November 27, 2023
Appeal APL23-009

Grove et al. Response to the City of Mercer Island's Motion to Dismiss
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On October 17, 2023, the The City of Mercer Island ("City") filed a Motion to Dismiss (hereinafter "Motion") two issues included in APL23-009.

This Motion should be denied with respect to both issues because it is an improper attempt to obtain a pre-ruling on issues and claims that are plainly legally sufficient. The City references *Doe v. Benton County*, but omits *Doe's* recitation of the applicable standard on a motion to dismiss (*Doe v. Benton County,* p. 787): "When considering a defendant's motion to dismiss under this rule, the court presumes all facts alleged in the plaintiff's complaint are true." The City's Motion presumes facts at odds with the allegations at the heart of the appeal, thus making any motion to dismiss at this stage improper.

A. The City's Motion to Dismiss the issue of the violation of Mercer Island City Code 19.07.160(B)(2)(b) should be denied.

The City seeks dismissal of the issue regarding Mercer Island City Code (hereinafter, "MICC") 19.07.160(B)(2)(b) "because MICC 19.07.160(B)(2)(b) applies to alteration of geological hazardous areas, not cutting or pruning of trees." (Motion, page 4)

The City's theory is erroneous in its interpretation of the relevant law as well as in its application of the law to the facts. First, the City errs in its characterization of "geological [sic] hazardous areas". Second, it errs in characterizing the applicant's actions as mere "maintenance of existing landscaping" that may be exempt under critical area regulations. Third, the City errs in stating, without authority or explanation, that "MICC 19.07.160(B)(2) does not apply to actions taken in the past."

First, we agree with the City that the "development proposal site" (hereinafter, "Site") sits fully and partially within multiple overlapping "geologically hazardous areas." However, the City's motion confuses alterations of geological hazards with MICC 19.07.020(A)'s description of actions actually regulated by MICC 19.07: "land uses that contain any of the following critical areas [... including]: Geologically hazardous areas." MICC 19.15.030 includes "tree removal" as a type of "land use" that is appropriately subject to critical area regulations when performed within "geologically hazardous areas."

The City declares that "Trees themselves, of course, are not a geological [sic] hazardous area" (Motion, page 4), but this sidesteps the question of the applicant's violation. MICC 19.07.160(B) regulates any "alteration[1] within geologically hazardous areas or associated buffers." The

[1] MICC 19.16.010: *Alteration:* Any human-induced action which impacts the existing condition of the area, including but not limited to grading, filling, dredging, draining, channeling and paving (including

applicant's actions on November 10, 2021 constitute an "alteration," and this "alteration" plainly occurred within geologically hazardous areas. As a result, this "alteration" must be evaluated for inclusion in this critical area review.

There are different definitions of "geologically hazardous areas" within MICC Title 19 (MICC 19.07.160(A)[2] and MICC 19.16.010[3]). Consequently, MICC 19.07.030(A) requires: "If more than one regulation applies to a given property, then the regulation that provides the greatest protection to critical areas shall apply." MICC 19.16.010, which specifically discusses the impact of vegetation on "geologically hazardous areas," is more protective. The dictionary definition of "area", according to Merriam-Webster, includes, in relevant part, "a particular extent of space or surface or one serving a special function: such as…a geographic region." It is in this sense that the MICC uses the word "area." The MICC regulates actions "within geologically hazardous areas," which should be understood as geographic regions "susceptible to" (MICC 19.16.010) the geological hazards enumerated in MICC 19.16.010 ("erosion, sliding, earthquake, or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or alterations, including landslide hazard areas, erosion hazard areas and seismic hazard areas.") Hence the City's theory that the applicant's actions with respect to trees were not "alterations within geographically hazardous areas" reflects an erroneous interpretation of the law and should be rejected.

Second, the City unquestionably errs on the factual question of whether the applicant's actions constituted potentially exempt "maintenance of existing landscaping" rather than "tree removal" of an "exceptional tree," to which critical area review regulations apply. The City alleges that the applicant's actions were "maintenance of existing landscaping" and thus evades the question of impermissible alterations altogether. (Motion, p. 3). Tree #5 is an "exceptional tree" under MICC 19.16.010 (See Scott Selby Arborist Report already filed in APL23-009, p. 2, hereinafter, "Selby report.") MICC 19.07.120(E)(4)(f) explicitly states that the exemption for "maintenance of existing landscaping" "does not include the removal of large or exceptional trees." Therefore, to qualify as "maintenance of existing landscaping" exempt from critical area review, the applicant's actions may not include "tree removal" of any "exceptional tree."

Tree #5's status as an "exceptional tree" is not in question. Thus if the applicant's actions constituted "tree removal," those actions would not be exempt from critical area review under

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construction and application of gravel). "Alteration" does not include walking, passive recreation, fishing, or similar activities.

[2] MICC 19.07.160(A): Geologically hazardous areas are lands that are susceptible to erosion, landslides, seismic events, or other factors as identified by WAC 365-190-120. These areas may not be suited for development activities because they may pose a threat to 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.

[3] MICC 19.16.010: *Geologically hazardous areas:* Areas susceptible to erosion, sliding, earthquake, or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or alterations, including landslide hazard areas, erosion hazard areas and seismic hazard areas.

MICC 19.07.120. Consequently, the relevant question is whether the actions constitute "tree removal."

The applicant's actions clearly constituted "tree removal." The MICC states: "For the purposes of this section, **tree removal includes the cutting** or removing directly or indirectly through site grading **of any tree**" (my emphasis). MICC 19.10.020(B)(3). MICC 19.10.020(B)(3)'s definition of tree removal must be applied carefully in keeping with MICC 19.07.030(A)'s requirement that "If more than one regulation applies to a given property, then the regulation that provides the greatest protection to critical areas shall apply." Appellants' prior submissions provide detailed analysis on this point and we do not repeat that analysis here. Master Arborist Selby's report demonstrates (Selby report, p. 3) that the "cutting" of Tree #5 that took place was not "pruning." Selby states that the action was a topping cut that "unquestionably meets th[e] criterion" for "cutting" under the MICC.

The applicant's actions constituted "cutting" per MICC 19.16.010[4], and thus amount to "tree removal." As such, they were not "maintenance of existing landscaping," as the City purports, but rather "alterations" that are not exempt from critical area regulations. If the City wishes to dispute these factual assertions, it must do so at the proper moment in this appeal, and as questions of fact, rather than on a preliminary motion as it here attempts to do.

Third, the City states, without authority, that "MICC 19.07.160(B)(2) does not apply to actions taken in the past." (Motion, p. 4) It is difficult to guess at the logic behind this unsupported assertion. The relevant regulations point towards a contrary conclusion. The MICC requires a critical area study to be conducted under certain circumstances. MICC 19.07.080 requires that the critical area study described in section 19.07.110 be "**completed over five years prior to the application submittal date**…." (my emphasis). By its plain language, the MICC contemplates a five-year lookback period measured as of the date of the application. In this case, the application was submitted on July 3, 2023. Thus any actions taken by the owner of the Site after July 3, 2018 must be included in the scope of the critical area review. Ms. Strand engaged in impermissible "removal" of Appellant Grove's "exceptional tree" on November 10, 2021, well within MICC 19.07.080's 5-year lookback period. Hence any arguments that would exclude her actions on the basis that the regulations are inapplicable "to actions taken in the past" are contrary to the plain language of the MICC and should be disregarded as legally erroneous.

The regulatory purposes of critical area regulation strongly support the appellant's position. The City's argument implies that MICC 19.07.160(B)(2) has no lookback period, which would undermine the MICC 19.07's purposes of protecting the environment. Removing the lookback

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[4] MICC 19.16.010: *Cut* or *cutting:* The intentional cutting of a tree to the ground (excluding acts of nature), any practice or act which is likely to result in the death of or significant damage to the tree or any other removal of a part of a tree that does not qualify as pruning.
Pruning: pruning of a tree through crown thinning, crown cleaning, windowing or crown raising but not including crown topping of trees or any other practice or act which is likely to result in the death of or significant damage to the tree.

period would encourage cheating; without the required retrospection, developers would be encouraged to remove “exceptional trees” that present obstacles in the way of their development projects. Merely filing an application one day after otherwise impermissible actions would be blessed under the City’s erroneous approach.

In sum, MICC 19.07.160(B)(2)(b) is clearly applicable here – the owner’s actions constituted “tree removal” of an “exceptional tree,” thus negating the possible exemption for “maintenance of existing landscaping.” This “tree removal” is an “alteration” that took place within the “geologically hazardous areas” that all parties agree exist relative to the Site. The “alteration” took place less than 5 years prior to the application submittal date, and thus fell within the mandatory lookback period designed to prevent circumvention of the rules. No authority has been cited for the proposition the City advances, namely that actions taken in the past fall outside the scope of review. Finally, the “alteration” adversely impacted a neighboring property by both damaging an “exceptional tree” and potentially compromising the “protected slope area” located by the City as surrounding the tree on the neighboring property.

The motion to dismiss the alleged violation of MICC 19.07.160(B)(2)(b) should be denied.

B. The City’s Motion to Dismiss the issue of the violation of MICC 19.02.050(D)(5)(a) should be denied.

The City also seeks dismissal of the issue of “existing grade” (or “excessive fill”) on the basis that it has already been determined “by a qualified expert, and in accord with prior practice of the City and two prior Administrative Interpretations” (Motion, p. 1) However, the City is requesting dismissal of a factual dispute, which is wholly improper at the motion to dismiss stage. There is substantial material evidence that requires that this dispute be heard by the Hearing Examiner. Furthermore, the qualified expert’s review arguably fell outside the scope of his qualifying expertise and relied on a partial record. In addition, the City’s characterization omits crucial facts that contradict its position and characterization of its own prior practice. Finally, it cites two administrative interpretations that are related to “existing grade” for “buildings” and attempts to extend them to this proposal. For these reasons, disposition of the disputed factual question of “existing grade” is inappropriate at this stage.

First, there is substantial material photographic evidence obtained from the Puget Sound Regional Archives that proves that the current “finished grade” of the Site is not the “existing grade.” See Figures 1 and 2 below.

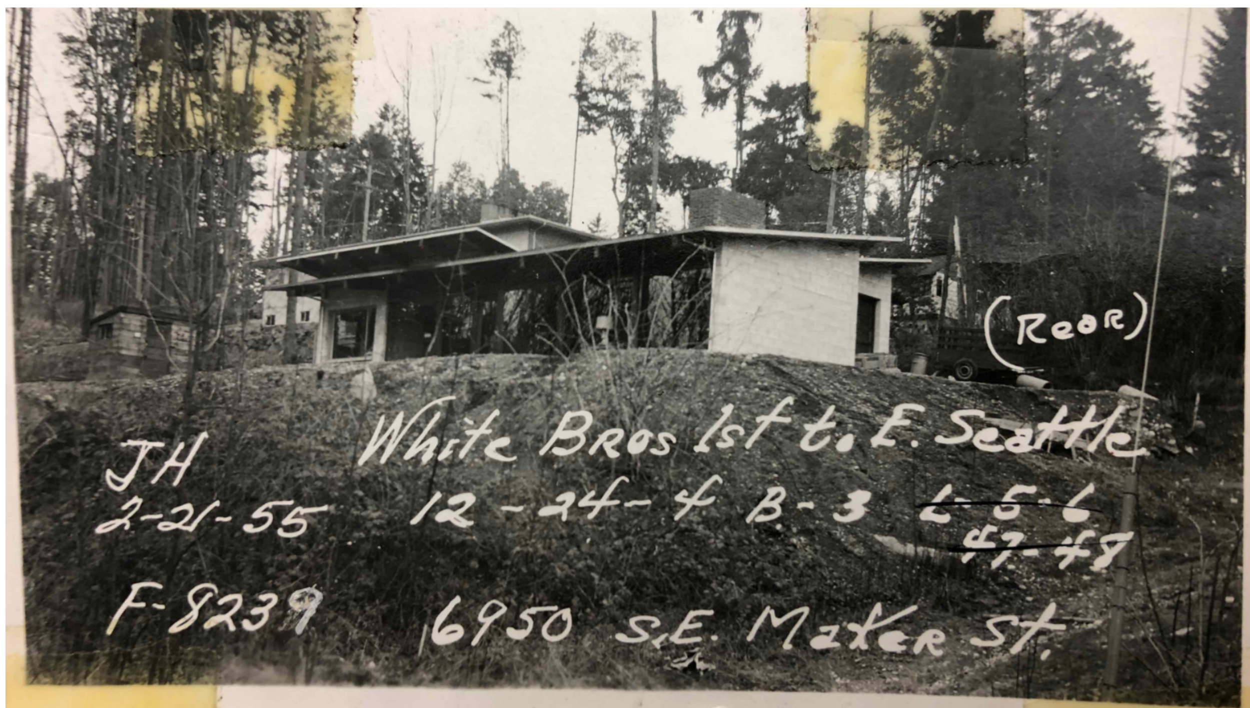

Figure 1. Site in 1955, seen from SE Maker Street right-of-way

Figure 2. Site in 2022, seen from same location (house hidden by brush/trees)

In addition, large portions of the Site are inarguably on fill that was placed over topsoil, as shown from the map from the 2022 geotechnical study in Figure 3 below.

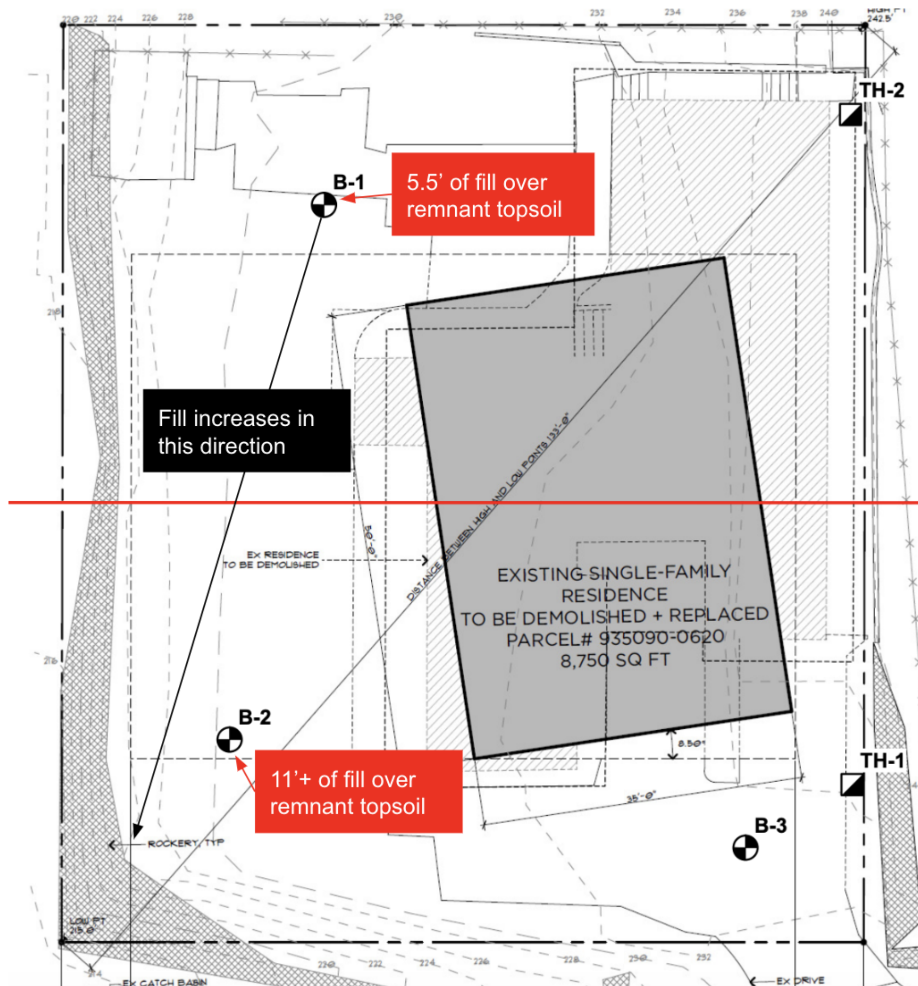

Figure 3. Approximate locations of fill on Site

The Motion ignores substantial evidence that would inform a factfinder's decision-making on the disputed factual question of the "existing grade", and thus should not be denied.

Next, the City's qualified expert (Harper) did not review the full relevant record, and he rendered an opinion arguably beyond the scope of his qualifying expertise. Harper's opinion is dated August 14, 2023, months before APL23-009 was filed. Consequently, Harper did not review information presented in appeal APL23-009. Furthermore, Harper's review did not reference the City of Mercer Island's Topographic Survey of 1963, which provides information material to this disputed issue. Appellants had requested this survey in 2022 and the City was not able to locate it. Appellants located it in a massive unindexed database of City development permits during

preparation for this appeal.[5] Concededly, Harper is not to be faulted for failing to consider a survey the City had been unable to locate, yet the fact that it has now been found makes the City's ignoring it inappropriate.

Even with respect to available evidence, however, Harper's review appears incomplete since it does not reference the geotechnical studies that had been performed, both on the Site, and at the neighboring property to the Site's north (7145 SE 35th Street, "7145"). Thus when Harper states that he "lacks concrete evidence of any original grade", it must be qualified by the fact that that Harper's review excludes any reference to multiple sources of significant material evidence as noted.

In addition, Harper's qualifying expertise lies in *surveying* the land rather than *assessing subsurface conditions*. The current grade can easily be assessed by an expert in subsurface conditions - e.g., a geologist, geomorphologist, or geotechnical engineer. When the City states that a question of fact has been determined by review by "a qualified expert," it should be permitted to rely on that determination only where the review includes reasonably available material evidence and has been conducted by not any expert but the appropriate expert qualified on the issue in question. Because the City makes factual assertions about "existing grade" that contradict plaintiff's assertions of fact, its Motion to Dismiss should be denied.

Unfortunately, the City appears disinclined to include material evidence despite its availability. In its determination of "existing grade," the City should be required to consider the evidence that has been collected during geotechnical studies. Instead, it permits the applicant to treat as "existing grade" the current "finished grade" (which photographic evidence above proves is *not* the "existing grade" as MICC defines it).

In particular, the City states, without evidence, that "the 2022 geotechnical study is not a 'snapshot' of original grade conditions and cannot be relied on for determination of any past, original grade." While we agree with the City that the 2022 geotechnical study is not a survey, it is not necessary to have a survey when reliable data exists. Indeed, the MICC does not mention the word "survey" at all. Nothing beyond the data in the 2022 geotechnical study is needed to establish the amount by which the "finished grade" was raised above the unaltered "existing grade."

Furthermore, the City's own prior actions in 2022 demonstrate that geotechnical data other than surveys may be used to establish "existing grade." Although the City claims that its "prior practice" weighs in favor of the arguments in its Motion to Dismiss, prior practice illustrates that the City may rely on material non-survey data to determine "existing grade." For example, the

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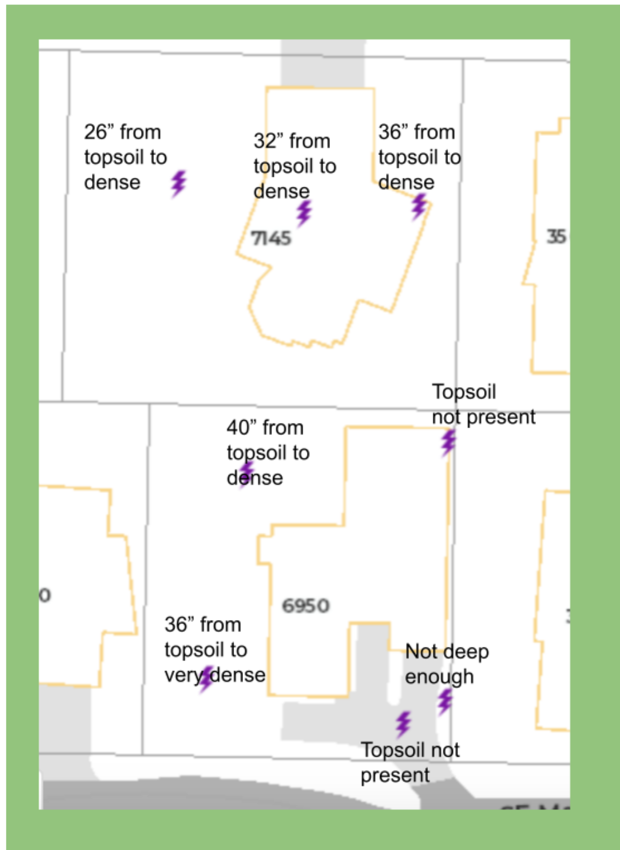
[5] We initially asked the City for this map set in 2022, and were told that it couldn't be located. In fact, the City has repeatedly been unable to produce original versions of this map set, despite its being created for the City, and used extensively for official City business over several decades (see https://mercerisland.nextrequest.com/requests/23-735, in which the city was only able to locate a 1991 update of this map set). We only found the map set by evaluating several thousand maps stored on the City's permit site. We brought this map set to the City's attention in public comments for associated Building Permit 2207-019 in October 2022..

City relied on a large set of geotechnical borings to determine “existing grade” (Exhibit A, pages 4-6) for Mercer Island Building Permit 2108-080, which was submitted in August 2021 and approved with respect to MICC Title 19 in October 2022. The City did so even though a survey was available in that case. Consistency with its own prior actions cuts in favor of permitting the use of geotechnical data in situations in which current survey data is known to diverge from original conditions.

Permitting use of the 2022 geotechnical study would also enable the City to harmonize with its neighboring municipalities. Other cities in the region make use of soil samples to determine “existing grade.” See, for instance, the City of Bellevue’s Land Use Code: “20.50.018 Existing Grade. The existing elevation of land prior to any cuts and fills or other disturbances, which may, at the discretion of the Director be determined by a topographic survey or soil sampling.” Bellevue and Mercer Island are charter members of our region’s “MyBuildingPermit” consortium, whose goal is for its 16 municipal entity members to “work together to share information, agree upon standards, and pool resources.”

Most pertinently for present purposes, the evidence above demonstrates that there is a material disputed fact. A review of a more complete body of evidence demonstrates the sizable difference between the “existing grade” and the current “finished grade.” For instance, 7145 had a geotechnical study (Exhibit C) performed in 1989, prior to any development at 7145. The remnant topsoil at the Site has the same thickness as the undisturbed topsoil that was sampled at 7145 – approximately 4-6” (see Exhibit C, pages 4 and 13). The depth of the layer of soil between the original topsoil and the glacial till that underlies Mercer Island is also very similar across Test Borings #2 and #3 and the 7145 boreholes. The borings at 7145 showed the distance from topsoil to dense grade soil as ranging from 26” to 36”. Boring #1 showed approximately 40” measured between the remnant topsoil and grading to dense, while Boring #2 showed approximately 36” between the remnant topsoil and grading to very dense.

Figures 4(a) and 4(b), below, show boring locations in the City’s GIS across the Site and 7145. Figure 4(a) shows the consistency of soil depths between original topsoil and glacial till across 5 samples. Figure 4(b) shows the difference in amounts of fill over that topsoil.



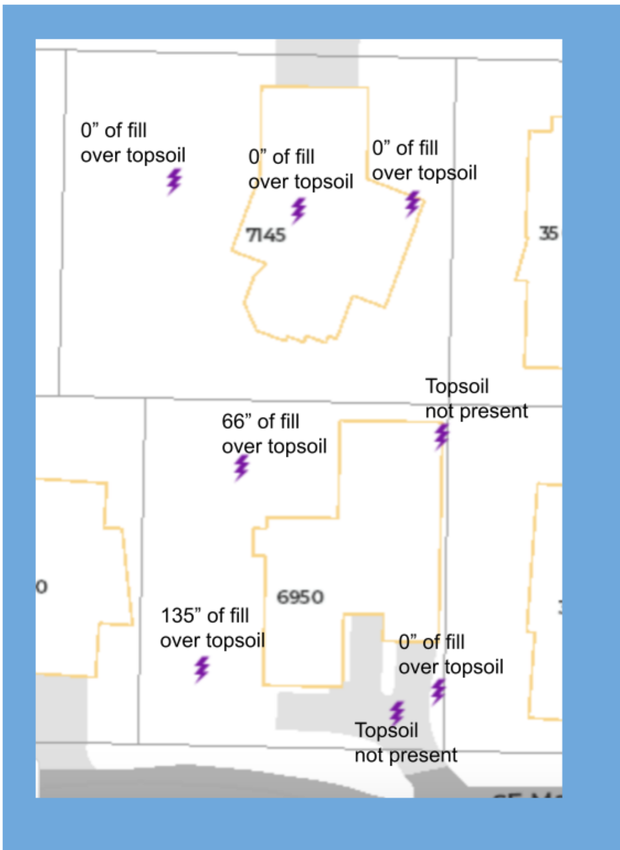


Figure 4(a): Depth from topsoil to glacial till in local borings

Figure 4(b): Amount of fill on top of original topsoil in local borings

Across all 5 boreholes that spanned from topsoil to dense soil in the area, 3 of which were taken prior to development (at 7145), the distance from topsoil to glacial till is highly consistent, ranging from 26" to 40". The other boreholes at the Site lack enough information to provide additional information – they were either missing topsoil or did not go deep enough to find glacial till.

MICC 19.02.050(D)(5)(a) states that "[no] combination of retaining walls or rockeries, to the extent used to raise grade and protect a fill slope, shall result in an increase in the finished grade by more than 72 inches at any point." On the basis of the evidence in Figures 4(a) and 4(b), it is clear that at Boring #2 the current "finished grade" has been increased by more than 72" over the "existing grade." In light of this clarifying evidence, the applicant's "finished grade" exceeds the permissible limit and thus violates MICC 19.02.050(D)(5)(a).

It is thus difficult not to conclude, at a minimum, that the City is mistaken in characterizing the "existing grade" as an issue appropriate for decision at the motion to dismiss stage. Indeed, it appears from this evidence that the City simply got it wrong on the facts.

Finally, the City refers to Administrative Interpretation 12-004 which states that “Without concrete evidence or verification from a previous survey document, as accepted by the City Code Official, the existing grade underlying the existing structure will be used as the elevation for the proposed development.” Yet this guidance seems to undercut the City’s theory since both “concrete evidence” and also a “previous survey document” exist, yet were excluded without justification, as described above, as described above. There is no reason that the 2022 geotechnical study should not be considered concrete evidence for determination of “existing grade” at the locations where borings for the 2022 geotechnical study was performed. The City is taking the 2022 geotechnical study as concrete evidence for other components of CAO23-011 (e.g., the city’s geotechnical review of CAO23-011).

The City has excluded geotechnical data from these studies and in so doing, omits evidence material to a factfinder’s accurate determination of “existing grade.” The City’s failure to make use of all of the available concrete evidence could incentivize strategic behavior by future applicants. Based on the City’s motion, developers would have every incentive to place fill prior to surveying, in order to receive approval for illegal development at higher elevations than are otherwise permitted. Such behavior would clearly be in violation of the spirit of MICC land use regulations, but would still receive City approval if considered under the standards implied in the City’s Motion. There is ample evidence available to aid the City’s determination. Excluding the available evidence contravenes the spirit and the letter of the MICC, and is bad for the members of the Mercer Island community.

There is more than sufficient evidence to demonstrate, *on the merits*, that this “development proposal” violates MICC 19.02.050(D)(5)(a). But at the very least, this unjustifiably excluded evidence creates a factual dispute that should be left to the factfinder and supports appellants’ corresponding allegations such that the City’s Motion should easily be denied.