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BEFORE THE HEARING EXAMINER FOR THE CITY OF MERCER ISLAND

In Re: Administrative Appeal of City Approval  
of Kristen DeRose/Gerald Yuen’s Critical Area  
Review 2 Application CAO23-004,  
  
E. MERCER WAY TRUST/JULIO  
RODRIGUEZ

Appellant

v.

CITY OF MERCER ISLAND, AND  
DEROSE/YUEN

Respondents

NO. APL23-003

RESPONDENT YUEN’S MOTION FOR  
SUMMARY DISMISSAL OF APPEAL

**I. INTRODUCTION & RELIEF REQUESTED**

Appellant E. Mercer Way Trust (“the Trust”) filed this Appeal for review of the City of Mercer Island’s approval of a Critical Area Review submitted by property owner Gerald Yuen. Mr. Yuen’s Critical Area Review of an application was submitted for concurrent review with an application for Site Development Permit Approval. The Trust did not file an appeal of this City permit authorizing construction.

On its face, the Trust’s Appeal fails to state any cognizable grounds for review by the Hearing Examiner, instead focusing on a separate disagreement between the Trust and Mr. Yuen

1 concerning the scope of a private access easement. The substance of the Trust’s Appeal,  
2 focusing on private easement rights, is not germane to the City Critical Area Review. Disputes  
3 over private easement rights are within exclusive jurisdiction of the Superior Court, and not  
4 properly before the Hearing Examiner. As such, pursuant to Rule 204 and Rule 228 of the City  
5 of Mercer Island Hearing Examiner Rules of Procedure, Respondent Gerald Yuen requests this  
6 Appeal be dismissed.  
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## 8 II. FACTS

### 9 A. Background Facts.

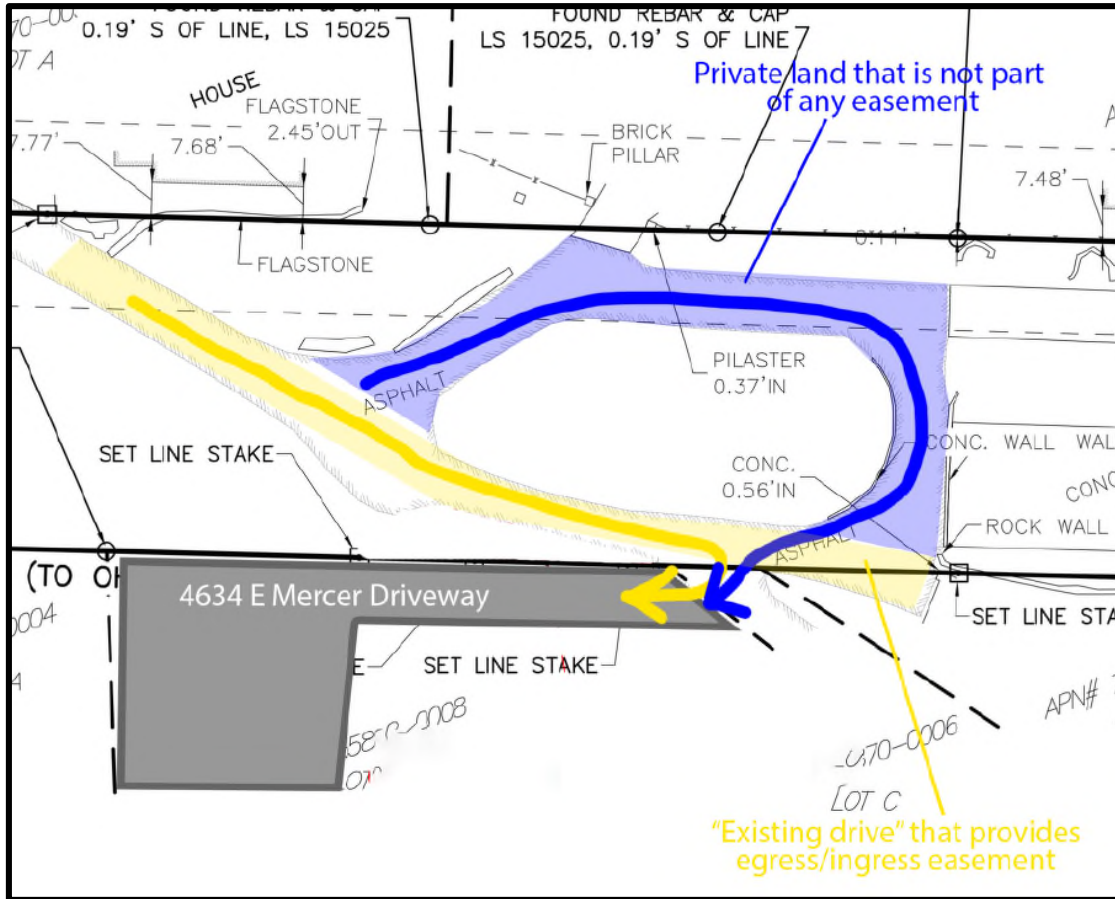
10 Mr. Yuen owns the real property located at 4624 E. Mercer Way, Mercer Island,  
11 Washington (the “Yuen Property”), a long, rectangular lot. The short, western end of the Yuen  
12 Property is bordered by Lake Washington. The eastern end is bordered by E. Mercer Way. To  
13 the south, the Yuen Property is bordered by four other lots, including the Appellant’s property at  
14 4634 E. Mercer Way (the “Rodriguez Property”). The properties are depicted below.<sup>1</sup>  
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23 The Rodriguez Property, along with the properties at 4632 and 4640 E. Mercer Way, are  
24 accessed from E. Mercer Way via a nonexclusive easement that runs over the Yuen Property.  
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<sup>1</sup> Declaration of Abigail Stagers (“Stagers Decl.”), Ex. 1.

1 The easement runs in a diagonal trajectory from a point on the north easterly side of the Yuen  
 2 Property to the point roughly where the property lines of the benefited properties converge (the  
 3 “Access Easement”). The Yuen Property is also improved with a roundabout asphalt driveway,  
 4 which connects to the asphalt Access Easement. Below is a depiction of the Access Easement in  
 5 yellow and the roundabout driveway in blue.<sup>2</sup>  
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22  
 23 **B. Mr. Yuen Applies for a Permit to Modify the Roundabout Driveway in**  
 24 **February 2023.**  
 25

<sup>2</sup> Stagers Decl., Ex. 2.

1 On or about February 7, 2023, Mr. Yuen filed a Site Development Application under File  
2 no. CAO23-004. The Application sought a Critical Area Review 2 for geologically hazardous  
3 area in conjunction with application for Site Development Permit 2208-092 for replacement and  
4 modifications to the driveway on the Yuen Property (the “Project”).<sup>3</sup> The proposed Project  
5 sought to improve the driveway for purposes of increasing fire safety access in accordance with  
6 direction and input from the Fire Marshall.<sup>4</sup> Mr. Yuen proposed to create a circular turnaround  
7 enhancing emergency vehicle access at the “Y” connection of the Access Easement to the  
8 roundabout driveway and eliminate the western segment of the roundabout driveway.<sup>5</sup> This  
9 segment of the driveway is situated near a five-foot drop off, with no barrier and a significant  
10 risk of accidents occurring on the Yuen Property.<sup>6</sup>

11  
12 The Project plans included installing new asphalt capable of bearing the weights  
13 recommended by the Fire Marshall and providing a fire truck turnaround of 62 feet in width.<sup>7</sup>  
14 The planned modifications would also reduce the steep grade of the driveway from a maximum  
15 of 22.7% to 10.5%, thereby making it suitable for access by emergency vehicles.<sup>8</sup> Below is a  
16 depiction of the plans for the modified driveway.<sup>9</sup>  
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23 <sup>3</sup> Stagers Decl., Ex. 3 (Development Application).

24 <sup>4</sup> Stagers Decl., Ex. 4 (Project Narrative).

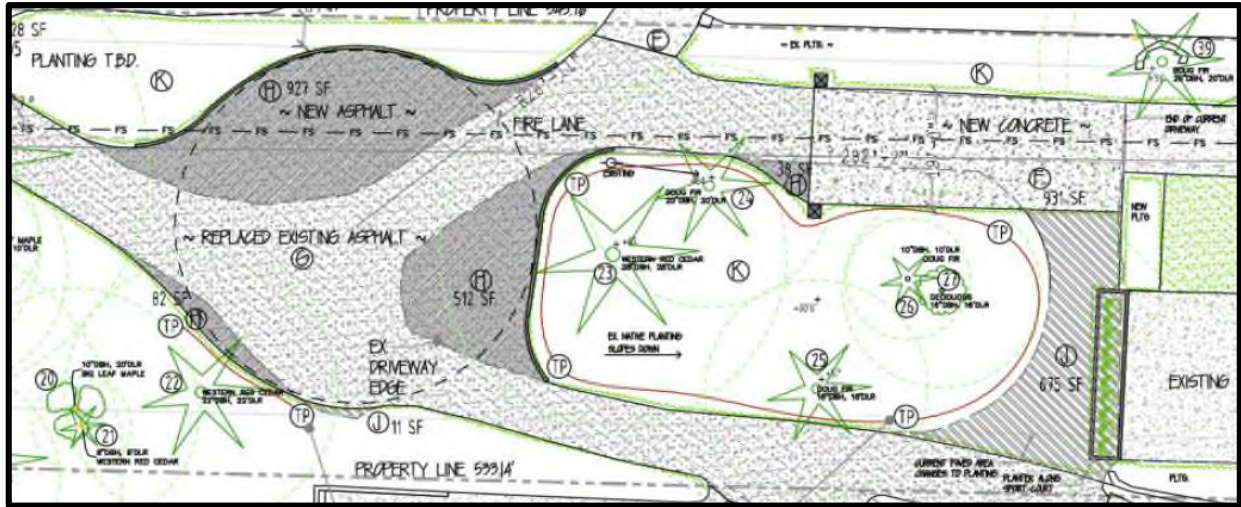
25 <sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Stagers Decl., Ex. 5 (Project plans).



As part of the critical area review application, Mr. Yuen submitted a required critical area report by Geo Group Northwest, Inc. addressing the existing geologically hazardous conditions in relation to the proposed Project.<sup>10</sup> Mr. Yuen also requested the critical area review occur concurrently with review of the underlying Site Development Project Permit 2208-092.<sup>11</sup> On June 12, 2023, the City issued its approval decision on CAO23-004.<sup>12</sup> Permit 2208-092 issued a few days later, on June 15, 2023.

**C. Rodriguez Appeals the Approval of CAO23-004.**

On June 26, 2023, the Trust filed this Appeal of CAO23-004.<sup>13</sup> The Trust did not appeal Site Development Permit 2208-092, which authorizes Mr. Yuen to construct the driveway and roundabout improvements. The Trust seeks review of “the approval for road reconfiguration... as it will greatly impact the access to my property.”<sup>14</sup> The Trust further explained the basis of this Appeal and requested relief:

<sup>10</sup> Stagers Decl., Ex. 6 (Critical Area Report).  
<sup>11</sup> Stagers Decl., Ex. 7 (Concurrent Review Request).  
<sup>12</sup> Stagers Decl., Ex. 8 (Notice of Decision).  
<sup>13</sup> Stagers Decl., Ex. 9 (Appeal).  
<sup>14</sup> *Id.*

1 With the new road proposal, I would have no room to enter and leave my  
2 driveway without having to use neighbors' driveways to turn around. I need an  
3 easement granted in front of the home in order to pour a new driveway to allow  
me to access my home with this new road proposal. Without it, this would have  
negative impacts on my home.<sup>15</sup>

4 The relief the Trust is requesting – a new easement – is beyond the jurisdictional  
5 authority of this Hearing Examiner. It is apparent the real issue in the Trust's Appeal is a dispute  
6 between private property owners concerning the scope of an access easement. This is not the  
7 appropriate forum for such a dispute. Mr. Yuen therefore requests that the Appeal be summarily  
8 dismissed pursuant to Rule of Procedure 228.<sup>16</sup>

### 10 III. ISSUE STATEMENT

11 Whether the Appeal should be dismissed because the Hearing Examiner has no  
12 jurisdiction to grant an easement and the Appeal has no merit on its face?

### 14 IV. EVIDENCE RELIED UPON

15 In support of this Motion, Respondent Yuen relies on the Declaration of Abigail Z.  
16 Stagers with exhibits, and the pleadings and papers already on file.

### 17 V. AUTHORITY & ARGUMENT

#### 18 A. Standards for Reviewing Approval of CAO23-004.

19 Municipal Hearing Examiners “are creatures of the legislature without inherent or  
20 common-law powers and may exercise only those powers conferred either expressly or by  
21 necessary implication.” *Chaussee v Snohomish County Council*, 38 Wn.App. 630, 636 689 P.2d  
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25 <sup>15</sup> *Id.*

<sup>16</sup> Rule 228 authorizes the Hearing Examiner to summarily dismiss an appeal for lack of jurisdiction, or if the appeal is without merit on its face, or frivolous.

1 1084 (1984) (citations omitted) (affirming Hearing Examiner’s determination of not having  
2 jurisdiction to consider the issue of equitable estoppel).

3         The Hearing Examiner’s jurisdiction when deciding an appeal of the City’s Critical Area  
4 Review 2 approval is limited to determining whether the approval is in “compliance with the  
5 requirements of this [Chapter 19.07, Environment].” MICC 19.07.020.B. The Hearing  
6 Examiner is authorized to grant relief only if the appellant shows (i) substantial error in the  
7 critical area approval; (ii) the approval proceedings were materially affected by irregularities;  
8 (iii) the critical area approval was unsupported by evidence in the record; or (iv) the critical area  
9 approval conflicts with the requirements of Chapter 19.07, *Environment*. MICC 19.15.130.C; *see*  
10 *also*, MICC 19.15.030 (identifying Critical area review 2 as a Type III land use review). Any  
11 relief granted by the Hearing Examiner is limited to (a) reversing the approval; (b) modifying the  
12 critical area decision and approving the decision as modified; or (c) remanding the critical area  
13 review to the City Code Official for further consideration. MICC 19.15.130.G.1  
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16         **B. Appellant fails to state cognizable grounds for Appeal of the Critical Area Review  
17 Approval of CAO23-004.**

18         The Trust’s Appeal, on its face, fails to address any of the four grounds on which the  
19 Hearing Examiner may grant relief. The sole basis asserted for the Trust’s appeal – impeding  
20 access – is inapplicable to the requirements of Chapter 19.07 that determine whether the City  
21 should grant critical area review approval. Mr. Yuen submitted a critical area study by a  
22 licensed geologist in compliance with the requirements of MICC 19.07.110. Appellant raises no  
23 issue or question regarding adequacy of this study and study conclusions.  
24

25         MICC 19.07.160.B outlines the sole “general review requirements” the City must follow  
when determining whether to approve or deny a property owner’s critical area application. The

1 requirements specific to reviewing an “alteration within geologically hazardous areas” are  
2 identified at paragraph 1, 2 and 3 of MICC 19.07.160.B. But Appellant makes no allegation that  
3 the City’s Critical Area 2 approval violates any of these review requirements. Appellant makes  
4 no allegations concerning insufficiency of evidence in the record, the approval conflicting with  
5 the requirements of Chapter 19.07, or any other substantial error concerning the approval  
6 decision failing to comply with Chapter 19.07.  
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8         Likewise, Appellant makes no allegation concerning irregularities in the procedure of the  
9 approval process. MICC 19.07.090, *Critical area reviews* “describes the purpose and procedures  
10 by which the City will review and authorize development and verify consistency with this  
11 chapter.” MICC 19.07.090.B., *Critical Area 2, Review timing and sequence*, specifies an  
12 applicant has two options “when development and/or activity is proposed on a site containing  
13 only geologically hazardous areas.” MICC 19.07.090.B.2.b. The property owner here chose  
14 option ii.: consolidation of review of geological hazardous areas together with construction  
15 permit review. Appellant raises no concerns with the concurrent review, public notice or  
16 comment periods or any other procedure during the critical area review process. The Trust has  
17 not alleged a basis for its Appeal within the scope of the Hearing Examiner’s jurisdictional  
18 authority.  
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20         Further, the relief requested by the Trust falls outside the Hearing Examiner’s authority.  
21 The Hearing Examiner has no authority to grant the easement requested by the Trust. That is a  
22 matter within the exclusive jurisdiction of the Superior Court. *See*, RCW 2.08.010 (“The  
23 superior court shall have original jurisdiction...in all cases at law which involve the title or  
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1 possession of real property”). A critical area review approval is not the means for parties to air  
2 their differences of opinion on the scope of access easement rights.

3 **C. Appellant’s failure to appeal City approval of Site Development Permit 2208-092 is**  
4 **additional grounds for dismissal.**

5 City approval of Site Development Permit 2208-092 is the City’s final determination to  
6 approve Yuen’s applications to construct driveway improvements.<sup>17</sup> Yet Appellant only  
7 appealed the Critical Area Review that is subsumed by the City’s Site Development Permit.  
8 Failure to appeal the City’s “final determination” approving commencement of construction is  
9 also fatal to the attempted appeal of the City’s Critical Area Review decision.

11 **VI. CONCLUSION**

12 Appellant does not present a claim cognizable under MICC Ch. 19.07. The City properly  
13 issued a Type III Critical Area Review 2 approval for File no. CAO23-004 in compliance with  
14 MICC 19.07.160.B. review requirements. The Appellant’s grounds for appeal present no claim  
15 to the contrary.

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24 <sup>17</sup> RCW 36.70C defines “land use decision in pertinent part as follows: (2) "Land use decision" means a final  
25 determination by a local jurisdiction's body or officer with the highest level of authority to make the determination,  
including those with authority to hear appeals, on: (a) An application for a project permit or other governmental  
approval required by law before real property may be improved, developed, modified, sold, transferred, or used...

1 DATED this 26<sup>th</sup> day of September, 2023.

2 WILLIAMS, KASTNER & GIBBS PLLC

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4 s/Abigail Z. Stagers

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury of the laws of the State of Washington that on  
3 the below date, I electronically filed the foregoing document with: the Mercer Island City Clerk  
4 at: [cityclerk@mercerisland.gov](mailto:cityclerk@mercerisland.gov) who will forward such filing to:  
5 Hearing Examiner John E. Galt at: [jegalt755@gmail.com](mailto:jegalt755@gmail.com).

6 I further certify I sent notification of such filing to the following:

7 Dan Walk 8 Nelson & Allen, P.S. 9 102 N. Meridian 10 Puyallup, WA 98371 <i>Attorney for Appellant</i>	Via Email: <a href="mailto:dwalk@nelsonallenlaw.com">dwalk@nelsonallenlaw.com</a>
11 Bio F. Park 12 City Attorney 13 City of Mercer Island 14 9611 SE 36 <sup>th</sup> Street 15 Mercer Island, WA 98040	Via Email: <a href="mailto:bio.park@mercergov.org">bio.park@mercergov.org</a>
16 Eileen M. Keiffer, WSBA No. 51598 17 Assistant City Attorney 18 Madrona Law Group, PLLC 19 14205 SE 36 <sup>th</sup> Street 20 Suite 100, PMB 440 21 Bellevue, WA 98006 22 Telephone: (425) 201-5111 <i>Attorneys for City of Mercer Island</i>	Via Email: <a href="mailto:Eileen@MadronaLaw.com">Eileen@MadronaLaw.com</a>
23 Grace Manahan 24 Assistant Planner 25 Community Planning & Development Department	Via Email: <a href="mailto:grace.manahan@mercerisland.gov">grace.manahan@mercerisland.gov</a>

Signed at Seattle, WA this 26<sup>th</sup> day of September, 2023.

*s/ Maggi Gruber*  
\_\_\_\_\_  
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