BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In re the Appeal of the Notice of Decision, File No. 2207-019: DANIEL GROVE, Appellant, vs. CITY OF MERCER ISLAND, Respondent.	NO. APL24-002 LAND USE HEARING MEMORANDUM OF APPLICANT DOROTHY STRAND

COMES NOW the Applicant, Dorothy Strand, and hereby respectfully submits this motion for summary judgment dismissal of Appellant's claims.

I. RELIEF REQUESTED

Applicant Dorothy Strand requests that enumerated claims contained within Appellant Daniel Grove's appeal be dismissed, with prejudice, because they fail as a matter of law.

II. FACTS

Appellant previously challenged issuance of Applicant's Critical Area Review 2 permit by the City. That appeal ("Grove I") was dismissed by Order of Summary Dismissal, issued December 2, 2023. A timely motion for reconsideration was denied by Order dated December

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29, 2023, which was not appealed to the Superior Court, and has become a final decision that is not subject to collateral attack. The Critical Area Review 2 Permit, and the present Building Permit pertain to the same residential project: namely, the demolition of an existing residential structure, followed by the construction of a new residential structure more or less in its place.

Appellant Grove has persistently opposed Applicant's project, desiring to protect a west facing view that is otherwise not protected by any private easement or covenants. As argued below, Applicant's proposed construction is compliant with all applicable provisions of Mercer Island's Code. Appellant's challenges should be dismissed, with prejudice.

III. ISSUES

1. Should Appellant's challenges to the determinations of "existing grade" and "finished grade" be rejected?

2. Should Appellant's challenge to the determination of Excluded Basement Area be rejected?

3. Should Appellant's challenge to the determination of Gross Floor Area of the proposed structure be rejected?

4. Should Appellant's challenge to the application of a 7.5-foot side yard setback be rejected?

5. Should Appellant's challenge to the calculation of proposed rooftop railings be rejected?

6. Should Appellant's challenge to the height of Applicant's proposed soldier pile shoring wall be rejected?

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IV. ANALYSIS

A. Burden and Standard of Proof

In an administrative appeal like this, Appellant must "demonstrate that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by evidence in the record, or that the decision is in conflict with the standards for review of the particular action." MICC 19.15.130(C). The Applicant, as a party to this proceeding, may request dismissal of all or any part of an appeal, at any time, with notice to all parties. RoP 204. If the facts in an appeal are legally insufficient to support the appeal, dismissal under this rule is appropriate. *See, Doe v. Benton County,* 200 Wash.App. 781, 787, 403 P.3d 861 (2017).

B. Appellant's Interpretations of the Mercer Island Code With Respect to "Existing Grade" and "Finished Grade" are Incorrect

Appellant wants a "second bite at the apple" with respect to the height of the proposed structure. He seeks to get there by arguing that all relevant height measurements should begin at a lower elevation than are represented in the permit application.

The issue of "existing grade" was exhaustively challenged and argued in Grove I. Grove sought to deliver evidence from various sources, attempting to show that the grade elevations of the site at a point in history before any human activity on the soil was somehow at least roughly discernable, and significantly lower than the elevations of the ground in its existing condition. This argument led to close examination of Mercer Island Administrative Interpretations 04-04 and 12-004. In so many words, the city's approach to determining "existing grade" under circumstances such as are presented here is to use the grade of soil immediately surrounding the exterior walls of the existing structure.

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IN 2004 the City adopted Administrative Interpretation 04-04, which provides, in pertinent part:

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

Eight years later, the City adopted Interpretation 12-004, consistent with Administrative Interpretation 04-04, but specifically aimed at calculating basement exclusion areas. Interpretation 12-004 contains "Conclusions 1 & 2", which say:

> 1. Without concrete evidence or verification from a previous survey document, as accepted by the City Code Official, the existing grade underlying the existing structure will be used as the elevation for the proposed development.
>
> 2. "Existing grade, for the purpose of calculating basement area exclusion without a survey of the pre-development conditions, shall be interpreted as the elevation of a point on the surface of the earth ***immediately adjacent to or touching a point on the exterior wall of a proposed structure***."

(Emphasis added).

It is reasonable to synthesize these two administrative interpretations and conclude that the elevations of the ground immediately surrounding a standing structure shall be used for determining "existing grade" and "average building elevation", under those circumstances where we do not have concrete evidence or verification from a previous survey document that has been accepted and approved by the City Building Official, to determine "existing grade". This is the conclusion that the city has used and applied at least since 2004, and that is the

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conclusion accepted by the hearing examiner in Grove's first appeal. This was the interpretation adopted by the Hearing Examiner in the Grove I appeal, and should not be relitigated.

The average building calculations are all shown on pages A1.0 and A3.1 of the Site Plan. The elevation locations and heights of the proposed structure are shown on page A1.0 of the Site Plan. These same elevation locations and heights are also shown on page A3.1, along with representations of the existing and finished grades adjacent to the building elevations.

Appellant advances the dubious argument that "existing grade" should be some inexact elevation that is "3 feet to 7 feet lower than the existing grade shown in the plans".[1] That interpretation ignores the language of Conclusion 2 in Administrative Interpretation 12-004. Appellant's challenge to the determinations of "existing grade" should be rejected.

BASEMENT EXCLUSION AREA

Appellant challenges the basement exclusion area purely on the grounds that all measurements should begin at a lower elevation than what is shown in the application. As set forth above, however, the calculations used in the Applicant's application are correct, drawn from proper application of the City Administrative Interpretations.

Appellant argues that the wall segment coverage (the portion of the wall that is below grade) ***should be*** approximately 40%. He reaches this conclusion according to what he describes as his "manual inspection" of Sheet A3.1. He is mistaken. MICC Chapter 19 Appendix B clarifies the basement exclusion calculation by prescribing the use of averaging to determine Wall Segment Coverage (Step Two). In this case, the East Elevation has a below grade wall height of 4'-9". The total wall height is 8'. Therefore 4.75/8 = 59.37% is the percentage of the

[1] See Notice of Appeal at p. 5.

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wall that is below grade. The height of wall below grade is called out on each elevation with a dimension. There is no need for Appellant to perform a "manual inspection". The information is on the drawing.

Appellant inserts an illustration from what is assumed to be a page from the Plan Set, with arrows pointing to two wall segments to which he refers, using the term "Finished Grade". He does not specifically state within the illustrations what the elevations of the referenced "finished grade" actually are. He appears only to say that the application uses elevations that are too high. Similar to the response above, the average elevations are noted on the SITE PLAN A1.0 (Points A-D) and are based on the survey data and interpolations of "existing grade" where the structure contacts the ground. All of these assume the lower of either existing or finished grade. Point A (226.47') is based on the proposed grade at the garage. Point B (231.25') is just East of the Western exterior wall of the existing house which is noted with a finished floor elevation of 231.3' on the survey (this was rounded down slightly since the outside patio is roughly equal to the inside floor). Point C (231.5') is another interpolation based on the survey. Point D (236.0') falls essentially at the rear of the existing garage which has a threshold of 236.8' from the survey. Applicant drew a line from the East side of the existing house (elevation 237.2) to the west. If we assume the existing structure was not there, the elevation at grade would be approximately 236'. "Existing grade" is reflected on Sheet A3.2 of the plans. MICC Chapter 19 Appendix B does not link the basement exclusion to the average building elevation as Appellant argues.

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Gross Floor Area

Using his incorrect conclusions about "existing grade" and "finished grade", Appellant proceeds to conclude that the Gross Floor Area of the proposed structure exceeds the maximum limit under the City Code. He reaches this conclusion by his subsidiary conclusion that the application excludes too much basement area. The Final Plan Set calculates 937.5 ft.^{2} of excluded basement area. Appellant says the figure should be approximately 613 ft.^{2}. The calculations above, pertaining to the basement exclusion lead to the conclusion that the Gross Floor Area is, in fact, complaint with the Code.

This is ultimately just a piece of arithmetic, but it begins with a verification of the "average building elevation". It is worth noting that Appellant refers to MICC 19.16.010 for the code definition of "average building elevation", which requires the applicant to average the elevation at "existing grade or finished grade, whichever is lower". MICC 19.02.020.E(4) contains a formula for calculating "average building elevation". There is a passage in that section verifying that the applicant should apply the lower of existing or finished ground elevation at the midpoint of each wall segment used in the calculation. Applicant properly used the lower of the two numbers for the Average Building Elevation calculations.

Side Yard Setback

Appellant misinterprets the relevant section of the code. Appellant focuses on MICC 19.02.020.C.1.c.iii.b; the very last subsection of the referenced code section. Per the Site Plan, the proposed residence is 7' 8" from the adjacent lot line. The overall building height at the side facing the Appellant's property is 24' 11 ½" tall – i.e., less than 25 feet. Under this calculation,

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the subsection relied upon by Appellant simply does not apply. Instead, MICC 10.02.020.C.1.c.iii.**a** applies, and the setback is 7'6". The siting of the proposed residence complies with the relevant code section.

Rooftop Railings

In his appeal, Appellant complains that rooftop railings must be included in the total height measurement of a structure, and that including them exceeds the height maximum. The A3.1 ELEVATIONS show that the maximum building height allowed is 30' above the Average Building Elevation. That elevation is clearly depicted by a line comfortably **above** the top of the proposed rooftop railings (which are 3 feet in height; not 4 feet, as Appellant argues). The drawing leaves 1'2" above the top of the depicted railings before hitting the maximum allowable building height. Subsection 1 of MICC 19.02.020.E supports this conclusion, because it states that maximum building height is measured by reference to the height of the highest point of the roof above the average building elevation.

Appellant has inserted into his notice of appeal document an illustration that he claims is "derived from" Sheet A3.1. He concludes that the total height of the structure, including the rooftop railing, measured from the lowest point on that particular elevation, is 33.9 feet, exceeding the 30-foot maximum. But Appellant is not measuring from Average Building Elevation, as called for under MICC 19.02.020.E.

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Retaining Walls/Rockeries

Appellant begins this section of his appeal with a concession that Applicant's existing rockeries do not constitute "retaining walls/rockeries" under the code.[2] So, this portion of the current appeal applies only to new and proposed retaining walls/rockeries. Appellant appears to take issue with the code compliance of the closely-spaced soldier piles to be installed behind (eastward of) the remaining lower portion of the existing rockery. This challenge arguably falls within the scope of Grove I, because the design for the installation of the soldier piles was a mandated feature to Applicant's previously approved Critical Area Review 2 permit. The soldier pile installation was elaborately described and explained in the March 21, 2022 geotechnical report that the city reviewed and approved.

Despite a "kitchen sink" approach to the first appeal, Appellant appears not to have engaged in any detailed criticism of the portion of the geotechnical report describing the soldier piles and the shoring wall. The doctrine of *res judicata* provides that any issue that was or could have been litigated in a prior adversarial proceeding between the same two parties cannot be relitigated. The generic term "res judicata" may include both res judicata or claim preclusion ***and*** collateral estoppel or issue preclusion. Because "res judicata" is a general term, a court may look to both claim and issue preclusion to determine whether there is an "identity" of the actions. *Bunch v. Nationwide Mut. Ins. Co.,* 180 Wn. App. 37, 43, 321 P.3d 266, 269–70 (2014). The doctrine has four elements. Res judicata precludes a later lawsuit when the second lawsuit has (1) identical subject matter, (2) cause of action, (2) persons and parties, and (4) the quality of

[2] This was a material conclusion drawn from the Grove I appeal.

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the persons for or against whom the claim is made. *Rains v. State,* 100 Wash.2d 660, 663, 674 P.2d 165 (1983), citing *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 607, 49 P.3d 894, 907 (2002). The parties and the "quality of the parties is identical in this appeal as in Grove I. The subject matter in both appeals is Applicant's proposal to demolish an existing residential structure and to build a new one on the same lot. The "cause of action" can be viewed as Appellant's challenge to the height of the shoring wall called for under the geotechnical report that the City reviewed and approved before issuance of the Critical Area Review 2 permit. Appellant challenged the entirety of Applicant being allowed to alter the soil on her lot, as part of her project. The requirement of the soldier pile shoring wall was a feature imposed upon Applicant as a condition to approval. Appellant clearly had all useful and necessary information available to him to challenge the compliance of the proposed soldier piles and shoring wall at the point of the Critical Area Review 2 permit appeal (Grove I).

However, if a *res judicata* argument is unavailing, we turn to responding to Appellant's arguments in this second appeal head-on. In so many words, Appellant argues that a 72-inch height limit applies to any newly installed retaining wall. He claims that the proposed soldier piles connected by wooden lagging meet the definition of a retaining wall. He says the proposed wall exceeds the maximum allowable height under the code. But Sheet C-3 of the Final Plans (illustrating the soldier pile installation called for under the approved geotechnical report) depicts a cross section of the structure to be built. A series of piles are to be driven into the downhill slope, located west of the residence and east of the existing rockery at the bottom of the slope. Portions of the soldier piles buried in soil below the downhill excavation area will not experience the same pressure forces of the adjacent slope, because they are counteracted by that

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portion of the slope downhill from the soldier piles. The bank that is being "retained" will be the exposed portion of the piles and lagging. As shown on the illustration, the exposed vertical façade of the soldier pile wall, after completion, is well below 72 inches in height, and code-compliant. Sheet C-3 shows an elevation of the soldier pile wall with the dark gray being the exposed area. The lowest 'dip' on the bottom of that gray area is noted as being 6' tall, which is code-compliant. Appellant seems to argue that Grove is referring to the "existing grade at bottom", is a set of elevations currently existing at the very bottom of the rockery. He does not appear to be referring to the grade at the bottom of the excavation cut to be made upon installation of the soldier piles and shoring wall.

CONCLUSION

For all of the above-stated reasons, Appellant's appeal should be dismissed, in its entirety.

DATED this 24th day of April, 2024.

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By _____

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DECLARATION OF SERVICE

I, Jerilyn K. Kovalenko, hereby declare under penalty of perjury under the laws of the State of Washington, that on April 24, 2024, I caused to be served true and correct copies of the foregoing on the following parties and/or counsel of record named below in the specific manner indicated:

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DATED April 24, 2024, at Bellevue, Washington.

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