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No. 70649-7-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

JEFFREY HALEY,

Appellant,

v.

JOHN F. PUGH,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant, Jeffrey Haley, appeals three trial court orders which granted summary judgment in favor of respondent, John F. Pugh. The trial court orders should be affirmed.[1]

The Summary Judgment order dated February 15, 2013 (CP 77-79) correctly ruled that any rights of appellant pursuant to a recorded easement were terminated and abandoned as to any use of the easement area which is inconsistent with a water course corridor permitted by the City of Mercer Island Planning Commission. Specifically, all easement rights were terminated and abandoned except for easement rights to utility, sewage and drainage serving appellant's property in the easement area. The easement in question was partially terminated as a result of the substantial alteration of use of the easement area which occurred more than ten years prior to the lawsuit.

In subsequent proceedings, the trial court entered an order May 8, 2013 (CP 80-81) dismissing appellant's shoreline law violation claims of illegal moorage and fraud by respondent in obtaining a dock

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[1] Defendants Sunstream Corporation and Debra Hey were dismissed in separate summary judgment proceedings. There was no appeal of that dismissal order. (CP 516.)

permit. The trial court correctly ruled these claims were dismissed as time-barred by the statute of limitations, RCW 4.16.080. Appellant's causes of action for an illegal boat lift or fraud in obtaining a permit are time-barred claims, whether or not deemed to be causes of action under the Land Use Petition Act (LUPA), RCW Ch. 36.70C, the Shorelines Management Act (SMA), RCW Ch. 90.58, or common law.

Finally, appellant challenges the trial court's order denying reconsideration entered June 11, 2013 (CP 103-104).

II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

Appellant incorrectly asserts in his Assignments of Error that the trial court "terminated" the easement at issue in this lawsuit. (Brief of Appellant at p. 4.) In fact, the trial court partially terminated the easement as to any use inconsistent with the use of the easement area as a water course permitted by the City of Mercer Island. (CP 78.)

The court found in its oral ruling of October 5, 2012 "as a matter of law that the easement was not abandoned in its entirety, but, there was abandonment of the uses that are inconsistent with the improvements that were made by the Defendant." (Verbatim Report

of Recorded Proceedings, October 5, 2012 at p. 1.) Appellant Haley acknowledged the ruling, stating:

> Your Honor, I presume we need to work out some language about what easement rights remain. (Verbatim Report. p. 2.)

In assigning error to the trial court's ruling on the boat lift issue, appellant ignores the fact that his claims for illegal moorage and fraud in obtaining a boat lift permit were dismissed as time-barred by the statute of limitations. (CP 81.)

III. STATEMENT OF THE CASE

A. Claims and Counterclaim. In his First Amended Complaint commencing this lawsuit, appellant Haley claimed respondent violated the SMA through illegal moorage and fraud in obtaining a boat lift permit. He requested an order of injunction to remove respondent's boat lift.[2] Additionally, appellant asserted easement rights in property owned by respondent and requested the right to remove structures within the easement area and reshape the land surface within the easement area including placement of a

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[2] Only a governmental entity may base an action for injunctive relief under the SMA, RCW 90.58.210(1); *Hedland v. White*, 67 Wn.App. 409, 836 P.2d 250 (1992).

culvert and dirt or decking as well as other alterations to the easement area. (CP 1-5.)

In answer to the First Amended Complaint, respondent Pugh denied the SMA claims and brought a counterclaim to extinguish and terminate the easement rights claimed by appellant. (CP 6-12.)

B. Undisputed Facts. Appellant Haley and Respondent Pugh are Mercer Island property owners residing on the east side of the island. Three parcels of land are involved in this lawsuit. The "Bird's Eye View Facing West" photograph (Exhibit 2, Declaration of Kathleen Hume; CP 66), also attached to appellant's opening brief, shows all three parcels. The Pugh residential parcel is a Lake Washington waterfront home. The Haley parcel is situated inland directly west of the Pugh parcel. The third parcel, Tract A, is outlined in red and is a parcel owned by Pugh to the north of the Haley and Pugh residences.

The 1979 easement which is the subject of this lawsuit covers a small portion of Tract A directly north of the Haley parcel. The easement is ten feet wide by approximately 140 feet long. The easement area is now an open watercourse with landscaping consisting of large rocks and plantings. A common driveway serving

the Pugh property and an adjacent property crosses the easement. (Brief of Appellant, at p. 6; CP 100-102.)

A photograph of the easement area looking east toward Lake Washington shows a telephone pole in the easement area, the watercourse, and a hedge on Haley's property with Haley's parking area to the right on his property. In the upper right hand corner Pugh's residence is visible as well as a corner of Haley's residence. (Exhibit 4, Declaration of Kathleen Hume; CP 70.)

Pugh obtained a variance to allow for alteration of the watercourse corridor and other improvements on September 17, 2001. (The Notice of Decision is Attachment A to the Declaration of George Steirer; CP 191-192.) The City of Mercer Island in 2001 approved physical alteration of a water course channel and relandscaping/site restoration in the water course area. There was a buried water pipe channeling water from west to east across the easement area into Lake Washington. Pugh proposed removal of the buried pipe and opening of the water course with significant landscaping including trees, boulders and vegetation. (CP 13-14.)

The foregoing occurred several years before appellant Haley purchased his property. Haley's predecessor in interest, Kathleen

Hume, was well aware of the permit process and plans by Pugh to open the watercourse and landscape the area. She consented to the proposed changes and, in fact, recognized that the easement area could no longer be used for pedestrian or vehicle access. (See Declaration of Kathleen Hume, ¶¶ 5-10; CP 58-59.)

The approved watercourse area is subject to restrictions and a buffer zone wherein no development can occur. Haley's intent to reestablish the area for pedestrian and vehicular use would violate the Mercer Island Code. Haley purchased his parcel in 2005. The surface easement rights had been clearly abandoned by his predecessor in interest in 2001. Almost 11 years later Haley threatens reestablishment of easement rights for pedestrians and vehicles which would require major alteration of the easement area and consent from the City of Mercer Island. (See Second Declaration of George Steirer; CP 525-526.)

With regard to the dock permit there are no genuine issues of material fact. In September, 2001 Pugh obtained a permit from the City of Mercer Island to repair his existing pier, decking and structural framework. The permit application is Attachment C to the Declaration of George Steirer. (CP 284-285.)

In March, 2005 Pugh obtained a permit from the City of Mercer Island to install a water craft lift canopy. A copy of the relevant permit documents obtained from the City of Mercer Island are contained in Attachment D to the Declaration of George Steirer. (CP 287-296.)

Haley claims the permit was obtained as a result of fraud by Pugh although no one has challenged the permit for more than seven years. Haley claims the "illegality of the boat lift's location was not evident to neighboring property owners . . . " until March, 2012. See page 4 Motion for Reconsideration. (CP 85.)

Haley's fraud claim is premised on measurements he claims to have taken which are contrary to measurements contained in the 2001 permit application documents. (CP 52-55.) No reason is given why the purported fraud could not have been discovered earlier than seven years after the shoreline permit was granted.

Additionally, Haley claims the boat lift referenced in the 2005 permit for a boat lift canopy was never itself permitted. Yet the boat lift has been present since at least 2005 and was clearly referenced as part of the permit process for a boat lift canopy in 2005. (CP 292.) The Notice of Decision for the boat lift canopy (CP 294-295) reflects

the project was granted a Shoreline Exemption Permit pursuant to the Mercer Island Code.

Neither Haley nor his predecessor in interest challenged either the 2001 or the 2005 land use decision under LUPA.

IV. ARGUMENT

A. Standard of Review. The purpose of a motion for summary judgment is to examine the sufficiency of evidence supporting plaintiff's allegations so that unnecessary trials may be avoided where no genuine issue of material fact exists. *Island Air, Inc. v. LaBar*, 18 Wn.App. 129, 566 P.2d 972 (1977).

Bare allegations of fact by affidavit without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966). A motion for summary judgment permits the court to pierce the formal allegations of facts in the pleadings when it appears there are no genuine issues. A response must set forth specific facts showing there is a genuine issue for trial. *Reed v. Streibe*, 65 Wn.2d 700, 399 P.2d 338 (1965).

On appeal from a grant of summary judgment the reviewing court must consider not only whether the affidavits and record

demonstrate an issue of fact, but also whether any such facts are material to the cause of action. *Greene v. Pateros School Dist.*, 59 Wn.App. 522, 799 P.2d 276 (1990).

When a party moving for summary judgment presents affidavits which make out a prima facie case, the opposing party may not rely on mere allegations contained in his pleadings but must make an evidentiary showing of a factual issue which is material to the contentions before the court. *Winterroth v. Meats, Inc.*, 10 Wn.App. 7, 516 P.2d 522 (1973).

B. Easement Rights Terminated.

1. ***Easement Area is Now an Approved Watercourse.*** Under either an abandonment analysis or termination of the easement by adverse possession, Haley's easement rights should be terminated to the extent such rights are inconsistent with the substantial improvements in the easement area approved by the City of Mercer Island in 2001. What was once a buried drainage pipe in the easement area is now an open watercourse with landscaping. (CP 58-59.) Specifically, Haley's claim that he be allowed to create parking spaces within the easement area, trim or cut bushes within the easement area to facilitate pedestrian use, place stepping stones

within the easement area, and add a pedestrian bridge over the ditch for the stream (CP 50-51), should be denied. The pedestrian or vehicular right to use the easement area has been lost by abandonment years ago with the consent of Haley's predecessor in interest. (CP 59.) Additionally, Pugh, as owner of Tract A upon which the easement exists, has extinguished these easement rights by adverse possession.

Haley's claim that his proposed "improvements" in the easement area are not prohibited by the Mercer Island Municipal Code is incorrect. Mercer Island has specific regulations pertaining to watercourses, which Haley ignores. (CP 525-527; Appendix 1, pp. 8-10.)

2. ***Abandonment of the Easement***. Clearly, the testimony of Kathleen Hume (CP 57-70, CP 413-415, CP 425-430) establishes abandonment of the easement by the dominant estate owner. Contrary to the assertions of Haley the evidence is undisputed that Haley's predecessor in interest, and others, used the easement area for ingress and egress. (CP 58.) That activity abruptly ended in 2001 when Haley's predecessor in interest, Kathleen Hume (dominant estate), consented to removal of the paved

area on the easement and allowed for alteration of the easement into a watercourse. (CP 59.) While Pugh testifies that the area was not "completed" until 2003 or 2004 (CP 14), Kathleen Hume testifies that no pedestrian or traffic use of the easement was made after 2001. (See Declaration of Kathleen Hume, ¶9; CP 59.) The change in use of the easement area was evident when Haley purchased his property in 2005. (CP 168-170.)

Haley relies upon an unpublished opinion by Division Two at p. 13 of the Brief of Appellant. As a Washington attorney (suspended according to Washington State Bar Association website) Haley should be familiar with Washington court rules which prohibit citation to unpublished opinions. Under RCW 2.06.040, Court of Appeals unpublished opinions lack precedential value; under GR 14.1, they may not be cited as authority.

Heg v. Alldredge, 157 Wn.2d 154, 137 P.3d 9 (2006) supports the abandonment argument. Haley claims there is no evidence of intent to abandon any part of the easement. Yet the testimony of Kathleen Hume offers proof of intent to abandon. Ms. Hume testifies that she was "fully aware that the creation of an open stream with landscaping would eliminate any pedestrian or vehicle use of the

easement area." She testifies that the improvements enhanced her property value. She was aware that the City of Mercer Island approved Pugh's plans. She states that from and after 2001, she "abandoned any claim of easement rights in Tract A with the exception of easement rights for any underground utilities. . . " See Declaration of Kathleen Hume, ¶¶ 7-10; (CP 59).

The court in *Heg* at p. 161, held that extinguishing an easement through abandonment requires more than mere non-use. The non-use "must be accompanied with the express or implied intention of abandonment" citing *Netherlands Am. Mortgage Bank v. ERy. & Lumber Co.*, 142 Wash. 204, 210, 252 Pac. 916 (1927). The testimony of Haley's predecessor in interest, Kathleen Hume, clearly establishes an express, unequivocal and decisive abandonment of the easement with respect to pedestrian and vehicular traffic. Her actions in supporting the improvements to the easement area are inconsistent with the continued existence of the easement for those purposes. All of this occurred several years before Haley had any interest in the property. (CP 168-169.) Haley offers no evidence disputing these facts.

3. ***Easement Rights Terminated by Adverse Possession***. As owner of Tract A, Pugh is the servient estate owner of the 1979 easement area. This easement area comprises a small portion of Tract A extending 10 feet into Tract A along the northerly boundary of Haley's parcel, proceeding eastward approximately 140 feet. Haley holds the dominant estate interest based upon the recorded easement. (CP 68-70.)

Haley relies upon *Cole v. Laverty*, 112 Wn.App. 180, 49 P.3d 924 (2002) which provides an analysis of how a recorded easement can be lost by adverse possession. The focus for an adverse possession claim is upon the actions of the servient estate owner that might have given notice of a hostile intent to adversely take away easement rights.

The court in *Cole* held that an easement can be extinguished through adverse use. See *City of Edmonds v. Williams*, 54 Wn.App. 632, 634, 774 P.2d 1241 (1989). To establish adverse possession, the claimant must show that the use was open, notorious, continuous, uninterrupted, and adverse to the property owner for the prescriptive period of ten years pursuant to RCW Ch. 7.28. The court stated that since the servient estate owner who seeks to extinguish the easement

is already in possession of the property (Pugh's possession of Tract A), in order to start the prescriptive period, the adverse use of the easement must be clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice. *Cole, supra* at p. 184.

The facts in *Cole* did not satisfy the requirements for adverse possession as a matter of law. The servient estate owner had installed locked gates on each end of the easement and placed two old bathtubs across the west end filled with dirt to act as planters. There was no record before the court indicating prior use of the easement area by the dominant estate.

To the contrary, in the present action, Haley's predecessor in interest provides testimony regarding prior use of the easement area and its importance for access to the Pugh property as well as another property. (See Declaration of Kathleen Hume, ¶ 5; CP 58.) Ms. Hume further testifies that elimination of the possibility of surface use of the easement for pedestrians and traffic by Pugh was a permanent improvement benefitting her property. Certainly Pugh's action in obtaining a permit to destroy the easement roadway and open the watercourse making parking and pedestrian traffic impossible was

open, notorious, continuous, uninterrupted and adverse to the interests of the dominant estate in the easement area. Notice of the adverse use commenced in 2001, 11 years prior to Haley's lawsuit.

The *Cole* case also illustrates that an easement may be partially terminated. The trial court had entered partial summary judgment quieting title to the easement for purposes of access and repair of utilities while terminating the portion of the easement dedicated to ingress and egress. The trial court ruling terminating that portion of the easement was reversed and remanded for further proceedings.

In the present action, the element of adverse use of the easement hostile to the dominant estate's interest is unusual in that Haley's predecessor in interest fully consented to loss of the easement rights. Nonetheless, the alteration of the easement commencing in 2001 was clearly adverse to anyone claiming dominant estate rights in the easement for a period in excess of 10 years. Haley was not the only dominant estate owner who could challenge the easement. Pugh and the owner to the south of Pugh also had the easement rights prior to 2001. (See Declaration of Kathleen Hume, ¶5; CP 58.)

*4. **Appellant's Proposed Use of the Easement Area Violates Mercer Island Ordinances.*** Haley ignores pertinent provisions of the Mercer Island Code pertaining to watercourses. MICC 19.07.070 is part of a regulatory scheme to protect critical areas as mandated by RCW Ch. 36.70(A). (See MICC 19.07.010(A), Appendix 1 hereto.)

MICC 19.07.070 specifies three types of watercourse. For each watercourse, a minimum buffer width of 25 to 75 feet is established. Buffer widths may be reduced when a critical area study establishes that a small area is adequate to protect the watercourse. MICC 19.07.070(B)(2). The subject watercourse is Type I (used by fish) with a 75 foot standard buffer requirement. (See Second Declaration of George Steirer; CP 525-527.)

Previously piped watercourses may be restored by removal of pipes conveying watercourses when the code official determines that the proposal will result in a net improvement of ecological functions and will not significantly increase the threat of erosion, flooding, slope stability or other hazards. (MICC 19.07.070(B)(4); Appendix 1 hereto.) This is the process that Pugh followed in making the watercourse improvements in 2001. Haley proposes to remove any

structure within the easement area including rock structures; trim or remove plantings within the easement area; reshape the land surface within the easement including the placement of a culvert and dirt or decking. (CP 5.) Absent approval, all of the foregoing would violate the Mercer Island Code established buffer zone for the watercourse. (Second Declaration of George Steier; CP 525-535.)

C. *Boat Lift Claims are Time-barred as a Matter of Law.*

1. ***Appellant relies upon unsupported facts and conjecture to establish boat lift claims.*** At pp. 17-20 of the Brief of Appellant, Haley presents facts which are unsupported by evidence and are largely premised on speculation and conjecture. He seeks an order that respondent's boat lift be removed. Haley's First Amended Complaint claimed the boat lift on respondent's dock as well as the boat lift cover violated the SMA, RCW 90.58.230. (CP 1-5.) It appears from the Brief of Appellant that Haley has now abandoned any claim under that statute. Instead, his Boat Lift Sub-Issues at p. 21, Brief of Appellant, states there is no statute of limitations period for his claim of removal; that respondent fraudulently obtained a permit to add the boat lift cover; and respondent made false

representations to the City of Mercer Island and the public which were not discovered until recently and should toll the statute of limitations.

Appellant must establish his claims for fraud and misrepresentation by clear, cogent and convincing evidence. See *Baddeley v. Seek*, 138 Wn.App. 333, 338-339, 156 P.3d 959 (2007); *Steineke v. Russi*, 145 Wn.App. 544, 563, 190 P.3d 60 (2008). The factual recitation in the Brief of Appellant at pp. 17-20 is based upon appellant's own declarations which contain purported assertions of fact which are largely based on hearsay, conjecture and speculation. For example, Haley claims respondent placed the boat lift beside his dock in 2001 without first obtaining a permit which Haley states was required by Mercer Island law. (CP 53.) No support for this statement is provided and the declaration of Mercer Island official George Steirer provides documentation of a 2001 permit application. (CP 283-85.) Haley claims that a boat lift cannot be permitted in its present location under Mercer Island ordinances. (CP 53.) No support for this claim is provided. Yet a Shoreline Exemption Permit for the boat lift was granted in 2005. (CP 286-296.)

Haley claims the 2005 boat lift cover permit was granted based upon false statements of respondent. (CP 32-34.) Haley bases his

claim of false statements and incorrect measurements, relying upon his own measurements taken by using a kayak and measuring tape, to verify the incorrectness of respondent's permit application. (CP 53.) Haley fails to explain how incorrect measurements (assuming the measurements are incorrect) would void the Shoreline Exemption Permit granted to Pugh which established the proposed boat lift canopy was exempt from requirements for an environmental impact statement (EIS). (CP 294-296.)

For purposes of a summary judgment motion, the non-moving party is entitled to the benefit of facts and inferences in his favor. Nonetheless, a non-moving party must present competent factual evidence. The foregoing factual recitation by Haley does not overcome the legal authority that his claims are time-barred since the dock and canopy were in existence approximately seven years prior to Haley's lawsuit. He claims the "illegality of the boat lift's location was not evident," until March, 2012. (CP 53-54.) He fails to explain why he was unable to discover the fraud or illegality during those seven years if, in fact, the existence of the boat lift and canopy was a concern.

2. ***The Boat Lift is Not a Continuing Zoning Law Violation.*** At p. 21 of the Brief of Appellant, Haley alleges the boat lift is a "continuing zoning violation" for which there is no statutory limitation period to force removal. Haley alleges a zoning law violation without citing which provision of the zoning code has been violated by the boat lift and canopy. This is not a zoning case. Respondent is unable to address any specific zoning law ordinance of the City of Mercer Island which Haley claims has been violated. In his Motion for Reconsideration, Haley cites the Shoreline Code of Mercer Island, MICC 19.07.110(A). (Appendix 1, pp. 12-40.) He claims he is not seeking damages under the SMA (CP 95). MICC 19.07.110(A) is not a zoning ordinance but rather the local rules and regulations implementing the State Shorelines Management Act, RCW Ch. 90.58. Nonetheless, respondent will address the case law authority cited by appellant.

All cases cited by Haley are readily distinguishable and do not support Haley's theory that no limitation period applies to his causes of action. Haley relies upon *Larsen v. Colton,* 94 Wn.App. 383, 973 P.2d 1066 (1999). In that case, Larsen challenged his neighbor's plan to construct an accessory building. Larsen became specifically

aware that a building permit had been issued on May 6, 1997. Larsen filed a complaint for injunctive relief seven days later. The building permit had apparently issued February 5, 1997. The trial court held the action was timely filed applying a reasonable time standard ruling that Larsen had commenced this lawsuit within a reasonable time after being able to recognize the building's respective size, use and the impact on the neighborhood.

On a motion for reconsideration, the neighbor, for the first time, contended that the 21 day limitation period required by the Land Use Petition Act (LUPA), RCW 36.70C.040(2) barred the action. The trial court and the Court of Appeals refused to apply LUPA holding that Larsen lacked standing under LUPA because the town of Colton was not required to consider Larsen's interests in making the land use decision.

Haley ignores the pertinent provisions of the *Larsen* decision relating to the timeliness of the action. The *Larsen* court states at p. 393:

> But when, as in this case, the land use decision is a purely ministerial act, the aggrieved person may not have notice or actual knowledge. Indeed, a neighbor's only notice that a building permit has issued may be the beginning of construction. . . A short limitation period

> beginning with the issuance of the building permit would not be reasonable.
>
> Actual or constructive knowledge of the building permit thus should be the triggering event for a reasonable limitation period. Here, as the Superior Court found, the Larsens became specifically aware that the building permit had been issued on May 6, 1997. They initiated this action a week later, which certainly was within a reasonable time. The Superior Court did not err in holding this action was timely.

Under the *Larsen* ruling, and any standard of reasonableness, Haley and/or his predecessor in interest, had notice of the boat lift and boat lift canopy no later than 2005. Haley's predecessor in interest, Kathleen Hume, was fully aware that Pugh had installed a boat lift and canopy. (See Declaration of Kathleen Hume, ¶11; CP 59.) Mr. Haley took title to the property from Kathleen Hume in May, 2005. (CP 168-170.) The boat lift and canopy were there to be seen.

In *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), our State Supreme Court distinguished the *Larsen* decision and clarified at p. 923-924 that *Larsen* did not negate the appeal limitation rule. Rather, the court in *Larsen* sought finality in ruling that the commencement of an action contesting a building permit one week after actual or constructive knowledge was within a reasonable time.

Further, the court in *Nykreim*, at p. 931-932, discussed our court's "stringent adherence to statutory time limits." Further, the court stated it has always recognized a strong public policy supporting administrative finality in land use decisions. In fact, if there were not finality in land use decisions, no owner of land would ever be safe in proceeding with development of his property. To make an exception would completely defeat the purpose and policy of the law in making a definite time limit. In this regard the court cited *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001).

Considering the finality doctrine and the strong adherence to the 21 day time limit of LUPA, the *Larsen* decision relied upon by Haley is a narrow exception to LUPA's strict time limit. Nonetheless, its holding does not support Haley's contention that there is *no* statutory limitation period to bring an action to force removal of the boat lift and canopy which were approved seven years ago.

Haley also relies upon *Radach v. Gunderson*, 39 Wn.App. 392, 695 P.2d 128 (1985). That reliance is misplaced. The *Radach* decision in 1985 was pre-LUPA. Timeliness of the Radachs' challenge to an illegal structure was not at issue. In fact, the court

stated at p. 400 "the Radachs were not guilty of delay or misconduct, and the injunction can be practicably framed and enforced." Also, the court ultimately ruled that the City of Ocean Shores which had issued the permit for an illegal structure should bear the cost of replacement.

Once again, Haley ignores the time lines in the *Radach* case. In 1977 a building permit issued which violated the zoning code. During that same year, Radach first saw the construction and noticed that the foundation was too close to the ocean. He complained to the City. A month later the City inspector was trying to "work something out" with the contractor. When the City ultimately approved a zoning variance, Radach sued. This case, and the other cases cited by Haley, all involve prompt action by the complaining party.

Haley claims at Brief of Appellant, pp. 8-9, that termination of his easement rights violates the U.S. and State of Washington Constitutions. No authority is cited. He claims property rights cannot be taken without due process. He ignores the public process undertaken by the City of Mercer Island in 2001 approving the watercourse improvement in the easement area (CP 191-282.) and the consent and involvement of Haley's predecessor in interest. (CP 58-60.)

3. RCW 4.16.080 Bars any Claim Challenging the 2005 Boat Lift Canopy Permit Including Allegations of Fraud In Obtaining the Permit.

Haley attempts to create a factual issue asserting fraud by Pugh in the Development Application submitted to the City of Mercer Island February 18, 2005, more than seven years prior to Haley's lawsuit. The application is found at Attachment D to the Declaration of George Steirer. (CP 286-296.) The application reveals a pre-existing boat lift and seeks approval of a canopy over the boat lift. The exemption permit was approved April 26, 2005.

Haley now asserts that the required distances from adjoining properties are fraudulently stated. While this can readily be refuted by Pugh, for purposes of a summary judgment motion, Pugh recognizes the court must accept Haley's allegations as true. Haley's attempt to lengthen the 3-year statute of limitations relies upon RCW 4.16.080(4) which provides that an action for relief upon the ground of fraud does not accrue "until the discovery by the aggrieved party of the facts constituting the fraud." Haley claims he did not discover the fraud until March or April, 2012.

Haley's reliance on the so-called "discovery rule" is misplaced. The statute begins to run in fraud cases when there is discovery by

the aggrieved party of the facts constituting the fraud. However, actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it. *Sanders v. Sheets*, 142 Wash. 155, 252 Pac. 531 (1927).

When an instrument involving real property is properly recorded it becomes notice to all the world of its contents. When the facts upon which the fraud is predicated are contained in a written instrument which is placed in the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument. *Strong v. Clark*, 56 Wn.2d 230, 352 P.2d 183 (1960).

It is also been held that the statute of limitations for a damage action based on fraud does not commence to run until the aggrieved party discovers, or should have discovered, the fact of fraud by due diligence *and* sustains some actual damage as a result therefrom. This interpretation prevents the unconscionable result of barring an aggrieved party's right to recovery before a right to judicial relief even arises. See *First Maryland LeaseCorp. v. Rothstein*, 72 Wn.App. 278, 282, 864 P.2d 17 (1993).

In determining whether facts should have been discovered by one exercising reasonable diligence, the defrauded party cannot be heard to say that he has not discovered the facts showing the fraud if the facts should have been discovered prior to that time by anyone exercising a reasonable amount of diligence. See *Sanders v. Sheets, supra* at p. 128. For the discovery rule to apply, the plaintiff must be on notice of some appreciable harm occasioned by another's wrongful conduct. See *Giraud v. Quincy Farm*, 102 Wn.App. 443, 6 P.3d 104 (2000). To invoke the discovery rule, the plaintiff must show that he or she could not have discovered the relevant facts earlier. *G.W. Constr. Corp. v. Professional Serv. Indus. Inc.*, 70 Wn.App. 360, 367, 853 P.2d 484 (1993).

Applying the foregoing standards to the case at bar, Haley and his predecessor in interest had actual knowledge of the boat lift and canopy's existence in 2005, as did any of his neighbors. Due diligence would have disclosed the existence of the permit application and Haley could have pursued any claim for fraud in that application within three years. In fact, Haley's predecessor in interest, Kathleen Hume, received notice of the boat lift canopy application and fully consented to this improvement. (CP 59.) Additionally, Haley fails to

show any injury as a result of the installation of the boat lift and canopy. To the extent he claims loss of view or loss of enjoyment of Lake Washington, these claims were well known to him in 2005. Haley cannot claim refuge under the discovery rule by failing to exercise due diligence in discovering his claim seven years ago.

Haley relies upon *Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011) for the proposition that a knowing misrepresentation of material fact confers no right upon the permit applicant. However, that case involved a timely LUPA petition filing twenty days after the relevant land use decision. That case has no applicability to the facts before this court.

Haley also cites *Ecology v. Pacesetter Construction*, 89 Wn.2d 203, 571 P.2d 196 (1977). In that case, an action was commenced against defendants approximately 1 month after plans were revealed. Unlike the present action, timeliness of the lawsuit was not an issue.

V. APPELLANT SHOULD BE AWARDED ATTORNEY'S FEES

Haley now claims, contrary to his Amended Complaint, that he is not seeking an award of damages under the SMA. He also disclaims his request for an award of costs and fees under the

Shoreline Management Act contrary to what is specifically set forth in his Amended Complaint. (CP 1-5.)

Haley claims he is now seeking "common law damages for fraud, negligence, damage to property and damage to enjoyment of property." (CP 94.) Yet a simple reading of his First Amended Complaint clearly claims violation of the Shoreline Act at paragraphs 6 through 11. Until the trial court's ruling, Haley's main causes of action have been centered on the Shorelines Management Act, RCW Ch. 90.58.

Pugh should be awarded attorney's fees for that portion of his fees related to the defense of SMA claims pursuant to RCW Ch. 90.58. The fact that Haley now shifts his action to one for unspecified zoning violations and disclaims an award of damages under the SMA does not defeat a claim for attorney's fees.

VI. CONCLUSION

The trial court's rulings should be affirmed. As a matter of law, the easement rights claimed by appellant were abandoned by his predecessor in interest. The City of Mercer Island in 2001 approved a change of use in the easement area to an open watercourse which is inconsistent with the vehicular or pedestrian use.

The challenge to respondent's boat lift and canopy approved by the City of Mercer Island 2005 is time-barred by the applicable 3-year statute of limitations at RCW 4.16.080.

Respondent is entitled to an award of attorney's fees for defense of the SMA claims.

Respectfully submitted this 9th day of January, 2014.

Frank R. Siderius WSBA 7759
SIDERIUS LONERGAN & MARTIN LLP
Attorneys for Appellant/Plaintiff

Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I mailed via U.S. Mail, first class, postage pre-paid and/or sent by legal messenger a true copy of this document to:

Jeffrey Haley
13434 SE 27th Place
Bellevue, WA 98005

Dated this 9th day of January, 2014.

Mary Berghammer

APPENDIX 1

Chapter 19.07
ENVIRONMENT

Sections:

19.07.010 Purpose.

These regulations are adopted for the following purposes:

A. To designate and protect critical areas as mandated by Chapter 36.70A RCW;

B. To include best available science in developing policies to protect the functions of critical areas as mandated by Chapter 36.70A RCW;

C. To prevent undue hazards to public health, safety, and welfare by minimizing impacts to critical areas;

D. To implement the city's comprehensive plan; and

E. To respond to the goals and objectives of the Washington State Growth Management Act, while reflecting the local conditions and priorities of Mercer Island. (Ord. 05C-12 § 5).

19.07.020 General provisions.

A. Applicability. Any alteration of a critical area or buffer shall meet the requirements of this chapter unless an allowed alteration or reasonable use exception applies pursuant to MICC 19.07.030.

B. Public Notice – Critical Area Determination. A critical area determination requires public notice pursuant to MICC 19.15.020(E) and this action may be appealed to the planning commission.

C. Critical Area Designation and Mapping. The approximate location and extent of critical areas are shown on the city's critical area maps (Appendix E), as now existing or hereafter amended. These maps are to be used as a reference only. The applicant is responsible for determining the scope, extent and boundaries of any critical areas to the satisfaction of the code official.

D. Administrative Guidelines. The code official may adopt administrative guidelines describing specific improvements to critical areas that are based on best available science and satisfy the no net loss standard described in this chapter.

E. Compliance with Other Federal, State or Local Laws. All approvals under this chapter, including critical area determinations and reasonable use exceptions, do not modify an applicant's obligation to comply in all respects with the applicable provisions of any other federal, state, or local law or regulation. (Ord. 05C-12 § 5).

19.07.030 Allowed alterations and reasonable use exception.

A. Allowed Alterations. The following alterations to critical areas and buffers are allowed and the applicant is not required to comply with the other regulations of this chapter, subject to an applicant satisfying the specific conditions set forth below to the satisfaction of the code official; and subject further, that the code official may require a geotechnical report for any alteration within a geologic hazard area:

1. Emergency actions necessary to prevent an immediate threat to public health, safety or welfare, or that pose an immediate risk of damage to private property. After the emergency, the code official shall be notified of these actions within seven days. The person or agency undertaking the action shall fully restore and/or mitigate any impacts to critical areas and buffers and submit complete applications to obtain all required permits and approvals following such work. The mitigation and restoration work will be completed within 180 days from issuance of required permits.

2. Operation, maintenance, renovation or repair of existing structures, facilities and landscaping, provided there is no further intrusion or expansion into a critical area.

3. Minor Site Investigative Work. Work necessary for land use submittals, such as surveys, soil logs, percolation tests, and other related activities, where such activities do not require construction of new access roads or significant amounts of excavation. In every case, impacts shall be mitigated and disturbed areas shall be restored.

4. Boundary Markers. Construction or modification of navigational aids and boundary markers.

5. Existing Streets and Utilities. Replacement, modification or reconstruction of existing streets and utilities in developed utility easements and in developed streets, subject to the following:

a. The activity must utilize best management practices; and

b. The activity is performed to mitigate impacts to critical areas to the greatest extent reasonably feasible consistent with best available science.

6. New Streets, Driveways, Bridges and Rights-of-Way. Construction of new streets and driveways, including pedestrian and bicycle paths, subject to the following:

a. Construction is consistent with best management practices;

b. The facility is designed and located to mitigate impacts to critical areas consistent with best available science;

c. Impacts to critical areas are mitigated to the greatest extent reasonably feasible so there is no net loss in critical area functions; and

d. The code official may require a critical area study or restoration plan for this allowed alteration.

7. New Utility Facilities. New utilities, not including substations, subject to the following:

a. Construction is consistent with best management practices;

b. The facility is designed and located to mitigate impacts to critical areas consistent with best available science;

c. Impacts to critical areas are mitigated to the greatest extent reasonably feasible so there is no net loss in critical area functions;

d. Utilities shall be contained within the footprint of an existing street, driveway, paved area, or utility crossing where possible; and

e. The code official may require a critical area study or restoration plan for this allowed alteration.

8. The removal of noxious weeds with hand labor and/or light equipment; provided, that the appropriate erosion-control measures are used and the area is revegetated with native vegetation.

9. Public and private nonmotorized trails subject to the following:

a. The trail surface should be made of pervious materials, unless the code official determines impervious materials are necessary to ensure user safety;

b. Trails shall be located to mitigate the encroachment; and

c. Trails proposed to be located in a geologic hazard area shall be constructed in a manner that does not significantly increase the risk of landslide or erosion hazard. The city may require a geotechnical review pursuant to MICC 19.07.060.

10. Existing single-family residences may be expanded or reconstructed in buffers, provided all of the following are met:

a. The applicant must demonstrate why buffer averaging or reduction pursuant to MICC 19.07.070(B) will not provide the necessary relief;

b. Expansion within a buffer is limited to 500 square feet beyond the existing footprint that existed on January 1, 2005;

c. The expansion is not located closer to the critical area than the closest point of the existing residence;

d. The functions of critical areas are preserved to the greatest extent reasonably feasible consistent with best available science;

e. Impacts to critical areas are mitigated to the greatest extent reasonably feasible so that there is no net loss in critical area functions;

f. Drainage capabilities are not adversely impacted; and

g. The city may require a critical area study or restoration plan for this exemption.

11. Conservation, preservation, restoration and/or enhancement of critical areas that does not negatively impact the functions of any critical area. If the proposed work requires

hydraulic project approval from the State of Washington Department of Fisheries, the code official may require a critical area study.

12. Tree pruning, cutting and removal in accordance with the permit requirements of Chapter 19.10 MICC, Trees.

13. Alterations to Category III and IV wetlands of low value under 2,500 square feet.

If a project does not qualify as an allowed alteration under this section, it may be allowed through a reasonable use exception or if it is consistent with the other regulations in this chapter.

B. Reasonable Use Exception.

1. Application Process. If the application of these regulations deny reasonable use of a subject property, a property owner may apply to the hearing examiner for a reasonable use exception pursuant to permit review, public notice and appeal procedures set forth in Chapter 19.15 MICC.

2. Studies Required. An application for a reasonable use exception shall include a critical area study and any other related project documents, such as permit applications to other agencies, and environmental documents prepared pursuant to the State Environmental Policy Act.

3. Criteria. The hearing examiner will approve the application if it satisfies all of the following criteria:

a. The application of these regulations deny any reasonable use of the property. The hearing examiner will consider the amount and percentage of lost economic value to the property owner;

b. No other reasonable use of the property has less impact on critical areas. The hearing examiner may consider alternative reasonable uses in considering the application;

c. Any alteration to critical areas is the minimum necessary to allow for reasonable use of the property;

d. Impacts to critical areas are mitigated to the greatest extent reasonably feasible consistent with best available science;

e. The proposal does not pose an unreasonable threat to the public health, safety, or welfare; and

f. The inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant after the effective date of this chapter.

The hearing examiner may approve, approve with conditions, or deny the request based on the proposal's ability to comply with all of the above criteria. The applicant has the burden of proof in demonstrating that the above criteria are met. Appeals of the hearing examiner's decision may be made to Washington State Superior Court. (Ord. 05C-12 § 5).

19.07.040 Review and construction requirements.

A. Development Standards. The applicant will comply with the general development standards set forth in Chapter 19.09 MICC.

B. Native Growth Protection Areas.

1. Native growth protection areas may be used in development proposals for subdivisions and lot line revisions to delineate and protect contiguous critical areas.

2. Native growth protection areas shall be designated on the face of the plat or recorded drawing in a format approved by the city. The designation shall include an assurance that native vegetation will be preserved and grant the city the right to enforce the terms of the restriction.

C. Setback Deviation. An applicant may seek a deviation from required front and back yard setbacks pursuant to MICC 19.02.020(C)(4).

D. Variances. Variances pursuant to MICC 19.01.070 are not available to reduce any numeric requirement of this chapter. However, the allowed alterations and the reasonable use exception allowed pursuant to MICC 19.07.030 may result in city approvals with reduced numeric requirements.

E. Appeals. Appeals of decisions made under the provisions of this chapter shall follow the procedures outlined in MICC 19.15.010(E) and 19.15.020(J).

F. Fees. Fees shall be set forth in a schedule adopted by city council resolution. The fee should be based on a submittal fee and the time required to review development applications for alterations within critical areas and buffers.

G. Hold Harmless/Indemnification Agreement and Covenant Not to Sue, Performance Guarantees, Performance Bonds, Insurance. An applicant for a permit within a critical area will comply with the requirements of MICC 19.01.060, if required by the code official.

H. Erosion Control Measures.

1. A temporary erosion and sediment control plan shall be required for alterations on sites that contain critical areas.

2. Erosion control measures shall be in place, including along the outer edge of critical areas prior to clearing and grading. Monitoring surface water discharge from the site during construction may be required at the discretion of the code official.

I. Timing. All alterations or mitigation to critical areas shall be completed prior to the final inspection and occupancy of a project. Upon a showing of good cause, the code official may extend the completion period.

J. Maintenance and Monitoring.

1. Landscape maintenance and monitoring may be required for up to five years from the date of project completion if the code official determines such condition is necessary to ensure mitigation success and critical area protection.

2. Where monitoring reveals a significant variance from predicted impacts or a failure of protection measures, the applicant shall be responsible for appropriate corrective action, which may be subject to further monitoring.

K. Suspension of Work. If the alteration does not meet city standards established by permit condition or applicable codes, including controls for water quality, erosion and sedimentation, the city may suspend further work on the site until such standards are met. (Ord. 05C-12 § 5).

19.07.050 Critical area study.
When a critical area study is required under MICC 19.07.030, 19.07.060, 19.07.070, 19.07.080 or 19.07.090, the following documents are required:

A. Site survey.

B. Cover sheet and site construction plan.

C. Mitigation and restoration plan to include the following information:

1. Location of existing trees and vegetation and proposed removal of same;

2. Mitigation proposed including location, type, and number of replacement trees and vegetation;

3. Delineation of critical areas;

4. In the case of a wildlife habitat conservation area, identification of any known endangered or threatened species on the site;

5. Proposed grading;

6. Description of impacts to the functions of critical areas; and

7. Proposed monitoring plan.

A mitigation and restoration plan may be combined with a storm water control management plan or other required plan. Additional requirements that apply to specific critical areas are located in MICC 19.07.060, Geologic hazard areas; MICC 19.07.070, Watercourses; MICC 19.07.080, Wetlands; and MICC 19.07.090, Wildlife habitat conservation areas.

D. Storm water and erosion control management plan consistent with Chapter 15.09 MICC. Off -site measures may be required to correct impacts from the proposed alteration.

E. Other technical information consistent with the above requirements, as required by the code official.

The critical area study requirement may be waived or modified if the code official determines that such information is not necessary for the protection of the critical area. (Ord. 05C-12 § 5).

19.07.060 Geologic hazard areas.
A. Designation. All property meeting the definition of a geologic hazard area is designated as a geologic hazard area.

B. Buffers. There are no buffers for geologic hazard areas, but a geotechnical report is required prior to making alterations in geologic hazard areas. This provision shall not change development limitations imposed by the creation of building pads under MICC 19.09.090.

C. Geotechnical Review.

1. The applicant must submit a geotechnical report concluding that the proposal can effectively mitigate risks of the hazard. Consistent with MICC 19.07.050, the report shall suggest appropriate design and development measures to mitigate such hazards.

2. The city may require peer review of the geotechnical report by a second qualified professional to verify the adequacy of the information and analysis. The applicant shall bear the cost of the peer review.

3. The code official may waive the requirement for a geotechnical report when the proposed alteration does not pose a threat to the public health, safety and welfare in the sole opinion of the code official.

D. Site Development.

1. Development Conditions. Alterations of geologic hazard areas may occur if the code official concludes that such alterations:

a. Will not adversely impact other critical areas;

b. Will not adversely impact (e.g., landslides, earth movement, increase surface water flows, etc.) the subject property or adjacent properties;

c. Will mitigate impacts to the geologic hazard area consistent with best available science to the maximum extent reasonably possible such that the site is determined to be safe; and

d. Include the landscaping of all disturbed areas outside of building footprints and installation of all impervious surfaces prior to final inspection.

2. Statement of Risk. Alteration within geologic hazard areas may occur if the development conditions listed above are satisfied and the geotechnical professional provides a statement of risk with supporting documentation indicating that one of the following conditions can be met:

a. The geologic hazard area will be modified, or the development has been designed so that the risk to the lot and adjacent property is eliminated or mitigated such that the site is determined to be safe;

b. Construction practices are proposed for the alteration that would render the development as safe as if it were not located in a geologic hazard area;

c. The alteration is so minor as not to pose a threat to the public health, safety and welfare; or

d. An evaluation of site specific subsurface conditions demonstrates that the proposed development is not located in a geologic hazard area.

3. Development Limitations. Within a landslide hazard area, the code official may restrict alterations to the minimum extent necessary for the construction and maintenance of structures and related access where such action is deemed necessary to mitigate the hazard associated with development.

4. Seasonal Limitations. Land clearing, grading, filling, and foundation work within geologic hazard areas are not permitted between October 1 and April 1. The code official may grant a waiver to this seasonal development limitation if the applicant provides a geotechnical report of the site and the proposed construction activities that concludes erosion and sedimentation impacts can be effectively controlled on-site consistent with adopted storm water standards and the proposed construction work will not subject

people or property, including areas off-site, to an increased risk of the hazard. As a condition of the waiver, the code official may require erosion control measures, restoration plans, and/or an indemnification/release agreement. Peer review of the geotechnical report may be required in accordance with subsection C of this section. If site activities result in erosion impacts or threaten water quality standards, the city may suspend further work on the site and/or require remedial action. (Ord. 05C-12 § 5).

19.07.070 Watercourses.

A. Watercourses – Designation and Typing. Watercourses shall be designated as Type 1, Type 2, Type 3 and Restored according to the following criteria:

1. Type 1 Watercourse. Watercourses or reaches of watercourses used by fish, or are downstream of areas used by fish.

2. Type 2 Watercourse. Watercourses or reaches of watercourses with year-round flow, not used by fish.

3. Type 3 Watercourse. Watercourses or reaches of watercourses with intermittent or seasonal flow and not used by fish.

4. Restored Watercourse. Any Type 1, 2 or 3 watercourses created from the opening of previously piped, channelized or culverted watercourses.

B. Watercourse Buffers.

1. Watercourse Buffer Widths. Standard buffer widths shall be as follows, measured from the ordinary high water mark (OHW), or top of bank if the OHW cannot be determined through simple nontechnical observations.

Watercourse Type	Standard (Base) Buffer Width (feet)	Minimum Buffer Width with Enhancement (feet)
Type 1	75	37
Type 2	50	25
Type 3	35	25
Restored or Piped	25	Determined by the code official

2. Reduction of Buffer Widths.

a. The code official may allow the standard buffer width to be reduced to not less than the above listed minimum width in accordance with an approved critical area study when he/she determines that a smaller area is adequate to protect the watercourse, the impacts will be mitigated by using combinations of the below mitigation options, and the proposal will result in no net loss of watercourse and buffer functions. However, in no case shall a reduced buffer contain a steep slope.

b. The code official may consider the following mitigation options:

i. Permanent removal of impervious surfaces and replacement with native vegetation;

ii. Installation of biofiltration/infiltration mechanisms such as bioswales, created and/or enhanced wetlands, or ponds supplemental to existing storm drainage and water quality requirements;

iii. Removal of noxious weeds, replanting with native vegetation and five-year monitoring;

iv. Habitat enhancement within the watercourse such as log structure placement, bioengineered bank stabilization, culvert removal, improved salmonid passage and/or creation of side channel or backwater areas;

v. Use of best management practices (e.g., oil/water separators) for storm water quality control exceeding standard requirements;

vi. Installation of pervious material for driveway or road construction;

vii. Use of "green" roofs in accordance with the standards of the LEED Green Building Rating System;

viii. Restoration of off-site area if no on-site area is possible;

ix. Removal of sources of toxic material that predate the applicant's ownership; and

x. Opening of previously channelized and culverted watercourses on-site or off-site.

3. Averaging of Buffer Widths. The code official may allow the standard buffer width to be averaged if:

a. The proposal will result in a net improvement of critical area function;

b. The proposal will include replanting of the averaged buffer using native vegetation;

c. The total area contained in the averaged buffers on the development proposal site is not decreased below the total area that would be provided if the maximum width were not averaged;

d. The standard buffer width is not reduced to a width that is less than the minimum buffer width at any location; and

e. That portion of the buffer that has been reduced in width shall not contain a steep slope.

4. Restoring Piped Watercourses.

a. Removal of pipes conveying watercourses shall only occur when the code official determines that the proposal will result in a net improvement of ecological functions and will not significantly increase the threat of erosion, flooding, slope stability or other hazards.

b. Where the buffer of the restored watercourse would extend beyond a required setback the applicant shall obtain written agreement from the affected neighboring property owner. The city may deny a request to restore a watercourse if it results in buffers being adjusted and increased onto adjacent properties.

C. Impervious Surfaces. Impervious surface shall not be permitted within a watercourse or watercourse buffer except as specifically provided in this chapter.

D. Development Standards.

1. Type 3 watercourses may be relocated when such relocation results in equivalent or improved watercourse functions. Type 1 and 2 watercourses shall not be relocated except through the reasonable use exception.

2. Existing watercourses shall not be placed into culverts except as provided by the allowed alterations or reasonable use exception. When culverts are allowed, they shall be designed to mitigate impacts to critical area functions. Oversize and open bottom culverts lined with rock that maintain a semi-natural stream bed are preferred to round culverts. (Ord. 08C-01 § 3; Ord. 05C-12 § 5).

19.07.080 Wetlands.

A. Wetland Designation. All property meeting the definition of a wetland in the Wetland Manual is designated as a wetland.

B. Wetland Ratings. Wetlands shall be rated as Category I, Category II, Category III or Category IV according to the wetland classification system.

C. Wetland Buffers.

1. Standard Wetland Buffer Widths. The following standard buffer widths shall be established from the outer edge of wetland boundaries:

Wetland Type	Standard (Base) Buffer Width (feet)	Minimum Buffer Width with Enhancement (feet)
Category I*	100	50
Category II	75	37
Category III	50	25
Category IV	35	25

* Note: There are no known Category I wetlands in the city.

2. Reduction of Wetland Buffer Widths. The code official may allow the standard wetland buffer width to be reduced to not less than the minimum buffer width in accordance with an approved critical area study when he/she determines that a smaller area is adequate to protect the wetland functions, the impacts will be mitigated consistent with MICC 19.07.070(B)(2), and the proposal will result in no net loss of wetland and buffer functions.

3. Averaging of Wetland Buffer Widths. The code official may allow averaging of the standard wetland buffer widths in accordance with the criteria of MICC 19.07.070(B)(3).

D. Alterations. Category III and IV wetlands of less than one acre in size may be altered if the applicant can demonstrate that the wetland will be restored, enhanced, and/or replaced with a wetland area of equivalent or greater function. In cases where the applicant demonstrates that a suitable on-site solution does not exist to enhance, restore, replace or maintain a wetland in its existing condition, the city may permit the applicant to provide off-site replacement by a

wetland with equal or better functions. The off-site location must be in the same drainage sub-basin as the original wetland. (Ord. 05C-12 § 5).

19.07.090 Wildlife habitat conservation areas.

A. Designation. Bald eagles are the only endangered or threatened non-aquatic wildlife species known to inhabit Mercer Island and the city designates those areas used by these species for nesting, breeding, feeding and survival as wildlife habitat conservation areas. If other non-aquatic species are later added by the State Washington Fish and Wildlife Department as endangered or threatened as set forth in WAC 232-12-011 through 232-12-014, as amended, the city council will consider amending this section to add such species. The provisions of this section do not apply to any habitat areas which come under the jurisdiction of the city's shoreline master program. The city's watercourse, wetland and shoreline regulations in this chapter provide required protections for aquatic species.

B. Establishment of Buffers. For any wildlife habitat conservation area located within other critical areas regulated in this chapter, the buffers for those critical areas shall apply except where species exist that have been identified by the State Department of Fish and Wildlife as endangered or threatened. If such species are present, the applicant shall comply with all state or federal laws in connection with any alteration of the wildlife habitat conservation area and the code official may require a critical area study.

C. Seasonal Restrictions. When a species is more susceptible to adverse impacts during specific periods of the year, seasonal restrictions may apply. Activities may be further restricted and buffers may be increased during the specified season. (Ord. 05C-12 § 5).

19.07.100 Shoreline areas.

Shorelands directly impact water quality as surface and subsurface waters are filtered back into the lake. Additionally, shorelines are a valuable fish habitat area characterized by lake bottom conditions, erosion tendencies, and the proximity to watercourse outfalls. These may combine to provide a suitable environment for spawning fish.

A. Critical Areas Delineations.

1. A survey to determine the line of ordinary high water (OHW) shall be current to within one year of the application for single lots, short subdivisions, long subdivisions, or lot line revisions.

2. The survey may be included in the site construction plan (see MICC 19.07.060, Reports and Surveys) or waived by city staff if the OHW has been delineated by an existing bulkhead.

3. Mark the shoreline setback on the site prior to the preconstruction meeting.

B. Site Development.

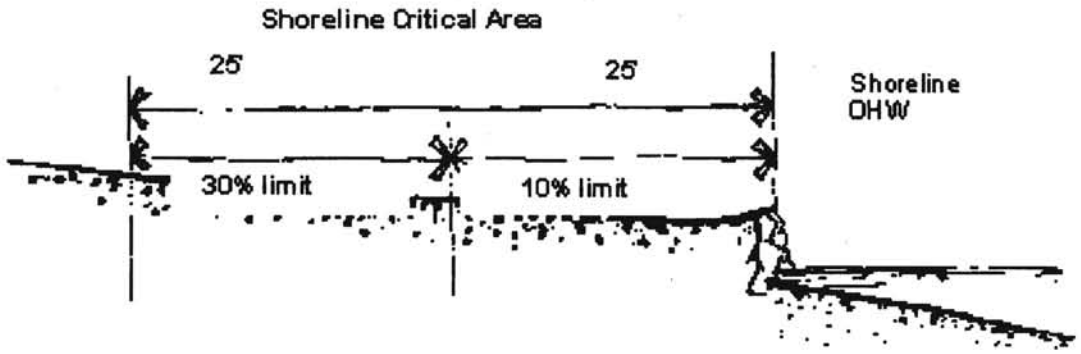
1. A 25-foot setback from OHW is required.

2. If a wetland is adjacent to the shoreline, measure the shoreline setback from the wetland's boundary.

C. Site Coverage. The amount of impervious surfaces which will be permitted is as follows:

Distance from OHW	Impervious Surface Limitations

0 – 25 feet	10% – No building(s) allowed
26 – 50 feet	30% – Structure(s) allowed



D. Storm Water and Erosion Control. Erosion control devices shall be installed along the boundaries of the shoreland setback following the preconstruction meeting and prior to clearing or grading.

E. Alteration. Any alteration in this area requires either: (1) a shoreline exemption or (2) a substantial development permit, a building/ grading permit, and storm water permit. Some development or alteration may also require a conditional use permit. (Ord. 08C-01 § 3; Ord. 05C-12 § 6; Ord. 02C-09 § 6; Ord. 99C-13 § 1. Formerly 19.07.050).

19.07.110 Shoreline management master program.

A. General Information.

1. Introduction and Purpose. The Washington State Legislature enacted the Shoreline Management Act (SMA) of 1971 (Chapter 90.58 RCW) to provide a uniform set of rules governing the development and management of shoreline areas. As a basis for the policies of the SMA, the Legislature incorporated findings that "the shorelines are among the most valuable and fragile" of the state's resources, that they are under "ever increasing pressure of additional uses" and that "unrestricted construction on the privately or publicly owned shorelines of the state is not in the best public interest." The Legislature further finds that "coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state, while, at the same time, recognizing and protecting private property rights consistent with the public interest."

The SMA sets up a process for managing development of the state's shorelines through state-monitored, locally administered permitting program. Local governments are required to prepare shoreline master programs to manage shoreline development within their jurisdiction. The SMA specifies that each local shoreline master program includes goals and policies that take into account the specific local conditions influencing the shoreline jurisdiction.

The purpose of the shoreline master program is to implement the Shoreline Management Act of 1971 and to establish regulations for development based on the local shoreline goals and policies.

a. The shoreline master program specifies boundaries of a shoreline jurisdiction and shoreline designated environments;

b. The shoreline master program establishes regulations for development within the shoreline jurisdiction;

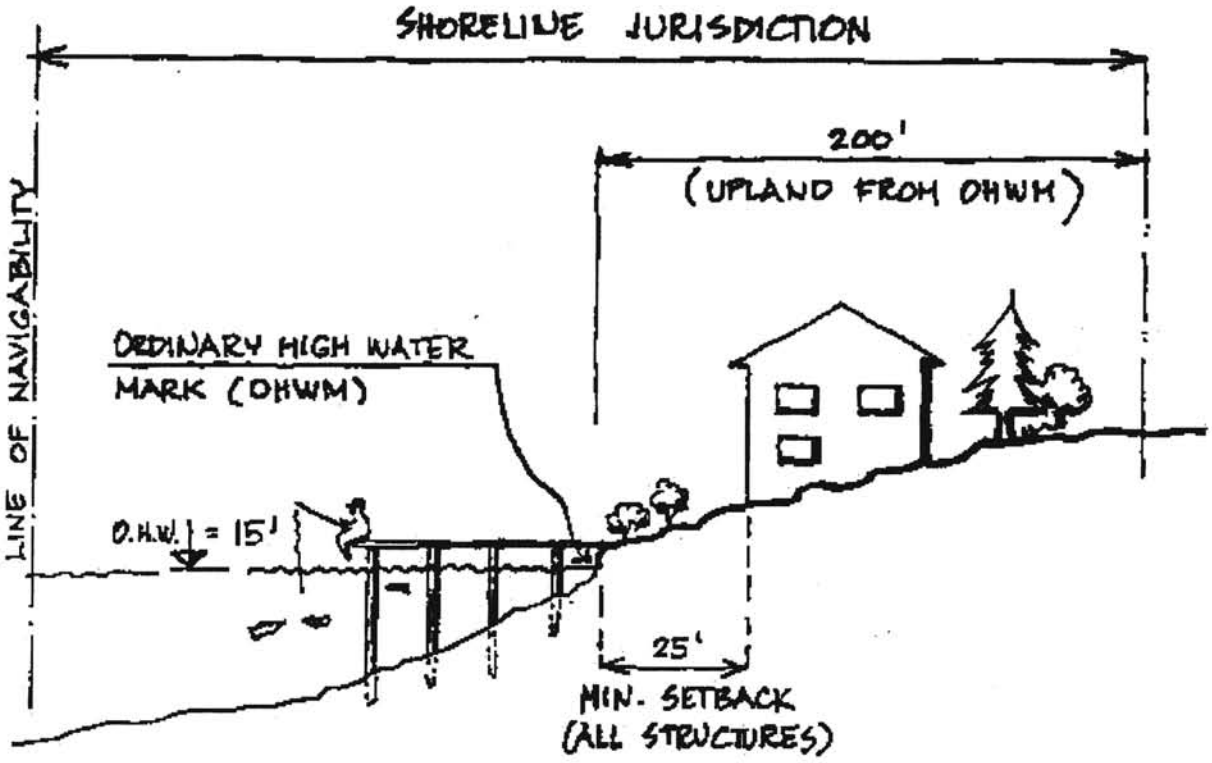
c. The shoreline master program specifies requirements for public participation in decisions about shoreline development.

2. Shoreline Jurisdiction. The shoreline jurisdiction is geographically defined as:

a. All lands extending landward 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark and all associated shorelands (RCW 90.58.030).

b. All lands under Lake Washington extending waterward to the line of navigability/inner harbor line as established in 1984 by the Board of Natural Resources by Resolution No. 461.

The following illustration shows the applicability of the shoreline master program jurisdiction:



3. Applicability. The regulations and procedures of the shoreline master program apply to all development within the shoreline jurisdiction of the city including the waters and underlying land of Lake Washington and to the shoreline uses established within the shoreline designated environments.

4. Adoption Authority. The regulations contained in MICC 19.07.080 are hereby adopted as the shoreline master program for the city of Mercer Island. These regulations are adopted under the authority of the Chapter 90.58 RCW and Chapter 173-16 WAC.

5. Relationship to Land Use Code and Other Ordinances.

a. The shoreline master program regulations are supplemental to the city of Mercer Island comprehensive plan, the Mercer Island development code and various other provisions of city, state and federal laws. Applicants must comply with all applicable laws prior to commencing any use, activity, or development.

b. The shoreline jurisdiction and the shoreline designated environments are superimposed upon the existing zoning classifications. The zoning regulations specified in the development code and this section are intended to operate together to produce coherent and thorough regulations. All uses, activities and developments must comply with both the Mercer Island development code and shoreline master program. If there is a conflict between the two, the more restrictive regulation applies.

6. Goals and Policies. In 1974 the city of Mercer Island adopted shoreline goals and policies. These goals and polices are consistent with the city's comprehensive plan adopted in 1993.

B. Shoreline Designated Environments.

1. Designated Environments. Different areas of the city's shoreline have different natural characteristics and development patterns. As a result, three shoreline designated environments are established to regulate developments and uses consistent with the specific conditions of the designated environments and to protect resources of the Mercer Island shoreline jurisdiction. They are:

a. Conservancy Environment. This environment constitutes large undeveloped areas with some natural constraints such as wetland conditions, containing a variety of flora and fauna. The purpose of this environment is to protect and manage the existing natural resources in order to achieve sustained resource utilization and provide recreational opportunities.

b. Urban Park. This environment consists of shoreline areas designated for public access and active and passive public recreation. It includes, but is not limited to, street ends, public utilities and other publicly owned rights-of-way. The uses located in this environment should be water-dependent and designed to maintain the natural character of the shorelines.

c. Urban Residential. The purpose of this environment is to provide for residential and recreational utilization of the shorelines, compatible with the existing residential character in terms of bulk, scale and type of development.

2. Shoreline Environment Map. The map in Appendix F of this development code is the official map of the city designating the various shoreline environments and the shoreline jurisdiction within the city.

3. Permit Requirements for Shoreline Uses and Development within the Designated Environments. All proposed development within the shoreline jurisdiction shall be consistent with the regulations of this Shoreline Master Program, the Shoreline Management Act of 1971 and the Mercer Island development code. In addition all development shall conform to permit requirements of all other agencies having jurisdiction within the designated environments.

The following table specifies the shoreline uses and developments which may take place or be conducted within the designated environments. It also specifies the type of shoreline permit required and further states the necessary reviews under the State Environmental Policy Act (SEPA). The uses and developments listed in the matrix are allowed only if they are not in conflict with more restrictive regulations of the Mercer Island development code and are in compliance with the regulations specified in subsection D of this section.

Key:	
CE:	Categorically Exempt
SEP:	Shoreline Exemption Permit
SDP:	Substantial Development Permit
SEPA:	Required Review under the State Environmental Policy Act
NP:	Not Permitted Use

The regulations of the shoreline master program apply to all shoreline uses and development, whether or not that development is exempt from the permit requirements (CE, SEP, or SDP).

	Designated Environments		
Shoreline Use	**Conservancy Environment**	**Urban Park Environment**	**Urban Residential Environment**
Single-family residential and associated appurtenances	NP	NP	CE or SDP if the construction is not by an owner, lessee or contract purchaser for his/her own use or if alteration applie
Multifamily residential	NP	NP	SDP, SEPA
Public and private recreational facilities and parks	SDP, SEPA	SDP, SEPA	SDP, SEPA
Moorage facilities (including piers, docks, piles, lift stations, or buoys)	SDP, SEPA	SDP, SEPA	SDP, SEPA
Commercial marinas, moorage and storage of commercial boats and ships	NP	NP	NP
Bulkheads and shoreline protective structures	SDP, SEPA	SDP, SEPA	SEP, SEPA
Breakwaters and jetties	NP	NP	NP
Utilities	SDP, SEPA	SDP, SEPA	CE, SEP or SDP, SEPA
Dredging	SDP, SEPA	SDP, SEPA	SDP, SEPA
Alterations over 250 cubic yards – outside the building footprint	SDP, SEPA	SDP, SEPA	SDP, SEPA
If a use is not listed in this matrix, it is not permitted.			

C. Administration and Procedures.

1. Administrative Responsibility. Except as otherwise stated in this section, the code official is responsible for:

a. Administering the shoreline master program.

b. Approving, approving with conditions or denying shoreline exemption permit, substantial development permits, variances and permit revisions in accordance with the provisions of this shoreline master program.

c. Determining compliance with Chapter 43.21C RCW, State Environmental Policy Act.

2. Permits and Decisions. No development shall be undertaken within the shoreline jurisdiction without first obtaining a permit in accordance with the procedures established in the shoreline master program. In addition such permit shall be in compliance with permit requirements of all other agencies having jurisdiction within the shoreline designated environment.

a. Shoreline Exemption Permit. A shoreline exemption permit (SEP) may be granted to the following development as long as such development is in compliance with all applicable requirements of this shoreline master program, the city of Mercer Island development code and WAC 173-27-040:

i. Any development of which the total cost or fair market value, whichever is higher, does not exceed $5,718 or as periodically revised by the Washington State Office of Financial Management, if such development does not materially interfere with the normal public use of the water or shorelines of the state;

ii. Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. "Normal maintenance" includes those usual acts established to prevent a decline, lapse, or cessation from a lawfully established condition. "Normal repair" means to restore a development to a state comparable to its original condition within a reasonable period after decay or partial destruction except where repair involves total replacement which is not common practice or causes substantial adverse effects to the shoreline resource or environment. Normal maintenance of single-family dwellings is categorically exempt as stated above;

iii. Construction of the normal protective bulkhead common to single-family dwellings. A "normal protective" bulkhead is constructed at or near the ordinary high water mark to protect a single-family dwelling and is for protecting land from erosion, not for the purpose of creating land. Where an existing bulkhead is being replaced, it shall be constructed no further waterward of the existing bulkhead than is necessary for construction of new footings;

iv. Emergency construction necessary to protect property from damage by the elements. An "emergency" is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this section;

v. Construction or modification of navigational aids such as channel markers and anchor buoys;

vi. Construction of a dock, designed for pleasure craft only, for the private noncommercial use of the owners, lessee, or contract purchaser of a single-family dwelling, for which the cost or fair market value, whichever is higher, does not exceed $10,000;

vii. Any project with a certification from the governor pursuant to Chapter 80.50 RCW.

If a development is exempt from the requirements of the substantial development permit, but a deviation or variance from the provisions of the shoreline master program is required, the applicant must request said deviation or variance through the procedures established in this section.

b. Substantial Development Permit. A substantial development permit (SDP) is required for any development within a shoreline jurisdiction not covered under a categorical exemption or shoreline exemption permit. Requirements and procedures for securing a substantial development permit are established below. Compliance with all applicable federal and state regulations is also required.

c. Deviations and Deviation Criteria. The city planning commission shall have the authority to grant deviations from the regulations specified in Table B in subsection D of this section; provided, the proposed deviation:

i. Will not constitute a hazard to the public health, welfare, and safety, or be injurious to affected shoreline properties in the vicinity;

ii. Will not compromise a reasonable interest of the adjacent property owners;

iii. Is necessary to the reasonable enjoyment of property rights of the applicant; and

iv. Is not in conflict with the general intent and purpose of the SMA, the shoreline master program and the development code.

d. Variances and Variance Criteria. Variances to the shoreline master program requirements are only granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In addition, in all instances the applicant for a variance shall demonstrate strict compliance with all variance criteria set out in MICC 19.15.020(G)(4) and the following additional criteria:

i. In the granting of all variance permits, consideration shall be given to the cumulative impact of additional request for like actions in the area. For example if variances were granted to other developments in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

ii. Variance permits for development that will be located landward of the ordinary high water mark may be authorized; provided, the applicant can demonstrate all of the following:

(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes or significantly interferes

with reasonable use of the property not otherwise prohibited by the master program;

(b) That the hardship in subsection (C)(2)(d)(ii)(a) of this section is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;

(c) That the design of the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment;

(d) That the requested variance does not constitute a grant of special privilege not enjoyed by the other properties in the area, and is the minimum necessary to afford relief; and

(e) That the public interest will suffer no substantial detrimental effect.

iii. Variance permits for development that will be located waterward of the ordinary high water mark may be authorized; provided, the applicant can demonstrate all of the following:

(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes reasonable use of the property not otherwise prohibited by the master program;

(b) That the proposal is consistent with the criteria established under subsections (C)(2)(d)(ii)(b) through (e) of this section; and

(c) That the public rights of navigation and use of the shorelines will not be adversely affected.

3. Permit Review Procedures.

Step 1. Application.

The applicant shall arrange a preapplication meeting for all substantial development permits, deviations and variances. Upon completion of the preapplication meeting, a complete application including the required processing fees shall be filed with the city on approved forms to ensure compliance with development codes and standards. A complete application for the shoreline exemption permit (SEP), substantial development permit (SDP), or variance and SEPA checklist, if applicable, shall be filed with the city on required forms.

SEP Review Process: The city shall issue or deny the SEP within 10 calendar days of receiving the request, or after SEPA review. The city shall then send the SEP to the applicant and the Department of Ecology, pursuant to WAC 173-27-130, and to all other applicable local, state, or federal agencies.

Step 2. Public Notice.

Public notice of an application for a substantial development permit shall be made in accordance with the procedures set forth in MICC 19.15.020; provided, such notice shall be given at least 30 days before the date of final local action.

If an application is not exempt from SEPA and no prior SEPA notice has been given, the city shall publish the SEPA determination and a notice that comments on the SEPA documents may be made during the review of the SDP, deviation and variance application.

Within 30 days of the final publication, posting or mailing of the notice, whichever comes last, any interested person may submit written comments on the proposed application. The city will not make a decision on the permit until after the end of the comment period.

Step 3. Review.

The Shoreline Management Act does not require that public hearing be held on SDP and/or variance application. The technical review of SDP and/or variance must ensure that the proposal complies with the criteria of the shoreline master program, Shoreline Management Act policies and all requirements of the city of Mercer Island development code.

An open record hearing before the planning commission, as set out in MICC 19.15.020(F), shall be conducted on all deviation applications and may be conducted on the SDP or variance application when the following factors exist:

(a) The proposed development has broad public significance; or

(b) Within the 30-day comment period, 10 or more interested citizens file a written request for a public hearing; or

(c) The cost of the proposed development, exclusive of land, will exceed $100,000.

Step 4. Decision.

After the 30-day comment period has ended, the city shall decide whether to approve or deny any SDP, deviation and/or variance application, unless the applicant and any adverse parties agree in writing to an extension of time with a certain date.

The city's action in approving, approving with conditions, or denying SDP, deviation and/or variance shall be given in writing in the form required by WAC 173-27-120 (or its successor) and mailed to the applicant, all persons who submitted written comments, the Department of Ecology, the Washington State Attorney General, and all other applicable local, state, or federal agencies.

The city's action in approving, approving with conditions, or denying any SDP and/or deviation is final unless an appeal is filed in accordance with applicable law.

The final decision in approving, approving with conditions, or denying variance is rendered by the Department of Ecology in accordance with WAC 173-27-200, and to all other applicable local, state, or federal agencies.

Step 5. Filing.

The city's final action in approving, approving with conditions, or denying SDP, deviation and/or variance shall be filed with the Department of Ecology and Washington State Attorney General.

Step 6. Authorization to Commence Construction.

If the SDP and/or variance is approved, the applicant shall not begin construction until after the 21-day review period by the Department of Ecology is over and/or any appeals concluded. The applicant shall also comply with all applicable federal, state and city standards for construction.

4. Time Limits of Permits. The following time limits shall apply to all shoreline exemption, substantial development, deviation and variance permits:

a. Construction or substantial progress toward construction of a development for which a permit has been granted must be undertaken within two years of the effective date of a shoreline permit. The effective date of a shoreline permit shall be the date of the last action required on the shoreline permit and all other government permits and approvals that authorize the development to proceed, including all administrative and legal actions on any such permit or approval.

b. A single extension before the end of the time limit, with prior notice to parties of record, for up to one year, based on reasonable factors may be granted.

5. Suspension of Permits. The city may suspend any shoreline exemption, substantial development, deviation and variance permit when the permittee has not complied with the conditions of the permit. Such noncompliance may be considered a public nuisance. The enforcement shall be in conformance with the procedures set forth in MICC 19.15.030, Enforcement.

6. Revisions. When an applicant seeks to revise a SDP, deviation and/or variance permit the requirement of WAC 173-27-100, as amended, shall be met.

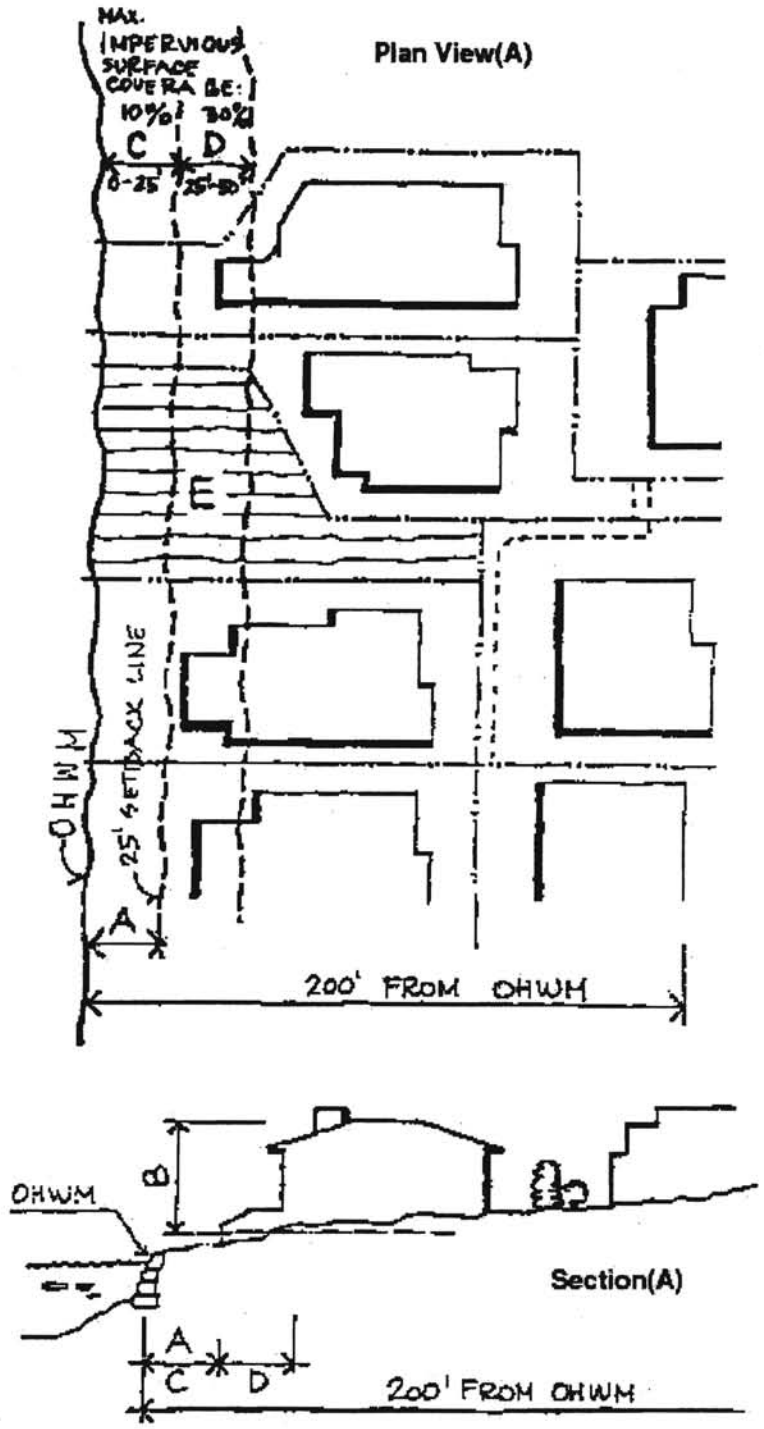
D. Use Regulations. All development within the shoreline jurisdiction shall be in compliance with all development requirements specified in this section.

1.

Table A. Requirements for Development Located Landward from the OHWM

Setbacks for All Structures (Including Fences over 48 Inches High) and Parking	A*	25 feet from the OHWM and all required setbacks of the development code
Height Limits for All Structures	B	Shall be the same as height limits specified in the developmen code but shall not exceed a height of 35 feet above average grade level (WAC 173-27-040)
Maximum Impervious Surface Coverage	C D	10%: between 0 – 25 feet from OHWM 30%: between 25 – 50 feet from OHWM
Minimum Land Area Requirements	E	All semi-private, commercial and noncommercial recreational tracts and areas shall have minimum land area: 200 square fe per family, but not less than 600 square feet, exclusive of driveways or parking areas. Screening of the boundaries with abutting properties and a planning commission approval of a si plan is required

*The letters in this column refer to the Plan View(A) and Section(A) diagrams.



2. Table B. Requirements for Moorage Facilities and Development Located Waterward from the OHWM

Setbacks for All Moorage Facilities, Covered Moorage, Lift Stations and Floating Platforms	A* B C	10 feet from the lateral line 35 feet from adjoining moorage structures (except where moorage facility is built pursuant to the agreement between adjoining owners as shown in Figure B below) 50 feet or 50% of the water frontage of the property whichever is less, from the common boundary of th subject property urban park or conservation environment
Setbacks for Boat Ramps and Other Facilities for Launching Boats by Auto or Hand, Including Parking and Maneuvering Space	D	25 feet from any adjacent private property line
Length or Maximum Distance Waterward from the OHWM for Moorage Facilities, Covered Moorage, Lift Stations and Floating Platforms	E	Maximum 100 feet, but in cases where water depth is less than 10 feet from the mean low water, lengtl may extend up to 150 feet or to the point where water depth is 10 feet at mean low water, whicheve is less
Width	F	Maximum 8 feet; does not apply to boat ramps, lift stations, or floating platforms
Height Limits for Piers and Docks	G	5 feet above the elevation of the OHWM
Height Limits for Walls, Handrails and Storage Containers Located on Piers	H	3 feet above the decking of the moorage facility
Height Limits for Mooring Piles, Diving Boards and Diving Platforms	I	10 feet above the elevation of the OHWM
*The letters in this column refer to the Plan View(B) and Section(B) diagrams.		

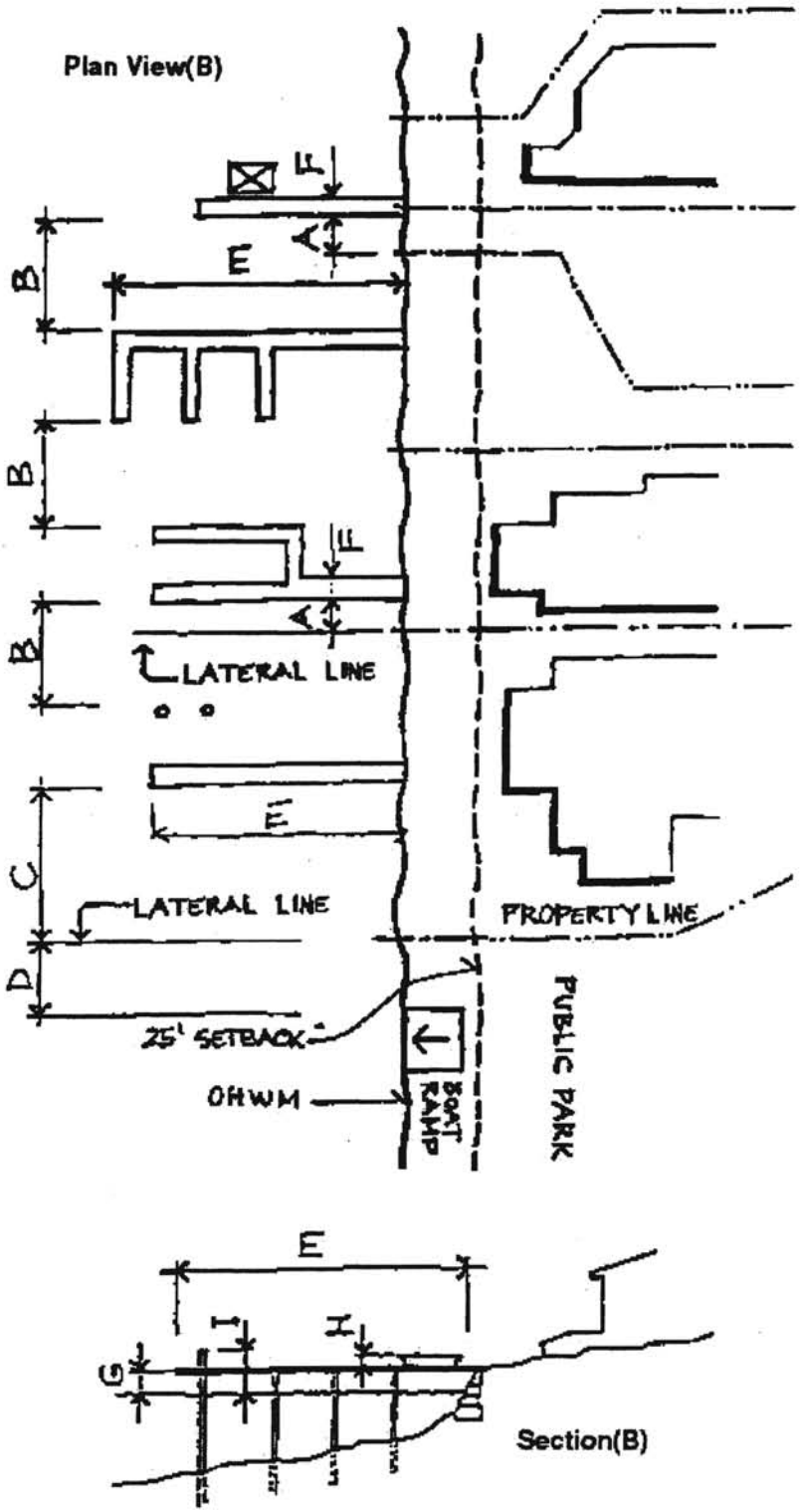


Table B (continued) Requirements for Moorage Facilities and Development Located Waterward from the OHWM

Minimum Water Frontage for Moorage Facility	J* K L	Single-family lots: 40 feet Shared – two adjoining lots: 40 feet combined Semi-private recreational tracts: 2 families: 40 feet 3 – 5 families: 40 feet plus 10 feet for each family more than 2 6 – 10 families: 70 feet plus 5 feet for each family more than 5 11 – 100 families: 95 feet plus 2 feet for each family more than 10 101+ families: 275 feet plus 1 foot for each family more than 100
Covered Moorage		Permitted on single-family residential lots subject to the following: (a) Maximum height above the OHWM: 20 feet; 20 to 25 feet subject tc deviation process (MICC 19.07.080(C)(2)(d).) (b) Location/area requirements: See Figure A for single-family lots and Figure B for shared moorage. Outside the triangle subject to deviation process (MICC 19.07.080(C)((d).) (c) Building area: 600 square feet. Building areas larger than 600 square feet are subject to conditional u: permit within the triangle, or variance outside the triangle (d) Covered moorage shall have open sides. Prohibited in semi-private recreational tracts, commercial and noncommercial recreational areas.
*The letters in this column refer to the Plan View(C).		

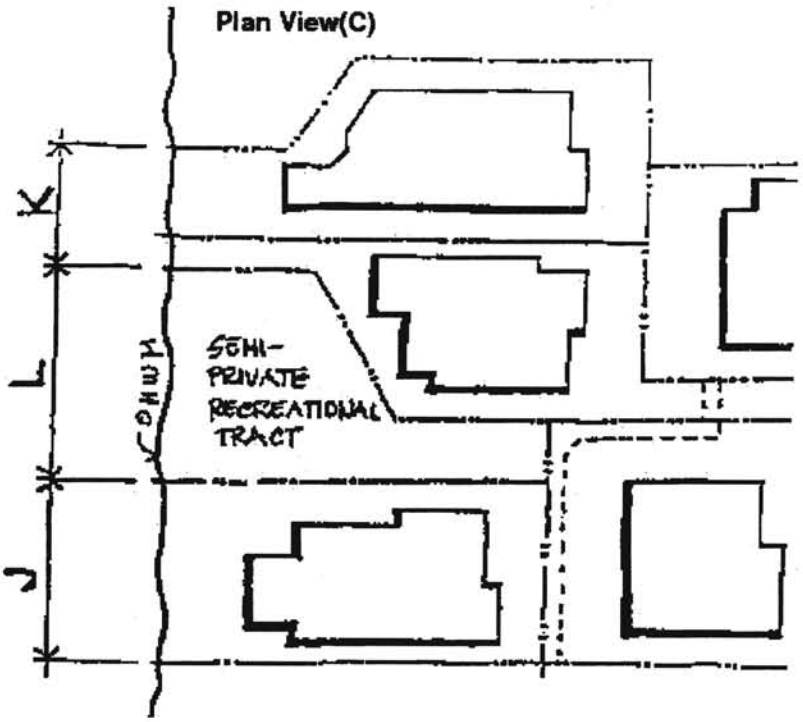
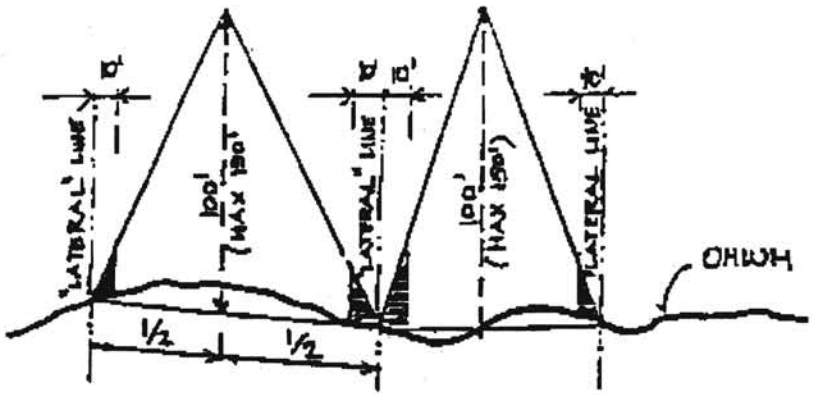


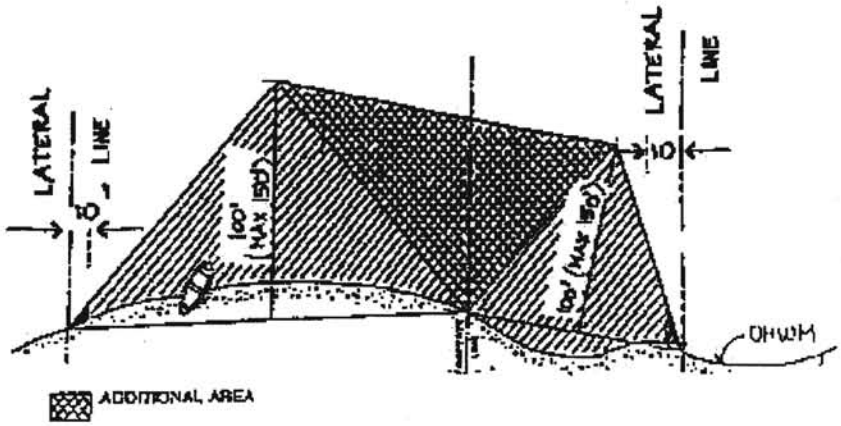
Table 1: Figure A: Area of Permitted Covered Moorage, Individual Lots



The covered portion of a moorage shall be restricted to the area lying within a triangle. The base of the triangle shall be a line drawn between the points of intersection of the property sidelines with the ordinary high water mark. The location of the covered moorage shall not extend more than 100 feet from the center of the base line of such triangle. In cases where water depth is less than 10 feet from the mean low water, the location of the covered moorage may extend up to 150 from the center of the base line or to the point where water depth is 10 feet at mean low water, whichever is less. The required 10 foot setbacks from the side property lines shall be deducted from the triangle area.

Table 2: Figure B: Area of Permitted Covered Moorage and Moorage Facilities,

Two Adjoining Single-family Lots



Where a covered moorage is built pursuant to the agreement of adjoining owners of single-family lots, the covered moorage area shall be deemed to include, subject to limitations of such joint agreement, all of the combined areas lying within the triangles extended upon each adjoining property and the inverted triangle situated between the aforesaid triangles.

3. Single-Family Moorage Facilities.

a. Moorage facilities may be developed and used as an accessory to dwellings on shoreline lots with water frontage meeting or exceeding the minimum lot width requirements specified in Table A.

b. Piles, floats or other structures in direct contact with water shall not be treated or coated with toxic substances harmful to the aquatic environment. Chemical treatment of structures shall comply with all applicable state and federal regulations.

4. Bulkheads and Shoreline Protective Structures.

a. Construction and maintenance of normal protective bulkhead common to single-family dwellings requires only a shoreline exemption permit; however, if the construction of the bulkhead is undertaken wholly or in part on lands covered by water, such construction shall comply with the SEPA Rules, Chapter 197-11 WAC.

b. Bulkheads shall be located generally parallel to the natural shoreline. No filling may be allowed waterward of the ordinary high water mark, unless there has been severe and unusual erosion within one year immediately preceding the application for the bulkhead. In this event the city may allow the placement of the bulkhead to recover the dry land area lost by erosion.

c. Replacement bulkheads may be located immediately in front of and abutting an existing bulkhead, but no filling shall be allowed waterward of the ordinary high water mark.

5. Utilities.

a. Utilities shall be placed underground and in common rights-of-way wherever economically and technically practical.

b. Shoreline public access shall be encouraged on publicly owned utility rights-of-way, when such access will not unduly interfere with utility operations or endanger public health and safety. Utility easements on private property will not be used for public access, unless otherwise provided for in such easement.

c. Restoration of the site is required upon completion of utility installation.

d. Construction of utility buildings and structures require a conditional use permit.

6. Dredging.

a. Dredging waterward or landward of the ordinary high water mark shall be permitted only if navigational access has been unduly restricted or other extraordinary conditions in conjunction with water-dependent use; provided, that the use meets all state and federal regulations.

b. Dredging shall be the minimum necessary to accommodate the proposed use.

c. Dredging shall utilize techniques that cause the least possible environmental and aesthetic impact.

d. Dredging is prohibited in the following locations:

i. Fish spawning areas.

ii. In unique environments such as lake logging of the underwater forest.

e. Disposal of dredged material shall comply with Ecology Water Quality Certification process and U.S. Army Corps of Engineers permit requirements. The location and

manner of the disposal shall be approved by the city. (Ord. 08C-01 § 3; Ord. 05C-12 § 6; Ord. 02C-09 §§ 7, 8; Ord. 99C-13 § 1. Formerly 19.07.080).

19.07.120 Environmental procedures.

A. Authority. The city adopts the ordinance codified in this section under the State Environmental Policy Act (SEPA), RCW 43.21C.120, and the SEPA rules, WAC 197-11-904. This section contains this city's SEPA procedures and policies. The SEPA rules, Chapter 197-11 WAC, must be used in conjunction with this section.

B. Purpose. The purpose of these procedures is to implement the requirements of the State Environmental Policy Act of 1971 (SEPA), Chapter 43.21C RCW, as amended, and the SEPA rules adopted by the State Department of Ecology and the authority and function of the city as provided therein. These procedures shall provide the city with principles, objectives, criteria and definitions to provide an efficient overall city-wide approach for implementation of the State Environmental Policy Act and Rules. These procedures shall also designate the responsible official, where applicable, and assign responsibilities within the city under the National Environmental Policy Act (NEPA).

C. Scope and Coverage. It is the intent of the city that compliance with the requirements of this section shall constitute procedural compliance with SEPA and the SEPA rules for all proposals. To the fullest extent possible, the procedures required by this section shall be integrated with existing planning and licensing procedures utilized by the city.

D. Adoption by Reference. The city adopts by reference as though fully set forth in this section, the following sections and subsections of Chapter 197-11 WAC (the SEPA rules) as adopted by the Department of Ecology of the state of Washington on January 26, 1984, and as the same may be hereafter amended:

WAC

197-11-020(3) Purpose
197-11-030 Policy
197-11-040 Definitions
197-11-050 Lead agency
197-11-055 Timing of the SEPA process
197-11-060 Content of environmental review
197-11-070 Limitations on actions during the SEPA process
197-11-080 Incomplete or unavailable information
197-11-090 Supporting documents
197-11-100 Information required of applicants
197-11-300 Purpose of this part (categorical exemptions and threshold determinations)
197-11-305 Categorical exemptions
197-11-310 Threshold determination required
197-11-315 Environmental checklist
197-11-330 Threshold determination process
197-11-335 Additional information
197-11-340 Determination of nonsignificance
197-11-350 Mitigated DNS
197-11-355 Optional DNS procedure
197-11-360 Determination of significance (DS)/initiation of scoping
197-11-390 Effect of threshold determination
197-11-400 Purpose of EIS
197-11-402 General requirements

197-11-405 EIS types
197-11-406 EIS timing
197-11-408 Scoping
197-11-410 Expanded scoping
197-11-420 EIS preparation
197-11-425 Style and size
197-11-430 Format
197-11-435 Cover letter or memo
197-11-440 EIS contents
197-11-442 EIS contents on nonproject proposals
197-11-443 EIS contents when prior nonproject EIS
197-11-444 Elements of the environment
197-11-448 Relationship of EIS to other considerations
197-11-450 Cost benefit analysis
197-11-455 Issuance of DEIS
197-11-460 Issuance of FEIS
197-11-500 Purpose of this part (commenting)
197-11-502 Inviting comments
197-11-504 Availability and cost of environmental documents
197-11-508(2) SEPA register
197-11-535 Public hearings and meetings
197-11-545 Effect of no comment
197-11-550 Specificity of comments
197-11-560 FEIS response to comments
197-11-570 Consulted agency costs to assist lead agency
197-11-600 When to use existing environmental documents
197-11-610 Use of NEPA documents
197-11-620 Supplemental environmental impact statement – Procedures
197-11-625 Addenda – Procedures
197-11-630 Adoption – Procedures
197-11-635 Incorporation by reference – Procedures
197-11-640 Combining documents
197-11-650 Purpose of this part (SEPA and agency decisions)
197-11-655 Implementation
197-11-660 Substantive authority and mitigation
197-11-680 Appeals
197-11-700 Definitions
197-11-702 Act
197-11-704 Action
197-11-706 Addendum
197-11-708 Adoption
197-11-710 Affected tribe
197-11-712 Affecting
197-11-714 Agency
197-11-716 Applicant
197-11-718 Built environment
197-11-720 Categorical exemption
197-11-722 Consolidated appeal
197-11-724 Consulted agency
197-11-726 Cost benefit analysis
197-11-728 County/city

197-11-730 Decisionmaker
197-11-732 Department
197-11-734 Determination of nonsignificance (DNS)
197-11-736 Determination of significance (DS)
197-11-738 EIS
197-11-740 Environment
197-11-742 Environmental checklist
197-11-744 Environmental document
197-11-746 Environmental review
197-11-748 Environmentally sensitive area
197-11-750 Expanded scoping
197-11-752 Impacts
197-11-754 Incorporation by reference
197-11-756 Lands covered by water
197-11-758 Lead agency
197-11-760 License
197-11-762 Local agency
197-11-764 Major action
197-11-766 Mitigated DNS
197-11-768 Mitigation
197-11-770 Natural environment
197-11-772 NEPA
197-11-774 Nonproject
197-11-776 Phased review
197-11-778 Preparation
197-11-780 Private project
197-11-782 Probable
197-11-784 Proposal
197-11-786 Reasonable alternative
197-11-788 Responsible official
197-11-790 SEPA
197-11-792 Scope
197-11-793 Scoping
197-11-794 Significant
197-11-796 State agency
197-11-797 Threshold determination
197-11-799 Underlying governmental action
197-11-800 Categorical exemptions
197-11-880 Emergencies
197-11-890 Petitioning Department of Ecology to change exemptions
197-11-900 Purpose of this part (agency compliance)
197-11-902 Agency SEPA policies
197-11-904 Agency SEPA procedures
197-11-906 Content and consistency of agency procedures
197-11-910 Designation of responsible official
197-11-916 Application to ongoing actions
197-11-920 Agencies with environmental expertise
197-11-924 Determining the lead agency
197-11-926 Lead agency for governmental proposals
197-11-928 Lead agency for public and private proposals
197-11-930 Lead agency for private projects with one agency with jurisdiction

197-11-932 Lead agency for private projects requiring licenses from more than one agency, when one of the agencies is a county/city
197-11-934 Lead agency for private projects requiring licenses from a local agency, not a county/city, and one or more state agencies
197-11-936 Lead agency for private projects requiring licenses from more than one state agency
197-11-938 Lead agencies for specific proposals
197-11-942 Agreements on lead agency status
197-11-944 Agreements on division of lead agency duties
197-11-946 DOE resolution of lead agency disputes
197-11-948 Assumption of lead agency status
197-11-960 Environmental checklist
197-11-965 Adoption notice
197-11-970 Determination of nonsignificance (DNS)
197-11-980 Determination of significance and scoping notice (DS)
197-11-985 Notice of assumption of lead agency status
197-11-990 Notice of action

E. Abbreviations. The following abbreviations are used in this section:

1. DEIS: Draft Environmental Impact Statement.

2. DNS: Determination of Nonsignificance.

3. DS: Determination of Significance.

4. EIS: Environmental Impact Statement.

5. FEIS: Final Environmental Impact Statement.

6. SEIS: Supplemental Environmental Impact Statement.

F. Designation of Responsible Official. For those proposals for which the city is the lead agency, the responsible official shall be the director of the development services group or a duly authorized designee.

G. Responsible Official – Duties. The responsible official shall:

1. Perform all duties of the responsible official under SEPA and the SEPA rules, and this section.

2. Perform all duties required to be performed by the city under NEPA, including the provision of coordination with the appropriate federal agencies.

3. Make the threshold determination on all proposals for which the city is the lead agency.

4. Supervise scoping and the preparation of all draft and final environmental impact statements and supplemental environmental impact statements, whether the same are prepared by the city or an applicant.

5. Establish procedures as needed for the preparation of environmental documents, including environmental impact statements.

6. Ensure that environmental factors are considered by city decisionmakers.

7. Coordinate the response of the city when the city is a consulted agency, and prepare timely written comments, which include data from all appropriate city departments, in response to consultation requests prior to a threshold determination.

8. Provide information to citizens, proposal sponsors and others concerning SEPA and this section.

9. Retain all documents required by the SEPA rules (Chapter 197-11 WAC) and make them available in accordance with Chapter 42.17 RCW.

10. Perform any other function assigned to the lead agency or responsible official by those sections of the SEPA rules that were adopted by reference in subsection D of this section.

H. Lead Agency Determination and Responsibilities.

1. The city department receiving an application for or initiating a proposal that involves a nonexempt action shall ask the responsible official to determine the lead agency for that proposal under WAC 197-11-050 and 197-11-922 through 197-11-940 unless the lead agency has been previously determined.

2. When the city is the lead agency for a proposal, the responsible official shall supervise compliance with the threshold determination requirements, and if an EIS is necessary, shall supervise preparation of the EIS.

3. When the city is not the lead agency for a proposal, all city departments shall use and consider, as appropriate, either the DNS or the final EIS of the lead agency in making decisions on the proposal. No city department shall prepare or require preparation of a DNS or EIS in addition to that prepared by the lead agency, unless required under WAC 197-11-600. In some cases, the city may conduct supplemental environmental review under WAC 197-11-600.

4. If the city or any city department receives a lead agency determination made by another agency that appears inconsistent with the criteria of WAC 197-11-922 through 197-

11-940, it may object to the determination. Any objection must be made to the agency originally making the determination and resolved within 15 days of receipt of the determination, or the city must petition the Department of Ecology for a lead agency determination under WAC 197-11-946 within the 15-day time period. Any such petition on behalf of the city must be initiated by the responsible official.

5. City departments are authorized to make agreements as to lead agency status or shared lead agency duties for a proposal under WAC 197-11-942 and 197-11-944; provided, the responsible official and any city department that will incur responsibilities as the result of any such agreement approve the agreement.

I. Timing of the Environmental Review Process.

1. The timing of the environmental review process shall be determined based on the criteria in the SEPA rules and this part of this section.

2. If the city's only action on a proposal is a decision on a building permit or other license that requires detailed project plans and specifications as part of a complete application for

such permit or license, the applicant may request in writing that the city conduct environmental review prior to submission of such detailed plans and specifications. A decision as to whether or not to do early environmental review, prior to receiving a complete application, shall be at the discretion of the responsible official.

3. The responsible official may elect to do early environmental review if adequate information is available to determine the size and scope of the proposed action, including dimensions and use of all proposed structures, project timing, and the extent of clearing and grading.

4. The city may initiate preliminary environmental review and have informal conferences with applicants prior to receipt of a complete application. However, this review shall not be binding on the city or the applicant (see also MICC 19.07.010(A)(1), Performance Standards for All Development).

5. For city-initiated proposals, the initiating city department should contact the responsible official as soon as a proposal is formulated to integrate environmental concerns into the decision-making process as soon as possible.

6. The procedural requirements of SEPA and this section shall be completed prior to the issuance of a permit or final decision on a nonexempt proposal.

J. Determination of Categorical Exemption.

1. Upon the receipt of an application for a proposal, the receiving city department shall, and for city proposals, the initiating city department shall, determine whether the proposal is an action potentially subject to SEPA and, if so, whether it is categorically exempt. This determination shall be made based on the definition of action (WAC 197-11-704), and the process for determining categorical exemption (WAC 197-11-305). As required, city departments shall ensure that the total proposal is considered. If there is any question whether or not a proposal is exempt, then the responsible official shall be consulted.

2. If a proposal is exempt, none of the procedural requirements of this section apply to the proposal. The city shall not require completion of an environmental checklist for an exempt proposal. The determination that a proposal is exempt shall be final and not subject to administrative review.

3. If the proposal is not categorically exempt, the city department making this determination (if different from proponent) shall notify the proponent of the proposal that it must submit an environmental checklist (or copies thereof) to the responsible official.

4. If a proposal includes both exempt and nonexempt actions, the city may authorize exempt actions prior to compliance with the procedural requirements of this chapter, except that:

a. The city shall not give authorization for:

i. Any nonexempt action;

ii. Any action that would have an adverse environmental impact; or

iii. Any action that would limit the choice of alternatives;

b. A city department may withhold approval of an exempt action that would lead to modification of the physical environment, when such modification would serve no purpose if nonexempt action(s) were not approved; and

c. A city department may withhold approval of exempt actions that would lead to substantial financial expenditures by a private applicant when the expenditures would serve no purpose if nonexempt actions were not approved.

5. The following types of construction shall be categorically exempt, except when undertaken wholly or partly on lands covered by water, or a rezone or any license governing emissions to the air or discharges to water is required:

a. The construction or location of any residential structures of four or fewer dwelling units;

b. The construction of an office, school, commercial, recreational, service or storage building with 4,000 square feet or less of gross floor area and with associated parking facilities designed for 20 or fewer automobiles;

c. The construction of a parking lot designed for 20 or fewer automobiles;

d. Any landfill or excavation of 500 cubic yards or less throughout the total lifetime of the fill or excavation; and any fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulations thereunder;

e. Pursuant to MICC 19.07.110(B)(3), projects in a shoreline area that involve alterations under 250 cubic yards outside the building footprint shall be exempt from review under the State Environmental Policy Act.

K. Environmental Checklist.

1. A completed environmental checklist (or a copy), in the form provided in WAC 197-11-960, shall be filed at the same time as an application for a permit, license, certificate, or other approval not specifically exempted in this section; except, a checklist is not needed if the city and applicant agree an EIS is required, SEPA compliance has been completed, or SEPA compliance has been initiated by another agency.

2. For private proposals, the city will require the applicant to complete the environmental checklist, providing assistance as necessary. For city proposals, the city department initiating the proposal shall complete the checklist for that proposal.

3. The city may complete all or part of the environmental checklist for a private proposal, if either of the following occurs:

a. The city has technical information on a question or questions that is unavailable to the private applicant; or

b. The applicant has provided inaccurate information on previous proposals or on proposals currently under consideration.

L. Threshold Determination. The responsible official shall make the threshold determination and issue a determination of nonsignificance (DNS) or significance (DS). The responsible official shall make such threshold determination in accordance with the procedures of Chapter 197-11 WAC, Part 3, as adopted by this section. The responsible official shall notify the

applicant, the lead city department, and (where a permit is involved) the permit-issuing city department of the threshold determination. The decision of the responsible official to issue a determination of significance shall not be appealable. The decision of the responsible official to issue a determination of nonsignificance shall be appealable pursuant to subsection T of this section.

M. Early Notice of Threshold Determination and Mitigated DNS.

1. As provided in this part of this section and in WAC 197-11-350, the responsible official may issue a DNS based on conditions attached to the proposal by the responsible official or on changes to, or clarifications of, the proposal made by the applicant.

2. An applicant may request in writing early notice of whether a DS is likely under WAC 197-11-350. The request must:

a. Follow submission of a permit application and environmental checklist for a nonexempt proposal for which the city department is lead agency; and

b. Precede the city's actual threshold determination for the proposal.

3. The responsible official should respond to the request for early notice within 10 working days. The response shall:

a. Be written;

b. State whether the city currently considers issuance of a DS likely and, if so, indicate the general or specific area(s) of concern that is/are leading the city to consider a DS; and

c. State that the applicant may change or clarify the proposal to mitigate the indicated impacts, revising the environmental checklist and/or permit application as necessary to reflect the changes or clarifications.

4. The city's written response under subsection (M)(2) of this section shall not be construed as a determination of significance. In addition, preliminary discussion of clarifications or changes to a proposal, as opposed to a written request for early notice, shall not bind the city to consider the clarifications or changes in its threshold determination.

5. As much as possible, the city should assist the applicant with identification of impacts to the extent necessary to formulate mitigation measures.

6. When an applicant submits a changed or clarified proposal, along with a revised or amended environmental checklist, the city shall base its threshold determination on the changed or clarified proposal and should make the determination within 15 days of receiving the changed or clarified proposal:

a. If the city indicated specific mitigation measures in its response to the request for early notice, and the applicant changed or clarified the proposal to include those specific mitigation measures, the city shall issue and circulate a DNS under WAC 197 -11-340(2).

b. If the city indicated areas of concern, but did not indicate specific mitigation measures, the city shall make the threshold determination, issuing a DNS or DS as appropriate.

c. The applicant's proposed mitigation measures (clarifications, changes or conditions) must be in writing and must be specific and feasible. For example, proposals to "control noise" or "prevent storm water runoff" are inadequate, whereas proposals to "muffle machinery to X decibel" or "construct 200-foot storm water detention pond at Y location" are adequate.

d. Mitigation measures which justify issuance of a mitigated DNS may be incorporated in the DNS by reference to agency staff reports, studies or other documents.

7. A proposal shall not be considered changed or clarified to permit the issuance of a mitigated DNS under WAC 197-11-350 unless all license applications for the proposal are revised to conform to the changes or other binding commitments made.

8. If a mitigated DNS is issued, the aspects of the proposal that allowed a mitigated DNS to be issued shall be included in any decision or recommendation of approval of the action. Mitigation measures incorporated into the mitigated DNS shall be deemed conditions of approval of the permit decision and may be enforced in the same manner as any term or condition of the permit, or enforced in any manner specifically prescribed by the city.

9. A mitigated DNS is issued under WAC 197-11-340(2), requiring a 14-day comment period and public notice.

10. If at any time the proposal (including associated mitigating measures) is substantially changed, the responsible official shall reevaluate the threshold determination and, if necessary, withdraw the mitigated DNS and issue a DS. Any questions regarding whether or not a change is substantial shall be resolved by the responsible official.

N. Environmental Impact Statements.

1. An environmental impact statement shall be required on any proposal determined to be a major action having a probable significant, adverse environmental impact. If it is determined that an environmental impact statement is required, the responsible official shall notify the applicant or proposal sponsor, the lead city department and (where a permit is involved) the department responsible for issuing the permit. The responsible official shall arrange for a meeting with the applicant or proposal sponsor to schedule necessary events and give any guidance necessary in the preparation of the EIS.

2. For private proposals, an EIS shall be prepared by a private applicant or agent thereof or by the city. For city proposals, the EIS shall be prepared by a consultant or by city staff. In all cases, the method of preparation and the selection of the consultant shall be subject to the approval of the responsible official. The responsible official shall assure that the EIS is prepared in a responsible and professional manner and with appropriate methodology and consistent with SEPA rules. The responsible official shall also direct the areas of research and examination to be undertaken as a result of the scoping process, as well as the organization of the resulting document. The responsible official may retain the services of a consultant to review all or portions of EIS prepared by an applicant, the applicant's agent, or the city, at the applicant's expense. Services rendered by the

responsible official and other city staff shall be subject to collection of fees as described in the city's officially adopted land use and planning fee schedule.

3. The responsible official will coordinate any predraft consultation procedures and scoping procedures so that the consultant preparing the EIS immediately receives all substantive information submitted by consulted agencies or through the scoping process. The responsible official shall also attempt to obtain any information needed by the consultant preparing the EIS which is on file with another agency or federal agency.

4. An environmental impact statement is required to analyze those probable adverse environmental impacts which are significant. Beneficial environmental impacts may be discussed. The responsible official shall consult with agencies, affected tribes and the public to identify such impacts and limit the scope of an environmental impact statement in accordance with the procedures set forth in subsection (N)(5) of this section. The purpose of the scoping process is to narrow the scope of every EIS to the probable significant adverse impacts and reasonable alternatives, including mitigation measures.

5. Procedures for Scoping.

a. The responsible official shall consult with agencies and the public to limit the scope of an environmental impact statement by any or all of the following means. The specific method to be followed shall be determined on a proposal-by-proposal basis by the responsible official, but at a minimum shall include the following:

i. The responsible official shall give notice that an EIS is to be prepared, which notice shall provide that agencies, affected tribes and the public may submit written comments to identify significant impacts and reasonable alternatives and limit the scope of the EIS. Comments must be submitted not later than 21 days from the date of issuance of the declaration of significance. Additionally, notice may be sent to any community groups known by the responsible official to have a possible interest in the proposal. Notice of the intent to prepare an EIS and the opportunity for commenting on the scope thereof may be sent with other public notices concerning the project.

ii. Additionally, the responsible official may conduct a meeting to provide the opportunity for oral comment on the scope of the EIS. Notice of such meeting shall be published in a newspaper of general circulation at least five days prior to the date of the meeting. The scoping meeting may be combined with other meetings or hearings concerning the proposal.

b. The appendix to the EIS shall include an identification of the issues raised during the scoping process and whether those issues have or have not been determined significant for analysis in the EIS. All written comments regarding the scope of the EIS shall be included in the proposal file.

c. The public and agency consulting process regarding the scope of the EIS shall normally occur within 30 days after the declaration of significance is issued, unless the responsible official and the applicant agree on a later date.

d. EIS preparation may begin during scoping.

6. The following additional elements may, at the option of the responsible official, be considered part of the environment for the purpose of EIS content, but do not add to the

criteria for the threshold determinations or perform any other function or purpose under these rules:

a. Economy;

b. Social policy analysis;

c. Cost-benefit analysis.

7. When a public hearing is held under WAC 197-11-535(2), such hearing shall be held before the responsible official.

O. Internal Circulation of Environmental Documents. Environmental documents shall be transmitted to decisionmakers and advisory bodies prior to their taking official action on proposals subject to SEPA.

P. Emergencies. The responsible official shall designate when an action constitutes an emergency under WAC 197-11-880.

Q. Public Notice.

1. Whenever the city issues a DNS under WAC 197-11-340(2) or a DS under WAC 197-11-360(3), the city shall give public notice of the DNS or DS by publishing notice in the city's permit information bulletin.

2. Whenever the city issues a DS under WAC 197-11-360(3), the city shall state the scoping procedure for the proposal in the DS as required in WAC 197-11-408 and in the public notice.

3. Whenever the city issues a DEIS under WAC 197-11-455(5) or a SEIS under WAC 197-11-620, notice of the availability of those documents shall be given by:

a. Indicating the availability of the DEIS in any public notice required for a nonexempt license; and

b. Publishing notice in the city's permit information bulletin.

4. Whenever an EIS hearing is required, the hearing shall be combined with the hearing on the underlying action and notice shall be provided in the manner specified in MICC 19.15.020.

5. The city shall integrate the public notice required under this section with existing notice procedures for the city's nonexempt permit(s) or approval(s) required for the proposal.

6. The responsible official may also elect to give notice by one or more of the other methods specified in WAC 197-11-510.

7. The city may require an applicant to complete the public notice requirements for the applicant's proposal at his or her expense.

R. Fees.

1. Environmental Checklist. The city shall establish a fee for review of an environmental checklist performed by the city when the city is the lead agency. The fee shall be

identified in the city's officially adopted land use and planning fee schedule, and collected prior to undertaking a threshold determination.

2. Environmental Impact Statements. For all proposals when the city is the lead agency and the responsible official determines that an EIS is required, the applicant shall be charged a fee for the administrative costs of supervision and preparation of the draft and final EISs. This fee shall be identified in the city's officially adopted land use and planning fee schedule, and collected prior to the initiation of work on the draft EIS.

3. For private proposals, the cost of retaining consultants for assistance in EIS preparation shall be borne by the applicant whether the consultant is retained directly by the applicant or by the city.

4. Consultant Agency Fees. No fees shall be collected by the city for performing its duty as a consultant agency.

5. Document Fees. The city may charge any person for copies of any documents prepared pursuant to the requirements of this section and for mailing thereof, in a manner provided by Chapter 42.17 RCW; provided, no charge shall be levied for circulation of documents as required by this section to other agencies.

S. Authority to Condition or Deny Proposals (Substantive Authority).

1. The policies and goals set forth in this section are supplementary to those in the existing authorization of the city.

2. The city may attach conditions to a permit or approval for a proposal so long as:

a. Such conditions are necessary to mitigate specific probable adverse environmental impacts identified in environmental documents prepared pursuant to this section; and

b. Such conditions are in writing; and

c. The mitigation measures included in such conditions are reasonable and capable of being accomplished; and

d. The city has considered whether other local, state or federal mitigation measures applied to the proposal are sufficient to mitigate the identified impacts; and

e. Such conditions are based on one or more policies in subsection (S)(4) of this section and cited in the license or other decision document.

3. The city may deny a permit or approval for a proposal on the basis of SEPA so long as:

a. A finding is made that approving the proposal would result in probable significant adverse environmental impacts that are identified in a FEIS or final SEIS prepared pursuant to this section; and

b. A finding is made that there are no reasonable mitigation measures capable of being accomplished that are sufficient to mitigate the identified impact; and

c. The denial is based on one or more policies identified in subsection (S)(4) of this section and identified in writing in the decision document.

4. The city designates and adopts by reference the following policies as the basis for the city's exercise of authority pursuant to this section:

a. The city shall use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

i. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

ii. Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

iii. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

iv. Preserve important historic, cultural, and natural aspects of our national heritage;

v. Maintain, wherever possible, an environment which supports diversity and a variety of individual choice;

vi. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities;

vii. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

b. The city recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

c. The city adopts by reference the policies in the following city codes, ordinances, resolutions, and plans, as presently adopted or hereafter amended:

i. The comprehensive plan of the city;

ii. The development code of the city;

iii. The policies of the Mercer Island environmental procedures code, including the policies and objectives of SEPA (Chapter 43.21C RCW) as adopted by the city;

iv. The parks and open space plan of the city;

v. The community facilities plan of the city;

vi. The design commission, Ordinance No. 297, and the design guidelines, Ordinance No. 491, of the city;

vii. The city's arterial plan, Ordinance No. 404;

viii. The six-year comprehensive street improvement program;

ix. 1976 memorandum agreement regarding I-90, signed by the cities of Mercer Island, Bellevue and Seattle, and the Washington State Department of Transportation;

x. Model Traffic Ordinance, Chapter 10.98 MICC;

xi. Street improvement and maintenance guidelines, approved September 13, 1982;

xii. Sewer rates and regulations, Chapter 15.08 MICC;

xiii. Water system, Chapter 15.12 MICC;

xiv. Minimum fire flow requirements, Resolution No. 778;

xv. Comprehensive city water plan.

5. The responsibility for enforcing conditions under SEPA rests with the city department or official responsible for enforcing the decision on the underlying action.

6. This part of this section shall not be construed as a limitation on the authority of the city to approve, deny or condition a proposal for reasons based upon other statutes, ordinances or regulations.

T. Administrative Appeals.

1. Except for SEPA procedural and substantive decisions related to permits, deviations and variances issued by the code official or hearing examiner under the shoreline management provisions or any legislative actions taken by the city council, the following shall be appealable to the planning commission under this section:

a. The decision to issue a determination of nonsignificance rather than to require an EIS;

b. Mitigation measures and conditions that are required as part of a determination of nonsignificance;

c. The adequacy of an FEIS or an SEIS;

d. Any conditions or denials of the proposed action under the authority of SEPA.

2. How to Appeal. The appeal must be consolidated with any appeal that is filed on the proposal or action, and must conform to the requirements of MICC 19.15.020(J), Permit Review Procedures. The appeal may also contain whatever supplemental information the appellant wishes to include.

3. For any appeal under this subsection, the city shall provide for a record that shall consist of the following:

a. Findings and conclusions;

b. Testimony under oath; and

c. A taped or written transcript.

4. The procedural determination by the city's responsible official shall carry substantial weight in any appeal proceeding.

5. The city shall give official notice under WAC 197-11-680(5) whenever it issues a permit or approval for which a statute or ordinance establishes a time limit for commencing judicial appeal.

U. Notice – Statute of Limitations.

1. The applicant for or proponent of an action of the city, when the action is one the city is proposing, may publish notice of action pursuant to RCW 43.21C.080 for any action.

2. The form of the notice shall be substantially in the form and manner set forth in RCW 43.21C.080. The notice may be published by the city for city projects or the applicant or proponent for private projects.

3. If there is a time period for appealing the underlying city action to court, the city shall give notice stating the date and place for commencing an appeal of the underlying action and an appeal under Chapter 43.21C RCW, the State Environmental Policy Act. Notice shall be given by mailing notice to parties of record to the underlying action and may also be given by publication in a newspaper of general circulation. (Ord. 10C-06 § 1; Ord. 08C-01 § 3; Ord. 05C-12 § 6; Ord. 03C-11 §§ 1, 2, 3; Ord. 99C-13 § 1. Formerly 19.07.100).
