

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

SHANE MILLER,
Petitioner

vs.

CITY OF MERCER ISLAND,
Respondent

No. APL 19-002

PETITIONER’S
CLOSING ARGUMENTS

SECTION: Slope not “43.8%”

1) The city has repeatedly claimed the slope is “43.8%”

For example, the Notice of Violation and Order to Correct says,

“A site plan from 1983 show the original slope on the property was calculated at 43.8%”
- Ref. exhibit 19, page 2,

Another example is the Staff Report says,

“A site plan from 1983 shows the surveyed slope on the property was calculated at 43.6% at that time”
- ref. exhibit 35, page 5, par. x,

another example is the Staff Report, which says,

“Including construction of a retaining wall in a critical area (including designations as a steep slope”
- ref. exhibit 35, page 1

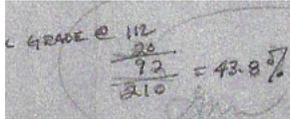
2) The source for the city having repeatedly claimed the slope is 43.8% is limited to just handwritten, “chicken scratch”

1 The handwritten “chicken scratch” is slanted and written twice, first in pencil and then gone over on top
2 of the pencil again with pen ink covering the pencil in some, but not all, areas. the “chicken scratch”
reads,

3 **“Original grade @112 – 20 = 92 / 210 = 43.8%”**

4 ***Beneath the numbers are what appear to be written only in pencil a person’s initials, “g.r.r.”***

5 **Figure 1.0 – handwritten “chicken scratch” including “G.R.R.”**



9 - **Ref. Exhibit 1029, red circle highlight area shows numbers and initials added by “G.R.R.”**

- 10 3) The source for the city having repeatedly claimed the slope is 43.8% is handwritten “chicken scratch” from
11 not the actual original Site Plan

12 The original Site Plan is from WA State licensed architects Baylis and WA State licensed professional
13 land surveyors Meriwether-Leachman and does not include handwritten “chicken scratch” that was
14 manually added after the fact with pencil and then gone over again a second time with ink pen in some,
but not all, areas.

15 - **Ref. exhibit 1030, red circle highlight area shows original not including the numbers and
16 initials that were handwritten “chicken scratch” that was added after the fact to a 2nd
17 version**

- 18 4) The source of the repeatedly claimed slope “43.8%” is handwritten “chicken scratch” placed on top thereby
19 creating a 2nd version of the original Site Plan document. the “chicken scratch” was added by former city
20 staff employee, Mr. G. Robert Rohrbach (initials “G.R.R.”)

21 Mr. Gary Robert Rohrbach was the City Building Official at that time during the mid-1980’s and had
initialed many other documents using “G.R.R.” with initials showing same penmanship/handwriting.

22 **Figure 2.0 – “G.R.R.” is “G. Robert Rohrbach”**

23 Sincerely,
24 
G. Robert Rohrbach
Code Official
25 GRR:s1

- 5) Mr. G. Robert Rohrbach is not qualified to calculate slope percent 43.8%

Mr. G. Robert Rohrbach does not have and has not held any WA state professional licenses.

- 6) Mr. Rohrbach is not qualified to calculate the slope percent at 43.8% in part due to not having a WA State
License as a Professional Land Surveyor (P.L.S.)

1 Mr. G. Robert Rohrbach does not have a WA State license as a Professional Land Surveyor (P.L.S.)
2 which is why licensed surveyor professionals including Meriweather-Leachman produced the original
3 Site Plan drawing and would ordinarily be responsible for ensuring correct slope calculation are made.

- 4 7) Mr. G. Robert Rohrbach needed to have left important survey calculations to professional surveyors
5 assigned to the project that had completed onsite surveying work rather than “going rogue” instead

6 It was improper for Mr. G. Robert Rohrbach to make random and incorrect slope calculations with
7 chicken scratch-scribbled handwritten by him on official Site Plan documents produced by WA State
8 licensed architects Baylis and WA State licensed surveyors Meriwether-Leachman.

- 9 8) The Seattle Times reported on February 15, 1990 that Mr. G. Robert Rohrbach had to leave as Mercer
10 Island Building Official due to “allegations of improprieties in City Building-code Division”

11 The Seattle Times article quotes investigative Detective Sgt. James Myers, “some improprieties did occur”.
12 And that Mr. Rohrbach prevented permit issuance on slopes and accepted favors from island developers.

- 13 9) City staff should have known better than to rely exclusively on Mr. Rohrbach’s 43.8% slope calculation due
14 to his severe credibility issues including documented history of “improprieties”

- 15 10) City of Mercer Island Code is specific about how to calculate slope:

16 ***“Slope: a measurement of the incline of a lot or other piece of land calculated by subtracting the lowest
17 existing elevation from the highest existing elevation, and dividing the resulting number by the shortest
18 horizontal distance between these two points.”***

- 19 11) Mr. Rohrbach did not follow code when he calculated “43.8%” by way of “chicken scratch” added to the
20 original site plan by Baylis and Meriwether-Leachman

21 Specifically, Mr. Rohrbach did not use the “lowest existing elevation of a lot”, did not subtract from the
22 “highest existing elevation of a lot” and did not divide by “the shortest horizontal distance between these
23 two points”.

- 24 12) Mr. Rohrbach did not follow the code *in effect at that time* when calculating “43.8%” by way of “chicken
25 scratch” added to the original Site Plan by Baylis and Meriwether-Leachman

The letter from Mr. George Lewis to Mr. Rohrbach dated March 6, 1984 explains Mr. Rohrbach did not
follow code language in effect at that time:

- ***Ref. Exhibit 1090 – March 6, 1984 letter from Mr. George Lewis to Mr. Rohrbach***

- 13) The dispute shown in the March 6, 1984 letter is what led to the March 5, 1984 letter getting drafted by Mr.
Max Meyring, P.L.S.

- 14) That is, the letters are drafted just 1 calendar day apart because the two letters of March 5 and March 6,
1984 are inextricably related

- 15) The purpose of the March 5, 1984 and March 6, 1984 letters was to refute the 43.8% that Mr. Rohrbach
handwrote incorrectly on the original Site Plan

- 16) This is why the March 5, 1984 and March 6, 1984 letters to Mr. Rohrbach / Building Department City of
Mercer Island both explain to Mr. Rohrbach how to compute the slope correctly per City Code

17) The fact Mr. Rohrbach was in effect getting taught by Mr. Lewis and Mr. Meyring P.L.S. on how to compute the slope correctly per code shows the slope from Mr. Rohrbach was in fact successfully disputed as incorrect even at the time as far back and during early March of 1984

18) Thus, the issue of the slope having been “litigated” as between Mr. Lewis / Mr. Meyring and Mr. Rohrbach is proven within the City’s own records from March 5-6, 1984

19) The City could have reviewed its own records and found this truth instead of re-litigating the incorrect slope of 43.8% against me decades after the fact when the City had previously been corrected by Mr. Lewis and Mr. Meyring P.L.S. as per the letters of March 5-6, 1984

SECTION: Slope is 37%

20) Mr. Max Meyring P.L.S. is qualified and signed and stamped the letter dated March 5, 1984 saying the slope is “37%”

The letter from Mr. Max Meyring P.L.S. dated March 5, 1984 stating the slope is 37% was recorded on May 2, 2022 at 12:27 pm via King County Recording/Instrument Number: 20220502000650.

The recording was completed by the letter’s original recipient, Mr. George Lewis and was recorded by a Senior Title Officer at Stewart Title Company.

21) Mr. Bob Winters P.L.S. is qualified and signed and stamped the letter dated October 18, 2021 saying the slope is “37%”

Mr. Bob Winters P.L.S. credibly testified at Hearing on December 9, 2021 at 9:30 a.m. including that he is a WA State licensed Professional Land Surveyor for the past over 40 years and successfully completed more than 10,000 professional land surveys in WA State.

Ref. Exhibit 1025 – Mr. Winters’ letter stating the slope is 37%

Ref. also king county recording instrument no. 20211026002342 (same letter; recorded)_

Ref. also exhibit 1099 – Stewart Title Senior Officer, Mr. Don Peterson recorded Mr. Winters’ letter

22) Note for clarity that both letters from Mr. Max Meyring P.L.S. and Mr. Bob Winters P.L.S. are recorded separately and appear on title and on title reports

23) The findings of Mr. Meyring P.L.S. and Mr. Winters P.L.S. as to the 37% slope should not be clouded on title by any new recording of incorrect slope percentages

SECTION: Not a steep slope

24) According to the city code definition for “steep slope”, it is only slopes that are greater than 40% that can be regulated as a “steep slope”

the City of Mercer Island code definition of Steep Slope says,

“Steep slope: any slope of 40 percent or greater calculated by measuring the vertical rise over any 30-foot horizontal run. steep slopes do not include artificially created cut slopes or rockeries”

25) Therefore, by city definition a slope that is 37% is not regulated as a “steep slope” because the 40 percent or greater threshold is unsurpassed

1
2 26) Therefore, by city definition, my slope, which is proven 37%, is not regulated as a “steep slope”

3 27) The city had omitted approximately half of the actual City Code definition of a Steep Slope

4 For example, the Notice of Violation and Order to Correct says definition of Steep Slope is limited to,

5 ***“Steep slope: any slope of 40 percent of greater calculated by measuring the vertical rise over
6 any 30-foot horizontal run”.***

7 however, this is incorrect due to material omission. that is, the City Code actual and complete definition
8 of “Steep slope” is,

9 ***“Steep slope: any slope of 40 percent of greater calculated by measuring the vertical rise over
10 any 30-foot horizontal run. Steep slopes do not include artificially created cut slopes or
11 rockeries.”***

12 therefore, the material omission portion is,

13 ***“Steep slopes do not include artificially created cut slopes or rockeries”***

14 28) This material omission shown above should never have been omitted by City Staff the way it was because
15 City Council passed its Codes with this language included so homeowners like myself could benefit from
16 the relief afforded by the language and intention

17 29) My property contains many ***“artificially created cut slopes or rockeries”***

18 30) The benefit afforded to me by the second sentence of the City Code,

19 ***“Steep slopes do not include artifically created cut slopes or rockeries”***

20 ...should not have been withheld from the definition via partial, incomplete and ommission-laced stripping
21 down of the actual complete steep slope code definition

22 31) The City misrepresented by way of omission the trur, correct and complete definition in the Notice of
23 Violation and Order to Correct and many other related communication messages

24 32) The actual, complete definition of a steep slope causes my property to be additionally eliminated from the
25 steep slope definition

that is, my property would be further eliminated from Steep Slope regulations for areas that,

“include artifically created cut slopes or rockeries”

33) For my property, there is not a single “30 foot-horizontal run” that does not intersect a legally established
“artificially created cut slope or rockery”

34) Therefore, in addition to the slope of 37% not meeting the definition of steep slope per the 40% threshold
being unsurpassed, the “artificially created cut slope or rockery areas” also provides a secondary set of
exemptions from the complete steep slope definition per actual, complete city code language

1 35) that is, my property is exempt both due to 37% slope being less than the 40% threshold and due to there not
2 being any “30-foot horizontal run” that does not also include “artificially created cut slopes or rockery
areas”

3 36) that is, my property is exempt from the steep slope definition not just once, but twice

4
5 **SECTION: Legally developed, grandfathered and not new**

6 37) Additionally, all of my “artificially created cut slopes or rockery areas” were created legally

7 38) That is, the cut slopes and rockery areas were legally graded to include City-approved plans, Engineers,
8 Architects, Permits and Inspections

9 39) Mr. Gareth Reese testified that a photo taken by Mr. George Lewis during ~1985 did show the subject area
10 and adjacent property areas between the house and Lake Washington were being legally graded and
“groomed”, and Mr. Reese also testified that the grading work observed in the photograph would have
required a permit and inspection at the time the work was occurring circa 1985

11 - **Ref. Exhibit 1057** – photo courtesy of Mr. George Lewis original owner and occupant ~1985

12 40) A letter from Mr. George Lewis to Mr. “Bob“ Rohbach dated October 26, 1983 “Re: Landscaping Plan of
13 Lewis Home” shows the grading and leveling plans getting proposed and approved by Mr. Rohrbach the
City Building Official at that time

14 - **Ref. Exhibit 1056** – October 26, 1983 letter from Mr. George Lewis to Mr. Bob Rohrbach re:
“Landscaping Plan of Lewis Home”

15 41) Combining Exhibits 1056 and 1057 shows the October 26, 1983 letter with subject, “Re: Landscaping Plan
16 of the Lewis Home” describing work that is the same as the landscaping work underway and near complete
as per the photograph circa 1985

17 - **Ref. Exhibits 1056 and 1057**

18 42) This means the subject area and entire landscaping areas between the house and Lake Washington were
19 getting legally graded during approximately 1983 – 1985 by Mr. Lewis, including having worked under the
supervision and inspection requirements of the City Building Official at that time, Mr. Rohrbach. The letter
and photo proves.

20
21 43) Additionally, more recent photos of the property show the subject area and landscaping area between the
house and Lake Washington are the same as the 1985 photo

22 - **Ref. Exhibit 29, pages 1 and 2, aerial photos show same or similar landscaping paths, etc.**

23 44) Additionally, Affidavit of Mr. George Lewis demonstrates Mr. Lewis describing the property as having the
same topography, plateaus, walkways etc. now as during 1985 and every year between

24 - **Ref. Exhibit 28** – Affidavit of George Lewis (1 of 2)

25 - **Ref. Exhibit 1076** – Affidavit of George Lewis (2 of 2)

45) The city incorrectly claims the engineered bulkhead permitted and inspected in ~1977 is a slope of 56%
 (“slope 1”) and the engineered wall permitted and inspected by Mr. Don Cole in 2002-2005 is a slope of
73% (“slope 2”)

City Exhibit 25 “slope 1” and “slope 2” fails to account for the fact that rockeries and cut slopes such as
these are exempt from city code definition of teep slope (as per described herein previously; not repeated)

1 - **Ref. Exhibit 25, page 1, “Slope 1” and “Slope 2”**

2 46) The city incorrectly claims the top of the slope from the ground to the top of the roof of the house structure
3 is a Steep Slope = 66% (“Slope 3”)

4 City exhibit 25 “slope 3” fails to account for the fact that LIDOR misreads dense objects such as rooftops as
5 hard surface and as a result cannot be relied upon to distinguish land and rooftop topography and associated
6 elevation measurement. This can be seen quite clearly as the lines follow the roof top gutters, etc. and is
7 widely known by users of GIS maps. As a result, “Slope 3” is actually measuring the slope of a line that
8 bizarrely would purport to connect from the ground **up to the top of the roof of the house structure. It is**
9 **absurd to suggest this is somehow an accurate slope measurement when it is clearly not even close to**
10 **representative.**

11 Additionally, the area shown has been entirely legally developed to include cut slopes, legal grading and
12 excavation, legal engineered poured concrete foundation footings and stem walls, etc. all with permit
13 issuance and inspection inclusive of final approvals such that exemptions for artificial cut slopes and prior
14 legal permitting and inspection make the slope claim nonsensical. That is, the area shown by Slope 3 has
15 clearly been developed legally and this can also be observed via Exhibit 1057 photograph from ~1985.

- 16 - **Ref. Exhibit 25**, page 1, “slope 3”
- 17 - **Ref. Exhibit 1057**, photograph from 1985

18 47) Additionally, the City claims the engineered rockery east of the driveway is a steep slope = 103% (Slope 4)
19 and = 110% (Slope 5) despite the fact the area is entirely exempt due to being an engineered, permitted,
20 inspected and approved cut slope rockery per steep slope code definition and exemptions allowed (described
21 earlier; not repeated)

- 22 - **Ref. Exhibit 25**, page 1, slope 4 and 5
- 23 - **Ref. Exhibit 1057**, photograph from 1985

24 City exhibit 25 “Slope 4” and “Slope 5” showing >100% slope (at a 37% slope property) is nearly as absurd
25 as the “roof top structure slope” calculation that was mentioned previously herein.

48) The rockery east of the driveway can also be seen in photographs and clearly is not a slope per City code
slope definition, which excludes cut slopes and rockeries

- **Ref. Exhibit. 9022.2**, page 10 - photo of driveway incl. rockery that is not a slope left/east of driveway

49) The city claimed Mr. Don Cole was not involved in the project to engineer walls uphill from the subject area
during 2002-2005, but the records show Mr. Cole was repeatedly involved with many reviews/approvals

- **Ref. Exhibit. 1091**, green highlight in margins, “reviewed by Don Cole”

50) The city did not review or share proactively the engineering plans designed and developed during 2002-
2005 in which Mr. Cole was involved and had approved, even though the plans are exculpatory re: the slope
clearly being far less than 40% and therefore not a steep slope per city code definition of steep slope

51) City staff had in their possession records of drawings from various professional engineering firms, some of
which included cross-section detail diagrams of the subject slope areas including vertical rise and horizontal
run measurements, which also show clearly and professionally the slope is 37% or less.

- **Ref. Exhibit 1053** - pages 1-4
- **Ref. Exhibit 1094** - pages 1-3
- **Ref. Exhibit 1028** slope = 32%
- **Ref. Exhibit 1050** slope = 32%
- **Ref. Exhibit 1045** slope = 33%
- **Ref. Exhibit 1039** slope = 35%
- **Ref. Exhibit 1041** slope = 38%
- **Ref. Exhibit 1042** slope = 37%
- **Ref. Exhibit 1043** slope = 32%
- **Ref. Exhibit 1044** slope = 28%

- 1
2
3 52) City staff, including Mr. Cole, claim to have “misplaced” and “never could find” engineering plans from
4 the 2002-2005 development that Mr. Cole had reviewed/approved during 2002-2005.
5 - note: these are legal documents and city policies require the documents retention, archival, etc.
- 6 53) The plans had to be recovered by me personally through having reached out directly to the project engineer,
7 Mr. Bruce Blyton, P.E. of AES Geotechnical Engineering
8 - **Ref. Exhibit 1092, 1093 and 1094**, pages 1-3
- 9 54) The retrieved plans from the engineering firm / Mr. Blyton show the subject area wall designed not
10 providing structural support to the slope and therefore purely superficial to the point of having been omitted
11 entirely from showing as a wall on the cross-section drawing
12 - **Ref. Exhibit 1094**, pages 1-3
- 13 55) The project engineer drew the plans to show all slopes and all engineered structures and notably did not
14 show the subject area landscape wall structure because the landscape wall structure was not providing any
15 structural support or value. I had testified this is normal for engineers to not draw “ornamental” elements
16 such as for example walls that were preexisting for superficial purposes only
17 - **Ref. Exhibit 1094**, pages 1-3
- 18 56) The City said the landscape wall is new including and aimed to purport aerial side-by-side images
19 incorrectly showing no existence of the wall previously at the subject area
20 - **Ref. Exhibit 43** – aerial side-by-side per the City aiming to show a wall did not exist previously
- 21 57) However, the City had in its possession numerous records of evidence proving the subject area wall had
22 existed previously since at least 1989
23 - **Ref. Exhibit 1081, 1082, 1083 and 1984** – topographic survey drawing, “4’ RET. WALL” drawn
24 clearly in subject area with same shape and alignment as current and proving wall preexisting
- 25 58) There is also evidence the City had previously entered written findings the subject area landscape wall had
existed by saying the wall existed and is therefore, “grandfathered”, saying,

“I learned they are grandfathered because they previously had a retaining wall in the same location”
– *Ms. Nicole Claudette, Senior Planner*
- **Ref. Exhibit 1033**
- 59) The city says the wall is “altered”. for example, the notice of violation and staff report allege.
- **Ref. Exhibits 9001, 19 and 32**
- 60) However, evidence spanning decades shows the wall was not altered. for example, the current size, shape.
location, alignment and mass are the exact same as per surveys during October 2001 (Exhibit 1081) and
same as current Site Plan drawing (Exhibit 22, page 3) and same as side-by-side before/after photographs
(Exhibit 1080) and same as Site Plan dated September 5, 1989 (Exhibit 1055)
- 61) That is, all these and other documents show the same existing walls in the same size, shape, location and
alignment. for this evidence to exist in the city records there could not have possibly been “altered” by me.
- **Ref. Exhibit. 1081, 22 pg 3, 1080 and 1055**

SECTION: Alcove pre-existing and not new or added

1
2 62) The City says an “alcove” was added. for example, the “alcove” argument is made in the Staff Report
-**Ref Ex 32 – Staff Report 10.18.21**

3 63) However, evidence shows the exact opposite, which is an “alcove” was not added but rather was in fact
4 preexisting. this evidence was also in the city’s records for example the topographic survey Exhibits 1081,
5 1082, 1083 and 1084 clearly show the “alcove” existed on the topographic survey as at October 11, 2001
and served as a half-planter box to a laurel or alder tree.

6 64) Similarly, side-by-side photograph provided as Exhibit 1080 shows the alcove preexisting as at February 1,
7 2018. additionally, exhibit 1085 photo provided shows a blue-color kayak cantilevered over what would is
8 seen as the alcove indentation area at that time. additionally, older topographic surveys circa 1970’s also
9 appear to possibly show a natural indentation at the alcove area including a tree at the area at that time also
as per exhibits 1086 and 1087. all this evidence clearly shows the alcove existed previously and at many
differing time periods as per the City’s own records.

10 65) Think the City may have been fooled by the photographs provided by Mr. Gartz. The photos are phony
11 with leyland cypress trees that are green year round instead showing yellow, a dock that is brown appearing
12 white, random lines across the image both horizontal and at angles, south-facing photo showing brown
water for a mile to Boeing Factory in Renton

13 66) The city also may have been fooled by Mr. Gartz performing “trenchless digging” i.e. drilling a temp septic
14 drain line into the lake, which the drilling may have caused dirt/mud from underground drilling lines to
15 enter the lake as showed. Mr. Gartz had drove soldier piles into Mr. Lewis’ sewer line which damaged the
16 sewer and necessitated installation of a temporary septic system with wastewater lines drilled and pvc pipes
installed through Mr. Gartz’ bulkhead for wastewater disposal into the lake

17 **SECTION: Not excavate into hillside**

18 67) The City says the hillside was excavated. for example, Don Cole testified at the hearing on rebuttal that
what made this a big deal to him was that the hillside was excavated into.

19 68) However, this is incorrect and also ties back to the alcove and alteration issue also being incorrect. that is, if
20 one believes that an “alcove” was added then an excavation into the hillside would have had to have been
21 completed, but on the other hand if the alcove preexisted then there would be no excavation into the hillside
22 necessary because the alcove already was in place preexisting. I think this is where Mr. Cole got off track.
I think the phony photos from Mr. Gartz also through off Mr. Cole.

23 **SECTION: Wall permitted**

24 69) the City says the wall is unpermitted. This sentiment by the City is evident in the email messages, the
25 Notice of Violation Courtesy Notices, the Notice of Violation and Order to Correct, and the Staff Report.

70) However, the wall unpermitted is incorrect as per earlier plans of 2002 – 2005 illustrate the subject area in
the design as nothing more than a dirt mound / cut slope. Additionally, photograph from 1985 shows area
legally graded / groomed as a cut slope. Both slope plan sets from 1985 and 2002-2005 have resulted in
proving the subject area was designed, permitted, inspected and is unchanged currently vs. legacy.

SECTION: Wall preexisting and not altered/changed

1
2 71) The photograph side-by-side provided Exhibit 1080 also shows the before and after are the same. There is
3 no difference other than purely superficial elements like facing was rotted creosote-soaked railroad ties
4 stacked non-structural i.e. no anchors or cribbing etc. vs. now more eco-friendly natural ornamental stone.
There is no structural difference. No change from before or from 1985 or 2002-2005 approved plans set
developed with Mr. Cole's oversight and approval.

5 **SECTION: Ornamental allowed per code**

6 72) Mr. Reese delivered oral testimony under sworn oath stating the word "ornamental" does not appear
7 anywhere in the code. Mr Reese was responding to a question from Ms. Keefer, "does the word ornamental
8 appear anywhere in the code". Mr. Reese responded, "no."

9 73) However, this is incorrect. In fact, this is so incorrect that the word "ornamental" appears in City Code at
10 14 unique locations. More importantly, the word "ornamental" appears in City Code definition of
11 Landscaping which is perfectly contextualized to the subject matter use case at hand, which is entirely
having to do with "ornamental" landscaping. See Exhibit 1095 which shows the word "ornamental" appears
14 times.

12 74) "Ornamental" also appears in the city definition of Landscaping,

13 ***"landscaping: the arrangement and planting of softscape elements (e.g., trees, grass, shrubs and
14 flowers), and the installation of hardscape elements (e.g. placement of fountains, patios, street
furniture and ornamental concrete or stonework"***

15
16 75) Also, Ms. Van Gorp on cross examination as well as myself during direct both of us had read aloud during
open hearing this passage with this definition inclusive of the word "ornamental" and yet still Mr. Reese
17 responded to Ms. Keefer stating that the word "ornamental" does not appear in City Code. Also, this
18 passage was quoted in writing by me including via city code screenshot for Mr. Reese to see as shown on
my notes that I reviewed at hearing, see Exhibit 1116 page 6.

19
20 **SECTION: Wall is not at the "base of a steep slope"**

21 76) The city says the subject wall is at the base of a steep slope. This is stated in the city's stop work order,
22 "you are doing unpermitted work at the base of a steep slope"
- **Ref. Exhibit 1098, page 3**

23 77) The evidence shows the subject area wall is not at the base of a steep slope. Exhibit 1057 photograph from
24 ~1985 clearly shows the base of the steep slope is not at the subject matter cut slope area but rather is at the
25 toe of the bulkhead location at the shoreline OHWM.

SECTION: Reviewed by experts

78) The city says the wall is not reviewed by experts

1 79) Evidence shows the wall is reviewed by experts. WA State licensed PE, LEG, GE Mr. Phil Haberman
2 reviewed.

3 **Ref. Exhibit 10 – Mr. Phil Haberman, PE, LEG, GE**

4 80) Washington state licensed architect Mr. Mike lee reviewed and approved

5 **Ref. Exhibit 11 – Architect Mr. Michael Lee**

6 81) Mr. Bruce Blyton P.E. of AES geotech reviewed and stamped the plans of 2002 – 2005 inclusive of the
7 subject area.

8 82) City staff Mr. Paul Skidmore reviewed and approved the plans of 2002-2005 inclusive of the area

9 83) City building official Mr. G. Robert Robrach reviewed including city oversight and inspection approval
10 during ~1985

11 84) City Building Official Mr. Don Cole reviewed plans during 2002-2005. Mr. Cole’s name appears in about
12 20 unique locations related to the 2002-2005 plans.

13 **SECTION: Meets code**

14 85) the city says the wall does not meet code and requires new code review inclusive of 20 questions/comments
15 from plan reviewers as per ex. 22 – city plan review comments

16 86) the evidence shows the wall meets code. the wall is less than four feet tall throughout. the wall has
17 preexisted same size, shape and alignment and weight/mass for many decades since at least 1989 as per
18 previous evidence shown (will not repeat). the letter from Mr. Cole Exhibit 15 page 2 says,

19 *“permits shall not be required for the following:*

20 *...*

21 *building.*

22 *...*

23 *4. retaining walls and rockeries which are not over 4 feet (1,219 mm) in height measured from the
24 bottom of the footing to the top of the wall, unless supporting a surcharge or impounding class i, ii or
25 iii-a liquids”*

- Mr. Don Cole, February 2018

87) for the avoidance of doubt, there is no surcharge or impounding class i, ii or ii-a liquids.

88) City staff incorrectly claims there is a surcharge issue, but this is incorrect and made up there is not a
surcharge issue

89) I agree with what Mr. Cole says in this Exhibit 15, page 2. i.e. “permits shall not be required”

90) Also, note that what Mr. Cole says in Exhibit 15, page 2 includes new development; whereas, this case is
not new development. i.e. mine is preexisting, refacing only, etc. (as evidenced previously; will not repeat)

91) Mr. Cole says there is “work” which purports to aim to say “development work” but separately says is
limited to “*the wall appears to be built more like a facing for weathering (erosion)*”. these two statements
are incongruent. typically facing is not considered “work” because is not new development, and especially
facing that is limited to just re-facing of existing.

1
2 92) Mr. Cole was correct when he described the work as limited to “more like a facing”, but was incorrect when
3 described the work as being development-type “work”.

4 **Ref. Exhibit 15, page 1-2 and Exhibit 1058, page 1**

5 **SECTION: Not development project**

6 93) the city has repeatedly said the wall is a development project in its various notices and communication
7 messages

8 94) however, the evidence shows the wall is just facing of existing and not a development project

9 **SECTION: Critical area designations may change or be corrected per code**

10 95) The city’s sworn testimony is that critical areas cannot change.

11 96) For example, Mr. Cole and Mr. Reese testified that they do not approve of a critical area change of
12 designation

13 97) However, the evidence shows otherwise i.e. code allows a critical area designation to be changed and/or
14 corrected

15 98) City code citation says,

16 *“notices on title may be removed or amended, which is applicable, at a property owner’s request, after*
17 *approval by the city if it is documented that the information contained in an existing notice is no longer*
18 *accurate because a critical area has changed, for example, in its type or location, or if the notice is*
19 *proposed to be replaced with a notice containing updated information.” (ord. 19c-05 s 1 (exh. a))*
20 **- ref. ex. 1063 – micc code re possible changing of critical area designation**

21 99) In practice change of critical area designation occurs frequently, and often in ways non-explicit.

22 100) For example, a wetland critical area may get entirely paved over to result in development of a new
23 parking lot atop where the wetland formerly existed. thereafter, what was formerly a wetland critical area is
24 no longer a wetland critical area.

25 101) Furthermore, if the area again gets redeveloped from a paved parking lot to a new apartment building.
this time a wetland areas review would not be necessary because the land use designation was changed
previously to longer being a wetland critical area. the designation change had already happened through the
planning and approval of the change from wetland to parking lot.

102) Similar situation currently. What used to be a natural undeveloped shoreline was changed during ~1984
to what is now hardened/armored bulkhead, poured concrete slab pathway, cut slope initially bare per 1985
photo (exhibit no. 1080) to become “ornamentized superficially” first with creosote-soaked railroad tie
timbers and later with ornamental stone. once legally permitted, changed, developed/graded, etc during
~1984 it doesn’t need to keep getting re-permitted over and over for being the same thing that was already
permitted and inspected.

1 103) this is precisely why the code that city council passed includes explicit language that allows for things
2 like repairs and maintenance of existing elements and things like simple landscaping including hardscapes
3 and ornamental stone e.g. and why 4' tall walls etc. especially preexisting less than 4' tall walls do not need
4 to constantly obtain new permits for the same thing over and over again.

5 **SECTION: City untimely**

6 104) City staff were untimely in serving the notice of violation and order to correct on 18 months following
7 the last communication.

8 105) The time since known issue has now reached 4.2 years since February 2018 through to the present

9 106) City are outside the statute of limitations for assessing a penalty for this matter

10 107) RCW 4.16.100 (2) "actions limited to two years. an action upon a statute for a forfeiture or penalty to
11 the state."

12 **- Ref. Exhibit 1047 – RCW 4.16.100 (2)**

13 108) Washington state supreme court upheld 2-year statute of limitations requirements for penalty and has
14 clarified the 2 years gets measured from the date the issue is first known

15 **- Ref. Exhibit 1046 – case law re: 2 year statute of limitations on penalty and from the date known**

16 **SECTION: the neighbor damaged the wall and promised to repair and broke his promise**

17 109) The city says that I deconstructed the wall

18 110) This is incorrect because evidence shows it was Mr. Gartz that first deconstructed the wall.

19 **- Ref. Exhibit 1013 – attorney Stuart Scarff letter to Mr. Gartz' attorney re: damages**

20 111) Mr. gartz' attorney Mr. Greg Ursich responded admitting that Mr. Gartz damaged the subject area wall

21 **- Ref. Exhibit 1022, pg 5, par. 3, 11. damage at waterfront**

22 112) Mr. Gartz' attorney promised that Mr. Gartz would repair damage Mr. Gartz did to subject wall

23 **- Ref. Exhibit 1022, pg 5, par. 3, 11. damage at waterfront**

24 113) Mr. Gartz broke the promise made in the attorney letter as can be seen in the photo showing remaining
25 damage to the subject area wall

- Ref. Exhibits 1078, 1079 and 1080 showing damage at horizontal cedar-faced wall as currently

114) City staff say I should now redevelop the wall

115) This is incorrect because it was Mr. Gartz that first damaged and deconstructed the wall and Mr. Gartz
through his attorney promised to repair the wall

116) Mr. Gartz has since sold his property during july 2021 and Mr. Gartz has relocated to a foreign country
in Europe, so it is unlikely Mr. Gartz will be honoring repair of the wall as he had promised

SECTION: Not geologic hazard area

- 1 117) the city repeatedly has stated the property is a geological hazard area
- 2 118) this is incorrect because the city code definition of a “geologically hazardous area” is unmet
- 3 119) for example, see exhibit 1069 definition. my property is not susceptible to erosion, sliding, etc
- 4 **- Ref. Exhibit 1069 – code definition geologic hazard area**

5

6 **SECTION: Not landslide hazard area**

- 7 120) the city repeatedly has stated the property is a landslide hazard area
- 8 121) this is incorrect because the city code definition of a “landslide hazardous area” is unmet
- 9 **- Ref. Exhibit 1068 – code definition landslide hazard area**
- 10 1. no historic failure*
 - 11 2. not all three characteristics a, b and c
 - 12 3. not shown evidence of past movement or underlain mass wastage debris
 - 13 4. no rapid stream incision, stream bank erosion
 - 14 5. not steep slope >40%

13 *note: city claims water pressure and volume from recalled “blue poly” pipe caused failure but incorrect; mitigated by new poly line permitted and installed properly)

14 **- Ref. Exhibit 1031 – waterline replacement permit**

15 **SECTION: Not erosion hazard area**

- 16 122) City says erosion hazard
- 17 123) this is incorrect because the city code definition of a “erosion hazard” is unmet
- 18 **- Ref. Exhibit 1061 – code definition erosion hazard areas**
- 19 124) Mr. Reese testified during open hearing that my property has not “been identified by the u.s. department of agriculture’s natural resources conservation service as having a “severe” or “very severe” rill and inter-rill erosion hazard, so this is unmet
- 20
- 21 125) Additionally, there is not “severe risk of erosion due to wind, rain, water, slope and other natural agents including those soil types”
- 22
- 23 126) Soils have been tested many times. designs were approved by many experts including Mr. Cole during 2001-2005 such that all soils have been assessed properly for possible erosion hazard issues, and were met with final approvals
- 24
- 25 127) I have planted approximately 1,000 plantings under the supervision of experts including the landscape architect mr. mike lee.
- 128) an excerpt of a landscape plan drawing completed for me by the Washington state licensed architect Mr. Mike Lee shows vegetation completed
- Ref. Exhibit 1088 – excerpt of Mike Lee architect landscape plan followed subject area**

1
2 129) The landscape architect that designed the plans implemented also wrote a letter explaining his
3 satisfaction that erosion control achieved

4 - **Ref. Exhibit 11** –mike lee architect letter re: landscape plan addresses erosion risk, etc

5 **SECTION: Not leak adjustment issue**

6 130) Ms. Keefer questioned me on cross examination about a leak adjustment. there was a leak adjustment
7 requested and granted for approx. \$1,000 because of a leaking irrigation line.

8 131) I have permanently decommissioned the irrigation system so this may not recur

9 132) Also, I had replaced the water supply line to ensure no leaks (as mentioned earlier; will not repeat)

10 **SECTION: Not life safety issue**

11 133) the city has most recently claimed the subject area wall is a life safety threat

12 134) this is incorrect the subject wall is 4' tall and has been reviewed in-person by Mr. Haberman PE, LEG,
13 GE and Mr. Mike Lee and myself also an engineer and all are satisfied there is not a life safety issue

14 135) Mr. Haberman PE, LEG, GE has offered to provide a minimum risk letter, if helpful

15 136) If the city truly had believed there was a life-safety issue, then it wouldn't have made sense for the city
16 to have waited 4.2 years to bring this matter to a hearing examiner. That is, true life-safety issues get dealt
17 with far more quickly. Therefore, i don't think the city genuinely believes there is a life-safety issue

18 **SECTION: building official does not have complete discretion**

19 137) City Council members requested that the Building Official not have discretion, and City Staff agreed to
20 honor the request

21 138) More generally, there has to be checks and balances in place to check the power of the Building Official
22 and discretion

23 139) Checks and balances are especially needed in this instance due to decades-spanning friendship issues
24 between Mr. Gartz and City Staff, including with Mr. Cole

25 140) Checks and balances are also needed based on the documented history of impropriety involving the
former Building Official, Mr. G. Robert Rohrbach.

141) It is also generally understood in the industry that the discretion afforded to a Building Official be used
to relax restrictions where reasonable to do so whereas with this matter Mr. Cole is aiming to do the
opposite of relax restrictions but rather is aiming to impose greater restrictions, which is an improper use of
the discretion concept in general

SECTION: Geotech reports

- 1 142) Many Geotech Reports were provided and all show the subsurface soils are underlaid with glacial till
2 from the Ferdinand Glacier
- 3 143) Glacial till is a dense and stable soil nearly on par with solid stone
- 4 144) This means that a deep-seated slide will not occur because of the favorable properties akin to glacial till
5 an the soils that underlain the Ferdinand glacier specifically
- 6 145) There are surface soils such as for example colluvium, which are less favorable
- 7 146) The less favorable soils at the top surface is okay because the top level surface is supported by
8 engineered plans and developed solutions that are also at the top level surface
- 9 147) Fill-type soils at the surface are okay because designs also at the surface have been planned for to
10 accommodate the less favorable properties
- 11 148) All recent slides that have occurred in this general area have been shallow slides surface soils only
- 12 149) The documentation available for my property, adjacent and nearby properties proves there has never
13 been a deep slide of any sort or involving the glacial till soils
- 14 150) Deep slides such as the large-scale slide at Whidbey Island were due to loose soils at deep depth and
erosion form lack of coastal seawalls, for example. this is not comparable to the subject case.
Ref: Exhibits 1100 to 1111 – Geotech reports

15 **SECTION: GIS**

- 16 151) The city refuses to acknowledge the limitations of GIS
- 17 152) GIS is for preliminary assessment to get a rough idea of what critical areas may be present
- 18 153) GIS data and especially contours data is not an accuracy panacea by any means
- 19 154) GIS data is intended as a starting point for potential identification of areas needing further exploration
20 by professionals on the ground, e.g. surveyors, geotechs, environmental consultants, etc.
- 21 155) Mr. Bob Winters P.L.S makes the following statement re: GIS data,
22 ***“GIS data is derived from the best available information. however, if a steep slope determination is
23 made without benefit of an accurate and current ground topographic survey, such determination
24 can’t be defended”***
- Ref: Exhibits 1097 – Bob Winters P.L.As email
- 25 156) In my case, GIS data has suggested possible critical areas on the ground; however, in my case
professionals including at least 5 different surveyors, 10 different geotechnical engineers, several building
officials including Mr. Cole, etc. have already undergone extensive exploration and engineering design and
development that properly addresses potential critical areas that may exist
- 157) There has not been changes since those professionals completed their work

1 158) The soils in place now are the same as the soils that were in place when the work of the professionals
2 was completed

3 159) It's not as though a new glacier had come through and removed all the soils and deposited new soils in
4 its place. the soils are the same.

5 **SECTION: CONCLUSION SUMMARY**

6 160) The City has time and again attempted to misuse incorrect information in order to try forcing me to do
7 unnecessary work

8 161) Initially the City alleged work was occurring waterward of the OHWM, which was incorrect

9 162) Next, the City alleged work was occurring at the bulkhead rockery of the shoreline, which was incorrect

10 163) Then the City alleged work was occurring at the base of the steep slope, which was incorrect because the
11 base of the steep slope is the toe of the bulkhead rockery

12 164) Next, the city alleged work was occurring on a steep slope >40%, which is incorrect because the slope is
13 37% per Meyring and Winters letters

14 165) Then, the city alleged the slope is "43.8%", which is incorrect because the slope is 37% per Meyring and
15 winters

16 166) Next, the city including Ms. Van Gorp and Mr. Reese said they did not know anyone who may have
17 worked at the city with initials "G.R.R." who might have handwritten the slope 43.8%, which is incorrect
18 because Don Cole's predecessor is G. Robert Rohrbach with G.R.R.

19 167) Then, the City omitted the second half of the steep slope definition to prevent me from seeing exceptions
20 in the actual and complete steep slope definition, which provides exceptions for cut stopes and rockeries

21 168) Next, the City provided slope calculations showing absurd slopes greater than 100% by measuring an
22 engineered rockery at the east of the driveway location, which is incorrect for many reasons including the
23 fact that artificial cut slopes and rockeries are excluded from the steep slope by definition

24 169) Then, the City provided slope calculations that measure a fictitious line from the ground to the top of the
25 roof of my house structure, which is beyond absurd and something a user of GIS should know incorrect

170) Next, the City provided slope calculations that measure slopes spanning not one but two different
engineered cut slopes and rockeries even though the steep slope definition says to exclude cut slopes and
rockeries, which is improper/incorrect

171) Then, the City gave incorrect information by saying that "ornamental" does not appear in the code even
though it appears 14 unique times and is perfectly contextual to the subject case due to being included in the
code definition of landscaping, with the subject case in fact, landscaping using "ornamental stone"

172) Next, the City said the wall was not grandfathered because the wall was new, which was incorrect the
wall same shape, size, alignment, etc. has existed in the city's records for decades

173) Then, the City said the wall is grandfathered because the city found the wall had preexisted (finding
revealed only via PRR)

- 1 174) Then, the City said that I had added an “alcove” to the wall, which is incorrect per the city’s own records
2 as evidence
- 3 175) Next, the City said that I had excavated into the hillside, which is proven incorrect by the city’s own
4 records as evidence which instead show the hillside was the same decades earlier
- 5 176) Then, the City said that the wall is unpermitted, which is incorrect because evidence shows the subject
6 area was permitted twice previously during 1985 when graded as a cut slope without ornamentation and
7 again during 2002-2005 as a cut slope only with the ornamentation having been ignored due to non-
8 structural element only
- 9 177) Next, the City said the 1984 letter “re: landscape plans for the lewis home” were not actually landscape
10 plans even though the plans describe four plateaus and slopes exactly as built per the 1985 photo
- 11 178) Then, the City many times said final plans from 2002-2005 were lost/misplaced and could not be found,
12 which is incorrect because found the plans by contacting the project engineer who emailed
- 13 179) The City Mr. Cole said he wasn’t involved in the 2002-2005 project, but the records show he was
14 involved and had approved.
- 15 180) Next, the City said the area is a landslide area, which is incorrect per code language because only
16 surface soils during broken water main which was replaced with permits and inspections and any soils will
17 move when sprayed with water at volume and pressure of firehose
- 18 181) Then, the City said the area is an erosion hazard area, which is incorrect per definition and per actual
19 vegetation planted throughout
- 20 182) Next, the City said the area is a geologic hazard area, which is incorrect per definition of geologic
21 hazard area as shown previously
- 22 183) Then, the City misused GIS data in spite of GIS disclaimers and Mr. Bob winters P.L.C saying cannot
23 use in lieu of on the ground professionals as the City was aiming doing
- 24 184) Next, the City said needs geotech evaluation even though more than ten geotech and many more are
25 available and all say the same that glacial till is deep and great soil and surface soils are fill but planned for
in designs already permitted and approved
- 185) Then, the city said the wall is a life-safety hazard, which is incorrect because the wall is less than 4’ tall
and the city waited 4.2 years to complete enforcement, which is not procedure for true life-safety issues
- 186) Next, the city said the wall will surcharge the bulkhead, which is incorrect because the wall is the same
size, mass-weight, location and alignment as the old wall and therefore no change to surcharge nor enough
weight to surcharge engineered bulkhead 5,000 lbs stones each
- 187) Last, the city said the slope above will surcharge the subject wall, which is incorrect because there is
nothing heavy above the wall and 2002-2005 plans designed for no structural support at all i.e. cut slope
only and the wall facing is same or better structural compared to previous railroad ties

SECTION: PRAYER FOR RELIEF

- 188) Asking that the Notice of Violation and Order to Correct be dismissed

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

Signed at Mercer Island, [City] WA [State] on May 13, 2022 [Date].

Shane Miller Shane Miller
(printed name) Signature