



CITY OF MERCER ISLAND

9611 SE 36th Street • Mercer Island, WA 98040-3732
(206) 275-7605 • FAX (206) 275-7726
www.mercergov.org

STAFF REPORT
APL21-003 – APPEAL OF NOTICE OF VIOLATION (CE20-0058)

Revised November 9, 2021

I. APPEAL SUMMARY

File Nos.:	APL19-002 CE18-0017 Code Enforcement Notice of Violation
Location:	7709 W Mercer Way, Mercer Island WA 98040; King County Assessor tax parcel number 545130-0045
Appellant:	Shane Miller
Responsible Person or Persons:	Shane M. Miller 7709 W Mercer Way Mercer Island WA 98040
Description:	The City has issued a Notice of Violation (CE18-0017) related to work commenced without required permits at the subject property. The Appellant has appealed the Notice of Violation. The appeal is based upon allegations by the Appellant that he did not believe a permit was required for the work in question.
Recommendation:	Affirm the City’s Notice of Violation and issue a final order to make corrective actions.

II. Introduction

This staff report is in response to an appeal of a Notice of Violation issued in response to a violation of the Mercer Island City Code (“MICC”). The Appellant performed work at the subject property (7709 West Mercer Way, hereafter referred to as the “Property”) without the requisite permits, including construction of a retaining wall in the shoreline area and in a critical area (including designations as a steep slope, landslide hazard area, erosion hazard area, and seismic hazard area). The City seeks corrective action by the Appellant.

III. FACTUAL BACKGROUND

1. On February 1, 2018, one of Mr. Miller’s neighbors, Mr. William Gartz, reported construction activity on the Property within 25 feet of the shoreline setback to the City’s then Code Compliance Officer, Jimmi Serfling. **Exhibit 1.**
2. On February 2, 2018, Mr. Gartz again emailed Ms. Serfling a photo of shoreline construction work in progress. In the photo, three men appear to be constructing a rockery on a steep slope within

close proximity of the lake shore. The lake water immediately adjacent to the construction work appears brown and cloudy. **Exhibit 2**

3. On February 2, 2018, Mr. Gartz also filed a report with the Washington State Department of Ecology, reporting soil erosion and water pollution in Lake Washington. The report was later referred to the City's Senior Planner Nicole Gaudette, and then to Code Compliance Officer, Ms. Serfling. **Exhibit 3.**
4. Ms. Serfling made a site visit to investigate the complaints on February 2, 2018. During that visit, Ms. Serfling posted a Stop Work Order (SWO). The SWO required Mr. Miller to refrain from:

further work toward completing the retaining wall project or the project within the lake waters of moving rocks and disturbance of the lake bed until such time that [he has] been issued the proper permits and approvals from the City of Mercer Island and any WA state agencies involved with work in the shoreline buffers and within the State waters.

The SWO did contain an exception for temporary measures to stabilize the slope and control erosion, but only if under the supervision of a Washington State registered geotechnical engineer. Mr. Miller did not grant access to Ms. Serfling to observe the work site at this visit (**Exhibit 30**). Ms. Serfling sent a follow up email to Mr. Miller documenting the site visit and SWO. **Exhibit 4.**

5. Ms. Serfling's follow up email also explained that Mr. Miller was required to submit for Shoreline Exemption and undergo SEPA analysis at a minimum, that he was also required to apply for a building permit, and noted that Mr. Miller may also need a critical area determination. **Id.**
6. On February 4, 2018, Mr. Gartz emailed City Staff with an additional photo alleging continuing erosion into Lake Washington and showing cloudy/dirty lake water immediately adjacent to Mr. Miller's constructed retaining wall. **Exhibit 5.**
7. On February 5, 2018, Mr. Miller emailed City Staff alleging that work was now completed. Mr. Miller further claimed that the work was "limited to yard maintenance" with photos showing the completed rockery and clear water along the shore of Lake Washington. Mr. Miller also alleged that "sandy dirt debris" in the lake was from a boat moored on the southern neighbor's dock, that was scraping the lake bottom due to wave action. He also alleged that a licensed geotechnical engineer had visited the property. **Exhibit 6.**
8. Ms. Serfling responded to Mr. Miller's February 5, 2018 email and stated that the work on the retaining wall "is above and beyond yard maintenance" and that a building permit, shoreline exemption and possibly SEPA review were required. She also stated that she received a notice from Department of Ecology and was required to follow up and respond. Ms. Serfling requested a site visit. **Exhibit 7.**
9. On February 7, 2018, Mr. Miller emailed Ms. Serfling a letter from Landscape Architect, Michael Lee, who designed the "slope improvements" on Miller property. The letter states that he designed a stone wall to replace an allegedly preexisting timber wall, as well as new plantings. **Exhibit 11.**
10. On February 12, 2018, City Staff issued a Code Compliance Courtesy Notice to Mr. Miller, reiterating that a retaining wall was altered and/or reconstructed within a shoreline area and geologic hazard area and dirt/mud washed into Lake Washington during construction and cleanup.

The Courtesy Notice also reiterated that Mr. Miller was at a minimum required to submit an application for a Shoreline Exemption Permit and that additional review/approvals may be required. **Exhibit 8.** The Courtesy Notice was hand delivered to Mr. Miller during the February 14, 2018 site visit. **Exhibit 30.**

11. On February 14, 2018, City staff including Jimmi Serfling and Senior Plans Examiner Gareth Reece conducted a site visit and met with Mr. Miller and geotechnical engineer Phil Haberman.
12. Following the site visit, Mr. Miller sent two emails to City Staff. **Exhibit 9.**
13. One of these emails from Mr. Miller attached a letter dated February 9, 2018 and signed by Phil Haberman of Cobalt Geosciences. Mr. Haberman, a licensed engineer, provides observations from a site visit. Mr. Haberman claimed that “the facing of a timber wall had been replaced with stacked stone” and that the timber wall was approximately 30-40 years old and in poor condition. **Exhibit 10.**
14. Senior Plans Examiner Mr. Reece responded to one of Mr. Miller’s February 14, 2018 emails, clarifying and correcting Mr. Miller’s characterization of Mr. Reece’s statements during the site visit and explaining relevant code requirements. He stated that the February 2, 2018 SWO was posted correctly and that a building permit is required to resolve the issues identified in the SWO, among other City approvals. **Exhibit 12**
15. On February 15, 2018, Mr. Miller responded to Mr. Reece via email, again disputing that permits were required for the work. **Exhibit 13.**
16. On February 16, 2018, Ms. Serfling responded to Mr. Miller’s February 15, 2018 email, providing responses to his arguments.¹ **Exhibit 14.**
17. City Building Official Don Cole also emailed Mr. Miller stating that he had reviewed the case and confirming that a permit is required and the SWO remained in effect. **Exhibit 15.**
18. Ms. Serfling retired in June of 2019. Anthony Myers was hired as the new Code Compliance Officer just prior to Ms. Serfling’s retirement.
19. On August 23, 2019, Mr. Myers issued a second Code Compliance Courtesy Notice to Mr. Miller. The notice summarizes the actions and findings from 2018 and reiterated the requirement for a building permit and provided Mr. Miller a 30-day deadline within which to comply. **Exhibit 16.**
20. On September 26, 2019, the City received a letter from Mr. Miller, once again disputing that permits were required for the work. **Exhibit 17.**
21. On November 4, 2019, Mr. Myers responded to Mr. Miller confirming the letter was received, and stating that the City would continue with enforcement. **Exhibit 18.**
22. On October 21, 2019, Mr. Myers issued a Notice of Violation (NOV) with a compliance deadline of November 4, 2019. **Exhibit 19.**
23. On November 4, 2019, Mr. Miller filed an appeal of the decision to issue the NOV. **Exhibit 20.**

¹ As the documents speak for themselves and to avoid overburdening this Staff Report, the City will not fully paraphrase or recreate the numerous “back and forths” between several City staff members and Mr. Miller.

24. On November 6, 2019, Mr. Miller and spouse Holly Miller met with City staff including Mr. Myers and then Community Planning and Development Department Director Evan Maxim and Deputy Director Alison Van Gorp. The process for permitting the retaining wall was discussed, and Mr. Miller expressed interest in “pausing” the appeal to pursue permits.
25. On November 11, 2019, Mr. Miller applied for a building permit (permit #1912-047). **Exhibit 21.** However, he did not pay his permit fee contemporaneously with the building permit application.
26. On December 12, 2019, Mr. Miller and the City requested a stay on the appeal proceedings. The Hearing Examiner issued a stay on the proceedings for 12 months.
27. By March 16, 2020, the City’s plan reviewers had completed the first round of review of permit #1912-047. City staff provided Mr. Miller with the plan review comments and requests for additional information. **Exhibit 22.**
28. On December 8, 2020, over a year after initial application for his building permit, Mr. Miller paid the permit fees associated with permit #1912-047. **Exhibit 31.**
29. On December 10, 2020, Mr. Miller and the City requested another 6-month stay on the proceedings. The stay was granted by the Hearing Examiner and expired June 30, 2021.
30. On May 11, 2021, Mr. Miller’s permit application #1912-047 expired due to inactivity. Mr. Miller did not respond to the City plan reviewer comments/requests for additional information and City Staff were unable to further process his application. Because no permit was issued within 18-months after the date of application, Mr. Miller’s building permit application expired by limitation. MICC 17.14.010 (105.3.2(1), Time limitation of application).
31. On August 4, 2021, Mr. Miller emailed Interim Director Jeff Thomas and Alison Van Gorp an affidavit from neighbor George Lewis. **Exhibit 28.**

IV. CODE VIOLATIONS

a. Failure to Obtain Building Permit

The construction of a retaining wall structure in a critical area requires a building permit under the Mercer Island City Code, among other approvals. “Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure... 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 (105.1).² While the code provides several exemptions from this requirement, including one for retaining walls of less than 4 feet, “permit exemptions shall not apply to Areas of Flood Hazard and City Land Use Critical Areas.” MICC 17.14.010(105.2).³

² This quotation reflects the wording of MICC 17.14.010 as of the date of the first code violation. Currently, MICC 17.14.010 (105.2) is worded slightly differently but similarly provides “[t]he 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 building.... 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.”

³ City Staff also notes that even if this wall were not located in the City Land Use Critical Area, exception #2 to MICC 17.14.010(105.2) still would not apply. That provision exempts walls “not over 4 feet (1,219 mm) in height

Critical Areas, defined in MICC 19.16.010, include “Geologic hazard areas, watercourses, wetlands and wildlife habitat conservation areas.” MICC 19.07.160 (A) clarifies that “[a]reas susceptible to one or more of the following types of hazards shall be designated as geologically hazardous areas: landslide hazard areas, seismic hazard areas, and erosion hazard areas.” Each of these three types of geologic hazards is defined in MICC 19.16.010, and the City’s GIS system incorporates data provided by Troost & Wisner (**Exhibit 23**) to estimate which hazards are likely to be present. As Staff will testify at hearing, over 12 years of continuous use, this mapping data has proven to be reliable when compared to subgrade investigations provided to the City during permit applications.

On this site, Erosion, Seismic, and two types of landslide hazard areas are mapped (**Exhibit 24**). These mapped hazards are assumed to be present unless otherwise demonstrated by a geotechnical professional. Without a subgrade investigation available, the easiest type of geologic hazard area to observe is the steep slope, a type of landslide hazard area. A steep slope is defined in MICC 19.16.010 as “any slope of 40% or greater calculated by measuring the vertical rise over any 30-foot horizontal run.” Using City GIS LiDAR data which approximates ground elevations and contours, several examples of slopes calculated on this site, including the slope where the wall is located, are shown in **Exhibit 25**, along with a USGS guideline for how slope percentage is calculated. The retaining wall in question is located within a steep slope area, a type of landslide hazard area, and thus in a Critical Area. Additionally, a site plan from 1983 shows the surveyed slope on the property was calculated at 43.8% at that time (**Exhibit 26**), and reflects similar, directly measured, overall site topography to confirm the City GIS LiDAR data. Evidence also supports the subject property being in an area at higher risk for landslides; there are ten identified historic landslides within 500 feet of the Property, including two on the Property itself (**Exhibit 27**).

In addition, MICC 19.16.010 defines shoreline areas by reference to "shorelands" as defined in RCW 90.58.030. "Shorelands" or "shoreland areas" means “those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark...” Work in the shoreline area generally requires either a shoreline exemption or a shoreline substantial development permit, depending on the size and scope of the project. MICC 19.13.010(B); RCW sections 90.58.030(3) and 90.58.140; WAC 173-27-040. The work in question occurred approximately 20 feet from the ordinary high water mark and is clearly located within the shoreline area; thus, a shoreline approval is required.

Because the work was located in a critical area, building permit exemptions do not apply, and a building permit was required for the work, including the relevant shoreline and/or critical area approvals. The Appellant did not obtain the requisite permits from the City prior to performing the work.

V. CORRECTIVE ACTIONS/PENALTIES

The City’s Notice of Violation required two reasonable corrective actions, including applying for and obtaining appropriate permits and completing inspection of the work done without permits by the city within 30 days of issuance of the permits (Exhibit 19).

VI. RESPONSE TO APPEAL

The Appellant alleges that:

measured from the bottom of the footing to the top of the wall, unless supporting a surcharge.” However, the wall in question is surcharged by the slope above (i.e. it does not support a level backfill), so this exception is also not applicable.

“All of the above apply: 1. There were substantial errors; and 2. The decisions unsupported by the facts presented; and 3. The decision is in conflict with the standards for review of the action; and 4. There were irregularities in the procedure. 5. See attached letter dated November 4, 2019, and including as exhibits the signed Letters from the Licensed Engineer and Architect saying no permit required. 6. Note that a Sworn Affidavit from the original owner and developer will be provided separately”

Staff Response:

Appeal Issues 3 and 4

Appellant alleges that the NOV was untimely. **Exhibit 20 at page 2.** However, Appellant cites no provision in the MICC requiring the City to close a case within any portion of time. Indeed, the record evidence shows that the City attempted to work with Mr. Miller in an informal manner on multiple occasions (including the issuance of two courtesy notices) prior to moving forward with formal enforcement. Further, there is no evidence that the matter was ever “closed as unfounded” and such allegation is belied by the plethora of communications between City Staff and Mr. Miller. **Exhibits 4-18.**

Appeal Issues 1, 2, 5, and 6.

Appellant further continues to allege that the work performed was only landscape or yard maintenance work and therefore, he does not believe a building permit was required. **Exhibit 20 at 2.** However, as discussed above, the evidence is that the work performed was construction/reconstruction of a retaining wall within a critical area. Indeed, the letters provided by Mr. Miller’s agents claim the replacement of a wooden retaining wall with a stacked stone one. **Exhibits 10-11.**

The Appellant’s appeal issue #5 claims that the letters from the Appellant’s engineer and architect say no permit is required. However, these letters do not state that no permit is required (rather they state that the work in question was “landscape maintenance... which would not typically require a permit” and “... the scope of work was limited to yard maintenance to repair the decomposed wall timbers, the new rock facing is consistent with a landscaping wall replacement.”) **Exhibits 10-11.** Mr. Miller also alleges that he is qualified to assess whether the work was “simple maintenance.” **Exhibit 20 at page 3.** However, neither Mr. Miller, Mr. Lee, nor Mr. Haberman have the authority to determine whether a City permit is required or not. That authority is held by the City’s Building Official, whose primary duty, as described in MICC 17.14.010 Section 104.2, is to “enforce compliance with the provisions of the construction codes and the Construction Administrative Code.” Thus, the decision of whether a building permit is required is that of the Building Official and any Deputies delegated authority under MICC 17.14.010 Section 103.3. As discussed above, it was the City’s determination that a building permit is required for the retaining wall. **Exhibit 19.**

The affidavit mentioned in the Appellant’s item #6 was not provided to the City as a part of the appeal filing. It was provided in an email to staff only very recently, on August 4, 2021 (**Exhibit 28**). The affidavit from Mr. George Lewis states, in part:

“It is my understanding from speaking with Mr. Miller, the City is currently alleging new construction and/or alteration of existing construction related to the retaining walls within approximately 20 feet of his shoreline area.

However, this is incorrect. Mr. Miller has done no such thing. I can attest that Mr. Miller has not done any such work and has not done any new construction or alteration in the 20 foot setback area of his shoreline. That is, there has always been walls landward of the sidewalk and uphill, and those walls are the same currently as during 1985 and every other year since 1985.”

However, the photo provided by Mr. Gartz (**Exhibit 2**) shows work in progress on a retaining wall in this very area, on Miller’s hillside adjacent to the shoreline. Mr. Miller’s landscape architect and engineer both provided letters explaining that a timber retaining wall was replaced with a stone retaining wall (**Exhibits 10 and 11**). The affidavit by Mr. Lewis conflicts with these prior assertions by other agents of Mr.

Miller. Furthermore, Mr. Miller provided a photo showing the completed rock retaining wall (**Exhibit 6**), and the City's aerial photos from 2017 and 2020 clearly show that the wall has been altered to create an alcove for three chairs (**Exhibit 29**).

Mr. Miller also alleged that the City's calculation of the slope was incorrect, based on his own calculations using an altimeter to measure his own elevations. **Exhibit 20 at pages 4-5**. Two numbers are used to calculate slope, a change in elevation, and a horizontal distance. The horizontal distance used in Mr. Miller's calculation was cited as coming from a survey by Group4, Inc, which was not provided as part of Mr. Miller's appeal. However, City Staff is familiar with this document as a result of an unrelated and separate code enforcement action. That survey allegedly shows 319.59' as the total length of both Parcel "A" and Parcel "D". Parcel "D" is 7705 West Mercer Way, and is not Mr. Miller's property. **Exhibit 34**. The correct length of Mr. Miller's property, Parcel "A," as shown on that survey is 201.28'. *Id.* However, ultimately that distance is not relevant. The definition of steep slope in MICC 19.16.010 specifies "measuring the vertical rise over any 30-foot horizontal run," not the total length of a lot line, or any other horizontal distance. Due to these flaws, Mr. Miller's personal calculations are not of assistance in determining the slope of the area he describes, or determining whether that area contains a steep slope as defined in the MICC. His conclusions are also contradicted by more credible evidence, including both the City's LiDAR data, as well as the 1983 site plan for the property. **Exhibits 25-26**.

With respect to Mr. Miller's allegations that the property has been "deemed stable including under seismic conditions," no support for this allegation was provided with the appeal. **Exhibit 20 at pages 5-6**. The City is unable at this time to respond to this allegation. However, the City would note that several exhibits would contradict Mr. Miller's assertion here, including a City of Mercer Island Property Hazard Report (**Exhibit 24**) and the map showing the Property has a history of documented landslides (**Exhibit 27**).

Finally, Mr. Miller alleges in his appeal that the code enforcement action is unconstitutional and purportedly infringes upon his homestead property rights. **Ex. 20 at page 6**. However, constitutional claims are beyond the scope of the Hearing Examiner's limited jurisdiction. Washington courts have long established that a hearing examiner has very limited subject matter jurisdiction and in fact, may "exercise only those powers conferred either expressly or by necessary implication." *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636 P.2d 1084 (1984), *citing State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979). See also, *Woodinville Water Dist. v. King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001) ("hearing examiners have only the authority delegated to them by the Council.").

The MICC does not delegate to the Hearing Examiner the authority to determine questions of constitutional law. Chapter 3.40 MICC, Hearing Examiner, creates the office of the hearing examiner and provides in part as follows:

3.40.020 Purpose – Function and jurisdiction

A. The hearing examiner will hear and decide upon applications and appeals as designated in this Code.

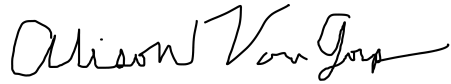
B. The hearing examiner's decision may be to:

1. Grant or deny the application or appeal; or
2. Grant the application or appeal with such conditions, modifications, and restrictions as the hearing examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the comprehensive plan, the Mercer Island City Code, and other official laws, policies, and objectives of the city of Mercer Island; or
3. Remand the decision back to the decision maker for further consideration.

Nothing in this provision grants the Hearing Examiner jurisdiction over constitutional claims. Therefore, Mr. Miller's complaints as to constitutional violations is beyond the scope of this appeal hearing before the Hearing Examiner.

VII. CONCLUSION

Mr. Miller failed to procure the requisite permit for the work on the Property. The City respectfully requests the Hearing Examiner uphold the issuance of the Notice of Violation and issue a final order for corrective actions.

A handwritten signature in black ink that reads "Alison Van Gorp". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Alison Van Gorp
Deputy Community Planning and Development Director
City of Mercer Island
