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 APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

The Motion for Summary Judgment of Applicant Seascape Homes LLC ("Seascape") advances arguments that are flatly contradicted by the MICC and the very evidence submitted by Seascape in support of its motion.

First, Seascape errs in maintaining that removal of trees 1003 and 1004 was authorized under MICC 19.10.060. To the contrary, MICC 19.10.060(A)(3) provides the only three circumstances in which an exceptional tree greater than 24" can be removed, and none of those three circumstances are present here.

Second**,** Seascape errs to the extent it argues that the CAR 2 Decision does not need to comply with the MICC's tree removal provisions because a separate tree removal permit was issued. This argument fails for myriad reasons, including because the MICC chapter governing critical area reviews required Respondent to apply regulations from other MICC chapters where

such regulations apply greater protection to critical areas, and because Seascape's CAR 2 application cover letter specifically requested removal of trees of 1003 and 1004.

For these reasons and those set forth more fully below, Seascape's Motion for Summary Judgment should be denied.

ARGUMENT

I

SEASCAPE IS WRONG THAT MICC 19.10.060 AUTHORIZES THE REMOVAL OF EXCEPTIONAL TREES SO LONG AS A DEVELOPMENT PLAN MINIMIZES THEIR REMOVAL AND PROVIDES FOR REPLACEMENT TREES

As explained in Appellant's opposition to Respondent's motion to dismiss, the MICC section governing tree removal in a development proposal contains a provision titled "Retention of exceptional trees." *See* MICC 19.10.060(A)(3). That provision states:

> "Development proposals specified under subsection (a)(1) of this section ***shall*** retain exceptional trees with a diameter of 24 inches or more. Exceptional trees with a diameter of 24 inches or more that are retained shall be credited towards compliance with the retention requirements of subsection (A)(2) of this section. Removal of exceptional trees with a diameter of 24 inches or more, ***shall*** be limited to the following circumstances:
>
> (a) [Where retention creates a hazardous situation];
>
> (b) Retention of an exceptional tree(s) with a diameter of 24 inches or more will limit the constructable gross floor area to less than 85 percent of the maximum gross floor area allowed under chapter 19.02 MICC; and
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> (c) [Where retention prevents creation of a residential lot.]"

Id. (emphasis added). The only plausible interpretation of this provision—which uses the word "shall" not once but twice—is that exceptional trees with a diameter of 24 inches or more can only be removed in the three circumstances set forth in MICC 19.10.060(A)(3)(a)-(c).

Seascape plainly knows this is true because at the time it filed its CAR 2 and tree removal permit applications, it (incorrectly) claimed it could remove trees 1003 and 1004 because one of these three circumstances applied— subsection (A)(3)(b) (which concerns a limit on

constructable gross floor area ("GFA")). *See* Spence Decl. Exh. C at PDF p. 15[1] (letter from Seascape to Respondent, subject "Critical Area Review – Application Narrative", stating that "[t]hese trees are being requested for removal due to their limitation on the ability to achieve 85% of the GFA allowed for this lot"); s*ee also* Spence Decl Exh. E at PDF pp. 20-21 (letter from Seascape to Respondent, subject "Explanation and Justification for removal of exceptional trees," arguing that Seascape should be permitted to remove trees 1003 and 1004 in order to achieve a constructable GFA of 85% allowed for the lot). However, now that Appellant has established that Seascape's analysis of the constructable GFA was flawed and that Seascape could easily retain trees 1003 and 1004 and still build a home on the lot with sufficient GFA (*see* Appellant's Opp. to MTD at pp. 4-5),[2] Seascape now claims it can remove trees 1003 and 1004 even if none of the three circumstances in MICC 19.10.060(A)(3) are present.

Seascape's new argument—which was invented solely for purposes of this motion and thus could not have been considered by Respondent when it issued the CAR 2 Decision—is that:

- "19.10.060(A)(3) states that tree retention must comply with retention requirements set forth and in MICC 19.10.060(A)(2);" and
- Therefore, if Seascape complies with (A)(2) (which requires development plans to minimize the removal of large trees), it can remove exceptional trees with a diameter greater than 24," even where doing so otherwise violates (A)(3).

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[1] "Spence Decl." refers to the Declaration of Michael A. Spence in Support of Applicant Seascape Homes, LLC's Motion for Summary Judgment, dated June 20, 2025. Spence Decl. page number citations in this memorandum refer to the PDF page numbers of the declaration (e.g., Spence Decl. Exh. A begins on PDF p. 4).

[2] Significantly, Seascape's motion does not even attempt to rehabilitate its "Explanation and Justification for removal of exceptional trees." *See* Seascape MSJ at p. 6, lines 9-14; Spence Decl. Exh. E. As set forth in Appellant's opposition to the motion to dismiss, the reasoning and math in that justification are simply wrong. *See* Appellant's Opp. to MTD at pp. 4-5.

See Seascape MSJ at p. 5, lines 8-13.

This argument is wrong. ***First***, 19.10.060(A)(3) does not state that tree retention "must comply with retention requirements set forth in [section (A)(2)]." The only reference to (A)(2) in 19.10.060(A)(3) is an irrelevant statement that retained exceptional trees "shall be credited towards compliance with the retention requirements of subsection (A)(2) of this section." ***Second***, Seascape's interpretation of 19.10.060 would render 19.10.060(A)(3) a meaningless suggestion. This would contradict the plain language of 19.10.060(A)(3), which, again, states twice that removal "shall" be limited to the circumstances enumerated in that provision. Seascape's interpretation also conflicts with well-established maxims of statutory construction, under which the provisions of a statute should be interpreted in a way that gives meaning to each provision and allows them to operate together.

Seascape also makes the unremarkable assertion that exceptional trees with a diameter greater than 24" "can be replaced as part of retention efforts, pursuant to MICC 19.10.070." *See* Seascape MSJ at p. p. 5, lines 12-13. This is correct, but Seascape is wrong to the extent it argues that this provision supersedes 19.10.060(A)(3) (again, this is wholly contrary to the plain language of the MICC and well-established rules of statutory interpretation).

The harmonious and correct interpretation of the provisions cited by Seascape is that:

- 19.10.060(A)(2) requires design plans to minimize the removal of large trees and prioritize the retention of large and exceptional trees;
- 19.10.060(A)(3) makes clear that there are only three limited circumstances in which an exceptional tree greater than 24" in diameter may be removed; and
- 19.10.070(A) provides the number of replacement trees that must be planted for each tree removed (including exceptional trees greater than 24" in diameter, but only if they can lawfully be removed under one of the three circumstances forth in 19.10.060(A)(3)).

This is not to say that Seascape doesn't deserve praise for submitting a development plan that "provides for 14 replacement trees – greater than the number of replacement trees required

for the removal of two exceptional trees." *See* Seascape MSJ at p. 6, lines 4-8. However, Seascape's proposal to plant additional trees does not absolve it of its obligation to comply with MICC 19.10.060(A)(3) and the other relevant provisions of the MICC described below. And more to the point, Respondent's issuance of the CAR 2 Decision notwithstanding Seascape's non-compliance is a substantial error that requires reversal.

II

SEASCAPE IS WRONG THAT ITS SEPARATE BUILDING AND TREE PERMITS MEAN THAT THE CAR 2 DECISION DOES NOT NEED TO COMPLY WITH THE MICC PROVISIONS CONCERNING TREE REMOVAL

Seascape also appears to suggest that the CAR 2 Decision does not need to comply with the MICC provisions governing tree removal because separate building and tree permits were issued. *See* Seascape MSJ at p.4, lines 4-8. This is incorrect for multiple independent reasons.

First, MICC Chapter 19.07 (which governs critical area reviews) is explicit that other MICC regulations that protect critical areas also apply. *See* MICC 19.07.030(A) ("Relationship to other regulations" provision stating that "[i]f more than one regulation applies to a given property, then the regulation that provides the greatest protection to critical areas shall apply.") Accordingly, the CAR 2 Decision should have considered whether the CAR 2 application (including the tree replacement plan) complied with MICC provisions intended to protect the site, including 19.10.060(A)(3).

Second, MICC Chapter 19.07 also includes its own independent prohibition on "the removal of large or exceptional trees." *See* MICC 19.07.120(E)(4)(f). Notably, compliance with this 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." *See* MICC 19.07.120(A). Because the proposed removal of trees 1003 and 1004 violates another city requirement (i.e., MICC 19.10.060(A)(3)), the exemption does not apply and Respondent

was required to review compliance with 19.07.120(E)(4)(f) as part of the CAR 2 Decision. It's failure to do so was a substantial error.

Third, the evidence advanced by Seascape in support of this motion unequivocally establishes that Seascape sought authorization to remove trees 1003 and 1004 ***as part of its CAR 2 application.*** Specifically, the application narrative submitted by Seascape along with its CAR 2 application form states that the "removal of two additional trees at the southern edge of this lot is also being proposed – a 33.5" Douglas fir and a 19.2" Douglas fir [(i.e., trees 1003 and 1004)]. These trees are being requested for removal due to their limitation on the ability to achieve 85% of the GFA allowed for this lot." The inclusion of this request in the CAR 2 application cover letter only further underscores the criticality of tree removal and replacement to the CAR 2 Decision, and therefore, the validity of Appellant's identification of unlawful tree removal as a basis for his appeal.

Fourth, Respondent's suggestion that its CAR 2 Decision did not address the tree replacement plan included within the CAR 2 Decision[3] is an admission that it failed to fulfill its mandate. *See, e.g.,* MICC 19.07.0160(B)(2) (describing the obligation for critical area documents to consider "landscaping of all disturbed areas outside of building footprints…"); MICC 19.07.110(B) (describing the obligation to ensure that the critical area study included "[a]n assessment of the probable effects to critical areas and associated buffers, including impacts caused by the development proposal . . . ."); 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

[3] *See, e.g.,* Respondent's Motion to Dismiss at p. 3, lines 14-15 ("Notably, the Decision does not address either retention or removal of exceptional trees.").

the quality of habitat to support the sustenance of native plants and animals"). [4] Had Respondent evaluated the tree replacement plan, it would have reached a similar conclusion to Appellant's Arborist, who confirmed that "[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 Opp. to MTD, Exh. 1001 (Sinclair Decl. ¶ 4).

Fifth, it would be unjust if the City's erroneous issuance of a tree removal permit somehow obviated the need for the CAR 2 Decision to comply with MICC provisions relating to tree removal. This is because, as the Hearing Examiner noted in his denial of Respondent's motion to dismiss, building permits and tree removal permits are classified by Respondent as Type I Land Use Reviews that do not require public notification. This effectively prevented an appeal by Appellant (i.e., one cannot appeal a permit issuance that which it has no knowledge of). Notice is only provided for land development decisions such as the CAR 2 Decision, and Appellant timely appealed from the only Decision Notice he received for 5222 Forest Avenue.

III

SEASCAPE'S REQUEST FOR ATTORNEYS' FEES AND COSTS IS A FRIVOLOUS AND VEXATIOUS ATTEMPT TO INTIMIDATE APPELLANT

Seascape cites *Kaintz v. PLG, Inc*., 147 Wn. App. 782, 785, 197 P.3d 710 (2008) for the black letter proposition that in Washington courts "attorney fees and costs may be awarded when authorized by a contract, statute, or a recognized ground in equity." *See* Seascape MSJ at p. 6,

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[4] Put another way, and to use an extreme but illustrative example, had Respondent erroneously issued a building permit for a skyscraper on this site, it's not the case that the CAR 2 Decision would be insulated from an appeal maintaining that Respondent had made a substantial error in determining that a skyscraper was compliant with the MICC and posed no danger to the critical area.

line 18. The only "contract, statute, or recognized ground in equity" cited in support of Seascape's claim for attorneys' fees and costs in this action is RCW 4.84.370 (*id.* at p. 7, n. 37), which states that "reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal ***before the court of appeals or the supreme court*** of a decision by a county, city, or town to issue, condition, or deny a development permit . . . . " (emphasis added). RCW 4.84.370 further provides two conditions that must both be satisfied before fees and costs shall be awarded, one of which is that the "prevailing party on appeal was the prevailing party or substantially prevailing party ***in all prior judicial proceedings***" RCW 4.84.370(1)(b) (emphasis added).

Seascape's counsel is an experienced land use attorney that surely understands this hearing is not before "the court of appeals or the supreme court", nor has the Seascape been a prevailing party in any forum, much less in a "prior judicial proceeding." Seascape's request for fees and costs can thus be seen as a bald attempt to intimidate a *pro se* Appellant that should not be indulged.[5]

Appellant's reading of the procedural rules governing this hearing is that they do not empower the Examiner to award fees and costs to Seascape or Appellant. However, if the Examiner determines otherwise, Appellant respectfully requests to be awarded his fees and costs for responding to this frivolous request.

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[5] This frustrating advocacy strategy is also consistent with the timing of Seascape's motion, which was filed on the eve of the dates that Appellant had previously notified the parties that Applicant would be out of town on vacation.

CONCLUSION

For the reasons set forth above, Seascape's Motion for Summary Judgment should be denied.

Respectfully submitted,

/s/ Robert Grossman
Robert Grossman

Date: July 1, 2025