

**BEFORE THE HEARING EXAMINER for the
CITY of MERCER ISLAND**

ORDER GRANTING MOTION TO DISMISS

FILE NUMBER: APL25-004

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TYPE OF CASE: Appeal from Approval of Critical Area Review 2; Ref. file no. CAO24-32

WHEREAS, the City of Mercer Island Hearing Examiner (“Examiner”) has before him the April 28, 2025, appeal of Robert Grossman (“Grossman”) (Exhibit 9002) from the City of Mercer Island Community Planning & Development’s (“CP&D’s”) April 14, 2025, approval (with conditions) of Seascope Homes,

LLC's ("Seascape's") Critical Area Review 2 ("CAR 2") application under City file number CAO24-032 (Exhibit 9001¹). Grossman's appeal alleges that removal of Trees 1003 and 1004 as depicted on the approved CAR 2 site plan would violate Mercer Island City Code ("MICC") provisions regarding tree retention. Grossman's appeal does not allege errors in the CAR 2 critical areas action *per se*; and

WHEREAS, this Order is in response to a June 20, 2025, Motion for Summary Judgment (Exhibit 9011) filed by Seascape (See below.); and

WHEREAS, summary dismissal requests in the quasi-judicial realm are akin to summary judgment requests in the judicial realm. Washington's appellate courts have explained the standard of review to be applied in summary judgment requests.

When reviewing a summary judgment order, we engage in the same inquiry as the trial court, affirming summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Staples v. Allstate Insurance Co., __ Wn.2d __, __ P.3d __ (2013)

A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986); and

WHEREAS, to facilitate reference to the several documents relating to the Grossman appeal now in the Examiner's possession, the Examiner herewith assigns the following administrative exhibit numbers for identification:²

Exhibit 9001:	Staff Report & Decision, CAO24-032, with Exhibits 1 – 14, to be cited as Exhibit 9001.1 - .14, issued April 14, 2025
Exhibit 9002:	Appeal, filed April 28, 2025
Exhibit 9003:	Letter, Examiner to Principal Parties, May 2, 2025 (Scheduling)
Exhibit 9004:	City of Mercer Island's Motion to Dismiss, filed May 12, 2025
Exhibit 9005:	Applicant's Joinder and Request for Expeditious Ruling, filed May 13, 2025
Exhibit 9006:	Email, Examiner to Principal Parties, May 13, 2025 (Setting deadline for responses to the Motion)

¹ The PDF page numbers in Exhibit 9001 run sequentially without regard to attached exhibit differentiation.

² The following exhibit numbers are assigned in accordance with the procedure for assigning administrative exhibit numbers in appeal cases as spelled out in RoP 224.

Exhibit 9007: Appellant's Response to Respondent's Motion to Dismiss, filed May 20, 2025
 Exhibit 9008: Email, Keiffer to Principal Parties, May 21, 2025 (Out of country notice)
 Exhibit 9009: Email, Examiner to Principal Parties, May 21, 2025 (Notice that Order will be issued after Keiffer's return)
 Exhibit 9010: Interlocutory Order Denying Motion to Dismiss, issued June 9, 2025
 Exhibit 9011: Applicant Seascope Homes, LLC's Motion for Summary Judgment, filed June 20, 2025
 Exhibit 9012: Declaration of Michael A. Spence in Support of Applicant Seascope Homes, LLC's Motion for Summary Judgment, with Exhibits A – K, to be cited as Exhibits 9012.A - .K, filed June 20, 2025
 Exhibit 9013: Email chain, Seascope-Examiner-Grossman-Examiner-Grossman, June 20, 2025 (Setting and adjusting deadline for responses to the Motion)
 Exhibit 9014: Appellant's Response to Applicant's Motion for Summary Judgment, filed July 1, 2025
 Exhibit 9015: City of Mercer Island's Response to Seascope Homes, LLC's Motion for Summary Judgment, filed July 3, 2025, at 2:03 p.m.
 Exhibit 9016: Declaration of Ryan Harriman in Support of City's Response to Applicant's Motion for Summary Judgment, with Exhibits A & B, to be cited as Exhibits 9016.A & .B, filed July 3, 2025, at 2:03 p.m.
 Exhibit 9017: Declaration of Andrea Larson, filed July 3, 2025, at 2:03 p.m.; and

WHEREAS, Seascope proposes to construct a single-family residence on King County Assessor's Parcel # 141030-0057 ("Parcel 0057"). (Exhibit 9001.1, PDF 3 & 4) Parcel 0057 contains "a piped and uniped *{sic}* watercourse and within a geologically hazardous areas *{sic}*, specifically a potential slide and erosion hazard area." (Exhibit 9001, PDF 4) Trees 1003 and 1004 are located outside of the regulated critical areas on Parcel 0057. (Exhibit 9012.F, PDF 27, 30, & 56); and

WHEREAS, "The purpose of a critical 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)(1)] However,

When development and/or activity is proposed on a site containing geologically hazardous areas and one or more of the critical area types listed in subsection (B)(2)(a) of this section or the associated buffer of one of those critical areas, a critical area review 2 reviewing all critical areas is required to be reviewed and approved prior to construction authorization, using the procedures required for a Type 3 land use review."

[MICC 17.09.090(B)(2)(c)]; and

WHEREAS, the City's tree protection, retention, and replacement regulations are contained in Chapter 19.10 MICC. "Generally, a permit is required to remove any tree with a diameter of greater than ten inches" [MICC 19.10.010(A)] "Permit approval to remove one or more nonhazardous trees may take the form of a tree removal permit or other construction permit approval." [MICC 19.10.020(B)(1), underlining added] On September 24, 2024, the date that Seascope filed its CAR 2 application, it also filed a Concurrent Review form requesting concurrent review of its applications, which include Building Permit application 2410-056. (Exhibits 9001.1 PDF 3; 9001.3, PDF 16); and

WHEREAS, the CP&D CAR 2 Decision (Exhibit 9001) does not discuss compliance with Chapter 19.10 MICC but does state that “[t]he project also includes the planting of replacement trees” (Exhibit 9001.1, PDF 6) The CP&D CAR 2 Decision concludes with the statement that CAR 2 “application CAO24-032 as depicted in **Exhibit 8**, is hereby **APPROVED as conditioned**. (Exhibit 9001.1, PDF 10, bold in original); and

WHEREAS, Exhibit 9001.8 is a 36-page plan set including site plans (PDF 104 & 105), “Replacement Tree Plan” (PDF 106), a lot survey (PDF 107), clearing, grading, and utility plans (PDF 108 – 113), complete structural construction plans for the proposed residence (PDF 114 – 133), mitigation plans (134 – 138), and a landscape plan (PDF 139); and

WHEREAS, tree removal permit applications are classified by the City as Type I Land Use Reviews; major building permit applications are classified by the City as Type III Land Use Reviews. [MICC 19.15.030(H), Tables A & C, respectively ³] Construction of “[a] new dwelling on a vacant lot or as replacement of an existing or demolished building” is defined as a major building permit. [MICC 19.16.010, “M”, Major Building Permit, § 1] Therefore, a Tree Permit is a Type I process while a building permit for a new house is a Type III process. Type I Land Use Reviews do not require public notification, notice of application, public hearing, or notice of decision. As opposed to Type I applications, Type III Land Use Reviews do require notice of application and notice of decision (but only to parties of record). Both Type I and III Land Use Review decisions are appealable to the Examiner. [MICC 19.15.030(H), Tables A & C] The deadline for filing an appeal from a Type I decision is 14 days after the decision. [MICC 19.15.130(B)]; and

WHEREAS, on May 12, 2025, Respondent CP&D filed a Motion to Dismiss (the “CP&D Motion”) asserting that the concern stated in Grossman’s appeal was beyond the scope of the CAR 2 review and, thus, beyond the scope of the Examiner’s jurisdiction in this appeal. (Exhibit 9004) On May 13, 2025, Seascope joined in the CP&D Motion. (Exhibit 9005) Grossman filed a Response on May 20, 2025. (Exhibit 9007) On June 9, 2025, the Examiner issued an Interlocutory Order Denying [the CP&D] Motion to Dismiss (Exhibit 9010); and

WHEREAS, on June 20, 2025, Seascope filed a Motion for Summary Judgment (the “Seascope Motion”) accompanied by the Spence Declaration. (Exhibits 9011 and 9012, respectively) Pursuant to Hearing Examiner Rule of Procedure 204(b), the Examiner set a deadline for submittal of responses to the Seascope Motion which he later extended to 5:00 p.m. on July 3, 2025, at Grossman’s request. (Exhibit 9013) On July 1, 2025, Grossman filed a Response to the Seascope Motion (Exhibit 9014); on July 3, 2025, at 2:03 p.m. CP&D filed a Response to the Seascope Motion (Exhibit 9015); and

WHEREAS, the Examiner has considered the Seascope Motion, the Spence Declaration, Grossman’s Response in opposition, CP&D’s Response in support, Harriman’s Declaration, and Larson’s Declaration; and

³ The inference in the Examiner’s Interlocutory Order Denying Motion to Dismiss (Exhibit 9010, PDF 3, fourth whole recital on PDF 3) that all building permits are Type I is not correct. Only “Nonmajor [*sic*] building permits” are Type I; “Major building permit” is a Type III application. [MICC 19.15.030(H), Tables A & C, respectively]

WHEREAS, the Spence Declaration includes a copy of the building permit plan set for Building Permit 2410-056, the residence which Seascope proposes to build on Parcel 0057. That plan set's "Residential Code Coversheet" shows that building permit review was approved on April 18, 2025, that Planning review was approved on April 15, 2025, that Engineering review was approved on March 25, 2025, that tree review was approved on April 15, 2025, and that Fire review was approved on March 31, 2025. (Exhibit 9012.F, PDF 23, data located in the "Plan Review Approvals" block in the lower right-hand corner of the sheet) Spence and Harriman included copies of permits/permit logs for the project that had been issued by the City: Building Permit 2410-056, issued April 30, 2025 (Exhibits 9012.B and 9016.A, PDF 5); Tree Permit 2504-153, also issued April 30, 2025. (Exhibits 9012.G and 9016.B, PDF 7) The deadline for filing an appeal from issuance of either of those permits would have been Wednesday, May 14, 2025. No appeals were filed; (Exhibit 9017, PDF 1, ¶ 4); and

WHEREAS, the Existence of the Building and Tree Permits was not known to the Examiner when he ruled on the CP&D Motion; and

WHEREAS, when the Examiner denied the CP&D Motion he concluded that issues of material fact existed that rendered summary dismissal inappropriate: Had a tree removal permit been rolled into CAR 2 permit CAO24-032 or some other development permit? Did CAR 2 permit CAO24-032 include approval of the underlying building permit? Had a separate tree permit and/or building permit been issued? Was a separate tree permit and/or building permit going to be issued? Was CAR 2 permit CAO24-032 the only forum in which the Type I or III Land Use Review right-to-appeal was available? (Exhibit 9010); and

WHEREAS, the answers to all of those questions have now been answered by the "Residential Code Coversheet" and permit copies in the Spence and Harriman Declarations: Both permits (most important to this appeal, the Tree Permit) have been issued, neither permit was appealed, and the time period within which one could have appealed either or both has passed. Simply put, CP&D issued a Tree Permit for removal of the trees whose removal Grossman is now objecting to through this appeal. That Tree Permit was subject to a right of appeal. Grossman did not appeal that Tree Permit for whatever reason.⁴ Grossman cannot now collaterally attack that Tree Permit by filing an appeal from a CAR 2 decision. The merits of either or both of the Tree and Building Permits cannot be argued through this appeal. Seascope's Motion must be approved, and Grossman's appeal must be dismissed; and

WHEREAS, the Examiner knows of no state law, City code, or City of Mercer Island Hearing Examiner Rule of Procedure authorizing or requiring the Examiner to award attorneys' fees (as urged by Seascope in Exhibit 9011, at PDF 6 & 7) in any land use matter that comes before him.⁵ Proceedings before the Examiner are quasi-judicial in nature, not judicial. Judicial rules are not applicable. Therefore, Seascope's request for attorney's fees is denied; and

WHEREAS, any Recital herein deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

⁴ Other Mercer Island residents have timely appealed issued building permits (e.g. APL24-002, *Grove v. CP&D*). (See also *Durland v. San Juan County*, 182 Wn.2d 55, 59-60, 340 P.3d 191, 194 (2014), holding that lack of notice does not alter appeal deadlines under Washington's land use system. Further, see Exhibit 9015, PDF 3 & 4.)

⁵ The Examiner also hears and decides personal property forfeiture claims under RCW 69.50 and RCW 10.105 for some jurisdictions. The applicable state law in those cases authorizes award of attorneys' fees in appropriate circumstances.

NOW, THEREFORE, the Hearing Examiner issues the following:

ORDER

The Seascope Motion (Exhibit 9011) is herewith **GRANTED** because there are no remaining issues of material fact and the applicant is entitled to dismissal as a matter of law.

Seascope's request for attorneys' fees is **DENIED**.

The April 28, 2025, appeal of Robert Grossman (Exhibit 9002) from the City of Mercer Island Community Planning & Development's April 14, 2025, approval (with conditions) of Seascope Homes, LLC's Critical Area Review 2 ("CAR 2") application under City file number CAO24-032 is **DISMISSED**.

The previously scheduled July 16, 2025, hearing is automatically **CANCELLED**.

This Order constitutes the Examiner's final disposition of this appeal.

ORDER issued July 3, 2025, at 3:40 p.m.

/s/ John E. Galt

JOHN E. GALT
Hearing Examiner

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: "1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision." [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

"Any judicial appeal of the hearing examiner's decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act ('LUPA'). The land use petition must be filed within 21 days of the issuance of the hearing examiner's decision." [MICC 3.40.100, ¶ 2]