Hearing Examiner Olbrechts

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of: MELINA LIN, Appellant, v. CITY OF MERCER ISLAND, Respondent.	No. APL25-006 CITY OF MERCER ISLAND'S STAFF REPORT PURSUANT TO RULES OF PROCEDURE 224

I. INTRODUCTION

The City of Mercer Island ("City") submits the following Staff Report/Prehearing Brief pursuant to Hearing Examiner Rules of Procedure ("RoP") 224(g).

II. FACTS

This appeal arises out of a December 1, 2025 appeal made by Appellant Melina Lin ("Appellant" or "Lin") of two land use approvals: Building Permit #2401-034 and Critical Area Determination 2 #CAO24-036. Ex. 41. As testimony is expected to show, the land use approvals arise out of application by Appellant's neighbor to reconstruct a retaining wall, greenhouse, and gazebo. *Also* Ex. 24 at bates no. 0191.

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The City issued a building permit for applicant signature on Nov 19, 2025 and the building permit was signed on November 21, 2025. Ex. 22 at bates no. 0178. The City issued a Staff Report & Decision for the Critical Area 2 Review on November 17, 2025. Ex. 24 at bates nos. 0191-0198.

The Appeal appears to allege two main points of error. Ex. 41 at bates 0288. First, the Appeal alleges that the location of the greenhouse, the gazebo, and the retaining wall impermissibly intrude into a setback. *See id.* Second, the Appeal alleges that the location of the retaining wall intrudes into a utility easement. *See id.*

III. ISSUES

1. Should Appellant's Appeal as to the Critical Areas Determination Be Dismissed As The Appeal Does Not Allege Error in the Critical Areas Determination? *Yes.*
2. Should Appellant's Appeal as to Encroachments Into the Yard Be Dismissed? *Yes.*
3. Should Appellant's Appeal as to Encroachment of the Retaining Wall Be Affirmed and the Permit Remanded? *If the Examiner finds the retaining wall encroaches upon a utility easement that does not permit such encroachment, then the Appeal should be affirmed and the building permit remanded.*

IV. ANALYSIS

1. Appellant's Appeal of the Critical Areas Determination Should Be Dismissed

Within this appeal, Appellant has appealed both building permit #2401-034 and the critical areas determination #CAO24-036. Ex. 41 at bates no. 0288. Appellant does not argue any basis under the code for overturning the critical areas determination. *Id.* at bates nos. 0288-0305.

"The purpose of a crucial 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). Appellant Lin does not allege any error with respect to the Decision reviewing Applicant's critical area studies and mitigation plans. Ex. 41 at bates nos. 0288-0305.

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Her only points of appeal are a) allegation that a structure impermissibly intrudes into a yard and b) allegation that the retaining wall encroaches upon an easement benefitting Appellant. *Id.*

As Appellant has alleged no error with respect to #CAO24-036, the appeal as to the critical areas determination should be dismissed.

2. Appellant's Appeal Regarding Encroachment Into the Front Yard Should Be Dismissed

While not completely clear, it appears that Appellant alleges that the proposed greenhouse intrudes into a property setback. Ex. 41. Testimony is expected to show that as permitted, the location of the greenhouse complies with the provisions of the Mercer Island City Code ("MICC"). Withing the MICC, "setbacks" are typically referred to as required yards (front yard, side yard, rear yard). *See, e.g.* MICC 19.02.020(C). The City does not dispute that an eave of the proposed greenhouse and/or gazebo may intrude into the front yard. This is permissible. MICC 19.02.020(C)(3), Intrusions into required yards, explicitly provides that eaves "shall not protrude more than 18 inches into any required yard." MICC 19.02.020(C)(3)(a)(i). The approved building permit contains notes for both structures that "PER MICC 19.02.020(C)(3)(A): EAVES SHALL NOT PROTRUDE MORE THAN 18 INCHES INTO ANY REQUIRED YARD." Ex. 23 at bates 0185, 0190. Further, with respect to the side yard, testimony is expected to show that the approved plans do not show eaves located within the side yard area. Testimony is also expected to show that conformance with MICC 19.02.020(C)(3)(a) will be confirmed by inspection following the construction by the Applicant.

With respect to the modular block retaining wall, again, testimony is expected to show that as permitted, the location of the retaining wall complies with the MICC. The code expressly provides that "[f]ences, retaining walls and rockeries may be located within any required yard as specified below." MICC 19.02.050(D). Appellant does not appear to argue that the retaining wall

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does not meet the standards of MICC 19.02.050(D) such as height limits, etc. Ex. 41 at bates nos. 0288-0305.

Because the MICC permits some intrusion into the required front yard, and inspection will verify that the structures, as constructed, follow the plans and the MICC, this issue is without merit and should be dismissed.

3. If The Hearing Examiner Affirms Appellant's Argument regarding Encroachment into Easement, the Building Permit Should Be Remanded for Revision

Appellant and Applicant appear to have an active dispute as to whether there is a valid utility easement in the location of the retaining wall and if such utility easement continues to exist, whether its terms permit some encroachment. *Cf.* Ex. 41 and 18. The City notes that disputes over private property rights, such as easements, are normally beyond the scope of permitting decisions. However, here, the MICC requires that the City, as the permitting authority, does have to consider when obstruction of easements within the context of its permitting decisions. MICC 19.02.020(H) provides:

> H. *Easements.* Easements shall remain unobstructed.
>
> 1. *Vehicular access easements.* No structures shall be constructed on or over any vehicular access easement. A minimum five-foot yard setback from the edge of any easement that affords or could afford vehicular access to a property is required for all structures; provided, that improvements such as gates, fences, rockeries, retaining walls and landscaping may be installed within the five-foot yard setback so long as such improvements do not interfere with emergency vehicle access or sight distance for vehicles and pedestrians.
>
> 2. *Utility and other easements.* No structure shall be constructed on or over any easement for water, sewer, storm drainage, utilities, trail or other public purposes unless it is permitted within the language of the easement or is mutually agreed in writing between the grantee and grantor of the easement.

The two parcels in question—Applicant's and Appellant's, appear to have been originally created via a 1978 short plat (Recording number 7812180972). Ex. 46. The original short plat shows an

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existing drive as well as a newly created ten foot drive and utility easement. *Id.* at bates nos. 0381-0382. Applicant has provided a copy of the 1979 Declaration of Easements, Restrictions and Privileges, in which Applicant's property is referred to as the "Upland Parcel" and Appellant Lin's property is referred to as the "Waterfront Parcel." Ex. 18. That Declaration of Easements, Restrictions, and Privileges describes several easements over the Upland Parcel for the benefit of the Waterfront Parcel: 1) a vehicular, pedestrian, and ingress/egress easement 12 feet in width ("lying six (6) feet in each side of a line denominated the 'driveway centerline' on the attached Exhibit 'A'"), 2) a 5 foot easement for water, sewer, phone, gas, electricity and other utilities adjacent to the northerly boundary of Applicant's parcel, and 3) a 5 foot easement for water, sewer, phone, gas, electricity and other utilities adjacent to the southern boundary of Applicant's parcel. *Id*. at bates nos. 0152-0153.[1] It is unclear to the City how such declarations fit in with the 1978 short plat—or whether they are related at all.

It is the twelve foot easement that is at issue in this proceeding. Contrary to the language within the Declarations, Exhibit A attached thereto shows the twelve foot easement, but describes it as "revised location of 12 foot easement for ingress, egress, and utilities." *Id.* at 0160.

Following these easements is a description that:

> "[t]he owner of the upland parcel shall have exclusive control over the landscaping of the easements… provided that no owner of the upland parcel shall erect, construct, plant or maintain any fence, rockery, shrubbery or similar device for the purpose of denying access to or physically enclosing any such easement herein reserved without first obtaining the written consent of the owner of the waterfront parcel." *Id.*

[1] If there are intervening documents between the 1978 short plat and the 1979 Declarations, the City is not aware. However, the City notes that the size of the southern utility easement differs between the two documents and it is unclear whether the "revision" to the driveway and utility easement was first evidenced in the 1979 Declarations or in some document predating it.

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Applicant argues that based on the language above, the easement permits the location of a retaining wall within the easement. Ex. 18 at bates no. 0153.

The original 1978 short plat was followed by other documents—a boundary line revision in 1979 (Recording No. 7911309020) (Ex. 43 at bates nos. 0334-0335) and a 1983 Boundary Line Revision (Recording No. 8309159010) (*Id.* at bates nos. 0337-0338). These documents both show a twelve foot ingress, egress, and utilities easement.

It appears that there were attempts to relocate this twelve foot easement. In 2011, the Applicant and the predecessor to Appellant executed an Access and Utilities Easement (Recording No. 20111110001264). Ex. 43 at bates nos. 0339-0345. That document shows the approximate location of the originally constituted 12 foot easement, and the position of the easement created in 2011. *Id.* at bates no 0345. However, the 2011 easement did not terminate or otherwise affect any existing easement. The parties subsequently executed a driveway relocation easement in 2017 (Recording No. 20170329001022). *Id.* at bates nos. 0347-0352. This easement did evidence an intent to cancel the previous location of the driveway, however, as noted by Judge Segal, discussed below, that 2017 did not affect the utility easement and it is doubtful that it could affect previous easements created by plat). Ex. 44 at bates no. 0364 (*see especially* footnote 1).

The existence and location of this easement has been subject to previous litigation between Applicant and Appellant in 2020 and 2021. Exs. 42 - 44. An order from former Superior court Judge Matt Segal, held:

> The City of Mercer Island Subdivision, recorded under Recording Number 7812180972, and as delineated on survey thereof, recorded under Recording Number 7911309020, as revised under Boundary Line Revision Recording Number 8309159010, includes a "12 FOOT EASEMENT FOR INGRESS EGRESS & UTILITIES (EASEMENT NO. 1)" which remains in effect, and as a matter of law was not modified or terminated by the parties' private 2017 Driveway Relocation Easement, King County Recording Number 20170329001022. Given the parties

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> have indicated a mutual intent to relocate the easement for ingress and egress, and neither party contends that the driveway should be located where it was prior to the 2017 agreement, it appears the parties could present their agreement to relocate the driveway to the City for approval or waiver on that point, and may have a mutual contractual obligation to do so. Interpreting the 2017 agreement, the Court does not conclude that it expressly intended to relocate utility easements.

Ex. 44.

The property records are thus conflicting in nature. Based upon the order by Judge Segal, which was not appealed, the City feels it is more likely than not that an ingress, egress and utility easement remains in its originally constituted location, rather than the relocated location of the current driveway. However, given the long and tortured history of this easement, the City acknowledges there is room for reasonable minds to differ on this question.

If the Hearing Examiner agrees that there remains a twelve foot ingress, egress, and utility easement in the location shown within the 1983 BLA, the operative question remains whether encroachment within such easement by a retaining wall is permitted under MICC 19.02.020(H). That section prohibits structures constructed on or over any vehicular access easement and also requires a five foot setback from the edge of any easement that affords or could afford vehicular access to a property for all structures. Therefore, if there remains an ingress/egress easement as shown on the 1983 BLA, it is likely the retaining wall does not meet the qualifications of MICC 19.02.020(H)(1).

MICC 19.02.020(H) further provides that structures may not be constructed on utilities easements unless the language of the agreement permits it or it is mutually agreed in writing between easement grantor and grantee. The City cannot determine whether the 1979 declarations or some other document (as indicated in the 2021 Segal Decision) created the ingress, egress, and

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utilities easement. Without that knowledge, the City cannot determine whether the terms of such easement permit the encroachment.

In the event the Hearing Examiner finds that the retaining wall encroachment is prohibited by 19.02.020(H), the building permit should be remanded back for revision. However, if Applicant is correct that there is either no easement in such location, or only a utilities easement whose terms permit encroachment, then the Hearing Examiner should dismiss this Appeal in full.

V. CONCLUSION

The Appeal as to the Critical Areas Determination, and its allegations that structures intrude into setbacks are not well founded, and should be dismissed on those grounds. As to Appellant's easement allegation, the City notes the long and tortured history of the property rights as between the Applicant and Appellant and their respective parcels. As to the easement issue, should the Hearing Examiner agree with Appellant's position that the retaining wall impermissibly encroaches upon an easement, then the building permit should be remanded back for correction.

DATED this 17th day of February, 2026.

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DECLARATION OF SERVICE

I, Tori Harris, 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 17th day of February, 2026, I served a true copy of the foregoing City of Mercer Island's Staff Report Pursuant to Rules of Procedure 224 on the following parties using the method of service indicated below:

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

DATED this 17th day of February, 2026, at Seattle, Washington.

/s/ Tori Harris
Tori Harris

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