

Michael J. Murphy
Direct Dial: (206) 618-7200
E-Mail: mmurphy@groffmurphy.com

August 5, 2022

Jeff Thomas
Interim CPD Director
Via Email: jeff.thomas@mercerisland.gov

Re: Cherberg Dock, PRE22-030, SHL14-031 & Building Permit 1501-218

Dear Jeff:

I represent Tom Graue III and Shannon Graue, the owners of the property immediately to the east of the Cherberg property. I have reviewed your email of May 25, 2022 to Seaborn (Kelsey Meyer) regarding the processing of the renewed permit requests for the dock project. I have also submitted a Public Records Act request for relevant City documents so that I can get a complete understanding of what has transpired over the last several years. Before the City's permit application review proceeds too far, however, I wanted to make sure that the City was aware of certain facts and serious concerns regarding the proposed dock.

The landscape mitigation plan that I have seen calls for the planting of trees on the property west of the creek. That is property owned by my client. The Cherbergs have an easement to use that area for limited purposes, but, among other restrictions, it prohibits any material changes to the landscaping without my client's consent. *See* attached **Exhibit A**. My client has not consented to the proposed landscaping plan. They have not even been asked to review it. It is not clear to me on what authority the Cherberg's have submitted the landscape plan, or what authority the City would have to require plantings on my client's property. I assume the City was not informed of the easement limitations.

My client has seen various drawings over the years, many of which appear inconsistent with each other with respect to the exact location of the proposed dock and its relationship to the various existing structures and setbacks. For example, the scale and the distance between the Graue & Griffith docks does not appear to be the same from design to design. What design exactly is being reviewed now and what is being done by the plan reviewer to validate the various distances?

Most importantly, the proposed dock is a hazard to safe navigation into and out of the Graue dock because it extends out beyond and cuts across the northwest half of the Graue dock at an angle. It is a hazard because of the close proximity of the proposed dock the fact that it angles towards the Graue dock. Because of those conditions, it severely limits maneuvering

space in a critical location northwest of the Graue dock. This portion of the lake is very active during summer, generating large and continuous wave action and wind, both primarily from the northwest, at the very time of year when the docks are in use and safe navigation around the Graue dock, slip and lift is required. The Graue dock has a sizable slip (16' x 42'), and they have had upwards of a 46-foot vessel docked there. Navigation of any vessel, let alone a vessel of this size, would require more navigation room north and west of the slip for safe departure and approach maneuvers than the proposed Cherberg dock will allow. In short, the proposed dock will impact the Graue's ability to fully and safely access their dock now and in the future. These problems normally do not exist with docks that are parallel to each other, even when they are of different length. But because of the angle and length of the proposed dock, it is highly problematic. Any Cherberg dock needs to allow the Graues the ability to safely accommodate the size of boats the Graue dock allows, and the space to safely maneuver as part of the overall use consideration. It does not.

Based on what I have reviewed to date, I understand that the City considers safety and navigation primarily a Corps of Engineers issue. The COE has already noted the safety issues as they relate to both the Graue dock and the Griffith dock in its preliminary reviews. Impairing safe access to the Graue dock, however, is more than just a navigation and safety issue. The Graue dock has been in continuous use for 50+ years. Permitting a dock in a highly questionable location that impairs safe access to an existing dock may constitute a taking of the Graue's property rights for a private purpose – the construction of someone else's dock. This is strictly forbidden by our State Constitution. CONST. art. I, § 16. Thus, I submit that the City must carefully review the navigation and access issues in its permit review. The Graue's have previously submitted an expert opinion on this issue. *See attached Exhibit B.* If the City intends to seek expert input on this issue, my client would like to be present for any on site visit and review any report. If the City is going to review this issue, the Graues would like to know what the City's projected timeline is so that they can submit additional information. Their concern is that merely eyeballing the area from the shore, or looking at an aerial view, does not impart the hazards and challenges that a boater would face trying to navigate safely to the Graue dock if the Cherberg dock is built as proposed.

Finally, my client has not received formal notices regarding the permits. Will they be receiving such notices?

Thank you for your attention to these concerns. Please let me know who the contact person is for these permits.

Very truly yours,

GROFF MURPHY PLLC

/s/ Michael J. Murphy
Michael J. Murphy

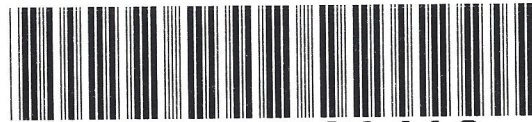
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August 5, 2022
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cc: Holly Mercier Permit Services Manager (via email, holly.mercier@mercerisland.gov)
Client (via email)

EXHIBIT A

AFTER RECORDING MAIL TO:

Michael Murphy
Groff Murphy, PLLC
300 East Pine Street
Seattle, WA 98122



20130123001418

J T GRAUE JR COV-RER 81.00
PAGE-001 OF 010
01/23/2013 13:32
KING COUNTY, WA

Easement and Restrictive Covenant

Grantor: James Thomas Graue, Jr., Trustee and Linda Merritt Graue, Trustee

Grantee: James W. Cherberg and Nan Chot Cherberg, husband and wife

Legal Description (dominant estate/benefitted parcel): PTN. GOV. LOT 4, SEC. 7, TWP 24 N, RG.
5E, W.M., King County, Washington

Legal Description (servient estate/burdened parcel): A portion Tracts C and D of the Un-recorded
plat of Lakemont, Section 7, Township 24, Range 5, East W. M., King County,
Washington

Assessor's Tax Parcel I.D. Nos. : 413930-0405 (benefitted parcel); 413930-0390 (burdened parcel)

EXCLUSIVE USE AND LANDSCAPING EASEMENT

THIS EXCLUSIVE USE AND LANDSCAPING EASEMENT (the "Agreement") is entered into as of this 1 day of Dec, 2012 by and between James Thomas Graue, Jr., Trustee under the James Thomas Graue, Jr. Residence Trust I established August 29, 2004, and Linda Merritt Graue, Trustee under the Linda Merritt Graue Residence Trust I established August 29, 1994, (hereinafter collectively "Grantor"), and James W. Cherberg and Nan Chot Cherberg (collectively "Grantee").

Recitals

A. Grantor is the owner of that certain real property described on **Exhibit 1** attached hereto and incorporated herein by reference (the "Servient Estate").

B. Grantee is the owner of that certain real property described on **Exhibit 2** attached hereto and incorporated herein by reference (the "Dominant Estate").

C. The parties desire to enter into this Agreement for the purpose of establishing an exclusive easement and restrictive covenant between the Servient and Dominant Estates.

D. The parties acknowledge that this Agreement establishes an Easement Area and access rights that provide Grantee with ingress, egress, use and landscaping rights in and to the Easement Area, as further described herein.

Agreement

NOW, THEREFORE, the parties agree as follows:

1. Grant of Easement/Use of Easement Area.

a. Grant of Access and Landscaping Easement. Grantor hereby creates, grants and conveys to Grantee, their heirs, successors and assigns for the benefit of Grantee's property a perpetual, exclusive easement for ingress, egress, use, landscaping, maintenance, and irrigation over, upon, under and across that portion of Grantor's real property cross hatched and shaded on **Exhibit 3**, which is attached hereto and incorporated herein by this reference ("Easement Area"). The Easement Area does not include the waters of Lake Washington or the creek.

b. Use and Maintenance of Easement Area by Grantee. The Easement Area is currently landscaped and irrigated. Grantee shall maintain at its sole cost and expense the existing landscaping and rockery and may use the Easement area for gardening, landscaping and

other purposes consistent with its current condition and subject to the restrictions contained in Paragraph 2 of this Agreement.

2. **Restrictions on Use of Easement Area.** No building, fence, storage structure, or other above ground structure of any kind (either temporary or permanent) may be built, constructed or located within the Easement Area by either Grantor or Grantee. Neither Grantor nor Grantee may use the Easement Area for commercial purposes, or fill, grade, make cuts, re-contour, pave, or permanently store any items thereon. Grantee shall make no improvements to the Easement Area or rockery within the Easement Area to enhance or encourage access into the waters of Lake Washington or the creek and will not use the Easement Area or rockery within the Easement Area for access into the creek or the waters of Lake Washington. Any material changes to the existing landscaping, other than routine maintenance or replacing existing plants in kind or with similar plantings, and any material changes to the rockery, other than routine maintenance, shall require the written consent of Grantor and Grantee, which consent shall not be unreasonably withheld.

3. **Binding Effect and Assignment.** The easement and the restrictions contained herein shall be binding upon and shall inure to the benefit of the parties and their respective successors, assigns, grantees, transferees, heirs, devisees, personal representatives, lessees and all those holding by, through or under them, whether by contract or by operation of law. Grantor and Grantee hereby stipulate that the rights and obligations herein do touch and concern, and run with the land. Grantee may not assign any rights under this Agreement to parties other than successor owners of the Dominant Estate without the express written consent of the Grantor, which consent may be granted or withheld in Grantor's sole discretion.

4. **Duration.** The term of said easement shall be indefinite and shall continue until revoked by the mutual agreement of Grantor and Grantee or their heirs, successors or assigns. Said easement is intended to and shall run with the land and the benefits and burdens of the easement herein created shall pass to the heirs, successors and assigns of the parties in and to their respective properties benefited and burdened by these easements.

5. **Enforcement and Arbitration.** Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration before a single arbitrator with Judicial Dispute Resolution, LLC ("JDR") in Seattle, King County, Washington, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If JDR no longer exists and the parties cannot agree on a substitute arbitration agency or arbitrator, then a single arbitrator shall be appointed by the King County Superior Court pursuant to RCW Chap. 7.04A. As a condition precedent to arbitration, and in the event of Grantor's or Grantee's breach of any provision of this Agreement, the aggrieved party shall provide written notice to the other

party describing the nature of such breach. If within ten (10) days of the receipt of such notice, the offending party has failed to cure or commence the cure of such breach, the aggrieved party may commence arbitration to specifically enforce the terms of this agreement and/or for damages. The parties each acknowledge that it would be extremely difficult to measure the resulting damages. Accordingly, any non-defaulting party, in addition to any other rights or remedies, shall be entitled to restraint by injunction of a violation, or attempted or threatened violation, of any condition or provision of this Agreement, or to a decree specifically compelling performance of any such condition or provision. The parties agree that the arbitrator shall have full authority to grant the foregoing relief, including affirmative injunctive relief, and that any injunctive relief shall be granted without the requirement of a bond. The parties hereto each expressly waive their defense that a remedy in damages or at law would be adequate.

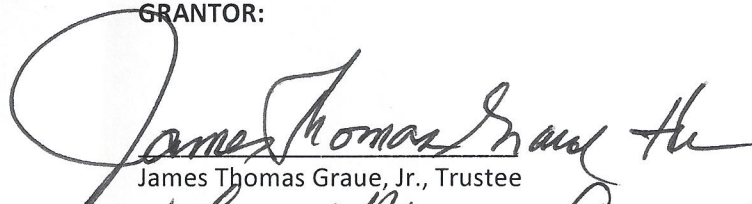
6. **Prevailing Party Attorney Fees.** If either party brings a lawsuit against the other in connection with the enforcement of this Agreement, the substantially prevailing party shall be entitled to an award of its attorney fees, expert fees, expenses and costs, including any such fees and costs incurred on appeal. Failure to enforce any covenant or restriction herein shall in no event be deemed a waiver of the right to do so thereafter.

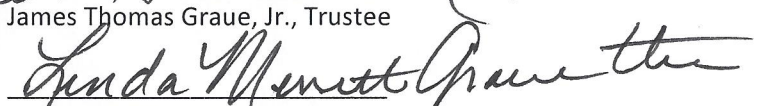
7. **No Termination Upon Breach.** No breach of this Agreement shall entitle either party to cancel, rescind or otherwise terminate this Agreement, provided, however, that this provision shall not limit or otherwise affect any other right or remedy which a party may have hereunder by reason of any breach of this Agreement, nor shall it preclude an arbitrator from terminating the easement due to repeated and material violations of this Agreement.

8. **Amendments.** Any amendment to this Agreement shall not be effective unless agreed to by both parties or their legal successors or assigns, reduced to writing, and executed and acknowledged by them.

9. **Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

GRANTOR:

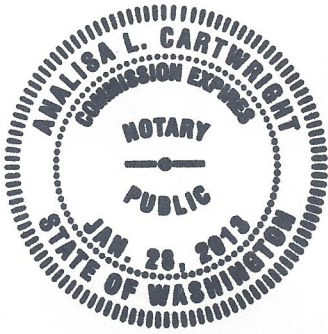

James Thomas Graue, Jr., Trustee

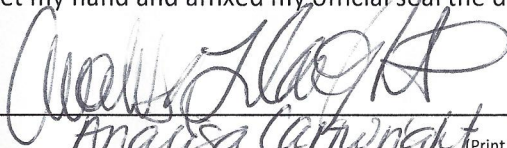

Linda Merritt Graue, Trustee

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 22 day of January, 2013, before me personally appeared JAMES THOMAS GRAUE, JR. and LINDA MERRITT GRAUE, to me known to be the individuals who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.





Analisa Cartwright (Print Name)
Notary Public in and for the State
of Washington, residing at King City
My Commission Expires: Jan 28 2013

GRANTEE:

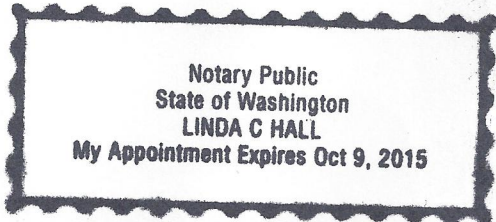
James W. Cherberg
 James W. Cherberg

Nan Chot Cherberg
 Nan Chot Cherberg

STATE OF WASHINGTON)
) ss.
 COUNTY OF KING)

On this 18th day of January, 2013, before me personally appeared JAMES CHERBERG and NAN CHOT CHERBERG, to me known to be the individuals who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Linda C. Hall
 Linda C. Hall (Print Name)
 Notary Public in and for the State of Washington,
 residing at Monroe, WA
 My Commission Expires: 10/9/2015

EXHIBIT 1
Legal Description – Servient Estate

THE REAL PROPERTY SITUATED IN THE COUNTY OF KING, STATE OF WASHINGTON MORE FULLY DESCRIBED AS:

PARCEL A:

THAT PORTION OF GOVERNMENT LOT 4, SECTION 7, TOWNSHIP 24 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT 834 FEET NORTH AND 156 FEET WEST OF THE SOUTHEAST CORNER OF GOVERNMENT LOT 4 AND RUNNING THENCE WEST 55 FEET; THENCE NORTH TO SHORE OF LAKE WASHINGTON; THENCE SOUTHEASTERLY ALONG SAID SHORELINE TO A POINT NORTH OF THE POINT OF BEGINNING; THENCE SOUTH TO THE POINT OF BEGINNING;

TOGETHER WITH SHORELANDS OF THE SECOND CLASS IN FRONT OF AND ABUTTING THEREON, EXCEPT ANY PORTION OF SAID SHORELANDS LYING EAST OF THE EAST LINE OF ABOVE DESCRIBED TRACT PRODUCED NORTH;

(ALSO KNOWN AS A PORTION OF TRACTS C AND D, LAKEMONT, ACCORDING TO THE UNRECORDED PLAT THEREOF).

PARCEL B:

THAT PORTION OF GOVERNMENT LOT 4, SECTION 7, TOWNSHIP 24 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT 854.00 FEET NORTH AND 136.00 FEET WEST OF THE SOUTHEAST CORNER OF SAID GOVERNMENT LOT 4; THENCE NORTH 133.00 FEET; THENCE NORTH 12°13'22" EAST 23.88 FEET TO THE TRUE POINT OF BEGINNING OF THE TRACT HEREIN DESCRIBED; THENCE SOUTH 12°13'22" WEST 23.88 FEET; THENCE NORTH TO THE SHORE OF LAKE WASHINGTON; THENCE SOUTHEASTERLY TO A POINT NORTH 1°19'00" EAST FROM THE TRUE POINT OF BEGINNING; THENCE SOUTH 1°19'00" WEST 208.79 FEET TO THE TRUE POINT OF BEGINNING;

(ALSO KNOWN AS A PORTION OF TRACT C, LAKEMONT, ACCORDING TO THE UNRECORDED PLAT THEREOF).

EXHIBIT 2

Legal Description – Dominant Estate

THAT PORTION OF GOVERNMENT LOT 4, SECTION 7, TOWNSHIP 24 NORTH, RANGE 5 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS: BEGINNING AT A POINT 834 FEET NORTH AND 211 FEET WEST OF THE SOUTHEAST CORNER OF SAID GOVERNMENT LOT 4; THENCE WEST 65 FEET; THENCE NORTH TO THE SHORE OF LAKE WASHINGTON; THENCE SOUTHEASTERLY ON SAID SHORE LINE 150 FEET, MORE OR LESS, TO A POINT WHICH IS NORTH OF THE POINT OF BEGINNING; THENCE SOUTH TO THE POINT OF BEGINNING; TOGETHER WITH ALL SECOND CLASS SHORE LANDS IN FRONT OF SAID PREMISES; EXCEPT THE SOUTH 212.60 FEET;

EXCEPT THAT PORTION LYING WITHIN THE FOLLOWING DESCRIBED PROPERTY:

BEGINNING AT A POINT 834 FEET NORTH AND 276 FEET WEST OF THE SOUTHEAST CORNER OF SAID GOVERNMENT LOT 4; THENCE NORTH TO A POINT 100 FEET SOUTH OF THE SHORE OF LAKE WASHINGTON AND WHICH POINT IS THE TRUE POINT OF BEGINNING; THENCE CONTINUING NORTH 100 FEET TO THE SHORE OF LAKE WASHINGTON; THENCE ON SAID SHORELINE SOUTHEASTERLY 50 FEET; THENCE SOUTHWESTERLY TO A POINT 10 FEET EAST OF THE TRUE POINT OF BEGINNING; THENCE SOUTH TO A LINE WHICH IS 834 FEET NORTH OF THE SOUTH LINE OF SAID GOVERNMENT LOT 4; THENCE WEST ON SAID LINE 10 FEET; THENCE NORTH TO THE TRUE POINT OF BEGINNING;

TOGETHER WITH ALL SECOND CLASS SHORELANDS IN FRONT OF SAID PREMISES;

TOGETHER WITH A PERMANENT EASEMENT FOR INGRESS, EGRESS AND UTILITIES OVER THE FOLLOWING TRACT:

BEGINNING AT A POINT 834 FEET NORTH AND 256 FEET WEST OF THE SOUTHEAST CORNER OF GOVERNMENT LOT 4, SECTION 7, TOWNSHIP 24 NORTH, RANGE 5 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON; THENCE WEST 10 FEET; THENCE NORTH 212.60 FEET; THENCE EAST 10 FEET; THENCE SOUTH 212.60 FEET TO THE POINT OF BEGINNING; EXCEPT THE SOUTH 20 FEET THEREOF FOR ROAD. SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

ABBREVIATED LEGAL: PTN. GOV. LOT 4, SEC. 7, TWP 24 N., RG. 5 E. , W.M.

EXHIBIT 3

Map of Portions of the Dominant and Servient Estates, and the Entire Easement Area

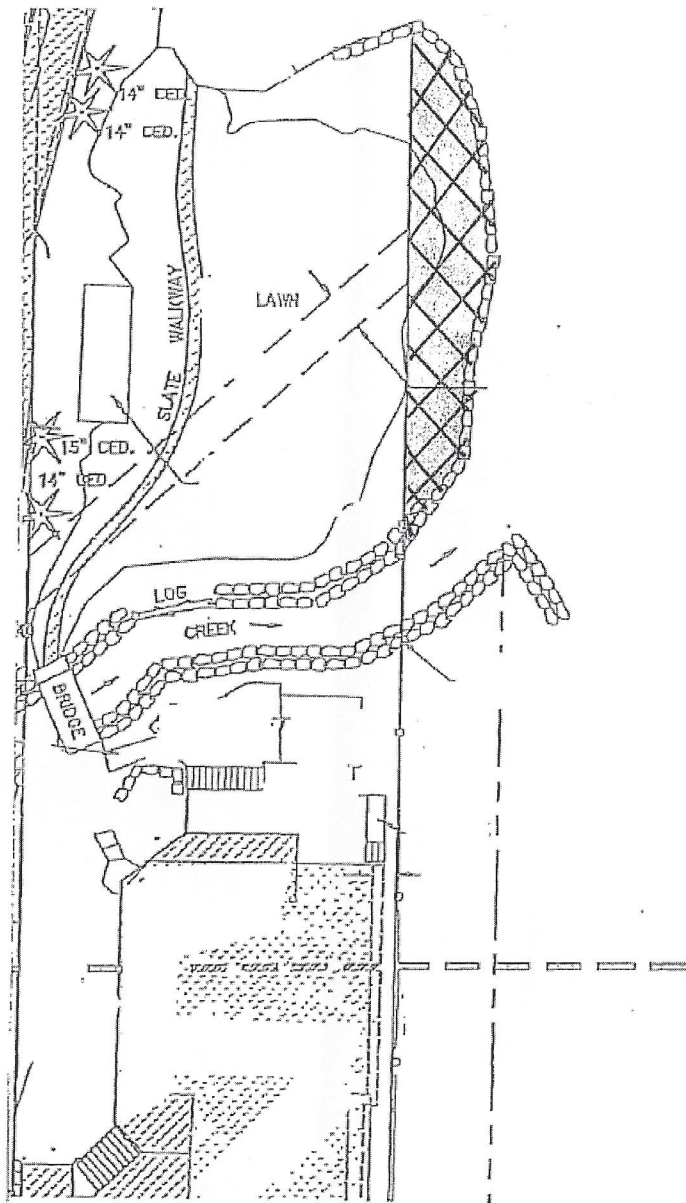


EXHIBIT B

From: [Randy Cowley](#)
To: jtgraue5@live.com
Subject: Cherborg Proposed dock
Date: Saturday, February 25, 2017 4:57:11 PM

Tom,

I have reviewed the information provided and offer the following opinion:

I am a professional consultant in the yachting industry, and a very accomplished yachtsman, with over 60 years of experience operating boats from 16' to 187'. I have very serious concerns regarding the placement of the proposed Cherborg dock, in relationship to the Graue's existing dock and the Griffith's dock to the west.

The revised placement of the new dock still does not allow for safe maneuvering space for an average sized boat that would be moored on the existing docks of Graue and Griffith.

There are also wind issues to deal with that commonly blow from the west to the east along the north side of Mercer Island and make for very difficult conditions to safely maneuver in and out of the existing docks. There is not enough space between the new proposed dock to do so without the possibility of damaging a boat, dock or injuring someone.

I hope this helps with your meeting, with the Army Corp engineers and finally resolves this issue with the proposed dock that just does not work at the Cherborg's property.

Regards,

Randy Cowley
President
RCYC LLC
reycelle@gmail.com
206 605 5473