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4 **BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND**

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6 NOTICE OF APPEAL  
7 IN RE: NOTICE OF DECISION: FILE NO.  
8 2207-019

Case No. \_\_\_\_\_

9 DANIEL GROVE,

Appellant,

10 APPELLANT DANIEL GROVE'S  
11 NOTICE OF APPEAL OF BUILDING  
12 PERMIT NO. 2207-019

v.

13 CITY OF MERCER ISLAND,

Respondent.

14  
15 **I. INTRODUCTION**

16 This is an action to stop an illegal construction project that grossly violates the Mercer  
17 Island City Code. Building Permit 2207-019 ("Permit 2207-019") proposes to demolish an existing  
18 house and build a new, larger home along with accessory structures at 6950 SE Maker Street on  
19 Mercer Island, Washington. On February 20, 2024, the City of Mercer Island ("City") approved  
20 Permit 2207-019 despite considerable evidence demonstrating that the proposal fails to comply  
21 with existing rules and regulations. The City's approval is in substantial error and is unsupported  
22 by the evidence in the record.

23 **II. IDENTITY OF APPELLANT AND STANDING**

24 Appellant, Daniel Grove, lives immediately adjacent to the demolition and redevelopment  
25 proposed at 6950 SE Maker Street, on Mercer Island, Washington. Mr. Grove resides at 3515 72nd  
26 Ave SE on Mercer Island, Washington. Approval of Permit 2207-019 will result in an out of scale

1 and oversized house that will directly injure Mr. Grove’s property and reduce its value.

2 **III. DECISION BEING APPEALED**

3 Mr. Grove appeals the City’s Notice of Decision: File No. 2207-019 (“Notice of Decision”)  
4 which approves Permit 2207-019 subject to conditions. A copy of the Notice of Decision is  
5 attached to this appeal as Exhibit A.

6 **IV. LEGAL AUTHORITY**

7 Pursuant to Mercer Island City Code (“MICC”) 19.15.130, a decision may be  
8 administratively appealed by filing a written appeal on the decision. The burden of proof is on the  
9 appellant to demonstrate that there has been substantial error, or the proceedings were materially  
10 affected by irregularities in procedure, or the decision was unsupported by evidence in the record,  
11 or that the decision is in conflict with the standards for review of the particular action. MICC  
12 19.15.130.C. Here, the City’s decision is both in substantial error and unsupported by the evidence  
13 in the record. Upon review, the Hearing Examiner may remand the decision back to the City for  
14 further consideration. MICC 3.40.020. Mr. Grove respectfully requests the Hearing Examiner do  
15 so in this case, as further detailed below.

16 **V. SUMMARY OF PROCEDURAL BACKGROUND**

17 In July 2022, Jeffrey Almeter, on behalf of Ms. Dorothy Strand (“Applicants”), submitted  
18 a building permit application and associated site plans to demolish the existing single-family  
19 residence at 6950 SE Maker Street and construct a new, 3,936 square foot single-family residence  
20 with an accessory dwelling unit. *See* Exhibit B (Building Permit Application). During the public  
21 comment period, several neighbors, including Mr. Grove, submitted comment letters to express  
22 their concerns about the development including the drastic changes in size of the home, failure to  
23 comply with Mercer Island City Code requirements, and several safety concerns due to the  
24 development being located within geologically hazardous areas.<sup>1</sup> Mr. Grove specifically raised the  
25

26 <sup>1</sup> Public comment letters can be located on Mercer Island’s public permit portal at:  
<https://mieplan.mercergov.org/public/2207-019/Public%20Comments/>

1 following concerns related to the: (1) miscalculation of elevation and existing grade, (2)  
2 miscalculation of gross floor area, and (3) miscalculation of the home’s building and facade height.  
3 Mr. Grove also raised the issues of (4) the safety and legality of the proposed perimeter rockery,  
4 and (5) severe damage to a tree designated as an “Exceptional Tree” in Mercer Island to enable the  
5 proposed demolition and rebuild of the proposed. *See* Exhibit C (Comment Letters).

6 The City responded with comments to the Applicants on November 18, 2022 and in  
7 response to those and subsequent comments, the Applicants submitted several more iterations of  
8 the Development Plan Set, culminating with the most recent Development Plan Set dated June 2,  
9 2023 (“Final Plan Set”). *See* Exhibit D (Final Plan Set, June 2, 2023). The City’s Notice of  
10 Decision relies on this Final Plan Set, which contains several errors.

11 The Final Plan Set still contains four main errors in violation of Mercer Island Code’s  
12 development code resulting in substantial error and a decision unsupported by the evidence in the  
13 record. **First**, the Gross Floor Area is much larger than permitted, resulting in a home that is  
14 substantially larger than allowed. This erroneous calculation was based on a similarly erroneous  
15 calculation of existing and finished grade of the home. **Second**, the required side yard depth is less  
16 than the 10 feet required on the east side of the proposed home. **Third**, the rooftop railings as part  
17 of the downhill facade extend above code height limits. **Fourth**, the proposed retaining  
18 walls/rockeries exceed code height limits. The City has provided no explanation for why the  
19 Applicant is exempt from or able to evade applicable building and development regulations that  
20 should constrain the project’s gross floor area, require a larger side yard, limit the maximum height  
21 of certain features, and limit the heights of multiple retaining walls/rockeries.

## 22 VI. ASSIGNMENTS OF ERROR

### 23 1. The City relied on an incomplete record and erroneously approved the “existing 24 grade” and “finished grade” calculations in the Final Plan Set skewing several key 25 metrics in the plan set

26 As a threshold issue, critical calculations including building height and building elevation,  
gross floor area, and side yard depth rely on a proper underlying calculation of existing or finished

1 grade. If these calculations are off, so are the resulting height and size of the home. Here, there are  
2 two principle errors that plague the Applicant’s proposal and the City’s approval of it related to  
3 existing and finished grade, resulting in various erroneous calculations: (a) the “existing grade” is  
4 distorted because the determination relies on an incomplete record and fails to apply the applicable  
5 administrative interpretations; and (b) the “finished grade” is distorted because it is based on an  
6 incorrect calculation.

7 **As to existing grade**, the record lacks important information required for a determination  
8 of “existing grade.” The topographic survey map should show the grade beneath the structure, but  
9 currently it ignores the grade of the existing home entirely (beyond spot elevations at its entrances).  
10 Specifically, the record does not establish the grade underlying the existing structure, which is  
11 required by Development Services Group (DSG)<sup>2</sup> Administrative Interpretation 12-004 and  
12 Administrative Interpretation 04-04.

13 “Existing grade” is defined as the surface level at any point on the lot prior to alteration<sup>3</sup>  
14 of the ground surface, or “the grade prior to any development.” MICC 19.16.010.E.; Exhibit E  
15 (Administrative Interpretations 12-004 and 04-04). In some cases, a survey of conditions prior to  
16 the existing development may be available as evidence of the “existing grade.” *Id.* However, if  
17 there is no concrete evidence or verification from a previous survey document that identifies  
18 existing grade, the existing grade underlying the existing structure is used as the elevation for the  
19 proposed development. Administrative Interpretations 04-04 and 12-004.

20 Here, the City and its expert, Mr. James Harper, determined that no survey of the site’s  
21 pre-development conditions exists.<sup>4</sup> The Hearing Examiner in an appeal of a related permit  
22 determined the same.<sup>5</sup> Therefore, the existing grade underlying the structure should control. The

23 <sup>2</sup> Now referred to as the City of Mercer Island, Department of Community Planning & Development.

24 <sup>3</sup> MICC 19.16.010.A. defines “alteration” as “any human-induced action which adversely impacts the existing  
25 condition of the area, including grading, filling, dredging, draining, channeling and paving (including construction  
26 and application of gravel).”

<sup>4</sup> See Exhibit G, Report of James Harper, Senior Associate Bush Roed & Hitchings, Inc., to the City dated August  
14, 2023)

<sup>5</sup> See Exhibit H, APL23-009, Order of Summary Dismissal of Appeal of Critical Area Review 2 (Ref. file no. CAO23-  
011) issued December 2, 2023 at 6 (“No ancient survey has been presented to show what the terrain on 6950 was

1 existing structure is built with slabs directly on dirt. *See* Exhibit F (Construction Photos).  
2 Therefore, the elevation of “existing grade underlying the existing structure” is the elevation of  
3 that dirt underneath the existing structure. *See* Administrative Interpretation 12-004. Despite this,  
4 the City has permitted the Applicant to interpolate the grades within the footprint of the existing  
5 structure, contrary to the Administrative Interpretations and its own previous determinations. The  
6 City’s expert, Mr. Harper, specifically stated that: the existing surveys<sup>6</sup> “do not serve as a  
7 “snapshot” of original grade conditions and cannot be relied on for interpolation or other such  
8 formulaic determinations of *any past original grade.*” Exhibit G at 1 (emphasis in original).  
9 Evidence in the record shows that the existing grade underlying the northeast portion of the  
10 structure is 3 feet to 7 feet lower than the existing grade shown in the plans. This evidence includes  
11 photographic evidence of the existing structure (both when it was under construction, and as it  
12 exists today), and the elevation measured by the Applicant’s at the northwest entrance to the  
13 existing structure. Exhibit D (Final Plan Set); Exhibit F (Construction Photos). For example,  
14 photographic evidence comparing grades west of existing house during its 1950s construction  
15 show the entire site has been significantly altered over time, both in the yard and underneath the  
16 existing structure. *See* Exhibit F (Construction Photos).

17 Use of the higher than permitted existing grade improperly increases several metrics,  
18 including the wall segment coverage and basement exclusion area, both of which are used in  
19 calculating the gross floor area to determine the resulting size of the home. It also skews the  
20 “average building elevation” calculation.<sup>7</sup> Because the midpoint of the proposed house’s eastern  
21 wall lies within the existing house, its elevation is the elevation of the grade underlying the existing  
22 structure at that point. The elevation of this midpoint should also be determined per Administrative  
23 Interpretation 04-04 in order to correctly compute “average building elevation” and “maximum

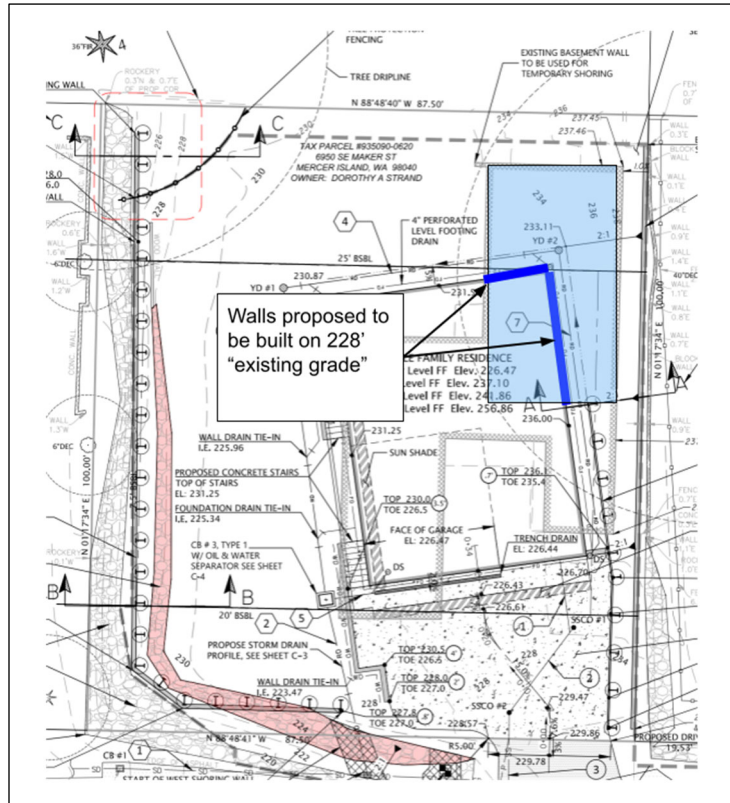
24 before any development occurred on the lot. (The lack of any such ancient survey is not unexpected given that the lot  
25 was developed before the City was incorporated.) The code interpretation controls: The existing grade is the grade to  
be used. Issue 2 must be dismissed based upon application of applicable law to the undisputed facts.”).

26 <sup>6</sup> Exhibit G at 1. Harper refers to a 2022, 1989 and 2005 survey of the property.

<sup>7</sup> In the R-8.4 zone (where the site is located), “average building elevation” is calculated using the lower of “existing grade” or “finished grade” at the midpoint of each exterior wall segment. MICC 19.16.010.



**Figure 2: Final Plan Set with Existing Grade Overlay**



**2. The City substantially erred in approving a Gross Floor Area larger than permitted and a home substantially larger than the code allows.**

Incorrect determinations of both “existing grade” and “finished grade” have resulted in a larger Gross Floor Area than permitted. In other words, the Applicant has improperly been approved to build a larger house than is permitted.

Gross Floor Area (“GFA”) is defined as “the total square footage of floor area bounded by the exterior faces of the building.” MICC 19.16.010.G. GFA is important because it essentially sets out the limits of the size of the home in relation to the size of the lot. A correct GFA calculation relies on a correct calculation of “existing grade” and “finished grade.” See MICC Title 19, Appendix B. This is because a portion of the basement floor area (called the basement exclusion area, which is used as part of the GFA calculation) can be excluded by the developer depending on which is lower—the existing or finished grade. *Id.*

1 The incorrect existing and finished grade calculations resulted in a smaller basement floor  
2 exclusion area than is used in the Final Plan Set. The Final Plan Set calculates a basement floor  
3 exclusion area of 937.5 square feet. Exhibit D at A1.0. The actual basement exclusion area to be  
4 used is closer to 613 square feet. This results in a GFA for the proposed house that is approximately  
5 4,250 square feet, which is significantly larger than the permitted 3,937.5 square feet. As it stands,  
6 if not corrected, the City has permitted a house with a GFA that is roughly 300 to 350 square feet  
7 larger than the 3,937.5 square feet permitted.

8 **3. The City substantially erred by misapplying the code allowing the structure to**  
9 **encroach into the required side yard, resulting in a side yard smaller than required**  
10 **by the code.**

11 In Mercer Island, single-family dwellings with a height of more than 25 feet measured from  
12 the existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining  
13 the side yard must provide a minimum side yard depth of **ten feet**. MICC 19.02.020.C.1.c.iii.b.  
14 (emphasis added).<sup>8</sup> This allows sufficient space between homes or structures and reduced  
15 crowding. But, here, the side yard is only 7.5 feet. The City appears to have allowed this because  
16 *part* of the façade adjoining the side yard is less than 25 feet while other portions are demonstrably  
17 over 25 feet. *See* Exhibit D (Final Plan Set) at A1.0 and A3.1. Specifically, the relevant portion of  
18 the façade is on average 28' in height while the highest point is 33.9' per the Final Plan Set. The  
19 Applicant cannot cherry pick a shorter section to avoid this requirement.<sup>9</sup> The City erroneously  
20 approved this blatant code violation in the plans.

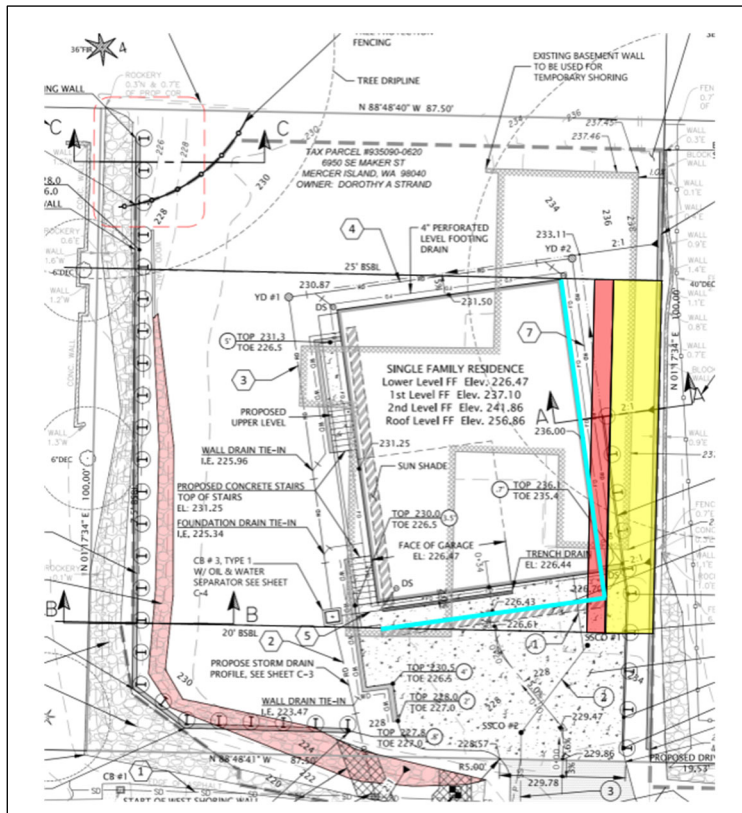
21 **Figure 3** below depicts the impact of a 7.5 foot versus 10 foot side yard on the surrounding  
22 areas. Figure 3 is derived from the Final Plan Set with an overlay. This shows how much closer  
23 Ms. Strand's proposed home will be to Mr. Grove's than it is otherwise allowed.

24 <sup>8</sup> Because there is a facade with a height of more than 25 feet adjoining the Applicant's east "side yard," MICC  
19.02.020(C)(1)(c)(iii)(b) mandates that the required east "side yard" depth be 10 feet.

25 <sup>9</sup> The Applicant appears to have misunderstood this portion of the code as Sheet A1.0 contains a note pointing to the  
26 east side of the proposed house as "10'-0" SETBACK ABOVE 15'." While the code actually states: "Single-family  
dwellings with a height of more than 25 feet measured from the existing or finished grade, whichever is lower, to the  
*top of the exterior wall facade adjoining the side yard* shall provide a minimum side yard depth of ten feet." MICC  
19.02.020.C.1.c.iii.b. (emphasis added).



**Figure 3: Comparison 7'5" proposed (yellow) and 10' (red) east side yard**



**4. The City substantially erred in allowing the home’s rooftop railings on the southern side to exceed maximum height limits set by the code.**

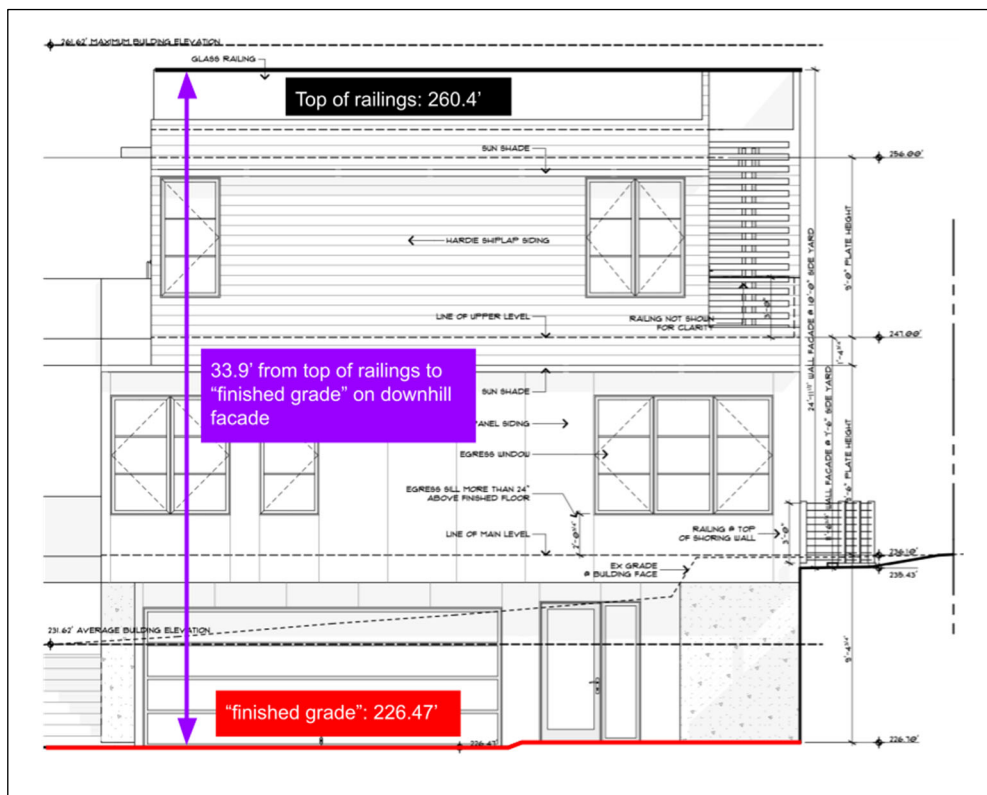
The City erroneously approved design plans that exceed the maximum building height limit by almost four feet when measured on the downhill side of the sloping lot. In most cases, maximum building height cannot exceed 30 feet above the average building elevation. MICC 19.02.020.E.1. For downhill sloping lots, like this one, the maximum building facade height also cannot exceed 30 feet in height. MICC 19.02.020.E.2. Building facade height, which includes the rooftop railings,<sup>10</sup> is “measured from the existing grade or finished grade, whichever is lower, at the furthest downhill extent of the proposed building, to the top of the exterior wall facade.” *Id.* The height limit can be increased up to five feet for certain appurtenances like chimneys or solar panels. MICC 19.02.020.E.3. But, the code expressly excludes rooftop railings from that list of allowable

<sup>10</sup> Per MICC 19.16.010.F, railing attached to exteriors walls are part of the façade.

1 appurtenances by stating “rooftop railings may not extend above the maximum allowed height for  
2 the main structure.” MICC 19.02.020.E.3.b.

3 The property at issue in this case slopes downhill primarily from east to west. The rooftop  
4 railings attached to the southern exterior wall and the southern end of the western wall both exceed  
5 maximum allowed heights. Those railings may not extend more than 30’ above the lower of the  
6 “finished grade” or “existing grade” at the furthest downhill extent of the proposed house. The  
7 finished grade at the furthest downhill extent of the façade on the southern end of the house is  
8 226.5’, the railings are at 260.4’, exceeding the maximum height allowed by at least 3.9 feet. The  
9 City has provided no information regarding why these rooftop railings should be exempted from  
10 existing regulations. Figure 4, below derived from Sheet A3.1 \_\_\_ of the Final Plan Set shows (in  
11 black) the rooftop railings that extend above 256.5’ at the furthest downhill extent of the proposed  
12 house.

13 **Figure 4: Distance from rooftop railing to finished grade**



1     **5. The City substantially erred in allowing retaining walls/rockeries that do not**  
2     **comply with the height requirements set by the code.**

3             The Mercer Island Code sets forth specific regulations related to the heigh of retaining  
4 walls/rockeries that contain “fill slopes”<sup>11</sup> in required yards. MICC 19.02.050. “Retaining  
5 walls/rockeries” are “walls of masonry, wood, rock, metal, or other similar materials or  
6 combination of similar materials that bears against earth or other fill surface for purposes of  
7 resisting lateral or other forces in contact with the wall, and/or the prevention of erosion.” MICC  
8 19.16.010.R. For this site, the Hearing Examiner previously ruled in APL23-009 that the existing  
9 rocks are “not a wall”, therefore not “retaining walls/rockeries” under the code. Exhibit H.

10            Any retaining walls/rockeries constructed as part of this proposal must conform with the  
11 current code requirements. Exhibit D (Sheet SH2).<sup>12</sup> The retaining walls/rockeries in the front yard,  
12 west yard and rear yards must comply with the height restriction of 72 inches per MICC  
13 19.02.050.D.5.b., measured from the top of the retaining wall or rockery to the existing grade or  
14 finished grade below it, whichever is lower. MICC 19.02.050.C.2. As previously determined, the  
15 dirt beneath the western and southern property perimeter is the “existing grade.”<sup>13</sup>

16            **Table 1** below provides a comparison of required height limits to proposed “retaining  
17 wall/rockery” heights derived from the existing and finished grades and proposed heights in the  
18 Final Plan Set. As depicted below, the proposed heights greatly exceed the height limit set forth in  
19 19.02.050.D.5.b.

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23  
24            <sup>11</sup> See Exhibit H, APL23-009, Order of Summary Dismissal at 4, Hearing Examiner Galt determined that the  
25 western side yard is a fill slope. (“The western fill slope has a total maximum height (from toe to top) of about 14.5  
26 feet.”).

<sup>12</sup> Exhibit I at 1 (Revised Geotech Report). The Applicant describes the shoring as “the partial removal of the  
existing western rockery, combined with the installation of closely-spaced soldier piles immediately behind the  
remaining lower portion of the rockery.”

<sup>13</sup> See Exhibit H, APL23-009, Order of Summary Dismissal at 6.

**Table 1: Comparison code height limits versus retaining wall/rockery actual proposed height**

<b>Required Yard</b>	<b>“Existing Grade” at Bottom</b>	<b>“Finished Grade” at Top</b>	<b>Height Limit</b>	<b>Proposed Height</b>
Front	214.4’	228’	72”	<b>~160” (13.6’)</b>
West Side	217.2’	228’	72”	<b>~130” (10.8’)</b>
Rear	219.6’	228’	72”	<b>~100” (8.4’)</b>

The City has provided no explanation for why this exceedance has been allowed to occur in light of the Hearing Examiner’s ruling in APL23-009, and it erred in approving a plan set that does so.

**VII. CONCLUSION**

Mr. Grove respectfully requests the Hearing Examiner remand Permit 2207-019 to the City for further consideration. Specifically:

- a) As to the existing and finished grade error, the Hearing Examiner should remand to the City to require (i) the Applicant to fully complete the record by demonstrating the grade underlying the existing house, (ii) correctly determine existing grade, and (iii) correctly determine finished grade;
- b) As to the gross floor area error, the Hearing Examiner should remand to the City to require the Applicant to correctly determine the basement exclusion area and the associated gross floor area;
- c) As to the required side yard errors, the Hearing Examiner should remand to the City to require the applicant to increase the depth of the east “required side yard” to the 10 feet required by the code;
- d) As to the rooftop railing errors, the Hearing Examiner should remand to the City to require the proposal be brought into compliance with existing height restrictions; and
- e) As to the retaining walls/rockeries errors, the Hearing Examiner should remand to the City to require the western and southern perimeter walls meet the height requirements set forth in the code.

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Respectfully submitted: March 5, 2024

**PERKINS COIE LLP**

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing NOTICE OF APPEAL on the following:

3  
4 **City Clerk’s Office**  
5 9611 SE 36th Street  
6 Mercer Island, WA 98040  
7 Phone: (206) 275-7793  
8 E-mail: [cityclerk@mercerisland.gov](mailto:cityclerk@mercerisland.gov)

9 to be sent by the following indicated method or methods, on the date set forth below:

- 10  by **sending via the court’s electronic filing system**
- 11  by **email**
- 12  by **mail**
- 13  by **hand delivery**

14 DATED: March 5, 2024

**PERKINS COIE LLP**

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