Before THE HEARING EXAMINER for the
CITY of MERCER ISLAND

ORDER of SUMMARY DISMISSAL

FILE NUMBER: APL23-009

APPELLANTS: Dan Grove *et al.* [1]
C/o Zachary E. Davison
Perkins Coie LLP
Seattle, WA 989101-3099
zdavison@perkinscoie.com
SERVICE BY E-MAIL (First class mail service if requested)

RESPONDENT: City of Mercer Island
Community Planning & Development
C/o Kim Adams Pratt
Madrona Law group, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
kim@madronalaw.com
SERVICE BY E-MAIL (First class mail service if requested)

AND

C/o Bio F. Park, City Attorney
9611 SE 36th Street
Mercer Island, WA 98040
bio.park@mercergov.org
SERVICE BY E-MAIL (First class mail service if requested)

APPLICANT: Jeffrey Almeter/Dorothy Strand
C/o David J. Lawyer
Inslee, Best, Doezie & Ryder, P.S.
10900 NE 4th Street, Suite 1500
Bellevue, WA 98004
dlawyer@insleebest.com
SERVICE BY E-MAIL (First class mail service if requested)

TYPE OF CASE: Appeal from approval of a Critical Area Review 2 (Ref. file no. CAO23-011)

---

[1] The other appellants, listed alphabetically, are Pam Faulkner, Jim Mattison, Susan Mattison, Lynn Michael, Martin Snoey, and Brigid Stackpool.

WHEREAS, on November 17, 2023, Respondent City of Mercer Island Community Planning & Development ("CP&D") filed a Motion to Dismiss ("Motion") in the above entitled matter. Pursuant to Hearing Examiner Rule of Procedure ("RoP") 204 the City of Mercer Island Hearing Examiner ("Examiner") granted Appellants Grove *et al.* (collectively "Grove") and Applicants Dorothy Strand and Jeffrey Almeter (collectively "Strand") 10 days in which to submit written responses to the Motion. Both filed timely responses; and

WHEREAS, the Examiner has considered the Motion based upon the following documents, submitted during the Motion procedure, which the Examiner has marked as exhibits for identification:

Exhibit 9001:	City of Mercer Island's Motion to Dismiss, filed November 17, 2023, with Exhibits A – G attached
Exhibit 9001.A:	CP&D's "Staff Report" (Decision) in CAO23-011, issued October 9, 2023
Exhibit 9001.B:	Grove Appeal, filed October 23, 2023
Exhibit 9001.C:	Tree Health Assessment by Scott Selby, Certified Arborist, prepared for Dan Grove, dated October 21, 2023
Exhibit 9001.D:	6950 SE Maker Street report by James M. Harper, PLS, prepared for Molly McGuire, CP&D Planner, dated August 14, 2023
Exhibit 9001.E:	Administrative Interpretation 12-004, issued January 9, 2013
Exhibit 9001.F:	Administrative Interpretation 04-04, issued August 9, 2004
Exhibit 9001.G:	Review of Revised Plans for 6950 SE Maker Street by Geotech Consultants, Inc., prepared for Strand, dated June 6, 2023
Exhibit 9002:	Interlocutory Order Establishing Deadline for Responses to Motion to Dismiss, issued November 19, 2023
Exhibit 9003:	Grove et al. Response to the City of Mercer Island's Motion to Dismiss, filed November 27, 2023, with Exhibits A – C attached
Exhibit 9003.A:	Original Grade Determination, Tseng Residence, 2720 71st Avenue SE by Liu & Associates, Inc., prepared for Sherry Tseng, dated August 3, 2017
Exhibit 9003.B:	Strand Residence – 2207-019, 6950 SE Maker Street by Lee Nyquist, PLS, prepared for CP&D, dated July 7, 2023
Exhibit 9003.C:	Geotechnical Consultation, Proposed Residence, 7100 Block, SE 35th Street by GeoEngineers, prepared for Art Pederson, dated May 9, 1989
Exhibit 9004:	Applicant Dorothy Strand's Response in Support of Motion to Dismiss, filed November 27, 2023
Exhibit 9005:	Response Declaration of Dorothy Strand's in Support of Motion to Dismiss, filed November 27, 2023, with Exhibits A – E attached
Exhibit 9005.A:	Arborist Report by Douglas Herrmann, Certified Arborist, prepared for Strand, June 29, 2021
Exhibit 9005.B:	Pre-construction Assessment 6950 SE Maker Street by Anthony Moran, Certified Arborist, prepared for Strand, dated August 16, 2022
Exhibit 9005.C:	Geotechnical Engineering Study and Critical Area Study by Geotech Consultants, Inc., prepared for Strand, dated March 21, 2022
Exhibit 9005.D:	Photograph, 6950 SE Maker Street, February 21, 1955

Exhibit 9005.E: Existing Rockery Memo by Jeffrey Almeter, prepared on Strand's behalf for Molly McGuire, CP&D Planner, July 6, 2023

and;

WHEREAS, Washington's appellate courts recognize the right of quasi-judicial bodies to act summarily in appropriate situations.

> Since Const. art. 4 and the Superior Court Civil Rules do not exclusively reserve summary procedures to the judiciary, there is no logic that compels us to consider separation of powers as a roadblock to the use of efficient judicial procedures in the field of administrative law. If there does not exist a genuine issue of material fact, there is no reason why an administrative board or agency should be denied an opportunity to handle the matter summarily, passing on the issue of law presented.

[*ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 696-97, 601 P.2d 501 (1979), citations omitted] In *Eastlake Community Council v. City of Seattle* [64 Wn. App. 273, 276, 823 P.2d 1132 (1992)] Division I of the Court of Appeals held that even where a quasi-judicial body's regulating procedures do "not contain any provisions authorizing agencies to grant summary judgment", they may do so when acting in a quasi-judicial role under the principle set down in *ASARCO*; and

WHEREAS, summary dismissal requests in the quasi-judicial realm are akin to summary judgment requests in the judicial realm. Washington's appellate courts have explained the standard of review to be applied in summary judgment requests.

> When reviewing a summary judgment order, we engage in the same inquiry as the trial court, affirming summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Staples v. Allstate Insurance Co., __ Wn.2d __, __ P.3d __ (2013)

> A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986); and

WHEREAS, City ordinances are subject to the same rules of interpretation and construction as apply to statutes. [*Neighbors v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997)] Courts, and by extension quasi-judicial decision makers, "do not construe a statute that is clear and unambiguous on its

face. We assume that the legislature means exactly what it says, and we give words their plain and ordinary meaning. Statutes are construed as a whole, to give effect to all language and to harmonize all provisions." [*Ockerman v. King Cy.*, 102 Wn. App. 212, 6 P.3rd 11214 (2000); see also: *Western Petroleum v. Freidt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995), holding that intent is relevant only if ambiguity exists in the language of the code; *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000), holding that clear and unambiguous codes are not subject to judicial construction] Legislative history cannot override an unambiguous code provision. [*Kirtley v. State*, 49 Wn. App. 894, 898, 748 P.2d 1148 (1987)]; and

WHEREAS, the City is required to base its land use decisions upon duly adopted laws and ordinances, and may not consider equitable defenses. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984)]; and

WHEREAS, the Grove appeal challenges CP&D's approval of a Critical Area Review 2 ("CAR 2") for Strand's proposed demolition and replacement of the existing residence at 6950 SE Maker Street; and

WHEREAS, there is no genuine issue regarding the following facts, derived from the documents listed above:

1. This appeal relates to a parcel whose mailing address is 6950 SE Maker Street, Mercer Island ("6950"). (Exhibit 9001.A, PDF 4)
2. 6950 is substantially, if not entirely, encumbered by regulated critical areas (steep slopes) and their required buffers. (Exhibit 9001.A, PDF 8)
3. Appellant Grove lives at 3515 72nd Avenue SE ("3515"), abutting 6950 on the east. (Exhibit 1, PDF 1)
4. The lots in this portion of Mercer Island were first platted in the 1890s. (Exhibit 9003.B, PDF 1)
5. The existing single-story, single-family residence was built in or around 1952. (Exhibit 9003.B, PDF 1)
6. The City of Mercer Island was incorporated on July 5, 1960. (Official notice)
7. 6950 was terraced before the residence was built, resulting in a fill slope along the west side of the lot. The fill slope was not initially rocked. (Exhibit 9005.D) The fill slope rises about 14.5 feet over a horizontal distance of about 30 feet, for an average slope of about 49 percent. (Exhibit 9005.C, PDF 5)
8. The western fill slope has since been rocked. (Exhibit 9005.B, PDF 5)
9. The western fill slope has a total maximum height (from toe to top) of about 14.5 feet. (Exhibit 9005.C, PDF 5)
10. 3515 also appears to have been terraced at some time in the past. The west edge of 3515, immediately east of the common boundary line with 6950, consists of a 5-foot tall Keystone wall topped by up to a 5-foot rockery. (Exhibit 9005.B, PDF 10)
11. The trunk of a Red oak tree ("Tree #5") having a DSH (a.k.a. DBH) of approximately 45 inches and a height of 50 – 70 feet is rooted on 3515 approximately 10 feet east of the common boundary between 6950 and 3515. Some of Tree #5's branches hang over the common 6950/3515 property line. (Exhibits 9001.C; 9001.D; 9005.A; 9005.B)
12. Tree #5 meets the Mercer Island City Code ("MICC") definition of an "exceptional" tree. (Exhibit 9001.C, PDF 3)

13. Strand first lived at 6950 in or around 2020. Strand purchased 6950 in 2021. (Exhibit 9005, PDF 1 & 2)
14. In November 2021, Strand had a professional tree service remove all that portion of a large limb on Tree # 5 which overhung the common property line between 6950 and 3515. Grove was aware of and observed the removal of the branch. (Exhibit 9005, PDF 4)

; and

WHEREAS, the Grove appeal (Exhibit 9001.B) presents two issues (labeled as "Parts"). "Part 1" is discussed from PDF 3 – 8; "Part 2" is discussed from PDF 9 – 14. Issue 1 ("Part 1") asserts that Strand performed unpermitted exceptional tree removal within a critical area which must be addressed and resolved through the CAR 2 process. Issue 2 ("Part 2") asserts that the current topography of 6950 cannot be accepted as the existing lot grade for the purpose of building height calculation; and

WHEREAS, Issue 1 depends upon Grove's assertion that removal of the limb from Tree #5 constituted "cutting" (as opposed to "pruning"). Issue 1 can be resolved by applying applicable law to the agreed facts. Issue 1 is, thus, appropriate for summary dismissal consideration; and

WHEREAS, Tree #5 is located on Grove's 3515, not Strand's 6950. The CAR 2 was an application by Strand to perform certain work on 6950; a CAR 2 is not a code enforcement proceeding. A permit for work on 6950 cannot require Strand to do anything on a different lot which she doesn't own. For example, CP&D could not require Strand to preserve Tree #5 because Tree #5 is not Strand's tree on Strand's property. Nor, for the same reason, CP&D could not require Strand to physically remove Tree #5 in its entirety. For the simple reason that Tree #5 is not within the jurisdiction of the CAR 2 review under challenge, Issue 1 must be dismissed for lack of jurisdiction; and

WHEREAS, Issue 2 asserts that 6950's topographic configuration which has existed for at least the last 68 years cannot be considered as the "existing grade" of the lot. Grove argues that one must go back in history to pre-development times (whenever that might be), with the topography of the lot at that time constituting "existing grade" for current building height calculation purposes. Grove further asserts that the current rockery on the west side of 6950 was constructed after 1963 and was illegal when constructed. Issue 2 can be resolved by applying applicable law to the agreed facts. Issue 2 is, thus, appropriate for summary dismissal consideration; and

WHEREAS, the 1955 photograph (Exhibit 9005.D) shows clearly that the slope on the west side of 6950 has existed in its current configuration since at least 1955, five years before the City became incorporated. The slope was created before any Mercer Island zoning existed. It is clear from the current topography and the 1955 photograph that the rocks covering the western slope were placed on the slope as it existed in 1955. The rocks may well be protecting the slope from erosion, but they are not retaining the slope in the normal sense of a typical, near-vertical retaining wall; they are not a wall. Further, years ago CP&D issued two Administrative Interpretations regarding the determination of "existing grade." (Exhibits 9001.E; 9001.F) Both reach essentially the same conclusion:

> without concrete evidence or verification from a previous survey document, as determined by the City Building Official, the existing grade of an existing structure or it's various wall

segments on a site will be used as the elevation for measuring average building elevation "prior to any development".

(Exhibit 9001.F, PDF 3) No ancient survey has been presented to show what the terrain on 6950 was before any development occurred on the lot. (The lack of any such ancient survey is not unexpected given that the lot was developed before the City was incorporated.) The code interpretation controls: The existing grade is the grade to be used. Issue 2 must be dismissed based upon application of applicable law to the undisputed facts; and

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

NOW, THEREFORE, the Hearing Examiner issues the following:

ORDER

The appeal from CAO23-011 filed by Grove *et al.* on October 23, 2023 (Appeal APL23-009), is herewith **SUMMARILY DISMISSED** for the reasons set forth above.

The previously scheduled hearing, being moot, is herewith **CANCELED.**

This Order constitutes the Examiner's final disposition of this appeal.

ORDER issued December 2, 2023.

\s\ *John E. Galt*

JOHN E. GALT
Hearing Examiner

NOTICE of RIGHT of RECONSIDERATION

This Order is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Order in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: "1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision." [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

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

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