

ARAMBURU & EUSTIS LLP  
ATTORNEYS AT LAW  
720 THIRD AVENUE, SUITE 2112  
SEATTLE, WASHINGTON 98104  
(206) 625-9515 • FAX (206) 682-1376

November 5, 2009

Lucas DeHerrera  
Department of Planning and Development  
700 5th Avenue, Suite 2000  
PO Box 34019  
Seattle, WA 98124

Lucas.DeHerrera@Seattle.gov

Re: Briarcliff Development

Dear Lucas:

I have received the letter from Melody McCutcheon on behalf of the Briarcliff developer responding to my letter of October 15, 2009. That letter claims that the developer can place fill on the site to raise the grade and increase the effective height of the proposed single family homes. The Magnolia Action Group (MAG) believes that the developer's action, if this leads to houses that exceed the height limit over the existing grade, is inconsistent with the code and should not be permitted. MAG asks that DPD immediately inform the Briarcliff developer that this fill cannot be used to increase the height of the proposed single family houses on the site.

The issues here are not complicated. As stated in our October 15 letter, the Seattle Land Use code requires that height be measured from "existing or finished grade, whichever is lower. . ." SMC 23.86.006. Under the land use code, "existing grade" is defined as follows:

"Lot grade, existing" means the natural surface contour of a lot, as modified by minor adjustments to the surface of the lot in preparation for construction.

SMC 23.86.006. Finished grade is not defined in the Land Use Code, but is defined in the grading ordinance as follows:

**"Finished grade"** means the grade upon completion of the fill or excavation."

SMC 22.801.070 (Emphasis in original).

In the present case, the "natural surface contour" of the Briarcliff site was established by a survey that was submitted as a part of the application for the CHPD proposal. As described in our October 15 letter, the natural surface contour over the western part of the site was about elevation 368 feet. The applicant admits that it has raised the elevation of the property by filling in the area of the proposed lots, thereby increasing the existing ground surface.

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The applicant admits that material has been deposited, but claims that this was legally done under a grading permit. The only apparent purpose for the deposition of this fill is to increase the elevation of the site for height calculation purposes; indeed, much of the fill will have to be removed if single family houses are built on the site, given the footprint of the houses and construction of below grade garages. The applicant claims that this grading permit (No. 6124084) established grades, as stated in the October 26 letter: "Existing grade for homes sites was established by the grading permit issued on May 5, 2008." This is not correct under the plain language of the municipal code.

First, a grading permit, under chapter 22 of the Municipal Code, does not set grades for calculation under the land use code. The grading code regulates the impacts of landfill and soil movement. As described in Client Assistance Memo (CAM) 502 (August 2003) the purpose of the grading regulations in Chapter 22.800 *et seq* is as follows: "protects the graded site and adjoining public and private properties, preserves natural drainage patterns and watercourses, and controls pollution." Nowhere in CAM 502 or Chapter 22.800 is the establishment of a fill grade, to be used for building height calculation, made a purpose or function of the grading ordinance. The "finished grade" under a grading permit only relates to elevations after the completion of the fill. But finished grade cannot be used for height calculation unless it is lower than existing grade under SMC 23.86.006. However here, the finished (fill) grade is well above the natural surface contour. Nothing in the grading ordinance or the land use code states that a grading permit can be used to raise land surface for the establishment of elevations for future home construction.

Second, the developer claims that "it is far too late in the process" to change plans. However, there was no public notice of the grading permit at all that would allow neighbors near the site to voice any protests, much less notice that the developer planned to build up the ground surface to increase building heights. It was only recently that local neighbors began to observe the build up of soils on site, which at first appeared to be temporary dirt storage. However, when the developer leveled the top of the fill, local neighbors became concerned that the elevated soils would be permanent. The attached photographs show current site conditions. Once the intent of the developer became clear, MAG promptly registered their concerns with DPD staff. We also understand that there has been no final inspection of the grading under the permit.

Third, to our knowledge, there have been no applications for any building permits so the actual height of the planned structures cannot be determined. If the building plans will describe building elevations that are consistent with height limit in the code from the natural surface of the site, i.e. about elevation 368 on the west portion of the site, then there are not issues with the code.<sup>1</sup> However, it seems apparent from Ms.

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<sup>1</sup>Historical information from the Seattle School District shows that the western part of the site has already been raised, apparently to create a level playfield. See attached photographs.

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McCutcheon's letter that the developer will apply for permits that start height calculations at the top of the new fill.

The reasonable interpretation of the code does not allow a property owner to violate long standing code requirements by filling his property. Code height dimensional requirements based on existing grade ("natural surface contour") will become meaningless if a property owner can gain unlimited additional height by simply depositing fill. Certainly, if the City Council wants to pass a rule that allows owners to boost up the elevations of their properties by depositing fill before applying for building permits, then it can do so, but the land use code has not been so amended.

The only mechanism that has been acknowledged by the DPD for adjusting calculations of building heights is Director's rule 12-2005, published in March, 2005. A copy of this Rule is attached hereto. This rule allows the DPD Director to "adjust the grade or grades (existing or finished) used for the purpose of measuring allowable height. . . " However, the rule applies only if there are "unusual topographic conditions" that would reduce the allowable development potential of a lot "when compared to what would otherwise be permitted if the subject lot were flat." This rule has no application here because, as the topographic survey indicates, the Briarcliff site is almost perfectly flat.<sup>2</sup> Other than DR 12-2005, there are no means to deviate from the long established rule (other than a variance) that height measurements begin at the lower of existing or finished grade. If, as Ms. McCutcheon states in her letter, there is little difference between the new elevations and those from the existing topographic survey, then there appears to be no harm to the developer from following the plain language of the code.

MAG asks that DPD inform the Briarcliff developer that height dimensions for any new homes planned for the property must begin at the existing grade, which is described by the natural ground contour from the survey submitted.

Thank you in advance for your consideration of my clients' views. Should you have any questions, please let me know.

Sincerely yours,

ARAMBURU & EUSTIS, LLP



J. Richard Aramburu

JRA:cc

cc by email: Clients, Melody McCutcheon

Enclosures

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<sup>2</sup>DR 12-2005 is probably invalid in any event because it purports to modify the land use code without approval of the City Council.