

CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

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STAFF REPORT TO HEARING EXAMINER APPEAL OF CRITICAL AREA DETERMINATION CAR20-004

Project No:	APL21-004
Description:	Appeal of Critical Area Review 1 CAO20-004 decision, which found that the subject property was partially encumbered by a Type Ns watercourse.
Applicant/ Owner:	Carol Ann Cook Revocable Living Trust
Site Address:	7025 N Mercer Way, Mercer Island, WA 98040
Zoning District	R-15
Staff Contact:	Robin Proebsting, Senior Planner

INTRODUCTION

The subject of this appeal is the decision for CAO20-004, the purpose of which was to obtain a determination from the City about the classification of a feature west of the subject property that is depicted as a Type Ns watercourse on the City's GIS maps. The City's maps by themselves do not determine the presence, absence, or type of feature may be on a given property, and field-verification is needed to confirm this information. The applicant submitted a critical area study for review as part of the application for CAO20-004, requesting a determination of whether the feature met the definition of "watercourse," and if so, what type. Based on third party peer review, the City disagreed with the conclusions of the study and determined the feature to be a Type Ns watercourse as it abuts the subject property.

The purpose of application CAO20-004 was only to determine the presence and type of feature adjacent to the subject property. No other land use applications or permits have been submitted for review, and no development is proposed at this time.

PROJECT HISTORY AND BACKGROUND

The applicant's property is approximately 23,000 sq ft and located on N Mercer Way, roughly one and one-half blocks north of I-90, within a residentially-zoned area. The applicant's property is developed with a single-family home, and the adjacent properties to the north, west, and east are also developed with single-family homes. The property to the south is developed with a bar/restaurant (the Roanoke Inn).

The City's GIS data depicts a Type Ns watercourse 25-40 feet to the west of the subject property, roughly parallel to the western property boundary. (Exhibit 7) The GIS data was developed in 2019-2020 by Herrera

Environmental Consultants, using a combination of desktop analysis using high-resolution LIDAR data and targeted field work. Pursuant to MICC 19.07.060, the City's GIS database depicts the approximate locations for critical areas, but field verification (and in appropriate circumstances, evaluation and mapping by a qualified professional is required to determine the location and type of critical area on a given site. MICC 19.07.070 requires applicants to "disclose to the city the presence of critical areas on the development proposal site and any mapped or identifiable critical areas within the distance equal to the largest potential required buffer applicable to the development proposal on the development proposal site."

In order to provide an avenue for City review of critical area locations and typing prior to the submittal of development proposals that will be contingent on critical areas information, the City provides a land use review called a Critical Area Review 1. According to MICC 19.07.090(A), "the purpose of a critical area review 1 is to review... [v]erification of the presence or absence of a critical area; or... [v]erification of the delineation and/or type of wetland or watercourse."

The applicant applied for a Critical Area Review 1 on November 18, 2020 (Exhibit 1). Subsequently, a memo prepared for the applicant by PBS (Exhibit 2) was submitted on December 28, 2020. The memo found a clearly defined "linear swale" with approximately 1 inch of water present on two properties to the west of the applicant's property (1818 70th Ave SE and 1804 70th Ave SE). The memo also found that evidence of all three primary indicators of an "active channel" were present: a break in slope, changes in sediment character, and changes in vegetation. Downslope from the open channel portion of the feature, the memo describes a concrete culvert under N Mercer Way and City GIS data showing the pipe continuing northward to Lake Washington. Lake Washington is a Type S water.

The PBS memo concludes that the subject feature (referred to in project materials as "Feature A") does not meet the City Code's definition of "Type Ns Watercourse" because of the presence of this culvert. The definition of Type Ns watercourse within the MICC is:

Type Ns, which include all segments of natural waters within the bankfull width of the defined channels that are not Type S, F, or Np waters. These are seasonal, nonfish habitat streams in which surface flow is not present for at least some portion of a year of normal rainfall and are not located downstream from any stream reach that is a Type Np water. Ns waters must be physically connected by an aboveground channel system to Type S, F, or Np waters.

The PBS memo concludes that while Feature A "satisfies the flow requirements of this definition, it does not possess an aboveground channel system that connects it to Lake Washington. As a result, it does not satisfy the City of Mercer Island's definition of a Type Ns watercourse." This interpretation implies that the term "aboveground channel system" as used in the definition of Type Ns watercourse *excludes* culverts like the one into which Feature A flows through to Lake Washington.

The City's third-party reviewer for wetland and watercourses, ESA, reviewed the PBS memo and conducted a site visit from the public right-of-way. ESA's review memo (Exhibit 3) made findings consistent with the PBS memo regarding the site conditions.

ESA's review memo also concludes that Feature A does meet the definition of "watercourse" in the Mercer Island City Code, which is as follows:

Watercourses: A course or route, formed by nature and generally consisting of a channel with a bed, banks, or sides throughout substantially all its length, along which surface waters, with some regularity (annually in the rainy season), naturally and normally flow in draining from

higher to lower lands. This definition does not include irrigation and drainage ditches, grass-lined swales, canals, storm water runoff devices, or other courses unless they are used by fish or to convey waters that were naturally occurring prior to construction.

MICC 19.16.010. Further, ESA’s review memo concludes that Feature A *does* meet the definition of “Type Ns Watercourse,” despite the presence of the downslope culvert into which Feature A flows. ESA understands “aboveground channel” as used in the definition of Type Ns watercourse to *include* culverts like the one into which Feature A flows based on direction provided by the Washington State Department of Fish and Wildlife. The memo provides a contrasting example to help illustrate this interpretation: An example of a scenario in which a watercourse was not physically connected by an aboveground channel system to Type S, F, or Np waters would be one in which the watercourse infiltrated into the ground prior to reaching Type S, F, or Np waters.

Staff therefore determined that based on third-party peer review, Feature A meets the definition of a Type Ns watercourse and sent a letter to the applicant on February 19, 2021 memorializing that determination. (Exhibit 4). Appellant appealed Staff’s determination on March 3, 2021. (Exhibit 12)

DISCUSSION OF APPEAL

1) Definition of Type Ns Watercourse

The key point of disagreement between the applicant and the City is over application of the definition of Type Ns watercourse per MICC 19.16.010 (and as found in WAC 222-16.030).

The City’s watercourse regulations are generally found in MICC 19.07.180, as part of the City’s Critical Areas code. The Washington Growth Management Act requires cities to enact Critical Areas Ordinances in order to protect certain types of critical areas. RCW 36.70A.030(6); RCW 36.70A.040(3); RCW 36.70A.060(2); WAC 365-196-830.¹ These ordinances must be crafted using the best available science. RCW 36.70A.172; WAC 365-196-485(3)(a).

WAC chapter 222-16, used by the Washington State Departments of Natural Resources, Fish and Wildlife, and Ecology, contains watercourse type definitions. WAC 222-16-030. “[C]ities are encouraged to adopt classification schemes that are consistent with federal and state classification schemes and those of adjacent jurisdictions to ensure regional consistency.” WAC 365-190-040(4)(a). In fact, WAC 365-190-130(i) expressly authorizes cities to use the water typing categories set forth in WAC 222-16.² To wit, the definition of watercourse in MICC 19.16.010 with respect to watercourse type Ns mirrors the definition of same contained in WAC 222-16-030(4). (Exhibit 8).

Appellant does not dispute that Feature A is a watercourse but argues that it cannot be a Type Ns watercourse because it purportedly lacks connection to a Type S, F, or NP water by an “aboveground channel.” However, the City understands this requirement to distinguish features that infiltrate into the ground, rather than

¹ Even cities not planning under the GMA are required to adopt critical areas ordinances. RCW 36.70A.130(1)(b).

² “Waters of the state are defined in RCW 90.48.020 and include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters, and all other surface waters and water courses in Washington. Stream types are classified in Title 222 WAC, the forest practices regulations. Counties and cities may use the classification system established in WAC 222-16-030 to classify waters of the state. Counties and cities using the water types defined in WAC 222-16-030 or 222-16-031 (interim) should not rely solely on Washington state department of natural resources maps of these stream types for purposes of regulating land uses or establishing stream buffers.” WAC 365-190-130(i). See also WAC 365-190-040(3).

connecting to another type of water. In performing its third-party review in this case, ESA specifically consulted the Department of Fish and Wildlife to confirm its interpretation of “aboveground channel.” WDFW confirmed the City’s reading of the MICC as consistent with the WDFW regulations contained in WAC 222-16 and as applied by WDFW elsewhere within the state. (Exhibit 9)

The Appellant argues that its interpretation is a “plain language” interpretation of the MICC. (Exhibit 12) First, the City does not agree that the definition of watercourse under MICC 19.16.010 is unambiguous and therefore that it is unnecessary to consult with other sources as to the meaning of the language. As Appellant admits, the term “aboveground” is not defined by the MICC. In such circumstances, the City is entitled to deference in interpretation of its own ordinances. *See, e.g.,* RCW 36.70C.130(1); *Chinn v. City of Spokane*, 173 Wn.App. 89, 95, 293 P.3d 401 (2013).

Further, even under a plain language analysis, “[i]n ascertaining a regulation’s plain meaning, we also consider the context in which the regulation appears, related regulations and statutes, and the statutory scheme of which the regulation is a part.” *Bravern Residential II, LLC v. Dep’t of Revenue*, 183 Wn.App. 769, 777, 334 P.3d 1182 (2014). Therefore, the Hearing Examiner must consider that the City’s ordinance matches the definitions of watercourse contained in WAC Chapter 222-16 and that the City here is applying its ordinance consistent with direction from the applicable state agency, WDFW. Indeed, Washington State agencies are entitled to deference and courts “give substantial weight to an agency’s interpretation of the law it administers, especially when the issue falls within the agency’s expertise.” *Southwick, Inc. v. State Dept. of Licensing Business and Professions Division*, 191 Wn.2d 689, 695, 426 P.3d 693 (2018).

Courts also avoid absurd results when interpreting statutes, even when applying plain language analysis. *State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740 (2015). Appellant’s interpretation would lead to absurd results. Appellant’s reading of the MICC and by extension the WAC would preclude large portions of the state from having Type Ns watercourses, if Type Ns watercourses could not pass through culverts. All but the watercourses nearest the Pacific Ocean and major rivers necessarily need to cross some kind of road or highway; however, if the applicant’s interpretation of “aboveground channel” were to be applied, most of these watercourses would be excluded from regulation as type Ns watercourses. This surely cannot have been the intent of WAC 222-16-030 and it was not the intent of the definition of “watercourse” adopted in MICC 19.16.010.

2) Definition of Piped Watercourse

Alternatively, Appellant also alleges that the City’s definition of “piped watercourse” is incorrect. Appellant alleges that a piped watercourse does not include storm water runoff devices. Appellant alleges the pipe is not a piped watercourse because several City owned catch basins lead into the pipe.

However, Appellant ignores another part of the definition of “piped watercourse,” which provides that stormwater runoff devices can be included within a piped watercourse if they are used “to convey waters that were naturally occurring prior to construction.” MICC 19.16.010, Exhibit 9. That is exactly the situation at hand. The King County aerial photo from 1936 depicts a vegetated corridor in the same alignment of the piped watercourse (Exhibit 5 and in combination with King County iMap hillshade (likely derived from LiDAR) (Exhibit 6), which depicts a swale/linear depression in the same alignment, it can be inferred that a watercourse previously flowed in a channel to Lake Washington. Therefore, the piped watercourse is used to convey waters that were naturally occurring prior to construction. Appellants’ attempt to ignore a portion of the definition of piped watercourse must be rejected.

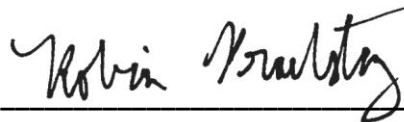
3) Appellant's Takings Allegations

Appellant makes a takings allegation as a third alternative theory in its appeal. However, Appellant does not cite any legal authority or evidence to support this alternative theory. (Exhibit 12). The City is contemporaneously filing a Partial Motion to Dismiss, requesting the Hearing Examiner dismiss Appellant's takings allegations, for several reasons. Accordingly, the City is not addressing Appellant's taking allegations in this Staff Report pending a ruling on the City's Partial Motion to Dismiss.

CONCLUSION

City staff correctly applied the definition of Type Ns watercourse to the subject site, consistent with the application and understanding of other agencies, most notably, the Washington Department of Fish and Wildlife. The City respectfully requests that the Hearing Examiner uphold the decision issued for CAO20-004.

Dated this 19th day of April 2021



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