



# CITY OF EDMONDS

MIKE COOPER  
MAYOR

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HEARING EXAMINER

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BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

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RE: Classico Homes

APPEAL OF BUILDING OFFICIAL  
DETERMINATION

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Appeal

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APL2011-0004

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## Summary

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The Appellant appeals an interpretation made by the Edmonds Building Official of ECDC 21.105.10, which defines the grade to be used to measure building height. The appeal is denied and the interpretation of the Building Official is affirmed.

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## Testimony

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### Appellant Testimony:

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John Bissell, representative of appellant Classico Homes, testified that Classico Homes purchased the property located on 520 7th Avenue S in 2004. According to Mr. Bissell by looking at a topographic map or physically looking at the site, it is obvious the site has been physically altered at some point in history. The current property owner, Joseph Schmaus, spoke with a City of Edmonds building official to find out how "undisturbed soil" is defined by Edmonds before buying the property in 2004, Mr. Bissell noted. Mr. Bissell testified that the building official, Jeannine Graf, told Mr. Schmaus that you must provide evidence as to what the topography had been previously. Thus, Mr. Bissell stated, Mr. Schmaus hired Higa-Burkholder, which became HBA, (where Mr. Bissell was planning director). Mr. Bissell commented that he asked the building official, Jeannine Graf, how to handle the definition of "undisturbed soil" in the code and planning staff agreed to add a note to the short plat (attachment 10, EXHIBIT 10) which reads "Topography was altered during previous construction. Evidence of original grade to be submitted with building permit" (note 5).

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According to Mr. Bissell, Higa-Burkholder asked the building official, Jeannine Graf, what type of evidence of the original grade would be accepted. Ms. Graf answered a topographic map by a licensed civil engineer based on both the topography of both the site and the entire hillside would be acceptable. During this period, Ms. Graf was replaced by Ann Bullis as building official, and Ms. Bullis agreed

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1 with Ms. Graf's previous statements regarding original grade evidence. In 2008, the applicant decided  
2 to hold off on building due to market fluctuations. In 2011, the applicant resumed building and  
3 submitted the documentation of evidence of the original grade. The new building official, Leonard  
4 Yarberry, denied the submittal.

5 Mr. Bissell stated that the code should be interpreted consistently with the interpretations of Ms. Graf  
6 and Ms. Bullis. He gave three basic issues with Mr. Yarberry's decision: consistent interpretation of  
7 the city code and what elements would result in a change of interpretation of the code, plain text  
8 reading of the code, and questioned whether Mr. Yarberry's proposed interpretation of the code was in  
9 compliance with due-process.

10 In regards to the issue of consistent interpretation, Mr. Bissell stated that he attempted to find Jeannine  
11 Graf and Ann Bullis (the two former building officials) and Star Campbell (former planner for City of  
12 Edmonds who did the work on this short subdivision), but could not locate them. This left him with no  
13 person who has previously worked for the city of Edmonds and dealt with this issue. However, he  
14 noted that he worked for the city of Edmonds from 1989-1998 and could provide evidence regarding  
15 previous code interpretation. During the period he worked for the city, he stated, similar issues with  
16 the definition of "undisturbed soil" came up only a couple of times and that in those few times the city  
17 code was interpreted as Jeannine Graf and Ann Bullis interpreted it. He once again remarked that the  
18 short plat had a note that stated it corroborated with city code (shown in EXHIBIT 10, note 5).

19 In the period from 1989 to now, when looking at code amendments, there have been no amendments  
20 made to this section of code regarding "undisturbed soil," according to Mr. Bissell. He remarked that a  
21 city would change interpretation of code if they established that their previous interpretation was  
22 wrong. He stated that the appellant finds no such error. He testified that interpretation could also  
23 change if intent of the code was mistaken, but once again there is no evidence for this circumstance.  
24 Finally, if the code was internally inconsistent, he stated, interpretation could change, but no internal  
25 inconsistency can be found. He remarked that there is no reason for the change of interpretation from  
26 the past and lack of consistency by the current building official.

27 In regards to plain-text reading of the code, Mr. Bissell stated that if you can read a code in plain  
28 English and it makes sense as read, no interpretation is necessary, according to case law. He testified  
29 that the code in plain English sets no particular point in time for when alterations must have occurred,  
30 citing the code "the site has been altered...before the application." The building official, Mr.  
31 Yarberry, claims the code says that the establishment of when "undisturbed soil" was set should be set  
32 at a particular point of time (in this case with the short sub-division application in 2004), according to  
33 Mr. Bissell. The building official, Mr. Yarberry, says that if this point in time was not set, it would be  
34 difficult to enforce this code because the time period for going back would be indefinite. Mr. Bissell  
35 further stated the building official offers no remedy if for some reason the applicant had not done a  
36 short plat in 2004. In this case what would the building official go back to in order to establish  
37 "undisturbed soil" topography, Mr. Bissell asked, the original building permit?

38 According to Mr. Bissell, the only way to deal with how the building official would like to interpret the  
39 code would be to add some way of interpreting the code with a specific time limit. A current reading  
40 of the code does not do this, thus the interpretation of the appellant should be adhered to, he noted.

41 In regards to due process, Mr. Bissell referenced *Anderson v. Issaquah*. The reading of the code by the  
42 building official, Mr. Yarberry, results in too much guesswork, according to Mr. Bissell. A man or a

1 woman of common intelligence would need to be able to interpret this code section for it to follow due  
2 process, but this would be impossible with all of the possibilities created by Mr. Yarberry's  
interpretation of the code, Mr. Bissell noted.

3 Upon questioning by the hearing examiner in regards to what difference would be made between using  
4 the 1948 contours v. the 2003 contours, Mr. Bissell referenced EXHIBIT 10, EXHIBIT 12, and  
5 EXHIBIT 15 (photo 1 and 2). He noted the HBA engineer used Lydar technology to create very  
6 accurate, detailed topography using airplanes. In EXHIBIT 12, the dotted line represent the current  
grade, while the solid line represents what Mike Ryan, the HBA engineer, believes was the grade of the  
site before the 1940s construction, according to Mr. Bissell.

7 Staff Testimony:

8 Leonard Yarberry, Edmonds Building Official, stated that this case is an issue of the interpretation of  
9 what "undisturbed soil" means. Mr. Yarberry remarked that attachment 6 was the application  
originally sent to him in March. This was the first involvement he had with the property, he noted.  
10 Mr. Yarberry testified that when you look at attachment 6 at the southern property line the elevation is  
shown at 190 feet, but when looking at attachment 10 that same line is shown as 180ft. elevation. He  
11 stated that when he went out to look at the site, he did not understand how the elevation noted in  
attachment 6 could reflect the true site conditions and suggested to Mr. Schmaus (the property owner)  
12 that he look back at the short plat report done by HBA in 2004 (attachment 10).

13 Mr. Yarberry made clear that he researched as best as he could previous policy interpretation by former  
building officials, but he could not find any written policy interpretation, email correspondence, or any  
14 written files regarding the history of "undisturbed soil" interpretation. He noted that he was not even  
able to find the exact time the definition of "undisturbed soil" came into existence or the history of that  
15 code section and stated that it is a definition strictly used for determination of height. According to  
attachment 7 (the text of the code), Mr. Yarberry stated that, in his plain reading of the text,  
16 "undisturbed soil" means the condition of the site at the time a building permit application is made to  
the city before any site work occurs. He noted this is what the city typically deals with in building  
17 permit applications for construction of new buildings. He testified that his interpretation of the  
continuation of the code, in regards to situations where the site has been altered before the application  
18 of building permit by "grading, cutting, filling, or similar activities," is that this was sometime in recent  
history of the building permit. In this case grading, cutting, or filling associated with the short plat  
19 done in 2004 would be applicable, but not back to 1948 when original construction occurred. His  
20 reading of the code is that the language is written to protect against a developer placing illegal fill on a  
property to create an artificial grade and to avoid undue burden on new property owners.

21 Mr. Yarberry stated that he took Mr. Bissell's determination by former building officials into  
22 consideration, but in the short plat submittal he found no discussion of determination of the elevation  
points for "undisturbed soil" or determination of height. In the short plat file (attachment 14) which  
23 was produced by HBA, there are some penciled in elevation marks at the corner of the proposed house  
which is the only place in the record that suggests any discussion of "undisturbed soil", according to  
24 Mr. Yarberry. In his response to the applicant, he suggested using the elevation points marked in  
attachment 14 because there was some evidence that they were previously discussed and agreed upon.  
25 These elevations compared with those in attachment 12 (which was the proposal from Mr. Ryan, the  
HBA engineer used by the appellant) offer an approximate difference of 1.5 feet.  
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1 Mr. Yarberry testified that he believes in order to follow the code they must look at what evidence is  
2 available, noting that the code language allows for the building official to make a determination on the  
3 "then available data of the mean elevation of the undisturbed soil" (attachment 7). He stated that there  
4 is no evidence to support that the contours provided in attachment 12 (Mr. Ryan's report) are based  
upon any geo-technical study. According to Mr. Yarberry, there may have been cut or fill on the site,  
but there is no real evidence as to what exactly occurred prior to 2003.

5 Thus, he stated, we must use the site conditions found in 2003 before the short plat occurred, which are  
6 the conditions which would have been in existence for at least 60 years (since 1948). Mr. Yarberry  
7 stated that the city asks the hearing examiner to uphold the building official's findings in the case and  
follow attachment 14 (the report from 2003) as the acceptable determination for "undisturbed soil"  
contours.

8 Mr. Yarberry stated that he does not believe that new survey technology (Lydar) is able to accurately  
9 determine the soil grade change from 1948. Lydar is able to look through vegetative cover and look at  
the ground, but it is not able to recreate soil that has been removed, he concluded.

10 Mr. Yarberry also noted that the photos featured in attachment 15 were taken in mid-August, 2011.

11 Public Testimony:

12 Alvin Rutledge noted that on page 11 of the staff report for the short plat there is a discrepancy in  
13 regards to attachment 7. He further stated that it is not clear what year the building was demolished  
14 (2003? 2004) and that can have an impact on the land use application/short plat. Additionally, he  
stated that the city has pictures in attachment 15 which feature signs for candidates in city elections  
which he believes should be omitted as they are a conflict of interests.

15 Appellant Rebuttal:

16 Mr. Bissell testified that an appeal has been filed in regards to the interpretation of the code setting a  
17 specific time-frame for the determination of "undisturbed soil," and the quality of the data is a different  
18 issue. He began his rebuttal by noting that the appellant is trying to read the code as "what it says" and  
19 that if previous officials have read the code as "what it says" then a written code interpretation would  
have been unlikely. He asserted this is why Mr. Yarberry has not found any written evidence of this  
particular code interpretation.

20 Mr. Bissell testified that Mr. Yarberry is adding "in recent history" to his interpretation of the code, but  
21 that is not written in the code. Mr. Bissell stated that it should not be inferred that the code means  
22 determination should be based on recent history, especially as the code states "if the undisturbed soil  
23 elevation is not readily determined due to demolition of an existing structure, the contours may be  
24 reconstructed by the building official..." In this case a building was demolished, thus allowing for the  
"undisturbed soil" to being back at the 1948 date, he noted. Mr. Bissell asserted that the code should  
not be interpreted any differently than it is outright written, thus Mr. Yarberry is incorrectly  
interpreting the code.

25 In regards to the quality of the data, Mr. Bissell stated that the subdivision file includes a geotech  
26 report that provides evidence that the site has been cut, and Mr. Yarberry is incorrect in stating there is  
no evidence as to whether it is cut or fill. Mr. Bissell testified that Lydar cannot recreate a site, but it  
gives a very accurate survey of a large area. He commented that Lydar was created by a government

1 agency and provides information for an engineer in a large scale. If you are looking at a single  
2 snapshot of a site, there can be a lot of guessing, but the Lydar technology allows one to look at a full  
3 scale of the site creating higher quality data, Mr. Bissell noted. He further stated that this part of the  
4 code is not well annotated, which means that it came in with the Edmonds community development  
code in 1982. In 1982, Lydar and GPS data systems had not been in use, but the code still stipulated  
for building officials to have some leeway in reconstructing contours, he noted.

5 Mike Ryan, civil engineer for HBA, first stated that attachment 14 (EXHIBIT 14) was not done by  
6 HBA. Mr. Ryan noted that they have gathered empirical and geotechnical data for this site. In  
7 attachment 13 (page 3) there is a photograph that gives the Lydar produced contours over several  
8 neighboring areas with the subject site, he noted. Mr. Ryan testified that Lydar cannot explicitly tell us  
9 what used to be, but it provides details that coincide with cutting. The data provided demonstrates a  
methodological lining of the grade which, Mr. Ryan stated, he finds highly unlikely to have occurred  
naturally. This patchwork of tertiary activity lines up to closely with the streets to be natural, he stated.  
A geotechnical investigation dug holes on the site, and in all but one instance the results came back as  
cut, rather than fill, according to Mr. Ryan. He noted that in the one instance of the results coming  
back as fill, he believes to be a localized phenomenon, which was not representative of the site.

10 Mr. Ryan testified he believes there is evidence of leveling off and hauling done to this site prior to  
11 construction of buildings. Furthermore, there would be evidence of wetland activity or previous  
12 wetland activity if this was a natural cutting phenomenon, he noted. Mr. Ryan stated that the sections  
used to create the contours (in attachment 13) represent a minimal native ground elevation and are  
conservative in his opinion. He stated that this method of creating contours is not that unusual and he  
13 has previous experience using this method. Additionally, photographs demonstrate that the nearby  
streets were cut and benched into the hill system, he noted. Mr. Ryan remarked that he believes the  
14 contours given are reasonable and that there is plenty of evidence that this ground has been previously  
manipulated.

15 Mr. Bissell reinforced that attachment 14 was not submitted by HBA. He noted that he cannot attest  
16 that any of attachment 14 was following instructions given by Jeannine Graf, former building official.  
17 Mr. Bissell also noted that attachment 6 is not what the appellant is asking for and was done as a  
preliminary measure by Emerald Land Surveying.

## 18 Exhibits

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21 The August 30, 2011 staff report, along with its attachments, was admitted into the record during  
the hearing. Attachments 1-15 to the staff report were admitted as corresponding Exhibits 1-15.  
22 In addition, notes from John Bissell were admitted as Ex. 16. The staff report was also admitted.

## 23 Findings of Fact

### 24 Procedural:

- 25  
26 1. Appellant. The Appellant is Classico Homes, represented by JBA consultants.

1 2. Hearing. The Examiner held a hearing on the appeal at 3:00 pm on September 8, 2011, in the  
2 City of Edmonds City Council Chambers.

3 **Substantive:**

4 3. Description of Appeal. The appeal is of the City Building Official's interpretation of ECDC  
5 21.105.010, the definition for "undisturbed soil". The Building Official interprets the undisturbed  
6 soil as the condition of the property at the time a short plat application was filed for the property in  
7 2004, prior to any site work done for the short plat. The Appellants claim that "undisturbed soil"  
8 means the condition of the soil prior to any alteration to the property, which would have been in  
9 1948 immediately prior to the construction of a home at the site. No artificial alteration of the site  
10 had occurred prior to 1948. The "undisturbed soil" definition is of significance to the Appellant  
11 because it is used to determine building height per ECDC 21.40.030.

12 4. Property Description. The property is located at 520 7<sup>th</sup> Ave, Edmonds WA, and is currently  
13 owned by Classico Homes. At the time the appellant originally applied for a 2-lot subdivision in  
14 2004 for the property, there was a single family home on the lot, which was built in 1948.  
15 Subsequent to a decision approving the subdivision, the residence was removed from the property  
16 and improvements for the newly created lots were installed.

17 5. Factual Basis for Appeal. In March of 2011 the Appellant submitted a survey of the property,  
18 Ex. 6, prepared by Emerald Land Surveying, with elevation points depicting the "original grade" as  
19 interpreted by the Appellant. According to the testimony of Mike Ryan, a civil engineer, the  
20 elevations accurately represent the elevations of the subject property before it was subject to any  
21 development or artificial alteration, which would have been prior to the construction of the existing  
22 home on the property in 1948. Mr. Ryan based his assessment upon his professional judgment,  
23 soil borings at the site and a comparison to surrounding topography with the assistance of Lydar  
24 photography. Mr. Yarberry testified that any assessment made of elevations in 1948 is highly  
25 speculative and there is no way of knowing precisely what those elevations would be. The  
26 Examiner agrees that the record does not establish that elevations from 1948 have not been  
precisely determined, but the elevations determined by the Appellants are the most accurate  
measurements of 1948 elevations that can be reasonably determined at this time.

Mr. Yarberry asserts that the elevations depicting the condition of the property prior to the  
submission of the 2004 short plat applications should be used to establish "original grade". Those  
elevations are depicted in Ex. 10.

## Conclusions of Law

**Procedural:**

1. Authority of Hearing Examiner. The interpretation of the Building Official, Ex. 2. Is a Type  
II decision as outlined in ECDC 20.01.001. . ECDC 20.01.003(B) provides that Type II

1 decisions are appealable to the Hearing Examiner, who is tasked with conducting an open  
2 record appeal hearing and making a final decision that is appealable to court.

3 2. Applicable Code Sections. The only applicable code section is regarding the definition of  
4 undisturbed soil in order to determine the grade of the lot.

5  
6 ECDC 21.105.101 – Undisturbed soil:

7 *Undisturbed soil means the condition of the site at the time a building permit application is*  
8 *made to the city, before any site work occurs. However, where the site has been altered by*  
9 *grading, cutting, or filling or similar activities before the application for a building permit,*  
10 *the building official shall make the determination from then available data of the mean*  
11 *elevation of the undisturbed soil. If the undisturbed soil elevation is not readily determined*  
12 *due to demolition of an existing structure, the contours may be reconstructed by the building*  
13 *official to coincide with adjoining topography to determine the undisturbed soil elevations. If*  
14 *the proposed structure occurs where no setbacks are required, the elevation of the surface*  
15 *(sidewalk, alley, or soil) of the property line at or nearest the intersection of the sides of the*  
16 *building height rectangle will be considered undisturbed soil. Where the building official*  
17 *deems it necessary, he shall have the right to require establishment of a datum point from*  
18 *which all height measurements shall be made.*

19 3. Interpretation. The Examiner agrees with the interpretation of the Building Official and the  
20 reasoning behind it as discussed in Ex. 2. ECDC 21.105.101 is ambiguous and not subject to any  
21 “plain meaning” construction. The operative ambiguity is “before any site work occurs” in the first  
22 sentence. It is unclear whether the “site work” is site work done for purposes of the building  
23 permit, or any site work ever, as argued by the Appellant. As noted in Ex. 2, the reason for the first  
24 sentence is to prevent building permit applicants from attempting to gain a height advantage by  
25 artificially manipulating grade prior to application. This is an imminently logical explanation for  
26 the requirement. The Appellant offers up no policy basis for their interpretation, nor is one  
evident. Under the Appellant’s interpretation the grade used to determine height could conceivably  
have no relationship whatsoever to the topography that surrounds it, due to decades of surrounding  
development. Absurd situations could follow, where the “original grade” could be 35 feet higher  
than the actual grade used for construction, resulting in situations in some zoning districts where  
the authorized height would be 0 feet above existing grade. Granted, a similar situation could  
occur under the Director’s interpretation, but this would only be for parcels having extreme  
variations in topography, which would fit neatly into the “unique circumstances” requirements for  
variances. The speculative nature of determining elevations from 60 or more years ago also  
supports the Building Official’s interpretation, as does his construction of the “demolition”  
sentence.

1 On the issue of prior interpretation, Mr. Bissell makes a compelling case that other Edmonds  
2 officials may have had an interpretation that differed from that of Mr. Yarberry for the subject  
3 project as well as others. Plat note No. 5 on Ex. 7, referencing original grade, is especially  
4 compelling in this regard. However, accounts of the interpretations made by Ms. Graf and Ms.  
5 Bullis are still only second hand without any documentation beyond the plat note. There is  
6 insufficient information to accurately determine if either Ms. Graf or Ms. Bullis would have  
7 ultimately required the use of 1948 grades to determine height. Even if Ms. Graf and Ms. Bullis  
8 would have applied the Appellant's interpretation, the strong policy support for Mr. Yarberry's  
9 interpretation and the absence of any compelling policy support for the Appellant's interpretation  
10 would establish that the Bullis/Graf interpretation was incorrect.

11 As to the due process arguments of Mr. Bissell, the remedy for a "void for vagueness" challenge  
12 under Anderson v. Issaquah is invalidation of the ordinance. The Examiner has no authority to  
13 invalidate City ordinances.

## 14 DECISION

15 The interpretation of the Building Official, as outlined in Ex. 2, is affirmed. The contours on Ex.  
16 4 represent the undisturbed soil for purposes of building height calculation.

17 DATED this 22<sup>nd</sup> day of September, 2011.



18 Phil A. Olbrechts  
19 City of Edmonds Hearing Examiner

## 20 Appeal Right and Valuation Notices

21 This decision is final and only subject to appeal to superior court as governed by Chapter 36.70C  
22 RCW. Appeal deadlines are short (21 days from issuance of the decision) and the courts strictly  
23 apply the procedural requirements for filing an appeal.

24 Affected property owners may request a change in valuation for property tax purposes  
25 notwithstanding any program of revaluation.  
26