Hearing Examiner John Galt

BEFORE THE HEARING EXAMINER
IN AND FOR THE CITY OF MERCER ISLAND

In Re The Appeal of: ROBERT GROSSMAN, Appellant, vs. CITY OF MERCER ISLAND, Respondent.	NO. APL 25-003 APPLICANT SEASCAPE HOMES, LLC'S RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

Applicant SeaScape Homes, LLC ("Applicant") requests that the Hearing Examiner deny Appellant Robert Grossman's ("Appellant") motion for reconsideration of the July 3, 2025 Order ("Order") granting Applicant's motion for summary judgment. Appellant has asserted in his motion for reconsideration that the tree permit did not exist at the time of his appeal, and claims that his appeal of the City of Mercer Island's ("City") Critical Area Review 2 ("CAR 2") Decision was not a collateral attack. However, the fact remains that Appellant appealed the incorrect decision. The CAR 2 Decision did not address tree replacement. Appellant chose to pursue its appeal of the CAR 2 Decision after the tree

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permit was approved, when he could have withdrawn his appeal of the CAR 2 Decision and separately appealed the tree permit.

Appellant also argues that it was erroneous for the Hearing Examiner to assume that the CAR 2 Decision did not authorize the removal of trees 1003 and 1004. However, it is the Appellant that has made an assumption: that the discussion of tree replacement in a September 24, 2024 letter from Applicant's architect related to the CAR 2 decision. Appellant's confusion is understandable: the letter was titled "CAR 2 Application Narrative," but it requested concurrent review of the CAR 2 application and the Building Permit. In fact, the only discussion of tree removal and replacement occurs in the context of the building permit. The CAR 2 Criteria Compliance Letter, which was also submitted on September 24, 2024 to illustrate compliance with CAR 2 requirements, does not even mention the word "tree." Finally, trees 1003 and 1004 do not fall within the Critical Area or the Critical Area buffer on the Property.

Appellant further asserts that the July 3, 2025 Order erred by failing to examine compliance with Mercer Island City Code ("MICC") 19.07. Appellant assumes that the analysis must have been in writing to have been performed. The Hearing Examiner did not discuss every single regulation with which Applicant complied because discussing regulations where compliance already exists would be both moot and impracticable. That does not mean that the Hearing Examiner did not analyze compliance, but rather that Applicant had complied.

While Appellant is within his rights to appeal any decision issued by the City, Appellant must accept the Hearing Examiner's decision that the appeal was incorrectly targeted and thus denied.

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II. STATEMENT OF FACTS

For a complete recitation of the facts, SeaScape respectfully refers to its Motion for Summary Judgment and Declaration of Michael A. Spence. For purposes of this Response, SeaScape provides the following facts, with emphasis upon those relevant to Appellant's Motion for Reconsideration.

SeaScape is the developer of the property at 5222 Forest Ave SE, King County Parcel No. 141030-00570 (the "Property"). SeaScape Homes submitted building permits and tree permits to the City of Mercer Island ("City"), which the City approved and issued on April 30, 2025. On September 24, 2024, SeaScape submitted a separate CAR 2 application for watercourse buffer mitigation. This application included a letter from its architect titled "Critical Area 2 Review – Criteria Compliance," which did not discuss tree replacement, and a letter titled "Critical Area 2 Review – Application Narrative" which requested concurrent review of the CAR 2 application and building permit. The only discussion of tree removal and replacement was in the second letter requesting Concurrent Review and took place in the context of the building permit.

The City's Community Planning & Development ("CP&D") approved the CAR 2 application and issued its notice of decision on April 14, 2025. On April 28, 2025, Appellant appealed the City's CAR 2 Decision. As the Hearing Examiner's May 2, 2025 letter stated, Appellant had appealed something that was not covered during the CAR 2 process. On May 12, 2025, the City filed a Motion to Dismiss, stating that Appellant's concern was beyond the scope of CAR 2 review. The Hearing Examiner denied this motion on June 9, 2025 pending confirmation that a tree removal permit existed and clarification regarding whether the CAR 2 application addressed tree removal. On June 20, 2025, Applicant filed a Motion for Summary Judgment that enclosed the requested tree permit. On July 3, 2025, the Hearing

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Examiner granted Applicant's Motion for Summary Judgment on the basis that the building and tree permits both existed and neither was timely appealed by Appellant.

III. STATEMENT OF ISSUE

Should the Court deny Appellant's motion for reconsideration of the Hearing Examiner's Order granting Applicant's motion for summary judgment where CAR 2 Decision was not based on tree replacement and Appellant failed to appeal the correct decision? **Yes**.

IV. EVIDENCE RELIED UPON

Applicant bases this response on the pleadings and documents filed in this matter.

V. ANALYSIS AND ARGUMENT

A. Appellant did not appeal the correct decision

As stated above, Appellant appealed the CAR 2 decision because the tree permit did not exist at the time of the deadline to appeal the CAR 2 decision. At the time of the CAR 2 decision, Appellant was aware that the purpose of a 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." MICC 19.07.090(B)(1). Appellant disregarded the purpose of the CAR 2 review and tried to make it a forum for his tree replacement dispute. This alone makes his appeal of the CAR 2 decision a collateral attack, as it the CAR 2 was the incorrect forum.

Appellant could have appealed the tree permit. As the Hearing Examiner notes in his July 3, 2025 order, tree removal permit applications are classified as Type I land use reviews, which are appealable. MICC 19.15.030(H), Table A. Notwithstanding the fact that Type I land use reviews do not require public notification, Appellant knew or should have known to appeal the tree permit once it was approved on April 30, 2025. Furthermore, the building permit application was a Type III land use review. MICC 19.15.030(H), Table C. Type III land use reviews do provide for public notification. *Id.* This should have put

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Appellant on notice to seek out the appropriate permit to appeal. Appellant was fully capable of seeking information regarding the tree permit and appealing it. Lack of notice does not alter appeal deadlines under Washington's land use system. *Durland v. San Juan County,* 182 Wn.2d 55, 59-60, 340 P.3d 191,194 (2014).

Once Appellant was on notice to seek out the tree permit, Appellant had the option to withdraw his appeal of the CAR 2 Decision and appeal the City's grant of the tree permit. When Appellant chose to continue to pursue the CAR 2 appeal rather than withdraw that appeal and instead appeal the tree permit, his pursuit of the CAR 2 appeal became a collateral attack.

B. <u>The CAR 2 Decision did not authorize the removal of trees 1003 and 1004</u>

Appellant also argues that it was erroneous for the Hearing Examiner to assume that the CAR 2 Decision did not authorize the removal of trees 1003 and 1004. However, it is the Appellant that has made an assumption: that the discussion of tree replacement in a September 24, 2024 letter from Applicant's architect related to the CAR 2 decision. Appellant's confusion is understandable: the letter was titled "CAR 2 Application Narrative," but it requested concurrent review of the CAR 2 application and the Building Permit. In fact, the only discussion of tree removal and replacement occurs in the context of the building permit.

The CAR 2 decision does not relate to trees 1003 and 1004. The CAR 2 Criteria Compliance Letter, which was also submitted on September 24, 2024 to illustrate compliance with CAR 2 requirements, does not even mention the word "tree." Although the CP&D CAR 2 decision mentions replacement trees in passing, the purpose of a CAR 2 review – and the CP&D's basis for its CAR 2 decision - is to support buffer averaging and reduction of wetland and watercourse buffers. trees 1003 and 1004 do not fall within the Critical Area or the Critical Area buffer on the Property.

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C. The Hearing Examiner need not have explicitly analyzed compliance with the MICC in his Order to have considered compliance with applicable regulations in his analysis

As stated above, the Hearing Examiner did not discuss every single regulation with which Applicant complied. The Hearing Examiner discharged his duty in reviewing materials in the record and analyzing them for compliance. He cites several regulations in his July 3, 2025 order because those regulations are relevant to his order. However, discussing regulations where compliance already exists would be moot, and discussing Applicant's compliance with all applicable regulations in the MICC within his order would be impracticable. That does not mean that the Hearing Examiner did not analyze compliance, but rather that Applicant had complied and that such compliance was not the subject of his order.

VI. CONCLUSION

Appellant offers no viable grounds for reconsideration, given that he continues to try to appeal the CAR 2 decision and has failed to timely appeal the tree permit. Appellant's arguments that tree replacement falls in the scope of CAR 2 review because of Applicant's request for concurrent consideration of the CAR 2 application and building permit must fail. For these reasons, this Proposed Order should deny Appellant's motion for reconsideration.

A proposed order is attached hereto.

Respectfully submitted this 16th day of July, 2025

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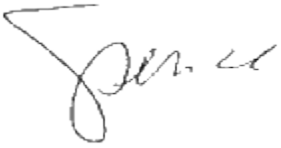

By:_____

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