calculated  
5 existing grade based upon the plan sets and other materials included in the permit file. City  
6 Staff will testify as to City Staff’s review process of the materials the Applicant submitted  
7 and City Staff’s subsequent verification of the calculations of existing and finished grade.  
8

9 **b. Finished Grade**

10 Appellant’s appeal presents an unsupported allegation that the calculation of  
11 “finished grade” for the western basement wall is somehow also incorrect. Ex. 86 (Bates  
12 00799). Appellant’s appeal lacks basis and support for this allegation. Testimony is expected  
13 to show that City Staff correctly verified the calculation of finished grade, based upon the  
14 materials in the application.  
15

16 Finally, the City notes that the MICC generally errs in favor of less, rather than  
17 greater, height by generally requiring the *lower* of existing grade or finished grade to be used.  
18 *See, e.g.* MICC 19.16.010 (definition of “average building elevation”) and Title 19, Appendix  
19 B. Again, testimony at hearing is expected to show that City Staff appropriately confirmed  
20 the calculation of both “existing grade” and “finished grade.”

21 **2) The City’s Permit Decision Correctly Confirmed Gross Floor Area In Conformance**  
22 **With the MICC.**

23 Appellant’s second assignment of error again relies on the incorrect position as to  
24 “existing grade” and “finished grade” alleged in its first assignment of error. Ex. 86 (Bates  
25 00800-00801). As discussed above, Appellant is incorrect in its theories regarding both  
26 “existing grade” and “finished grade.”

1           The MICC permits a basement exclusion for Gross Floor Area. MICC Title 19,  
2 Appendix B (“The Mercer Island Development Code excludes that portion of the basement  
3 floor area from the gross floor area, which is below the existing or finished grade, whichever  
4 is lower.”) Testimony is expected to demonstrate that City Staff reviewed the application  
5 materials, confirmed the lower of the two measures were used, and that the calculation of  
6 Gross Floor Area met the requirements of the MICC. Testimony is further expected to  
7 demonstrate that these calculations were verified by comparing the calculation of the wall  
8 segments below grade to the delineation of the lower of existing or finished grade on the  
9 elevation drawings according to the methodology laid out in MICC Title 19, Appendix B.  
10 Testimony is also expected to show that the percent of the perimeter of the proposed basement  
11 below grade was correctly and appropriately excluded from Gross Floor Area.

12  
13 **3) The City’s Permit Decision Correctly Applied the MICC As Respect to Side Yards**

14           Appellant’s argument applies the incorrect section of the MICC with respect to side  
15 yards. Ex. 86 (Bates 00801-00802). Appellant, again relying on its incorrect theories on  
16 height, argues the building exceeds 25 feet in height and that accordingly, MICC  
17 19.02.020(C)(1)(c)(iii)(b) applies. Ex. 86 (Bates 00801). However, testimony is expected to  
18 demonstrate that both Applicant and City Staff agree that the building is less than 25 feet in  
19 height. Therefore, the MICC permits a side yard depth of 7.5 feet. MICC  
20 19.02.020(C)(1)(c)(iii)(a). Testimony is expected to show that the side yard in question  
21 complies with this side yard setback (and indeed Appellant admits the setback is at least 7.5  
22 feet in its appeal). Ex. 86 (Bates 00801).

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1 **4) The City’s Permit Decision Correctly Measured the Home’s Rooftop Railings on**  
2 **the Southern Side**

3 **a. Maximum Building Height**

4 The MICC caps maximum building height at 30 feet for single family residential  
5 structures. MICC 19.02.020(E)(1). Appellant’s assertion that the railings exceed maximum  
6 building height stem from Appellant’s erroneous assertion on how existing grade and finished  
7 grade are measured—leading Appellant to miscalculate average building elevation. Ex. 86  
8 (Bates 00801-00802). The City expects testimony to show that the City’s permit decision  
9 correctly confirmed the Applicant’s calculation of existing grade and finished grade.  
10

11 **b. Maximum Building Facade Height**

12 Pursuant to MICC 19.02.020(E)(2), “[t]he maximum building facade height on the  
13 downhill side of a sloping lot shall not exceed 30 feet in height. The building facade height  
14 shall be measured from the existing grade or finished grade, whichever is lower, at the furthest  
15 downhill extent of the proposed building, to the top of the exterior wall facade supporting the  
16 roof framing, rafters, trusses, etc.” Further, certain appurtenances are permitted to exceed this  
17 height threshold by a maximum of five feet, with the MICC expressly providing that  
18 “[r]ooftop railings may not extend above the maximum allowed height for the main structure.”  
19 MICC 19.02.020(E)(3)(b). Testimony is expected to demonstrate that the proposed downhill  
20 facade height is less than the maximum allowed downhill facade height of 30 feet.  
21

22 **5) The City’s Permit Decision is Correct With Respect to Retaining Walls/Rockerries**

23 Finally, Appellant’s argument with respect to retaining walls/rockeries is  
24 misplaced. Appellant’s argument again relies on its mistaken assertions about how to calculate  
25 “existing grade.” Ex. 86 (Bates 00804-00805). Testimony is expected to show that City Staff  
26 correctly reviewed the elevation drawings for the proposed west shoring wall and determined



1 that the proposed height at the tallest point from the top of the wall to finished grade, is 72  
2 inches, in compliance with the maximum height for retaining wall for fill slopes within  
3 required yards. MICC 19.02.050(D)(5).

4 **V. CONCLUSION**

5 Appellant will not be able to meet its burden of proof at hearing. Testimony and  
6 evidence will demonstrate that the City correctly issued the building permit with conditions.  
7 The City stands by its permitting decision. Appellant’s appeal should be dismissed.  
8

9 DATED this 29<sup>th</sup> day of April, 2024.

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**DECLARATION OF SERVICE**

I, Reina McCauley, declare and state:

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

2. On the 29<sup>th</sup> day of April, 2024, I served a true copy of the foregoing **City of Mercer Island’s Staff Report** on the following counsel of record using the method of service indicated below:

Zachary E. Davison Gabrielle Gurian Perkins Coie, LLP 10885 N.E. fourth Street, Suite 700 Bellevue, WA 98004  <i>Attorneys for Appellant</i>	<input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:zdavison@perkinscoie.com">zdavison@perkinscoie.com</a> <a href="mailto:ggurian@perkinscoie.com">ggurian@perkinscoie.com</a>
David J. Lawyer Inseelee Best Doezie & Ryder, P.S. 10900 NE 4 <sup>th</sup> Street, Suite 1500 Bellevue, WA 98004  <i>Attorneys for Applicant Dorothy Strand</i>	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:dlawyer@insleebest.com">dlawyer@insleebest.com</a>

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

DATED this 29<sup>th</sup> day of April, 2024, at Seattle, Washington.

/s/Reina McCauley  
Reina McCauley