Hearing Examiner Galt

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of: SHANE MILLER, Appellant, v. CITY OF MERCER ISLAND, Respondent.	No. APL 19-002 (Ref. No. CE18-0017) CITY OF MERCER ISLAND'S CLOSING ARGUMENT

I. INTRODUCTION

The City of Mercer Island ("City") respectfully requests the Hearing Examiner dismiss Appellant's appeal and uphold the City's October 21, 2019 Notice of Violation and Order to Correct ("NOV"). Despite the unusually arduous procedural history of this appeal proceeding, the facts relevant to this case are simple. Appellant failed to obtain the appropriate permits required for construction/reconstruction/repair of a retaining wall in the shoreline area and within an area bearing multiple critical areas designations.

The City is seeking corrective action of the code violation. The City's goal is to ensure compliance with the Mercer Island City Code ("MICC"), especially given the nature of the code violation as an issue relating to health, safety, and the general public welfare. Indeed, the City's evidence at hearing established that it consistently applies the MICC's permit requirements, even to the City's own projects, as well as past projects on the subject property.

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Appellant's appeal theories are incorrect and rely upon misapplications of the MICC and other law. The Hearing Examiner should affirm the City's October 21, 2019 Notice of Violation and Order to Correct and establish new deadlines for corrective action.

II. VIOLATIONS

A. Appellant Failed to Obtain a Building Permit Prior to Performing the Work

The key facts are that on or around February 2, 2018, Mr. Miller constructed, altered, repaired, and/or reconstructed a retaining wall structure within the shoreline setback and within an area bearing multiple critical areas designations. This is undisputed. Exs. 2, 19, 21, 29; *compare* Ex. 1078 with Ex. 1079; and Appellant's testimony throughout the hearing. Further, Appellant's own agents made representations contemporaneously with the violation at issue, documenting the work forming the basis of the violation. Per Phil Haberman of Cobalt Geosciences, "a timber wall [was] replaced with stacked stone." Ex. 10. Appellant's agent Mike Lee, the landscape architect who designed the stacked stone wall, also confirmed that a timber wall was replaced with stacked stone. Ex. 11. Either a new stone wall structure was constructed and/or an existing (allegedly wooden) wall structure was altered/repaired by complete replacement of the wood with stacked stone. Indeed, this admission is consistent with the testimony of City Senior Plans Examiner, Gareth Reece, P.E., who visited the site in question on February 14, 2018 and observed first hand evidence of the work that was done (which was complete by the time of Mr. Reece's visit). Reece Direct Testimony, December 9, 2021. *See also* Ex. 12.

MICC 17.14.010 (105.1)[1] requires that "[a]ny owner or authorized agent who intends to **construct**, **enlarge**, **alter**, **repair,** move, demolish, or change the occupancy of a building or structure…., or to cause any such work to be done, shall first make application to the building official and obtain the required permit." (emphasis supplied) There is no dispute that Appellant altered, constructed, reconstructed, and/or repaired the wall structure—indeed, he

[1] The quotation provided is how the code read in 2019, at the time of the NOV's issuance.

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completely replaced the allegedly preexisting timber wall structure with large stacked stones. Exs. 2, 10, 11, 1080. Therefore, under the plain language of MICC 17.14.010 (105.1), a building permit was required before Appellant undertook such work.

i. Appellant Caused the Work to Be Done Without Permits in a Critical Area

While the MICC provides some exemptions from the otherwise applicable building permit requirement cited above, work performed within areas of flood hazard or critical areas is specifically ***not exempted***. Ex. 19; MICC 17.14.010 (105.2). The area in question is a critical area in multiple respects. Critical areas include geologic hazard areas, watercourses, wetlands, and wildlife habitat conservation areas. MICC 19.16.010(C).

There are several sub-types of geologic hazard areas: landslide hazard areas, seismic hazard areas, and erosion hazard areas. MICC 19.16.010(G); 19.07.160. Mr. Reece testified that the area in question has been mapped as being within two types of landslide hazard area, a seismic hazard area, and an erosion hazard area. Reece Direct Testimony, December 9, 2022; also Exs. 26, 27.

Mr. Miller focuses his appeal to a large extent upon his theory that this portion of his property does not qualify as a steep slope, utilizing several exhibits with mathematical errors, or relying upon exhibits and testimony that calculate slope using methods that do not conform to the 30-foot horizontal run required by the MICC. Appellant Closing at pp. 1-6; *see also e.g.* Ex. 1076. However, the landslide hazard area designation is broader than the steep slope definition; put differently, being a steep slope hazard is only one way, and not the only way, a property can be a landslide hazard area, and in turn, also a geologic hazard area. MICC 19.16.010(L). The applicable subsets of geologic hazard areas are addressed in turn, below.

a. The Area in Question is an Erosion Hazard Area

Erosion hazard areas are "[t]hose 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

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Conservation Service as having a "severe" or "very severe" rill and inter-rill erosion hazard." MICC 19.16.010(E). It is undisputed that the area in question bears a greater than a 15 percent slope. Ex. 25. Further, the City has mapped the area in question as an erosion hazard area based on the University of Washington mapping study performed in 2008 by Troost & Wisher, which included an Erosion Hazard Assessment, Landslide Hazard Assessment, and Seismic Hazard Assessment. Exs. 23, 24, 35. Mr. Reece explained that licensed geologists Troost and Wisher collected information, analyzed it, and provided it to the City to perform the hazard assessment and that the maps provided were based upon the data provided by Troost and Wisher. Reece Direct Testimony, Dec. 9, 2021; Exs. 23-24. Mr. Reece further testified that the Troost and Wisher data has been extremely reliable in his years of administering the MICC. Reece Direct Testimony, Dec. 9, 2021.

The policy reason behind requiring a building permit for work to be performed in an erosion hazard area is to ensure that appropriate erosion controls are present. Here, the work was performed in close proximity to Lake Washington. The photograph in Exhibit 2 shows the work in question in progress, and does not evidence the use of erosion control measures. Ex. 2 shows an extremely muddy pathway, which is more apparent when compared to Exhibit 6, showing the completed rock wall and cleared pathway.[2] Because Appellant performed the work without receiving the appropriate permits, City Staff were unable to review and ensure that appropriate erosion prevention measures would be in place for the work. *See also* Ex. 8.

While Appellant claims the disclaimer at the bottom of Ex. 24 invalidates its use, Mr. Reece explained on cross examination that the disclaimer (the same included on Ex. 27) is intended to indicate to residents that there may be hazards that are **not** mapped. Reece Testimony, Dec. 9, 2021. Mr. Reece testified as to the reliability of the data provided by Troost and Wisher, calling it "substantially accurate" and Mr. Reece testified without

[2] While Appellant has made multiple allegations that Ex. 2 has been altered or photoshopped, he has not provided any evidence to support this contention. Frankly, this contention lacks credibility, given that Exhibit 6 shows the grey stone pathway in clear contrast to the surrounding ground, which is brown. In Exhibit 2, the pathway and ground appear to be almost the same color entirely.

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hesitation that the area in question qualified as multiple types of geologic hazard area, including erosion hazard area. Further, Troost and Wisher data (and indeed the City's GIS maps) have been relied upon by the very geotechnical reports admitted by and relied upon Appellant. *See, e.g.* Exs. 1107 at p. 4, 1111 at p. 4.

Appellant also claims the only way a property could be classified as an erosion hazard area is if it has been identified by the U.S. Department of Agriculture's ("USDA") Natural Resources Conservation Service. Appellant Closing at 14. Appellant misapplies the code. MICC 19.16.010(E) provides the presence of soil types/areas so identified by the USDA is merely one way that a property can be classified as an erosion hazard area, as evidenced by the use of the term "including" within the definition. MICC 19.16.010(E). Additionally, nothing in the definition requires that the identification of soil types/areas must be performed on site by the USDA. *Id.* Further, Appellant's argument conflates a typing performed by the group publishing the standard, as opposed to a type defined by a standard. The definition indicates the role of the USDA is to identify soil types/areas that indicate risk. It would be GIS or other local data that would indicate whether such soil types/area are present on site.

Finally, as discussed *infra*, Appellant has not had a Critical Area Review performed nor otherwise supplied a qualified expert witness to establish that the area is not an erosion hazard area. The overwhelming evidence in the record is that the area in question is an erosion hazard area and therefore, a critical area.

b. <u>The Area in Question is also a Seismic Hazard Area</u>

Seismic hazard areas are defined in the code as those "areas subject to severe risk of damage as a result of earthquake induced ground shaking, slope failure, settlement, soil liquefaction or surface faulting." MICC 19.10.060(S). The City has mapped the area in question as a seismic hazard area based on the same reliable data from licensed University of Washington geologists Troost and Wisher. Exs. 23, 24, Reece Direct Testimony, Dec. 9, 2021. Mr. Reece did not hesitate to testify that the area in question is indeed a seismic hazard

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area and was absolutely confident in that determination. Reece Direct Testimony, Dec. 9, 2021. Indeed, the Troost and Wisher study was performed after the 2001 landslide on the property (as well as another, undated but documented landslide on the property). *See* Ex. 1105, pp. 1-2.

The Geotech reports admitted by Appellant also characterize this area as a seismic hazard area based upon the City's data. (Ex. 1105 details a landslide that occurred on the property in 2001). Indeed, the 2001 landslide was of sufficient severity that the residence was red-tagged as unsafe for entry, pending the outcome of the investigation documented within Ex. 1105. These exhibits demonstrated that mass wastage (colluvium) is deposited on the property, which renders the property subject to severe risk of damage as a result of earthquake induced ground shaking. *See, e.g.* Ex. 1026; Rebuttal Testimony of Don Cole, March 29, 2021. Finally, again as will be discussed further *infra*, Mr. Miller has not performed a critical area review or otherwise presented qualified evidence determining the area is not a seismic hazard area. The overwhelming evidence in the record is that the area is a seismic hazard area, and therefore, a critical area.

c. <u>The Area In Question is a Landslide Hazard Area</u>

The area in question is a landslide hazard area in multiple respects. The MICC defines landslide hazard areas as those:

> subject to landslides based on a combination of geologic, topographic, and hydrologic factors, including:
> 1. Areas of historic failures;
> 2. Areas with all three of the following characteristics:
> a. Slopes steeper than 15 percent; and
> b. Hillsides intersecting geologic contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock; and
> c. Springs or ground water seepage;
> 3. Areas that have shown evidence of past movement or that are underlain or covered by mass wastage debris from past movements;
> 4. Areas potentially unstable because of rapid stream incision and stream bank erosion; or

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> 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).

Taking these subcategories separately, it cannot reasonably be alleged that the area in question is not a landslide hazard area. First, it is an area of historic failure because there is a history of historic failures on the property. Exs. 27, 1105. Indeed, there was a documented landslide on the property in 2001 in the precise vicinity of the wall in question. Exs. 27, 1105; Reece Testimony, Dec. 9, 2021. There is also documented movement on the property in the past, prior to 2001. "The City of Mercer Island's sensitive area map shows this area as…in the general proximity of a point labeled 'location of known soil movement year unknown.'" Ex. 1105 at p. 2.

Second, City of Mercer Island Building Official Don Cole, testified that the area in question is categorized and marked by mass wastage from past movements and that there is a slump ending at the wall in question. Cole Rebuttal Testimony, March 29, 2022. Therefore, the area shows evidence of past movement or that are underlain and/or is covered by mass wastage debris from past movements. *Id.; see, e.g.* Ex. 1026. Finally, the area is mapped within the City's system, based on the reliable Troost and Wisher data, as being within two types of landslide hazard area. Ex. 24.

When considering the dangers present within geologic hazard areas, the provision that building permits must be obtained for work on structures within critical areas becomes obvious. Mr. Reece testified as to the purpose of the building code is to ensure health and public safety. Reece Rebuttal Testimony, March 29, 2022. He further explained that even ornamental structures must be inspected for safety purposes. *Id*. Also, Reece Direct Testimony, Dec. 9, 2021 ("Something can be ornamental but also serve a structural role, so installing something that you would describe as ornamental doesn't necessarily absolve you of providing the structure that would be required in the regulation of a building permit.") Indeed, the City requires building permits for ornamental installations by the City itself—in

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the example Mr. Reece cited, the City required a permit, with associated inspections, for a statue erected in one of the City's parks. Reece Rebuttal Testimony, March 29, 2022. Even though ornamental, if a statue falls over, it could injure someone or cause property damage. Similarly, Mr. Miller has had stacked a four feet wall of large stones within an area that is an erosion hazard area, a seismic hazard area, and a landslide hazard area (and indeed with a history of documented landslides in the recent past). The MICC understandably and reasonably requires a building permit (and inspection) for such work.

B. Mr. Miller Performed the Work Without Obtaining a Shoreline Exemption or Permit

With respect to shoreline exemption or permits, the City notes that these issues are not included within the NOV and therefore, a finding by the Examiner on these issues is not strictly necessary. For the record, the area where Appellant performed the work lies within the shoreline area as defined by RCW 90.58.030.[3] The work was done approximately twenty feet from the ordinary high-water mark (well within the shoreline area). Exs. 2, 6, 29. Therefore, as part of corrective action building permit approval, it will likely be required for Appellant to obtain either a shoreline exemption[4] or a shoreline substantial development permit, depending on the size/scope of the project.[5] MICC 19.13.010(B); RCW 90.58.030(3) and 90.58.140; WAC 173-27-040; Van Gorp Direct Testimony, Nov. 19, 2021. It is undisputed that Mr. Miller did not undergo shoreline review and receive either a granted exemption or a permit prior to performing the work. Ex. 35.

C. Appellant's Legal and Factual Theories Are Misplaced

Mr. Miller does not dispute that he caused the work in question to be performed. Further, he does not dispute that he did not apply for a building permit (or other permits)

[3] The City notes that this violation was listed in the Stop Work Order, which was not appealed.
[4] Shoreline exemptions must be applied for and granted—it is not automatic. *See, e.g.* WAC 173-27-040(1)(a).
[5] *See also* Ex. 22, in which during review of Appellant's after the fact building permit application, City planners requested information on the purportedly original retaining wall in order to evaluate whether such work could be allowed at all under a shoreline exemption. ("Please provide the building permit for the timber wall that was removed for the installation of this rock wall….This wall is nonconforming because structures are not allowed within 25-feet of the Ordinary High Water Mark of the lake. The permit(s) for the timber retaining wall being removed must be provided to prove that the wall is 'legal' nonconforming,") *Id.* p. 2.

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before doing the work. Instead, Mr. Miller incorrectly alleges instead that permits were not required, by minimizing the work that was done and misapplying the MICC and other law. Pursuant to well established caselaw, Mr. Miller, as a pro se appellant, is held to the same standard as attorneys. The law forbids judicial and quasi-judicial officers from providing special assistance to pro se parties; doing so is reversible error. "A pro se litigant is held to the same standard as an attorney." *West v. State, Washington Ass'n of Cty. Offs.,* 162 Wash. App. 120, 137, 252 P.3d 406, 415 (2011); *Kelsey v. Kelsey,* 179 Wash. App. 360, 368, 317 P.3d 1096, 1100 (2014).

The vast majority of Appellant's theories are speculation, unsubstantiated by evidence in the record[6] (or often, contradicted by Appellant's own evidence) or are the result of misapplication of law. As discussed below, each of Appellant's theories fails.

i. Appellant Misapplies the MICC—There Is No Building Permit Exemption for Ornamental Work

Mr. Miller cites to multiple definitions sprinkled throughout MICC Title 19 (the City's unified land use code) to imply that the work he had performed was permitted by the entire MICC. Appellant Closing at p. 13. This is a misapplication of the MICC. Community and Planning Development Director Alison Van Gorp testified as to how MICC Title 19 applies. Van Gorp Direct Testimony, November 19, 2021. She explained that the building permit requirements derive from Title 17 of the MICC, not Title 19. *Id.* She also explained that simply because Title 19 may define a term, this does not mean that the work can be done without receiving the requisite permits from the City. *Id.* (*See also* Mr. Miller's argument at p. 10 of his closing that the work purportedly qualifies ordinary repairs and maintenance, relying on a definition that pertains to nonconforming structures in MICC 19.16.010(O).

[6] Further, the City objects to Mr. Miller's attempted "citations" to evidence not in the record in his closing, such as the unsubstantiated allegations contained at page 3 regarding Mr. Rohrbach or regarding the purported decommissioning of his irrigation system at page 15.

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Simply because this term is defined within Title 19 MICC does not mean that ordinary repairs and maintenance are exempted from permitting.)

Mr. Miller also relies on a carefully worded declaration from Michael Lee, who offers evasive opinions such as "would not typically" require permits. Ex. 11. Mr. Lee does not address the fact that the work was performed in a critical area, thus removing it from any permit exemptions under the code. Mr. Lee does not reference the MICC at all and it is doubtful whether he actually reviewed the code to determine whether the work would require a permit. In any event, it is not Mr. Lee's call to make—the City's Building Official is the arbiter of its building code. MICC 17.14.010 (104.1).

ii. Appellant Mischaracterizes the Work Performed

Mr. Miller also greatly minimizes the scope of the work that was performed. Mr. Miller disingenuously claims that there is no structural difference between the allegedly preexisting wooden wall and today's stacked stone wall structure. Appellant Closing at p. 10. This is contrary to the evidence in the record and contrary to representations by Appellant's own agents. Ex. 11 ("The stone wall is a much better replacement for the rotting wood and will hold the slope long term.") Appellant has himself called the wall a retaining wall. Ex. 21 at p. 1. Mr. Miller also characterized the work as a construction project when he testified as to why he took the photos shown in Exhibit 1080. Rebuttal Cross Examination of Miller, April 14, 2022. Indeed, Exhibit 1080 shows that the new stacked stone wall structure extends further to the north than the previous timber facing wall structure, as the stone wall now appears closer to the arbor vitae plants on the north edge of the property. In any event, even if the stacked stone wall structure is purely ornamental (despite the evidence to the contrary), the result is the same. Pursuant to the building code, a building permit is required to ensure that the appropriate inspections occur, even of ornamental structures, as Mr. Reece testified. Reece Rebuttal Testimony, March 29, 2022.

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Additionally, Appellant's reliance on declarations purportedly executed by the former property owner, Mr. George Lewis, must be rejected. *See, e.g.* Appellant Closing at 6. The declarations provided as purportedly from Mr. Lewis lack credibility. First, Mr. Lewis was never provided for purposes of cross examination, and per Appellant's unsworn assertions, Mr. Lewis suffers from some type of neurological condition that renders him unable to read or write. Yet, Mr. Lewis' declarations are hand-signed and the record is devoid of sworn testimony that Mr. Lewis did indeed sign them himself and/or understood what he was signing.

Further, Mr. Lewis' statements lack credibility because they conflict with the assertions of other of Appellant's agents, which indicate that a previously existing wooden wall structure was dismantled and replaced with a new wall structure of stacked stone. *Compare* Exs. 28, 10, and 11. They also lack credibility because they reach scientific and legal conclusions for which it was not established that Mr. Lewis has the requisite experience, education, training, or expertise to provide. Finally, nothing in Mr. Lewis' declarations contradict the fact that the MICC clearly requires a building permit for the work performed.

Finally, the fact that a landscape architect was commissioned to "design a replacement for a failing timber wall" that purportedly "will hold the slope long term" demonstrate clearly that the work performed altered, repaired, constructed and/or reconstructed a structure, sufficient to trigger the requirement for a building permit under the MICC.

iii. Appellant Misapplies The Concept Of Grandfathering

Appellant's Closing also alleges that his property is grandfathered. Appellant Closing at pp. 6-10, citing an email from Senior Planner Nicole Gaudette (Ex. 1033). Nothing in this email indicates that Mr. Miller's construction, reconstruction, alteration, or repair of the retaining wall in question was exempt from building permitting. Indeed, Ms. Gaudette's email indicates that the application should be further routed to ***continue*** permit review. *Id.* Further, this email must be taken in the context of the permit review context in which it was

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provided—to wit, the plan review comments contained in Ex. 22. Ms. Gaudette's inquiry relates to the City's shoreline regulations. She inquired as to whether the wall was nonconforming as to shoreline regulations, as "structures are not allowed within 25-feet of the Ordinary High Water Mark of the lake. The permit(s) for the timber retaining wall being removed must be provided to provide that the wall is 'legal' nonconforming." Ex. 22.

Whether the wall in question is legally nonconforming as to the City's Title 19 land use regulations is a question well beyond the scope of this very limited code enforcement appeal proceeding. However, assuming *arguendo* (and without conceding) that the wall in question is legally nonconforming for purposes of MICC Title 19, any construction, reconstruction, repair, or alteration of the structure still triggers a building permit under MICC Title 17.[7]

In this portion of his closing, Appellant also alleges that the wall in question meets code. Appellant Closing at page 11. However, Appellant ignores the fact that code compliance is yet to be determined and would only be determined through the appropriate permit review. A structure may be allowable under MICC Title 19. However, this does not eliminate the building code's very clear requirement for a building permit for alteration, repair, or reconstruction of such structure. MICC 17.14.010 (105.1).

Further, Appellant miscites his sources. For example, he cites an email by Mr. Cole, which quotes the MICC as to when permits are required or not required, and claims "Mr. Cole says in this Exhibit 15, page 2. i.e. 'permits shall not be required.'" Mr. Cole did not take such a position. To the contrary, on page one of Exhibit 15, Mr. Cole clearly states:

> [m]y review confirmed that a permit is required for this work because work within land use critical areas is not exempt from permit (as highlighted in the code section below). Work within such areas is not exempt in order to verify work is in compliance with the protective regulations for such critical areas.

[7] Because it is outside of the scope of this proceeding, the City is not taking a position as to whether the retaining wall in question was legally permitted in the past nor whether it has legal nonconforming status under any portion of Title 19 MICC.

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The Staff position has been consistent across multiple Staff members—Appellant was required to obtain a permit before performing the work in question. Exs. 8, 12, 15, 19.

Further, Appellant's arguments as to whether the work is new development work or not is based upon another misapplication of the code. Appellant Closing at pp. 11-12. Title 17 does not require permits only for work associated with new development. Rather, it is a uniform building code that has broad application and requires a permit before reconstruction, alteration, or repair of existing structures, in addition to construction of new structures. MICC 17.14.010 (105.1).

iv. This Proceeding is Not a Critical Area Review

Appellant mischaracterizes the City's position on critical areas. Appellant Closing at pp. 12-13. Mr. Reece and Mr. Cole never testified that it is impossible to ever change critical areas designations. Indeed, critical area review and related procedures are contained within Title 19, and specifically, Chapter 19.07 MICC. As Mr. Reece testified on December 9, 2021, property owners or developers can provide scientific analysis that their property is not within a critical area pursuant to the provisions of Title 19 MICC. However, this proceeding is a code enforcement appeal, and **not** a critical area review under MICC Ch. 19.07. While Mr. Miller retains his rights to apply for critical area review, that is well beyond the scope of this proceeding. The Examiner is without jurisdiction in this proceeding to determine that Mr. Miller's property no longer qualifies as a critical area.

In any event, the overwhelming evidence in this proceeding clearly establishes that the property is a critical area several times over. Appellant's arguments to the contrary are unavailing and his own evidence supports the continued conclusion that his property is within several types of critical area. City Staff appropriately used the well tested and accurate information within the City's critical areas maps, along with site information, and determined Appellant performed work in a critical area without a permit.

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v. Appellant's Theory On the Statute of Limitations Is Incorrect

Mr. Miller also erroneously claims that his own appeal proceeding is barred by the statute of limitations. Appellant Closing at p. 13. Appellant's cited statute, RCW 4.16.100(2) is inapplicable in multiple respects, the first of which is that it applies to court actions, not appeals before the City Hearing Examiner. Further, it applies to actions upon a statute for a forfeiture or penalty to the state. This is a code enforcement ***appeal***, brought by Mr. Miller, not the City. Further, this is not an action for forfeiture, nor is the City seeking penalties at this time (but however, reserves its right to do so in the future should such be necessary).

Similarly, despite being excluded from the record, Mr. Miller cites to Ex. 1046, which is a case regarding the statute of limitations applicable to the Department of Ecology's imposition of penalties under the Water Pollution Control Act. The case is simply inapplicable to this proceeding. The City is not the Department of Ecology, nor is this an action imposing penalties pursuant to Ch. 90.48 RCW.

Additionally, Appellant's theory ignores the fact that pursuant to MICC Ch. 6.10, each day out of compliance constitutes a separate violation. "Each day during which a code violation is committed, occurs or continues shall be considered a separate offence for purposes of civil infractions or notices of violation." MICC 6.10.050.

Finally, it is disingenuous of Appellant to cause the delay of his own appeal proceeding and then claim that same appeal is barred by the statute of limitations. (*See*, *e.g.*. Appellant Closing at 13, arguing the City took 4.2 years to bring the appeal to the hearing examiner.) This argument discounts the stay the City agreed to in an effort to allow Appellant the reasonable opportunity to comply with the MICC. Ex. 35, 9005-9007. Since the expiration of the stay, the record clearly establishes that the unusual delay in completion of this appeal proceeding has been one-sided and indeed, been contrary to the continued objection of the City to the delay. *See, e.g.* Exs. 9014-9024.

vi. Appellant's Claims About His Former Neighbor are Irrelevant

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Appellant's arguments that his former neighbor damaged the wall in question are irrelevant. Appellant Closing at p. 13. As such, the City will not respond to such allegations.

vii. Appellant's Argument Regarding Leak Adjustment Is Irrelevant

As to the leak adjustment issue, Mr. Miller's assertions about the irrigation system are irrelevant. Appellant Closing at 14-15. While Mr. Miller claims the sole cause of the 2001 landslide was a broken water main, the cause of the landslide does not negate the fact that a landslide occurred, making it an area of historic failure. Ex. 1105. Indeed, Mr. Reece testified that water main breaks in areas that are not prone to landslides do not produce landslides—but rather result in standing water, flooded basements, and the like. Reece Rebuttal Testimony, March 29, 2022. The cause of a landslide is immaterial under the MICC and it is undisputed that there was a landslide on Appellant's property in 2001.

Further, Appellant's own evidence indicates a partial cause behind the 2001 landslide was the February 2001 earthquake. Ex. 1105. The same report references documentation of a previous landslide as well. *Id.* Additionally, the engineer who prepared Exhibit 1105 continued to refer to the event as a landslide, even after concluding the causes behind the landslide. *Id.*

Regardless of cause, the undisputable fact is that a landslide occurred in 2001, the area in question is an area of historic failure and therefore, a landslide hazard area. Finally, Mr. Cole testified that the area meets other critical area requirements, such as the presence of mass wastage (colluvium), that also indicate the presence of landslide hazard areas. Cole Rebuttal Testimony, March 29, 2022; Ex. 1026.

viii. Appellant's Arguments There Is No Public Health or Safety Issue Are Incorrect

Mr. Miller disputes that there is really a public health and safety issue associated with the unpermitted (and uninspected) demotion of a wooden retaining wall structure and replacement with a new stacked stone structure. Appellant Closing at 15. First, he asserts that

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because the work performed was reviewed by his agents, Mssrs. Haberman and Lee, that the wall is safe.[8] However, the MICC does not exempt work from permitting (and associated inspections) if it is reviewed by agents of the property owner. Here, the work in question undisputedly lacks inspection through the appropriate permitting process.

Appellant also claims that there cannot be a public health or public safety issue because of the length of time to conclusion of hearing. However, as discussed *supra*, the City has consistently objected to the unusual delay in the conclusion of this appeal proceeding.

It is readily apparent that large stones stacked upon each other within a seismic hazard area, landslide hazard area, and erosion hazard area can constitute a public health and safety concern. Accordingly, the MICC very clearly requires permitting and appropriate inspections by appropriate City inspectors for such work. MICC 17.14.010 (105.1); Reece Rebuttal Testimony, March 29, 2022.

ix. Appellant's Arguments Regarding The Building Official's Discretion Are Also Incorrect

There is no evidence in the record to support Mr. Miller's unsubstantiated allegations that his former neighbor, Mr. Gartz is friends with, or somehow influential over Mr. Cole. Appellant Closing at 15. Indeed, Mr. Cole played a very limited role in this particular code enforcement proceeding. Mr. Cole did not post the stop work, nor did he visit the site following the 2018 work, and Mr. Cole did not issue the NOV under appeal. Ex. 19. Indeed, Mr. Cole seems only to have contributed an email in this matter, confirming within his authority that a permit was required for the work Mr. Miller had performed. Ex. 15.

Appellant also argues that Mr. Cole should have "relaxed code restrictions" for him, rather than holding him to the plain language of the MICC. Appellant Closing at 15. Needless

[8] Mr. Miller also cites himself, purportedly an engineer, but the Hearing Examiner was abundantly clear that he was considering Mr. Miller to be a lay, and not an expert witness. Mr. Miller's credentials were not presented at hearing.

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to say, an allegation that Staff did not afford Appellant special privileges is inappropriate, and certainly not a valid basis upon which to appeal a code enforcement action.

x. Appellant's Submitted Geotech Reports Are Either Irrelevant or Further Establish that Appellant's Property is a Critical Area

The geotechnical reports cited by Mr. Miller do not establish that the area in question is not a critical area. First, a great deal of the exhibits are irrelevant. Many of the exhibits relate to the neighboring property, 7703 West Mercer Way and therefore, bear little relevancy to this proceeding except to the extent they discuss the surrounding areas at large. Ex. 1106, 1107, 1108, 1109, 1110, 1111. While Exs. 1102 and 1104 relate to the subject property, they concern a different portion of the property—the area of the wall to the east of the residence. The area in question lies to the west of the residence and therefore, these exhibits are irrelevant. Ex. 1103 appears to be a site report confirming that geotechnical recommendations were followed during work regulated by permit.

As a whole, the reports provided by Mr. Miller are proof that the entire area in question (the subject property and the neighboring properties) is geologically hazardous. Ex. 1105 was commissioned for purposes of documenting an investigation of the landslide that occurred in 2001 on 7709 West Mercer Way—the property in question and determining whether the residence was fit for human habitation following the slide. Indeed, such landslide occurred on the "west side of the residence." Ex. 1105 at p. 1. The report appears to describe the wall in question in relation to the 2001 landslide. "A short (4-foot high) timber wall bordered the western edge of the observed movement. About 50 feet of the wall had deformed by the slide mass, and a sight bulge was observed for about two feet in front of (west of) the wall." *Id*. at 2. Further, the report attributes the slide both to a water main break, and the February 2001 earthquake. *Id* at 3.

Ex. 1100 appears to have been chartered for the purposes of "evaluating stability of the hillside site and feasibility of house construction." Indeed, this report characterizes the

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property as "steeply sloping down to the west." *Id.* Ex. 1101 contains very strict recommendations for development of the site, especially for excavations and slopes, to reduce erosion and support stability. Ex. 1110 clearly states that a portion of 7703 W. Mercer Way is within "mapped landslide, steep slope[,] seismic, and erosion hazard areas; therefore, the standards of the Mercer Island City Code (MICC) for geologically hazardous areas (MICC 19.07.160) apply)."

Ex. 1111 relies in part on Troost and Wisher data—the same Troost and Wisher who provided the data upon which the City's critical areas maps are based upon. *See supra* at p. 4. Ex. 1107 also cites to Troost and Wisher data, as well as noting "[s]everal previous landslides were mapped on and in the vicinity of" neighboring property 7703 West Mercer Way. Ex. 1107 at p. 4. Ex. 1109 also indicates that the neighboring property is located in a mapped geologic hazard area.

Ex. 1108 sums up the situation at hand in this proceeding nicely. While discussing the neighboring property, the report explains the limitations of mitigation work that can be performed in the area. "This does not mean that there are no risks associated with the property - the subject lot and the entire surrounding area are a steep slope hazard and there will always be risks associated regional slope movement due to earthquakes that cannot be mitigated." Ex. 1108 p. 2. It also explains the risks associated with landscaping walls. "Short retaining walls such as these are commonly subjected to long-term soil creep. The oldest wood crib wall is a good example as it is currently leaning over beyond vertical. The wall will continue to function as a landscaping wall but will need to be replaced with either a new wall or a stabilized slope." *Id.* These reports clearly demonstrate the policy basis undergirding the MICC. In critical areas, activities that might not normally be exempted from building permits trigger the requirement of a permit to ensure that the requirements associated with critical areas are followed and the impacts associated with critical areas are addressed. Ex. 15.

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Indeed, the high number of geotechnical reports associated with the subject property and neighboring properties speaks volumes about the character of those properties. One would expect a property not within critical areas to have very few or even zero geotechnical reports associated with it. However, even routine work such as driveway repair in this area requires a geotechnical report due to the steepness of the area and its susceptibility to geologic hazards. *See e.g.,* Ex. 1110. Taken as a whole, the geotechnical reports were prepared and now exist in the City's records and are available to Appellant as a result of prior owners of the property conforming with the code and causing appropriate geotechnical work to be performed. Indeed, without the City's stop work, notice of violation, and defense in this appeal, future owners of the subject property will be denied the regulation and documentation that Mr. Miller enjoys.

Finally, Mr. Miller's arguments as to his own "scientific or engineering conclusions" must be disregarded because Mr. Miller testified as a lay witness and has not demonstrated the education or experience to support any use of his testimony or conclusions as expert testimony. Hearing Transcript, Examiner Comments, Dec. 9, 2021.

xi. Appellant's Arguments As To the Reliability of GIS Maps Misunderstands the Basis for Such Maps

Appellant attempts to discredit Ex. 24 by characterizing it as being based entirely off of GIS. Appellant Closing at pp. 16-17. However, he misunderstands the bases of the data behind Ex. 24. Again, Ex. 24 is based upon data provided to the City from University of Washington geologists Troost and Wisher. Reece Direct Testimony, Dec. 9, 2021. Indeed, Troost and Wisher data was consistently relied upon in the geotechnical reports Appellant claims support his position. As discussed above, these reports demonstrate several times over that the property and area in question are several categories of geologic hazard area. Finally, the email from retired surveyor Bob Winters does not invalidate the specialized scientific data provided by licensed geologists Troost and Wisher. Indeed, Mr. Winters was extremely

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limited and cautious in his statements regarding Exhibit 24—he did not and could not by limitation of his qualifications, dispute the accuracy of the exhibit.

In sum, the City's case establishing the code violations is simple, clear-cut, and has not been effectively rebutted at hearing. Appellant's arguments are not well grounded in law or the facts in the record and must be rejected.

III. CORRECTIVE ACTIONS

The City's Notice of Violation and Order to Correct required two reasonable corrective actions (and imposed no penalties). Ex. 19. Those actions were:

- 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.

Id. Those required corrective actions should be upheld, and the Examiner should establish new compliance dates for those corrective actions pursuant to MICC 6.10.090(C).

IV. CONCLUSION

The fact that the violations occurred is undeniable. It is undisputed that Appellant (through his agents) illegally constructed, reconstructed, repaired, or altered an existing structure in a critical area without first receiving the appropriate permits, including, but not limited to a building permit. The Hearing Examiner should dismiss Appellant's appeal and affirm the October 21, 2019 Notice of Violation and Order to Correct and establish new deadlines for the reasonable corrective actions set forth in the affirmed NOV.

DATED this 31st day of May, 2022.

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DECLARATION OF SERVICE

I, Eileen Keiffer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 31st day of May, 2022, I served a true copy of the foregoing City of Mercer Island's Closing Argument on the following counsel of record using the method of service indicated below:

Shane Miller Pro Se Appellant	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: shane_miller_usa@yahoo.com; shanemillerus@gmail.com ☐ EService pursuant to LGR

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

DATED this 31st day of May, 2022, at Kirkland, Washington.

MADRONA LAW GROUP, PLLC

By: */s/ Eileen M. Keiffer*
Eileen M. Keiffer, WSBA No. 51598

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