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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In re the Appeal of:

File No. APL25-006

MELINA LIN,

Appellant,

MELINA LIN’S REPLY  
IN SUPPORT OF REQUEST FOR  
RECONSIDERATION

v.

CITY OF MERCER ISLAND,

Respondent.

**I. INTRODUCTION**

Ms. Lin’s Request for Reconsideration did not intend to suggest that *Halverson* directly applies to this case. Rather, Ms. Lin challenged the Examiner’s conclusion that it should issue a decision in this case because the Examiner lacks jurisdiction to resolve disputes as to the scope of the utility easement and City Staff did not initially have all the necessary information to determine whether the retaining wall complied with MICC 19.02.020(H).

Ms. Lin agrees with the City that the Code requires the Examiner to evaluate “the language of the easement to determine whether it permits such encroachment.” *See* City Resp. at 3:14–18. But Ms. Lin disputes that the 1981 Declaration, *see* Ex. 45, is even controlling as to the scope of the easement, and the Code does not authorize the Examiner to step in to the shoes of a superior court to resolve this question. Ms. Lin also agrees with

1 the City that “the [C]ode does not require the adjudication of the accessibility of the  
2 easement in practice and/or whether there has been any interference with the easement  
3 rights[.]” *See* City Resp. at 3:15–17. Even if the 1981 Declaration is controlling as to the  
4 scope of the easement, substantial evidence demonstrates that the encroachment will in fact  
5 both physically enclose and deny access to the waterline. But again, the Code does not  
6 authorize the Examiner to make this determination.

7 To the extent that the Examiner believes he has authority to interpret the scope of  
8 the easement, the Examiner should adhere to the City’s judgment. Just as the City  
9 determined in the north easement area that the language does not permit structures, so  
10 should the Examiner conclude regarding the Middle Easement.

11 For the reasons explained below, the Decision is “based in whole or in part on  
12 erroneous facts or information” and “failed to comply with existing laws or regulations.”  
13 MICC 3.40.110(A)(1)–(2). The Examiner should reconsider Finding of Fact 9 and  
14 Conclusions of Law 1 and 4 and determine that Applicants’ retaining wall/structure does  
15 not comply with MICC 19.02.020(H) and shall be removed from the easement.

## 16 II. ARGUMENT

### 17 A. *Halverson* does not apply

18 Ms. Lin agrees with the City that *Halverson v. City of Bellevue*, 41 Wn. App. 457,  
19 704 P.2d 1232 (1985) does not apply to the Examiner’s analysis. *See* City Response at 2:6–  
20 3:3. *Halverson* is factual and legally distinguishable.

21 First, the “essence of the claim” was that “Halverson should not have been  
22 considered an owner . . . until her adverse possession claim was adjudicated and her  
23 ownership interest made a matter of record.” *Halverson*, 41 Wn. App. at 459. Here, there is  
24 no dispute that Ms. Lin “ha[s] utility rights to the middle easement,” or that the Middle  
25 Easement “still grant[s] utility rights over the ‘existing driveway’ location depicted in the

1 1978 short plat.” Decision at 6–7, CoL 2–3. The only reason that there is a “dispute” as to  
2 the existence of Ms. Lin’s easement is because the City was unaware of the 2021 Segal  
3 ruling when it issued the building permit. *See* Tr. at 63, 2:07:04–16; *id.* at 69, 2:20:53–  
4 2:21:11; *id.* at 56, 1:53:45; Ex. 18 at 1.<sup>1</sup>

5 Second, the *Halverson* court’s holding is predicated on the fact that the applicable  
6 statutes “d[id] not provide a direct answer to the question of how a city, town, or county  
7 should proceed in cases of disputed ownership of a portion of the property to be platted.”  
8 *Halverson*, 41 Wn. App. at 459. That is not at issue here. The Code tells the City what to  
9 do. *See* MICC 19.02.020(H) (“Easements *shall* remain unobstructed”) (emphasis added);  
10 MICC 6.10.110 (“The word ‘shall’ is always mandatory[.]”); MICC 6.10.020(B) (“The  
11 violation of any regulation is unlawful, and the director may take reasonable action to bring  
12 about compliance . . . including but not limited to the revocation or modification of  
13 permits[.]”).

14 Indeed, the City agrees that “the key issue was whether, under MICC  
15 19.02.020(H)(2), Applicant’s retaining wall was constructed on or over a utility easement  
16 benefitting Appellant and if so, whether such construction is permitted within the language  
17 of the easement.” *See* City Resp. at 2:22–3:1. The record establishes that the retaining wall  
18 obstructs Ms. Lin’s utility easement, which is expressly prohibited under the Code. The  
19 1981 Declaration, *see* Ex. 45, does not control the scope of the easement but even if it did,  
20 that language does not allow encroachments that physically enclose or deny access to the  
21 easement.

22 \_\_\_\_\_  
23 <sup>1</sup> The Code required Applicants to submit “all information” “to determine if the proposed permit or  
24 application will comply with the requirements of the applicable development regulations.” *See*  
25 MICC 19.15.060(A). To the extent Applicants intentionally chose to conceal the existence of, and/or  
failed to provide, the 2021 Segal decision to the City, Applicants’ omission was unlawful under the  
Code. *See* MICC 1.04.030 (“Whenever in the ordinances of the city any act or omission is made  
unlawful, it includes causing, allowing, permitting, aiding, abetting, suffering or concealing the fact  
of such act or omission.”).

1           Moreover, City Staff confirmed that they were not confused about how to apply the  
2 Code or what analysis to conduct. City Staff specifically testified that “with the additional  
3 information that the city has looked at since receiving the appeal,” it likely would require  
4 “remov[al] [of] the retaining walls from the easement area.” Tr. at 64, 2:09:41–2:10:18. The  
5 Examiner should not stand in the shoes of City Staff when they did not themselves have  
6 opportunity to evaluate the easements. Tr. at 70–71, 2:24:15–2:25:05.

7           Finally, the *Halverson* court held that “[b]ecause the merit of an adverse possession  
8 claim cannot be determined by the city prior to adjudication, caution in approving plats in  
9 such cases is warranted.” *Halverson*, 41 Wn. App. at 460. There is no plat nor adverse  
10 possession claim at issue. Rather, Ms. Lin is asking that the Code’s plain language, *see*  
11 MICC 19.02.020(H) (“[E]asements *shall* remain unobstructed”) (emphasis added), apply to  
12 the Examiner’s analysis of the retaining wall and its encroachment into her easement rights.

13           **B. *Halverson* does not require a quiet title action has already been filed.**

14           As described above, the Code—not *Halverson*—applies to the Examiner’s analysis.  
15 Neither the City, nor the Examiner, must wait until a quiet action has been commenced to  
16 decide the issues here.

17           Of seven cases citing to *Halverson*, five confirm that “[a] quiet title action [is] not  
18 prerequisite” to a valid claim of adverse possession. *Gorman v. City of Woodinville*, 175  
19 Wn.2d 68, 74, 283 P.3d 1082 (2012).<sup>2</sup> The remaining two cases state principles that are

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20           <sup>2</sup> *See also Shadle v. Kailash Dev., LLC*, 146 Wn. App. 1041, 2008 WL 4003732 at \*3–\*4  
21 (“Significantly, [*Halverson*] does not stand for the proposition . . . that an adverse possession claim  
22 is barred if it is not timely asserted or if it is not asserted before preliminary plat approval is  
23 received.”); *Gorman v. City of Woodinville*, 160 Wn. App. 759, 763, 249 P.3d 1040 (2011) (an  
24 “adverse possessor need not record or sue to preserve his rights in the land” because “the law is  
25 clear that title is acquired by adverse possession upon passage of the 10-year period.”) (citing  
*Halverson*, 41 Wn. App. at 460); *Johnson v. Kissler*, 184 Wn. App. 1013, 2014 WL 5363854 at \*3  
(adverse possessor “demonstrated that title to the disputed parcel vested” because “once adverse  
possession is established by 10 years of adverse use, title automatically passes to the claimant”)  
(citing *Halverson*, 41 Wn. App. at 460); *Beres v. U.S.*, 143 Fed. Cl. 27, 58–59 (2019) (“under

1 worth reiterating here. First, under RCW 58.17.165, “[c]onsent by the owners is necessary  
2 to prevent future title challenges.” *Harrison v. Cnty. of Stevens*, 115 Wn. App. 126, 132, 61  
3 P.3d 1202 (2003) (citing *Halverson*, 41 Wn. App. at 460). Although a plat is not at issue  
4 here, this standard mirrors the Code, which prohibits structures “on or over” utility  
5 easements unless “mutually agreed in writing between the grantee and grantor of the  
6 easement.” MICC 19.02.020(H)(2).

7 Second, superior courts have jurisdiction over a “quiet title action [which] involves  
8 the title or possession of real property.” *Guest v. Lange*, 8 Wn. App.2d 1062, 2019 WL  
9 2004235 at \*7; *see also Shadle*, 2008 WL 4003743 at \*3 (“There is simply no authority for  
10 [the] assertion that the City of Mukilteo could or did address any claim of adverse  
11 possession in the platting process. Only a court could have resolved an adverse possession  
12 claim.”). Conversely, the Examiner has jurisdiction to “hear and decide upon applications  
13 and appeals as designated in th[e] Code.” MICC 3.40.020(A).

14 **C. The Code guides the City’s actions when an adverse property claim is made.**

15 The Examiner asked whether “cities and counties [are] required to suspend permit  
16 review every time someone makes an adverse claim” and “[i]f not, what is the dividing line  
17 between the claims that should be heeded and those that can be ignored.” In short, the Code  
18 dictates the City’s course of conduct.<sup>3</sup>

19 The Court’s analysis in *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P.3d 218 (2012)  
20 is directly on point. In *Littlefair*, the code stated that “no building or structure may be located

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21 Washington State law, plaintiffs did not, prior to filing suit in [the Court of Federal Claims], need  
22 to bring actions against third-parties in order to have obtained interests in the land underlying [a]  
23 railroad corridor through adverse possession.”) (citing *Halverson*, 41 Wn. App. at 460).

24 <sup>3</sup> The Examiner has referenced permitting reform under the Regulatory Reform Act, ch. 36.70B  
25 RCW, which the Examiner reasons “imposes permit processing deadlines that could not be met if  
permit review were suspended every time a question of title arose.” Decision at 5:2–4. These  
concerns are unfounded in this case because the permit processing deadlines do not apply to building  
permits. *See* RCW 36.70B.020(4)(b) (“‘Project permit’ or ‘project permit application’ does not  
include building permits.”).

1 within any easement” and a property owner sued because a neighbor built a fence on the  
2 property owner’s easement. *Littlefair*, 169 Wn. App. at 662–63. The trial court refused to  
3 enforce the code because the county was “laced with easements that have structures on  
4 them” and “enforcing this zoning ordinance would wreak havoc on the county’s ability to  
5 have any reasonable land use proceedings whatsoever.” *Id.* at 664 (quotations omitted). But  
6 the Court of Appeals expressly rejected the trial court’s reasoning and concluded that the  
7 “code is clear: property owners cannot construct fences within easements.” *Id.* at 670. The  
8 Court of Appeals explained that because “the ordinance is clear,” and “leav[es] no room for  
9 an interpretation that strays from such plain meaning,” “[w]hether the county will encounter  
10 problems enforcing the ordinance is an issue for the county commissioners to resolve.” *Id.*

11 It would be error for the Examiner to ignore the Code’s plain language. *Id.* at 669–  
12 70 (“Where a zoning ordinance is unambiguous, we must construe it to achieve its plain  
13 purpose and intent.”). Just as in *Littlefair*, the Code’s intent is clear: “Easements shall  
14 remain unobstructed.” MICC 19.02.020(H).

15 **D. The Examiner does not need to resolve the accessibility of the easement.**

16 Under MICC 19.02.020(H)(2), “[n]o structure shall be constructed on or over any  
17 easement for . . . utilities . . . unless it is permitted within the language of the easement.”  
18 Although the 1981 Declaration does not apply to the Middle Easement, the “language of  
19 the easement” only authorizes Applicant’s retaining wall *if* they “obtain[ed] the written  
20 consent of the owner of the waterfront parcel.” Ex. 45 at 3; *see also* Ex. 2001; Decision at  
21 3, FoF 4.

22 The Examiner concluded that “the parties don’t mutually consent to the  
23 encroachment.” Decision at 8:5–7. Ms. Lin does not ask for reconsideration of this  
24 conclusion, and neither the City nor Applicants dispute this issue. The mere fact that  
25 Applicants’ retaining wall is placed on top of Ms. Lin’s utility easement violates the Code.

1 This is enough for the Examiner to grant Ms. Lin’s appeal and remand the permit so that  
2 the City can issue a revised permit requiring Applicants to remove the retaining wall from  
3 the utility easement.

4 Moreover, because the Code “grant[s] adjoining property owners a claim of  
5 entitlement in the protection” of their easement rights, and the permitting decision  
6 encroaches upon Ms. Lin’s property interest, the permit must be denied. *Durland v. San*  
7 *Juan Cnty.*, 182 Wn.2d 55, 69, 340 P.3d 191 (2014). Allowing the retaining wall, fence, and  
8 shrubbery to remain on top of the easement is contrary to the Code and violates Ms. Lin’s  
9 due process rights and constitutionally protected property interests. *Durland*, 182 Wn.2d at  
10 69 (“A constitutionally protected property interest exists when a plaintiff demonstrates that  
11 he or she possesses a ‘legitimate claim of entitlement’ under the law.”) (citation omitted).

12 The Examiner does not need to make any further findings, conduct any more  
13 analysis, or alter its conclusions because the “language of the easement” precludes the  
14 existence of the retaining wall without Ms. Lin’s consent.

15 **E. Although unnecessary to determine, substantial evidence establishes that**  
16 **Applicant’s retaining wall denies access to Ms. Lin’s utility easement.**<sup>4</sup>

17 The Examiner does not need to resolve the accessibility of the easement for the  
18 reasons described above. However, by ruling that the permit does not violate MICC  
19 19.02.020(H), the Examiner necessarily goes beyond reviewing the express language of  
20 whether encroachments are allowed under the easement and rules on the accessibility  
21 question by allowing Applicants to construct a retaining wall within the easement area  
22 (despite substantial evidence that the retaining wall denies access to Ms. Lin’s easement).

23 \_\_\_\_\_  
24 <sup>4</sup> Applicants do not address the Examiner’s questions. Instead, Applicants argue that Ms. Lin did  
25 not prove that the retaining wall denies access to the easement. *See* Applicants’ Resp. to Request  
for Reconsideration at 3:3–4:10. Although the Examiner does not need to decide this issue, Ms. Lin  
incorporates her prior briefing in response. *See* Request for Reconsideration at 10:17–2.

1 The Examiner should not rule on the accessibility issue by authorizing the encroachment  
2 vis-à-vis permitting the retaining wall.

3 To the extent that the Examiner believes he has authority to interpret the scope of  
4 the easement, the City has previously done so before it issued the permit. *See* Decision at 4,  
5 FoF 5 n.1. Just as the City determined in the north easement area that the language does not  
6 permit structures, so should the Examiner conclude regarding this Middle Easement. *Id.*

7 Furthermore, the record establishes that the retaining wall could “impact future  
8 access, maintenance, or replacement of subsurface utilities beneath them.” Ex. 1003 at 2, ¶  
9 5. Indeed, throughout these proceedings, Ms. Lin consistently asserted that the retaining  
10 wall could “obstruct access needed for maintenance of emergency repairs” which could  
11 “present significant long-term risks related to accessibility, liability, and maintenance.” Ex.  
12 38 at 3; *see also* Ex. 39 at 1 (“As far as I understand, no structure—including a retaining  
13 wall—should be placed within a utility easement, as it would obstruct access for  
14 maintenance or emergency purposes.”).

15 The Examiner also noted that “[a]s of the appeal hearing, [Ms. Lin] hadn’t yet  
16 actually made any physical effort to access the waterline” and “deferred addressing that  
17 issue until [Ms. Lin] had actually made that effort and could demonstrate that the retaining  
18 wall structures prevented access.” As an initial matter, the Examiner’s deferral of this issue  
19 would require Ms. Lin to bear the expense and potential property damage that could result  
20 if emergency maintenance arises. That is an untenable position. But further, the record  
21 establishes that Applicants have consistently prevented Ms. Lin from “making the effort”  
22 to demonstrate that the retaining wall structures prevent access. *See* Ex. 43 at 3, ¶ 13; Tr. at  
23 15, 32:58–33:58; Tr. at 15, 35:32; Tr. at 16, 36:27; Tr. at 16: 37:24; Tr. at 49, 1:40:14. The  
24 record also establishes that will not change in the future. Tr. at 91, 3:07:45–3:08 (“Despite  
25 the existence of what I would call a very, very short retaining wall, if Ms. Lin needed to

1 access that for actual servicing her water line in the future, would you allow that?”  
2 Applicant: “No.”).

3 The Code does not authorize legal determinations as to whether a structure that  
4 encroaches on an easement is “modest.” *See* Decision at 5, FoF 9. It simply prohibits it.  
5 Here, to conclude that the proposed encroachment is allowed, the Examiner must go beyond  
6 the plain language of the utility easement language. The Code does not authorize the  
7 Examiner to do so. By issuing a ruling—despite evidence establishing that the retaining  
8 wall does enclose and prevent access to the easement—effectively constitutes a ruling on  
9 the accessibility of the easement.

### 10 III. CONCLUSION

11 For the reasons explained herein, the Decision is “based in whole or in part on  
12 erroneous facts or information” and “failed to comply with existing laws or regulations.”  
13 MICC 3.40.110(A)(1)–(2). The Examiner should reconsider Finding of Fact 9 and  
14 Conclusions of Law 1 and 4 and determine that Applicants’ retaining wall/structure does  
15 not comply with MICC 19.02.020(H) and shall be removed from the easement.

16 Respectfully submitted this 15th day of April 2026.

17  
18 VAN NESS FELDMAN LLP

19 /s/ Liberty Quihuis

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*Attorneys for Melina Lin*

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**CERTIFICATE OF SERVICE**

I, Ann Gabu, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein:

That I, as a Legal Assistant in the office of Van Ness Feldman LLP, caused true and correct copies of the following documents to be delivered as set forth:

- 1. Melina Lin’s Reply in support of Reconsideration, and
- 2. Certificate of Service

and that on April 15, 2026, I addressed said documents and deposited them for delivery as follows:

<p><b>Hearing Examiner</b>          For the City of Mercer Island          Phil A. Olbrechts, Attorney-At-Law          WSBA #19146          Olbrechts and Associations PLLC          720 N. 10<sup>th</sup> Street, Suite A-297          Renton, WA 98057-5683          Phone: 206-650-7268          E-mail: <a href="mailto:olbrechtslaw@gmail.com">olbrechtslaw@gmail.com</a></p>	<p><input type="checkbox"/> <input type="checkbox"/> By First Class Mail  <input type="checkbox"/> <input type="checkbox"/> By Legal Messenger  <input type="checkbox"/> <input checked="" type="checkbox"/> Via Email</p>
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<p><b>Applicant/Applicant Representative</b> Gary Mok/GM Design 4511 Somerset Drive SE Bellevue, WA 98006 E-Mail: <a href="mailto:mokgary@gmail.com">mokgary@gmail.com</a></p> <p>Tammy Liu 8636 North Mercer Way Mercer Island, WA 98040 E-Mail: <a href="mailto:tmsliu3@gmail.com">tmsliu3@gmail.com</a></p> <p><b>Attorneys for Applicant/Applicant Representative</b> Morgan J. Wais, Attorney-At-Law WSBA #36603 Douglas W. Scott, Attorney-At-Law WSBA #6658 Rainier Legal Advocates, LLC 465 Rainier Blvd. N., Suite C Issaquah, WA 98027 E-Mail: <a href="mailto:morgan@rainieradvocates.com">morgan@rainieradvocates.com</a> E-Mail: <a href="mailto:doug@rainieradvocates.com">doug@rainieradvocates.com</a> E-Mail: <a href="mailto:chris@rainieradvocates.com">chris@rainieradvocates.com</a></p>	<p><input type="checkbox"/> <input type="checkbox"/> By First Class Mail <input type="checkbox"/> <input type="checkbox"/> By Legal Messenger <input type="checkbox"/> <input checked="" type="checkbox"/> Via Email</p>

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<b>City of Mercer Island</b> Deborah Estrada, MMC Administrative Coordinator/Deputy City Clerk City of Mercer Island 9611 SE 36 <sup>th</sup> Street Mercer Island, WA 98040 E-Mail: <a href="mailto:deborah.estrada@mercerisland.gov">deborah.estrada@mercerisland.gov</a>	<input type="checkbox"/> <input type="checkbox"/> By First Class Mail <input type="checkbox"/> <input type="checkbox"/> By Legal Messenger <input type="checkbox"/> <input checked="" type="checkbox"/> Via Email
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EXECUTED at Seattle, Washington, on this 15th day of April 2026.

/s/ Ann Gabu  
Ann Gabu, Legal Assistant