Hearing Examiner Galt

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of: Development Code Interpretation No. 22-004	APL No. 22-004 CITY'S STAFF REPORT PURSUANT TO ROP 224(g)

I. INTRODUCTION

The subject of this appeal is Development Code Interpretation ("DCI") 22-004, issued November 21, 2022. Under the Mercer Island City Code ("MICC"), the City's Code Official may issue a written interpretation of the meaning or application of provisions of the City of Mercer Island Development Code. MICC 19.15.160. The Code Official issued DCI 22-004 to instruct City Staff regarding a potential conflict within MICC 19.06.110(B), with respect to variances.

Appellants do not appear to disagree with the Code Official's reading of the plain language of the MICC provision at issue. Rather, their appeal focuses almost exclusively on Appellants' characterization of the ***effect*** of DCI 22-004 on projects they wish to undertake.

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The City acknowledges that the result of DCI 22-004 may not be ideal for Appellants or other prospective project proponents, who may wish to pursue variances for their projects. However, it is not within City Staff's authority to read words into the MICC that the City Council did not see fit to place there. City Staff cannot read the MICC to fit a particular project; they must apply the code as is written. DCI 22-004 does just that.

Accordingly, the City respectfully requests the Hearing Examiner deny Appellants' appeal and uphold DCI 22-004.

II. FACTS

The Code Official issued DCI 22-004 on November 21, 2022. Ex. 1 at 0001. MICC 19.15.160 provides that "[u]pon formal application, or as determined necessary, the code official may issue a written interpretation of the meaning or application of provisions of the development code." The Code Official did not issue DCI 22-004 upon formal application by any person. Rather, the City's Code Official determined that it was necessary to interpret a potential conflict between provisions in MICC 19.06.110(B). Ex. 1 at 0002.[1]

DCI 22-004 interprets the portion of the MICC excerpted below:

> B. Variances.
>
> 1. Purpose. An applicant or property owner may request a variance from any numeric standard, except for the standards contained within chapter 19.07 MICC. A variance shall be granted by the city only if the applicant can meet all criteria in subsections (B)(2)(a) through (B)(2)(h) of this section. A variance for increased lot coverage for a regulated improvement pursuant to subsection (B)(2)(i) of this section shall be granted by the city only if the applicant can meet criteria in subsections (B)(2)(a) through (B)(2)(i) of this section.

[1] To the extent the Staff Report cites to the City's exhibits, such citations will refer to the bates numbers assigned within those exhibits, although the City notes that some documents may also be separately numbered.

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2. Criteria.

a. The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an "unnecessary hardship" is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot;

…..

i. Public and private schools, religious institutions, private clubs and public facilities in single-family zones with slopes of less than 15 percent may request a variance to increase the impervious surface to a maximum 60 percent impervious surface and such variance application will be granted if the hearing examiner determines that the applicant has demonstrated that the following criteria are satisfied:

> i. There will be no net loss of permeable surface from the existing permeable surface. No net loss will be determined by the code official and may be achieved by off-site mitigation and/or by reconstructing existing parking areas to allow storm water penetration. This replacement will be an exception to MICC 19.02.060(C)(2), prohibiting parking areas from being considered as permeable surfaces;
>
> ii. All storm water discharged shall be mitigated consistent with the most recent Washington State Department of Ecology Stormwater Management Manual for Western Washington, including attenuation of flow and duration. Mitigation will be required for any and all new and replaced impervious surfaces. In designing such mitigation, the use of a continuous simulation hydrologic model such as KCRTS or WWHM shall be required; event based models will not be allowed. In addition, mitigation designs shall utilize flow control best management practices (BMPs) and low impact development (LID) techniques to infiltrate, disperse and retain storm water on site to mitigate the increased volume, flow and pollutant loading to the maximum extent feasible;
>
> iii. The director must approve a storm drainage report submitted by the applicant and prepared by a licensed civil engineer assuring the city that city infrastructure, in concert with the project design, is adequate to accommodate storm drainage from the project site, or identifying appropriate improvements to public and/or private infrastructure to assure this condition is met, at the applicant's expense; and

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> iv. The variance may not be used with other provisions to exceed this maximum 60 percent impervious surface coverage.

Ex. 1; MICC 19.06.110(B)(1)-(2).

DCI 22-004 addresses the specific question: "Can the City grant a variance from numeric standards for a non-residential structure sited in a residential zone, if under MICC 19.06.110(B)(1), all criteria in subsection (B)(2)(a) through (B)(2)(h) must be met, and that for a variance to lot coverage standards, the criteria in subsection (B)(2)(a) through (B)(2)(i) must be met?" Ex. 1 at 0001 (emphasis in original). It concludes that:

> The specifically enumerated non-residential structures listed in MICC 19.06.110 (B)(2)(i) are eligible to receive a variance from impervious surface standards if the Hearing Examiner determines the application has demonstrated satisfaction of the criteria contained within MICC 19.06.110(B)(2)(i)(i-iv) and the applicant or property owner demonstrates compliance with the other criteria enumerated in subsection (B)(2)(a) through (i), including demonstrating an unnecessary hardship, per subsection (B)(2)(a), but disregarding the conflicting second sentence of (B)(2)(a).
>
> Having not been expressly included in MICC 19.06.110(B)(2), the position of the Code Official is that all other variances from numerical standards for non-residential structures in residential zones are prohibited by MICC 19.06.110(B)(2)(a).

Ex. 1 at 0008.

The City issued notices of decision per the applicable portions of MICC 19.15.120 on November 21, 2022. Exs. 2-3. Appellants Stroum Jewish Community Center of Greater Seattle, Island Synagogue, French American School of Puget Sound, Congregational Church of Mercer Island, and Yeshiva High School (collectively "Appellants") filed an appeal of DCI 22-004 on December 5, 2022. Exs. 13-15. On December 9, 2022, the Hearing Examiner set the hearing date of January 25, 2023. The City issued notice of the

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appeal hearing per the applicable portions of MICC 19.15.100 on December 19, 2022. Exs. 16-17.

III. STANDARD OF REVIEW

In appeal hearings, the Hearing Examiner shall review the decision at issue to determine whether there has been substantial error, whether the proceedings were materially affected by irregularities in procedure, whether the decision was unsupported by material and substantial evidence in view of the entire record, or whether the decision is in conflict with the City's standards for review of the particular action. MICC 19.15.130(C), (G).

The burden of proof is on the Appellants. MICC 19.15.130(C). The City notes that despite Appellants having the burden of proof, an anomaly of the Hearing Examiner's Rules of Procedure ("RoP") requires the City to file its Staff Report prior to the brief of Appellants. RoP 224. Further, the RoP do not provide for filing of a reply brief by the City. *Id.*

The Hearing Examiner's review must take into account that no project proponent applied for DCI 22-004. Rather, the Code Official initiated the code interpretation, to provide instructions to City Staff as to how they will prepare recommendations to the Hearing Examiner with respect to certain types of variance applications. Ex. 1 at 0001. Under the MICC, City Staff do not grant or deny variances; rather, that power lies solely with the Hearing Examiner. MICC 19.15.130, Tables A and B. As such, DCI 22-004 does not and cannot bind the Hearing Examiner as to any particular outcome in a future variance decision. The Hearing Examiner need not agree with the outcome of DCI 22-004 to uphold it as correctly decided per the review principles contained in MICC 19.15.130.

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Crucially, the instant appeal cannot determine decisions that are larger than the narrow conclusion reached in DCI 22-004. A fundamental premise of Appellants' appeal is their belief that DCI 22-004 will foreclose practically any or all renovations of existing non-residential facilities within residential zones. Whether Appellants' anticipated projects are permittable under the MICC greatly exceeds the scope of the code interpretation under appeal. Indeed, for this appeal to address those questions would present an approach that is fundamentally inverted from the general principles governing land use permitting. To be successful, a project proponent should propose a project that conforms to the mandates of the MICC. While the MICC does provide for a variance mechanism to most of the numerical standards within MICC Title 19, it does not guarantee any applicant a variance. Instead, the MICC requires variance applicants to show compliance with 8-9 different enumerated criteria and to go through a Type IV land use review process, including a hearing and decision ultimately by the Hearing Examiner.[2] Variances, by the provisions of MICC, are to be the exception, not the rule.

Appellants' appeal appears instead to attempt to fit the code to a particular project or project(s). *See, e.g.* Ex. 14 at 0492, describing at length one of the Appellants' renovation plans and taking issue that such project may not be permissible under the reading of the MICC expressed within DCI 22-004. This is not the standard of review provided by MICC 19.15.130—the Hearing Examiner may not set aside or modify DCI 22-004 because its conclusion does not fit a prospective project by an appellant. The Hearing Examiner should reject any requests by Appellants to make a ruling based upon this inversion of land use

[2] Indeed, the ninth criterion contains four separate sub-criteria. MICC 19.06.110(B)(2)(a)-(i).

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permitting principles.[3] A project must fit the code and not the reverse. In any event, any specific project-oriented questions are well beyond the limited scope and application of DCI 22-004.

Moreover, even if Appellants' fears about how DCI 22-004 might affect their future development projects were correct (an issue that is not ripe for decision and beyond the scope of this appeal), that would not mean that DCI 22-004 is erroneous as a matter of law. The City Council has no obligation to provide a highly forgiving variance policy, nor must the Code Official read the City Council's adopted variance criteria expansively.

As discussed in detail below, DCI 22-004 does not present substantial error, is well supported by material and substantial evidence in view of the entire record, and does not conflict with the City's applicable decision criteria. As Appellants do not allege any procedural irregularities in their appeal, they are estopped from making any such arguments at this juncture. *See* MICC 19.15.130(D). Accordingly, the Hearing Examiner should deny Appellants' appeal and affirm DCI 22-004.

IV. RESPONSE TO APPEAL ARGUMENTS

1) DCI 22-004 Appropriately Considered the Relevant Portions of the MICC

First, Appellants make the argument that the Code Official was required to consider purpose and intent statements within MICC chapters/sections unrelated to the code at issue in DCI 22-004, such as the purpose statement for nonconforming uses contained in MICC 19.01.050(A), and the purpose statement for the residential chapter, Ch. 19.02. Ex. 14 at 0494-0495. The MICC does not require this. MICC 19.15.160(A)(2) directs the Code

[3] Additionally, it is not the City's position that the Hearing Examiner is bound by DCI 22-004 during the review of any particular variance application.

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Official to consider the "purpose and intent statement of the chapters in question;" it does not require consideration of other, unrelated chapters of the MICC. The only chapter in question is MICC Ch. 19.06. The Code Official appropriately considered the purpose and intent statement of the chapter in question. He correctly noted that "Chapter 19.06 MICC does not contain a general purpose statement." Ex. 1 at 0003. Therefore, he correctly reviewed the purpose statement contained in MICC 19.06.110(B)(1) and not statements contained in other, unrelated portions of the MICC.

Further, while the City does not dispute that MICC 19.01.010 contains the direction to read Title 19 as a whole, it also provides that in the event of conflicts, general purposes within the development code must yield to more specific purposes. MICC 19.01.010. It is just that type of conflict between the general and the specific that DCI 22-004 addresses. MICC 19.06.110(B)(2)(a) contains general language, while MICC 19.06.100(B)(2)(i) contains specific language that appears to conflict with (B)(2)(a). Ex. 1 at 0003. DCI 22-004 reconciles this conflict while appropriately giving effect to both sections. To the extent there are conflicts with general purpose sections of other portions of Title 19, those general purpose sections must yield to specific language in MICC 19.06.110(B)(2), in the event of a conflict.

Appellants' arguments conflate the land use concept of non-conforming use with the variance procedural tool; in essence, presupposing every project for a non-residential structure in a residential zone will require a variance. Ex. 14 at 0495-0496. This argument is misplaced and misses the narrow focus of DCI 22-004, which does not discuss the MICC's provisions on non-conforming uses at all, nor any other ancillary land use concept. There is simply no need to do so—the purpose of DCI 22-004 is to address a potential

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conflict within the language of MICC 19.06.110(B)(2) concerning variances. It would be inappropriate for DCI 22-004 to address variances in the context of each and every other land use concept which may apply based upon the characteristics of the proposed project.

Appellants also make the argument that the language in the variance section indicates that an applicant or property owner may request a variance from *any* numeric standard, except for those contained in MICC Ch. 19.07. Ex. 14 at 0496. This argument ignores the instruction of MICC 19.01.010 as to reconciliation in the code of conflicts between general statements versus specific statements. While MICC 19.06.110(B)(1) provides that applicants may *request* a variance from any numeric standard (except for those contained within MICC Ch. 19.07), the actual granting of variances is preconditioned on the applicant demonstrating to the Hearing Examiner that they meet all of the criteria in MICC 19.06.110(B)(2)(a) through either (B)(2)(h) or (B)(2)(i), depending on the type of variance sought. Put another way, the MICC does not guarantee a variance from any numeric standard. Indeed, it imposes a high bar to clear for any project proponent applying for a variance.

Finally, the fact that there is no purpose statement stating that Appellants are limited to seeking only one type of variance is immaterial. Ex. 14 at 0496. Other types of variances prohibited by the code are likewise not enumerated within the general-purpose section of MICC 19.06.110(B)(1). Indeed, MICC 19.06.110(B)(1) does not state all of the situations in which the code does not permit a variance, such as when the request for the variance is based upon the actions of the current or prior property owner. Nevertheless, there can be no dispute that the MICC does not permit variances in situations in which the basis for

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requesting the variance is the direct result of the current or prior property owner. MICC 19.06.110(B)(2)(h). Appellants' argument is misplaced.

2) Appellants Erroneously Expand the Conclusions Drawn In DCI 22-004

The City disagrees with Appellants' characterization of DCI 22-004 as concluding that "City Council intended to render community organizations obsolete." Ex. 14 at 0496. DCI 22-004 makes no such conclusion. Ex. 1 at 0001-0008. It simply reconciles two provisions within MICC 19.06.110, relating to variances. Appellants' argument puts the cart before the horse, and assumes that if they cannot obtain a variance, they cannot remodel (or rebuild) their facilities. That is not what DCI 22-004 concludes, and even if it were, it would not logically follow that the decision must therefore be incorrect. The feasibility of any particular project as to land use permitting depends upon any number of factors. DCI 22-004, being narrow in scope, cannot and does not speak to the viability of any particular project nor must it guarantee any specific outcomes.

DCI 22-004 relates only to variances—it makes absolutely no statements as to non-conforming uses, gross floor area, or other areas of concern to Appellants—nor should it. *Cf.* Ex. 1 at 0001-0008; Ex. 14 at 0489-0490. It bears repeating that DCI 22-004 does not prohibit applicants from applying for variances and does not prohibit the Hearing Examiner from granting variances. It merely provides the Code Official's opinions that City Staff should oppose certain variance requests in their recommendation to the Hearing Examiner, based on DCI 22-004, which includes a plain reading of the applicable code language.

The City does not dispute that during its deliberations of Ordinance No. 17C-15, the City Council primarily focused on single-family residences. Ex. 14 at pp. 0496-0497. However, this does not necessarily mean the City Council lacked understanding of how the

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ordinance would impact non-residential properties. For example, criterion (B)(2)(i) in MICC 19.06.110 regarding impervious surface variances for non-residential structures and facilities was intentionally brought forward from the former code to Ordinance No. 17C-15 and adopted by the City Council. Ex. 4 at 0038; 0096-0097. Further, it is axiomatic that legislative bodies understand the repercussions of their legislation. *State v. Costich*, 152 Wn. 2d 463, 470, 98 P.3d 795 (2004) ("we presume the legislature says what it means and means what it says.") The Hearing Examiner must conclude that the City Council understood the code language that it passed and that it intended the result of that legislation.

Even assuming an unintended result, City Staff is without the authority to substitute its judgment for the plain language of the MICC. Put plainly, City Staff lack the authority to read words into the MICC that are not there. *See infra*, Section V(6) below. If the City Council or its constituents wish to correct an unintended, but rational, consequence of past legislation, they must take action to amend the MICC. City Staff lack authority to do so *sua sponte*. Nor may the Hearing Examiner assume a result is unintended when it flows from the most natural and harmonious reading of the text. *Costich*, 152 Wn.2d at 470.

3) The Code Official Appropriately Weighed Different and Sometimes Competing Comprehensive Plan Policies

Appellants allege that the Code Official focused disproportionally on single family policies in the Comprehensive Plan. Ex. 14 at 0497. This is incorrect. While the Code Official did note several policies relating to single family residential, he also considered policies relating to non-residential structures in residential zones, including ones citied by Appellants. *See, e.g.* Ex. 1 at 0005, citing to Goal 17, section 17.4, from the Land Use Element of the Comprehensive Plan.

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Additionally, DCI 22-004 specifically interprets MICC language pertaining to the meaning of "unnecessary hardship" specifically within residential zones. Ex. 1 at 0001-0008. Accordingly, those policies certainly constitute "[p]olicy direction provided by the Mercer Island Comprehensive Plan." MICC 19.15.160(A)(4).

Appellants also allege that the Comprehensive Plan supports allowing community organizations to rebuild. Ex. 14 at 0497. This is an overstatement. As noted within DCI 22-004:

> The Comprehensive Plan evidences an intent to retain certain non-residential structures located in non-residential zones. However, the Comprehensive Plan is silent on whether such structures would be eligible for variances from otherwise applicable numerical standards.

Ex. 1 at p. 0005. This statement holds true when compared against Appellants' cited Comprehensive Plan policies. Ex. 14 at 0497-0498. This is logical in that variances are simply one tool relating to land use permitting. A number of factors would be expected to play into whether a particular non-residential use or organization would desire to remain within a residential zone within the City. The achievement of the Comprehensive Plan's policies relating to non-residential uses in residential zones could not have been intended to rest entirely on variances being freely available. *See also* Ex. 1 at 0005-0006 ("The Comprehensive Plan also evidences an intent to preserve existing conditions and to generally permit changes only through amendments to the development code, rather than through granting numerous [] variances to that development code.")

The Code Official considered the relevant provisions in the Comprehensive Plan, but came to a different conclusion than that preferred by Appellants. This is not a basis to overturn the Code Official's decision per MICC 19.15.130. Given the various provisions

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in the Comprehensive Plan prioritizing single family residential, but also directing for retention of appropriately sized and compatible non-residential uses, the Code Official appropriately considered and harmonized the conflicting directions of the Comprehensive Plan. Appellants' arguments are misplaced.

4) There Is No Hidden Or Undisclosed Impact Of DCI 22-004

Appellants overstate the likely impact of DCI 22-004 by assuming that it will result in "destabilization of the community fabric of Mercer Island." Ex. 14 at 0500.[4] This language appears hyperbolic and at best, speculative. It bears repeating that DCI 22-004 binds City Staff, but does not bind the Hearing Examiner, who makes the ultimate decision on a grant or denial of a variance application at the City approval level. MICC 19.15.030. Further, Appellants' alleged impact of DCI 22-004 seems unlikely, given that the code language interpreted in DCI 22-004 has been present within the MICC since 2017, without significant impact.

Indeed, constraints relating to Appellants' desired projects appear to be related to other portions of the MICC, rather than the language interpreted by DCI 22-004. For example, Appellants cite to the square footage limitations of the MICC. Ex. 14 at 0500 ("most Community Organizations in single family zones exceed the maximum square footage limit"). As stated previously, DCI 22-004 did not consider square footage limitations or other land use concepts; its sole purpose was to reconcile provisions within MICC 19.06.110(B)(2). If the language in the MICC forecloses variances as a possibility

[4] Appellants' arguments also assume a right for their facilities to "grow, rebuild, and reinvent themselves." *Id.* This both overstates the rights afforded to nonconforming uses and is irrelevant to the decision at land, which pertains only to variances.

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to solve this issue for a project proponent, such proponent could theoretically pursue other possible solutions, such as a Development Code amendment to alter the square footage limitations within the MICC, purchasing additional property to increase their campus size, and/or pursuing both Comprehensive Plan land use designation and rezone amendments of their property.[5] There is no guarantee that the conclusion reached in DCI 22-004 would make all projects desired by Appellants infeasible.

As discussed *supra*, Appellants' focus on variances with respect to their desired project(s) again presents an inverted approach to land use permitting. Instead of designing a project to meet the code, or exploring other solutions, such as code amendments or rezoning, Appellants appear to rely heavily (or exclusively) on the variance tool. City Staff are not unsympathetic to the position of Appellants. However, City Staff cannot change the MICC's language to fit desired projects by the Appellants or any other organization (indeed, as Appellants note in their appeal, this will apply equally to the Mercer Island Community and Events Center). Ex. 14 at 0491, footnote 1.

Even assuming *arguendo* that Appellants' speculations are correct, this does not change the text of the code, nor how City Staff must interpret it. It is the role of the City Council to set the City's land use policy, through promulgation of policies, such as the ordinances contained within the MICC. Even should City Staff disagree with that policy or the end result of legislation by the City Council, City Staff (and the Hearing Examiner) must apply the code as written. As discussed below, while reasonable people could

[5] Nothing in this Staff Report is intended to constitute project or legal advice to Appellants or any other potential project proponent.

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potentially debate whether the language in MICC 19.06.110(B)(2) results in desirable policy, the result is not absurd and as such, must stand, unless and until it is amended.

5) The MICC Does Not Guarantee Variances; Ordinance No. 17C-15 Was Designed to Limit and Restrict When Variances May Be Granted to Otherwise Applicable Numeric Standards within the MICC

Appellants do not dispute that no variances for non-residential uses in residential zones have been granted since the promulgation of Ord. 17C-05 in 2017. Ex. 14 at 0501. Appellants argue, however, that in the past, variances were liberally granted. *Id*. However, Appellants ignore the intent of City Council to reduce variances from the commonplace, to only those cases in which applicants are able to demonstrate an unnecessary hardship, among other criteria. *See* Ex. 8 at 0420-0421; MICC 19.06.110(B)(2)(a). It cannot be disputed that Ord. 17C-15 was intended to restrict and limit the practice of granting variances. To wit, the ordinance added MICC 19.06.110(B)(2)(a), requiring every variance applicant to demonstrate that they will suffer an unnecessary hardship without a variance. Ex. 4 at 0095. It also added a criterion requiring that the basis for requesting the variance is not the direct result of a past action by the current or prior property owner. Ex. 4 at 0096. These amendments evidence a clear intent to restrict and limit the granting of variances.

Practices relating to variances that predate the passage of Ord. 17C-15 are irrelevant to DCI 22-004, which interprets language added by Ord. 17C-15. Appellants' arguments are misplaced.

6) Appellants' Cited Precedent Regarding Statutory Interpretation Favors the Interpretation Contained Within DCI 22-004

Contrary to Appellants' assignment of error, DCI 22-004 does not contain error in its use of statutory interpretation principles. Ex. 14 at 0501. First, the Code Interpretation

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procedure provided within MICC 19.15.160 largely parallels the procedure of statutory interpretation deployed by the courts. In cases of statutory interpretation, the purpose of statutory interpretation is to determine and give effect to the intent of the legislative body. *State v. Evans,* 177 Wash. 2d 186, 192, 298 P.3d 724, 727 (2013). When possible, a reviewing tribunal derives legislative intent "solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Id*. If there is more than one reasonable interpretation of the plain language, the legislation is ambiguous, and the trier of fact engages in statutory construction, including reviewing legislative history. *Id*. Unambiguous language does not require construction. *Id.*

The code interpretation process set forth in MICC 19.15.160(A) largely mirrors the above listed in the principles of statutory interpretation, requiring the Code Official to consider:

1. The plain language of the code section in question;
2. Purpose and intent statement of the chapters in question;
3. Legislative intent of the city council provided with the adoption of the code sections in question;
4. Policy direction provided by the Mercer Island comprehensive plan;
5. Relevant judicial decisions;
6. Consistency with other regulatory requirements governing the same or similar situation;
7. The expected result or effect of the interpretation; and
8. Previous implementation of the regulatory requirements governing the situation.

Thus, just as a court would begin with the language of the provision in question, the Code Official too begins with the plain language of the MICC provision at issue in DCI 22-004. The Code Official then considers contextual factors, such as the purpose and intent

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statement of the chapter in question, and the policy direction provided by the City's Comprehensive Plan. Notably, as stated previously, Appellants do not appear to disagree with the Code Official's plain read of the MICC provision in question but rather, their perception of the result of that plain language reading.

While Appellants cite to *State v. Taylor,* 97 Wn.2d 724, 649 P.2d 633 (1982), the discussion therein inures in favor of upholding DCI 22-004. Ex. 14 at 0501-0502. The *Taylor* case recognizes three scenarios regarding legislative interpretation. The first is when a party argues that the language in question contains an error or omission, but the reviewing tribunal was able to postulate why the legislature may have intended the literal meaning of the language in question. *Taylor*, 97 Wn.2d at 729. "In such cases the court has uniformly concluded judicial intervention was unwarranted." *Id.*

The second scenario is when a reviewing tribunal concludes that a clearly inadvertent error or omission creates inconsistencies curtailing the legislation's effectiveness, but the tribunal can nevertheless read the statute rationally without the omitted language. *Id.* Again, within this second scenario, courts do not intrude and supply any omitted language themselves; "[t]o do so would have been to arrogate to ourselves the power to make legislative schemes more perfect..." *Id.* The courts instead recognize the separation of duties and leave perfection of the legislation up to the legislative body. *See id.*

The third scenario is where an error or omission creates an error so large that it renders the legislative language absurd and undermines its sole purpose. *Id*. at 730. Only in this circumstance will a court read legislation to supply erroneously omitted language. *Id.*

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Applying the *Taylor* precedent cited by Appellants, it is unnecessary (and improper) for the Hearing Examiner to read words into the MICC. First, the language at issue fits into the first *Taylor* scenario—while it is theoretically possible the language contains an error or omission (and the record is devoid of evidence that there is such an error or omission), the Hearing Examiner can rationally conclude that the City Council intended the result laid out in DCI 22-004, which is based upon the literal language of MICC 19.06.110(B)(2). Indeed, a legislative body such as the City Council is presumed to be aware of the consequences of their legislation. *Costich*, 152 Wn. 2d at 470 ("we presume the legislature says what it means and means what it says.") Therefore, the Hearing Examiner must not supply any language urged to be omitted by Appellants under the *Taylor* analysis.

The MICC language at issue also fits into the second *Taylor* scenario. Assuming, *arguendo*, that the variance language contains an error or omission (and again, the record is devoid of evidence that there is such error or omission), despite the error it is possible to read the language rationally. Put another way, it is unnecessary to read words into the MICC to make it rational.

> The specifically enumerated non-residential structures listed in MICC 19.06.110 (B)(2)(i) are eligible to receive a variance from impervious surface standards if the Hearing Examiner determines the application has demonstrated satisfaction of the criteria contained within MICC 19.06.110(B)(2)(i)(i-iv) and the applicant or property owner demonstrates compliance with the other criteria enumerated in subsection (B)(2)(a) through (i), including demonstrating an unnecessary hardship, per subsection (B)(2)(a), but disregarding the conflicting second sentence of (B)(2)(a).
>
> Having not been expressly included in MICC 19.06.110(B)(2), the position of the Code Official is that all other variances from numerical standards for

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> non-residential structures in residential zones are prohibited by MICC 19.06.110(B)(2)(a).

Ex. 1 at 0008. This may not be Appellants' desired result, but it is not irrational. Therefore, under the principles of *Taylor*, the Hearing Examiner may not supply additional language to the MICC that is not there.

The third *Taylor* scenario simply does not apply. A plain language reading of MICC 19.06.110(B)(2)(a) is not absurd, nor does it undermine the **sole** purpose of the variance tool. While the City acknowledges that reasonable minds may differ on whether the result is desirable policy, undesirable is not the same as absurd. Further, such a plain language reading does not undermine the sole purpose of the MICC provision in question. MICC 19.06.110(B) provides various criteria which an applicant must meet to be granted a variance. The provision does not guarantee variances to any particular applicant, and indeed the City Council clearly intended to limit the number of variances granted. *See, e.g.* Ex. 4 at 0095-0097; Ex. 8 at 0420-0421. As the third *Taylor* scenario does not apply, again the Hearing Examiner cannot supply language to the MICC that the City Council did not place there.

Appellants wish the Hearing Examiner to read MICC to contain a clause that it does not currently contain. Ex. 14 at 0502. Appellants essentially argue that the Hearing Examiner should read MICC 19.16.110(B)(2) as follows:

> 2. Criteria.
>
> a. The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, <u>as to single family residential projects</u> in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an "unnecessary hardship" is limited to those circumstances where the adopted standards of this title prevent the

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> construction of a single-family dwelling on a legally created, residentially zoned lot;

The Hearing Examiner lacks the authority to read the MICC as if it contains the underlined language demonstrated above, as the City Council did not see fit to include such language. *Taylor*, 97 Wn.2d at 729. Appellants' argument must be rejected. Again, "[i]t is a well-established principle of statutory interpretation that we may not add words 'to an unambiguous statute when the legislature has chosen not to include that language.'" *State v Dennis,* 191 Wn.2d 169, 173, 421 P.3d 944, 947 (2018) (quoting *State v. Delgado,* 148 Wash.2d 723, 727, 63 P.3d 792 (2003)).

Further, Appellants' precedent regarding non-conforming uses is irrelevant. Ex. 14 at 0502-0503. The *Keller v. Bellingham* case concerned whether a particular project fit within the City of Bellingham's nonconforming ordinance provisions. 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). The case does not discuss variances at all. DCI 22-004 does not, and indeed, could not consider whether a particular project fits within the nonconforming-use provisions of the MICC because 1) DCI 22-004 focuses solely on the interplay between MICC 19.06.110(B)(2)(a) and (B)(2)(i) and 2) there is no project to measure against the applicable nonconforming-use provisions of the MICC.

Finally, while it is true that Ordinance No. 17C-15 mainly focused on residential development standards, it is a mischaracterization of the ordinance to claim it **only** relates to residential development. Ex. 14 at 0503. For example, Ordinance 17C-15 also revised the City's sound regulation code. Ex. 4 at 0023. It also amended portions of the City's Construction Administrative Code, including provisions relating to "non-residential or mixed-use construction." Ex. 4 at 0024. Another example is that the ordinance also

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promulgated language governing tree removal within development in commercial or multifamily zoning designations. Ex. 4 at 0065. While residential development may have been the main focus of Ordinance No. 17C-15, it cannot be disputed that the City Council also revised portions of the MICC relating to other types of uses.

Appellants' argument as to Section 4 of Ordinance No. 17C-15is also misplaced. Ex. 14 at 0503. Appellants omit the first sentence of cited section 4, which places it in context:

> **An existing lot shall be a condition precedent for determination of a complete application for a building and other construction permit associated with single family home development.** This section shall apply to all building and other construction permits associated with single family development received on or after the effective date of this ordinance.

Ex. 4 at 0020 (emphasis supplied). This section does not mean that every other provision of Ord. 17C-15 only applies to single family development, despite the plain and ordinary language contained within the ordinance that indicates otherwise. *See e.g.* Ex. 4 at 0023-0024.

DCI 22-004 gives effect to the plain and ordinary meaning of the language contained within MICC 19.06.110(B)(2). Appellants do not, and indeed cannot, dispute the plain language reading of the provision at issue. What they dispute is the policy created by the plain language of the MICC. This is not a basis for reversal of DCI 22-004.

V. CONCLUSION

Appellants cannot show that there was substantial error with respect to DCI 22-004. Further, Appellants do not show that DCI 22-004 was unsupported by material and substantial evidence in view of the entire record. Finally, DCI 22-004 is not in conflict with

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the City's applicable decision criteria. Accordingly, the City respectfully requests the Hearing Examiner deny Appellants' appeal and uphold DCI 22-004.

DATED this 13th day of January, 2023.

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DECLARATION OF SERVICE

I, Tori Harris, 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 13th day of January, 2023, I served a true copy of the foregoing City's Staff Report Pursuant to RoP 224(g) on the following parties using the method of service indicated below:

Jessica M. Clawson, WSBA No. 36901 McCullough Hill Leary, P.S. 701 Fifth Avenue, Suite 6600 Seattle, WA 98104 *Counsel for Appellants*	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: jclawson@mhseattle.com jessica@mhseattle.com

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

DATED this 13th day of January, 2023, at Seattle, Washington.

/s/ Tori Harris
Tori Harris

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