

72809-1

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 72809-1-I

DANIEL THOMPSON and THEODORE MISSELWITZ

Appellants,

v.

CITY OF MERCER ISLAND,

Respondents,

ANDERSON ARCHITECTURE,

Applicant,

ON THE ROCK,

Owner, Additional Parties pursuant to
RCW 36.70C.040(2)(b)-(d)

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OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
I. INCORPORATION AND SUMMARY OF PETITIONERS’MOTION TO VACATE THE TRIAL COURT’S ORDER OF DISMISSAL AND REMAND BECAUSE ON THE ROCK, LLC IS NOT THE OWNER OF THE PROPERTY.....	1
II INTRODUCTION.....	4
III. ASSIGNMENTS OF ERROR.....	9
IV. STATEMENT OF THE CASE.....	10
A. Procedure before the Superior Court.....	10
B. Preliminary Approval of SUB 13-008.....	13
C. History of SUB-008, Public Notice and Out of Department Review	19
D. July 23, 2014 Planning Commission Hearing.....	24
V. ARGUMENT.....	31
A. Standard Review under CR 12(b) (6) and (1) for Motions to Dismiss LUPA Petition.....	31
B. OTR and the City’s motions to dismiss were untimely filed and were reviewed under CR 12(b).....	32
C. Petitioner Misselwitz Has Standing in the LUPA Appeal.....	36
D. Petitioner Thompson Has Standing.....	42

V. PETITIONERS' REQUEST FOR ATTORNEY'S
FEES AND COSTS PURSUANT TO RAP 18.1.....49

VII. CONCLUSION.....50

TABLE OF AUTHORITIES

Cases.....	Page
<i>Crystal Lotus Enters. v. Shoreline</i> , 167 Wn.App 501-507-8 (2012).	51
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wash.2d 749, 755, 881 P.2d 216 (1994).....	32
<i>Durland v. San Juan County</i> , 175 Wn. App. 316 (2013).....	31
<i>Hoffer v. State</i> , 110 Wash.2d 415, 420, 755 P.2d 781 (1988)	32
<i>Jones v. The Town of Hunts Point</i> , 166 Wn. App. 452 (2012).....	42
<i>JZ Knight v. The City of Yelm</i> , 173 Wn.2d 325 (2011).....	45, 49
<i>Lauer v. Pierce Co.</i> , 173 Wn.2d 242 (2011).....	44, 45
<i>Peyton Bldg. v. Niko's Gourmet</i> , 180 Wn.App 674, 680-84 (2014).....	4
<i>Prosser Hill Coal v. County of Spokane</i> , 176 Wn App 280 (2013).....	38
<i>Spokane Airports v. RMA, Inc.</i> , 149 Wn.App 930, 935-944 (2009).....	1
<i>State v. McEnroe</i> , 175 Wn.2d 795, 808 fn. 7 (2012).....	36
<i>West v. Stahley</i> , 155 Wn. App. 691, 696 (2010).....	31
Codes.....	Page
MICC 19.02.010(E)	14
MICC 19.02.020 (D)(1)	15
MICC 19.02.020(D).....	14
MICC 19.09.040(A).....	14
MICC 19.15.020(F)(1).....	7

MICC 19.15.020(J).....	9, 12
MICC, 19.01.040	14
Statutes.....	Pages
R.C.W 36.70B.120.....	9
R.C.W. 36.70B.110.....	6
RCW 19.27.095	48
RCW 36.70B.120(2)	7
RCW 36.70C.020.....	12
RCW 36.70C.040(2)	2, 3
RCW 36.70C.040(2)(d):	41
RCW 36.70C.050.....	3
RCW 36.70C.060(2);.....	12
RCW 36.70C.070(6).....	43
RCW 36.70C.080.....	32
RCW 36.70C.080(3)	32
RCW 36.70C.120(1)	43
RCW 36.70C.120(3)	43
RCW 58.17.033	48

I. INCORPORATION AND SUMMARY OF PETITIONERS' MOTION TO VACATE THE TRIAL COURT'S ORDER OF DISMISSAL AND REMAND BECAUSE ON THE ROCK 98040, LLC IS NOT THE OWNER OF THE PROPERTY

On Monday June 1, 2015 legal counsel in an unrelated action on the property that is the subject of this appeal appeared and emailed counsel in this matter a copy of a statutory warranty deed executed by On the Rock on August 12, 2014 conveying all interest in the property to another entity. The deed was filed August 19, 2014. Since the deed is not part of the record below petitioners will file a motion requesting the Court of Appeals supplement the record to include the statutory warranty deed, vacate the trial court's order of dismissal since an indispensable party was not joined in the action below, and remand this matter to the trial court with directions to join the real owner of the property. This procedure was approved in *Spokane Airports v. RMA, Inc.*, 149 Wn.App 930, 935-944 (2009) (evidence not in the record important to the disposition of the trial court's jurisdiction may be accepted pursuant to RAP 9.11). A summary of the motion, with reference only to documents in the record below (except for the August 12, 2014 deed) is as follows.

The applicant Anderson Architecture and owner On the Rock were represented at the administrative level by the law firm of Lasher, Hozapel, Sperry, and Ebberson. Attorney Taro Kusonose signed the Applicant's

and On the Rock's brief to the Planning Commission. CP 344. Mr. Kusonose was the notary on the August 12, 2014 deed.

On August 14, 2014 petitioners filed and served their LUPA petition pursuant to RCW 36.70C.040(2). At that time, OTR satisfied both statutory bases since it was the owner identified in the land use decision and owner of title. At this point the superior court was vested with subject matter jurisdiction. On August 14, 2014 petitioners served a courtesy copy of the petition and civil case schedule on Mr. Kusonose. CP 36-37. The deed was filed August 19, 2014. Lasher was the filing and receipt agent on the deed.

On August 28, 2014 Mario Bianchi from Lasher filed a notice of appearance on behalf of "On The Rock, Owner." CP 40. On September 19, 2014 outside counsel Zachary Lell appeared on behalf of the Applicant, Anderson Architecture listing On the Rock as the owner of the property, and service on Mr. Bianchi as attorney for On the Rock, Owner. CP 46. On September 19, 2014 Mr. Lell filed his notice of association of counsel for On the Rock, Owner with Mr. Bianchi. CP 49-51. On October 31, 2014, Mr. Lell filed a note for motion to dismiss on behalf of On the Rock. CP 52. The caption and first line in the motion to dismiss filed by Mr. Lell listed On the Rock, LLC as the moving party. CP 54. The service page notes that a copy of the motion was served on Mario

Bianchi, “Attorney for On the Rock, Owner.” CP 70. The trial court’s order granting the motions to dismiss identifies On the Rock as the owner of the property, and notes that On the Rock appeared by and through their associated counsel of record, Mario Bianchi and Zachary Lell. CP 1575-1576

RCW 36.70C.050 provides that if the applicant to the land use decision is not the owner of the property, and the owner is not accurately identified under RCW 36.70C.040(2), the applicant is responsible for promptly securing the joinder of the owners. In addition, within 14 days of service each party shall disclose to the other parties the name and address of any person whom such party knows may be needed for just adjudication. The purpose behind this rule is that effectively there is no discovery in the superior court under LUPA, or a continuing duty to supplement discovery responses.

Substitution under RAP 3.2 is not applicable because LUPA requires joinder of all indispensable parties, which in this case is both property owners: On the Rock because its joinder vested the superior court with subject matter jurisdiction, and the joinder of the owner at the time the trial court’s order was filed to make the order enforceable. On the Rock has no interest in the action or order to substitute, and hasn’t since August 12, 2014, before the petition was filed. See *Peyton Bldg. v.*

Niko's Gourmet, 180 Wn.App 674, 680-84 (2014) (discussing distinction between standing and CR 17(a) real party interest).

Neither the Applicant nor On the Rock ever informed petitioners that On the Rock had conveyed all interest in the property on August 12, 2014. The petitioners request at the end of this brief their attorney's fees and costs at the appellate and trial level should the Court of Appeals vacate the trial court's order of dismissal for failure to join or disclose the subsequent owner of the property and remand to start all over again.

II. INTRODUCTION

The following arguments made in this brief are in the alternative should the Court of Appeals decide the trial court's order does not need to be vacated for absence of an indispensable party. The other issue the petitioners face is that although the motions and order of dismissal were filed under CR 12(b) with three court days notice they are based upon and reference the underlying record. Therefore, the petitioners feel some obligation to attempt to prove the legitimacy of the statements in their 24 page single spaced petition found at CP 1-24.

This case involves preliminary approval of a subdivision on Mercer Island, SUB 13-008 (subdivision, year, sequential number of

subdivision application).¹ The City's February 3, 2014 preliminary approval begins at CP 117, and the pre-administrative hearing staff report begins at CP 107. The Planning Commission's Decision and Order dated July 28, 2014 can be found at CP 25-27. Petitioners Thompson and Misselwitz are adjacent landowners to the proposed subdivision. The trial court granted OTR's and the City's motions to dismiss Thompson's LUPA petition under CR 12(b) on the basis he failed to allege "actual harm". CP 1577. The trial court dismissed Misselwitz' petition under CR12(b) on the basis that although Misselwitz participated in the open record appeal hearing Misselwitz' failure to file his own separate administrative appeal and pay the \$837 appeal fee prevented Misselwitz from having standing to appeal to the superior court. CP 1577.

The City and OTR concede the LUPA petition was timely filed and served, all available administrative remedies were exhausted by Thompson, and a "Land Use Decision" was issued pursuant to RCW

¹ LEGEND:

- 1) Clerk's papers, including the administrative record: CP ____.
- 2) Verbatim Report of Proceedings of 10-31-14 superior court hearing RP ____.
- 3) 7-23-14 transcript of administrative hearing before the Mercer Island Planning Commission. CP ____
- 4) Property owner: On The Rock (OTR)
- 5) Applicant: Anderson Architecture (Applicant)
- 6) City of Mercer Island: City

36.70C.020(2). Therefore the trial court was vested with subject matter jurisdiction.

The motions to dismiss were filed under LCR 12(b). The trial court must presume petitioner's allegations to be true, and only dismiss if it appears beyond a reasonable doubt that no facts justifying recovery exist. The inquiry should begin--and end--with the petition found at CP 1-24, although the court may consider hypothetical facts not part of the formal record. Since the motions to dismiss were actually based on the record, and the order of dismissal was actually based upon the record, the motions to dismiss required 28 days notice under LCR 7(b), LCR 12(b), CR 12(b) and CR 56(c).

Dismissal of Misselwitz' petition was error. Both OTR and the City do not assert that SUB13-008 will not cause Misselwitz injury in fact. The basis of the trial court's order holding that only the administrative appellant has standing to appeal to the superior court from an open record hearing is contrary to state and local law, and contrary to the specific notice of the open record hearing mailed to Misselwitz and Thompson. CP 1413 (public notice); 1415-1416; 1405-1407 (staff analysis), title 19 of the Mercer Island Comprehensive Code 19.15.020(J) Appeals, appendix Exh. 5: 16-17 ("MICC"), LUPA, R.C.W. 58.17.180, R.C.W. 36.70B.110 No case holds that only the administrative appellant has standing under LUPA

to appeal from an open record appeal hearing. Furthermore, local and state law hold that no matter how many administrative appeals are filed, there can be only one open record hearing and one final land use decision. RCW 36.70B.120(2); MICC 19.15.020(F)(1) Appendix Exh. 5:12.

Both OTR and the City concede Thompson exhausted his administrative remedies and obtained a final land use decision, CP 61:11-24; CP 85:17-19; RP 23:24-24:3, but argue that Thompson, unlike Misselwitz who is also an adjacent land owner, will not suffer the same injury in fact as Misselwitz, or any injury. Thompson is an adjacent property owner who alleges that the preliminary approval of the subdivision will injure his property. See Decl. of Thompson, CP 1391-1397; p. 1396 para. 13; RP 39:8-40:6. See also, Summary of Thompson's requested relief CP 1124-1127; notice of administrative appeal, CP 221-230; Brief of Administrative Appellant CP 347-385, exhibit index CP 386-395. Therefore, his alleged injury is immediate and specific, and it was error to dismiss his petition under CR 12(b) for a failure to allege "actual harm."

The Mercer Island Planning Commission's decision was not unanimous. CP 1453, p. 110:19-22; CP 1450 p. 97:20-100:25. In fact, during the administrative hearing for SUB 13-008 the Planning Commission passed a motion prohibiting the use of "Tract X's" in any

future subdivisions on Mercer Island. CP 1453, p. 110:23-CP 1461, p. 137:22 (hearing transcript); CP 1463 (minutes of hearing)

As one Commissioner noted: “So the irony will be that we’ll set a really good policy for the benefit of the future citizens, but the guy who contested over it loses out”. CP 1457, p.124: 10-12.

Neither OTR nor the City raised lack of standing at the administrative level even though the privilege log shows the City Attorney and the City’s outside counsel were actively involved in the case as early as October 24, 2013, CP 919, eight months before the July 23, 2014 administrative hearing (although Mr. Walter did not formally appear until the superior court, CP 43). Therefore, Thompson and Misselwitz must be afforded the opportunity, if necessary, to submit evidence outside the administrative record to establish standing, which is not possible in a CR 12(b) motion to dismiss.

When the LUPA petition is timely filed and served, all available administrative remedies have been exhausted, a final land use decision has been issued, the petitioners are adjacent land owners who allege injury to their property (and it is conceded one adjacent landowner will suffer injury in fact) and the defense of lack of standing was not raised at the administrative level, dismissal under CR 12(b) is error.

III. ASSIGNMENTS OF ERROR

The trial court erred when it granted the motions to dismiss the LUPA petition under CR 12(b), CP 1575, and when it denied petitioners' motion for reconsideration. CP 1640.

Issues Pertaining to Assignments of Error

1. There was an irregularity in the proceedings by allowing dispositive motions on the record to be noted six court days before the hearing that prejudiced petitioners.
2. The trial court's order dismissing Misselwitz' petition for failing to exhaust administrative remedies under MICC 19.15.020(J) and R.C.W 36.70B.120 on the basis only the administrative appellant has standing to appeal to the superior court from an open record hearing is an error of law.
3. The trial court's order dismissing Thompson's petition due to an absence of "actual harm" is an error of law under a CR 12(b) standard of review.
4. The trial court's order dismissing of Thompson's and Misselwitz' petitions without affording either an opportunity to submit evidence of standing outside the administrative record is an error of law because lack of standing was not raised at the administrative level.

IV. STATEMENT OF THE CASE

A. Procedure before the Superior Court

The initial hearing on jurisdictional and preliminary matters was originally set under the civil case schedule for October 3, 2014. CP 30.² However, based upon the trial court's schedule the trial court rescheduled the initial hearing for October 31, 2014. On September 23 the City and OTR emailed the trial court stating each would be filing motions to dismiss on jurisdictional and standing issues. CP 1548. On the afternoon of October 23, 2014 OTR and the City filed their motions to dismiss. CP 54; 73. On the same afternoon of October 23, 2014, the City filed the 1213 page administrative record ("AR"), CP 101-102, and 116 page administrative hearing transcript.³ CP 1258 although each were not required to be filed under the civil case schedule until November 17, 2014. CP 30. As noted in the declaration of service, the petitioners were served late in the afternoon on October 23, 2014 with an electronic copy of the administrative record, which had been remarked, and which obviously had

² RCW 36.70C.080(1) requires the preliminary hearing to be set between 35 and 50 days of the service of the LUPA petition. The LUPA petition was served August 14, 2014. The October 31, 2014 hearing was 79 days after the filing of the petition.

³ The actual hearing transcript is 137 pages and can be found at CP 1426-1461. Although the petitioner was required to pay for transcribing the administrative hearing, and pursuant to RCW 36.70C110(1) petitioner is to file the transcribed hearing record, the City insisted on filing the transcript and only filed pages 1- 113 of the transcript. CP 1259-1371. Pages 113-137 of the hearing transcript document the Planning Commission's discussion and motion to prohibit "Tract X" in any future subdivisions. CP 1455-1461.

been made available to the City, OTR, and the Applicant well in advance in order to prepare their motions to dismiss which were filed and served before the administrative record. CP 100. See, Decl. of Thompson, CP 1392, para 3 noting the motions were filed and served before the administrative record.

King County's civil case schedule for LUPA petitions states: "Motions on jurisdictional and procedural issues shall comply with Civil Rule 7 and King County Local Rule 7, except that the minimum notice of hearing requirement shall be 8 days." CP 29.

The parties in emails to the trial court disputed whether notice pursuant to the civil case schedule for jurisdictional motions under LCR 7 should be eight days or six day's notice, CP 1614-1616; 1542-1550, and the petitioners objected to the timeliness of the motions, and the submission of the administrative record and administrative hearing transcript three court days before petitioners' responses to the motions to dismiss were due under LCR 7(b)(1). CP 1376-1377. The court denied all of the parties' preliminary motions to strike. RP 3:14-24.

On October 31, 2014 a hearing was held before the trial court. On November 7, 2014 the trial court signed the City's proposed order granting OTR's and the City's motions to dismiss petitioners' LUPA petitions. CP 1575.

The order notes the trial court struck the post-oral argument supplemental pleadings (petitioners had submitted a statement of supplemental authorities addressing legal issues raised at the hearing, CP 1562). The order notes the trial court considered the administrative record and administrative hearing transcript. The order states:

“(2) Petitioner Daniel Thompson lacks standing [“*absent actual harm*” as interlineated by the Court] under, *inter alia*, RCW 36.70C.060(2); (3) Petitioner Theodore Misselwitz failed to exhaust required administrative remedies under the Mercer Island City Code (MICC 19.15.020(J)) as required by RCW 36.70C.020(2) and RCW 36.70C.060; (4) for the foregoing reasons the Court lacks jurisdiction under RCW 36.70C.020 to adjudicate Petitioners’ claims in the LUPA Petition.

CP 1576:16-21.

Petitioners filed a motion for reconsideration with attachments, again objecting to the procedure. CP 1581-1605.

On December 1, 2014 the trial court issued its order denying the motion for reconsideration stating:

This matter came before the undersigned Court on Petitioners’ Motion for Reconsideration of the Court’s November 7, 2014 order. The Court considered the motion, attachments 1-4, all filed materials; the motion is DENIED.

CP 1640.

B. Preliminary Approval of SUB 13-008

The land use determination that is the subject of this appeal is regulated under the Title 19 the Unified Land Development Code, Mercer Island Comprehensive Code (“MICC”), and the City’s Comprehensive Plan pursuant to the Growth Management Act.

Petitioners’ declaration in support of response to motions to dismiss sets forth the history with attachments. CP 1391. An outline of the relief requested at the administrative level is in CP 1467-1470. Petitioner’s brief to the Planning Commission is at CP 347.

SUB 13-008 is a new three parcel short plat replacing an existing two lot short plat SUB 08-009⁴ in a R-12 zone on Mercer Island. See Preliminary Approval, CP 117-134; plat map CP 138. The amended short plat creates three parcels: two lots, and “Tract X”. Tract X is not a road or easement but a strip of the easement and is approximately 6’ of the required 18’ width. CP 122-123. Tract X is to be jointly owned by the two lots. Tract X is approximately 6 ft. wide, and runs adjacent to the easement for the length of the easement for approximately 180 ft. It is 100%

⁴ SUB 08-009 is commonly misidentified throughout the record as SUB 09-008. Although SUB 08-009 was filed in September 2008, it was not finally recorded until February 11 2011.. OTR had agreed to purchase the property in January 2011 .Part of this confusion may be due to the fact the initial application filed in September 2008 differs significantly from the public notice of application issued on November 17, 2009 that increased gross area of the property from 26,080 sf to 27,432 sf. This is discussed at length in Thompson’s declaration. CP 1393-1395.

impervious surface. The width of Tract X is included in the overall width of the easement to comply with the required easement width for vehicular access. Tract X does not meet the area or dimension requirements for a lot in R-12. Id.

The MICC regulates the size of houses in three key ways: 1) Different areas of the City have different minimum net lot area required to build, e.g. R-12,000 MICC, 19.01.040 appendix Exh. 1:2; 2) the relationship of the gross area of the house to the lot size, MICC 19.02.010(E) appendix Exh. 2:9; and 3) the maximum amount of allowable impervious surface, which includes foundations MICC 19.02.020(D) appendix Exh 2:13. For each extra square foot of foundation area there can be a corresponding increase in house square footage *for each story*.

The MICC also increases the necessary width of easements depending on the number of houses served by the easement. MICC 19.09.040(A) appendix Exh. 4:4-5. The easement is considered 100% impervious surface. MICC 19.16.010 (definition of impervious surface). Appendix Exh. 6:12. The impervious area of the easement is then counted against the subservient lot upon which the easement traverses. This rule is explained in DSG policy memorandum #07-05, appendix Exh. 8.

DSG Policy Memorandum Administrative Interpretation #07-05 was enacted June 1, 2007. It defines whether the area within an access easement is to be included in the area of the lot used for the purpose of calculating compliance with impervious surface coverage limitations. Based on the finding that it is appropriate to refer to the general definition of “lot” which would include the entire area of “a designated parcel, tract or area of land established by plat, subdivision, or as otherwise permitted by law to be used, developed or built on as a unit”, the administrative interpretation concluded that the entire area of the lot was included in the impervious surface calculation, and that under MICC 19.02.020 (D)(1) any driveway or other impervious surface within such easement must be included as impervious surface.

So, the purpose of Tract X is to remove the area of impervious surface in Tract X from the easement and from counting against lot 1 since it is not an “easement” but a separate non-conforming legal parcel that is “jointly owned.” CP 122-123. Therefore the house on lot 1 can be much larger than the code would otherwise allow.

The assigned planner Travis Saunders and Commissioner McCann discussed this issue at the administrative hearing:

COMMISSIONER

MCCANN:

Two lots and this Tract X disappeared the covered surface belongs to the upper lot,

what would the ramification be for the architectural plan, smaller house?

MR. SAUNDERS: So if I understand you correctly, if this road access were an easement, all on an easement, not a tract and an easement, what would be the detriment to the upland lot, as far as impervious surfaces, right?

COMMISSIONER MCCANN: Yeah.

MR. SAUNDERS: So it would be twofold, and it would be that it, the road area would be counted against the lot coverage calculations. So if they had 1,000 square feet of ingress-egress easement, that is subtracted right off the top of their buildable, impervious surface on that lot.

COMMISSIONER MCCANN: So you'd end up with a lot less than 12,000 feet?

MR. SAUNDERS: Well, yeah, your house. Yeah, yeah.

COMMISSIONER MCCANN: So the house would be smaller?

MR. SAUNDERS: The house and the appurtenances would have to be smaller because of that additional 1,000 square feet.

CP 1445, P: 80:25 – CP 1446, 81:19.

Counsel for OTR argued that although “this case is not about the merits of the appeal” (RP 24: 12) “there is some necessity to look at the

impacts of the proposal in order to determine whether or not a particular party has standing” (RP 24: 12-15). The following exchange occurred:

THE COURT: So in layman’s terms, what is the point?

MR LELL: The point is to maximize the future development potential of the property and to eliminate the inefficiencies of the original design.

THE COURT: And how does that do that?

Mr. LELL: It takes the impervious surface calculation—

THE COURT: What does that mean? What do you mean?

Mr. LELL: Impervious surface, Your Honor, is surface area that cannot percolate in and of itself. So things like hard roofs, asphalt services, overhangs, driveways, et cetera, under most local municipal codes and under the Mercer Island Municipal Code, each buildable lot has a maximum imperious surface limitation.

And my client felt upon purchasing the property that the inefficient configuration of the 2009 short plat unnecessarily constrained the impervious surface limitation on one of the lots because all of the access easement driveway was going to be allocated against that lot. So—

THE COURT: So this is all to lay the groundwork for the future construction?

MR. LELL: Largely that’s a correct premise, Your Honor. But as Your Honor can see in comparing these two site plans which is really at issue today, there really is no perceptible difference. In fact, I apologize in that the—even with the magnified, blown-up depiction, it’s probably almost impossible for the Court to actuals see what has been changed. And that really

is reflective of the de minimis nature of the amendment effectuated by SUV 13-008.

RP 27:19-28:33

OTR in its motion to dismiss calculated the impervious surface removed from lot 1 by Tract X at 750 sf, which is applicable to each story.

CP 56: ll 19-21.

The City issued Preliminary Approval for SUB 13-008 on February 3, 2014 including Tract X. CP 117-134. The preliminary approval of SUB 13-008 states that since Tract X is a Tract jointly owned by lots 1 and 2, the impervious surface in Tract X does not count against either lot. (It is not clear why the developer did not place all of the easement's impervious surface in Tract X). CP 122-123.

The preliminary approval states:

“Staff Response:

The purpose of Tract X is to provide ingress/egress to the subject lots. The applicant has proposed a combination of private easement across the upland lot and a tract in order to provide the required 16 feet wide access. Owners of lot 1 and lot 2 will share an equal ownership and maintenance and repair interest in Tract X. The land underlying the easement portion of the 16 feet wide access belongs to the upland lot. That portion crossing the upland lot will be included in the impervious surface area of the lot at the time of building permit. The Tract, while considered 100% impervious surface, is a jointly owned, maintained and repaired private roadway; the MICC does not regulate the

amount of impervious surface on private roadways when placed within a tract jointly owned by the properties of a subdivision. Both lots are subject to lot coverage maximums, pursuant to MICC 19.02.020(D).

CP 122-123: Preliminary Approval, p. 6, para. (2)(e).

(The required easement plus Tract X is actually 18' wide including a chimney drain and retaining wall CP 138).

The preliminary approval states a further basis for approval of Tract X is: "The proposal will make the lots more marketable, thus helping to satisfy the Comprehensive Plan's goals to help absorb population and housing growth" while at the same time maintaining the existing character of the neighborhood pursuant to Goal 8.2 of the Comprehensive Plan. CP 119-120.

The bases for petitioners' objection to the legality of Tract X is set forth in the petition, brief to the Planning Commission, CP 347-385, and summary of relief requested, CP 386-395.

C. History of SUB 13-008, Public Notice and Out of

Department Review

The following history can be found in Thompson's September 24, 2013 letter, CP 153-173, administrative appeal, CP 219-313, administrative appeal brief, CP 347-385, and declaration in response to motions to dismiss. CP 1391-1397. SUB 13-008 began in March 2013

with applications for a lot line revision and building permits for both lots that even with impervious surface deviations would not fit into the existing subdivision SUB 08-009 or the property at 7260 N. Mercer Way. CP 1135-1142; 1143. In May 2013, the applicant switched to SUB 13-008. CP 1147. Although the Preliminary Approval states Tract X is necessary for ingress and egress, a July 17, 2013 email from permit coordinator Mr. Henderson to Fire Marshal Rostov states Tract X “was created so they could meet the impervious surface requirements”. CP 1506.

On Monday, July 1, 2013, three days before the July 4, 2013 holiday, the applicant paid the final fees for the building permits, two impervious surface deviations, 13-008, and the sub permits. CP1154-1165. On that same day, SUB 13-008 was determined to be complete, CP 141 and was issued for public notice along with impervious surface deviation DEV 13-022, CP 1167-1168, and required specific written objections be filed with the city by 5 p.m. on July 15, 2013, although the planner was out of the office June 28, 2013 to July 15, 2013 for vacation. CP 140;(public notice); CP 1517(out of office email); CP 122 (preliminary approval). It isn't revealed in any record who actually gave final approval to the application for SUB 13-008.

On July 15, 2013, Petitioner Thompson submitted a letter addressing the issues despite the little information that was available to

him. CP 145-152⁵. Another adjacent land owner also filed written comments and objections. CP 143. On August 1, 2013, the City required the applicant to sign a hold harmless agreement for concurrent permit review, although all permits had been reviewed, paid for, and public notice had been issued. CP1508.

One of the issues raised in Thompson's 7-15-14 letter was the location of the ordinary High Water Mark (OHWM), and the increase in house size due to Tract X. CP 150-151. The City then requested the applicant to "delineate" the OHWM for the first time since the original 2008 subdivision application. CP 1510. Although it is not explicitly stated in Mr. Anderson's August 9, 2013 letter, the amended survey resulted in 53 sf less area (12,170 sf-53 sf=12,117), CP 138 plat map for SUB 13-008 compared to CP 141 SUB 08-009 plat map, enough to result in the original subdivision SUB 08-009 having insufficient area to subdivide, or to build on the waterfront. See CP 153-156, September 24, 2013 letter. The survey also revealed what has been documented in title reports since 2001: the landowners to the north (including Misselwitz) had openly possessed 1-2 feet of property boundary line since 1967 and 1978 respectively, and the easement had been poured along the wrong boundary line and was

⁵ The issues involved with access to information and public records are documented in correspondence found at CP 923 (February 25, 2014 letter); CP 997 (April 2, 2104 email); CP 1002 (April 2, 2014 email); CP 1073 (July 17, 2014 letter).

only 14.5' wide. CP 1422 (Misselwitz letter). CP testimony by Mr. Anderson. CP 1440, p. 57:5, Thompson Decl. CP 1395-1396. The City's and OTR's response to this was to bulldoze into the neighbor's yard without notice. CP 1511-1512.

On October 2, 2013, City Planner Mr. Saunders emailed Petitioner Thompson to let him know he would be meeting with the City Attorney in the near term to discuss the issues raised in Thompson's letters prior to moving forward on the subject applications. CP 783.

On October 7, 2013 Thompson emailed Mr. Saunders noting OTR had restaked the northern property line, placing orange driveway tacks and stakes into Misselwitz' property. CP 189. It was then, three years after the 200 foot asphalt easement had been poured that OTR realized it had poured the easement at 14.5 feet, not the required 16 feet paved surface.

The City then required the applicant to place SUB 13-008 on hold without any notice to the parties of record. CP 1514. On October 30, 2013 the architect for the owners forwarded a letter to Mr. Saunders with copies to the principals for On The Rock stating:

The City of Mercer Island Planning Department has requested that On the Rock 98040, LLC allow the City to put the Short Plat review for the proposed Short plat plan by Anderson Architecture, for the On the Rock 98040, LLC Short Plat, M.I. SUB 13-008 temporarily on hold, thereby granting the City the necessary time to have an "out of department" third party review of the

Short Plat documents. In a desire to work with the City in resolving this matter, we are willing to grant this temporary extension to the City, as we feel that this is a reasonable request, and will serve to benefit all the parties involved.”

CP 1514.

Mr. Saunders followed up with an email on 11/15/2013 requesting the applicant put both impervious surface deviations on hold, which the applicant agreed to. CP 788-789.

On January 8, 2014 Thompson emailed Mr. Saunders' documents received from a PRA request to the University of Washington, (a remainder owner of the property from Dr. Coe), disclosing past surveys and title documents. CP 239-292. The City claimed the email (and only this email) was destroyed by its spam filter and declined to review the submission even though an appeal would be an open record hearing in which additional evidence could be submitted. CP 236. So Thompson sent a reply email attaching his January 8, 2014 email with attachments and noting the appeal would be to an open record hearing and Thompson would include it in his appeal because it was an open record hearing. The City eventually relented and included Thompson's email and attachments in the administrative record. CP 109.

On July 7, 2014, the City Attorney forwarded a letter to the parties stating the “out of department” third party review had never been

performed, without explanation. CP1071. Petitioner Thompson's letter in response, with a history of the efforts to obtain information and an independent review, can be found at CP 1073.

D. July 23 2014 Planning Commission Hearing

On July 23, 2014, a hearing was held before the Planning Commission in the above referenced appeal. Petitioners Thompson and Misselwitz submitted written comments and testified. CP 103 (Notice of Decision). Petitioner Misselwitz's testimony is found at CP 1439, p. 54-56, and his letter at CP 1422. (Misselwitz is nearly 90 and his testimony involved reading his letter). His family also submitted comments.

The Planning Commission only addressed two issues raised by petitioners: 1) Whether the applicant had met its burden to accurately delineate the necessary area of the parcel in order to subdivide and build considering the admitted errors in surveys since 2008, and the neighbors or City were entitled to an independent survey at their cost; and 2) whether "Tract X" violated the MICC.

In order to uphold SUB 13-008 the Planning Commission had to consider the definition of "Tract" which is defined under MICC 19.16.010 as:

A piece of land designated and set aside as either public or private open space. No dwelling shall be constructed on the tract, and

only those structures that are in keeping with the tract's use as open space shall be allowed.

Appendix 6:24

The Commissioners' concern with the definition of a tract and open space including a roadway begins at CP 1451, p. 102, l. 10. Ultimately the Commissioners were faced with the dilemma in upholding SUB 13-008 that if their interpretation of tract and open space included roads, most of Mercer Island would be "open space." CP 1453, p. 110, 3-18 (quoted *infra*).

The Commission held the MICC does permit Tract X, although City staff and the Planning Commission could not identify any particular precedent for "Tract X". CP1441, p. 61:23-62:10; CP 1448, p. 89:6-92:24. Immediately after issuing its oral ruling, the Commission discussed and passed a motion requesting City staff prepare either an administrative interpretation or "proposal" to the City Council as soon as possible prohibiting the use of such Tracts in the future, which it described as a "trick". CP 1445, p. 113:1-CP 1461, p. 137:2; CP 1463. Petitioners contend this a simply a spot zone, specifically prohibited by MICC 19.15.020(G)(2)(d) appendix Exh. 5:14.

This led to the following discussion among the Commission:

COMMISSIONER

MCCANN: Then we think road is open space? The Planning Commission thinks road is open space?

COMMISSIONER OLSON: We're having problems with that.

VICE-CHAIR WEINMAN: I think we're all having a little problem.

COMMISSIONER MCCANN: So in denying the appeal, you're saying essentially, "A road is open space?"

COMMISSIONER OLSON: That's the way—

COMMISSIONER MCCANN: So in the whole of Mercer Island and it's full of open space?

CHAIR FRIEDMAN: So that's the way that we are interpreting that currently. And I don't know if there is any, there may or may not need to be an administrative memo or something to clarify that for us, or like I said. But that's the way that it's been interpreted to this point and that's, I think, the way that we're going. So...

CP 1453, p. 110: 3-18

The ever changing area calculations are discussed in Thompson's September 24, 2013 letter, CP 166-168, which was the basis of Commissioner McCann's questioning of the surveyor. OTR's surveyor testified during the hearing. CP1443, p. 69:6--CP 1445 p. 79:24; CP 1447, p. 88:1--CP 1448, p.89:4. She acknowledges discrepancies in her surveys,

but also stated the areas represented in several other surveys submitted by the applicant were not her numbers. The head of the City Design Services Group, Scott Greenberg, testified that in 36 years he had never questioned a survey submitted by an applicant, and such a procedure did not exist ⁶.

CP 1447, p. 87:2-22.

The Commission approved the Preliminary Approval in its entirety. CP 104-105.

The Planning Commissions' decision was not unanimous. Commissioner McCann dissented and held that the irregularities in the surveys dating from 2008 entitled the neighbors to an independent survey. CP 1450, p. 98:1-100:25. Commissioner McCann further held Tract X was a violation of the MICC:

The second thing, however, I have really harped on with is your Tract X game. I think it's a trick. I'm a homeowner. I think it's a game to make houses bigger. And sitting on the Commission, I think open space shouldn't have a road on it.

And I think we should take up a bigger action, that the Planning Department should come back and define "open space" and it shouldn't include tarmac. And I think gaming Tract X is a trick so the house can be larger. It's going to diminish the views of the people down there. I walked that lot tonight. So we're going to jam two McMansions in there where the other houses are more modest size, because we've gained it with the Tract X. So I think that the City Planning Department is

⁶ However, the city's own application for a lot line revision requires the applicant deposit funds for an independent peer review survey.

almost bending over too much in favor of developers and isn't thinking about homeowners. And I'm a homeowner and I pay taxes. And I think the Planning Department has to balance its duty to citizens versus developers, and I feel right now that my perception is we've done a lot of really good email response to developers, and we're not too responsive to complaining homeowners. That's my perception.

And we listened here tonight, but I don't walk away feeling like this guy has had the same treatment as the architect. And I read all the litany of communication. So the perception I've walked away with is if I just roll over and deny the appeal, I'm beginning to worry that we just do whatever developers want, and complaining homeowners get short shifted.

So I would vote for you could be right, they could still proceed, you may be right with our expert planner that the land is there. And if the land is there, I would still veto the Tract X. And if the upper house has to be smaller, tough luck. Because I think the Tract X is a game, and I say that as a homeowner. So I don't like Tract X, I think we should kill it as a tactic. And if you want to come back with no Tract X, two lots, yeah, there's 27,000 square feet here and you have your two homes. Tough luck on the architect. That would be what I would vote for, but I'm in the minority.

But I'm feeling really uncomfortable with just saying, "Appeal denied," because then what's all the citizen balance with City balance? So do we want to be balancing citizen to developers, or are we just going to do what developers want? That's how I, that's the perception I think you can derive from the facts.

Later in the hearing the Commission discussed ways to prohibit

Tract X from ever being approved again:

COMMISSIONER
CAIRNS:

But I am, I don't like this tract notion here as it's applied and I would like to see that it doesn't happen again. So my question is: if we wanted to request staff to define this in such a way that we don't have this ambiguous talk we have and prevents this sort of thing happening again, what is the process and how long would it take us to do that, so that it doesn't happen again.

MS. SCHUCK:

Christina Schuck, Assistant City Attorney, for the record. And I will mention that we are hoping to rewrite, a rewrite of Chapter 19 next year. We're in the process of trying to get funding and this is something we could add to the list and bring back before you.

COMMISSIONER
CAIRNS:

I guess I would feel very much if this were to come up again before that is written, I would be inclined to lean on the discussion tonight and say, "no." You know, I'm -- you can interpret that different ways, but we have history apparently that has in the past usage. But I would not like to see it happen in the future.

VICE-CHAIR
WEINMAN:

We could ask for an administrative interpretation of that section in the code. I mean, I think Scott's kind of jiggering his de facto interpretation of the code, but we could ask for a more formal interpretation of that definition specific to this situation. And

that could be, I think, additional grounds for impetus to ask staff to consider a change in the definition, so this technique is not used again.

CHAIR FRIEDMAN: Well, okay, and we could have staff make it so that it can't be used again, or clean it up so that if we're, if we want to allow—

COMMISSIONER
CAIRNS: Well, I would like to clean it up as soon as we can, because if you, if it's known that this is our sentiment, but it's not cleaned up, then it would invite anybody in the interim to take advantage of the intervening period.

CHAIR FRIEDMAN: That's exactly right.

COMMISSIONER
CAIRNS: Which I would like to see be extraordinarily short.

COMMISSIONER
MCCANN: Tract X's popping up everywhere.

MS. SCHUCK: So another idea is to ask the Council to direct staff to make a quicker change.

CHAIR FRIEDMAN: So can we take that up after this agenda item, or link it to this agenda item?

MS. SCHUCK: Please do it on a separate motion.

CP 1453, p. 111: 3- 112:20.

Ultimately, the Planning Commission amended the motion to read:
“Request the City Council to direct staff to restrict the definition of tract and short plat as it relates to vehicular access.” CP 1463.

V. ARGUMENT

A. Standard of Review under CR 12(b) for motions to dismiss LUPA petition

The City cited *Durland v. San Juan County*, 175 Wn. App. 316 (2013) in its motions to dismiss, CP 80, and petitioners provided a copy of *Durland* to the trial court at oral argument. *Durland* held: “The superior court properly dismisses a claim pursuant to CR 12(b)(6) and (1)‘only if it appears beyond a reasonable doubt that no facts justifying recovery exist,’” quoting *West v. Stahley*, 155 Wn. App. 691, 696 (2010). “Similarly, we review de novo rulings to dismiss for lack of jurisdiction pursuant to CR 12(b)(1).” *Id.* The full quote from *West* states:

A trial court’s ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law that we review de novo. *Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 755, 881 P.2d 216 (1994). A trial court should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts justifying recovery exist. *Cutler*, 124 Was.2d at 755, 881 P.2d 216. “‘Under this rule, a plaintiff’s allegations are presumed to be true’, and ‘a court may consider hypothetical facts not part of the formal record.’” *Cutler*, 124 Wash.2d at 755, 881 P.2d 216 (quoting *Hoffer v. State*, 110 Wash.2d 415, 420, 755 P.2d 781 (1988), *aff’d on reconsideration*, 113 Wash.2d 148, 776 P.2d 963 (1989)). A trial court should grant CR 12(b)(6) motions “‘sparingly and with **care**’ and ‘**only in the unusual case in which plaintiff includes**

allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Cutler*, 1224 Wash.2d at 755, 881 P.2d 216 (quoting *Hoffer*, 110 Wash.2d at 420, 755P.2d 781).

West at 696 (emphasis added).

B. OTR and the City’s motions to dismiss were untimely filed and are reviewed under CR 12(b)

King County LCR 7(b)(1) states that “[E]xcept when specifically provided in another rule, this rule governs all motions in civil cases,” listing LCR 12. LCR 12(d) notes that motions under CR 12(b) shall be subject to the page limitations and scheduling requirements of CR 56 and LCR 56. LCR 56(2) states filing deadlines shall be pursuant to CR 56 and the order setting civil case schedule. CR 56(c) requires 28 days calendar notice prior to filing summary judgment motions. The civil case schedule states motions on jurisdictional and procedural issues shall comply with CR 7 and LCR 7, except minimum notice of hearing requirements shall be eight days. CP 29. The case schedule references RCW 36.70C.080 which requires an initial hearing between 35 and 50 days of the filing of the petition, and provides that defenses of jurisdiction and standing are waived if not raised by timely motion. CP 30; RCW 36.70C.080(3).

CR 12(b) notes that if on a motion under 12(b)(6) for failure to state a claim upon which relief can be granted matters outside the pleadings are presented to and not excluded by the trial court, the motion

shall be treated as one for summary judgment and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion . In this matter OTR and City filed their motions to dismiss under CR 12(b) based upon the record and therefore the time requirements for OTR and the City's motions to dismiss must be reviewed under LCR 12(b) and require 28 days' notice⁷ .

Petitioners objected to OTR's and the City's motions to dismiss in emails to the court CP 1614-1616; CP 1547-1548, and in petitioners' response to the motions to dismiss CP 1376-1377, and in petitioner's motion for reconsideration. CP 1582-1588.

Both OTR and the City's motions to dismiss are replete with references to the record, and the "minimal effect" of SUB 13-008. OTR even attached documents from the Administrative Record to its motion to dismiss (CP 66-69), and brought blow ups of exhibits to the oral argument. RP 25:24-26:22. In its motion to dismiss OTR characterized SUB 13-008 as a "minor configural modification of a pre-existing short plat" CP 54: 11. 20-21, to alleviate "implicated certain development inefficiencies that unnecessarily restricted future use of the property" CP 55: 17-18 in the

⁷ This would not have been a hardship for OTR and the city considering: 1) There had already been an administrative hearing; 2) outside counsel for the City had been involved since October 24 3) the original superior court hearing date was October 3, 2014 CP 30; and 4) the City and OTR noted in their emails dated September 23, 2014 they would be filing motions to dismiss and presumably could have filed their motions at that time providing the necessary 28 days notice before the hearing on 10-31-2014. CP 1548.

previous subdivision concerning “the ‘impervious surface’ restriction codified at Section 19.02.020(D) of the Mercer Island Code (MICC), which limits the maximum impervious surface of a lot to 35 percent of its gross square foot area” CP 55: ll. 23--CP 56: ll.1. According to OTR, “these minor changes are negligible in relation to the original 2009 short plat.” CP 56: 24-25.

The City likewise in its motion to dismiss argued the *de minimus* impacts of SUB 13-008, which it described as “literally just moved lines on a piece of paper.” CP 89: ll. 10-11

During oral argument the City stated it was not arguing the merits, to which the trial court asked “**How can I evaluate the extent of harm without doing that?**” (RP 6:6-12). The City answered by noting that they can refer to the record “to understand how minimal, if not non-existent, any impacts from this actual short plat modification are” (RP 6: 20-22).

The City argued SUB 13-008 “doesn’t change much of anything” but that counsel was “not going to get into detail on this because I think Mr. Lell, on behalf of the additional parties, is going to discuss kind of the background and distinction between what was existing and what was actually approved here because he’s representing those parties that are making the application” (RP 9: 20-25). The City further noted that “Mr. Lell will point out and he’s brought from the record, this was a literally

near insignificant amendment of an already existing two-lot short plat (RP 16: 2-5); the “project on its face literally creates no impacts to anyone” (RP 16: 8-9), “just no discernable impacts from this project” (RP 17: 4); “this is literally just moving some lines on the site plan” (RP 17: 19-20) and that the neighbors’ concerns over the already filed construction building plans for two houses were “blah, blah; that’s pure speculation” (RP 19: 21).⁸

Local rules that are inconsistent with rules adopted by the Washington Supreme Court shall be disapproved. *State v. McEnroe*, 175 Wn.2d 795, 808 fn. 7 (2012). Requiring petitioners to respond to the two motions to dismiss on the record with six days notice and three court days to file a response unfairly prejudiced petitioners, especially considering the City filed the administrative record and hearing transcript at the same time as it filed its motion to dismiss (and renumbered the administrative record) and obviously had a copy prior in order to prepare their motions.

As a result the Court of Appeals should reverse the trial court’s order granting dismissal of the petition because OTR and the City waived objections to standing by failing to timely note its motions under either CR

⁸ Neither OTR nor the city clarify why SUB 13-008 will result in injury in fact to Misselwitz if the project “on its face” literally creates no impact to anyone” and “is literally just moving lines on the site plan,” or what that injury in fact will be.

56 or CR 12(b), or hold in the alternative petitioners have met their burden to establish standing.

C. Petition Mizzelwitz has Standing in the LUPA Appeal

OTR and the City do not contest that Misselwitz will suffer injury in fact from SUB 13-008, but claim Misselwitz lacks standing because he did not individually file his own administrative appeal before the Planning Commission. CP 60-61; 82-83 and pay a separate \$827 appeal fee. The City never raised this rule at the administrative level.

The City's notice of open record hearing mailed to Thompson, Misselwitz and all landowners within 300 feet, and posted on a sign, stated:

You may review the application and appeal on file for this matter at the City of Mercer Island, Development Services Group, 9611 SE 36th Street, Mercer Island, Washington. **Only those persons who submit written comments or testify at the open hearing will be parties of record,; and only parties of record will receive a notice of the decision and have the right to appeal.**

CP 1413-1416. (emphasis added).

City staff prepared a staff report to the Planning Commission addressing the issues raised in the administrative appeal. CP 1402-1410. On page 5, it noted the appeal shall be an open record appeal and new information may be presented, citing MICC 19.15.020(J)(5). CP 1406.

The Staff Report states that all property owners within 300 feet of the proposed subdivision must receive individual notice of the open record hearing by mail CP 1405 para 4. The declaration of mailing specifically notes individual notice was mailed to Misselwitz and Thompson CP 1415-1416.⁹

The Planning Commission's decision specifically states that Thompson filed a complete and timely administrative appeal with the City clerk to the decision under file SUB 13-008. CP 103, Finding of Fact 2; CP 104 Conclusion of Law 3. The Commission's decision further states that all parties of record with standing may appeal the City's final decision to the King County Superior Court. CP 105. The notice of open record hearing states *participation* at the hearing confers standing and makes a city a party of record with the right to appeal CP 1413. The Decision and Order states:

5. On July 23, 2014, the Planning Commission reviewed the exhibits and heard testimony from the following **parties**:

d) Ted Misselwitz of 7250 North Mercer Way, Mercer Island, WA 98040.

⁹ There were two public notices of open record appeal hearing. The first was scheduled for May 21, 2014 CP 1412. However the City posted the wrong date for the hearing, and the planner's declaration of mailing listed inconsistent dates for the declaration of posting. CP 325. The May 21, 2014 hearing was cancelled and renoted for July 23, 2014 after Thompson informed the City of *Prosser Hill Coal v. County of Spokane*, 176 Wn App 280 (2013).

CP 104 (emphasis added)

OTR and the City have asked this court to make a fundamental change in the law, and MICC and hold under the MICC, or any jurisdiction, only the administrative appellant has standing to appeal to the superior court from an open record hearing the petitioner participated in. OTR and the City cite no case supporting this holding, and indeed all the applicable cases and statutes hold the opposite.

There are three statutes and one ordinance relating to notice of a permit application, decision, and appeal for a subdivision:

1. R.C.W. 58.17 (subdivision statute)
2. R.C.W. 36.70B (project permit statute)
3. R.C.W. 36.70C (LUPA)
4. MICC 19.15.020

There are four stages in project permit review and the necessary notice to the public.

1. Requirements for notice of completed *application*. R.C.W. 36.70B.110(2); MICC 19.15.020(D). Appendix Exh. 5:9. The notice issued for SUB 13-008 states a citizen must file written comments within 14 days in order to become a party of record and have standing to appeal. CP 140. This is not correct. MICC 19.15.020(D) states a citizen who submits written

comments to notice of an application within the time period shall receive a copy of the *decision*. A citizen cannot appeal an *application*, which is a preliminary step without a final determination to appeal.

2. Public notice. In addition to notice of the application, public notice is required for all administrative actions, which include preliminary approval of a short subdivision. MICC 19.15.020(E) appendix Exh. 5:11. It is this notice prior to the decision that triggers a requirement to comment in order to become a party of record. In this matter, the City never issued this ten day notice pre-decision.
3. Notice of *decision*. MICC 19.15.020(H) appendix Exh. 5:16
 - a. A pre-decision open record hearing based upon a threshold determination (ie. a long subdivision of more than four lots); or
 - b. Notice of decision without open record hearing, as in SUB 13-008. MICC 19.15.010(E).
4. Open record appeal hearing. R.C.W. 36.70B.110(a); MICC 19.15.020(E). If a pre-decision open record hearing has been held (long subdivision), the appeal is to a closed record appeal before the legislative body. If no open record hearing has been

provided pre-decision (short subdivision), any party of record may appeal the notice of decision and request an open record appeal hearing.

5. Public notice of open record hearing. MICC 19.15.020(J)(1). Appendix Exh. 5:16-17. The public notice of an open record hearing shall state that only those persons who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will receive a notice of decision and have the right to appeal. MICC 19.15.020(E)(3)(e). Appendix Exh. 5:11. There is no mention and no requirement that only the administrative appellant has the right to appeal to the superior court from an open record hearing.
6. Appeal from final land use decision. MICC 19.15.020(J)(5)(g) addresses appeals to superior court. It states:
 - g. The city's final decision on a development proposal may be appealed by a party of record with standing to file a land use petition in King County superior court. Such petition must be filed within 21 days of the issuance of the decision.

Appendix Exh. 5:18

MICC 19.15.020(J)(5)(g) does *not* state only the administrative appellant may appeal to superior court as OTR and the City argue. If that was the case, there would be no point to public notice and public hearings if only the administrative appellant could have standing.

At the oral argument petitioners provided the court with a copy of *Jones v. The Town of Hunts Point*, 166 Wn. App. 452 (2012). In *Jones* the court allowed an individual who was not the applicant nor the appellant below to substitute as the LUPA petitioner. The court quoted R.C.W. 36.70C.040(2) relating to persons who shall be parties, and must be named and served in the LUPA petition. In particular, the court in *Jones* quoted RCW 36.70C.040(2)(d):

Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. **Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.**

Jones at 452-453 (Emphasis added).

As petitioners argued, LUPA would not make a distinction between the administrative appellant, who is an indispensable party to the superior court appeal, from persons who later intervened or joined in the administrative appeal, and who are not *required* to be made parties under

this section. One could not intervene or join in an administrative appeal “later” if they had filed their own administrative appeal. Once an appeal has been filed by a citizen from the decision, an open record appeal hearing is required, additional evidence may be submitted, and any citizen who participates shall become a party of record and may appeal to the superior court.

D. Petitioner Thompson Has Standing

As noted above, during oral argument the trial court observed that it is impossible to evaluate the extent of harm without reaching the merits of the claim. RP 6:6-12. As noted in the introduction above, the petitioners believe that when the petition is timely filed and served, all administrative remedies have been exhausted, a final land use has been issued, the petitioners are adjacent land owners who allege injury to their property, and the defense of lack of standing was not raised at the administrative level, dismissal under CR 12(b) is an error of law. Petitioners cannot find a single case in which the trial court dismissed the LUPA petition as a matter of law based on these facts, let alone one in which the Court of Appeals affirmed the dismissal.

OTR and the City did not raise lack of standing for Thompson at the administrative level. Throughout their motions, OTR and the City state Thompson is precluded from introducing evidence of standing or

harm outside the administrative record, even underlining this argument twice, or in the alternative the administrative record contrary to evidence to establish harm. City motion, CP 77: ll. 27-CP 78: ll. 1; CP 81: ll. 20-CP 82: ll. 9; OTR motion, CP 63: ll. 8-11. The Supreme Court in *Lauer v. Pierce Co.*, 173 Wn.2d 242 (2011) held exactly the opposite:

As a preliminary matter, the Garrisons argue that the superior court erred in considering evidence of Lauer and de Tienne's standing that was not in the administrative record. This challenge is easily rejected based on the plain statutory language of LUPA. First, a LUPA petitioner must establish facts supporting standing. RCW 36.70C.070(6). This requirement plainly indicates that the legislature anticipated later consideration of facts related to judicial standing. Moreover, while judicial review of factual issues under LUPA is generally limited to the administrative record, the statute expressly provides that this limitation applies only when "the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues." RCW 36.70C.120(1). Lauer and de Tienne participated in the administrative hearing, but the Garrisons never challenged their standing before the hearing examiner. As such, no record was developed on the question of standing; it simply was not a relevant issue at the hearing. Because there was no opportunity to make a record on the issue, "the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record." RCW 36.70C.120(3).

Lauer at p. 254.

The record clearly notes Thompson has established, let alone alleged, harm.

In *JZ Knight v. The City of Yelm*, 173 Wn.2d 325 (2011), the supreme court reiterated the holding that there is no specific quantum of harm to allege to establish standing. But what ultimately defines the necessary quantum of harm at trial is the legality of the permit under the applicable development regulations and comprehensive plan. This requires 1) an analysis of the requirements for preliminary approval of a short subdivision; 2) an analysis of the goals and purpose of the comprehensive plan and development code which reflect the harm to be prevented; and 3) the unique two stage process for approval of a subdivision.

1. Under the MICC the requirements to receive a permit for preliminary approval for a subdivision are found in 19.08.020(F):

F. Preliminary Application Procedure

1. Findings of Fact. All preliminary approvals or denials of long subdivisions or short subdivisions shall be accompanied by written findings of fact demonstrating that:

- a. The project does or does not make appropriate provisions for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation,

playgrounds, school and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school;

b. The public use and interest will or will not be served by approval of the project; and

c. The project does or does not conform to applicable zoning and land use regulations

2. Short Subdivisions and Lot Line Revisions. The code official shall grant preliminary approval for a short subdivision or lot line revision if the application is in proper form and the project complies with the design standards set out in MICC 19.08.030, the Comprehensive Plan, and other applicable development standards.

Appendix, Exh 3:7

2. SUB 13-008 and Tract X are directly contrary to the goals of the Comprehensive Plan and MICC. The harm to Thompson mirrors the gain to OTR of houses that are inconsistent in size with the neighborhood and MICC. This harm is specifically recognized in OTR's motion. See CP 63 fn. 2, noting Thompson's objection to size of future homes; CP 56:17-21, noting Tract X results in an additional 750 sf of impervious surface which creates 750 extra sf for *each* story. The Mercer Island Comprehensive Plan identifies two core goals in its

Land Use Section: Open space, and construction consistent with neighborhoods and the MICC.

The first land use goal on Mercer Island under the Comprehensive Plan for development outside the commercial district is Goal 7:

GOAL 7 Mercer Island should remain principally a low density, single family residential community.

7.1 Existing land use policies, which strongly support the preservation of existing conditions in the single family residential zones, will continue to apply. Changes to the zoning code or development standards will be accomplished through code amendments.

Appendix Exh. 7:1

The first goal under the Comprehensive Plan for residential housing is:

Goal 1 To ensure that single family and multi-family neighborhoods provide safe and attractive living environments, and are compatible in quality, design and intensity with surrounding land uses, traffic patterns, public facilities and sensitive environmental features.

1.1 Ensure that zoning and city code provisions protect residential areas from incompatible uses and promote bulk and scale consistent with the existing neighborhood character.

1.2 Promote single family residential development that is sensitive to the quality, design, scale and character of existing neighborhoods.

Appendix 7:2.

The first development regulation in the MICC states the guiding principles for balancing development on Mercer Island:

19.01.010 Purpose

The general purpose of this code is to protect and promote health, safety, and the general welfare through the regulation of development within the city of Mercer Island.

To that end, this code classifies the land within the city into various zones and establishes the use of land and nature of buildings within these zones; controls the form of plats and subdivisions; regulates the construction of commercial and residential structures; and protects critical and sensitive areas within the city.

The provisions of this code are designed to consider light, air and access; to conserve and protect natural beauty and other natural resources; to provide coordinated development; to avoid traffic congestion; to prevent overcrowding of land; to facilitate adequate provisions for transportation, water, sewage, schools, parks and other requirements; and to encourage the use of solar energy practices.

This code is to be interpreted as a whole, in view of the purpose set out in this section.

If the general purpose of this development code conflicts with the specific purpose of any chapter of this development code, the specific purpose shall control. (Ord. 99C-13§1).

Appendix Exh. 1:1

3. Finally, OTR and the City argue that the harm from the proposed subdivision is merely abstract or theoretical. The Supreme Court held the opposite in *JZ Knight v. The City of Yelm*, 173 Wn.2d 325 (2011). In *Knight*, the court noted that the subdivision of land is a matter of state concern to be administered in a uniform manner provide copy to the court. The court noted that preliminary approval of a subdivision is a final land use decision by the local government implicating inherent harm for neighbors which is why they are entitled to special notice.

A proposed subdivision of land that complies with zoning and development regulations shall vest under the regulations and zoning ordinance in effect at the time of a submission of a complete application. RCW 58.17.033. A valid and fully complete building permit application that complies with the zoning and other land use controls in effect on the date of the application shall vest under those regulations. RCW 19.27.095. “Actual” or “immediate” harm is not when the actual construction vested under the permit begins, but the right under the vested permit to the construction. Once the permit is issued and becomes final a citizen and the jurisdiction itself cannot deny the actions approved by the permit.

The petition sets forth the specific provisions of the MICC and law petitioners' allege SUB 13-008 does not comply with. The court must assume these allegations are true, and along with Commissioner McCann presume harm to adjacent property from failure to comply with the Comprehensive Plan and MICC principles of air, light, open space, adequate roads, sufficient area to subdivide, consistent bulk and scale, prevention of overcrowding of land, all of which provide attractive neighborhoods and affect the value of surrounding property. The ultimate result of SUB 13-008 is houses that are inconsistent with the zone and neighborhood, overcrowd land, negatively affects open space, air, light, comfort, esthetics, and diminishes the value of surrounding properties like Thompson's.

VI. PETITIONERS' REQUEST FOR ATTORNEY'S FEES AND COSTS PURSUANT TO RAP 18.1

RAP 18.1 requires the petitioners to request attorney's fees and costs in their opening brief. The basis for fees and costs is contingent upon the Court of Appeals' decision on the petitioners' motion to supplement the record to include the August 12, 2014 statutory warranty deed, this court's decision whether the trial court's order must be vacated for failure to join an indispensable party.

The failure of a party to name or join an indispensable party is a basis for a finding that the appeal was frivolous and a basis for award of attorney's fees. *Crystal Lotus Enters. v. Shoreline*, 167 Wn.App 501-507-8 (2012).

VII. CONCLUSION


The petitioners respectfully request that the Court of Appeals reverse the trial court's order dismissing their LUPA petition and order denying petitioners' request for reconsideration for the reasons discussed above.

Dated this 8 day of June, 2015.

Respectfully submitted,

Thompson and Delay

By:



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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and THEODORE
MISSELWITZ,

Appellants

v.

THE CITY OF MERCER ISLAND, a
municipality of the State of Washington,

Respondents,

and

ANDERSON ARCHITECTURE, Applicant,
and ON THE ROCK, Owner

Additional Parties pursuant to
RCW 36.70C.040(2)(b)-(d)

COURT OF APPEALS
CASE No. 72809-1

KING COUNTY SUPERIOR
COURT No. 14-2-22512-1

DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, Michael A. Remedios, under penalty of perjury under the laws of the State of
Washington, declare as follows:

I am the legal assistant for Thompson and Delay herein. On the date in the manner indicated below, I caused the Opening Brief of Appellants to be served on:

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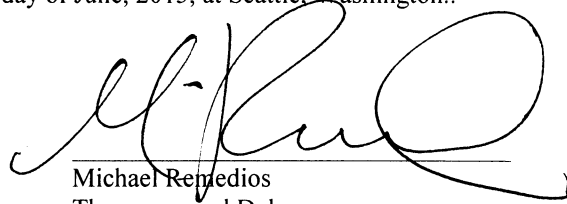
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X Via U.S.Mail
Via Facimile
Via Messenger

DATED this 8th day of June, 2015, at Seattle, Washington..



Michael Remedios
Thompson and Delay
Seattle, Washington

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 72809-1-I

DANIEL THOMPSON and THEODORE MISSELWITZ

Appellants,

v.

CITY OF MERCER ISLAND,

Respondents,

ANDERSON ARCHITECTURE,

Applicant,

ON THE ROCK,

Owner, Additional Parties pursuant to
RCW 36.70C.040(2)(b)-(d)

~~FILED~~
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUN -9 AM 11:22

APPENDIX TO OPENING BRIEF OF APPELLANTS

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(206) 622-0670
Appellant and Attorney for
Appellant Misselwitz

APPENDIX TO APPELLANTS' OPENING BRIEF

<u>Title 19 Mercer Island Comprehensive Code</u>	<u>Exhibit</u>
1. MICC Ch. 19.01 General Provisions.....	1
2. MICC Ch. 19.02 Residential.....	2
3. MICC Ch. 19.08 Subdivisions.....	3
4. MICC Ch. 19.09 Property Development.....	4
5. MICC Ch. 19.15 Administration.....	5
6. MICC Ch. 19.16 Definitions.....	6
7. Mercer Island Comprehensive Plan	7
8. DSG Policy Memorandum Interpretation #07-05.....	8

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Chapter 19.01 GENERAL PROVISIONS

Sections:

- 19.01.010 Purpose.
- 19.01.020 Validity.
- 19.01.030 Reasonable accommodation.
- 19.01.040 Zone establishment.
- 19.01.050 Nonconforming structures, sites, lots and uses.
- 19.01.060 Hold harmless/indemnification agreement and covenant not to sue, performance guarantees, liability protection.
- 19.01.070 Variance and deviation procedures.

19.01.010 Purpose.

The general purpose of this code is to protect and promote health, safety, and the general welfare through the regulation of development within the city of Mercer Island.

To that end, this code classifies the land within the city into various zones and establishes the use of land and nature of buildings within those zones; controls the form of plats and subdivisions; regulates the construction of commercial and residential structures; and protects critical and sensitive areas within the city.

The provisions of this code are designed to consider light, air and access; to conserve and protect natural beauty and other natural resources; to provide coordinated development; to avoid traffic congestion; to prevent overcrowding of land; to facilitate adequate provisions for transportation, water, sewage, schools, parks and other public requirements; and to encourage the use of solar energy practices.

This code is to be interpreted as a whole, in view of the purpose set out in this section.

If the general purpose of this development code conflicts with the specific purpose of any chapter of this development code, the specific purpose shall control. (Ord. 99C-13 § 1).

19.01.020 Validity.

If any section, paragraph, subsection, clause or phrase of this code is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this code. The city council hereby declares that they would have passed this code and each section, paragraph, subsection, clause or phrase thereof irrespective of the fact that any one or more sections, paragraphs, clauses, or phrases were unconstitutional or invalid. (Ord. 99C-13 § 1).

19.01.030 Reasonable accommodation.

A. Eligibility. Any person claiming to have a handicap or disability, within the meaning of the Fair Housing Amendments Act (FHAA), 42 U.S.C. 3602(h) or the Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW, or someone acting on his or her behalf, who wishes to be excused from an otherwise applicable requirement of this development code pursuant to the requirement of

Cmt ex: 1
P. 1;

the FHAA, or the WLAD, that reasonable accommodations be made in rules, policies, practices, or services when such accommodations may be necessary to afford persons with handicaps or disabilities equal opportunity to use and enjoy a dwelling, shall make such request for reasonable accommodation to the code official.

B. Procedure.

1. An applicant for reasonable accommodation must provide verifiable documentation of handicap or disability eligibility to the code official and describe the need for and proposed accommodation.
2. The code official shall determine what adverse land use impacts, including cumulative impacts, if any, would result from granting the proposed accommodation. This determination shall take into account the size, shape and location of the dwelling unit and lot; the traffic and parking conditions on adjoining and neighboring streets; vehicle usage to be expected from the residents, staff and visitors; and any other circumstances determined to be relevant.
3. The applicant's need for accommodation shall be considered in light of the anticipated land use impacts, and conditions may be imposed in order to make the accommodation reasonable in light of those impacts.
4. A grant of reasonable accommodation permits a dwelling to be inhabited only according to the terms and conditions of the applicant's proposal and the code official's decision. If it is determined that the accommodation has become unreasonable because circumstances have changed or adverse land use impacts have occurred that were not anticipated, the code official shall rescind or modify the decision to grant reasonable accommodation.
5. The code official shall act promptly on the request for accommodation and shall not charge any fee for responding to a request for accommodation.
6. Nothing herein shall prevent the code official from granting reasonable accommodation to the full extent required by federal or state law.
7. The code official's decision shall constitute final action by the city on a request for accommodation, and review of the decision will be available only in superior court. Any appeal must be filed not more than 21 days after the issuance of the code official's decision. (Ord. 03C-08 § 2; Ord. 99C-13 § 1).

19.01.040 Zone establishment.

A.	Zone	Symbol
	Single-Family	R-8.4
	Single-Family	R-9.6
	Single-Family	R-12
	Single-Family	R-15
	Multiple-Family	MF-2L

Clmt ex. 1
P. 2 : _____

Multiple-Family	MF-2
Multiple-Family	MF-3
Business	B
Planned Business	PBZ
Commercial Offices	C-O
Public Institution	P
Town Center	TC

B. The location and boundaries of the various zones of the city are shown and delineated on the city of Mercer Island Zoning Map which is set out in Appendix D of this development code and is incorporated herein by reference.

C. The location and boundaries of the various zones as hereafter determined by the city council shall be shown and delineated on zone maps covering portions of the city, each of which maps shall be a part of this code either by adoption as a part hereof or by amendment hereto.

D. Each zone map and all notations and other information shown thereon shall become part of this code.

E. A zone map may be divided into parts and each part may, for purposes of identification, be subdivided into units. Such parts may be separately and successively adopted by means of an amendment of this code and, as adopted, such zone map, or its parts, shall become a part of this code.

F. Changes in the boundaries of a zone shall be made by ordinance adopting an amended map, or part of said zone map.

G. When uncertainty exists as to the boundaries of any zones shown on any zone map, the following rules shall apply:

1. Boundaries shown on a map as approximately following street lines or lot lines shall be construed as actually following such lines.
2. Where a boundary between zones divides a lot into two or more pieces, the entire lot shall be deemed to be located in the first zone on the following list in which any part of the lot is located: R-15, R-12, R-9.6, R-8.4, MF-2L, MF-3, MF-2, P, PBZ, C-O, TC, and B. The location of the zone boundary shall be determined by use of the scale appearing on the zone map unless the location of the boundary is indicated by dimensions.
3. Where property abuts Lake Washington, the land use classification of the upland property extends waterward across the abutting shorelands and beds to the line of navigability/inner harbor line as established in 1984 by the board of natural resources by Resolution No. 461.
4. In case any uncertainty exists, the planning commission shall recommend and the city council shall determine the location of boundaries.

Clmt ex. 1
 P. 3 ; _____

5. Home business as an accessory use to the residential use, subject to all of the following conditions:

- a. The home business may make those improvements to the home business normally allowed for single-family residences. For a day care, play equipment and play areas are not allowed in front yards.
- b. Only those persons who reside on the premises and one other person shall be permitted to engage in the business on the premises at any one time; provided, that a day care or preschool may have up to three nonresident employees on the premises at any one time. This limitation applies to all owners, managers, staff or volunteers who operate the business.
- c. There shall be no exterior storage or display of materials except as otherwise allowed for single-family residences, and no sign advertising the home business located on the premises except as specifically allowed by MICC 19.12.080(B).
- d. No offensive noise, vibration, smoke, dust, odor, heat or glare or excessive traffic to and from the premises shall be produced or generated by the home business.
- e. The home business shall not involve the use of more than 30 percent of the gross floor area of the residence, not including the allowed basement exclusion area consistent with subsection E of this section and MICC 19.16.010(G). However, a day care or preschool may use up to 75 percent of said gross floor area.
- f. No home business shall be permitted that generates parking demand that cannot be accommodated on the lots consistent with the applicable maximum impervious surface coverage limits of MICC 19.02.020(D). Parking shall be provided to handle the expected parking demand. In the case of a day care or preschool, parking for residents and employees shall occur on site; resident

Clmt ex. 2
P. 2;

and employee parking shall not occur on an adjacent street.

g. The business shall not provide healthcare services, personal services, automobile repairs; serve as a restaurant, commercial stable, kennel, or place of instruction licensed as a school under state law and which will operate with more than three students at a time; or serve as a bed and breakfast without a conditional use permit as set out in subsection (C)(7) of this section. Nothing contained in this subsection (A)(5) (g) shall be interpreted to prohibit a day care.

h. A day care shall be limited to 18 children maximum (not including dependents) at a time.

6. Public park subject to the following conditions:

a. Access to local and/or arterial thoroughfares shall be reasonably provided.

b. Outdoor lighting shall be located to minimize glare upon abutting property and streets.

c. Major structures, ballfields and sport courts shall be located at least 20 feet from any abutting property.

d. If a permit is required for a proposed improvement, a plot, landscape and building plan showing compliance with these conditions shall be filed with the city development services group (DSG) for its approval.

7. Semi-private waterfront recreation areas for use by 10 or fewer families, subject to the conditions set out in MICC 19.07.080.

8. One accessory dwelling unit (ADU) per single-family dwelling subject to conditions set out in MICC 19.02.030.

Clmt ex. 2
P. 3

9. Special needs group housing as provided in MICC 19.06.080.

10. Social service transitional housing, as provided in MICC 19.06.080.

11. A state-licensed day care or preschool as an accessory use, when situated at and subordinate to a legally established place of worship, public school, private school, or public facility, meeting the following requirements:

a. The number of children in attendance at any given time shall be no more than 20 percent of the legal occupancy capacity of the buildings on the site, in the aggregate.

b. Signage shall be consistent with the provisions of MICC 19.12.080(B)(3).

c. Off-street parking provided by the primary use shall be deemed sufficient for the accessory day care or preschool if at least one space per employee is provided, and either:

i. One additional parking space is provided for every five children in attendance, or

ii. Adequate pick-up and drop-off space is provided as determined by the code official.

B. Additional Use Permitted in Zones R-9.6, R-12, and R-15. One accessory building for the housing of domestic animals and fowl, having a floor area not to exceed 36 square feet for each lot and located not less than 65 feet from any place of habitation other than the owners'; provided, the roaming area shall be fenced and located not less than 35 feet from any adjacent place of human habitation.

C. Conditional Uses. The following uses are permitted when authorized by the issuance of a conditional use permit when the

Clmt ex. 2
P. 4;

applicable conditions set forth in this section and in MICC 19.15.020(G)(3) have been met:

1. Government services, public facilities, utilities, and museums and art exhibitions, subject to the following conditions:
 - a. All structures shall be located at least 20 feet from any abutting property;
 - b. Off-street parking shall be established and maintained at a minimum ratio of one parking space for each 200 square feet of gross floor area; and
 - c. Utilities shall be shielded from abutting properties and streets by a sight obscuring protective strip of trees or shrubs.
2. Private schools accredited or approved by the state for compulsory school attendance, subject to conditions set out in subsection (A)(4) of this section.
3. Places of worship subject to the following conditions:
 - a. All structures shall be located at least 35 feet from any abutting property.
 - b. Off-street parking shall be established and maintained at a ratio of one parking space for each five seats in the chapel, nave, sanctuary, or similar worship area.
4. Noncommercial recreational areas, subject to the conditions contained in subsection (A)(6) of this section.
5. Semi-private waterfront recreation areas for use by more than 10 families, subject to conditions set out in MICC 19.07.080.
6. Retirement homes located on property used primarily for a place of worship subject to the following conditions:

Clmt ex. 2
P. 5 ; _____

a. Retirement home structures shall not occupy more than 20 percent of the lot; provided, the total lot coverage for the retirement home, the place of worship, and all other structures shall not exceed the lot coverage specified in MICC 19.02.020(D).

b. A plot, landscape and building plan shall be filed with the design commission for its approval, and the construction and maintenance of buildings and structures and the establishment and continuation of uses shall comply with the approved plot, landscape and building plan. Alterations to the project are permitted only upon approval by the design commission of a new or amended plan.

c. The number of dwelling units shall be determined by the planning commission upon examination of the following factors:

i. Demonstrated need;

ii. Location, size, shape and extent of existing development on the subject property;

iii. Nature of the surrounding neighborhood; and

iv. Legal assurances that the entire property remains contiguous, and that the retirement home is owned and controlled by the applicant religious organization.

d. The retirement home shall be located at least 35 feet from all abutting property.

e. Off-street parking shall be established and maintained at a ratio of one-half parking space for each dwelling unit.

7. The use of a single-family dwelling as a bed and breakfast subject to the following conditions:

Clmt ex. 2
P. 6;

- a. The bed and breakfast facility shall meet all applicable health, fire, and building codes.
- b. Not more than four rooms shall be offered to the public for lodging.
- c. There shall be no external modification of any structure that alters the residential nature of the premises.
- d. The bed and breakfast shall be the primary residence of the operator.
- e. In addition to the parking required set out in MICC 19.02.020(E), one off-street parking space, not located in the lot setbacks, shall be provided for each rental room.
- f. Meals shall be made available only to guests, and not to the general public.

8. Nonschool uses of school buildings, subject to the following conditions:

- a. No use or proposed use shall be more intensive than the school activity it replaced. Consideration shall be given to quantifiable data, such as, but not limited to, traffic generation, parking demand, noise, hours of operation;
- b. All activities, with the exception of outdoor recreation shall be confined to the interior of the building(s);
- c. Exterior modification of the building(s) shall not be permitted if such a modification would result in an increase in the usable area of the building(s);
- d. Minor changes in the building exterior, landscaping, signs, and parking may be permitted subject to the review and approval of the design commission; and
- e. Off-street parking for all activities at the site shall be provided in existing school parking lots.

Clmt ex. 2
P. 1;

f. Termination. Conditional use permits for nonschool uses shall terminate and the use of the site shall conform to the requirements of the zone in which the school building is located on the day of the termination under the following conditions:

i. The school building is demolished or sold by the Mercer Island school district.

ii. The city council revokes the permit on the recommendation of the planning commission. Revocation shall be based on a finding that the authorized use constitutes a nuisance or is harmful to the public welfare, or the applicant has failed to meet the conditions imposed by the city.

g. Revision. Any modification to a nonschool conditional use permit shall be approved by the planning commission; however, the code official may approve minor modifications that are consistent with the above stated conditions.

9. A state-licensed day care or preschool not meeting the requirements of subsection (A)(11) of this section, subject to the following conditions:

a. Off-street parking and passenger loading shall be sufficient to meet the needs of the proposed day care or preschool without causing overflow impacts onto adjacent streets.

b. Signage shall be consistent with the provisions of MICC 19.12.080(B)(3).

D. Building Height Limit. No building shall exceed 30 feet in height above the average building elevation to the top of the structure except that on the downhill side of a sloping lot the building may extend to a height of 35 feet measured from existing grade to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.; provided, the roof ridge does not exceed 30 feet in

Clmt ex. 2
P. 8;

height above the average building elevation. Antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces and other similar appurtenances may extend to a maximum of five feet above the height allowed for the main structure.

The formula for calculating average building elevation is as follows:

Formula:

Average Building Elevation = (Mid-point Elevation of Individual Wall Segment) x (Length of Individual Wall Segment) ÷ (Total Length of Wall Segments)

See Appendix G, Calculating Average Building Elevation.

E. Gross Floor Area.

1. The gross floor area of a single-family structure shall not exceed 45 percent of the lot area.

2. Lots created in a subdivision through MICC 19.08.030(G), Optional Standards for Development, may apply the square footage from the open space tract to the lot area not to exceed the minimum square footage of the zone in which the lot is located. (Ord. 09C-04 §§ 1, 2; Ord. 08C-01 § 1; Ord. 05C-16 § 1; Ord. 04C-08 § 9; Ord. 03C-08 § 3; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.020 Lot requirements.

A. Minimum Lot Area.

R-8.4: The lot area shall be at least 8,400 square feet. Lot width shall be at least 60 feet and lot depth shall be at least 80 feet.
R-9.6: The lot area shall be at least 9,600 square feet. Lot width shall be at least 75 feet and lot depth shall be at least 80 feet.

Clmt ex. 2
P. 9

R-12: The lot area shall be at least 12,000 square feet. Lot width shall be at least 75 feet and lot depth shall be at least 80 feet.

R-15: The lot area shall be at least 15,000 square feet. Lot width shall be at least 90 feet and lot depth shall be at least 80 feet.

1. Minimum lot area requirements do not apply to any lot that came into existence before September 28, 1960; however structures may be erected on the lot only if those structures comply with all other restrictions governing the zone in which the lot is located.

2. In determining whether a lot complies with the lot area requirements, the following shall be excluded: the area between lateral lines of any such lot and any part of such lot which is part of a street.

B. Street Frontage. No building will be permitted on a lot that does not front onto a street acceptable to the city as substantially complying with the standards established for streets.

C. Yard Requirements.

1. Minimum. Except as otherwise provided in this section, each lot shall have front, rear, and side yards not less than the depths or widths following:

a. Front yard depth: 20 feet or more.

b. Rear yard depth: 25 feet or more.

c. Side yard depth: The sum of the side yards shall be at least 15 feet; provided, no side yard abutting an interior lot line shall be less than five feet, and no side yard abutting a street shall be less than 10 feet.

2. Yard Determination.

Clmt ex. 2
P. 10;

a. Front Yard. The front yard is the yard abutting an improved street from which the lot gains primary access or the yard abutting the entrance to a building and extending the full width of the lot. If this definition does not establish a front yard setback, the code official shall establish the front yard based upon orientation of the lot to surrounding lots and the means of access to the lot.

i. Waterfront Lot. On a waterfront lot, regardless of the location of access to the lot, the front yard may be measured from the property line opposite and generally parallel to the ordinary high water line.

b. Rear Yard. The rear yard is the yard opposite the front yard. The rear yard shall extend across the full width of the rear of the lot, and shall be measured between the rear line of the lot and the nearest point of the main building including an enclosed or covered porch. If this definition does not establish a rear yard setback for irregular shaped lots, the code official may establish the rear yard based on the following method: The rear yard shall be measured from a line or lines drawn from side lot line(s) to side lot line(s), at least 10 feet in length, parallel to and at a maximum distance from the front lot line.

c. Corner Lots. On corner lots the front yard shall be measured from the narrowest dimension of the lot abutting a street. The yard adjacent to the widest dimension of the lot abutting a street shall be a side yard. If a setback equivalent to or greater than required for a front yard is provided along the property lines abutting both streets, then only one of the remaining setbacks must be a rear yard. This code section shall apply except as provided for in MICC 19.08.030(F)(1).

d. Side Yard. Any yards not designated as a front or rear yard shall be defined as a side yard.

3. Intrusions into Required Yards.

Clmt ex. 2
P. 11;

- a. Minor Building Elements. Porches, chimney(s) and fireplace extensions, and unroofed, unenclosed outside stairways and decks shall not project more than three feet into any required yard. Eaves shall not protrude more than 18 inches into any required yard; provided, no penetration shall be allowed into the minimum five-foot setback abutting an interior lot line except where an existing flat roofed house has been built to the interior side yard setback line and the roof is changed to a pitched roof with a minimum pitch of 4:12, the eaves may penetrate up to 18 inches into the side yard setback.
- b. Platforms, Walks, and Driveways. Platforms, walks, and driveways not more than 30 inches above existing grade or finished grade may be located in any required yard.
- c. Fences, Retaining Walls and Rockeries. Fences, retaining walls and rockeries are allowed in required yards as provided in MICC 19.02.050.
- d. Garages and Other Accessory Buildings. Garages and other accessory buildings are not allowed in required yards, except as provided in MICC 19.02.040.
- e. Heat Pumps, Air Compressors, Air Conditioning Units, and Other Similar Mechanical Equipment. Heat pumps, air compressors, air conditioning units, and other similar mechanical equipment may be located within any required yard provided they will not exceed the maximum permissible noise levels set forth in WAC 173-60-040, which is hereby incorporated as though fully set forth herein. Any such equipment shall not be located within three feet of any lot line.
- f. Architectural Features. Freestanding architectural features such as columns or pedestals that designate an entrance to a walkway or driveway and do not exceed 42 inches in height are allowed in required yards.

Clmt ex. 2
P. 12 ; _____

g. Other Structures. Except as otherwise allowed in this subsection (C)(3), structures over 30 inches in height from existing grade or finished grade, whichever is lower, may not be constructed in or otherwise intrude into a required yard.

4. Setback Deviation. On any lot with a critical area that makes it impractical to locate a building pad on the lot except by intruding into required yards, the code official shall have discretion to grant a deviation from yard setbacks for single lots, subdivisions and lot line revisions.

a. The city shall provide notice of the proposed action as required by MICC 19.15.020(D) and (E).

b. The decision to grant the deviation shall be pursuant to procedures contained in MICC 19.15.010(E) and 19.15.020(G)(5).

c. In granting any such deviation, the code official may require the submission of any reasonably necessary information.

d. Yard setbacks shall not be reduced below the following minimums:

i. Front and rear setbacks may not be reduced to less than 10 feet each;

ii. Side setbacks may not be reduced to less than five feet.

D. Lot Coverage.

1. Maximum Impervious Surface Limits for Lots. The total percentage of a lot that can be covered by impervious surfaces (including buildings) is limited by the slope of the lot for all single-family zones as follows:

Lot Slope	Lot Coverage
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Clmt ex. 2
P. 13;

	(limit for impervious surfaces)
Less than 15%	40%*
15% to less than 30%	35%
30% to 50%	30%
Greater than 50% slope	20%

*Public and private schools, religious institutions, private clubs and public facilities (excluding public parks or designated open space) in single-family zones with slopes of less than 15 percent may be covered by the percentage of legally existing impervious surface that existed on May 1, 2006, as determined by the code official.

2. Exemptions. The following improvements will be exempt from the calculation of the maximum impervious surface limits set forth in subsection (D)(1) of this section:

a. Decks/Platforms. Decks and platforms constructed with gaps measuring one-eighth inch or greater between the boards which provide free drainage between the boards as determined by the code official shall be exempt from the calculation of maximum impervious surface limits so long as the surface below the deck or platform is not impervious.

b. Pavers. Pavers installed with a slope of five percent or less and covering no more than 10 percent of the total lot area will be calculated as only 75 percent impervious. Provided, however, that all pavers placed in driveways, private streets, access easements, parking areas and critical areas shall be considered 100 percent impervious.

c. Patios/Terraces. Uncovered patios/ terraces constructed of pavers shall be exempt from the maximum impervious surface limits.

Clmt ex. 2
P. 14;

d. Pedestrian-Oriented Walkways. Uncovered pedestrian walkways constructed with gravel or pavers not to exceed 60 inches in width shall be exempt from the maximum impervious surface limits.

e. Public Improvements. Open storm water retention/detention facilities, public rights-of-way and public pedestrian trails shall be exempt from the maximum impervious surface limits.

f. Rockeries/Retaining Walls. Rockeries and retaining walls shall be exempt from the maximum impervious surface limits.

3. Deviation. The code official may grant a deviation, allowing an additional five percent of lot coverage over the maximum requirements; provided, the applicant demonstrates through the submittal of an application and supporting documentation that the proposal meets one of the following criteria:

a. The proposal uses preferred practices, outlined in MICC 19.09.100, which are appropriate for the lot; or

b. The lot has a unique shape or proportions (i.e., a flag lot, with a circuitous driveway corridor); or

c. The proposal minimizes impacts to critical areas and provides the minimum extent possible for the additional impervious surfaces.

The city shall provide notice for the proposed action as required by MICC 19.15.020(D) and (E), Administration.

4. Variance. Public and private schools, religious institutions, private clubs and public facilities in single-family zones with slopes of less than 15 percent may request a variance to increase the impervious surface to a maximum 60 percent impervious surface and such variance application will be granted if the hearing examiner determines that the applicant has demonstrated that the following criteria are satisfied:

Clmt ex. 2
P. 15

Chapter 19.02 RESIDENTIAL

Sections:

- 19.02.010 Single-family.
- 19.02.020 Lot requirements.
- 19.02.030 Accessory dwelling units.
- 19.02.040 Garages and other accessory buildings.
- 19.02.050 Fences, retaining walls and rockeries.
- 19.02.060 Swimming pools.

19.02.010 Single-family.

A use not permitted by this section is prohibited. Please refer to MICC 19.06.010 for other prohibited uses.

A. Uses Permitted in Zones R-8.4, R-9.6, R-12, and R-15.

1. Single-family dwelling.
2. Accessory buildings incidental to the main building.
3. Private recreational areas.
4. Public schools accredited or approved by the state for compulsory school attendance, subject to design commission review and all of the following conditions:
 - a. All structures shall be located at least 35 feet from any abutting property and at least 45 feet from any public right-of-way.
 - b. Off-street parking shall be established and maintained at a minimum ratio of one parking space per classroom with high schools providing an additional one parking space per 10 students.
 - c. A one-fourth acre or larger playfield shall be provided in one usable unit abutting or adjacent to the site.

Clmt ex. 2
P. 1

Chapter 19.08 SUBDIVISIONS

Sections:

- 19.08.010 General provisions.
- 19.08.020 Application procedures and requirements.
- 19.08.030 Design standards.
- 19.08.040 Plat improvements.
- 19.08.050 Final plats.
- 19.08.060 Condominium conversions.

19.08.010 General provisions.

- A. No person shall subdivide land, either through a long subdivision or a short subdivision, or make a lot line revision, without first obtaining official approval as herein provided.
- B. All applications for long subdivisions, short subdivisions, or lot line revisions are governed by the permit review procedures set out in MICC 19.15.020 except where superseded by language contained in this chapter.
- C. Land contained in a prior short subdivision may not be further divided in any manner for a period of five years after the recording of the final plat with King County without the filing of a long subdivision plat; however when a short subdivision consists of less than four lots, an alteration to the short subdivision is permitted so long as no more than four lots are created through the total short subdivision process.
- D. In their interpretation and application, the provisions of this chapter shall be held to be the minimum requirements adopted for the promotion of the public safety, health, and general welfare.

Cmnt ex. 3
P. 1; _____

This chapter is not intended to interfere with or abrogate or annul any easements, covenants, conditions, or restrictions created or imposed by plats or deeds or record or by agreements between parties, except where the provisions of this chapter are more restrictive, in which event the provisions of this chapter shall govern.

E. Preliminary long subdivision, short subdivision, and lot line revision applications shall be processed simultaneously with all applications for rezones, variances, planned unit developments, and site plan approvals to the extent the procedural requirements of those actions allow simultaneous action.

F. Vacations of long subdivisions shall be governed by RCW 58.17.212. Alterations to long subdivisions shall be governed by RCW 58.17.215. All public hearings for both vacations and alterations of long subdivisions shall be before the planning commission, which shall make recommendations as to the vacation or alteration to the city council.

G. Vacations and alterations of short subdivisions shall be reviewed by the code official, and shall comply with the requirements of this chapter for the creation of short subdivisions, unless those requirements are waived by the code official. Vacations and alterations of short subdivisions that involve a public dedication shall be governed by subsection F of this section. (Ord. 08C-01 § 4; Ord. 99C-13 § 1).

19.08.020 Application procedures and requirements.

A. Applications for short subdivisions and lot line revisions or alteration or vacation thereof shall be reviewed by the code official.

Clmt ex. 3
P. 2 ; _____

Applications for long subdivisions or alteration or vacation thereof are reviewed by the planning commission and the city council.

B. The planning commission may grant a variance, with restrictions if deemed necessary, from the four-acre limitation for purpose of permitting short subdivision of property containing more than four acres into four or less lots when all of the following circumstances shall be found to apply:

1. That there are special circumstances applicable to the particular lot, such type of ownership, restrictive covenants, physiographic conditions, location or surroundings, or other factors;
2. That the granting of the variance will not result in future uncoordinated development nor alter the character of the neighborhood; and
3. That granting the variance will not conflict with the general purposes and objectives of the comprehensive plan or the development code.

C. Applicants shall prepare a concept sketch of the proposal for the preapplication meeting required under MICC 19.09.010(A).

D. Preliminary Application Contents. In addition to any documents, information, or studies required under Chapter 19.07 MICC, Critical Areas, an application for a long subdivision, short subdivision, or a lot line revision shall include the documents set forth below and any other document or information deemed necessary by the code official upon notice to the applicant. All documents shall be in the form specified by the code official and shall contain such information as deemed necessary by the code

Clmt ex. 3
P. 3

official. The applicant shall submit the number of copies of each document specified by the code official.

1. Development Application Cover Form. The development application cover form shall be signed by all current property owners listed on the plat certificate, and shall list the legal parcel numbers of all property involved in the project.
2. Long Subdivision, Short Subdivision, or Lot Line Revision Plan. The applicant shall provide copies of fully dimensioned plans of the project prepared by a Washington registered civil engineer or land surveyor, meeting the requirements of Chapter 19.07 MICC, Environment, and containing any other information deemed necessary by the code official. The city engineer may waive the requirement that an engineer or surveyor prepare the plans for a short subdivision or lot line revision. The submitted plans shall demonstrate that a building pad has been designated for each proposed lot per MICC 19.09.090. No cross-section dimension of a designated building pad shall be less than 20 feet in width.
3. Plat Certificate. Applicant shall provide a plat certificate issued by a qualified title insurance company not more than 30 days before filing of the application showing the ownership and title of all parties interested in the plat. If the plat certificate references any recorded documents (i.e. easements, dedications, covenants, etc.) copies of those documents shall also be provided.
4. Legal Documents. Applicants shall provide copies of each of the following documents (if applicable):

a. Proposed restrictive covenants.

Clmt ex. 3
P. 4;

b. Draft deeds to the city for any land to be dedicated.

c. Proposed easements.

5. Project Narrative. Applicants shall provide a clear and concise written description and summary of the proposed project.

6. Neighborhood Detail Map. Applicants shall provide copies of a map drawn at a scale specified by the code official showing the location of the subject site relative to the property boundaries of the surrounding parcels within approximately 1,000 feet, or approximately 2,500 feet for properties over four acres. The map shall identify the subject site with a darker perimeter line than that of the surrounding properties.

7. Topography Map. The applicant shall provide copies of a topographical map showing the existing land contours using vertical intervals of not more than two feet, completed and signed by a Washington licensed surveyor. For any existing buildings, the map shall show the finished floor elevations of each floor of the building. Critical slopes exceeding 30 percent must be labeled and delineated by a clearly visible hatching.

8. Detailed Grading Plan. If the grade differential on the site of the proposed project will exceed 24 inches and/or if the amount of earth to be disturbed exceeds 50 cubic yards, the applicant shall provide copies of a detailed grading plan drawn by a Washington licensed engineer.

Clmt ex. 3
P. 5; _____

9. Street Profiles. The applicant shall provide copies of a street profile showing the profiles and grades of each street, together with typical cross sections indicating:

- a. Width of pavement;
- b. Location and width of sidewalks, trails, bike lanes, ditches, swales, etc.; and
- c. Location of any utility mains.

10. Geotechnical Report. The applicant shall provide a geotechnical report meeting the requirements of Chapter 19.07 MICC, Critical Lands. This requirement may be waived by the city Engineer under the criteria set out in MICC 19.07.010.

11. Utility Plan. Conceptual plan showing the locations of existing and proposed utilities.

E. Notice.

1. Short Subdivisions and Lot Line Revisions. Public notice of an application for a short subdivision or a lot line revision shall be made in accordance with the procedures set forth in MICC 19.15.020.

2. Long Subdivisions.

a. Public notice of a long subdivision application shall be made at least 10 days prior to the open record hearing on the application in accordance with the procedures set forth in MICC 19.15.020 for an administrative or discretionary act; provided, notice shall also be

Clmt ex. 3
P. 6;

published at least 10 days prior to the hearing in a newspaper of general circulation within the city.

b. If the owner of a proposed long subdivision owns land adjacent to the proposed long subdivision, that adjacent land shall be treated as part of the long subdivision for notice purposes, and notice of the application shall be given to all owners of lots located within 300 feet of the proposed long subdivision or the applicant's adjacent land.

3. The city shall provide written notice to the Department of Transportation of an application for a long subdivision or short subdivision that is located adjacent to the right-of-way of a state highway. The notice shall include a legal description of the long subdivision or short subdivision and a location map.

F. Preliminary Application Procedure.

1. Findings of Fact. All preliminary approvals or denials of long subdivisions or short subdivisions shall be accompanied by written findings of fact demonstrating that:

a. The project does or does not make appropriate provisions for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school;

Clmt ex. 3
P. 1;

- b. The public use and interest will or will not be served by approval of the project; and
- c. The project does or does not conform to applicable zoning and land use regulations.

2. Short Subdivisions and Lot Line Revisions. The code official shall grant preliminary approval for a short subdivision or lot line revision if the application is in proper form and the project complies with the design standards set out in MICC 19.08.030, the comprehensive plan, and other applicable development standards.

3. Long Subdivisions.

a. At an open record hearing the planning commission shall review the proposed long subdivision for its conformance with the requirements of MICC 19.08.030, the comprehensive plan, and other applicable development standards.

b. The planning commission shall make a written recommendation on the long subdivision, containing findings of fact and conclusions, to the city council not later than 14 days following action by the planning commission.

c. Upon receipt of the planning commission's recommendation, the city council shall at its next public meeting set the date for the public hearing where it may adopt or reject the planning commission's recommendations.

Clmt ex. 3
P. 8 ; _____

d. Preliminary approval of long subdivision applications shall be governed by the time limits and conditions set out in MICC 19.15.020(E); except the deadline for preliminary plat approval is 90 days, unless the applicant consents to an extension of the time period.

4. Conditions for Preliminary Approval. As a condition of preliminary approval of a project, the city council in the case of a long subdivision, or the code official in the case of a short subdivision or lot line revision, may require the installation of plat improvements as provided in MICC 19.08.040 which shall be conditions precedent to final approval of the long subdivision, short subdivision, or lot line revision.

5. Expiration of Approval.

a. Once the preliminary plat for a long subdivision has been approved by the city, the applicant has five years to submit a final plat meeting all requirements of this chapter to the city council for approval.

b. Once the preliminary plat for a short subdivision has been approved by the city, the applicant has one year to submit a final plat meeting all requirements of this chapter. A plat that has not been recorded within one year after its preliminary approval shall expire, becoming null and void. The city may grant a single one-year extension, if the applicant submits the request in writing before the expiration of the preliminary approval.

c. In order to revitalize an expired preliminary plat, a new application must be submitted.

Clmt ex. 3
P. 9;

6. No Construction Before Application Approval. No construction of structures, utilities, storm drainage, grading, excavation, filling, or land clearing on any land within the proposed long subdivision, short subdivision, or lot line revision shall be allowed prior to preliminary approval of the application and until the applicant has secured the permits required under the Mercer Island City Code. (Ord. 10C-07 § 2; Ord. 08C-01 § 4; Ord. 99C-13 § 1).

19.08.030 Design standards.

A. Compliance with Other Laws and Regulations. The proposed subdivision shall comply with arterial, capital facility, and land use elements of the comprehensive plan; all other chapters of the development code; the Shoreline Management Act; and other applicable legislation.

B. Public Improvements.

1. The subdivision shall be reconciled as far as possible with current official plans for acquisition and development of arterial or other public streets, trails, public buildings, utilities, parks, playgrounds, and other public improvements.

2. If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city shall adopt the designated name.

C. Control of Hazards.

1. Where the project may adversely impact the health, safety, and welfare of, or inflict expense or damage upon, residents

Clmt ex. 3
P. 10;

or property owners within or adjoining the project, other members of the public, the state, the city, or other municipal corporations due to flooding, drainage problems, critical slopes, unstable soils, traffic access, public safety problems, or other causes, the city council in the case of a long subdivision, or the code official in the case of a short subdivision or lot line revision, shall require the applicant to adequately control such hazards or give adequate security for damages that may result from the project, or both.

2. If there are soils or drainage problems, the city engineer may require that a Washington registered civil engineer perform a geotechnical investigation of each lot in the project. The report shall recommend the corrective action likely to prevent damage to the areas where such soils or drainage problems exist. Storm water shall be managed in accordance with the criteria set out in MICC 15.09.030 and shall not increase likely damage to downstream or upstream facilities or properties.

3. Alternative tightline storm drains to Lake Washington shall not cause added impact to the properties, and the applicant shall submit supportive calculations for storm drainage detention.

D. Streets, Roads and Rights-of-Way.

1. The width and location of rights-of-way for major, secondary, and collector arterial streets shall be as set forth in the comprehensive arterial plan.

2. Public rights-of-way shall comply with the requirements set out in MICC 19.09.030.

Clint ex. 3
P. 11: _____

3. Private access roads shall meet the criteria set out in MICC 19.09.040.

4. Streets of the proposed subdivision shall connect with existing improved public streets, or with existing improved private access roads subject to easements of way in favor of the land to be subdivided.

E. Residential Lots.

1. The area, width, and depth of each residential lot shall conform to the requirements for the zone in which the lot is located. Any lot which is located in two or more zones shall conform to the zoning requirements determined by the criteria set out in MICC 19.01.040(G)(2).

2. Each side line of a lot shall be approximately perpendicular or radial to the center line of the street on which the lot fronts.

F. Design Standards for Special Conditions.

1. Subdivisions abutting an arterial street as shown on the comprehensive arterial plan shall be oriented to require the rear or side portion of the lots to abut the arterial and provide for internal access streets.

2. Where critical areas meeting the criteria set out in Chapter 19.07 MICC are present within the subdivision, the code official or city council may:

a. Require that certain portions of the long subdivision or short subdivision remain undeveloped with such restrictions shown on the official documents;

Clmt ex. 3
P. 12 ; _____

- b. Increase the usual building set-back requirements; and/or
- c. Require appropriate building techniques to reduce the impact of site development.

G. Optional Standards for Development. In situations where designing a long subdivision or short subdivision to the requirements of subsections A through F of this section would substantially hinder the permanent retention of wooded or steep areas or other natural features; preclude the provision of parks, playgrounds, or other noncommercial recreational areas for neighborhood use and enjoyment; or would negatively impact the physiographic features and/or existing ground cover of the subject area, the applicant may request that the project be evaluated under the following standards:

1. The use of the land in the long subdivision or short subdivision shall be one permitted in the zone in which the long subdivision or short subdivision is located.
2. The number of lots shall not exceed the number that would otherwise be permitted within the area being subdivided, excluding the shorelands part of any such lot and any part of such lot that is part of a street.
3. An area suitable for a private or public open space tract shall be set aside for such use.
4. The lots may be of different areas, but the minimum lot area, minimum lot width, and minimum lot depth shall each be at least 75 percent of that otherwise required in the zone in which the long subdivision or short subdivision is located.

Clmt ex. 3
P. 13 ; _____

In no case shall the lot area be less than 75 percent of that otherwise required in the zone. Lot size averaging must be incorporated if lot width or depth requirements are 75 percent of the minimum that would otherwise be required for the zone without utilizing the optional development standards. Any designated open space or recreational tract shall not be considered a lot.

5. The ownership and use of any designated open space or recreational tract, if private, shall be shared by all property owners within the long subdivision or short subdivision. In addition, a right of entry shall be conveyed to the public to be exercised at the sole option of the city council if such area shall cease to be an open space or recreational tract.

6. The open space or recreational tract must remain in its approved configuration and be maintained in accordance with approved plans. Any deviation from the foregoing conditions must receive expressed approval from the planning commission. (Ord. 08C-01 § 4; Ord. 99C-13 § 1).

19.08.040 Plat improvements.

A. Streets, Utilities and Storm Drainage. The long subdivision, short subdivision, or lot line revision shall include provisions for streets, water, sanitary sewers, storm drainage, utilities and any easements or facilities necessary to provide these services. All utilities shall be placed underground unless waived by the city engineer. Detailed plans for these provisions shall not be required until after the approval of the preliminary plat and shall be a condition precedent to the official approval of the subdivision.

Clmt ex. 3
P. 14;

B. Performance Bond. The owner(s) of a project shall deposit with the city a performance bond or funds for a set-aside account in an amount equal to 150 percent of the cost of the required improvements, as established by the city engineer. Such security shall list the exact work that shall be performed by the owner(s) and shall specify that all of the deferred improvements shall be completed within the time specified by the city engineer, and if no time is so specified, then not later than one year. The city may also require a bond or set-aside account securing the successful operation of improvements or survival of required landscaping for up to two years after final approval.

C. Site Supervision. Any and all services performed by city employees in field inspection of construction of plat improvements, clearing, and/or grading processes, shall be charged to the developer at 100 percent of direct salary cost, plus 35 percent of such cost for overhead. Any outside consultants retained by the city to evaluate any phase of plat design or construction shall be charged at actual cost, plus any additional administrative costs. Billings tendered to the owner(s) shall be payable within 30 days.

D. Construction Seasons. Either the city engineer or the building official may:

1. Limit the construction project to a specific seasonal time period.
2. Prevent land clearing, grading, filling, and foundation work on lots with critical slopes or geologic hazard areas between October 1 and April 1, as set out in MICC 19.07.020; and
3. Require short term soil and drainage control measures such as, but not limited to: hemping, seeding, gravel or light

Clmt ex. 3
P. 15;

asphalt base roads, temporary siltation and detention ponds.
(Ord. 99C-13 § 1).

19.08.050 Final plats.

A. Required Signatures.

1. Before the original or extended deadline for recording the final plat as set forth in MICC 19.08.020(F)(5), the applicant may file with the city the final plat of the proposed long subdivision, short subdivision, or lot line revision in the form prescribed by subsection C of this section.
2. The city engineer shall check the final plat and shall sign it when satisfied that it meets the requirements of subsection C of this section, adequately addresses sewage disposal and water supply, and complies with all conditions placed on the preliminary plat approval.
3. After the final plat has been signed by the city engineer, it shall go to the code official for final signature.
4. Each long subdivision plat submitted for final signature shall be accompanied by the recommendation for approval or disapproval of the city engineer as to the requirements of subsection (A)(2) of this section. The city engineer's signature on the final plat shall constitute such recommendation.
5. Final plats shall be approved, disapproved, or returned to the applicant within 30 days from the date of filing, unless the applicant consents to an extension of such time period.

B. Recording of the Final Plat.

Clmt ex. 3
P. 16 ; _____

1. The applicant shall deliver the mylars to King County for recording.
2. The recording of the final plat with the county department of records shall constitute the official approval of the subdivision, and lots may not be legally sold until the plat has received its recording number.
3. After the final plat has been recorded, the original plat shall be returned to the city engineer and filed as the property of the city.

C. Contents of the Final Plat. All final plats submitted to the city shall meet the requirements set out in Chapter 58.09 RCW, Chapter 332-130 WAC, and those requirements set out below.

Final plats submitted to the city shall consist of one mylar and one copy containing the information set out below. The mylar and copy shall be 18 inches by 24 inches in size, allowing one-half inch for borders. If more than one sheet is required for the mylar and copy, each sheet, including the index sheet, shall be the specified size. The index sheet must show the entire subdivision, with street and highway names and block numbers.

1. Identification and Description.
 - a. Name of the long subdivision, short subdivision or lot line revision.
 - b. A statement that the long subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners.

Cmt ex. 3
P. 17;

- c. Location by section, township and range, or by other legal description.
- d. The name and seal of the registered engineer or the registered land surveyor.
- e. Scale shown graphically, date and north point. The scale of the final plat shall be such that all distances and bearings can be clearly and legibly shown thereon in their proper proportions. Where there is a difference between the legal and actual field distances and bearings, both distances and bearings shall be shown with the field distances and bearings shown in brackets.
- f. A description of property platted which shall be the same as that recorded in preceding transfer of said property or that portion of said transfer covered by plat. Should this description be cumbersome and not technically correct, a true and exact description shall be shown upon the plat, together with original description. The correct description follow the words: "The intent of the above description is to embrace all the following described property."
- g. A vicinity map showing the location of the plat relative to the surrounding area.

2. Delineation.

- a. Boundary plat, based on an accurate traverse, with angular and lineal dimensions.
- b. Exact location, width, and name of all streets within and adjoining the plat, and the exact location and widths

Clmt ex. 3
P. 18;

of all roadways, driveways, trail easements. The name of a street shall not duplicate that of any existing street in the city, unless the platted street be a new section or continuation of the existing street.

c. True courses and distances to the nearest established street lines or official monuments which shall accurately describe the location of the plat.

d. Municipal, township, county or section lines accurately tied to the lines of the subdivision by courses and distances.

e. Radii, internal angles, points of curvature, tangent bearings and lengths of all arcs.

f. All easements for rights-of-way provided for public services or utilities. Utility easements shall be designated as public or private.

g. All lot and block numbers and lines, with accurate dimensions in feet and hundredths. Blocks in numbered additions to subdivisions bearing the same name may be numbered or lettered consecutively through the several additions. The square footage for each lot less vehicular easements shall be shown.

h. Accurate location of all monuments, which shall be concrete commercial monuments four inches by four inches at top, six inches by six inches at bottom, and 16 inches long. One such monument shall be placed at each street intersection and at locations to complete a

Clmt ex. 3
P. 19;

continuous line of sight and at such other locations as are required by the engineer.

- i. All plat meander lines or reference lines along bodies of water shall be established above the ordinary high water line of such water.
- j. Accurate outlines and legal description of any areas to be dedicated or reserved for public use, with the purpose indicated thereon and in the dedication; and of any area to be reserved by deed covenant for common uses of all property owners.
- k. Critical areas as identified under Chapter 19.07 MICC.
- l. Corner pins made of rebar with caps.

3. Other Marginal Data on Final Plat.

- a. If the plat is subject to dedications to the city or any other party, the dedications shall be shown and shall be duly acknowledged. The plat shall also contain a waiver of all claims for damages against the city which may be occasioned to the adjacent land by the established construction, drainage and maintenance of any streets dedicated to the city.
- b. A copy of the protective covenants, if any.
- c. Certification by Washington registered civil engineer or land surveyor to the effect that the plat represents a survey made by that person and that the monuments shown thereon exist as located and that all dimensional and geodetic details are correct.

Clmt ex. 3
P. 20 : _____

d. Proper forms for the approvals of the city engineer and the mayor, on behalf of the city council, in the case of a long subdivision; or the city engineer and the code official in the case of short subdivisions or lot line revisions, with space for signatures.

e. Certificates by the county assessor showing that the taxes and assessments on the land to be submitted have been paid in accordance with law, including a deposit for the taxes for the following year.

f. Approval by the county department of records.

4. Other Documents. When filed with the city, the final plat shall be accompanied by the following additional documents.

a. "As Built" Drawings. A plan, profile and section drawing, prepared by a Washington licensed engineer showing all streets and other access ways, water, sewer, storm water detention facilities, retaining walls, and rockeries within the subdivision at a scale of one inch equal to 40 feet or less on a standard sheet 24 inches wide and 36 inches long.

b. Plat Certificate. A plat certificate issued by a qualified title insurance company not more than 30 days before filing of the final plat showing the ownership and title of all parties interested in the plat. If the plat certificate references any recorded documents (i.e., easements, dedications, covenants, etc.) copies of those documents shall also be provided. (Ord. 10C-07 § 3; Ord. 10C-06 § 2; Ord. 08C-01 § 4; Ord. 99C-13 § 1).

Clmt ex. 3
P. 21 ; _____

19.08.060 Condominium conversions.

In addition to the requirements set out in Chapter 64.34 RCW, multiple-family dwellings being converted into condominiums are subject to the following conditions.

A. Preconversion Inspection.

1. All multiple-family dwellings being converted to a condominium shall be inspected by the building official and the fire marshal prior to dwelling units being offering for sale.
2. The inspection report shall list any violations of the development code or other applicable governmental regulations.
3. The inspection shall be made within 45 days of the declarant's written request therefor and the inspection report shall be issued within 14 days of said inspection being made.
4. Such inspection shall not be required for any building for which a final certificate of occupancy has been issued by the city within the preceding 24 months.
5. The fee for making the preconversion inspection shall be same as the fee that would be charged for making such inspection for a purpose other than a condominium conversion.

B. Disclosure of Inspection Report. The public offering statement required by Chapter 64.34 RCW for a condominium conversion shall contain a copy of the inspection report prepared under subsection A of this section.

C. Reinspection.

Clmt ex. 3
P. 22;

1. Prior to the conveyance of any dwelling unit within a conversion condominium, other than a conveyance to a declarant or affiliate of a declarant, all violations disclosed in the inspection report shall be repaired to the city's satisfaction.

2. The city shall reinspect the building within seven days of the declarant's written request for reinspection, and if the repairs have been made to the city's satisfaction, the city shall issue a certification stating that such repairs have been made.

D. Warranty on Repairs. The declarant shall warranty all repairs required by the city against defects due to workmanship or materials for a period of one year following the completion of such repairs. The declarant shall also deposit with the city funds equaling 10 percent of the actual cost of making such repairs, to be used to satisfy claims made under such warranty. Following the expiration of the one-year warranty period, any funds remaining in such account shall be returned to the declarant.

E. Relocation Assistance.

1. Relocation assistance not to exceed \$500 per dwelling unit shall be paid to tenants and subtenants who elect not to purchase a dwelling unit and who are in lawful occupancy for residential purposes of a dwelling unit and whose monthly household income from all sources, on the date of the notice required under RCW 64.34.440(1), was less than an amount equal to 80 percent of:

a. The monthly median income for comparably sized households in the standard metropolitan statistical area.

Clmt ex. 3
P. 23 ; _____

as defined and established by the United States Department of Housing and Urban Development, in which the condominium is located; or

b. If the condominium is not within a standard metropolitan statistical area, the monthly median income for comparably sized households in the state of Washington, as defined and determined by said department.

2. The household size of a unit shall be based on the number of persons actually in lawful occupancy of the unit. The tenant or subtenant actually in lawful occupancy of the unit shall be entitled to the relocation assistance.

3. Relocation assistance shall be paid on or before the date the tenant or subtenant vacates and shall be in addition to any damage deposit or other compensation or refund to which the tenant is otherwise entitled. Unpaid rent or other amounts owed by the tenant or subtenant to the landlord may be offset against the relocation assistance. (Ord. 99C-13 § 1).

The Mercer Island Municipal Code is current through Ordinance 15-05, passed March 16, 2015.

Disclaimer: The City Clerk's Office has the official version of the Mercer Island Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.



Clmt ex. 3
P. 24;

Chapter 19.09 PROPERTY DEVELOPMENT

Sections:

- 19.09.010 Preapplication and intake screening meetings.
- 19.09.020 Field markings.
- 19.09.030 Public and private streets.
- 19.09.040 Private access roads.
- 19.09.050 Street names and house numbers.
- 19.09.060 Right-of-way use.
- 19.09.070 Street vacations.
- 19.09.080 Moving of buildings.
- 19.09.090 Building pad.
- 19.09.100 Preferred practices.

19.09.010 Preapplication and intake screening meetings.

A. Preapplication meetings between the applicant, members of the applicant's project team, and city staff are required for all subdivisions or lot line revisions, shoreline substantial development permits, shoreline deviations, variances, temporary encampments, and for any alteration of a critical area or buffer, except those alterations that are identified as allowed uses under MICC 19.07.030(A)(1) through (5), (8) and (12). Preapplication meetings may be held for any other development proposal at the request of the applicant.

B. The preapplication meeting will include a preliminary examination of the proposed project and a review of codes as described in MICC 19.15.020(A). The purpose of a preapplication meeting is to provide the applicant with information that will assist in preparing a formal development application meeting city development standards and permit processing requirements.

C. City staff are not authorized to approve any plan or design offered by the applicant at a preapplication or intake meeting.

Clmt ex. 4
P. 1;

D. Intake screenings between the applicant and city staff are required for all building permits involving the following: expansion of a building footprint by 500 square feet or more; an increase in impervious surface of 500 square feet or more; or any alteration of a critical area or buffer, except those alterations that are identified as allowed uses under MICC 19.07.030(A)(1) through (5), (8) and (12). Applicants are encouraged to bring their project team. The purpose of an intake screening is to resolve issues that may cause delay in processing a permit prior to formal acceptance of a permit application. The intake screening will include a preliminary examination of the proposed project and a review of any applicable codes. City staff are not authorized to approve any plan or design offered by the applicant at an intake screening. (Ord. 10C-01 § 4; Ord. 08C-01 § 5; Ord. 05C-12 § 8).

19.09.020 Field markings.

A. Prior to the start of construction, the applicant shall mark the following on the site to reflect the proposed site construction plan: the location of the building footprint, critical area(s) boundaries, the outer extent of yard setbacks, areas to remain undisturbed, and trees and vegetation to be removed.

B. The applicant shall maintain the field markings for critical area(s) and areas to remain undisturbed throughout the duration of the construction permit.

C. The code official may waive the requirement for field marking when no activity is proposed within or adjacent to a critical area. (Ord. 05C-12 § 8).

19.09.030 Public and private streets.

A. Standards Adopted by Reference. Residential access streets (local access streets), curbs, gutters, sidewalks and drainage and utility facilities in the public right-of-way shall be constructed in accordance with "City and County Design Standards for Low Volume Roads and Streets, Adopted February 10, 1994, per RCW 35.78.030 and RCW 43.32.020" which was enacted by Ordinance 98C-07, and which is on file in the city clerk's office, and by this reference made a part of this section as if fully set forth, and the

Clmt ex. 4
P. 2;

plans and profiles for any such construction shall be submitted to and approved by the city engineer prior to the commencement of any grading, excavation or other phase of such construction.

B. Acceptance of Improvements. Upon certification by the city engineer that the construction has been completed in compliance with the provisions of this section and to his or her satisfaction, the city council may formally accept the improvements for maintenance by the city.

C. Construction Specifications. Residential access streets (local access streets) shall be constructed of six-inch cement concrete pavement or two-inch asphaltic concrete with cement concrete curbs and gutters, rolled cement concrete curbs or thickened asphaltic concrete edges, and shall be a minimum of 16 feet in width with minimum one-foot-wide gravel shoulders, measured from the outside edges of thickened asphaltic concrete edges or of rolled cement concrete curbs and from the inside faces of cement concrete curbs. Cement concrete curbs and thickened asphaltic concrete edges may be eliminated in conjunction with the use of low impact development storm water management techniques. Porous pavement and/or pavers may be considered acceptable pavement alternatives when approved by the city engineer. All construction materials and workmanship shall be in accordance with the Washington State Department of Transportation and American Public Works Association current "Standard Specifications for Road, Bridge, and Municipal Construction" as amended by the city engineer for city of Mercer Island public works projects, and shall be subject to inspection and approval by the city engineer.

D. Rights-of-Way Widths.

1. Arterials. Arterial streets, as designated in the 1976 arterial and circulation plan, shall have rights-of-way widths as follows:

Street Designation	Right-of-Way (ft.)
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Clmt ex. 4
P. 3;

Major Arterial	60 – 100
Secondary Arterial	60 – 90
Collector Arterial	50 – 66

2. Local Access Streets. Local access streets shall have rights-of-way of the following widths, based on the type of street and on the number of potential lots or dwelling units that the street will serve.

a. Dead-End Streets.

Number of Lots or Dwelling Units	Right-of-Way (ft.)
Over 20	40 – 50
11 – 20	35 – 50
6 – 10	30 – 45
3 – 5	20 – 40
1 – 2	16 – 40

b. Through Streets. Through streets shall have rights-of-way widths of 40 to 50 feet.

E. Exceptions from Width Requirements Authorized. In cases where it is found by the city council that special conditions of topography, right-of-way width, traffic flow and the like exist, and that a lesser improvement width will not create a vehicular or pedestrian traffic hazard, the city council may, in its discretion, grant exceptions from the minimum width requirements. (Ord. 09C-17 § 2; Ord. 99C-13 § 1).

19.09.040 Private access roads.

A. The following are the minimum requirements for private access roads. To accommodate fire suppression and rescue activities, the Mercer Island fire chief may require that the widths of private access roads or the size of turn-arounds be increased or that turn-arounds be provided when not otherwise required by this section.

Clmt ex. 4
 P. 4;

B. All private access roads serving three or more single-family dwellings shall be at least 20 feet in width. All private access roads serving less than three single-family dwellings shall be at least 16 feet in width, with at least 12 feet of that width consisting of pavement and the balance consisting of well compacted shoulders.

C. All corners shall have a minimum inside turning radius of 28 feet.

D. All private access roads in excess of 150 feet in length, measured along the centerline of the access road from the edge of city street to the end of the access road, shall have a turn-around with an inside turning radius of 28 feet.

E. All cul-de-sacs shall be at least 70 feet in diameter; provided, cul-de-sacs providing access to three or more single-family dwellings shall be at least 90 feet in diameter.

F. Gradient.

1. No access road or driveway shall have a gradient of greater than 20 percent.

2. For all access roads and driveways with a gradient exceeding 15 percent, the road surface shall be cement concrete pavement with a brushed surface for traction. Access roads and driveways with gradients of 15 percent or less may have asphalt concrete surface. (Ord. 99C-13 § 1).

19.09.050 Street names and house numbers.

A. Classifications of Streets.

1. Avenue. A public or private roadway improved for general travel which, except for occasional sinuosities, runs in a generally north-south direction shall be designated as an "avenue."

2. Boulevard Drive, Road, Lane or Way. A public or private roadway improved for general travel, either as a thoroughfare or cul-de-sac, having such sinuosities as not to fit into the

Clmt ex. 4
P. 5;

regular street or avenue pattern, or a divided or other ornamental way within or adjacent to a park, scenic or landscaped area and not being a portion or extension of a named street or avenue shall be designated as a "boulevard," "drive," "road," "lane," or "way."

3. Place. A public or private roadway improved for general travel and, except for occasional sinuosities, lying between and parallel to streets or avenues as an extra roadway to the grid system of 16 streets to a mile; or a public or private roadway other than an alley, boulevard, drive, road, lane or way, which does not fit into the fixed street and avenue pattern by virtue of running at an acute angle to streets or avenues shall be designated as a "place."

4. Street. A public or private roadway improved for general travel which, except for occasional sinuosities, runs in a generally east-west direction shall be designated as a "street."

B. Assignment of Names and Numbers to Public or Private Roadways. The code official shall assign names or numbers to all public or private roadways, now existing or hereafter established, which have not been named or numbered heretofore; provided, no name or number shall be assigned to a private roadway unless the same shall be servient to one or more properties other than the lot of which it is a portion.

C. Change of Existing Roadway Designations. All existing roadways shall continue to bear the designation heretofore existing unless changed by resolution of the city council after the council has determined that the prior designation does not conform to the criteria set forth in this section, and that the public convenience and welfare will be served by such change and designation.

D. Use of County System to Name and Number Roadways. The code official shall assign a name or number to all public or private roadways in accordance with the King County numbering system set out in King County Code, Chapter 16.08, Road Names and Addressing Buildings. All public or private roadways shall be

Clmt ex. 4
P. 6;

Chapter 19.15 ADMINISTRATION

Sections:

- 19.15.010 General procedures.
- 19.15.020 Permit review procedures.
- 19.15.030 Enforcement.
- 19.15.040 Design commission.

19.15.010 General procedures.

A. Purpose. Administration of the development code is intended to be expedient and effective. The purpose of this chapter is to identify the processes, authorities and timing for administration of development permits. Public noticing and hearing procedures, decision criteria, appeal procedures, dispute resolution and code interpretation issues are also described.

B. Objectives. Guide customers confidently through the permit process; process permits equitably and expediently; balance the needs of permit applicants with neighbors; allow for an appropriate level of public notice and involvement; make decisions quickly and at the earliest possible time; allow for administrative decision-making, except for those decisions requiring the exercise of discretion which are reserved for appointed decision makers; ensure that decisions are made consistently and predictably; and resolve conflicts at the earliest possible time.

C. Roles and Responsibilities. The roles and responsibilities for carrying out the provisions of the development code are shared by appointed boards and commissions, elected officials and city staff. The authorities of each of these bodies are set forth below.

1. City Council. The city council is responsible for establishing policy and legislation affecting land use within the city. The city council acts on recommendations of the planning

Clmt ex. 5
P. 1; _____

commission in legislative and quasi-judicial matters, and serves as the appeal authority on discretionary actions.

2. Planning Commission. The role of the planning commission in administering the development code is governed by Chapter 3.46 MICC. In general, the planning commission is the designated planning agency for the city (see Chapter 35A.63 RCW). The planning commission is responsible for final action on a variety of discretionary permits and makes recommendations to the city council on land use legislation, comprehensive plan amendments and quasi-judicial matters. The planning commission also serves as the appeal authority for some ministerial and administrative actions.

3. Design Commission. The role of the design commission in administering the development code is governed by Chapter 3.34 MICC and MICC 19.15.040. In general, the design commission is responsible for maintaining the city's design standards and action on sign, commercial and multiple-family design applications.

4. Building Board of Appeals. The role of the building board of appeals in administering the construction codes is governed by Chapter 3.28 MICC. In general, the building board of appeals is responsible for hearing appeals of interpretations or application of the construction codes set forth in MICC Title 17.

5. Development Services Group. The responsible officials in the development services group act upon ministerial and administrative permits.

a. The code official is responsible for administration, interpretation and enforcement of the development code.

b. The building official is responsible for administration and interpretation of the building code, except for the International Fire Code.

Clmt ex. 5
P. 2

c. The city engineer is responsible for the administration and interpretation of engineering standards.

d. The environmental official is responsible for the administration of the State Environmental Policy Act and shoreline master program.

e. The fire code official is responsible for administration and interpretation of the International Fire Code.

6. Hearing Examiner. The role of the hearing examiner in administering the development code is governed by Chapter 3.40 MICC.

D. Actions. There are four categories of actions or permits that are reviewed under the provisions of the development code.

1. Ministerial Actions. Ministerial actions are based on clear, objective and nondiscretionary standards or standards that require the application of professional expertise on technical issues.

2. Administrative Actions. Administrative actions are based on objective and subjective standards that require the exercise of limited discretion about nontechnical issues.

3. Discretionary Actions. Discretionary actions are based on standards that require substantial discretion and may be actions of broad public interest. Discretionary actions are only taken after an open record hearing.

4. Legislative Actions. Legislative actions involve the creation, amendment or implementation of policy or law by ordinance. In contrast to the other types of actions, legislative actions apply to large geographic areas and are of interest to many property owners and citizens. Legislative actions are only taken after an open record hearing.

E. Summary of Actions and Authorities. The following is a nonexclusive list of the actions that the city may take under the

Clmt ex. 5
P. 3;

development code, the criteria upon which those decisions are to be based, and which boards, commissions, elected officials, or city staff have authority to make the decisions and to hear appeals of those decisions.

ACTION	DECISION AUTHORITY	CRITERIA	APPEAL AUTHORITY
Ministerial Actions			
Right-of-Way Permit	City engineer	Chapter <u>19.09</u> MICC	Hearing exami
Home Business Permit	Code official	MICC <u>19.02.010</u>	Hearing exami
Special Needs Group Housing Safety Determination	Police chief	MICC <u>19.06.080(A)</u>	Hearing exami
Lot Line Adjustment Permit	Code official	Chapter <u>19.08</u> MICC	Hearing exami
Design Review – Minor Exterior Modification Outside Town Center	Code official	Chapters <u>19.11</u> and <u>19.12</u> MICC, MICC <u>19.15.040</u>	Design commission
Design Review – Minor Exterior Modification in Town Center with a Construction Valuation (as defined by MICC <u>17.14.010</u>) Less Than \$100,000	Code official	Chapters <u>19.11</u> and <u>19.12</u> MICC, MICC <u>19.15.040</u>	Design commission
Design Review – Minor Exterior Modification in Town Center with a Construction Valuation (as defined by MICC <u>17.14.010</u>) \$100,000 or Greater	Design commission	Chapters <u>19.11</u> and <u>19.12</u> MICC, MICC <u>19.15.040</u>	Hearing exami
Final Short Plat Approval	Code official	Chapter <u>19.08</u> MICC	Planning commission

Clmt ex. 5
P. 4;

Seasonal Development Limitation Waiver	Building official or city arborist	MICC <u>19.07.060(D)</u> (4), <u>19.10.030</u>	Building board appeals
Development Code Interpretations	Code official	MICC <u>19.15.020(L)</u>	Planning commission
Shoreline Exemption	Code official	MICC <u>19.07.010</u>	Hearing exami
Administrative Actions			
Accessory Dwelling Unit Permit	Code official	MICC <u>19.02.030</u>	Hearing exami
Preliminary Short Plat	Code official	Chapter <u>19.08</u> MICC	Planning commission
Deviation (Except Shoreline Deviations)	Code official	MICC <u>19.01.070</u> , <u>19.02.020(C)(4)</u> and (D)(3), <u>19.02.050(F)</u> , <u>19.15.020(G)</u>	Planning commission
Critical Areas Determination	Code official	Chapter <u>19.07</u> MICC	Planning commission
Shoreline – Substantial Development Permit	Code official	MICC <u>19.07.110</u>	Shoreline heari board
SEPA Threshold Determination	Code official	MICC <u>19.07.120</u>	Planning commission
Short Plat Alteration and Vacations	Code official	MICC <u>19.08.010(G)</u>	Hearing exami
Long Plat Alteration and Vacations	City council via planning commission	MICC <u>19.08.010(F)</u>	Superior court
Temporary Encampment	Code official	MICC <u>19.06.090</u>	Superior court
Wireless Communications Facility	Code official	MICC <u>19.06.040</u>	Hearing exami

Clmt ex. 5P. 5

Wireless Communications Facility Height Variance	Code official	MICC <u>19.01.070</u> , <u>19.06.040(H)</u> and <u>19.15.020</u> (G)	Hearing examiner
Minimum Parking Requirement Variances for MF, PBZ, C-O, B and P Zones	Code official via design commission and city engineer	MICC <u>19.01.070</u> , <u>19.03.020(B)</u> (4), <u>19.04.040</u> (B)(9), <u>19.05.020(B)(9)</u> and <u>19.15.020</u> (G)	Hearing examiner
Discretionary Actions			
Conditional Use Permit	Planning commission	MICC <u>19.11.130(B)</u> , <u>19.15.020(G)</u>	Hearing examiner
Reclassification (Rezone)	City council via planning commission*	MICC <u>19.15.020(G)</u>	Superior court
Design Review – Major New Construction	Design commission	Chapters <u>19.11</u> and <u>19.12</u> MICC, MICC <u>19.15.040</u>	Hearing examiner
Preliminary Long Plat Approval	City council via planning commission**	Chapter <u>19.08</u> MICC	Superior court
Final Long Plat Approval	City council via code official	Chapter <u>19.08</u> MICC	Superior court
Variance	Hearing examiner	MICC <u>19.01.070</u> , <u>19.15.020(G)</u>	Superior court
Variance from Short Plat Acreage Limitation	Planning commission	MICC <u>19.08.020</u>	City council
Critical Areas Reasonable Use Exception	Hearing examiner	MICC <u>19.07.030(B)</u>	Superior court

Clmt ex. 5

P. 6

Street Vacation	City council via planning commission**	MICC <u>19.09.070</u>	Superior court
Shoreline Deviation	Planning commission	MICC <u>19.07.080</u>	City council
Shoreline Variance	Planning commission	MICC <u>19.07.110(C)(2)</u> (d)	State Shoreline Hearings Board
Impervious Surface Variance	Hearing examiner	MICC <u>19.02.020(D)(4)</u>	Superior court

Legislative Actions

Code Amendment	City council via planning commission**	MICC <u>19.15.020(G)</u>	Growth management hearings board
Comprehensive Plan Amendment	City council via planning commission**	MICC <u>19.15.020(G)</u>	Growth management hearings board

*Final rulings granting or denying an exemption under MICC 19.07.110 are not appealable to the Shoreline Hearings Board (SHB No. 98-60).

**The original action is by the planning commission which holds a public hearing and makes recommendations to the city council which holds a public meeting and makes the final decision.

(Ord. 11C-05 § 2; Ord. 11C-04 § 2; Ord. 10C-06 § 5; Ord. 10C-01 § 5; Ord. 08C-01 § 8; Ord. 06C-06 § 2; Ord. 06C-05 § 2; Ord. 05C-12 § 9; Ord. 04C-12 § 16; Ord. 04C-08 § 3; Ord. 03C-08 §§ 9, 10; Ord. 02C-04 § 5; Ord. 02C-01 § 6; Ord. 99C-13 § 1).

19.15.020 Permit review procedures.

The following are general requirements for processing a permit application under the development code. Additional or alternative requirements may exist for actions under specific code sections (see MICC 19.07.080, 19.07.100, and 19.08.020).

A. Preapplication. Applicants for development permits are encouraged to participate in informal meetings with city staff and property owners in the neighborhood of the project site. Meetings with the staff provide an opportunity to discuss the proposal in

Clmt ex. 5
P. 1

concept terms, identify the applicable city requirements and the project review process. Meetings or correspondence with the neighborhood serve the purpose of informing the neighborhood of the project proposal prior to the formal notice provided by the city.

B. Application.

1. All applications for permits or actions by the city shall be submitted on forms provided by the development services group. An application shall contain all information deemed necessary by the code official to determine if the proposed permit or action will comply with the requirements of the applicable development regulations.

2. All applications for permits or actions by the city shall be accompanied by a filing fee in an amount established by city ordinance.

C. Determination of Completeness.

1. The city will not accept an incomplete application. An application is complete only when all information required on the application form and all submittal items required by code have been provided to the satisfaction of the code official.

2. Within 28 days after receiving a development permit application, the city shall mail or provide in person a written determination to the applicant, stating either that the application is complete or that the application is incomplete and what is necessary to make the application complete. An application shall be deemed complete if the city does not provide a written determination to the applicant stating that the application is incomplete.

3. Within 14 days after an applicant has submitted all additional information identified as being necessary for a complete application, the city shall notify the applicant whether the application is complete or what additional information is necessary.

Clmt ex. 5
P. 8

4. If the applicant fails to provide the required information within 90 days of the determination of incompleteness, the application shall lapse. The applicant may request a refund of the application fee minus the city's cost of determining the completeness of the application.

D. Notice of Application.

1. Within 14 days of the determination of completeness, the city shall issue a notice of application for all administrative, discretionary, and legislative actions listed in MICC 19.15.010 (E).

2. The notice of application shall include the following information:

- a. The dates of the application, the determination of completeness, and the notice of application;
- b. The name of the applicant;
- c. The location and description of the project;
- d. The requested actions and/or required studies;
- e. The date, time, and place of the open record hearing, if one has been scheduled;
- f. Identification of environmental documents, if any;
- g. A statement of the public comment period, which shall be not less than 14 days nor more than 30 days following the date of notice of application; and a statement of the rights of individuals to comment on the application, receive notice and participate in any hearings, request a copy of the decision once made and any appeal rights;
- h. The city staff contact and phone number;
- i. The identification of other permits not included in the application to the extent known by the city;

Cltm ex. 5
P. 9

j. A description of those development regulations used in determining consistency of the project with the city's comprehensive plan; and

k. Any other information that the city determines appropriate.

3. Open Record Hearing. If an open record hearing is required on the permit, the city shall:

a. Provide the notice of application at least 15 days prior to the hearing; and

b. Issue any threshold determination required under MICC 19.07.100 at least 15 days prior to the hearing.

4. Notice shall be provided in the bi-weekly DSG bulletin, posted at City Hall and made available to the general public upon request.

5. All comments received on the notice of application must be received by the development services group by 5 pm on the last day of the comment period.

6. Except for a determination of significance, the city shall not issue a threshold determination under MICC 19.07.100 or issue a decision on an application until the expiration of the public comment period on the notice of application.

7. A notice of application is not required for the following actions; provided, the action is either categorically exempt from SEPA or an environmental review of the action in accordance with SEPA has been completed:

a. Building permit;

b. Lot line revision;

c. Right-of-way permit;

d. Storm drainage permit;

Clmt ex. 5
P. 10;

- e. Home occupation permit;
- f. Design review – minor new construction;
- g. Final plat approval;
- h. Shoreline exemption permit;
- i. Critical lands determination; and
- j. Seasonal development limitation waiver.

E. Public Notice.

1. In addition to the notice of application, a public notice is required for ~~all administrative, discretionary, and legislative actions~~ listed in MICC 19.15.010(E).

2. ~~Public notice~~ shall be provided at least 10 days prior to any required open record hearing. If ~~no such hearing is required,~~ public notice shall be provided ~~10 days prior to the decision on the application.~~

3. The ~~public notice~~ shall include the following:

- a. A general description of the proposed project and the action to be taken by the city;
- b. A nonlegal description of the property, vicinity map or sketch;
- c. ~~The time, date and location of any required open record hearing;~~
- d. A contact name and number where additional information may be obtained;
- e. ~~A statement that only those persons who submit written comments or testify at the open record hearing will be parties of record, and only parties of record will~~

Clmt ex. 5
P. 11

~~receive a notice of the decision and have the right to appeal; and~~

~~f. A description of the deadline for submitting public comments.~~

4. Public notice shall be provided in the following manner:

a. Administrative and Discretionary Actions. Notice shall be mailed to all property owners within 300 feet of the property and posted on the site in a location that is visible to the public right-of-way.

b. Legislative Action. Notice shall be published in a newspaper of general circulation within the city.

F. Open Record Hearing.

~~1. Only one open record hearing shall be required prior to action on all discretionary and legislative actions except design review and street vacations.~~

2. Open record hearings shall be conducted in accordance with the hearing body's rules of procedures. In conducting an open record hearing, the hearing body's chair shall, in general, observe the following sequence:

a. Staff presentation, including the submittal of any additional information or correspondence. Members of the hearing body may ask questions of staff.

b. Applicant and/or applicant representative's presentation. Members of the hearing body may ask questions of the applicant.

c. Testimony by the public. Questions directed to the staff, the applicant or members of the hearing body shall be posed by the chairperson at his/her discretion.

d. Rebuttal, response or clarifying statements by the applicant and/or the staff.

Clmt ex. 5
P. 12;

e. The public comment portion of the hearing is closed and the hearing body shall deliberate on the action before it.

3. Following the hearing procedure described above, the hearing body shall:

- a. Approve;
- b. Conditionally approve;
- c. Continue the hearing; or
- d. Deny the application.

G. Decision Criteria. Decisions shall be based on the criteria specified in the Mercer Island City Code for the specific action. A reference to the code sections that set out the criteria and standards for decisions appears in MICC 19.15.010(E). For those actions that do not otherwise have criteria specified in other sections of the code, the following are the required criteria for decision.

1. Comprehensive Plan Amendment.

- a. There exists obvious technical error in the information contained in the comprehensive plan;
- b. The amendment is consistent with the Growth Management Act, the county-wide planning policies, and the other provisions of the comprehensive plan and city policies;
- c. The amendment addresses changing circumstances of the city as a whole;
- d. If the amendment is directed at a specific property, the following additional findings shall be determined:
 - i. The amendment is compatible with the adjacent land use and development pattern;

Clmt ex. 5
P. 13;

ii. The property is suitable for development in conformance with the standards under the potential zoning;

iii. The amendment will benefit the community as a whole and will not adversely affect community facilities or the public health, safety, and general welfare.

2. Reclassification of Property (Rezoning).

a. The proposed reclassification is consistent with the policies and provisions of the Mercer Island comprehensive plan;

b. The proposed reclassification is consistent with the purpose of the Mercer Island development code as set forth in MICC 19.01.010;

c. The proposed reclassification is an extension of an existing zone, or a logical transition between zones;

d. The proposed reclassification does not constitute a "spot" zone;

e. The proposed reclassification is compatible with surrounding zones and land uses; and

f. The proposed reclassification does not adversely affect public health, safety and welfare.

3. Conditional Use Permit.

a. The permit is consistent with the regulations applicable to the zone in which the lot is located;

b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;

Clmt ex. 5
P. 1A;

c. The use is consistent with policies and provisions of the comprehensive plan; and

d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance.

4. Variances.

a. No use variance shall be allowed;

b. There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; the trees, groundcover, or other physical conditions of the lot and its surroundings; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;

c. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated;

d. The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property; and

e. The variance is consistent with the policies and provisions of the comprehensive plan and the development code.

5. Deviation.

a. No use deviation shall be allowed;

b. The granting of the deviation will not be materially detrimental to the public welfare or injurious to the

Clmt ex. 5
P. 15;

property or improvements in the vicinity and zone in which the property is situated;

c. The granting of the deviation will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property; and

d. The deviation is consistent with the policies and provisions of the comprehensive plan and the development code.

H. ~~Notice of Decision~~

1. Unless the city and applicant have mutually agreed in writing to an extension of time, project review shall be completed within 120 days from the date the application is determined to be complete. Time required for the submittal of additional information, preparation of environmental impact statement, and hearing of appeals shall be excluded from this 120-day period.

2. Written notice of the decision shall be provided to the applicant and all ~~parties of record~~. Notice of decision shall also be provided in the biweekly DSG bulletin.

I. Optional Consolidated Permit Processing.

1. An application that involves two or more permits may be processed concurrently and the decision consolidated at the request of the project applicant. If an applicant elects the consolidated permit processing, the code official shall determine the appropriate application and review procedures for the project.

2. If a project requires action from more than one hearing body, the decision authority in the consolidated permit review shall be by the decision body with the broadest discretionary powers.

J. Appeals.

Clmt ex. 5
P. 16;

1. Any party of record on a decision may file a letter of appeal on the decision. Appeals shall be filed with the city clerk within 14 days after the notice of decision or after other notice that the decision has been made and is appealable.

2. Appeals shall include the following information:

a. The decision being appealed;

b. The name and address of the appellant and his/her interest in the matter;

c. The specific reasons why the appellant believes the decision to be wrong. The burden of proof is on the appellant to demonstrate that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by evidence in the record, or that the decision is in conflict with the standards for review of the particular action;

d. The desired outcome or changes to the decision; and

~~e. The appeals fee, if required.~~

3. Authority for appeals is specified in MICC 19.15.010(E).

4. Public notice of an appeal shall be provided in the manner specified in subsection E of this section.

5. The rules of procedure for appeal hearings shall be as follows:

a. For development proposals that have been subject to an open record hearing, the appeal hearing shall be a closed record appeal, based on the record before the decision body, and no new evidence may be presented.

b. For development proposals that have not been subject to an open record hearing, the appeal hearing shall be an

Clmt ex. 5
P. 17;

~~open record appeal and new information~~ may be presented.

c. The total time allowed for oral argument on the appeal shall be equal for the appellants and the applicant (if not the appellants). ~~If there are multiple parties on either side,~~ they may allocate their time between themselves or designate a single spokesperson to represent the side. All testimony shall be given under oath.

d. If the hearing body finds that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by material and substantial evidence in view of the entire record, or the decision is in conflict with the city's applicable decision criteria, it may:

- i. Reverse the decision.
- ii. Modify the decision and approve it as modified.
- iii. Remand the decision back to the decision maker for further consideration.

e. If the hearing body finds that none of the procedural or factual bases listed above exist and that there has been no substantial error, the hearing body may adopt the findings and/or conclusions of the decision body, concur with the decision of the decision body and approve the development proposal as originally approved, with or without modifications.

f. Final decision on the appeal shall be made within 30 days from the last day of the appeal hearing.

g. The city's final decision on a development proposal ~~may be appealed by a party of record with standing to file~~ a land use petition in King County superior court. Such petition must be filed within 21 days of the issuance of the decision.

Clmt ex. 5
P. 18 ; _____

K. Expiration of Approvals. Except for building permits or unless otherwise conditioned in the approval process, permits shall expire one year from the date of notice of decision if the activity approved by the permit is not exercised. Responsibility for knowledge of the expiration date shall be with the applicant.

L. Code Interpretations. Upon request or as determined necessary, the code official shall interpret the meaning or application of provisions of the development code. The code official may also bring any issue of interpretation before the planning commission for determination. Anyone in disagreement with an interpretation by the code official may also request a review of the code official's interpretation by the planning commission. (Ord. 10C-06 § 6; Ord. 08C-01 § 8; Ord. 02C-04 § 7; Ord. 02C-01 § 6; Ord. 99C-13 § 1).

19.15.030 Enforcement.

A. Violations.

1. It is a violation of the development code, MICC Title 19, for any person to initiate or maintain or cause to be initiated or maintained the use of any structure, land or real property within the city of Mercer Island without first obtaining proper permits or authorizations required for the use by the development code.

2. It is a violation of the development code for any person to use, construct, locate, demolish or cause to be used, constructed, located, or demolished any structure, land or property within the city of Mercer Island in any manner that is not permitted by the terms of any permit or authorization issued pursuant to the development code or previous codes.

3. It is a violation of the development code to misrepresent any material fact in any application, plans or other information submitted to obtain any land use authorization.

4. It is a violation of the development code for anyone to fail to comply with the requirements of the development code, as set out in the specific sections of the code.

Clmt ex. 5
P. 19;

**Chapter 19.16
DEFINITIONS**

Sections:

19.16.010 Definitions.

19.16.010 Definitions.

Words used in the singular include the plural and the plural the singular.

A

Accessory Buildings: A separate building or a portion of the main building, the use of which is related to and supports that of the main building on the same lot.

1. **Attached Accessory Building:** An accessory building that shares a portion of one of its walls with the main building, is separated from the main building by less than five feet, or is attached to the main building by a structure other than a fence.

2. **Detached Accessory Building:** An accessory building that does not share a portion of any of its walls with the main building and is separated from the main building by more than five feet and is not attached to the main building by a structure other than a fence or a pedestrian walkway.

Accessory Dwelling Unit (ADU): A habitable dwelling unit added to, created within, or detached from a single-family dwelling that provides basic requirements for living, sleeping, eating, cooking and sanitation.

Accessory Use: A use customarily incidental and accessory to the principal use of a site or a building or other structure located upon the same lot.

Adult Entertainment: An adult retail establishment or adult theater. "Adult entertainment" shall not be considered to be included under any other permitted use in this code as either a primary or accessory use, and is not permitted in any zone unless specifically stated. For purposes of adult entertainment, the following definitions apply:

1. **Adult Retail:** An establishment in which 10 percent or more of the stock in trade consists of merchandise distinguished or characterized by a predominant emphasis on the depiction, description, simulation or relation to specified sexual activities or specified anatomical areas.

2. **Adult Theater:** A facility used for presenting for commercial purposes motion picture films, video cassettes, cable television, live entertainment or any other such material, performance or activity, distinguished or characterized by a predominant emphasis on depiction, description, simulation or relation to specified sexual activities or specified anatomical areas for observation by patrons therein. Structures housing panoramas, peep shows, entertainment studios or topless or nude dancing are included in this definition.

Clmt ex. 6
P. 1;

3. Merchandise: Shall include, but is not limited to, the following: books, magazines, posters, cards, pictures, periodicals or other printed material; prerecorded video tapes, discs, film, or other such medium; instruments, devices, equipment, paraphernalia, or other such products.
4. Panorams or Peep Shows: Any device which, upon insertion of a coin or token or by any other means, exhibits or displays a picture; an image from a film, video cassette, video disc, or any other medium; or provides a view of a live performance.
5. Specified Anatomical Areas:
 - a. Less than completely and/or opaquely covered human genitals, pubic region, buttock, or female breast below the top of the areola.
 - b. Human male genitals in a discernibly turgid state, even if completely or opaquely covered.
6. Specified Sexual Activities:
 - a. Human genitals in a state of sexual stimulation, and/or
 - b. Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex or between humans and animals, and/or
 - c. Acts of human masturbation, sadism or torture in the context of sexual relationship, and/or sadomasochistic abuse in the context of sexual relationship, and/or
 - d. Fondling or other erotic touching of human genitals, pubic region, buttocks or the female breast.
7. Stock in Trade: Shall mean either:
 - a. The dollar value of all merchandise readily available for purchase, rental, viewing, or use by patrons of the establishment excluding material located in any storeroom or other portion of the premises not regularly open to patrons; or
 - b. The total volume of shelf space and display area in those portions of the establishment open to patrons.

Adult Family Home: As defined and regulated by Chapter 70.128 RCW, an adult family home is the regular family abode of a person or persons who are providing personal care, special care, and room and board to more than one but not more than six adults who are not related by blood or marriage to the person or persons providing the services.

Affordable Housing Unit:

1. Owner Affordable Housing Unit: An owner-occupied dwelling unit affordable to households with household income not exceeding 90 percent of the King County median income, adjusted for household size.

Clmt ex. 6
P. 2 ; _____

2. Rental Affordable Housing Unit: A renter-occupied dwelling unit affordable to households whose income does not exceed 60 percent of the King County median income, adjusted for household size.

3. King County Median Income: The median yearly income for the average sized family in the Seattle Metropolitan Statistical Area as published by the United States Department of Housing and Urban Development from time to time. In the event such income determination is no longer published, or has not been updated for a period of at least 18 months, the city may use or develop such other reasonable method as it may choose in order to determine the income for families in King County at the median yearly income for King County.

Alteration: Any human-induced action which adversely impacts the existing condition of the area, including grading, filling, dredging, draining, channeling and paving (including construction and application of gravel). "Alteration" does not include walking, passive recreation, fishing, or similar activities.

Antenna: An apparatus, outside of or attached to the exterior of a structure, together with any supporting structure for sending or receiving electromagnetic waves. "Antenna" includes, but is not limited to, a dish antenna, wire or whip antenna, and microwave transmitting antenna. This definition does not include an antenna mounted on a licensed vehicle; provided, the antenna is a type commonly mounted on a licensed vehicle for the purposes of mobile communication or radio reception within the vehicle (such as AM/FM radio, citizens band radio, two-way radio or cellular telephone).

Appeal, Closed Record: An administrative appeal to the city council following an open record hearing on a project application. Evidence for the appeal is limited to the record of the open record hearing. (See also "Open Record Hearing").

Appeal, Open Record: An administrative appeal to the planning commission or city council when there has not been an open record hearing on a project application. New evidence or information is allowed to be submitted in review of the decision (See also "Open Record Hearing").

Appurtenance:

1. Single-Family Residential: A structure which is necessarily connected to the use and enjoyment of a single-family dwelling. An appurtenance includes but is not limited to antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces, garages, decks, driveways, utilities, fences, swimming pools, hot tubs, landscaping, irrigation, grading outside the building footprint which does not exceed 250 cubic yards and other similar minor construction.

2. Town Center and Multifamily Zones: A subordinate element added to a structure which is necessarily connected to its use and is not intended for human habitation or for any commercial purpose, other than the mechanical needs of the building, such as areas for mechanical and elevator equipment, chimneys, antennas, communication facilities, smoke and ventilation stacks.

Clmt ex. 6
P. 3 ; _____

Assisted Living Facilities: Residences for the frail, sick or elderly, excluding special needs group housing, that provide rooms, meals, personal care and supervision of self-administered medication. Other services, such as recreational activities and transportation, may also be provided.

Average Building Elevation: The reference point on the surface topography of a lot from which building height is measured. Elevation established by averaging the elevation at existing grade. The elevation points to be averaged shall be located at the center of all exterior walls of the completed building; provided:

1. Roof overhangs and eaves, chimneys and fireplaces, unenclosed projecting wall elements (columns and fin walls), unenclosed and unroofed stairs, and porches, decks and terraces may project outside exterior walls and are not to be considered as walls.
2. If the building is circular in shape, four points, 90 degrees apart, at the exterior walls, shall be used to calculate the average building elevation.
3. For Properties within the Town Center: If a new sidewalk is to be installed as the result of a new development, the midpoint elevation for those walls adjacent to the new sidewalk shall be measured from the new sidewalk elevation, rather than existing grade prior to development activity. The city engineer shall determine the final elevation of the sidewalk.

Formula:

Average Building Elevation = (Mid-point Elevation of Individual Wall Segment) x (Length of Individual Wall Segment) ÷ (Total Length of Wall Segments)

B

Bar: A premises used primarily for the sale or dispensing of liquor by the drink for on-site consumption and where food may be available for consumption on the premises as accessory to the principal use.

Bed and Breakfast: A single-family dwelling in which public lodging and meals may be provided to guests for periods of 30 days or less.

Best Available Science: Current scientific information based upon scientifically valid methods used to analyze critical areas, as defined by WAC 375-195-900 through 375-195-925, as amended.

Best Construction Practices: Methods, techniques and/or procedures developed by the city arborist to protect trees being retained during construction work from damage.

Best Management Practices: The practices that use the best available technologies or techniques, to prevent or minimize the degradation of any critical area or its buffer.

Binding Site Plan: A method of dividing land that sets out specifications for a number of aspects of development on the site, including streets, building envelopes, improvements, utilities, parking, and open spaces. The requirements of a binding site plan are enforceable against any person acquiring an interest in any lot or parcel created pursuant to the plan.

Clmt ex. 6
P. 4;

Boat Ramp: An inclined structure upon which a watercraft is raised or pulled onto land or a dock.

Breakwater: A protective structure usually built offshore for the purpose of protecting the shoreline or harbor areas from wave action.

Buffer: A designated area adjoining a critical area intended to protect the critical area from degradation.

Building: A structure having a roof, but excluding trailers, mobile homes, and all other forms of vehicles even though immobilized. Where this code requires, or where special authority granted pursuant to this code requires that a use shall be entirely enclosed within a building, this definition shall be qualified by adding "and enclosed on all sides."

Building Footprint: That portion of the lot that is covered by building(s).

Building Height: The vertical distance measured from the average building elevation to the highest point of the roof structure excluding appurtenances. A mezzanine need not be counted as a story for determining the allowable number of stories when constructed in accordance with the requirements of the construction codes set forth in MICC Title 17.

Building Pad: That portion of a lot on which a building may be located based on criteria set forth under the development code.

Bulkhead: A solid or open pile of rock, concrete, steel, timber or other materials erected parallel to, and normally erected at, the ordinary high water line for the purpose of protecting adjacent property from waves or currents.

C

Capital Improvement: Any development by the city upon property owned by or under the control of the city.

Care Services: The provision of rooms, meals, personal care and health monitoring assistance other than in special needs group housing. Other support may be provided as an adjunct to the provision of care services, including recreation, social, counseling, transportation and financial services.

Examples include daycare services, nursing homes, assisted living facilities and retirement homes.

Carport: A covered parking area or an accessory portion of the main building, entirely open on two or more sides, which is used for parking or storage of private vehicles, trailers and boats, by the occupants of the primary building.

Catastrophic Loss: A loss which occurs as a result of accidental fire, storm, earthquake or any other natural disaster, or an act of vandalism, terrorism or war.

City: The city of Mercer Island, Washington.

City Arborist: The person designated by the code official to administer the provisions of Chapter 19.10 MICC.

Clmt ex. 6
P. 5;

City Department: Any division, subdivision or organizational unit of the city established by ordinance, rule or order.

City Street: "City street" means and includes the right-of-way of every principal arterial, secondary arterial, collector arterial or local street or portion thereof, which has been improved for and is used for vehicular travel within the city limits.

Civic and Social Organizations: Organizations primarily engaged in promoting the civic and social interests of their members. Illustrative examples include alumni associations, fraternal lodges, granges, and social clubs. Such organizations may operate bars and restaurants for their members if such uses are otherwise allowed within the zone.

Clearing: The act of destroying or removing trees or groundcover from any undeveloped or partially developed lot, public lands, or public right-of-way. Clearing may only occur on these lots with approval by the city.

Code Official: The director of the development services group for the city of Mercer Island or a duly authorized designee.

Commercial Zone: Any area located within a Town Center, business, planned business or multifamily zone, or any area located on property in a single-family zone containing a nonresidential use.

Conditional Use: A use listed among those permitted in any given zone but authorized only after a conditional use permit has been granted.

Condominium: A multiple-family dwelling, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real property is not a condominium unless the undivided interests in the common elements are vested in the dwelling unit owners, and unless a declaration and a survey map and plans have been recorded.

Conifer Trees: Trees that are called evergreen, stay green all year, have needles or scales for leaves, and produce seeds in protective cones. This includes a few rare conifer trees that lose their needles in the fall such as: Tamarack or Larch, *Larix sp.*, Dawn Redwood, *Metasequoia glyptostroboides*, or Bald Cypress, *Taxodium distichum*.

Construction Costs: Construction costs shall mean all costs included in the average price per square foot of a building as set forth in the current Mercer Island Building Valuation Data Table on file with the code official.

Construction Work: Any construction or reconstruction creating more than 500 square feet of new impervious surface. Trees are considered cut as a result of construction work if done during the construction work, two years prior to commencement of the work or two years following completion of the work. For these purposes, commencement of the work shall be the date the initial permit for the work is issued by the city, and completion of the work shall be the date the city final a building permit.

Clmt ex. 6
P. 6;

Covered Moorage: A pier, dock, boatlift, series of piles, or other structure intended for moorage over which a roof or canopy is erected.

Critical Area Determination: An administrative action by the code official pursuant to MICC 19.15.010 (E) to allow reduction or averaging of a wetland or watercourse buffer, or alteration of a steep slope.

Critical Area Study: A study prepared by a qualified professional on existing conditions, potential impacts and mitigation measures for a critical area, consistent with MICC 19.07.050.

Critical Areas: Geologic hazard areas, watercourses, wetlands and wildlife habitat conservation areas.

Critical Tree Area: An area on a lot where trees are provided certain protections that contains any of the following:

1. A geologic hazard area;
2. A watercourse or its buffer;
3. Wetlands or their buffer; or
4. Protected slope area.

Crown: The leaves and branches of a tree from the lowest branch on the trunk to the top.

Crown Cleaning: The removal of dead, dying, diseased, crowded, weakly attached, low-vigor branches, and watersprouts from a tree's crown.

Crown Raising: The removal of the lower branches of a tree in order to provide a height of up to eight feet for pedestrian clearance, up to 14 feet for equestrian clearance and up to 16 feet for vehicular clearance or such other increased height as deemed appropriate for clearance by the city arborist.

Crown Thinning: The selective removal of branches not to exceed more than 25 percent of the leaf surface to increase light penetration and air movement, and to reduce weight.

Crown Topping: The removal of the upper portion of the crown of a tree by cutting back young shoots to a bud or older branches or trunk to a stub or lateral branch not sufficiently large enough to assume the terminal role.

Cut or Cutting: The intentional cutting of a tree to the ground (excluding acts of nature), any practice or act which is likely to result in the death of or significant damage to the tree or any other removal of a part of a tree that does not qualify as pruning.

D

Day Care: A business that provides personal care, education and/or supervision of minor children age 12 or under for a fee or other consideration for periods lasting less than 24 hours.

Development:

Clmt ex. 6
P. 7 ; _____

1. A piece of land that contains buildings, structures, and other modifications to the natural environment; or
2. The alteration of the natural environment through:
 - a. The construction or exterior alteration of any building or structure, whether above or below ground or water, and any grading, filling, dredging, draining, channelizing, cutting, topping, or excavation associated with such construction or modification.
 - b. The placing of permanent or temporary obstructions that interfere with the normal public use of the waters and lands subject to this code.
 - c. The division of land into two or more parcels, and the adjustment of property lines between parcels.

Deviation: A minor modification of standard development code provisions that does not require the special circumstances necessary for granting a variance and which complies with the city's deviation criteria.

Diameter: The circumference of a tree divided by pi (3.14) and measured at a point four and one-half feet above the ground.

Dish Antenna: A parabolic antenna greater than 24 inches in diameter intended to send or receive signals to or from orbiting satellites or other communications systems.

Ditch: A long, narrow, human-built excavation that conveys storm water or irrigation water that is not identified by the state of Washington as a classified or unclassified stream.

Dwelling:

1. Dwelling Unit: A part of a multiple-family dwelling containing only one kitchen, that houses not more than one family, plus any live-in household employees of such family (see also "Accessory Dwelling Unit (ADU)").
2. Multiple-Family Dwelling: A building, other than a single-family dwelling with an accessory dwelling unit, containing two or more dwelling units.
3. Single-Family Dwelling: A building designed and/or used to house not more than one family, plus any live-in household employees of such family.
4. Single-Family Dwelling – Detached: A single-family dwelling that is not attached to any other structure by any means and is surrounded by open space or yards.
5. Single-Family Dwelling – Semi-Detached: A single-family dwelling that is attached to another dwelling unit by a common vertical wall, with each dwelling unit located on a separate lot.

E

Clmt ex. b
P. 8 :

Easement: A grant of one or more of the property rights or privileges by the property owner to and/or for use or protection of a portion of land, by the public, a corporation or another person or entity, that runs with the land.

Enhancement or Enhance: Actions performed to increase the functions of critical areas.

Erosion Hazard Areas: Those areas greater than 15 percent slope and subject to a severe risk of erosion due to wind, rain, water, slope and other natural agents including those soil types and/or areas identified by the U.S. Department of Agriculture's Natural Resources Conservation Service as having a "severe" or "very severe" rill and inter-rill erosion hazard.

Existing Grade: The surface level at any point on the lot prior to alteration of the ground surface.

F

Facade: Any exterior wall of a structure, including projections from and attachments to the wall. Projections and attachments include balconies, decks, porches, chimneys, unenclosed corridors and similar projections.

Fair Market Value: The expected price at which a development can be sold to a willing buyer. For developments which involve nonstructural operations such as dredging, drilling, dumping, or filling, the fair market value is the expected cost of hiring a contractor to perform the operation or where no such value can be calculated, the total of labor, equipment use, transportation and other costs incurred for the duration of the permitted project (WAC 173-27-030(8)).

Family: One or more persons (but not more than six unrelated persons) living together in a single housekeeping unit. For purposes of this definition, persons with familial status and persons with handicaps within the meaning of the Fair Housing Amendments Act (FHAA), 42 U.S.C. Sections 3602 (h) and (k) will not be counted as unrelated persons. The limitation on the number of unrelated residents set forth in this definition shall not prohibit the city from making reasonable accommodations, as required by the FHAA, 42 U.S.C. Section 3604(f)(3)(B) and as provided in MICC 19.01.030. The term "family" shall exclude unrelated persons who are not also handicapped or have familial status within the meaning of the FHAA who live together in social service transitional housing or special needs group housing.

Fence: A barrier composed of posts or piers connected by boards, rails, panels or wire, or a masonry wall.

Fill: The placement of earth material by artificial means.

Financial and Insurance Services: Establishments primarily engaged in financial transactions and/or in facilitating financial transactions. Examples include banks, credit unions, stock brokers, and insurance underwriters.

Finger Pier: An extension from a dock used to create moorage slips.

Fish Use or Used by Fish: Those areas within a watercourse where live fish normally exist for spawning rearing and/or migration. "Fish use" may be presumed to occur in those reaches of watercourses that have year round flow, are accessible from Lake Washington to juvenile salmonid

Clmt ex. 6
P. 9;

fish and have an average bed slope of less than 12 percent. "Fish use" shall not be presumed for (1) intermittent or seasonal reaches; (2) for reaches with an average bed slope of 12 percent or greater; (3) for reaches upstream from road culverts with a bottom slope of 10 percent or greater; or (4) reaches with greater than a 12-inch drop from the downstream invert of the culvert to the downstream pool elevation at ordinary high water. If the uppermost point of fish use cannot be identified with simple, nontechnical observations, then the upper extent of fish use should be determined using the best professional judgment of a qualified professional after considering actual conditions and the physical abilities and capabilities of juvenile salmonid fish.

Floating Platform: A flat structure or device moored or anchored, not permanently secured by piles, which floats upon the water.

Foster Family Home: A person or persons providing state-licensed foster care on a 24-hour-a-day basis to one or more, but not more than four, children, expectant mothers, or developmentally disabled persons in the family abode of the person or persons under whose direct care and supervision the child, expectant mother or developmentally disabled person is placed.

Foster Family Home, Large: At least two persons providing state-licensed foster care on a 24-hour-a-day basis to five or six children, expectant mothers or developmentally disabled persons in the family abode of the persons under whose direct care and supervision the child, expectant mother or developmentally disabled person is placed.

G

Garage: An accessory building or an accessory portion of the main building designed and/or used customarily for parking or storage of vehicles, trailers, and boats by the occupants of the main building, which does not meet the definition of a carport.

Geologic Hazard Areas: Areas susceptible to erosion, sliding, earthquake, or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or alterations, including landslide hazard areas, erosion hazard areas and seismic hazard areas.

Geotechnical Professional: A practicing, geotechnical/civil engineer licensed as a professional civil engineer with the state of Washington, or a licensed engineering geologist with sufficient relevant training and experience as approved by the city.

Government Services: Services provided by the city, King County, the state of Washington, or the federal government including, but not limited to, fire protection, police and public safety activities, courts, administrative offices, and equipment maintenance facilities.

Groin: A structure used to interrupt sediment movement along the shore.

Gross Floor Area: The total square footage of floor area bounded by the exterior faces of the building.

1. The gross floor area of a single-family dwelling shall include:

a. The main building, including but not limited to attached accessory buildings.

Clmt ex. 6
P. 10;

b. All garages and covered parking areas, and detached accessory buildings with a gross floor area over 120 square feet.

c. That portion of a basement which projects above existing grade as defined and calculated in Appendix B of this development code.

2. In the Town Center, gross floor area is the area included within the surrounding exterior finish wall surface of a building, excluding courtyards and parking surfaces.

Groundcover: Small plants such as salal, ferns, mosses, grasses or other types of vegetation which normally cover the ground and includes trees less than four inches in diameter measured at 24 inches above the ground level.

H

Handicaps, Persons With:

1. A person who has a physical or mental impairment which substantially limits one or more of such person's major life activities; or
2. A person with a record of having such an impairment; or
3. A person who is regarded as having such an impairment, but the term impairment does not include current, illegal use of or active addiction to a controlled substance.

Hazardous Tree: Any tree that receives an 11 or 12 rating under the International Society of Arboricultural rating method set forth in Hazard Tree Analysis for Urban Areas (copies of this manual are available from the city arborist) and may also mean any tree that receives a 9 or 10 rating, at the discretion of the city arborist.

Hazardous Waste: Those solid wastes designated by 40 CFR Part 261 and regulated by the State Dangerous Waste Regulations, Chapter 173-303 WAC.

1. Hazardous Waste Storage: The holding of hazardous waste for a temporary period.
2. Hazardous Waste Treatment: The physical, chemical or biological processing of hazardous waste to make such waste nondangerous or less dangerous, safer for transport, amenable for energy or material resource recovery, amenable for storage, or reduced in volume.

Healthcare Services: Establishments providing outpatient health care services directly or indirectly to ambulatory patients. Examples include offices for doctors, dentists, optometrists, and mental health professionals. This use does not include medical and diagnostic laboratories.

Hotel/Motel: A facility offering temporary accommodations for a fee to the general public and which may provide additional services such as restaurants, meeting rooms, entertainment, and recreational facilities.

Hydric Soils: Soil that is wet long enough to periodically produce reduced oxygen conditions, thereby influencing the growth of plants.

City ex. 6
P. 11;

I

Impervious Surfaces: Includes without limitation the following:

1. Buildings – the footprint of the building and structures including all eaves;
2. Vehicular use – driveways, streets, parking areas and other areas, whether constructed of gravel, pavers, pavement, concrete or other material, that can reasonably allow vehicular travel;
3. Sidewalks – paved pedestrian walkways, sidewalks and bike paths;
4. Recreation facilities – decks, patios, porches, tennis courts, sport courts, pools, hot tubs, and other similar recreational facilities;
5. Miscellaneous – any other structure or hard surface which either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development, or causes water to run off the surface in greater quantities or at an increased rate of flow from present flow rate under natural conditions prior to development.

J

Jetty: A barrier used to protect areas from accumulations of excess sediment.

K

Kennel:

1. Any lot on which six or more dogs, cats, or other small animals over the age of four months are kept for any reason; or
2. Any lot on which any number of dogs, cats, or other small animals over the age of four months are kept for sale, are bred to produce off-spring for sale, or are boarded for a fee or other consideration.

Kitchen: Any room used, intended, or designed for cooking and/or preparation of food.

L

Landmark Grove: A healthy grove of trees satisfying one or more of the following criteria and having been designated as a landmark grove under MICC 19.10.140:

1. The grove is relatively mature and is of a rare or unusual nature containing trees that are distinctive either due to size, shape, species, age or exceptional beauty;
2. The grove is distinctive due to a functional or aesthetic relationship to a natural resource, such as trees located along a ridge line; or
3. The grove has a documented association with a historical figure, property or significant historical event.

Clmt ex. 6
P. 12 ; _____

Landmark Tree: Any healthy tree satisfying one or more of the following criteria and having been designated as a landmark tree under MICC 19.10.140:

1. The tree has a diameter of 36 inches or greater;
2. The tree has a distinctive size, shape or location, or is of a distinctive species or age;
3. The tree possesses exceptional beauty;
4. The tree is distinctive due to a functional or aesthetic relationship to a natural resource, such as trees located along a ridge line; or
5. The tree has a documented association with a historical figure, property or significant historical event.

Landslide Hazard Areas: Those areas 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
5. Steep Slope. Any slope of 40 percent or greater calculated by measuring the vertical rise over any 30-foot horizontal run.

Landward: Any point located inland from the ordinary high water mark.

Large (Regulated) Tree: Any conifer tree that is six feet tall or more or any deciduous tree with a diameter of more than six inches.

Lateral Line: The extension waterward of a property line into Lake Washington beyond the ordinary high water mark. How property lines extend waterward from the ordinary high water mark is an area of misconception. If the title does not clearly state the location of the property lines waterward from the ordinary high water mark, waterfront owners are not allowed to unilaterally project the upland boundaries out into the shorelands (waterward). There are no statutes defining the direction of the lateral lines waterward from the ordinary high water mark. The Supreme Court has the final word to decide location of lateral line on case-by-case basis.

Clmt ex. 6
P. 13;

Lift Station (Boat Hoist): A structure or device normally attached to a dock or pier used to raise a watercraft above the waterline for secure moorage purposes.

Lot: A designated parcel, tract or area of land established by plat, subdivision, or as otherwise permitted by law to be used, developed or built upon as a unit.

1. Corner Lot: A lot located at the junction of and abutting two or more intersecting streets.
2. Upland Lot: A lot having no frontage on Lake Washington.
3. Waterfront Lot: A lot having frontage on Lake Washington.

Lot, Conforming: A lot that conforms with the applicable zoning ordinance standards as to size, width, depth and other dimensional regulations.

Lot Depth: For lots with exactly one front lot line, one rear lot line, and two side lot lines, lot depth is the distance as measured from the midpoint of the front property line to the midpoint of the rear property line. For all other lots, lot depth is determined by the mean average distance measured from the front lot line to the rear lot line. To calculate mean average distance, draw lines perpendicular to the front property line at two-foot intervals. The lengths of the perpendicular lines, which extend through the building pad to the rear lot line, shall be added together and the sum of the lengths shall be divided by the total number of perpendicular lines.

Lot Line Revisions: An adjustment of boundary lines between existing lots that does not create any additional lots and which does not reduce the area of any existing lot to the point that it fails to meet minimum development code requirements for area and dimensions.

Lot, Nonconforming: See Nonconforming Lot.

Lot Width: For lots with exactly one front lot line, one rear lot line, and two side lot lines, lot width is the distance between the two midpoints of side lot lines. For all other lots, lot width is determined by a lot width circle within the boundaries of the lot; provided, that no access easements are included within the lot width circle.

Lots, Contiguous: Contiguous lots are two or more lots that share a common property line; provided, the existence of a public or private roadway, utility and/or similar easement shall not be deemed to divide or make land noncontiguous if land on both sides of such roadway, utility and/or similar easement is commonly owned or controlled.

M

Major New Construction: Construction from bare ground or an enlargement or alteration that changes the exterior of an existing structure that costs in excess of 50 percent of the structure's assessed value. Single-family development is excluded from this definition.

Major Site Feature: The public development amenities listed in MICC 19.11.060 that an applicant of major new construction in the Town Center must provide in order to be allowed building height over the base building height of two stories.

Clmt ex. 6
P. 14;

Manufacturing: An establishment engaged in the mechanical or chemical transformation of materials or substances into new products. Uses which create or involve the production of hazardous materials or objectionable noise, odor, dust, smoke, cinders, gas fumes, noise, vibration, refuse or water-carried waste are not allowed. Manufacturing uses are limited to 10,000 square feet or less of gross floor area.

Marina: A commercial basin providing rental or sale of docks, watercraft, moorage, and/or supplies. Casual single-family renting of moorage is excluded from this definition.

Master Site Plan: The comprehensive, long range plan intended to guide the growth and development on a parcel of land that shows the existing and proposed conditions on the site including topography, vegetation, drainage, flood plains, wetlands, waterways, landscaping, open spaces, walkways, means of ingress and egress, circulation, utilities, structures and buildings, and any other information reasonably necessary for the design commission to make an informed decision about development of the site.

Mean Low Water: The level of Lake Washington during the fall and winter when the water level is lowered to minimize winter storm damage to lakeside properties. Mean low water is one and one-half feet lower than ordinary high water.

Minor Exterior Modification: Any exterior modification to an existing development or site that does not constitute major new construction.

Minor Modification to Site Plan: Modification of lot lines which does not violate any development or design standards, or increase the intensity or density of uses; reconfiguration of parking lots or landscape areas which does not reduce the required amount of parking or landscaping or negatively impact the screening from adjacent residential property; change in tree and landscape plant material that is less than four-inch caliber in size; modifications of the building envelope which do not increase the building footprint or which constitute minor exterior modification; relocation of fire lanes or utility lines.

Minor Site Feature: The public development amenities listed in MICC 19.11.060 that an applicant of major new construction in the Town Center must include regardless of the building's height.

Mitigation or mitigate: The use of any or all of the following actions in a critical area:

1. Avoiding the impact by not taking a certain action;
2. Minimizing the impact by limiting the degree or magnitude of the action and its implementation by using appropriate technology or by taking affirmative steps to avoid or reduce the impact;
3. Rectifying the impact by repairing, rehabilitating or restoring the affected critical area;
4. Minimizing or eliminating the impact over time by preservation or maintenance operations;
5. Compensating for the impact by replacing, enhancing or providing substitute critical areas; or
6. Monitoring the impact and taking appropriate corrective measures including any combination of the measures listed in subsections (1) through (5) of this definition.

Clmt ex. 6
P. 15;

Mixed Use: Development with a variety of complementary and integrated uses, such as, but not limited to, residential, office, retail, public, or recreation.

Monitoring: Evaluating the impacts of alterations to critical areas and assessing the performance of required mitigation measures through the collection and analysis of data.

Moorage Facility: Any device or structure used to secure a boat or a vessel, including piers, docks, piles, lift stations or buoys.

Mortuary Services: The preparation of the dead for burial or interment including conducting funerals, transporting the dead, and selling caskets and related merchandise.

Museums and Art Exhibitions: The exhibition of objects of historical, cultural, and/or educational value that are not offered for sale.

N

Native Growth Protective Easement (NGPE): An easement granted to the city for the protection of native vegetation within a critical area or buffer.

Native vegetation: Vegetation comprised of plant species which are indigenous to the Puget Sound region and which reasonably could have been expected to naturally occur on the site. Native vegetation does not include noxious weeds.

No Net Loss: An ecological concept whereby conservation losses in one geographic or otherwise defined area are equaled by conservation gains in function in another area.

Nonconforming Lot: A lot that has less than the minimum area, width and depth required by the current code for the zone in which the lot is located.

Nonconforming Site, Legal: A developed building site that lawfully existed prior to September 26, 1960, or conformed to the applicable code requirements that were in effect regarding site development at the time it was developed but no longer conforms to the current regulations of the zone in which it is situated due to subsequent changes in code requirements.

Nonconforming Structure, Legal: A structure that lawfully existed prior to September 26, 1960, or conformed to the applicable code requirements in effect at the time it was constructed but no longer conforms to the current regulations of the zone in which it is situated due to subsequent changes in code requirements.

Nonconforming Use, Legal. The use of a structure, site or of land that lawfully existed prior to September 26, 1960, or conformed to the applicable code requirements in effect at the time it was commenced but no longer conforms to the current regulations of the zone in which it is situated due to subsequent changes in code requirements.

Noxious weed: Any plant which when established is highly destructive, competitive, or difficult to control by cultural or chemical practices (see Chapter 5.10 RCW). The state noxious weed list in Chapter 16-750 WAC, as compiled by the State Noxious Weed Control Board, is the officially adopted list of noxious weeds for the city.

Cmnt ex. 6
P. 16: _____

Nursing Home: An establishment as defined, regulated and licensed by Chapter 18.51 RCW that provides care to persons who through illness or infirmity are not capable of caring for themselves.

O

Office Uses: The use of a room or group of rooms for conducting the affairs of a business, profession, service, or government and generally furnished with desks, tables, files and communication equipment.

Open Record Hearing: A hearing conducted by the authorized body that creates the city's record through testimony and submission of evidence and information, under procedures prescribed by city ordinance and/or adopted by the hearing body.

Ordinary High Water (OHW): The point on the shore that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter in accordance with permits issued by a local government or the department.

Ordinary Repairs and Maintenance: An activity in response to the effects of aging or ordinary use, wear and tear that restores the character, scope, size, footprint or design of a serviceable area, structure, or land use to its previously existing, authorized or undamaged condition; however, this is not intended to allow total replacement, substitution or reconstruction of a nonconforming structure. Activities that change the character, size, footprint or scope of a project beyond the original shall not be considered ordinary repairs and maintenance and shall result in loss of nonconforming status.

P

Parking: A public or private area, under, within or outside a building or structure, designed and used for parking motor vehicles including parking lots, garages, and driveways. For the purposes of this definition only:

1. "Parking structure" shall mean a building or structure consisting of more than one level and used for the temporary parking and storage of motor vehicles.
2. "Underground parking" shall mean the location of that portion of the parking structure located below the existing grade of the ground abutting the structure.

Patio Home: A single-family dwelling on a separate parcel with open spaces on three sides and with a court.

Pavers: A paver or pavement that allows rain and/or surface water runoff to pass through it and reduce runoff from a site and surrounding areas. Pavers include porous pavement, porous pavers, and permeable interlocking concrete pavement as described in the Washington State Department of Ecology Stormwater Management Manual, as now exists or hereafter amended.

Pedestrian-Oriented Uses: Uses that stimulate pedestrian activity along the sidewalk frontage of a building. Uses include, but are not limited to, small scale retail, restaurants and theaters.

Clmt ex. 6
P. 17

Pedestrian Walkway: A walkway used exclusively for pedestrian trafficway, which may be covered or enclosed.

Person: An individual, partnership, corporation, or association.

Personal Services: A business that provides services relating to personal grooming and health. Uses include barber shops, hair stylists, spas, fitness centers and nail salons.

Pile: A timber or section of concrete placed into the ground to serve as a support or moorage.

Places of Worship: A church, synagogue, mosque, or other institution that people regularly attend to participate in or hold religious services, meetings, or other religious activities.

Premises: A piece of land with or without improvements, including but not limited to a building, room, enclosure, vehicle, vessel or other place thereon.

Private Property: Any property other than public property.

Professional, Scientific, and Technical Services: Establishments that specialize in performing professional, scientific, and technical activities for others. These activities require a high degree of expertise and training and include legal services; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; research services; real estate sales services; advertising services; photographic services; translation and interpretation services; veterinary services; and other professional, scientific, and technical services.

Protected Slope Area: Any area within a 40-foot radius of the base of the subject tree if there is any point within that area that is at least 12 feet higher or lower than the base of the tree.

Prune or Pruning: The pruning of a tree through crown thinning, crown cleaning, windowing or crown raising but not including crown topping of trees or any other practice or act which is likely to result in the death of or significant damage to the tree.

Public Access: A means of physical approach to and along the shoreline, or other area, available to the general public. Public access may also include visual approach.

Public Facility: A building, structure, or complex used by the general public. Examples include but are not limited to assembly halls, schools, libraries, theaters and meeting places.

Public Meeting: A meeting, hearing workshop, or other public gathering of people to obtain comments from the public on a proposed project permit prior to the city's decision. A public meeting does not include an open record hearing.

Public Property: Any property under direct ownership or control of the city of Mercer Island. This includes, but is not limited to, parks, green belts, open spaces, rights-of-way, and ground around public buildings but excludes Interstate 90 and any property owned by the state of Washington.

Public Tree: Any tree located on public property.

Clmt ex. 6
P. 18 ; _____

Q

Qualified professional: A person who performs studies, field investigations, and plans on critical areas and has an educational background and/or relevant experience in the field, as determined by the code official.

R

Reasonable Use: A legal concept that has been and will be articulated by federal and state courts in regulatory takings and substantive due process cases. The decisionmaker must balance the public's interests against the owner's interests by considering the nature of the harm the regulation is intended to prevent, the availability and effectiveness of alternative measures, the reasonable use of the property remaining to the owner and the economic loss borne by the owner. Public interest factors include the seriousness of the public problem, the extent to which the land involved contributes to the problem, the degree to which the regulation solves the problem, and the feasibility of less oppressive solutions. A reasonable use exception set forth in MICC 19.07.030(B) balances the public interests against the regulation being unduly oppressive to the property owner.

Recreation: In the Town Center, recreation includes a place designed and equipped for the conduct of leisure-time activities or sports.

Recreational Area: For single-family and multifamily residential zones, an area, including facilities and equipment, for recreational purposes, such as a swimming pool, tennis court, a golf course, or a playground.

1. Commercial Recreational Area: A recreational area maintained and operated for a profit.
2. Noncommercial Recreational Area: A recreational area maintained and operated by a nonprofit club or organization with specified limitations upon the number of members or limited to residents of a block, subdivision, neighborhood, community or other specific area of residence for the exclusive use of members and their guests.
3. Recreational Area, Private: A recreational area maintained by an individual for the sole use of his/her household and guests, located or adjacent to his/her residence, not for profit or in connection with any business operated for profit.
4. Semi-Private Waterfront Recreational Area: A separate shoreline property interest established in fee simple or by easement in favor of one or more upland lots which is used for water-related recreational purposes.

Regulated Improvements: Any development of any property within the city, except:

1. Property owned or controlled by the city; or
2. Single-family dwellings and the buildings, structures and uses accessory thereto; or
3. Wireless communications structures, including associated support structures and equipment cabinets.

Repair Services: The repair and maintenance of personal and household goods, including locksmithing, appliance repair, furniture reupholstery, and shoe repair.

Clmt ex. 6
P. 19; _____

Replacement Tree: Any tree that is planted in order to satisfy the tree replacement requirements of a tree permit.

Residential Care Facility: A facility, licensed by the state that cares for at least five but not more than 15 people with functional disabilities, that has not been licensed as an adult family home pursuant to Chapter 70.128 RCW.

Residential Dwelling: A home, abode or place that is used for human habitation.

Residential Uses: For purposes of the shoreline management provisions of this code, residential uses shall mean those uses allowed in the R-8.4, R-9.6, R-12, R-15, MF-2L, and MF-2 zones.

Restaurant: An establishment where food and drink are prepared and consumed. Such establishment may also provide catering services.

Restoration or restore: Actions performed to return a critical area to a state in which its functions approach its unaltered state as closely as possible.

Retail Use: An establishment engaged in selling goods or merchandise and rendering services incidental to the sale of such goods.

1. Small Scale Retail: A retail establishment occupying a space of 20,000 square feet or less.
2. Large Scale Retail: A retail establishment occupying more than 20,000 square feet.
3. Outdoor Retail: The display and sale primarily outside a building or structure of the following: vehicles, garden supplies, gas, tires, boats, aircraft, motor homes, building and landscape materials, and lumber yards.

Retaining Walls/Rockerries: A wall of masonry, wood, rock, metal, or other similar materials or combination of similar materials that bears against earth or other fill surface for purposes of resisting lateral or other forces in contact with the wall, and/or the prevention of erosion.

Retirement Home: An establishment operated for the purpose of providing domiciliary care or assisted living for a group of persons who by reason of age are unable to or do not desire to provide such care for themselves and who are not in need of medical or nursing aid, except in cases of temporary illness.

Right-of-way: Land acquired by reservation, dedication, prescription or condemnation, and intended to be used by a road, sidewalk, utility line or other similar public use.

Riprap: Hard angular carry rock or other similar materials used for erosion control and/or land or bank stabilization.

Rooming House: A home or other facility, other than special needs group housing or social service transitional housing as provided in MICC 19.06.080(A) and (B), that provides room or room and board to seven or more persons unrelated to the operator, and does not include persons with handicaps or persons with familial status within the meaning of the FHAA.

S

Clmt ex. 6
P.20: _____

Salmonid: A member of the fish family Salmonidae.

Scale: The height, width and general proportions of a structure or features of a structure in relationship to its surroundings. Human or pedestrian scale is building form or site design that is intimate, comfortable and understandable from the perspective of an individual walking.

Seismic Hazard Areas: Seismic hazard areas are areas subject to severe risk of damage as a result of earthquake induced ground shaking, slope failure, settlement, soil liquefaction or surface faulting.

Senior Citizen Housing: Dwelling units which are used exclusively for housing persons 60 years of age and older.

SEPA Rules: Chapter 197-11 WAC adopted by the Department of Ecology, as now or hereafter amended.

Service: An establishment primarily engaged in providing assistance as opposed to products. Examples include but are not limited to personal services, business, financial and insurance services, mortuary services, tailors, healthcare services, educational services, repair services, amusement services, membership organizations, and other professional, scientific, and technical services.

Service Stations: Establishments retailing automotive fuels (e.g., gasoline, diesel fuel, gasohol) and automotive oils. These establishments may also provide repair and maintenance services for automotive vehicles and/or convenience store retailing.

Shared Pier: A dock or pier which is shared by two or more waterfront lots.

Shorelands: Those areas extending landward for 200 feet in all directions, as measured on a horizontal plane from the ordinary high water mark, floodways and contiguous floodplain areas landward 200 feet from such floodplains and all wetlands and river deltas associated with the streams, lakes and tidal waters subject to the Shoreline Management Act (Chapter 90.58 RCW).

Shrub: Any living woody plant species characterized by having multiple vertical or semiupright branches originating at or near the ground and is known to achieve a typical mature height of less than 15 feet. Species include without limitation, rhododendrons, pyramidalis, laurel, boxwood and other ornamental shrubs.

Sign: Any series of letters, figures, design symbols, lights, structure, billboard, trademark or device intended or used to attract attention to any activity, service, place, subject, person, firm, corporation, or thing. Excluded are official traffic signs or signals, public notices, and governmental flags.

Sign, Directional: A sign which contains only the name and location of a use located elsewhere and intended for guidance only.

Significant Affordable Housing: Affordable housing in the Town Center meeting the requirements of MICC 19.11.050(B)(5).

Significant Pedestrian Connection or Connection: A pedestrian connection in the Town Center meeting the requirements of MICC 19.11.050(B)(3).

Clmt ex. 6
P. 21 ; _____

Significant Public Amenity or Amenities: The public development amenities listed in MICC 19.11.050 that an applicant must provide in order to be permitted the maximum allowed building height in the Town Center.

Significant Public Plaza or Plaza: A public plaza in the Town Center meeting the requirements of MICC 19.11.050(B)(2).

Slope: A measurement of the average incline of a lot or other piece of land calculated by subtracting the lowest elevation from the highest elevation, and dividing the resulting number by the shortest horizontal distance between these two points.

Small Tree: Any conifer tree that is less than six feet tall or any deciduous tree with a diameter of six inches or less.

Social Service Transitional Housing: Noninstitutional group housing facilities for unrelated persons, other than special needs group housing or rooming houses, that are privately or publicly operated, including those facilities required to be licensed by the state or federal governments as well as those that may not be required to be licensed, that provide temporary and transitional housing to meet community social service needs including, but not limited to, work-release facilities and other housing facilities serving as an alternative to incarceration, halfway houses, emergency shelters, homeless shelters, domestic violence shelters and other such crisis intervention facilities. Social service transitional housing excludes institutional facilities that typically cannot be accommodated in a single-family residential structure.

Solar Energy System: Any device, structure, mechanism, or series of mechanisms which use solar radiation as an energy source for heating, cooling, or electrical energy.

Special Needs Group Housing: Noninstitutional group housing that primarily supports unrelated persons with handicaps or persons protected by familial status within the meaning of the FHAA, but not including individuals whose tenancy would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. Special needs group housing includes, but is not limited to, foster family homes, adult family homes and residential care facilities as provided in Chapter 70.128 RCW, but excludes facilities that typically cannot be accommodated in a single-family residential structure such as hospitals, nursing homes, assisted living facilities and detention centers.

Stealth Design: Wireless communications facilities designed to blend into the surrounding environment as determined by the code official. Examples of stealth design include architecturally screened roof-mounted antennas, facilities integrated into architectural elements, and facilities designed to blend with or be integrated into light poles, utility poles, trees, steeples, or flag poles.

Steep Slope: Any slope of 40 percent or greater calculated by measuring the vertical rise over any 30-foot horizontal run. Steep slopes do not include artificially created cut slopes or rockeries.

Story: Story is that portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. If the finished

Clmt ex. 6
P. 22; _____

floor level directly above a usable or unused under-floor space is more than six feet (1,829 mm) above grade for more than 50 percent of the total perimeter, or is more than 12 feet (3,658 mm) above grade at any point, such usable or unused under-floor space shall be considered as a story. Grade is measured as the lowest point on the property within a distance of five feet from the exterior wall.

Street: An improved or unimproved public or private right-of-way or easement which affords or could be capable of affording vehicular access to property.

- 1. Collector Arterial: A street designed to collect and distribute traffic from major arterials to the local access streets. The collector arterial is similar to a local access street except for stop and yield privileges over a local access street and restrictions for on street parking.
- 2. Local Access Street: A street designated for direct access to properties, and which is tributary to the arterial system.
- 3. Major Arterial Street: A street designed to collect and distribute large volumes of traffic from the freeway, Town Center and less important arterial streets. This type of arterial normally is designed to expedite through traffic.
- 4. Second Arterial Street: A street designed to collect and distribute traffic from the freeway or major arterials and less important streets.

Street Furniture: Structures located in streets, rights-of-way, parking lots, or other similar open spaces on a site, including, but not limited to, light standards, utility poles, newspaper stands, bus shelters, planters, traffic signs, traffic signals, benches, guard rails, rockeries, retaining walls, mail boxes, litter containers, and fire hydrants.

Structural Alteration: Any change, addition, or modification to elements of a structure that are or relate to load-bearing members or the stability of the structure (as distinguished from screening or ornamental elements). Examples of structural alterations include, but are not limited to, any change in the supporting members of a structure, such as foundations, studs in exterior or bearing walls or bearing partitions, columns, beams, headers, girders, joists or rafters. Replacement of exterior cladding and replacement of glazing in existing openings shall not be considered structural alteration.

Structure: That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

Subdivision: The division or platting of, or the act of division or platting of, land into two or more lots for the purpose of transfer of ownership, building development, or lease, whether immediate or future, and shall include all resubdivision of land.

- 1. Short Subdivision or Short Plat: A subdivision consisting of four or less lots on four or less acres.
- 2. Long Subdivision or Long Plat: A subdivision consisting of five or more lots on any number of acres or any number of lots on more than four acres.

Clmt ex. 6
P. 23 ; _____

Substantial Development: A development of which the total cost or fair market value exceeds \$2,500 or any development that materially interferes with the normal public use of the water or shorelines of the state, except as specifically exempted pursuant to RCW 90.58.030(3e) and WAC 173-27-040.

Support Structure: See "Wireless Communication Support Structure."

T

Teen Dance: Any dance that is open to the public and is held and conducted directly or indirectly for a profit, or requires a monetary contribution from any of the persons admitted or from a parent, and which permits the entry of persons under the age of 20 years. Teen dance does not include noncommercial dances sponsored by an accredited educational institution, nor does it include a dance sponsored by churches or other religious institutions, community organizations or other nonprofit tax-exempt organizations.

Temporary Encampment: A group of persons temporarily residing in one or more temporary structures, except for recreational purposes, and located at a place of worship.

Temporary Encampment Managing Organization: A group or organization that has the capacity to organize and manage a temporary encampment. A temporary encampment "managing organization" may be the same entity as the temporary encampment sponsor.

Temporary Encampment Sponsor: A place of worship which owns the property or has an ownership interest in the property, for which a temporary encampment is to be located, and that has an agreement with the temporary encampment managing organization to provide basic services and support for the residents of a temporary encampment and liaison with the surrounding community and joins with the managing organization in an application for a temporary encampment permit. A "sponsor" may be the same entity as the managing organization.

Temporary Erosion and Sediment Control Plan: A plan that details the location and type of temporary physical, structural and/or managerial practices an applicant will use to reduce erosion, prevent pollution of water with sediment and comply with the adopted storm water manual pursuant to Chapter 19.09 MICC.

Theaters: Establishments primarily engaged in either (1) producing live presentations involving the performances of actors and actresses, singers, dancers, musical groups and artists, and other performing artists or (2) exhibiting motion pictures or videos.

Top and Toe of Slope: The points at which a critical slope decreases to less than 30 percent slope. The upper edge is the "top" of the slope and the bottom is the "toe."

Townhouse: A single-family dwelling unit at least two stories in height constructed in a group of two or more attached dwelling units in which each unit extends from foundation to roof and with open space on at least two sides and a separate means of ingress and egress.

Tract: A piece of land designated and set aside as either public or private open space. No dwelling shall be constructed on the tract, and only those structures that are in keeping with the tract's use as open space shall be allowed.

Clmt ex. 6
P. 24;

Trailer: A vehicle without motor power designed to be drawn by a motor vehicle and to be used for human habitation or for carrying persons and property, including a mobile home or trailer coach and any self-propelled vehicle having a body designed for or converted to the same uses as an automobile trailer without motor power.

Transportation/Utility: A facility primarily engaged in providing transportation services, including automobile service stations and transit stations; the generation, transmission, distribution of energy; or the collection of waste and recycled materials.

Tree: Any living woody plant species other than a shrub, characterized by one main trunk or few dominant trunks and many branches, known to achieve a typical mature height of at least 15 feet.

Tree Permit: A permit issued by the city arborist under Chapter 19.10 MICC.

U

Uplighting: Illumination of an object by methods that project light upward and onto the object to be illuminated, primarily to enhance visual interest at night.

Usable Signal: An unscrambled signal, which when acquired or transmitted by use of a properly installed, maintained and operated antenna, is at least equal in sound or picture quality to that received from local commercial radio or television stations or by way of cable.

Utilities: Facilities providing infrastructure services by a public utility or private utility regulated by the state through fixed wires, pipes, or lines. Such facilities may include water, sewer, storm water facilities (lines, ditches, swales and outfalls) and private utilities such as natural gas lines, telecommunication lines, cable communication lines, electrical lines and other appurtenances associated with these utilities. "Utilities" does not include wireless facilities.

V

Variance: A modification of standard development code provisions based on special circumstances and complying with the city's variance criteria.

Vegetative Cover: All significant vegetation (excluding exotic or invasive species) in a critical tree area, the existence or loss of which will have a material impact on the critical tree area.

Vehicle: An instrument capable of movement, by means of wheels, skids or runners of any kind, along roadways, paths, or other ways of any kind, specifically including, but not limited to, all forms of automotive vehicles, buses, trucks, cars and vans, and all forms of trailers or mobile homes of any size whether capable of supplying their own motor power or not, regardless whether the primary purpose of such instrument is or is not the conveyance of persons or objects. A vehicle includes all such instruments even if immobilized in any way and for any period of time.

W

Warehouse: A building used primarily for the storage of goods and materials, including facilities available to the public for a fee.

Clmt ex. 6
P. 25; _____

Warehousing: The storage of goods and materials, including facilities available to the public for a fee.

Water-Dependent: A use or a portion of a use which cannot exist in any other location and is dependent on the water by reason of the intrinsic nature of its operations. Examples of water-dependent uses may include ship cargo terminal loading areas, ferry and passenger terminals, barge loading facilities, ship building and dry docking, marinas, aquaculture, float plane facilities and sewer outfalls.

Watercourses: A course or route, formed by nature and generally consisting of a channel with a bed, banks, or sides throughout substantially all its length, along which surface waters, with some regularity (annually in the rainy season), naturally and normally flow in draining from higher to lower lands. This definition does not include irrigation and drainage ditches, grass-lined swales, canals, storm water runoff devices, or other courses unless they are used by fish or to convey waters that were naturally occurring prior to construction.

Watercourses – Intermittent or Seasonal Flow: Those watercourses that go dry or exhibit zero surface discharge at any point during water years with normal rainfall as determined from climatological data published for the Seattle-Tacoma International Airport by the National Oceanic and Atmospheric Administration or its successor agency.

If the lowermost point of either year-round flow or intermittent or seasonal flow cannot be identified with simple, nontechnical observations, or if climatological data show that rainfall is significantly above normal for the water-year, then the point of flow should be determined using the best professional judgment of a qualified professional after considering actual conditions and the climatological data.

Watercourses – Year Round Flow: Those watercourses that do not go dry any time during water-years with normal rainfall as determined from climatological data published for the Seattle-Tacoma International Airport by the National Oceanic and Atmospheric Administration or its successor agency. For the purpose of watercourse typing, watercourses with year round flow may include intermittent or seasonal reaches below the uppermost point of year round flow during normal water-years.

Waterfront Structure: Docks, piers, wharves, floats, mooring piles, anchor buoys, bulkheads, submerged or overhead wires, pipes, cables, and any other object passing beneath, through or over the water beyond the line of ordinary high water.

Waterward: Any point located in Lake Washington, lakeward from the ordinary high water mark.

Wetlands: Areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands do not include artificial wetlands, such as irrigation and drainage ditches, grass-lined swales, canals, landscape amenities, and detention facilities or those wetlands that were unintentionally created as a result of the construction of a road or street unless the artificial wetlands were created to mitigate the alteration of a naturally occurring wetland. For identifying and delineating a regulated wetland, the city will use the Wetland Manual.

Clmt ex. 6
P. 26; _____

Wetland Classification System: Those categories set forth in the Washington State Wetland Rating System for Western Washington, Publication #04-06-025 dated August, 2004. A summary of the classification system is provided below:

1. Category I. Category I wetlands are those that meet the following criteria:
 - a. Wetlands that are identified by scientists as high quality or high function wetlands;
 - b. Bogs larger than one-half acre;
 - c. Mature and old-growth forested wetlands larger than one acre; or
 - d. Wetlands that are undisturbed and contain ecological attributes that are impossible to replace within a human lifetime.
2. Category II. Category II wetlands are not defined as Category I wetlands and meet the following criteria:
 - a. Wetlands that are identified by scientists as containing "sensitive" plant species;
 - b. Bogs between one-quarter and one-half acre in size; or
 - c. Wetlands with a moderately high level of functions.
3. Category III. Category III wetlands do not satisfy Category I or II criteria, and have a moderate level of functions. These wetlands generally have been disturbed in some ways, and are often less diverse or more isolated from other natural resources than Category II wetlands.
4. Category IV. Category IV wetlands do not satisfy Category I, II or III criteria; and have the lowest level of functions; and are often heavily disturbed.

Wetland Manual: The Washington State Wetland Identification and Delineation Manual.

Wildlife Habitat Conservation Areas: Those areas the city council determines are necessary for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created consistent with WAC Title 365.

Windowing: The selective removal of branches not to exceed more than 25 percent of the leaf surface while retaining the symmetry and natural form of the tree in order to increase views and light penetration.

Wireless Communications:

1. Attached Wireless Communications Facility (Attached WCF): An antenna array that is attached to an existing building or structure, including utility poles, with any accompanying attachment structure, transmission cables, and an equipment cabinet which may be located either inside or outside of the attachment building or structure.
2. Wireless Communications Antenna Array (Antenna Array): One or more rods, panels, discs or similar devices used for the transmission or reception of radio frequency signals, which may

Clmt ex. 6
P. 27;

include omni-directional antenna (whip), directional antenna (panel), and parabolic antenna (dish).

3. Wireless Communications Facility (WCF): Any unstaffed facility for the transmission and/or reception of radio frequency signals usually consisting of antennas, an equipment cabinet, transmission cables, and a support structure to achieve the necessary elevation.

4. Wireless Communications Support Structure (Support Structure): A structure designed and constructed specifically to support an antenna array, and may include a monopole tower, lattice tower, guy-wire support tower or other similar structures. Any structure which is used to attach an attached WCF to an existing building or structure (hereinafter "attachment structure") shall be excluded from the definition of and regulations applicable to support structures.

Y

Yard: An open, unoccupied space, unobstructed from the ground to the sky, except where specifically provided by this code, on the lot on which a building is situated, required to be kept open by the yard requirements prescribed herein.

1. Front Yard: The front yard is the yard abutting an improved street from which the lot gains primary access or the yard abutting the entrance to a building and extending the full width of the lot. If this definition does not establish a front yard setback, the code official shall establish the front yard based upon orientation of the lot to surrounding lots and the means of access to the lot.

2. Rear Yard: The yard opposite the front yard.

3. Side Yard: Any yards not designated as a front or rear yard shall be defined as a side yard. (Ord. 11C-11 § 2; Ord. 11C-05 § 3; Ord. 10C-09 § 1; Ord. 10C-06 § 7; Ord. 10C-01 § 1; Ord. 08C-01 § 9; Ord. 07C-02 § 1; Ord. 06C-04 § 2; Ord. 05C-16 § 2; Ord. 05C-12 § 4; Ord. 04C-12 § 17; Ord. 04C-08 § 11; Ord. 04C-02 § 2; Ord. 03C-08 § 11; Ord. 03C-01 § 5; Ord. 02C-10 § 4; Ord. 02C-09 § 5; Ord. 02C-05 § 5; Ord. 02C-04 § 8; Ord. 02C-01 § 2; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

The Mercer Island Municipal Code is current through Ordinance 14C-07, passed June 2, 2014.

Disclaimer: The City Clerk's Office has the official version of the Mercer Island Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.



Clmt ex. 6
P. 28 : _____

Land Use Policies Outside the Town Center

airports. Compatible permitted uses such as education, recreation, open spaces, government social services and religious activities will be encouraged.

GOAL 7: Mercer Island should remain principally a low density, single family residential community.

GOAL 8: Achieve additional residential capacity in single family zones through flexible land use techniques.

- 7.1 Existing land use policies, which strongly support the preservation of existing conditions in the single family residential zones, will continue to apply. Changes to the zoning code or development standards will be accomplished through code amendments.
- 7.2 Residential densities in single family areas will generally continue to occur at 3 to 5 units per acre, commensurate with current zoning. However, some adjustments may be made to allow the development of innovative housing types, such as accessory dwelling units and compact courtyard homes at slightly higher densities as outlined in the Housing Element.
- 7.3 Multi-family areas will continue to be low rise apartments and condos and duplex/triplex designs, and with the addition of the Commercial/Office (CO) zone, will be confined to those areas already designated as multi-family zones.
- 7.4 As a primarily single family residential community with a high percentage of developed land, the community cannot provide for all types of land uses. Certain activities will be considered incompatible with present uses. Incompatible uses include land fills, correctional facilities, zoos and
- 8.1 Use existing housing stock to address changing population needs. Accessory housing units and shared housing opportunities should be considered in order to provide affordable housing, relieve tax burdens, and maintain existing, stable neighborhoods.
- 8.2 Through zoning and land use regulations provide adequate development capacity to accommodate Mercer Island's projected share of the King County population growth over the next 20 years.
- 8.3 Promote a range of housing opportunities to meet the needs of people who work and desire to live in Mercer Island.
- 8.4 Promote accessory dwelling units in single-family districts subject to specific development and owner occupancy standards.
- 8.5 Encourage infill development on vacant or under-utilized sites that are outside of critical areas and ensure that the infill is compatible with the surrounding neighborhoods.

maintenance of roads, utilities and other public services are necessary to maintain residential access to all amenities.

to meet the needs of all residential areas. (See Appendix G – Mercer Island Human Services Strategic Plan 1999 – 2000)

GOAL 1: To ensure that single family and multi-family neighborhoods provide safe and attractive living environments, and are compatible in quality, design and intensity with surrounding land uses, traffic patterns, public facilities and sensitive environmental features.

- 1.1 Ensure that zoning and city code provisions protect residential areas from incompatible uses and promote bulk and scale consistent with the existing neighborhood character.
- 1.2 Promote single family residential development that is sensitive to the quality, design, scale and character of existing neighborhoods.
- 1.3 Promote quality, community friendly Town Center, CO and PBZ district residential development through features such as pedestrian and transit connectivity, and enhanced public spaces.
- 1.4 Preserve the quality of existing residential areas by encouraging maintenance and revitalization of existing housing stock.
- 1.5 Foster public notification and participation in decisions affecting neighborhoods.
- 1.6 Provide for roads, utilities, facilities and other public and human services

Parks and Open Space Policies

GOAL 11: Continue to maintain the Island's unique quality of life through open space preservation, park and trail development and well-designed public facilities.

- 11.2 More specific policy direction for parks and open space shall be identified in the Parks and Recreation Plan and the Pedestrian and Bicycle Facility Plan. These plans shall be updated periodically to reflect changing needs in the community.
- 11.3 Acquisition, maintenance and access to public areas, preserved as natural open spaces or developed for recreational purposes, will continue to be an essential element for maintaining the community's character.
- 11.4 View preservation actions should be balanced with the efforts to preserve the community's natural vegetation and tree cover.
- 11.5 Future land use decisions should encourage the retention of private club recreational facilities as important community assets.
- 11.6 Provide recreation and leisure time programs and facilities that afford equal opportunities for use by all Mercer Island residents while considering the needs of non-Mercer Island residents.
- 11.7 Provide a system of attractive, safe, and functional parks, and park facilities.
- 11.8 Preserve natural and developed open space environments and trails for the benefit of existing and future generations.
- 11.9 Provide a broad representation of public art through cooperation with the Mercer Island Arts Council.
- 11.10 Funding for existing facilities should be provided at a level necessary to sustain and enhance parks, trails and open space consistent with the Parks and Recreation Plan, the Trails Plan and the Capital Facilities Element.
- 11.11 Promptly investigate open space acquisition opportunities as they become available.
- 11.12 Pursue state and federal grant funding for parks and open space improvements.

**DSG Policy Memorandum
Administrative Interpretation
#07-05**



DEVELOPMENT SERVICES GROUP
9611 SE 36TH St., Mercer Island, WA 98040
(206) 236-5300

TO: DSG Staff
FROM: Steve Lancaster, Development Services Director
DATE: June 1, 2007
RE: Impervious surface calculation for Single Family lots
CC: City Attorney

MICC Section(s) Interpreted: 19.02.020(D)

ISSUE

Shall the area within an access easement be included in the area of the lot used for the purpose of calculating compliance with impervious surface coverage limitations?

FINDINGS

- The Code Official, pursuant to MICC 19.15.010(C)(5)(a) of the Mercer Island City Code (MICC), is authorized to make this administrative interpretation subject to the procedures established by MICC 19.15.020(L). The Development Services Group Director or the Director's duly authorized designee is designated as the Code Official under Section 19.16.010.
- MICC 19.16.010 defines "impervious surfaces" to include "driveways, streets, parking areas and other areas, whether constructed of gravel, pavers, pavement, concrete or other material, that can reasonably allow vehicular travel" and further defines "street" as "An improved or unimproved public or private right-of-way or easement which affords or could be capable of affording vehicular access to property."
- MICC 19.02.020(D)(1) establishes maximum impervious surface limits for lots in single family zones, ranging from 20% to 40% depending on slope.
- MICC 19.16.010 defines "lot" as "A designated parcel, tract or area of land established by plat, subdivision, or as otherwise permitted by law to be used, developed or built on as a unit."

Clmt ex. 8
P. 1;

- MICC 19.02.020(A) establishes minimum lot areas for the various single family zones. MICC 19.02.020(A)(2) states: "In determining whether a lot complies with the lot area requirements, the following shall be excluded: the shorelands part of any such lot and the part of such lot which is part of a street" (emphasis supplied).

CONCLUSIONS

- Confusion has arisen concerning whether a part of a lot that is a private street must be excluded from the area of the lot used in calculating impervious surface coverage limitations. This confusion is due to the provisions of MICC regarding calculation of minimum lot area.
- If "lot area" for the purpose of calculating impervious surface coverage is considered to be the same as "minimum lot area," a significant hardship would be created for a specific class of single family lots (those providing private access to neighboring lots). This is due to the fact that under MICC 19.02.020(A)(2), the geographic area of any private street or access easement is subtracted from the calculation, while MICC 19.02.020(D)(1) requires that any driveway or other impervious surface within such easement must be included in the calculation. By including this area in the numerator of the equation while removing it from the denominator, impervious surface within a private street or access easement would essentially be "double-counted" when compared to other impervious surfaces.
- It is important to note that this situation arises due to an ownership issue as opposed to the physical quantity of impervious surface (and related impacts) associated with an individual home. Similarly situated homes whose access is provided by a publicly owned street or by an easement crossing another's property do not suffer this hardship.
- It is not necessary to consider "lot area" for the purpose of calculating impervious surface coverage to be the same as "minimum lot area." The subsection determining how to calculate minimum lot area (MICC 19.02.020(A)) specifically states this calculation is for the purpose of "determining whether a lot complies with the minimum lot area requirements" established within that same subsection. The subsection specifying how to calculate impervious surface coverage includes no reference to "minimum lot area" but instead refers simply to a "lot." It is therefore appropriate to refer to the general definition of "lot" which would include the entire area of "a designated parcel, tract or area of land established by plat, subdivision, or as otherwise permitted by law to be used, developed or built on as a unit."

INTERPRETATION

The area within an access easement or private street shall be included in the area of the lot used for the purpose of calculating compliance with impervious surface coverage limitations. The appropriate calculation is as follows:

$$\text{Impervious Surface Coverage} = \frac{\text{Impervious surfaces, including those on any part of the lot which is part of a street}}{\text{Lot area, including any part of the lot which is part of a street}}$$