

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal Of:

ROBERT GROSSMAN,

Appellant,

-against-

CITY OF MERCER ISLAND,

Respondent.

No. APL25-004

**APPELLANT’S RESPONSE TO
RESPONDENT’S MOTION TO
DISMISS**

PRELIMINARY STATEMENT

Respondent’s motion misunderstands both the CAR 2 Decision¹ and Appellant’s appeal. The CAR 2 Decision included and depended upon a “Replacement Tree Plan” that plainly identified the removal of trees 1003 and 1004. Furthermore, the Appeal and the evidence in support of this opposition make clear not only that removing trees 1003 and 1004 violates the MICC, but also that it would also have a deleterious impact on the critical area and buffer that are the subject of the CAR 2 Decision. Finally, neither Respondent nor Applicant Seascope Homes LLC (“Seascope”, which joined Respondent’s motion) attempt to argue the removal of

¹ The decision approving Seascope Homes, LLC’s Critical Area Review 2 permit application, CA024-32.

trees 1003 and 1004 in the CAR 2 Decision did not violate the MICC. Nor could they, because Seascape’s own submissions to Respondent establish a violation of the MICC at a minimum with respect to tree 1004. For these reasons and those set forth more fully below, the Motion to Dismiss should be denied.

ARGUMENT

I

THE EXAMINER HAS JURISDICTION TO ADJUDICATE THIS APPEAL

The MICC provides that Appellant can appeal the CAR 2 Decision if there has “been substantial error . . . or the decision was unsupported by evidence in the record.” MICC 19.15.130(C). The City’s failure to follow the MICC (including MICC 19.10, as described more fully in Section II below), or to consider the impact of the trees’ removal on the critical area, plainly meets this standard.

Respondent argues that its compliance with Chapter 19.10 is outside the scope of the CAR 2 Decision because the Decision doesn’t explicitly authorize or address the removal of trees. *See* Resp. MTD at p. 3, lines 9-15. However, Respondent’s Motion defines the entirety of Exhibit A (inclusive of the CAR 2 Development Application) as the CAR 2 Decision,² and thus the CAR 2 Decision contains a “Replacement Tree Plan” that identifies the removal of trees 1003 and 1004. *See* Resp. Exh. A.7 at PDF p. 106 (Replacement Tree Plan).³ ***Put simply, by Respondent’s own definition, the Replacement Tree Plan is part of the CAR 2 Decision.***

² Resp. MTD at p. 2, lines 6-7.

³ Seascape’s CAR 2 Application made clear it includes a site plan. *See* Resp. Exh. A.2 at p.2.

It is not surprising that the CAR 2 Decision includes and depended upon a Replacement Tree Plan because the MICC requires that all critical area studies include “[a]n assessment of the probable effects to critical areas and associated buffers, including impacts caused by the development proposal” MICC 19.07.110(B); *see also* MICC 19.07.010(B) (making clear that a purpose of the CAR 2 regulations is to “to maintain the functions and values of critical areas and enhance the quality of habitat to support the sustenance of native plants and animals”). The Appeal speaks to this exact issue, arguing that “the trees are on a site with geological hazardous areas and a watercourse, and thus the soil erosion prevention and water quality benefits of these trees are even greater than other similar firs on Mercer Island.” And Appellant’s Arborist confirms “[t]here exists geological hazard areas in the vicinity with steep slopes as well as watercourses. The removal of these firs would likely have an adverse effect on stability and ecological quality.” *See* Appellant’s Exh. 1001 (Sinclair Decl. ¶ 4). In fact, so important are large trees to critical areas, that Chapter 19.07 explicitly prohibits landscaping that involves the “removal of large or exceptional trees.” 19.07(E)(4)(f).⁴

Respondent also states that “[t]ree removal requires a permit, not CAR 2 review,”¹ perhaps suggesting that Appellant should have appealed the tree removal permit. However, no notice is provided to neighbors such as Appellant regarding tree removal permit issuance, effectively preventing any such appeal. Notice is only provided for land development decisions,

⁴ Under MICC 19.07(4), compliance with this landscaping provision is exempt from city review and approval *only* to the extent the compliance is “otherwise consistent with the provisions of other city, state, and federal laws and requirements.” This exemption does not apply in this case because the removal of trees 1003 and 1004 violates a city requirement in another MICC chapter – i.e., MICC 19.10.060(A)(3). *See* Section II below.

and Appellant timely appealed from the only Decision Notice he received for 5222 Forest Avenue. In any event, the fact that a developer may receive a building permit and/or tree removal permit for a site does not absolve Respondent of its responsibility to review a CAR 2 Application (which again, included the Replacement Tree Plan) to determine if the application complies with the MICC.

Finally, Respondent is not correct that “[n]o alteration of the CAR 2 Decision would affect either retention or removal of exceptional trees by the Applicant.” Resp. MTD at p. 1, lines 24-25. If the CAR 2 Decision is reversed, Seascope will be prohibited from moving forward with its land development plan, inclusive of its Replacement Tree Plan.

II

DOCUMENTS SUBMITTED BY SEASCOPE ESTABLISH THAT THE TREE REMOVAL AT ISSUE IN THIS APPEAL VIOLATES MICC 19.10.060

The Tree Assessment submitted by Seascope to Respondent in connection with another filing identifies tree 1004 as an “Exceptional” Douglas fir tree in “Good” health, with a diameter of 33.5” and height of 125’. *See* Resp. Exh. 1002 (Summary Table from the Tree Assessment for Seascope Homes at Lot 1, 5222 Forest Ave SE). Tree 1003 is identified as a “Large” Douglas tree in “Good” health, with a diameter of 19.2” and height of 110’. Thus, by all accounts, at a minimum tree 1004 is an exceptional tree with a diameter greater than 24”.

Under the MICC provision titled “Retention of exceptional trees,” all “[d]evelopment proposals [for single family homes] . . . shall retain exceptional trees with a diameter of 24 inches or more.” *See* 19.10.060(A)(3); *see also* MICC 19.07(E)(4)(f) (prohibiting landscaping that involves the “removal of large or exceptional trees”, as described in Section I above). The MICC provides only three exceptions to this rule, and Seascope appears to have relied on 19.10.060(A)(3)(b), which allows removal where “[r]etention of an exceptional tree(s) with a

diameter of 24 inches or more [if retention] will limit the constructable gross floor area to less than 85 percent of the maximum gross floor area allowed under chapter 19.02 MICC.”

Specifically, a letter submitted to Respondent in connection with Seascape’s building permit application for 5222 Forest Ave SE (“Subj.: Explanation and Justification for removal of exceptional trees”) states that “zoning of this lot allows us a maximum of 6000 square feet for our GFA . . . [and] we are guaranteed 85% . . . [which is] 5100 square feet GFA guaranteed.” Resp. Exh. 1003 at p. 1. The letter goes on to note that “the area of building pad allowed for development would [be] 3400 square feet” and “that to achieve a house close to the allowable maximum GFA, a two-story house is proposed.” Resp. Exh. 1003 at p.2. Finally, it states that “attempting to keep both trees [1003 and 1004] would greatly diminish the ability to build 85% of the guaranteed GFA. Avoiding excavation into the minimum root zones would eliminate at least an additional 600 square feet from the buildable area.” Resp. Exh. 1003 at p. 2.

Protecting the trees may have “diminished the ability” of Seascape to build 85% GFA, but it did not prevent it from doing so. If the trees are preserved and the available building pad is reduced by 600 square feet, the building pad would be 2800 square feet (*i.e.*, 3400-600). A two-story house built on that pad would be 5600 square feet (*i.e.*, 2800 x 2), which is well in excess of the 85% GFA; *see also* Appellant’s Exh. 1001 (Sinclair Decl. ¶ 4). Thus, Seascape’s justification for removing trees 1003 and 1004 fails on its face to satisfy 19.10.060(A)(3)(b). It is therefore not surprising that nothing within the CAR 2 Decision justifies the removal of these trees, or explains how the CAR 2 Decision satisfies the MICC provisions governing exceptional tree removal.

CONCLUSION

Because the Examiner has jurisdiction to review this appeal and Seascope's own submissions to Respondent establish a violation of MICC on their face, Respondent's Motion to Dismiss should be denied.

Respectfully submitted,

/s/ Robert Grossman

Robert Grossman

Date: May 20, 2025