

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.

Case No. APL23-009

DECLARATION OF DANIEL GROVE IN SUPPORT OF APPELLANT’S MOTION FOR RECONSIDERATION

I, Daniel Grove, declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am a citizen of the United States. I am over the age of eighteen and competent to testify in this matter. I have personal knowledge of the following:

2. Attached as **Exhibit A** is a true and correct copy of the email Appellants received on Saturday, December 3, 2023, from Hearing Examiner Galt, which attached the “informal” Order of Summary Dismissal, to be formally provided to the parties by the City on Monday, December 4, 2024. The email also cancelled the December 7, 2023, hearing.

3. Attached as **Exhibit B** is a true and correct copy of the email exchange I had with Hearing Examiner Galt on December 7, 2023, regarding when the Order of Summary Dismissal would “officially” be issued, and what the applicable 10 day reconsideration period would be. I

1 asked because I had not received any formal notice from the City or Hearing Examiner Galt at that
2 point.

3 4. Attached as **Exhibit C** is a true and correct copy of the comparison of the 1963
4 Survey which demonstrates that the fill slope was augmented, and the large southern rockery was
5 built, in 1963. The overlay shows differences in elevation between the 2021 Survey (submitted as
6 Exhibit 1003, p. 2) and the City of Mercer Island's Topographic Base Map of 1963 (submitted as
7 Exhibits 1007 and 1007.1). The 2021 and 1963 surveys are largely identical for the 6950 lot, except
8 for the area of the southern retaining wall/rockery. Differences in elevation within the margin of
9 error for the surveys are shown in Exhibit C in green, while larger differences in elevation are
10 shown in orange and red. This exhibit was submitted with my hearing brief as Exhibits 1026.

11 5. Attached as **Exhibits D.1-D.4** are true and correct copies of the historic photos that
12 Susan Mattison, another Appellant in this appeal, provided to me. She located them by
13 communicating with Greg Allen, whose parents did the original development of 6950. These
14 photos were taken between 1951 and 1955, show the original condition of 6950, and show that the
15 fill slope was built after the home was originally constructed. We had planned to submit these
16 photos as supplemental exhibits prior to the hearing, since we did not locate the photos until the
17 day after the brief was due (we did not receive these photos until approximately 5PM on December
18 1, 2023).

19 6. Attached as **Exhibit E** is a true and correct copy of an exchange between the City's
20 planner I received as part of a Public Records Act request that I submitted to the City in Spring
21 2023 regarding the illegal nonconforming status of the rockery and fill.

22 Executed this 18th day of December 2023 at Mercer Island, Washington.

23 *DANIEL D. GROVE*

24 _____
25 Daniel Grove
26

2- DECLARATION OF DANIEL GROVE

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

EXHIBIT A



Dan Grove <dan@grove.cx>

APL23-009: Order of Summary Dismissal attached

John Galt <jegalt755@gmail.com>

Sat, Dec 2, 2023 at 1:41 PM

To: Andrea Larson <Andrea.Larson@mercergov.org>, Bio Park <bio.park@mercergov.org>, Dan Grove <dan@grove.cx>, "David J. Lawyer" <dlawyer@insleebest.com>, "Davison, Zachary (Perkins Coie)" <ZDavison@perkinscoie.com>, Deb Estrada <Deborah.Estrada@mercerisland.gov>, Dorothy Strand <kcra2005@yahoo.com>, Jeffrey Almeter <jeffrey.almeter@gmail.com>, "Jerilyn K. Kovalenko" <Jkovalenko@insleebest.com>, Kim Adams Pratt <kim@madronalaw.com>, Mary Swan <mary.swan@mercergov.org>

Dear Principal Parties:

I want you to have this Order as soon as possible, so I am "informally" distributing it to you today, Saturday, December the 2nd, the day I completed my work on it.

However, I will consider it officially "issued" on Monday the 4th when the City distributes it to you.

The reconsideration period will end on December 14th.

Respectfully,

John E. Galt

Hearing Examiner/Officer

Mediator

Voice: (425) 259-3144


 **APL23-009 c.doc**
58K

EXHIBIT B



Dan Grove <dan@grove.cx>

Canceled: APL23-009 Hearing - Grove et al v. MI CP&D - CANCELED

Dan Grove <dan@grove.cx>
To: John Galt <jegalt755@gmail.com>

Thu, Dec 7, 2023 at 8:28 AM


Hello Mr. Galt-

With the City's notification going out the night of December 6 (rather than December 4, as you stated in your document), can you clarify when the reconsideration period would end?

Thank you.
Dan Grove
[Quoted text hidden]

2 attachments

 **invite.ics**
5K

 **APL23-009 c.doc**
58K



Dan Grove <dan@grove.cx>

RE: APL23-009: Order of Summary Dismissal attached

John Galt <jegalt755@gmail.com>

Thu, Dec 7, 2023 at 9:36 AM

To: Andrea Larson <Andrea.Larson@mercergov.org>, Bio Park <bio.park@mercergov.org>, Dan Grove <dan@grove.cx>, "David J. Lawyer" <dlawyer@insleebest.com>, "Davison, Zachary (Perkins Coie)" <ZDavison@perkinscoie.com>, Deb Estrada <Deborah.Estrada@mercerisland.gov>, Dorothy Strand <kcra2005@yahoo.com>, Jeffrey Almeter <jeffrey.almeter@gmail.com>, "Jerilyn K. Kovalenko" <Jkovalenko@insleebest.com>, Kim Adams Pratt <kim@madronalaw.com>, Mary Swan <mary.swan@mercergov.org>

Dear Mr. Grove:

The below email, which I sent to everyone on the email distribution list for this case on Saturday, December 2nd, answers the question in your email of this morning: "The reconsideration period will end on December 14th."

Saturday's Order dismissed the appeal and canceled the hearing. All yesterday's Zoom notice did was cancel the Zoom session.

Respectively,

John E. Galt

Hearing Examiner/Officer

Mediator

Voice: (425) 259-3144

From: John Galt**Sent:** Saturday, December 02, 2023 1:41 PM**To:** Andrea Larson <Andrea.Larson@mercergov.org>; Bio Park <bio.park@mercergov.org>; Dan Grove <dan@grove.cx>; David J. Lawyer <dlawyer@insleebest.com>; Davison, Zachary (Perkins Coie) <ZDavison@perkinscoie.com>; Deb Estrada <Deborah.Estrada@mercerisland.gov>; Dorothy Strand <kcra2005@yahoo.com>; Jeffrey Almeter <jeffrey.almeter@gmail.com>; Jerilyn K. Kovalenko <Jkovalenko@insleebest.com>; Kim Adams Pratt <kim@madronalaw.com> <kim@madronalaw.com>; Mary Swan <mary.swan@mercergov.org>**Subject:** APL23-009: Order of Summary Dismissal attached

Dear Principal Parties:

I want you to have this Order as soon as possible, so I am "informally" distributing it to you today, Saturday, December the 2nd, the day I completed my work on it.

However, I will consider it officially “issued” on Monday the 4th when the City distributes it to you.

The reconsideration period will end on December 14th.

Respectfully,

John E. Galt

Hearing Examiner/Officer

Mediator

Voice: (425) 259-3144



Dan Grove <dan@grove.cx>

APL23-009 Hearing - Grove et al v. MI CP&D - CANCELED

John Galt <jegalt755@gmail.com>

Thu, Dec 7, 2023 at 9:47 AM

To: Deb Estrada <Deborah.Estrada@mercerisland.gov>, Bio Park <Bio.Park@mercergov.org>, Kim Adams Pratt <kim@madronalaw.com>, Dan Grove <dan@grove.cx>, "David J. Lawyer" <dlawyer@insleebest.com>, Dorothy Strand <kcra2005@yahoo.com>, Jeffrey Almeter <jeffrey.almeter@gmail.com>

Cc: Jeff Thomas <jeff.thomas@mercerisland.gov>, Alison Van Gorp <alison.vangorp@mercergov.org>, Ryan Harriman <ryan.harriman@mercerisland.gov>, Molly McGuire <molly.mcguire@mercerisland.gov>, Andrea Larson <Andrea.Larson@mercergov.org>, Mary Swan <mary.swan@mercerisland.gov>, Reina McCauley <rmccauley@madronalaw.com>, Eileen Keiffer <Eileen@madronalaw.com>, John Kenney <John.Kenney@mercergov.org>

Dear Principal Parties:

Please ignore the email I sent you a few minutes ago.

My Outlook displays incoming messages with the latest message at the top of the list. Thus, I saw and answered Mr. Grove's email of this morning before seeing Ms. Estrada's message of last evening.

Legally, I believe that the Order was issued to all principal parties on Saturday the 2nd with my email of that date. However, in order to avoid any possible time-line complaint, I will construe that the Order was not issued until Wednesday the 6th. That means that the 10-day reconsideration period would end on December 16th. Since December 16th is a Saturday, the reconsideration period will end the following Monday, the 18th. (See RoP 140.)

Respectfully,

John E. Galt

Hearing Examiner/Officer

Mediator

Voice: (425) 259-3144

-----Original Appointment-----

From: Deb Estrada**Sent:** Wednesday, December 06, 2023 9:41 PM**To:** John Galt; Bio Park; Kim Adams Pratt; Dan Grove; David J. Lawyer; Dorothy Strand; Jeffrey Almeter**Cc:** Jeff Thomas; Alison Van Gorp; Ryan Harriman; Molly McGuire; Andrea Larson; Mary Swan; Reina McCauley; Eileen Keiffer; John Kenney**Subject:** APL23-009 Hearing - Grove et al v. MI CP&D - CANCELED

12/15/23, 4:56 PM

Grove.cx Mail - APL23-009 Hearing - Grove et al v. MI CP&D - CANCELED

When: Thursday, December 07, 2023 10:00 AM-2:00 PM (UTC-08:00) Pacific Time (US & Canada).

Where: Zoom

[Quoted text hidden]

EXHIBIT C

EXHIBIT D.1



EXHIBIT D.2



EXHIBIT D.3



EXHIBIT D.4



EXHIBIT E

- Existing grade determination by code official
 - Existing grade is the grade established in the 2021 survey submitted with the building permit application - OR - the interpolated grade done by neighbors based on the conclusions of the out of date administrative interpretation:
 - No. 3 is based on whether or not there is a current survey available. The interpolated survey done by the neighbors is based on a survey from 1961 and an old survey for a neighboring property.
 - The existing house was built in 1952.
 - We need to decide which method is correct and which one we want to make the applicant go through with. This would affect the project's maximum height and gross floor area (basement exclusion) allowances.
- Existing rockery needs mitigation
 - Michele's original email in October:
 - Comment:
The geotechnical engineering report indicates "...due to the loose nature of the upper fill soils behind the rockery, it would only be considered moderately stable, and likely has a current factor of safety of 1.0 or slightly higher with regards to slope stability."

Indicate how this hazard is being mitigated (MICC 19.07.160).

Although the new site development is not "touching—altering" the existing rockeries (except for utilities that may be incorrectly located on the civil drawings) does this statement in the report identify a hazard that then has to be mitigated? FS of 1.0 is not the standard for long term stability—not to mention the use of rockery to retain a loose fill.

- Don's reply:
 - Ryan or Jeff, please see Michele's question whether to include a comment requesting mitigation for an appropriate factor of safety (FOS) for an existing rockery located below a SF Demo/Rebuild project. If the Geotech report did not mention the FOS, then we would have assumed the existing rockery was acceptable. However, the Geotech report stated the existing rockery has a FOS that is less than standard for a new design and the scope of work does not propose any mitigation. However, the scope of work does not touch the rockery, so Michele's question is whether MICC 19.07.160 applies, which would trigger her comment to provide mitigation.

My initial thoughts based on code language are the following (but it's your call):

The Title 19 definition of "Development" appears to extend to the entire site, so believe the statements within MICC 19.07.160 would apply, and

mitigation to the rockery should be addressed. This would be an unpopular interpretation because it is an existing rockery that is not touched, and the cost to repair the situation is very expensive. On the other hand, there are public comments from the downhill neighbors expressing concerns of this rockery failing.

Also, when considering that this is an existing rockery, as previously stated, our first assumption is that an existing rockery is likely constructed properly, considered “grandfathered”, and no comment would be made. However, because the geo report information describes construction methods that would not have been legal at the time along with the marginal FOS, it may not be appropriate to consider the rockery to be legally grandfathered. Your choice, please feel free to contact me for questions.

- Michele’s reply (after some back and forth)
 - I think the issue is that the rockery is substandard to begin with and the geotechnical engineer has noted a marginal stability (no stability analyses were given, but rockeries are not used to retain a fill since they are not considered retaining walls). Also the fact that the fill is loose indicates no compaction during original placement of this fill—so this fill would be considered an uncontrolled or unengineered fill. Since this has been noted by their geotechnical engineer, it is my opinion that there has to be some mitigation.
- 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. Additionally, several public comments were regarding the rockery.
- March - Michele asked about height restrictions for the rockery. The rockery is located partially in the front and side yard setbacks, and partially in the ROW. Per MICC 19.02.050, the rockery is limited to 72 in height. The existing rockery is around 11 ft at the tallest point in the SW corner of the property. Michele stated that the height requirement in the front yard will complicate their mitigation of the marginally stable rockery.
- Don’s reply:
 - Molly, maybe I do not understand the scope of work correctly, but are there exemptions for an existing situation? It seems problematic to require the repair/replacement of the many existing property line walls around Mercer Island that are over 72” with a max 72” wall. Perhaps there is an exemption or interpretation (e.g. - definition of preconstruction/existing grade, etc.)? After confirming, please make any wall height restrictions as a separate land use comment, so questions are directed to you and not Michele.

Michelle, please do not include the land use wall height requirement in your comment. Instead, please feel free to refer to Molly’s land use comment.

- Per MICC 19.01.050(B)(1): *Ordinary repairs and maintenance*. Ordinary repairs

and maintenance of a legally nonconforming structure are permitted. In no event may any repair or maintenance result in the expansion of any existing nonconformity or the creation of any new nonconformity. However, Michele and Don's original comments stated that the rockery was not constructed using methods that would have been accepted for the factor of safety. Therefore, I don't think that we can use ordinary repairs and maintenance for the structure to maintain the existing nonconforming height.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Declaration on the following:

Daniel Grove
3515 72nd Avenue SE
Mercer Island, WA 98040
Appellant

- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: dan@grove.cx

Martin Snoey
7145 SE 35th Street
Mercer Island, WA 98040
Appellant

- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: mrsnoey@msn.com

Jim and Susan Mattison
7075 SE Maker Street
Mercer Island, WA 98040
Appellants

- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: jim@mattison.me
susan@mattison.me

Pam Faulkner
7011 SE Maker Street
Mercer Island, WA 98040
Appellant

- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: pfaulk9801@gmail.com

to be sent by the following indicated method or methods, on the date set forth below:

- by **sending via the court’s electronic filing system**
- by **email**
- by **mail**
- by **hand delivery**

DATED: December 18, 2023

PERKINS COIE LLP

By: /s/ Zachary E. Davison

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Attorneys for Appellant Daniel Grove