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4 **BEFORE THE HEARING EXAMINER**
5 **FOR THE CITY OF MERCER ISLAND**

6 Phil Olbrechts, Hearing Examiner

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

15 Appellant's request for reconsideration is denied except for the addition of one added
16 finding to the Final Decision¹. If it is inappropriate to defer consideration of whether
17 the proposed Middle Easement encroachments block waterline access, it is found for
the Final Decision that the proposed encroachments do not block that access.

18 The Appellant's reconsideration request threads a particularly difficult needle. It
19 attempts to assert both that the Examiner has the jurisdiction to interpret the language
20 of the Middle Easement while at the same time asserting there is no jurisdiction to use
21 associated title documents to assist in that interpretation. The Appellant argues that the
22 Middle Easement language grants utility rights while at the same time asserting that
23 the Examiner doesn't have jurisdiction to consider another title document that limits
24 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

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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

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

1. *Halverson*

5 To reach the Appellant's jurisdictional arguments, further elaboration is necessary on
6 the applicability of the Halverson decision, *Halverson v. Bellevue*, 41 Wn. App. 457
7 (1985). The primary and most complicated issue of this appeal remains whether
8 *Halverson* allows the hearing examiner to assess the "language of the easement" as
9 required by MICC 19.02.020H2. There are at least a couple reasons why *Halverson*
10 doesn't preclude that assessment. Even if *Halverson* does preclude such review, the
11 assessment of easement rights in this case will ultimately not result in any substantial
12 prejudice to the parties.

13 *Halverson* generally dictates that if local permit review involves resolving quiet title
14 issues, the permit review must be stayed or perhaps denied² pending resolution of the
15 quiet title issues by superior court. 41 Wn. App. at 460 ("*Because the merit of an
16 adverse possession claim cannot be determined by the city prior to adjudication,
17 caution in approving plats in such cases is warranted. ... Once the City was put on
18 notice of Halverson's [adverse possession] claim, approval of the plat as submitted was
19 improper.*")

20 As noted in the Final Decision, the first reason *Halverson* is not found to apply is
21 because the regulatory context has changed since *Halverson* was issued more than 40
22 years ago. Since then the legislature has adopted multiple permit processing deadlines
23 under RCW 36.70B.080³ with financial consequences under RCW 64.40.020. Strict

24 ² The *Halverson* decision only concluded that approval of the subdivision was improper once the City
25 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

1 application of *Halverson* would require the City to stay its building permit review until
2 a superior court exercised its original jurisdiction to resolve the title dispute. There is
3 no exception for *Halverson* stays of permit review⁴. In finding *Halverson* inapplicable
4 for this reason, the Examiner is not overruling *Halverson* as suggested by the Appellant.
5 Rather *Halverson* is simply not found to apply to the current regulatory land use
6 framework, which substantially differs from that of 1985 when *Halverson* was issued.

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

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

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

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

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

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

1 within a utility easement unless consistent with the scope of the easement or mutually
2 agreed upon in writing. The specific reference to the scope of the easement in MICC
3 19.02.020H2 makes the scope of the easement directly pertinent to approval of the
4 building permit. No such regulation was identified in *Durban*. As such, the scope of
5 the easement is a land use decision issue in this case subject to LUPA appeal and its
6 associated LUPA stays.

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

18 The Final Decision did err in omitting a perhaps more persuasive and directly
19 applicable reason that *Halverson* doesn't apply to this case. Specifically, *Halverson* is
20 factually distinguishable because the adverse possession claimant of that case had filed
21 a quiet title action at the time the preliminary plat application was under review. *See*
22 41 Wn. App. at 458. The Appellant has provided the City with no indication that she
23 has filed a quiet title claim. For *Halverson* to be the least bit workable in the real world,
24 it must be construed as limited to circumstances where an adverse claimant is invested
25 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 claim⁵ or face an
indefinite stay or denial of its application.

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

1 To avoid the scenario above the City could theoretically assess the merits of each
2 adverse title claim and just impose a *Halverson* stay for those claims the City believes
3 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.

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

16 Appellant cites to "post-*Halverson*" case law that she purports to show that *Halverson*
17 still applies today. The first case she cites is *Gorman v. City of Woodinville*, 175 Wash.
18 2d 68, 283 P.3d 1082, 1084 (2012). That case is irrelevant to the authority of local
19 decision makers to assess easement rights. The *Gorman* court just cited to *Halverson*
20 to support its ruling that title passes under adverse possession upon passage of the 10-
21 year limitations period without the need to sue to perfect the interest. *Id.* At 74. This
22 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.

23 Appellant's second "post-*Halverson*" case is similarly irrelevant to the jurisdictional
24 issues of this appeal. Appellant cites to *Harrison v. Cnty. of Stevens*, 115 Wn. App.
25 126, 132, 61 P.3d 1202 (2003) for its ruling that "[c]onsent by the owners is necessary

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.

1 *to prevent future title challenges.”* That conclusion was a reference to the fact that
2 Stevens County regulations require that applications for subdivisions include
3 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.

4 The City took the position in its response brief that *Halverson* doesn’t apply to this case.
5 The City asserts that *Halverson* is distinguishable because it involved an adverse
6 possession and ownership claim. The Appellant took a similar position at pages 2-3 of
7 its reply brief. The ownership/adverse possession issue is not found to be a material
8 distinction. As noted above, the pertinent *Halverson* holding was that “*an adverse*
9 *possession claim cannot be determined by the City.*” 41 Wn. App. at 460. It was for
10 that reason that the *Halverson* court found approval of the plat improper. The *Halverson*
11 court unfortunately didn’t explain why the City had no such authority. However, as
12 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*
13 *involve the title or possession of real property.*” Disputes over the scope of an easement
14 are just as much an issue of “*title or possession of real property*” as an adverse
15 possession claim. As pertinent to *Halverson*, the City has not identified any reason why
16 easement issues should be treated differently than adverse possession claims.

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

19 **2. Code Based Jurisdiction**

20 Appellant asserts that the examiner has no authority to assess easement rights because
21 the Code limits the Examiner’s jurisdiction to “*hear and decide upon applications and*
22 *appeals as designated in th[e] Code.*” MICC 3.40.020(A). That same code prohibits
23 the construction of any structure within a utility easement unless consistent with the
24 “language of the easement” or mutually agreed upon in writing. MICC 19.02.020H2.
25 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

1 “decide upon applications” includes the duty to ascertain the scope of an easement as
2 required by MICC 19.02.020H2.

3 **3. City’s Cautionary Approach**

4 Appellant asserts that the Examiner departed from the City’s “cautionary approach” in
5 interpreting the scope of the easement. The Examiner’s “approach” precisely follows
6 what the City advocated in its prehearing brief. As succinctly stated in the brief:

7 *If the Examiner finds the retaining wall encroaches upon a utility easement*
8 *that does not permit such encroachment, then the Appeal should be*
9 *affirmed and the building permit remanded.*

10 City prehearing brief, p. 2.

11 As noted at page 4 of the brief:

12 *The City notes that disputes over private property rights, such as easements,*
13 *are normally beyond the scope of permitting decisions. However, here, the*
14 *MICC requires that the City, as the permitting authority, does have to*
15 *consider when obstruction of easements [sic] within the context of its*
16 *permitting decisions. MICC 19.02.020(H) provides: ...*

17 The City both recognizes the novelty of having to interpret the scope of easements and
18 that such analysis is required by MICC 19.02.020(H). The Examiner’s decision is
19 limited to ascertaining whether the Applicant’s retaining walls impermissibly encroach
20 into the Middle Easement, exactly what the City requested the Examiner to do.
21 Appellant’s only evidence to the contrary is a statement from code enforcement staff
22 at the hearing that in permit review the reviewer will identify what easements are
23 present and then “coordinate with the code and what the code says regarding the
24 specific type of easement.” Tr. 62. In this case, the code for utility easements under
25 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.

26 **B. Advisory Opinion**

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

1 presented in an open record appeal. City staff addressed the language of the Middle
2 Easement during permit review. They had a full opportunity to address Judge Segal's
3 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.

4 At the outset, it should be obvious that the Examiner's opinion is not an advisory
5 opinion. The case law cited by Appellant concerns circumstances where the court was
6 asked to resolve issues that weren't necessary to resolve the case. That's not the
7 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*
8 *easement.*" Whether or not the building permit was correctly issued depends
9 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.

10 Appellant's "advisory opinion" case is *Prosser Hill Coal. v. Cnty. of Spokane*, 176
11 Wash. App. 280, 292, 309 P.3d 1202, 1209 (2013). In that case the Court of Appeals
12 was asked to address the merits of a hearing examiner decision approving a conditional
13 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.
14 Despite the remand, the applicant still wanted the Court of Appeals to address the
15 merits of the Examiner's decision. The Court of course declined, since a new public
16 hearing was still outstanding. Any opinion issued by the court under such
17 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."

18 The *Prosser Hill* court also noted that it could not rule upon the merits of the case
19 because the superior court hadn't as well. As noted by the *Prosser* Court of Appeals,
20 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
21 remanded the case for a second hearing. In this case, the hearing examiner has original
22 administrative appeal jurisdiction like superior courts in land use appeals. For this
23 reason, the examiner's review authority is not analogous to that of the Court of
24 Appeals, which doesn't have original jurisdiction. Further, City staff did assess the
25 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.

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

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

20 Remand could also be helpful if staff expertise is necessary to address some new issues
21 raised in the appeal hearing. The only new issues raised in the appeal are based upon
22 applications of the language of the Middle Easement. City staff have expertise on the
23 interpretation and application of City code. They don’t have any significant expertise
24 in interpreting private easements. As emphasized by Appellant herself, the courts
25 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 easement⁷. 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

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

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

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

23 Appellant mischaracterizes the Examiner decision as concluding that the encroachments
24 don't "enclose" the easement solely because they're modest. The decision at FOF No.
25 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

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.

1 (2016) A court must consider the hardship to the parties if the court declines to address
2 the issue. Id. In this case impediments to access cannot be fully addressed because no
3 attempt access under the retaining walls has yet been made. As identified in the Final
4 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.

5 In her reply briefing the Appellant raises the compelling point that the Appellant could
6 be prejudiced by a delayed review if she faces an emergency situation that requires
7 immediate or expedited access. If the Appellant is without water or a leak is causing
8 property damage, there may not be sufficient time to file a quiet title action to challenge
9 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.

10 FOF No. 9 of the Final Decision identifies several compelling reasons why the modest
11 Middle Easement encroachments don't impair access to the Appellant's waterline. As
12 previously noted in FOF No. 9 of the Final Decision, the best Appellant could get from
13 her contractor, the only person qualified to testify on the issue, was that the retaining
14 walls "may impact" future access. The Appellant did testify that the retaining wall
15 would impair access, but she identified no reason for this conclusion. Her comments
16 were just unsupported assertions of fact. It is also important to recognize that the
17 "*language of the easement*" in the Ex. 45 Declaration requires that the retaining wall be
18 constructed "*for the purpose of denying access.*" The Ex. 9 survey constitutes
19 substantial evidence that this is not the case, that the modest retaining wall
20 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 removed⁸.

21 ⁸ Major reliance is placed upon the Ex. 9 survey to ascertain the extent of the retaining wall
22 encroachments. Only the Appellant supplied photographs of the retaining wall and most did not show
23 the retaining wall as located within the easement. Photograph 1013 shows a massive two tiered retaining
24 wall, but almost none of it except for a wing extension on the far left encroaches into the middle
25 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

1 Appellant also asserts that she's been prevented from having access to the Middle
2 Easement because the Applicant has denied her access. That issue is beyond the scope
3 of this review. Application of MICC 19.02.020H2 is limited to assessing whether
4 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.

5 ***Due Process***

6 Appellant asserts that approving the building permit denies her due process by failing
7 to follow the requirements of MICC 19.02.020H2. Appellant claims that she has a
8 protected property interest under MICC 19.02.020H2 because that provision requires
9 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.

10 ***City Response Issues***

11 The City also asserts in its response that accessibility of the easement need not be
12 resolved in the application of MICC 19.02.020(H)(2). That position is directly at odds
13 with the requirements of MICC 19.02.020(H)(2). MICC 19.02.020(H)(2) requires an
14 assessment of the "language of the easement." The language of the Middle Easement
15 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).

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

19 **DECISION UPON RECONSIDERATION**

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21 Appellant's request for reconsideration is denied. The legal analysis above is intended
22 to supplement the Conclusions of Law of the Final Decision. In addition, if the issue of
23 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.

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

3 Dated this 30th day of April, 2026.

4 *Phil Olbrechts*

5 Phil Olbrechts,
6 City of Mercer Island Hearing Examiner

7 **Appeal Right and Valuation Notices**

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

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