BEFORE THE HEARING EXAMINER
FOR THE CITY OF MERCER ISLAND

Phil Olbrechts, Hearing Examiner

In Re the Appeal of: MELINA LIN, Appellant, v. CITY OF MERCER ISLAND, Respondent.	No. APL25-006 Decision Upon Reconsideration

Summary

Appellant's request for reconsideration is denied except for the addition of one added finding to the Final Decision[1]. If it is inappropriate to defer consideration of whether the proposed Middle Easement encroachments block waterline access, it is found for the Final Decision that the proposed encroachments do not block that access.

The Appellant's reconsideration request threads a particularly difficult needle. It attempts to assert both that the Examiner has the jurisdiction to interpret the language of the Middle Easement while at the same time asserting there is no jurisdiction to use associated title documents to assist in that interpretation. The Appellant argues that the Middle Easement language grants utility rights while at the same time asserting that the Examiner doesn't have jurisdiction to consider another title document that limits those rights. Despite her valiant effort to the contrary, the Appellant can't have it both ways. The Examiner either can or cannot interpret all the terms of the Middle Easement. That includes terms that link the scope of the easement to other title documents. There is no legal authority that limits examiner review to a facial analysis of easement language. To tie the hands of the examiner in such an absurd fashion

[1] The "Final Decision" as referenced in this Decision Upon Reconsideration is the March 23, 2026 Final Decision issued for this appeal.

forces erroneous interpretations of easement language due to incomplete information and assessment.

As in the Final Decision, the biggest issue of this reconsideration request is still whether the Examiner has jurisdiction to address title disputes, with particular emphasis upon *Halverson v. Bellevue*, 41 Wn. App. 457 (1985). The *Halverson* case is challenging to apply because it was issued in a regulatory context that at this point is 40 years old. The *Halverson* decision also dealt with a project opponent who was vested enough in her concerns to have filed a quiet title claim. No such claim has been filed in this case. In the absence of such filed claims, a city cannot be expected to stay or deny decisions every time someone verbalizes an adverse title claim. This is particularly problematical under the post-*Halverson* regulatory context, where permitting deadlines can result in substantial liability if they're not met. From a practical perspective, the most prudent approach for a City to take in the absence of an actual filed claim is to evaluate title issues to the extent necessary to assess code compliance. If a reviewing court finds that City jurisdiction was lacking for that exercise, the error will usually be harmless. The superior court can simply disregard the title findings of the City and come to its own conclusions. Those superior court conclusions would be well within the constitutionally authorized original jurisdiction of the court.

The Appellant has also sought to have the easement language remanded for further staff review. Appellant claims such remand is necessary because staff wasn't made aware of Judge Segal's superior court decision assessing Middler Easement rights. All parties to this case had a full opportunity to present facts and argue the full scope of the easement at the appeal hearing with full consideration of the impacts of Judge Segal's. Appellant's counsel didn't object to the consideration of those issues. Under those circumstances little is to be gained from seeking City staff's lay opinion about the scope of a private easement. Remand is not found necessary or beneficial for this case. A remand would just prejudice the parties by unnecessarily delaying their ability to file a judicial appeal.

Evidence Relied Upon

The evidence relied upon for this Decision Upon Reconsideration is composed of the administrative record of this appeal in addition to the Appellant's April 2, 2026 Request for Reconsideration, the April 10, 2026 responses from the Applicant and City and the April 15, 2026 reply from the Appellant.

Legal Analysis

The specific issues addressed by the Appellant are individually addressed below.

A. Examiner Jurisdiction

Appellant asserts that she doesn't contest the Examiner's finding that she has utility rights to the Middle Easement. She then takes the conflicting position that the

Examiner has no jurisdiction to use title documents to assess the language of her easement. If the Examiner has the authority to interpret the language of the Middle Easement, that includes the authority to use extrinsic aides of construction such as other recorded documents.

1. Halverson

To reach the Appellant's jurisdictional arguments, further elaboration is necessary on the applicability of the Halverson decision, *Halverson v. Bellevue*, 41 Wn. App. 457 (1985). The primary and most complicated issue of this appeal remains whether *Halverson* allows the hearing examiner to assess the "language of the easement" as required by MICC 19.02.020H2. There are at least a couple reasons why *Halverson* doesn't preclude that assessment. Even if *Halverson* does preclude such review, the assessment of easement rights in this case will ultimately not result in any substantial prejudice to the parties.

Halverson generally dictates that if local permit review involves resolving quiet title issues, the permit review must be stayed or perhaps denied[2] pending resolution of the quiet title issues by superior court. 41 Wn. App. at 460 ("*Because the merit of an adverse possession claim cannot be determined by the city prior to adjudication, caution in approving plats in such cases is warranted. ... Once the City was put on notice of Halverson's [adverse possession] claim, approval of the plat as submitted was improper*.)

As noted in the Final Decision, the first reason *Halverson* is not found to apply is because the regulatory context has changed since *Halverson* was issued more than 40 years ago. Since then the legislature has adopted multiple permit processing deadlines under RCW 36.70B.080[3] with financial consequences under RCW 64.40.020. Strict

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[2] The *Halverson* decision only concluded that approval of the subdivision was improper once the City was put on notice about the adverse possession claim. 41 Wn. App. at 460. As discussed in Footnote No. 2, avoiding permit approval could theoretically be accomplished by either a stay or denial of the permit. Those options will be referenced as a "*Halverson* stay" in this summary.

[3] The Appellant correctly identifies that RCW 36.70B.080 permitting deadlines don't apply to building permits because those permits aren't included in the definition of project permits as defined by RCW 36.70B.020(4)(b). Building permits likely aren't subject to 36.70B procedural requirements because they're processing times are so short that the procedural steps designed to expedite project review would lengthen their processing time. Most other types of land use decisions are subject to the RCW 36.70B.020(4) project permit definition, including the preliminary plat assessed in *Halverson*. Further the City's municipal code imposes a 65-day processing deadline on building permits anyway. See MICC 19.15.030, Table A.

The conflicts created by RCW 36.70B.080 permitting deadlines and the associated state policy of expeditious permit processing create a sound basis for no longer finding *Halverson* applicable to the project permits defined in RCW 36.70B.020(4). Excluding building permits from that conclusion wouldn't make much sense given that building permits typically take less time to process than project permits. The resulting dichotomy under the Appellant position would be that permits taking a relatively

application of *Halverson* would require the City to stay its building permit review until a superior court exercised its original jurisdiction to resolve the title dispute. There is no exception for *Halverson* stays of permit review[4]. In finding *Halverson* inapplicable for this reason, the Examiner is not overruling *Halverson* as suggested by the Appellant. Rather *Halverson* is simply not found to apply to the current regulatory land use framework, which substantially differs from that of 1985 when *Halverson* was issued.

The Final Decision identified RCW 36.70C.100 as an example of a new regulation that renders Halverson questionable. RCW 36.70C.100 creates a process for staying local land use decisions pending judicial appeal. Appellant asserts that she wouldn't be able to acquire a stay to resolve her easement issues on appeal, citing to unpublished case of *Durbin v. City of Univ. Place*, 33 Wash. App. 2d 1025 (2024). The *Durbin* case noted that a "*LUPA [Chapter 33.70C RCW] action c[an] not determine the validity of [an] easement because an easement's validity is not a 'land use decision' within the meaning of RCW 36.70C.020(2).*"

This appeal is distinguishable from *Durbin* because resolution of title issues is directly required by a City land use regulation, i.e. MICC 19.02.020H2. *Durbin* dealt with a short plat application in which there was a dispute over the use of an access easement to the plat. There was no land use regulation identified in *Durbin* that compelled resolution of the easement dispute. RCW 36.70C.020(2) includes in its definitions of a "land use decision" an application for a project permit required before property can be developed. As previously noted, the Examiner in this case is tasked with ascertaining where the building permit complies with all pertinent land use standards, which includes MICC 19.02.020H2. MICC 19.02.020H2 in turn prohibits construction

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short amount of processing time would be vulnerable to extensive *Halverson* delays while permits typically taking much longer would not.

[4] If a court were inclined to significantly bend statutory requirements to accommodate *Halverson*, it could construe the results of a quiet title action to be "additional information" that tolls permitting deadlines. RCW 36.70B.080gi excludes the time that permit applicants must provide "additional information" from permit processing deadlines. Such a position would add significant delay and expense to permit processing while yielding nominal authority to the original jurisdiction of the superior courts. If tortured constructions are found necessary to deal with *Halverson*, a much more practical approach would be to simply not construe title issues attaching to provisions such as MICC 19.02.020H2 as quiet title issues, but rather as nonbinding local code constructions necessary to assess code compliance.

Another untenable option in dealing with Halverson would be to give the Applicant the choice either have the application denied due to insufficient information regarding tile or in the alternative waive any claims of liability due to permitting delay for the duration of a superior court quiet title action. As identified above, such tortured acrobatics have nominal practical impact in honoring the original jurisdiction of superior court.

It is recognized that RCW 36.70B.080 doesn't impose any deadline on the processing of administrative appeals. However, any finding in an administrative appeal that imposes a Halverson stay is a finding that the original permit decision makers should have stayed their review. To construe that otherwise would make the original decision makers undertake the pointless task of resolving quiet title actions only to have that found outside their jurisdiction in the administrative appeal.

within a utility easement unless consistent with the scope of the easement or mutually agreed upon in writing. The specific reference to the scope of the easement in MICC 19.02.020H2 makes the scope of the easement directly pertinent to approval of the building permit. No such regulation was identified in *Durban*. As such, the scope of the easement is a land use decision issue in this case subject to LUPA appeal and its associated LUPA stays.

Appellant also asserts that having to file for a stay and quiet title action would not be feasible or efficient. Appellant's position appears to be that *Halverson* still applies to assessment of the applicability of the Ex. 45 1981 declaration, i.e. that approval of the building permit must be put on hold until a court quiets title to the issues of the Middle Easement. Under Appellant's position the retaining wall improvements would remain in violation of code until they were removed or a quiet title action was issued. Under these conditions Appellant would have little incentive to file a quiet title action. That would be left up to the Applicants. They would have to go through the time and expense of a quiet title action just because someone voiced a potential adverse claim that they may or may not have actually pursued. Overall, such a process doesn't appear to be more efficient than the LUPA stay process referenced in the Final Decision.

The Final Decision did err in omitting a perhaps more persuasive and directly applicable reason that *Halverson* doesn't apply to this case. Specifically, *Halverson* is factually distinguishable because the adverse possession claimant of that case had filed a quiet title action at the time the preliminary plat application was under review. *See* 41 Wn. App. at 458. The Appellant has provided the City with no indication that she has filed a quiet title claim. For *Halverson* to be the least bit workable in the real world, it must be construed as limited to circumstances where an adverse claimant is invested enough to file a quiet title claim. Otherwise, project opponents have the unfettered power to stop and indefinitely stall project review by manufacturing frivolous adverse title claims at every project they oppose. In the absence of any filed quiet title action by a project opponent under a *Halverson* stay, the project applicant would be burdened with filing the quiet title action regardless of the merits of the claim[5] or face an indefinite stay or denial of its application.

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[5] At page 5 of her reply brief the Appellant suggests that cities counties can adjudicate title issues if the ordinances are clear in their requirements, citing *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P.3d 218 (2012). Littlefair does not support such a conclusion. At issue in Littlefair was a county zoning ordinance that prohibited buildings or structures within easements. The clarity of the ordinance was only pertinent in that case because the trial court had found the ordinance unenforceable because the County was "laced with easements that have structures on them" and that enforcing the zoning ordinance would "wreak havoc on the county's ability to have any reasonable land use proceedings whatsoever." 169 Wash. App. 670. The court found that since there was no ambiguity in the ordinance, it had no choice but to enforce its plain terms.

Although its somewhat tempting to conclude that unambiguous title issues can be adjudicated by cities and counties, that's not the ruling in Littlefield. Littlefield didn't address who has jurisdiction to assess whether the encroachments at issue violated the terms of any easement. Jurisdiction wasn't an issue

To avoid the scenario above the City could theoretically assess the merits of each adverse title claim and just impose a *Halverson* stay for those claims the City believes have merit. This puts the City in the ironic position of having to assess quiet title issues outside of its jurisdiction and facing permit delay liability if it's wrong.

Ultimately, even if *Halverson* does dictate a stay or denial of the building permit, it likely is harmless error and in most respects beneficial if the City assesses title rights anyway. If someone disagrees with the title determinations of a City permitting decision or administrative appeal, they can judicially appeal the decision and consolidate that appeal with a quiet title action. If *Halverson* applies, the title rulings of the administrative appeal decision would be found inapplicable and the quiet title decision would govern. Overall, such a procedure would be more efficient than dealing with the back and forth of a Halverson stay or denial of the building permit. If the parties agreed with the title rulings of the administrative ruling, they could then avoid the delay and expense of a quiet title action entirely. If they don't agree, the administrative title rulings wouldn't significantly delay the permit review process unless the superior court title rulings materially change the outcome of the local review.

Appellant cites to "post-Halverson" case law that she purports to show that *Halverson* still applies today. The first case she cites is *Gorman v. City of Woodinville*, 175 Wash. 2d 68, 283 P.3d 1082, 1084 (2012). That case is irrelevant to the authority of local decision makers to assess easement rights. The *Gorman* court just cited to *Halverson* to support its ruling that title passes under adverse possession upon passage of the 10-year limitations period without the need to sue to perfect the interest. Id. At 74. This just means that the timing of a transfer in ownership due to adverse possession isn't affected by when a quiet title action is filed – the quiet title ruling just identifies when the transfer occurred. To the extent that principle applies to this case, the Appellant also has utility rights to the Middle Easement regardless of whether she's yet acquired a quiet title ruling to that effect. That's all that *Gorman*[6] and the four other cases cited in Footnote 2 of the Appellant's reply brief stand for. Those rulings don't address who has the jurisdiction to determine if and when an adverse possession claim has been perfected.

Appellant's second "post-Halverson" case is similarly irrelevant to the jurisdictional issues of this appeal. Appellant cites to *Harrison v. Cnty. of Stevens*, 115 Wn. App. 126, 132, 61 P.3d 1202 (2003) for its ruling that "*[c]onsent by the owners is necessary*

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because it was superior court trial judge who made that determination. As noted in the Final Decision, superior courts have original jurisdiction to adjudicate title issues.

[6] The Appellant also notes that the *Gorman* Court found that the City could have avoided the costs of litigation by simply doing an inspection prior to the dedication. That comment was simply referring to the fact that the City could have ascertained by a site inspection that the property at issue had transferred ownership due to adverse possession. This was just recognition by the court, again, that the timing of a transfer of ownership by adverse possession is not affected by when a quiet title action is filed. Those comments are irrelevant to who has the authority to determine if the elements of adverse possession have ever been met.

to prevent future title challenges." That conclusion was a reference to the fact that Stevens County regulations require that applications for subdivisions include signatures of all persons having an ownership interest in the land to be subdivided. The conclusion has nothing to do with who has the authority to assess those ownership rights.

The City took the position in its response brief that *Halverson* doesn't apply to this case. The City asserts that *Halverson* is distinguishable because it involved an adverse possession and ownership claim. The Appellant took a similar position at pages 2-3 of its reply brief. The ownership/adverse possession issue is not found to be a material distinction. As noted above, the pertinent *Halverson* holding was that "*an adverse possession claim cannot be determined by the City*." 41 Wn. App. at 460. It was for that reason that the *Halverson* court found approval of the plat improper. The *Halverson* court unfortunately didn't explain why the City had no such authority. However, as identified in the Final Decision, it's clear that the reason was because Article IV, Section 6 provides that superior courts have original jurisdiction "*in all cases at law which involve the title or possession of real property*." Disputes over the scope of an easement are just as much an issue of "*title or possession of real property*" as an adverse possession claim. As pertinent to *Halverson*, the City has not identified any reason why easement issues should be treated differently than adverse possession claims.

The Appellant also points out in its reply brief that the *Halverson* ruling is predicated upon the fact that applicable statutes "*don't provide a direct answer*" to the question of how local government should proceed in cases of disputed ownership. Neither do the City's regulations in cases of disputed easement scope. The Appellant asserts that the City regulations provide that answer by prohibiting encroachments into easements. The state subdivision statutes in *Halverson* provided equivalent guidance by requiring signatures of all owners to a plat application. Both sets of regulations fail to identify who must resolve the title issues pertinent to establishing ownership or scope of easement. There is no material distinction between *Halverson* and this appeal on the failure to answer issue.

2. Code Based Jurisdiction

Appellant asserts that the examiner has no authority to assess easement rights because the Code limits the Examiner's jurisdiction to "*hear and decide upon applications and appeals as designated in th[e] Code*." MICC 3.40.020(A). That same code prohibits the construction of any structure within a utility easement unless consistent with the "language of the easement" or mutually agreed upon in writing. MICC 19.02.020H2. The Examiner's role to "decide upon applications" is to determine whether applications conform to approval criteria. The decision under appeal is a building permit governed by the 2021 edition of the International Residential Code (IRC). See MICC 17.02.010. Section 105.3.1 of the IRC requires conformance of building permit applications to the requirements of "pertinent laws." MICC 19.02.020H2, requiring an assessment of easement scope, is clearly a pertinent law. The Examiner's duty and authority to

"decide upon applications" includes the duty to ascertain the scope of an easement as required by MICC 19.02.020H2.

3. City's Cautionary Approach

Appellant asserts that the Examiner departed from the City's "cautionary approach" in interpreting the scope of the easement. The Examiner's "approach" precisely follows what the City advocated in its prehearing brief. As succinctly stated in the brief:

> *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.*

City prehearing brief, p. 2.

As noted at page 4 of the brief:

> *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 [sic] within the context of its permitting decisions. MICC 19.02.020(H) provides: …*

The City both recognizes the novelty of having to interpret the scope of easements and that such analysis is required by MICC 19.02.020(H). The Examiner's decision is limited to ascertaining whether the Applicant's retaining walls impermissibly encroach into the Middle Easement, exactly what the City requested the Examiner to do. Appellant's only evidence to the contrary is a statement from code enforcement staff at the hearing that in permit review the reviewer will identify what easements are present and then "coordinate with the code and what the code says regarding the specific type of easement." Tr. 62. In this case, the code for utility easements under MICC 19.02.020(H) requires that no utility easement encroachments are permitted unless "within the language of the easement." The Examiner has applied the code to ascertain whether the retaining walls are allowed "within the language of the easement" just as staff would have done if they had not been misinformed by the Applicant that the Middle Easement was no longer in place.

B. Advisory Opinion

Appellant somehow characterizes the Examiner's decision as an "advisory opinion" because evidence was presented at the appeal hearing that wasn't provided to the City when it reviewed the building permit under appeal. Specifically, the City was not made aware of Judge Segal's superior court decision during its review of the building permit. For this reason, the Appellant asserts that a remand is necessary so the City can assess the impact of the judge's decision. The appeal of this case was held in a de novo open record appeal hearing. Remands are not required because new evidence is

presented in an open record appeal. City staff addressed the language of the Middle Easement during permit review. They had a full opportunity to address Judge Segal's decision in the appeal hearing. Appellant also had a full opportunity to address the scope of the Middle Easement and did so during the appeal hearing. There is no basis for a remand instead of a final decision.

At the outset, it should be obvious that the Examiner's opinion is not an advisory opinion. The case law cited by Appellant concerns circumstances where the court was asked to resolve issues that weren't necessary to resolve the case. That's not the situation here. As previously noted, MICC 19.02.020(H) requires that no utility easement encroachments are permitted unless permitted "*within the language of the easement*." Whether or not the building permit was correctly issued depends primarily in this case upon whether the retaining wall encroachments were authorized by the language of the Middle Easement. There's no question that this issue had to be resolved by the examiner or (arguably) the courts to evaluate the validity of the building permit decision under appeal.

Appellant's "advisory opinion" case is *Prosser Hill Coal. v. Cnty. of Spokane*, 176 Wash. App. 280, 292, 309 P.3d 1202, 1209 (2013). In that case the Court of Appeals was asked to address the merits of a hearing examiner decision approving a conditional use permit. The trial court had remanded the case for another public hearing due to improper public notice and the Court of Appeals had upheld remand on that basis. Despite the remand, the applicant still wanted the Court of Appeals to address the merits of the Examiner's decision. The Court of course declined, since a new public hearing was still outstanding. Any opinion issued by the court under such circumstances would be purely advisory since the hearing examiner was tasked in that case with holding another public hearing where she or he would have to apply law to facts and arrive at a new decision. The Court of Appeals opinion on the merits in that scenario would just provide guidance as to how the Examiner should rule, which easily fits into the common understanding of an "advisory opinion."

The *Prosser Hill* court also noted that it could not rule upon the merits of the case because the superior court hadn't as well. As noted by the *Prosser* Court of Appeals, the superior court had original jurisdiction under land use appeals under RCW 36.70C.040(1). The superior court hadn't addressed the merits because it had remanded the case for a second hearing. In this case, the hearing examiner has original administrative appeal jurisdiction like superior courts in land use appeals. For this reason, the examiner's review authority is not analogous to that of the Court of Appeals, which doesn't have original jurisdiction. Further, City staff did assess the same issues reviewed by the Examiner, i.e. whether the Middle Easement precluded retaining wall encroachments. City staff came to different conclusions about the easement because they had less information than was presented to the examiner. As previously noted, there's no authority that requires a remand just because of new information presented in an open record hearing that could have changed the staff level decision.

Appellant also again cites to caselaw that provides that the authority of a hearing examiner is limited to the powers granted to them by the legislative body that creates them. As referenced by Appellant herself, MICC 3.40.020(A) grants the examiner the authority to "hear and decide upon applications and appeals as designated in th[e] Code." MICC 3.40.020(A). The code allows for open record hearings on appeals of building permit decisions. MICC 19.15.030 Table A, MICC 19.15.140A. The examiner held an open record hearing for a building permit appeal as expressly and clearly authorized by applicable code provisions. None of those code provisions require a remand because of new information presented at an open record hearing.

A remand might have been justified if the language of the easement were not addressed by the parties at the hearing. That's not the case. At the appeal hearing Appellant presented numerous exhibits depicting the utility encroachments. As identified in Appellant's prehearing brief, her counsel specifically addressed the language of the easement, arguing that the retaining wall "*acts to fully enclose sections of that utilities easement*" in violation of the language of the utility easement. Appellant's prehearing brief, p. 13. The Appellant also submitted a declaration from her contractor that addressed easement access. See Ex. 1003. The details of the title history were also addressed by the Applicant's attorney during the appeal hearing. There is no need to remand to collect further information on this issue.

Remand could also be helpful if staff expertise is necessary to address some new issues raised in the appeal hearing. The only new issues raised in the appeal are based upon applications of the language of the Middle Easement. City staff have expertise on the interpretation and application of City code. They don't have any significant expertise in interpreting private easements. As emphasized by Appellant herself, the courts usually have the responsibility to assess easement rights. Given the litigious nature of this case, there's nothing to be gained in remanding this appeal to staff for their lay opinion on Middle Easement rights when ultimately the issue may very well be resolved by the courts.

Related to remand, the Appellant's reply brief mischaracterizes what staff would do in case of a remand. Page 4 of the brief asserts that had staff known about Judge Siegel's decision, they "*likely*" would require removal of the retaining wall. Staff made no such comment. In response to what staff would have done if they'd had Judge Siegel's decision, Ms. Manahan replied that the result "**may** be to remove the retaining walls." (emphasis added), Tr. 64. Staff likely have no idea how they'd apply the easement at this point. Planning and building staff are not lawyers. They have no expertise in assessing the language of private easements. At best they would act upon the advice of the City Attorney, who would otherwise be taking the same position in a judicial appeal. Since the parties, including the City, had a full opportunity to litigate the scope of the easement at the appeal hearing, there's nothing to be gained from remanding the issue back for staff's opinion on a legal title issue.

C. Intent and Language

Appellant asserts that the intent and plain language of MICC 19.02.020(H) prohibits the retaining wall encroachments in the Middle Easement. Appellant derives that intent by focusing upon the first sentence and pretending that the second sentence doesn't exist. Of course, plain intent is not derived by ignoring those portions of a statute one finds unappealing. All of the text must be considered in deriving intent and plain language. As noted by Appellant, the first sentence of MICC 19.02.020(H) does provide that "easements shall remain unobstructed." The sentence Appellant wishes to ignore is the more specific sentence applicable to utility easements in MICC 19.02.020H2. That subsection clearly and unequivocally provides that utility easement encroachments are authorized "*if permitted within the language of the easement*." There is no ambiguity as to the intent and plain meaning of MICC 19.02.020(H) as it applies to this case – encroachments are not allowed unless permitted by the language of the easement.

The Appellant claims that the Examiner used a "*less exacting standard*" for review of the plain language of the easement by assessing whether the encroachment is "consistent with the scope of the easement." The scope of the easement is defined by the "language of the easement," the very issue required to be assessed for compliance with MICC 19.02.020H2. The Examiner's review was limited to assessing the language of the easement, i.e. its scope, the issue plainly and clearly required by MICC 19.02.020H2 to assess if its requirements are met.

Appellant's reply brief reveals that Appellant apparently distinguishes the "scope" of the easement from the "language of the easement" by asserting that the Ex. 45 declaration isn't part of the "language of the easement" and is therefore the scope of the easement[7]. See Reply Brief, p. 1. Apparently, assessing the plain meaning of easement

[7] It is acknowledged that perhaps the point the Appellant is making is that MICC 19.02.020H2 limits evaluation of the scope of the easement to the "language of the easement" and that this doesn't include restrictions added to the easement by other title documents. Such a position would result in absurd consequences such as finding that subsequent recorded amendments to an easement couldn't be considered as part of the "language of the easement" because it's not in the same recorded document. It also requires the understanding that the location of the easement language in one document is more determinative than ascertaining what encroachments are actually allowed by an easement whose terms are dispersed in more than one document. There is some partial merit to such an interpretation. It does compel a relatively quick and simple scope analysis as opposed to the more intense legal analysis that a court would employ in the exercise of its original jurisdiction. However, such an interpretation makes little practical sense for developers struggling to find space for required improvements just because the language of an easement is spread across more than one recorded document. The more practical and rational interpretation of the "language of an easement" in MICC 19.02.020H2 is that it refers to the language that governs the scope of the easement, whether that be in one easement document or more than one. In this regard, the "language of the easement" as referenced in MICC 19.02.020H2 is the language contained in both Ex. 2005 BLA and the Ex. 45 1981 declaration.

The consideration of both Ex. 2005 and Ex. 45 in this case for "language of the easement" is particularly compelling in this appeal because the BLA that creates the easement is simply a survey that highlights the location of all easements on the Applicant's property. Ex. 45 provides the detail of those easements that can't be depicted on the survey map itself. An additional page of the BLA survey could lay out the

language doesn't qualify as resolving a title issue subject to original superior court jurisdiction, but using extrinsic aides of construction like associated title documents does qualify as a superior court title issue. The Appellant cites to no legal authority for such a tortured distinction.

As identified in Finding of Fact (FOF) No. 4 of the Final Decision, the BLA that establishes the existence of the Middle Easement expressly references the easement nomenclature of the Ex. 45 declaration. In assessing the "language of the easement," the Appellant essentially takes the position that the nomenclature must be ignored because it relates to another document. It's unlikely that any court will mandate that local decision makers make erroneous easement interpretations by requiring them to ignore pertinent evidence of what easement language is intended to mean. Either the Examiner can use all relevant evidence to interpret the language of an easement or he is entirely barred from considering the issue under *Halverson*. The partial authority to interpret easement language advocated by the Appellant is not supported by any legal authority or conducive to a rational decision-making process.

Appellant then goes on to assert that the Examiner's assessment of MICC 19.02.020H2 should have stopped upon finding that there was no mutual agreement to encroach into the easement. Again, Appellant cannot simply choose to ignore associated title documents such as the Ex. 45 declaration because she finds them unappealing. The MICC 19.02.020H2 exceptions for easement encroachments aren't limited to agreed upon encroachments. The exceptions include encroachments permitted by the "language of the easement." Those permitted encroachments are outlined in Ex. 45.

Appellant mischaracterizes the Examiner decision as concluding that the encroachments don't "enclose" the easement solely because they're modest. The decision at FOF No. 9 references the survey of the property that shows that the "*retaining wall encroachments are modest. They do not in any sense of the term "enclose" the utility easement area*." As readily seen from the foregoing, FOF No. 9 was not solely based upon the extent of the encroachment. It was based upon the term "enclose" and the survey showing the extent of the enclosure. The term "enclose" is defined by Webster' as "to close in: surround." As shown in the Ex. 9 p 2 survey referenced in FOF No. 9, the encroachments of the retaining wall aren't extensive enough (i.e. are too modest) to enclose, i.e. surround, any portion of the Middle Easement.

Appellant also asserts that the retaining wall prevents access to her waterline. As noted in FOF No. 9 of the Final Decision, whether the retaining wall encroachments prevent access to the waterline is left for resolution to another date in a quiet title action. That issue is not yet ripe for review. Claims are ripe for judicial review if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *WT Props., LLC v. Leganieds, LLC*, 195 Wash. App. 344, 353, 382 P.3d 31

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details of each individual depicted easement. However, there's little reason to have to acknowledge the second page of a BLA survey but to ignore a separately recorded document that provides the same information.

(2016) A court must consider the hardship to the parties if the court declines to address the issue. Id. In this case impediments to access cannot be fully addressed because no attempt access under the retaining walls has yet been made. As identified in the Final Decision, the best the Applicant's water contractor could claim is that the encroachment "may" affect access. Deferring resolution of the issue won't prejudice the parties in terms of available remedies. The remedies available now or in the future are largely the same, i.e. the encroachment has to be removed or may be retained.

In her reply briefing the Appellant raises the compelling point that the Appellant could be prejudiced by a delayed review if she faces an emergency situation that requires immediate or expedited access. If the Appellant is without water or a leak is causing property damage, there may not be sufficient time to file a quiet title action to challenge the encroachment. To the extent that a finding addressing access must be based upon the record of this proceeding, it is determined that there is substantial and a preponderance of evidence establishing that the retaining wall encroachments into the Middle Easement are not designed to prevent access to the waterline.

FOF No. 9 of the Final Decision identifies several compelling reasons why the modest Middle Easement encroachments don't impair access to the Appellant's waterline. As previously noted in FOF No. 9 of the Final Decision, the best Appellant could get from her contractor, the only person qualified to testify on the issue, was that the retaining walls "may impact" future access. The Appellant did testify that the retaining wall would impair access, but she identified no reason for this conclusion. Her comments were just unsupported assertions of fact. It is also important to recognize that the "*language of the easement*" in the Ex. 45 Declaration requires that the retaining wall be constructed "*for the purpose of denying access*." The Ex. 9 survey constitutes substantial evidence that this is not the case, that the modest retaining wall encroachments were not designed to deny access. The retaining walls are narrow and only serve as a minor obstruction to access. Further, the vast majority of the retaining walls are located outside of the easement. If the retaining walls were designed to obstruct access their construction would have been concentrated within the Middle Easement as opposed to outside of it. The Ex. 9 survey and the photographs show that the portions of the retaining wall in the easement are modest in scale. They show that more likely than not work can be done under the walls without too much effort or alternatively that the portions interfering with repair work could be easily removed[8].

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[8] Major reliance is placed upon the Ex. 9 survey to ascertain the extent of the retaining wall encroachments. Only the Appellant supplied photographs of the retaining wall and most did not show the retaining wall as located within the easement. Photograph 1013 shows a massive two tiered retaining wall, but almost none of it except for a wing extension on the far left encroaches into the middle easement. The most revealing photograph showing the modest encroachment of the retaining wall appears to be Ex. 1004, which shows the encroachment on the right side. In assessing the location of the retaining wall, it helps to keep in mind that the gazebo is closest to the Middle Easement with the enclosed greenhouse located further away.

The Appellant at p. 8 of her reply brief asserts that City staff have found retaining wall encroachments within utility easements to violate the language of the easement because the City required removal of

Appellant also asserts that she's been prevented from having access to the Middle Easement because the Applicant has denied her access. That issue is beyond the scope of this review. Application of MICC 19.02.020H2 is limited to assessing whether structures located within the Middle Easement are denying access. If the Applicant is verbally refusing to allow Appellant access, that is a separate matter that isn't pertinent to approval of the building permit for the retaining walls.

Due Process

Appellant asserts that approving the building permit denies her due process by failing to follow the requirements of MICC 19.02.020H2. Appellant claims that she has a protected property interest under MICC 19.02.020H2 because that provision requires the terms of the Middle Easement to be enforced. Those terms have been properly enforced as discussed above. Consequently there is no due process violation.

City Response Issues

The City also asserts in its response that accessibility of the easement need not be resolved in the application of MICC 19.02.020(H)(2). That position is directly at odds with the requirements of MICC 19.02.020(H)(2). MICC 19.02.020(H)(2) requires an assessment of the "language of the easement." The language of the Middle Easement expressly states that the Applicants may not install any structure "*for the purpose of denying* ***access*** *to or physically enclosing any such easement" without written consent of the Appellant*." (emphasis added). Access is a central element of the "language of the easement" and must be addressed to assess compliance with MICC 19.02.020(H)(2).

It appears that the City may have been referring to the verbal denials of access allegedly made by the Applicant to the Appellant. As previously noted, it is agreed that those denials are beyond the scope of this appeal. The access issue is limited to denial of access by the retaining wall encroachments.

DECISION UPON RECONSIDERATION

Appellant's request for reconsideration is denied. The legal analysis above is intended to supplement the Conclusions of Law of the Final Decision. In addition, if the issue of easement access is found by a reviewing court to be ripe for review, the substantial and preponderance of evidence in the record establishes that access is not denied for the

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the retaining wall from the north easement of project site. However, as depicted in Exhibits 1004 and 1013, the retaining wall encroachment on the north side of the property is substantially significantly more severe than the encroachments in the middle easement. The two sets of encroachments are not comparable.

reasons identified in the last paragraph of Page 13 above along with Footnote No. 8 as well as FOF 9 of the Final Decision.

Dated this 30th day of April, 2026.

Phil Olbrechts

Phil Olbrechts,
City of Mercer Island Hearing Examiner

Appeal Right and Valuation Notices

This land use decision is final and subject to appeal to superior court as governed by the Land Use Petition Act, Chapter 36.70C RCW.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.