

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 APPELLANT’S MOTION
FOR RECONSIDERATION, OR IN THE
ALTERNATIVE CLARIFICATION

I. PRELIMINARY STATEMENT

Appellant’s Motion for Reconsideration and/or Clarification (“Motion for Reconsideration”) should be denied. Nothing in the Motion for Reconsideration refutes that Appellant did not appeal either the tree permit or the building permit for the project in question. Both are now final. These approvals cannot be changed through an appeal of the City’s separately issued Critical Area Review 2. The City cannot consent to submitting to a proceeding in which the Hearing Examiner lacks jurisdiction because the Appellant appealed the wrong approval. Appellant’s Motion for Reconsideration should be denied.

1 **II. STATEMENT OF FACTS**

2 This section only responds to the Statement of Facts presented in the Motion for
3 Reconsideration.

4 **A. Applicant Did Not Request the Removal of Trees 1003 and 1004 In Its CAR 2**
5 **Review Application.**

6 Applicant Seascape Homes submitted a request for the removal of trees 1003 and 1004 as
7 part of an application for a building permit. Spence Decl. Ex. E. While the CAR 2 application
8 narrative mentions that trees will be removed, the full context of that statement is that the request
9 was being made “due to their limitation on the ability to achieve 85% of the [gross floor area] GFA
10 allowed for this lot.” Spence Decl. Ex. C at pdf p. 15.¹ Removal of trees based on the ability to
11 achieve 85% GFA is examined under MICC 19.10.060 and requires the issuance of either a tree
12 removal permit or other construction permit. MICC 19.10.020.

13
14 The CAR 2 Staff Report delineates the scope of what was reviewed under that approval.
15 City’s Motion To Dismiss, Exhibit A, Ex. 1 at pdf p. 4. The CAR 2 Staff Report states that the
16 CAR 2 application was submitted “due to the proposed development location containing a piped
17 and unpiped watercourse and within a geologically hazardous area, specifically a potential slide
18 and erosion hazard area.” *Id.* The Staff Report also provided that “[t]he purpose of a critical area
19 review 2 is to review critical area studies and mitigation plans in support of a proposed buffer
20 averaging and reduction of wetland and watercourse buffers.” *Id.* at pdf p. 5. Removal of trees
21 1003 and 1004 was not considered within the scope of the CAR 2 review; instead, Staff reviewed
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¹ That narrative also provides an overview of the home proposed to be built, including its foundation, gross floor area, and nature of its garage. *Id.*

1 Applicant's proposal for watercourse buffer averaging and geologic hazards. *Id.* at pdf pp. 3-10.
2 The trees in question lie outside of the mapped critical areas. Spence Decl. at 27, 30, and 56.

3 **B. The CAR 2 Decision Does Not Authorize The Removal of Trees 1003 and 1004.**

4 While Ex. 8 to the CAR 2 Decision depicts the removed trees, it also depicts the structure
5 to be built. City's Motion To Dismiss, Exhibit A, Ex. 8 at pdf p. 106 and 139. Nowhere within the
6 narrative of the CAR 2 Staff Report does it grant approval to remove trees 1003 and 1004. *Id.* at
7 pdf pp. 3-10. Under the code, approvals to remove trees must be provided by a construction permit
8 or a tree permit. MICC 19.10.020. A CAR 2 is neither.

9
10 **C. Regardless of Timing of Approvals, Appellant Appealed the Wrong Approval,
11 Thus Depriving the Hearing Examiner of Jurisdiction Over the Appeal.**

12 There is no dispute that the deadline to appeal the CAR 2 preceded the deadlines to appeal
13 the building and/or tree permits. But as posited below, the timing is immaterial.

14 **III. RESPONSE**

15 The City agrees with Appellant that he had the right to appeal the Applicant's decision to
16 remove the trees. However, the City disagrees that he could do so by appealing the CAR 2 review.
17 Appellant could have appealed the tree or building permit—such are appealable under the MICC.
18 Having failed to do so, such permits are now final under the law.

19
20 **A. Seascape Did Not Request Nor Did Respondent Authorize, Removal of Trees
21 1003 and 1004 as Part of the Critical Area Review.**

22 Appellant's Motion for Reconsideration misstates the record. Motion for Reconsideration
23 at p. 6. It is undisputed that Applicant submitted a request for the removal of the trees as part of an
24 application for a *building permit*. Spence Decl. Ex. E. The narrative of the CAR 2 Staff Report
25 does not grant approval to remove trees 1003 and 1004. City's Motion To Dismiss, Exhibit A, Ex.

1 8 at pdf p. 3-10. A CAR 2 cannot grant approval to remove trees—per MICC 19.10.020, that must
2 be done through a construction or tree removal permit. A CAR 2 is neither. By contrast, both a
3 building and a tree permit were issued. Spence Decl. at Exs. B and G.

4 **B. Appellant’s Appeal of the CAR 2 Decision is a Collateral Attack on the Tree**
5 **Permit.**

6 Appellant focuses very literally on timing, arguing that he could not have appealed the
7 building and/or tree permits at the time he filed his CAR 2 permit. Motion for Reconsideration at
8 1, 5, 6. This is beside the point.

9 The fact of the matter is that both the building and tree permits were separately appealable
10 as Type I decisions per MICC 19.15.030, Table A (non-major building permits and tree removal
11 permits are both appealable to the Hearing Examiner). Whether such permits were effective before
12 or after the deadline to appeal the CAR 2 is immaterial. Appealing the CAR 2 Decision is not
13 sufficient to circumvent missed filing deadlines for the building and tree permit approvals. The
14 July 3 Order correctly dismissed the instant appeal because Appellant appealed the wrong land use
15 approval. Therefore, reconsideration should be denied.

16 **C. Appellant Attempts to Raise Issues Not Raised in His Appeal; They Cannot Be**
17 **Considered Within A Motion for Reconsideration.**

18 Appellant raises points in his motion for reconsideration that were not raised in his appeal.
19 Motion for Reconsideration at 7-8. These cannot be considered as appropriate grounds for
20 reconsideration. MICC 19.15.130 provides strict procedural requirements for the filing of appeals.
21 Pursuant to subsection (D)(4), written appeals must include “[t]he specific reasons why the
22 appellant believes the decision to be wrong.” The code does not allow prospective Appellants to
23 file placeholder appeals, with the legal theories to be determined at a later date. His appeal should
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1 not be reinstated so that Appellant may argue various theories arising under MICC Ch. 19.07,
2 when Appellant did not plead any part of MICC Ch. 19.07 in his appeal (citing instead, *only* MICC
3 Ch. 19.10). Spence Decl. at Ex. H.

4 The Motion for Reconsideration asks the Examiner to reinstate the appeal based upon legal
5 theories not pled in the appeal, and thus not properly preserved for appeal. Motion for
6 Reconsideration at 7-8. This is inappropriate grounds for reconsideration.

7
8 Finally, the City wishes to address the incorrect contention that “developers could avoid
9 reviewing tree removal during critical area reviews simply by securing a tree permit.” Motion for
10 Reconsideration at 8. This is a gross misstatement of how the code works. The MICC anticipates
11 that projects may require tree removal approval, critical area review, or both. However, the code
12 provides for separate tracks for review of tree removal and critical area review. *Cf.* MICC Ch.
13 19.07 and MICC Ch. 19.10; *see also* MICC 19.15.030—establishing separate types of land use
14 review. To be perfectly clear, the City’s position is not that Applicant’s proposal to remove trees
15 1003 and 1004 was unappealable. But such removal had to be timely challenged through the proper
16 land use approval. That is where Appellant’s appeal fails—he challenged the wrong approval and
17 failed to timely challenge the correct approval(s). Accordingly, the Examiner lacks jurisdiction to
18 hear Appellant’s appeal, and dismissal was appropriate.

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21 **D. The Examiner Should Reject Appellant’s Request for “Clarification” that**
22 **Tree Removal Cannot Be Challenged in a CAR 2 Decision Where a Tree**
23 **Permit Authorizing Removal Has Been Issued or May Be Issued in the Future**

24 Appellant’s argument in this section appears to essentially be rhetoric and misunderstands
25 the purpose of the various permits (as well as the July 3 Order itself). Motion for Reconsideration
at 10. Appellant points to the extra procedural trappings surrounding Type III permit review,

1 compared to those for Type I permit review. Motion for Reconsideration at 10. The MICC
2 establishes which permits undergo which type of review—not the Hearing Examiner. To the extent
3 Appellant believes tree removal should be examined under the Type III process, that would require
4 a code change, not a decision from the Hearing Examiner.
5

6 IV. CONCLUSION

7 Appellant’s Motion for Reconsideration does not set forth a basis by which the Examiner
8 should reconsider his July 3 Order dismissing the instant appeal. Accordingly, dismissal of this
9 appeal was appropriate.

10 DATED this 16th day of July, 2025.

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1 **DECLARATION OF SERVICE**

2 I, Reina McCauley, declare and state:

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

5 2. On the 16th day of July, 2025, I served a true copy of the foregoing **CITY OF MERCER**
6 **ISLAND’S RESPONSE TO APPELLANT’S MOTION FOR RECONSIDERATION, OR**
7 **IN THE ALTERNATIVE CLARIFICATION** on the following parties using the method of
8 service indicated below:
9

<p>10 Robert Grossman 11 5249 W. Mercer Way 12 Mercer Island, WA 98040 13 <i>Appellant</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail:reg232@gmail.com</p>
<p>14 Michael Spence 15 Hellsell Fetterman, LLP 16 800 Fifth Avenue, Suite 3200 17 Seattle, WA 98104 <i>Applicant Seascope Homes LLC</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail:mspence@hellsell.com</p>

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

20 DATED this 16th day of July, 2025, at Auburn, Washington.

21 /s/Reina McCauley
22 Reina McCauley
23
24
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