Hearing Examiner Galt

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of: ROBERT GROSSMAN, Appellants, v. CITY OF MERCER ISLAND, Respondent.	No. APL25-004 CITY OF MERCER ISLAND'S ***RESPONSE*** TO SEASCAPE HOMES, LLC'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Seascape Homes, LLC's Motion for Summary Judgment ("MSJ") should be granted, as there is no issue of material fact that could result in Appellant prevailing in this appeal.

The MICC deprives the Hearing Examiner of jurisdiction to hear matters that were not timely appealed, such as here. The MSJ, and more particularly, the Declaration of Michael A. Spence in Support of the MSJ ("Spence Declaration" or "Spence Decl."), definitively resolves the "issues of material fact [that] exist" as identified in the Examiner's June 9, 2025 Interlocutory Order Denying Motion to Dismiss ("Interlocutory Order"). In summary, the Interlocutory Order inquired as to whether the City issued a construction permit or a tree permit which authorized the removal of the trees in question (as opposed to the CAR 2, which is a critical area review). The

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MSJ answers that inquiry—the City issued ***both*** a building and tree permit, issued, signed for, and finalized on April 30, 2025—these are attached to the Spence Declaration.

Appellant did not appeal either the tree permit or the building permit. Both are now final. These approvals cannot be changed through a collateral attack through an appeal of the City's Critical Area Review 2. Appellant's appeal does not present any alleged errors contained within the scope of the Critical Area Review 2 — accordingly, there are no issues of material fact which could result in the relief requested by the Appellant. Accordingly, Applicant's MSJ should be granted and the Hearing Examiner has authority to dismiss this appeal.

II. STATEMENT OF FACTS

Applicant applied for a building permit on October 8, 2024. Declaration of Ryan Harriman at Ex. A (attached) (hereafter "Harriman Decl."). That building permit application included a request by the Applicant to remove two exceptional trees. Spence Decl. at Ex. E ("This letter is being submitted as part of an application for a building permit. We are requesting the removal of regulated tree 1003 and exceptional tree 1004."). The trees authorized for removal are not located within the critical areas on the proposed site. Spence Decl. at pp. 27, 30, and 56 (trees to be removed are along the southern boundary of the proposed approximate area of foundation excavation).

The building permit was approved on April 18, 2025 and issued on April 30, 2025. Harriman Decl. at Ex. A; Spence Decl. Ex. B. The associated tree permit was approved on April 21, 2025 and issued on April 30, 2025. Harriman Decl. at Ex. B; Spence Decl. at Ex. G. Both the tree permit and the building permit were not appealed. Declaration of Andrea Larson (hereafter "Larson Decl.") (attached hereto) at ¶ 4.

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Building permits and tree removal permits are Type I Land Use Reviews under the Mercer Island City Code. MICC 19.15.030(H), Table A Type I Land Use Reviews do not require notice of decision. MICC 19.15.120. Regardless, Type I Land Use Review decisions are appealable to the City's Hearing Examiner. MICC 19.15.030(H), Table A.

By contrast, Applicant applied for a Critical Area Review 2 on September 24, 2024. Spence Decl. at Ex. C. That review was completed in spring of 2025 and the City issued its Decision on the matter on April 14, 2025.

Appellant filed an appeal of CAO24-32 on April 28, 2025. Spence Decl. at Ex. H. That appeal alleged ***only*** errors with respect to the City's tree code, citing MICC Ch. 19.10 no fewer than five times. *Id.* Appellant raised zero appeal points referencing MICC Ch. 19.07, which governs Critical Area Reviews. *Id.* Again, the trees in question are located outside of the critical areas on site. Spence Decl. at pp. 27, 30, and 56 (trees to be removed are along the southern boundary of the proposed approximate area of foundation excavation).

III. ISSUES

Should Applicant's MSJ be granted and the appeal dismissed because Appellant's failure to appeal the correct decision deprives the Examiner of jurisdiction? ***Yes.***

IV. ARGUMENT

1) Applicant's MSJ Establishes That the Causes of Action Alleged by Appellant Should Have Been Brought in an Appeal of the Building and/or Tree Permit; Applicant Is Correct that The Errors Alleged by Appellant Cannot Be Had in the Instant Appeal.

Applicant's MSJ correctly identifies that a separate tree permit and building permit were issued and that they cannot be collaterally attacked through an appeal of a Critical Area Review 2. MSJ at p. 2, Spence Decl. at Exs. B and G. Tree permits are appealable to the Hearing Examiner

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under the MICC. MICC 19.15.030 (Table A). Similarly, non-major building permits are also appealable to the Hearing Examiner under the MICC. *Id.* While the code does not require public notice of Type I decisions such as non-major building permits or tree removal permits, this does not change the fact that the code provides they are appealable. *Cf.* MICC 19.15.120 and 19.15.030(A). As a practical matter, other Mercer Island residents have timely appealed such Type I decisions. *See, e.g.* APL 24-002, an appeal made by resident Dan Grove, which was the appeal of a building permit for a single-family residence.

Under Washington law, unappealed land use approvals are final and unassailable. The Washington courts have definitively upheld that the doctrine of administrative finality applies even if a prospective Appellant did not have notice of the decision they seek to appeal:

> Petitioners did not receive notice of the permit application and grant until the administrative appeals period had expired. Thus, petitioners claim that our court's interpretation of the Land Use Petition Act (LUPA), chapter 36.70C RCW, required them to do the impossible: to appeal a decision without actual or constructive notice of it. While this result may seem harsh and unfair, to grant relief on these facts would be contrary to the statutory scheme enacted by the legislature as well as our prior holdings. Indeed, we have acknowledged a strong public policy supporting administrative deadlines and have further explained that "[l]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner." *Chelan County v. Nykreim,* 146 Wash.2d 904, 933, 52 P.3d 1 (2002). This court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for landowners and the government.

Durland v. San Juan Cnty., 182 Wash. 2d 55, 59–60, 340 P.3d 191, 194 (2014). *See also Habitat Watch v. Skagit County*, 155 Wn. 2d 397, 408, 120 P.3d 56 (2005) (even land use decisions that are granted without public notice are time barred if not timely filed); *Chelan Cnty. v. Nykreim,* 146 Wash. 2d 904, 933, 52 P.3d 1, 15 (2002) ("Leaving land use decisions open to reconsideration

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long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner."); *Samuel's Furniture, Inc. v. State Dep't of Ecology,* 147 Wn.2d 440 at 458, 54 P.3d 1194 (2002).

As the building permit and the tree permit were not appealed within the deadline so provided under the MICC, they are now final. Appellant cannot receive the relief requested (avoiding removal of the trees at issue) because the authority for the tree removal lies in other permitting decisions—the final and unappealed building and tree permits--not the CAR 2 review that is under appeal in the instant case. Summary dismissal is appropriate.

2) The Applicant's MSJ Definitively Answers the Questions By the Examiner In the Interlocutory Order

The MSJ and attachments thereto definitively answer the questions left in the Examiner's mind with respect to whether he has jurisdiction over the instant appeal.

- *What is the scope of CAR 2 [review] CAO24-032?*

The scope of the CAR 2 review is to review critical area studies and mitigation plans in support of proposed buffer averaging and reduction of wetland and watercourse buffers for the proposed project. Spence Decl., Ex. C, MICC 19.07.090(B)(1). It does not cover review of the trees sought by Appellant to be protected, as the trees in question are located outside of the critical areas on site. Spence Decl. at pp. 27, 30, and 56 (trees to be removed are along the southern boundary of the proposed approximate area of foundation excavation).

- *Does [CAR 2 CAO 24-032] include the required tree removal permit (given that the approved plan set includes a "Replacement Tree Plan"?)*

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No. The applicant applied for permission for tree removal as part of its building permit. Spence Decl., Ex. E ("This letter is being submitted as part of an application for a building permit. We are requesting the removal of regulated tree 1003 and exceptional tree 1004."). A separate building permit and tree removal permit were issued. Spence Decl., Exs. B and G, MICC 19.07.090(B)(1). The trees in question are located outside of the critical areas on site. Spence Decl. at pp. 27, 30, and 56 (trees to be removed are along the southern boundary of the proposed approximate area of foundation excavation).

- *Does [CAR 2 CAO 24-032] include approval of the underlying building permit (given that the approved plan set includes a complete building plan set)?*

No. The Applicant applied for and received a separate building permit. Spence Decl., Ex. B; Harriman Decl. at Ex. A.

- *Is there a separate tree permit yet to be issued?*

A separate tree permit that ***was*** issued. Spence Decl. at Ex. G; Harriman Decl. at Ex. B.

- *Is there a separate building permit yet to be issued?*

There is a separate tree permit that ***was*** issued. Spence Decl., Ex. B; Harriman Decl. at Ex. A.

- *Is this the only forum in which the Type I land Use review right-to-appeal is available?*

The MICC expressly permitted Appellant to separately appeal the building permit, tree permit, or both. MICC 19.15.030, Table A. The Hearing Examiner has heard appeal hearings of Type I land use decisions previously (see, e.g. APL 24-002, Appeal of Dan Grove). No parties dispute that Appellant did not appeal the building or tree permit. Larson Decl. at ¶ 4.

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V. CONCLUSION

Applicant's MSJ unequivocally demonstrates that Appellant did not appeal the correct land use decision. There are no remaining issues of material fact; because removal of the trees in question was granted by final and unappealed permits, there is no set of facts under which Appellant can prevail in the instant appeal. Accordingly, dismissal of this appeal is appropriate.

DATED this 3rd day of July, 2025.

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DECLARATION OF SERVICE

I, Reina McCauley, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 3rd day of July, 2025, I served a true copy of the foregoing **CITY OF MERCER ISLAND'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** on the following parties using the method of service indicated below:

Robert Grossman 5249 W. Mercer Way Mercer Island, WA 98040 *Appellant*	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail:reg232@gmail.com
Jon Tellefson Seascape Homes, LLC PO Box 40568 Bellevue, WA 98015 *Applicant*	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail:jmt1231@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of July, 2025, at Auburn, Washington.

/s/Reina McCauley
Reina McCauley

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