

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
STAFF REPORT PURSUANT TO
RULES OF PROCEDURE 224

I. INTRODUCTION

The City of Mercer Island (“City”) submits the following pursuant to Hearing Examiner Rules of Procedure (“RoP”) 224(g). This Staff Report relies on the previously submitted Motion to Dismiss for two issues brought by Appellants. For the remaining issues, testimony and evidence at the hearing is anticipated to show that a permit was not required for work done on Applicant Dorothy Strand’s (“Strand”) property to trim overhanging branches from a tree on Appellant Dan Grove’s property, and the existing rockeries on the Strand property are not illegally nonconforming given provisions in the City’s code that were likely in place at the time of construction.

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II. FACTS

The City Decision being appealed is approval of the Critical Area Review 2 application (“CAR2”) for the demolition of Strand’s existing single-family residence and construction of a new approximately 4,000 square foot single-family residence on Strand’s property (“Strand Property”) located within mapped geologically hazardous areas. Ex. 1 and 2. The appeal filed by Appellants dated October 23, 2023 (“Appeal Letter”), Exhibit 9, includes one issue regarding the criteria necessary to approve the CAR2 application. The remaining issues rely on section 19.15.210(B) of the Mercer Island City Code (“MICC”) and argue that the Decision should not have been issued because development on the Strand Property is inconsistent with Title 19 MICC.

The testimony during the hearing is anticipated to show that in 2021 a tree located on Appellant Dan Grove’s property, adjacent to the boundary line with the Strand Property, had limbs overhanging the boundary line removed. The tree continues to exist on the Grove property. Ex. 9 at 169-170¹ and Ex. 6 at 228. The health of the tree is currently described by arborists as “in fair condition overall but is exhibiting signs of stress in the upper canopy,” and “[s]ome decline of the crown is observed . . . but it is difficult to distinguish between seasonable dieback and potential stress of the tree.” Ex. 9 at 170, Ex. 6 at 229. A permit is required under MICC 19.10.020 prior to “removing” a tree unless an exception exists in the code. MICC 19.10.020(B). An exception from permitting exists for tree pruning² on private property. MICC 19.10.030(C) and 19.07.120(E)(4). A tree permit was not obtained prior to the 2021 work on the tree, and testimony is anticipated to show that this was consistent with exceptions in the code.

¹Page numbers reference Bate Stamp numbers on the City’s exhibits.

² MICC 19.16.010(P) Prune or pruning: The 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.

1 B. The City's relies on previous briefing in its Motion to Dismiss.

2 The City filed a Motion to Dismiss on November 17, 2023, and does not anticipate having
3 a ruling from the Hearing Examiner on the motion until after this Staff Report is due. The City
4 relies on its Motion to Dismiss for facts, analysis and exhibits regarding Issues 1 and 2 above.

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6 C. Appellants were not required to obtain a permit for work performed on the Strand
7 Property to remove overhanging branches from a tree located on the Grove
8 property.

9 MICC 19.15.210(B) provides that if development on a site is inconsistent with Title 19
10 MICC, *Unified Land Development Code*, without prior City approval, the City will not issue a land
11 use approval until restoration has occurred:

12 MICC 19.15.210 - Compliance required.

13 B. If development inconsistent with the purposes and requirements of this title has
14 occurred on a development proposal site without prior city approval, the city shall
15 not issue any land use review approvals for the development proposal site unless
16 the land use review approval requires that the restoration of the site to a state that
17 complies with the purposes and requirements of this title be addressed.

18 Regarding Issue 3 identified above, a permit is required under MICC 19.10.020 prior to
19 “removing” a tree unless an exception exists in the code. MICC 19.10.020(B). “Tree removal” for
20 purposes of MICC 19.10.020 “includes the cutting³ or removing directly or indirectly through
21 site grading of any tree, or root destruction that will result in a tree ultimately becoming a
22 hazardous tree.” MICC 19.10.020(B)(3). An exception from permitting is provide in the MICC
23 for tree pruning⁴ on private property. MICC 19.10.030(C) and MICC 19.07.120(E)(4). Testimony

24 ³ MICC 19.16.010(C) Cut or cutting: The intentional cutting of a tree to the ground (excluding acts of nature), any
25 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.

⁴ MICC 19.16.010(P) Prune or pruning: The 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.

1 at the hearing will show that the City determined that the 2021 work fell under exceptions to the
2 requirement for obtaining a permit. The 2021 tree work would not, therefore, cause existing
3 development on the Strand Property to be inconsistent with Title 19 MICC, and the CAR2 permit
4 was correctly issued without requiring restoration.

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6 D. Evidence does not show that rockeries on the Strand Property are illegally non-
7 conforming.

8 The Mercer Island Zoning Code (“MIZC”) dated 1960 includes provisions for retaining
9 walls in section 16.01.4 (a), (f), and (g). Ex. 5 at 212-213. Neither the term retaining wall or rockery
10 is defined in the 1960 MIZC. Ex. 5 at 184-185. In 1969, this code section was amended by
11 Ordinance No. 236, which also did not include a definition of retaining wall or rockery. Ex. 19. In
12 2002, Ordinance No. 02C-09, the term “rockery” was added to Title 19 MICC. Ex. 18 at 287-289.
13 Testimony at the hearing is anticipated to show that these code sections were reviewed by City
14 staff and a determination was made that there was not enough clarity to prove the Strand rockeries
15 were inconsistent with the City’s code when constructed. It appears they did not become
16 nonconforming until 2002 when rockeries were added to the code, making Strand’s rockeries legal
17 nonconforming. Therefore, the rockeries do not violate MICC 19.15.210(B) and no “restoration”
18 was required before the CAR2 Decision was issued.
19

20 **V. CONCLUSION**

21 Testimony and evidence from the hearing will show that Appellants’ appeal should be
22 denied as Appellants’ are not able to demonstrate that there has been substantial error, the Decision
23 was unsupported by evidence in the record, or that the Decision is in conflict with the standards
24 for review of CAR2 applications. The criteria for the CAR2 Decision under MICC 19.07.160 were
25 satisfied. The appeal of Issue 1 regarding adverse impact to adjacent property should be denied

1 because MICC 19.07.160(B)(2)(b) applies to Alteration of geological hazardous areas, not cutting
2 or pruning of trees. Issue 2 regarding excessive fill on the site should also be denied because
3 Existing Grade on the site has been determined to be the current grade on site after review by a
4 qualified expert, and in accord with prior practice of the City and two prior Administrative
5 Interpretations. Issue 3 should be denied because a permit was not required in 2021 for work done
6 on the Strand Property to trim back overhanging branches from a tree on Appellant Dan Grove's
7 property. The work fell within code exceptions for obtaining a tree removal permit. And Issue 4,
8 should be denied because the existing rockeries on the Strand Property are not illegally
9 nonconforming given provisions in the City's code that were likely in place at the time of
10 construction.
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12 DATED this 27th day of November, 2023.

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Attorneys for City of Mercer Island

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 27th day of November, 2023, I served a true copy of the foregoing **CITY OF**
6 **MERCER ISLAND’S STAFF REPORT PURSUANT TO RULES OF PROCEDURE 224** on
7
8 the following parties using the method of service indicated below:

<p>9 Daniel Grove 3515 72nd 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: dan@grove.cx</p>
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<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: pfaulk9801@gmail.com</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: bstackpool@gmail.com</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: lynn@jakkal.net</p>
<p>9 Jeffrey Almeter 10 <i>Engineer for Respondent Dorothy Strand</i> 11 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: Jeffrey.almeter@gmail.com</p>
<p>13 David J. Lawyer 14 Inslee, Best, Doezie & Ryder, P.S. 15 10900 NE 4th Street, Suite 1500 16 Bellevue, WA 98004 <i>Attorney for Respondent Strand</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: dlawyer@insleebest.com kcra2005@yahoo.com jkovalenko@insleebest.com</p>
<p>17 John Galt 18 City of Mercer Island 19 927 Grand Avenue 20 Everett, WA 98201 <i>Hearing Examiner</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: jegalt755@gmail.com Mary.swan@mercerisland.gov</p>

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

24 DATED this 27th day of November, 2023, at Whittier, California.

25 /s/Reina McCauley
Reina McCauley