APL23-009 Appellants' Hearing Memorandum
November 29,2023

Approving CAO23-011 would allow the Applicant to take advantage of multiple illegal actions that have occurred at the "development proposal site" (hereinafter, "the Site") to shoehorn in a project that, objectively, does not comply with the Mercer Island City Code (hereinafter, "MICC"). The City is required to enforce MICC with respect to this development proposal. To conclude otherwise would result in a substantial error that is neither supported by the record evidence nor consistent with the applicable standards of review. It would also require an adoption of the City's and the Applicant's surface level "arguments" that not only conflict with the operative legal rules, but premised on incomplete and inaccurate recitation of the relevant facts–including material facts that the City appears to have intentionally sought to omit from the record.

CAO23-011 is a critical area review 2, which is a Type III "land use review" under MICC 19.15.030. MICC Chapter 19.07 governs critical area reviews, and MICC Chapter 19.15 administers critical area reviews. MICC 19.07.010 lists the purposes for the Mercer Island Critical Areas Ordinance, including "balanc[ing] property owner interests with the public interest." The City should not be permitted to ignore violations of MICC that unlawfully and unjustly benefit the owner of the Site in a way that disregards these fundamental policies.

Importantly, the approval at issue in this appeal violates MICC regulations and policies in the following ways:

1. "Development" at the Site was carried out inconsistently with the purposes and requirements of MICC Title 19, and did not receive prior City approval. CAO23-011 does not propose bringing the site into compliance with MICC Title 19. As a result, the City's approval of CAO23-011 violates MICC 19.15.210(B)'s policy of encouraging consistent enforcement.[1]

2. Unpermitted actions taken in association with CAO23-011 violate multiple provisions of MICC 19.07 and the associated MICC 19.10 tree regulations. Because of this, approval of CAO23-011 violates MICC 19.07.030(A) and MICC 19.10.060(A)(4).

The approval of CAO23-011 conflicts with standards of review of the action and is unsupported by the record evidence. For those reasons, as more fully explained in the following paragraphs, the approval of CAO23-011 must be overturned.

Appellants' documentary evidence and anticipated testimony will prove that, contrary to the City's assertions:

[1] MICC 19.15.210 was added to MICC in late 2018 in ordinance 18C-08, "to ensure that permit processing was clear to staff and to the public and was occurring consistent with the provisions of the Mercer Island Comprehensive Plan."

1. The City was aware of the illegality of the retaining wall's construction methods, and failed to release its findings in its exhibits. (page 19)
2. City Code regulated the larger of the two retaining walls, contrary to the claims made in the City of Mercer Island's Staff Report Pursuant to Rules of Procedure 224 (hereinafter "Staff Report") (page 2)
3. City Code required that the larger of the two retaining walls be removed decades ago. (page 17).
4. The actions taken by the owner of the Site against Tree #5 constituted "tree removal" under MICC. (page 20)

The following analysis is broken into three parts. Part I summarizes the errors presented in the City's and Applicant's written submissions to date. Part II explains why the City's approval of the "development proposal" on the site violates MICC. Part III discusses why CAO23-011 violates MICC 19.07 and MICC 19.10. It then concludes that, based on the anticipated documentation and testimony that will be provided at the hearing, CAO23-011 must be rejected.

Part I - Errors by the City and Applicant Require Correction

To resolve the violations summarized above, it is important to first understand the multiple (and critical) errors present in the City's Motion to Dismiss (hereinafter, "Motion"); the Staff Report; and the Applicant's Response to the City's Motion to Dismiss (hereinafter, "Applicant's Response").

A. The Staff Report incorrectly states that retaining walls were not regulated by the Mercer Island Zoning Code and Mercer Island City Code Prior to 2002. (Staff Report, page 5)

In support of its theory that no "restoration" was required before CAO23-011 was approved, the City claims on various grounds that what it terms Ms. Strand's "rockeries" are now legally nonconforming (and thus they need not be restored as part of MICC 19.15.210(B)) (Staff Report, p. 5).

This argument is plainly wrong as a matter of both law and ordinary language. The City offers negative evidence by arguing that the terms "retaining wall" and "rockery" were undefined, yet ignores affirmative evidence that existed elsewhere that discredits their argument, including the plain language and what would become the Mercer Island Code, the precursor to the MICC. The City's argument attempts to prove too much. It also errs, factually.

First, the City claims that because both the 1960 MIZC and the 1969 update to the MIZC do not define either of the terms "retaining wall" or "rockery," the relevant laws at the time did not apply to Ms. Strand's retaining wall (Staff Report, p. 5). It asserts that these terms remained undefined in the zoning code until 2002 (*Id.*). While the City is correct that the MIZC did not define these terms, the absence of a definition in the MIZC, by itself, is not dispositive of the larger regulatory

reach of the zoning and building codes then applicable, especially when construed as a unitary whole as they were intended to be.

For example, other relevant terms such as “structure” are not included in the MIZC but are found elsewhere in the Mercer Island Code, as discussed further below[2]. Would the City truly argue that “structure[s]” are not regulated under the MIZC merely because that part of the relevant law, in isolation, contains no definition of “structure”? Of course not. This strained reading of applicable law does not withstand scrutiny. Consider the following related example. MIZC 1960 defines a “building” as “BUILDING: Any *structure* having a roof” (my emphasis). Because MIZC 1960 defines “building[s]” as “*types of structures*,” yet does not define “*structure*,” the City’s argument would presumably mean that neither “structures” nor the broader category of “buildings” fall under the regulation of the MIZC. Such a reading would produce absurd results. Common sense dictates that the scope of zoning regulation does not depend on the inclusion of particular definitional terminology.[3] This was the same case before the MIZC - King County Zoning Resolution 18801 that relied on definitions in the Uniform Building Code of 1958 (“UBC”, Exhibit 1020) (and prior to that King County Code relied on the UBC of 1946). And, of course, if the test for whether an ordinance applies was whether its operative terms were specifically defined in the code, then *many* ordinances would never apply, rendering much of the regulatory scheme completely meaningless. Obviously that cannot be the result. The City’s attempt to evade the relevant provisions by asserting a lack of definition is neither persuasive nor legally sound.

Second, the City seeks to inject uncertainty where it does not exist and, and ignores common sense and a plain reading in attempting to build what amounts to an absurd legal conclusion. For example, the City states: “[C]ode provisions from the 1960s *were not clear as to their intent for rockeries* and therefore a determination could not be made that the rockeries on the Strand property are illegally nonconforming” (Staff Report, p. 3).

In fact, this uncertainty is manufactured. The mere absence of a definition in what is only one part of the relevant Mercer Island City laws then applicable (MIZC) does not determine the scope of applicable regulation of that code, especially when other parts of the Code *do* affirmatively define it. Looking at the prehistory of MICC’s current unified code plainly supports this position.

i. History of MIZC and UBC

[2] Similarly, MIZC 1960 lacks definitions for, among other terms, “dwelling” and “floor area”, which are both defined in the UBC and extensively used in MIZC regulations.

[3] The definitions of “structure” and “retaining walls/rockeries” were eventually included in 1985, when the MIZC was replaced by the Mercer Island City Code (“MICC”). As part of the ordinances passed in 1985, legislation from the “Town of Mercer Island" was merged into the newly enacted MICC Land Use Code. The Town of Mercer Island’s code had contained definitions for both of these terms, and the MICC incorporated those explicitly.

The UBC of 1958 was adopted by Mercer Island as part of its incorporation in July 1960 (in Ordinance 5, Exhibit 1021). Simultaneously, Mercer Island also adopted King County Districting Resolution No. 18801[4] as a temporary zoning code, also passed in Ordinance 5. Shortly thereafter, in September 1960, the temporary zoning code adopted from King County was repealed as part of passage of the new zoning code, MIZC (see Ordinances 15 (Exhibit 1005) and 16 (Exhibit 1022)).

Under ordinary canons of construction, we may presume that the MIZC reflects and incorporates the earlier UBC. The legislative timeline makes this even clearer because the repeal of the temporary zoning code left the rest of Ordinance 5 intact. Hence the 1958 UBC's "retaining wall" definition remained codified and bears clear relevance to any understanding of the MIZC.

The UBC *does* define "retaining wall," as follows: "Retaining Wall is *any wall used to resist* the lateral displacement of any material." (UBC 1958, Section 424, my emphasis).

This legislative background explains why the MIZC lacks certain definitions, such as "retaining wall"; there was no definition necessary because the recently-passed UBC already contained one. If the term "retaining wall" were a term of art that required a differentiated understanding in the zoning versus the building contexts, one might wonder whether the MIZC's omission reflected a legislative oversight. However, the term does not require differentiated treatment in the zoning and building contexts. Even if it did, any putative legislative oversight had ample opportunity for correction in the decades that followed, and to the best of appellants' knowledge, the term was never defined differently until the 1985 enactment of the MICC or litigated for lack of clarity.

The meaning of a "retaining wall" under MIZC 1960 is perfectly clear when the zoning and building codes are considered as a unified whole, as they are intended to be.

Ii. Relationship of Terms in Plain Language, UBC, and MIZC

Contemporaneous legislative usage of the term, "retaining wall" also offers support for its common understanding. The same definitional language had been in prior versions of the UBC (UBC 1946, Section 401), and the term was used in King County in the period immediately before its adoption by Mercer Island (UBC 1946 was adopted by King County in March, 1950). Additionally, the UBC's common-sense definition aligns with common understanding inasmuch as a "retaining wall" is a wall used to "retain," or "resist" the something. This ordinary meaning does not appear to have changed; a historical dictionary definition of "retaining wall" is also "a

[4] King County Resolution 18801 defined "Structure" slightly differently than the UBC, as follows: "STRUCTURE: That which is built or constructed, an edifice or building of any kind,' or any piece of work artificially built up or composed of parts joined together in some definite manner but not including retaining walls or fences four feet or less in height and other improvements of minor character ". However, the King County Code did not define "retaining wall" - instead, relying on the definition of "retaining wall" from the UBC. The symmetry is instructive; when a definition clearly exists in one part of the code there is no need to repeat it in every relevant part of the code.

wall built to keep any movable backing, or a bank of sand or earth, in its place; – called also retain wall." (Webster's English Dictionary, 1913).

The City might argue that this analysis is irrelevant if the structure was not a retaining wall but a "rockery," a term it appears to prefer. Any such argument would be subject to the City's incorrect recitation of facts.

In 1985, the newly-created MICC added a definition of "rockery" when it enacted Ordinance A-37. This term's definition does not date to 2002 as the City erroneously claims (cf. Staff Report, p. 5). The 2002 and 1985 definitions are identical. The correction is necessary to explain appellants' use of 1985 as an anchoring date for analysis.

The 1985 definition represents two terminological changes relevant for our purposes. First, the term "rockery" was added and appended by a slash, signifying equivalent to, the term "retaining wall." Second, the notion of a "retaining wall" was broadened to include not only a wall used to "resist . . . lateral forces" but also to "prevent . . . erosion." It also clearly included walls made of other materials, suggesting that the two concepts ("rockery" and "retaining wall") need not be interchangeable even though from this point forward, they could be.

Comparison of 1958 UBC, 1985 MICC, and 1913 plain language definitions of "retaining wall"[5]	
Retaining Wall (Merriam-Webster 1913)	"A wall built to keep any movable backing, or a bank of sand or earth, in its place."
Retaining Wall (1946 and 1958 UBC)	"Retaining Wall is *any wall used to resist* the lateral displacement of any material." (UBC 1958, Section 424)
Retaining Walls/Rockeries (1985 MICC)	"A wall of masonry, wood, rock, metal, or other similar materials or combination of similar materials that bears against earth or other fill surface for purposes of resisting lateral or other forces in contact with the wall, and/or the prevention of erosion"

From 1985 forward, the MICC appears to treat "retaining wall" and "rockery" interchangeably, yet with respect to either term, the definition is primarily *functional* rather than compositional. That is, whether a "wall" comprises stone, "wood, rock, metal" or "other similar materials," what makes it a "retaining wall" is the fact that it retains, or to use the statutory language, "resist[s] lateral or other forces" and/or "prevent[s] . . . erosion." Its purpose as a "structure" is to resist

[5] Available as Exhibit 1024

forces or prevent erosion, regardless of what materials are used in its construction. The 1985 definition thus tracks and expands upon the UBC's definition cited above, by emphasizing the functional purpose of the wall as a physical structure that retains.

Comparing the two definitions illustrates that in contemporary usage, from 1985, the two terms were used interchangeably, so long as the wall was used in the structural manner described above. The existence of this broader 1985 definition does not negate the narrower definition of "retaining wall" used in the earlier UBC and thus applicable in the MIZC. But these definitions also show that quibbling over the word is unnecessary. Under both definitions, if the wall is used to "resist lateral forces," it qualifies as a retaining wall subject to applicable zoning rules. This was true in 1946, 1958, and 1960; it was true in 1985, and it remains true now.

At bottom, the undisputed evidence and testimony will show that Ms. Strand's wall made of rock, whether called a rockery or a retaining wall, is a structure over 10' high that is clearly retaining the surrounding fill (which has been found to be over 10' deep).

iii. Summary of Regulations of Retaining Walls in MIZC 1960

In sum, the City is mistaken in attempting to prove through the negative–an *absence* of definitions of "retaining wall" and "rockery" from the 1960 MIZC, artificially considered in isolation from the rest of the Mercer Island Code–that the Strand "rockeries" are now somehow not also retaining walls. On the contrary, the relevant legal language and the history of the Code's passage, both support Appellants' contention that these "rockeries" are indeed, and have always been, retaining walls.[6]

B. The City states that there is no lookback period for actions in Critical Areas, even when "development" occurs shortly thereafter (City's Motion to Dismiss, p. 4)

As discussed in Appellants' Response to Motion to Dismiss ("Appellants' Response", pages 3-4), this argument is demonstrably false. Under MICC 19.07.080, a critical area study is required to be "completed over five years prior to application submittal date".

C. The Applicant states that "MICC does not define the term 'remove' or 'removal' in reference to trees." (Applicant's Response, page 2)

This statement is also inaccurate. Here is the relevant definition: "For the purposes of this section, tree removal includes the cutting or removing directly or indirectly through site grading of any tree, or root destruction that will result in a tree ultimately becoming a hazardous tree." MICC 19.10.020(B)(3)

[6] Some contemporary case law also supports this functionalist understanding of a "retaining wall." Woldson v. Woodhead, 159 Wn. 2d 215, 217 (Wash. 2006) (noting that a freestanding "rubble masonry wall became a retaining wall for the extra dirt on Woodhead's land").

Unlike the term “retaining wall,” whose legal use matches its ordinary plain meaning as discussed at page 4, “tree removal” is a term of art that must be carefully construed in light of its legislative definition and the underlying purposes of the Code.

Applicant’s brief states that the tree was “not removed.” If the term “removal” here bore its ordinary meaning, she would be correct. However, the Code defines the term to include several actions less severe than complete removal. Had she *removed* appellant’s tree in the ordinary sense of that word, she would have clearly committed actionable trespass. For her actions to constitute code-defined “tree removal,” however, they need not amount to trespass.

Applicant’s actions on November 10, 2021 were “cutting” Tree #5 (see Appellants’ Response, page 3). “Cutting” is one form of “removal” under the operative definition listed above. Applicant characterizes her actions differently, but this is a factual question at best. As explained in further detail below, the evidence will show that her actions constituted “exceptional tree” “removal” within a critical area took place in service of Ms. Strand’s “development proposal,” in violation of multiple provisions under Title 19.

Part II - The City's approval of the "development proposal" on the Site violates MICC

The City's Approval of CAO23-011 violates MICC 19.15.210(B). As the following paragraphs will discuss, any "development proposal" that is "inconsistent" with the MICC under certain criteria may not be approved unless the City also mandates restoration. To assess the inconsistencies between the current Site and MICC Title 19, it is helpful to examine the background of the existing retaining walls at the Site.

A. Retaining wall background

There are two existing retaining walls on the Site - which this brief will refer to as the "upper wall" and the "lower wall" respectively, as shown in Figure 1 below. The existing lower retaining wall is by far the larger of the two. While the upper wall ranges from a foot to a few feet tall across part of the property, the lower wall spans 6' to 11' high across the entire western boundary of the Site, is 11.5' high at the southwest corner, and covers part of the southern boundary of the Site.

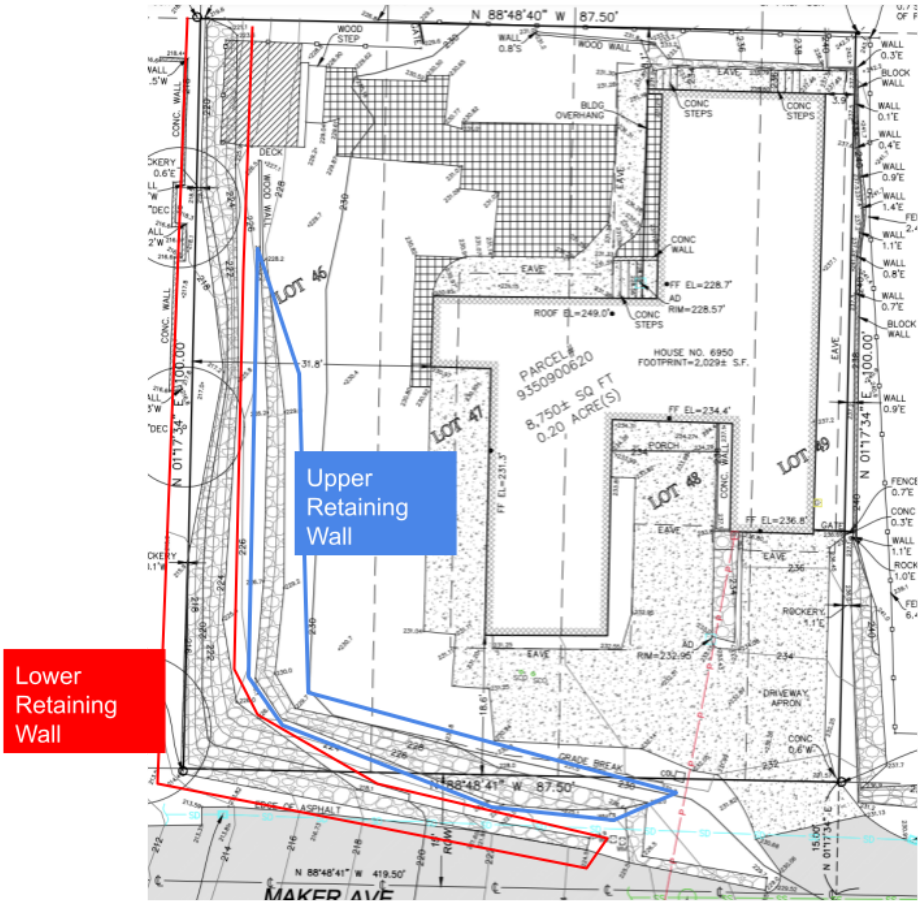

Figure 1. Lower and Upper Existing Retaining Walls

B. MICC 19.15.210(B) as applied to the Site's existing retaining walls

MICC expressly prohibits the City from issuing land use review approvals under certain conditions. In particular, the City may not approve reviews when development occurs on certain sites where non-permitted development occurred. In effect, MICC prevents developers from taking advantage of prior illegal "development" on a "development proposal site":

> If development inconsistent with the purposes and requirements of this title has occurred on a development proposal site without prior city approval, the city shall not issue any land use review approvals for the development proposal site unless the land use review approval requires that the restoration of the site to a state that complies with the purposes and requirements of this title be addressed. MICC 19.15.210(B)

Stated differently, MICC 19.15.210(B) prohibits the City from granting land use review approval when three conditions are satisfied, *unless* the City conditions that approval on certain required action by the applicant. The rule thus contains four components:

- If activity that occurred on the "development proposal site" constituted "development" *and*
- such "development" is "inconsistent with the purposes and requirements" of MICC Title 19, *and*
- the City's prior approval of this "inconsistent" "development" is lacking, then the City "shall" not grant approval *unless*
- Such approval is conditioned on mandatory restoration of the site to a state that complies with "the purposes and requirements" of MICC Title 19.

The first three components of the rule are met by CAO23-011. As a result, under the final component, the City may not issue an approval of this "land use review" application without the proposal's mandatory restoration of the Site. As such, the City improperly granted the approval without requiring any restoration. The following paragraphs elaborate on this point.

1. The construction of the existing retaining walls constitutes "development" on this "development proposal site" under MICC.

MICC 19.16.010 defines a "development proposal site" as "[t]he boundaries of the lot or lots for which an applicant has or should have applied for approval from the city of Mercer Island to carry out a development proposal."

The "development proposal site" for CAO23-011 is 6950 SE Maker Street, Mercer Island. MICC 19.16.010 defines "development" as "[t]he alteration of the natural environment through … The *construction or exterior alteration of any building* or *structure*, whether above or below

ground or water, and any grading, filling, dredging, draining, channelizing, cutting, topping, or excavation associated with such construction or modification." (my emphasis)

MICC 19.16.010 defines "structure" expansively: "That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner." Each of the existing retaining walls is "built[7]" and "artificially built up" as well as "joined together in some definite manner." Consequently, construction of the wall was "development" of a "structure" under the Code.

Thus, the construction of the existing retaining wall at 6950 SE Maker Street easily qualifies as "development" on the "development proposal site."

2. The "development" of the existing retaining wall on the "development proposal site" is "inconsistent" with the requirements of MICC Title 19.

Whether the existing retaining walls are "inconsistent" with MICC Title 19; depends in part on the "existing grade" of the Site. MICC 19.16.010 defines "existing grade" as: "The surface level at any point on the lot prior to alteration of the ground surface." In turn, MICC defines "alteration" as:

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

The definition of "alteration" is important partly because the "finished grade" may be the result of "alterations" to the existing condition of the lot, as is the case here. Relatedly, MICC defines "finished grade" as "[t]he surface level at any point on the lot at the conclusion of development."

The current "finished grade" of the Site differs from the "existing grade" of the Site due to the "alterations" carried out on the Site. This delta is clear in the 2 photos in Figures 2 and 3 below, which show the Site in photographs taken from the same location in 1955 and 2022. Put another way, the Site's current "finished grade" should not be conflated with the "existing grade" since alterations are easily perceptible and municipally acknowledged to have occurred. Yet some available evidence pinpointing the impact of those alterations on the "existing grade" has been improperly excluded from the process thus far in the City's refusal to accept the implications of the 2022 geotechnical study, which it had before it (Motion, page 8).

[7] Under MICC 19.02.050(D)(1), a building permit would be required to construct the existing retaining wall (a retaining wall with height greater than 4', measured from the bottom of the footing to the top of the structure requires a permit under the 2018 International Building Code section 105.2. The 2018 International Building Code is adopted in MICC 17.14.010). From this, it is clear that the existing retaining wall was "built", and is therefore a "structure" under MICC.

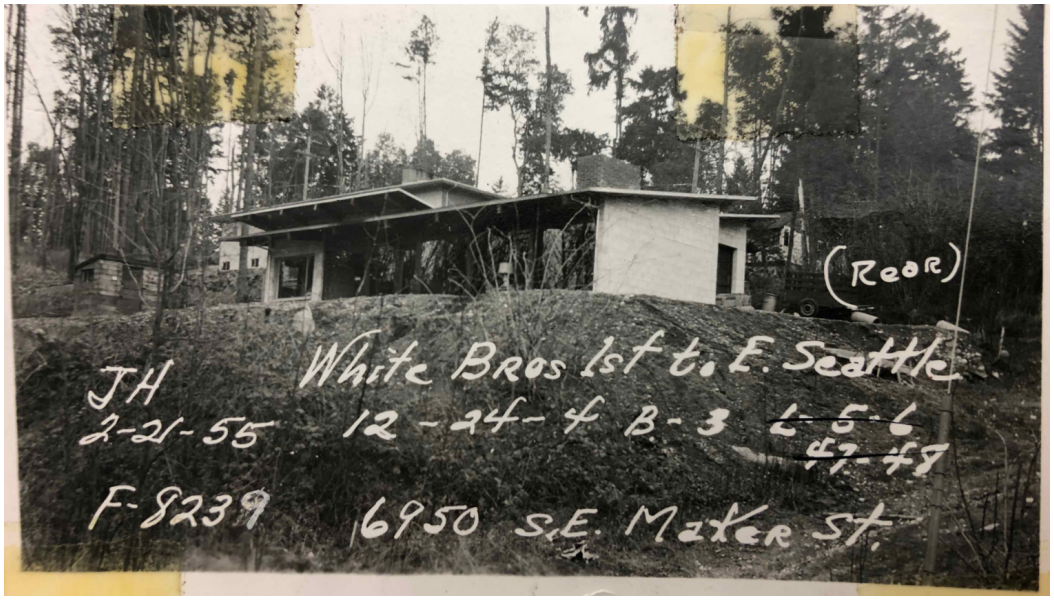

Figure 2. Development Site in 1955, seen from SE Maker Street right-of-way[8]

Figure 3. Development Site in 2022, seen from same location

[8] Source: King County Assessor's photo, Puget Sound Regional Archives.

Appellants will not fully reiterate here their arguments regarding the City's exclusion of available evidence and the limitations of the review conducted by the City's expert, James Harper (Appellant's Response, pages 7-8). In brief, Harper was arguably opining beyond the scope of his expertise and also on the basis of an incomplete body of evidence (Appellant's Response, pages 7-8). However, one question illuminated by the excluded data is central to this appeal: the question of "existing grade" on the Site.

The determination of "existing grade" directly affects the allowable height of the retaining wall on Ms. Strand's property. Thus it was an error unjustifiably to exclude evidence available to assist in determination of the "existing grade," a fact directly relevant to the dispute between the parties. Specifically, the following data (which was either not referenced by Harper, not reviewed by Harper, or possibly both) could and should be used to determine the "existing grade":

- 2022 Geotechnical Study of the Site (whose use the City rejected for this purpose, relying on Harper's expertise) (Exhibit 2.5)
- 1989 Geotechnical Study of 7145 35th Ave SE, which neighbors the Site to the north (which it is unknown if the City has seen) (Exhibit 1023)
- 1963 City of Mercer Island Topographic Base Map (which was requested of the City but not previously locatable) (Exhibits 1006, 1007, and 1007.1)

These sources of data help demonstrate that the Site's current dimensions are "inconsistent" with MICC Title 19 and clarify the impact of the City's evidentiary omission.

The MICC specifies the maximum amount by which fill retained by a retaining wall or rockery may increase the "finished grade" over the "existing grade" at any point on the lot:

> *Maximum height in required yard—Fill slopes.* No retaining walls or rockeries, or any 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. MICC 19.02.050(D)(5)(a)

If Ms. Strand's structures are considered "retaining walls or rockeries," they are subject to a maximum height restriction if constructed in a required yard. Ms. Strand attempts to evade these limitations first by arguing that the retaining wall is not a "retaining wall" nor even a "structure." For reasons articulated above in Section I.A, the Strand "structures" (the lower and upper walls) clearly qualify as "retaining walls" because they retain fill. Per the 2022 geotechnical study, these retaining walls retain fill: "This is especially true for un-engineered structures that retain fill soils, which exist to the west … of the planned development area" (Exhibit 2.5, page 18). Furthermore, these structures are used to "raise grade and protect a fill slope." They are thus precisely the sort of structure the Code intended to target with its height restrictions. The 2022 geotechnical study (Exhibit 2.5) also demonstrates that the structures increase the current "finished grade" on the Site by much more than 72" over the "existing grade." Consequently, the 2022 geotechnical study demonstrates that the Site contains retaining walls or rockeries whose effect is to make the Site "inconsistent" with MICC 19.02.050(D)(5)(a).

The Site's inconsistencies also extend to the "required rear yard" and "required side yard", where the existing retaining walls are inconsistent with the MICC requirements. MICC 19.02.050(E)(1)(a) sets out height limits for fences or gates in required yards as follows:

> "(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."

While MICC 19.02.050(E)(1)(a)(i) limits retaining walls in these yards to 72" in height, on the Site, these limits are clearly exceeded. The lower wall in the "required rear yard" is 82" in height, and the lower wall in western "required side yard" is 119" in height (heights are calculated from toe to top of retaining walls in Exhibit 1003, Page 2).

While MICC 19.020.050(E)(1)(a)(ii) limits retaining walls in the "required front yard" to a total of 42" in height, on the Site, these limits are clearly exceeded. The existing retaining walls in the "required front yard" total approximately 186" in height (height is calculated from the toe of the lower wall to the top of the upper wall in the "required front yard" as shown in Exhibit 1003, Page 2).

Figure 4 below offers proof of the Site's inconsistencies with MICC 19.02.050(E)(1)(a)(i) in highlighted in blue and yellow and with MICC 19.02.050(E)(1)(a)(ii) in highlighted in red.

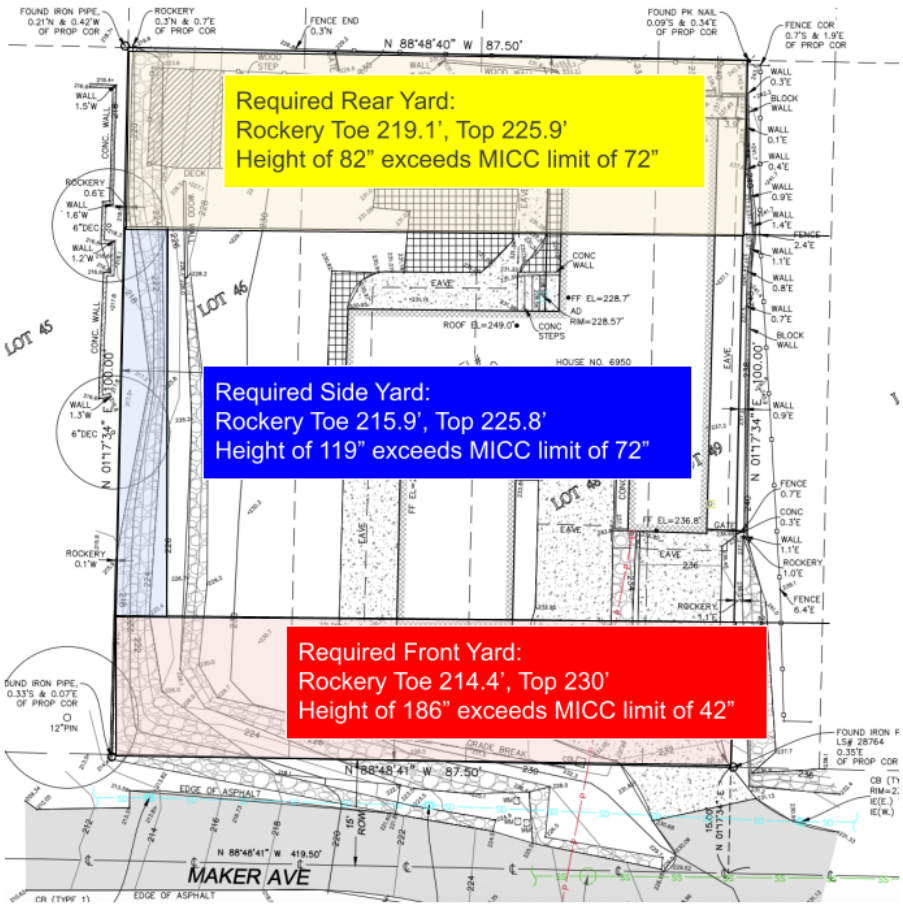

Figure 4. Existing retaining walls are inconsistent with MICC 19.02.050

These inconsistencies with the code are not a matter of a stray inch here or there, or even a few inches, but are measured in feet. It is unclear why the City would ignore evidence of these examples of significant non-compliance with the Code. The rules themselves may feel hypertechnical or picayune, but it is not within the City's purview to choose to set them aside in the face of assertions, supported with data, that these provisions are clearly violated.

3. **The "development" of the existing retaining walls lacked prior City approval.**

MICC 19.10.050(A)(3) states that "Structures, sites and uses that were not in conformance with all applicable code provisions in effect at the time of their creation are illegal and shall be brought into compliance with all applicable provisions of this Code." If structures were created such that they were illegal upon their creation, then their construction or "development" can be said to have "lacked prior City approval."

a. Identifying when both walls were built identifies the laws applicable to them.

For present purposes, whether the existing retaining walls were illegal upon their creation requires identifying when the structures were built and what laws applied at that time. Perhaps because of certain changes in the Code over the years, there have been many questions and much speculation about when the existing retaining walls were built. Geotechnical reviews of the neighboring property conducted in the 1980's permit some inferences to be drawn that date the wall, and the City of Mercer Island's Topographic Base Map from 1963 ("1963 Map", Exhibits 1006, 1007, 1007.1) sheds some further light on the date of construction of the walls.

For instance, the lower wall must have existed by 1985 when a geotechnical review mentions it. In a **1985 review of 7030 SE Maker site** in preparation for a small retaining wall's being built to the west of 7030 the review notes: "The rockery on the east side of the building site is in good condition." (Exhibit 1017, page 2) This evidence is useful in establishing that the wall was in existence by 1985.

Along similar lines, the wall is unlikely to have been built before 1981 given the existence of a **1981 geotechnical review of the 7030 SE Maker site**, directly adjacent to the lower wall. This 1981 review makes no mention of a wall on the property's border (Exhibit 1019). An 8' deep basement was dug for this project just 5' away from the 6950 property line (Exhibit 1018). It would be very surprising to have no mention of a wall directly adjacent to such a large excavation had the wall existed at that point.

In fact, the 1985 geotechnical review (Exhibit 1017) surveyed a site farther away from the Site at 6950 SE Maker, yet it mentions the lower wall. The contrast between the 1981 and 1985 reviews permits an inference that the wall would have been mentioned in 1981 had it existed at that time.

A comparison of the contours in the 1963 Map with the applicant's 2021 survey (Exhibit MI_000014, page 2.2) is instructive. The 1963 Map had 5-foot contours intervals, which under the NMAS mapping standard adopted in 1941, required that 90% of locations on contours be within 2.5 vertical feet. Figure 5 (also available as Exhibit 1026), below, shows an overlay the 1963 Map with the 2021 survey, matching lot lines, with elevation differences marked where contours crossed contours[9]. The color codes show the differences in elevations found by the two surveys:

- Green: less than 2.5' different (within the standard of error)
- Orange: between 2.5' and 5' different (within the 2x standard of error)
- Red: between 5' and 7.5 different (2x-3x the standard of error)

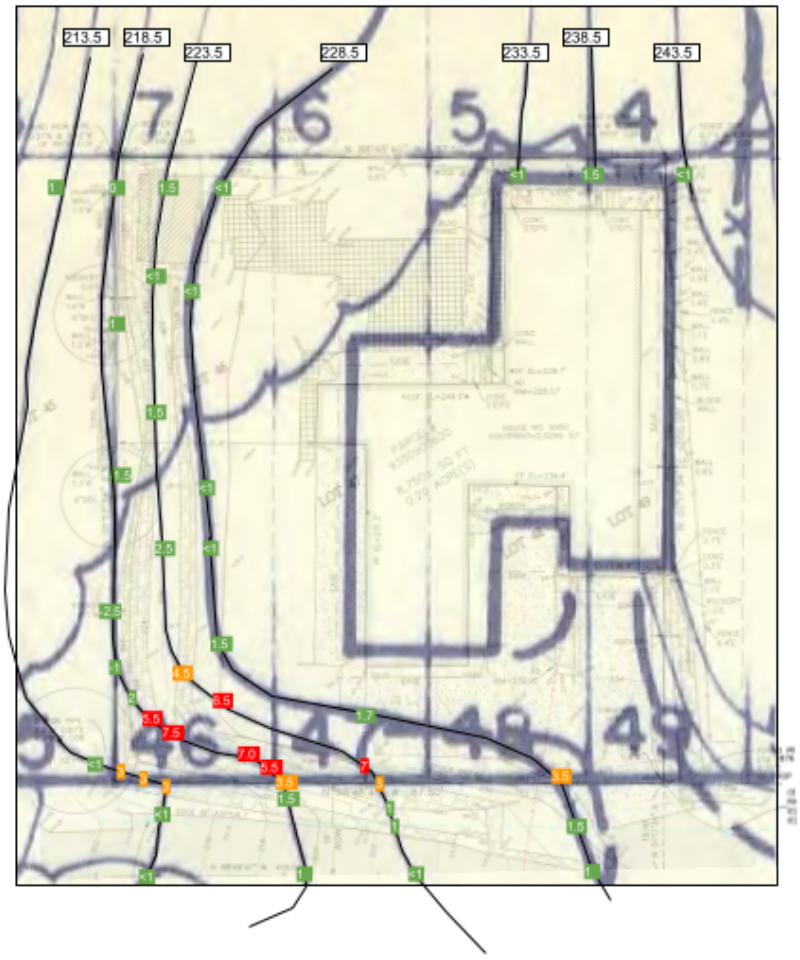

Figure 5. A comparison of 1963 Map Contour Lines with 2021 Survey Contours

[9] Because the calculation of sea level changed between these two maps, conversion of the 1963 maps NGVD29 elevations to NAVD88 elevations (which is what the 2021 survey used) was performed by adding 3.5' to the 1963 map contour elevations (details from City of Seattle).

It is clear that outside of the southern boundary of the property, the maps are in agreement with each other well within the standard of error. While there is no evidence that the 1963 elevations are the original grade, it is also clear that significant elevation was added after 1963. This strongly suggests that the southern wall was built after the 1963 Map was created as an official topographic map for the City.

b. The lower wall's construction is inconsistent with the MIZC

The lower wall does not conform with the MIZC 1960, which contains this regulation:

- Where a retaining wall protects a cut below the natural grade, and is located on the line separating lots or parcels, such retaining wall may be topped by a fence or wall of the same height that would otherwise be permitted at the location if no retaining wall existed. MIZC 1960 16.01.4(f).

The referenced fence heights are defined as follows:

- A fence not exceeding 42 inches in height may be located in any required yard. MIZC 1960 16.01.4(b)
- On interior lots a fence not exceeding seventy-two (72) inches in height may be located anywhere on the lot to the rear of the rear line of the required front yard. MIZC 1960 16.01.4(d)

Had the lower wall been built prior to MIZC 1960 coming into effect in 1960, it would have become "legally nonconforming" in September 1960. However, it would have been subject to mandatory removal within 5 years of its construction.

> REMOVAL OF NONCONFORMING STRUCTURES OTHER THAN BUILDINGS: Any nonconforming structure which is not a building shall be removed within five (5) years from the effective date of this Ordinance. MIZC 1960 20.09.[10]

MIZC 20.09 remained in the code for through the 1970s. Because the lower wall is not a building but *is* a structure (as well as a retaining wall) and because it is nonconforming, it was subject to mandatory removal under MIZC. This mandatory removal provision existed in all versions of MIZC between 1960 and 1978. As a result of this required removal, the lower wall was deemed a public nuisance when the removal deadline passed, further justifying its abatement. Appellants have been unable to find any evidence that prior approval was obtained, and neither the City nor the Applicant have furnished any such evidence.

In the more likely case that the lower wall was built after MIZC 1960 came into effect, it would have been illegally nonconforming, because it would have been built in contravention of MIZC 1960 16.01.4(f)

[10] This provision also appears in MIZC 1960 20.09.

Procedures for developers seeking a variance or deviation existed which would have enabled bypassing these limits in some cases. Yet City records reflect that no variance or deviation was ever sought or granted for the Site.

There is no question that was in conflict with MIZC 1960, if it was created that early. It was either illegal at its construction or it was required to be removed by September 1965, 5 years after the passage of MIZC 1960. Consequently, the lower wall became inconsistent with the MIZC.

It is also worth noting that the City is definitely on notice of the occurrence of inconsistent development at the Site without prior city approval, as the City has identified an unpermitted addition that was created at the 6950 house between 1985 and 1992 (Exhibit 1011, page 2).

c. The City has acknowledged that the wall was built with illegal methods

The City has acknowledged its awareness of the lower wall's illegal construction. Exhibit 1010 shows meeting notes obtained from Community Planning and Development in record request 23-247 (https://mercerisland.nextrequest.com/requests/23-247). The City states: "We determined that mitigation would be required for the rockery due to the fact that it was *not constructed with methods that would have been legal at the time* with the marginal factor *of safety*." (Exhibit 1010, page 2, my emphasis). Shockingly, the City did not volunteer these notes in its list of proposed trial exhibits; nor has it mentioned this internal conclusion in any of its externally filed documents or arguments. Nonetheless, the City's notes reflect a coordinated process by agents or employees of the City, acting in its service, making the candid determination that the rockery required mitigation because of its clearly illegal construction.

The City's conclusion makes sense in light of risks posed by the lower wall's illegal construction. Since 1950, the building code adopted by King County required that any "structure" constructed meet a minimum "factor of safety" of 1.50.[11] According to the study Ms. Strand's agent prepared, the "factor of safety" of the existing lower wall is "1.0 or slightly higher" (Exhibit 1002, page 7). Accordingly, it falls far short of the minimum safety standard – a 1.0 factor of safety means that collapse may happen when any additional force is placed on the wall. In fact, the original geotechnical survey for Site stated that the wall was so weak that "a sprinkler system should not be installed for the western yard, due to the potential for leakage in the underground piping, which could trigger a failure." (Exhibit 1001). When it was built, the lower wall's factor of safety failed to meet the minimum factor of safety mandated by the building code at that time. The lower wall's illegal construction rendered it unsafe, and the City is on notice of this hazard. The lower wall's failure to meet the minimum legal safety threshold applicable from the day it was built provides an additional and independent basis for the Site's inconsistency with the Code.

In sum, appellants agree with the City's assessment that the lower wall was not constructed with legal methods, and have offered multiple grounds as the basis of their conclusion.

d. Summary

Inconsistency with either the building or zoning codes satisfies the "without prior City approval" clause of MICC 19.15.210(B). Appellants will present ample evidence to show that the lower wall violated both building and zoning codes when it was constructed or soon thereafter, and

[11] The Factor of Safety was "approximately 1.0 or slightly higher" for the lower wall (Exhibit 1002), while the UBC 1949 required a factor of safety of 1.50. Factor of Safety is determined by dividing "moment of stability" by "overturning moment," as reflected in UBC 1949: "Overturning Moment. In no case shall the calculated overturning moment of any building or structure due to the forces provided for in this Section exceed two-thirds of the moment of stability of such building or structure. Moment of stability shall be calculated using the same loads as used in calculating the overturning moment." King County Resolution 11867, March 20, 1950, adopted the UBC 1949's earthquake calculations.

that the Site did not receive City approval for these departures from legally required standards. Unless the City requires restoration, it may not approve development of the Site.

4. **CAO23-011 does not restore the Site to a state that complies with the purposes and requirements of MICC Title 19**.

While CAO23-011 proposes changes to the Site's existing retaining walls, it does not propose "restoration" of the Site to compliance. The proposal remains inconsistent with the Code on the following points, which further justify its denial:

a. The Applicant's own geotechnical survey (Exhibit 1002 - Page 4) shows that the Site contains 11' of fill over the "existing grade" at Borehole B-2, and the proposal does not change this.
    i. Recall MICC 19.02.050(D)(5)(a), which prohibits retaining walls protecting a fill slope from increasing the "finished grade" over the "existing grade" by more than 6' at any point on the "development proposal site."
b. The Site exceeds the maximum height for retaining walls in required yards, and CAO23-011 does not change this.
    i. Recall MICC 19.02.050(E)(1)(a)(i), which limits rockery and retaining wall for the fill slope in the western "required side yard" and "required rear yard" to 6'. The proposed retaining wall in these yards is ~10'.
    ii. Recall MICC 19.020.050(E)(1)(a)(ii), which limits retaining walls for the fill slope in the "required front yard" to maximum allowed height of 42 inches above the "lower of existing grade or finished grade." The combined height of the remaining retaining wall plus proposed new retaining walls in this yard is 15 feet.

C. **Summary of Violation of MICC 19.15.210(B)**

Points 1, 2, and 3 above demonstrate that, per MICC 19.15.210(B), "development inconsistent with the purposes and requirements of this title has occurred on a development proposal site without prior city approval."

As a result, MICC 19.15.210(B) requires that "the city shall not issue any land use review approvals for the development proposal site unless the land use review approval requires that the restoration of the site to a state that complies with the purposes and requirements of this title be addressed."

As shown in point 4 above, CAO23-011 does not restore the Site to a state that complies with the requirements of MICC Title 19. Hence "land use review" CAO23-011 cannot be approved in its current form. The approval of CAO23-011 should be overturned, and the "development proposal" should be required to conform with the requirements of MICC Title 19.

Part III. CAO23-011 violates MICC 19.07 and MICC 19.10

A. Overview

To enable CAO23-011 and its associated Construction Permit, 2207-019, Ms. Strand significantly damaged an “exceptional tree” on the “critical tree slope” of the adjacent property at 3515 72nd Ave SE. Because the Development Site sits within multiple “geologically hazardous areas,” it is subject to Mercer Island’s Critical Areas Ordinance, MICC 19.07.

B. Ms. Strand carried out “removal” of an “exceptional tree” over 24” in diameter in a critical area

For the purposes of permit approval, MICC 19.10.020(B)(3) defines “tree removal” as follows: *“tree removal includes the cutting* or removing directly or indirectly through site grading *of any tree*, or root destruction that will result in a tree ultimately becoming a hazardous tree.” (my emphases).

MICC 19.16.010 defines “cut or cutting” as “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” (my emphasis).

At the hearing, Appellants, will present Scott Selby, an ASCA Registered Consulting Arborist, ISA Board Certified Master Arborist, and ISA Qualified Tree Risk Assessor with over 35 years of full-time experience. As Master Arborist Selby’s report demonstrated (Exhibit 1004), the “cutting” of Tree #5 that took place does not qualify as "pruning." Selby states that the action was a “topping cut that . . . unquestionably meets this criterion” (Exhibit 1004, page 3) for “cutting” under MICC. This “cutting” meets the MICC 19.10.020(B)(3) criteria for “tree removal.”

Tree #5 is a 45-inch DSH Red Oak, and is therefore an "exceptional tree" under MICC 19.16. In fact, according to the Exhibit 1004, “At 141 inches circumference (45 inches DSH), this specimen is nearly the exact same size as the largest red oak listed in *Trees of Seattle* Arthur Lee Jacobson (143 inches).”

Ms. Strand incorrectly claims that Mr. Grove “did not protest the activity” (Applicant’s Response, page 4), when in fact, Mr. Grove had contacted the City about this, and, along with other appellants, requested that Ms. Strand not carry out this work (Exhibit 1013, a letter was signed by Appellants Jim and Susan Mattison, Pam Faulkner, Brigid Stackpool, Lynn Michael and neighbor Jim Miller). Short of chaining himself to his tree, it is difficult to see how Mr. Grove could have made his views any clearer. Various appellants raised concerns about the tree removal at various points (for example, see Exhibit 1014). In short, the City had actual notice of multiple neighbors’ concerns prior to the "tree removal" on November 10, 2021, yet ignored these concerns and alleged violations without explanation.

Ms. Strand's cutting of Mr. Grove's "exceptional tree" is an unpermitted removal that violates MICC 19.07.020(B) and 19.10.020(B).

> The city shall not approve any development proposal or otherwise issue any authorization to alter the condition of any land, water or vegetation or to construct or alter any structure or improvement without first assuring compliance with the requirements of this chapter or determining that this chapter is not applicable to the development. MICC 19.07.020(B).
>
> *Permit required.* A permit approval is required prior to removing any tree, except for trees that are exempt pursuant to MICC 19.10.030. MICC 19.10.020(B).

Violation of 19.10.020(B) is also a violation of MICC 19.07 under MICC 19.07.030(A).

> *Interpreting multiple regulations.* If more than one regulation applies to a given property, then the regulation that provides the greatest protection to critical areas shall apply. MICC 19.07.030(A).

C. This "removal" was unpermitted and done to enable a "development proposal"

The "removal" of Tree #5 was carried out without the required removal permit and motivated by a development proposal, in violation of MICC. The anticipated evidence will include contradictory communications by the owner regarding her actions and intentions.

Unpermitted "removal" of an "exceptional tree" as part of a "development proposal" violates MICC 19.10.060(A)(3). Violation of 19.10.060(A)(3) is also a violation of MICC 19.07 under MICC 19.07.030(A).

> *Retention of exceptional trees.* Development proposals specified under subsection (a)(1) of this section shall retain exceptional trees with a diameter of 24 inches or more. Exceptional trees with a diameter of 24 inches or more that are retained shall be credited towards compliance with the retention requirements of subsection (A)(2) of this section. Removal of exceptional trees with a diameter of 24 inches or more, shall be limited to the following circumstances: . . . MICC 19.10.060(A)(3).

The timeline in Figure 6 below shows that the "tree removal" was caused by the owner, contrary to the erroneous representations made in the TPP submitted by the Applicant (albeit conceded in Applicant's Response). This timeline further affirms that the "tree removal" occurred in direct connection with this "development proposal."

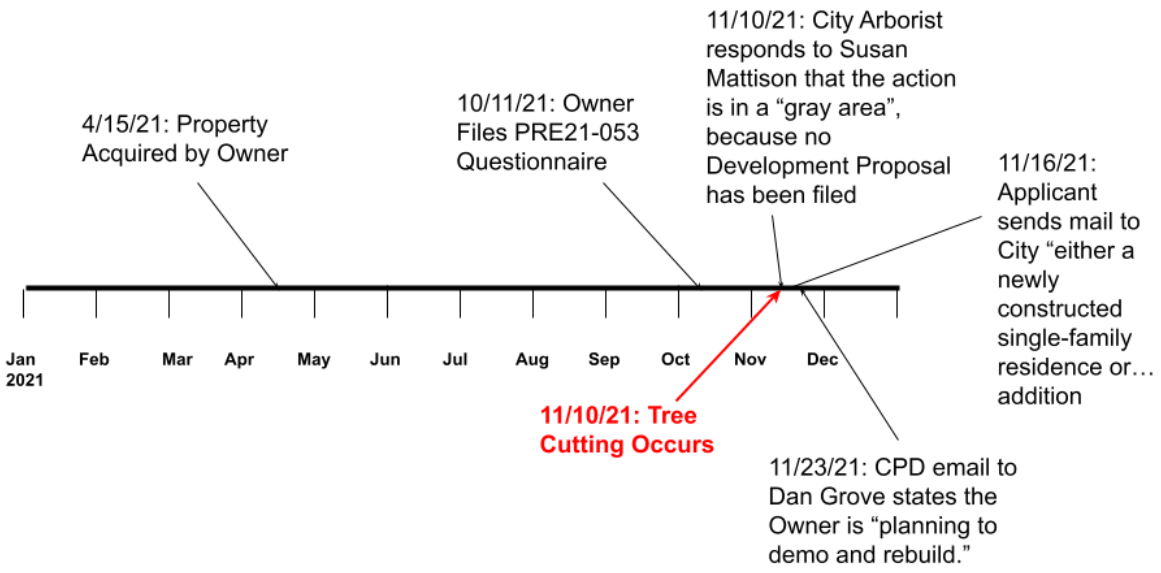

Figure 6. Tree Cutting Timeline

The purchase of the Development Site by the Owner closed on **April 15, 2021**.

On **October 11, 2021** the Applicant filed a Site Development Questionnaire with the City as part of PRE21-053 (Exhibit 1008) for a 1471-square foot second floor addition. In this filing, the Applicant represented that "no large trees would be removed as a result of this development activity."

On **November 10, 2021**, Appellant Susan Mattison emailed the City Arborist to query how Ms. Strand's "cutting" could be permitted when it was openly known that it was being done as part of a "development" proposal. The City Arborist responded by stating that this action was "in a gray area," because the development status of the Site was unclear (Exhibit 1014). Apparently, then, the City Arborist was unaware of the development plans Ms. Strand had already set in motion.

On **November 10, 2021**, P'n'D Logging, as the agent of Ms. Strand, "cut" the "exceptional tree." Per Master Arborist Selby's report (Exhibit 1004, page 2), "approximately 30 percent of the total biomass of the crown" was removed.

On **November 16, 2021,** Applicant wrote to City stating that "We are considering either a newly constructed single-family residence or possibly substantial remodel and addition…" (Exhibit 1025).

On **November 23, 2021**, in an email from the City's Community Planning and Development Department ("CPD"), Tim McHarg informed Appellant Mr. Grove that Ms. Strand was "planning to demo and rebuild" (Exhibit 1009, page 1).

To summarize, Ms. Strand conducted an unpermitted "removal" of an exceptional tree 13 days before the City's informing Mr. Grove by happenstance that despite Ms. Strand was intending to demolish and rebuild the house at the Site. Appellants were surprised since this contradicted Ms. Strand's representations in person.

Further muddying the record, the TPP contains two significant mischaracterizations. First, the TPP described the "cutting" as a mere "pruning"; second, it represented, falsely, that the Site's prior owners were responsible for this Action:

> "Just prior to selling the property they *[the previous owners]*… arranged to have the neighbor's large tree pruned back from over their roof." (Exhibit 1015, page 1).

This is patently false. The Tree was "cut," not "pruned," and it was "cut" by Ms. Strand's agent (almost 7 months after her acquisition of the property, see timeline above). The City received notice of this mischaracterization via appellants Jim and Susan Mattison's comments on Building Permit 2207-019, more one year ago. Ms. Strand now states that this was an "innocent, but mistaken conclusion" (Applicant Response, page 5). Yet the TPP has never been corrected. In fact, the TPP containing this mischaracterization was resubmitted for CAO23-011, almost a year after this issue was pointed out, and was approved by the City as part of CAO23-011.

MICC addresses the supposed "gray area" mentioned by the City Arborist by imposing a 5-year lookback period for any tree whose retention is required. MICC 19.10.060(A)(4). Unless an exception listed in MICC 19.10.060(A)(3)(a)-(c) applies, retention of "exceptional trees," like Tree #5, which is an "exceptional tree" over 24" in diameter, is required for all "development proposals". MICC 19.10.060(A)(3).

Had Ms. Strand properly followed MICC requirements regarding "tree removal," she would have been required to obtain a removal permit as part of a "development proposal" *prior* to her actions. By proactively engaging in non-permitted "tree removal," she attempted to circumvent the tree retention requirements that would be imposed on her "development proposal." The City must hold her to the same standards as those required of all community members. Otherwise, Ms. Strand stands to evade the requirements that would have limited the "development proposal's" size and/or location pursuant to MICC 19.10.060(A)(3)'s "tree retention" regulations.

The Applicant must demonstrate that one of the exceptions in MICC 19.10.060(A)(3)(a)-(c) applied, or must comply with the tree retention requirements of MICC 19.10.060(A)(4), which require retention of "exceptional trees" for "five years prior to the date of application." As a result, CAO23-011 may not be approved until November 10, 2026, that is, 5 years after the "tree removal" date of November 10, 2021.

D. The Owner's Unpermitted Actions Adversely Impacted the adjacent property containing Tree #5.

MICC 19.07.160(B)(2)(b) prohibits approval of "alterations" to Critical Areas that will adversely impact adjacent property.

> 19.07.160(B)(2): Alteration of landslide hazard areas and seismic hazard areas and associated buffers may occur if the critical area study documents find that the proposed alteration:
>
> a. Will not adversely impact other critical areas;
> b. Will not adversely impact the subject property or adjacent properties;...

As discussed in Appellants' Response (page 4), MICC 19.07.160(B)(2)(b) clearly applies here–the "tree removal" in question is not an "exempt" "alteration" carried out by Ms. Strand's agents; the "alteration" took place within the "geologically hazardous areas" overlying the Site; the "alteration" took place less than 5 years prior to the application submittal date; and the "alteration" adversely impacted a neighboring property by both compromising the health of an "exceptional tree" and potentially compromising the "protected slope area" surrounding the tree on neighboring property. As a result, CAO23-011 violates MICC 19.07.160(B)(2)(b).

E. Summary of MICC 19.07 and associated MICC 19.10 violations

The tree retention requirements for "development proposals" in MICC are clear, and especially important to respect in the case of "exceptional trees." As shown above, the "cutting" of "exceptional tree" #5 violated multiple aspects of MICC 19.07 and MICC 19.10:

1. Unpermitted "removal" of an "exceptional tree" in a critical area violates MICC 19.07.020(B) and MICC 19.10.020(B)(1).
2. This "removal" of an "exceptional tree" greater than 24" in diameter was performed to enable this "development proposal," violating MICC 19.10.060(A)(3) and MICC 19.07.020(B).
3. This "removal" adversely impacted adjacent property, violating MICC 19.07.160(B)(2)(b).

In order to "balance property owner interests with the public interest", as described in the Purposes of MICC 19.07, the "removal" of this "exceptional tree" must result in any approval of a "development proposal" for the Site by the City being denied for 5 years after the November 10, 2021 date of "tree removal." MICC 19.10.060(A)(4).

Conclusion

Land use application CAO23-011 should be rejected, and the City's approval overturned, because:

1. The lower retaining wall was built with illegal construction methods, and under MIZC 1960 could not have remained in place as a legally nonconforming structure after September 1965. Under MICC 19.15.210(B), the City must require that any Land Use Application for this Site bring the Site into compliance with MICC, which CAO23-011 does not do.
2. Unpermitted "exceptional tree" "removal" within a critical area took place in service of Ms. Strand's "development proposal," in violation of multiple provisions under Title 19. CAO23-011 takes direct advantage of this illegal "tree removal." The Applicant should be required to prove that her actions qualify for an exception that allowed not merely the pruning, but the removal, of an "exceptional tree." Alternatively, any future application should come no earlier than five years after the unpermitted Removal on November 10, 2021.

Failure to insist that development proposals comply with MICC renders those requirements effectively irrelevant.