

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

DANIEL GROVE; MARTIN SNOEY; JIM MATTISON; SUSAN MATTISON; PAM FAULKNER; BRIGID STACKPOOL; and LYNN MICHAEL,

Appellants,

v.

CITY OF MERCER ISLAND,

Respondent.

No. APL23-009

CITY OF MERCER ISLAND’S MOTION TO DISMISS

**I. RELIEF RQUESTED**

The City of Mercer Island (“City”) brings this Motion to Dismiss two issues included in Appellants’ appeal of the October 9, 2023, decision approving applicant Dorothy Strand’s Critical Area Review 2 permit application, CA23-011 (the “Decision”). The issue regarding damage to adjacent property should be dismissed because Mercer Island City Code (“MICC”) 19.07.160(B)(2)(b) applies to Alteration of geological hazardous areas, not cutting or pruning of trees. The issue regarding excessive fill on the site should also be dismissed because Existing Grade on the site has been determined to be the current grade on site after review by a qualified expert, and in accord with prior practice of the City and two prior Administrative Interpretations.

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## II. FACTS

The facts included herein are only those related to this Motion. The City Decision being appealed, attached as **Exhibit A**, approved the Critical Area Review 2 application (“CAR2”) for the demolition of Dorothy Strand’s (“Strand”) existing single-family residence and construction of a new approx. 4,000 square foot single-family residence on Strand’s property (“Strand Property”) located within mapped geologically hazardous areas. Appellants assert facts in their appeal dated October 23, 2023 (“Appeal Letter”) regarding the 2021 cutting or pruning of a red oak tree located on Dan Grove’s (“Grove”) property adjacent to the Strand Property. **Exhibit B** attached. This tree is referred to as “Tree #5” in the Appeal Letter. Ex. B at 2. Tree #5’s location is confirmed as being on Grove’s property in the Scott Selby Consulting LLC report dated October 21, 2023, attached as **Exhibit C**. Exhibit C at 1.

## III. ISSUES

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1. Should Appellants’ issue alleging 2021 tree cutting violates the geological hazardous area criteria in MICC 19.07.160(B)(2) be dismissed? *Yes*.
  2. Should Appellants’ issue alleging that fill material on the Strand Property exceeds the maximum allowed fill depth under the MICC be dismissed? *Yes*.

## IV. ANALYSIS

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A. Standard of review and burden of proof.

For administrative appeals such as this one, the MICC requires Appellants “to demonstrate that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by evidence in the record, or that the decision is in conflict with the standards for review of the particular action.” MICC 19.15.130(C). Written appeals must include, among other components, “specific reasons why the appellant believes the

1 decision is wrong.” MICC 19.15.130(D)(4). Under the City of Mercer Island’s Hearing Examiner  
2 Rules of Procedures (“RoP”), any party may request dismissal of all or part of an appeal at any  
3 time with notice to all parties. RoP 204. If the facts in an appeal are legally insufficient to support  
4 the appeal, dismissal under this rule is appropriate. *See Doe v. Benton County*, 200 Wn.App 781,  
5 787, 403 P.3d 861 (2017), review denied, 190 Wn. 2d 1006 (2018).

7 B. Appellants misinterpret MICC 19.07.160(B)(2)(b) by arguing the 2021 tree  
8 cutting/pruning is an adverse impact from Alteration of geological hazardous areas.

9 Because the Strand Property lies within geologically hazardous areas, Strand is required to  
10 meet the criteria in MICC 19.07.160, *Geological hazard areas*, for any Alterations<sup>1</sup> done on the  
11 Strand Property. Appellants erroneously argue that Strand cannot satisfy all the criteria, claiming  
12 that the 2021 cutting/pruning<sup>2</sup> of Tree #5 results in Strand not satisfying MICC  
13 19.07.160(B)(2)(b). Ex. B at 2, 5. MICC 19.07.160(B)(2) provides as follows:

14 19.07.160 – *Geological hazard areas*.

15 . . .

16 B. *General review requirements.* Alteration within geologically hazardous areas or  
17 associated buffers is required to meet the standards in this section, unless the scope of work is  
18 exempt pursuant to section 19.07.120, exemptions, or a critical area review 1 approval has been  
19 obtained pursuant to section 19.07.090(A)

20 . . .

21 2. Alteration of landslide hazard areas and seismic hazard areas and associated buffers may  
22 occur if the critical area study documents find that the **proposed alteration:**

23 a. Will not adversely impact other critical areas;

24 **b. Will not adversely impact the subject property or adjacent properties;**

25 c. Will mitigate impacts to the geologically hazardous area consistent with best available  
science to the maximum extent reasonably possible such that the site is determined to be  
safe; and

<sup>1</sup> “Alteration” is defined in MICC 19.16.010 as “[a]ny human-induced action which impacts the existing condition of the area, including but not limited to grading, filling, dredging, draining, channeling and paving (including construction and application of gravel). “Alteration” does not include walking, passive recreation, fishing, or similar activities.

<sup>2</sup> A determination of whether Tree #5 was cut or pruned does not need to be made for the purposes of this Motion.

1 d. Includes the landscaping of all disturbed areas outside of building footprints and  
2 installation of hardscape prior to final inspection. (Emphasis added).

3 The “proposed alteration” to geological hazardous areas in Strand’s CAR2 application is  
4 the prospective demolition of her existing single-family residence and construction of a new  
5 approximately 4,000 square foot single-family residence (“Strand Proposed Alteration”). Ex. A at  
6 1. The plain language of MICC 19.07.160(B)(2)(b) shows that any cutting or pruning of Tree #5  
7 was not **Alteration of a geological hazardous area** on the Strand Property and therefore does not  
8 fall within MICC 19.07.160(B)(2)(b). Trees themselves, of course, are not a geological hazardous  
9 area. MICC 19.07.160(A) defines geological hazardous areas as follows:  
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11 Geologically hazardous areas are lands that are susceptible to erosion, landslides,  
12 seismic events, or other factors as identified by WAC 365-190-120. These areas  
13 may not be suited for development activities because they may pose a threat to  
14 public health and safety. Areas susceptible to one or more of the following types  
of hazards shall be designated as geologically hazardous areas: landslide hazard  
areas, seismic hazard areas, and erosion hazard areas.

15 Cutting or pruning a tree is not alteration of a geological hazardous area under MICC  
16 19.07.160(B)(2). Additionally, because the development standards in MICC 19.07.160 are  
17 triggered by the submittal of a development proposal within a geologically hazardous area, the  
18 Director correctly applied the criteria in MICC 19.07.160(B)(2) to the Strand Proposed Alteration.  
19 MICC 19.07.160(B)(2) does not apply to actions taken in the past. Appellants have elsewhere in  
20 their Appeal Letter asserted issues regarding past actions citing to MICC 19.15.210(B) in support.  
21 Ex. B at 1, 6, 10-11.

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1 C. Given the lack of credible, reliable information about the original grade of the  
2 Strand Property, consistent with City practice since the 1990's, the current grade  
3 on the Strand Property is considered the Existing Grade under MICC.

4 Appellants allege that the Strand Property does not comply with the regulation of fill  
5 material in MICC 19.02.050(D)(5)(a) and MICC 19.02.050(E)(1)(a)(i)-(ii) <sup>3</sup> and therefore  
6 restoration must occur under MICC 19.15.210(B) before the Decision may be issued. Ex. B at 6-  
7 7. The Appellants' argument, however, relies on an incorrect location for Existing Grade, which  
8 is a defined term in the MICC that has been the subject of two prior Administrative Interpretations.  
9 Appellants allege that "the Existing Grade here is the elevation of the remnant topsoil found in the  
10 2022 Geotechnical Survey, below as much as 11' of fill." Id. at 7, ftnt 1.

11 The City agrees with Appellants that Existing Grade is defined in MICC 19.16.010(E) as  
12 "[t]he surface level at any point on the lot prior to alteration of the ground surface." Alteration is  
13 defined as "[a]ny human-induced action which impacts the existing condition of the area, including  
14 but not limited to grading, filling, dredging, draining, channeling and paving (including  
15 construction and application of gravel)." MICC 19.16.010(A).

17 Existing Grade on the Strand Property was analyzed in the August 14, 2023, report from  
18 James M. Harper, P.L.S. ("Harper Report"). **Exhibit D** attached. During his consideration of  
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20 <sup>3</sup> 19.02.050(D) Retaining walls and rockeries—Requirements. . . .

21 5. Maximum height in required yard—Fill slopes.

22 a. No retaining walls or rockeries, or any combination of retaining walls or rockeries, to the extent used to  
23 raise grade and protect a fill slope, shall result in an increase in the finished grade by more than 72 inches at  
24 any point.

25 19.02.050(E) Fences and gates.

1. Fences or gates in required yard.

a. Height limits.

i. Side and rear yards. Fences and gates are allowed to a maximum height of 72 inches within  
required side or rear yards, provided the combined height of a fence and retaining wall or rockery for a fill  
slope authorized pursuant to subsection (D)(5) of this section shall not exceed a total height of 72 inches.

ii. Front yards. Fences, gates, or any combination of retaining walls, rockeries and fences are  
allowed to a maximum height of 42 inches within required front yards.

1 Existing Grade, Harper reviewed three topographic surveys dated 1989, 2005, and 2022; all  
2 application materials; and public comments. Ex. D at 1 - 2. Harper explains as follows:

3       Each survey appears to reflect a high level of diligence and there are no  
4       observable deficiencies that might bring their reliability into question.

5       As with any survey drawing, these can only illustrate conditions in existence at  
6       that specific time of performance and cannot illustrate conditions that *may have*  
7       existed previously. Therefore, one cannot assume that *any* mapping element from  
8       these surveys reflects conditions prior to alternations of any kind. These surveys  
do not serve as a “snapshot” of original grade conditions and cannot be relied on  
for interpolation or other formulaic determination of any *past, original grade*.

9 Id. at 1. Harper concludes that given the lack of “concrete evidence of any original grade which  
10 may have preceded the current existing conditions, it is my opinion that *existing* grade, for the  
11 purposes of permitting considerations, should be the surface elevation immediately adjacent to, or  
12 touching a point on the exterior wall of a proposed structure, in accord with Conclusion 2 of the  
13 Administrative Interpretation 12-004.” Id. at 2.

14       Attached as **Exhibit E** is Administrative Interpretation 12-004 (“AI 12-004”) referenced  
15 by Harper, the purpose of which is to clarify existing grade as it pertains to basement area exclusion  
16 of Gross Floor Area calculations. Ex. E at 1. Conclusion 2 cited by Harper provides as follows:

17       Existing grade, for the purpose of calculating basement area exclusions without a  
18       survey of the pre-development conditions, shall be interpreted as the elevation of  
19       a point on the surface of the earth immediately adjacent to or touching a point on  
20       the exterior wall of a proposed structure.

21 Id. at 2, Conclusion ¶2. AI 12-004 explains that “the phrase ‘prior to alteration’ is problematic”  
22 and that prior Administrative Interpretation 04-04 (“AI 04-04”) discussed that “in the absence of  
23 a survey of the original condition of the lot, it may be impossible to determine the degree of  
24 alteration, and complicating the issue is that many lots were altered (grading, tree removal) years  
25 prior to the original development.” Id. at 2, Finding ¶5.

1 Attach at **Exhibit F** is AI 04-04 dated August 9, 2004, also an interpretation of the phrase  
2 “prior to any development,” and which includes historical facts regarding development on Mercer  
3 Island that led to the City’s practice since the 1990’s of determining Existing Grade as the current  
4 grade at the time of development. The Development Services Director at the time, Richard Hart,  
5 AICP, provides historical context for the Administrative Interpretations.  
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7 Determination of what point in time represents “prior to any development” becomes  
8 difficult without prior survey documents identifying topographic elevations of the  
9 land that has not been disturbed with grading, cuts or fill to place existing structures  
10 on lots. Many of these structures have existed on lots for 30-60 years or longer. In  
11 addition it is difficult to determine what, if any, grading, cut or fill has taken place  
12 20, 30, 50 or 80 years prior to existing conditions on a lot that contains any  
13 structural development or any grading or tree cutting that might have been  
14 performed in the early 1900’s when land was originally subdivided or platted, or  
15 roads were originally constructed.

16 Determination of existing grade “prior to any development” becomes critical when  
17 an existing structure is demolished for replacement with a new structure, and the  
18 existing grade must be established for measuring the newly allowed height of the  
19 new structure. This becomes more critical when there appears to have been some  
20 minor grading, cut or fill, including construction of some retaining walls on site to  
21 provide level surfaces for a building pad or useable outdoor yard areas.

22 Ex. F. at 1-2.

23 Hart concludes that, given these complexities, “the City will interpret the existing code  
24 language and definitions to mean that, without concrete evidence or verification from a previous  
25 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”. Id. at 2.

For their assertion that Existing Grade is 11’ below the existing surface on the Strand  
Property, Appellants rely on the March 21, 2022, Geotechnical Engineering Study and Critical  
Area Study by Geotech Consultants, Inc. (“Geotechnical Study”) done for the Strand Property.

1 **Exhibit G** attached. Adam Moyer, a Geotechnical Engineer, and Marc McGinnis, P.E, submitted  
2 the Geotechnical Study, the purpose of which was to provide recommendations for general  
3 earthwork, stormwater infiltration considerations, critical areas (geological hazardous area)  
4 considerations, and design considerations for foundations, retaining walls, subsurface drainage,  
5 and temporary excavation/shoring. Ex. G cover letter.  
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7 The Geotechnical Study is not a survey. Its authors did not identify topographic elevations  
8 of the Stand Property prior to any grading, cuts or fill to place existing structures on the Strand  
9 Property. The Geotechnical Study does not provide any information regarding what, if any,  
10 grading, cut or fill has taken place 20, 30, 50 or 80 years prior to existing conditions on the Strand  
11 Property. The Geotechnical Study is not a “snapshot” of original grade conditions and cannot be  
12 relied on for determination of any *past, original grade*. Therefore, consist with prior  
13 Administrative Interpretations and the Harper Report, the Existing Grade on the Strand Property  
14 is the current grade, and there is no inconsistency with Title 19 regarding maximum fill amounts  
15 and no restoration required under MICC 19.15.210(B) prior to the Decision on CA 23-011 being  
16 issued.  
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## 18 V. CONCLUSION

19 The City respectfully requests that two issues included in Appellants’ appeal be dismissed.  
20 Appellants are not able to demonstrate that there has been substantial error, the decision was  
21 unsupported by evidence in the record, or that the decision is in conflict with the standards for  
22 review of the particular action. The issue regarding adverse impact to adjacent property should be  
23 dismissed because MICC 19.07.160(B)(2)(b) applies to Alteration of geological hazardous areas,  
24 not cutting or pruning of trees. And, the issue regarding excessive fill on the site should also be  
25



1 dismissed because Existing Grade on the site has been determined to be the current grade on site  
2 after review by a qualified expert, and in accord with prior practice of the City and two prior  
3 Administrative Interpretations.

4 DATED this 17<sup>th</sup> day of November, 2023.

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23 Attorneys for City of Mercer Island  
24  
25

1 **DECLARATION OF SERVICE**

2 I, Reina McCauley, declare and state:

3 1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this  
4 action, and competent to be a witness herein.

5 2. On the 17<sup>th</sup> day of November, 2023, I served a true copy of the foregoing **CITY OF**  
6 **MERCER ISLAND’S MOTION TO DISMISS** on the following parties using the method of  
7 service indicated below:  
8

<p>9 Daniel Grove 3515 72<sup>nd</sup> Avenue SE 10 Mercer Island, WA 98040 11 <i>Appellant</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:dan@grove.cx">dan@grove.cx</a></p>
<p>13 Martin Snoey 7145 SE 35<sup>th</sup> Street 14 Mercer Island, WA 98040 15 <i>Appellant</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:mrsnoey@msn.com">mrsnoey@msn.com</a></p>
<p>17 Jim and Susan Mattison 7075 SE Maker Street 18 Mercer Island, WA 98040 19 <i>Appellants</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:jim@mattison.me">jim@mattison.me</a> <a href="mailto:susan@mattison.me">susan@mattison.me</a></p>
<p>21 Pam Faulkner 7011 SE Maker Street 22 Mercer Island, WA 98040 23 <i>Appellant</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:pfaulk9801@gmail.com">pfaulk9801@gmail.com</a></p>

<p>1 Brigid Stackpool 2 7011 SE Maker Street 3 Mercer Island, WA 98040 4 <i>Appellant</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:bstackpool@gmail.com">bstackpool@gmail.com</a></p>
<p>5 Lynn Michael 6 7030 SE Maker Street 7 Mercer Island, WA 98040 8 <i>Appellant</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:lynn@jakkal.net">lynn@jakkal.net</a></p>
<p>9 Dorothy Strand 10 Jeffrey Almeter 11 <i>Respondents</i> 12</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:kcra2005@yahoo.com">kcra2005@yahoo.com</a> <a href="mailto:Jeffrey.almeter@gmail.com">Jeffrey.almeter@gmail.com</a></p>

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

15 DATED this 17<sup>th</sup> day of November, 2023, at Auburn, Washington.

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17  
18 */s/Reina McCauley*  
19 Reina McCauley