

From: [Dan Grove](#)
To: [Molly McGuire](#)
Subject: Development Proposal Site for Permit 2207-019 is Illegally nonconforming
Date: Friday, June 16, 2023 8:27:41 AM
Attachments: [6950 Illegal Nonconforming Status \(1\).pdf](#)

Hello Molly-

I didn't hear back from you on the Critical Area Review 2 question, but I still want to give you the important feedback that I have about the site, which is illegally nonconforming.

I have sent 3 pieces of feedback on SUB3, and want to make sure that you have all of these for your processing of SUB3.

"Existing Grade for permit 2207-019 SUB3" - sent June 9 (this focuses on the question of what the Existing Grade is for the proposed structure)

"Re: Permit 2207-019 / 6950 SE Maker Street" - sent June 12 (this focused on the CAR2 process)

This note: "Development Proposal Site for Permit 2207-019 is Illegally nonconforming" (this focuses on the illegally nonconforming state of the project Site, and the violations of MICC for the proposed retaining wall and yard)

Can you please confirm that you've gotten all of these?

Thank you,
Dan Grove

Molly McGuire
Mercer Island Community Planning and Development Department
RE: Development Site for Permit 2207-019 is Illegally Nonconforming
June 15, 2023

Dear Ms. McGuire:

I'm writing to ensure that an important set of Site and Critical Area violations in SUB3 of Mercer Island Permit 2207-019 (address: 6950 SE Maker Street) are addressed. The problems I lay out about the site are in addition to the issues I've already identified around the elevation, grade, size, and setbacks for the proposed structure that I laid out in my June 9, 2023 email.

Section 1 of this document demonstrates 3 facts about the 2207-019 Site at 6950 SE Maker Street:

1. The current rockery on the Lot's edges is an Illegal Nonconforming Structure.
2. As a result of the rockery's Illegal Nonconformance and the increase in grade that was created when the rockery is installed, the Development Site is an Illegal Nonconforming Site.
3. Changes proposed to the rockery are not Modifications, because the rockery is not a legal established structure.

Despite the fact that the entire Development Site is designated under one or more Critical Area designations, no Critical Area Review 2 has been applied for.

These facts result in 2207-019 containing a variety of violations of MICC, some of which are listed in Section 2.

Section 1 - The Development Site is an Illegal Nonconforming Site

MICC 19.16.010 defines the following:

- *Lot*: A designated parcel, tract or area of land established by plat, subdivision, or as otherwise permitted by law to be used, developed or built upon as a unit.
- *Development proposal*: The application for a permit or other approval from the city of Mercer Island relative to the use or development of land.
- *Development proposal site*: The 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.

To set correct context, Figure 1 shows the Lot in 1955, before the rockery was installed.

When this photo was taken, the area directly west of the house (and shown in this photo) had approximately 10' of fill in place (based on the 1963 Survey and 2022 Geotechnical Survey, shown below).

This fill installation was the first of at least 2 major fill installations that occurred on the site over its lifetime.

On September 26, 1960, the site became Legally Nonconforming when the initial MICC was adopted.

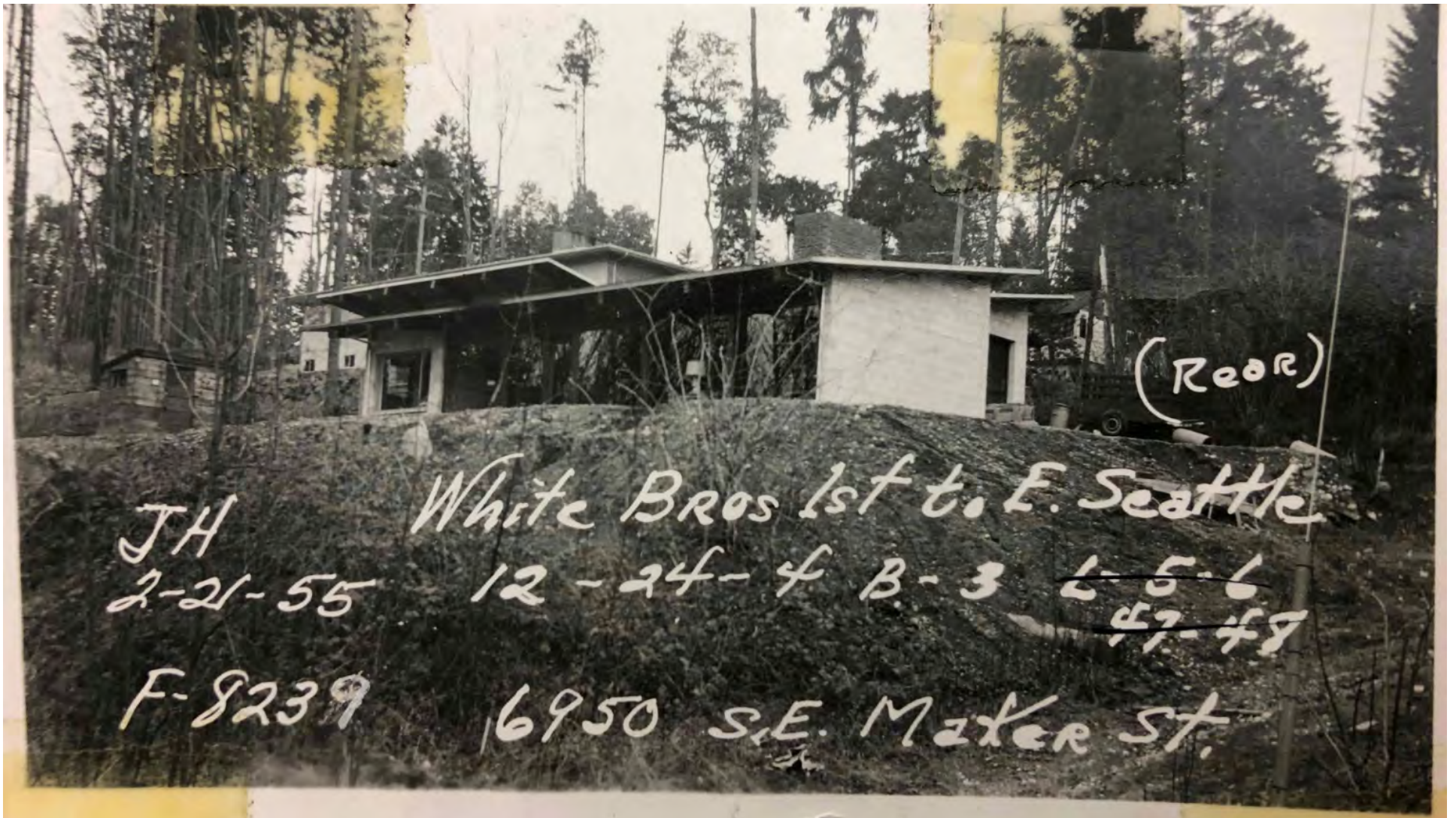


Figure 1. 1955 King County Assessor photo showing same hillside as 1963 Aerial Image in Figure 2b

Figure 2 is taken from a [Mercer Island 1963 survey](#) that shows the contours of the Lot and the SE Maker right-of-way after the 6950 house was completed in 1955, but before the rockery was put in place around 6950.

It is important to note that there is no rockery in the SE Maker right-of-way south of 6950, and no rockery on the western boundary of 6950. This is confirmed by the 1963 aerial image in Figure 3a.

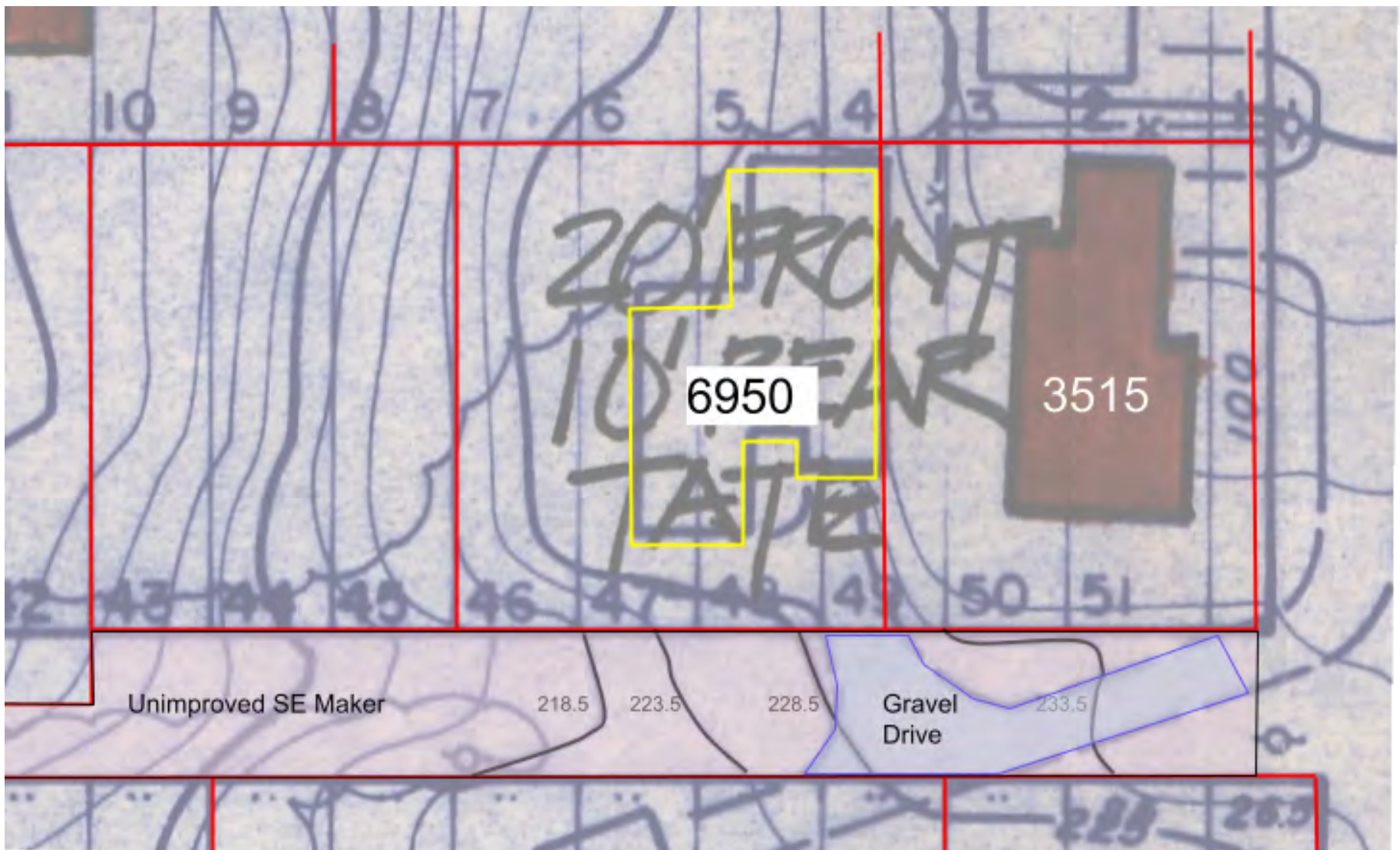


Figure 2. Survey showing original grade of SE Maker Street, 1963. The grade shown for 6950 is already Altered from the Existing Grade. ("1963 Survey")



Figure 2a. 1963 Aerial Image showing no rockery to the west and no rockery in SE Maker ROW



Figure 2b. For comparison, 1992 Aerial Image showing rockery to the west and rockery in SE Maker ROW

Another survey of SE Maker Street and 6950 SE Maker was done in 2021, as shown in Figure 3. The rockery installed after 1963 significantly altered the grade of the front and side yards of 6950 SE Maker (north and east of the rockery), as a second fill installation was done (to fill in the area behind the rockery, and to increase the grade of the front/side yards).

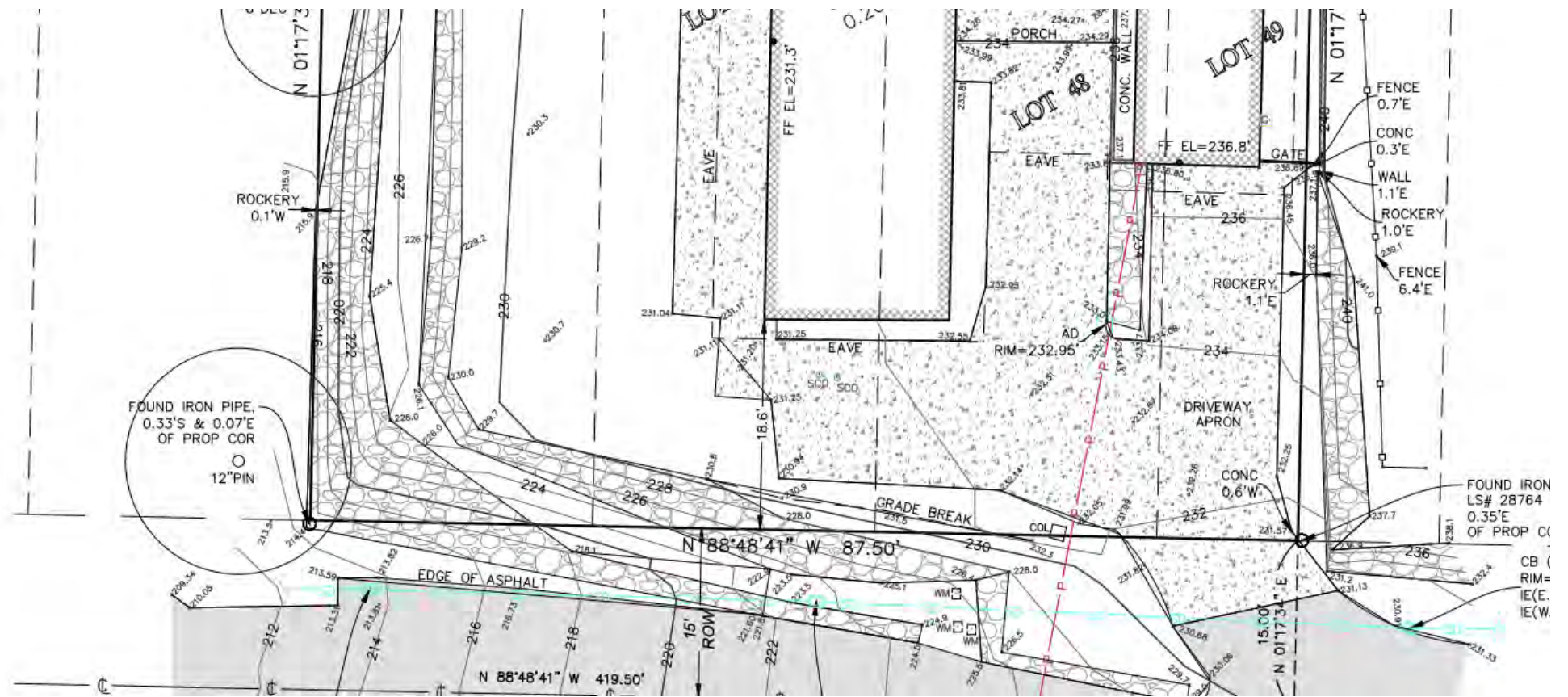


Figure 3. 2021 Survey of 6950 SE Maker and SE Maker Street

A comparison of cross sections (shown in Figure 4) of the 1963 Survey in figure with the 2021 Survey from 2207-019 clearly confirms that the rockery was installed between the dates of the two surveys. In these two surveys, 60 years apart:

- The elevation of the Maker Street midline (shown in Blue) is differs from 1963 to 2021 by only a few inches (despite the street being paved several times between the two surveys)
- At the south boundary of 6950 (in Green), the rockery that was added is clearly visible - as you can see, there are up to 4 feet of difference between 1963 and 2021.
- The cross section 10' north of the boundary (in Red) shows that the rockery increased the elevation of the yard by 7.5 feet when comparing 2021 and 1963 elevations.

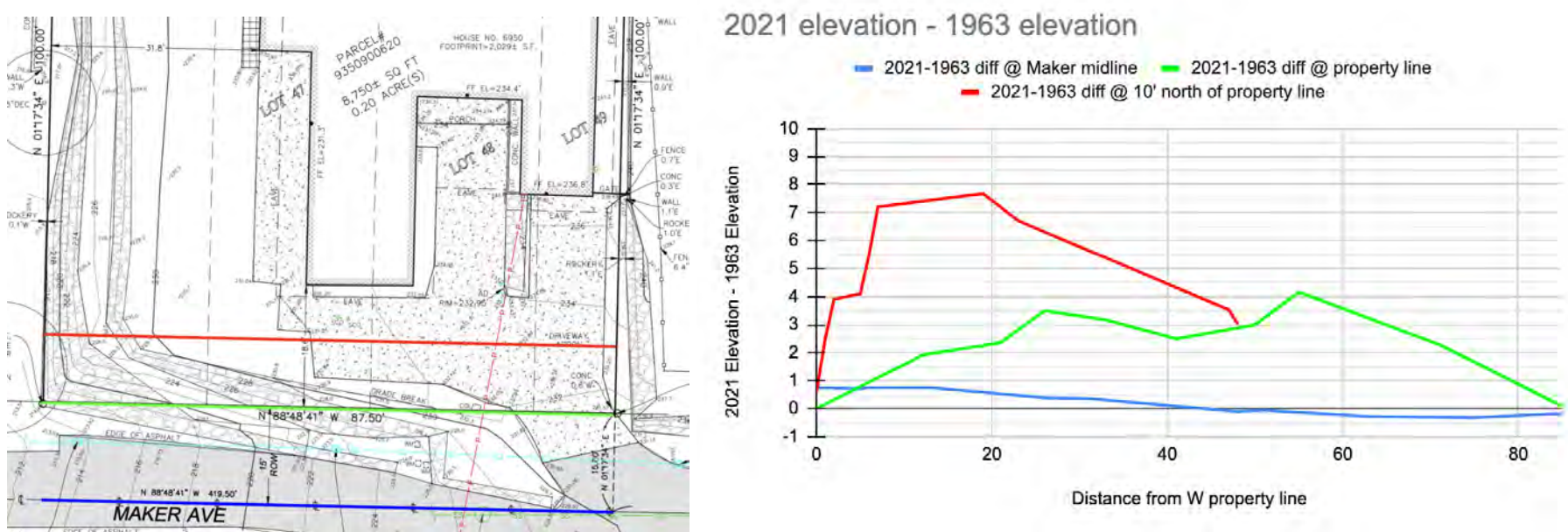


Figure 4. Comparison of cross sections of 1963 and 2021 Survey elevations

No permit was issued for the rockery's installation. Because the installation took place after September 26, 1960 (we know this because it is not present in 1963 survey/aerial imagery in Figures 2 and 2A), and because the 2022 Geotechnical Report of 6950 SE Maker describes the construction methods as those that would not have been legal at the time of construction (due to its marginal Factor of Safety), the rockery is an Illegal Nonconforming Structure. An "Illegal Nonconforming Structure" is one that is not in conformance with all applicable code provisions in effect at the time of its creation - as is the case here. Illegal Nonconforming Structures must be brought into compliance with all applicable provisions of the MICC per MICC 19.01.050.

On the southern edge of 6950, the rockery currently sits in both the Required Front Yard of 6950 and the SE Maker Street Right of Way, and is up to 11' feet tall. No encroachment agreement was made with the city to enable this rockery's construction in the Right of Way.

The rockery is illegal for several reasons:

- It was built after September 26, 1960, and used construction methods not legal at that time (per notes from the City of Mercer Island: “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. “)
- It did not follow MICC at the time of its construction:
 - No building permit was issued for its construction, despite it being required
 - [MICC in 1960](#) section 16.01.4 limited a fill retaining wall in the Required Front Yard to 42 inches. Required Front Yard depth in the 1960 MICC was 20 feet (identical to today).
 - [MICC in 1960](#) section 16.01.4 limited a fill retaining wall in the Required Side Yard to 72 inches in height. Required Side Yard Depth in the 1960 MICC was 5 feet (which differs from today’s code).

Because the rockery is illegal, the Ordinary Repairs and Maintenance clause of MICC 19.01.050(B)(1) may not be used to maintain the current structure’s nonconformance. Per MICC 19.01.050(B)(1), ordinary repairs and maintenance are only permitted for *legally* nonconforming structures, which are not present here.

In addition, the changes proposed to the rockery are not Modifications per MICC 19.07.130 because the rockery is not a “legally established structure or building within a critical area and/or buffer constructed on or before January 1, 2005” (MICC 19.07.130). In fact, the notes from the City obtained in [Public Records Request 23-247](#) tell the same story:

- “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. “
- “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.”

Because the site was made more nonconforming when the rockery was built after September 26, 1960, the site lost any Legal Nonconforming Status it may have had before the rockery’s construction. The site is an Illegal Nonconforming Site (a developed building site that did not conform to the applicable code requirements that were in effect regarding site development) and therefore must be brought into conformance with all current code requirements (MICC 19.01.050(A)(3). Bringing the site into conformance with current MICC is especially important for this site where various neighbors have already provided comments outlining safety concerns related to the lack of structural integrity of the rockery (and where the rockery has already failed once).

Section 2 - MICC Violations

As a result of the findings in Section 1, there are a wide variety of violations of MICC.

MICC 19.07.090(B) requires a Critical Area Review 2 (CAR2). A CAR2 must occur because the rockery is an Illegal Nonconforming Structure, and therefore changes to it are not Modifications under MICC 19.07.130(A). No Type III Review Process for a CAR2 has been performed.

In addition, the proposed development violates multiple additional aspects of MICC, including:

- 19.01.050(A)(3) - The Site was made more nonconforming when the rockery was built and large amounts of fill installed after September 26, 1960. As a result, the site lost its Legal Nonconforming Status. The site is an Illegal Nonconforming Site, and must be brought into conformance with current MICC.
- 19.02.050(D)(5) - There is at least 12 feet of fill in the Required Front Yard and in the western Required Side Yard (per the 2022 geotechnical survey), exceeding the maximum allowed fill depth of 72 inches.
- 19.02.050(D)(5) - The proposed rockery + retaining wall in the western Required Side Yard exceeds its maximum height of 72 inches. The proposed rockery + retaining wall in the western Side Yard is between 96 and 144 inches above the existing grade. As should be obvious, the Existing Grade at the bottom of the wall is the Existing Grade from which the height of the proposed rockery + retaining wall must be measured.
- 19.02.050(E)(1) - the proposed rockery/retaining wall in the Required Front Yard exceeds the maximum height of 42 inches. The proposed rockery + retaining wall in the Required Front Yard is up to 156 inches (13 feet) high. As I have demonstrated in other filings, the current grade of SE Maker Street is the correct Existing Grade for the southern border of the Lot, and is the height from which the height of the proposed rockery + retaining wall must be measured.

In the end, the majority of the problems with this proposal are due to illegal alterations to the Development Site per MICC.

Thank you for your careful attention to this matter.

Dan Grove
3515 72nd Ave SE
Mercer Island, WA 98040

—
Appendix - Sources and Methods

<https://www.seattle.gov/dpd/codes/dr/DR2012-4.pdf> - page 7, showing City of Seattle’s documented best practices for interpolation of lot elevations when the lot has been altered prior to its survey.

Figure 1: 1955 photo of 6950 SE Maker and environs (from Puget Sound Regional Archives)

Figure 2: [January 1963 survey](#) (from Mercer Island GIS)

Figure 2a: 1963 Aerial photograph of 6950 SE Maker (from Mercer Island GIS)

Figure 2b: 1992 Aerial photograph of 6950 SE Maker (from Mercer Island GIS)

Figure 3: [2021 Survey](#) (from 6950 SE Maker Street permit application)

In this document, elevations from the 1963, 1989 and 2004 surveys are normalized from their original NGVD29 elevations to current NAVD88 elevations by adding 3.5 feet to the NGVD29 elevations (for more details, [see this document](#) from the City of Seattle).