

**BEFORE THE HEARING EXAMINER for the  
CITY of MERCER ISLAND**

**INTERLOCUTORY ORDER DENYING MOTION TO DISMISS**

FILE NUMBER: APL25-004

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TYPE OF CASE: Appeal from Approval of Critical Area Review 2; Ref. file #CAO24-32

**WHEREAS**, the City of Mercer Island Hearing Examiner (“Examiner”) has before him the April 28, 2025, appeal of Robert Grossman (“Grossman”) from the City of Mercer Island Community Planning &

Development Department's ("CP&D's") April 14, 2025, approval (with conditions) of Seascape Homes, LLC's ("Seascape's") Critical Area Review 2 ("CAR 2") application; and

**WHEREAS**, on May 12, 2025, Respondent CP&D filed a Motion to Dismiss (the "Motion") asserting that the concern stated in Grossman's appeal (to wit: that removal of Trees 1003 and 1004 as depicted on the approved CAR 2 site plan would violate Mercer Island City Code ("MICC") provisions) was beyond the scope of the CAR 2 review and, thus, beyond the scope of the Examiner's jurisdiction in this appeal. On May 13, 2025, Applicant Seascape joined in CP&D's Motion; and

**WHEREAS**, as contemplated by the Examiner's Rules of Procedure (See RoP 204 and RoP 228.) the Examiner granted Appellant time to respond to the Motion, which Appellant did on May 20, 2025. The Examiner has purposely delayed issuance of this Order because Respondent's Counsel was out of the country from May 21 through June 6; and

**WHEREAS**, summary dismissal requests in the quasi-judicial realm are akin to summary judgment requests in the judicial realm. Washington's appellate courts have explained the standard of review to be applied in summary judgment requests.

When reviewing a summary judgment order, we engage in the same inquiry as the trial court, affirming summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

*Staples v. Allstate Insurance Co.*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_ (2013)

A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

*Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); and

**WHEREAS**, Seascape proposes to construct a single-family residence on King County Assessor's Parcel # 141030-0057 ("Parcel 0057"). (CP&D CAR 2 Decision, Exhibit 1, PDF 3 & 4) Parcel 0057 contains "a piped and uniped watercourse and within a geologically hazardous areas, specifically a potential slide and erosion hazard area." (CP&D CAR 2 Decision, PDF 4 {*sic*}); and

**WHEREAS**, "The purpose of a critical area review 2 is to review critical area studies and mitigation plans in support of proposed buffer averaging and reduction of wetland and watercourse buffers." [MICC 19.07.090(B)(1)] However,

When development and/or activity is proposed on a site containing geologically hazardous areas and one or more of the critical area types listed in subsection (B)(2)(a) of this section or the associated buffer of one of those critical areas, a critical area review 2 reviewing all critical areas is required to be reviewed and approved prior to construction authorization, using the procedures required for a Type 3 land use review.”

[MICC 17.09.090(B)(2)(c)]; and

**WHEREAS**, The City’s tree protection, retention, and replacement regulations are contained in Chapter 19.10 MICC. “Generally, a permit is required to remove any tree with a diameter of greater than ten inches ....” [MICC 19.10.010(A)] “Permit approval to remove one or more nonhazardous trees may take the form of a tree removal permit or other construction permit approval.” [MICC 19.10.020(B)(1), underlining added] On September 24, 2024, the date that Seascape filed its CAR 2 application, it also filed a Concurrent Review form requesting concurrent review of its applications, which include Building Permit application 2410-056. (CP&D CAR 2 Decision, Exhibits 1 PDF 3; 3, PDF 16); and

**WHEREAS**, the CP&D CAR 2 Decision does not discuss compliance with Chapter 19.10 MICC but does state that “[t]he project also includes the planting of replacement trees ....” (CP&D Decision, Exhibit 1, PDF 6) The CP&D CAR 2 Decision concludes with the statement that CAR 2 “application CAO24-032 as depicted in **Exhibit 8**, is hereby **APPROVED as conditioned**. (CP&D Decision, Exhibit 1, PDF 10); and

**WHEREAS**, CP&D CAR 2 Decision Exhibit 8 is a 36-page plan set including site plans (PDF 104 & 105), “Replacement Tree Plan” (PDF 106), a lot survey (PDF 107), clearing, grading, and utility plans (PDF 108 – 113), complete structural construction plans for the proposed residence (PDF 114 – 133), mitigation plans (134 – 138), and a landscape plan (PDF 139); and

**WHEREAS**, building permits and tree removal permits are classified by the City as Type I Land Use Reviews. Type I Land Use Reviews do not require public notification, notice of application, public hearing, or notice of decision. Type I Land Use Review decisions are appealable to the Examiner. [MICC 19.15.030(H), Table A]; and

**WHEREAS**, issues of material fact exist that render summary dismissal inappropriate. A tree removal permit is required, but it may be rolled into some other development permit. Whether that has occurred here is unknown to the Examiner. What is the scope of CAR 2 permit CAO24-032? Does it include the required tree removal permit (given that the approved plan set includes a “Replacement Tree Plan”)? Does it include approval of the underlying building permit (given that the approved plan set includes a complete building plan set)? Is there a separate tree permit yet to be issued? Is there a separate building permit yet to be issued? Is this the only forum in which the Type I Land Use Review right-to-appeal is available?; and

**WHEREAS**, any Recital herein deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

**NOW, THEREFORE**, the Hearing Examiner issues the following:

**ORDER**

The Motion to Dismiss is herewith **DENIED** because issues of material fact remain unanswered.

This Order is interlocutory in nature.

**ORDER** issued June 9, 2025.

ls/ *John E. Galt*

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JOHN E. GALT  
Hearing Examiner