

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

DECISION and ORDER

FILE NUMBER: APL19-002
(Ref. Code Compliance Case CE18-0017)

APPELLANT: Shane M. Miller
7709 W Mercer Way
Mercer Island, WA 98040

RESPONDENT: City of Mercer Island
Department of Community Planning and Development
Code Compliance Officer
C/o Eileen M. Keiffer
Madrona Law Group, PLLC
14205 SW 36th Street, Suite 100
PMB 440
Bellevue, WA 98006

TYPE OF CASE: Appeal from a Notice of Violation & Civil Penalties

EXAMINER DECISION: SUSTAIN; compliance schedule changed

DATE OF DECISION: June 9, 2022

INTRODUCTION¹

Shane M. Miller (“Miller”) appeals from a Notice of Violation & Order to Correct (“Notice”) issued by the City of Mercer Island (“City”) Department of Planning & Development’s (“Department’s”) Code Compliance Officer (“CCO”) on October 21, 2019. (Exhibit 19²)

Miller filed the appeal on November 4, 2019. (Exhibit 20)

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The subject property is located at 7709 W Mercer Way. The subject property is Lot A in short subdivision MI-81-2-02. (Exhibits 34; 1030) Its Assessor's Parcel Number is 545130-0045. (Exhibit 35) The subject property will be referred to hereinafter as "Lot A"; the house on Lot A will be referred to as "7709".

On December 12, 2019, the principal parties filed a Joint Motion for Stay of Proceedings (to facilitate settlement discussions) which the Hearing Examiner ("Examiner") granted that same day. (Exhibits 9005 and 9006, respectively) As that Stay was expiring, the principal parties asked for a six month extension which the Examiner granted on December 11, 2020. (Exhibits 9007 and 9008, respectively) The Extension expired on June 30, 2021. (Exhibit 9008) On July 26, 2021, Respondent Department informed the Examiner that resolution of the matter had not been successful and asked the Examiner to proceed to schedule a hearing on the merits. (Exhibit 9009)

The Examiner held a remote prehearing conference via Zoom with the principal parties on August 18, 2021. Among other matters, the principal parties agreed to convene a remote hearing via Zoom on October 28, 2021. (Exhibits 9012; 9013)

On October 18, 2021, Miller filed a Request for Continuance/Rescheduling of Hearing Date. (Exhibit 9014) Later on October 18, 2021, the Examiner advised the principal parties that the hearing would be convened as scheduled, but that the only item to be taken up would be selection of a continuance date. (Exhibit 9015) On October 27, 2021, Miller filed a second request for continuance. (Exhibit 9016) The Examiner did not respond to that request.

The Examiner convened the open record hearing on October 28, 2021, as scheduled. The hearing was conducted remotely via "Zoom." Notice of the hearing was given as required by the Mercer Island City Code ("MICC"). (Exhibit 33) The principal parties agreed to continue the hearing to November 19, 2021.

On November 1, 2021, Miller filed a third Request for Continuance/Rescheduling of Hearing Date. (Exhibit 9017) The Department opposed the Request. (Exhibit 9018) On November 2, 2021, the Examiner denied that request for a continuance. (Exhibit 9019)

At 7:46 a.m. on November 10, 2021, Miller filed a fourth request for a continuance because he thought the Department's Staff Report had been untimely filed. The Staff Report had not been untimely filed. At 10:14 a.m. on November 10, 2021, the Examiner denied that request for a continuance. (Exhibit 9020)

The City received a written comment from a member of the public on November 9, 2021. (Exhibit 9022.1) At 12:45 p.m. on November 10, 2021, Miller filed a fifth request for a continuance believing, incorrectly, that the citizen comment was untimely. At 1:45 p.m. on November 10, 2021, the Examiner denied that request for a continuance. (Exhibit 9021)

The Examiner reconvened the open record hearing remotely via “Zoom” on November 19, 2021, as scheduled. After approximately three hours of testimony, the hearing was continued to December 9, 2021, when an additional six hours of testimony was taken. Insufficient time was available on December 9, 2021, to conclude the hearing, so the principal parties agreed to continue it to January 21, 2022.

On January 17, 2022, Miller advised the Examiner that one of his children had to be quarantined due to COVID-19 exposure and asked that the January 21, 2022, hearing be rescheduled. Because the Examiner was having major eye surgery in early February, the Examiner suggested to the principal parties that the hearing be rescheduled for early March to allow sufficient time for the COVID quarantine to run and for the Examiner to recuperate from his eye surgery. Miller objected to an early March date for personal family reasons and suggested three dates in late March. The principal parties agreed to reschedule the hearing for March 29, 2022. (Exhibit 9023)

At 7:26 p.m. on March 28, 2022, Miller requested that the hearing be postponed because Respondent had not timely responded to Public Records Act (“PRA”) requests that he had filed. Respondent objected. The Examiner did not respond to either the request or the objection. (Exhibit 9024)

The Examiner reconvened the hearing on March 29, 2022, as scheduled. After over seven hours of testimony it was clear that the hearing could not be completed that day. Because of Miller’s personal schedule, the earliest continuance date that the principal parties could agree on was April 14, 2022.

The Examiner reconvened the hearing on April 14, 2022, as agreed. The hearing was concluded and adjourned after 3.5 hours of testimony.

Pursuant to Hearing Examiner Rule of Procedure (“RoP”) 224(c), over the course of the hearing the Examiner entered documents marked as administrative Exhibits 9001 – 9024 into the hearing record:

- Exhibit 9001: Notice of Violation & Order to Correct, issued to Shane M. Miller on October 21, 2019
- Exhibit 9002: Appeal APL19-002, filed November 4, 2019, with attached Exhibits A and B to be cited as Exhibits 9002.A and 9002.B
- Exhibit 9003: Letter, Hearing Examiner to Principal Parties, December 2, 2019 (Scheduling guidance)
- Exhibit 9004: Email chain, Miller-Hearing Examiner-Park, December 2 & 3, 2019 (Forthcoming request for Stay)
- Exhibit 9005: Joint Motion for Stay of Proceedings, filed December 12, 2019
- Exhibit 9006: Notice of Stay in Proceedings, issued December 12, 2019
- Exhibit 9007: Status Report, filed by Respondent December 11, 2020

- Exhibit 9008: Notice of Extension of Stay in Proceedings, issued December 11, 2020
- Exhibit 9009: Email, Park-Hearing Examiner, July 26, 2021 (Notice of impasse; request for prehearing conference)
- Exhibit 9010: Letter, Hearing Examiner to Principal Parties, July 28, 2021 (Prehearing conference scheduling)
- Exhibit 9011: Email chain (3 pages), Keiffer-Miller-Keiffer-Hearing Examiner, July 30, 2021
- Exhibit 9012: Notice of Prehearing Conference (Zoom), issued August 5, 2021
- Exhibit 9013: Order Memorializing a Prehearing Conference, issued August 18, 2021
- Exhibit 9014: Email, Miller to Hearing Examiner, October 18, 2021, with [Appellant's] Request for Continuance/Rescheduling of Hearing Date
- Exhibit 9015: Email chain (3 pages), October 18 – 27, 2021 (regarding rescheduling)
- Exhibit 9016: [Appellant's] Declaration Re: Issues that Shall Delay Resetting of the New Hearing Date, filed October 27, 2021, at 2:37 p.m.
- Exhibit 9017: [Appellant's] Request for Continuance/Rescheduling of Hearing Date, filed November 1, 2021, at 7:55 p.m.
- Exhibit 9018: City of Mercer Island's Response to Appellant's Request for Continuance/Rescheduling of Hearing Date, filed November 2, 2021, at 12:16 p.m.
- Exhibit 9019: Email, Hearing Examiner to Miller, November 2, 2021, at 12:27 p.m. (Denial of request for continuance)
- Exhibit 9020: Email chain (2 pages), Miller-Park-Hearing Examiner, November 10, 2021 (Appellant's Request for continuance; denial of same)
- Exhibit 9021: Email chain (15 pages), November 9 – 12, 2021 (Regarding citizen comment filing rules; denying Appellant's request for continuance)
- Exhibit 9022.1: Letter, Gartz to City, November 9, 2021
- Exhibit 9022.2: Letter, Gartz to City, September 21, 2020, with Exhibits A – H, to be cited as Exhibits 9022.2.A – 9022.2.H
- Exhibit 9023: Email chain (6 pages), January 17 – 20, 2022 (Reschedule due to COVID exposure)
- Exhibit 9024: Email chain (4 pages), March 28, 2022 (PRA matters)

Pursuant to RoP 224(d), Respondent Department pre-filed Exhibits 1 - 34 and pre-filed Exhibit 35, its Revised Staff Report, pursuant to RoP 224(g). During the course of the hearing Respondent Department offered Exhibits 36 – 41, and 43.³ Miller did not object to entry of those exhibits. The Examiner entered Exhibits 1 – 41 and 43 into the hearing record.

Pursuant to RoP 224(e), Appellant Miller pre-filed Exhibits 1001 – 1037. Miller also filed a Pleading which was marked as Exhibit 1038. During the course of the hearing Appellant Miller offered Exhibits 1039 – 1065 and 1067 – 1116.⁴ The Department objected to entry of

³ Respondent Department pre-filed Exhibit 42 as a rebuttal exhibit but did not seek its admission.

⁴ Respondent Miller did not use exhibit number 1066.

many of those exhibits. After entertaining brief oral argument on the requested exclusions, the Examiner entered Exhibits 1013 (expressly to allow consideration of §§ 2 & 4), 1022 (expressly to allow consideration of § 11), 1025 – 1034, 1036 – 1045, 1049 – 1051, 1053 – 1057, 1070, 1071, 1076 – 1088, 1090, 1092 – 1095, 1098 – 1111, 1115, and 1116 into the hearing record. The other pre-filed exhibits were excluded because they were irrelevant to the matter before the Examiner.

RoP 320 allows the principal parties to opt for written closing statements. The parties did so. RoP 320(d) calls for the first written closing statement to be filed one week after the close of the hearing. Miller had the first closing statement. Miller asked for substantial additional time to prepare and file his closing statement. Over the objection of the City and acting under authority of RoP 104, the Examiner granted Miller not as much time as he had requested, but one month (which included the Easter weekend) in which to submit his closing statement with the City having 18 days thereafter (which included the Memorial Day weekend) in which to submit its closing statement. The established filing dates were May 13 and 31, 2022, respectively. The Examiner also imposed a 20-page limit along with other closing statement requirements. On May 10, 2022, Miller asked for a filing extension; the Examiner denied that request on May 11, 2022. On May 12, 2022, Miller requested reconsideration or treatment of the reconsideration request as a new filing extension request. The Examiner denied that request on May 12, 2022. (Exhibit 9025) The following were entered into the record pursuant to the agreed schedule:

Exhibit 1117: Petitioner's Closing Arguments, filed May 13, 2022
Exhibit 44: Respondent's Closing Argument, filed May 31, 2022

The Examiner advised the principal parties in his May 11, 2022, filing extension denial email that the May 10 – 11 email chain regarding extension of the closing statement filing deadline would be entered into the record. Subsequent to that advisory the email chain was extended to May 12, 2022, by Miller's requests for reconsideration/new request and responses thereto. The Examiner finds and concludes that those additional emails need to also be in the record for completeness. Therefore, the following exhibit is entered into the hearing record:

Exhibit 9025: Email chain (5 pages), May 10 - 12, 2022 (Regarding request to extend closing statement filing)

The City has the record copy of the exhibits. All exhibits, whether admitted or excluded, are available on the City's on-line MIEplan web page.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. *Notice of Violation and Appeal*
- 1.1. On October 21, 2019, then Mercer island Code Compliance Officer Anthony Myers (“CCO Myers”) issued the Notice to Shane M. Miller (“Miller”) for violation of the MICC by failing to obtain a building permit before undertaking erection of a stone wall (rockery) on Lot A on or about February 2, 2018. (Exhibit 19) The Notice cited two MICC provisions in support of the charged violation: MICC 17.14.010(105.1) and MICC 17.14.010(105.2).⁵

MICC 17.14.010(105.1) Required.

Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by the construction codes and the Construction Administrative Code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

MICC 17.14.010(105.2) Work exempt from permit.

Exemptions from permit requirements related to the construction codes shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of the construction codes or any other laws or ordinances of this jurisdiction. Permit exemptions shall not apply to Areas of Flood Hazard and City Land Use Critical Areas.

(Exhibit 19, PDF 1, bold in original, code citation corrected)

The Notice imposed “Corrective Actions.”

- Apply for and receive approval for the building permit that is/was required to replace the retaining wall near the bulkhead.
- Once the permits have been approved and issued, all inspections must be completed within 30 days of the permit activation.

⁵ The Notice quotes these two code sections in reverse order and, presumably the result of a scrivener’s error, provides the same code citation for both. The two code sections are quoted here from the Notice using the Notice text, but in the correct numerical order and with the correct code citations.

(Exhibit 19, PDF 2)

The compliance date for completion of the initial corrective action was November 4, 2019. (Exhibit 19, PDF 2)

The only civil penalties imposed were the standard daily penalties for failure to comply that would begin to accrue after the compliance date. (Exhibit 19, PDF 2)

1.2. On November 5, 2019, Miller timely filed an appeal from the Notice. In addition to the required appeal form, Miller submitted a letter dated November 4, 2019, detailing the reasons he believes that the Notice is erroneous. (Exhibit 20) The letter contains 20 numbered paragraphs which contain five basic allegations of error. The Examiner has labeled those issues as Appeal Issues A – E for ease of reference:

1.2.1 Appeal Issue A (Paragraph #1). Miller asserts that the Notice was untimely issued as it relates to an event that occurred in or around early February, 2018. (Exhibit 20, PDF 2)

1.2.2. Appeal Issue B (Paragraph #2). Miller asserts that City staff had investigated the event in 2018 and had concluded in February, 2018, that no building permit was required for the work that had occurred. (Exhibit 20, PDF 2)

1.2.3. Appeal Issue C (Paragraphs 3 – 10). Miller asserts that the work that occurred was exempt from building permit requirements as landscape maintenance. (Exhibit 20, PDF 2 – 3)

1.2.4. Appeal Issue D (Paragraphs 13 – 19). Miller asserts that Lot A does not exhibit steep slopes, as that term is defined in the MICC, and, therefore, is not a critical area. Therefore, the asserted exemption for landscape maintenance would apply to the work that was undertaken. (Exhibit 20, PDF 4 – 6)

1.2.5. Appeal Issue E (Paragraph 20). The Notice is “unconstitutional as it infringes on [Miller’s] homestead property rights.” (Exhibit 20, PDF 6)

1.2.6. Paragraphs 11 and 12 of the appeal letter contain *ad hominem* assertions regarding Miller’s then next door neighbor to the north, William Gartz (“Gartz”). (Exhibit 20, PDF 4) The Examiner ruled at the outset of the hearing that testimony or argument about alleged code violations by anyone other than Miller or about the interpersonal relationship between Miller and Gartz would not be admitted or considered. The relationship between Miller and Gartz was, thus, not allowed to enter into the hearing and exhibits relating thereto were excluded from the record.

- 1.3. Short subdivision MI-81-2-02 is a four-lot land division between West Mercer Way and the Lake Washington shoreline which was recorded on May 7, 1981. Lots A, B, and C front on the lake shoreline from south to north; Lot D is upslope of Lots A and B along West Mercer Way. Lots A, B, and C exhibit a southwesterly slope down to the shore. (Exhibits 34; 1030)

George Lewis (“Lewis”) was the developer of the short subdivision. (Exhibits 1076, PDF 1; 1101) Lewis built 7709 in 1983 – 84 and resided there until he sold Lot A to Woo in 1988; Woo owned Lot A until he sold it to Coson in 1995; Coson owned Lot A until he sold it to Miller in 2006. (Exhibits 1049; 1076, PDF 1; and testimony)

- 1.4. Lot A is an irregularly shaped lot with about 78 feet of frontage along the lake shoreline. Lot A naturally sloped rather sharply downward to the lake shoreline, flattening out near the shoreline. The lake’s ordinary high water mark (“OHWM”) apparently lies beyond (west of) the western property line. 7709 is not parallel to any property line or to the lake shoreline. Measured at right angles to the face of the west wall, 7709 varies between approximately 69 to 83 feet east of the OHWM. (Exhibits 26; 34⁶) A 5’ – 7’ tall heavy stone bulkhead fronts all of Lot A and extends upslope along the south property line for some distance. (Exhibit 1057) The exhibits strongly suggest that the bulkhead was placed more or less along the OHWM and backfilled behind it. (Exhibits 41, PDF 2 & 3; 1057)

- 1.5. There are currently three “walls” crossing the slope from north to south west of 7709. The rockery which is at issue in this proceeding will be referred to as the “lower wall,” a timber wall upslope to its east will be referred to as the “middle wall,” and a timber wall farther upslope to the east will be referred to as the “upper wall.”

- 1.6. Section 17.14.010(105.2) MICC, as quoted in the Notice, is the version in effect in 2019 when the Notice was issued. “The construction codes and construction administrative code that are in effect when the building permit application is deemed complete by the building official shall apply.” [MICC 17.14.010(105.3.4)] “Complete applications for land use review of ... building permits... shall vest on the date a complete application is filed.” [MICC 19.15.170(B)] Under either of those applicable regulations a complete application must be filed in order to trigger a vested right.

⁶ Exhibit 34 is a survey of MI-81-2-02 prepared and stamped in or around 2013 by a licensed land surveyor. Distances not stated on the face of the survey have been interpolated by the Examiner based upon the bar scale on the exhibit.

The Notice involves an action that was taken without benefit of any building or land use application having been filed. Therefore, vested rights are not a consideration in this proceeding.

Section 17.14.010 MICC has been amended since 2019. [Ord. 21C-01 § 1 (Exh. A); Ord. 20C-21 § 1] Except for quoted documents (such as the Notice), the current version of the MICC will be used herein. Wherever possible, the Examiner will indicate the existence of any significant code changes since 2019.

1.7. The current versions of MICC 17.14.010(105.1) and (105.2) read as follows:

105.1 Required. Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by the construction codes and the Construction Administrative Code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

105.2 Work exempt from permit. The following permit exemptions shall not apply to Areas of Flood Hazard and City Land Use Critical Areas unless the work is entirely within or on the exterior envelope of a legally established existing building. For example, exempt repairs to mechanical, electrical, and plumbing equipment, exempt re-roofing, exempt wall finishes and similar exempt work, which is located entirely within or on the exterior envelope of a legally established existing building remains exempt from permit when located within Areas of Flood Hazard and City Land Use Critical Areas. Exemptions from permit requirements related to the construction codes shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of the construction codes or any other laws or ordinances of this jurisdiction.

[Bold in original]

1.8. The remainder of the Findings of Fact is organized around the five appeal issues. A concluding section in the Findings of Fact analyzes, in chronological order, the numerous photographs of Lot A that are in the hearing record. The Conclusions of Law are also organized around the five appeal issues.

- 1.9. The Findings of Fact and Conclusions of Law in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the Decision as a whole.
- 1.10. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
2. *Appeal Issue A*
- 2.1. Miller asserts that the Notice was untimely issued as it relates to an event that occurred in or around early February, 2018. (Exhibit 20, PDF 2)
- 2.2. On or about February 1, 2018, Gartz filed an email compliant with the City regarding work being done on Lot A near the lake shoreline allegedly without a permit. (Exhibit 1) On or about February 2, 2018, Gartz sent the City a picture of an apparent rockery being constructed within 10 feet or so of the lake shoreline.⁷ (Exhibit 2)
- 2.3. On February 2, 2018, Then Code Compliance Officer Jimmi Serfling (“CCO Serfling”) posted a Stop Work Order (“SWO”) on Lot A ordering all work on the rockery structure to cease. (Exhibits 4; 1098, PDF 27) Miller did not appeal the SWO.
- 2.4. On February 5, 2018, Miller sent an email to CCO Serfling explaining why, in his opinion, no building permit was required for the rockery work that had been done. (Exhibit 6)
- 2.5. Later on February 5, 2018, CCO Serfling responded to Miller advising him that the work done exceeded “simple yard maintenance” and required a building permit, a Shoreline Management Act (“SMA”) permit of some type, and, possibly, State Environmental Policy Act (“SEPA”) review. (Exhibit 7)
- 2.6. On February 6 and 9, 2018, Miller submitted letters from Michael Lee (“Lee”), a landscape architect, and Phil Haberman (“Haberman”), a geotechnical engineer. Lee said the rockery replaced a timber wall in poor condition which he had seen in 2016. Lee described the work as “simple landscape maintenance”. (Exhibit 11) Haberman stated that the rockery replaced an un-engineered railroad tie wall that was in poor condition. He opined that the rockery was a better solution. (Exhibit 10) The rockery was not an engineered structure.
- 2.7. On February 12, 2018, CCO Serfling issued a Code Compliance Courtesy Notice (“Courtesy Notice”) to Miller. The Courtesy Notice advised that the rockery work

⁷ Distance from the shoreline estimated by the Examiner based on the height of the workers and other exhibits which depict a 3-foot wide concrete walk between the rockery and the lake shore bulkhead.

- was beyond yard maintenance and that, at a minimum, he needed to submit an SMA Shoreline Exemption Permit application and that additional requirements could be forthcoming. (Exhibit 8)
- 2.8. On the morning of February 14, 2018, CCO Serfling and Gareth Reece (“Reece”),⁸ City Plans Examiner, met with Miller, Lee, and Haberman on Lot A. Reece told the group that he believed a building permit was required for the rockery work that had been performed. Serfling informed Miller that he needed to apply for a building permit, an SMA Shoreline Exemption Permit, and, likely, SEPA review. (Exhibits 9, PDF 2; 30, PDF 5)
- 2.9. At 2:56 p.m. on February 14, 2018, Miller sent a lengthy email to CCO Serfling explaining why he still believed that no permit was required for the rockery work. (Exhibit 9)
- 2.10. At 4:42 p.m. on February 14, 2018, Reece sent an email to Miller explaining why a building permit was required, refuting part of Miller’s earlier email of that date. (Exhibit 12)
- 2.11. On February 15, 2018, Miller emailed Reece asserting that since the rockery was less than four (4) feet tall, no building permit was required under the exemption contained in MICC “17.14.105.2.4.”⁹ (Exhibit 13)
- 2.12. At 1:09 p.m. on February 16, 2018, CCO Serfling emailed Miller in response to his February 14th email, Exhibit 9. Serfling concluded that a building permit was required to replace a timber wall with the rockery. (Exhibit 14)
- 2.13. At 1:28 p.m. on February 16, 2018, City Building Official Don Cole (“Cole”) sent Miller an email stating that, after a review of the City’s file and correspondence, he had concluded that a building permit was required because the area where the rockery had been constructed was a regulated steep slope, one of the types of critical areas regulated by the City, and that none of the building permit exemptions applied within regulated critical areas. (Exhibit 15)

⁸ Miller orally doubted that Reece was a licensed engineer. (Testimony) Reece is a licensed Professional Engineer (“PE”) in the State of Washington. He holds active license No. 48003, initially issued on March 17, 2011, nearly seven years prior to his first involvement in this case. His current license is valid through October 11, 2023. [Official notice <https://professions.dol.wa.gov/s/license-lookup>, last visited May 18, 2022]

⁹ The record contains no hard evidence on the height of the rockery structure.

Miller’s code citation is an apparent scrivener’s error. The correct citation is “17,14.010(105.2.4).”

- 2.14. On April 9, 2018, Miller requested a meeting with Cole. (Exhibit 1027) No meeting was held. (Testimony)
- 2.15. CCO Serfling left City employ in or around Spring, 2019, and was replaced by Anthony Myers (“CCO Myers”).
- 2.16. On August 22, 2019, CCO Myers reviewed the Miller case. (Exhibit 30, PDF 4)
- 2.17. On August 23, 2019, CCO Myers sent Miller a second Courtesy Notice. CCO Myers reminded Miller of the February, 2018, correspondence and the City’s position that a building permit was required. The Courtesy Notice informed Miller that he had to initiate the building permit application process not later than September 23, 2019, or enforcement action would be undertaken. (Exhibit 16)
- 2.18. On September 22, 2019, Miller sent an email to CCO Myers denying the need for a building permit based upon his assertion that the slope was not steep enough to be considered a critical area (less than 40%). (Exhibit 17)
- 2.19. On September 24, 2019, CCO Myers advised Miller by email that he could not find a building permit application for the rockery in the City’s system. Miller promptly responded that he had sent a letter to CCO Myers. (Exhibit 30, PDF 4) CCO Myers received the Miller letter on September 26, 2019. (Exhibit 30, PDF 3)
- 2.20. On October 21, 2019, the Notice was issued. (Exhibit 19) On November 4, 2019, Miller’s appeal was filed. (Exhibit 20) Events directly related to the appeal process that occurred after the appeal was filed have been set out in the Introduction, above.
- 2.21. On November 6, 2019, City staff met with Miller and advised that the City would not pursue civil penalty accrual pending Miller’s decision whether to apply for a building permit. (Exhibit 30, PDF 2)
- 2.22. On or about November 11, 2019, Miller filed building permit application BP1912-047 to maintain an existing four (4) foot retaining wall on Lot A. (Exhibit 21) Miller later submitted plans dated November 26, 2019, for a rock wall. The plans do not reflect that which was built based on the evidence in this record.¹⁰ (Exhibit 22, PDF 1, 3, & 5)

¹⁰ The plans show a battered wall composed of stacked 3-man (700 – 2,000 pound), 2-man (250 – 700 pound), and 1-man (30 – 250 pound) rocks, with the bottom row beneath grade and the rockery back-filled with drain gravel. (Exhibit 22, PDF 1 & 3) The photographs of the rockery do not indicate any sub-grade bottom row nor any 3-man (or perhaps even 2-man) rocks in the rockery. It would be hard to tell from the available photographs whether any drain rock was placed behind the rockery. (Exhibits 2; 6, PDF 2) Exhibit 6 appears to show 1-man rocks laid against an existing slope as a facing, not a stacked stone retaining wall.

2.23. On December 30, 2019, and January 2, 2020, City staffers prepared review comments for the BP 1912-047 application. (Exhibit 22) The record does not indicate whether those comments were ever sent to Miller.

2.24. As of March 24, 2020, review of BP1912-047 was on hold pending payment by Miller of the required application fee. (Exhibit 30, PDF 1)

3. *Appeal Issue B*

3.1. Miller asserts that City staff had investigated the event in 2018 and had concluded in February, 2018, that no building permit was required for the work that had occurred. (Exhibit 20, PDF 2)

3.2. See Findings of Fact 2.2 – 2.13, above.

4. *Appeal Issue C*

4.1. Miller asserts that the work that occurred was exempt from building permit requirements as landscape maintenance. (Exhibit 20, PDF 2 – 3)

4.2. As quoted in the Notice, MICC 17.14.010(105.1) requires issuance of a building permit before most construction work is undertaken. (See Findings of Fact 1.1 and 1.7, above.) Section 17.14.010(105.2) MICC contains numerous exemptions from the building permit requirement, only one of which could possibly apply to the rockery work that was performed:

Building.

...

4. Retaining walls and rockeries which are not over 4 feet (1,219 mm) in height measured from the bottom of the footing to the top of the wall, unless supporting a surcharge or impounding Class I, II or III-A liquids.

The 2019 version of MICC 17.14.010(105.2) has exactly the same language for the rockery exemption. [Official notice]

4.3. No liquids are impounded by the rockery (or either of the other two walls, for that matter). Therefore, the “impounding Class I, II or III-A liquids” restriction is irrelevant.

The word “surcharge” is not defined in the MICC. When an ordinance does not define specific terms used within that ordinance, it is appropriate to consult a dictionary to determine meaning. [*Peter Schroeder Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 192, 920 P.2d 1216 (1996)] In the geologic context, “surcharge” means “[a]n additional force applied at the exposed upper surface of a restrained soil.” [http://geotechnicalinfo.com/geotechnical_glossary.html#n, last visited June 4, 2022]

4.4. “Landscaping” has two components: “softscape” and “hardscape”. “The arrangement and planting of softscape elements (e.g., trees, grass, shrubs and flowers), and the installation of hardscape elements (e.g., placement of fountains, patios, street furniture and ornamental concrete or stonework).” [MICC 19.16.010, “L” definition of “Landscaping”]

5. *Appeal Issue D*

5.1. Miller asserts that Lot A does not exhibit steep slopes, as that term is defined in the MICC, and, therefore, is not a critical area. Therefore, Miller asserts that an exemption for landscape maintenance would apply to the work that was undertaken. (Exhibit 20, PDF 4 – 6)

5.2. “Critical areas” are defined as “Geologic hazard areas, watercourses, wetlands and wildlife habitat conservation areas.” [MICC 19.16.010, “C” definition “Critical areas”] It is undisputed that no watercourses, wetlands, or wildlife habitat conservation areas exist on or in immediate proximity to Lot A. Therefore, the only critical area that might exist on Lot A would be “Geologic hazard areas”.

5.3. “Geologically hazardous areas” are defined as “Areas susceptible to erosion, sliding, earthquake, or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or alterations, including landslide hazard areas, erosion hazard areas and seismic hazard areas.” [MICC 19.16.010, “G” definition “Geologically hazardous areas”]

“Landslide hazard areas” are defined as “Those areas subject to landslides based on a combination of geologic, topographic, and hydrologic factors, including” five categories, of which three may have relevance in this case:

1. Areas of historic failures;
...
2. Areas that have shown evidence of past movement or that are underlain or covered by mass wastage debris from past movements;
...

5. Steep slope. Any slope of 40 percent or greater calculated by measuring the vertical rise over any 30-foot horizontal run.

[MICC 19.16.010, “L” definition “Landslide hazard areas”] The definition of “steep slope” adds a qualifier:

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.

[MICC 19.16.010, “S” definition “Steep slope,” italics in original] Reece testified that the second sentence means that one does not artificially create a “steep slope” by grading and terracing.

- 5.4. “Slope” is defined as “A measurement of the incline of a lot or other piece of land calculated by subtracting the lowest existing elevation from the highest existing elevation, and dividing the resulting number by the shortest horizontal distance between these two points.” [MICC 19.16.010, “S” definition “Slope”] This definition is substantively the same as the 1984 MICC 17.10.090 definition of “slope” quoted by Lewis in his March, 1984, letter to the City. (See Finding of Fact 5.10, below.)

But it is important to realize that for the purpose of determining whether a landslide hazard area exists on a parcel, the relevant term is “steep slope” as defined in the MICC 19.16.010, “L” definition of “Landslide hazard areas” (See Finding of Fact 5.3, above.), not the general definition of “Slope.” A “steep slope” is a special subcategory of “slope.”

- 5.5. “Erosion hazard areas” are defined as “Those areas greater than 15 percent slope and subject to a severe risk of erosion due to wind, rain, water, slope and other natural agents including those soil types and/or areas 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.” [MICC 19.16.010, “E” definition “Erosion hazard areas,” underlining added]

The word “including” is not a limiting word. Rather, it means that what follows are examples of what would qualify as an erosion hazard area. Any area of “greater than 15 percent slope and subject to a severe risk of erosion due to wind, rain, water, slope and other natural agents” is an erosion hazard area by definition, regardless of its soil type.

- 5.6. On April 6, 2009, licensed geologists Kathy Troost and Aaron Wisher of the University of Washington (“Troost & Wisher”) delivered to the City a set of geological hazard maps of Mercer Island that they had prepared under contract with

the City. The maps were prepared “in accordance with standard practice for hazard assessment, the Washington Administrative Code, and the Mercer Island City Code.” (Exhibit 23)

Excerpts from the Troost & Wisher maps covering Lot A are in the record as Exhibit 24. The excerpts depict the area between 7709 and the shoreline as an erosion hazard area, a steep slope hazard area, and a seismic risk area. (Exhibit 24)

Exhibit 24 contains a disclaimer:

These maps are for the use of City of Mercer Island staff for the purposes of permit application evaluation. It provides a general assessment of known or suspect hazard areas for which the City will require site and project specific evaluation by a Washington State licensed engineer, geologist or engineering geologist prior to issuing a site for development. All areas have not specifically evaluated for hazards and there may be locations that are not correctly represented on these maps. It is the responsibility of the property owners and map users to evaluate risk associated with their proposed development. No site-specific assessment of risk is implied or otherwise indicated by the City of Mercer Island by these maps.

That disclaimer places the burden of proving whether a specific parcel is a critical area as defined on the landowner. This statement is further codified in MICC 19.07.060:

Approximate locations of critical areas in the city of Mercer Island are depicted on citywide maps displayed in the city's GIS database, as amended. Field verification and, if the city deems appropriate, evaluation and mapping by a qualified professional of the location of critical areas will be required to determine the location and type of critical area on a given site.

- 5.7. The City has a map of historic landslides which indicates that an ancient landslide and a more recent, known landslide occurred on Lot A. That map also indicates that a landslide scarp lies upslope between Lots A and B and West Mercer Way. (Exhibit 27¹¹)
- 5.8. Lot A originally exhibited an irregular slope down to the lake shoreline: The middle section of the slope was steepest (topographic contour lines were closer together); the slope flattened out significantly near the shoreline (contours were farther apart); and

¹¹ Miller challenged the credibility of Exhibit 27.

a swale bisected the slope running from east to west. (Exhibit 26) The shoreline bulkhead is not mentioned in the 1983 geotechnical report. (Exhibit 1101) It seems likely that it was constructed as part of the development of Lot A in or around 1983 - 1985.

- 5.9. In August, 1983, Earth Consultants, Inc. (“ECI”) completed a geotechnical evaluation of Lots A – C for Lewis. ECI was told that “[t]he site will be re-graded to create a bench for the house construction and the spoils will be placed downslope from any construction.” (Exhibit 1101, PDF 3) “Lots A, B, and C of the Lewis Short Plat are located on a moderate to steeply sloping hillside. ... At the bottom of the slope near the lake the ground surface flattens abruptly.” (Exhibit 1101, PDF 3) ECI excavated five test pits, only one of which was located on Lot A: Test Pit “TP-1” was located in the north center of Lot A near the Lot A/Lot B boundary. (Exhibit 1101, PDF 3 & 11)

The near surface soils on the site are primarily loose sandy silt, to medium dense gravelly sands. Below two to four feet the soils became dense to very dense. We encountered dense gray gravelly glacial till soils below the surface soils in Test Pits TP-2 and TP-5. Test Pit TP-4 was completely in glacial till.

(Exhibit 1101, PDF 3) Test Pit TP-1 exhibited 2 feet of loose sand over moist, medium dense to dense silty sand to the extent of exploration (8 feet) which ECI did not characterize as glacial till. (Exhibit 1101, PDF 13) ECI stated that “[t]he existing, natural site slopes appear to be generally stable, although some minor sloughing is occurring on the more steep slopes. ... All permanent fill slopes should be inclined no steeper than 1.5:1. ... Water should not be allowed to flow uncontrolled over the top of any slopes.” (Exhibit 1101, PDF 6)

- 5.10. In 1983 Lewis applied to construct a residence on Lot A. His application was assigned file number 83-350 and his proposed site plan was approved on or about September 2, 1983.

During the 1983-84 review process for Lewis’ building permit for 7709, a dispute arose about the steepness of the slope on Lot A. (Exhibit 1090) In March, 1984, Lewis submitted to the City a letter statement from a licensed land surveyor (Meyring¹²) stating that the “elevation between the highest and lowest points on” Lot A resulted in an average “37% slope, between the NE corner and the South line intersect at the rip-rap along the West line, (a distance of 250 feet between the

¹² Meyring has since passed away. [Official notice]

highest and lowest elevation).” (Exhibit 9016.K ¹³) Lewis asserted that this calculation complied with then MICC “17.10.050 (F), [which] says that the slope is calculated from the ‘... highest point of elevation of the LOT to the lowest point of elevation of the LOT.’” (Exhibit 1090; all-caps in original) The City apparently accepted that argument as Lewis received his building permit and 7709 was constructed.

In October, 2021, Miller had a retired, formerly licensed land surveyor (“Winters”) evaluate the “average overall grade” calculation using the 1983 plans. (Testimony) Winters sent Miller a letter in which he explained what he did: Winters

created a cross-section that bisects the parcel, beginning at a point on the east property line (elevation 95') and ending at the rockery along the lake shore (elevation 20'). The scaled distance between those 2 points is 205 ft. Therefore, the average grade = 37%, which is the change in elevation (75 ft) divided by the horizontal distance (205').

(Exhibit 1025 ¹⁴) That calculation is not the same as “steep slope.”

- 5.11. Based on the approved site plan for the 1983 building permit, the elevation change between the west face of 7709 and the shoreline, measured at right angles to the slope, is approximately 35 feet (55 feet elevation at the face of the residence to 20 feet elevation at the base of the bulkhead) over a horizontal distance of about 75 feet, an average 47% slope ($35/75 = 46.66\%$). ¹⁵ (Exhibit 26 ¹⁶)
- 5.12. When Lewis finished 7709 he created a series of four cross-slope terraces between the residence and the shoreline bulkhead. Each terrace was separated from its

¹³ It is impossible to determine from Meyring’s letter what he meant by “NE corner” of Lot A. Lot A includes a 64’ x 20’ panhandle extension at its northeast corner. The horizontal distance between the southwest corner of Lot A and the start of the panhandle is only about 163 feet; Lot A’s south lot line is only about 201 feet long. (Exhibit 34. For a time in these proceedings Miller asserted that the south line of Lot A was about 320 feet long and calculated slope based on that number. Miller later realized that the 320 foot number on Exhibit 34 was the sum of Lot A’s and Lot D’s south lines.) Thus the 250-foot horizontal distance reported by the surveyor had to extend well beyond the bulk of Lot A. The horizontal distance between the southwest lot corner and the northeast corner of the panhandle is only about 220 feet. If one measures from the OHWM (which according to Exhibit 34 lies west of, outside of the lot) to the northeast corner of the panhandle, the distance is about 230 feet. (Distances interpolated from Exhibit 34.)

¹⁴ Miller recorded the Winters letter against the title of Lot A on October 26, 2021, a fact which has absolutely no bearing on this appeal. Recording a document against title doesn’t prove anything about the content of the document.

¹⁵ Slopes have to be measured at right angles to the contour lines – along what snow skiers would call the “fall line.” Measuring slope any other way would generally tend to artificially minimize the acuteness of the slope by measuring angularly across the slope.

¹⁶ Exhibit 1026 is a duplicate.

neighbor by a 1.5:1, unconstrained cut/fill slope. The terraces were apparently created by depositing up to 10 feet of fill on the slope, including backfill behind the shoreline bulkhead. The terraces largely filled in the former swale. (Exhibits 1056; 1057; 1105, PDF 3. See Finding of Fact 7.2, below, for a more detailed description.)

- 5.13. In or around 1989 Woo applied for a building permit to replace three wood bulkheads¹⁷ with keystone retaining walls and to construct new keystone retaining walls on Lot A's slope, all west of the site's driveway. Building Permit 89-624 was approved on or about September 5, 1991. (Exhibit 1055)

The September, 1991, approved plan depicts three existing timber "bulkheads" on Lot A's slope: One more or less where the lower wall is currently, a second more or less where the middle wall is currently, and a third, short timber "bulkhead" extending westerly from the face of 7709. (The record is devoid of any evidence of permits having been obtained for those walls.) The approved plan was to remove those three timber "bulkheads," replace them with keystone walls, and add additional keystone walls on the slope. Neither the plan view nor the section view depict the lake shore bulkhead although the shore bulkhead is in the area covered by both views. (Exhibit 1055)

The keystone walls approved under Building Permit 89-624 were never built.

- 5.14. In 1991 Woo replaced a timber retaining wall east of Lot A's driveway on the east edge of Lot A with an engineered rockery wall. (Exhibits 1102 – 1104)
- 5.15. In the Spring of 2001 the plastic water line serving 7709 (and possibly also the residence on Lot B) ruptured. Because the residence was unoccupied at the time, water flowed out of the pipe, down the driveway, and downslope across Lot A for a substantial period. The result was a slide of surficial materials west of 7709. The slide created a 3-foot deep scarp at its top which extended in an arc about 60 feet north to south across Lot A starting just west of 7709. The east-west extent of the slide was about 55 feet. (Exhibit 1105) Given those dimensions, the slide would have extended more or less to just upslope of the lower wall location.

AMEC Earth & Environmental, Inc. ("AMEC") was retained by the company hired to repair the broken water line to investigate the cause of the slide on Lot A. 7709 was "red-tagged" as unsafe for entry pending the results of AMEC's investigation. AMEC's contract called for a "reconnaissance," but did not include any field exploration. AMEC's reconnaissance report was issued in June, 2001. (Exhibit 1105, PDF 1 & 2)

¹⁷ When or how these bulkheads came to be is not disclosed in the record.

AMEC observed the path that the mudflow from the break had followed down the slope on Lot A and into Lake Washington. The headscarp of the landslide was about 3 feet from the edge of 7709's back yard patio. AMEC observed an approximate 4-foot high timber wall at the west (downslope) edge of the slide area. That wall was slightly bowed downslope. AMEC described the area downslope of that wall as consisting of a level bench (which it believed was the location of a sewer line) bordered by a slope down to the rock lake shore bulkhead. (Exhibit 1105)

AMEC concluded that the primary cause of the landslide was the water line break and that a contributing cause might have been a February, 2001, earthquake in the region. AMEC concluded that the soils which slid were the fill soils placed on the slope during Lewis's 1984 -85 landscaping. (There had been a swale on the slope which the terracing covered.) AMEC recommended that test borings be performed to confirm that only the fill soils had slid. (Exhibit 1105, PDF 3)

5.16. An October, 2001, survey of the southwest corner of Lot B and the northwest corner of Lot A depicted a different 25-foot wide landslide which began on Lot B and extended across Lot A to the bulkhead. That survey depicted a 4-foot timber retaining wall immediately adjacent to and upslope of the concrete walkway along the bulkhead. That wall is depicted as extending approximately 50 feet south of the common property line where it jogs east (upslope) about 9 feet before continuing south off the part of Lot A covered by the survey. The southern extent of that wall cannot be determined from the exhibit as it does not depict all of Lot A. (Exhibit 1081)

5.17. AMEC followed up its June reconnaissance with a Limited Technical Report in January, 2002. (Exhibit 39) The report describes the site as "steeply sloping." In preparing the report AMEC drilled two borings and dug one test hole on the slope west of 7709.¹⁸ (Exhibit 39, PDF 3, 18, 21, & 22)

Boring B-1 was advanced on terrace two to a depth of 23 feet below ground surface ("bgs") or about 3 feet below the lake bed. Boring B-1 encountered about 13 feet of fill overlying about 2 feet of colluvium¹⁹ over dense pre-glaciation deposits to the depth explored. (Exhibit 39, PDF 19 & 21)

Boring B-2 was advanced on terrace four near the scarphead to a depth of 16 feet bgs. Boring B-2 encountered 8 feet of fill overlying about 5 feet of colluvium over dense pre-glaciation deposits to the depth explored. (Exhibit 39, PDF 18, 19, & 22)

¹⁸ A third boring was advanced at a location on the east side of 7709. (Exhibit 39, PDF 23)

¹⁹ Colluvium is "[a] general term applied to any loose, heterogeneous, and incoherent mass of soil material and/or rock fragments deposited by rainwash, sheetwash, or slow, continuous downslope creep, usually collecting at the base of gentle slopes or hillsides." [<https://mrdata.usgs.gov/geology/state/sgmc-lith.php?text=colluvium>, last visited June 4, 2022]

AMEC described finding only one timber retaining wall between 7709 and the shoreline bulkhead: an approximate 4-foot high wall between B-1 and B-2. (Exhibit 39, PDF 5 & 19)

AMEC described Lot A's stratigraphy as

2 1/2 to 12 1/2 feet of loose to medium dense silty sand (fill) mantling 2 1/2 to 4 feet of very loose to loose silty sand with some organics (colluvium). Underlying these shallow surficial soils, we encountered medium dense to dense glacial till and very dense sand. The very dense sands deposits were encountered to the full depth explored in our borings.

(Exhibit 39, PDF 6) AMEC described the on-site "soils to be currently above their optimum moisture contents, and to be moderately sensitive to highly sensitive to moisture content variations." (*Ibid.*) AMEC recommended that runoff water from construction areas should be carefully controlled to prevent erosion. (Exhibit 39, PDF 11)

AMEC then analyzed the stability of the slope between 7709 and the shoreline.

... Our analysis indicates that sliding is occurring within the relatively loose fill and colluvium atop the denser soils at depth. The recent movement was apparently initiated by the elevated groundwater conditions stemming from the water leak. The toe of the slide mass appears to coincide with the timber bulkhead at the base of the slope.

... Seismic factors of safety in all cases are less than 1.0. While a higher static and seismic safety factor would be desirable, the construction cost to achieve this is very high in relation to the value of the property and end use of the backyard area.

(Exhibit 39, PDF 8)

AMEC proposed constructing three arcuate keystone retaining walls on the slope, each resting on a grade beam supported by needle piles (sometimes called "pin piles") driven into the pre-glaciation substrata. The existing fill materials on the slope would be removed and replaced with reinforced soil (structural fill) behind each of the walls. (Exhibit 39, PDF 10 – 15 & 18 – 20)

- 5.18. In or around June, 2003, Coson retained Associated Earth Sciences, Inc. (“AESI”) to develop a different plan to restore the slope behind 7709. The plans prepared by AESI depict the shoreline bulkhead, the narrow first terrace, a 1.5:1 unsupported slope up to the second terrace, a broad second terrace, and then a slope up to 7709. AESI proposed to construct a single, slightly curvilinear geoweb reinforced retaining wall with a timber face across the slope more or less at the upper edge of the second terrace. AESI’s plan did not involve driving pin piles, constructing a grade beam to support the retaining wall, or a keystone retaining wall. The AESI plans do not show any existing retaining wall between the first and second terraces where the rockery at issue in this case is located. (Exhibit 1094)
- 5.19. The City issued building permit BP0203-066 on March 2, 2004, to construct the wall system as proposed by AMEC in Exhibit 39. (Exhibit 41) There is no evidence that the AESI plan was ever approved by the City.
- 5.20. The walls depicted on the approved AMEC plans were never built. Instead, a modified version of the AESI plan, which had not been approved by the City, was constructed: The curve was removed from the geoweb wall. On June 7, 2004, AESI sent a short letter to Coson advising that it had monitored construction of the wall “part-time” during May and June of that year. AESI advised that the wall had been completed in “general accordance” with the AESI plans (not the AMEC plans that had been approved by the City). (Exhibit 1071)
- 5.21. Building permit BP0203-066 expired; the City subsequently discovered that work had been done on the slope, but not the work authorized by the then-expired permit. (Testimony) On January 28, 2005, the City sent a letter to Coson or his agent raising questions about the work that had been done on Lot A’s slope. (Exhibit 1070, PDF 1) That letter is not in the hearing record.

On February 10, 2005, AESI issued a response to the City’s letter. (Exhibit 1070) In that letter, AESI explained that since the slope stability factor of safety would not be appreciably improved by the wall system proposed by AMEC and approved by the City, Coson had AESI design a simpler geoweb wall and had it constructed in 2004. AESI opined that the alternate wall as constructed “is not materially different from the originally permitted wall.” (Exhibit 1070, PDF 2) AESI stated that the geoweb “wall was not designed or intended to stabilize the hillside.” (*Ibid.*) AESI further stated that the geoweb wall was east of the sewer line that crosses the slope on Lot A and “replaced the timber wall that was destroyed by the slide”.²⁰ (Exhibit 1070, PDF 3) Lastly, AESI stated that the timber wall facing of the geoweb wall was not structural; it was just to cover the face of the wall. (*Ibid.*)

²⁰ What timber wall AESI meant is not clear since there is no record of a wall having been previously built across the slope.

This wall, the upper wall, is shown in Exhibit 1038, PDF 27, Figs. 11.1 & 11.2, as it existed in 2021. Figure 11.2 shows that the timber facing has deformed slightly downslope on the southern portion of the wall.

- 5.22. The City retained Kolke Consulting Group, Inc. (“Kolke”) to review the wall that had been built. Kolke concluded that the wall “was in substantial compliance” with applicable codes. (Exhibit 1051)
- 5.23. The several site plans in the record (Exhibits 26 (1983), 1055 (1991), 1081 (2001), 39 (2002), 1094 (2003)) are frustratingly inconsistent and, probably, inaccurate to some extent. For example, the dogleg at the west end of the north property line is shown as 55' ± to the shoreline bulkhead on Exhibit 26, 52' ± to the high water line (no bulkhead shown) on Exhibit 1055, 75' ± to the east edge of the concrete walkway on Exhibit 1081, 30' ± to the shoreline bulkhead on Exhibit 39, PDF 18, and 45' ± to the OHWM (which is depicted as some 13' west of the shoreline bulkhead) on Exhibit 1094.

All but Exhibit 1055 depict the shoreline bulkhead, but we know that the shoreline bulkhead existed in its present location as early as 1985. Why wasn't it included on a 1991 plan?

The depiction of the lower wall is substantially different on Exhibits 1055 and 1081; no lower wall is shown at all on the plan views and cross-section views on Exhibits 39 and 1094. But there is no evidence in the record of alteration to that wall before 2018.

The sewer manhole is located in approximately the same location on Exhibits 1055, 39, and 1094, but is shown in a vastly different location on Exhibit 1081.

Exhibit 41, PDF 18, schematically depicts the stairs which crossed over and descended down from the upper wall, but it doesn't show the wall that the stairs crossed. (Cf. Exhibit 41 with Exhibit 36. The stairs had been removed by 2017. (Exhibit 29, PDF 1))

These are all features (except the stairs) which didn't move over time; their depiction on plans prepared by licensed surveyors and engineers should be virtually, if not exactly, identical. But they aren't.

The discrepancies leave one with two vexing, unanswerable questions: Which, if any, plan is an accurate depiction of Lot A's physical features? Which, if any, plan contains an accurate representation of Lot A's contours?

6. *Appeal Issue E*

- 6.1. The Notice is “unconstitutional as it infringes on [Miller’s] homestead property rights.” (Exhibit 20, PDF 6)
- 6.2. No evidence was entered into the record regarding this issue. The issue was not argued during the hearing. Miller’s Closing Arguments do not address this issue. (Exhibit 1117)

7. *Imagery Analysis*

- 7.1. The record contains numerous photographs of Lot A, some overhead imagery (most, if not all, Google Earth satellite imagery), some low oblique aerial imagery (probably from a small private plane flying over Lake Washington), some from a boat on Lake Washington, and some from ground level cameras. The photographs in the record provide an historical record of Lot A from 1985 through the present. The resolution of the various photographs varies significantly; none of the overhead images are available as stereo pairs (which would allow definitive terrain description).

The following Findings of Fact provide the Examiner’s best interpretation of what each photograph tells about Lot A.²¹

- 7.2. 1985; Exhibit 1057. This apparent low oblique photograph shows the Lewis (now Miller) house as it looked shortly after its completion but before landscaping had been completed. The photograph is taken looking east. The lakeshore bulkhead is in place; it runs the entire length of Lot A’s lake frontage and extends part way up the hillside along the south property line. The hillside between the bulkhead and the west wall of the residence has been shaped into four terraces (referred to contemporaneously by Lewis as “plateaus”). Each terrace is separated by a cut and/or fill slope of about 1.5:1.

Lewis described his back yard landscaping proposal in an October, 1983, letter to the City. He said the lowest terrace would be about 8 feet wide at the level of the top of the bulkhead, elevation 20 feet. The second terrace would be about 7 feet higher and about 15 feet wide. The third terrace would be 7 feet higher and about 10 feet wide. A sewer line runs beneath the third terrace. The fourth terrace would be another 7 feet higher and about 10 feet wide. (Exhibit 1056)

²¹ The Examiner’s undergraduate and graduate field of study was Geography which included aerial photographic interpretation. The Examiner was trained as an Aerial Imagery Interpretation Officer by the U.S. Army and performed that work on active and reserve duty with the Defense Intelligence Agency.

- The visible terrain in Exhibit 1057 matches Lewis' description rather well. A probable sewer manhole is visible at the north end of the third terrace. The slope appears to have been recently covered with a thin layer of dark topsoil or mulch. The concrete walk along the south edge of the property that will eventually extend along the edge of the bulkhead to the north property line is partly finished and partly under construction. The raw earth area to the north (left edge of the photograph) is the south end of Lot B, mostly not part of Lot A. Only one significant retaining wall was in existence at this time: A timber wall along the upslope, east side of Lot A's driveway behind 7709. No retaining walls ran north-south across the slope between 7709 and the shoreline.
- 7.3. 1986-87; Exhibit 1115. A real estate marketing photograph taken from the lake shows 7709 and the upper part of its back yard facing the lake. The fourth terrace is visible along with a short timber retaining wall extending toward the lake from the lowest floor level.
- 7.4. 2007; Exhibit 36. By the time this aerial photograph was taken the concrete walkway had been finished along the south property line and bulkhead. A timber retaining wall had been constructed from the north property line more or less where the bank had been between the third and fourth terraces (the "upper wall") south to the concrete walkway. No other retaining walls are visible on Lot A west of 7709 except for a hint of a wall of indeterminant type at the far northwest corner of the lot more or less where the bank between the first and second terraces had been (the "lower wall"). However, there is no indication on the photograph that that wall extends very far into Lot A. A large flowering tree is present on what would likely be the second terrace.
- 7.5. 2009; Exhibit 38, bottom photograph. There is very little difference between this aerial photograph and the 2007 aerial photograph except for an apparent baren area west of the upper retaining wall leading from the concrete sidewalk to the flowering tree. There is no clear indication of the lower wall.
- 7.6. 2012; Exhibit 9022.2, PDF 6. This ground level photograph, presumably taken from a boat in Lake Washington, depicts much of the north half of the back yard of Lot A. The upper wall (gray in color) is clearly visible in the center of the photograph. A shorter timber retaining wall with a three-plank height addition visible (gray below; orange-brown above) has been constructed downslope of the upper wall (the "middle wall"). This middle wall is labeled on the photograph as the "shoreline retaining wall". That is an incorrect label. The lower left corner of the photograph shows a short segment of faded (light gray) timber retaining wall apparently extending onto Lot A from Lot B to the north (the "lower wall"). The middle wall is upslope of the lower wall and downslope of the upper wall. The north-south extent of the lower wall cannot be discerned because of the tall grasses along the top of the bulkhead.

- 7.7. 2017; Exhibit 29, PDF 1. The upper wall (topped with a row of shrubs) and the middle wall (baren and sharply visible just west of the children's play set) are both clearly visible. A very short length of the lower wall is visible at the Lot A/Lot B property line. The lower wall is not apparent anywhere else along the shoreline bulkhead sidewalk. The large flowering tree has been removed.
- 7.8. 20??; Exhibit 1085. Miller testified that this ground level photograph, apparently taken from the north end of Miller's dock, was taken before Exhibit 2. Because the vegetation cascading over the face of the middle wall is far more dense and lush than that in Exhibit 1078, the Examiner believes that this photograph may have been taken a year or more prior. The top of the bulkhead, the lower wall, the middle wall, and the upper wall are visible in the photograph. Because of the portrait orientation of the photograph, the north south extent of the walls is not visible. The blue kayak is resting on the east-west leg of the lower wall. (The area Miller refers to as the "alcove.") The lower wall to the south of the kayak is covered by vegetation. The location of the step-back where the kayak is appears to be farther north than suggested by Exhibit 1081.
- 7.9. 2018; Exhibit 1078. This ground-level photograph, dated February 1, 2018, the day before the alleged violation occurred, appears to have been taken from the north end of Miller's dock. It shows a slice of the north end of Lot A from the first terrace (the bulkhead is not included in the photograph) to the upper wall. On the left is the short stub of a timber retaining wall (the lower wall) extending onto Lot A from Lot B. That wall appears to be seven boards high. If those boards were 6" wide (as appears likely from the photograph), that wall would have been 42" tall. At the end of that wall a stacked railroad tie wall begins. It would appear that the railroad tie wall was composed of four or five rows of ties, making that part of the wall about 32" – 40" tall. The top of the railroad tie wall is covered with vegetation. The filled yard waste bags in the foreground (likely resting on the concrete walkway) suggest that vegetation covering the railroad tie wall may have been recently removed. The middle wall is visible, although substantially covered by vine-like plants. The upper wall is also visible behind the children's play structure.
- 7.10. 2018; Exhibits 2; 6, PDF 2, bottom (left) photograph. These ground level photographs were taken on February 2, 2018, when the subject rockery was under construction and sometime between February 2 and 5, 2018, after completion, respectively. No trace whatsoever of a prior lower wall is visible in Exhibit 2. The condition of the slope on the southern portion of Lot A in Exhibit 2 is not indicative of the condition that would exist after a vertical timber wall had been removed. Rather it looks more like a sloping cut slope. The completed rockery in Exhibit 6 very much has the appearance of rock facing over a 1.5:1 slope between the first and second terraces. The height of the rockery cannot be accurately estimated as there is nothing in the photograph with a known dimension. It does appear that the height

varies, with the highest portion being in the alcove behind the two Adirondack chairs.

- 7.11. 2019; Exhibit 43, right photograph. Vegetation has grown along the edge of the middle wall, but its straight lines are still visible. The 2018 rock facing is visible across Lot A just east of the concrete walkway. An “alcove” in the lower wall, jutting into the slope, is discernable where three or four chairs are located. However, that alcove appears to be farther north than suggested by Exhibit 1081.
- 7.12. 2020; Exhibit 9022.2.B. This ground level photograph, apparently taken from Miller’s dock or a boat in Lake Washington, shows the steps in the southern concrete walkway, the south end of the upper wall, the south end of the middle wall (covered with vegetation and topped with a chain link fence), and the south end of the lower wall rock facing.
- 7.13. 2020; Exhibit 37. This aerial photograph shows the upper wall (topped with a row of shrubs), the middle wall (hard to see due to vegetation, but its straight lines are a telltale giveaway), and the lower wall rock facing (including the alcove).
- 7.14. 2021; Exhibit 1038, PDF 27. These two ground-level photographs depict the upper wall in the Fall of 2021. If the horizontal timbers are 8” – 10” wide (as seems likely), then the upper wall is about 5 feet tall.
- 7.15. 2022; Exhibit 1079. This April, 2022, photograph is framed similarly as Exhibit 1078, but it also shows 7709 in the background. Facing rock is visible in front of the timber stub wall on the left. Assuming that wall to be 42” tall as previously estimated, the facing rock in front of that wall is less than 42” tall and the rockery which replaced the railroad ties is also about 42” tall.²²

LEGAL FRAMEWORK²³

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

The Examiner is charged with hearing timely appeals of Notices of Violation. [MICC 6.10.090(B)] The Examiner holds an open record hearing after which he issues a written decision. The Examiner’s Decision is a final decision for the City subject to the right of

²² Exhibit 1080 depicts Exhibits 1078 and 10789 side-by-side on one sheet for comparison.

²³ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

reconsideration and appeal to a court of competent jurisdiction. [MICC 6.10.090(D); MICC 3.40.110]

Review Criteria

1. Following review of the evidence submitted, if the examiner finds that no violation has occurred, the hearing examiner shall uphold the appeal and reverse the notice of violation or stop order. If the hearing examiner finds that a violation has occurred, the hearing examiner shall issue an order to the person responsible for the violation which includes the following information:
 - a. The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;
 - b. The required corrective action;
 - c. The date by which the correction must be completed; and
 - d. The civil penalties assessed based on the provisions of this chapter and the fee resolution;
2. If an owner of property where a violation has occurred has affirmatively demonstrated that the violation was caused by another person or entity not the agent of the property owner and without the property owner's knowledge or consent, such property owner shall be responsible only for abatement of the violation.

[MICC 6.10.090(C)]

Standard of Review

The standard of review is preponderance of the evidence. The respondent has the burden to prove the violation. [MICC 6.10.090(B)(1); MICC 3.40.080(B); Hearing Examiner Rule of Procedure 316(a)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. *Appeal Issue A*
 - 1.1. The Notice was not untimely; the hearing was not untimely. The state laws cited by Miller in this regard have no bearing or relevance to a municipal code enforcement action.

- 1.2. The City engaged actively with Miller in February, 2018, after the SWO, which Miller did not appeal, was posted. It issued a Courtesy Notice during that period advising Miller to seek permits for the work that had been done. Miller did not follow up with a permit application.

The case then went dormant for about a year at which time the new CCO reactivated it upon determining that Miller had not applied for required permits. From that point on, there was no lag in prosecution of the case. (All the delays after the Appeal was filed were either joint requests or at Miller's request.)

The dormant period to allow voluntary compliance may seem long to some, but it did not harm Miller as no penalties were accruing during that period.

2. *Appeal Issue B*

- 2.1. Miller is categorically wrong in this assertion. The last emails from CCO Serfling and Cole in 2018 both stated that permits were required for the work that had been performed. There is simply no evidence to refute those emails.

3. *Appeal Issue C*

- 3.1. The existence, precise location, and extent of the lower wall over time cannot be confirmed from either the plans or the photographs in the record. As previously noted, the plans are terribly inconsistent. The aerial photographs do not provide sufficient resolution and the ground level photographs do not have sufficient coverage of the shoreline to provide definitive evidence.
- 3.2. Whether a wall of any sort existed where the current rockery is located (the lower wall) is ultimately irrelevant. Section 17.14.010(105.1) MICC requires that "Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, ... a ... structure, ... or to cause any such work to be done, shall first make application to the building official and obtain the required permit." A stacked stone wall is a structure: "That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner." [MICC 19.16.010, "S" definition, "Structure," underlining added] Unless specifically exempted by the MICC, a permit is required to build a new wall, a permit is required to demolish a wall, a permit is required to repair an existing wall, a permit is required to replace a timber wall with a rock wall, a permit is required to face a timber wall with rocks.
- 3.3. Installation of softscape is not construction; therefore, no building permit is required to install plants, tend plants, or remove plants (unless they are trees regulated under other provisions of the MICC). Installation of hardscape involves construction;

therefore, it is subject to Title 17 MICC's building permit requirements. Unless a specific hardscape construction activity is expressly exempt from the building permit requirement, a building permit must be obtained.

- 3.4. There is not now and there was not in 2019 any specific exemption for hardscape construction. The rockery exemption in MICC 17.14.010(105.2, Building § 4) would apply only if the rockery/wall were less than 4 feet tall (including its footings), did not support a surcharge, did not impound Class I, II or III-A liquids, and/or was not located within a regulated critical area.
- 3.5. The record, despite its length, does not contain any actual measurements of the lower wall's height, length, or manner of construction. Based upon the photographs in the record, parts of it may be under the 4-foot height limit, but parts of it may be above that limit; it may or may not have any footings which would have to be counted in its height. A decision as to whether a code applies or doesn't cannot be based upon guesswork.

If this were the determining factor, which it isn't, the Examiner would have to contingently sustain the Notice subject to a requirement that Miller provide objective, impartial measurements of the height of the rockery.

- 3.6. The plans which Miller submitted with the building permit application he filed in December, 2019, do not represent what was constructed in February, 2018. The plans depict 3-man rocks at the base of the wall, tapering to 1-man rocks in the top row. (Exhibit 22) The photographs of the constructed wall undeniably depict a wall of similar size rock from bottom to top, none of which are anywhere near the 3-man size range. (Exhibit 6, PDF 2)
- 3.7. The best evidence in the record regarding surcharge forces on the rockery is Exhibit 39 which shows that everything behind (upslope of) the lower wall is fill. In fact, Exhibit 39 indicates that everything behind the bulkhead is also fill, which means that the concrete walkway and the lower wall are both founded on fill, not on native materials. Native soils do not appear until well below the bottom of the lower wall. In that sense, then, the bulkhead and all three walls above it (the lower wall, middle wall, and upper wall) are retaining surcharge fill materials that were placed on the native slope in the 1980s to create the terraces that Lewis wanted in his back yard. Not counting the bulkhead (about which the record contains no construction data), only the upper wall appears to have been an engineered wall - and even it wasn't built in full compliance with the plans that the City had approved.²⁴

²⁴ Neither the bulkhead, the lower wall, nor the upper wall were built during Miller's ownership of Lot A. The record has no data regarding construction of the third wall.

This fact alone removes the rockery from the exempt classification and requires that a building permit be issued.

- 3.6. The lower wall does not impound any liquids, so the Class I, II or III-A liquid impoundment limitation does not apply.

4. *Appeal Issue D*

- 4.1. Meyring's, Winter's, and Miller's slope calculations may be accurate as far as they go, but all three calculate "slope," not "steep slope." "Steep slope" is what may make a site a landslide hazard area, and thus, a critical area. "Steep slope" requires a measurement of elevation change over any discrete 30-foot horizontal distance. The logical starting point would be at the toe (bottom) of a suspect slope; the ending point would be 30 horizontal feet upslope from the starting point. If the elevation at the ending point was 12 feet or more greater than at the starting point, the slope would be 40% or more (Rise/Run = % slope; $12/30 = 40\%$).
- 4.2. The Examiner has found nothing in the code that says one must ignore terrain changes made over time when calculating current steep slope.
- 4.3 The only calculation of "steep slope" for any part of Lot A is that contained in Exhibit 25 prepared by the City. Of the five slope sections depicted, only "Slope 1" is relevant here - the others purport to measure steep slope on parts of Lot A that are not relevant to the lower wall. Slope 1 was calculated from the base of the bulkhead (at elevation 20) to a point 30 horizontal feet easterly (at elevation 37 feet). The upper point is on the terrace between the middle and upper walls. In other words, the upper point may or may not be on fill from Lewis' 1984 terracing activities. The City reports the calculated slope as 56% ($37' - 20' = 17'$; $17'/30' = 56.66\%$).
- 4.4. The most recent depiction of terrain contours is Exhibit 1094, the 2003 plan for Coson. However, that plan states "Reference: Map provided by client." (Exhibit 1094, lower left corner) We have no idea what Coson gave AESI. The Examiner declines to rely on the terrain depicted on that exhibit.

The next more recent depiction of terrain is Exhibit 39. That exhibit was prepared by AMEC, a geotechnical consulting firm, and does not credit the terrain source. The Examiner declines to rely on the terrain depicted on that exhibit.

The most recent topographic survey in the record prepared by a licensed land surveyor is Exhibit 1081 from October, 2001. That exhibit reports the most detailed elevations of any exhibit in the record: The water level was 21.9', the top of the shoreline bulkhead was 26.6', the bottom of the lower wall was 28.6', the top of the lower wall was 32.6', the sewer manhole cover was 40', the bottom of the middle

- wall was 40.4', and the top of the middle wall was 44.4'. (Exhibit 1081) The sewer manhole is depicted as 30' east of the shoreline bulkhead, downslope of the middle wall, on the 40' contour. The sewer manhole cover is essentially at the grade of the original slope.²⁵ A calculation of slope between the toe of the bulkhead and the 40 foot contour would represent natural conditions. The slope between the water level and the 40' contour is 60% ($40' - 22' = 18'$; $18'/30' = 60\%$).
- 4.5. Based on the most recent, reliable contour evidence in the record (Exhibit 1081), the lower wall lies within a "steep slope" area. That fact places the lower wall within a landslide hazard area by definition and eliminates the possibility of an exemption to the building permit requirement.
- 4.6. The evidence demonstrates that Lot A has been subjected to at least two landslides, one originating on Lot A and one originating on Lot B whose earth flow crossed over Lot A. It does not matter what triggered the landslides. What matters is that they occurred, which means that at least the surficial soils on Lot A are susceptible to sliding. Lot A is a critical area also by virtue of its documented historic landslides.
- 4.7. The record contains two geotechnical reports covering Lot A: ECI's 1983 report (Exhibit 1101) and AMEC's 2002 report (Exhibit 39). Both mention erosion, but only in passing. ECI expressed concern about the effect of any water flowing over the edges of any slopes on-site. (Finding of Fact 5.9) Nearly 20 years later AMEC observed that on-site soils were highly moisture sensitive and recommended numerous measures to prevent erosion. (Finding of Fact 5.17) Troost & Wisner characterized Lot A as lying within an erosion hazard area. (Exhibit 24)
- Based on the totality of the evidence it is fair to conclude that Lot A's soils are highly moisture sensitive and, combined with the site's slope, constitute an erosion hazard. Lot A is a critical area also by virtue of its erosion hazard.
- 4.8. Haberman's statement that "[i]n general, the current stone facing is more suitable than the previous railroad tie landscaping wall" (Exhibit 10) may well be true, but it is completely irrelevant to the fundamental question of whether a building permit was required for construction of the rockery.
- 4.9. Even if the Examiner's conclusions regarding steep slopes and landslide hazards were wrong, the lower wall still requires a building permit: The wall retains a surcharge and is not exempt.

²⁵ See Exhibit 1057. The raw earth to the left (north) of the sewer manhole appears to represent nearly original terrain at that point on the hillside. The manhole cover is at essentially equal elevation with the earth to its north. It is also worth noting that the location of the sewer manhole as depicted on Exhibit 1081 is an outlier: Other exhibits place the manhole farther up the slope between the middle and upper walls.

4.10. The Examiner concludes, based on the preponderance of the credible evidence, that the lower wall is located in a geologically hazardous area based on steep slope, landslide hazard, and erosion hazard. Even if it were not, the lower wall retains a surcharge and would not be exempt from the building permit requirement.

5. *Appeal Issue E*

5.1. An issue for which no evidence is presented nor argument made will not be considered.

6. *Summary*

6.1. “[T]he issue of credibility is for the trier of fact to decide. The trial court, in a bench trial, evaluates the credibility of witnesses.” [*Thor v. McDearmid*, 63 Wn. App. 193, 817 P.2d 1380 (1991)] The Examiner sits in the position of the trial judge in a bench trial when hearing cases; the Examiner must make credibility decisions.

6.2. Lewis’ July 26, 2020, Declaration contains a statement that is demonstrably false. (Exhibit 28) Lewis avers that the Lot A yard is exactly the same as it was in 1985. That is simply not true based on the evidence in the record: The photograph which Lewis had taken in 1985 shows absolutely no cross-slope walls anywhere between 7709 and the shoreline bulkhead.

Lewis’ recollection of the historical condition in this Declaration is not credible.

6.3. Lewis’ October 17, 2021, Declaration contains statements that require brief comment. (Exhibit 1076)

Paragraph # I.2: The Examiner concurs with Lewis (and Miller who took the same position) that the toe of the shoreline bulkhead is the toe of Lot A’s slope.

Paragraph # I.3. Lewis asserts that the bulkhead was engineered to carry slope loads. The Examiner would simply note that no evidence exists in this record regarding when, by whom, or to what standards the shoreline bulkhead was constructed. There is, therefore, no evidence to support this assertion.

Paragraph # I.5. The heading of this paragraph is misleading and false; the text which follows is true and supported by the evidence. The heading reads “Landward of bulkhead unchanged.” [All caps omitted] That is a false statement. The terraces landward of the shoreline bulkhead were not originally supported by any walls. Lewis’ own picture from 1985 proves the point. (Exhibit 1057) The text which follows says that the concrete walkway landward of the bulkhead is unchanged since

Lewis built 7709. Except for normal wear and tear, that statement is absolutely true and supported by photographic evidence. (Exhibit 6, PDF 2)

Paragraph # I.6. Lewis asserts that Miller could restore the slope to its 1985 condition by simply “removing the landscape rocks and plants and spread only beauty bark.” That is a false statement. In addition to the rocks that now comprise the lower wall, two timber walls (the middle and upper walls) would also have to be removed. This false statement may simply be an oversight error, but it points out that declarations must be carefully drafted and reviewed to ensure compliance with known facts.

Paragraph # II. In this part of his Declaration Lewis quotes the Meyring 1983 letter and asserts that the slope of Lot A is less than 40%. As discussed previously, the issue is whether steep slopes exist on Lot A, not what is the overall slope of Lot A.

The above portions of this Lewis Declaration (except Paragraph # I.2 and part of Paragraph # I.5) are not credible.

- 6.4. The preponderance of the credible evidence demonstrates that a building permit was required for construction of the rockery/lower wall in 2018. The rockery is located within a critical area; therefore, no permit exemptions apply. Even if it were not located in a critical area, the permit exemption for a wall less than 4 feet in height would not apply: The wall is subject to a surcharge and/or portions may be taller than 4 feet. The violation charged within the Notice must be sustained.
- 6.5. The appropriate remedy for the violation is to obtain a building permit and then bring the rockery up to code, if necessary. The Notice gave Miller two weeks (October 21, 2019, to November 4, 2019) to obtain the required building permit and then 30 days to complete the work and obtain inspection approval. (Exhibit 19, PDF 2)

Under the circumstances here present, two weeks to obtain a building permit is probably unrealistically short. As has been noted, the plans Miller has submitted do not depict the rockery that he had constructed. Miller either needs to prepare new plans or be prepared to demolish the current rockery and replace it with one compliant with his plans (assuming that they are approved). In addition, since a surcharge condition is involved, a geotechnical analysis will be needed to support whatever approach is proposed.

Therefore, the compliance period will be extended: Receive confirmation from the City of receipt of a complete building permit application, with supporting geotechnical analysis as deemed necessary by the City, within 60 days; receive inspection approval within 60 days of permit activation.

- 6.6. The Notice does not charge Miller with any violation of the SMA or any City regulation related to the SMA. Therefore, any consideration of SMA requirements is beyond the scope of this proceeding.
- 6.7. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION and ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner herewith issues the following Decision and Order:

- A. The Notice of Violation & Order to Correct issued on October 21, 2019, under City Compliance Case No. CE18-0017 is **SUSTAINED**.
- B. Required corrective actions are **SUBJECT TO** the following **CHANGES**:
- Receive confirmation from the City of receipt of a complete building permit application, with supporting geotechnical analysis as deemed necessary by the City, not later than August 9, 2022.
 - Perform the work and receive inspection approval within 60 days of permit activation.

Decision and Order issued June 9, 2022.

|s| *John E. Galt*

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ²⁶

Shane Miller
Alison Van Gorp
Gareth Reece

Eileen Keiffer, unsworn counsel
Robert Winters
Don Cole

²⁶ The official Parties of Record register is maintained by the City's Hearing Clerk.

NOTICE of RIGHT of RECONSIDERATION

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

NOTICE of RIGHT of APPEAL

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

<p>The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”</p>
