From: Robert A. Medved
To: Deb Estrada
Cc: Jessi Bon
Subject: Hearing Examiner Appeal ALP22-004
Date: Wednesday, January 18, 2023 11:44:39 AM
Attachments: MEMORANDUM OF RAM.pdf
DECLARATION OF RAM.pdf

Ms. Estrada:

Attached are: (i) the Memorandum Of Robert A. Medved In Support Of The City Of Mercer Island, and (ii) the Declaration Of Robert A. Medved In Support Of The City Of Mercer Island. Please confirm your receipt and your filing of these two attachments with the Hearing Examiner.

This e-mail and its two attachments are being copied to the City Manager as a courtesy.

Thank you.

Robert A. Medved
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E-mail: robertamedved@msn.com

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal Of: Development Code Interpretation No. 22-004	APL No. 22-004 MEMORANDUM OF ROBERT A. MEDVED IN SUPPORT OF THE CITY OF MERCER ISLAND

TABLE OF CONTENTS

I. INTRODUCTION

The plain meaning of MICC 19.06.110(B)(2)(a) is unambiguous. Accordingly, MICC 19.06.110(B)(2)(a) is not subject to construction as a matter of law.

The City's Development Code Interpretation 22-044 correctly recognizes that the plain meaning of MICC 19.06.110(B)(2)(a) is unambiguous.

The Appellants fail to recognize that the plain meaning of MICC 19.06.110(B)(2)(a) is unambiguous. Instead, the Appellants resort to disingenuous arguments to avoid the fact that MICC 19.06.110(B)(2)(a) is unambiguous.

Because the plain meaning of MICC 19.06.110(B)(2)(a) is unambiguous and MICC 19.06.110(B)(2)(a) is not subject to construction as a matter of law, it is respectfully requested that this appeal be denied at the outset of the January 25, 2023 hearing.

II. THE PLAIN MEANING OF MICC 19.06.110(B)(2)(a) IS UNAMBIGOUS

The plain meaning of MICC 19.06.110(B)(2)(a) ("Hardship Ordinance")[1] is unambiguous. The Hardship Ordinance provides in its entirety as follows:

> 2. *Criteria.*
>
> a. The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an "unnecessary hardship" is limited to those circumstances where the adopted standards of this title prevent the

[1] This Memorandum intentionally does not address the criteria for increased lot coverage and increased impervious surface variances that are addressed by MICC 19.06.110 (B)(1) and MICC 19.06.110(B)(2)(i).

> construction of a single-family dwelling on a legally created, residentially zoned lot…. (quotation marks in the original) (bold added).

When the plain meaning of a statute like the Hardship Ordinance is unambiguous, that statute is not subject to construction as a matter of law. *See, e.g., In re E.M.*, 197 Wn.2d 492 (2021) and *In re Zandi*, 187 Wn.2d 921 (2017). *In re E.M.*, 197 Wn.2d 492, 499-500 (2021) provides as follows:

> **In resolving an issue of statutory construction, we first look to the plain meaning of the statute….. Meaning must be ascertained from the plain language of the statute…. Thus, if the plain meaning of the statute is unambiguous, we end our inquiry.**
>
> ***
>
> The statute is not ambiguous as to whether private counsel must be appointed—there is no such requirement. Accordingly, we decline to apply canons of construction or look to the legislative intent of the statute. (citations omitted) (bold added).

In re Zandi, 187 Wn.2d 921, 927 (2017) provides as follows:

> **If the plain meaning of a statute is unambiguous, our inquiry ends**.
>
> ***
>
> The Court of Appeals majority correctly recognized that "uninsured medical expenses" under RCW 26.18.170 unambiguously include costs "'not covered by insurance.'" (quotation marks in the original) (citations omitted) (bold added).

Highlighted copies of *In re E.M.* and *In re Zandi* are attached to the Declaration Of Robert A. Medved In Support Of The City Of Mercer Island ("Medved Decl.") as **Exhibit 1** and **Exhibit 2.**

Because the plain meaning of the Hardship Ordinance is unambiguous, the Hardship Ordinance should not be construed in this appeal.

III. 2016 – 2021 ADOPTED AND PROPOSED CODE AMENDMENTS

Between 2016 and 2021 there were three adopted and two proposed amendments to MICC Title 19 – Unified Land Development Code that involved the Stroum Jewish Community Center of Greater Seattle ("JCC"), namely: (i) the Variance Hardship Ordinance No. 17C-15, (ii) the Transportation Concurrency Ordinance No. 18C-12, (iii) the Community Facility Zone Designation Ordinance No. 20-04, (iv) the Docketing Ordinance No. 19C-21 and (v) the Hill Application To Amend The Zoning Code. *See* Medved Decl., at paragraphs 8-39 and **Exhibits 3-35.**

At times the City's consideration of these five adopted and proposed amendments overlapped. *See* Medved Decl., at paragraph 7 and **Exhibit 3**. These five adopted and proposed amendments are treated in more detail below.

A. The Variance Hardship Ordinance No. 17C-15

(i.) <u>The Hardship Ordinance Adoption Process</u>

The Hardship Ordinance was a part of the City's review and amendment of its Residential Development Standards Code. *See* Medved Decl., at paragraphs 8-11 and **Exhibits 4-7.**

The City's review and amendment process started around July 20, 2016 and ended around September 19 2017 with the adoption of the Hardship Ordinance—*i.e.*, approximately fourteen months. *See* Medved Decl., at paragraphs 7, 8 and 11 and **Exhibits 3, 4** and **7.** *See also* the Declaration Of Matthew Goldbach, Neighbor Of The

Jewish Community Center In Support Of Mercer Island's Code Interpretation ("Goldbach Decl."), at paragraphs 2.1 and 2.2.

The public participated throughout this fourteen month adoption process, *See* Medved Decl., at paragraphs 8-11 and **Exhibit 4**, at pp. 1-2; **Exhibit 5**, at p. 1; **Exhibit 6**, at pp. 2-3 and **Exhibit 7**, at pp. 2-3.

(ii.) <u>The JCC Failed To Participate In The Hardship Ordinance Adoption Process</u>

The JCC did not participate in the Hardship Ordinance fourteen month adoption process. Despite the fact that the JCC did not participate in the Hardship Ordinance fourteen month adoption process, the JCC now, more than five years after the adoption of the Hardship Ordinance, claims that the Hardship Ordinance will have a "devasting (sic) effect"[2] on the JCC.

B. The Transportation Concurrency Ordinance No. 18C-12.

(i.) <u>The Transportation Concurrency Ordinance Adoption Process</u>

The adoption process for the Transportation Concurrency Ordinance started around February 15, 2017 and ended around December 20, 2018—*i.e.*, approximately twenty-one months.

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[2] The JCC appeal at page 13 claims that the City:

> "ignores the devasting (sic) effect of [the Hardship Ordinance on the JCC] and ultimately the essence of (sic) Mercer Island community which will dissolve without healthy support for the organizations that bind Mercer Island residents as an extremely close-knit community.

The public participated in the Transportation Concurrency Ordinance twenty-one month adoption process. *See* Medved Decl., at paragraphs 13, 14 and 17 and **Exhibit 9**, at p. 2; **Exhibit 10** and **Exhibit 13**.

(ii.) <u>The JCC Failed To Participate In The Transportation Concurrency Ordinance Adoption Process</u>

The Transportation Concurrency Ordinance prohibits new development if traffic studies reveal adverse traffic consequences that are caused by new development.[3] The JCC is required to submit traffic studies to the City but has not done so. At the hearing, the City can provide more information regarding JCC's obligations to submit traffic studies should the Hearing Examiner wish to inquire further.

Despite the possibility that any proposed JCC development may not be approved as a result of the adoption of Transportation Concurrency Ordinance and as a result of the JCC not providing traffic studies to the City, the JCC did not participate in the Transportation Concurrency Ordinance twenty-one month adoption process.

C. The Community Facility Zone Designation Ordinance No. 20-04.

On September 29, 2017, the JCC applied for a comprehensive plan amendment that would create a Community Facility Zone for the JCC. *See* Medved Decl., at paragraph 18 and **Exhibit 14.**

[3] One purpose of the Traffic Concurrency Ordinance is "prohibiting approval of development proposals if the development causes the level of service on" traffic to decline below certain standards. MICC 19.20.010.

On February 18, 2020, the City Council adopted Ordinance No. 20-04 which repealed all ordinances related to the Community Facility Zone. *See* Medved Decl., at paragraphs 25 and 26 and **Exhibits 21** and **22.**

See also Medved Decl., at paragraphs 18-26 and **Exhibits 14-22,** *and see* Goldbach Decl., at paragraphs 3.4-3.9, *and see* the Declaration Of John Hall, Neighbor Of The Jewish Community Center In Support Of Mercer Island's Code Interpretation ("Hall Decl."), at paragraphs 2.1-2.5.

D. The Docketing Ordinance No. 19C-21.

(i.) <u>The Docketing Ordinance Adoption Process</u>

The Docketing Ordinance is mandated required by the GMA and requires all proposed comprehensive plan amendments and all code amendments be placed on a docket to allow the City to manage these proposed amendments. The adoption process for the Docketing Ordinance started around July 16, 2019 and ended around May 1, 2020—*i.e.*, approximately nine months. *See* Medved Decl., at paragraphs 27 and 33 and **Exhibits 23** and **29.**

The public participated in the nine month adoption process. *See* Medved Decl., at paragraphs 27 and 29 and **Exhibits 23** and **25.**

(ii.) <u>The JCC Failed To Participate In The Docketing Ordinance Adoption Process</u>

The JCC did not participate in the Docketing Ordinance nine month adoption process. Instead, on December 9, 2019, the JCC sent a request to the City to postpone the final adoption of the Docketing Ordinance "to address the adverse impacts [the

Docketing Ordinance] would have on [the JCC's ability] to move forward with [the JCC's] projects." *See* Medved Decl., at paragraph 31 and **Exhibit 27.**

See also Medved Decl., at paragraphs 27-33 and **Exhibits 23-29**, *and see* Goldbach Decl., at paragraphs 4.1-4.4 *and see* Hall Decl., at paragraph 2.6.

E. The Hill Application To Amend The Zoning Code.

On February 11, 2020, the JCC though attorney Richard Hill filed an Application For Zoning Text Amendment which would have allowed new JCC development projects to be sited in single-family neighborhoods.[4] *See* Medved Decl., at paragraphs 34 and 35 and **Exhibits 30** and **31.**

On February 18, 2020, the JJC through attorney Richard Hill attended the Mercer Island City Council Meeting and:

> … asked the Council to direct staff and the Planning Commission to review the proposed [Application For Zoning Text Amendment] this year, explaining that the proposed [Application For Zoning Text Amendment] is a narrowly tailored amendment to the code. Mr. Hill then outlined three changes, including one to GFA, one to height, and one to lot coverage.

See Medved Decl., at paragraph 36 and **Exhibit 32.**

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[4] Although the JCC Application For Zoning Text Amendment proposed sweeping amendments to Mercer Island Land Use Code, the JCC Application For Zoning Text Amendment did not propose any amendments to the Hardship Ordinance. *See* Medved Decl., at paragraphs 34 and 35 and **Exhibits 30** and **31.**

On March 2, 2020, a comprehensive Request For Legal Opinions regarding the Application For Zoning Text Amendment was sent to the City. *See* Medved Decl., at paragraph 37 and **Exhibit 33.**

On March 6, 2020, the Concerned Neighbors for the Preservation of Our Community through attorney Alex Sidles sent a letter critical of the Application For Zoning Text Amendment to the City. *See* Medved Decl., at paragraph 38 and **Exhibit 34.**

The JCC did not actively pursue its Application For Zoning Text Amendment. Instead, on February 1, 2021, the JCC withdrew its Application For Zoning Text Amendment and was refunded all fees associated with the JCC Application For Zoning Text Amendment. *See* Medved Decl., at paragraph 39 and **Exhibit 35.**

See also Medved Decl., at paragraphs 34-39 and **Exhibits 30-35**, *and see* Goldbach Decl., at paragraphs 4.5 through 4.14, *and see* Hall Decl., at paragraphs 2.6 and 2.7.

IV. ARGUMENT IN SUPPORT OF THE CITY OF MERCER ISLAND

Development Code Interpretation 22-004, at paragraphs 5(a) and 7(1)(i) on pages 2-3, correctly recognized that the plain meaning of the Hardship Ordinance is unambiguous. In addition to correctly dealing with the Hardship Ordinance criteria, Development Interpretation 22-004, at paragraphs 5(a)-5(c), 7(1)(i) and 7(1)(ii) on pages 2-3, also correctly dealt with the criteria for increased lot coverage and increased

impervious surface area variances addressed by MICC 19.06.110 (B)(1) and MICC 19.06.110(B)(2)(i).[5]

V. ARGUMENT IN OPPOSITION TO THE JCC APPEAL

A. The JCC Appeal Fails To Address The Fact That The Plain Meaning Of The Hardship Ordinance Is Unambiguous.

The JCC appeal fails to address the fact that the plain meaning of the Hardship Ordinance is unambiguous and should not be construed in this JCC appeal.

Instead, the JCC appeal creates four disingenuous statements not supported by any statutory language and not supported by the law.

(i.) The JCC's First Created Disingenuous Statement

First, the JCC appeal at page 15 disingenuously states: "We believe [the Hardship Ordinance] was intended to apply to only the structures it was intended by the City Council to apply—single family mega homes." There nothing in the Hardship Ordinance or the law that supports that statement. Indeed, that statement is contrary to the Hardship Ordinance's unambiguous language and is contrary to the law.

(ii.) The JCC's Second Created Disingenuous Statement

Second, the JCC appeal at page 16 disingenuously states: "… nonresidential structures in single family zones can meet the hardship criterion for all development standards due to the fact that the hardship provision was intended only to apply to single family structures." Again, there is nothing in the Hardship Ordinance or the law that

[5] *See* footnote 1, *supra*, at page 2.

supports that statement. Indeed, that statement is contrary to the Hardship Ordinance's unambiguous language and is contrary to the law.

(iii.) <u>The JCC's Third Created Disingenuous Statement</u>

Third, the JCC appeal at page 9 first disingenuously states that MICC 19.06.110(B)(1) somehow changes the plain meaning of the Hardship Ordinance language. This third disingenuous statement is not only without merit, it omits the MICC 19.06.110(B)(1) language that cites to and requires compliance with the Hardship Ordinance. That MICC 19.06.110(B)(1) language provides:

> "A variance shall be granted by the city **only if the applicant can meet all criteria in subsections (B)(2)(a)** [the Hardship Ordinance] through (B)(2)(h) of this section." (bold added).

Moreover, the JCC Appeal fails to recognize that the specific language of the Hardship Ordinance supersedes the general language of MICC 19.06.110(B)(1). *See, e.g., Kustura v Department Of Labor & Industries,* 169 Wn.2d 81 (2010), *Futurewise v. Spokane County,* 517 P.3d 519 (2022) and *Lakeside Industries v. Washington. State Department Of Revenue,* 495 P.3d 257 (2021).

Kustura v Department Of Labor & Industries, 169 Wn.2d 81, 88 (2010) provides as follows:

> **A specific statute will supersede a general one** when both apply. (citations and quotation marks omitted) (bold added).

Futurewise v. Spokane County, 517 P.3d 519, 525 (2022) provides as follows:

> A well-accepted rule of statutory construction is that **a specific statute will supersede a general one** when both apply. (citation omitted) (bold added).

Lakeside Industries v. Washington State Department Of Revenue, 495 P.3d 257, 262 (2021) provides as follows:

> Where general and specific statues address the same matter, **the specific statute prevails.** (citation omitted) (bold added).

Highlighted copies of: (i) *Kustura v Department Of Labor & Industries*, (ii) *Futurewise v. Spokane*, and (iii) *Lakeside Industries v. Washington State Department Of Revenue* are attached to the Medved Decl. as **Exhibit 36**, **Exhibit 37** and **Exhibit 38.**

(iv.) <u>The JCC's Forth Created Disingenuous Statement</u>

Fourth, the JCC appeal at page 15 and citing *State v. Taylor*, 97 Wn.2d 724, 730 (1982), disingenuously states that some unidentified language omitted from the Hardship Ordinance "rendered the [Hardship Ordinance] absurd and undermined [the Hardship Ordinance's] sole purpose." However, the unambiguous Hardship Ordinance language itself conclusively demonstrates that: (i) no language has been omitted from the plain meaning of the Hardship Ordinance, (ii) the plain meaning of the Hardship Ordinance is not absurd, and (iii) the plain meaning of the Hardship Ordinance does not undermine its purpose. At the hearing, the City can corroborate the fact that no language was omitted from the Hardship Ordinance should the Hearing Examiner wish to inquire further. *See also* Medved Decl. at paragraphs 8-11 and **Exhibits 4-7**.

B. The JCC Appeal Fails To Recognize That The Hardship Ordinance Prevails Over The Comprehensive Plan.

The JCC appeal continuously fails to address the fact that the plain meaning of the Hardship Ordinance is unambiguous and should not be construed in this JCC appeal.

Instead, the JCC permeates the JCC appeal with select portions of the comprehensive plan. In doing so, the JCC ignores that as a matter of law the Hardship Ordinance prevails over the comprehensive plan. *See, e.g., Citizens For Mount Vernon v. City Of Mount Vernon,* 133 Wn.2d 861 (1997), *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 (1994) and *Cougar Mountain Associates v. King County*, 111 Wn.2d 742 (1988).

Citizens For Mount Vernon v. City Of Mount Vernon, 133 Wn.2d 861, 873-74 (1997) provides as follows:

> **A specific zoning ordinance will prevail over an inconsistent comprehensive plan.**
>
> ***
>
> If a comprehensive plan prohibits a particular use but the zoning code permits, the use would be permitted. (citations omitted) (bold added).

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 43 (1994) provides as follows:

> Generally, **a specific zoning ordinance will prevail, even over an inconsistent comprehensive plan….** Thus, to the extent the comprehensive plan prohibits the landfill use, while the zoning code permits it, the use would be a permitted use under this general rule. (citations omitted) (bold added).

Cougar Mountain Associates v. King County, 111 Wn.2d 742, 757 (1988) provides as follows:

> **A comprehensive plan is no more than a general policy guide** to the later adoption of official controls **which subordinate to specific zoning regulations.** (citations and quotation marks omitted) (bold added).

Highlighted copies of: (i) *Citizens For Mount Vernon v. City Of Mount Vernon*, (ii) *Weyerhaeuser v. Pierce County*, and (iii) *Cougar Mountain Associates v. King County* are attached to the Medved Decl. as **Exhibit 39**, **Exhibit 40** and **Exhibit 41.**

VI. CONCLUSION

Because the plain meaning of MICC 19.06.110(B)(2)(a) is unambiguous and MICC 19.06.110(B)(2)(a) is not subject to construction as a matter of law, the JCC appeal should be denied at the outset of the January 25, 2023 hearing.

DATED this 6th day of January, 2023

Robert A. Medved

Robert A. Medved

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal Of: Development Code Interpretation No. 22-004	APL No. 22-004 DECLARATION OF ROBERT A. MEDVED IN SUPPORT OF THE CITY OF MERCER ISLAND

Robert A. Medved declares:

1. I have personal knowledge of the matters set forth herein and am competent to testify to the same.

2. I lived in Mercer Island, Washington for more than consecutive 20 years.

3. While I am temporarily living in Bellevue, Washington, I intend to move back to Mercer Island, Washington.

MICC 19.06.110(B)(2)(a)

4. MICC 19.06.110(B)(2)(a) provides as follows:

> The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an "unnecessary hardship" is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot….

WASHINGTON SUPREME COURT OPINIONS

5. Attached hereto as **Exhibit 1** is a highlighted copy of *In re E.M.*, 197 Wn.2d 492 (2021) which provides at page 499 as follows:

> In resolving an issue of statutory construction, we first look to the plain meaning of the statute.
>
> ***
>
> **Thus, if the plain meaning of the statute is unambiguous, we end our inquiry.** (citations omitted) (bold added).

6. Attached hereto as **Exhibit 2** is a highlighted copy of *In re Zandi*, 187 Wn.2d 921 (2017) which provides at page 927 as follows:

> **If the plain meaning of a statute is unambiguous, our inquiry ends**.
>
> ***
>
> The Court of Appeals majority correctly recognized that "uninsured medical expenses" under RCW 26.18.170 unambiguously include costs "'not covered by insurance.'" (quotation marks in the original) (citations omitted) (bold added).

GANTT CHART

7. Attached hereto as **Exhibit 3** is a copy of a Gantt Chart. The attached Gantt Chart depicts the approximate beginning and ending dates of events regarding the following:

A. Variance Hardship Ordinance No. 17C-15. *See* paragraphs 8-11 and **Exhibits 4-7** hereto;

B. Transportation Concurrency Ordinance No. 18C-12. *See* paragraphs 12-17 and **Exhibits 8-13** hereto;

C. Community Facility Zone Designation Ordinance No. 20-04. *See* paragraphs 18-26 and **Exhibits 14-22** hereto;

D. Docketing Ordinance No. 19C-21. *See* paragraphs 27-33 and **Exhibits 23-29** hereto; and

E. The Hill Application To Amend The Zoning Code. *See* paragraphs 34-39 and **Exhibits 30-35** hereto.

VARIANCE HARDSHIP ORDINANCE NO. 17C-19

8. Attached hereto as **Exhibit 4** is a highlighted copy of the minutes of the Mercer Island Planning Commission's July 20, 2016 Meeting.

9. Attached hereto as **Exhibit 5** is a highlighted copy of the minutes of the Mercer Island Planning Commission's May 17, 2017 Meeting.

10. Attached hereto as **Exhibit 6** is a highlighted copy of the minutes of the Mercer Island City Council's June 6, 2017 Meeting.

11. Attached hereto as **Exhibit 7** is a highlighted copy of the minutes of the Mercer Island City Council's September 19, 2017 Meeting.

TRANSPORTATION CONCURRENCY ORDINANCE NO. 18C-12

12. Attached hereto as **Exhibit 8** is a highlighted copy of the minutes of the Planning Commission's February 15, 2017 Meeting.

13. Attached hereto as **Exhibit 9** is a highlighted copy of the minutes of the City Council's October 3, 2017 Meeting.

14. Attached hereto as **Exhibit 10** is a highlighted copy of the Growth Management Hearings Board's March 30, 2018 Order Finding Non-Compliance.

15. Attached hereto as **Exhibit 11** is a highlighted copy of the minutes of the City Council's October 2, 2018 Meeting.

16. Attached hereto as **Exhibit 12** is a highlighted copy of Mercer Island's October 2, 2018 Transportation Concurrency Ordinance No. 18C-12.

17. Attached hereto as **Exhibit 13** is a highlighted copy of the Growth Management Hearings Board's December 18, 2018 Order Finding Compliance.

COMMUNITY FACILITIES ZONING ORDINANCE NO. 20-04

18. Attached hereto as **Exhibit 14** is a highlighted copy of the Strom Jewish Community Center's September 29, 2017 Development Application.

19. Attached hereto as **Exhibit 15** is a highlighted copy of the minutes of the Mercer Island Planning Commission's October 18, 2017 Meeting.

20. Attached hereto as **Exhibit 16** is a highlighted copy of the minutes of the Mercer Island City Council's October 2, 2018 Meeting.

21. Attached hereto as **Exhibit 17** is a highlighted copy of the minutes of the Mercer Island City Council's November 20, 2018 Meeting.

22. Attached hereto as **Exhibit 18** is a highlighted copy of the Concerned Neighbors For The Preservation Of Our Community's January 29, 2019 Petition For Review to the Growth Management Hearings Board.

23. Attached hereto as **Exhibit 19** is a highlighted copy of the Mark Coen's February 4, 2019 Petition For Review to the Growth Management Hearings Board.

24. Attached hereto as **Exhibit 20** is a highlighted copy of the Growth Management Hearings Board's August 5, 2019 Final Decision And Order.

25. Attached hereto as **Exhibit 21** is a highlighted copy of the minutes of the Mercer Island City Council's February 18, 2020 Meeting.

26. Attached hereto as **Exhibit 22** is a highlighted copy of Mercer Island's February 18, 2020 Ordinance No. 20-04.

DOCKETING ORDINANCE NO. 19C-21

27. Attached hereto as **Exhibit 23** is a highlighted copy of Robert Medved's July 7, 2019 Petition For Review to the Growth Management Hearings Board.

28. Attached hereto as **Exhibit 24** is a highlighted copy of the Growth Management Hearings Board's August 15, 2019 Order Finding Noncompliance.

29. Attached hereto as **Exhibit 25** is a highlighted copy of Robert Medved's December 3, 2019 letter to the Mercer Island City Council.

30. Attached hereto as **Exhibit 26** is a highlighted copy of the minutes of the Mercer Island City Council's December 3, 2019 Meeting.

31. Attached hereto as **Exhibit 27** is a highlighted copy of the Stroum Jewish Community Center's December 9, 2019 request to the Mercer Island City Council.

32. Attached hereto as **Exhibit 28** is a highlighted copy of the minutes of the Mercer Island City Council's December 10, 2019 Meeting.

33. Attached hereto as **Exhibit 29** is a highlighted copy of the Growth Management Hearings Board's May 1, 2020 Order Finding Compliance.

THE HILL APPLICATION TO AMEND THE ZONING CODE

34. Attached hereto as **Exhibit 30** is a highlighted copy Richard Hill's February 11, 2020 Application For A Zoning Code Text Amendment.

35. Attached hereto as **Exhibit 31** is a highlighted copy Richard Hill's February 11, 2020 proposed amended text of the zoning code.

36. Attached hereto as **Exhibit 32** is a highlighted copy of the minutes of the Mercer Island City Council's February 18, 2020 Meeting.

37. Attached hereto as **Exhibit 33** is a highlighted copy of Robert Medved's March 2, 2020 Request to the Mercer Island City Council for Legal Opinions.

38. Attached hereto as **Exhibit 34** is a highlighted copy of Alex Slides' March 6, 2020 Letter to the Mercer Island City Council.

39. Attached hereto as **Exhibit 35** is a copy of a February 1, 2021 e-mail string whereby Richard Hill withdrew the February 11, 2020 Application For A Zoning Code Text Amendment.

COURT OPINIONS

40. Attached hereto as **Exhibit 36** is a highlighted of *Kustura v Department Of Labor & Industries,* 169 Wn.2d 81 (2010) which provides at page 88 as follows:

> **A specific statute will supersede a general one** when both apply. (citations and quotation marks omitted) (bold added).

41. Attached hereto as **Exhibit 37** is a highlighted copy of *Futurewise v. Spokane County,* 517 P.3d 519, 525 (2022) which provides at page 525 as follows:

> A well-accepted rule of statutory construction is that **a specific statute will supersede a general one** when both apply. (citation omitted) (bold added).

42. Attached hereto as **Exhibit 38** is a highlighted copy of *Lakeside Industries v. Washington. State Department Of Revenue,* 495 P.3d 257 (2021) which provides at page 262 as follows:

> Where general and specific statues address the same matter, **the specific statute prevails.** (citation omitted) (bold added).

43. Attached hereto as **Exhibit 39** is a highlighted copy of *Citizens For Mount Vernon v. City Of Mount Vernon,* 133 Wn.2d 861 (1997) which provides at pages 873 and 874 as follows:

> **A specific zoning ordinance will prevail over an inconsistent comprehensive plan.**
>
> ***
>
> If a comprehensive plan prohibits a particular use but the zoning code permits, the use would be permitted. (citations omitted) (bold added).

44. Attached hereto as **Exhibit 40** is a highlighted copy of *Weyerhaeuser v. Pierce County,* 124 Wn.2d 2 (1994) which provides at page 43 as follows:

> Generally, **a specific zoning ordinance will prevail, even over an inconsistent comprehensive plan….** Thus, to the extent the comprehensive plan prohibits the landfill use, while the zoning code permits it, the use would be a permitted use under this general rule. (citations omitted) (bold added).

45. Attached hereto as **Exhibit 41** is a highlighted copy of *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 757 (1988) which provides at page 757 as follows:

> **A comprehensive plan is no more than a general policy guide** to the later adoption of official controls **which subordinate to specific zoning regulations.** (citations and quotation marks omitted) (bold added).

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED this 18th day of January, 2023

Robert A. Medved

Robert A. Medved

EXHIBIT 1

197 Wash.2d 492
484 P.3d 461

In the MATTER OF the DEPENDENCY OF E.M., a minor child,

No. 98596-1

Supreme Court of Washington.

Oral Argument Date: January 19, 2021
Filed: April 15, 2021

Jan Trasen, Attorney at Law, 1511 3rd Ave. Ste. 610, Seattle, WA, 98101-3647, for Petitioner.

Kelly L. Taylor, Office of the Attorney General, 800 5th Ave. Ste. 2000, Seattle, WA, 98104-3188, Alicia O. Young, WA State Attorney General's Office, Po Box 40100, Olympia, WA, 98504-0100, for Respondent.

Kathleen Carney Martin, Dependency CASA Program, 401 4th Ave. N. Rm. 3081, Kent, WA, 98032-4429, for Guardian(s) Ad Litem.

Jeffrey Todd Even, Office of The Attorney General, Po Box 40100, 1125 Washington St. Se, Olympia, WA, 98504-0100, for Amicus Curiae on behalf of Office of Civil Legal Aid.

Sungah Annie Chung, Legal Counsel For Youth and Children, Po Box 28629, Seattle, WA, 98118-8629, for Amicus Curiae on behalf of Legal Counsel for Youth and Children.

D'Adre Beth Cunningham, Washington Defender Association, 110 Prefontaine Pl. S. Ste. 610, Seattle, WA, 98104-2626, for Amicus Curiae on behalf of Washington Defender Association.

Lisa Ann Kelly, University of Washington, Po Box 85110, William H. Gates Hall, Ste. 265, Seattle, WA, 98145-1110, for Amicus Curiae on behalf of Children and Youth Advocacy Clinic.

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OWENS, J.

[197 Wash.2d 495]

¶ 1 This case asks whether a private attorney can represent a child in a dependency proceeding without first obtaining the court's approval. In 2018, E.M. was a three-year-old boy who had lived with his grandmother

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since birth as a dependent child of the State. When his grandmother sought to return to work, E.M. suddenly found himself in a custodial tug-of-war between his biological parents, his grandmother, and the State. After the dust had settled, the King County Superior Court placed E.M. in foster care—separating E.M. from his family for the first time in his young life.

¶ 2 E.M.'s grandmother quickly retained an attorney for E.M. for the purpose of asking the King County Superior Court to reconsider its decision. The attorney, however, was unable to meet with E.M. because the Department of Children, Youth, and Families (Department) would not provide contact details or arrange a meeting with E.M. Ultimately, the court declined reconsidering E.M.'s placement in foster care because it ruled that the attorney was not appointed by the court to represent E.M. and because the representation raised numerous ethical issues. E.M.'s mother appealed this ruling, and the Court of Appeals affirmed.

¶ 3 Washington litigants involved in a broad range of matters enjoy the paramount right to retain a private

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attorney of their choice to best represent their interests—without the court's interference. Dependency proceedings carry drastic consequences that may forever dwell on a child. Children at such an important crossroads in life must also be afforded this right when they are sufficiently mature to make such a decision. However, when a child is not sufficiently mature to make such a consequential decision, the court inherently has plenary authority in deciding whether to allow a representation to proceed.

¶ 4 Nonetheless, circumstances may arise where an attorney must undertake a representation to protect a person's interest in limited circumstances before the attorney has had a chance to meet with the person or obtain the court's approval. Accordingly, before striking a representation, the court must first consider whether the circumstances may authorize such a limited representation. As the superior court failed to make this consideration before striking the notice of appearance, we reverse.

I. STATEMENT OF FACTS

¶ 5 E.M. is a young boy who was born in 2015. He was declared to be a dependent child of the State shortly after his birth and lived with his grandmother during the following years.[1] In 2017, E.M.'s grandmother (Grandmother) sought to return to work and supported a change in placement to his mother (Mother), provided there was a visitation monitor present to monitor their contact at all times. Although Grandmother sought a return to work, ensuring E.M. had a safe place to live took precedence.

¶ 6 Mother petitioned for E.M. to live with her and a friend (a visitation monitor), while E.M.'s father (Father)

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filed a competing motion, seeking to place E.M. in foster care. The commissioner granted Mother's request. E.M. lived with Mother and the visitation monitor for a very brief time. Father moved to revise the commissioner's decision in King County Superior Court. Father asserted that Mother was alone with E.M. when the visitation monitor was at work in violation of the court's order. Father further argued that E.M. should not move back with Grandmother because Grandmother berated Father in front of E.M., thereby reducing Father's chances of reunification. Instead, Father asked the court to place E.M. in foster care. The superior court agreed and ordered E.M. to be placed in foster care.

¶ 7 In response to the order, Grandmother quickly retained an attorney, Ms. Aimée Sutton,[2] to represent E.M. five days after E.M. was moved to foster care. The attorney was unable to meet with E.M. because the Department

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would not provide contact details to the attorney or allow the attorney to meet with E.M. The attorney promptly filed a notice of appearance days before filing a motion to reconsider the court's decision to place E.M. in foster care. On the same day the attorney filed the notice of appearance, the court appointed a guardian ad litem for E.M., as E.M. had been without a guardian ad litem for the previous several months.

¶ 8 The attorney filed a timely motion for reconsideration a few days later, noting that the turbulence of the placement changes had begun to negatively affect E.M. The attorney noted that E.M. had been moved between placements four times within a month, visited Mother less often, and had a number of meetings with Mother unexpectedly cancelled. The attorney argued that E.M.'s transition to foster care could result in significant psychological consequences as E.M. had always previously lived with a family member. The attorney advocated for E.M. to return to

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Grandmother, where he lived before the placement changes began.

¶ 9 Father and the Department opposed the attorney's representation of E.M. in their responses to the motion for reconsideration. At the reconsideration hearing, the court preliminarily struck the attorney's notice of appearance and refused to hear the substance of the motion. The superior court ruled that the attorney could not represent E.M. because the attorney was not appointed pursuant to RCW 13.34.100 and because the representation presented numerous ethical issues. Mother appealed the ruling, and Division I of the Court of Appeals affirmed the trial court. *In re Dependency of E.M.* , 12 Wash. App. 2d 510, 458 P.3d 810 (2020). The attorney has placed fees for this representation in trust, and the attorney has not drawn from these funds. E.M. has lived in foster care ever since.

II. ISSUES PRESENTED

1. Does RCW 13.34.100 require that private attorneys for children in dependency proceedings be appointed by the court prior to beginning representation?

2. Did the trial court err when it struck the attorney's notice of appearance based on the attorney's ability to comply with the Rules of Professional Conduct?

III. ANALYSIS

A. *RCW 13.34.100 Does Not Require Private Attorneys for Children in Dependency Proceedings To Be Appointed by the Court*

¶ 10 We are first[3] tasked with determining whether RCW 13.34.100(7) requires privately retained attorneys

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for children in dependency proceedings to first be appointed by the court prior to beginning representation. This is a question of statutory interpretation, which we review de novo. *Jametsky v. Olsen* , 179 Wash.2d 756, 761-62, 317 P.3d 1003 (2014).

¶ 11 In resolving an issue of statutory construction, we first look to the plain meaning of the statute. *Dep't of Ecology v. Campbell & Gwinn, LLC* , 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002). Meaning must be ascertained from the plain language of the statute, unless the statute is ambiguous in that the language "remains susceptible to more than one reasonable meaning." *Id* . at 12, 43 P.3d 4 (citing *Cockle v. Dep't of Labor & Indus* ., 142 Wash.2d 801, 808, 16 P.3d 583 (2001)). Thus, if the plain meaning of the statute is unambiguous, we end our inquiry. Only when the statute is ambiguous do we resort to the aids of statutory construction and legislative history. *Id.*

¶ 12 The Department primarily asserts that RCW 13.34.100 requires that all attorneys representing children in dependency

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proceedings first be appointed by the court. The Department asserts that the legislature envisioned a "gatekeeping" role for courts in permitting representation of children in dependency proceedings.

¶ 13 For support of its position, the Department compares subsection (7)(a) of RCW 13.34.100 with subsection (7)(b):

> (7)(a) The court *may appoint an attorney* to represent the child's position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department.
>
> (b)(i) If the *court has not already appointed an attorney for a child,*

> *or the child is not represented* by a privately retained attorney:
>
> [197 Wash.2d 500]
>
> (A) The child's caregiver, or any individual, may refer the child to an attorney for the purposes of filing a motion to request *appointment of an attorney at public expense* ; or
>
> (B) The child or any individual may retain an attorney for the child for the purposes of filing a motion to request *appointment of an attorney at public expense* .

RCW 13.34.100 (emphasis added).

¶ 14 The Department contrasts the phrase "appointment of an attorney at public expense," of subsection (7)(b)(i)(A)-(B) with the phrase "appoint an attorney" from subsection (7)(a). From this molecular distinction, the Department argues that the legislature intended that the court play a gatekeeping role to approve or deny the representation of all attorneys seeking to represent children.

¶ 15 The Department's interpretation is incorrect. Nowhere does RCW 13.34.100 require privately retained attorneys to seek appointment by the court. Subsection (7)(a) does not expressly impose any obligation on an attorney to be appointed by the court but, rather, notes that the court "may" appoint counsel at its discretion. Additionally, subsection (7)(b)(i) draws a clear distinction between "appointed" counsel and "privately retained" counsel, which evidences that "privately retained counsel" is a mutually exclusive and distinct group for which there is no appointment requirement in the statute. The statute is not ambiguous as to whether private counsel must be appointed—there is no such requirement. Accordingly, we decline to apply canons of construction or look to the legislative intent of the statute.

¶ 16 In conclusion, RCW 13.34.100 does not impose an obligation on privately retained attorneys to first seek appointment by the court. As there is no statutory appointment requirement, several ethical and practical questions arise when third parties retain attorneys on behalf of children during dependency proceedings. We address these issues in turn.

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B. *Whether an Attorney Has Sufficient Authority To Represent a Child Depends on Whether an Attorney-Client Relationship Has Formed*

¶ 17 Although an attorney need not first seek court appointment, an attorney is nonetheless required to demonstrate authority for the representation when prompted. RCW 2.44.030. This raises the question as to whether an attorney has authority to properly represent a client with whom she has never even met, particularly when that client is a three-year old child who likely will not understand the nature of the proceedings or the role of an attorney. While the trial court relied in part on the Rules of Professional Conduct (RPCs) to strike the representation, the threshold issue is whether the attorney had the requisite authority to undertake the representation.

¶ 18 To show that an attorney has the requisite authority to act on behalf of a client, the attorney must establish that the party represented is actually a client. *See* RCW 2.44.010 (statute confers power to bind a "*client* "). Accordingly, an attorney must demonstrate that an attorney-client relationship has been formed or that the representation is otherwise authorized by law.

¶ 19 And while these are the minimum requirements to exist, authority to bind a child client does not exist in a dependency proceeding where the attorney is not

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independent,[4] where the third party has been accused of neglecting or abusing the child, or

where other conflicts with the RPCs would substantially limit the representation. *See generally In re Marriage of Wixom* , 182 Wash. App. 881, 904, 332 P.3d 1063 (2014) (the court has the inherent authority to safeguard

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the ethical practice of law); NAT'L ASS'N OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES std. G-1 (1996). Additionally, those with no legitimate interest in the welfare of the child are wholly without authority to obtain a lawyer on a child's behalf, absent court approval. *See* STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES , *supra* , std. H-5 (1996). All of these factors must be considered when determining whether an attorney has authority to undertake a representation on behalf of a child in a dependency proceeding.

¶ 20 Addressing these factors, whether an attorney-client relationship exists depends on whether "the attorney's advice or assistance is sought and received on legal matters," and on " 'the client's subjective belief that it exists.' " *Bohn v. Cody* , 119 Wash.2d 357, 363, 832 P.2d 71 (1992) (citing 1 RONALD E. MALLEN & JEFFREY SMITH, LEGAL MALPRACTICE § 11.2 n.18, at 635 (1989); 7 AM. JUR. 2D *Attorneys at Law* § 118 (1980), and quoting *In re McGlothlen* , 99 Wash.2d 515, 522, 663 P.2d 1330 (1983)). Thus, a dependent child is capable of forming an attorney-client relationship by seeking legal advice and reasonably believing that such a relationship exists.

¶ 21 Whether a child is sufficiently mature to form an attorney-client relationship and, further, to provide informed consent in the event of any conflicts of interest largely remains a question of fact dependent on whether the child is sufficiently mature to understand the nature of the dependency proceedings, the attorney-client relationship, and the possibility of conflicts of interest. When children lack such capacity, the court is the sole authority

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that may permit such a representation.[5] Here, there was no contact whatsoever between the attorney and E.M., so E.M. could not authorize the representation even if he were capable, and additionally, the attorney did not seek approval of the court prior to beginning the representation. Nonetheless, while an attorney-client relationship is typically the vessel that provides the attorney authority to undertake representation, implied authority may also arise in particular circumstances under RPC 1.14.

C. *Before Striking a Representation Due to a Lack of Authority, the Court Must Consider Whether the Representation May Be Impliedly Authorized under RPC 1.14*

¶ 22 While there cannot logically be an attorney-client relationship when no contact between the putative client and the attorney has been made, an attorney is nonetheless able to take legal action on behalf of such persons under limited circumstances on an emergency basis pursuant to RPC 1.14 :

> (1) the person's "health, safety or a financial interest" must be "at risk,"
>
> (2) the person must be "unable to establish a client-lawyer relationship ... when the person or another acting in good faith on that person's behalf has consulted with the lawyer,"
>
> (3) the attorney must "reasonably believe[ ] that the person has no other lawyer, agent or other representative available," and
>
> (4) the attorney must "take legal action on behalf of the person only to the extent reasonably necessary to maintain the

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> status quo or otherwise avoid imminent and irreparable harm."

RPC 1.14 cmt. 9.

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¶ 23 RPC 1.14 permits implied authorization for representation under a narrow set of circumstances, which may have arguably existed in this case. Here, the attorney knew that no guardian ad litem[6] or other attorney represented E.M. until she filed the notice of appearance, after which there remained little time to file a motion for reconsideration. The attorney was acting immediately in response to the superior court's revised order that placed young E.M. in foster care and separated him from his family for the very first time in his life. Furthermore, as the attorney argued, placing E.M. in foster care could result in unnecessary psychological harm to the child when he arguably could have returned to live with Grandmother to preserve the status quo.

¶ 24 Had the superior court considered these factors, it likely would have found that the attorney had implied authorization to undertake the representation.[7] It did not, however, and as a result, the court refused to hear the merits of the argument, thereby possibly depriving E.M. and his biological family of years of contact. We hold today that when the court strikes an appearance due to a lack of authority, the court must consider whether the representation may otherwise be impliedly authorized under the RPCs.

¶ 25 A child has a significant interest in the outcome of a dependency proceeding. Where an individual with a legitimate interest in the child's welfare seeks to retain an attorney to represent the child's interest in such an important proceeding, the court must consider all sources of authority and the respective negating factors before striking the representation. Because the Attorney arguably had authority

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to represent E.M. on a limited basis pursuant to RPC 1.14 comment 9, we hold that the court erred by not considering all necessary factors before striking the representation.

IV. CONCLUSION

¶ 26 Privately retained attorneys are not required to seek appointment by the court in dependency proceedings under RCW 13.34.100 when the child has capacity to consent to the relationship. While E.M. did not expressly consent to the representation, the superior court nonetheless erred when it struck the notice of appearance without considering whether the representation was impliedly authorized pursuant to RPC 1.14 comment 9. Here, a very young child was denied a hearing on the merits to reconsider his placement with a foster family, possibly resulting in years of lost time. The superior court should have considered all relevant RPCs and sources of authority before striking the representation. E.M. may retain private counsel in accordance with today's opinion. We reverse.

WE CONCUR:

González, C.J.

Johnson, J.

Stephens, J.

Gordon McCloud, J.

Montoya-Lewis, J.

Whitener, J.

YU, J. (concurring)

¶ 27 I agree with the majority that RCW 13.34.100 does not require privately retained attorneys to be appointed by the court in dependency proceedings. Such a restriction is not supported by the express language of the statute nor is it reasonably implied in any provisions of the statute.

¶ 28 I also agree with the majority's conclusion that the trial court erred when it

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struck the attorney's notice of appearance without considering the implied emergency authorization under RPC 1.14. However, I write separately to reassert my belief that children are categorically entitled to legal representation at public expense in every dependency

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proceeding under art. I, § 3 of our state constitution.[1] The discretionary case-by-case approach to the appointment of counsel for children in these cases does not protect the right for a child to state their position and to have that position shared with the court. The risk for these children is that they will be erroneously deprived of their rights in dependency proceedings. *See In re Dependency of E.H.* , 191 Wash.2d 872, 902, 427 P.3d 587 (2018) (Yu, J., dissenting in part). As I stated in *E.H.* ,

> [T]he unguided discretion that trial courts currently have in appointing counsel allows for inconsistent practices that leave many children with no voice and no one to advocate for their rights. This arrangement does not satisfy the heightened due process protections provided in this context by article I, section 3.

Id. at 903, 427 P.3d 587.

¶ 29 While the majority acknowledges that "[a] child has a significant interest in the outcome of a dependency proceeding," these interests are not currently protected by our system. Majority at 468. In most counties, each child in dependency proceedings is subject to the individual policies and preferences of the particular court hearing the matter, which results in disparate practices across the state. Leaving children, like three-year old E.M., with no voice or advocate in proceedings deprives them of the opportunity to be heard and to have their interests protected. As noted by amici curiae, research in our state has demonstrated that

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children without counsel are frequently not even mentioned in these proceedings.[2]

¶ 30 Finally, the majority in dicta, seems to suggest that a child's inability to authorize legal representation is why the court must retain the authority to appoint counsel. I disagree and would point to this fact as one that actually supports the view that appointment of counsel for children should be automatic in every case. The right to counsel does not rest on a child's capacity to consent or to communicate with counsel or on a judge's personal belief that the child's rights are sufficiently protected. The right to counsel is rooted in a constitutional right to due process and some would argue a liberty interest. And contrary to the majority's assertions, the Rules of Professional Conduct do not impede or prohibit an attorney's ability to represent a child in such proceedings. There are national standards and guidelines for attorneys representing a child who is preverbal or otherwise unable to communicate. *See* AM. BAR ASS'N, ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 7(d) cmt. (Aug. 2011), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf [https://perma.cc/MLC6-PF8Z].[3]

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These standards place the attorney in the role of advocating the child's legal interest. Unlike the subjective best interest standard of a guardian ad litem, "it is a role that looks to the purpose of the underlying

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laws governing whatever the stage of the proceedings and seeks to secure the child's rights within those proceedings." Commentary, Children's Representation Workgroup at 6. For example, these rights might include advocacy to support healthy physical and emotional healing after trauma or to support healthy attachments to family or siblings despite being placed out of home.

¶ 31 I am not persuaded that there are other sufficient safeguards in dependency proceedings to protect a child's legal rights. In an adversarial proceeding, only an attorney can effectively serve as an advocate for the child. Here, a vulnerable child required the assistance of an attorney but was denied such representation. E.M., like all children in dependency cases, has an interest in maintaining a continuous relationship with his family but, instead, was placed in foster care. E.M. also has the right to be heard on his own behalf. RCW 13.34.090(1).

¶ 32 The court deprived E.M. of this right to be heard when it struck the notice of appearance and refused to hear the motion to reconsider. Report of Proceedings at 21. Considering children's interests at stake in dependency cases and the high risk of deprivation of these interests under the current system, I firmly believe that every child in a dependency case should be entitled to appointed counsel. Thus, I respectfully concur only in the resolution of the narrow question posed in this case.

Madsen, J.

Montoya-Lewis, J.

Notes:

[1] In 2011, E.M.'s mother left E.M.'s brother in a car on the side of the road for an hour while she went to get gas with E.M.'s sister. When the mother returned, E.M.'s brother was gone. The disappearance remains unsolved. Additionally, E.M.'s biological father has since divorced E.M.'s mother and has allegedly experienced drug addiction, homelessness, and incarceration. Due to these circumstances, E.M. was declared to be a dependent child.

[2] Ms. Sutton has since been appointed to serve as a King County Superior Court judge. No disrespect is intended by the omission of honorific terms.

[3] As a preliminary matter, Mother has standing to raise this issue as Mother's fundamental right to the " 'custody, care and nurture of the child' " is affected when the court prohibits E.M. from obtaining private representation and results in the child's placement in foster care. *See In re Dependency of M.S.R.* , 174 Wash.2d 1, 15, 271 P.3d 234 (2012) (internal quotation marks omitted) (quoting *In re Welfare of Luscier* , 84 Wash.2d 135, 136–37, 524 P.2d 906 (1974), *overruled on other grounds by In re Dependency of M.H.P.* , 184 Wash.2d 741, 759, 364 P.3d 94 (2015)). The issue is also not moot because E.M. can obtain different private counsel after this appeal, in spite of the fact that the attorney, as a superior court judge, can no longer represent E.M.

[4] An independent representation requires that the attorney does not share privileged information with the third party without the express and voluntary consent from the child and that the third party is unable to direct the representation. These requirements must be communicated by the attorney to the third party in writing. *See* Nat'l Ass'n of Counsel for Children, American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases std. G-1 (1996).

[5] Guardians ad litem, although vested with many duties to ensure the best interest of a child are served, are not vested with the power to approve or disapprove of a representation. *See* RCW 13.34.105.

[6] When a private representation exists, the court must ensure that the child has a guardian ad litem. *See* RCW 13.34.100(1). Guardians ad litem help ensure the representation is carried out

independently and that the interests of the child are properly represented.

[7] We find that Ms. Sutton likely had sufficient authorization to undertake the representation and her actions did not conflict with the RPCs. Accordingly, she may withdraw fees from the funds held in trust.

[1] *See also* Br. of Amici Curiae Wash. Def. Ass'n, Am. Civil Liberties Union of Wash., Univ. of Wash. Sch. of Law Children & Youth Advocacy Clinic, & Wash. Criminal Def. Lawyers in Supp. of Pet'r (Br. of Amici Curiae Wash. Def. Ass'n et al.) (arguing the same under a liberty interest); *see also* Statewide Children's Representation Workgroup, Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System, Standards of Practice, Voluntary Training, and Caseload Limits in Response to HB 2735 (2010) (Children's Representation Workgroup).

[2] Br. of Amici Curiae Wash. Def. Ass'n et al. at 5-6 (citing Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts* , 14 STAN. J.C.R. & C.L. 125, 143 (2018)).

[3] Other resources on representing infants or preverbal children include the American Bar Association Center on Children and the Law, the National Association of Counsel for Children, the Juvenile Law Center, and Zero to Three. Specifically, *see* Tori Porell, *Legal Representation for the Youngest Clients: A Holistic Approach* , Am. Bar Ass'n (Mar. 31, 2020), https://www.americanbar.org/groups/litigation/committees/childrensrights/articles/2020/legal-representation-for-the-youngest-clients-a-holistic-approach/ [https://perma.cc/Y5UW-3WRF]; Candice L. Maze, Children in Dependency Proceedings: the Hallmarks of Effective, Ethical Representation (Oct. 2010); Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children* , 50 Fam . L.Q. 383 (2016) ; Eva J. Klain & Jenifer Goldman Fraser, *Representing Very Young Children in Child Welfare Proceedings* , 41 The Guardian 9 (2019).

EXHIBIT 2

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In the MATTER OF the MARRIAGE OF Victor M. ZANDI, Jr., Petitioner, and Deanna M. Zandi, Respondent.

NO. 92296-9

Supreme Court of Washington.

Argued Oct. 25, 2016
Filed Feb. 23, 2017

John A. Hays, Attorney at Law, 1402 Broadway St., Longview, WA, 98632-3714, Robert Harold Falkenstein, Falkenstein Zandi PLLC, 950 12th Ave., Ste. 100, Longview, WA, 98632-2550, for Petitioner.

Darrel S. Ammons Jr., Attorney at Law PLLC, 871 11th Ave., Ste. 2, Longview, WA, 98632-2430, for Respondent.

STEPHENS, J.

[187 Wash.2d 923]

¶1 This case asks if out-of-network health care costs qualify as " '[u]ninsured medical expenses' " under RCW 26.18.170(18)(d). Victor and Deanna Zandi's dependent daughter, T.Z., incurred approximately $13,000 in medical bills when she had a kidney stone removed while traveling outside the Kaiser Permanente network. The superior court ordered Victor Zandi to pay 75 percent of the cost and Deanna Zandi to pay the remaining 25 percent. The Court of Appeals reversed, finding that the superior court abused its discretion by modifying the parties' 2009 order of child support, which required Victor Zandi to pay 100 percent of "uninsured medical expenses." *In re Marriage of Zandi* , 190 Wash.App. 51, 52, 357 P.3d 65 (2015).

¶2 We affirm the Court of Appeals. The legislature defines " '[u]ninsured medical expenses' " as costs "not covered" by insurance. RCW 26.18.170(18)(d). WAC 388-14A-1020

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clarifies that this includes costs "not paid" by insurance, even if those costs would be covered under other circumstances. Because the health care expenses in this case are unambiguously within the scope of RCW 26.18.170(18)(d), financial responsibility is allocated by the 2009 order and may not be modified absent evidence of changed circumstances or other evidence consistent with the requirements of RCW 26.09.170(6) -(7).

FACTS AND PROCEDURAL HISTORY

¶3 T.Z. is the daughter of Deanna and Victor Zandi.[1] In June 2011, T.Z. developed a four millimeter stone in her left kidney. The following month, while visiting her maternal aunt in Ohio, T.Z.'s condition worsened. T.Z. was admitted to a hospital in the Cincinnati area, where doctors installed a temporary stent. T.Z.'s surgeon referred her to the Urology Group in Cincinnati to have the kidney stone removed via lithotripsy. Lithotripsy uses ultrasound shock waves to break up a stone, allowing it to be passed from the body.

¶4 T.Z. has medical insurance through her father's plan with Kaiser. Kaiser is not available in the Cincinnati area. T.Z.'s aunt lives in Goshen, a suburb of Cincinnati in southwestern Ohio; the closest Kaiser facility is near Cleveland, 186 miles to the northeast. When Deanna contacted Victor to advise him of T.Z.'s situation, Victor told her that T.Z.'s

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aunt should either drive T.Z. to Cleveland or wait to see if Kaiser would authorize an out-of-network provider. Deanna disagreed, believing T.Z. needed immediate surgery. T.Z.'s aunt took her to the Urology Group in Cincinnati on July 7, 2011, where doctors used lithotripsy to successfully treat T.Z.'s kidney stone. Medical expenses for T.Z.'s time in Ohio totaled approximately

$13,000. Concluding that T.Z.'s treatment was both nonemergent and out of network, Kaiser ultimately declined to cover these costs.

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¶5 Under the terms of the Zandis' 2009 order of child support, Victor is responsible for providing T.Z. with medical insurance and paying any uninsured medical expenses. Paragraph 3.19 states, "The father shall pay 100% of uninsured medical expenses and the mother shall pay 0% of uninsured medical expenses...." Clerk's Papers (CP) at 7. Deanna sought enforcement of this provision under RCW 26.18.170. *See* Resp't's Suppl. Br. at 10-13. Victor argued that he should be excused from the terms of the child support order because Deanna did not "go through the appropriate channels" (i.e., obtain preauthorization before sending T.Z. to a non-Kaiser facility). CP at 207. The trial court found that because T.Z. was residing with her mother, Deanna was in a "better position to secure coverage for the kidney stone treatment by Kaiser Permanente" and ordered Deanna to pay 25 percent of the medical costs. *Id.* at 247.

¶6 A divided Court of Appeals reversed, finding that because T.Z.'s medical costs were " '[u]ninsured medical expenses' " under RCW 26.18.170(18)(d), paragraph 3.19 of the 2009 order controlled the allocation of financial responsibility. *Zandi* , 190 Wash.App. at 54-55, 357 P.3d 65. The majority acknowledged the dissent's concern that a parent with control over a child's health care could unfairly subject the financially responsible parent to unnecessary out-of-network expenses. *Id.* at 56-57, 357 P.3d 65. Noting that nothing in the record before the superior court suggested Deanna acted in bad faith or unreasonably, the majority held that the lower court abused its discretion by effectively modifying the 2009 order of child support without adequate cause. We granted Victor's petition for review. *In re Marriage of Zandi* , 185 Wash.2d 1002, 366 P.3d 1244 (2016).

ANALYSIS

¶7 Victor argues that the health care costs in this case were not "uninsured medical expenses" within the scope of the 2009 order of child support because the health care T.Z.

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received would have been covered by Kaiser under different circumstances. Pet. for Review at 7. We disagree, and affirm the Court of Appeals. Reading RCW 26.18.170(18)(d) and its interpretive regulation in the context of chapter 26.18 RCW, "uninsured medical expenses" unambiguously includes the costs Kaiser declined to cover in this case. *See* WAC 388-14A-1020. By contrast, the narrow interpretation of "uninsured medical expenses" advanced by Victor and the dissenting Court of Appeals judge reads RCW 26.18.170(18)(d) out of context and runs contrary to the core purpose of chapter 26.18 RCW.

¶8 Chapter 26.18 RCW governs the enforcement of child support orders. Under that chapter, one parent's financial responsibility for a dependent child's medical expenses can be enforced by the other parent. *See* RCW 26.18.170. Specifically, RCW 26.18.170(17) states:

> If a parent required to provide medical support fails to pay his or her portion of any premium, deductible, copay, or *uninsured medical expense* ... the parent seeking reimbursement of medical expenses may enforce collection of the obligated parent's portion.

(Emphasis added.) The legislature, recognizing the importance of ensuring that child support obligations are met, instructed courts to "liberally construe[ ]" chapter 26.18 RCW in order to "assure that all dependent children are adequately supported." RCW 26.18.030(3). Here, the 2009 order of child support states that Victor is financially responsible for 100 percent of his daughter's uninsured medical expenses. CP at 7. Because the superior court reduced Victor's financial burden to 75 percent, this case turns on whether the medical bills T.Z. incurred while in

Ohio qualify as "uninsured medical expenses" under RCW 26.18.170.

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¶9 Statutory interpretation involves a question of law, subject to de novo review. *See, e.g., Clallam County v. Dry Creek Coal.* , 161 Wash.App. 366, 385, 255 P.3d 709 (2011). The

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purpose of our inquiry is to identify and give effect to the legislative intent behind the statute. *Jametsky v. Olsen* , 179 Wash.2d 756, 762, 317 P.3d 1003 (2014). If the plain meaning of a statute is unambiguous, our inquiry ends. *Id.* When attempting to ascertain a statute's plain meaning, we consider the "context of the entire act" as well as related statutes. *Id.* (citing *Dep't of Ecology v. Campbell & Gwinn, LLC* , 146 Wash.2d 1, 11, 43 P.3d 4 (2002)).

A. The Medical Costs in This Case Are Unambiguously "Uninsured Medical Expenses" under RCW 26.18.170

¶10 This case presents a straightforward question of statutory interpretation. The Court of Appeals majority correctly recognized that "uninsured medical expenses" under RCW 26.18.170 unambiguously include costs " 'not covered by insurance.' " *Zandi* , 190 Wash.App. at 54-55, 357 P.3d 65. Because "Kaiser is not covering the disputed medical expenses," these health care costs are "uninsured medical expenses" that the 2009 order obliges Victor to pay. *Id.*

¶11 The legislature promulgated chapter 26.18 RCW to meet "an urgent need for vigorous enforcement of child support and maintenance obligations." RCW 26.18.010. The provision at issue here, RCW 26.18.170(17), furthers this goal in the context of medical expenses. If a financially responsible parent fails to meet his or her obligations, RCW 26.18.170(17) allows either the State or the other parent to enforce the child support order. This applies specifically to the "obligated parent's portion of the premium, deductible, copay, or uninsured medical expense incurred on behalf of the child." *Id.* The legislature defined " '[u]ninsured medical expenses' " as "premiums, copays, deductibles, *along with other health care costs not covered by insurance* ." RCW 26.18.170(18)(d) (emphasis added).

¶12 The meaning of the phrase "along with other health care costs not covered by insurance" is clear and unambiguous: it means costs the insurer declines to cover. Since Kaiser

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declined to pay T.Z.'s medical expenses, those expenses were "costs 'not covered by insurance.' " *Zandi* , 190 Wash.App. at 55, 357 P.3d 65. Any potential ambiguity is resolved by reading RCW 26.18.170(17) and (18)(d) in their statutory context.

¶13 The interpretation advanced by Victor and the Court of Appeals dissent requires distinguishing medical costs that are "not covered" from those that are merely unpaid. *See* Pet. for Review at 7; *Zandi* , 190 Wash.App. at 56-57, 357 P.3d 65. According to the dissent, " 'premiums, copays, [and] deductibles' " are specific costs Kaiser "never promised to pay," and thus the general phrase " 'other health care costs *not covered* by insurance' " should apply only to other health care costs Kaiser did not promise to pay. 190 Wash.App. at 56-57, 357 P.3d 65 (quoting RCW 26.18.170(18)(d)). Such a narrow construction of RCW 26.18.170(18)(d) runs contrary to the legislature's directive that chapter 26.18 RCW must be "liberally construed." RCW 26.18.030(3). The motivating principle in chapter 26.18 RCW is to ensure that dependents are "adequately supported," *id* . which means that children actually receive the health care they need. To achieve this purpose, the scope of RCW 26.18.170(17)'s enforcement power must be at least as broad as Victor's medical support obligations. By removing out-of-network provider charges from the scope of RCW 26.18.170, Victor's interpretation would undermine the

statute's ability to guarantee that children receive health care regardless of the circumstances.

¶14 The narrow analysis advanced by Victor and the Court of Appeals dissent also ignores the regulatory definition of " 'uninsured medical expenses.' " WAC 388-14A-1020 (boldface omitted). The regulation clarifies that medical costs "not paid" by insurance qualify as " 'uninsured medical expenses.' " *Id.* (boldface omitted). The expenses in this case were indisputably not paid by Kaiser. Thus, reading RCW 26.18.170(18)(d) alongside the applicable regulation clarifies that medical expenses "not paid" by insurance and

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costs "not covered" by insurance qualify as "uninsured medical expense [s]" under

[391 P.3d 433]

RCW 26.18.170(17). WAC 388-14A-1020. Because the medical expenses in this case were neither "covered" nor "paid," they are unambiguously "uninsured medical expense[s]" in the context of RCW 26.18.170(17).

B. Consideration of the Parties' Relative Fault Is Inappropriate in Enforcing Child Support Orders

¶15 In accepting Victor's narrow interpretation of "uninsured medical expenses," the Court of Appeals dissent expressed a concern for "[b]asic fairness." *Zandi* , 190 Wash.App. at 57, 357 P.3d 65. The dissenting judge criticized the majority for requiring Victor to "pay 100 percent of this large medical bill, even though ... Victor was not responsible for violating [Kaiser's] in-network limitation." *Id.* This analysis incorrectly introduces concepts of marital fault into the enforcement of a child support order.

¶16 In general, marital fault is irrelevant in proceedings relating to divorce. *See, e.g.* , RCW 26.09.090(1) (excluding spousal "misconduct" from the calculation of maintenance orders); *In re Marriage of Steadman* , 63 Wash.App. 523, 528, 821 P.2d 59 (1991) (noting that "immoral" conduct may not be considered in dividing property). Generally, absent a showing of changed circumstances to justify modification, a child support order must be enforced according to its terms. *See* RCW 26.09.170(5) -(7). We certainly acknowledge the possibility that "a parent with control over his or her child's medical care could boundlessly violate the insurance plan's in-network limitation with knowledge that the other parent would be forced to absorb the resulting costs." *Zandi* , 190 Wash.App. at 57, 357 P.3d 65. But there is no evidence of bad faith or unreasonable conduct by either parent in this case. The superior court made no findings as to fault. *See* CP at 246-47. Indeed, the record shows that before incurring the out-of-network expenses, Deanna asked Victor's permission, contacted Kaiser to request coverage,

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and was assured by the Urology Group doctor that Kaiser would pay for the procedure.[2] *Id.* at 43-44.

¶17 Underlying the "basic fairness" argument seems to be the belief that the parent paying for a child's health care should be able to insist on the most cost-effective care, as the nonpaying parent has little incentive to avoid unnecessary expenses. *See Zandi* , 190 Wash.App. at 57, 357 P.3d 65. This argument overlooks the premise that parenting authority is a fundamental right and is not based on financial responsibility. *See, e.g., Troxel v. Granville* , 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion) (recognizing that the due process clause of the Fourteenth Amendment to the federal constitution protects the fundamental parenting rights of each spouse). By assigning financial responsibility for T.Z.'s health care to Victor, the 2009 order of child support did not in any way limit Deanna's right to make parenting decisions. From Victor's perspective, the outcome may seem "unfair," but it is not difficult to imagine the complications that would arise if courts recognized the "right" of a paying parent to interfere with the other parent's authorized decision-making. Moreover, concerns of fault or

unfairness to the paying parent cannot influence the proper interpretation of "uninsured medical expenses" within the meaning of RCW 26.18.170. Out-of-network costs—even those that could have been avoided—remain "uninsured medical expenses," and the parties' child support order allocates 100 percent of these expenses to Victor.

CONCLUSION

¶18 The Court of Appeals correctly determined that unpaid, out-of-network health care costs are "uninsured medical expenses" under RCW 26.18.170. When read in light

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of chapter 26.18 RCW's purpose and alongside WAC 388-14A-1020, the legislature's definition in RCW 26.18.170(18)(d) unambiguously encompasses the out-of-network expenses that Kaiser declined to cover. Because the medical expenses in this case fall within the

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scope of "uninsured medical expenses," Victor is obligated to pay 100 percent of the costs by the terms of the 2009 order of child support. By modifying the terms of this order without evidence of changed circumstances, *see* RCW 26.09.170(5), or other evidence justifying modification, *see* RCW 26.09.170(6) -(7), the superior court abused its discretion. We affirm the Court of Appeals.

WE CONCUR:

Fairhurst, C.J.

Johnson, J.

Owens, J.

Madsen, J.

Wiggins, J.

González, J.

Gordon McCloud, J.

Yu, J.

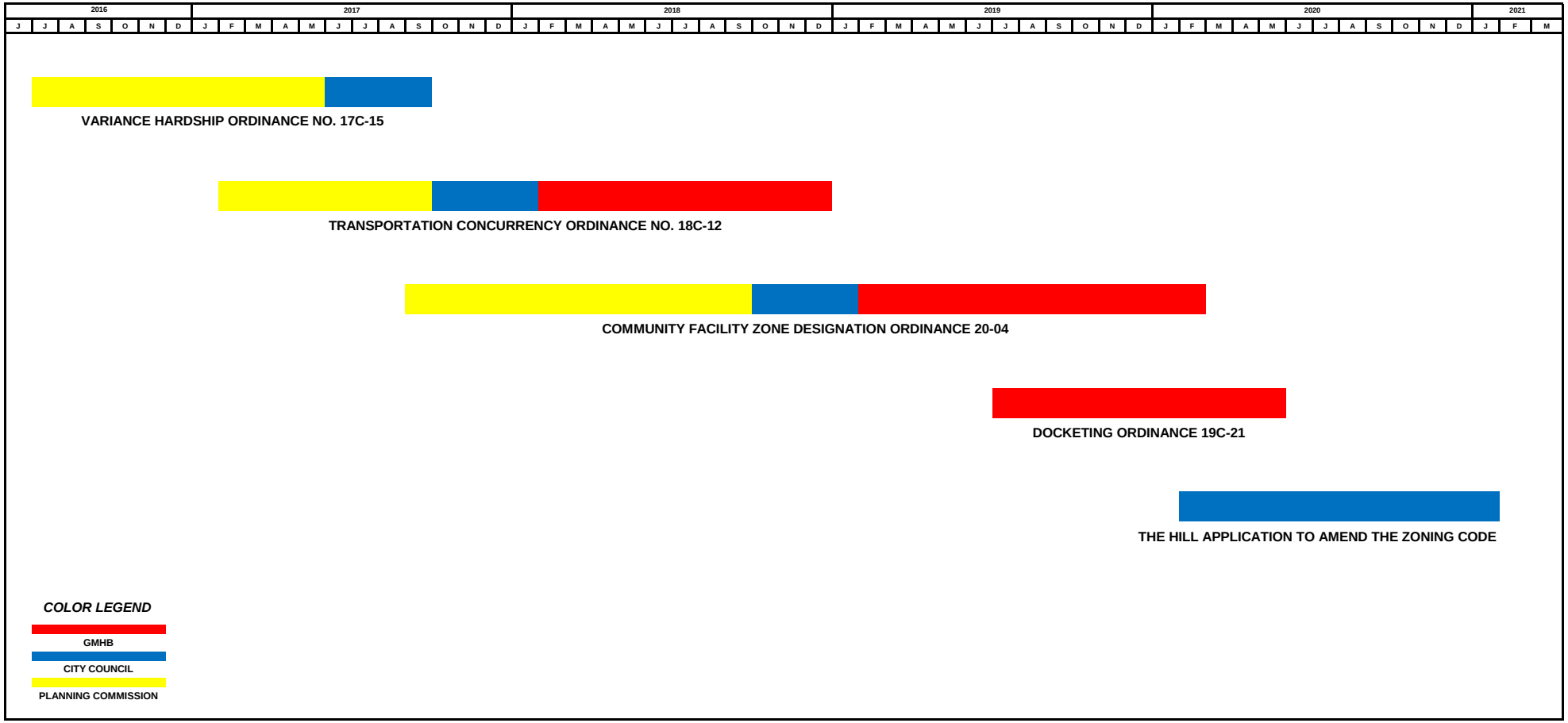
Notes:

[1] Because the parties share the last name Zandi, we use their first names for clarity, with no disrespect intended.

[2] Because there was no finding of bad faith in this case, CP at 246-47, our holding in no way limits a trial court's discretion to fashion a result that comports with fundamental fairness. A trial court, presented with evidence of bad faith could, for example, reasonably conclude that a party acting in bad faith constitutes changed circumstances. *See* RCW 26.09.170(5), (6), (7).

EXHIBIT 3

GANTT CHART


2016
J J A S O N D
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VARIANCE HARDSHIP ORDINANCE NO. 17C-15
TRANSPORTATION CONCURRENCY ORDINANCE NO. 18C-12
COMMUNITY FACILITY ZONE DESIGNATION ORDINANCE 20-04
DOCKETING ORDINANCE 19C-21
THE HILL APPLICATION TO AMEND THE ZONING CODE
COLOR LEGEND
GMHB
CITY COUNCIL
PLANNING COMMISSION

EXHIBIT 4

PLANNING COMMISSION MEETING MINUTES JULY 20, 2016

CALL TO ORDER:
Vice-Chair Weinman called the regular meeting to order at 7:01 PM in the Council Chambers at 9611 SE 36th Street, Mercer Island, Washington.

ROLL CALL:
Chair Suzanne Skone, Vice Chair Richard Weinman and Commissioners Bryan Cairns, Tiffin Goodman, Jennifer Mechem and Lucia Pirzio-Biroli were present. Commissioner Daniel Hubbell was absent. City staff was represented by Scott Greenberg, Development Services Director, Christina Schuck, Assistant City Attorney, Alison Van Gorp, Administrative Services Manager/Ombudsman, Evan Maxim, Planning Manager and Will Piro, Planner.

APPEARANCES:
Tom Acker, 2427 84th Ave SE, addressed the Commission regarding construction in the Town Center and residential neighborhoods, and enforcement of codes and agreements.

Molly Mahoney, 3024 60th Ave. SE, spoke about a large house in the East Seattle neighborhood; in particular how the character of the neighborhood is being ruined.

Cheryl Schumacher, 3040 60th Ave SE, lives across from the street from the new building that Molly Mahoney discussed and shares the same concerns.

Lynn Hagerman, 3058 61st Ave. SE, lives across the street from the Proctor Land Trust development. She was concerned about the combination of 5 parcels to allow the development, a soil removal deviation, notices sent out during the winter holidays in legal speak, and the need for time constraints for construction projects.

Ka Anderson, 6004 SE 32nd St, addressed the Commission regarding single family development.

Carolyn Boatsman, 3201 74th Ave. SE, applauded the City Council for supporting residents' requests to review residential development standards and providing the staff to do the work. She requested that the Planning Commission add review of deviations for impervious surface and fence height to the scope of work. Deviations are too easy to get. The proposed code should allow flexibility in unusual situations without compromising the intent of the code.

Steve Marshall, Emmanuel Lutheran Church, addressed the Commission on religious institutions codes. He recommended treating religious institutions similar to schools. A rectory is low income housing, allowing the religious leader to live on Mercer Island.

Hunt Priest, Emmanuel Lutheran Church, had to move 4 times due to increasing rents. There is a community value to religious institutions.

Alan Reed Sr., Emmanuel Lutheran Church, supported the proposed framework for church zoning.

Marianne Bond, 3014 60th Ave. SE, discussed impacts of a new house across from her house, especially when investors build the house and don't live there.

MINUTES:
Commissioner Goodman moved to approve the minutes from July 6, 2016. Commissioner Pirzio-Biroli seconded the motion. The minutes were unanimously approved (6-0).

REGULAR BUSINESS:
Agenda Item #1: Public Hearing on ZTR16-003 Zoning Code Text Amendment related to Comprehensive Plan amendment procedures

Scott Greenberg, Development Services Director presented the proposed code text amendment. He explained that the proposed process would split the Comprehensive Plan amendment process into two phases: a preliminary docket and a final docket. Notification of the annual amendment cycle would be disseminated by September 1 and the deadline for proposing amendment requests would be October 1. The Planning Commission would review the preliminary docket of all amendment requests and make a recommendation to City Council on a final docket of amendments to be considered the following calendar year. The City Council would consider the Planning Commission's recommendation at the same time as consideration of the City's budget, to better align planning resource needs with the City's budget.

Vice-Chair Weinman opened the public hearing at 7:45 pm.

Tom Acker, 2427 84th Ave SE, said that the Comprehensive Plan needs to be handled with care as it has a significant impact across other city planning and development related actions. Mercer Island is a special place, please do the right thing to preserve it for generations to come.

Lynn Hagerman, 3058 61st Ave SE, asked the Commission to zone for certain types of construction in certain areas to protect neighborhoods.

Vice-Chair Weinman closed the public hearing at 7:51 pm.

The Commission discussed the proposed amendments. Commissioner Pirzio-Biroli asked how conflicts between proposed amendments and the existing Plan would be addressed. Mr. Greenberg stated that staff would identify any conflicts in the staff report and the Commission would decide how to act.

Vice Chair Weinman found the decision criteria to be confusing – do all criteria need to be met or just one? Mr. Greenberg said that criteria b and d should apply to all amendments and will make that change.

Commissioner Goodman moved to recommend that the City Council approve the request for an amendment to Mercer Island City Code (MICC) Title 19, as detailed in Exhibit 1, provided the proposal shall be modified as discussed 19.15.020(G) – (decision criteria). The motion was seconded by Commissioner Mechem. The motion passed unanimously.

Chair Skone left the meeting at 8:02 pm.

Agenda Item #2: ZTR16-004: Zoning Code Text Amendment related to single-family residential development standards

Evan Maxim, Planning Manager presented the proposed scope of work. He suggested the Commission use a policy-based approach to provide a framework for consideration and evaluation of options for addressing issues. Alison Van Gorp described the proposed public engagement plan.

Suggestions from the Commission included expanding the schedule an extra month, maybe two; have presentations at small groups; consider conflicts with major school events (curriculum nights, etc.); give Commissioners the option to attend the small group presentations, and have some study sessions without public comment.

The Commission asked to consider construction impacts (noise, trucks, etc.) and review processes as part of the scope of work.

Agenda Item #3: Planning Commission Bylaws

Will Piro, Planner presented the proposed Planning Commission bylaws. Commissioner Mechem moved to approve the bylaws as written with the possible addition of an additional section on subcommittees based on staff research. Commissioner Pirzio-Biroli seconded the motion. The bylaws were unanimously approved (5-0).

STAFF COMMENTS:
None.

PLANNED ABSENCES FOR FUTURE MEETINGS:
Commissioner Skone will be absent on August 3, 2016. Commissioner Jennifer Mechem will be absent on August 17, 2016.

ANNOUNCEMENTS AND COMMUNICATIONS:
None.

NEXT MEETING:
The next Planning Commission meeting is scheduled for August 3, 2016 at 7:00 p.m.

ADJOURNMENT:
Vice-Chair Weinman adjourned the meeting at 10:14 PM.

EXHIBIT 5

PLANNING COMMISSION MEETING MINUTES MAY 17, 2017

CALL TO ORDER:
Chair called the meeting to order at 6:06 PM in the Council Chambers at 9611 SE 36th Street, Mercer Island, Washington.

ROLL CALL:
Chair Suzanne Skone, Vice-Chair Richard Weinman, Commissioners Jennifer Mechem, Lucia Pirzio-Biroli and Bryan Cairns were present. City staff was represented by Alison Van Gorp, Administrative Services Manager/Ombudsman, Evan Maxim, Planning Manager, Bio Park, Assistant City Attorney and Scott Greenburg, DSG Director.

APPEARANCES:
Mark Coen 73rd Ave SE – First Hill has seen so many impacts from new development. This type of development will spread island-wide. It's time to be aggressive, the Commission should stay strong and be decisive. Supports Mr. Thompson's proposal of 25' height limit, also 40% FAR, Mr. Grausz's proposal of regulating all trees >10".

David Youssefnia 8241 SE 30th St – Hardscape limit is still too small for sport courts. Suggests at-grade pervious sport courts be considered softscape. Net lot area definition should not exclude easements as this significantly reduces the area available for hardscape.

Carolyn Boatsman 3210 74th Ave SE – Would like to see more significant changes to the code – 40% GFA and height limits are too incremental. Supports Mr. Thompson's proposal for 25' height limit. Concerned about proposed deviation for height limits. Need to keep noise regs as is, just change construction hours. Concerned about fence height in front yards – 72" is too high. Need to do more to protect trees, make ordinance easier to understand. Rather than tree removal "permit" call it a "notification".

Dan Grausz 3215 74th Place SE – Thanks to Commissioners Skone and Weinman for their service. Tree provision – consider stripping it out from package to take another look. Need to cover smaller trees, 24" is too big. 30%+ requirement works fine. Keep it simple for non-development scenarios. Height limits – supports the 25' limit, + 5' for pitched roof and 30' on downslope side.

Commissioner Daniel Hubbell arrived at 6:22 p.m.

APPROVAL OF MINUTES:
The Commission reviewed the minutes from the May 3, 2017 meeting. Commissioner Cairns made a motion to approve the minutes, Vice-Chair Weinman seconded. The minutes were approved unanimously.

REGULAR BUSINESS:
Agenda Item #1: ZTR16-004 Residential Development Standards

Evan Maxim provided an overview of the updated draft code amendment. He also provided a presentation on the analysis and graphics developed by MAKERS "beta testing" the proposed code. Commissioners discussed issues, concerns and proposed amendments to the draft code.

Commissioner Hubbell made a motion to recommend that the City Council approve the proposed amendments to Mercer Island City Code (MICC) Title 8, 17, and 19, as detailed in Exhibit 1 and direct the Commission regarding the items in Exhibit 2. The motion was seconded by Commissioner Cairns.

The Commissioners deliberated, made comments and amendments to the motion as follows:

- Commissioner Pirzio-Biroli moved and Commissioner Cairns seconded a motion that the inadvertent omission of the downhill façade height limit be corrected. Motion carried by unanimous vote.
- Vice-Chair Weinman moved and Commissioner Cairns seconded a motion that staff incorporate technical edits into the draft recommendation to City Council. Motion carried by unanimous vote.
- Commissioner Pirzio-Biroli made a motion that the Commission designee provide additional guidance to staff in finalizing the recommendation and transmittal to City Council. Commissioner Cairns seconded. Motion carried by unanimous vote.
- **8.24.020 (Q)**
    - Vice Chair Weinman motioned to include a reference to state noise standards. Commissioner Cairns seconded. Weinman withdrew the motion, Cairns agreed.
    - Commissioner Pirzio-Biroli moved to set construction hours for permitted activity from 7am – 7pm, Monday – Friday only, excluding Saturdays. Owner-performed and permitted work could also occur on Saturday and Sunday from 9am-6pm. Commissioner Hubbell seconded. Motion failed 5-0, 1 abstention.
    - Commissioner Mechem made a motion to allow construction from 9am to 6pm on Saturday or Sunday, but not consecutive days in the same weekend. Motion failed 1-5.
- **17.14.010(2)**
    - Vice chair Weinman moved to amend the section to provide conditions for the building official to renew permits – adding a proviso that any required construction management plan has been followed prior to the request for renewal. Chair Skone seconded. Motion carried by unanimous vote.
    - Commissioner Hubbell moved to amend the section to lower thresholds for provision of construction management plans by 1000 sq ft to 6000 sq ft (new construction) and 3000 sq ft (remodel). Seconded by Vice-Chair Weinman. Motion carried by unanimous vote.
- **19.01.050**
    - 19.01.050(F)(3)(b) Commissioner Pirzio-Biroli moved to allow for an increase in height and GFA to the maximum permitted. Commissioner Hubbell seconded. Motion carried by unanimous vote
    - 19.01.050(F)(2)(a) Commissioner Hubbell moved to amend the requirement to come into conformance with parking requirements with an exterior alteration or enlargement of 500 sq ft or more. Commissioner Pirzio-Biroli seconded. Motion carried 5-1.
- **19.02.005(B)**
    - Subsection 1: Vice-Chair Weinman moved to amend section to put a period after the word “designations” in line 12 and delete the remainder of the sentence. Commissioner Hubbell seconded. Motion carried unanimously.
- Commissioner Pirzio-Biroli made a motion to amend section 19.02.020(A)(1) to replace the term “minimum lot area” with “minimum net lot area”. Commissioner Hubbell seconded. Motion carried unanimously.
- Commissioner Hubbell moved to amend 19.02.020(C)(1)(c)(3)(1) (line 17, page 11) to increase the height from 15’ to 18’ for the height of the exterior wall façade. Commissioner Pirzio-Biroli seconded. Motion failed unanimously.
- Commissioner Hubbell moved to amend 19.02.020(C)(1)(c)(3)(1) (line 17, page 11) to provide an additional 3’ of height for a gabled roof end. Commissioner Pirzio-Biroli seconded. Motion

carried unanimously.

- Commissioner Pirzio-Biroli made a motion to remove the edits to section 19.02.020(3)(a) allowing penetrations of up to 18" into the side yard setback. Motion withdrawn.

The Chair adjourned the meeting at 8:12

The meeting was called back to order at 8:20 pm.

- Chair Skone moved to amend 19.02.020(D)(3) (page 14, line 15) to add column "lot coverage" to table including description of lot coverage – house, driveway, accessory structures. Eliminate sections (3)(b-c). Seconded by Commissioner Pirzio-Biroli. Motion carried unanimously.
    - Weinman moved to amend the motion to retain subsection (c). Hubbell seconded. Motion carried unanimously.
- Commissioner Pirzio-Biroli motioned to remove subsection (d) (page 15, line 4) and to amend subsection (F)(2)(b) to extend the 1 covered stall parking allowance to the entire R8.4 zone. Seconded by Hubbell. Motion carried unanimously
    - Skone amended the motion to extend the parking allowance to all single family homes. Commissioner Pirzio-Biroli seconded. Motion carried unanimously.
- Vice-Chair Weinman moved to amend the minimum and maximum numbers to reduce the requirement for hardscape (20%) and increase the requirement for softscape (80%) and to revise the definitions to exclude sports courts and similar recreational facilities with a pervious surface area of up to 1,200 square feet from hardscapes. Commissioner Pirzio-Biroli seconded. Motion carried 3-2, with 1 abstention.
- Commissioner Pirzio-Biroli motioned to move gross floor area up to become section D (order of sections becomes: lot size, yards, GFA, height, lot coverage, parking, easements, etc.). Chair Skone seconded. Motion carried unanimously.
- **Gross Floor Area**
    - Chair Skone moved to limit house size to 150% of allowable GFA in that zone (5040, 5760, 8640, 9000). Commissioner Pirzio-Biroli seconded. Motion failed 1-5.
    - Commissioner Mechem moved to amend section D2 Accessibility to add a phase eliminating the impracticality exemption. Clarify "clear" width for entrances, routes and door widths. Vice-Chair Weinman second. Motion carried unanimously
    - Chair Skone moved to add section D stating the overall GFA does not exceed 5000 sq ft. Commissioner Hubbell seconded. Motion carried unanimously.
        - Chair Skone amended motion to exclude ADA from 5000 limit (only applies to ADU's)
- **Fences**
    - Commissioner Pirzio-Biroli moved to limit increased fence height allowances on Island Crest way from SE 63rd to the CBD and on SE 40th between 92nd Ave SE and 78th Ave SE. Vice- Chair Weinman seconded. Motion carried unanimously.
- Commissioner Pirzio-Biroli moved to remove section about house orientation 19.09.090(A)(1)(d). Vice-Chair Weinman seconded. Motion carried unanimously.
- Commissioner Pirzio-Biroli moved to remove trees from the discussion. Chair Skone seconded. Motion failed unanimously.

Original motion to recommend the amended code to City Council passed unanimously.

OTHER BUSINESS:
None.

ANNOUNCEMENTS AND COMMUNICATIONS:
None.

NEXT MEETING:
The next two Planning Commission meetings are scheduled for May 31, 2017 at 6:00 p.m. and June 7, 2017 at 6:00 p.m. at Mercer Island City Hall. Planning Commission will present their recommended code amendments to the City Council on June 5, 2017 at 6:00 p.m. at Mercer Island City Hall.

ADJOURNMENT: Chair Skone adjourned the meeting at 10:25 pm.

EXHIBIT 6

CITY COUNCIL MINUTES
REGULAR MEETING
JUNE 5, 2017

CALL TO ORDER & ROLL CALL

Mayor Bruce Bassett called the meeting to order at 5:01 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Bruce Bassett, Deputy Mayor Debbie Bertlin, and Councilmembers Dan Grausz, Wendy Weiker (arrived at 7:05 pm), David Wisenteiner (arrived 6:22 pm), and Benson Wong were present. Councilmember Jeff Sanderson was absent.

AGENDA APPROVAL

Mayor Bassett noted that staff requested removing AB 5310: NPDES Stormwater Code Update (2nd Reading & Adoption) from the consent calendar.

It was moved by Wong; seconded by Grausz to:
Approve the agenda as amended.
Passed 4-0
FOR: 4 (Bassett, Bertlin, Grausz, Wong)
ABSENT: 3 (Sanderson, Weiker, Wisenteiner)

EXECUTIVE SESSION

Executive Session #1 to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 30 minutes.

At 5:04 pm, Mayor Bassett convened Executive Session #1 to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 30 minutes.

At 5:22 pm, Mayor Bassett adjourned Executive Session #1 and convened Executive Session #2 to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 38 minutes.

At 6:00 pm, Mayor Bassett adjourned Executive Session #2 and the Regular Meeting reconvened.

STUDY SESSION

AB 5307 CenturyLink Cable Franchise Agreement

City Attorney Kari Sand presented a franchise agreement allowing CenturyLink to provide its new cable service – "Prism TV" – to Mercer Island residents. The franchise agreement allows CenturyLink to locate its facilities (either on utility poles or underground) in City rights-of-ways and, as part of the agreement, CenturyLink will pay a 5% franchise fee and other consideration for use of City right-of-way. She noted that staff has negotiated a proposed franchise agreement with CenturyLink with terms that comply with federal law and meet the needs and interests of the community.

City Attorney Sand introduced Torry Somers, Associate General Counsel for CenturyLink who explained the "Prism TV" product.

SPECIAL BUSINESS

The Mercer Island City Council presented the 2016 Citizen of the Year Award to Terry Moreman.

Mayor Bassett spoke about the contributions Terry has made in community during her 38 years of residence on Mercer Island. Serving on numerous boards and committees, Terry has served as an advocate for many valuable causes. He noted Terry's service as the Executive Director of the Mercer Island Chamber of Commerce for over 25 years. Bringing the community great events like Town Center trick-or-treating and Art UnCorked. In addition to building a strong and respected business core in Mercer Island, she has played a significant role in the success of organizations like the Historical Society, Sister City Association, Farmers Market, Boys and Girls Club, PTA, Mercer Island Preschool Association, Community Fund, and Mercer Island Schools Foundation.

Terry thanked the Council for the award and their kind words.

CITY MANAGER REPORT

City Manager Underwood provided a report on the following items:

- ALERT King County, the City's emergency notification system
- Thank you to Public Works and Fire for Truck Day at the JCC
- Congratulation to Youth and Family Services for being recognized by the Island-wide PTA for the Communities That Care program
- Council candidate orientation on June 15
- Farmers Market is open!

APPEARANCES

Bahrat Shyam, 8405 SE 34th Pl, thanked staff and Council for their efforts in I-90 negotiations. He thinks the Council is in a good place with a few months to work out the details of an agreement with Sound Transit. He requested the Council to consider use tolling if Congress wouldn't act to grandfather SOV access to the HOV ramp. He asked the Council to keep their focus on last mile efforts such as Island only transit, stand-alone transit, or ride services to encourage Island residents to utilize the light rail once it is complete.

Sam Shyam, 8405 SE 34th Pl, spoke about proposed installation of more stoplights in the north end. He asked Council to consider roundabouts instead to improve traffic safety and reduce traffic speeds.

Meg Lippert, 5042, read statements from Mark Hall (6018 East Mercer Way) asking the Council to consider the ramifications and cost regarding restriping 77th Ave SE and Jeff Bender (2438 74th Ave SE) expressing concern about potential dangers presented by replacing bike lanes with sharrows on 77th Ave SE.

Elizabeth Buckley, 15 Brook Bay, spoke about tentative agreement with Sound Transit regarding I-90 loss of mobility. She is satisfied with the Park & Ride and removal of a bus turnaround portions of the proposed agreement. She expressed concern that the agreement doesn't compare financially to what other communities have received as mitigation for the East Link Project.

Jackie Dunbar, 7116 82nd Ave SE, spoke about the restriping 77th Ave SE proposal and questioned why the City is considering a large restriping project when the community is trying to assess the impacts of the East Link Project. She believes this is an effort to provide parking for MICA and asked the Council and City staff to be transparent for the community.

Scott Kuznicki, 7650 SE 27th St, thanked the Council for their investment of time in negotiating with Sound Transit. He asked the Council to consider using the mitigation funds dedicated to parking improvements related to the Park and Ride to build parking above the light rail station itself.

David Youssefnia, 8214 SE 30th St, spoke briefly about Residential Code Updates and expressed support for happy, healthy, and family friendly activities. He asked the Council to support the Planning Commission's recommendation of making a gross floor area exception for pervious sports courts.

John Tiscornia, 5646 E Mercer Way, thanked the Council for work in negotiating agreement. He appreciates plans for MI parking permits. He asked the Council to ensure the parking permit program is strongly enforced. He is concerned that bike paths on Mercer Way are filled with parked cars.

Steve Orr, 7376 SE 71st St, incoming President of MI Baseball Booster Club, supports MI High School baseball team, also spoke on behalf of Becky Shaddle (President of MI Football Booster Club). He spoke about Island Crest Park field improvements and requested the Council fund turf for the new outfield and lights at the same time. He advised that MI Baseball Booster Club is willing to make a $10,000 donation to South Field turf improvements and that the MI Football Booster Club has committed to making a $10,000 donation as well. He noted that the MI Baseball Booster Club has also donated the funds necessary to purchase a new scoreboard for the North Field.

Jodi McCarthy, 7665 80th Pl SE, representing Nowland Premier Soccer Academy, spoke in support of option 3A (new lights, shock pad and cork fill for outfield) on the Island Crest Park Field Improvement Agenda Bill.

Dan Syrdal, 6650 East Mercer Way, spoke about the settlement agreement with Sound Transit. He is concerned that it does not solve SOV/HOV access because that decision needs to be made by the Federal Highway Administration. He requested that Council consider making a takings claim against the Federal Highway Administration demanding compensation for loss of access under the fifth amendment.

David Hoffman, representing the Master Builders Association, spoke about Residential Code Updates. He complimented the Planning Commission for their work on such a massive project. He advised that the Master Builders Association is supportive of most of the Planning Commission's draft recommendations. And he appreciated the clarity that is provided in the tree language of the draft recommendations.

Jim Eames, 2930 76th Ave SE, spoke about restriping on 77th Ave SE and asked Council to consider diagonal parking, which has shown to improve sales for local businesses.

Ira Appelman, 9039 E. Shorewood Drive, spoke in opposition to the settlement agreement with Sound Transit.

CONSENT CALENDAR

Payables: $1,231,685.71 (05/11/2017), $1,184,494.17 (05/25/2017), $102,572.61 (06/01/2017)
Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $809,644.42 (05/26/2017)
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes: May 8, 2017 Special Meeting Minutes, May 16, 2017 Special Meeting Minutes, May 22, 2017 Special Meeting Minutes, May 23, 2017 Special Meeting Minutes, May 24, 2017 Special Meeting Minutes, and May 31, 2017 Special Meeting Minutes
Recommendation: Adopt the May 8, 2017 Special Meeting Minutes, May 16, 2017 Special Meeting Minutes, May 22, 2017 Special Meeting Minutes, May 23, 2017 Special Meeting Minutes, May 24, 2017 Special Meeting Minutes, and May 31, 2017 Special Meeting Minutes as written.

AB 5309 Arts Council 2016 Annual Report and 2017 Work Plan
Recommendation: Receive the Arts Council 2016 Annual Report and the 2017 Work Plan.

It was moved by Wisenteiner; seconded by Wong to:
Approve the Consent Calendar and the recommendations contained therein as amended.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Weiker, Wisenteiner, Wong)
ABSENT: 1 (Sanderson)

REGULAR BUSINESS

AB 5312 I-90 Loss of Mobility Status Report

City Manager Julie Underwood provided an update on I-90 Loss of Mobility. She spoke about the center roadway closure on June 3 and reported on the traffic impacts so far.

Ed Holmes, Police Chief provided a report on Monday's morning traffic due the I-90 center roadway closure.

AB 5308 CenturyLink Cable Franchise Agreement (1st Reading)

It was moved by Weiker; seconded by Bertlin to:
Set Ordinance No. 17-14 to June 19, 2017 for second reading and adoption as amended.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Weiker, Wisenteiner, Wong)
ABSENT: 1 (Sanderson)

It was moved by Grausz; seconded by Wisenteiner to:
Amend Ordinance No. 17-14 to include the Crown Castle tree and location provisions, making them only effective if similar language is included in a future Comcast agreement.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Weiker, Wisenteiner, Wong)
ABSENT: 1 (Sanderson)

AB 5311 Island Crest Park North Outfield Project

Parks & Recreation Director Bruce Fletcher and Parks Superintendent Paul West presented the Island Crest Park North Outfield project for the Council's consideration. They spoke about the projects options and alternatives and staff's recommendation of Option 3A (cork infill + shock pad + lighting for north field).

It was moved by Bertlin; seconded by Wisenteiner to:
Authorize the City Manager to proceed with Option 3A for the construction of new synthetic turf and the installation of lighting at Island Crest Park north field through the King County Directors Association purchasing cooperative, and set the project budget to $2,596,350, with $511,190 in additional funding coming from surplus General Fund and real estate excise tax revenues in 2015 and 2016, King County Parks, Trails & Open Space Levy monies, community donations, and other one-time funding sources and every effort will be made to replace the Mercerdale playground no later than 2020.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Weiker, Wisenteiner, Wong)
ABSENT: 1 (Sanderson)

AB 5313 Planning Commission's Recommendation for Residential Development Standards Code Amendments (1st Reading)

Planning Manager Evan Maxim presented a brief review of the Planning Commission's draft recommendations for Residential Code Updates. He noted that the Planning Commission has held 15 regular and special meetings, three Community Meetings, and one Public Hearing. He reviewed the following policies for the Council to consider during their deliberations of the recommendations:

Current Code

- 45% allowed Gross Floor Area
- 40% impervious surface with allowed deviation of 5%
- 15-foot side yard setbacks
- Reasonable best efforts for tree retention
- No limit on accessory buildings
- Generous construction hours & permit renewals

Planning Commission Recommendation

- 40% allowed Gross Floor Area; caps on maximum
- 60% landscaping required, no deviations
- Wider lots = wider setbacks
- 30% retention minimum + reasonable best efforts
- Limits on height and area
- 7PM end of construction, limited permit renewal, proactive scheduling

It was moved by Grausz; seconded by Weiker to:
Conduct Public Hearing for June 12 and Set Ordinance No. 17C-15 for a continuation of the first reading on June 19, 2017.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Weiker, Wisenteiner, Wong)
ABSENT: 1 (Sanderson)

OTHER BUSINESS

Councilmember Absences
Councilmember Sanderson's absence was excused.
Councilmember Grausz will be absent at the June 12 Special Meeting.

Planning Schedule
City Manager Julie Underwood advised that at the June 19 meeting, she is hoping to schedule a brief presentation by King County Access for All Program to explain to the community their arts proposal expected to be on the August primary ballot.
City Manager Underwood noted that she is also hoping to schedule a brief presentation by King County to explain to the community the renewal of the Veterans and Human Services levy that is expected on the November ballot.
Deputy Mayor Bertlin requested an update from staff on whether the Fire Chief will approve the sale of fireworks this summer on Mercer Island.

Board Appointments
It was moved by Bertlin; seconded by Wong to:
Confirm the appointment of the following individuals to the City Boards and Commissions:

ARTS COUNCIL
Position 7, Erin Vivion, Expiring 5/31/2021
Position 8, An Tootill, Expiring 5/31/2021
Position 11, Xi Tian, Expiring 5/31/2018

COMMUNITY SERVICES BOARD (ADULT)
Position 2, Shabai Li, Expiring 5/31/2018
Position 3, Meg Kerrigan, Expiring 5/31/2018
Position 9, Martina Kozar, Expiring 5/31/2020
Position 10, James Schwab, Expiring 5/31/2020
Position 11, Teri Jones, Expiring 5/31/
Position 12, Harry Dingwall, Expiring 5/31/2020

COMMUNITY SERVICES BOARD (YOUTH)
9th Grade, Renee White, Expiring 5/31/2019
9th Grade, Evan Dickstein, Expiring 5/31/2019
9th Grade, Liliana Szafir, Expiring 5/31/2019
11th Grade, Christopher Elliott, Expiring 5/31/2019
11th Grade, Alex White, Expiring 5/31/2019
10th Grade, Sarah Wang, Expiring 5/31/2019

DESIGN COMMISSION
Position 5, Suzanne Zahr, Expiring 5/31/2021
Position 6, Richard Erwin, Expiring 5/31/2021

OPEN SPACE CONSERVANCY TRUST
Position 5, Marie Bender, Expiring 5/31/2021
Position 7, Geraldine Poor, Expiring 5/31/2021

PLANNING COMMISSION
Position 5, Carolyn Boatsman, Expiring 5/31/2021

Position 7, Ted Weinberg, Expiring 5/31/2018

UTILITY BOARD
Position 3, Tim O'Connell, Expiring 5/31/2021
Position 4, Mary Grady, Expiring 5/31/2021
Position 5, Stephen Milton, Expiring 5/31/2021
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Weiker, Wisenteiner, Wong)
ABSENT: 1 (Sanderson)

Councilmember Reports

Councilmember Weiker noted that a retirement party for MISD Superintendent Gary Plano scheduled for June 15 at 6 pm.

Mayor Bassett invited the Council to attend a high school civics class on the coming Wednesday. He thanked staff and Council for their work on I-90 negotiations.

ADJOURNMENT

The Regular Meeting was adjourned at 10:20 pm.

_____
Bruce Bassett, Mayor

Attest:

_____
Ellie Hooman, Deputy City Clerk

EXHIBIT 7

CITY COUNCIL MINUTES
REGULAR MEETING
SEPTEMBER 19, 2017

CALL TO ORDER & ROLL CALL

Mayor Bruce Bassett called the meeting to order at 5:00 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Bruce Bassett, Deputy Mayor Debbie Bertlin, and Councilmembers Dan Grausz, Salim Nice, Wendy Weiker (arrived 5:29 pm), and Benson Wong (arrived 5:05 pm) were present. Councilmember David Wisenteiner was absent.

AGENDA APPROVAL

It was moved by Grausz; seconded by Bertlin to:
Amend the agenda to include a second Executive Session after the first Executive Session to discuss, with legal counsel, pending or potential litigation pursuant to RCW 42.30.110 (1)(i) for 15 minutes.
Passed 4-0
FOR: 4 (Bassett, Bertlin, Grausz, Nice)
ABSENT: 3 (Weiker, Wisenteiner, Wong)

EXECUTIVE SESSION

Executive Session to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(i) for one hour

At 5:02 pm, Mayor Bassett convened Executive Session #1 to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 60 minutes.

At 6:02 pm, Mayor Bassett adjourned Executive Session #1

Executive Session #2 to discuss, with legal counsel, pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 15 minutes.

At 6:03 pm, Mayor Bassett convened Executive Session #2 to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 15 minutes.

At 6:18 pm, Mayor Bassett adjourned Executive Session #2 and the Regular Meeting reconvened.

STUDY SESSION

AB 5344 Right of Way (ROW) Services Report

Public Works Director Jason Kintner, Right of Way Services Manager Brian Hartvigson and Arborist Hannah Van Pelt provided a general overview of right of way (ROW) services in over 84 miles of roadway and over 300 acres of undeveloped ROW, which are maintained by the ROW Team. Director Kintner noted that the ROW team is responsible for: pavement markings, street sign maintenance, pothole repairs, roadway shoulder work, street sweeping, street light maintenance, sidewalk maintenance, vegetation work, planter bed beautification, and special event & emergency services support.

He spoke about the ROW team staffing history, the ROW tree assessment program, and where the team is headed using new technology, revamping business process, identifying future reinvestment opportunities, and

enhancing the Town Center tree program. Public Works staff will return to Council with recommendations on service levels and input on ROW tree program during the 2019-2020 Budget development in 2018.

At 6:49 pm, the Council took a break. The Regular Meeting reconvened at 7pm.

CITY MANAGER REPORT

City Manager Julie Underwood reported on the following:

- Community Center Drainage & Asphalt Repair Project
- The deadline to submit an application for the Financial Challenges Community Advisory Group (CAG) is October 27.
- The City's first Telephone Town Hall to learn more about the City's Financial Challenges will be held on Wednesday, October 11, 2017 – 7:00-8:00 pm
- The City issued the MICA – SEPA Determination - The Planning Commission will hold a public hearing on Wednesday, October 18, 6:00 pm at City Hall
- A new art exhibit, from the Seattle Chapter of the Colored Pencil Society of America, runs through October 27, 2017 at the Community and Event Center's Mercer Gallery.
- Sand at Island Crest Park is being recycled throughout City Parks and School District fields.
- The City will launch NextRequest in October to help the public access and request public records. The goal is to implement a system that is efficient and streamlined – ultimately saving taxpayer money and requesters' time.
- Thanked the City's CERT Volunteers and expressed that thoughts are with emergency responders who are helping those throughout our country and aboard. You can help, by making a donation to the Red Cross at redcross.org. Give cash and not supplies.

Deputy Mayor Bertlin spoke about Bob Bersos, who had a long history with the City as a Volunteer Firefighter. He served eight years as an Emergency Volunteer. He also served as a Bus Driver for 13 years for the School District. She noted that Bob's service is Friday, Sept. 22, at 4:00 pm at Emmanuel Episcopal Church.

APPEARANCES

Tom Gallagher, 4243 Shoreclub Drive, builder, spoke for his clients who he does not think have been represented in the code amendments process. He stated that the following three items are a disservice to citizens: (1) eliminate concurrent review, (2) not allowing people to buy multiple lots and build large houses, (3) review idea of bigger incentive for daylight basement.

Trevor Reed, 8210 SE 65th Street, spoke in opposition to the Residential Development Standards code update. He stated that If the Council fails to allow development, then it will undermine the provision of amenities in the Town Center that citizens have come to appreciate.

Kathryn Jerkovich, BCRA Plan Designer, 414 Stewart Street, Seattle, spoke about results from analysis of proposed FAR and tree code code rewrite conducted on behalf of JayMarc Homes. BCRA found that individually each proposed change didn't have a large impact, but cumulatively they resulted in an average reduction in buildable area of 24%.

Allen Hovsepian, 4344 90th Ave SE, spoke in opposition to the Residential Development Standards code update. He asked the Council to consider the financial impact this change will have on home values on the Island.

Randy Koehler, 3056 70th Ave SE, RKK Construction, spoke in opposition to the Residential Development Standards code update. He feels that the proposed changes are too restrictive. He expressed concern with buyers choosing to purchase homes somewhere else to avoid Mercer Island's building restrictions.

Jackie Dunbar, 7116 82nd Ave SE, spoke against the portion of the Residential Development Standards code update changing the rules for long platting. She asked the Council to allow for more citizen involvement in the code rewrite process.

Carolyn Boatsman, 3210 74th Ave SE, thanked the Council for their work on the Residential Development Standards and tree code update. She spoke in support of approval of the proposed changes.

Lynn Hagerman, 3058 61st Ave SE, spoke in support of approving the proposed changes.

Manny Cawaling, Executive Director for Youth Theatre Northwest, announced that the 30th Anniversary for YTN begins in November. He advised that enrollment in the groups programs is up. To be able to allow more kids to participate the group needs a larger facility here on the Island. He asked that the Council and the community continue to support MICA so that groups like Youth Theater Northwest can remain on Mercer Island.

Ira Appelman, 9039 E. Shorewood Drive, spoke in support of the changes in the Residential Development Standards code in general. He disagreed with regulating trees on flat lots and still allowing people to purchase multiple lots and combining them to build larger homes. He asked the Council to do more to educate the community on how the code changes will affect development.

Dennis Dahl, 2530 70th Ave SE, spoke in opposition to the Residential Development Standards code update. He advised that the comments listed on the City website in support of more restrictive development codes are from only 1% of Mercer Island's population. He asked the Council to consider the impact this update will have on all of Mercer Island's residents.

CONSENT CALENDAR

Payables: $392,835.76 (08/03/2017), $531,223.43 (09/07/2017)
Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $811,962.76 (09/01/2017)
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes: September 5, 2017 Regular Meeting Minutes
Recommendation: Adopt the September 5, 2017 Regular Meeting Minutes as written.

AB 5342 Port of Seattle Grant Acceptance for Wayfinding Sign Program
Recommendation: Accept the grant from the Port of Seattle, authorize the City Manager to enter into an agreement with the Port of Seattle, and appropriate $35,490 from the Beautification Fund for the project.

It was moved by Bertlin; seconded by Wong to:
Approve the Consent Calendar and the recommendations contained therein.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Nice, Weiker, Wong)
ABSENT: 1 (Wisenteiner)

REGULAR BUSINESS

AB 5345 Residential Development Standards Code Amendments (7th Reading and Adoption)

Planning Manager Evan Maxim presented Ordinance No. 17C-15 for adoption by the City Council.

It was moved by Wong; seconded by Grausz to:
Adopt Ordinance No. 17C-15, amending Mercer Island City Code Titles 8, 17, and 19 on Residential Development Standards as amended, which shall take effect five days after the date of publication, provided the effective date for Attachment A shall be on November 1, 2017.

It was moved by Weiker; seconded by Bassett to:
Amend the previous motion to:
Remove sections 3 and 4 of Ordinance No. 17C-15.

Motion to Amend Failed 2-4
FOR: 2 (Bassett, Weiker)
AGAINST: 4 (Bertlin, Grausz, Nice, Wong)
ABSENT: 1 (Wisenteiner)

It was moved by Grausz; seconded by Wong to:
Amend the previous motion to:

- **Amend Section 3 of Ordinance No. 17C-15 to read as follows: "Pursuant to the Revised Code of Washington (RCW) 36.70B.140, the City Council hereby excludes building and other construction permits associated with single family development from consolidated permit review. This section shall apply to all building and other construction permits associated with single family development received on or after the effective date of this ordinance."**
- **Amend Section 4 of Ordinance No. 17C-15 to read as follows: "An existing lot shall be a condition precedent for determination of complete application for a building and other construction permit associated with single family home development. This section shall apply to all building and other construction permits associated with single family development received on or after the effective date of this ordinance."**

Motion to Amend Passed 4-2
FOR: 4 (Bertlin, Grausz, Nice, Wong)
AGAINST: 2 (Bassett, Weiker)
ABSENT: 1 (Wisenteiner)

It was moved by Nice; seconded by Grausz to:
Amend the previous motion to:
Amend Attachment A to Ordinance No. 17C-15 to read as follows:
Amend the sentence starting with the word "permit" on lines 10-13 of page 50 to read: "Permit applications shall be accompanied by documentation of the imminent threat to life or property, ideally in the form of a report by a qualified arborist, but at least in the form of photographs that clearly depict the threat."
Motion to Amend Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Nice, Weiker, Wong)
ABSENT: 1 (Wisenteiner)

It was moved by Nice; seconded by Grausz to:
Amend the previous motion to:
Amend Attachment A to Ordinance No. 17C-15 to read as follows:
Amend the sentence starting with the word "permit" on lines 10-11 of page 50 to read: "Permit approval to remove one or more trees that pose an imminent threat to life or property, such as tree limbs or trunks that are demonstrably cracked, leaning toward overhead utility lines or structures, or are uprooted by flooding, heavy winds or storm events, in which event the permit must be applied for within fourteen (14) days of the removal"
Motion to Amend Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Nice, Weiker, Wong)
ABSENT: 1 (Wisenteiner)

It was moved by Grausz; seconded by Nice to:
Amend the previous motion to:
Amend Attachment A to Ordinance No. 17C-15 to read as follows:
Amend the sentence starting with the word "permit" in footnote 1 of page 75 to read: "Tree removal associated with a development proposal and authorized through the issuance of a tree removal permit, shall not commence until the later of the end of the appeal period associated with the tree removal permit, or a decision is issued on an administrative appeal of the tree removal permit."
Motion to Amend Passed 5-1
FOR: 5 (Bassett, Bertlin, Grausz, Nice, Wong)
AGAINST: 1 (Weiker)
ABSENT: 1 (Wisenteiner)

The Council discussed "very large homes" in the R-15 zone and remanded the issue back to the Planning Commission for further review and recommendation.

It was moved by Grausz; seconded by Wong to:
Amend the previous motion to:
Amend Attachment A to Ordinance No. 17C-15 to read as follows:
Further amend Section 3 of Ordinance No. 17C-15 to read as follows: "Pursuant to the Revised Code of Washington (RCW) 36.70B.140, the City Council hereby excludes building and other construction permits associated with single family development of a preliminary short subdivision or preliminary long subdivision from consolidated permit review. This section shall apply to all building and other construction permits associated with single family development of a preliminary short subdivision or preliminary long subdivision received on or after the effective date of this ordinance."
Motion to Amend Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Nice, Weiker, Wong)
ABSENT: 1 (Wisenteiner)

It was moved by Weiker; seconded by Wong to:
Amend the previous motion to:
Amend Attachment A to Ordinance No. 17C-15 to read as follows:
Amend page 25, line 38, to change 40 percent to 50 percent for the length of the structure's external walls for all new construction and remodels (MICC 19.01.050(D) regarding non-conforming structures will also need to be amended).
Motion to Amend Failed 1-5
FOR: 1 (Weiker)
AGAINST: 5 (Bassett, Bertlin, Grausz, Nice, Wong)
ABSENT: 1 (Wisenteiner)

Main Motion as Amended Passed 5-1
FOR: 5 (Bassett, Bertlin, Grausz, Nice, Wong)
AGAINST: 1 (Weiker)
ABSENT: 1 (Wisenteiner)

The Council decided to move the discussion of the Planning Commission Accompanying Recommendations to their 2018 Planning Session in January for incorporation into DSG and the Planning Commission's work plans.

It was moved by Grausz; seconded by Bertlin to:
Authorize expansion of the arborist and code compliance officer positions to full-time equivalent positions.
Passed 5-1
FOR: 5 (Bassett, Bertlin, Grausz, Nice, Wong)
AGAINST: 1 (Weiker)
ABSENT: 1 (Wisenteiner)

It was moved by Wong; seconded by Weiker to:
Direct staff to monitor the implementation of the Residential Development Standards and report back to the City Council in 3 to 5 years on the effectiveness of the proposed amendments. Further direct staff to provide the public with information and resources on the adopted regulations and to engage in continuous improvement of the adopted regulations, using the "user group" process.
Passed 5-1
FOR: 5 (Bassett, Bertlin, Nice, Weiker, Wong)
AGAINST: 1 (Grausz)
ABSENT: 1 (Wisenteiner)

AB 5339 2016 General Fund & REET Year-End Surplus Disposition

Finance Director Chip Corder presented the 2016 year-end surplus balances which were driven by a high level of development activity on the Island. He noted that this surplus provides the Council with an opportunity to address one-time operating, capital, and reserve funding needs outside of the biennial budget process. He explained that

the major funding are:

- Projected $2.0 million deficit in General Fund and Youth & Family Services Fund combined.
- Contingency Fund 2017 needs $199,115 to meet target balance goal of 10% of General Fund budgeted expenditures.
- Open Space/Vegetation Management Program needs $160,000 in 2018 to address a dramatic increase in the cost of contracted restoration work.
- Soil remediation at Maintenance Center/Honeywell property is estimated to cost between $392,000 and $788,000.
- Maintenance Center renovation/expansion is estimated to cost $5.92 million.

It was moved by Weiker; seconded by Wong to:
Direct staff to transfer all of the available General Fund surplus from the 2015 and 2016 fiscal years, which amounts to $1,035,704, to the Contingency Fund, leaving the one-time funding there until the outcome of placing an operating levy lid lift on the November 6, 2018 ballot is known.

It was moved by Bertlin; seconded by Weiker to:
Amend the previous motion as follows:
Direct staff to transfer all of the available General Fund surplus from the 2015 and 2016 fiscal years, which amounts to $1,035,704, to the Contingency Fund.
Motion to Amend Passed 4-2
FOR: 4 (Bassett, Bertlin, Weiker, Wong)
AGAINST: 2 (Grausz, Nice)
ABSENT: 1 (Wisenteiner)

Amended Main Motion Passed 4-2.
FOR: 4 (Bassett, Bertlin, Weiker, Wong)
AGAINST: 2 (Grausz, Nice)
ABSENT: 1 (Wisenteiner)

It was moved by Wong; seconded by Grausz to:
Direct staff to transfer $160,000 from the 2017 REET surplus toward the City's open space vegetation management program.
Passed 4-2
FOR: 4 (Bertlin, Grausz, Nice, Wong)
AGAINST: 2 (Bassett, Weiker)
ABSENT: 1 (Wisenteiner)

OTHER BUSINESS

Councilmember Absences

Councilmember Wisenteiner's absence was excused.
Mayor Bassett will be absent October 17 and October 26.

Planning Schedule

City Manager Underwood spoke about:

- Possible Study Session on October 3 regarding the Last & First Mile Study Session
- Upcoming code amendments on October 3
- The Aubrey Davis Park Master Plan Study Session on October 17
- The Joint Meeting with the MISD Board on October 26
- Executive Sessions on October 3 starting at 5pm.

Board Appointments

There were no appointments.

Councilmember Reports

Councilmember Grausz attended the JRC meeting discussing the Community Development Block Grant Program. Nothing of significance to report.
Deputy Mayor Bertlin attended the Eastside Transportation Partner meeting. She advised that they are currently

building their legislative agenda for 2018, and it is her hope to introduce to the group the idea of the I-90 bike/pedestrian corridor. She also noted that Former Mayor Alan Merkle was recently named as the recipient of the Chevalier de l'Ordre National du Merite by the government of France. This award confers the rank of Knight, and is one of the highest awards given to non-French natives.

Councilmember Nice, along with Deputy Mayor Bertlin and City Manager Underwood, attended an ARCH workshop. He noted that the group shared some recent accomplishments, and some unique ideas in how contributing cities can participate in the program through a fee in lieu role.

Councilmember Weiker attended an Eastside Legislative Forum, noting one of topics discussed was the impact the McCleary school funding decision will have on Eastside communities. She asked City Manager Underwood to collaborate with Superintendent Colosky to determine what these changes will look like for Mercer Island residents. She noted two upcoming candidate forums: Thursday, September 21, 2017, 12pm at the Community Center hosted by Mercer Island Chamber of Commerce and Tuesday, October 10, 2017, 7pm at West Mercer Elementary hosted by the Mercer Island League of Women Voters.

Councilmember Wong attended the Lincoln Landing Community Meeting put on by the Parks and Recreation Department. He attended the SCA Public Issues Committee meeting, noting the main topic of discussion was the opioid crisis in King County and how it ties to the rise in property crime. He plans to attend an impacts of self-driving cars training talk by Forterra on September 20, 2017.

Mayor Bassett, along with several other councilmembers attended "Meeting of the Greens". He commended Sustainability & Communications Manager Ross Freeman for his work in putting the event together.

EXECUTIVE SESSION

Executive Session to review the performance of a public employee pursuant to RCW 42.30.110(1)(g) for one hour

This Executive Session was moved to October 3.

ADJOURNMENT

The Regular Meeting adjourned at 10:57 pm.

_____
Bruce Bassett, Mayor

Attest:

_____
Allison Spietz, City Clerk

EXHIBIT 8

PLANNING COMMISSION MEETING MINUTES FEBRUARY 15, 2017

CALL TO ORDER:
Vice Chair called the meeting to order at 6:04 PM in the Council Chambers at 9611 SE 36th Street, Mercer Island, Washington.

ROLL CALL:
Vice-Chair Richard Weinman, Commissioners Daniel Hubbell, Jennifer Mechem, Lucia Pirzio-Biroli, and Tiffin Goodman were present. City staff was represented by Julie Underwood, City Manager, Scott Greenberg, Development Services Group Director, and Evan Maxim, Planning Manager, Nicole Gaudette, Senior Planner.

Commissioner Mechem arrived at 6:13PM.

Chair Suzanne Skone and Commissioner Bryan Cairns were absent.

APPEARANCES:
Rita Latsinova - 600 University Street, Seattle, WA – Alarmed with the proposed amendments to the City Code: 1) Does not address pending appeals. 2) Administrative appeals would only be available to the developer – neighbors cannot appeal. Commission should be aware of pending appeals. Definition of appeal creates a situation where a neighbor cannot appeal a building permit.

Erin Anderson - Ellensburg, WA – Recommend that Commission remand draft amendment back to the City staff. Ordinance does not state an effective date. Appellants should also be vested to the rules in effect on the date of appeal. Do not create more than one class of appellants. May be a violation of RCW 64.40. Appeals should not be dismissed if they are currently before the City. Concerns regarding the content of the proposed amendment.

APPROVAL OF MINUTES:
The Commission reviewed the minutes from the February 1, 2017 meeting.

Commissioner Goodman requested a correction a misspelling of Chair Suzanne Skone's name.

Commissioner Goodman made a motion to adopt the minutes. The motion was seconded by Commissioner Hubbell. The minutes were approved by a vote of 5-0.

REGULAR BUSINESS:
Julie Underwood, City Manager introduced herself to the Planning Commission. The City Manager provided an overview of the Council action on February 13, 2017, and requested the Planning Commission's assistance in evaluating ordinances related to Essential Public Facilities, Traffic Concurrency, and I-90 P zone uses. Director Greenberg summarized the effect of the moratoria.

Scott Greenberg, Development Services Group Director, presented the current Planning Commission schedule through July 2017. A copy of the work plan schedule will be provided to the Planning Commission regularly and will be updated as needed. Director Greenberg reviewed the work plan with the Planning Commission.

Director Greenberg also noted that the City will be providing an update to the City Council on February 21, 2017 regarding the proposed Residential Development Standards. Commissioner Hubbell, Pirzio-Biroli, and Vice Chair Weinman indicated they may attend the Council meeting.

The Planning Commission agreed to begin their PC meetings at 6:00PM through the end of June to aid in managing the full work plan schedule.

Vice Chair Weinman requested that the City Attorney evaluate the appropriateness of Council liaisons at the Planning Commission.

Agenda Item #1: ZTR17-001 – Proposed Appeal Code Amendment
Scott Greenberg introduced a proposed zoning code text amendment related to the process and procedures for appealing certain permit and land use decisions.

The proposed amendment will result in quasi-judicial appeals being heard by a Hearing Examiner rather than by the City Council, Building Board of Appeals, or Planning Commission. The proposed amendment will also result in amending the decision authority for quasi-judicial decisions being heard by a Hearing Examiner rather than by the Planning Commission.

The Planning Commission asked clarifying questions of Director Greenberg and discussed possible options for further review.

OTHER BUSINESS:
Evan Maxim, Planning Manager, provided and reviewed a memorandum with the Planning Commission summarizing the results of the Planning Commission's policy review of the proposed Residential Development Standards.

ANNOUNCEMENTS AND COMMUNICATIONS:
None.

NEXT MEETING:
The next Planning Commission regular meeting is scheduled for March 1, 2017 at 6:00 p.m. at Mercer Island City Hall.

ADJOURNMENT: Vice-Chair Weinman adjourned the meeting at 7:45 pm.

EXHIBIT 9

CITY COUNCIL MINUTES
REGULAR MEETING
OCTOBER 3, 2017

CALL TO ORDER & ROLL CALL

Mayor Bruce Bassett called the meeting to order at 5:01 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Bruce Bassett, Deputy Mayor Debbie Bertlin, and Councilmembers Dan Grausz, Salim Nice, David Wisenteiner (arrived 5:24 pm), and Benson Wong were present. Councilmember Wendy Weiker was absent.

AGENDA APPROVAL

It was moved by Wong; seconded by Nice to:
Approve the Agenda as presented.
Passed 5-0
FOR: 5 (Bassett, Bertlin, Grausz, Nice, Wong)
ABSENT: 2 (Weiker, Wisenteiner)

EXECUTIVE SESSION

Executive Session to review the performance of a public employee pursuant to RCW 42.30.110(1)(g) for one hour.

At 5:03 pm, Mayor Bassett convened an Executive Session to review the performance of a public employee pursuant to RCW 42.30.110(1)(g) for one hour.

At 6:05 pm, Mayor Bassett adjourned the Executive Session.

Executive Session to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(l) for one hour.

At 6:05 pm, Mayor Bassett convened an Executive Session to discuss (with legal counsel) pending or potential litigation pursuant to RCW 42.30.110(1)(i) for one hour.

At 7:00 pm, Mayor Bassett extended the Executive Session for 10 minutes.

At 7:11 pm, Mayor Bassett adjourned the Executive Session and the Regular Meeting resumed.

SPECIAL BUSINESS

Domestic Violence Action Month Proclamation

Mayor Bassett proclaimed October 2017 as Domestic Violence Action Month. The Mayor asked citizens to speak out against domestic violence and support efforts to prevent and end domestic abuse and the indifference that sustains it.

AB 5347 King County Human Services/Veteran's Levy Presentation

Assistant City Manager Kirsten Taylor introduced Mr. Leo Flor, King County Veterans Human Services Levy Manager. Mr. Flor summarized the current Veterans and Human Services Levy which was renewed in 2011 at the rate of $0.05 per $1,000 of assessed value. The Levy is used to fund programs like the mobile medical van which

goes around the community to treat homeless adults and families to prevent unneeded ER visits. The Levy also supports programs such as mental health treatment for veterans and mothers receiving WIC benefits through the County. He noted that the proposed increase would raise the rate to $0.10 per $1,000 of assessed value, and those additional funds would allow a third category of vulnerable seniors to be added to the populations served by Levy funded programs.

CITY MANAGER REPORT

City Manager Julie Underwood reported on the following:

- Sound Transit I-90 Settlement agreement tentatively scheduled for Council approval on October 17, 2017.
- First/Last Mile solutions Study Session tentatively scheduled for November 7 Council meeting.
- Traffic Mitigation Community Meeting planned for late November/early December.
- Community Center Drainage & Asphalt Repair Project is complete.
- Community Center full day closure on Monday, October 9, 2017 to allow for staff training on new registration system that is planned to roll out in January, 2018.
- City Financial Challenges presentation planned for Chamber's Membership Luncheon on Wednesday, October 11 from 12-1pm at MICEC.
- The City's first Telephone Town Hall to learn more about the City's Financial Challenges will be held on Wednesday, October 11, 2017 from 7-8pm
- 2017 Fall Recycling Event is planned for Saturday, October 21, 2017 from 9am-3pm at Mercer Island Boat Launch.
- Free Medication Take-Back Event scheduled for Saturday, October 28 from 10am-2pm at City Hall.

APPEARANCES

Carol Friends, 3260 80th Ave SE, thanked the Council for their service. She commended City staff for running the City smoothly.

Bob Medved, 7238 SE 32nd Street, asked Council and staff to review WAC 365.196.210 and consider adopting an ordinance that simply states the City accepts the definitions provided in the WAC. He also asked the Council to look at Transportation Concurrency Ordinances from the cities of Bellingham and Kirkland for samples of plans already in place.

CONSENT CALENDAR

Payables: $905,641.89 (09/14/2017) & $576,040.73 (09/28/2017)
Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $801,475.47 (09/15/2017) & $798,217.55 (09/29/2017)
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes: September 19, 2017 Regular Meeting Minutes
Recommendation: Adopt the September 19, 2017 Regular Meeting Minutes as written.

It was moved by Bertlin; seconded by Wong to:
Approve the Consent Calendar and the recommendations contained therein.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Nice, Wisenteiner, Wong)
ABSENT: 1 (Weiker)

REGULAR BUSINESS

AB 5336 Transportation Concurrency Code Amendment (1st Reading)

Development Services Group Director Scott Greenberg presented a brief review of the local government transportation concurrency plan requirements in the Growth Management Act. He reviewed the four elements of the proposed concurrency program: Applicability, Concurrency Test, Concurrency Acceptance Letter, and Certificate of Concurrency.

Council provided direction for staff to report back with more detailed information on how changes in the Town Center and I-90 corridor are impacting traffic patterns on the Island. Council requested staff return with a plan for how the timeline of impact fees being paid and transportation concurrency mitigation being carried out will relate.

Council provided direction to staff to reword language in 19.20.020B to remove "any intersection" and replace with “any intersection of two arterials during peak hours.” Depending on the amount of study that needs to be conducted, this issue may be tied into the Transportation Improvement Plan discussion in spring 2018.

AB 5330 Essential Public Facilities Code Amendment (1st Reading)

Development Services Group Director Scott Greenberg provided a short presentation on siting of essential public facilities requirements under the Growth Management Act. He reviewed the following proposed code amendment requirements:

- Pre-application meeting including public participation plan
- Conditional use permit which must document: facility need, consistency with sponsor's long range plan and Comprehensive Plan
- Minimum siting requirements
- Investigation of alternative sites
- Proposed impact mitigation
- May require design review if not located on City property
- May require independent consultant review

Council consensus to exempt the City and School District from siting requirements and change the working project sponsor to applicant for consistency.

It was moved by Wisenteiner; seconded by Grausz to:
Set Ordinance No. 17C-20 for second reading and adoption on October 17, 2017 as amended.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Grausz, Nice, Wisenteiner, Wong)
ABSENT: 1 (Weiker)

OTHER BUSINESS

Councilmember Absences
Councilmember Weiker was excused.

Planning Schedule
City Manager Underwood noted the following changes to the Planning Schedule:

- Addition of an Executive Session on October 17, 2017 at 6 pm.
- Remove the second reading of the Transportation Concurrency Ordinance from the October 17, 2017 meeting and reschedule for a later date.
- Sound Transit Settlement Agreement tentatively planned to be added to October 17, 2017 meeting.
- Joint Meeting with MISD on October 26, 2017 at 5 pm.
- Mayor Bassett will be absent from October 17 & 26 meetings.

Board Appointments
It was moved by Bertlin; seconded by Nice to:
Confirm the appointment June Silverberg to Arts Council Position 2 (expiring 5/31/2019).
Passed 6-0

FOR: 6 (Bassett, Bertlin, Grausz, Nice, Wisenteiner, Wong)
ABSENT: 1 (Weiker)

Councilmember Reports

Councilmember Wisenteiner reported on the swim across America fundraiser. He commended Mercer Island Police Department and Parks and Recreation Department for their efforts during the event.

Councilmember Grausz attended JARC resources committee, proposing to sound cities that the committee be reformulated or abolished because in 2 years it has accomplished nothing.

Deputy Mayor Bertlin thanked Suzanne Skone for the invitation to the Forterra meeting on the future of driverless cars. Deputy Mayor Bertlin, along with Councilmember Wong and City Manager Underwood attended the presentation. She noted that Mercer Island Community Center hosted a meeting for the Regional Affordable Housing task force on September 22, 2017.

Councilmember Wong attended Community Services Board orientation. There is a community engagement forum planned for later in the year.

ADJOURNMENT

The Regular Meeting adjourned at 9:35 pm.

_____
Bruce Bassett, Mayor

Attest:

_____
Ellie Hooman, Deputy City Clerk

EXHIBIT 10

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

MARK COEN,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

CASE No. 18-3-0004

ORDER FINDING NON-COMPLIANCE PURSUANT TO STIPULATIONS

SYNOPSIS

Petitioner's challenged the City of Mercer Island (City) for failure to act to adopt a transportation concurrency plan as required by the GMA. After settlement discussions, the City agreed to stipulate that it has not complied with GMA goals and requirements because it has not adopted a transportation concurrency plan. A finding of noncompliance was entered and the parties agreed to a compliance schedule.

I. INTRODUCTION

This comes before the Board on the parties' joint stipulation to Finding of Facts and Conclusions of Law received March 28, 2018. The parties report that they have reached agreement as to a compliance schedule that will settle the matter.

II. STIPULATIONS

The parties stipulated to the following Findings of Fact:[1]

1. The City of Mercer Island adopted its Growth Management Act Comprehensive Plan on October 3, 1994.

[1] Joint Proposed Stipulated Final Decision and Order (March 28, 2018) at 2.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

2. The City of Mercer Island has not adopted a transportation concurrency ordinance as required by RCW 36.70A.020(12), .040, and .070(6)(b).

III. DISCUSSION

RCW 36.70A.070 sets forth mandatory comprehensive plan elements for jurisdictions required to plan under RCW 36.70A.040. The City of Mercer Island is in King County and is thus a jurisdiction required to plan under RCW 36.70A.040.

RCW 36.70A.020(12) ("Goal 12 of the GMA") directs that a jurisdiction's comprehensive plan and development regulations be guided by the goal of ensuring that public facilities and services necessary to support development be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. More specifically, RCW 36.70A.070(7)(b) requires the City's Transportation Element must include adoption of ordinance(s), sometimes called a "transportation concurrency ordinance," that prohibit(s) development if it would cause the level of service for City-owned transportation facilities to decline below standards set forth in the comprehensive plan unless action is taken to accommodate the transportation impacts concurrent with the development.[2]

The City having stipulated that it has failed to adopt a transportation concurrency ordinance, the Board is convinced that a mistake has been made.

The Board finds and concludes that the City has failed to be guided by the goal set forth in RCW 36.70A.020(12) and has failed to act as required by RCW 36.70A.070(b).

---

[2] RCW 36.70A.070(6)(b) reads in pertinent part:

> After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride-sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6), "concurrent with the development" means that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years....

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

IV. ORDER

Based on the foregoing, the Board Orders:

1. The City of Mercer Island has failed to comply with goals and requirements set forth in the GMA.
2. The matter is remanded to the City for action guided by the goal set forth in RCW 36.70A.020(12) that will bring its Transportation Element into compliance with RCW 36.70A.070(6)(b).
3. The compliance schedule shall be as follows:

Item	Date Due
Compliance Due	November 6, 2018
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	November 16, 2018
Objections to a Finding of Compliance	November 30, 2018
Response to Objections	December 14, 2018
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 4472777#	**December 19, 2018** **10:00 a.m.**

SO ORDERED this 30th day of March, 2018.

Cheryl Pflug, Board Member

Deb Eddy, Board Member

Nina Carter, Board Member

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

Case No. 18-3-0004

Mark Coen v. City of Mercer Island

DECLARATION OF SERVICE

I, LYNN ECCLES, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Legal Assistant to the Growth Management Hearings Board. On the date indicated below a copy of the ORDER FINDING NON-COMPLIANCE PURSUANT TO STIPULATIONS in the above-entitled case was sent to the following through the United States postal mail service:

Robert Medved
Law Offices of Robert A. Medved
7238 Southeast 32nd Street
Mercer Island, WA 98040

Daniel Thompson
Thompson & Delay
506 Second Ave, Ste 2500
Seattle, WA 98104

Kari L. Sand
Bio F. Park
Office of the City Attorney
City of Mercer Island
9611 SE 36th St
Mercer Island WA 98040

DATED this 30 day of March, 2018.

Lynn Eccles, Legal Assistant

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

EXHIBIT 11

CITY COUNCIL MINUTES
REGULAR MEETING
OCTOBER 2, 2018

CALL TO ORDER & ROLL CALL

Mayor Debbie Bertlin called the meeting to order at 5:00 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Debbie Bertlin, Deputy Mayor Salim Nice, and Councilmembers Bruce Bassett (5:05 pm), Wendy Weiker (5:15 pm), David Wisenteiner, and Benson Wong were present.

Position #4 is vacant.

AGENDA APPROVAL

Mayor Bertlin amended the agenda explain that King County Councilmember Claudia Balducci would not be available to present to the Council under Special Business.

It was moved by Wong; seconded by Wisenteiner to:
Approve the agenda as amended.
Passed 4-0
FOR: 4 (Bertlin, Nice, Wisenteiner, and Wong)
ABSENT: 2 (Bassett and Weiker)
VACANT: 1 (Position 4)

EXECUTIVE SESSION

Executive Session to discuss with legal counsel pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 60 minutes.

At 5:02 pm, Mayor Bertlin convened the Executive Session to discuss with legal counsel pending or potential litigation pursuant to RCW 42.30.110(1)(i) for approximately 60 minutes.

At 6:05 pm, Mayor Bertlin adjourned the Executive Session and recessed the meeting for five minutes.

STUDY SESSION

AB 5481: Transportation Concurrency Revised Ordinance

Mayor Bertlin started the Study Session at 6:11 pm.

Interim Development Services Director Evan Maxim provided a brief overview of concurrency, summarized the first reading and Council's direction at its October 3, 2017 meeting, and the Transportation Concurrency revised ordinance. He further explained that impact fees are assessed per vehicle trip and that concurrency mitigation is only required when an intersection fails to meet level of service (LOS) post development.

The revised ordinance does the following:

- Requires a concurrency certificate on all development generating a net new vehicle trip;
- Allows for denial of a concurrency review, and describes remedies available to an applicant; and
- Creates a basis for timely updates to the transportation model and associated LOS.

The Concurrency Ordinance relies on the Transportation LOS and will take effect on December 3, 2018.

Michael Lapham, consultant with KPG, responded to Council questions regarding planned improvement projects and the Six-Year Transportation Improvement Plan.

The Council discussed proposed amendments to the ordinance as suggested by Councilmember Wong.

The Study Session concluded and Mayor Bertlin recessed the meeting until 7:00 pm.

SPECIAL BUSINESS

AB 5484: Domestic Violence Action Month Proclamation

YFS Senior Programs Manager and Clinical Supervisor Derek Franklin introduced Ward Urion, Social Change Manager with Lifewire to join him and Mayor Bertlin and receive the proclamation.

Mayor Bertlin proclaimed October 2018 as Domestic Violence Action Month and called upon residents of Mercer Island to speak out against domestic violence and support efforts to prevent and end domestic abuse and the indifference that sustains it.

CITY MANAGER REPORT

City Manager Julie Underwood reported on the following items:

- **Aubrey Davis Park Master Plan** process going on now through the fall of 2019
- **Coffee with a Cop**, Wednesday, October 3, 4 pm to 6 pm
- **Mercer Island's Proposition 1 Pro & Con Committee Forums**:
    - Monthly Chamber Luncheon, Thursday, October 4, 12 pm to 1:30 pm
    - Mercer Island Beach Club, Tuesday, October 9, 7 pm to 8 pm
- Final **Farmers Market** of the Season, Sunday, October 7, 10 am to 3 pm, Mercerdale Park
- **MICA's Community Visioning Report Session**, Monday, October 8, 7 pm to 8:30 pm, Mercer Island Boys & Girls Club
- Final **Solarize 2.0 Meeting**, Tuesday, October 9, 6 pm to 7:30 pm, Mercer Island Congregational Church
- Proposed **"Community Facilities" Listening Session**, Thursday, October 11, 6 pm, Mercer Island Community Center
- **Birding Trip**, Hawks Fall Color, Back Roads, Thursday, October 11, 6:30 am to 6:00 pm, depart from Community Center
- **Arbor Day & Tree Planting Celebration**, Saturday, October 20, 9 am to 2 pm, Luther Burbank Park
- **ARCH** (A Regional Coalition of Housing) Seeking Volunteers, visit www.archhousing.org for more information
- **Commuter Parking & Town Center Project Open House**, Monday, October 22, 6 pm to 9 pm, Community Center Mercer Room
- YFS: Celebrating 30 Years, Sharing 30 Stories, February 13, 2019, **MIYFS Foundation Annual Breakfast**
- Congratulations **Roanoke Inn**, 2018 King County Executive's John D. Spellman Excellence in Historic Preservation Award

APPEARANCES

Judy Ross, Bellevue, spoke to the Council regarding the changes she has seen to Mercer Island over the past 50 years.

The following people spoke in opposition to Comprehensive Plan Amendment 8 (Private Community Facilities):

- Julie Garwood, Mercer Island
- Ryan Rahlfs, Mercer Island
- John Hall, Mercer Island

Rene Stratton, Mercer Island, spoke in support of Comprehensive Plan Amendment 6 (Arts and Culture).

The following people spoke in favor of Comprehensive Plan Amendment 8 (Private Community Facilities):

- Joel Mezistrano, Mercer Island
- Carin Jacobson, Mercer Island
- Eric Thuau, Mercer Island
- Tristan Vingtdeux, Mercer Island, French/American School Alum
- Ben Orillon, Mercer Island, French/American School Alum
- Liz Friedman, Stroum Jewish Community Center Board Chair
- Laura Mousseau, Bellevue, French/American School Administrator
- Amy Lavin, Mercer Island, Stroum Jewish Community Center CEO

Cheryl D'Ambrosio, Mercer Island, apologized for not being available to meet with Mayor Bertlin and City Manager Underwood. She expressed concern regarding traffic safety by her home.

Daniel Thompson, Mercer Island, provided his opinions on the Comprehensive Plan amendments.

Mark Coen, Mercer Island, spoke in opposition to Comprehensive Plan Amendments 1 (Land Use Designations), 6 (Arts and Culture), 8 (Private Community Facilities), 10 (Universal Design, Disability Access, and Age-Friendly Planning), 11 (Green Building Introduction), 13 (Town Center Height & Public Amenities), 14 (PUD / Pilot Program), and 15 (Commuter Parking in Town Center) as they are inconsistent with the law, injurious to his property, and prejudicial towards him.

Ira Appleman, Mercer Island, spoke in opposition Comprehensive Plan Amendments 6 (Arts and Culture) and 8 (Private Community Facilities).

CONSENT AGENDA

Payables: $1,019,581.67 (09/13/2018) & $1,213,880.17 (09/20/2018)
Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $801,612.14 (09/28/18)
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes: July 17, 2018 Regular Meeting
Recommendation: Adopt the July 17, 2018 Regular Meeting Minutes as written.

It was moved by Wisenteiner; seconded by Wong to:
Approve the Consent Calendar and the recommendations contained therein.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

REGULAR BUSINESS

AB 5482: Code Amendment Regarding Transportation Concurrency (2nd Reading)

It was moved by Wong; seconded by Nice to:
Adopt Ordinance No. 18C-12 establishing a new Chapter 19.20 and amending Chapters 19.15 and 19.16 of the Mercer Island City Code to provide for a Transportation Concurrency Management System as required by the Growth Management Act.

It was moved by Wong; seconded by Wisenteiner to:
Amend the previous motion to:
Amend the following sections of the ordinance as follows:

1. **MICC 19.20.050(A): change "subsection D" to "subsection C"**
2. **MICC 19.20.050(B): add to (B)(1): "A project shall be deemed abandoned by the City, if an applicant does not proceed under subsection 2 or 3 below."**
3. **MICC 19.20.050(C)(1)(a): change "may" to "shall"**
4. **MICC 19.20.050(C)(2): change "may" to "shall"**
5. **MICC 19.20.050(C)(2): (a): add "schedule that is satisfactory to the code official." at the end and (b): add "performance that is satisfactory to the code official." at the end.**
6. **MICC 19.20.070(B): add "to" between "impact" and "other"**
7. **MICC 19.20.080(B): change "shall" to "should" and delete ", provided funding for the update is available"**

Motion to Amend Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

Main Motion Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

AB 5483: 2018 Comprehensive Plan Amendments and Accompanying Zoning Code Amendments (1st Reading)

Interim DSG Director Evan Maxim presented the Planning Commission's recommendation on fifteen amendments to the Comprehensive Plan. Michael Lapham from KPG reviewed the proposed amendments to the Transportation Element. Planning Commissioner Chair Daniel Hubbel assisted in answering questions from the Council.

The Council discussed the proposed Amendments in the following order:

- Amendment 3: Transportation Element Update
- Amendment 8: Community Facilities (SJCC / FASPS / Herzl-Ner Tamid)
- Amendment 6: Arts & Culture
- Amendment 15: Tully's / Parcel 12 Re-Designation and Zoning
- Amendment 7: Critical Areas Update
- Amendment 10: Universal Design
- Amendment 12: STAR Analysis Framework
- Amendment 14: Pilot Program / PUD
- Amendment 1: Land Use Map Clarification
- Amendment 2: CIP Cross Reference
- Amendment 4: Private Conservation / PBRS
- Amendment 5: NPDES Policy Support
- Amendment 9: Disaster Planning
- Amendment 11: Green Building

In addition to minor edits to the Amendments, the Council directed staff to make the following major edits:

- **Amendment 3: Transportation Element Update**
  The Council discussed the rumble strips recommendation. Staff noted that the Planning Commission's discussion was focused on the traffic pattern changes, number of vehicles traveling on the roadway, and felt it warranted more discussion. Mayor Bertlin noted that this discussion and any changes should be part of the Transportation Improvement Program review and an updated Bicycle and Facilities Plan. Council directed staff to remove references to rumble strips.

- **Amendment 8: Community Facilities (SJCC / FASPS / Herzl-Ner Tamid)**
  Following staff's presentation on the proposed Community Facilities zoning designation the Council asked questions about who could ask for this designation and expressed desire to have a collaborative process. Council directed staff to delete "private" from the proposed zoning designation.

- **Amendment 6: Arts and Culture**
  The Council discussed incorporating public arts in to capital projects versus using the 1% for the Arts Fund and directed staff to propose language for second reading.

Director Maxim noted that on October 11, 2018 the City would be hosting a community meeting regarding Amendment 8 – Community Facilities and that all are welcome to attend. He stated that the second reading of the amendments would be on October 16, 2018. He anticipates Department of Commerce approval on November 11, 2018, allowing for Council's third reading and adoption of the amendments on November 20, 2018.

It was moved by Basset; seconded by Weiker to:
Set Ordinance Nos.18-13 and 18C-14 for second reading on October 16, 2018.
Passed 6-0
FOR: (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

AB 5487: City Council Vacancy Process and Timeline for Position #4

Mayor Bertlin reviewed the proposed process and timeline for appointment to vacant Position #4 on the Mercer Island City Council as follows:

The City will advertise the vacancy and replacement process in the Mercer Island Reporter, on the City's website, the City's social media accounts, and to the Council's agenda email list. The proposed timeline for filling the Council vacancy is as follows:

- Monday, October 8, 2018: Advertising begins and applications available
- Wednesday, November 21, 2018: Applications due to City Clerk by 5:00 pm
- Thursday, December 6, 2018 (Special Meeting, 6:00 pm): Candidate speeches/interviews; Council deliberation in Executive Session to follow
- Tuesday, December 11, 2018 (Special Meeting, 6:00 pm): City Council vote prior to Joint Meeting with MISD)
- Tuesday, December 18, 2018: Swearing in of new Councilmember (Regular Meeting)*

*The selected candidate will be expected to stay and participate in this meeting.

It was moved by Bassett; seconded by Nice to:
Approve the proposed process and timeline for appointment to vacant Position #4 on the Mercer Island City Council as outlined in AB 5487 and direct staff to begin advertising.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

OTHER BUSINESS

Councilmember Absences
Councilmember Bassett and Councilmember Wisenteiner will be absent October 16.

Planning Schedule
There were no changes.

Board Appointments
There were no appointments.

Councilmember Reports
Councilmember Wong thanked Evan Maxim for his work and presentation on the Comprehensive Plan.
Councilmember Bassett spoke about the recent K4C meeting.
Councilmember Wisenteiner gave a shout out to MI Junior Football team who beat Bellevue, the first team to do that in 14 years.

ADJOURNMENT

The Regular Meeting adjourned at 11:39 pm.

_____
Debbie Bertlin, Mayor

Attest:

_____
Deborah A. Estrada, City Clerk

EXHIBIT 12

CITY CLERK'S OFFICE
CITY OF MERCER ISLAND, WASHINGTON
9611 SE 36th Street | Mercer Island, WA 98040-3732
(206) 275-7793 | www.mercergov.org

CERTIFIED PHOTOCOPY

State of Washington

County of King

I, Deborah A. Estrada, a notary public, do certify that on this 18th day of October, that the preceding or attached document is a true, exact, complete, and unaltered printed copy made by me from the original electronic document Ordinance No. 18C-12.

[SEAL]

D. A. Estrada
Notary Public, State of Washington
Residing at: Bellevue
My Commission Expires: 2/1/2021

CITY OF MERCER ISLAND
ORDINANCE NO. 18C-12

AN ORDINANCE OF THE CITY OF MERCER ISLAND ESTABLISHING A NEW CHAPTER 19.20 AND AMENDING CHAPTERS 19.15 AND 19.16 OF THE MERCER ISLAND CITY CODE TO PROVIDE FOR A TRANSPORTATION CONCURRENCY MANAGEMENT SYSTEM AS REQUIRED BY THE GROWTH MANAGEMENT ACT, PROVIDING FOR SEVERABILITY AND RATIFICATION, AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, the Mercer Island City Code (MICC) contains Title 19, the Unified Land Development Code; and

WHEREAS, the Growth Management Act (chapter 36.70A RCW) (GMA) requires cities and counties planning under the GMA to adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development; and

WHEREAS, staff sent notice of Mercer Island's proposed zoning code text amendment to the Washington State Department of Commerce for review as required by the GMA on May 22, 2017; and

WHEREAS, the proposed ordinance is exempt from the State Environmental Policy Act (chapter 43.21C RCW and MICC 19.07.120) pursuant to WAC 197-11-800(19); and

WHEREAS, on May 22, 2017, a Public Notice of Application and Public Hearing was published in the City of Mercer Island Permit Bulletin regarding the zoning code text amendment proposal to give public notice of the open record hearing in front of the Planning Commission and to encourage public participation; and

WHEREAS, on May 24, 2017, a Public Notice of Application and Public Hearing was published in the Mercer Island Reporter, giving public notice of the open record hearing in front of the Planning Commission and encouraging public participation; and

WHEREAS, a public comment period was provided from May 22, 2017 through June 21, 2017 to obtain public comments regarding the proposed zoning code text amendment; and

WHEREAS, the Mercer Island Planning Commission opened the public hearing on June 21, 2017, and continued the public hearing to August 2, 2017; and

WHEREAS, on August 2, 2017, the Mercer Island Planning Commission recommended approval of the proposed zoning code text amendment; and

WHEREAS, the city council held the first reading of the proposed zoning code text amendment on October 3, 2017 and directed city staff to provide new information on several items including how changes in the Town Center and I-90 corridor are impacting traffic patterns on the Island, how impact fees and concurrency mitigation relate, and other edits to the draft ordinance; and

WHEREAS, on November 6, 2017, the City Council passed Resolution No. 1534 establishing the City's 2018 Comprehensive Plan amendment docket, including updating the Transportation Element to address traffic modeling, levels of service, non-motorized transportation and I-90 changes, which will provide updated data to support a transportation concurrency ordinance; and

WHEREAS, on February 23, 2018, Mercer Island resident Mark Coen, represented by attorneys Robert Medved and Daniel Thompson, submitted a Petition for Review with the Growth Management Hearings Board, Central Puget Sound Region ("the GMHB"), challenging the City for failure to act to adopt a transportation concurrency ordinance as required by the GMA. After settlement discussions, the City agreed to stipulate that it had not yet complied with GMA goals and requirements because it had not yet adopted a transportation concurrency ordinance. A finding of noncompliance was entered, and the parties agreed to a compliance schedule requiring a transportation concurrency ordinance to be adopted by the City Council no later than November 6, 2018;

WHEREAS, on September 5, 2018, the Planning Commission recommended that the City Council adopt an updated Transportation Element, which includes updated levels of service for arterial intersections on Mercer Island; and

WHEREAS, on November 20, 2018, the City Council is scheduled to adopt the Planning Commission recommended updates to the Transportation Element, including updates to the levels of service, and which adoption will become effective on December 3, 2018; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MERCER ISLAND, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. **Establish Mercer Island City Code Chapter 19.20, Transportation Concurrency Management System.** There is hereby added to Title 19 of the Mercer Island City Code ("MICC"), a new chapter 19.20, entitled "Transportation Concurrency Management System," as follows:

Chapter 19.20
TRANSPORTATION CONCURRENCY MANAGEMENT SYSTEM

Sections:

19.20.010 Purpose and Authority.

A. This chapter is enacted pursuant to the city's police powers, the State Growth Management Act (GMA) as codified in Chapter 36.70A RCW and the concurrency regulations as codified in WAC 365-196-840.

B. The purpose of this chapter is to:

1. Comply with the GMA by prohibiting approval of development proposals if the development causes the level of service on a transportation facility to decline below the standards adopted in the Transportation Element of the Mercer Island Comprehensive Plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. For the purposes of the city's concurrency requirement, "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

2. Establish a system to evaluate development proposals to ensure that adequate transportation facilities are provided concurrently with development, as defined by the GMA.

19.20.020 Transportation Concurrency Application and Certificate Required.

A transportation concurrency application and transportation concurrency certificate are required for any development proposal specified in MICC 19.20.030 or any development that will otherwise result in the creation of one or more net new trips in the morning peak hour or evening peak hour. No development shall be required to obtain more than one (1) transportation concurrency certificate, unless the applicant or subsequent owners propose changes or modifications that require a new development permit application or result in increased net new trips, a future phase of the project requires a transportation concurrency application, or the original transportation concurrency certificate has expired.

19.20.030 Transportation Concurrency Review.

The following describes the steps in obtaining a transportation concurrency certificate.

A. Application: A transportation concurrency application and traffic impact analysis (if required) shall be submitted prior to, or concurrent with, an application for the following development proposals:

1. Preliminary long plat or preliminary short plat and revisions or alterations thereof which will increase the number of dwelling units or net new trips;
2. Development agreements;
3. Design Review or Conditional Use Permit; or,
4. Any other land use approval or building permit that will result in net new trips, unless a certificate has been issued for the same development proposal in conjunction with subsections 1., 2., or 3. of this section.

B. Contents of Application: Transportation concurrency applications shall be submitted on a form prescribed by the code official. Applicants for a certificate of concurrency shall designate the density and intensity of development to be tested for concurrency, provided such density and intensity shall not exceed the maximum allowed for the development proposal site. The concurrency test and resulting concurrency certificate will be based on and applicable to only the applicant's designated density and intensity, and the resulting net new trips, calculated pursuant to subsection "E."

C. The transportation concurrency application shall accompany the first application for land use approval or building permit. Transportation concurrency applications, once determined complete and following receipt of any required fees, shall be reviewed on a first-come, first-served basis.

D. Traffic Impact Analysis: A traffic impact analysis complying with the City's Traffic Impact Analysis Guidelines is required for any development proposal that generates 10 or more net new vehicle trips during the morning or evening peak hour.

E. Determine Number of Net New Trips: The code official shall review the transportation concurrency application to determine the number of net new trips generated by the development proposal using the most current edition of the ITE Trip Generation Manual. Applicants may be required to provide supplemental information regarding the number of vehicle trips created by the prior use and/or for their specific development if the number of vehicle trips created is not clearly addressed in the most current edition of the ITE Trip Generation Manual. In determining the net new trips, no credit shall be given for vehicle trip ends from sites/structures that have been vacant for more than one (1) year or for trips from any unpermitted or illegal development.

19.20.040 Transportation Concurrency Certificate--Approval.

A. Approval: A transportation concurrency certificate shall be approved if net new trips from the development proposal do not cause the level of service at a concurrency intersection to decline below the standards adopted in the Transportation Element of the Comprehensive Plan. The level of service analysis shall include the net new trips for all developments that have been previously approved for concurrency.

B. Contents: A transportation concurrency certificate shall include, as a minimum:

1. The location or other description of the development proposal site.

2. The type of development proposal for which the transportation concurrency certificate is

issued.

3. The specific use, densities, and intensities that were tested for transportation concurrency and which are authorized for development of the property.

4. The net new trips assigned to the development as described in the certificate.

5. Conditions of approval, if applicable.

6. An effective date.

7. An expiration date.

C. Reservation of Capacity: The city shall reserve capacity to accommodate the net new trips from any development proposal receiving a concurrency certificate. Reserved capacity shall not be returned to the system unless and until an associated development permit application is denied, rejected, invalidated or abandoned, or the transportation concurrency certificate is no longer valid or expires.

D. Validity: A transportation concurrency certificate is valid only for the specified uses, densities, intensity and development proposal site(s) for which it was issued and shall not be transferred to a different project or parcel. A transportation concurrency certificate shall remain valid for the longer of:

1. One (1) year from the date of issuance;

2. During the period of time the development proposal associated with the certificate is under review by the city;

3. For the same period of time as the development approval. If the development does not have an expiration date or an approved phasing schedule that allows a longer build-out, the concurrency certificate shall be valid for one (1) year from the date of the last permit approval associated with the development proposal;

4. For a period of time specified in an approved development agreement.

E. Expiration: A transportation concurrency certificate shall expire if any of the following occur:

1. The timeframe established in section D above is exceeded.

2. The related development permit application is denied or revoked by the city.

3. The related development permit expires prior to issuance of a building permit.

F. Extension: A transportation concurrency certificate shall not be extended. A new transportation concurrency application, review and certificate are required if the previous

transportation concurrency certificate has expired.

19.20.050 Transportation Concurrency Certificate--Denial.

A. Denial: A transportation concurrency certificate shall be denied if the number of net new trips resulting from the development proposal causes the level of service at a concurrency intersection to decline below the standards adopted in the Transportation Element of the Comprehensive Plan, unless transportation improvements or strategies to accommodate the net new trips are made concurrent with the development, subject to the provisions of subsection C of this section. The applicant shall be notified in writing that the development proposal has failed concurrency.

B. Options for Development Failing Concurrency: The applicant for a development proposal failing concurrency may:

1. Abandon the proposed development. A project shall be deemed abandoned by the City, if an applicant does not proceed under subsection 2 or 3 below.

2. Agree in writing within sixty (60) days of the notification of concurrency failure to:

    a. Build or provide a mitigation strategy, and provide a financial commitment, for the transportation facility improvements necessary to achieve concurrency;

    b. Phase the development to reduce the number of net new trips to a level that will achieve concurrency; and/or

    c. Modify the transportation concurrency application and the associated development proposal applications to reduce the number of net new trips to a level that will allow for concurrency approval pursuant to MICC 19.20.040.

3. Appeal the denial to the hearing examiner in accordance with MICC 19.20.120.

C. Mitigation Criteria: The mitigation options established in subsection (B)(2) of this section shall be consistent with the following criteria:

1. Transportation Facility Improvements or Strategies:

    a. Administrative Approval: The code official shall approve transportation facility improvements or strategies that will achieve transportation concurrency at a concurrency intersection when the following criteria are met:

        i. The proposed improvement or strategy is consistent with the City's Comprehensive Plan and is in the city's adopted Six-Year Transportation Improvement Program (TIP); and

        ii. The proposed improvement is completed, or the proposed strategy is implemented within six (6) years of the date of issuance of a certificate of

occupancy.

b. City Council Approval: The city council may approve a transportation facility improvement not included in the Six-Year TIP as transportation concurrency mitigation by amending the TIP to include the proposed improvement.

c. Funding Commitment and Conditions: The approval of any development proposal requiring one (1) or more transportation facility improvements to achieve concurrency shall establish conditions requiring a financial commitment by the applicant, binding on subsequent owners, for the completion of the improvement(s). The cost of the transportation improvement(s) required for concurrency may be credited towards the developer's transportation impact fee obligation in accordance with MICC 19.19.040(D).

d. Latecomer Agreements: The city may authorize latecomer agreements, or other reimbursement from owners of property benefited by the transportation concurrency improvements, as allowed by State law.

2. Transportation Demand Management (TDM)/Phasing: Transportation demand management shall include strategies designed to increase the efficiency of the transportation facilities, including, but not limited to, transit and ridesharing incentives, flexible working hours, parking management, and pedestrian and bicycle enhancements to decrease single occupancy vehicle trips. The code official shall approve a TDM strategy or phasing plan that achieves transportation concurrency when the TDM strategy or phasing plan includes:

   a. An implementation plan and schedule that is satisfactory to the code official;

   b. Methods to monitor and enforce TDM/phasing performance that is satisfactory to the code official; and

   c. A contingency plan to achieve transportation concurrency if the TDM goals are not achieved within two (2) years of issuance of the certificate of occupancy and all necessary permit approvals. The TDM strategy/phasing plan shall be a condition of development approval and shall apply to all future property owners. The code official shall determine, consistent with accepted engineering practice, the appropriate trip reduction resulting from the proposed TDM strategy.

19.20.060 Performance Guarantee.

The code official may require a performance guarantee, as applicable, to ensure compliance with any aspect of transportation concurrency for the development proposal or construction permit approval.

19.20.070 Intergovernmental Coordination.

A. The city may enter into agreements with other local, regional, state and federal governments, to coordinate mitigation for transportation concurrency.

B. The city may apply standards and mitigation to development in the city that results in transportation impact to other local governments in the State of Washington. Approvals or permits issued by the city may include conditions and mitigation that will be imposed on behalf of and implemented by other local governments in the State of Washington. The city may agree to accept and implement conditions and mitigation that are imposed by other jurisdictions on development in their jurisdictions that impact the city.

19.20.080 Updating Level of Service.

A. The code official shall determine the current level of service at concurrency intersections as of December 3, 2018. The code official shall use traffic counts and traffic modeling information produced in 2017 and 2018 as the baseline for determining current levels of service.

B. The city should update the existing levels of service at concurrency intersections at least every five (5) years.

C. Each level of service update shall carry forward the vehicle trips for any approved development proposal that has not been completed and occupied prior to the level of service update.

19.20.090 Administration.

A. All final decisions regarding the administration of this chapter shall be the responsibility of the code official.

B. The code official shall be authorized to establish administrative rules and procedures for administering the transportation concurrency management system.

19.20.100 Relationship to the State Environmental Policy Act.

A. A transportation concurrency application and transportation concurrency certificate are categorically exempt from the State Environmental Policy Act (SEPA).

B. This chapter establishes the minimum transportation concurrency requirements applicable to all development and is not intended to limit the city's authority under SEPA or to evaluate all transportation impacts resulting from new development, particularly safety and operational impacts. SEPA mitigation regarding intersection operation and/or safety may be included as conditions of the transportation concurrency certificate at the discretion of the code official.

19.20.110 Fees.

The city shall charge a processing fee to any individual or entity that applies for a transportation concurrency certificate. Such fees shall be determined by resolution of the city council. An

additional fee will be required if, in the sole judgment of the code official, use of the city's transportation model is necessary for making a transportation concurrency determination. All transportation concurrency processing fees shall be paid in full upon application for a transportation concurrency certificate.

19.20.120 Appeals.

A decision on a transportation concurrency certificate may be appealed pursuant to chapter 19.15 MICC.

Section 2. Amendment to MICC 19.15.040, Land Use Review Types. MICC 19.15.040, Table A "Land Use Review Type" is hereby amended as follows:

Type I	Type II	Type III	Type IV
• Home business • Seasonal development limitation waiver • Non-major single-family dwelling building permits • Tree removal permit • Right of way permit • Special needs group housing safety determination • Tenant improvement / change of use • Shoreline exemption[1] • Critical areas determination (steep slope alteration) • Final short plat • Temporary commerce on public property • Site development permits • transportation concurrency certificate	• Modified wireless communication facilities (6409 per 47 CFR 1.40001) • Lot line revision • Setback deviations • Final plat[2, 3] • Code official design review • Accessory dwelling unit • Parking variances (reviewed by city engineer).	• New and modified wireless (non-6409) eligible facility • SEPA threshold determination • Critical areas determination (wetland/watercourse buffer averaging/reduction • Temporary encampment[4] • Short plat alteration and vacations • Preliminary short plat • Development code interpretations • Major single-family dwelling building permit • Shoreline substantial development permit[1] • Shoreline revision (substantial development)[1]	• Preliminary long plat approval • Conditional use permit • Variance • Critical areas reasonable use exception • Long plat alteration and vacations • Parking variances (reviewed by Design Commission) • Variance from short plat acreage limitation • Wireless communication facility height variance • Planned unit development • Design Commission design review • Permanent commerce on public property • Shoreline conditional use permit (SCUP)[5] • Shoreline variance[5] • Shoreline revision (variance and SCUP).

[1] Appeal will be heard by the Shoreline Hearings Board

[2] Decision is made by City Council after discussion at a public meeting

[3] A Notice of Decision will be issued for a final long plat

[4] A public meeting is required

[5] Hearing Examiner will forward a recommendation to the Washington State Department of Ecology for Ecology's decision

Section 3. **Amendments to Chapter 19.16 MICC, Definitions.** Chapter 19.16 MICC, "DEFINITIONS," is hereby amended to include the following:

Concurrency intersection: The intersection of two arterials.

Evening peak hour: The single hour with the highest traffic volumes on the roadway adjacent to the development between 4:00 p.m. and 6:00 p.m.

Morning peak hour: The single hour with the highest traffic volumes on the roadway adjacent to the development between 7:00 a.m. and 9:00 a.m.

Transportation Concurrency: Facilities or strategies that achieve the City's level of service standards adopted in the Comprehensive Plan that:

1. Are planned and fully funded in the City's Six-Year Transportation Improvement Program to be installed and fully constructed within six years of the issuance of a certificate of occupancy for the development, or

2. Will be available and complete no later than six years after issuance of a certificate of occupancy for the development, and the applicant and/or the City provides a financial commitment which is in place at the time the development is approved by the code official.

Transportation level of service (LOS): A measurement of the quality of traffic flow and congestion at intersections and roadways. LOS is defined by the amount of delay experienced by vehicles traveling through an intersection or on a street. LOS is defined and calculated per the methods in the Highway Capacity Manual (HCM) 6th Edition or newer.

Transportation model: The use of a computer model by the City to forecast traffic flow, evaluate intersection impacts, and determine level of service and available capacity at concurrency intersections.

Trips: The number of vehicle trips generated by a land use in the morning peak hour or evening peak hour as determined by the latest edition of the Institute of Transportation Engineers Trip Generation Manual, or other authorized source approved by the code official.

Trips, net new: The number of vehicle trips generated by a new development, change in use, expansion or modification requiring a development permit minus the trips generated by the previous use of the site within the one (1) year immediately prior to the development permit application. No credit shall be given for vehicle trip ends from sites/structures that have been vacant for more than one (1) year or for trips from any unpermitted or illegal development.

Section 4. **Codification and Effective Date of the Regulations.** The city council authorizes the Development Services Group Interim Director and City Clerk to correct scriveners' errors in Sections, 1, 2, or 3, codify the regulatory provisions of the amendments into Title 19 of the Mercer Island City Code, and publish the

amended code. Notwithstanding the effective date of this Ordinance set forth in Section 8, the effective date of these regulatory provisions establishing a Transportation Concurrency Management system shall be on and after December 3, 2018.

Section 5. **Interpretation.** The city council authorizes the code official to adopt administrative rules, interpret, and administer the amended code as necessary to implement the legislative intent of the city council.

Section 6. **Severability.** If any section, sentence, clause or phrase of this ordinance or any municipal code section amended hereby should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity of any other section, sentence, clause or phrase of this ordinance or the amended code section.

Section 7. **Ratification.** Any act consistent with the authority and prior to the effective date of this ordinance is hereby ratified and affirmed.

Section 8. **Effective Date.** This Ordinance shall take effect and be in force on 5 days after its passage and publication.

PASSED by the City Council of the City of Mercer Island, Washington at its regular meeting on the 2nd day of October 2018 and signed in authentication of its passage.

CITY OF MERCER ISLAND

Debbie Bertlin

Debbie Bertlin, Mayor

Approved as to Form:

Kari Sand, City Attorney

ATTEST:

Deborah Estrada, City Clerk

Date of Publication: 10/24/18

EXHIBIT 13

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

MARK COEN,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

CASE No. 18-3-0004
(Coen I)

ORDER FINDING COMPLIANCE

I. INTRODUCTION

On March 30, 2018, the Board issued its Order Finding Noncompliance Pursuant to Stipulations in this case and remanded the matter to the City of Mercer Island (City) to take action to bring its Transportation Element into compliance with RCW 36.70A.070(6)(b) by November 6, 2018.

On October 2, 2018, the City adopted Ordinance No. 18C-12. On November 16, 2018, the City filed its Statement of Actions Taken to Comply, providing a copy of the Compliance Ordinance and attached exhibits. The City also filed the original proceeding index and compliance index. Petitioner Coen did not file a compliance brief.

Pursuant to RCW 36.70A.330(1) and (2), the Board conducted a telephonic compliance hearing on December 19, 2018. Board members Deb Eddy and Nina Carter attended the hearing. Cheryl Pflug convened the hearing as the Presiding Officer. Kari Sand appeared on behalf of the City of Mercer Island. The hearing afforded Board members an opportunity to hear further argument and have questions answered.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

II. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.[1] After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.[2] For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.[3]

In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[4] Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.[5] Thus, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the City is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW, the Growth Management Act.[6]

III. DISCUSSION

The Remanded Issues

In its Order Finding Noncompliance Pursuant to Stipulations,[7] the Board determined that the City of Mercer Island had failed to comply with the Growth Management Act (GMA) because it had not adopted a transportation concurrency ordinance, as required by RCW RCW 36.70A.040 and .070(6)(b).

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[1] RCW 36.70A.300(3)(b).
[2] RCW 36.70A.330(1) and (2).
[3] RCW 36.70A.320(1), (2), and (3).
[4] *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
[5] RCW 36.70A.3201.
[6] RCW 36.70A.320(2).
[7] Issued March 30, 2018.

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The City's Compliance Action

On October 2, 2018, the City of Mercer Island passed Ordinance 18C-12 (Compliance Ordinance,)[8] which added Chapter 19.20, the Transportation Concurrency Management System, to the Mercer Island City Code (MICC) and amended MICC 19.16, Definitions, and MICC 19.15, Appeals.[9]

Board Analysis

RCW 36.70A.070(6)(b) requires that local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. "Concurrent with the development" means that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

The Compliance Ordinance (1) establishes a system to evaluate development proposals and ensure transportation facilities by requiring a transportation concurrency application and certificate for any development that will result in the creation of one or more net new trips during peak traffic hours; (2) provides that proposals that will cause the level of service on a transportation facility to decline below standards adopted in the City's Transportation Element shall be denied unless improvements or strategies to accommodate the impacts are in place concurrent with the development; and (3) establishes criteria for evaluating mitigation options.

At the compliance hearing, the Petitioner acknowledged engaging with the City in the process of adopting the Compliance Ordinance and stated that Petitioner believes it complies the GMA.

The Board finds and concludes that the City's action was guided by

[8] Ordinance 18C-12 was published October 24, 2018, and became effective October 29, 2018.
[9] MICC 19.15.040 Table A, "Land Use Review Types," was amended to add a transportation concurrency certificate as a Type I Land Use Review such that a decision on a transportation concurrency certificate may be appealed pursuant to MICC 19.15.

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RCW 36.70A.020(12)[10] and satisfies the requirements of RCW 36.70A.070(6)(b) that adequate transportation facilities will be provided concurrent with development.

IV. ORDER

Based upon review of the March 30, 2018, Order Finding Noncompliance Pursuant to Stipulations, the City's Statement of Actions Taken to Achieve Compliance and Ordinance No. 18C-12, the Growth Management Act, prior Board orders and case law, having considered the City's brief and an the comments of the parties offered at the compliance hearing, and having deliberated on the matter, the Board Orders:

- The City of Mercer Island has complied with RCW 36.70A.070(6)(b).
- Case No. 18-3-0004 is **closed**.

SO ORDERED this 20th day of December 2018.

Cheryl Pflug, Board Member

Deb Eddy, Board Member

Nina Carter, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[11]

[10] RCW 36.70A.020(12) Public facilities and services, reads:
> Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

[11] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. *See* RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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EXHIBIT 14

CITY OF MERCER ISLAND

DEVELOPMENT SERVICES GROUP

9611 SE 36TH STREET | MERCER ISLAND, WA 98040
PHONE: 206.275.7605 | www.mercergov.org

CITY USE ONLY		
PERMIT #	RECEIPT #	FEE
CPA17-002		434.66
Date Received:		RECEIVED

DEVELOPMENT APPLICATION

Received By: SEP 29 2017
CITY OF MERCER ISLAND
DEVELOPMENT SERVICE GROUP

STREET ADDRESS/LOCATION	ZONE
3801, 3700, 3795 E. Mercer Way	R-8.4, R-9.6, C-0
COUNTY ASSESSOR PARCEL #'S	**PARCEL SIZE (SQ. FT.)**
See Attached Exhibit A	Approximately 18 Acres

PROPERTY OWNER *(required)*	ADDRESS *(required)*	CELL/OFFICE *(required)*
Stroum Jewish Community Center	7795 E. Mercer Way	206-930-7828 E-MAIL *(required)* rich@mhseattle.com
PROJECT CONTACT NAME	**ADDRESS**	**CELL/OFFICE**
G. Richard Hill	701 Fifth Avenue, Ste. 6600, Seattle 98104	206-930-7828 E-MAIL rich@mhseattle.com
TENANT NAME	**ADDRESS**	**CELL PHONE** **E-MAIL**

DECLARATION: I HEREBY STATE THAT I AM THE OWNER OF THE SUBJECT PROPERTY OR I HAVE BEEN AUTHORIZED BY THE OWNER(S) OF THE SUBJECT PROPERTY TO REPRESENT THIS APPLICATION, AND THAT THE INFORMATION FURNISHED BY ME IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

SIGNATURE _____ DATE 9/29/17

PROPOSED APPLICATION(S) AND CLEAR DESCRIPTION OF PROPOSAL (PLEASE USE ADDITIONAL PAPER IF NEEDED):

See Attched Exhibit B

ATTACH RESPONSE TO DECISION CRITERIA IF APPLICABLE

CHECK TYPE OF LAND USE APPROVAL REQUESTED:

APPEALS
- ☐ Building (+cost of file preparation)
- ☐ Land use (+cost of verbatim transcript)
- ☐ Code Interpretation

CRITICAL AREAS
- ☐ Determination
- ☐ Reasonable Use Exception

DESIGN REVIEW
- ☐ Administrative Review
- ☐ Design Review – **Major**
- ☐ Design Review – **Minor**

WIRELESS COMMUNICATIONS FACILITIES
- ☐ Wireless Communications Facilities-6409 Exemption
- ☐ New Wireless Communications Facility

DEVIATIONS
- ☐ Changes to Antenna requirements
- ☐ Changes to Open Space
- ☐ Fence Height
- ☐ Critical Areas Setback

DEVIATIONS Continued
- ☐ Impervious Surface (5% Lot overage)
- ☐ Shoreline
- ☐ Wet Season Construction Moratorium

ENVIRONMENTAL REVIEW (SEPA)
- ☐ Checklist: Single Family Residential Use
- ☐ Checklist: Non-Single Family Residential Use
- ☐ Environmental Impact Statement

SHORELINE MANAGEMENT
- ☐ Exemption
- ☐ Semi-Private Recreation Tract (modification)
- ☐ Semi-Private Recreation Tract (new)
- ☐ Substantial Dev. Permit

SUBDIVISION LONG PLAT
- ☐ Long Plat
- ☐ Subdivision Alteration to Existing Plat
- ☐ Final Subdivision Review

SUBDIVISION SHORT PLAT
- ☐ Short Plat
- ☐ Deviation of Acreage Limitation

SUBDIVISION SHORT PLAT Continued
- ☐ Short Plat Amendment
- ☐ Final Short Plat Approval

VARIANCES (Plus Hearing Examiner Fee)
- ☐ Type 1**
- ☐ Type 2***

OTHER LAND USE
- ☐ Accessory Dwelling Unit
- ☐ Code Interpretation Request
- ■ Comprehensive Plan Amendment (CPA)
- ☐ Conditional Use (CUP)
- ☐ Lot Line Revision
- ☐ Lot Consolidation
- ☐ Noise Exception
- ■ Reclassification of Property (Rezoning)
- ☐ ROW Encroachment Agreement (*requires separate ROW Use Permit*
- ■ Zoning Code Text Amendment

***Includes all variances of any type or purpose in all zones other than single family residential zone: B,C-O,PBZ,MF-2,MF2L,MF-2L, MF-3,TC,P)*

****Includes all variances of any type or purpose in single family residential zone: R-8.4, R-9.6, R-12, R-15)*

DECISION CRITERIA SHEET

Describe the requested change to the current Mercer Island Comprehensive Plan. If possible, identify (by section: element, policy or goal) the existing provisions of the Code, which would be changed or identify (by section: element, policy or goal) where the proposed amendment would be located within the existing Comprehensive Plan. The decision criteria pursuant to ULDC 19.15.020(G) 1. listed below shall be addressed for any proposed Comprehensive Plan amendment. *Your response does not have to be limited to the space provided below and can be provided in a separate written response.*

a. There exists obvious technical error in the information contained in the comprehensive plan;

See Attachment B

b. The amendment is consistent with the Growth Management Act, the county-wide planning policies, and the other provisions of the comprehensive plan and city policies;

See Attachment B

c. The amendment addresses changing circumstances of the city as a whole;

See Attachment B

d. If the amendment is directed at a specific property, the following additional findings shall be determined:

i. The amendment is compatible with the adjacent land use and development pattern;

See Attachment B

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

See Attachment B

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

See Attachment B

EXHIBIT A

3795 and 3801 E. Mercer Way

Tax Parcel Numbers: 265550-137, 265550-0115, 265550-167-02

Abbreviated Legal Description:

Ptn Lt 17, Blk 1, Fruitland Acres

3700 E. Mercer Way

Tax Parcel Numbers: 2107000010, 1515600010

Abbreviated Legal Description:

Addition Rec. In Vol. 75 of Plats, Page 24, & Lots 1 Thru 7, Channel Crest Recorded in Vol. 72 of Plats, Page 63, Together with that portion of tract A, Channel Crest, Vol. 72, Page 63, all in King County.

EXHIBIT B

APPLICATION FOR COMPREHENSIVE PLAN AMENDMENT

Proposed Application and Clear Description of Proposal:

This proposal affects three contiguous properties on Mercer Island located at 3801 E. Mercer Way (currently occupied by Stroum Jewish Community Center), 3700 E. Mercer Way (currently occupied by Herzl-Ner Tamid), and 3795 E. Mercer Way (currently occupied by French American School). The three properties together comprise approximately 18 acres.

The owners of the properties are interested in the possibility of working together to develop a comprehensive master plan to coordinate future development and improvement of the properties for continued private community facilities uses. The properties are currently designated on the Comprehensive Plan, and zoned, R-8.4, R-9.6, B and C-O. All three properties are proximate to the E. Mercer Way intersection with I-90. See Exhibit C, Vicinity Map and Existing Site Plan.

There is currently no private community facilities category in the City's Comprehensive Plan or Zoning Code. The applicants propose an Amendment to the City's Comprehensive Plan and Zoning Code to create a new Private Community Facilities designation that will enable the applicants to work with each other and with the City to develop a master plan for phased development of existing and future private community facilities on the properties, encompassing private school, religious institution, and non-profit community and recreational facilities. The applicants propose that these Plan and Zoning changes would accommodate flexible design and dimensional standards to encourage superior site and building design outcomes.

(a) How is the proposed amendment consistent with the Growth Management Act, the county-wide planning policies, and the other provisions of the Comprehensive Plan and City policies?

The proposed amendment is consistent with the Growth Management Act, RCW 36.70A, because it will facilitate development of private community facilities, including community centers, recreational facilities, schools and educational uses, serving Mercer Island urban residents within the urban area. Allowing comprehensive master planning of the properties will facilitate the efficient use of land. The proposed amendments are consistent with the county-wide planning policies for the same reasons.

The proposed amendments will further encourage and implement the City's Comprehensive Plan, in particular Land Use Goal 17.4, which recognizes that "social and recreation clubs, schools and religious institutions are predominantly located in single family residential areas of the Island," and that "development regulation should reflect the desire to retain valuable and healthy social, recreational, educational, and religious organizations as community assets which are essential for the mental, physical and spiritual health of Mercer Island."

(b) Is there an obvious technical error in the information contained in the Comprehensive Plan, or does the amendment address changing circumstances of the City as a whole?

The existing Comprehensive Plan does not have a designation for Private Community Facilities. Adding such a designation and applying it to the properties owned by the applicants

will correct a deficiency in the current Comprehensive Plan and assist in the implementation of Land Use Goal 17.4.

(c) Is the amendment directed at a specific property? If so, address the following questions:

1. Is the amendment compatible with the adjacent land use and development pattern?

   Yes. The properties are adjacent to I-90 to the north, and residential zoned properties to the south, east and west. The uses proposed have been present on the site for many years and are recognized in the Comprehensive Plan as consistent with being located in single family residential areas of the Island. Land Use Goal 17.4

2. Is the property suitable for development in conformance with the standards under the potential zoning?

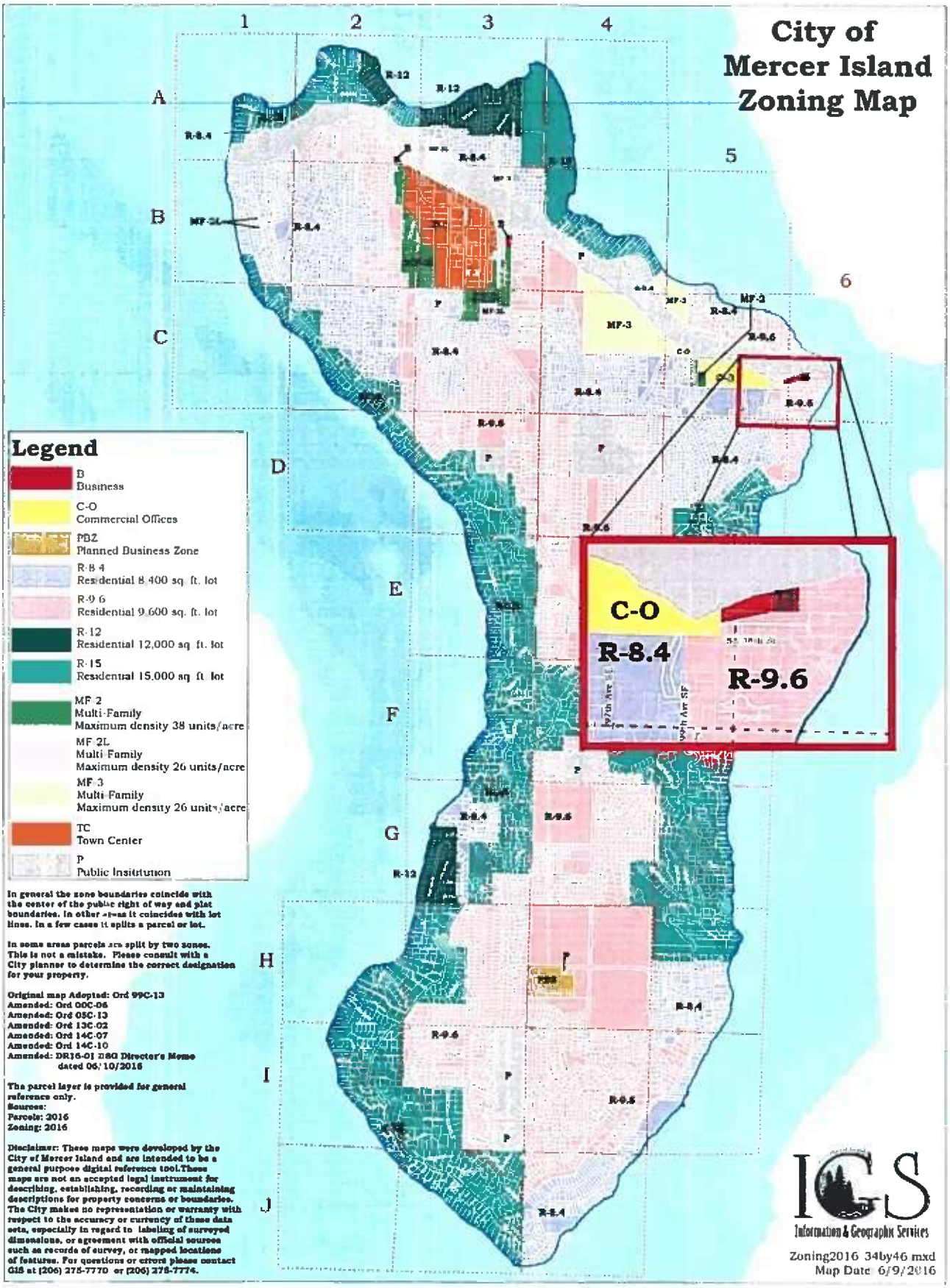
   Yes. The properties are already developed for private community facilities. The amendments, if adopted, will ensure superior site planning and phased development with standards adopted to address pertinent City policies and priorities.

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

   The amendment will benefit the community as a whole and the public welfare by facilitating the renovation and improvement of site planning for the properties to serve as resources for the recreational, educational, and spiritual needs of Mercer Island.

EXHIBIT C

City of Mercer Island Zoning Map



Legend

- B — Business
- C-O — Commercial Offices
- PBZ — Planned Business Zone
- R-8.4 — Residential 8,400 sq. ft. lot
- R-9.6 — Residential 9,600 sq. ft. lot
- R-12 — Residential 12,000 sq. ft. lot
- R-15 — Residential 15,000 sq. ft. lot
- MF-2 — Multi-Family, Maximum density 38 units/acre
- MF-2L — Multi-Family, Maximum density 26 units/acre
- MF-3 — Multi-Family, Maximum density 26 units/acre
- TC — Town Center
- P — Public Institution

In general the zone boundaries coincide with the center of the public right of way and plat boundaries. In other areas it coincides with lot lines. In a few cases it splits a parcel or lot.

In some areas parcels are split by two zones. This is not a mistake. Please consult with a City planner to determine the correct designation for your property.

Original map Adopted: Ord 99C-13
Amended: Ord 00C-06
Amended: Ord 05C-13
Amended: Ord 13C-02
Amended: Ord 14C-07
Amended: Ord 14C-10
Amended: DR16-01 ISG Director's Memo dated 06/10/2016

The parcel layer is provided for general reference only.
Sources:
Parcels: 2016
Zoning: 2016

Disclaimer: These maps were developed by the City of Mercer Island and are intended to be a general purpose digital reference tool. These maps are not an accepted legal instrument for describing, establishing, recording or maintaining descriptions for property concerns or boundaries. The City makes no representation or warranty with respect to the accuracy or currency of these data sets, especially in regard to labeling of surveyed dimensions, or agreement with official sources such as records of survey, or mapped locations of features. For questions or errors please contact GIS at (206) 275-7770 or (206) 275-7774.

IGS Information & Geographic Services

Zoning2016 34by46.mxd
Map Date: 6/9/2016

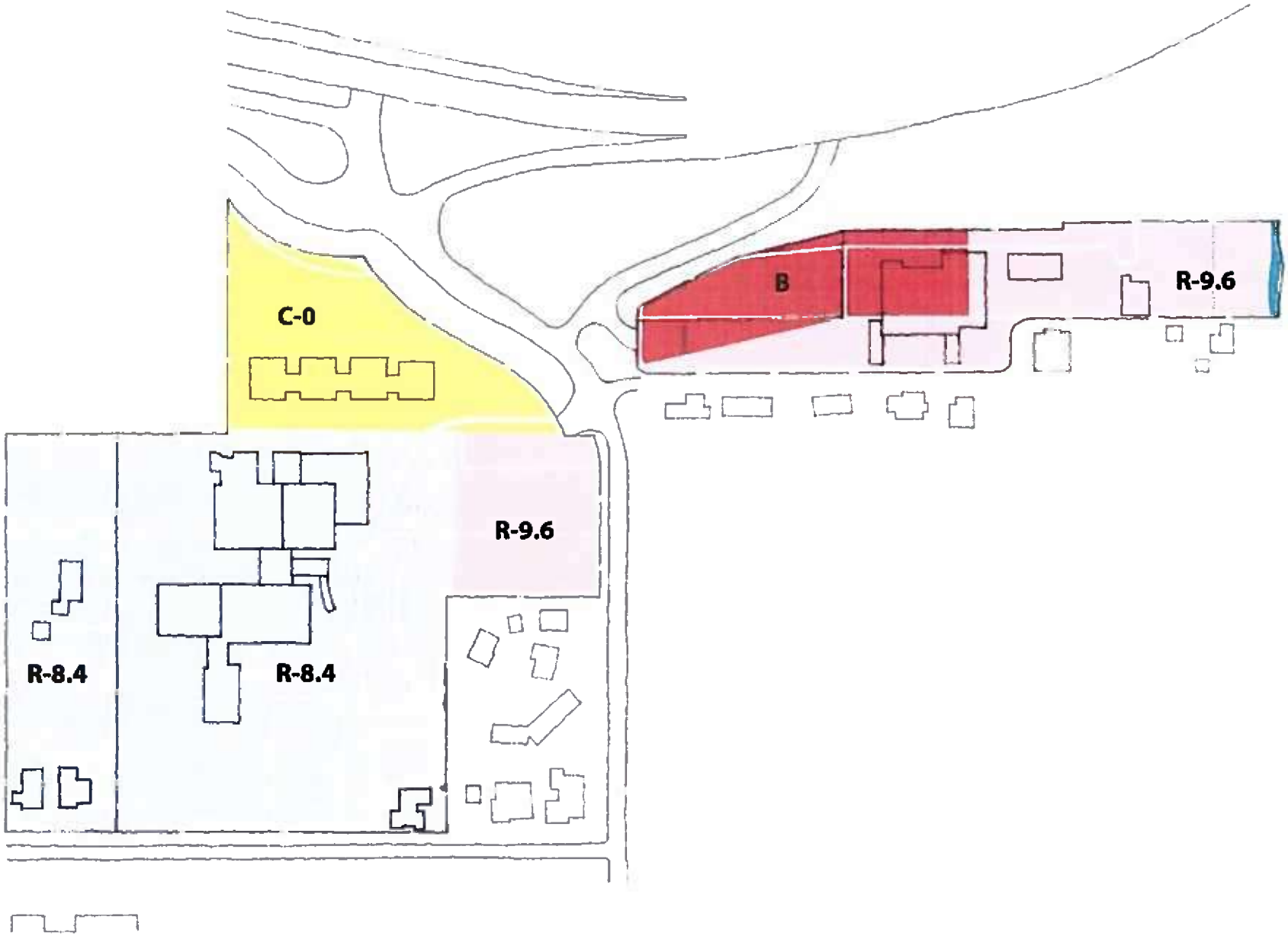

C-0
B
R-9.6
R-9.6
R-8.4
R-8.4

EXHIBIT 15

PLANNING COMMISSION MEETING MINUTES OCTOBER 18, 2017

CALL TO ORDER:
The Planning Commission was called to order by Chair Dan Hubbell at 6:06 PM in the Council Chambers at 9611 SE 36th Street, Mercer Island, Washington.

ROLL CALL:
Chair Dan Hubbell, Vice Chair Tiffin Goodman, Commissioner Ted Weinberg, Jennifer Mechem, Lucia Pirzio-Biroli, Bryan Cairns and Carolyn Boatsman were present.

City staff was represented by Evan Maxim, Planning Manager, Lauren Anderson, Assistant Planner, Bio Park, Assistant City Attorney, Andrea Larson, Administrative Assistant, and Kelsey Salvo, Administrative Assistant.

Commissioner Carolyn Boatsman moved to approve the September 27, 2017 minutes. Commissioner Bryan Cairns seconded move to approve minutes. 7-0 minutes passed.

Commissioner Jennifer Mechem motioned to approve the October 4, 2017 minutes. Commissioner Carolyn Boatsman seconded to approve the minutes. 7-0 minutes passed.

APPEARANCES:
No public appearances.

REGULAR BUSINESS:
Agenda Item #1: ZTR16-002 MICA Zoning Text Amendment Public Hearing- Cancelled
Evan Maxim, Planning Manager, discussed the pause for the exploration of alternative sites. Rescheduling will likely happen in December 2017 or January 2018.

Agenda Item #2: 2018 Comprehensive Plan Amendments – Preliminary Docket
Evan Maxim, Planning Manager, reviewed the history of the Comprehensive Plan Amendment review process, docket criteria, provided an overview of the amendments on the docket, and fielded questions from the Planning Commission. Public Notice was August 16, 2017 and the deadline for submitting requests was October 1, 2017. November 6, 2017 is the scheduled City Council review. The docket items includes the following:

1. Update the Land Use Element / Land Use Map for clarity and accuracy of map designations
2. Update the Capital Facilities Plan with the budget
3. Update to address traffic modeling, LOS, non-motorized (pedestrian and bike), and I-90 changes
4. Add policy support for participation in the King County Public Benefit Rating System
5. Develop goals and policies supporting the requirements of the City National Pollution Discharge Elimination System (NPDES) permit and supporting low impact development
6. Develop goals and policies supporting the cultural arts
7. Critical areas ordinance update – placeholder
8. Create a new land use map designation "Private Community Facilities" or similar, for the properties currently occupied by the JCC, French American School, and Herzl-Ner Tamid

(approximately 18 acres). This amendment to be accompanied by a zoning map and zoning code amendment.

Referring to docket item number 8, the applicant, Richard Hill, discussed why the proposal was requested to be added to the docket (6:41pm). Richard then introduced Ed Weinstein, the architect and planner, who then presented the proposed phasing of the project.

Following the applicant's presentation, the Commission then asked for clarification on certain items. Ed Weinstein, Richard Hill, and Evan Maxim responded to the Commission's questions.

Three representatives of the three stakeholders were present. Dave Cutler, board of trustees for the French American School, Michelle Glasser, Co-President at Herzl Ner Tamid, and Amy Lavin the Chief Executive Officer of the SJCC spoke to recommend the Planning Commission move to put item number 8 on the docket.

Commissioner Bryan Cairns motioned to recommend approval of the preliminary docket of Comprehensive Plan Amendments to the City Council for creation of a final docket of Comprehensive Plan Amendments, for review in 2018. Seconded by Commissioner Lucia Pirzio-Biroli.

Chair Hubbell opened for discussion. Commissioner Lucia Pirzio-Biroli recommended considering to include housing for a care taker for example for item 8. Vice ChairTiffin Goodman recommended to add disaster/hazard planning to the docket. Commissioner Jennifer Mechem agreed with Vice Chair Tiffin Goodman, and also recommended to consider smaller housing and cottage housing into the docket. Commissioner Jennifer Mechem recommended to add accessibility into the Comprehensive Plan.

Commissioner Lucia Pirzio-Biroli motioned to add to the docket a 9th item, to develop goals and policies for disaster planning and recovery. Seconded by Vice Chair Tiffin Goodman. Amendment passes 7-0.

Commissioner Jennifer Mechem motioned to add item 10 to the docket to review Comprehensive Plan to identify and recommend policy to promote accessibility, universal design, and age friendly planning throughout the City. Seconded by Commissioner Carolyn Boatsman. Commissioner Lucia recommended to add this item to the purpose section as a blanket statement for the entire Comprehensive Plan. Amendment passes 7-0.

Chair Daniel Hubbell motioned to recommend approval of all 10 items in the preliminary docket of Comprehensive Plan Amendments to the City Council for creation of a final docket of Comprehensive Plan Amendments, for review in 2018. The recommended docket was passed 7-0.

OTHER BUSINESS:

Discussed the City Council's response to the Planning Commission's recommendation for Cohen's proposed amendment.

NEXT MEETING:

The next regularly scheduled Planning Commission meeting will be November 1, 2017 at 6:00PM at Mercer Island City Hall. The next meeting currently has no items so far on the agenda, and most likely will be cancelled. Chair Dan Hubbell will not be present on November 1, 2017. Next meeting will be on November 15, 2017.

ADJOURNMENT: Chair Dan Hubbell adjourned the meeting at 7:46 pm.

EXHIBIT 16

CITY COUNCIL MINUTES
REGULAR MEETING
OCTOBER 2, 2018

CALL TO ORDER & ROLL CALL

Mayor Debbie Bertlin called the meeting to order at 5:00 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Debbie Bertlin, Deputy Mayor Salim Nice, and Councilmembers Bruce Bassett (5:05 pm), Wendy Weiker (5:15 pm), David Wisenteiner, and Benson Wong were present.

Position #4 is vacant.

AGENDA APPROVAL

Mayor Bertlin amended the agenda explain that King County Councilmember Claudia Balducci would not be available to present to the Council under Special Business.

It was moved by Wong; seconded by Wisenteiner to:
Approve the agenda as amended.
Passed 4-0
FOR: 4 (Bertlin, Nice, Wisenteiner, and Wong)
ABSENT: 2 (Bassett and Weiker)
VACANT: 1 (Position 4)

EXECUTIVE SESSION

Executive Session to discuss with legal counsel pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 60 minutes.

At 5:02 pm, Mayor Bertlin convened the Executive Session to discuss with legal counsel pending or potential litigation pursuant to RCW 42.30.110(1)(i) for approximately 60 minutes.

At 6:05 pm, Mayor Bertlin adjourned the Executive Session and recessed the meeting for five minutes.

STUDY SESSION

AB 5481: Transportation Concurrency Revised Ordinance

Mayor Bertlin started the Study Session at 6:11 pm.

Interim Development Services Director Evan Maxim provided a brief overview of concurrency, summarized the first reading and Council's direction at its October 3, 2017 meeting, and the Transportation Concurrency revised ordinance. He further explained that impact fees are assessed per vehicle trip and that concurrency mitigation is only required when an intersection fails to meet level of service (LOS) post development.

The revised ordinance does the following:

- Requires a concurrency certificate on all development generating a net new vehicle trip;
- Allows for denial of a concurrency review, and describes remedies available to an applicant; and
- Creates a basis for timely updates to the transportation model and associated LOS.

The Concurrency Ordinance relies on the Transportation LOS and will take effect on December 3, 2018.

Michael Lapham, consultant with KPG, responded to Council questions regarding planned improvement projects and the Six-Year Transportation Improvement Plan.

The Council discussed proposed amendments to the ordinance as suggested by Councilmember Wong.

The Study Session concluded and Mayor Bertlin recessed the meeting until 7:00 pm.

SPECIAL BUSINESS

AB 5484: Domestic Violence Action Month Proclamation

YFS Senior Programs Manager and Clinical Supervisor Derek Franklin introduced Ward Urion, Social Change Manager with Lifewire to join him and Mayor Bertlin and receive the proclamation.

Mayor Bertlin proclaimed October 2018 as Domestic Violence Action Month and called upon residents of Mercer Island to speak out against domestic violence and support efforts to prevent and end domestic abuse and the indifference that sustains it.

CITY MANAGER REPORT

City Manager Julie Underwood reported on the following items:

- **Aubrey Davis Park Master Plan** process going on now through the fall of 2019
- **Coffee with a Cop**, Wednesday, October 3, 4 pm to 6 pm
- **Mercer Island's Proposition 1 Pro & Con Committee Forums**:
    - Monthly Chamber Luncheon, Thursday, October 4, 12 pm to 1:30 pm
    - Mercer Island Beach Club, Tuesday, October 9, 7 pm to 8 pm
- Final **Farmers Market** of the Season, Sunday, October 7, 10 am to 3 pm, Mercerdale Park
- **MICA's Community Visioning Report Session**, Monday, October 8, 7 pm to 8:30 pm, Mercer Island Boys & Girls Club
- Final **Solarize 2.0 Meeting**, Tuesday, October 9, 6 pm to 7:30 pm, Mercer Island Congregational Church
- Proposed **"Community Facilities" Listening Session**, Thursday, October 11, 6 pm, Mercer Island Community Center
- **Birding Trip**, Hawks Fall Color, Back Roads, Thursday, October 11, 6:30 am to 6:00 pm, depart from Community Center
- **Arbor Day & Tree Planting Celebration**, Saturday, October 20, 9 am to 2 pm, Luther Burbank Park
- **ARCH** (A Regional Coalition of Housing) Seeking Volunteers, visit www.archhousing.org for more information
- **Commuter Parking & Town Center Project Open House**, Monday, October 22, 6 pm to 9 pm, Community Center Mercer Room
- YFS: Celebrating 30 Years, Sharing 30 Stories, February 13, 2019, **MIYFS Foundation Annual Breakfast**
- Congratulations **Roanoke Inn**, 2018 King County Executive's John D. Spellman Excellence in Historic Preservation Award

APPEARANCES

Judy Ross, Bellevue, spoke to the Council regarding the changes she has seen to Mercer Island over the past 50 years.

The following people spoke in opposition to Comprehensive Plan Amendment 8 (Private Community Facilities):

- Julie Garwood, Mercer Island
- Ryan Rahlfs, Mercer Island
- John Hall, Mercer Island

Rene Stratton, Mercer Island, spoke in support of Comprehensive Plan Amendment 6 (Arts and Culture).

The following people spoke in favor of Comprehensive Plan Amendment 8 (Private Community Facilities):

- Joel Mezistrano, Mercer Island
- Carin Jacobson, Mercer Island
- Eric Thuau, Mercer Island
- Tristan Vingtdeux, Mercer Island, French/American School Alum
- Ben Orillon, Mercer Island, French/American School Alum
- Liz Friedman, Stroum Jewish Community Center Board Chair
- Laura Mousseau, Bellevue, French/American School Administrator
- Amy Lavin, Mercer Island, Stroum Jewish Community Center CEO

Cheryl D'Ambrosio, Mercer Island, apologized for not being available to meet with Mayor Bertlin and City Manager Underwood. She expressed concern regarding traffic safety by her home.

Daniel Thompson, Mercer Island, provided his opinions on the Comprehensive Plan amendments.

Mark Coen, Mercer Island, spoke in opposition to Comprehensive Plan Amendments 1 (Land Use Designations), 6 (Arts and Culture), 8 (Private Community Facilities), 10 (Universal Design, Disability Access, and Age-Friendly Planning), 11 (Green Building Introduction), 13 (Town Center Height & Public Amenities), 14 (PUD / Pilot Program), and 15 (Commuter Parking in Town Center) as they are inconsistent with the law, injurious to his property, and prejudicial towards him.

Ira Appleman, Mercer Island, spoke in opposition Comprehensive Plan Amendments 6 (Arts and Culture) and 8 (Private Community Facilities).

CONSENT AGENDA

Payables: $1,019,581.67 (09/13/2018) & $1,213,880.17 (09/20/2018)

Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $801,612.14 (09/28/18)

Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes: July 17, 2018 Regular Meeting

Recommendation: Adopt the July 17, 2018 Regular Meeting Minutes as written.

It was moved by Wisenteiner; seconded by Wong to:
Approve the Consent Calendar and the recommendations contained therein.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

REGULAR BUSINESS

AB 5482: Code Amendment Regarding Transportation Concurrency (2nd Reading)

It was moved by Wong; seconded by Nice to:
Adopt Ordinance No. 18C-12 establishing a new Chapter 19.20 and amending Chapters 19.15 and 19.16 of the Mercer Island City Code to provide for a Transportation Concurrency Management System as required by the Growth Management Act.

It was moved by Wong; seconded by Wisenteiner to:
Amend the previous motion to:
Amend the following sections of the ordinance as follows:

1. **MICC 19.20.050(A): change "subsection D" to "subsection C"**
2. **MICC 19.20.050(B): add to (B)(1): "A project shall be deemed abandoned by the City, if an applicant does not proceed under subsection 2 or 3 below."**
3. **MICC 19.20.050(C)(1)(a): change "may" to "shall"**
4. **MICC 19.20.050(C)(2): change "may" to "shall"**
5. **MICC 19.20.050(C)(2): (a): add "schedule that is satisfactory to the code official." at the end and (b): add "performance that is satisfactory to the code official." at the end.**
6. **MICC 19.20.070(B): add "to" between "impact" and "other"**
7. **MICC 19.20.080(B): change "shall" to "should" and delete ", provided funding for the update is available"**

Motion to Amend Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

Main Motion Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

AB 5483: 2018 Comprehensive Plan Amendments and Accompanying Zoning Code Amendments (1st Reading)

Interim DSG Director Evan Maxim presented the Planning Commission's recommendation on fifteen amendments to the Comprehensive Plan. Michael Lapham from KPG reviewed the proposed amendments to the Transportation Element. Planning Commissioner Chair Daniel Hubbel assisted in answering questions from the Council.

The Council discussed the proposed Amendments in the following order:

- Amendment 3: Transportation Element Update
- Amendment 8: Community Facilities (SJCC / FASPS / Herzl-Ner Tamid)
- Amendment 6: Arts & Culture
- Amendment 15: Tully's / Parcel 12 Re-Designation and Zoning
- Amendment 7: Critical Areas Update
- Amendment 10: Universal Design
- Amendment 12: STAR Analysis Framework
- Amendment 14: Pilot Program / PUD
- Amendment 1: Land Use Map Clarification
- Amendment 2: CIP Cross Reference
- Amendment 4: Private Conservation / PBRS
- Amendment 5: NPDES Policy Support
- Amendment 9: Disaster Planning
- Amendment 11: Green Building

In addition to minor edits to the Amendments, the Council directed staff to make the following major edits:

- **Amendment 3: Transportation Element Update**
  The Council discussed the rumble strips recommendation. Staff noted that the Planning Commission's discussion was focused on the traffic pattern changes, number of vehicles traveling on the roadway, and felt it warranted more discussion. Mayor Bertlin noted that this discussion and any changes should be part of the Transportation Improvement Program review and an updated Bicycle and Facilities Plan. Council directed staff to remove references to rumble strips.

- **Amendment 8: Community Facilities (SJCC / FASPS / Herzl-Ner Tamid)**
  Following staff's presentation on the proposed Community Facilities zoning designation the Council asked questions about who could ask for this designation and expressed desire to have a collaborative process. Council directed staff to delete "private" from the proposed zoning designation.

- **Amendment 6: Arts and Culture**
  The Council discussed incorporating public arts in to capital projects versus using the 1% for the Arts Fund and directed staff to propose language for second reading.

Director Maxim noted that on October 11, 2018 the City would be hosting a community meeting regarding Amendment 8 – Community Facilities and that all are welcome to attend. He stated that the second reading of the amendments would be on October 16, 2018. He anticipates Department of Commerce approval on November 11, 2018, allowing for Council's third reading and adoption of the amendments on November 20, 2018.

It was moved by Basset; seconded by Weiker to:
Set Ordinance Nos.18-13 and 18C-14 for second reading on October 16, 2018.
Passed 6-0
FOR: (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

AB 5487: City Council Vacancy Process and Timeline for Position #4

Mayor Bertlin reviewed the proposed process and timeline for appointment to vacant Position #4 on the Mercer Island City Council as follows:

The City will advertise the vacancy and replacement process in the Mercer Island Reporter, on the City's website, the City's social media accounts, and to the Council's agenda email list. The proposed timeline for filling the Council vacancy is as follows:

- Monday, October 8, 2018: Advertising begins and applications available
- Wednesday, November 21, 2018: Applications due to City Clerk by 5:00 pm
- Thursday, December 6, 2018 (Special Meeting, 6:00 pm): Candidate speeches/interviews; Council deliberation in Executive Session to follow
- Tuesday, December 11, 2018 (Special Meeting, 6:00 pm): City Council vote prior to Joint Meeting with MISD)
- Tuesday, December 18, 2018: Swearing in of new Councilmember (Regular Meeting)*

*The selected candidate will be expected to stay and participate in this meeting.

It was moved by Bassett; seconded by Nice to:
Approve the proposed process and timeline for appointment to vacant Position #4 on the Mercer Island City Council as outlined in AB 5487 and direct staff to begin advertising.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
VACANT: 1 (Position 4)

OTHER BUSINESS

Councilmember Absences
Councilmember Bassett and Councilmember Wisenteiner will be absent October 16.

Planning Schedule
There were no changes.

Board Appointments
There were no appointments.

Councilmember Reports
Councilmember Wong thanked Evan Maxim for his work and presentation on the Comprehensive Plan.
Councilmember Bassett spoke about the recent K4C meeting.
Councilmember Wisenteiner gave a shout out to MI Junior Football team who beat Bellevue, the first team to do that in 14 years.

ADJOURNMENT

The Regular Meeting adjourned at 11:39 pm.

_____
Debbie Bertlin, Mayor

Attest:

_____
Deborah A. Estrada, City Clerk

EXHIBIT 17

CITY COUNCIL MINUTES
REGULAR MEETING
NOVEMBER 20, 2018

CALL TO ORDER & ROLL CALL

Mayor Debbie Bertlin called the meeting to order at 6:00 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Debbie Bertlin, Deputy Mayor Salim Nice, and Councilmembers Bruce Bassett, Wendy Weiker (6:39 pm), David Wisenteiner, and Benson Wong were present.

AGENDA APPROVAL

It was moved by Wong; seconded by Wisenteiner to:
Approve the agenda as presented.
Passed 5-0
FOR: 5 (Bertlin, Nice, Bassett, Wisenteiner, and Wong)
ABSENT: 1 (Weiker)
VACANT: 1 (Position 4)

EXECUTIVE SESSION

Executive Session to discuss with legal counsel pending or potential litigation pursuant to RCW 42.30.110(1)(i) for approximately 60 minutes.

At 6:01 pm, Mayor Bertlin convened the Executive Session to discuss with legal counsel pending or potential litigation pursuant to RCW 42.30.110(1)(i) for 60 minutes.

At 7:04 pm, Mayor Bertlin adjourned the Executive Session.

CITY MANAGER REPORT

City Manager Julie Underwood reported on the following items:

- Mercer Island's Neighbors In Motion arranged for the City to collect 6 free bike racks to repurpose around the Island.
- A member of the Parks staff remodeled the play area at the Community Center.
- Volunteer for a city related program like Neighborhood Watch, Thrift Shop, Meals on Wheels, and more.
- Council vacancy deadline is tomorrow -applications must be received by 5:00pm, November 21.
- City facilities closed for Thanksgiving – Thursday and Friday, November 22–23.
- Community Dance – Saturday, November 24, 7 – 11pm.
- Reception Honoring Rep. Judy Clibborn – Monday, November 26, 5:30-6:30pm.
- Ribbon Cutting Ceremony celebrating successful completion of the SE 40th Street Corridor Project – December 6, at 10am.
- Tree Lighting & Firehouse Munch – Friday, December 7 at 6:30pm.
- Parents Night Out Holiday Party with Santa – Saturday, December 8, 5-10pm.

APPEARANCES

The following owner and residents for/of 7800 Plaza condominiums spoke against changing the Comprehensive Plan, rezoning Parcel 12, and the Tully's project:

- Julie Green, 7800 Plaza
- Gabe Goldberg, 7800 Plaza, supports MICA, parking, but opposed public park

- Willie Mullins, 7800 Plaza
- Jim Schwab, 7800 SE 27th Street, owner

The following people spoke in opposition to the proposed Comp Plan Amendments:

- Mark Hall, 6018 E. Mercer Way, specifically with regards to the proposed "private facilities zone."
- Matt Goldbach, 9580 SE 40th Street, specifically with regards to Amendments 8 and 15.
- Peter Struck, 9130 SE 54th Street, spoke in opposition to Amendments 8 and 15.
- Cheryl D'Ambrosio, 3712 East Mercer Way, specifically with regards to zoning at JCC.
- Mark Coen, 73rd Ave SE, he believes the proposed Comp Plan Amendments violate the Growth Management Act.
- Ryan Rahlfs, 970 SE 40th, specifically with regards to Amendment 8 and encouraged Council to delay a vote on the Comp Plan.

The following people spoke in favor of retaining funding for school counselors:

- Erin & Elliot Vivion, 2278 72nd Ave SE
- Bharat Shyam, 8405 SE 34th Place, he also thanked Council for the work on the Aubrey Davis Park and the MICA project.
- Olivia Stovall, MISD student
- Noah Bernside, MISD student
- Kelly Goodejohn, 4224 94th Ave SE
- Heather Cartwright, 8204 SE 62nd Street
- Sarah Smith, Mercer Island
- Nancy S. 8320 SE 34th Street
- Gwen Loosmore, 6125 79th Ave SE
- Kathy Muffet McDonald, Mercer Island
- Dina Holan, 6121 85th Place SE
- Ralph Jorgenson, Mercer Island
- Diane Barrett Tien, 6110 86th Ave SE

Alec Sidles, Attorney for Bricklin Newman, representing 7800 Plaza and Concerned Neighbors for the Preservation of the Community spoke in opposition to the Comprehensive Plan amendments.

Amy Lavin, 7835 SE 22nd Place, spoke in support of the Comprehensive Plan amendments and its positive impacts on the JCC.

Gary Robinson, 6026 Mercer Way, encouraged Council and the City Manager to focus on bringing people together on the Island. He indicated that the Levy Lid Lift was not about the community, but rather about the Council and the City Manager.

Nicole Kelly, 9821 SE 40th Street, spoke in opposition to Amendment 8 and the adoption of the Comprehensive Plan. She also spoke in support of school counselors and encouraged Council to consider their vote.

Ira Appleman, Mercer Island, reported that Proposition 1 was the first levy lost in 20 years. He went on to outline levy statistics and survey data and encouraged Council to find efficiencies.

Eric Thuau, Head of the French American School, was impressed by the community engagement and applauded the Planning Commission for recommending Amendment 8.

Laura Mousseau, Board Chair at the French American School, urged Council to support Amendment 8.

There being no additional public comments, Mayor Bertlin closed Appearances.

CONSENT CALENDAR

Councilmember Wisenteiner asked to remove AB5501, Comprehensive Plan amendment from the Consent Calendar.

Payables: $594,684.53 (11/08/2018) & $58,803.52 (11/15/2018)
Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $799,221.92 (11/09/2018)
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes: June 19, 2018 Regular Meeting and November 5, 2018 Special Meeting
Recommendation: Adopt the June 19, 2018 Regular Meeting and November 5, 2018 Special Meeting minutes as written.

It was moved by Bassett; seconded by Weiker to:
Approve the Consent Calendar, as amended, and the recommendations contained therein.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, and Wong)
VACANT: 1 (Position 4)

AB 5501: 2018 Comprehensive Plan Amendments (3rd Reading & Adoption)

Councilmember Wisenteiner made a motion to remove Amendment 8 from the Comprehensive Plan. The motion failed for lack of a second.

It was moved by Bassett; seconded by Wong to:
Adopt Ordinance No. 18-13 with Attachments A and B amending the Comprehensive Plan and Land Use Map.
Passed 5-1
FOR: 5 (Bassett, Bertlin, Nice, Weiker, and Wong)
AGAINST: 1 (Wisenteiner)
VACANT: 1 (Position 4)

It was moved by Bassett; seconded by Wong to:
Adopt Ordinance No. 18C-14 with Attachment A amending chapter 19.11 MICC and the Mercer Island Zoning Map.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)
VACANT: 1 (Position 4)

Mayor Bertlin recessed the meeting at 8:45 pm. The meeting resumed at 8:55 pm.

PUBLIC HEARING

Finance Director/Assistant City Manager Chip Corder briefly introduced AB 5500, 2019-2020 Proposed Budget.

Mayor Bertlin opened the final public hearing for the 2019-2020 Proposed Budget at 8:49 pm.

Meg Lippert, 4052 94th Avenue SE, stated that she was inspired by what she had heard and spoke in support of funding the school counselors.

Tim O'Connell, Utility Board Chair, explained that the costs reflected in the proposed changes are costs that the City is incurring. He noted that the City's sewage is treated by King County and that the County is increasing its rates by 2.5%. The recommendation to increase the rates was a unanimous recommendation from the Utility Board.

Peter Struck, 9130 SE 54th Street, reminded Council of the number of residents that voted no on the levy and encouraged Council to reconsider the fiscal sustainability plan and minimize non-essential employees.

Mike Cero, Mercer Island, reiterated the number of residents that voted no on the levy and encouraged the Council to reduce budget expenditures by 2.5%. He also distributed a 2017 Salary Data report to Council for

consideration.

Jared Lundell, 7474 85th Place SE, explained that he voted yes on the Levy and supports YFS; however, he struggles to understand how the City comes out of this situation without making cuts to YFS.

Janelle Honeycut, 8636 SE 75th Place, encouraged the Council to maintain the YFS counselors.

Erin Gurney, 4550 E Mercer Way, spoke in support of retaining funding for school counselors.

Ira Appleman, Mercer Island, encouraged Council to focus more on tracking staff time and encouraged the Council to increase the City Attorney's budget.

Johan Valentin, 4346 E. Mercer Way, spoke in support of funding school counselors.

There being no additional public comments, Mayor Bertlin closed the public hearing at 9:19 pm.

AB 5500: 2019-2020 Proposed Budget: Finalize Changes and Approve 2019 Resolutions and Property Tax Ordinances

City Attorney Kari Sand reported on the status of the Prevailing Wage Issue and the advisory meeting held on November 9th, explaining that to date, Labor and Industries had not responded to cities regarding the previaling wage issue.

Parks and Recreation Director Jessi Bon noted that the City will budget for the increase.

Parks and Recreation Director Bon reported that the Luther Burbank Shoreline Improvements mistakenly showed Phase 3 (Swim Beach) as funded. The budget was corrected to include $55,000 to address that expense.

Information Services Director Mike Kaser responded to questions regarding the Network Communications Infrastructure.

Finance Director Chip Corder reported on the updated REET forecast explaining that the 2018-2024 REET forecast incorporated October 2018 receipts. As a result of the updated REET forecast, he noted that projected fund balances were updated to include a 44/55 split between the Street Fund and Capital Improvement Fund.

Mayor Bertlin explained that in order to amend the budget, Council would follow the same motion procedures as with other matters before Council. The process was outlined as follows:

- Specify the proposed budget amendment by motion. Prior to Council discussion, the motion to amend the budget would require a second.
- Each motion to amend the budget must include a recommended funding source – or offsetting expenditure reduction (budget cut) - and information regarding the timeline for implementation (when within the biennium).
- In order for motions to pass, support from 4 Councilmembers (a majority of the whole Council) would be required.

It was moved by Wisenteiner; seconded by Nice to:
Direct the City Manager to reduce deficit spending by an additional $1.2M which would leave $800K in deficit spending within the 2019-2020 biennium and that further reductions shall be based on Guiding Budget Reduction Principles which shall be developed, reviewed, and approved by the Council before the Second Quarter 2019 Financial Status Report and Budget Adjustments.
Passed 5-1
FOR: 5 (Bassett, Bertlin, Nice, Wisenteiner, and Wong)
AGAINST: 1 (Weiker)
VACANT: 1 (Position #4)

Following the direction from Council on the 2019-2020 Biennium Budget, Mayor Bertlin provided the following guidance to Council and staff:

- The City is at the beginning of defining a "new normal" given the failure of Proposition 1.
- There can be nothing sacred in terms of cuts and measures considered by the Council because the projected deficits in 2021-2022 are significantly greater.
- The Council is committed to providing a path forward for future Councils and beginning the process of transitioning to new lower levels of service. This path will not excuse the current Council from making difficult decisions now.
- The City will use the Financial Sustainability Plan, which will be kicked off on December 18, 2018, to guide the Council and staff in making difficult decisions regarding service levels in 2019-2020.

It was moved by Wong; seconded by Weiker to:
Raise the Utility Tax from 5.3% to 6.1% to fund school counselors for 2019-2020 biennium.
Failed 4-2
AGAINST: 4 (Bassett, Bertlin, Nice, and Wisenteiner)
FOR: 2 (Wong, Weiker)

It was moved by Wong; seconded by Weiker to:
Strike $55,000 from 2020 Organizational Assessment
FAILED 4-2
AGAINST: 4 (Bassett, Nice, Wisenteiner, Bertlin)
FOR: 2 (Wong, Weiker)
VACANT: 1 (Position #4)

COUNCIL DIRECTION – Council directed City Manager Underwood to meet with the Mercer Island School District Superintendent to discuss a return to an equitable (50-50) funding arrangement of school counselors.

It was moved by Weiker; seconded by Wong to:
Use $150 from contingency fund to support counselors.
Failed 4-2
AGAINST: 4 (Bassett, Bertlin, Nice, Wisenteiner)
FOR: 2 (Wong, Weiker)
VACANT: 1 (Position #4)

There being no further service reductions that Council wished to consider, Mayor Bertlin recessed the meeting at 10:38 pm.

Mayor Bertlin reconvened the meeting at 11:00 pm and Finance Director Chip Corder introduced the Capital Improvement Program (CIP) Discussion.

It was moved by Bassett; seconded by Nice to:
Adopt the Alternative Budget Proposal with 4% inflation only.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, Wong)
Vacant: 1 (Position #4)

It was moved by Bassett; seconded by Wong to:
Adopt the $145,000 Network Communications Infrastructure budget as proposed by staff.

It was moved by Nice; seconded by Wisenteiner to:
Amend the motion to remove the $21,000 for replacment of fiber between City Hall and Maintenance Building.
Motion to Amend failed 4-2
AGAINST: 4 (Basset, Bertlin, Weiker, and Wong)
FOR: 2 (Nice, Wisenteiner)
VACANT: 1 (Position #4)

It was moved by Nice; seconded by Wisenteiner to:
Remove $99K for conduit design and $10K for conduit across 77th Avenue overpass from the $145K Network Communications Infrastructure budget.

Motion to Amend failed 4-2
AGAINST: 4 (Basset, Bertlin, Wong, and Weiker)
FOR: 2 (Nice, Wisenteiner)
VACANT: 1 (Position #4)

Main Motion Passed 4-2
FOR: 4 (Bassett, Bertlin, Wong, and Weiker)
AGAINST: 2 (Wisenteiner and Nice)
VACANT: 1 (Position #4)

It was moved by Nice; seconded by Wong to:
Reduce the General Fund contribution to the YFS Fund (Thrift Shop Project) by $137,000 to support a police patrol officer position.
Passed 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, and Wong)
VACANT: 1 (Position #4)

It was moved by Wisenteiner; seconded by Bassett to:
1. **Approve Resolution No. 1553, which approves NORCOM's 2019 budget allocation to the City of Mercer Island.**
2. **Approve Resolution No. 1549, which establishes classifications of water users and a schedule of charges for water usage, a schedule of rates for fire service, a schedule of special service charges, meter and service installation charges, and connection charges effective January 1, 2019 and thereafter.**
3. **Approve Resolution No. 1550, which establishes rates and connection charges for sewerage disposal services provided by the City of Mercer Island effective January 1, 2019 and thereafter.**
4. **Approve Resolution No. 1551, which establishes the bi-monthly service charge for storm and surface water services provided by the City of Mercer Island effective January 1, 2019 and thereafter.**
5. **Approve Resolution No. 1552, which establishes the bi-monthly utility fee for the emergency medical and ambulance services supplied by the City of Mercer Island effective January 1, 2019 and thereafter.**
6. **Approve Resolution No. 1555, which adjusts development and construction permit fees effective January 1, 2019 and thereafter.**
7. **Suspend the City Council Rules of Procedure 6.3, requiring a second reading for an ordinance.**
8. **Adopt Ordinance No. 18-16, which establishes the total amount of property taxes to be levied for the year 2019.**
9. **Adopt Ordinance No. 18-17, which identifies the dollar and percent increases of the total property tax levy for the year 2019 relative to the total property tax levy for the year 2018.**

PASSED 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner, and Wong)
VACANT: 1 (Position #4)

REGULAR BUSINESS

AB 5502: 2019 Comprehensive Plan Amendment Final Docket

It was moved by Wong; seconded by Nice to:
Approve Resolution No. 1554, establishing the 2019 Comprehensive Plan amendment final docket.
Passed 6-0
FOR: 6 (Bertlin, Nice, Bassett, Weiker, Wisenteiner, and Wong)
VACANT: 1 (Position 4)

OTHER BUSINESS

Councilmember Absences

Councilmember Wisenteiner will be absent at the November 26, 2018 Special Meeting.

Planning Schedule

City Manager Underwood reviewed items scheduled for the following Council meetings:

- **November 26 Special Meeting** - Reception for Representative Judy Clibborn, Legislative Priorities Discussion with 41st Delegation, and RFQ finalists regarding the commuter project
- **December 4 Regular Meeting** - Solid Waste Contract discussion
- **December 6 Special Meeting** - Council Position No. 4 Vacancy Interviews
- **December 11 Special Meeting** - Council Position No. 4 Vacancy Appointment
- **December 18 Regular Meeting** - City Manager Review, Councilmember Position No. 4 Swearing In, Fiscal Sustainability Plan, and Board and Commission Committee Recommendations, and 3rd Quarter 2018 Financial Status Report

Board Appointments

Mayor Bertlin reported that the application process for Vacant Council Position No. 4 was scheduled to close on Wednesday, November 21 at 5 p.m.

Councilmember Reports

Councilmember Weiker reported on King County Conservation District's strategic planning efforts.

ADJOURNMENT

The regular Council Meeting adjourned at 11:51 pm.

_____

Debbie Bertlin, Mayor

Attest:

_____

Deborah A. Estrada, City Clerk

EXHIBIT 18

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

CONCERNED NEIGHBORS FOR THE PRESERVATION OF OUR COMMUNITY Petitioner, v. CITY OF MERCER ISLAND, a Respondent.	NO. 19-3-0002c PETITION FOR REVIEW

I. PETITIONER

Petitioner Concerned Neighbors for the Preservation of Our Community (CNPC) is an unincorporated citizens' group with the following mailing address:

Concerned Neighbors for the Preservation of Our Community
Attn: Matthew Goldbach
9980 SE 40th St.
Mercer Island, WA 98040
Telephone: (954) 806-2489
Email: matt@bitmax.net

Bricklin and Newman, LLP, by Alex Sidles, represents CNPC in this matter. The firm's contact information is:

David Bricklin
Alex Sidles
Bricklin and Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, Washington 98101

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Telephone: (206) 264-8600
Email: bricklin@bnd-law.com; sidles@bnd-law.com

II. THE CHALLENGED ACTION

The challenged action is Mercer Island's November 20, 2018 adoption of Ordinance No. 18-13, which amends the Mercer Island Comprehensive Plan. In accordance with WAC 242-03-210(3), only the challenged portions of the ordinance are attached to this petition as Exhibit A.

III. DETAILED STATEMENT OF THE ISSUES

1. By failing to provide mailed notice of the Planning Commission hearings regarding the ordinance, did the City violate its own public participation program, described in MICC 3.46.080; 19.15.050.D.2.d; 19.15.010; 19.15.020.D, E (former)[1]; MICC 19.15.269.A (current), in violation of the GMA, RCW 36.70A.035; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3); WAC 365-196-600(10)?

2. By failing to identity "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

3. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[1] Note on citations to the Mercer Island code: On September 17, 2018, the City adopted a large-scale reorganization of its land use code in ordinance numbers 18C-06 and 18C-08. The reorganized code took effect October 1, 2018. In this petition, citations to the pre-October 1, 2018 code are given as MICC (former), whereas citation to the post-October 1, 2018 code are given as MICC (current).

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4. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

5. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

6. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

10. By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), and create an internally inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

11. By applying a new land use designation (community facilities) to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any community facilities zone in the land use code, did the City fail to show that "The

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property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

12. By creating a new land use designation (community facilities), and applying that new designation to a specific property, but without adopting new development regulations that would apply to the new designation, did the City create an inconsistency between its comprehensive plan and its zoning regulations, in violation of RCW 36.70A.040 and the holding in *City of Bremerton v. Kitsap County*, GMHB 04-3-0009c, at 10 (Final Decision and Order, Aug. 9, 2004)?

IV. STANDING

13. CPNC has participation standing under RCW 36.70A.280(2)(b) in that CNPC submitted written comments to the City regarding this ordinance prior to its adoption and gave repeated oral testimony to the City Council and Planning Commission.

14. Throughout this process, CNPC repeatedly advised the City that it was acting in violation of the above-mentioned provisions of law. However, CNPC was unsuccessful in persuading the City to change course.

15. CNPC also has standing under RCW 36.70A.280(2)(d) in that the CNPC's members live immediately adjacent to the property. They will be affected by the negative effects of increased development, including more traffic, blocked views, more noise.

V. ESTIMATED TIME FOR THE HEARING ON THE MERITS

16. Four hours, or such additional time as the Board may deem necessary.

VI. RELIEF SOUGHT

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17. CNPC requests that the Board rule the challenged ordinance to be noncompliant with the GMA; and remand the challenged ordinance to the City to take the necessary legislative actions for it to be compliant with the GMA; and issue an order of invalidity.

The Petitioner has read the Petition for Review and believes the contents to be true.

Respectfully submitted this 29th day of January, 2019.

BRICKLIN & NEWMAN, LLP

By: _____

David A. Bricklin, WSBA No. 7583
Alex Sidles, WSBA No. 52832
Attorneys for Petitioner

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EXHIBIT 19

ORIGINAL

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

MARK COEN,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

Case No. 19-3-0003c

PETITION FOR REVIEW

TABLE OF CONTENTS

THOMPSON & DELAY
506 Second Avenue, Suite 2500
Seattle, Washington 98104
(206) 622-0670

I. PETITIONER

1. Petitioner Coen is a resident of the City of Mercer Island, Washington. The name and contact information for Petitioner Coen are:

Mark Coen
3220 73rd Avenue Southeast
Mercer Island, Washington 98040
Phone: (206) 200-1735
E-mail: mscnb@msn.com

II. PETITIONER'S ATTORNEYS

2. The name and contact information of Petitioner Coen's attorneys are:

Daniel P. Thompson
Thompson & Delay
506 Second Avenue, Suite 2500
Seattle, Washington 98104
Phone: (206) 622-0670
Fax: (206) 622-3965
E-mail: danielpthompson@hotmail.com

III. RESPONDENT

3. Respondent is the City of Mercer Island, a municipality of the State of Washington.

IV. THE CHALLENGED ACTIONS

4. RCW 36.70A.040(1) provides in part as follows:

> Each county that has both a population of fifty thousand or more and, until May 16, 1995, has had its population increase by more than ten percent in the previous ten years or, on or after May 16, 1995, has had its population increase by more than seventeen percent in the previous ten years, **and the cities located within such county**, and any other county regardless of its population that has had its population increase by more than twenty percent in

> the previous ten years, **and the cities located within such county, shall conform with all of the requirements of this chapter**.[1] (underlined bold added).

5. On October 3, 1994, the City of Mercer Island adopted its Growth Management Act Comprehensive Plan by means of City of Mercer Island Ordinance No. A-122.

6. The first challenged action is Ordinance 18-13. On November 20, 2018, the City of Mercer Island adopted Ordinance 18-13 which included fourteen comprehensive plan amendments. Some of these amendments are not scheduled to have draft development regulations until 2021. Attached as Exh. A is a copy of the 2018 Preliminary Comprehensive Plan Docket. Amendment 15 which is not noted on the 2018 Preliminary Comprehensive Plan docket relates to a comprehensive plan amendment for an emergency rezone for a parcel of property referred to as "Parcel 12" as part of the Tully's project, which was later added to the planning commission's 2018 preliminary comprehensive plan docket as an emergency comprehensive plan amendment and rezone. Petitioner Coen is challenging amendments 1, 6, 8, 10, 11, 12, 13, 14 and 15.

7. Comprehensive plan amendment 13 was not adopted.[2]

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[1] King County had: (i) a population of 1,269,749 in 1980, (ii) a population of 1,507,305 1,507,319 in 1990, and (iii) a population of 1,737,034 in 2000. King County had: (i) a population increase of 237,556 between 1980 and 1990, and (ii) a population increase of 229,729 between 1990 and 2000. King County had a population increase of 467,285 between 1980 and 2000. King County had: (i) a population increase of 18.7% between 1980 and 1990, and (ii) a population increase of 15.2% between 1990 and 2000. King County had a population increase of 36.8% between 1980 and 2000.

[2] Comprehensive Plan Amendment 3 addressed the adoption of a Transportation Concurrency Ordinance pursuant to the appeal in Coen v. City of Mercer Island, case number 18-30004 (February 23, 2018) that resulted in a Stipulated Order of Non-Compliance, and subsequently a Board Order finding compliance dated December 20, 2018.

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8. The second challenged action is Mercer Island's November 20, 2018 adoption of Ordinance No. 18C-14, a site-specific rezone. For clarity, this ordinance shall be referred to as the "rezone ordinance." Because this site-specific rezone was not authorized by the pre-existing comprehensive plan, but was instead adopted concurrently with the Comprehensive Plan ordinance, the Board has jurisdiction over the rezone ordinance. RCW 36.70A.030(7); RCW 36.70B.020(4); *Spokane County v. Eastern Wash. Growth Management Hearings Bd.*, 176 Wn. App. 555, 571, 309 P.3d 673 (2013). A full copy of the rezone ordinance is attached to this petition as Exhibit H.

V. RELATED APPEALS – NOTICE OF PROPOSED CONSOLIDATION

9. This petition challenges amendments 1, 6, 8, 10, 11, 12, 14 and 15. To date, two related petitions have been filed by separate parties challenging Ordinance 18-13 and 18C-14:

1. *7800 Plaza Owners Association v. City of Mercer Island* (filing date January 18, 2019) challenging ordinance 18-13 and 18C-14 and comprehensive plan amendment number 15 relating to the emergency amendment and rezone of Parcel 12 as part of the Tully's Project.

2. *Concerned Neighbors for the Preservation of Our Community v. City of Mercer Island* (filing date January 29, 2019) challenging Ordinance 18-13 and comprehensive plan amendments 1 and 8 which created a new Community Facilities Zone (previously called "Private Community Facilities") and amended the land use map designating property owned by the Jewish

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Community Center and French American School as a new Community Facility Zone (CFZ) zone.

10. It is the intent of Petitioner Coen to move to consolidate this appeal with the two appeals referenced above, as well as any other appeals challenging ordinance 18-13 and 18C-14, or any of the 2018 comprehensive plan amendments.

VI. INCORPORATION AND REFERENCE OF COEN V. CITY OF MERCER ISLAND CASE NO. 18-3-0018 (November 15, 2018)

11. On November 15, 2018, Petitioner Coen filed a petition challenging Mercer Island Ordinance 18C-08 that codified MICC 19.15.230(I) that authorized the adoption of comprehensive plan amendments without concurrent development regulations. This appeal is scheduled for hearing on March 20, 2019, and requests that the Board invalidate MICC 19.15.230(I) and issue an Order reaffirming the requirement that the amendment of a comprehensive plan requires concurrent development regulations. The petition also challenges 18C-08 on procedural grounds.

12. Comprehensive plan amendments 6, 8, 10, 11, 12 and 14 were adopted in 18-13 without concurrent development regulations. Since Petitioner Coen cannot anticipate the Board's ruling on his pending appeal 18-3-0018 Petitioner Coen references and incorporates in this appeal the legal bases for invalidation of 18C-08 and MICC 19.15.230(I) due to the lack of concurrent adoption of development regulations when amending the comprehensive plan.

VII. DETAILED STATEMENT OF THE ISSUES

A. Comprehensive Plan Amendments 1 and 8 – Exh. B

Comprehensive Plan Amendment No. 1

"Update the Land Use Element / Land Use Map for clarity and accuracy of map designations."

See Exh A, 2018 Preliminary Comprehensive Plan Docket.

Comprehensive Plan Amendment No. 8

"Create a new land use map designation "Private Community Facilities" or similar, for the properties currently occupied by the JCC, French American School, and Herzl-Ner Tamid (approximately 18 acres). This amendment to be accompanied by a zoning map and zoning code amendment."

See Exh A, 2018 Preliminary Comprehensive Plan Docket.

Does the Council's adoption of Ordinance 18-13 and comprehensive plan amendments 1 and 8 without concurrent development regulations violate the following provisions of the Growth Management Act relating to concurrency and consistency between the Comprehensive Plan and development regulations and violate the City's own procedures and the Growth Management Act for a site specific rezone of property:

1. RCW 36.70A.040(3) that requires the city to adopt a comprehensive plan and development regulations that are consistent.

2. RCW 36.70A.130(1)(a) that requires revisions to the comprehensive plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter including consistency and concurrency.

3. RCW 36.70A.130(1)(d) that requires that any amendment of or revision to a comprehensive land use plan shall conform to the Growth Management Act, and any development regulation shall be consistent with and implement the comprehensive plan.

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4. RCW 36.70A.130(4) that requires cities within King County to take action to review and if needed revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter including concurrency and consistency.

5. WAC 365-196-010(1)(e) that requires that development regulations adopted to implement the comprehensive plan be consistent with such plans.

6. WAC 365-196-060(2)(d) that requires development regulations must be consistent with the goals and requirements of the Act and the comprehensive plan.

7. WAC 365-196-210(8) that defines consistency as to mean no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

8. WAC 365-196-500(3) that requires that development regulations must be internally consistent and be consistent with and implement the comprehensive plan.

9. WAC 365-196-500(4) that requires that each comprehensive plan should require mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflict become apparent. At a minimum, any amendment to the comprehensive plan or development regulations must be reviewed for consistency. The review and update processes required in RCW 36.70A.130(1) and (3) should include a review of the comprehensive plan and development regulations for consistency.

10. WAC 365-196-610 that requires periodic review and update of comprehensive plan amendments and development regulations. Comprehensive plans and development regulations are subject to periodic update on the schedule established in RCW 36.70A.130(5) and requires

that cities must review and if needed revise their comprehensive plans and development regulations for compliance with the act.

11. WAC 365-196-640 that provides for comprehensive plan amendment procedures and requires the comprehensive plan is internally consistent and consistent with the comprehensive plans of adjacent counties and cities as well as the city's own development regulations that implement the comprehensive plan.

12. WAC 365-196-800(1) that requires development regulations must be consistent with and implement comprehensive plans adopted pursuant to the act.

13. WAC 365-196-805 that requires that development regulations must be drafted and adopted concurrently with comprehensive plan amendments.

14. By failing to identify "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

15. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

16. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required,

did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

17. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

18. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

19. By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), and create an internally inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

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20. By applying a new land use designation (community facilities) to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any community facilities zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

Comprehensive Plan Amendment No. 6 – Exh. C

"Develop goals and policies supporting the cultural arts."

See Exh A, 2018 Preliminary Comprehensive Plan Docket.

Does the Council's adoption of Ordinance 18-13 and comprehensive plan amendment 6 without concurrent development regulations violate the following provisions of the Growth Management Act relating to concurrency and consistency between the Comprehensive Plan and development regulations:

1. RCW 36.70A.040(3) that requires the city to adopt a comprehensive plan and development regulations that are consistent.

2. RCW 36.70A.130(1)(a) that requires revisions to the comprehensive plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter including consistency and concurrency.

3. RCW 36.70A.130(1)(d) that requires that any amendment of or revision to a comprehensive land use plan shall conform to the Growth Management Act, and any development regulation shall be consistent with and implement the comprehensive plan.

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4. RCW 36.70A.130(4) that requires cities within King County to take action to review and if needed revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter including concurrency and consistency.

5. WAC 365-196-010(1)(e) that requires that development regulations adopted to implement the comprehensive plan be consistent with such plans.

6. WAC 365-196-060(2)(d) that requires development regulations must be consistent with the goals and requirements of the Act and the comprehensive plan.

7. WAC 365-196-210(8) that defines consistency as to mean no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

8. WAC 365-196-500(3) that requires that development regulations must be internally consistent and be consistent with and implement the comprehensive plan.

9. WAC 365-196-500(4) that requires that each comprehensive plan should require mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflict become apparent. At a minimum, any amendment to the comprehensive plan or development regulations must be reviewed for consistency. The review and update processes required in RCW 36.70A.130(1) and (3) should include a review of the comprehensive plan and development regulations for consistency.

10. WAC 365-196-610 that requires periodic review and update of comprehensive plan amendments and development regulations. Comprehensive plans and development regulations are subject to periodic update on the schedule established in RCW 36.70A.130(5) and requires

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that cities must review and if needed revise their comprehensive plans and development regulations for compliance with the act.

11. WAC 365-196-640 that provides for comprehensive plan amendment procedures and requires the comprehensive plan is internally consistent and consistent with the comprehensive plans of adjacent counties and cities as well as the city's own development regulations that implement the comprehensive plan.

12. WAC 365-196-800(1) that requires development regulations must be consistent with and implement comprehensive plans adopted pursuant to the act.

13. WAC 365-196-805 that requires that development regulations must be drafted and adopted concurrently with comprehensive plan amendments.

Comprehensive Plan Amendment No. 10 – Exh. D

> "Develop goals and policies to promote universal design, disability access, and age friendly planning on Mercer Island."

See Exh A, 2018 Preliminary Comprehensive Plan Docket.

Does the Council's adoption of Ordinance 18-13 and comprehensive plan amendment 10 without concurrent development regulations violate the following provisions of the Growth Management Act relating to concurrency and consistency between the Comprehensive Plan and development regulations and violate the City's own procedures and the Growth Management Act for a site specific rezone of property.

1. RCW 36.70A.040(3) that requires the city to adopt a comprehensive plan and development regulations that are consistent.

2. RCW 36.70A.130(1)(a) that requires revisions to the comprehensive plan and

development regulations to ensure the plan and regulations comply with the requirements of this chapter including consistency and concurrency.

3. RCW 36.70A.130(1)(d) that requires that any amendment of or revision to a comprehensive land use plan shall conform to the Growth Management Act, and any development regulation shall be consistent with and implement the comprehensive plan.

4. RCW 36.70A.130(4) that requires cities within King County to take action to review and if needed revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter including concurrency and consistency.

5. WAC 365-196-010(1)(e) that requires that development regulations adopted to implement the comprehensive plan be consistent with such plans.

6. WAC 365-196-060(2)(d) that requires development regulations must be consistent with the goals and requirements of the Act and the comprehensive plan.

7. WAC 365-196-210(8) that defines consistency as to mean no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

8. WAC 365-196-500(3) that requires that development regulations must be internally consistent and be consistent with and implement the comprehensive plan.

9. WAC 365-196-500(4) that requires that each comprehensive plan should require mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflict become apparent. At a minimum, any amendment to the comprehensive plan or development regulations must be reviewed for consistency. The review and update

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processes required in RCW 36.70A.130(1) and (3) should include a review of the comprehensive plan and development regulations for consistency.

10. WAC 365-196-610 that requires periodic review and update of comprehensive plan amendments and development regulations. Comprehensive plans and development regulations are subject to periodic update on the schedule established in RCW 36.70A.130(5) and requires that cities must review and if needed revise their comprehensive plans and development regulations for compliance with the act.

11. WAC 365-196-640 that provides for comprehensive plan amendment procedures and requires the comprehensive plan is internally consistent and consistent with the comprehensive plans of adjacent counties and cities as well as the city's own development regulations that implement the comprehensive plan.

12. WAC 365-196-800(1) that requires development regulations must be consistent with and implement comprehensive plans adopted pursuant to the act.

13. WAC 365-196-805 that requires that development regulations must be drafted and adopted concurrently with comprehensive plan amendments.

15. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

16. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required,

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did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

17. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

18. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

20. By creating a new land use designation to an unknown specific property, even though no zoning regulations currently exist that will apply to the new designation, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

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21. By creating a new land use designation, and applying that new designation to a specific unknown property, but without adopting new development regulations that would apply to the new designation, did the City create an inconsistency between its comprehensive plan and its zoning regulations, in violation of RCW 36.70A.040 and the holding in *City of Bremerton v. Kitsap County*, GMHB 04-3-0009c, at 10 (Final Decision and Order, Aug. 9, 2004)?

Comprehensive Plan Amendment No. 11 – Exh. E

> "Green incentive for single-family residential new construction projects."

See Exh A, 2018 Preliminary Comprehensive Plan Docket.

Does the Council's adoption of Ordinance 18-13 and comprehensive plan amendment 11 without concurrent development regulations violate the following provisions of the Growth Management Act relating to concurrency and consistency between the Comprehensive Plan and development regulations:

1. RCW 36.70A.040(3) that requires the city to adopt a comprehensive plan and development regulations that are consistent.

2. RCW 36.70A.130(1)(a) that requires revisions to the comprehensive plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter including consistency and concurrency.

3. RCW 36.70A.130(1)(d) that requires that any amendment of or revision to a comprehensive land use plan shall conform to the Growth Management Act, and any development regulation shall be consistent with and implement the comprehensive plan.

4. RCW 36.70A.130(4) that requires cities within King County to take action to review and if needed revise their comprehensive plans and development regulations to ensure the plan

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and regulations comply with the requirements of this chapter including concurrency and consistency.

5. WAC 365-196-010(1)(e) that requires that development regulations adopted to implement the comprehensive plan be consistent with such plans.

6. WAC 365-196-060(2)(d) that requires development regulations must be consistent with the goals and requirements of the Act and the comprehensive plan.

7. WAC 365-196-210(8) that defines consistency as to mean no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

8. WAC 365-196-500(3) that requires that development regulations must be internally consistent and be consistent with and implement the comprehensive plan.

9. WAC 365-196-500(4) that requires that each comprehensive plan should require mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflict become apparent. At a minimum, any amendment to the comprehensive plan or development regulations must be reviewed for consistency. The review and update processes required in RCW 36.70A.130(1) and (3) should include a review of the comprehensive plan and development regulations for consistency.

10. WAC 365-196-610 that requires periodic review and update of comprehensive plan amendments and development regulations. Comprehensive plans and development regulations are subject to periodic update on the schedule established in RCW 36.70A.130(5) and requires that cities must review and if needed revise their comprehensive plans and development regulations for compliance with the act.

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11. WAC 365-196-640 that provides for comprehensive plan amendment procedures and requires the comprehensive plan is internally consistent and consistent with the comprehensive plans of adjacent counties and cities as well as the city's own development regulations that implement the comprehensive plan.

12. WAC 365-196-800(1) that requires development regulations must be consistent with and implement comprehensive plans adopted pursuant to the act.

13. WAC 365-196-805 that requires that development regulations must be drafted and adopted concurrently with comprehensive plan amendments.

Comprehensive Plan Amendment No. 12 – Exh. F

"Star communities – placeholder."

See Exh A, 2018 Preliminary Comprehensive Plan Docket.

Does the Council's adoption of Ordinance 18-13 and comprehensive plan amendment 12 without concurrent development regulations violate the following provisions of the Growth Management Act relating to concurrency and consistency between the Comprehensive Plan and development regulations and violate the City's own procedures and the Growth Management Act for a site specific rezone of property:

1. RCW 36.70A.040(3) that requires the city to adopt a comprehensive plan and development regulations that are consistent.

2. RCW 36.70A.130(1)(a) that requires revisions to the comprehensive plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter including consistency and concurrency.

3. RCW 36.70A.130(1)(d) that requires that any amendment of or revision to a comprehensive land use plan shall conform to the Growth Management Act, and any development regulation shall be consistent with and implement the comprehensive plan.

4. RCW 36.70A.130(4) that requires cities within King County to take action to review and if needed revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter including concurrency and consistency.

5. WAC 365-196-010(1)(e) that requires that development regulations adopted to implement the comprehensive plan be consistent with such plans.

6. WAC 365-196-060(2)(d) that requires development regulations must be consistent with the goals and requirements of the Act and the comprehensive plan.

7. WAC 365-196-210(8) that defines consistency as to mean no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

8. WAC 365-196-500(3) that requires that development regulations must be internally consistent and be consistent with and implement the comprehensive plan.

9. WAC 365-196-500(4) that requires that each comprehensive plan should require mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflict become apparent. At a minimum, any amendment to the comprehensive plan or development regulations must be reviewed for consistency. The review and update processes required in RCW 36.70A.130(1) and (3) should include a review of the comprehensive plan and development regulations for consistency.

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10. WAC 365-196-610 that requires periodic review and update of comprehensive plan amendments and development regulations. Comprehensive plans and development regulations are subject to periodic update on the schedule established in RCW 36.70A.130(5) and requires that cities must review and if needed revise their comprehensive plans and development regulations for compliance with the act.

11. WAC 365-196-640 that provides for comprehensive plan amendment procedures and requires the comprehensive plan is internally consistent and consistent with the comprehensive plans of adjacent counties and cities as well as the city's own development regulations that implement the comprehensive plan.

12. WAC 365-196-800(1) that requires development regulations must be consistent with and implement comprehensive plans adopted pursuant to the act.

13. WAC 365-196-805 that requires that development regulations must be drafted and adopted concurrently with comprehensive plan amendments.

14. By failing to identify "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

15. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending

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comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

16. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

17. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

18. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

19. By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former);

MICC 19.15.230.F.1 (current), and create an internally inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

20. By applying a new land use designation to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any community facilities zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

Comprehensive Plan Amendment No. 14 – Exh. G

> "Develop goals and policies that would support Planned Unit Development (PUD) proposals for new subdivisions in order to facilitate lot sizes that would encourage less expensive housing options."

See Exh A, 2018 Preliminary Comprehensive Plan Docket.

Does the Council's adoption of Ordinance 18-13 and comprehensive plan amendment 14 without concurrent development regulations violate the following provisions of the Growth Management Act relating to concurrency and consistency between the Comprehensive Plan and development regulations and violate the City's own procedures and the Growth Management Act for a site specific rezone of property:

1. RCW 36.70A.040(3) that requires the city to adopt a comprehensive plan and development regulations that are consistent.

2. RCW 36.70A.130(1)(a) that requires revisions to the comprehensive plan and

development regulations to ensure the plan and regulations comply with the requirements of this chapter including consistency and concurrency.

3. RCW 36.70A.130(1)(d) that requires that any amendment of or revision to a comprehensive land use plan shall conform to the Growth Management Act, and any development regulation shall be consistent with and implement the comprehensive plan.

4. RCW 36.70A.130(4) that requires cities within King County to take action to review and if needed revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter including concurrency and consistency.

5. WAC 365-196-010(1)(e) that requires that development regulations adopted to implement the comprehensive plan be consistent with such plans.

6. WAC 365-196-060(2)(d) that requires development regulations must be consistent with the goals and requirements of the Act and the comprehensive plan.

7. WAC 365-196-210(8) that defines consistency as to mean no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

8. WAC 365-196-500(3) that requires that development regulations must be internally consistent and be consistent with and implement the comprehensive plan.

9. WAC 365-196-500(4) that requires that each comprehensive plan should require mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflict become apparent. At a minimum, any amendmcnt to the comprehensive plan or development regulations must be reviewed for consistency. The review and update

processes required in RCW 36.70A.130(1) and (3) should include a review of the comprehensive plan and development regulations for consistency.

10. WAC 365-196-610 that requires periodic review and update of comprehensive plan amendments and development regulations. Comprehensive plans and development regulations are subject to periodic update on the schedule established in RCW 36.70A.130(5) and requires that cities must review and if needed revise their comprehensive plans and development regulations for compliance with the act.

11. WAC 365-196-640 that provides for comprehensive plan amendment procedures and requires the comprehensive plan is internally consistent and consistent with the comprehensive plans of adjacent counties and cities as well as the city's own development regulations that implement the comprehensive plan.

12. WAC 365-196-800(1) that requires development regulations must be consistent with and implement comprehensive plans adopted pursuant to the act.

13. WAC 365-196-805 that requires that development regulations must be drafted and adopted concurrently with comprehensive plan amendments.

14. By failing to identify "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

15. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b

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(former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

16. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

17. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

18. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

19. By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial

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designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), and create an internally inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

20. By applying a new land use designation to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

Comprehensive Plan Amendment No. 15 – Exh. H
[Site Specific Emergency Rezone of Parcel 12 as Part of the Tully's Project]

1. Resolution 1545 was passed on June 5, 2018. Resolutions and Ordinances are "Legislative Actions" for purposes of adopting Comprehensive Plans and adopting Amendments To Comprehensive Plans. MIMC 2.24.030 provides that ordinances do not go into effect until 30 days from the time of final passage. Resolution 1545 became effective on July 5, 2018. The application to amend the comprehensive plan was filed on June 5, 2018 and was deemed complete on June 6, 2018 – 29 days before Resolution (Ordinance) 1545 went into effect. Thus, is the application to amend the comp plan and any actions regarding the comprehensive plan amendment and rezone prior to July 5, 2018 void.

2. Resolution 1545 purports to qualify as an "emergency". When determining whether an "emergency" exists, courts are "limited to examining the face of the ordinance." Federal Way v. King County, 62 Wn. App. 530, 536 (1991). The ordinance must include a

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statement of the underlying emergent facts. Id. At 543. Without such a statement, an emergency declaration is invalid. Id. at 536. Resolution 1545 does not even state that there is an emergency. All statements in the resolution are conclusory in nature and it does not contain any facts to justify an emergency. *See, Swartout v. Spokane,* 12 Wn. App. 665, 672-73 (1979). On June 5, 2018 during AB 5434, the council discussed Resolution 1545 there was no mention of an emergency or discussion of any facts which would support an emergency. The City's own self-imposed deadline does not create an emergency. Does the lack of a true emergency and the failure to document the emergency render comprehensive plan amendment 15 and the rezone void.

3. By adopting the Comprehensive Plan ordinance without placing Amendment 15 on the annual comprehensive plan amendment docket, as required by MICC 19.15.050.D (former) and MICC 19.15.230.C (current), and without declaring an emergency as required by RCW 36.70A.130(2)(b) and WAC 365-195-640(4), did the City fail to consider all amendment proposals concurrently, no more frequently than once per year, and as part of the docket cycle, as required by RCW 36.70A.130(2); RCW 36.70A.470; WAC 365-196-640(3); WAC 365-640(6); and WAC 365-196-600(3)(a)(i)?

4. By amending the comprehensive plan land use map to change a portion of Aubrey Davis Park from "linear park" to "town center," did the City disregard the provisions in the comprehensive plan protecting parks, including Land Use Goal 19; LU I 9.2; Parks and Recreation Plan Goal 2.b; 2.c ; 3; and 5.a, thereby creating an internally inconsistent plan in violation of MTCC 19.15.020.G. I.a (former), MICC 19.15.230.F. 1 (current), and RCW 36.70A.070?

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5. By amending the comprehensive plan to change a portion of Aubrey Davis Park from "linear park" to "town center," did the City create an internal inconsistency with the provisions in the comprehensive plan limiting new multi-family development, including Land Use Goal 15; 15.3; I 7; and 17.3, all in violation of MI CC 19. I 5.020.G. l .a (former), Ml CC 19.15.230.F.1 (current) and RCW36.70A.070?

6. By amending the comprehensive plan to change a large portion of the Greta Hackett Outdoor Sculpture Gallery from "linear park" to "town center," did the City violate the requirements in MICC 19.15.230.F.2 (current) and MICC 19.15.020.G.l.a (former) that site-specific amendments must be compatible with the adjacent land use and development patterns and must benefit the community as a whole and must not adversely affect community facilities, all in violation of RCW 36.70A.130; RCW 36.70A.l40; WAC 365-196-600(3); WAC 365-196-600(10)?

7. By failing to make the findings required under MICC 19.15.230.F (current) and MICC 19.15.020.G. I (former), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A. l 30; RCW 36.70A. l 40; WAC 365-196-600(3); WAC 365-196-600(IO)?

8. By amending the comprehensive plan to eliminate a portion of the Gretta Hackett Outdoor Sculpture Gallery, even though the 2014-2019 Parks and Recreation Plan Capital Improvement Projects List and the Mercer Island 2017-2022 Capital Improvement Fund both identified funds for improvements to the sculpture gallery, did the City violate the requirements to create and follow an internally consistent capital facilities plan and budget, RCW 36.70A.070(3) and (8); RCW 36.70A.120?

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9. By amending the comprehensive plan to allow high-density residential and commercial development without amending the capital facilities and transportation elements, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)?

10. By amending the comprehensive plan to allow the construction of a City-owned commuter parking lot, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail

to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)? B. Rezone Ordinance

11. By failing to provide mailed notice of the Planning Commission hearings regarding the rezone ordinance, did the City violate its own public participation program, described in MICC 19.15.010 and 19.15.020.D, E (former), and required by RCW 36.70A.035; RCW 36.70A.I30(2); RCW 36.70A.140; and WAC 365-196-600(3); WAC 365-196-600(10)?

12. By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies protecting parks, including Land Use Goal 19; LU I 9.2: Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, all in violation of M[CC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), and RCW 36.70A.040(3), RCW 36.70A.I30(1)(d)?

13. By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the

comprehensive plan policies limiting new multi-family development,, including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.2.a (former), MICC 19.15.240.C.1 (current) and RCW 36.70A.040(3), RCW 36.70A.I30(1)(d)?

14. By failing to make the findings required by MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), did the City fail to follow procedures as required by RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

15. By rezoning the property to eliminate a portion ·of the Gretta Hackett Outdoor Sculpture Gallery, even though the 2014-2019 Parks and Recreation Plan Capital Improvement Projects List and the Mercer Island 2017-2022 Capital Improvement Fund both identified funds for improvements to the sculpture gallery, did the City adopt a development regulation that fails to be consistent with and implement the comprehensive plan, in violation of RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)?

16. By rezoning the property from "public institution" to "town center," did the City violate the requirement in MICC 19.05.010.B (current and former) that "the entire area within the Mercer ls land 1-90 right-of-way, including ... recreations areas, linear greenbelts ... shall be part of the public institution zone," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? See West Seattle Defense Fund v. City of Seattle, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 1 l, 1995), at 7-8?

18. By rezoning the property from "public institution" to "town center" in order to develop new residential and other uses on the property, did the City violate the requirement in MTCC 19.05.010.B (current and former) that. "all uses within the 1-90 right-of-way shall be

maintained as set forth in city-approved 1-90 related documents," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? See West Seattle Defense Fund v. City of Seattle, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at 7-8?

19. If the Board finds the Comprehensive Plan ordinance violates the GMA, should the rezone ordinance also be found in violation and remanded, because the rezone ordinance is based on the Comprehensive Plan ordinance, and development regulations must be consistent with and implement the comprehensive plan, per RCW 36.70A. I 30(I)(d) and RCW 36. 70A.040(3)?

VIII. STANDING

20. Petitioner Coen has: (i) Participation Standing and (ii) Administrative Procedure Act Standing, each of which is independent of and separate from the other.

A. PARTICIPATION STANDING

21. RCW 36.7A.280 provides in part as follows:

> (2) A petition may be filed only by: ... (b) a person who has **participated orally or in writing before the county or city regarding the matter on which a review is being requested**.... (underlined bold added).

22. Petitioner Coen has Participation Standing under, without limitation, RCW 36.70A.280(2)(b).

1. Petitioner Coen's Written Participation

23. On November 14, 2018 Petitioner Coen participated in writing by sending a letter to every City of Mercer Island Councilmember regarding the matters on which he is

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requesting a review and relating to the issues Petitioner Coen is presenting to this Growth Management Hearings Board.

24. Petitioner Coen's November 19, 2018 letter to every City of Mercer Island Councilmember is restated as follows:

> Honorable Mayor, Deputy Mayor and Councilmembers:
>
> I own and have lived in the single family residence located at 3220 73rd Avenue Southeast, Mercer Island, Washington 98040 for over eighteen years.
>
> Throughout that eighteen year period, I have participated in land use issues on Mercer Island, including citizen group participation in Mercer Island's recently amended residential building code.
>
> Throughout that eighteen year period, Mercer Island has repeatedly failed to comply with and has violated the Growth Management Act.
>
> By way of example, although the Growth Management Act required Mercer Island to adopt a Transportation Concurrency Ordinance in 1994, Mercer Island did not adopt a Transportation Concurrency Ordinance until 2018, more than 24 years after the Growth Management Act required Mercer Island to do so.
>
> By way of another example, although the Growth Management Act required Mercer Island to update its Critical Areas Ordinance on or before June 30, 2015, Mercer Island has not updated its Critical Area Ordinance as of the date of this letter, November 19, 2018.
>
> At its November 20, 2018, meeting, the City Council will consider the adoption fifteen Proposed Comprehensive Plan Amendments.[1]
>
> Proposed Comprehensive Plan Amendments Nos. 1, 6, 7, 8, 10, 11, 13, 14 and 15 (collectively "Unlawful Proposed Comprehensive Plan Amendments") fail to comply with and violates the Growth Management Act and its implementing regulations, including the criteria for adopting amendments to

Comprehensive Plans and Development Regulations.[2]

Additionally, and without limiting the generality of the foregoing, the Unlawful Proposed Comprehensive Plan Amendments fail to comply with and violate the Mercer Island City Code, which, in turn, fail to comply with and violate the Growth Management Act and the Washington Administrative Code.

As a longtime resident of Mercer Island, my interests include, without limitation, (i) lawful land use planning and implementation processes, (ii) elimination of preordained land use planning and implementation processes, (iii) elimination of land use planning and implementation processes that only benefit special interests, (iv) elimination of "pet project" land use planning and implementation processes, (v) land use planning and implementation processes that benefit the citizens of Mercer Island as a whole, (vi) transparent land use planning and implementation processes, (vii) unbiased land use planning and implementation processes, (vii) meaningful citizen participation in land use planning and implementation processes, (viii) orderly land use planning and implementation processes, (ix) strategic land use planning and implementation processes, and (x) informed land use planning and implementation processes. These interests are among the interests the City of Mercer Island is required to consider when reviewing the Proposed Comprehensive Plan Amendments.

The Unlawful Proposed Comprehensive Plan Amendments have in fact specifically and personally aggrieved, adversely affected, injured and prejudiced me as, without limitation, follows: (i) promoting and maintain unlawful land use planning and implementation processes, (ii) promoting and maintaining preordained land use planning and implementation processes, (iii) promoting and maintaining land use planning and implementation processes that only benefit

---

[1] The Table on page 2 of the Development Services Group's Staff Report for Agenda Bill 5501 numbers the proposed Comprehensive Plan Amendments as 1 through 15 (collectively "Proposed Comprehensive Plan Amendments"). This Letter will use the same number used by the Table to refer to an individual Proposed Comprehensive Plan Amendment.

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[2] During public appearances portion of the October 2, 2018, City Council meeting. I objected to Proposed Comprehensive Plan Amendments Nos. 1, 6, 8, 10, 11, 13, 14 and 15. My October 2, 2018, objections are incorporated herein by reference.

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special interests, (iv) promoting and maintaining "pet project" land use planning and implementation processes, (v) promoting and maintaining land use planning and implementation processes that do not benefit the citizens of Mercer Island as a whole, (vi) promoting and maintaining the concealment of land use planning and implementation processes, (vii) promoting and maintaining biased land use planning and implementation processes, (vii) promoting and maintaining the lack of meaningful citizen participation in land use planning and implementation processes, (viii) promoting and maintaining unorderly land use planning and implementation processes, (ix) promoting and maintaining nonstrategic and piecemeal land use planning and implementation processes, (x) promoting and maintaining ill-informed and uninformed land use planning and implementation processes, (xi) the degradation of my property values, and (xii) the degradation of my emotional, psychological and physical health and well-being (collectively "Current Prejudice").

The Unlawful Proposed Comprehensive Plan Amendments will likely in fact specifically and personally aggrieved, adversely affected, injured and prejudiced me as, without limitation, follows: (i) promoting and maintain unlawful land use planning and implementation processes, (ii) promoting and maintaining preordained land use planning and implementation processes, (iii) promoting and maintaining land use planning and implementation processes that only benefit special interests, (iv) promoting and maintaining "pet project" land use planning and implementation processes, (v) promoting and maintaining land use planning and implementation processes that do not benefit the citizens of Mercer Island as a whole, (vi) promoting and maintaining the concealment of land use planning and implementation processes, (vii) promoting and maintaining biased land use planning and implementation processes, (vii) promoting and maintaining the lack of meaningful citizen participation in land use planning and implementation processes, (viii) promoting and maintaining unorderly land use planning and implementation processes, (ix) promoting and maintaining nonstrategic and piecemeal land use planning and implementation processes, (x) promoting and

maintaining ill-informed and uninformed land use planning and implementation processes, (xi) the degradation of my property values, and (xii) the degradation of my emotional, psychological and physical health and well-being (collectively "Likely Prejudice").

An Order from the Growth Management Hearings Board invalidating the Unlawful Proposed Comprehensive Plan Amendments will substantially eliminate or redress the Current Prejudice I have incurred and will substantially eliminate or redress the Likely Prejudice I will likely incur.

25. Petitioner Coen has Participation Standing under, without limitation, RCW 36.70A.280(2)(b).

2. Petitioner Coen's Oral Participation

1. At the City of Mercer Island's October 2, 2018 City Council meeting, Petitioner Coen participated orally regarding the matters on which he is requesting a review and relating to the issues Petitioner Coen is presenting to this Growth Management Hearings Board.

2. During the public appearances portion of the October 2, 2018, City Council meeting. Petitioner Coen, among other things, objected to the Comprehensive Plan Amendments Nos. 1, 6, 8, 10, 11, 13, 14 and 15.

3. Petitioner Coen has Participation Standing under, without limitation, RCW 36.70A.280(2)(b).

3. Petitioner Coen's Participation on November 20, 2018

4. On November 20, 2018, Petitioner Coen participated by providing oral comments to the Mercer Island City Counsel.

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5. Petitioner Coen's November 20, 2018, oral comments are restated as follows:

Good evening.

My name is Mark Coen.

I own and have lived in the single family residence located at 3220 73rd Avenue Southeast, Mercer Island, Washington 98040 for over eighteen years.

Throughout that eighteen year period, I have participated in land use issues on Mercer Island, including citizen group participation in Mercer Island's recently amended residential building code.

Throughout that eighteen year period, Mercer Island has repeatedly failed to comply with and has violated the Growth Management Act.

By way of example, although the Growth Management Act required Mercer Island to adopt a Transportation Concurrency Ordinance in 1994, Mercer Island did not adopt a Transportation Concurrency Ordinance until 2018, more than 24 years after the Growth Management Act required Mercer Island to do so.

By way of another example, although the Growth Management Act required Mercer Island to update its Critical Areas Ordinance on or before June 30, 2015, Mercer Island has not updated it Critical Areas Ordinance as of today, November 20, 2018.

At tonight's meeting, the City Council will consider the adoption fifteen Proposed Comprehensive Plan Amendments.

At the October 2, 2018, City Council meeting, I objected to Proposed Comprehensive Plan Amendments Nos. 1, 6, 8, 10, 11, 13, 14 and 15. I include my October 2, 2018, objections in my presentation to night.

In a November 19, 2018, letter to each City Councilmember, I objected to Proposed Comprehensive Plan Amendments Nos. 1, 6, 7, 8, 10, 11, 13, 14 and 15. I include my November 19, 2018, objections in my presentation to night.

Proposed Comprehensive Plan Amendments Nos. 1, 6, 7, 8, 10, 11, 13, 14 and 15 fail to comply with and violate the Growth Management Act and its implementing regulations, including the criteria for adopting amendments to Comprehensive Plans and Development Regulations.

Additionally, and without limiting the generality of the foregoing, Proposed Comprehensive Plan Amendments Nos. 1, 6, 7, 8, 10, 11, 13, 14 and 15 fail to comply with and violate the Mercer Island City Code, which, in turn, fail to comply with and violate the Growth Management Act and the Washington Administrative Code.

Proposed Comprehensive Plan Amendments Nos. 1, 6, 7, 8, 10, 11, 13, 14 and 15 have in fact, and will likely in fact, specifically and personally aggrieve, adversely affect, injure and prejudice me.

Thank you.

B. ADMINISTRATIVE PROCEDURE ACT STANDING

6. RCW 36.70A.280 provides in part as follows:

> (2) A petition may be filed only by: ... (d) a person qualified pursuant to RCW 34.05.530.

7. RCW 34.50.530 provides as follows:

> A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
>
> (1) The agency action has **prejudiced or is likely to prejudice** that person;
>
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
>
> (3) A judgment in favor of that person would substantially eliminate or redress the **prejudice to that person caused or likely to be caused** by the agency action. (underlined bold added).

8. Petitioner Coen has Administrative Procedure Act Standing under, without limitation, RCW 36.70A.280(2)(d) and RCW 34.50.530.

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9. Petitioner Coen has owned and has have lived in the single family residence located at 3220 73rd Avenue Southeast, Mercer Island, Washington 98040 for over eighteen years.

10. Throughout that eighteen year period, Petitioner Coen have participated in land use issues on Mercer Island, including citizen group participation in Mercer Island's recently amended residential building code.

11. Throughout that eighteen year period, Mercer Island has repeatedly failed to comply with and has violated the Growth Management Act.

12. By way of example, although the Growth Management Act required Mercer Island to adopt a Transportation Concurrency Ordinance in 1994, Mercer Island did not adopt a Transportation Concurrency Ordinance until 2018, more than 24 years after the Growth Management Act required Mercer Island to do so.

13. By way of another example, although the Growth Management Act required Mercer Island to update its Critical Areas Ordinance on or before June 30, 2015, Mercer Island had not updated its Critical Areas Ordinance as of November 15, 2018.

14. As a longtime resident of Mercer Island, Petitioner Coen's interests include, without limitation, (i) lawful land use planning and implementation processes, (ii) elimination of preordained land use planning and implementation processes, (iii) elimination of land use planning and implementation processes that only benefit special interests, (iv) elimination of "pet project" land use planning and implementation processes, (v) land use planning and implementation processes that benefit the citizens of Mercer Island as a whole, (vi) transparent land use planning and implementation processes, (vii) unbiased land use

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planning and implementation processes, (vii) meaningful citizen participation in land use planning and implementation processes, (viii) orderly land use planning and implementation processes, (ix) strategic land use planning and implementation processes, and (x) informed land use planning and implementation processes. These interests are among the interests the City of Mercer Island was required to consider when it adopted and published Ordinance 18-13 and 18C-14.

15. Ordinance 18-13 and 18C-14, and their adoption and publication, has in fact specifically and personally aggrieved, adversely affected, injured and prejudiced Petitioner Coen as, without limitation, follows: (i) promoting and maintain unlawful land use planning and implementation processes, (ii) promoting and maintaining preordained land use planning and implementation processes, (iii) promoting and maintaining land use planning and implementation processes that only benefit special interests, (iv) promoting and maintaining "pet project" land use planning and implementation processes, (v) promoting and maintaining land use planning and implementation processes that do not benefit the citizens of Mercer Island as a whole, (vi) promoting and maintaining the concealment of land use planning and implementation processes, (vii) promoting and maintaining biased land use planning and implementation processes, (vii) promoting and maintaining the lack of meaningful citizen participation in land use planning and implementation processes, (viii) promoting and maintaining unorderly land use planning and implementation processes, (ix) promoting and maintaining nonstrategic and piecemeal land use planning and implementation processes, (x) promoting and maintaining ill-informed and uninformed land use planning and implementation processes, (xi) the degradation of Petitioner Coen's

property values, and (xii) the degradation of Mr. Coen's emotional, psychological and physical health and well-being (collectively "Current Prejudice").

16. Ordinance 18-13 and 18C-14, and their adoption and publication, will likely in fact specifically and personally aggrieved, adversely affected, injured and prejudiced Petitioner Coen as, without limitation, follows: (i) promoting and maintain unlawful land use planning and implementation processes, (ii) promoting and maintaining preordained land use planning and implementation processes, (iii) promoting and maintaining land use planning and implementation processes that only benefit special interests, (iv) promoting and maintaining "pet project" land use planning and implementation processes, (v) promoting and maintaining land use planning and implementation processes that do not benefit the citizens of Mercer Island as a whole, (vi) promoting and maintaining the concealment of land use planning and implementation processes, (vii) promoting and maintaining biased land use planning and implementation processes, (vii) promoting and maintaining the lack of meaningful citizen participation in land use planning and implementation processes, (viii) promoting and maintaining unorderly land use planning and implementation processes, (ix) promoting and maintaining nonstrategic and piecemeal land use planning and implementation processes, (x) promoting and maintaining ill-informed and uninformed land use planning and implementation processes, (xi) the degradation of Petitioner Coen's property values, and (xii) the degradation of Petitioner Coen's emotional, psychological and physical health and well-being (collectively "Likely Prejudice").

17. An Order from the Growth Management Hearings Board invalidating Ordinance 18-13 and Ordinance 18C-14 will substantially eliminate or redress the Current

Prejudice Petitioner Coen has incurred and will substantially eliminate or redress the Likely Prejudice Petitioner Coen will likely incur.

18. Petitioner Coen has Administrative Procedure Act Standing under, without limitation, RCW 36.70A.280(2)d) and RCW 35.05.530.

IX. ESTIMATED TIME REQUIRED FOR HEARING

19. Petitioner Coen estimates that the Hearing on the Merits for this matter will last one full day.

X. RELIEF SOUGHT

20. The Petitioner requests that the Board rule the challenged ordinances to be noncompliant with the GMA and remand the challenged ordinances to the City to take the necessary legislative actions for it to be compliant with the GMA and issue an order of invalidity.

XI. ATTESTATION

21. Petitioner Coen has read this Petition For Review and believes the contents to be true.

DATED this 4th day of February, 2019.

Mark Coen, Petitioner

THOMPSON & DELAY

By: _____
Daniel P. Thompson
WSBA No. 18189
Attorneys for Petitioner Coen

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EXHIBIT 20

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

OWNERS AND NEIGHBORS, et al. (COEN III),

Petitioners,

v.

CITY OF MERCER ISLAND,

Respondent,

and

STROUM JEWISH COMMUNITY CENTER, FRENCH AMERICAN SCHOOL OF PUGET SOUND, HERZL-NER TAMID CONSERVATIVE CONGREGATION, AND MERCER ISLAND CENTER FOR THE ARTS,

Intervenors.

Case No. 19-3-0003c

FINAL DECISION AND ORDER

SYNOPSIS

7800 Plaza Owners Association (Owners), Concerned Neighbors for the Preservation of Our Community (Neighbors), and Mark Coen (Coen) challenged the City of Mercer Island (City) Ordinance No. 18-13, an annual update to the City's Comprehensive Plan which included 15 amendments, and Ordinance No. 18C-14, a legislative action which rezoned property consistent with Amendment 15 to the City's Comprehensive Plan and included an updated land use map. The Board concluded that the City did not have development regulations to implement its new comprehensive plan provisions as required by RCW 36.70A.040.

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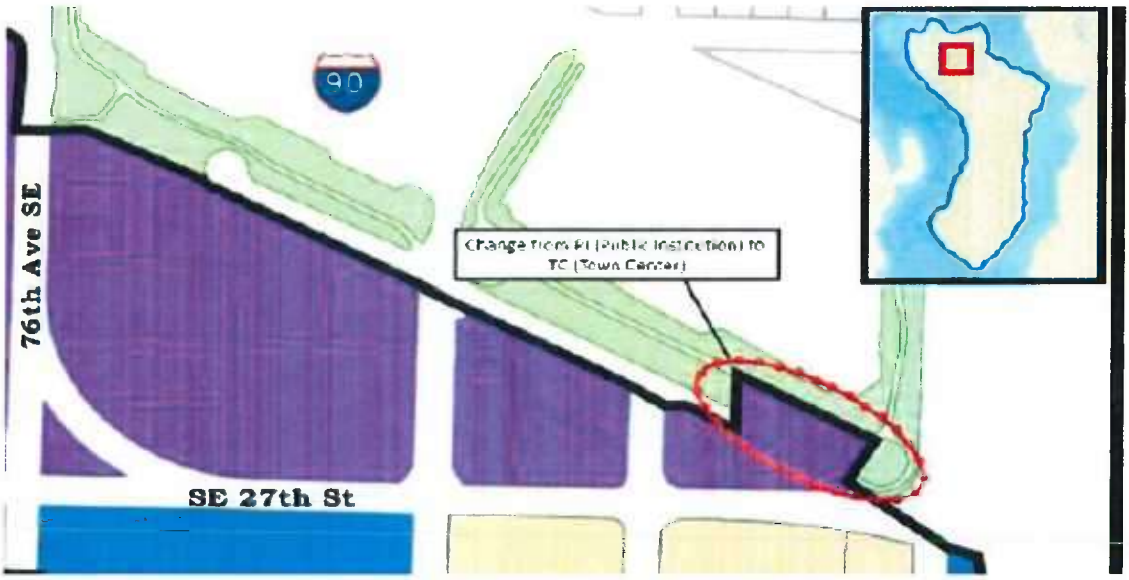
I. INTRODUCTION

Petitioners ***Owners*** and ***Neighbors*** challenge related actions involving amendments to the City's Comprehensive Plan in a number of issues, specifically[1]:

- Ordinance 18-13, constituting an annual update to the City's Comprehensive Plan, which included
  - Amendments 1 and 8, creating a "Community Facilities" (CF) designation.
  - Amendment 15, changing the land use designation of property from Public Institution (PI) to Town Center (TC).
- Ordinance 18C-14, which, consistent with Amendment 15 to the Comprehensive Plan, rezoned a property known collectively as "Parcel 12" from "Public Institution" (PI) to "Town Center" (TC).

Petitioner ***Owners***' concern is that the City's actions will enable a mixed-use development in conjunction with a future light rail station near I-90. Part of this development will be on Parcel 12. Owners challenge the City's actions in laying the land use groundwork for the development as violating provisions of the GMA (Amendment 15, Ordinance 18C-14).



[1] The chronology of the challenged actions appears at pages 3-9 of the City's Prehearing Brief.

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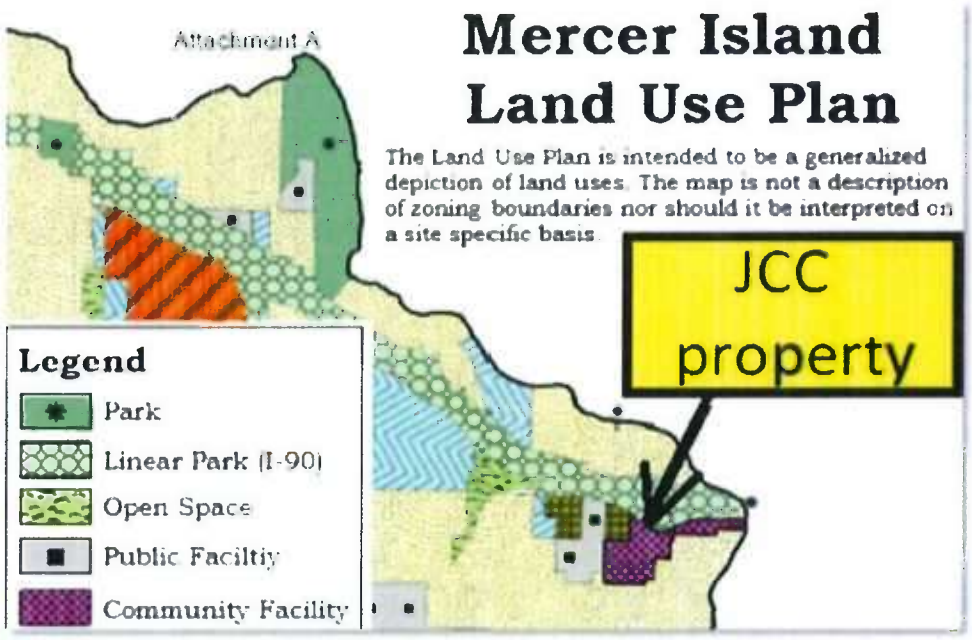
Petitioner ***Neighbors***' challenge relates to the City's identification of a new land use designation, "Community Facilities" (CF) to address expansion plans by the Stroum Jewish Community Center, the French American School and the Herzl-Ner Tamid Conservative Congregation. This collection of interests will hereafter be referred to as "JCC." Neighbors challenge the site-specific actions taken by the city in Amendment 1 and Amendment 8.



Petitioner ***Coen*** joins in some of the issues presented by Owners and Neighbors, but challenges other aspects of Ordinance No. 18-13 and Ordinance No. 18C-14, in particular

- Amendments 6, 10, 11, 12, and 14 due to the lack of rezone applications or development regulations
- Resolution 1545, declaring an emergency.

Procedural matters relevant to the case are detailed in Appendix A.

Legal issues relevant to the case are detailed in Appendix B.

Issues 7, 13, and 27 were not briefed or otherwise abandoned and will not be further dealt with in this order.

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II. BOARD JURISDICTION

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290 (2). The Board finds the Petitioner has standing to appear before the Board pursuant to RCW 36.70A.280(2)(b). The Board also finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

III. STANDARD OF REVIEW

Comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[2] This presumption creates a high threshold for challengers as the burden is on the Petitioners to demonstrate that any action taken by the City is not in compliance with the Growth Management Act (GMA).[3] The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[4]

The scope of the Board's review is limited to determining whether a City has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[5] The Board is directed to find compliance unless it determines that the challenged action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[6]

Several issues allege violations of implementing regulations, Chapter 365-196 Washington Administrative Code (WAC). That chapter establishes procedural criteria to assist local jurisdictions in their GMA compliance efforts. WAC 365-196-030(2) states:

> Compliance with the procedural criteria is not a prerequisite for compliance with the act. This chapter makes recommendations for meeting the requirements of the act, it does not set a minimum list of actions or criteria that

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[2] RCW 36.70A.320(1).
[3] RCW 36.70A.320(2).
[4] RCW 36.70A.280, RCW 36.70A.302.
[5] RCW 36.70A.290(1).
[6] RCW 36.70A.320(3). In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1,* 121 Wn.2d 179, 201 (1993).

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> a county or city must take. Counties and cities can achieve compliance with the goals and requirements of the act by adopting other approaches.

Consequently, the Board will not address Petitioners' alleged WAC violations where based purely on the procedural WAC and not on a goal or requirement of the GMA. While the Board will consider the procedural criteria in reviewing Petitioners' allegations involving substantive requirements found in the GMA, ultimate resolution of the issues will be based on the GMA itself together with appellate court and Board decisions.[7]

Several issues contain assertions that the City did not comply with various provisions of its code unrelated to public participation, in particular decision criteria for a comprehensive plan amendment proposal. This Board's jurisdiction does not extend to determining whether a local jurisdiction follows its own ordinances; our charge is limited to determining whether comprehensive plans and development regulations comply with the GMA and certain other statutes.[8] We address the assertion fully in Issue 2, but otherwise decline to address it repetitively in additional issues where it is raised. Issues concerning whether a local government has followed its own public participation procedures are subject to Board review only under certain circumstances.[9]

IV. ANALYSIS AND DISCUSSION

PUBLIC PARTICIPATION – AMENDMENT 15

Applicable Laws:

RCW 36.70A.140 requires cities and counties to establish and implement a public participation program. It also provides that errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

RCW 36.70A.035(1) requires the City to establish notice procedures "reasonably calculated to provide notice" to property owners and other interested individuals.

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[7] *Peranzi v. City of Olympia*, GMHB No. 11-2-0011 (FDO, May 4, 2012) at 6.
[8] *Spokane County v. City of Spokane*, 148 Wn. App. 120, 125, 197 P.3d 1228, 1230 (2009).
[9] *McNaughton Group v. Snohomish County*, GPSGMHB No. 06-3-0027 (FDO, January 29, 2007) at 22; WAC 365-196-600(10).

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Issue 1. Ordinance 18-13 Did the failure to provide mailed notice of Planning Commission hearings on 18-13 and 18C-14 and when Amendment 15 was added to the docket by Resolution 1545 violate public participation requirements of the GMA?[10]

Petitioners argue that the City did not follow the requirements of its own public participation program and cites the Board's statement in *McNaughton Group* for the proposition that "a jurisdiction's failure to follow the public participation procedures it has adopted pursuant to RCW 36.70A.140 constitutes noncompliance with the statute."[11] Indeed, the issue of whether a local government complies with its own public participation requirements is within the Board's jurisdiction, but as the final order in *McNaughton Group* makes clear, the facts in which the allegation arises matter.[12]

Much of Petitioners Owners and Neighbors' argument centers on a specific provision of the Mercer Island City Code (MICC) 19.15 Administration and on suggestions made in procedural regulations in Chapter 365-196 WAC for the proposition that a necessary notice was not mailed to the public.[13]

Petitioners argue that MICC 19.15.230 applies; that section provides "[i]n cases where both a comprehensive plan amendment and a rezone are required, both shall be considered together, and all public notice must reflect the dual nature of the request." [14] Acknowledging that the city provided newspaper and bulletin notice, Petitioners believe that

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[10] Issue 1, as it appears in the Prehearing Order: By failing to provide mailed notice of the Planning Commission hearings regarding ordinances 18-13 and 18C-14, including a failure to provide mailed notice when Amendment 15 was added to the docket by Resolution 1545, did the City violate its own public participation program, described in MICC 3.46.080; 19.15.050.D.2.d; 19.15.010; 19.15.020.D, E (former); MICC 19.15.269.A (current), in violation of the GMA, RCW 36.70A.035; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3); WAC 365-196-600(10)?

[11] Owners' and Neighbors' Prehearing Brief at 5, citing *McNaughton Group v. Snohomish County*, GPSGMHB No. 06-3-0027 (FDO, January 29, 2007) at 22.

[12] *McNaughton Group* at 15-17.

[13] As noted above in discussing the Standard of Review, the Board does not recognize procedural regulations as providing requirements with which local governments must comply, in the absence of specific requirement language in the GMA itself.

[14] Petitioner in its brief refers to both former code MICC 19.15.050.F and current code MICC 19.15.230.G, since during the year the City adopted an overhaul of is land use administration procedural provisions. The distinction is not germane to the issue here.

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the failure to provide mailed notice violated the City's own public participation program, as pertains to both Parcel 12 and the JCC.[15]

The City asserts that no mailed notice was necessary because the City distinguishes Code requirements relating to proposed code and comprehensive plan amendments, which are legislative actions, from the mailed notice requirements applicable only to "Administrative and Discretionary Actions and Major Single-Family Dwelling Building Permits," which these code and comprehensive plan amendments were not. Thus the City asserts that:

> [E]ven though MICC 19.15.010.E (former) may include Reclassification (Rezone) as Discretionary Actions, it applies only to a project-level or development-specific, "quasi-judicial" rezones that are appealable to Superior Court as a LUPA action.[16]

Petitioners Owners' and Neighbors' reliance on *McNaughton Group* is not persuasive; that case affirms the Board's view that noncompliance must be based on the statute itself as applied to the specific facts of the case.[17] The City's explanation for the application of its own procedures is reasonable.

Petitioners must identify a specific GMA requirement with which the City has failed to comply in order to persuade the Board that a violation has occurred. Here, the Petitioners provided no legal argument connecting the alleged failure to provide mailed notice to requirements appearing in either RCW 36.70A.035(1) or RCW 36.70A.140.

The Board finds and concludes that the Petitioners have not carried their burden in Issue 1 in demonstrating noncompliance with RCW 36.70A.035(1) or RCW 36.70A.140.

Issue 27. Since city code provides that ordinances do not go into effect until 30 days from passage, was Resolution 1545 ineffective insofar as the application to amend the

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[15] Owners and Neighbors at 6-7.
[16] City's Prehearing Brief at 16.
[17] *McNaughton Group* at 1-2.

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comprehensive plan was filed prior to the resolution's effective date and thus violated public participation provisions of the GMA?[18]

MICC 2.24.030 provides that "[g]eneral ordinances of the city shall not go into effect until after 30 days from the time of final passage and are subject to referendum during that period."

Petitioner Coen argues that Resolution 1545 was void because the City gave effect to the Resolution before the 30 days had passed.[19] The City notes that the provision applies to ordinances only and not to resolutions, which it distinguishes as an administrative or ministerial act of the legislative body as compared to ordinances, which enact laws.[20] Under these facts, the Board agrees.

The Board finds and concludes that the Petitioner has not carried its burden in Issue 27 in demonstrating noncompliance with RCW 36.70A.035(1) or RCW 36.70A.140.

FAILURE OF FINDINGS – AMENDMENTS 1, 8, AND 15

Issue 2. By failing to make findings concerning the applications for comprehensive plan amendment in Ordinance 18-13, as required by city code, did the City violate the GMA?[21]

In Issue 2, Petitioners argue in careful detail that the City did not follow its own procedures for amending its Comprehensive Plan, in so far as the City failed to provide

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[18] Issue 27: Resolution 1545 was passed on June 5, 2018. Resolutions and Ordinances are "Legislative Actions" for purposes of adopting Comprehensive Plans and adopting Amendments to Comprehensive Plans. MICC 2.24.030 provides that ordinances do not go into effect until 30 days from the time of final passage. Resolution 1545 became effective on July 5, 2018. The application to amend the comprehensive plan was filed on June 5, 2018, and was deemed complete on June 6, 2018 – 29 days before Resolution (Ordinance) 1545 went into effect. Thus, is the application to amend the comp plan and any actions regarding the comprehensive plan amendment and rezone prior to July 5, 2018, void and violate the Act's provisions referring to public notice and participation in RCW 36.70A.020(11); .035; .070 (preamble); .130(2); .140; .390 and MICC 2.24.220 and .240 that allow a citizen to file a referendum within 30 days of a general ordinance challenging said ordinance?

[19] Petitioner Coen's Prehearing Brief at 17-18.

[20] City's Prehearing Brief at 65.

[21] Issue 2: By failing to make the findings required under MICC 19.15.230.F (current) and MICC 19.15.020.G.1 (former), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

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detailed analysis of both the Parcel 12 and JCC proposals.[22] The City responds that the plain language of the city code sections setting out the decision criteria places the burden on the applicant (not the Planning Commission or City Council):

> *Decision Criteria:* Decision to amend the comprehensive plan shall be based on the criteria specified below. An applicant for a comprehensive plan amendment proposal shall have the burden of demonstrating that the proposed amendment complies with the applicable regulations and decision criteria.[23]

The Council, in its legislative role, determines whether this burden of proof has been met. In *State ex rel. Morrison v. Seattle*, the Court of Appeals analyzed whether the Seattle city council made the proper criteria findings in approving a permit and observed that where general 'findings' are required, the word 'findings' means nothing more than administrative determinations."[24] The City Council here made the determination that the information provided by the applicants was sufficient to meet their burden, a legislative judgment that is afforded discretion and latitude. The City describes the case's holding as followed:

> [W]here general 'findings' are required, "the word 'findings' means nothing more than administration determinations." *State ex rel. Morrison v. Seattle*, 6 Wn. App. 181, 191, 492 P.2d 1078 (1971). The Court continued by clarifying that "[w]hen the council acted to grant [the] applications, it determined that the "facts" necessary to the grant were present." Id. In other words, unless the code specifically requires written findings, which "MICC 19.15.020.G.2 (former) and MICC 19.15.240 (current)" do not, approval by the City Council constitutes a "determina[ation] that the "facts" necessary [for approval] were present. *Id.* [Emphasis from brief deleted.][25]

Petitioners must identify a specific GMA requirement with which the City has failed to comply in order to persuade the Board that a violation has occurred. Here, the Petitioners provided no legal argument connecting the alleged failure of analysis to GMA requirements.

The Board finds and concludes that the Petitioners have not carried their burden in

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[22] Owners and Neighbors Prehearing Brief at 9.
[23] MICC 19.15.230.F, formerly MICC 19.15.020.G.1.
[24] *State ex rel. Morrison v. Seattle*, 6 Wn. App. 181, 191, 492 P.2d 1078 (1971).
[25] City's Brief at 37-38.

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Issue 2 in demonstrating noncompliance with RCW 36.70A.130 or RCW 36.70A.140 through a failure of analysis of proposals for comprehensive plan amendments.

Issue 6. Did Ordinance 18-13, in changing the comprehensive plan to change a large portion of the Greta Hackett Outdoor Sculpture Gallery from "linear park" to "town center" in Amendment 15 fail to comply with criteria set out of the City code applicable to site specific amendments and thus violate provisions of the GMA?[26]

As in Issue 2, above, in Issue 6, Petitioners aver that the City did not correctly apply the criteria set out in its own code. The assertion made here is refuted by the same analysis: The applicants for a comprehensive plan amendment are to demonstrate compliance with the criteria. The City Council made the legislative judgment that the criteria were met.

Petitioners must identify a specific GMA requirement with which the City has failed to comply in order to persuade the Board that a violation has occurred. Here, the Petitioners provided no legal argument connecting the alleged failure of analysis to GMA requirements.

The Board finds and concludes that the Petitioners have not carried their burden in Issue 6 in demonstrating noncompliance with RCW 36.70A.130 or RCW 36.70A.140 in actions alleging failure of analysis for comprehensive plan amendments.

Issue 12. By failing to make findings as required by city code, in Ordinance 18-13, Amendment 15, did the City violate certain provisions of the GMA?[27]

In Issue 12, Petitioners allege the City was required to make certain written findings as a procedural matter before approving the rezone.[28] Although the code sections alleged violated here are different, the analysis refuting this argument is largely the same, as the

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[26] Issue 6: By amending the comprehensive plan to change a large portion of the Greta Hackett Outdoor Sculpture Gallery from "linear park" to "town center," did the City violate the requirements in MICC 19.15.230.F.2 (current) and MICC 19.15.020.G.1.a (former) that site-specific amendments must be compatible with the adjacent land use and development patterns and must benefit the community as a whole and must not adversely affect community facilities, all in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[27] Issue 12: By failing to make the findings required by MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), did the City fail to follow procedures as required by RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[28] Owners' and Neighbors' Prehearing Brief at 23.

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City points out, again citing precedent in *State ex rel. Morrison* that written findings are not required for legislative acts.[29]

The Board finds and concludes that the Petitioners have not carried their burden in Issue 12 in demonstrating noncompliance with a RCW 36.70A.130 or RCW 36.70A.140 through failure of analysis of proposals for comprehensive plan amendments.

Issue 18. By failing to identity "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" as required by city code, did the City violate the GMA?[30]

Issue 19. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by city code, did the city violate the GMA?[31]

Issue 24. By applying a new land use designation to a specific property, even though no zoning regulations currently exist, did the city fail to show that the property is suitable for development in accordance with its own code and thus violate the GMA?[32]

For Issues 18, 19, and 24, Petitioners Owners and Neighbors briefed these issues by reference to the arguments made in Issue 2.[33] For same reasons as noted there, and as offered by the City in counter,[34] the issues fail.

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[29] City of Mercer island's Prehearing Brief at 37-38.

[30] Issue 18: By failing to identity "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[31] Issue 19: By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[32] Issue 24: By applying a new land use designation (community facilities) to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any community facilities zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[33] Owners and Neighbors Prehearing Brief at 35.

[34] City's Brief at 44-45 and 59.

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The Board finds and concludes that the Petitioners have not carried their burden in Issue 18, 19, and 24 in demonstrating noncompliance with RCW 36.70A.130 or RCW 36.70A.140 through failure of analysis or findings for comprehensive plan amendments.

DOCKETING – AMENDMENT 15

Applicable Law:

RCW 36.70A.130(2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year....

(b) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with the growth management hearings board or with the court.

Issue 3. By adopting Ordinance 18-13 without placing Amendment 15 on the initial comprehensive plan docket and without declaring an emergency, did the city violate the GMA by failing to consider all amendment proposals concurrently and no more than once a year?[35]

Petitioners assert that the City adopted an out-of-cycle plan amendment, Amendment 15, which is the site-specific plan amendment for Parcel 12, without declaring an emergency, thus running afoul of RCW 36.70A.130.

Petitioners assert that because Amendment 15 was not included in the final docket adopted November 6, 2017, the City Council did not have the opportunity to concurrently consider "the cumulative effect of the various proposals." The City has identified Resolution

[35] Issue 3: By adopting the Comprehensive Plan ordinance without placing Amendment 15 on the annual comprehensive plan amendment docket, as required by MICC 19.15.050.D (former) and MICC 19.15.230.C (current), and without declaring an emergency as required by RCW 36.70A.130(2)(b) and WAC 365-195-640(4), did the City fail to consider all amendment proposals concurrently, no more frequently than once per year, and as part of the docket cycle, as required by RCW 36.70A.130(2); RCW 36.70A.470; WAC 365-196-640(3); WAC 365-640(6); and WAC 365-196-600(3)(a)(i)?

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1545 as the emergency addition to the docket, consistent with RCW 36.70A.130(2)(b), but Petitioners challenge the characterization of the resolution as sufficient to establish that an emergency existed because "neither the title nor the text of Resolution 1545 declares an emergency."[36]

The City counters by pointing out that all 15 amendments were considered in 2018, a single calendar year, thus meeting the requirements of the statute. The Petitioners' argument that Amendment 15 was "out-of-cycle" suggests that it is the docket that is subject to some point of final determination. Petitioners read words into the statute that aren't there. The plain language of RCW 36.70A.130(2) makes clear that it is amendment or revision to the comprehensive plan that is subject to the annual limitation.

The Board finds and concludes that the Petitioners have not carried their burden in Issue 3 in demonstrating noncompliance with any GMA section in the later addition of Amendment 15 to the docket.

INCONSISTENCY WITHIN COMPREHENSIVE PLAN – AMENDMENT 15

Applicable Laws:

RCW 36.70A.070 - The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

RCW 36.70A.130(1)(d) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

Issue 4. Ordinance 18-13 Did the ordinance, in changing the designation of Aubrey Davis Park from "linear park" to "town center" in Amendment 15, create an internal inconsistency with existing policies of the Comprehensive Plan concerning parks and recreation?[37]

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[36] Owners and Neighbors Prehearing Brief at 16.

[37] Issue 4: By amending the comprehensive plan land use map to change a portion of Aubrey Davis Park from "linear park" to "town center," did the City disregard the provisions in the comprehensive plan protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, thereby creating an

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Issue 5. Ordinance 18-13 Did the ordinance, in changing the designation of Aubrey Davis Park from "linear park" to "town center" in Amendment 15 create an internal inconsistency with the comprehensive plan policies limiting new multi-family development?[38]

Petitioners in Issues 4 and 5 allege that the amendment is inconsistent with the comprehensive plan's policies concerning parks, specifically the Park Plan's identification of goals for parks that address retention of publicly owned parks and open spaces in perpetuity and the preservation of open space environments and trails for the benefit of existing and future generations.[39]

Further Petitioners argue that Land Use Goal (LU) 15, which states that "Mercer Island should remain *principally* a low density, single family residential community"[40] prohibits *any* reconfiguration of the land use map that reduces the area designated as low density, single family residential. In LU 15.3, the comprehensive plan asserts that "[m]ulti-family areas will continue to be low rise apartments and condos and duplex/triplex designs, and with the addition of the Commercial/Office (CO) zone, will be confined to those areas already designated as multi-family zones." Further LU 17 states that "[w]ith the exception of allowing residential development, commercial designations and permitted uses under current zoning will not change."

Petitioners argue:

> Amendment 15 creates an internal inconsistency with these policies, because... it allows 125 residential units in the park, which is not an area "already designated for multi-family zones." The amendment allows the expansion of commercial uses, because of the proposed ground floor retail. Amendment 15's expansion of multi-family and commercial uses into a new area thwarts and precludes the achievement of those policies that explicitly

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internally inconsistent plan in violation of MICC 19.15.020.G.1.a (former), MICC 19.15.230.F.1 (current), and RCW 36.70A.070?

[38] Issue 5: By amending the comprehensive plan to change a portion of Aubrey Davis Park from "linear park" to "town center," did the City create an internal inconsistency with the provisions in the comprehensive plan limiting new multi-family development, including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.1.a (former), MICC 19.15.230.F.1 (current) and RCW 36.70A.070?

[39] Owners and Neighbors Prehearing Brief, p 16-17, referencing IR 189 at 91-93.

[40] Emphasis added.

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forbid such expansion. Amendment 15 is therefore, internally inconsistent with the rest of the Comprehensive Plan, thereby violating the GMA.[41]

Petitioners' use of hyperbole here, e.g., "125 residential units in the park," is unpersuasive and, frankly, not factual. The portion of Aubrey Davis Park re-designated to Town Center by Amendment 15 is small. As the City notes, the Town Center area is 76 acres; Aubrey Davis Park is more than 85 acres. Of the approximately 20,000 square feet affected by Amendment 15, approximately 10,500 square feet (0.24 acres) is associated with Aubrey Davis Park; the remainder is Sunset Highway. [42]

Amendment 15 affects a small portion of the total park area, on its flank, and immediately adjacent to the Town Center zone which is a focused mixed use core, oriented toward pedestrian connections and regional transit access. The land affected by Amendment 15 was part of a complex negotiation between the City and the regional transit authority for purposes of siting a light rail station, in furtherance of a variety of other comprehensive plan goals.[43]

RCW 36.70A.070 requires consistency, but courts have recognized that "[g]oals considered by local governments in comprehensive planning may be mutually competitive at times," and if an amendment advances some goals, the fact that fails to advance another "cannot [alone] be an invalidating inconsistency" if the latter goals are not precluded by the former.[44] This Board has consistently held that the requirement of internal consistency means that planning policies and regulations must not make it impossible to carry out one provision of a plan or regulation and also carry out the others.[45] The Petitioners have not shown how the adoption of Amendment 15 will prevent the realization of any of the goals named in their brief, nor how Amendment 15 impedes or precludes the realization of any of those goals by the City.

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[41] Owners and Neighbors Prehearing Brief at 19.
[42] City's Prehearing Brief at 26, footnote 15.
[43] City's Prehearing Brief at 5-9, provides a detailed chronology leading up to Amendment 15.
[44] *Spokane County v. EWGHMB*, 173 Wn. App. 310, 333, 293 P.3d 1248, 1259-60 (2013).
[45] *Futurewise v. Whatcom County*, WWGMHB Case. No. 05-2-0013, Final Decision and Order (January 9, 2012).

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The Board finds and concludes that the Petitioners have not carried their burden in Issues 4 and 5 in asserting that the re-designation of a portion of Aubrey Davis Park creates an internally inconsistent plan in violation of RCW 36.70A.070.

Issue 10. Ordinance 18-13 By rezoning the property from "public institution" to "town center" in Amendment 15 did the City adopt a development regulations that is inconsistent with and fails to implement comprehensive plan policies concerning parks and recreation?[46]

Issue 11. Ordinance 18-13 By rezoning the property from "public institution" to "town center" in Amendment 15 did the City adopt a development regulation that is inconsistent with and fails to implement comprehensive plan policies limiting new multi-family development?[47]

Petitioners here argue that Amendment 15 created a development regulation that is inconsistent with and fails to implement the comprehensive plan. The City responds that Ordinance 18C-14 implemented the comprehensive plan amendment approved in Ordinance 18-13.

A City is permitted to change its comprehensive plan, and inconsistency arises only between the current comprehensive plan and the development regulations. Inconsistency, discussed in more detail in Issues 21-23 below, does not apply to a former comprehensive plan policy.

The Board finds and concludes that the Petitioners have not carried their burden in issues 10 and 11 in showing that the adoption of Ordinance 18-13, Amendment 15, created an inconsistency between the comprehensive plan and development regulations.

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[46] Issue 10: By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, all in violation of MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?

[47] Issue 11: By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies limiting new multi-family development, including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.2.a (former), MICC 19.15.240.C.1 (current) and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?

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FAILURE TO CONSIDER COMP PLAN ELEMENTS – AMENDMENT 15

Applicable Law:

RCW 36.70A.070 requires comprehensive plans to contain both a capital facilities plan (subsection 3) and a transportation plan (subsection 6).

Issue 8. Did adoption of Ordinance 18-13, Amendment 15, allowing high-density residential and commercial, without amending the capital facilities and transportation elements, violate GMA requirements?[48]

Issue 9. By amending the comprehensive plan in Ordinance 18-13, Amendment 15, to allow construction of a commuter parking lot, without updating traffic forecasts or providing financing, did the City fail to comply with the GMA?[49]

Petitioners' argument is that the City, in adopting Amendment 15, failed to consider the impact of that action on its capital facilities and transportation element.[50] That failure, in Petitioners' view, constitutes a violation of the GMA due to the fact that the City failed to 'show its work,'[51] citing *In re Expansion of Spokane County Urban Growth Area,* 181 Wn. App. 369, 325 P.3d 434 (2014). The City distinguishes the facts in this case from those in *In re Expansion of Spokane County*, in which the County had expanded its Urban Growth Area (UGA) by 229 acres; the Board held that in expanding the UGA, the County was required to engage in planning for capital facilities, utilities and transportation within the land covered by that expansion.[52]

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[48] Issue 8: By amending the comprehensive plan to allow high-density residential and commercial development without amending the capital facilities and transportation elements, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)?

[49] Issue 9: By amending the comprehensive plan to allow the construction of a City-owned commuter parking lot, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)?

[50] Owners and Neighbors Prehearing Brief at 22.

[51] The citation in Owners and Neighbors Prehearing Brief at 22, was to the Court of Appeals case of a different title, appealing a Board decision under a different name. *In re Expansion of Spokane County Urban Growth Area*, 181 Wn. App. 369, 325 P.3d 434 (2014)., which was an appeal of *Miotke et al v. Spokane County*, EWGMHB No. 05-1-0007 (FDO, February 14, 2006).

[52] City's Prehearing Brief at 35, citing *Miotke et al*, at 81.

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Here Petitioners have not identified any insufficiency in the City's Capital Facilites Plan (CFP) or Transportation element as a result of the City's action. The City was not expanding the UGA, as was the case *In re Expansion of Spokane County,* so the 'show your work' requirement is not applicable to these facts. Here, the City was redesignating property within the UGA, and Petitioners have not shown how the 'show your work' requirement applies in this instance.

The Board finds and concludes that the Petitioners have not carried their burden in Issues 8 and 9 in showing any violation of RCW 36.70A.070.

SEPA

Issue 17. Did the City fail to update its SEPA review to account for new information regarding the Parcel 12 initiative?[53]

Petitioners Owners' and Neighbors' brief argues that the City's SEPA Checklist[54] and its subsequent Determination of Non-significant (DNS)[55] are insufficient because neither included information specific to Amendment 15 nor information which was subsequently developed during a Request for Qualifications process concerning development on Parcel 12.[56]

Petitioners' framing of the issue itself specifically asks this Board to assess whether "[b]y failing to update the July 30, 2018, SEPA Determination of Non-significance (which purports to analyze both the Comprehensive Plan ordinance and the rezone ordinance),

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[53] Issue 17: By failing to update the July 30, 2018, SEPA Determination of Non-significance (which purports to analyze both the Comprehensive Plan ordinance and the rezone ordinance), even after substantial new information about the development proposals emerged in response to the City's Request for Proposals prior to the November 20, 2018, City Council vote, did the City violate SEPA's requirement to conduct the earliest review possible once the features of a project can be identified, and update such review in light of new information, MICC 19.07.120.I.5 (current and former) WAC 197-11-055; WAC 197-11-340(3)(a); RCW 43.21C.110(1) (authorizing the two WACs cited alreadin [sic] in this issue and making such WACs binding upon all branches of government, including local government); RCW 43.21C.030 (guidelines for state agencies, local governments)?

[54] IR 125.

[55] IR 135.

[56] Owners and Neighbors at 28.

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even after substantial new information about the development proposals emerged in response to the City's Request for Proposals prior to the November 20, 2018, City Council vote, did the City violate SEPA's requirement to conduct the earliest review possible *once the features of a project can be identified, and update such review in light of new information* ...?" [Emphasis added.][57]

To the extent that Petitioners' brief describes insufficiencies in the SEPA action[58] beyond the effect of the 'new information' described in the issue statement, this Board is unable to address those arguments. This Board is limited in its jurisdiction and does not issue advisory opinions "on issues not presented to the board in the petition for review's statement of the issues, as modified by any prehearing order." WAC 242-03-810(2).

The issue statement directs us to evaluate the impact of the 'substantial new information' which emerged subsequent to the July 30 DNS, and the Petitioners describe the City's action as a 'Request for Proposals' and the subsequent information to involve 'development proposals' with 'features' that required updating the SEPA Checklist and DNS. The City's advertisement was for Request for Qualification, and the presentations were in response to the City's requirement that the applicants illustrate a project vision and concept.[59] Seeking a development partner for a project which includes not only Parcel 12 but other adjacent parcels is a proprietary matter for the City. Adopting the ordinances challenged here was a legislative non-project action of the City, as a municipal government. This distinction is critical to the Board's analysis of this issue; the City's proprietary action in pursuing a development partner for a possible future project to be pursued with other partners does not rise to the level of 'new information' about legislative action taken to facilitate consideration of that future project.

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[57] Issue 17, as it appears in the Prehearing Order, italics added for emphasis.
[58] Owners and Neighbors at 29-34.
[59] *Exs. 193, 194.*

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As the City states, amendment of the land use designation "does not *per se* approve or require any project on Parcel 12. Any future development proposal for Parcel 12 will be subject to SEPA at the appropriate, required time."

The Board finds and concludes that the Petitioners have not carried their burden in showing that the City in adopting these ordinances violated RCW 43.21C.

FINDINGS REQUIRED BY CITY CODE – AMENDMENTS 1, 8, 15

Issue 20. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, did the City violate the requirement to consider an amendment and a rezone together as required by city code, thus in violation of the GMA?[60]

Petitioners read MICC 19.15.230.G[61] (current) to mean that the amendment and rezone are "required" in this instance. Petitioners' argument is conclusory in nature. The City reads this section of its code to require concurrent consideration of the comprehensive plan amendment with a rezone request made by a private party.[62] Without any analysis or precedent supporting Petitioners' contention, Petitioners have not provided adequate legal argument to prove any violation of RCW 36.70A.130 nor RCW 36.70A.140.

The Board finds and concludes that the Petitioners have not carried their burden in Issue 20 to establish a violation of RCW 36.70A.130 or RCW 36.70A.140.

INCONSISTENCY WITH PLANNING POLICIES – AMENDMENTS 1, 8, AND 15

Applicable Law:

As a general matter, **RCW 36.70A.070** requires comprehensive plans to be internally consistent and all elements to be consistent with the future land use map.

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[60] Issue 20: By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[61] MICC 19.15.230.G *Combined Comprehensive Plan Amendment and Rezone.* In cases where both a comprehensive plan amendment and a rezone are required, both shall be considered together, and all public notice must reflect the dual nature of the request.

[62] City's Brief at 46.

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Issue 21. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44 and thus in violation of the GMA?[63]

Issue 22. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, creating an internal inconsistency in violation of the GMA?[64]

Issue 23. By analyzing policy LU 17.4 but failing to analyze LU 17, which promises not to change existing commercial designations and uses, did the City create an internally inconsistent comprehensive plan, in violation of the GMA?[65]

As a general matter, the GMA's consistency requirement "means that differing parts of the comprehensive plan 'must fit together so that no one feature precludes the achievement of any other." *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 476-77, 245 P.3d 789, 804 (2011). This does not mean that any tension between the goals in a plan is impermissible; courts recognize that "[g]oals considered by local governments in comprehensive planning may be mutually competitive at times,' and "[t]he weighing of competing goals and policies is a fundamental planning responsibility of the local government." If an amendment "meaningfully advances [some] comprehensive plan goals and policies,' the fact that it 'fails to advance another ... cannot [alone] be an invalidating inconsistency" if the latter goals are not precluded by the former. *Spokane County v. EWGHMB*, 173 Wn. App. 310, 333, 293 P.3d 1248, 1259-60 (2013).

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[63] Issue 21: Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

[64] Issue 22: Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

[65] Issue 23: By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), and create an internally inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

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Instead, "[t]he GMA requirement for internal consistency means that the planning policies and regulations must not make it impossible to carry out one provision of a plan or regulation and also carry out the others." *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013, Final Decision and Order at 169 (January 9, 2012).

Petitioners Owners and Neighbors argue for a variety of inconsistencies but fail to make convincing argument as to how creating the Community Facilities land use category and policies precludes the attainment of, or is in actual conflict with, the city or county policies named in the issue statement.

The King County Countywide Policies DP-39 and DP-44 appear in the section addressing urban design and recommend processes and standards. Petitioners offer no argument for how these specific policies are thwarted or precluded by the language of the comprehensive plan amendment. Indeed, LU Goal 27 established in Amendment 8 calls for the establishment of standards and regulations subject to design review and supplemental "community design dialogue, utilizing techniques such as design charrettes and public engagement and outreach."[66]

In addressing the city policies, generally, Petitioners encourage us to "assume that the most intense possible development will occur, and then analyze whether that level of development would be consistent with the GMA," suggesting "an unlimited number of multi-story buildings with no setbacks and no stepping-back of upper stories, featuring multi-family housing at unlimited density, plus business, office and other commercial uses."[67]

Petitioners interpret each of the land use policies cited as providing "strict protections" for single-family neighborhoods without showing how Amendments 1 and 8 threaten the attainment of these policies on a city-wide basis. The City contends that Petitioners would have the Board interpret policies concerning the principal focus on low-density, single family housing as requiring exclusivity of that housing type.[68] Analysis of

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[66] Mercer Island Comprehensive Plan, Land Use Element.
[67] Owners and Neighbors at 39.
[68] City's brief at 52.

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consistency under the statute and regulations require no such thing.

The Board finds and concludes that the Petitioners have not carried their burden in Issues 21, 22, and 23 to show the City violated the GMA.

EFFECT OF EMERGENCY – RESOLUTION 1545

Issue 28. Does Resolution 1545 fail to qualify as an emergency such that the comprehensive plan amendment and the rezone to which it applied are void?[69]

Petitioner Coen's argument that Resolution 1545 is 'facially invalid' and violates the public participation provisions of the GMA is predicated on the belief that the resolution did not qualify as an emergency action as contemplated by RCW 36.70A.130(2)(b). The Board, in its Order on Motions, denied the City's Motion to Dismiss Issue 30, awaiting further argument on this issue.

Resolution 1545 directed staff to analyze, study, and bring a recommendation to the City Council on a possible comprehensive plan amendment affecting Parcel 12. Although the resolution itself describes the potential amendment as "out-of-cycle," the Board has determined above that it was not. For purposes of RCW 36.70A.130(2)(b), all amendments, including the amendment created through the staff work performed pursuant to Resolution 1545, were considered in 2018, a single calendar year. The requirements of the statute were met.

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[69] Issue No. 28: Resolution 1545 purports to qualify as an "emergency." When determining whether an "emergency" exists, courts are "limited to examining the face of the ordinance." *Federal Way v. King County*, 62 Wn. App. 530, 536 (1991). The ordinance must include a statement of the underlying emergent facts. *Id.* at 543. Without such a statement, an emergency declaration is invalid. *Id.* at 536. Resolution 1545 does not even state that there is an emergency. All statements in the resolution are conclusory in nature and it does not contain any facts to justify an emergency. *See Swartout v. Spokane*, 12 Wn. App. 665, 672-73 (1979). On June 5, 2018, during AB 5434, the council discussed Resolution 1545 but there was no mention of an emergency or discussion of any facts which would support an emergency. The City's own self-imposed deadline does not create an emergency. Does the lack of a true emergency and the failure to document the emergency render comprehensive plan amendment 15 and the rezone void and violate the Act's provisions .130(2)(a) and .130(2)(b) requiring that nonemergency plan amendments shall be considered no more frequently than once every year unless a true emergency exists and is properly documented?

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As discussed in Issue 3, the Petitioner's argument that Amendment 15 was "out of cycle"[70] suggests that it is the docket that is subject to some point of final determination. That reads words into the statute that aren't there. The plain language of RCW 36.70A.130(2) makes clear that it is amendment or revision to the comprehensive plan that is subject to the annual limitation.

The Board finds and concludes that Petitioner has not met its burden to show violation of the GMA in Issue 28.

ISSUES ADDRESSING ONLY AMENDMENTS 6, 8, 10, 12, and 14

Issue 30. By adopting amendments 6, 8, 10, 12 and 14 that seek to create a new zone with identifying "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole", did the city violate the GMA?[71]

Issue 31. By adopting site-specific amendments 6, 10, 12, and 14 to its comprehensive plan without making the additional findings for site-specific amendments required by city code, did the city violate the GMA?[72]

Issue 32. By adopting site-specific comprehensive plan amendments 6, 10, 12 and 14 without a site-specific rezone, did the City violate the requirement to consider an amendment and a rezone together as required by city code and in violation of the GMA?[73]

Issue 33. Are amendments 6, 10, 12, and 14 inconsistent with county-wide planning

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[70] Coen's Prehearing Brief at 12.

[71] Issue 30: Did the Council's adoption of ordinance 18-13 and comprehensive plan amendments 6, 8, 10, 12 and 14 that seek to create a new zone fail to identify "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), and did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[72] Issue 31: By adopting site-specific amendments 6, 10, 12 and 14 to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[73] Issue 32: By adopting site-specific comprehensive plan amendments 6, 10, 12 and 14 without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

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policies DP-39 and DP-44?[74]

Issue 34. Are amendments 6, 10, 12, and 14 inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, creating an internally consistent comprehensive plan in violation of the GMA?[75]

Issue 35. By applying a new but inchoate land use designation to a specific property in amendments 6, 10, 12, and 14, even though no zoning regulations currently exist, did the City fail to comply with existing city code, in violation of the GMA?[76]

Petitioner Coen's argument in support of these issues is comprised of a number of conclusory statements, based on a presumption that the absence of applications to rezone properties and development regulations implementing the amendments make it impossible to determine whether the amendments are consistent and because they cannot be evaluated for consistency at this moment in time, they must violate the GMA and invalidated.[77]

> Ordinarily, in order to compare two things for consistency, both things must be known. In this case, the comprehensive plan is known, as well as the existing policies ... but none of the future, inchoate zones specifically set forth in the amendments or anticipated has an applicant, an application, location, or any of the necessary amendments to the development regulations for height, setbacks, lot coverage/impervious surface limits, and gross floor area to lot area ration (GFAR). As a result, just as the citizens struggled,

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[74] Issue 33: Are amendments 6, 10, 12 and 14 inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

[75] Issue 34: Are amendments 6, 10, 12 and 14 inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

[76] Issue 35: By applying a new but inchoate land use designation to a specific property in amendments 6, 10, 12 and 14, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any such zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

[77] Petitioner Coen's Prehearing Brief, p. 17.

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> petitioners and citizens cannot meaningfully determine the internal consistency Amendments 1, 8, 10, 11, 12 and 14. Therefore, the Board should invalidate these amendments until the proper application to rezone and concurrent development regulations have been drafted and are concurrently adopted.[78]

Petitioner Coen relies yet again on his proposition that the failure to concurrently adopt development regulations (or a purported rezone) with a comprehensive plan amendment is sufficient to invalidate the amendment itself. Yet Petitioner cannot cite a GMA statute or regulation which would clearly support this result

The Board finds and concludes that the Petitioner has failed to meet its burden to show that adoption of the challenged ordinances were in violation of the GMA, as alleged in Issues 30, 31, 32, 33, 34, or 35.

INCONSISTENCY IN COMP PLAN AND DEVELOPMENT REGULATIONS – AMENDMENTS 1, 8, AND 15

Applicable laws:

RCW 36.70A.040(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210; … [and] (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan …

RCW 36.70A.070 - The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map …

RCW 36.70A.130(d) - Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

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[78] *Id.* at 20-21.

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Issue 14. In rezoning Parcel 12 from public institution to town center, did the City violate its own code by creating an inconsistency within the City's development code concerning the I-90 right of way?[79]

Petitioners argue that the action taken in rezoning Parcel 12 violated Mercer Island's development regulations, because MICC 19.05.010.B states that the area in question "shall be part of the publication institution zone" and that all uses within the I-90 right of way "shall be maintained as set forth" in related documents., and that "the City is prohibited from rezoning the park out of the 'Public Institution zone."[80] As discussed previously, and as the City again asserts,[81] this argument ignores the City Council's plenary powers to enact law, including amending or repealing prior laws.[82]

The Board finds and concludes that Petitioners have not met their burden to show violation of the GMA in Issue 14.

Issue 15. In rezoning Parcel 12 from public institution to town center in order to develop new uses, did the City violate its own code by creating an inconsistency with the City's development code concerning the I-90 right of way?[83]

On the question of inconsistency raised in Issue 15, however, in Ordinance 18C-14, the City did change the Future Land Use Map (FLUM) and the zoning applicable to Parcel 12 from public institution to town center. MICC 19.05.010 Public Institution is the section of

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[79] Issue 14: By rezoning the property from "public institution" to "town center," did the City violate the requirement in MICC 19.05.010.B (current and former) that "the entire area within the Mercer Island I-90 right-of-way, including...recreations areas, linear greenbelts... shall be part of the public institution zone," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? *See West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995) at 7–8?

[80] Owners and Neighbors Prehearing Brief at 25.

[81] City's Prehearing Brief at 39.

[82] This relatively settled point of municipal law was recently affirmed in *Fabre v. Town of Ruston*, 180 Wn. App. 150, 321 P.3d 1208 (2014).

[83] Issue 15: By rezoning the property from "public institution" to "town center" in order to develop new residential and other uses on the property, did the City violate the requirement in MICC 19.05.010.B (current and former) that "all uses within the I-90 right-of-way shall be maintained as set forth in city-approved I-90 related documents," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? See *West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 95-3-0040 (Final Decision and Order, September 11, 1995) at 7–8?

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the land development code applicable to the I-90 right of way. It is not immediately apparent from Petitioners' brief where the specific inconsistencies lie, i.e., what development regulations previously applicable to Parcel 12 are inconsistent with its FLUM designation and the rezone adopted by Ordinance 18C-14. However, Petitioner did cite Development Services Director Evan Maxim as testifying to the City Council:

> If it's commuter parking, I think it falls within the zoning allowances for the public institution zoning designation. So there wouldn't be a need then to look at a rezone under the Primavera (sculpture) site. The TC zoning designation was necessary for the – the private development component to occur.[84]

The City alludes to and acknowledges the potential for the inconsistency in its brief:

> [T]o the extent that Ord. 18C-14 and MICC 19.05.010B are impermissibly inconsistent, this Board should provide the Mercer Island City Council the opportunity to reconcile them on remand by amending MICC 19.05.010B to not restrict the rezone of parcel 12, rather than invalidate ord. 18C-14.

As this Board has previously held, the GMA requires consistency between the comprehensive plan, the land use map and the zoning code. Petitioners have identified an inconsistency between the City's comprehensive plan, land use map and development regulations concerning Parcel 12, the City has acknowledged it, and the Board is persuaded that a mistake has been made.

The Board finds and concludes that the Petitioners have met their burden in Issue 15, showing that the adoption of Ordinance 18C-14 resulted in an inconsistency between the comprehensive plan, the land use map and the development regulations concerning Parcel 12, in violation of RCW 36.70A.040.

Issue 16. Ordinance 18-13 If the Board finds the Comprehensive Plan ordinance violates the GMA, should the rezone ordinance also be found in violation, because the plan and development regulations are now inconsistent?[85]

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[84] Owners and Neighbors Prehearing Brief at 26, citing IR 198 at 3. Details within IR 193.

[85] Issue 16: If the Board finds the Comprehensive Plan ordinance violates the GMA, should the rezone ordinance also be found in violation and remanded, because the rezone ordinance is based on the Comprehensive Plan ordinance, and development regulations must be consistent with and implement the comprehensive plan, per RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)?

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To the extent that the comprehensive plan amendment adopted in Ordinance 18-13 resulted in the later rezone adopted in Ordinance 18C-14 and thus created an inconsistency between the comprehensive plan and the city's development regulations, that issue is resolved in the violation found under Issue 15, above. The Board has remanded for actions to cure that violation, but does not have the authority to direct the manner in which the City complies.

The Board finds and concludes that the Petitioners have not carried their burden to establish a violation of the GMA in Issue 16.

Issue 25. By creating a new land use designation but without adopting new development regulations, did the City create an inconsistency between its comprehensive plan and its zoning regulations in violation of the GMA?[86]

Issue 26. Does the council's adoption of both ordinances, without concurrent development regulations for an indefinite period of time, violate GMA's requirement of concurrency and consistency between the comprehensive plan and development regulations?[87]

Issue 29. Does the Council's adoption of ordinance 18-13 and comprehensive amendments 6, 10, 11, 12 and 14 without concurrent development regulations for an indefinite period of time violate the GMA's requirement of concurrency and consistency between the comprehensive plan and development regulations?[88]

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[86] Issue 25: By creating a new land use designation (community facilities), and applying that new designation to a specific property, but without adopting new development regulations that would apply to the new designation, did the City create an inconsistency between its comprehensive plan and its zoning regulations, in violation of RCW 36.70A.040 and the holding in *City of Bremerton v. Kitsap County*, GMHB 04-3-0009c at 10 (Final Decision and Order, Aug. 9, 2004)?

[87] Issue 26: Does the council's adoption of ordinance 18-13 and ordinance 18C-14, and amendments 1, 8 and 15, without concurrent development regulations for an indefinite period of time violate the provisions of the Growth Management Act relating to concurrency and consistency between the comprehensive plan and development regulations: RCW 36.70A.040(3), RCW 36.70A.130(1)(a), RCW 36.70A.130(1)(d), RCW 36.70A.130(4), WAC 365-196-010(1)(e), WAC 365-196-060(2)(d), WAC 365-196-210(8), WAC 365-196-500(3), WAC 365-196-500(4), WAC 365-196-610, WAC 365-196-640, WAC 365-196-800(1), and WAC 365-196-805?

[88] Issue 29: Does the Council's adoption of ordinance 18-13 and comprehensive amendments 6, 10, 11, 12 and 14 without concurrent development regulations for an indefinite period of time violate the provisions of the Growth Management Act relating to concurrency and consistency between the comprehensive plan and development regulations: RCW 36.70A.040(3), RCW 36.70A.130(1)(a), RCW 36.70A.130(1)(d), RCW 36.70A.130(4), WAC 365-196-010(1)(e), WAC 365-196-060(2)(d), WAC 365-196-210(8), WAC 365-196-500(3), WAC 365-196-500(4), WAC 365-196-610, WAC 365-196-640, WAC 365-196-800(1), and WAC 365-196-805?

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This Board considered a version of some of these issues in *Mark Coen v. City of Mercer Island (Coen II)*, GMHB No. 18-3-0010 (FDO, May 10, 2019, Appealed to King County Superior Court, Mark Coen v. City of Mercer Island, Case Number: 19-2-15162-5). In that case, Mark Coen challenged the City of Mercer Island Ordinance No. 18C-08, a revision of the City's land use approval procedures, which included a provision codifying the city's intent to adopt development regulations consistent with certain amendments to the comprehensive plan "as soon as reasonably practicable following the adoption of the amendments." MICC 19.15.230(I). Petitioner argued the Growth Management Act (GMA) requires adoption of consistent implementing development regulations concurrent with adoption of comprehensive plan amendments. The Board concluded that Petitioner failed to carry his burden to prove that the procedural ordinance was noncompliant even though following the process there adopted might result in a failure to comply in some circumstances.

Where Petitioners here attempt to link consistency and concurrency, as they do in Issues 26 and 29, their argument fails for the same reasons that the Board ruled as it did in *Coen II*.

This Board in *Bremerton v. Kitsap County*, CPSGMHB Case No. 04-3-0009c (Bremerton II) FDO, August 9, 2004, established its understanding of the relationship between consistency and concurrency in the adoption of comprehensive plan amendments and implementing development regulations.

In *Bremerton*, Kitsap County had adopted new policies on rural lands in its comprehensive plan amendments; Bremerton challenged the ordinance based on an assertion that Kitsap County's failure to **concurrently** (at the same time) review and adopt **consistent** development regulations created a violation of RCW 36.70A.040. The County defended its actions with two separate arguments:

(1) There is nothing in the GMA barring the county from setting up a framework for establishing future development regulations (**addressing concurrent adoption**), AND

(2) The zoning regulations then currently in effect substantially reflected the recently

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amended comprehensive plan, except for the portion of the amendment that permitted clustering incentives (**addressing consistency**).[89]

In ruling on this issue, the Board states the law as:

> The GMA requires a jurisdiction's development regulations to be consistent with, and implement, its comprehensive Plan. *See* RCW 36.70A.040. The essence of the City's argument on this issue is: since the County did not adopt implementing regulations for the RWL policies at the same time as it adopted the new RWL Plan policies, then the Plan and [existing] development regulations must be inconsistent. While that may be true in some circumstances, the Board concludes that it is not the case here.
>
> First, the Act does not specifically mandate that Plans and development regulations be adopted concurrently. However, as the Board has previously indicated, concurrent adoption of Plan amendments and implementing development regulations may be the wisest course of action to avoid inconsistencies between the Plan and development regulations. *See*: *Jody L. McVittie v. Snohomish County (McVittie V),* CPSGMHB Case No. 00-3-0016, Final Decision and Order, (Apr. 12, 2000), footnote, at 7. However, concurrent adoption of development regulations may not be necessary if the existing development regulations continue to implement the Plan as amended. This is the situation posed here.[90]

The Board found that, as to the question of concurrency, "the Act does not specifically mandate that Plans and development regulations be adopted concurrently," but noted that a failure to concurrently adopt or amend development regulations concurrent with plan changes could result in internal inconsistency. On those facts, the Board found that the new plan policies and the existing regulations were not inconsistent, and to the extent that other new policies were unsupported by existing regulations, those policies could not be effective until development regulations are adopted for them.[91]

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[89] *Bremerton* at 24-25.
[90] *Bremerton* at 14.
[91] *Id.*

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Issues 26 and 29 both rely on "GMA's requirement of concurrency and consistency," a proposition refuted by the Board's analysis in *Coen II.* The result here is the same as in that case: Petitioners have failed to meet their burden to show a violation of the GMA by the lack of immediate concurrency in adopting comprehensive plan amendments with development regulations to implement those amendments.

As concerns Issue 25, Petitioners Owners and Neighbors[92] points out the specific inconsistency occasioned by the adoption of a comprehensive plan amendment creating a new "Community Facilities" designation for which there are no development regulations. The existing zoning for the properties now designated as "CF" is a mixture of single-family, commercial and business. The City argues that the existing development regulations continue to implement the comprehensive plan, as amended, and thus there is no inconsistency,[93] but the argument doesn't stand up to scrutiny. The City acknowledges that a rezone will be necessary to carry out the vision of the new CF designation, with its own specific development regulations.[94] None of the existing zoning regulations will be applicable, broadly, although some elements of all of them may be incorporated into the final zoning for the CF designation.

Petitioners appropriately note, "[b]ecause a rezone will be required to accommodate the JCC, and because the 'Community Facility' is not allowed under the current zoning regulations that apply to the property, the City should have considered a rezone concurrently with the Plan amendment to maintain consistency between the development regulations and the Plan, as is required by the GMA."[95] This Board does not presume to advise the City on what it should have done; we limit our holding here to the conclusion that the adoption of these ordinances created inconsistencies between the comprehensive plan, the land use map and the development regulations, in violation of RCW 36.70A.040.

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[92] Owners and Neighbors at 43-46.
[93] City's Prehearing brief at 60-61, analogizing the Board's finding in *Bremerton.*
[94] Owners and Neighbors Prehearing Brief at 45.
[95] *Id.*

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As we noted in our earlier order in *Coen II,* the adoption of the procedural ordinance anticipating a delay between the adoption of a comprehensive plan amendment and implementing development regulations did not violate the GMA; following the process there adopted will undoubtedly create an inconsistency of some duration.

The Board finds and concludes that Petitioner Coen has not met its burden to show violation of the GMA in issues 26 and 29. **The Board also finds and concludes** that Petitioners Owners and Neighbors has carried its burden in Issue 25 to show that the adoption of the Community Facilities designation for the JCC property without implementing development regulations fails to comply with RCW 36.70A.040.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board finds:

The Petitioners have met their burden in Issue 15, showing that the adoption of challenged ordinances resulted in an inconsistency between the comprehensive plan and the development regulations concerning Parcel 12, in violation of RCW 36.70A.040.

The Petitioners have met their burden in Issue 25 showing that adoption of the challenged ordinances created an inconsistency between the comprehensive plan and the development regulations concerning JCC property, in violation of RCW 36.70A.040.

The Petitioners have failed to carry their burden to establish violation of the GMA in any other issue pleaded, and those issues are dismissed.

The matter is remanded to the City for compliance actions.

Item	Date Due
Compliance due	October 9, 2019
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	October 23, 2019

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Objections to a Finding of Compliance	November 6, 2019
Response to Objections	November 18, 2019
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 7864979#	**December 4, 2019** **10:00 a.m.**

Length of Briefs – A brief of 15 pages or longer shall have a table of exhibits. WAC 242-03-590(3) states: "Clarity and brevity are expected to assist a board in meeting its statutorily imposed time limits. A presiding officer may limit the length of a brief and impose format restrictions." **Compliance Report/Statement of Actions Taken to Comply shall be limited to 10 pages, 15 pages for Objections to Finding of Compliance, and 5 pages for the Response to Objections.**

SO ORDERED this 5th day of August 2019.

Deb Eddy, Board Member

Bill Hinkle, Board Member

I concur in the results of the Board's decision.

Cheryl Pflug, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[96]

[96] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. *See* RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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Appendix A: Procedural matters

On January 22, 2019, 7800 Plaza Owners Association filed a petition for review. The petition was assigned case no. 19-3-0001. On January 29, 2019, Concerned Neighbors for the Preservation of Our Community filed a petition for review. The petition was assigned case no. 19-3-0002. On February 4, 2019, Mark Coen filed a petition for review. The petition was assigned case no. 19-3-0003. On February 7, 2019, the cases were consolidated to be case no. 19-3-0003c.

A prehearing conference was held telephonically on February 22, 2019. Petitioner 7800 Plaza Owners Association (Owners) and Petitioner Concerned Neighbors for the Preservation of Our Community (Neighbors) appeared through their attorney, Alex Sidles. Petitioner Mark Coen appeared through his attorney, Dan Thompson. Respondent City of Mercer Island (City) appeared through its attorneys, Kari Sand and Bio Park. Proposed Intervenors appeared through their attorneys, G. Richard Hill and Ian Morrison.

On February 21, 2019, a Stipulation and Proposed Order Granting Intervention was filed. This motion was granted. March 7, 2019, Respondent City of Mercer Island's Motion to Dismiss Issue No. 28 for Lack of Subject Matter Jurisdiction. This motion was denied. March 14, 2019, Owners' Motion to Supplement the Record was filed. This motion was granted. March 28, 2019, Owners' Motion to Strike and Motion for leave to file Reply was filed. This motion was denied. April 11, 2019, Petitioner Coen's Motion to Supplement the Record was filed. This motion was denied. On April 26, 2019, Respondent filed City of Mercer Island's Motion to Supplement the Index to the Administrative Record. This motion was granted. On May 9, 2019, Petitioner filed Coen's Motion for Reconsideration of Board's May 3, 2019, Order on Later Motions to Supplement the Record Denying Petitioner Coen's Motion to Supplement the Record with Exhibits 195, 196, and 197. This motion was denied.

The Briefs and exhibits of the parties were timely filed and are referenced in this order as follows:

- Petitioner Coen's Prehearing Brief filed April 22, 2019.

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- Owners' and Neighbors' Prehearing Brief April 22, 2019.
- Response Brief filed May 13, 2019.
- Intervenors' Joinder in Respondent City of Mercer Island's Prehearing Brief filed May 13, 2019.
- Owners' and Neighbors' Reply Brief filed May 28, 2019.
- Petitioner Coen's Reply Brief filed May 28, 2019.

Hearing on the Merits

The hearing on the merits was convened June 12, 2019. The hearing afforded each party the opportunity to emphasize the most important facts and arguments relevant to its case. Board members asked questions seeking to thoroughly understand the history of the proceedings, the important facts in the case, and the legal arguments of the parties.

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Appendix B: Legal Issues

Per the Amended Prehearing Order, legal issues in this case were as follows:

I. Issues Raised by Both Owners and Neighbors Pertaining to Ordinance No. 18-13

1. By failing to provide mailed notice of the Planning Commission hearings regarding ordinances 18-13 and 18C-14, including a failure to provide mailed notice when Amendment 15 was added to the docket by Resolution 1545, did the City violate its own public participation program, described in MICC 3.46.080; 19.15.050.D.2.d; 19.15.010; 19.15.020.D, E (former); MICC 19.15.269.A (current), in violation of the GMA, RCW 36.70A.035; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3); WAC 365-196-600(10)?

2. By failing to make the findings required under MICC 19.15.230.F (current) and MICC 19.15.020.G.1 (former), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

II. Issues Raised Only by Owners Pertaining to Ordinance No. 18-13 (Attachment A, and Amendment 15 to Attachment B)

3. By adopting the Comprehensive Plan ordinance without placing Amendment 15 on the annual comprehensive plan amendment docket, as required by MICC 19.15.050.D (former) and MICC 19.15.230.C (current), and without declaring an emergency as required by RCW 36.70A.130(2)(b) and WAC 365-195-640(4), did the City fail to consider all amendment proposals concurrently, no more frequently than once per year, and as part of the docket cycle, as required by RCW 36.70A.130(2); RCW 36.70A.470; WAC 365-196-640(3); WAC 365-640(6); and WAC 365-196-600(3)(a)(i)?

4. By amending the comprehensive plan land use map to change a portion of Aubrey Davis Park from "linear park" to "town center," did the City disregard the provisions in the comprehensive plan protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, thereby creating an internally inconsistent plan in violation of MICC 19.15.020.G.1.a (former), MICC 19.15.230.F.1 (current), and RCW 36.70A.070?

5. By amending the comprehensive plan to change a portion of Aubrey Davis Park from "linear park" to "town center," did the City create an internal inconsistency with the provisions in the comprehensive plan limiting new multi-family

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development, including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.1.a (former), MICC 19.15.230.F.1 (current) and RCW 36.70A.070?

6. By amending the comprehensive plan to change a large portion of the Greta Hackett Outdoor Sculpture Gallery from "linear park" to "town center," did the City violate the requirements in MICC 19.15.230.F.2 (current) and MICC 19.15.020.G.1.a (former) that site-specific amendments must be compatible with the adjacent land use and development patterns and must benefit the community as a whole and must not adversely affect community facilities, all in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

7. By amending the comprehensive plan to eliminate a portion of the Gretta Hackett Outdoor Sculpture Gallery, even though the 2014-2019 Parks and Recreation Plan Capital Improvement Projects List and the Mercer Island 2017-2022 Capital Improvement Fund both identified funds for improvements to the sculpture gallery, did the City violate the requirements to create and follow an internally consistent capital facilities plan and budget, RCW 36.70A.070(3) and (8); RCW 36.70A.120?

8. By amending the comprehensive plan to allow high-density residential and commercial development without amending the capital facilities and transportation elements, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)?

9. By amending the comprehensive plan to allow the construction of a City-owned commuter parking lot, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)?

III. Issues Raised Only by Owners Pertaining to Ordinance No. 18C-14

10. By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, all in violation of

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MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?

11. By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies limiting new multi-family development, including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.2.a (former), MICC 19.15.240.C.1 (current) and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?

12. By failing to make the findings required by MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), did the City fail to follow procedures as required by RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

13. By rezoning the property to eliminate a portion of the Gretta Hackett Outdoor Sculpture Gallery, even though the 2014-2019 Parks and Recreation Plan Capital Improvement Projects List and the Mercer Island 2017-2022 Capital Improvement Fund both identified funds for improvements to the sculpture gallery, did the City adopt a development regulation that fails to be consistent with and implement the comprehensive plan, in violation of RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)?

14. By rezoning the property from "public institution" to "town center," did the City violate the requirement in MICC 19.05.010.B (current and former) that "the entire area within the Mercer Island I-90 right-of-way, including...recreations areas, linear greenbelts... shall be part of the public institution zone," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? *See West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at 7–8? ("Despite these references [given in the FDO as: RCW 36.70A.070, RCW 36.70A.070(3)(e), RCW 36.70A.070(6), RCW 36.70A.080(2), RCW 36.70A.040(3)(d) and (4)(d), RCW 36.70A.130(1), RCW 36.70A.100, RCW 36.70A.210(1), RCW 36.70A.030(7)] to the Act's consistency requirements (not every such reference was cited), the Act does not contain an explicit requirement that a development regulation be internally consistent, or that any such regulation be consistent with another development regulation. However, the Board cannot read the above-referenced provisions, nor the GMA as a whole, without concluding that the Act necessarily creates such requirements.")

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15. By rezoning the property from "public institution" to "town center" in order to develop new residential and other uses on the property, did the City violate the requirement in MICC 19.05.010.B (current and former) that "all uses within the I-90 right-of-way shall be maintained as set forth in city-approved I-90 related documents," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? *See West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at 7–8? ("Despite these references [given in the FDO as: RCW 36.70A.070, RCW 36.70A.070(3)(e), RCW 36.70A.070(6), RCW 36.70A.080(2), RCW 36.70A.040(3)(d) and (4)(d), RCW 36.70A.130(1), RCW 36.70A.100, RCW 36.70A.210(1), RCW 36.70A.030(7)] to the Act's consistency requirements (not every such reference was cited), the Act does not contain an explicit requirement that a development regulation be internally consistent, or that any such regulation be consistent with another development regulation. However, the Board cannot read the above-referenced provisions, nor the GMA as a whole, without concluding that the Act necessarily creates such requirements.")

16. If the Board finds the Comprehensive Plan ordinance violates the GMA, should the rezone ordinance also be found in violation and remanded, because the rezone ordinance is based on the Comprehensive Plan ordinance, and development regulations must be consistent with and implement the comprehensive plan, per RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)?

IV. Issues Raised Only by Owners Pertaining to SEPA Review of Ordinances 18-13 (Attachment A, and Amendment 15 to Attachment B) and 18C-14

17. By failing to update the July 30, 2018, SEPA Determination of Non-significance (which purports to analyze both the Comprehensive Plan ordinance and the rezone ordinance), even after substantial new information about the development proposals emerged in response to the City's Request for Proposals prior to the November 20, 2018, City Council vote, did the City violate SEPA's requirement to conduct the earliest review possible once the features of a project can be identified, and update such review in light of new information, MICC 19.07.120.I.5 (current and former) WAC 197-11-055; WAC 197-11-340(3)(a); RCW 43.21C.110(1) (authorizing the two WACs cited alreadin [*sic*] in this issue and making such WACs binding upon all branches of government, including local government); RCW 43.21C.030 (guidelines for state agencies, local governments)?

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V. Issues Raised Only by Neighbors Pertaining to Ordinance No. 18-13 (Attachment A, and Amendments 1 and 8 of Attachment B)

18. By failing to identity "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

19. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

20. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

21. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

22. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

23. By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), and create an internally

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inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

24. By applying a new land use designation (community facilities) to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any community facilities zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

25. By creating a new land use designation (community facilities), and applying that new designation to a specific property, but without adopting new development regulations that would apply to the new designation, did the City create an inconsistency between its comprehensive plan and its zoning regulations, in violation of RCW 36.70A.040 and the holding in *City of Bremerton v. Kitsap County*, GMHB 04-3-0009c, at 10 (Final Decision and Order, Aug. 9, 2004)?

VI. Issues Raised Only by Coen Pertaining to Both Ordinances

26. Does the council's adoption of ordinance 18-13 and ordinance 18C-14, and amendments 1, 8 and 15, without concurrent development regulations for an indefinite period of time violate the provisions of the Growth Management Act relating to concurrency and consistency between the comprehensive plan and development regulations: RCW 36.70A.040(3), RCW 36.70A.130(1)(a), RCW 36.70A.130(1)(d), RCW 36.70A.130(4), WAC 365-196-010(1)(e), WAC 365-196-060(2)(d), WAC 365-196-210(8), WAC 365-196-500(3), WAC 365-196-500(4), WAC 365-196-610, WAC 365-196-640, WAC 365-196-800(1), and WAC 365-196-805?

27. Resolution 1545 was passed on June 5, 2018. Resolutions and Ordinances are "Legislative Actions" for purposes of adopting Comprehensive Plans and adopting Amendments to Comprehensive Plans. MICC 2.24.030 provides that ordinances do not go into effect until 30 days from the time of final passage. Resolution 1545 became effective on July 5, 2018. The application to amend the comprehensive plan was filed on June 5, 2018, and was deemed complete on June 6, 2018 – 29 days before Resolution (Ordinance) 1545 went into effect. Thus, is the application to amend the comp plan and any actions regarding the comprehensive plan amendment and rezone prior to July 5, 2018, void and

Growth Management Hearings Board
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violate the Act's provisions referring to public notice and participation in RCW 36.70A.020(11); .035; .070 (preamble); .130(2); .140; .390 and MICC 2.24.220 and .240 that allow a citizen to file a referendum within 30 days of a general ordinance challenging said ordinance?

28. Resolution 1545 purports to qualify as an "emergency". When determining whether an "emergency" exists, courts are "limited to examining the face of the ordinance." *Federal Way v. King County*, 62 Wn. App. 530, 536 (1991). The ordinance must include a statement of the underlying emergent facts. *Id.* At 543. Without such a statement, an emergency declaration is invalid. *Id.* at 536. Resolution 1545 does not even state that there is an emergency. All statements in the resolution are conclusory in nature and it does not contain any facts to justify an emergency. *See, Swartout v. Spokane,* 12 Wn. App. 665, 672-73 (1979). On June 5, 2018, during AB 5434, the council discussed Resolution 1545 but there was no mention of an emergency or discussion of any facts which would support an emergency. The City's own self-imposed deadline does not create an emergency. Does the lack of a true emergency and the failure to document the emergency render comprehensive plan amendment 15 and the rezone void and violate the Act's provisions .130(2)(a) and .130(2)(b) requiring that nonemergency plan amendments shall be considered no more frequently than once every year unless a true emergency exists and is properly documented?

VII. Issues Raised Only by Coen Pertaining to Ordinance No. 18-13

29. Does the Council's adoption of ordinance 18-13 and comprehensive amendments 6, 10, 11, 12 and 14 without concurrent development regulations for an indefinite period of time violate the provisions of the Growth Management Act relating to concurrency and consistency between the comprehensive plan and development regulations: RCW 36.70A.040(3), RCW 36.70A.130(1)(a), RCW 36.70A.130(1)(d), RCW 36.70A.130(4), WAC 365-196-010(1)(e), WAC 365-196-060(2)(d), WAC 365-196-210(8), WAC 365-196-500(3), WAC 365-196-500(4), WAC 365-196-610, WAC 365-196-640, WAC 365-196-800(1), and WAC 365-196-805?

30. Did the Council's adoption of ordinance 18-13 and comprehensive plan amendments 6, 8, 10, 12 and 14 that seek to create a new zone fail to identify "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), and did the City disregard its own procedures for amending its comprehensive plans, in violation

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of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

31. By adopting site-specific amendments 6, 10, 12 and 14 to its comprehensive plan without making the additional findings for site-specific amendments required by MICC 19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

32. By adopting site-specific comprehensive plan amendments 6, 10, 12 and 14 without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC 19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

33. Are amendments 6, 10, 12 and 14 inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?

34. Are amendments 6, 10, 12 and 14 inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?

35. By applying a new but inchoate land use designation to a specific property in amendments 6, 10, 12 and 14, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any such zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

Case No. 19-3-0003c

Owners and Neighbors, et al. (COEN III) v. City of Mercer Island

DECLARATION OF SERVICE

I, DESIREE ORTIZ, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Legal Assistant to the Growth Management Hearings Board. On the date indicated below a copy of the FINAL DECISION AND ORDER in the above-entitled case was sent to the following through the United States postal mail service:

Kari L. Sand
City Attorney
Bio F. Park
Assistant City Attorney
City Attorney's Office
City of Mercer Island
9611 SE 36th Street
Mercer Island WA 98040

Daniel Thompson
Thompson & Delay
506 Second Ave, STE 2500
Seattle WA 98104

David Bricklin
Alex Sidles
Bricklin & Newman, LLP
1424 Fourth Ave Suite 500
Seattle WA 98101

G. Richard Hill
Ian S. Morrision
McCullough Hill Leary, P.S.
701 Fifth Ave Suite 6600
Seattle WA 98104

DATED this 5th day of August 2019.

Desiree Ortiz, Legal Assistant

Growth Management Hearings Board
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EXHIBIT 21

CITY COUNCIL MINUTES
REGULAR MEETING
FEBRUARY 18, 2020

CALL TO ORDER & ROLL CALL

Mayor Benson Wong called the meeting to order at 5:30 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Benson Wong, Deputy Mayor Wendy Weiker, and Councilmembers Lisa Anderl, Jake Jacobson, Salim Nice, Craig Reynolds, and David Rosenbaum were present.

AGENDA APPROVAL

It was moved by Anderl; seconded by Jacobson to:
Approve the agenda as presented.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Nice, Reynolds, Rosenbaum, Weiker and Wong)

STUDY SESSION

AB 5664: Classification and Compensation Discussion

Chief of Administration Ali Spietz explained that the purpose of the Study Session was to facilitate a project scoping discussion with the City Council prior to issuance of a Request for Proposals, explaining that the additional work would require a budget appropriation to be authorized at a future meeting. She further explained that the City had not completed a classification and compensation study in over 20 years.

Spietz explained that the compensation and classification study would examine and evaluate the City's current salary schedule and classification system and provide recommendations for modifications. She then reviewed the key objectives for the consultant.

Council expressed support for the project and requested that the City Manager remain involved throughout the process.

CITY MANAGER REPORT

Interim City Manager Bon reported on the following:

- New Sewer Truck
- King / Xing Hua Property
- East Seattle School – 30 day public comment period is open through March 11
- Debris on Lake Washington
- Life Jacket Loaner Stations
- Gallagher Hill Crosswalk Installation Construction
- Recology Tour
- Athletic Field Maintenance Review
- 2019 (Preliminary) Year-End Financial Report – Available at the March 17 meeting
- YFS Breakfast – over 600 Islanders attended

APPEARANCES

Joy Matsura: She expressed concern for the Town Center and the limited designation of retail space.

Josh Knopp (President for Citizens for Reasonable Shoreline Policies): He addressed the Shoreline Master Plan, explaining that he is anxiously waiting for the new SMP to move forward.

Dan Sitman: In his opinion, most of the traffic is not associated with the SJCC and that it is wrong to blame the SJCC. He further described the French American School as a great amenity for the island.

The following individuals participate in the Sister City trip to France and spoke very favorably of the trip:

- Roberta Lewandowski
- Ted Weinberg
- Jane Meyer-Brahm
- Eric Thuau

Ed Weinstein (SJCC Architect). He explained that he is prepared to abandon the Community Facility Zone and return to the Conditional Use Permit, explaining that code amendments are still needed. He further stated that valuable community organizations should be supported.

Rich Hill (SJCC / FAS / Herzl-Ner Tamid counsel): He asked the Council to direct staff and the Planning Commission to review the proposed amendments this year, explaining that the proposed amendment is a narrowly tailored amendment to the code. Mr. Hill then outlined three changes, including one to GFA, one to height, and one to lot coverage.

David Fain: He spoke in support of the SJCC

Traci Granbois (French American School Member): She express three concerns: 1) she believes it is an illegal spot zone, 2) It is an improper process to rezone, and 3) it provides for different rules for non-residential uses in a residential zone.

CONSENT CALENDAR

It was requested that Resolution No. 1580 Appointing City Manager be removed from the consent calendar. Mayor Wong moved it to the first item of Regular Business.

Payables: $623,808.15 (1/31/2020) and $1,307,133.83 (2/7/2020)
Recommendation: Certify that the materials or services herein before specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $909,621.85 (2/14/2020)
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes of the February 4, 2020 Regular Meeting.
Recommendation: Approve the February 4, 2020 Regular Meeting minutes as written.

AB 5662: ROW Fleet Appropriation
Recommendation: Authorize the appropriation of $32,917 from the Equipment Rental Fund to purchase the upgraded hydraulic driven drop-in sander as part of the previously authorized replacement of FL-0422.

It was moved by Anderl; seconded by Jacobson to:
Approve the Consent Calendar as revised.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

REGULAR BUSINESS

AB 5658: Resolution No. 1580 Appointing City Manager

Each councilmember expressed strong support and gratitude for City Manager Bon's leadership over the past 8 months and thanked her for accepting the position.

It was moved and duly seconded to:
Approve Resolution No. 1580 appointing Jessi Bon as City Manager and authorizing the Mayor to execute the City Manager Employment Agreement thereto attached.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5663: Community Facility Code Amendment: Planning Commission Recommendation, Ordinance 20-04; 1st Reading & Adoption

Community Planning and Development Director Evan Maxim reviewed the history of the Community Facility zoning designation and the City Council's August 2019 direction to the Planning Commission to:

1. Review the "problem statement" and determine if an alternative approach is warranted;
2. Explore alternative decision-making processes; and
3. Report back to the City Council for further direction.

Director Maxim then explained that the Planning Commission evaluated four different alternative approaches which included:

Alternative 1: No change to the current regulations:
Alternative 2: A change to the criteria for approval of a Conditional Use Permit ("CUP");
Alternative 3: A change to the CUP approval criteria and development of a tool (Master Plan); and
Alternative 4: Continuing the work that was "paused" in June of 2019.

Following discussion of these approaches, the Planning Commission developed a three-part recommendation to the City Council that included:

Part A – Discontinue Community Facility zone process
Part B – Review/update CUP process and pursue code amendments
Part C – Resume Community Facility zone process at a future date

Director further explained that staff concurred with the Planning Commission recommendation on Part A.

It was moved and duly seconded to:
Suspend the City Council Rule of Procedure 6.3, requiring a second reading for an ordinance.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

It was moved and duly seconded to:
Adopt Ordinance No. 20-04, to repeal portions of the 2018 Comprehensive Plan amendments related to the Community Facility zone.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5665: City Council Rules of Procedure Amendments

City Clerk Deb Estrada reported that at the February 4 meeting City Council directed staff to further review and modify the Board and Commission appointment process in the Rules of Procedure. Specific requests were to ensure applicants received a minimum of four votes and to provide more clarity as to the steps in the voting process. Staff reviewed the appointment process used by other cities, particularly those governed under the Council-City Manager form of government and made revisions accordingly.

It was moved and duly seconded to:
Approve Resolution No. 1579 amending the City Council Rules of Procedure as set forth in Exhibit A.
Passed 7-0

FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5666: Boards & Commissions Code Amendments (2nd Reading, Ordinance No. 20C-02)

City Clerk Deb Estrada reported that at the February 4 meeting City Council directed staff to make additional changes. She explained that Ordinance No. 20C-02 amends the membership appointment process for the Design Commission, the Planning Commission, the Utility Board, the Parks and Recreation Commission, and the Mercer Island Arts Council. Estrada further noted that Ordinance No. 20C-02 does not apply to the Open Space Conservancy Trust because prior to any proposed amendment to the Trust's Articles, the Council is required to request recommendations and comments from the Trustees regarding the proposed amendment and hold a public hearing for the purpose of considering the community and Trustees' recommendations and comments.

It was moved and duly seconded to:
Adopt Ordinance No. 20C-02 amending membership appointment process in Chapters 3.34 Design Commission, 3.46 Planning Commission, 3.52 Utility Board, 3.53 Parks & Recreation Commission, and 3.55 Mercer Island Arts Council.
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5667: City Council Letter of Support - East Channel Required Navigation Procedures Arrivals & Departures

Councilmember Salim Nice explained that the City of Renton owns and operates the Renton Municipal Airport. In his advisory capacity, he has long since advocated for safer and less impactful flight operations out of Renton Airport. In pursuit of this endeavor, he has worked with Retired Captain Thomas Imrich, a retired Boeing Experimental Test Pilot and retired FAA administration official, as well as an island resident. He recommended that Council authorize the Mayor to sign the letter of support.

It was moved and duly seconded to:
Authorize the Mayor to sign a letter recommending FAA take the necessary steps to propose upgrading the priority for Required Navigation Performance procedures for Renton Airport as "Priority 1."
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

OTHER BUSINESS

Planning Schedule

Interim City Manager Bon reviewed the planning schedule and reminded Council that the March 3 meeting was canceled. In its place, a special meeting for March 10 was scheduled. She also noted that she would not be present at the March 10 meeting due to a prescheduled vacation.

Councilmember Reports

Councilmember Reynolds - complimented the YFS Breakfast

Councilmember Rosenbaum - wished the Mercer Island High School basketball team luck

Councilmember Anderl – summarized her visit to the Recology facility and the Do's and Don'ts of recycling

Deputy Mayor Weiker – reported on the opportunity to recognize one of our students for the AWC scholarship

Councilmember Jacobson – reported on his experience on the Recology Facility tour and the PROS questionnaire, which can be accessed online, and the Eastside Transportation Partnership meeting.

Mayor Wong – reported on the March 2 SCA Meeting on Regional Homelessness Authority, the April 23 invite with the Mercer Island School District Board of Directors and discussion topics, 20th Anniversary celebration of the Sister City Association.

Renton Airport Advisory Voting Proxy

It was moved by Weiker and seconded by Jacobson to:
Authorize the Mayor to sign a letter of support addressed to the Renton Airport Advisory Committee acknowledging that Captain Thomas Imrich will serve as the City of Mercer Island's designated proxy in Councilmember Nice's absence.
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

Councilmember Absences

Deputy Mayor Weiker reported that she would not be present for the March 17 Regular Meeting.

EXECUTIVE SESSION

At 8:40 pm, Mayor Wong convened an Executive Session for approximately two hours and 60 minutes to to discuss pending or potential litigation with legal counsel pursuant to RCW 42.30.110(1)(i).

No action was taken.

At 9:41 pm, Mayor Wong adjourned the Executive Session; no action was taken.

ADJOURNMENT

There being no additional business to come before City Council, the Regular Meeting adjourned at 9:42 pm.

Benson Wong, Mayor

Attest:

Deborah A. Estrada, City Clerk

EXHIBIT 22

CITY OF MERCER ISLAND
ORDINANCE NO. 20-04

AN ORDINANCE OF THE CITY OF MERCER ISLAND AMENDING THE LAND USE ELEMENT OF THE MERCER ISLAND COMPREHENSIVE PLAN TO REPEAL 2018 COMPRHENSIVE PLAN AMENDMENTS RELATED TO THE COMMUNITY FACILITY ZONE, PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the Mercer Island City Code (MICC) establishes development regulations that are intended to result in the implementation of the Mercer Island Comprehensive Plan pursuant to the Revised Code of Washington (RCW) 36.70A.040; and

WHEREAS, the Mercer Island City Council adopted Ordinance No. 18-13 on November 20, 2018 amending the Mercer Island Comprehensive Plan land use map and establishing goals and policies related to the establishment of a Community Facility zoning designation and related development regulations in the Land Use Element; and

WHEREAS, on August 5, 2019, the Growth Management Hearings Board, as result of appeals of Ordinance No. 18-13, issued a Final Decision and Order (Case No. 19-3-0003c) directing the City to correct certain inconsistencies between the Comprehensive Plan and the City's development regulations related to the Community Facility zone created by the Ordinance No. 18-13; and

WHEREAS, on January 29, 2020, following review and deliberation, the Mercer Island Planning Commission recommended that the City Council forgo implementation of a Community Facility zoning designation and adoption of related development regulations; and

WHEREAS, the City Council intends to comply with the Growth Management Hearings Board's Final Decision and Order (Case No. 19-3-0003c) to ensure that the City's development regulations implement, and are consistent with, the Comprehensive Plan by repealing those Comprehensive Plan amendments in Ordinance No. 18-13 that created the inconsistencies cited in Final Decision and Order (Case No. 19-3-0003c); and

WHEREAS, RCW 36.70A.130(2) authorizes the City Council to adopt Comprehensive Plan revisions and amendments "out of cycle" to resolve an appeal of a comprehensive plan filed with the Growth Management Hearings Board as herein described;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MERCER ISLAND, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1: **Repeal of Amendments Related to Community Facility in Attachment A of Ordinance No. 18-13.** Amendments related to Community Facility in Attachment A of Ordinance No. 18-13 are repealed as set forth in Attachment A to this ordinance.

Section 2: **Repeal of Amendments Related to Community Facility in Amendment 1 in Attachment B of Ordinance No. 18-13.** Amendments related to Community Facility in Amendment 1 of Attachment B of Ordinance No. 18-13 are repealed as set forth in Attachment B to this ordinance.

Section 3: **Repeal of Amendment 8 in Attachment B of Ordinance No. 18-13.** The amendments adopted in Amendment 8 of Attachment B of Ordinance No. 18-13 are repealed.

Section 4: **Publish Comprehensive Plan as Amended.** The City Council authorizes the Community Planning and Development Director and the City Clerk to correct scrivener's errors in Attachments A and B, effectuate the amendments in Sections 1, 2 and 3 of this ordinance into the Mercer Island Comprehensive Plan, and publish the amended document.

Section 5: **Severability.** If any section, sentence, clause or phrase of this ordinance or any municipal code section amended hereby should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity of any other section, sentence, clause or phrase of this ordinance or the amended code section.

Section 6: **Publication and Effective Date.** A summary of this Ordinance consisting of its title shall be published in the official newspaper of the City. This Ordinance shall take effect and be in full force five days after the date of publication.

PASSED by the City Council of the City of Mercer Island, Washington at its regular meeting on February 18, 2020 and signed in authentication of its passage.

CITY OF MERCER ISLAND

_____
Benson Wong, Mayor

Approved as to Form:

ATTEST:

_____
Bio Park, Interim City Attorney

_____
Deborah A. Estrada, City Clerk

Date of Publication: _____

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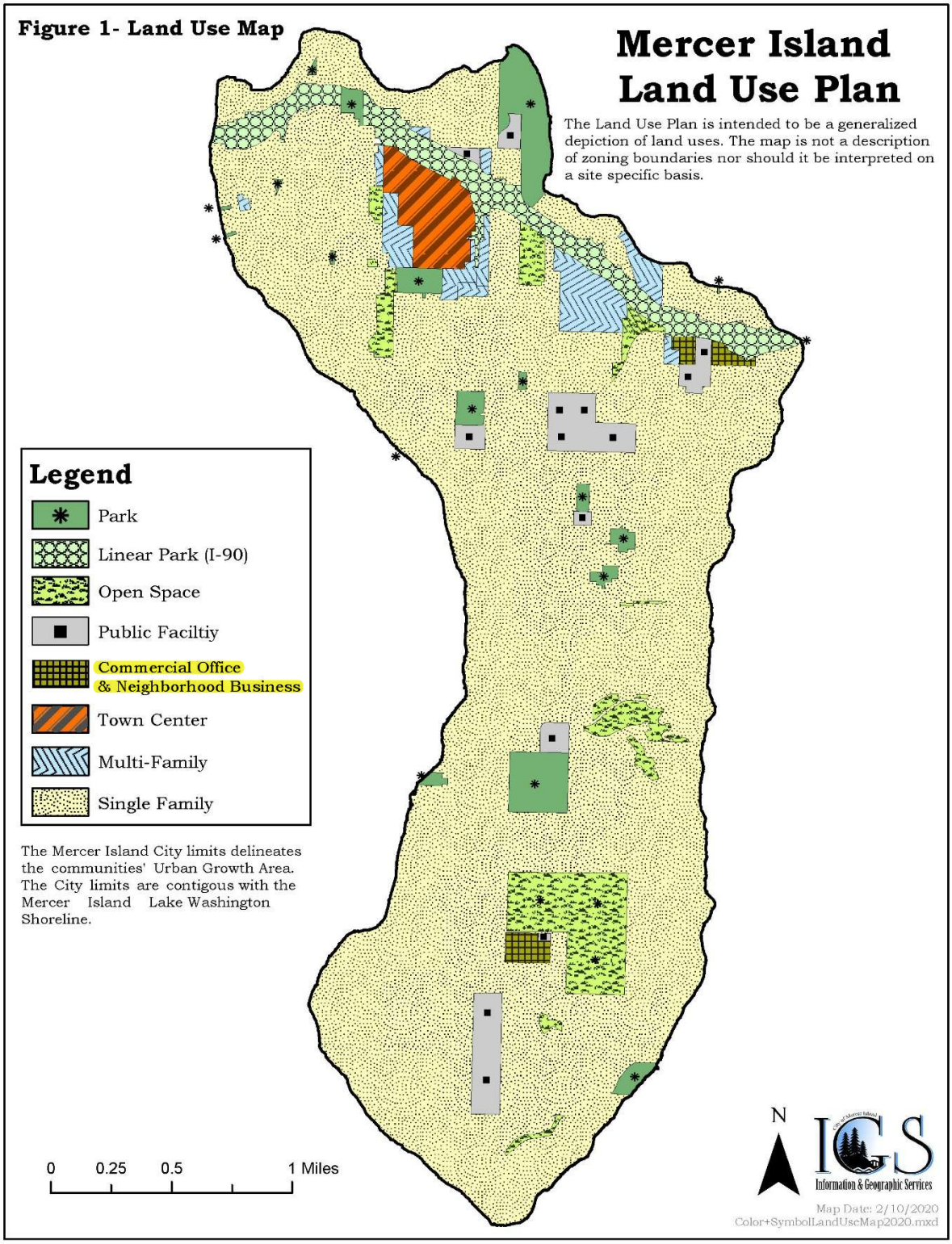
Attachment A



Attachment B

2018 Comprehensive Plan Amendment 1 – Land Use Designations

Amend the Land Use Designation table in Section VII to read as follows:

Land Use Designation	Implementing Zoning Designations	Description
Park	PI R-8.4 R-9.6 R-12 R-15	The park land use designation represents land within the City that is intended for public use consistent with the adopted Parks and Recreation Plan.
Linear Park (I-90)	PI	The linear park (I-90) land use designation primarily contains the Interstate 90 right-of-way. The land use designation is also improved with parks and recreational facilities (e.g. Aubrey Davis park, I-90 Outdoor Sculpture Gallery, etc) adjacent to and on the lid above the Interstate 90 freeway.
Open Space	PI R-8.4 R-9.6 R-12 R-15	The open space use designation represents land within the City that should remain as predominantly unimproved open space consistent with the adopted Parks and Recreation Plan.
Commercial Office	CO B	The commercial office land use designation represents commercial areas within Mercer Island, located outside of the Town Center, where the land use will be predominantly commercial office. Complementary land uses (e.g. healthcare uses, schools, places of worship, etc.) are also generally supported within this land use designation.
Neighborhood Business	PBZ	The neighborhood business land use designation represents commercial areas within Mercer Island, located outside of the Town Center, where the land uses will be predominantly a mix of small scale, neighborhood oriented business, office, service, public and residential uses.
Single Family Residential (R)	R-8.4 R-9.6 R-12 R-15	The single family residential land use designation (R) represents areas within Mercer Island where development will be predominantly single family residential neighborhoods. Complementary land uses (e.g. private recreation areas, schools, home businesses, public parks, etc) are generally supported within this land use designation.
Multifamily Residential (MF)	MF-2 MF-2L MF-3	The multifamily residential land use (MF) represents areas within Mercer Island where the land use will be predominantly multifamily residential development. Complementary land uses (e.g. private recreation areas, schools, home businesses, public parks, etc) are generally supported within this land use designation.

Town Center (TC)	TC	The Town Center land use designation represents the area where land uses consistent with the small town character and the heart of Mercer Island will be located. This land use designation supports a mix of uses including outdoor pedestrian spaces, residential, retail, commercial, mixed-use and office-oriented businesses.
Public Facility	C-O PI R-8.4 R-9.6 R-15 TC	The public facility land use designation represents land within the City that is intended for public uses, including but not limited to schools, community centers, City Hall, and municipal services.
~~Community Facilities~~	~~CF~~	~~The community facilities use designation represents land within the City that is intended for community use including but not limited to private schools and other educational uses, religious facilities, and non-profit community centers and recreation facilities.~~

Community Facility Code Amendment Discussion

City Council

February 18, 2020

EXHIBIT 23

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ROBERT A. MEDVED, Petitioner, v. CITY OF MERCER ISLAND, Respondent.	Case No. _____ **PETITION FOR REVIEW**

TABLE OF CONTENTS

PETITIONER
7238 Southeast 32nd Street
Mercer Island, WA 98040
(206) 550-3300

I. PETITIONER

1. Petitioner is a resident of the City of Mercer Island, Washington. The name and contact information for Petitioner are:

Robert A. Medved
7238 Southeast 32nd Street
Mercer Island, WA 98040
Phone: (206) 550-3300
E-mail: robertamedved@msn.com

II. RESPONDENT

2. Paragraph 1 is hereby re-alleged.

3. Respondent is the City of Mercer Island, a municipality of the State of Washington.

III. THE CHALLENGED ACTION

4. Paragraphs 1-3 are hereby re-alleged.

5. On October 3, 1994, the City of Mercer Island adopted its Growth Management Act Comprehensive Plan by means of City of Mercer Island Ordinance No. A-122.

6. RCW 36.70A.470 was enacted in 1995.

7. RCW 36.70A.470 provides in part as follows:

> ***
>
> (2) Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130. (underlining added).
>
> ***

> (4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public. (underlining added).

8. The docketing procedure identified in RCW 36.70A.470 will hereinafter be referred to as a "Development Regulation Docket."

9. Despite the fact that the City of Mercer Island adopted its Growth Management Act Comprehensive Plan on October 3, 1994, the City of Mercer Island has continuously failed to act and has continuously failed to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470.

IV. DETAILED STATEMENT OF THE ISSUES

10. Paragraphs 1-9 are hereby re-alleged.

11. Does the City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations fail to comply with and violate, without limitation, RCW 36.70A.470?

V. STANDING

12. Paragraphs 1-11 are hereby re-alleged.

13. Petitioner has: (i) Participation Standing, (ii) Administrative Procedure Act Standing, and (iii) Failure to Act Standing, each of which is independent of and separate from the others.

A. PARTICIPATION STANDING

14. Paragraphs 1-13 are hereby re-alleged.

PETITIONER
7238 Southeast 32nd Street
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15. RCW 36.7A.280 provides in part as follows:

> (2) A petition may be filed only by: … (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested….

16. Petitioner has Participation Standing under, without limitation, RCW 36.70A.280(2)(b).

1. <u>Petitioner's Written Participation</u>

17. On July 15, 2019 Petitioner participated in writing by sending a letter to every City of Mercer Island Councilmember regarding the matters on which he is requesting a review and relating to the issues Petitioner is presenting to this Growth Management Hearings Board.

18. Petitioner's July 15, 2019 letter to every City of Mercer Island Councilmember is summarized as follows:

> Honorable Mayor, Deputy Mayor and Councilmembers:
>
> I have lived in the single family residence located at 7238 Southeast 32nd Street, Mercer Island, Washington 98040 for over eighteen years.
>
> Throughout that more than eighteen period, it appears that the City of Mercer Island has publically demonstrated its lack of understanding of various requirements the Growth Management Act ("GMA").
>
> Throughout that more than eighteen year period, it appears that the City of Mercer Island has ignored various requirements of the GMA.

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Throughout that more than eighteen year period, it appears that the City of Mercer Island has circumvented various requirements of the GMA.

By way of example, although the GMA required Mercer Island to adopt a Transportation Concurrency Ordinance in 1994, Mercer Island did not adopt a Transportation Concurrency Ordinance until 2018, more than 24 years after the GMA required Mercer Island to do so.

By way of another example, although the GMA required Mercer Island to update its Critical Areas Ordinance on or before June 30, 2015, Mercer Island has not updated its Critical Area Ordinance as of the date of this letter, July 15, 2019.

RCW 36.70A.470 was enacted in 1995.

The City of Mercer Island has failed to act and has failed to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470.

As a longtime resident of Mercer Island, my asserted interests include, without limitation, (i) lawful land use planning by the City of Mercer Island, (ii) knowledgeable land use planning by the City of Mercer Island, (iii) orderly land use planning by the City of Mercer Island, (iv) transparency by the City of Mercer Island in its land use planning, (v) citizen public participation in Mercer Island's land use planning, (vi) land use planning impacts on property values, (vii) the City of Mercer Island's compliance with the law, and (viii) the City of Mercer Island ceasing its apparent unlawful acts. These interests are among the interests the City of Mercer Island is required to consider when it includes a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470.

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The City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 has in fact specifically and personally aggrieved, adversely affected, injured and prejudiced me as, without limitation, follows: (i)) the high probability of me, as a taxpayer, being required to pay for undesirable growth on the City of Mercer Island, (ii) enduring the City of Mercer Island's apparent continuous failure to comply with the law, (iii) enduring the City of Mercer Island's apparent continuous unlawful acts, and (v) enduring the City of Mercer island's apparent continuous lack of transparency (collectively "Current Prejudice").

The City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 will likely in fact specifically and personally aggrieved, adversely affected, injured and prejudiced me as, without limitation, follows: (i) the high probability of me, as a taxpayer, being required to pay for undesirable growth on the City of Mercer Island, (ii) enduring the City of Mercer Island's apparent continuous failure to comply with the law, (iii) enduring the City of Mercer Island's apparent continuous unlawful acts, and (v) enduring the City of Mercer island's apparent continuous lack of transparency (collectively "Likely Prejudice").

An Order from the Growth Management Hearings Board requiring the City of Mercer Island to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 will substantially eliminate or redress the Current Prejudice I have incurred and will substantially eliminate or redress the Likely Prejudice I will likely incur.

Please call if you have any questions.

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19. Petitioner has Participation Standing under, without limitation, RCW 36.70A.280(2)(b).

B. <u>ADMINISTRATIVE PROCEDURE ACT STANDING</u>

20. Paragraphs 1-19 are hereby re-alleged.

21. RCW 36.70A.280 provides in part as follows:

> (2) A petition may be filed only by: … (d) a person qualified pursuant to RCW 34.05.530.

22. RCW 34.50.530 provides as follows:

> A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
>
> (1) The agency action has prejudiced or is likely to prejudice that person;
>
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
>
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

23. Petitioner has Administrative Procedure Act Standing under, without limitation, RCW 36.70A.280(2)(d) and RCW 34.50.530. Petitioner's Administrative Procedure Act Standing is summarized as follows:

> Petitioner has lived in the single family residence located at 7238 Southeast 32nd Street, Mercer Island, Washington 98040 for over eighteen years.
>
> Throughout that more than eighteen period, it appears that the City of Mercer Island has publically

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demonstrated its lack of understanding of various requirements the Growth Management Act ("GMA").

Throughout that more than eighteen year period, it appears that the City of Mercer Island has ignored various requirements of the GMA.

Throughout that more than eighteen year period, it appears that the City of Mercer Island has circumvented various requirements of the GMA.

By way of example, although the GMA required Mercer Island to adopt a Transportation Concurrency Ordinance in 1994, Mercer Island did not adopt a Transportation Concurrency Ordinance until 2018, more than 24 years after the GMA required Mercer Island to do so.

By way of another example, although the GMA required Mercer Island to update its Critical Areas Ordinance on or before June 30, 2015, Mercer Island has not updated its Critical Area Ordinance as of the date of this letter, July 15, 2019.

RCW 36.70A.470 was enacted in 1995.

The City of Mercer Island has failed to act and has failed to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470.

As a longtime resident of Mercer Island, Petitioner's asserted interests include, without limitation, (i) lawful land use planning by the City of Mercer Island, (ii) knowledgeable land use planning by the City of Mercer Island, (iii) orderly land use planning by the City of Mercer Island, (iv) transparency by the City of Mercer Island in its land use planning, (v) citizen public participation in Mercer Island's land use planning, (vi) land use planning impacts on property values, (vii) the City of Mercer Island's compliance with the law, and (viii) the City of Mercer Island ceasing its apparent

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unlawful acts. These interests are among the interests the City of Mercer Island is required to consider when it includes a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470.

The City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 has in fact specifically and personally aggrieved, adversely affected, injured and prejudiced Petitioner as, without limitation, follows: (i)) the high probability of Petitioner, as a taxpayer, being required to pay for undesirable growth on the City of Mercer Island, (ii) enduring the City of Mercer Island's apparent continuous failure to comply with the law, (iii) enduring the City of Mercer Island's apparent continuous unlawful acts, and (v) enduring the City of Mercer island's apparent continuous lack of transparency (collectively "Current Prejudice").

The City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 will likely in fact specifically and personally aggrieved, adversely affected, injured and prejudiced Petitioner as, without limitation, follows: (i) the high probability of Petitioner, as a taxpayer, being required to pay for undesirable growth on the City of Mercer Island, (ii) enduring the City of Mercer Island's apparent continuous failure to comply with the law, (iii) enduring the City of Mercer Island's apparent continuous unlawful acts, and (v) enduring the City of Mercer island's apparent continuous lack of transparency (collectively "Likely Prejudice").

An Order from the Growth Management Hearings Board requiring the City of Mercer Island to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 will substantially

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eliminate or redress the Current Prejudice Petitioner has incurred and will substantially eliminate or redress the Likely Prejudice Petitioner will likely incur.

24. Petitioner has Administrative Procedure Act Standing under, without limitation, RCW 36.70A.280(2)(d) and RCW 35.05.530.

C. FAILURE TO ACT STANDING

25. Paragraphs 1-24 are hereby re-alleged.

26. Petitioner has Failure To Act Standing under, without limitation, WAC 242-03-220(5), WAC 242-03-555(1), WAC 242-03-940(4) and the case law. Petitioner's Failure To Act Standing is summarized as follows:

> Petitioner has lived in the single family residence located at 7238 Southeast 32nd Street, Mercer Island, Washington 98040 for over eighteen years.
>
> The City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 has in fact specifically and personally aggrieved, adversely affected, injured and prejudiced Petitioner as, without limitation, follows: (i)) the high probability of Petitioner, as a taxpayer, being required to pay for undesirable growth on the City of Mercer Island, (ii) enduring the City of Mercer Island's apparent continuous failure to comply with the law, (iii) enduring the City of Mercer Island's apparent continuous unlawful acts, and (v) enduring the City of Mercer island's apparent continuous lack of transparency.
>
> The City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations as required by, without limitation, RCW 36.70A.470 will likely in fact specifically and personally aggrieved, adversely

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> affected, injured and prejudiced Petitioner as, without limitation, follows: (i) the high probability of Petitioner, as a taxpayer, being required to pay for undesirable growth on the City of Mercer Island, (ii) enduring the City of Mercer Island's apparent continuous failure to comply with the law, (iii) enduring the City of Mercer Island's apparent continuous unlawful acts, and (v) enduring the City of Mercer island's apparent continuous lack of transparency.

27. Petitioner has Failure To Act Standing under, without limitation, WAC 242-03-220(5), WAC 242-03-555(1), WAC 242-03-940(4) and the case law.

VI. SUMMARY JUDGMENT

28. Paragraphs 1-27are hereby re-alleged.

29. This Petition For Review is a "failure to act" case.

30. There is no genuine issue of material fact in this "failure to act" case.

31. There is no genuine issue of material fact that, without limitation, RCW 36.70A.470 requires the City of Mercer Island as a matter of law to include a Development Regulation Docket in its Development Regulations.

32. There is also no genuine issue of material fact that the City of Mercer Island has continuously failed to act and has continuously failed to include a Development Regulation Docket in its Development Regulations that is required as a matter of law by, without limitation, RCW 36.70A.470.

33. This "failure to act" case as a matter of law should be disposed of by Summary Judgment. *See, e.g., Whidbey Environmental Action Network (WEAN) v. Island County*, WWRGMHB Case No. 17-2-0004, Order Finding Non-Compliance (Failure to Act), (April 17, 2017) at 4-5; WAC 242-03-555(1) and Superior Court Civil Rule 56.

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VII. ESTIMATED TIME REQUIRED FOR HEARING

34. Paragraphs 1-33 are hereby re-alleged.

35. In the event this matter is not disposed of by Summary Judgment, Petitioner estimates that the Hearing on the Merits for this matter will last between one half of a day and one full day.

VIII. RELIEF SOUGHT

A. SUMMARY JUDGMENT

36. Paragraphs 1-35 are hereby re-alleged.

37. Petitioner respectfully request that Growth Management Hearings Board in this "failure to act" case grant and enter Summary Judgment requiring the City of Mercer Island within 30 days after the entry of Summary Judgment to include a Development Regulation Docket in its Development Regulations that as a matter of law is required by, without limitation, RCW 36.70A.470.

B. FINDINGS, CONCLUSIONS AND ORDER

38. Paragraphs 1-37 are hereby re-alleged

39. In the event that this "failure to act" case is not disposed of by Summary Judgment, Petitioner respectfully request that Growth Management Hearings Board make and enter the following FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

1. Findings Of Fact

40. Petitioner respectfully requests that the Growth Management Hearings Board make and enter the following Findings Of Fact:

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Based upon the files, pleadings and records herein and upon the foregoing, this Board makes and enters the following FINDINGS OF FACT:

1. On October 3, 1994, the City of Mercer Island adopted its Comprehensive Plan by means of the City of Mercer Island Ordinance No. A-122.

2. RCW 36.70A.470 was enacted in 1995.

3. Despite the fact that the City of Mercer Island adopted its Growth Management Act Comprehensive Plan on October 3, 1994 and despite the fact that RCW 36.70A.470 was enacted in 1995, the City of Mercer Island has continuously failed to act and has continuously failed to include a Development Regulation Docket in its Development Regulations that as a matter of law is required by, without limitation, RCW 36.70A.470.

4. The City of Mercer Island has continuously failed to act and has continuously failed to include a Development Regulation Docket in its Development Regulations that as a matter of law is required by, without limitation, RCW 36.70A.470.

41. Petitioner respectfully requests that the above FINDINGS OF FACT be amended as necessary to conform to the evidence.

2. <u>Conclusions Of Law</u>

42. Petitioner respectfully requests that the Growth Management Hearings Board make and enter the following CONCLUSIONS OF LAW:

Based upon the files, pleadings and records herein and upon the foregoing FINDINGS OF FACT, this Board makes and enters the following CONCLUSIONS OF LAW:

1. The City of Mercer Island's failure to act and failure to include a Development Regulation Docket in its Development Regulations as a matter of law, without

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limitation, violate RCW 36.70A.470, do not comply with 36.70A.470 and are unlawful.

43. Petitioner respectfully requests that the above CONCLUSIONS OF LAW be amended as necessary to conform to the evidence.

3. Order

44. Petitioner respectfully requests that the Growth Management Hearings Board issue and enter the following Order:

> Based upon the files, pleadings and records herein and upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, it is hereby ORDERED:
>
> 1. That the City of Mercer Island shall within 30 days include a Development Regulation Docket in its Development Regulations that as a matter of law is required by, without limitation, RCW 36.70A.470.

45. Petitioner respectfully requests that the above ORDER be amended as necessary to conform to the evidence.

IX. ATTESTATION

46. Petitioner has read this Petition For Review and believes the contents to be true.

DATED this 16th day of July, 2019.

Robert A. Medved

Robert A. Medved, Petitioner

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EXHIBIT 24

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ROBERT A. MEDVED,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

Case No. 19-3-0014

ORDER FINDING NONCOMPLIANCE PURSUANT TO STIPULATION

SYNOPSIS

Petitioner challenged the City of Mercer Island (City) for failure to act to adopt a docketing procedure as required by the RCW 36.70A.470. After settlement discussions, the City agreed to stipulate that it had not complied with the Growth Management Act (GMA) requirement to include a docketing procedure for development regulations, as called for in the Act. A finding of noncompliance was entered, and the parties agree to a compliance schedule.

STIPULATION

This matter comes before the Board on the Stipulation filed on August 13, 2019. The parties report that they have reached agreement as to a compliance schedule that will settle the matter. Robert Medved, Petitioner, appearing *pro se*, and the City of Mercer Island, through its interim city attorney, Bio F. Park, stipulate as follows:

1. October 3, 1994, the city of Mercer Island adopted its comprehensive plan in Ordinance No. A-122.
2. RCW 36.70A.470, enacted in 1995, provides in part as follows:

(2) Each county and city planning under RCW 36.70A.040 shall include in its

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Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

...

(4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.

3. The City of Mercer Island has failed to act by not including a development regulation docketing procedure, hereinafter referred to as a "development regulation docket," in its development regulations, as required by RCW 36.70A.470.
4. The parties request that the Board enter a Final Decision and Order requiring the City to include a development regulation docket in its development regulations and that the board set a schedule with a compliance due date no later than February 15, 2020.

ORDER

Based on the foregoing, the Board orders:

The City of Mercer Island has failed to comply with the goals and requirements of the GMA, and the matter is remanded for the City to take action to comply with RCW 36.70A.470. The compliance schedule shall be as follows, unless amended by later order.

Item	Date Due
Compliance Due	February 18, 2020
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	March 3, 2020
Objections to a Finding of Compliance	March 17, 2020

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Response to Objections	March 27, 2020
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 7864979#	**April 6, 2020** **10:00 a.m.**

Compliance Report/Statement of Actions Taken to Comply shall be limited to 15 pages, 20 pages for Objections to Finding of Compliance, and 5 pages for the Response to Objections.

DATED this 15th day of August 2019.

Deb Eddy, Board Member

Cheryl Pflug, Board Member

Bill Hinkle, Board Member

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

EXHIBIT 25

Robert A. Medved
2750 68th Avenue Southeast
Mercer Island, WA 98040
Telephone: (206) 550-3300
Email: robertamedved@msn.com

December 3, 2019

Mayor Bertlin
9611 SE 36th Street
Mercer Island, WA 98040
debbie.bertlin@mercergov.org

Deputy Mayor Nice
9611 SE 36th Street
Mercer Island, WA 98040
salim.nice@mercergov.org

Councilmember Anderl
9611 SE 36th Street
Mercer Island, WA 98040
lisa.anderlt@mercergov.org

Councilmember Bassett
9611 SE 36th Street
Mercer Island, WA 98040
bruce.bassett@mercergov.org

Councilmember Weiker
9611 SE 36th Street
Mercer Island, WA 98040
wendy.weiker@mercergov.org

Councilmember Wisenteiner
9611 SE 36th Street
Mercer Island, WA 98040
david.wisenteiner@mercergov.org

Councilmember Wong
9611 SE 36th Street
Mercer Island, WA 98040
benson.wong@mercergov.org

Re: *Docketing Procedure For Proposed Development Regulation Amendments*

Honorable Mayor, Deputy Mayor and Councilmembers:

RCW 36.70A.470 of the Growth Management Act ("GMA") was enacted in 1995 and requires that proposed amendments to the comprehensive plan and proposed amendments to development regulations shall both be docketed. *See* RCW 36.70A.470. *See general* RCW 36.70A.130.

One purpose of docketing both proposed amendments to the comprehensive plan and proposed amendments to development regulations is to consider both concurrently and to ensure consistency. *See, e.g., North Everett Neighbor Alliance v. City of Everett*, CPSGMHB Case No. 08-3-0005, Order on Motions (Jan. 26, 2009). The GMHB in *North Everett Neighbor Alliance v. City of Everett*, opined as follows:

> Most cities and counties in the Central Puget Sound have adopted **annual docketing processes whereby proposed rezones and other development regulation amendments are considered concurrently with their related comprehensive plan amendments**. **In this way, proposed rezones and development regulation amendments that were *not* previously authorized in the adopted comprehensive plan can be appropriately considered together with proposed comprehensive plan amendments to ensure consistency**. When the resulting actions are appealed to this Board, the Board has jurisdiction over the various components of **the challenged action – comprehensive plan and future land use map amendments, rezone, and amendments to development regulations**. (italics in the original)(bold added).

The City of Mercer Island complied with RCW 36.70A.470s requirement that proposed amendments to the comprehensive plan be docketed. *See* MICC 19.15.230(D). The City of Mercer Island, however, failed to comply with RCW 36.70A.470's requirement that proposed amendments to development regulations be docketed.

On August 15, 2019 (more than 18 years after it was legally obligated to do so), the GMHB order the City of Mercer Island to comply with RCW 36.70A.470's requirement that proposed amendments to development regulations be docketed. The GMHB gave the City of Mercer Island until February 18, 2020, to comply with RCW 36.70A.470's requirement that proposed amendments to development regulations be docketed. *See Robert A. Medved v. City of Mercer Island*, CPSGMHB Case No. 19-3-0014, Order Finding Noncompliance Pursuant To Stipulation (August 15, 2019) ("GMHB Order"). A copy of the GMHB Order is attached as **Exhibit 1**.

In its effort to comply the GMHB Order, the City of Mercer Island has suggested changes to MICC 19.15.230 and to MICC 19.15.250. *See* AB 5630, at pp. 543-54.

While the City of Mercer Island's suggested changes to MICC 19.15.230 and to MICC 1915.250 for the most part address the requirement that proposed amendments to development regulations be docketed, the City of Mercer Island's changes to MICC 19.15.230(D)(1)(b) and to MICC 1915.250(C)(3) attempt to create an exemption from the docketing procedures of MICC 19.15.230(D).

This attempt to create an exemption arguably results in adverse consequences. For example, any exemption of proposed Development Code amendments the docketing procedures will allow that exempt proposed Development Code amendment to avoid MICC 19.15.230(D)(2)(b) which requires:

> All items on the final docket shall be **considered concurrently** so that the **cumulative effect** of the various proposals can be ascertained. (bold added).

The City of Mercer Island's suggested changes to MICC 19.15.230(D)(1)(b) provide:

> The code official shall review all complete and timely filed application and suggestions proposing amendments to the comprehensive plan or code –and pace these applications on the preliminary docket along with other city initiated amendments to the comprehensive plan. (underlining in the original to denote the City of Mercer Island's suggested changes).

In order to eliminate the attempt to create an exemption from the docketing procedures, MICC 19.15.230(D)(1)(b) should provide:

> The code official shall review all complete and timely filed application and suggestions proposing amendments to the comprehensive plan or code –and pace these applications **and suggestions** on the preliminary docket along with other city initiated amendments to the comprehensive plan **or code**. (underlining in the original to denote the City of Mercer Island's suggested changes)(bold underlining denotes text to eliminate the attempt to create an exemption from the docketing procedures.

The City of Mercer Island's suggested change to MICC 19.15.250(C)(3) provides:

> Application for a code amendment shall not be subject to the docketing procedures of MICC 19.15.230(D). (underlining in the original to denote the City of Mercer Island's suggested changes).

In order to eliminate the attempt to create an exemption from the docketing procedures, MICC 19.15.250(C)(3) should be deleted in its entirety.

If adopted, the attempt to create an exemption from the docketing procedures of MICC 19.15.230(D) will likely in fact specifically and personally aggrieve, adversely affect, injure and prejudice me by, without limitation, subjecting the citizens of the City of Mercer Island and me to unplanned growth.

Please call if you have any questions.

Sincerely,
Robert A. Medved

EXHIBIT 1

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ROBERT A. MEDVED,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

Case No. 19-3-0014

ORDER FINDING NONCOMPLIANCE PURSUANT TO STIPULATION

SYNOPSIS

Petitioner challenged the City of Mercer Island (City) for failure to act to adopt a docketing procedure as required by the RCW 36.70A.470. After settlement discussions, the City agreed to stipulate that it had not complied with the Growth Management Act (GMA) requirement to include a docketing procedure for development regulations, as called for in the Act. A finding of noncompliance was entered, and the parties agree to a compliance schedule.

STIPULATION

This matter comes before the Board on the Stipulation filed on August 13, 2019. The parties report that they have reached agreement as to a compliance schedule that will settle the matter. Robert Medved, Petitioner, appearing *pro se*, and the City of Mercer Island, through its interim city attorney, Bio F. Park, stipulate as follows:

1. October 3, 1994, the city of Mercer Island adopted its comprehensive plan in Ordinance No. A-122.
2. RCW 36.70A.470, enacted in 1995, provides in part as follows:

(2) Each county and city planning under RCW 36.70A.040 shall include in its

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development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

...

(4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.

3. The City of Mercer Island has failed to act by not including a development regulation docketing procedure, hereinafter referred to as a "development regulation docket," in its development regulations, as required by RCW 36.70A.470.
4. The parties request that the Board enter a Final Decision and Order requiring the City to include a development regulation docket in its development regulations and that the board set a schedule with a compliance due date no later than February 15, 2020.

ORDER

Based on the foregoing, the Board orders:

The City of Mercer Island has failed to comply with the goals and requirements of the GMA, and the matter is remanded for the City to take action to comply with RCW 36.70A.470. The compliance schedule shall be as follows, unless amended by later order.

Item	Date Due
Compliance Due	February 18, 2020
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	March 3, 2020
Objections to a Finding of Compliance	March 17, 2020

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Response to Objections	March 27, 2020
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 7864979#	**April 6, 2020** **10:00 a.m.**

Compliance Report/Statement of Actions Taken to Comply shall be limited to 15 pages, 20 pages for Objections to Finding of Compliance, and 5 pages for the Response to Objections.

DATED this 15th day of August 2019.

Deb Eddy, Board Member

Cheryl Pflug, Board Member

Bill Hinkle, Board Member

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P.O. Box 40953
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EXHIBIT 26

CITY COUNCIL MINUTES
REGULAR MEETING
DECEMBER 3, 2019

CALL TO ORDER & ROLL CALL

Mayor Debbie Bertlin called the Regular Meeting to order at 5:30 pm at City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Debbie Bertlin and Councilmembers Lisa Anderl (by phone), Bruce Bassett, Deputy Mayor Salim Nice, Wendy Weiker (7:49 pm) David Wisenteiner (5:50 pm) and Benson Wong were present.

AGENDA APPROVAL

It was moved by Nice; seconded by Bassett to:
Approve the agenda as presented.
Passed: 5-0
FOR: 5 (Anderl, Bassett, Bertlin, Nice, and Wong)
ABSENT: 2 (Weiker and Wisenteiner)

EXECUTIVE SESSION

At 5:30 pm, Mayor Bertlin convened an executive session for planning or adopting the strategy or position to be taken by the City Council during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress pursuant to RCW 42.30.140(4)(b) for approximately 30 minutes.

At 5:43 pm, Mayor Bertlin came out of executive session and announced that the primary executive session had concluded, and that Council would continue in executive session to discuss pending or potential litigation with legal counsel pursuant to RCW 42.30.110(1)(i) for the remaining 17 minutes.

No action was taken.

At 6:00 pm, Mayor Bertlin closed the executive session and reconvened the Regular Meeting at 6:01 pm.

STUDY SESSION

AB 5639: Code of Ethics Revisions (2nd Reading)

Chief of Administration Ali Spietz and Interim City Attorney Bio Park outlined changes made to Ordinance No. 19C-20 in response to Council's feedback at the November 19 meeting. Revisions addressed the following:

- Added Definitions
- Prohibited Conduct
- Advisory Opinions
- Complaint Process
- Disposition
- No Recovery of Fees or Costs

She further reported that additional revisions were made to the Code of Ethics Statement and that it reflects language replacement regarding Prohibited Conduct.

Council discussed the proposed revisions at length and directed staff to make additional changes and return

with a third reading at the December 10 meeting.

SPECIAL BUSINESS

Mayor Bertlin presented Mr. Fred Jarrett with the Key to the City for his deep commitment to public service, innovation and accountability in government, and long-time service to Mercer Island.

CITY MANAGER REPORT

Interim City Manager Jessi Bon reported on the following:

- Sound Transit Park & Ride Permit Parking Program
- 77th Avenue Walkway Closure and Construction Update
- Water Main Flushing Along EMW
- Firefighter Food Drive for MI Food Pantry
- The Lighting at Mercerdale park and Firehouse Munch
- Two Community Events on December 22:
    - Celebrate the first night of Hanukkah at Mercerdale Park
    - Argosy Holiday Ship & Boat Parade
- Mercer Island YFS & Lions Club Tree Lot
- Tree Recycling

APPEARANCES

Roberta Lewandowski, Mercer Island

Ms. Lewandowski spoke on behalf of Island Vision and encouraged Council to support the Comprehensive Plan amendments addressing sustainability.

Anumeha, Mercer Island and Arts Commission member

She advocated for the City's Aubrey Davis Park Master Plan.

Victor Raisys, Mercer Island

Mr. Raisys spoke to the Comprehensive Plan amendments and economic development on the Island. He encouraged Council to develop an economic development plan for Mercer Island, explaining that without an economic development plan the City is out of compliance with the Growth Management Act. He also encouraged the Council to engage professional and experts in economic development to develop the plan.

Jonathan Harrington, Mercer Island

Thanked Council for adopting Resolution No. 1570, which adopted updated K4C Climate commitments. He also submitted to Council a list of recommended changes to the Climate Goals and Policies for their consideration.

Jim Stanton, Mercer Island

Mr. Stanton serves on the Steering Committee for Neighbors in Motion and expressed support for the bicycle elements of the ADPMP explaining that it will increase safety for cyclists and others using the park.

Councilmember Weiker arrived after appearances.

CONSENT CALENDAR

Accounts Payable Report for the period ending November 21, 2019 in the amount of $1,944,450.84:

Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Certification of Payroll dated November 22, 2019 in the amount of $827,636.49

Recommendation: Certify that the materials or services specified have been received and that all fund

warrants are approved for payment.

AB 5636: CPD Development and Construction Permit Fees Update
Recommended Action: Approve Resolution No. 1567 adopting new development and construction permit fees effective January 1, 2020.

AB 5635: Public Institution Code Amendment (2nd Reading & Adoption)
Recommended Action: Adopt Ordinance No. 19C-19 amending MICC 19.05.010 to repeal Subsection B; providing for severability and establishing an effective date.

AB 5641: Acceptance of MIYFS Foundation Funds for 2020 Youth and Family Services Staffing
Recommended Action: Accept a donation of $54,624 from the Mercer Island Youth and Family Services Foundation to fund the half time reduction in the Geriatric Specialist position from January 1, 2020 through December 31, 2020.

It was moved by Nice; seconded by Wong to:
Approve the Consent Calendar and the recommendations contained therein as presented.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

REGULAR BUSINESS

AB 5637: Public Hearing: Interim Ordinance Design and Concealment Standards for Small Cell Facilities Deployment

Evan Maxim, Community Planning and Development Director, summarized the process to date, reporting that City Council adopted an interim small cell ordinance on January 15 and scheduled a public hearing within 60 days of the interim ordinance's passage as required. Six months later the City Council held a second public hearing and passed Ordinance 19-10, which extended the interim small cell ordinance through January 14, 2020.

Director Maxim further explained that on November 20, 2019, the Planning Commission initiated its work on a recommendation for "permanent" standards regulating small cell facilities. The Planning Commission has since developed a recommended scope for the proposed update, which staff anticipates will be reviewed by the City Council in January or February of 2020.

Mayor Bertlin opened the public hearing at 7:53 pm.

There being no public comments, Mayor Bertlin closed the public hearing at 7:53 pm.

It was moved by Nice; seconded by Wong to:
Suspend the City Council Rules of Procedure 6.3, requiring a second reading of an ordinance.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

It was moved by Nice; seconded by Wisenteiner to:
Adopt Ordinance No. 19-22, extending the Interim Design and Concealment Standards for Small Cell Facilities deployment established under Ordinance No. 19C-02.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

AB 5629: Aubrey Davis Park Master Plan Adoption

Interim Parks and Recreation Director Ryan Daly and Capital Projects and Planning Manager Paul West reviewed the public engagement and City Council process to date and subsequent changes made to the ADMP since the November 4 Study Session. At Council Direction, revisions addressed:

- Vegetation – Planting Palette and Water Conservation

- Trails – Width, Optional Soft Surface Trails, Restroom Conflict Zone, ADA Requirements, and Lighting
- Improvements – New Restroom and Dog Off-leash Area
- Arts, Culture and Placemaking – Historical Context and Existing Policies on Public Art
- Project Implementation – Cost Updates, Public Engagement, and Safety as a Priority

City Council discussed the ADMP revisions at length.

It was moved by Bassett; seconded by Wisenteiner to:
Approve Resolution No 1571 adopting the Aubrey Davis Park Master Plan as revised; and

It was moved by Wong; seconded by Bertlin to:
Amend the motion to "include optional soft surface trails" in the ADMP
Failed 4-3
AGAINST: 4 (Anderl, Nice, Weiker, Wisenteiner)
FOR: 3 (Bassett, Bertlin, Wong)

It was moved by Nice; seconded by Anderl to:
Amend the motion to remove the "Criteria for prioritization of the projects included in this Master Plan mirrors the criteria used in the City's Capital Improvement Program (CIP)" and the three bullet points that followed on page 52 of the ADMP.
Failed 5-2
AGAINST: 5 (Bassett, Bertlin, Weiker, Wisenteiner, and Wong)
FOR: 2 (Anderl, Nice)

Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

It was moved by Bassett; seconded by Wisenteiner to:
Direct the City Manager and the Parks and Recreation Commission to develop a recommended scope of work for the $500,000 Washington State Department of Commerce grant to be presented to the City Council for consideration and approval in Q1 2020.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

AB 5631: 2019 Comprehensive Plan Amendments (ORD. No. 19-23, 2nd Reading & Adoption)

Community Planning and Development Director Evan Maxim summarized the Planning Commission review process and City Council direction received at the October 15, 2019 first reading. He then reviewed staff changes to policy language in consultation with the Planning Commission Chair and Vice Chair. Director Maxim also reported that CPD staff partnered with the City's Sustainability Manager to prepare the revised language.

City Council discussed the proposed amendments and made additional amendments.

It was moved by Wong; seconded by Bertlin to:
Adopt Ordinance No. 19-23 amending the Mercer Island Comprehensive Plan Land Use, Capital Facilities, and Transportation Elements as amended.

It was moved by Bassett; seconded by Bertlin to:
Amend Land Use Element Goal 28.1 to read, Partner with the King County-Cities Climate Collaboration (K4C) "*and the community"* to mitigate climate change."
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

It was moved by Nice; seconded by Wong to:
Amend Land Use Element Goal 28.4 to remove "K4C recommended" and read, Evaluate and prioritize actions to reduce GHG emissions.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

It was moved by Nice; seconded by Wisenteiner to:
Amend Land Use Element Goal 28 to revise and renumber 28.1 and 28.2.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

Council Consensus to reorder the first four paragraphs under Sustainability as suggested by Dr. Jonathan Harrington.

It was moved by Wong; seconded by Bassett to:
Amend Land Use Element Goal to include a reference to the City's recent adoption of the K4Cs joint climate commitments.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

It was moved by Anderl; seconded by Bassett to:
Amend Amendment 2, V. Capital Facilities Goals and Policies, Section 1.20 to remove the word "favor" and replace it with "choose" to read …"and choose options that have the lowest feasible carbon footprint and greatest carbon sequestration potential.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

It was moved by Anderl; seconded by Nice to:
Amend Amendment 3, Land Use Element, 14.1 to read, "Develop an Economic Development Plan, engaging internal and external resources as appropriate."
Passed: 5-1-1
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)
AGAINST: 1 (Bertlin)
ABSTAINED: 1 (Bassett)

Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

AB 5630: 2019 Minor Code Amendments (1st Reading)

Community Planning and Development Director Evan Maxim outlined the draft 2019 minor code amendments outlined in Ordinance No. 19C-21, which addressed minor code amendments related to the following subjects:

- Clarification of side yard terminology;
- Clarification of roof pitch when allowing eaves into non-conforming setbacks;
- An allowance for a driveway that exceeds 30 inches in height in a yard where necessary to provide vehicle access to the house;
- Establishing a height limit in the MF-2L zone and a methodology for calculating the height limit in the MF-2, MF-3, PBZ, and CO zones;
- Correcting a grammatical error that indicated that all development should be avoided;
- Revising the term used to describe the City's determination of the amount of required parking from "variance" to "modification";
- Allowing the City to issue a decision on a project or permit review when requests for a correction are repeatedly not addressed;
- Correcting a cross reference in design review;
- Creating a definition of irregular lot;
- Amending the definition of lot coverage to include eaves and roof overhangs; and,
- Creating a process whereby any person may propose the docketing of a code amendment for review by the City Council.

Following review, the City Council provided additional direction regarding the proposed amendments for inclusion in the second reading on December 10.

It was moved by Nice; seconded by Wisenteiner to:
Set Ordinance No. 19C-21 for second reading and adoption on the December 10, 2019 Consent Calendar as amended by Council discussion.

Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)1

AB 5642: Design Commission Vacancy Appointment

Mayor Bertlin reported that reported that in March the City began its annual recruitment process for filling positions whose terms were expiring on the City's advisory boards and commissions. In response to outreach efforts last March, there was one request for reappointment to the Design Commission and no additional applications were received, leaving one vacancy. To bring balance to the Design Commission, advertising efforts continued through the summer and early fall and applicants with landscape experience were encouraged to apply. While none of the applicants had landscape experience, Ms. Sanderson had previous experience on the Design Commission.

It was moved by Wong; seconded by Wisenteiner to:
Appoint the Mayor and Deputy Mayor's recommendation of Lara Sanderson to Position No. 2 on the Design Commission.
Passed: 6-0
FOR: 6 (Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)
ABSTAIN: 1 (Anderl)

OTHER BUSINESS

Planning Schedule

Interim City Manager Bon summarized the December 10 agenda schedule and reported that the December 17 meeting was canceled.

Councilmember Reports

SCA Legislative Agenda – Council expressed support for the SCA Legislative Agenda.

SCA Voting Delegate – It was the consensus of Council that Councilmember Bassett be the voting delegate at the December 4 meeting.

Councilmember Weiker reported on the tree lighted scheduled for December 6 and the SCA dinner on December 4.

Councilmember Bassett thanked the Council for the SCA Award nomination. He also encouraged Council to only allow councilmembers to participate by phone under extenuating circumstances.

Mayor Bertlin supported Councilmember's Bassett's comments regarding Council participation by phone and also reminded everyone to attend the December 6 Tree Lighting.

Councilmember Absences
There were no absences to report.

ADJOURNMENT

There being no additional business to come before City Council, the Regular Meeting adjourned at 10:48 pm.

_____
Debbie Bertlin, Mayor

Attest:

_____
Deborah Estrada, City Clerk

EXHIBIT 27

Subject: Request to postpone code amendment docketing ordinance

Date: Monday, December 9, 2019 at 5:28:31 PM Pacific Standard Time

From: Amy Lavin

To: Debbie Bertlin, Salim Nice, Lisa Anderl, Bruce Bassett, Wendy Weiker, David Wisenteiner, Benson Wong

CC: Jessi Bon, Evan Maxim, Michael Levy (mike.rebar1@gmail.com), zane, erict@fasps.org, oren.nissim, Steve Dispensa, Nadine Strauss

Dear Council Members,

It recently came to our attention that Council is considering a new proposal to only accept code amendment applications one time a year, during the fall, to be placed on the docket for the upcoming year. We understand this was proposed with a goal of standardizing a process that is deemed burdensome and inefficient. While we agree with those stated goals, the effect of this ordinance would be to impose an additional 18+ months delay on our ability to propose and work with the city on land use revisions to our properties. **Therefore, we urge you to delay a vote on final passage or amend to address the adverse impacts this action would have on our ability to move forward with our projects.**

As you know, the SJCC, FASPS and HNT approached the City in 2017. At that time, we were fully prepared to work within the challenging but available CUP city process. **At the City's request and recommendation**, we agreed instead to work with the City on a new Community Facility Zoning concept. We have been going down that road now for over 18 months, in good faith with the City as our partner, but it is apparent that the City's CFZ process is likely no longer viable and a recommendation by the Planning Commission to go in a different direction is expected shortly.

As we stated publicly at the joint council and planning commission meeting earlier this Fall, we will work with the City in whichever way the City prefers (CFZ or CUP), and our priority is simply in getting clarity as quickly as possible given we are already 18 months in. As we said back in 2017 and as we reiterated to Council, the Planning Commission and staff in September, we have always been willing to work with the City on using the CUP process – we just want the green light to move forward in whatever process is preferred.

With this new Council recommendation currently before you, **it appears the City is seeking to have us delay for another 18 months.** If the earliest we can get docketed is sometime in 2021, then that will represent a full four years of delay - through City action alone - upon even consideration of our project.

It is our sincere hope that the City did not intend to impact us in this way. We are and remain committed to working with our neighbors and with the City to bring forward evolved concepts for our properties that enhance the City and neighborhood. To that end, **we ask you take one of three actions**:

- Delay your vote tomorrow until a regulatory path forward for SJCC, FASPS and HNT can be identified and supported by City staff; or
- Amend the ordinance to grandfather in our projects, allowing us to submit applications this calendar year; or
- Amend the ordinance delaying implementation until 2021, which will in effect allow us to submit applications for our projects during the coming calendar year.

Thank you for your consideration and attention to this challenge. We want nothing more than to be able to evolve our facilities to better serve Mercer Island, our community, and the goals of the City – we just need the City to tell us how you prefer to work with us, preferably without another two-year delay. Please don't

hesitate to contact any of us if we can provide additional information.

French American School of Puget Sound, Herzl-Ner Tamid, and the Stroum Jewish Community Center

Amy Lavin
Chief Executive Officer | Stroum Jewish Community Center | Direct: 206-232-7116 | M: 425-443-6047

EXHIBIT 28

CITY COUNCIL MINUTES
SPECIAL MEETING
DECEMBER 10, 2019

CALL TO ORDER & ROLL CALL

Mayor Debbie Bertlin called the Special Meeting to order at 7:00 pm at City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Debbie Bertlin, Deputy Mayor Salim Nice, and Councilmembers Lisa Anderl, Bruce Bassett, Wendy Weiker, David Wisenteiner and Benson Wong were present.

AGENDA APPROVAL

Councilmember Wong requested to remove AB 5638: 2019 Minor Code Amendments (Ordinance No. 19C-21, 2nd Reading & Adoption) from the Consent Calendar. Mayor Bertlin added it as the first item of Regular Business

It was moved by Nice; seconded by Wisenteiner to:
Approve the agenda as amended.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner, and Wong)

CITY MANAGER REPORT

Interim City Manager Jessi Bon reported on the following:

- YFS Emergency Family Assistance Holiday Gift Program
- Two Projects on I-90 Trail:
  - King County Wastewater Treatment Division
  - Sound Transit
- ST Park & Ride Permit Parking Program
- Project Updates: Mercer Island Fire Department:
  - Organizational Assessment
  - MIFD Back at Full Staffing Soon
- Project Updates: Community Planning & Development:
  - Small Cell Ordinance
  - Organizational Assessment
  - Critical Areas Regulations / Shoreline Master Program
  - Community Facility Zone
- Parks & Recreation:
  - 2020 Parks, Recreation, and Open Space (PROS) Plan
- YFS Health Youth Initiative
- Holiday Closures
- Upcoming Events

APPEARANCES

The following Mercer Island residents thanked the outgoing Council for their service and recognized those individuals that will serve on the Council going forward:

- Craig Reynolds
- Carolyn Boatsman
- Lucia Pirzio-Biroli
- Todd Fiala
- Jake Jacobson

CONSENT CALENDAR

Accounts Payable Report for the period ending December 5, 2019 in the amount of $367,647.31:
Recommendation: Certify that the materials or services hereinbefore specified have been received and that all warrant numbers listed are approved for payment.

Certification of Payroll dated December 6, 2019 in the amount of $838,586.01
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Approve the minutes of the November 19, 2019 Regular Meeting.

AB 5646: 2020 – 2021 AFSCME Collective Bargaining Agreement
Recommended Action: Authorize the Interim City Manager to sign the AFSCME Collective Bargaining Agreement for the period of January 1, 2020 through December 31, 2021, in substantially the form attached hereto as Exhibit 1

It was moved by Nice; seconded by Bassett to:
Approve the Consent Calendar and the recommendations contained therein as presented.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

REGULAR BUSINESS

AB 5638: 2019 Minor Code Amendments (Ordinance No. 19C-21, 2nd Reading & Adoption)

Community Planning and Development Director Evan Maxim reported that following City Council's first reading of Ordinance No. 19C-21 on December 3, Council provided additional direction regarding the proposed amendments which staff observed to include the following:

- No code amendment docketing period in 2019,
- A desire to manage legislative work plan items,
- Allow for a transition period that is consistent with past practice, and
- Comply with the Hearings Board order by February 18, 2020.

It was moved by Wong; seconded by Nice to:
Adopt Ordinance No. 19C-21 amending Title 19 of the Mercer Island City Code to clarify development and administrative standards and to create a procedure to docket and consider suggested amendments to development regulations with an effective date for the amendments no earlier than February 18, 2020.
Passed: 6-1
FOR: 6 (Anderl, Bassett, Nice, Weiker, Wisenteiner and Wong)
AGAINST: 1 (Bertlin)

AB 5644: Acquisition of ARCO/Tully's Property

Interim City Attorney Bio Park explained that staff is seeking explicit authorization from the City Council for the City Manager to sign all necessary closing documents on behalf of the City in the acquisition of ARCO/Tully's Property, explaining that the closing entails the following:

- Closing must be completed by December 31, 2019
- Purchase price remains $2,000,000
- Funds from REET 1 were previously appropriated and earnest money of $150,000 was deposited into escrow, and
- Closing date is currently scheduled for December 27, 2019.

It was moved by Nice; seconded by Wong to:
Authorize the Interim City Manager, or the Interim City Manager's designee if she is unavailable, to

execute the closing documents to complete the City's acquisition of the real property at 7810 SE 27th Street, Mercer Island, WA.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

AB 5645: 2020 Comprehensive Plan Amendment Docket

Community Planning and Development Director Evan Maxim provided an overview of the process to date and the Planning Commission's preliminary docket, which included the following recommendations:

- Establish economic development policies and goals that establish a policy direction around the development of an economic development plan and related priorities, values, and strategies.
- Establish goals and policies supporting the planting of trees in the public right-of-way for the purposes of carbon sequestration, shade to reduce urban heat-island effect, and wildlife habitat.

Director Maxim further explained that the City Council options included:

- Adopt the Planning Commission's recommended docket; or
- Adopt the Planning Commission's recommended docket with changes; or
- Decline to adopt a final docket of Comprehensive Plan amendments

After discussing the issue, Council chose not to act on either recommendation made by the Planning Commission.

It was moved by Bassett; seconded by Bertlin to:
Not docket any items for the 2020 Comprehensive Plan
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

AB 5643: Code of Ethics Revisions (Third Reading and Adoption)

Chief of Administration Ali Spietz outlined the changes made to the Code of Ethics since its second reading on December 3 and requested Council direction on the maximum amount the City would reimburse an official for the defense of an ethics complaint that results in a dismissal of the complaint by the city council without penalties subsequent to a hearing by the hearing examiner. Council also requested that complaints be submitted within two years rather than three.

It was moved by Bassett; seconded by Nice to:
Adopt Ordinance No. 19C-20 to amend chapter 2.60 of the Mercer Island City Code revising the Code of Ethics and pass Resolution No. 1572 revising the Code of Ethics Statement.
Passed: 7-0
FOR: 7 (Anderl, Bassett, Bertlin, Nice, Weiker, Wisenteiner and Wong)

OTHER BUSINESS

Public Issues Committee – There was Council Consensus that Benson Wong serve as the PIC voting delegate. Councilmember Wong noted that Councilmember Weiker had expressed a desire to serve on the SCA Board and he intended to nominate her.

COUNCIL REPORTS

Councilmember Wong reminded Councilmembers to purchase their Christmas Tree.

SPECIAL BUSINESS

Deputy Mayor Nice read Resolution No. 1575 acknowledging Councilmember Dave Wisenteiner's four years in office and his contributions to the Mercer Island Community.

Washington State Representative Tana Senn read a Resolution No. 1574 acknowledging Mayor Debbie Bertlin's eight years in office and her contributions to the Mercer Island Community.

Chief of Administration Ali Spietz read a Resolution No. 1573 acknowledging Councilmember Bruce Bassett's twelve years in office and his contributions to the Mercer Island Community.

On behalf of its citizens, the City Council commended Councilmember Wisenteiner, Mayor Bertlin, and Councilmember Basset for their distinguished public service and extended its sincerest thanks and appreciation for their time and many significant contributions to Mercer Island over the past several years. A reception honoring the Mayor and Councilmembers was held directly following the meeting.

ADJOURNMENT

There being no additional business to come before City Council, the Regular Meeting adjourned at 9:26 pm.

_____
Debbie Bertlin, Mayor

Attest:

_____
Deborah Estrada, City Clerk

EXHIBIT 29

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ROBERT A. MEDVED, Petitioner, v. CITY OF MERCER ISLAND, Respondent.	**19-3-0014** **ORDER FINDING COMPLIANCE**

I. INTRODUCTION

On August 15, 2019, the Board issued an Order Finding Noncompliance Pursuant to Stipulation. The parties agreed that the City of Mercer Island had failed to act to adopt a development regulation docketing procedure as required by RCW 36.70A.470. The City submitted its statement of actions taken by comply, along with a compliance index.[1] Thereafter, the Petitioner submitted his objection,[2] to which the City replied.[3] A telephonic compliance hearing was held April 6 in which Petitioner Medved represented himself; Bio Park represented the City of Mercer Island. All three board members in this case attended the hearing.

II. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.[4] After the period for compliance

[1] City of Mercer Island's Statement of Actions Taken to Comply (March 3, 2020).
[2] Petitioner's Objections to the City's Statement of Actions Taken to Comply and Petitioner's Objections to the City's Compliance Index (Petitioner's Objection, March 17, 2020).
[3] City of Mercer Island's Response to Petitioner's Objections, March 27, 2020.
[4] RCW 36.70A.300(3)(b).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.[5] For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.[6]

In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[7] Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.[8] Thus, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that **any action** taken by the City is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth Management Act).[9]

III. DISCUSSION

Action Taken to Comply

The City adopted Ordinance No. 19C-21 on December 10, 2019, amending Title 19 of the Mercer Island City Code, creating procedures to docket and consider suggested development regulation amendments from interested persons. It amended sections of the Mercer Island City Code, MICC 19.15.230 (requiring the City to maintain a list of suggested changes to the code) and MICC 19.15.250 (permitting interested persons to suggest code amendments for docketing in the aforementioned list), requiring the City to consider suggested changes on at least an annual basis.

---

[5] RCW 36.70A.330(1) and (2).
[6] RCW 36.70A.320(1), (2), and (3).
[7] *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
[8] RCW 36.70A.3201.
[9] RCW 36.70A.320(2).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Petitioner's Objection and City Response

Petitioner's objection is based on his assertion that the actions taken in compliance are "inaccurate and incomplete."[10] The statement of compliance, in Petitioner's view "implies that the City is not required to docket City-initiated code amendments and that the City may adopt code amendments at any time," describing the interaction of two MICC code subsections, MICC 19.15.250(C)(1) and (C)(2). Petitioner's argument is that the action taken, and/or the way it may be construed in relation to other city code provisions, may violate certain common-law principles of statutory construction.[11] Further, Petitioner alleged that the compliance index submitted did not include two important documents: a letter from the Petitioner to the City Council and a PowerPoint presentation made by the Director of Community Planning and Development.[12] The City filed a response and submitted the requested additional documents as supplemental exhibits. [13]

Board Analysis

The Board's Order in this case required the City to comply with RCW 36.70A.470, which provides:

> RCW 36.70A.470, enacted in 1995, provides in part as follows:
>
> (2) Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.
>
> …
>
> (4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development

---

[10] Petitioner's Objection p. 2.
[11] Petitioner cites *Faben Point v. Mercer Island,* 102 Wn. App 775 (2000); *Porter v. Kirkendoll,* 449 P.3d 627 (2019); *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516 (2010); *Western Telepage v. City of Tacoma*, 95 Wn. App 140 (1999), for various general propositions in statutory construction and municipal law.
[12] Petitioner's Objection p. 6.
[13] City of Mercer Island's Response to Petitioner's Objections (March 27, 2020).

Growth Management Hearings Board
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> regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.

The Petitioner does not dispute that the City took action to provide for docketing of proposed amendments to development regulations; his objection goes to his belief that the action was noncompliant because it does not provide that City initiated development regulations must also be docketed. The Board's rules provide guidance here:

> When the basis for an order of noncompliance is the failure to take an action …, the only question before the board at the compliance hearing is whether the [jurisdiction] has taken the required action. Any challenge to the merits of the newly enacted legislation must be asserted in a new petition for review. WAC 242-03-940(4)

Thus the question before the Board on compliance is whether the City's action has brought the City into compliance with RCW 36.70A.470. Here, the City enacted procedures for interested persons to suggest amendments to the comprehensive plan and/or development regulations such that they are docketed and considered at least annually. Petitioner objects to the merits of the legislation, as it may be interpreted together with other sections of the city code, concerning suggested changes instigated or considered by the City Council. The Board notes that RCW 36.70A.470 does not require docketing of council-initiated amendments.

The Board finds that the text of Ordinance 19C-21 amends MICC 19.15.230 and MICC 19.15.250 to include docketing procedures for development regulations.

The Board finds that the amendment to MICC 19.15.230 requires the City to maintain a list of suggested changes to the code (development regulations) in addition to the docketing of comprehensive plan amendments.

The Board finds that the amendment to MICC 19.15.250 permitted interested persons to suggest code amendments for docketing in the aforementioned list, requiring the City to consider them on at least an annual basis.

The Board finds that by passage of Ordinance 19C-21, the City has adopted a docketing procedure for suggested changes to the City's development regulations in compliance with RCW 36.70A.470.

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IV. ORDER

Based upon review of the Board's Order Finding Noncompliance, the City of Mercer Island's Statement of Actions Taken to Achieve Compliance, Ordinance 19C-21, the Growth Management Act, prior Board orders and case law, and having considered the arguments of the parties offered in the briefing and at the compliance hearing, and having deliberated on the matter, **the Board finds and concludes** that the City is in compliance with RCW 36.70A.470 and this case is closed.

SO ORDERED this 1st day of May 2020.

Deb Eddy, Board Member

Cheryl Pflug, Board Member

Bill Hinkle, Board Member

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EXHIBIT 30

CITY USE ONLY		
PROJECT#	RECEIPT #	FEE
Date Received:		
Received By:		

APPLICATION FOR ZONING CODE TEXT AMENDMENT

Applicant: **G. Richard Hill**
701 5th Avenue
Suite 6600
Seattle, WA 98104
(206) 812-3388

1. **Completed Pre-Application:**

The applicant has conferred with the Director of Community Planning and Development ("Director") and has reviewed the Application with him. The Director has accordingly advised the applicant that this conference suffices to fulfill the Pre-Application processing requirement.

2. **Development Application Sheet:**

The completed Development Application Sheet accompanies this Application for Code Amendment.

3. **Project Narrative:**

This Application for a Mercer Island Zoning Code ("Code") Text Amendment ("Code Amendment") is a non-project, legislative proposal that addresses the unintended consequences of the recent Residential Code Update, as to Regulated Improvements. The Code Amendment would address Gross Floor Area, Height, and Lot Coverage issues to render them compatible with existing Regulated Improvements, and to allow reasonable redevelopment of them. A description of the Approach taken with respect to the drafting of the Code Amendment is set forth on Exhibit A to this Application, as is a Matrix

comparing the Gross Floor Area, Height, and Lot Coverage regulations under the Pre-Residential Code, the Residential Code Update (the current Code), and the Proposed Amendments, which would apply to Regulated Improvements only. The proposed Code Amendment itself is attached as Exhibit B and constitutes a red-line of the current Code provisions indicating where changes are proposed. The Code Amendment is consistent with the Growth Management Act. RCW 36.70A, because it will facilitate development of Regulated Improvements (as defined in the Code), including community centers, recreational facilities, schools and educational uses that serve Mercer Island urban residents within the urban area. Approval of the Code Amendment will facilitate the efficient use of land. The Code Amendment is consistent with the county-wide planning policies for the same reasons. The Code Amendment will further encourage and implement the City's Comprehensive Plan, in particular Land Use Goal 17.4, which recognizes that "social and recreation clubs, schools and religious institutions are predominantly located in single family residential areas of the Island," and that "development regulations should reflect the desire to retain valuable and healthy social, recreational, educational, and religious organizations as community assets which are essential for the mental, physical and spiritual health of Mercer Island."

4. **Title Report:**

The Director has advised that because this is a non-project legislative rezone, no Title Report will be required in connection with this application.

5. **SEPA Checklist:**

A completed non-project SEPA Checklist accompanies this Application.

6. **Fees:**

A fee of $23,559.22 (SEPA @ $2,657.00 + Code Amendment @ $20,902.22) accompanies this Application.

7. **Vicinity Map:**

Because the Code Amendment is a non-project action, the requirement for a Vicinity Map is not applicable.

Dated this 11th day of February 2020.

G. Richard Hill, Applicant

Exhibit A

Approach

1. Update "Regulated Improvements" to bring existing private schools, religious buildings, and community centers into code conformance while allowing property owners the ability to reasonably renovate and develop their properties.
2. Limit the applicability of most amendments to lots that abut commercial zones.

Proposed Amendments

	Pre-Residential Code Update	**Residential Code Update** (Current Code)	**Proposed Amendments** (Regulated Improvements Only)
Gross Floor Area (19.02.020.D)	45% of lot area for SF structures only. Regulated Improvements not specifically restricted; governed by height, setbacks, and lot coverage.	40% of lot area for all structures, or: • R-8.4: 5,000 sf, whichever is less. • R-9.6: 8,000 sf, whichever is less. • Etc.	40% of lot area • Allow exceptions for substantially below grade parking structures (less than 4'-0" above grade). • Allow increase for lots less than 3-acres that abut a commercial zone.[1] (See 19.02.060.B.)
Height (19.02.020.E)	30', or 35' measured on the downhill side.	30', measured from average building elevation. Downhill façades measured from existing or finished grade, whichever is lower.	36' • Allow increase to 45' farther than 150' from a public ROW or within 300' of a commercial zone. (See 19.02.060.E.) • Provide method of measurement to allow buildings to respond better to sloping sites. (See 19.02.060.F.)
Lot Coverage (19.02.060)	40%	40%	40%[2] Allow 25% increase for lots that abut a commercial zone (See 19.02.060.C.). Allow exceptions for usable open spaces, such as: • Athletic and similar play fields • Occupiable green roofs or other structured landscaped area. • Grass block access drives solely for the use of emergency vehicles (See 19.02.060.D.)

[1] GFA in the C-O zone: max. building footprint = 35% of lot area; max. height = 36', which allows 3 floors; max. effective GFA as multiple of lot area is 0.35 x 3 = 1.05 times lot area.

[2] Change 19.02.060 from impervious surface to lot coverage. Impervious surfaces are regulated by the MICC Title 15 and construction codes.

Exhibit B

19.02.005Purpose and applicability.

A. *Purpose.* The purpose of the residential chapter is to identify land uses and to establish development standards that are appropriate within the residential zoning designations. The development standards provide a framework for a site to be developed consistent with the policy direction of the adopted Mercer Island Comprehensive Plan.

B. *Applicability.*

1. The provisions of this chapter shall apply to all development proposals in the R-8.4, R-9.6, R-12, and R-15 zoning designations.

2. Unless otherwise indicated in this chapter, the applicant shall be responsible for the initiation, preparation, and submission of all required plans or other documents prepared in support of or necessary to obtain a permit and to determine compliance with this chapter. (Ord. 17C-15 § 1 (Att. A).

19.02.010Single-family.

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

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

1. Single-family dwelling.

2. Accessory buildings incidental to the main building.

3. Private recreational areas.

4. Public schools accredited or approved by the state for compulsory school attendance, subject to design commission review and all of the following conditions:

a. All structures shall be located at least 35 feet from any abutting property and at least 45 feet from any public right-of-way.

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space per classroom with high schools providing an additional one parking space per 10 students.

c. A one-fourth acre or larger playfield shall be provided in one usable unit abutting or adjacent to the site.

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

a. The home business may make those improvements to the home business normally allowed for single-family residences. For a day care, play equipment and play areas are not allowed in front yards.

b. Only those persons who reside on the premises and one other person shall be permitted to engage in the business on the premises at any one time; provided, that a day care or preschool may have up to three nonresident employees on the premises at any one time. This limitation applies to all owners, managers, staff or volunteers who operate the business.

c. There shall be no exterior storage or display of materials except as otherwise allowed for single-family residences, and no sign advertising the home business located on the premises except as specifically allowed by MICC 19.12.080(B).

d. No offensive noise, vibration, smoke, dust, odor, heat or glare or excessive traffic to and from the premises shall be produced or generated by the home business.

e. The home business shall not involve the use of more than 30 percent of the gross floor area of the residence, not including the allowed basement exclusion area consistent with subsection E of this section and MICC 19.16.010. However, a day care or preschool may use up to 75 percent of said gross floor area.

f. No home business shall be permitted that generates parking demand that cannot be accommodated on the lots consistent with the applicable maximum impervious surface coverage limits of MICC 19.02.060. Parking shall be provided to handle the expected parking demand. In the case of a day care or preschool, parking for residents and employees shall occur on site; resident and employee parking shall not occur on an adjacent street.

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

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

6. Public park subject to the following conditions:

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

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

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

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

7. Semi-private waterfront recreation areas for use by 10 or fewer families, subject to the conditions set out in MICC 19.07.110.

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

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

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

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

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

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

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

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

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

12. Places of worship may have a stage theater program as an accessory use. Stage theater programs are defined as productions of live presentations involving the performances of actors or actresses, singers, dancers, musical groups, or artists. Stage theater programs also include related classes and instructional workshops. Adequate parking must be provided, as determined by the code official.

13. Open space.

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

C. *Conditional Uses.* The following uses are permitted when authorized by the issuance of a conditional use permit when the applicable conditions set forth in this section and in MICC 19.15.040 have been met:

1. Government services, public facilities, utilities, and museums and art exhibitions, subject to the following conditions:

a. All structures shall be located at least 20 feet from any abutting property;

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space for each 200 square feet of gross floor area; and

c. Utilities shall be shielded from abutting properties and streets by a sight obscuring protective strip of trees or shrubs.

2. Private schools accredited or approved by the state for compulsory school attendance, subject to conditions set out in subsection (A)(4) of this section.

3. Places of worship subject to the following conditions:

a. All structures shall be located at least 35 feet from any abutting property.

b. Off-street parking shall be established and maintained at a ratio of one parking space for each five seats in the chapel, nave, sanctuary, or similar worship area.

4. Noncommercial recreational areas, subject to the conditions contained in subsection (A)(6) of this section.

5. Semi-private waterfront recreation areas for use by more than 10 families, subject to conditions set out in MICC 19.07.110.

6. Retirement homes located on property used primarily for a place of worship subject to the following conditions:

a. Retirement home structures shall not occupy more than 20 percent of the lot; provided, the total lot coverage for the retirement home, the place of worship, and all other structures shall not exceed the lot coverage specified in MICC 19.02.060.

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

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

i. Demonstrated need;

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

iii. Nature of the surrounding neighborhood; and

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

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

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

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

a. The bed and breakfast facility shall meet all applicable health, fire, and building codes.

b. Not more than four rooms shall be offered to the public for lodging.

c. There shall be no external modification of any structure that alters the residential nature of the premises.

d. The bed and breakfast shall be the primary residence of the operator.

e. In addition to the parking required set out in MICC 19.02.020(G), one off-street parking space, not located in the lot setbacks, shall be provided for each rental room.

f. Meals shall be made available only to guests, and not to the general public.

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

a. No use or proposed use shall be more intensive than the school activity it replaced. Consideration shall be given to quantifiable data, such as, but not limited to, traffic generation, parking demand, noise, hours of operation;

b. All activities, with the exception of outdoor recreation shall be confined to the interior of the building(s);

c. Exterior modification of the building(s) shall not be permitted if such a modification would result in an increase in the usable area of the building(s);

d. Minor changes in the building exterior, landscaping, signs, and parking may be permitted subject to the review and approval of the design commission; and

e. Off-street parking for all activities at the site shall be provided in existing school parking lots.

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

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

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

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

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

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

b. Signage shall be consistent with the provisions of MICC 19.12.080(B)(3). (Ord. 19C-04 § 1 (Exh. A); Ord. 17C-15 § 1 (Att. A); Ord. 15C-03 § 1; Ord. 09C-04 §§ 1, 2; Ord. 08C-01 § 1; Ord. 05C-16 § 1; Ord. 04C-08 § 9; Ord. 03C-08 § 3; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.020Development standards.

A. *Minimum Net Lot Area.*

R-8.4:	The net lot area shall be at least 8,400 square feet. Lot width shall be at least 60 feet and lot depth shall be at least 80 feet.
R-9.6:	The net lot area shall be at least 9,600 square feet. Lot width shall be at least 75 feet and lot depth shall be at least 80 feet.
R-12:	The net lot area shall be at least 12,000 square feet. Lot width shall be at least 75 feet and lot depth shall be at least 80 feet.
R-15:	The net lot area shall be at least 15,000 square feet. Lot width shall be at least 90 feet and lot depth shall be at least 80 feet.

1. Minimum net lot area requirements do not apply to any lot that came into existence before September 28, 1960. In order to be used as a building site, lots that do not meet minimum net lot area requirements shall comply with MICC 19.01.050(G)(3).

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

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

C. *Yard Requirements.*

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

a. Front yard depth: 20 feet or more.

b. Rear yard depth: 25 feet or more.

c. Side yards shall be provided as follows:

i. *Total Depth.*

(a) For lots with a lot width of 90 feet or less, the sum of the side yards' depth shall be at least 15 feet.

(b) For lots with a lot width of more than 90 feet, the sum of the side yards' depth shall be a width that is equal to at least 17 percent of the lot width.

ii. *Minimum Side Yard Depth.*

(a) The minimum side yard depth abutting an interior lot line is five feet or 33 percent of the aggregate side yard total depth, whichever is greater.

(b) The minimum side yard depth abutting a street is five feet.

iii. *Variable Side Yard Depth Requirement.* For lots with an area of 6,000 square feet or more, the minimum side yard depth abutting an interior lot line shall be the greater of the minimum side yard depth required under subsection (C)(1)(c)(ii) of this section, or as follows:

(a) Single-family dwellings shall provide a minimum side yard depth of seven and one-half feet if the building:

(1) For nongabled roof end buildings, the height is more than 15 feet measured from existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard; or

(2) For gabled roof end buildings, the height is more than 18 feet measured from existing or finished grade, whichever is lower, to the top of the gabled roof end adjoining the side yard.

(b) Single-family dwellings with a height of more than 25 feet measured from the existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard shall provide a minimum side yard depth of 10 feet.

2. *Yard Determination.*

a. *Front Yard.*

i. *Front Yard – General.* For lots that are not corner lots or waterfront lots, the front yard shall extend the full width of the lot and is determined using the following sequential approach, in descending order of preference, until a front yard is established:

(a) The yard abutting an improved street from which the lot gains primary access.

(b) The yard abutting the primary entrance to a building.

(c) The orientation of buildings on the surrounding lots and the means of access to the lot.

ii. *Front Yard – Corner Lots.* On corner lots the front yard shall be measured from the narrowest dimension of the lot abutting a street. The yard adjacent to the widest dimension of the lot abutting a street shall be a side yard; provided:

(a) If a setback equivalent to or greater than required for a front yard is provided along the property lines abutting both streets, then only one of the remaining setbacks must be a rear yard.

iii. *Front Yard – Waterfront Lots.* On a waterfront lot, regardless of the location of access to the lot, the front yard may be measured from the property line opposite and generally parallel to the ordinary high water line.

iv. This section shall apply except as provided for in MICC 19.08.030(F)(1).

b. *Rear Yard.* Except as allowed in subsections (C)(2)(a)(ii) and (iii) of this section, the rear yard is the yard opposite the front yard. The rear yard shall extend across the full width of the rear of the lot, and shall be measured between the rear line of the lot and the nearest point of the main building including an enclosed or covered porch. If this definition does not establish a rear yard setback for irregularly shaped lots, the code official shall establish the rear yard based on the following method: The rear yard shall be measured from a line or lines drawn from side lot line(s) to side lot line(s), at least 10 feet in length, parallel to and at a maximum distance from the front lot line.

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

3. *Intrusions into Required Yards.*

a. *Minor Building Elements.*

i. Except as provided in subsection (C)(3)(a)(ii) of this section, porches, chimney(s) and fireplace extensions, window wells, and unroofed, unenclosed outside stairways and decks shall not project more than three feet into any required yard. Eaves shall not protrude more than 18 inches into any required yard.

ii. No penetration shall be allowed into the minimum side yard setback abutting an interior lot line except where an existing flat-roofed house has been built to the interior side yard setback line and the roof is changed to a pitched roof with a minimum pitch of 4:12, the eaves may penetrate up to 18 inches into the side yard setback.

b. *Hardscape and Driveways.* Hardscape and driveways not more than 30 inches above existing grade or finished grade, whichever is lower, may be located in any required yard.

c. *Fences, Retaining Walls and Rockeries.* Fences, retaining walls and rockeries are allowed in required yards as provided in MICC 19.02.050.

d. *Garages and Other Accessory Buildings.* Garages and other accessory buildings are not allowed in required yards, except as provided in MICC 19.02.040.

e. *Heat Pumps, Air Compressors, Air Conditioning Units, and Other Similar Mechanical Equipment.* Heat pumps, air compressors, air conditioning units, and other similar mechanical equipment may be located within any required yard provided they will not exceed the maximum permissible noise levels set forth in WAC 173-60-040, which is hereby incorporated as though fully set forth herein. Any such equipment shall not be located within three feet of any lot line.

f. *Architectural Features.* Detached, freestanding architectural features such as columns or pedestals that designate an entrance to a walkway or driveway and do not exceed 42 inches in height are allowed in required yards.

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

4. *Setback Deviation.* The code official may approve a deviation to front, side, and rear setbacks pursuant to MICC 19.15.040.

D. *Gross Floor Area – Single Family Dwellings.*

1. Except as provided in subsection (D)(3) of this section, the gross floor area of a single-family dwelling shall not exceed:

a. R-8.4: 5,000 square feet or 40 percent of the lot area, whichever is less.

b. R-9.6: 8,000 square feet or 40 percent of the lot area, whichever is less.

c. R-12: 10,000 square feet or 40 percent of the lot area, whichever is less.

d. R-15: 12,000 square feet or 40 percent of the lot area, whichever is less.

This section does not apply to regulated improvements.

2. *Gross Floor Area Calculation.* The gross floor area is the sum of the floor area(s) bounded by the exterior faces of each building on a residential lot, provided:

a. The gross floor area shall be 150 percent of the floor area of that portion of a room(s) with a ceiling height of 12 feet to 16 feet, measured from the floor surface to the ceiling.

b. The gross floor area shall be 200 percent of the floor area of that portion of a room(s) with a ceiling height of more than 16 feet, measured from the floor surface to the ceiling.

c. Staircases shall be counted as a single floor for the first two stories accessed by the staircase. For each additional story above two stories, the staircase shall count as a single floor area. For example, a staircase with a 10-foot by 10-foot dimension that accesses three stories shall be accounted as 200 square feet (100 square feet for the first two stories, and 100 square feet for the third story).

d. For the purposes of calculating allowable gross floor area, lots created in a subdivision through MICC 19.08.030(G), Optional Standards for Development, may apply the square footage from the open space tract to the lot area not to exceed the minimum square footage of the zone in which the lot is located.

3. *Allowances.*

a. The gross floor area for lots with an area of 7,500 square feet or less may be the lesser of 3,000 square feet or 45 percent of the lot area; or

b. If an accessory dwelling unit is proposed, the 40 percent allowed gross floor area may be increased by the lesser of five percentage points or the actual floor area of the proposed accessory dwelling unit, provided:

i. The allowed gross floor area of accessory buildings that are not partially or entirely used for an accessory dwelling unit shall not be increased through the use of this provision;

ii. The lot will contain an accessory dwelling unit associated with the application for a new or remodeled single-family home; and

iii. The total gross floor area shall not exceed 4,500 square feet or 45 percent of the lot area, whichever is less.

E. *Building Height Limit – Single Family Dwellings.*

1. *Maximum Building Height.* No Single Family Dwelling ~~building~~ shall exceed 30 feet in height above the average building elevation to the highest point of the roof.

2. *Maximum Building Height on Downhill Building Facade.* The maximum building facade height on the downhill side of a sloping lot shall not exceed 30 feet in height. The building facade height shall be measured from the existing grade or finished grade,

whichever is lower, at the furthest downhill extent of the proposed building, to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.

3. Antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces, solar panels, and other similar appurtenances may extend to a maximum of five feet above the height allowed for the main structure in subsections (E)(1) and (2) of this section; provided:

a. Solar panels shall be designed to minimize their extension above the maximum allowed height, while still providing the optimum tilt angle for solar exposure.

b. Rooftop railings may not extend above the maximum allowed height for the main structure.

4. The formula for calculating average building elevation is as follows:

Formula:	Average Building Elevation = (Weighted Sum of the Mid-point Elevations) ÷ (Total Length of Wall Segments)
Where:	Weighted Sum of the Mid-point Elevations = The sum of: ((Mid-point Elevation of Each Individual Wall Segment) x (Length of Each Individual Wall Segment))

For example for a house with 10 wall segments:

(Axa) + (Bxb) + (Cxc) + (Dxd) + (Exe) + (Fxf) + (Gxg) + (Hxh) + (Ixi) + (Jxj)

a + b + c + d + e + f + g + h + i + j

Where:	A, B, C, D… = The existing or finished ground elevation, whichever is lower, at midpoint of wall segment.
And:	a, b, c, d… = The length of wall segment measured on outside of wall.

F. *Lot Coverage – Single-Family Dwellings.*

1. *Applicability.* This section shall apply to the development of single-family dwellings including, but not limited to, the remodeling of existing single-family dwellings and construction of new single-family dwellings. This section does not apply to regulated improvements.

2. *Landscaping Objective.*

a. To ensure that landscape design reinforces the natural and wooded character of Mercer Island, complements the site, the architecture of site structures and paved areas, while maintaining the visual appearance of the neighborhood.

b. To ensure that landscape design is based on a strong, unified, coherent, and aesthetically pleasing landscape concept.

c. To ensure that landscape plantings, earth forms, and outdoor spaces are designed to provide a transition between each other and between the built and natural environment.

d. To ensure suitable natural vegetation and landforms, particularly mature trees and topography, are preserved where feasible and integrated into the overall landscape design. Large trees and tree stands should be maintained in lieu of using new plantings.

e. To ensure planting designs include a suitable combination of trees, shrubs, groundcovers, vines, and herbaceous material; include a combination of deciduous and evergreen plant material; emphasize native plant material; provide drought-tolerant species; and exclude invasive species.

3. *Lot Coverage – Landscaping Required.*

a. *Minimum Area Required.* Development proposals for single-family dwellings shall comply with the following standards based on the net lot area:

Lot Slope	**Maximum Lot Coverage (house, driving surfaces, and accessory buildings)**	**Required Landscaping Area**
Less than 15%	40%	60%
15% to less than 30%	35%	65%
30% to 50%	30%	70%
Greater than 50% slope	20%	80%

b. *Hardscape.*

i. A maximum of nine percent of the net lot area may consist of hardscape improvements including, but not limited to, walkways, decks, etc., and provided:

(a) The hardscape for lots with a net lot area of 8,400 square feet or less may be the lesser of 755 square feet or 12 percent of the net lot area.

ii. Hardscape improvements are also permitted in the maximum lot coverage area established in subsection (F)(3)(a) of this section.

c. *Softscape and Driveways.*

i. The required landscaping area in subsection (F)(3)(a) of this section shall consist of softscape improvements, except where used for hardscape improvements pursuant to section (F)(3)(b) of this section.

ii. Driveways and other driving surfaces are prohibited within the landscaping area.

For example, a flat lot with a net area of 10,000 square feet shall provide a minimum 6,000 square feet of landscaped area. Up to 900 square feet of the landscaped area may be used for a walkway, patio, or deck or other hardscape area. The remainder of the area shall be used for softscape improvements, such as landscaping, tree retention, etc.

d. Development proposals for a new single-family home shall remove Japanese knotweed (Polygonum cuspidatum) and Regulated Class A, Regulated Class B, and Regulated Class C weeds identified on the King County Noxious Weed list, as amended, from required landscaping areas established pursuant to subsection (F)(3)(a) of this section. New landscaping associated with new single-family home shall not incorporate any weeds identified on the King County Noxious Weed list, as amended. Provided, that removal shall not be required if the removal will result in increased slope instability or risk of landslide or erosion.

e. *Allowed Adjustments.* A one-time reduction in required landscaping area and an increase in the maximum lot coverage are allowed, provided:

i. The total reduction in the required landscaping area shall not exceed five percentage points, and the total increase in the maximum lot coverage shall not exceed five percentage points; and

ii. The reduction in required landscaping area and increase in maximum lot coverage are associated with:

(a) A development proposal that will result in a single-story single-family dwelling with a wheelchair accessible entry path, and may also include a single-story accessory building; or

(b) A development proposal on a flag lot that, after optimizing driveway routing and minimizing driveway width, requires a driveway that occupies more than 25 percent of the otherwise allowed lot coverage area. The allowed reduction in the required landscaping area and increase in maximum lot coverage shall not exceed five percent, or the area of the driveway in excess of 25 percent of the lot coverage, whichever is less.

For example, a development proposal with a driveway that occupies 27 percent of the otherwise allowed lot coverage may increase the total lot coverage by two percent; and

iii. A recorded notice on title, covenant, easement, or other documentation in a form approved by the city shall be required. The notice on title or other documentation shall describe the basis for the reduced landscaping area and increased lot coverage.

G. *Parking.*

1. *Applicability.* Subsection (G)(2) of this section shall apply to all new construction and remodels where more than 40 percent of the length of the structure's external walls have been intentionally structurally altered.

2. *Parking Required.*

a. Each single-family dwelling with a gross floor area of 3,000 square feet or more shall have at least three parking spaces sufficient in size to park a passenger automobile; provided, at least two of the stalls shall be covered stalls.

b. Each single-family dwelling with a gross floor area of less than 3,000 square feet shall have at least two parking spaces sufficient in size to park a passenger automobile; provided, at least one of the stalls shall be a covered stall.

3. No construction or remodel shall reduce the number of parking spaces on the lot below the number existing prior to the project unless the reduced parking still satisfies the requirements set out above.

4. Except as otherwise provided in this chapter, each lot shall provide parking deemed sufficient by the code official for the use occurring on the lot; provided, any lot that contains 10 or more parking spaces shall also meet the parking lot requirements set out in Appendix A of this development code.

H. *Easements.* Easements shall remain unobstructed.

1. *Vehicular Access Easements.* No structures shall be constructed on or over any vehicular access easement. A minimum five-foot yard setback from the edge of any easement that affords or could afford vehicular access to a property is required for all structures; provided, that improvements such as gates, fences, rockeries, retaining walls and landscaping may be installed within the five-foot yard setback so long as such improvements do not interfere with emergency vehicle access or sight distance for vehicles and pedestrians.

2. *Utility and Other Easements.* No structure shall be constructed on or over any easement for water, sewer, storm drainage, utilities, trail or other public purposes unless it is permitted within the language of the easement or is mutually agreed in writing between the grantee and grantor of the easement.

I. *Large Lots.* The intent of this section is to ensure that the construction of a single-family dwelling on a large lot does not preclude compliance with applicable standards related to subdivision or short subdivision of the large lot. Prior to approval of a new single-family

dwelling and associated site improvements, accessory buildings, and accessory structures on large lots, the applicant shall complete one of the following:

1. *Design for Future Subdivision.* The proposed site design that shall accommodate potential future subdivision of the lot as follows:

a. The proposed site design shall comply with the applicable design requirements of Chapters 19.08, Subdivision, 19.09, Development, and 19.10, Trees, MICC.

b. The proposed site design shall not result in a circumstance that would require the removal of trees identified for retention, as part of a future subdivision.

c. The proposed site design shall not result in a circumstance that would require modifications to wetlands, watercourses, and associated buffers as part of a future subdivision.

d. Approval of a site design that could accommodate a potential future subdivision does not guarantee approval of such future subdivision, nor does it confer or vest any rights to a future subdivision.

2. *Subdivide.* Prior to application for a new single-family dwelling, the property is subdivided or short platted to create all potential lots and building pads permitted by zoning. The proposed single-family dwelling shall be located on a lot and within a building pad resulting from a recorded final plat.

3. *Limit Subdivision.* Record a notice on title, or execute a covenant, easement, or other documentation approved by the city, prohibiting further subdivision of the large lot for a period of five years from the date of final inspection or certificate of occupancy.

J. *Building Pad.* New buildings shall be located within a building pad established pursuant to Chapter 19.09 MICC. Intrusions into yard setbacks authorized pursuant to MICC 19.02.020(C)(3) may be located outside of the boundaries of the building pad. (Ord. 19C-04 § 1 (Exh. A); Ord. 18C-05 § 1 (Att. A); Ord. 17C-15 § 1 (Att. A); Ord. 17C-02 § 1; Ord. 10C-07 § 1; Ord. 09C-17 § 1; Ord. 08C-01 § 1; Ord. 06C-05 § 1; Ord. 05C-12 § 7; Ord. 03C-01 § 3; Ord. 02C-09 § 4; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.030Accessory dwelling units.

A. *Purpose.* It is the purpose of this legislation to implement the policy provisions of the housing element of the city's comprehensive plan by eliminating barriers to accessory dwelling units in single-family residential neighborhoods and provide for affordable housing. Also, to provide homeowners with a means of obtaining rental income, companionship, security and services through tenants in either the accessory dwelling unit or principal unit of the single-family dwelling.

B. *Requirements for Accessory Dwelling Units.* One accessory dwelling unit is permitted as subordinate to an existing single-family dwelling; provided, the following requirements are met:

1. *Owner Occupancy.* Either the principal dwelling unit or the accessory dwelling unit must be occupied by an owner of the property or an immediate family member of the property owner. Owner occupancy is defined as a property owner, as reflected in title records, who makes his or her legal residence at the site, as evidenced by voter registration, vehicle registration, or similar means, and actually resides at the site more than six months out of any given year.

2. *Number of Occupants.* The total number of occupants in both the principal dwelling unit and accessory dwelling unit combined shall not exceed the maximum number established for a family as defined in MICC 19.16.010 plus any live-in household employees of such family.

3. *Subdivision.* Accessory dwelling units shall not be subdivided or otherwise segregated in ownership from the principal dwelling unit.

4. *Size and Scale.* The square footage of the accessory dwelling unit shall be a minimum of 220 square feet and a maximum of 900 square feet, excluding any garage area; provided, the square footage of the accessory dwelling unit shall not exceed 80 percent of the total square footage of the primary dwelling unit, excluding the garage area, as it exists or as it may be modified.

5. *Location.* The accessory dwelling unit may be added to or included within the principal unit, or located in a detached structure.

6. *Entrances.* The single-family dwelling containing the accessory dwelling unit shall have only one entrance on each front or street side of the residence except where more than one entrance existed on or before January 17, 1995.

7. *Additions.* Additions to an existing structure or newly constructed detached structures created for the purpose of developing an accessory dwelling unit shall be designed consistent with the existing roof pitch, siding, and windows of the principal dwelling unit.

8. *Detached Structures.* Accessory dwelling units shall be permitted in a detached structure.

9. *Parking.* All single-family dwellings with an accessory dwelling unit shall meet the parking requirements pursuant to MICC 19.02.020(G) applicable to the dwelling if it did not have such an accessory dwelling unit.

C. *Exceptions – Ceiling Height.* All existing accessory dwelling units that are located within a single-family dwelling, which was legally constructed but does not now comply with current ceiling height requirements of the construction codes set forth in MICC Title 17, shall be allowed to continue in their present form.

D. *Notice on Title.* Approval of the accessory dwelling unit shall be subject to the applicant recording a document with the King County department of records and elections which runs with the land and identifies the address of the property, states that the owner(s) resides in either the principal dwelling unit or the accessory dwelling unit, includes a statement

that the owner(s) will notify any prospective purchasers of the limitations of this section, and provides for the removal of the accessory dwelling unit if any of the requirements of this chapter are violated.

E. *Elimination/Expiration.* Elimination of an accessory dwelling unit may be accomplished by the owner recording a certificate with the King County department of records and elections and development services stating that the accessory dwelling unit no longer exists on the property. (Ord. 18C-08 § 1 (Att A.); Ord. 08C-01 § 1; Ord. 04C-12 § 10; Ord. 99C-13 § 1).

19.02.040Garages, other accessory buildings and accessory structures.

A. Accessory buildings, including garages, are not allowed in required yards except as herein provided.

B. *Attached Accessory Building.* An attached accessory building shall comply with the requirements of this code applicable to the main building.

C. *Detached Accessory Buildings and Accessory Structures.*

1. *Gross Floor Area.*

a. The combined total gross floor area for one or more accessory building(s) shall not exceed 25 percent of the total gross floor area allowed on a lot within applicable zoning designations pursuant to MICC 19.02.020. For example, on a lot where the total allowed gross floor area is 4,000 square feet, the combined total gross floor area for all accessory buildings is 1,000 square feet.

b. The gross floor area for a detached accessory building that is entirely or partially used for an accessory dwelling unit may be increased by the additional floor area authorized pursuant to MICC 19.02.020(D)(3)(b).

2. *Height.*

a. Detached accessory buildings, except for buildings that contain an accessory dwelling unit, are limited to a single story and shall not exceed 17 feet in height above the average building elevation computed from existing grade or finished grade, whichever is lower, to the highest point of the roof. Average building elevation is calculated using the methodology established in MICC 19.02.020(E)(4).

b. Detached accessory buildings that are entirely or partially used for an accessory dwelling unit shall meet the height limits established for the primary building.

3. Detached accessory buildings are not allowed in required yard setbacks; provided, one detached accessory building with a gross floor area of 200 square feet or less and a height of 12 feet or less may be erected in the rear yard setback. If such an accessory building is to be

located less than five feet from any property line, a joint agreement with the adjoining property owner(s) must be executed and recorded with the King County department of records and thereafter filed with the city.

4. *Accessory Structures.* The maximum height of an accessory structure that is not also an accessory building shall not exceed 17 feet. The height of an accessory structure is measured from the top of the structure to the existing grade or finished grade, whichever is lower, directly below the section of the structure being measured.

D. *Garages and Carports.* Garages and carports may be built to within 10 feet of the property line in the front yard; provided:

1. There is greater than four vertical feet measured between the elevation at the bottom of the wall of the building and the ground elevation at the front yard property line where such property line is closest to the building. The elevations of both the intersection of the building and the ground, and the point of the property line closest to the wall of the building, shall be measured using the lower of the existing and finished grade; and

2. The height of such garage or carport shall not exceed 12 feet from existing or finished grade, whichever is lower, for that portion built within the front yard.

E. *Pedestrian Walkways.* Enclosed or covered pedestrian walkways may be used to connect the main building to a garage or carport. Enclosed pedestrian walkways shall not exceed six feet in width and 12 feet in height calculated from finished grade or 30 feet above average building elevation, whichever is less. (Ord. 19C-04 § 1 (Exh. A); Ord. 17C-15 § 1 (Att. A); Ord. 08C-01 § 1; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.050Fences, retaining walls and rockeries.

A. *Location in Required Yard.* Fences, retaining walls and rockeries may be located within any required yard as specified below.

B. *Location in Street.*

1. *Fences.* No fence shall be located in any improved street. Fences may be allowed in unimproved public streets subject to approval of the city engineer and the granting of an encroachment agreement as required by MICC 19.06.060.

2. *Retaining Walls and Rockeries.* Retaining walls and rockeries may be allowed in any street subject to the approval of the city engineer and the granting of an encroachment agreement covering any public street as required by MICC 19.06.060.

C. *Height Measurement.*

1. *Fences/Gates.* The height of a fence or gate is measured from the top of the fence or gate, including posts, to the existing grade or finished grade, whichever is lower, directly below the section of the fence or gate being measured.

2. *Retaining Walls and Rockeries.* The height of a retaining wall or rockery is measured from the top of the retaining wall or rockery to the existing grade or finished grade, whichever is lower, directly below the retaining wall or rockery.

3. *Multiple Retaining Walls.* Retaining walls outside of required yard setbacks shall be stepped to meet a 1:1 ratio of separation with 45 degrees of grade to be considered separate. For example, two six-foot-tall retaining walls would need to be separated by at least six feet of horizontal distance measured from the toe of the upper wall to the top of the bottom wall, to be considered separate and not combined for maximum height calculations.

D. *Retaining Walls and Rockeries – Requirements.*

1. *Building Permit.* A building permit is required for retaining walls or rockeries not exempted from permit by Section 105.2 of the Construction Administrative Code, Chapter 17.14 MICC.

2. *Engineer.* Any rockery requiring a building permit shall be designed and inspected by a licensed geotechnical engineer.

3. *Drainage Control.* Drainage control of the area behind the rockery shall be provided for all rockeries.

4. *Maximum Height in Required Yard – Cut Slopes.*

a. No retaining walls or rockeries, or any combination of retaining walls or rockeries, to the extent used to protect a cut or cuts into existing grade within any required yard, shall exceed a total of 144 inches in height.

b. All retaining walls and/or rockeries within a required yard shall be included in calculating the maximum height of 144 inches.

c. Retaining walls or rockeries may be topped by a fence as provided in subsection E of this section.

5. *Maximum Height in Required Yard – Fill Slopes.*

a. No retaining walls or rockeries, or any combination of retaining walls or rockeries, to the extent used to raise grade and protect a fill slope, shall result in an increase in the finished grade by more than 72 inches at any point.

b. All retaining walls and/or rockeries within a required yard shall be included in calculating the maximum height of 72 inches.

c. Retaining walls or rockeries may be topped by a fence as provided in subsection E of this section.

E. *Fences and Gates.*

1. *Fences or Gates in Required Yard.*

a. *Height Limits.*

i. *Side and Rear Yards.* Fences and gates are allowed to a maximum height of 72 inches within required side or rear yards, provided the combined height of a fence and retaining wall or rockery for a fill slope authorized pursuant to subsection (D)(5) of this section shall not exceed a total height of 72 inches.

ii. *Front Yards.* Fences, gates, or any combination of retaining walls, rockeries and fences are allowed to a maximum height of 42 inches within required front yards.

b. *Exceptions to Height Limits.*

i. Fences within front yards may be designed to incorporate an open latticework or similar architectural feature at the entrance of a walkway, provided the total height of the entryway feature shall not exceed 90 inches. The open latticework or architectural feature shall be designed such that at least 50 percent of its total surface area consists of evenly distributed open spaces.

ii. Fences or gates located within the front yard may have a maximum height of 72 inches, provided:

(a) The proposed fence or gate is located along a property line contiguous to either: Island Crest Way north of SE 53rd Place, or SE 40th Street between 92nd Avenue SE and 78th Avenue SE; and

(b) The proposed fence or gate is located a minimum of five feet from the street property line and will be screened by landscaping designed to soften the presence of the fence; and

(c) The proposed fence or gate will not create a traffic, pedestrian, or public safety hazard.

2. *Fill/Berms.* No person shall place fill upon which to build a fence unless the total height of the fill plus the fence does not exceed the maximum height allowable for the fence without the fill.

3. *Shorelines.* Fences, rockeries and retaining walls located within any shoreland shall also comply with Chapter 19.07 MICC.

F. *Electric and Barbed Wire Fences.* Electric fences, barbed wire fences, or similar fences that could pose a safety risk are not allowed.

G. *Exceptions.* These provisions do not apply to fences required by state law to enclose public utilities, or to chain link fences enclosing school grounds or public playgrounds, or to screens used for safety measures in public recreation areas such as ballfields. (Ord. 19C-04 § 1 (Exh. A); Ord. 18C-05 § 1 (Att. A); Ord. 17C-15 § 1 (Att. A); Ord. 04C-12 § 11; Ord. 02C-09 § 2).

19.02.060~~Lot coverage~~ Regulated improvements.

A. *Applicability.* This section shall only apply to regulated improvements (for example, schools, noncommercial recreational areas, or religious buildings) in the residential zoning designations of R-8.4, R-9.6, R-12, and R-15.

B. *Gross Floor Area.* The total gross floor area of all structures on a lot shall not exceed:

1. 40% of the gross lot area, except:

a. For lots less than 3 acres that abut a commercial zone, the total gross floor area shall not exceed 75% of the gross lot area.

b. Parking structures or portions of parking structures accessory to conditional uses allowed under section 19.02.010.C and less than 4 feet above finished grade shall not be included in the gross floor area calculation.

C. Maximum ~~Impervious Surface Limits for Lots~~Lot Coverage. The total percentage of ~~a lot that can be covered by impervious surfaces (including buildings)~~ lot coverage is limited by the slope of the lot for all single-family zones as follows, based on the net lot area:

Lot Slope	**Lot Coverage (limit for impervious surfaces)**
Less than 15%	40%*
15% to less than 30%	35%
30% to 50%	30%

Lot Slope	Lot Coverage (limit for impervious surfaces)
Greater than 50% slope	20%

*Public and private schools, religious institutions, private clubs and public facilities (excluding public parks or designated open space) in single-family zones with slopes of less than 15 percent may be covered by the percentage of legally existing impervious surface that existed on May 1, 2006, or may multiply the limits set forth subsection C by 1.25, provided the lot abuts a commercial zone, as determined by the code official.

~~C~~D. *Exemptions.* The following improvements will be exempt from the calculation of the maximum ~~impervious surface~~lot coverage limits set forth in subsection ~~B~~ C of this section:

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

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

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

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

5. *Rockeries/Retaining Walls.* Rockeries and retaining walls shall be exempt from the maximum lot coverage~~impervious surface~~ limits.

6. *Residences for Religious Leaders Located on Properties Used by Places of Worship.*

a. A structure primarily used as a residence for a religious leader provided by its congregation and located on the same lot or lots as the improvements for a church, synagogue, mosque, or other place of worship shall be exempt from the maximum lot coverage~~impervious surface~~ limits, subject to the limitations under subsection (C)(6)(b) of this section. All impervious surface areas directly and commonly associated with the residence such as, but not limited to, the footprint of the residence, an attached or detached garage, a patio and/or deck not otherwise exempted by subsections (C)(1) and (3) of this section, and a driveway not otherwise used for general access to the place of worship, shall be exempt.

b. A residence and its associated impervious improvements, as described above, may only be exempted if 4,999 square feet or less or up to 20 percent of lot area, whichever is less. For these purposes, lot area means the lot or lots on which the place of worship is located.

c. ~~Impervious surface~~ Lot coverage exceeding 60 percent shall not be allowed whether by variance to this section or by this exemption.

7. Unenclosed recreational areas, athletic fields, and similar areas with underdrainage systems, provided the rate of stormwater discharge is limited to that under natural conditions prior to development.

8. The area of green roofs on structures on the lot, provided that the rate of stormwater discharge is limited to that under natural conditions prior to development.

9. Access drives solely for the use of emergency vehicles, provided the driveway surface is constructed of grass block, or similar porous paving material.

~~D~~E. Height. Structure height shall not exceed 36 feet, except that structure height shall not exceed 45 feet father than 150 feet from a public right of way or within than 300 feet of a commercial zone.

F. Height measurement. The calculation of structure height in subsection 19.02.020.E. may be modified, at the discretion of the applicant, as follows to permit the structure to respond to the topography of the lot:

1. Draw the smallest rectangle that encloses the principal structure.

2. Divide one side of the rectangle, chosen by the applicant, into sections at least 15 feet in length using lines that are perpendicular to the chosen side of the rectangle.

3. The sections delineated in this subsection E.2 are considered to extend vertically from the ground to the sky.

4. The maximum height for each section of the structure is measured from the average building elevation for that section of the structure, which is calculated as the average elevation of finished lot grades at the midpoints of the two opposing exterior sides of the rectangle for each section of the structure.

G. *Variance.* Regulated improvements in the R-8.4, R-9.6, R-12, and R-15 zoning designations may request a variance to increase lot coverage ~~impervious surface~~ pursuant to MICC 19.15.230(F). (Ord. 17C-15 § 1 (Att. A)).

19.02.070Swimming pools[1].

A. A swimming pool is not allowed in any front yard.

B. A swimming pool is not allowed closer than five feet from any adjacent property measured from the edge of the water to the property line.

C. A swimming pool located in a public park or noncommercial recreation area shall conform to the setback regulations governing such areas.

D. All fences surrounding outdoor swimming pools shall conform to the requirements of MICC Title 17. (Ord. 04C-12 § 12; Ord. 99C-13 § 1. Formerly 19.02.060).

1Code reviser's note: Ord. 17C-15 added a new Section 19.02.060 (Lot coverage – Regulated improvements). This section has been editorially renumbered to 19.02.070 in order to accommodate the addition of the new section.

EXHIBIT 31

19.02.005 Purpose and applicability.

A. *Purpose.* The purpose of the residential chapter is to identify land uses and to establish development standards that are appropriate within the residential zoning designations. The development standards provide a framework for a site to be developed consistent with the policy direction of the adopted Mercer Island Comprehensive Plan.

B. *Applicability.*

1. The provisions of this chapter shall apply to all development proposals in the R-8.4, R-9.6, R-12, and R-15 zoning designations.

2. Unless otherwise indicated in this chapter, the applicant shall be responsible for the initiation, preparation, and submission of all required plans or other documents prepared in support of or necessary to obtain a permit and to determine compliance with this chapter. (Ord. 17C-15 § 1 (Att. A).)

19.02.010 Single-family.

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

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

1. Single-family dwelling.

2. Accessory buildings incidental to the main building.

3. Private recreational areas.

4. Public schools accredited or approved by the state for compulsory school attendance, subject to design commission review and all of the following conditions:

a. All structures shall be located at least 35 feet from any abutting property and at least 45 feet from any public right-of-way.

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space per classroom with high schools providing an additional one parking space per 10 students.

c. A one-fourth acre or larger playfield shall be provided in one usable unit abutting or adjacent to or within 1,300 feet of the site.

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

a. The home business may make those improvements to the home business normally allowed for single-family residences. For a day care, play equipment and play areas are not allowed in front yards.

b. Only those persons who reside on the premises and one other person shall be permitted to engage in the business on the premises at any one time; provided, that a day care or preschool may have up to three nonresident employees on the premises at any one time. This limitation applies to all owners, managers, staff or volunteers who operate the business.

c. There shall be no exterior storage or display of materials except as otherwise allowed for single-family residences, and no sign advertising the home business located on the premises except as specifically allowed by MICC 19.12.080(B).

d. No offensive noise, vibration, smoke, dust, odor, heat or glare or excessive traffic to and from the premises shall be produced or generated by the home business.

e. The home business shall not involve the use of more than 30 percent of the gross floor area of the residence, not including the allowed basement exclusion area consistent with subsection [ ] of this section and MICC 19.16.010. However, a day care or preschool may use up to 75 percent of said gross floor area.

f. No home business shall be permitted that generates parking demand that cannot be accommodated on the lots consistent with the applicable maximum impervious surface coverage limits of MICC 19.02.060. Parking shall be provided to handle the expected parking demand. In the case of a day care or preschool, parking for residents and employees shall occur on site; resident and employee parking shall not occur on an adjacent street.

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

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

6. Public park subject to the following conditions:

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

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

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

landscape building
city
development

recreation
19.07.110
families

accessory dwelling unit (ADU) single-family dwelling
19.02.030

Special needs group housing 19.06.080

Social service transitional housing, 19.06.080

day care accessory use
public facility

buildings

19.12.080(B)(3)

street parking
day care

parking

code official

Places of worship theater accessory use
theater

theater
parking code official

Open space

accessory building
floor

lot
fenced

conditional use
19.15.040

1. Government services, public facilities, utilities, and museums and art exhibitions, subject to the following conditions:

a. All structures shall be located at least 20 feet from any abutting property;

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space for each 200 square feet of gross floor area; and

c. Utilities shall be shielded from abutting properties and streets by a sight obscuring protective strip of trees or shrubs.

2. Private schools accredited or approved by the state for compulsory school attendance, subject to conditions set out in subsection (A)(4) of this section.

3. Places of worship subject to the following conditions:

a. All structures shall be located at least 35 feet from any abutting property.

b. Off-street parking shall be established and maintained at a ratio of one parking space for each five seats in the chapel, nave, sanctuary, or similar worship area.

4. Noncommercial recreational areas, subject to the conditions contained in subsection (A)(6) of this section.

5. Semi-private waterfront recreation areas for use by more than 10 families, subject to conditions set out in MICC 19.07.110.

6. Retirement homes located on property used primarily for a place of worship subject to the following conditions:

a. Retirement home structures shall not occupy more than 20 percent of the lot; provided, the total lot coverage for the retirement home, the place of worship, and all other structures shall not exceed the lot coverage specified in MICC 19.02.060.

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

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

i. Demonstrated need;

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

iii. Nature of the surrounding neighborhood; and

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

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

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

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

a. The bed and breakfast facility shall meet all applicable health, fire, and building codes.

b. Not more than four rooms shall be offered to the public for lodging.

c. There shall be no external modification of any structure that alters the residential nature of the premises.

d. The bed and breakfast shall be the primary residence of the operator.

e. In addition to the parking required set out in MICC 19.02.020(G), one off-street parking space, not located in the lot setbacks, shall be provided for each rental room.

f. Meals shall be made available only to guests, and not to the general public.

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

a. No use or proposed use shall be more intensive than the school activity it replaced. Consideration shall be given to quantifiable data, such as, but not limited to, traffic generation, parking demand, noise, hours of operation;

b. All activities, with the exception of outdoor recreation shall be confined to the interior of the building(s);

c. Exterior modification of the building(s) shall not be permitted if such a modification would result in an increase in the usable area of the building(s);

d. Minor changes in the building exterior, landscaping, signs, and parking may be permitted subject to the review and approval of the design commission; and

e. Off-street parking for all activities at the site shall be provided in existing school parking lots.

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

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

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

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

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

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

b. Signage shall be consistent with the provisions of MICC 19.12.080(B)(3). (Ord. 19C-04 § 1 (Exh. A); Ord. 17C-15 § 1 (Att. A); Ord. 15C-03 § 1; Ord. 09C-04 §§ 1, 2; Ord. 08C-01 § 1; Ord. 05C-16 § 1; Ord. 04C-08 § 9; Ord. 03C-08 § 3; Ord. 01C-06 § 1; Ord. 99C-13 § 1);

19.02.020Development standards.

A. *Minimum Net Lot Area.*

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

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

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

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

1. Minimum net lot area requirements do not apply to any lot that came into existence before September 28, 1960. In order to be used as a building site, lots that do not meet minimum net lot area requirements shall comply with MICC 19.01.050(G)(3).

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

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

C. *Yard Requirements.*

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

a. Front yard depth: 20 feet or more.

b. Rear yard depth: 25 feet or more.

c. Side yards shall be provided as follows:

i. *Total Depth.*

(a) For lots with a lot width of 90 feet or less, the sum of the side yards' depth shall be at least 15 feet.

(b) For lots with a lot width of more than 90 feet, the sum of the side yards' depth shall be a width that is equal to at least 17 percent of the lot width.

ii. *Minimum Side Yard Depth.*

(a) The minimum side yard depth abutting an interior lot line is five feet or 33 percent of the aggregate side yard total depth, whichever is greater.

(b) The minimum side yard depth abutting a street is five feet.

iii. *Variable Side Yard Depth Requirement.* For lots with an area of 6,000 square feet or more, the minimum side yard depth abutting an interior lot line shall be the greater of the minimum side yard depth required under subsection (C)(1)(c)(ii) of this section, or as follows:

(a) Single-family dwellings shall provide a minimum side yard depth of seven and one-half feet if the building:

(1) For nongabled roof end buildings, the height is more than 15 feet measured from existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard; or

(2) For gabled roof end buildings, the height is more than 18 feet measured from existing or finished grade, whichever is lower, to the top of the gabled roof end adjoining the side yard.

(b) Single-family dwellings with a height of more than 25 feet measured from the existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard shall provide a minimum side yard depth of 10 feet.

2. *Yard Determination.*

a. *Front Yard.*

i. *Front Yard – General.* For lots that are not corner lots or waterfront lots, the front yard shall extend the full width of the lot and is determined using the following sequential approach, in descending order of preference, until a front yard is established:

(a) The yard abutting an improved street from which the lot gains primary access.

(b) The yard abutting the primary entrance to a building.

(c) The orientation of buildings on the surrounding lots and the means of access to the lot.

ii. *Front Yard – Corner Lots.* On corner lots the front yard shall be measured from the narrowest dimension of the lot abutting a street. The yard adjacent to the widest dimension of the lot abutting a street shall be a side yard; provided:

(a) If a setback equivalent to or greater than required for a front yard is provided along the property lines abutting both streets, then only one of the remaining setbacks must be a rear yard.

iii. *Front Yard – Waterfront Lots.* On a waterfront lot, regardless of the location of access to the lot, the front yard may be measured from the property line opposite and generally parallel to the ordinary high water line.

iv. This section shall apply except as provided for in MICC 19.08.030(F)(1).

b. *Rear Yard.* Except as allowed in subsections (C)(2)(a)(ii) and (iii) of this section, the rear yard is the yard opposite the front yard. The rear yard shall extend across the full width of the rear of the lot, and shall be measured between the rear line of the lot and the nearest point of the main building including an enclosed or covered porch. If this definition does not establish a rear yard setback for irregularly shaped lots, the code official shall establish the rear yard based on the following method: The rear yard shall be measured from a line or lines drawn from side lot line(s) to side lot line(s), at least 10 feet in length, parallel to and at a maximum distance from the front lot line.

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

3. *Intrusions into Required Yards.*

a. *Minor Building Elements.*

i. Except as provided in subsection (C)(3)(a)(ii) of this section, porches, chimney(s) and fireplace extensions, window wells, and unroofed, unenclosed outside stairways and decks shall not project more than three feet into any required yard. Eaves shall not protrude more than 18 inches into any required yard.

ii. No penetration shall be allowed into the minimum side yard setback abutting an interior lot line except where an existing flat-roofed house has been built to the interior side yard setback line and the roof is changed to a pitched roof with a minimum pitch of 4:12, the eaves may penetrate up to 18 inches into the side yard setback.

b. *Hardscape and Driveways.* Hardscape and driveways not more than 30 inches above existing grade or finished grade, whichever is lower, may be located in any required yard.

c. *Fences, Retaining Walls and Rockeries.* Fences, retaining walls and rockeries are allowed in required yards as provided in MICC 19.02.050.

d. *Garages and Other Accessory Buildings.* Garages and other accessory buildings are not allowed in required yards, except as provided in MICC 19.02.040.

e. *Heat Pumps, Air Compressors, Air Conditioning Units, and Other Similar Mechanical Equipment.* Heat pumps, air compressors, air conditioning units, and other similar mechanical equipment may be located within any required yard provided they will not exceed the maximum permissible noise levels set forth in WAC 173-60-040, which is hereby incorporated as though fully set forth herein. Any such equipment shall not be located within three feet of any lot line.

f. *Architectural Features.* Detached, freestanding architectural features such as columns or pedestals that designate an entrance to a walkway or driveway and do not exceed 42 inches in height are allowed in required yards.

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

4. *Setback Deviation.* The code official may approve a deviation to front, side, and rear setbacks pursuant to MICC 19.15.040.

D. *Gross Floor Area – Single Family Dwellings.*

1. Except as provided in subsection (D)(3) of this section, the gross floor area of a single-family dwelling shall not exceed:

a. R-8.4: 5,000 square feet or 40 percent of the lot area, whichever is less.

b. R-9.6: 8,000 square feet or 40 percent of the lot area, whichever is less.

c. R-12: 10,000 square feet or 40 percent of the lot area, whichever is less.

d. R-15: 12,000 square feet or 40 percent of the lot area, whichever is less.

This section does not apply to regulated improvements.

2. *Gross Floor Area Calculation.* The gross floor area is the sum of the floor area(s) bounded by the exterior faces of each building on a residential lot, provided:

a. The gross floor area shall be 150 percent of the floor area of that portion of a room(s) with a ceiling height of 12 feet to 16 feet, measured from the floor surface to the ceiling.

b. The gross floor area shall be 200 percent of the floor area of that portion of a room(s) with a ceiling height of more than 16 feet, measured from the floor surface to the ceiling.

c. Staircases shall be counted as a single floor for the first two stories accessed by the staircase. For each additional story above two stories, the staircase shall count as a single floor area. For example, a staircase with a 10-foot by 10-foot dimension that accesses three stories shall be accounted as 200 square feet (100 square feet for the first two stories, and 100 square feet for the third story).

d. For the purposes of calculating allowable gross floor area, lots created in a subdivision through MICC 19.08.030(G), Optional Standards for Development, may apply the square footage from the open space tract to the lot area not to exceed the minimum square footage of the zone in which the lot is located.

3. *Allowances.*

a. The gross floor area for lots with an area of 7,500 square feet or less may be the lesser of 3,000 square feet or 45 percent of the lot area; or

b. If an accessory dwelling unit is proposed, the 40 percent allowed gross floor area may be increased by the lesser of five percentage points or the actual floor area of the proposed accessory dwelling unit, provided:

i. The allowed gross floor area of accessory buildings that are not partially or entirely used for an accessory dwelling unit shall not be increased through the use of this provision;

ii. The lot will contain an accessory dwelling unit associated with the application for a new or remodeled single-family home; and

iii. The total gross floor area shall not exceed 4,500 square feet or 45 percent of the lot area, whichever is less.

E. *Building Height Limit – Single Family Dwellings.*

1. *Maximum Building Height.* No Single Family Dwelling ~~building~~ shall exceed 30 feet in height above the average building elevation to the highest point of the roof.

2. *Maximum Building Height on Downhill Building Facade.* The maximum building facade height on the downhill side of a sloping lot shall not exceed 30 feet in height. The building facade height shall be measured from the existing grade or finished grade,

whichever is lower, at the furthest downhill extent of the proposed building, to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.

3. Antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces, solar panels, and other similar appurtenances may extend to a maximum of five feet above the height allowed for the main structure in subsections (E)(1) and (2) of this section; provided:

a. Solar panels shall be designed to minimize their extension above the maximum allowed height, while still providing the optimum tilt angle for solar exposure.

b. Rooftop railings may not extend above the maximum allowed height for the main structure.

4. The formula for calculating average building elevation is as follows:

Formula:	Average Building Elevation = (Weighted Sum of the Mid-point Elevations) ÷ (Total Length of Wall Segments)
Where:	Weighted Sum of the Mid-point Elevations = The sum of: ((Mid-point Elevation of Each Individual Wall Segment) x (Length of Each Individual Wall Segment))

For example for a house with 10 wall segments:

(Axa) + (Bxb) + (Cxc) + (Dxd) + (Exe) + (Fxf) + (Gxg) + (Hxh) + (Ixi) + (Jxj)

a + b + c + d + e + f + g + h + i + j

Where:	A, B, C, D… = The existing or finished ground elevation, whichever is lower, at midpoint of wall segment.
And:	a, b, c, d… = The length of wall segment measured on outside of wall.

F. *Lot Coverage – Single-Family Dwellings.*

1. *Applicability.* This section shall apply to the development of single-family dwellings including, but not limited to, the remodeling of existing single-family dwellings and construction of new single-family dwellings. This section does not apply to regulated improvements.

2. *Landscaping Objective.*

a. To ensure that landscape design reinforces the natural and wooded character of Mercer Island, complements the site, the architecture of site structures and paved areas, while maintaining the visual appearance of the neighborhood.

b. To ensure that landscape design is based on a strong, unified, coherent, and aesthetically pleasing landscape concept.

c. To ensure that landscape plantings, earth forms, and outdoor spaces are designed to provide a transition between each other and between the built and natural environment.

d. To ensure suitable natural vegetation and landforms, particularly mature trees and topography, are preserved where feasible and integrated into the overall landscape design. Large trees and tree stands should be maintained in lieu of using new plantings.

e. To ensure planting designs include a suitable combination of trees, shrubs, groundcovers, vines, and herbaceous material; include a combination of deciduous and evergreen plant material; emphasize native plant material; provide drought-tolerant species; and exclude invasive species.

3. *Lot Coverage – Landscaping Required.*

a. *Minimum Area Required.* Development proposals for single-family dwellings shall comply with the following standards based on the net lot area:

Lot Slope	Maximum Lot Coverage (house, driving surfaces, and accessory buildings)	Required Landscaping Area
Less than 15%	40%	60%
15% to less than 30%	35%	65%
30% to 50%	30%	70%
Greater than 50% slope	20%	80%

b. *Hardscape.*

i. A maximum of nine percent of the net lot area may consist of hardscape improvements including, but not limited to, walkways, decks, etc., and provided:

(a) The hardscape for lots with a net lot area of 8,400 square feet or less may be the lesser of 755 square feet or 12 percent of the net lot area.

ii. Hardscape improvements are also permitted in the maximum lot coverage area established in subsection (F)(3)(a) of this section.

c. *Softscape and Driveways.*

i. The required landscaping area in subsection (F)(3)(a) of this section shall consist of softscape improvements, except where used for hardscape improvements pursuant to section (F)(3)(b) of this section.

ii. Driveways and other driving surfaces are prohibited within the landscaping area.

For example, a flat lot with a net area of 10,000 square feet shall provide a minimum 6,000 square feet of landscaped area. Up to 900 square feet of the landscaped area may be used for a walkway, patio, or deck or other hardscape area. The remainder of the area shall be used for softscape improvements, such as landscaping, tree retention, etc.

d. Development proposals for a new single-family home shall remove Japanese knotweed (Polygonum cuspidatum) and Regulated Class A, Regulated Class B, and Regulated Class C weeds identified on the King County Noxious Weed list, as amended, from required landscaping areas established pursuant to subsection (F)(3)(a) of this section. New landscaping associated with new single-family home shall not incorporate any weeds identified on the King County Noxious Weed list, as amended. Provided, that removal shall not be required if the removal will result in increased slope instability or risk of landslide or erosion.

e. *Allowed Adjustments.* A one-time reduction in required landscaping area and an increase in the maximum lot coverage are allowed, provided:

i. The total reduction in the required landscaping area shall not exceed five percentage points, and the total increase in the maximum lot coverage shall not exceed five percentage points; and

ii. The reduction in required landscaping area and increase in maximum lot coverage are associated with:

(a) A development proposal that will result in a single-story single-family dwelling with a wheelchair accessible entry path, and may also include a single-story accessory building; or

(b) A development proposal on a flag lot that, after optimizing driveway routing and minimizing driveway width, requires a driveway that occupies more than 25 percent of the otherwise allowed lot coverage area. The allowed reduction in the required landscaping area and increase in maximum lot coverage shall not exceed five percent, or the area of the driveway in excess of 25 percent of the lot coverage, whichever is less.

For example, a development proposal with a driveway that occupies 27 percent of the otherwise allowed lot coverage may increase the total lot coverage by two percent; and

iii. A recorded notice on title, covenant, easement, or other documentation in a form approved by the city shall be required. The notice on title or other documentation shall describe the basis for the reduced landscaping area and increased lot coverage.

G. *Parking.*

1. *Applicability.* Subsection (G)(2) of this section shall apply to all new construction and remodels where more than 40 percent of the length of the structure's external walls have been intentionally structurally altered.

2. *Parking Required.*

a. Each single-family dwelling with a gross floor area of 3,000 square feet or more shall have at least three parking spaces sufficient in size to park a passenger automobile; provided, at least two of the stalls shall be covered stalls.

b. Each single-family dwelling with a gross floor area of less than 3,000 square feet shall have at least two parking spaces sufficient in size to park a passenger automobile; provided, at least one of the stalls shall be a covered stall.

3. No construction or remodel shall reduce the number of parking spaces on the lot below the number existing prior to the project unless the reduced parking still satisfies the requirements set out above.

4. Except as otherwise provided in this chapter, each lot shall provide parking deemed sufficient by the code official for the use occurring on the lot; provided, any lot that contains 10 or more parking spaces shall also meet the parking lot requirements set out in Appendix A of this development code.

H. *Easements.* Easements shall remain unobstructed.

1. *Vehicular Access Easements.* No structures shall be constructed on or over any vehicular access easement. A minimum five-foot yard setback from the edge of any easement that affords or could afford vehicular access to a property is required for all structures; provided, that improvements such as gates, fences, rockeries, retaining walls and landscaping may be installed within the five-foot yard setback so long as such improvements do not interfere with emergency vehicle access or sight distance for vehicles and pedestrians.

2. *Utility and Other Easements.* No structure shall be constructed on or over any easement for water, sewer, storm drainage, utilities, trail or other public purposes unless it is permitted within the language of the easement or is mutually agreed in writing between the grantee and grantor of the easement.

I. *Large Lots.* The intent of this section is to ensure that the construction of a single-family dwelling on a large lot does not preclude compliance with applicable standards related to subdivision or short subdivision of the large lot. Prior to approval of a new single-family

dwelling and associated site improvements, accessory buildings, and accessory structures on large lots, the applicant shall complete one of the following:

1. *Design for Future Subdivision.* The proposed site design that shall accommodate potential future subdivision of the lot as follows:

a. The proposed site design shall comply with the applicable design requirements of Chapters 19.08, Subdivision, 19.09, Development, and 19.10, Trees, MICC.

b. The proposed site design shall not result in a circumstance that would require the removal of trees identified for retention, as part of a future subdivision.

c. The proposed site design shall not result in a circumstance that would require modifications to wetlands, watercourses, and associated buffers as part of a future subdivision.

d. Approval of a site design that could accommodate a potential future subdivision does not guarantee approval of such future subdivision, nor does it confer or vest any rights to a future subdivision.

2. *Subdivide.* Prior to application for a new single-family dwelling, the property is subdivided or short platted to create all potential lots and building pads permitted by zoning. The proposed single-family dwelling shall be located on a lot and within a building pad resulting from a recorded final plat.

3. *Limit Subdivision.* Record a notice on title, or execute a covenant, easement, or other documentation approved by the city, prohibiting further subdivision of the large lot for a period of five years from the date of final inspection or certificate of occupancy.

J. *Building Pad.* New buildings shall be located within a building pad established pursuant to Chapter 19.09 MICC. Intrusions into yard setbacks authorized pursuant to MICC 19.02.020(C)(3) may be located outside of the boundaries of the building pad. (Ord. 19C-04 § 1 (Exh. A); Ord. 18C-05 § 1 (Att. A); Ord. 17C-15 § 1 (Att. A); Ord. 17C-02 § 1; Ord. 10C-07 § 1; Ord. 09C-17 § 1; Ord. 08C-01 § 1; Ord. 06C-05 § 1; Ord. 05C-12 § 7; Ord. 03C-01 § 3; Ord. 02C-09 § 4; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.030Accessory dwelling units.

A. *Purpose.* It is the purpose of this legislation to implement the policy provisions of the housing element of the city's comprehensive plan by eliminating barriers to accessory dwelling units in single-family residential neighborhoods and provide for affordable housing. Also, to provide homeowners with a means of obtaining rental income, companionship, security and services through tenants in either the accessory dwelling unit or principal unit of the single-family dwelling.

B. *Requirements for Accessory Dwelling Units.* One accessory dwelling unit is permitted as subordinate to an existing single-family dwelling; provided, the following requirements are met:

1. *Owner Occupancy.* Either the principal dwelling unit or the accessory dwelling unit must be occupied by an owner of the property or an immediate family member of the property owner. Owner occupancy is defined as a property owner, as reflected in title records, who makes his or her legal residence at the site, as evidenced by voter registration, vehicle registration, or similar means, and actually resides at the site more than six months out of any given year.

2. *Number of Occupants.* The total number of occupants in both the principal dwelling unit and accessory dwelling unit combined shall not exceed the maximum number established for a family as defined in MICC 19.16.010 plus any live-in household employees of such family.

3. *Subdivision.* Accessory dwelling units shall not be subdivided or otherwise segregated in ownership from the principal dwelling unit.

4. *Size and Scale.* The square footage of the accessory dwelling unit shall be a minimum of 220 square feet and a maximum of 900 square feet, excluding any garage area; provided, the square footage of the accessory dwelling unit shall not exceed 80 percent of the total square footage of the primary dwelling unit, excluding the garage area, as it exists or as it may be modified.

5. *Location.* The accessory dwelling unit may be added to or included within the principal unit, or located in a detached structure.

6. *Entrances.* The single-family dwelling containing the accessory dwelling unit shall have only one entrance on each front or street side of the residence except where more than one entrance existed on or before January 17, 1995.

7. *Additions.* Additions to an existing structure or newly constructed detached structures created for the purpose of developing an accessory dwelling unit shall be designed consistent with the existing roof pitch, siding, and windows of the principal dwelling unit.

8. *Detached Structures.* Accessory dwelling units shall be permitted in a detached structure.

9. *Parking.* All single-family dwellings with an accessory dwelling unit shall meet the parking requirements pursuant to MICC 19.02.020(G) applicable to the dwelling if it did not have such an accessory dwelling unit.

C. *Exceptions – Ceiling Height.* All existing accessory dwelling units that are located within a single-family dwelling, which was legally constructed but does not now comply with current ceiling height requirements of the construction codes set forth in MICC Title 17, shall be allowed to continue in their present form.

D. *Notice on Title.* Approval of the accessory dwelling unit shall be subject to the applicant recording a document with the King County department of records and elections which runs with the land and identifies the address of the property, states that the owner(s) resides in either the principal dwelling unit or the accessory dwelling unit, includes a statement

that the owner(s) will notify any prospective purchasers of the limitations of this section, and provides for the removal of the accessory dwelling unit if any of the requirements of this chapter are violated.

E. *Elimination/Expiration.* Elimination of an accessory dwelling unit may be accomplished by the owner recording a certificate with the King County department of records and elections and development services stating that the accessory dwelling unit no longer exists on the property. (Ord. 18C-08 § 1 (Att A.); Ord. 08C-01 § 1; Ord. 04C-12 § 10; Ord. 99C-13 § 1).

19.02.040Garages, other accessory buildings and accessory structures.

A. Accessory buildings, including garages, are not allowed in required yards except as herein provided.

B. *Attached Accessory Building.* An attached accessory building shall comply with the requirements of this code applicable to the main building.

C. *Detached Accessory Buildings and Accessory Structures.*

1. *Gross Floor Area.*

a. The combined total gross floor area for one or more accessory building(s) shall not exceed 25 percent of the total gross floor area allowed on a lot within applicable zoning designations pursuant to MICC 19.02.020. For example, on a lot where the total allowed gross floor area is 4,000 square feet, the combined total gross floor area for all accessory buildings is 1,000 square feet.

b. The gross floor area for a detached accessory building that is entirely or partially used for an accessory dwelling unit may be increased by the additional floor area authorized pursuant to MICC 19.02.020(D)(3)(b).

2. *Height.*

a. Detached accessory buildings, except for buildings that contain an accessory dwelling unit, are limited to a single story and shall not exceed 17 feet in height above the average building elevation computed from existing grade or finished grade, whichever is lower, to the highest point of the roof. Average building elevation is calculated using the methodology established in MICC 19.02.020(E)(4).

b. Detached accessory buildings that are entirely or partially used for an accessory dwelling unit shall meet the height limits established for the primary building.

3. Detached accessory buildings are not allowed in required yard setbacks; provided, one detached accessory building with a gross floor area of 200 square feet or less and a height of 12 feet or less may be erected in the rear yard setback. If such an accessory building is to be

located less than five feet from any property line, a joint agreement with the adjoining property owner(s) must be executed and recorded with the King County department of records and thereafter filed with the city.

4. *Accessory Structures.* The maximum height of an accessory structure that is not also an accessory building shall not exceed 17 feet. The height of an accessory structure is measured from the top of the structure to the existing grade or finished grade, whichever is lower, directly below the section of the structure being measured.

D. *Garages and Carports.* Garages and carports may be built to within 10 feet of the property line in the front yard; provided:

1. There is greater than four vertical feet measured between the elevation at the bottom of the wall of the building and the ground elevation at the front yard property line where such property line is closest to the building. The elevations of both the intersection of the building and the ground, and the point of the property line closest to the wall of the building, shall be measured using the lower of the existing and finished grade; and

2. The height of such garage or carport shall not exceed 12 feet from existing or finished grade, whichever is lower, for that portion built within the front yard.

E. *Pedestrian Walkways.* Enclosed or covered pedestrian walkways may be used to connect the main building to a garage or carport. Enclosed pedestrian walkways shall not exceed six feet in width and 12 feet in height calculated from finished grade or 30 feet above average building elevation, whichever is less. (Ord. 19C-04 § 1 (Exh. A); Ord. 17C-15 § 1 (Att. A); Ord. 08C-01 § 1; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.050 Fences, retaining walls and rockeries.

A. *Location in Required Yard.* Fences, retaining walls and rockeries may be located within any required yard as specified below.

B. *Location in Street.*

1. *Fences.* No fence shall be located in any improved street. Fences may be allowed in unimproved public streets subject to approval of the city engineer and the granting of an encroachment agreement as required by MICC 19.06.060.

2. *Retaining Walls and Rockeries.* Retaining walls and rockeries may be allowed in any street subject to the approval of the city engineer and the granting of an encroachment agreement covering any public street as required by MICC 19.06.060.

C. *Height Measurement.*

1. *Fences/Gates.* The height of a fence or gate is measured from the top of the fence or gate, including posts, to the existing grade or finished grade, whichever is lower, directly below the section of the fence or gate being measured.

2. *Retaining Walls and Rockeries.* The height of a retaining wall or rockery is measured from the top of the retaining wall or rockery to the existing grade or finished grade, whichever is lower, directly below the retaining wall or rockery.

3. *Multiple Retaining Walls.* Retaining walls outside of required yard setbacks shall be stepped to meet a 1:1 ratio of separation with 45 degrees of grade to be considered separate. For example, two six-foot-tall retaining walls would need to be separated by at least six feet of horizontal distance measured from the toe of the upper wall to the top of the bottom wall, to be considered separate and not combined for maximum height calculations.

D. *Retaining Walls and Rockeries – Requirements.*

1. *Building Permit.* A building permit is required for retaining walls or rockeries not exempted from permit by Section 105.2 of the Construction Administrative Code, Chapter 17.14 MICC.

2. *Engineer.* Any rockery requiring a building permit shall be designed and inspected by a licensed geotechnical engineer.

3. *Drainage Control.* Drainage control of the area behind the rockery shall be provided for all rockeries.

4. *Maximum Height in Required Yard – Cut Slopes.*

a. No retaining walls or rockeries, or any combination of retaining walls or rockeries, to the extent used to protect a cut or cuts into existing grade within any required yard, shall exceed a total of 144 inches in height.

b. All retaining walls and/or rockeries within a required yard shall be included in calculating the maximum height of 144 inches.

c. Retaining walls or rockeries may be topped by a fence as provided in subsection E of this section.

5. *Maximum Height in Required Yard – Fill Slopes.*

a. No retaining walls or rockeries, or any combination of retaining walls or rockeries, to the extent used to raise grade and protect a fill slope, shall result in an increase in the finished grade by more than 72 inches at any point.

b. All retaining walls and/or rockeries within a required yard shall be included in calculating the maximum height of 72 inches.

c. Retaining walls or rockeries may be topped by a fence as provided in subsection E of this section.

E. *Fences and Gates.*

1. *Fences or Gates in Required Yard.*

a. *Height Limits.*

i. *Side and Rear Yards.* Fences and gates are allowed to a maximum height of 72 inches within required side or rear yards, provided the combined height of a fence and retaining wall or rockery for a fill slope authorized pursuant to subsection (D)(5) of this section shall not exceed a total height of 72 inches.

ii. *Front Yards.* Fences, gates, or any combination of retaining walls, rockeries and fences are allowed to a maximum height of 42 inches within required front yards.

b. *Exceptions to Height Limits.*

i. Fences within front yards may be designed to incorporate an open latticework or similar architectural feature at the entrance of a walkway, provided the total height of the entryway feature shall not exceed 90 inches. The open latticework or architectural feature shall be designed such that at least 50 percent of its total surface area consists of evenly distributed open spaces.

ii. Fences or gates located within the front yard may have a maximum height of 72 inches, provided:

(a) The proposed fence or gate is located along a property line contiguous to either: Island Crest Way north of SE 53rd Place, or SE 40th Street between 92nd Avenue SE and 78th Avenue SE; and

(b) The proposed fence or gate is located a minimum of five feet from the street property line and will be screened by landscaping designed to soften the presence of the fence; and

(c) The proposed fence or gate will not create a traffic, pedestrian, or public safety hazard.

2. *Fill/Berms.* No person shall place fill upon which to build a fence unless the total height of the fill plus the fence does not exceed the maximum height allowable for the fence without the fill.

3. *Shorelines.* Fences, rockeries and retaining walls located within any shoreland shall also comply with Chapter 19.07 MICC.

F. *Electric and Barbed Wire Fences.* Electric fences, barbed wire fences, or similar fences that could pose a safety risk are not allowed.

G. *Exceptions.* These provisions do not apply to fences required by state law to enclose public utilities, or to chain link fences enclosing school grounds or public playgrounds, or to screens used for safety measures in public recreation areas such as ballfields. (Ord. 19C-04 § 1 (Exh. A); Ord. 18C-05 § 1 (Att. A); Ord. 17C-15 § 1 (Att. A); Ord. 04C-12 § 11; Ord. 02C-09 § 2).

19.02.060[illegible] Regulated improvements.

A. *Applicability.* This section shall only apply to regulated improvements (for example, schools, noncommercial recreational areas, or religious buildings) in the residential zoning designations of R-8.4, R-9.6, R-12, and R-15.

B. *Gross Floor Area.* The total gross floor area of all structures on a lot shall not exceed:

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1. 40% of the gross lot area, except:

a. For lots less than 3 acres that abut a commercial zone, the total gross floor area shall not exceed 75% of the gross lot area.

b. Parking structures or portions of parking structures accessory to conditional uses allowed under section 19.02.010.C and less than 4 feet above finished grade shall not be included in the gross floor area calculation.

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C. *Maximum ~~Impervious Surface Limits for Lots~~Lot Coverage.* The total percentage of ~~a lot that can be covered by impervious surfaces (including buildings)~~ lot coverage is limited by the slope of the lot for all single-family zones as follows, based on the net lot area:

Lot Slope	Lot Coverage (limit for impervious surfaces)
Less than 15%	40%*
15% to less than 30%	35%
30% to 50%	30%

Lot Slope	Lot Coverage (limit for impervious surfaces)
Greater than 50% slope	20%

*Public and private schools, religious institutions, private clubs and public facilities (excluding public parks or designated open space) in single-family zones with slopes of less than 15 percent may be covered by the percentage of legally existing impervious surface that existed on May 1, 2006, or may multiply the limits set forth subsection C by 1.25, provided the lot abuts a commercial zone, as determined by the code official.

CD. *Exemptions.* The following improvements will be exempt from the calculation of the maximum ~~impervious surface~~lot coverage limits set forth in subsection ~~B~~C of this section:

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

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

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

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

5. *Rockeries/Retaining Walls.* Rockeries and retaining walls shall be exempt from the maximum lot coverage~~impervious surface~~ limits.

6. *Residences for Religious Leaders Located on Properties Used by Places of Worship.*

a. A structure primarily used as a residence for a religious leader provided by its congregation and located on the same lot or lots as the improvements for a church, synagogue, mosque, or other place of worship shall be exempt from the maximum lot coverageimpervious surface limits, subject to the limitations under subsection (C)(6)(b) of this section. All impervious surface areas directly and commonly associated with the residence such as, but not limited to, the footprint of the residence, an attached or detached garage, a patio and/or deck not otherwise exempted by subsections (C)(1) and (3) of this section, and a driveway not otherwise used for general access to the place of worship, shall be exempt.

b. A residence and its associated impervious improvements, as described above, may only be exempted if 4,999 square feet or less or up to 20 percent of lot area, whichever is less. For these purposes, lot area means the lot or lots on which the place of worship is located.

c. Impervious surface Llot coverage exceeding 60 percent shall not be allowed whether by variance to this section or by this exemption.

7. Unenclosed recreational areas, athletic fields, and similar areas with underdrainage systems, provided the rate of stormwater discharge is limited to that under natural conditions prior to development.

8. The area of green roofs on structures on the lot, provided that the rate of stormwater discharge is limited to that under natural conditions prior to development.

9. Access drives solely for the use of emergency vehicles, provided the driveway surface is constructed of grass block, or similar porous paving material.

DE. Height. Structure height shall not exceed 36 feet, except that structure height shall not exceed 45 feet father than 150 feet from a public right of way or within than 300 feet of a commercial zone.

F. Height measurement. The calculation of structure height in subsection 19.02.020.E. may be modified, at the discretion of the applicant, as follows to permit the structure to respond to the topography of the lot:

1. Draw the smallest rectangle that encloses the principal structure.

2. Divide one side of the rectangle, chosen by the applicant, into sections at least 15 feet in length using lines that are perpendicular to the chosen side of the rectangle.

3. The sections delineated in this subsection F.2 are considered to extend vertically from the ground to the sky.

4. The maximum height for each section of the structure is measured from the average building elevation for that section of the structure, which is calculated as the average elevation of finished lot grades at the midpoints of the two opposing exterior sides of the rectangle for each section of the structure.

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G. *Variance.* Regulated improvements in the R-8.4, R-9.6, R-12, and R-15 zoning designations may request a variance to increase lot coverage impervious surface pursuant to MICC 19.15.230(F). (Ord. 17C-15 § 1 (Att. A)).

19.02.070Swimming pools[1]

A. A swimming pool is not allowed in any front yard.

B. A swimming pool is not allowed closer than five feet from any adjacent property measured from the edge of the water to the property line.

C. A swimming pool located in a public park or noncommercial recreation area shall conform to the setback regulations governing such areas.

D. All fences surrounding outdoor swimming pools shall conform to the requirements of MICC Title 17. (Ord. 04C-12 § 12; Ord. 99C-13 § 1. Formerly 19.02.060).

1Code reviser's note: Ord. 17C-15 added a new Section 19.02.060 (Lot coverage – Regulated improvements). This section has been editorially renumbered to 19.02.070 in order to accommodate the addition of the new section.

EXHIBIT 32

CITY COUNCIL MINUTES
REGULAR MEETING
FEBRUARY 18, 2020

CALL TO ORDER & ROLL CALL

Mayor Benson Wong called the meeting to order at 5:30 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

Mayor Benson Wong, Deputy Mayor Wendy Weiker, and Councilmembers Lisa Anderl, Jake Jacobson, Salim Nice, Craig Reynolds, and David Rosenbaum were present.

AGENDA APPROVAL

It was moved by Anderl; seconded by Jacobson to:
Approve the agenda as presented.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Nice, Reynolds, Rosenbaum, Weiker and Wong)

STUDY SESSION

AB 5664: Classification and Compensation Discussion

Chief of Administration Ali Spietz explained that the purpose of the Study Session was to facilitate a project scoping discussion with the City Council prior to issuance of a Request for Proposals, explaining that the additional work would require a budget appropriation to be authorized at a future meeting. She further explained that the City had not completed a classification and compensation study in over 20 years.

Spietz explained that the compensation and classification study would examine and evaluate the City's current salary schedule and classification system and provide recommendations for modifications. She then reviewed the key objectives for the consultant.

Council expressed support for the project and requested that the City Manager remain involved throughout the process.

CITY MANAGER REPORT

Interim City Manager Bon reported on the following:

- New Sewer Truck
- King / Xing Hua Property
- East Seattle School – 30 day public comment period is open through March 11
- Debris on Lake Washington
- Life Jacket Loaner Stations
- Gallagher Hill Crosswalk Installation Construction
- Recology Tour
- Athletic Field Maintenance Review
- 2019 (Preliminary) Year-End Financial Report – Available at the March 17 meeting
- YFS Breakfast – over 600 Islanders attended

APPEARANCES

Joy Matsura: She expressed concern for the Town Center and the limited designation of retail space.

Josh Knopp (President for Citizens for Reasonable Shoreline Policies): He addressed the Shoreline Master Plan, explaining that he is anxiously waiting for the new SMP to move forward.

Dan Sitman: In his opinion, most of the traffic is not associated with the SJCC and that it is wrong to blame the SJCC. He further described the French American School as a great amenity for the island.

The following individuals participate in the Sister City trip to France and spoke very favorably of the trip:

- Roberta Lewandowski
- Ted Weinberg
- Jane Meyer-Brahm
- Eric Thuau

Ed Weinstein (SJCC Architect). He explained that he is prepared to abandon the Community Facility Zone and return to the Conditional Use Permit, explaining that code amendments are still needed. He further stated that valuable community organizations should be supported.

Rich Hill (SJCC / FAS / Herzl-Ner Tamid counsel): He asked the Council to direct staff and the Planning Commission to review the proposed amendments this year, explaining that the proposed amendment is a narrowly tailored amendment to the code. Mr. Hill then outlined three changes, including one to GFA, one to height, and one to lot coverage.

David Fain: He spoke in support of the SJCC

Traci Granbois (French American School Member): She express three concerns: 1) she believes it is an illegal spot zone, 2) It is an improper process to rezone, and 3) it provides for different rules for non-residential uses in a residential zone.

CONSENT CALENDAR

It was requested that Resolution No. 1580 Appointing City Manager be removed from the consent calendar. Mayor Wong moved it to the first item of Regular Business.

Payables: $623,808.15 (1/31/2020) and $1,307,133.83 (2/7/2020)
Recommendation: Certify that the materials or services herein before specified have been received and that all warrant numbers listed are approved for payment.

Payroll: $909,621.85 (2/14/2020)
Recommendation: Certify that the materials or services specified have been received and that all fund warrants are approved for payment.

Minutes of the February 4, 2020 Regular Meeting.
Recommendation: Approve the February 4, 2020 Regular Meeting minutes as written.

AB 5662: ROW Fleet Appropriation
Recommendation: Authorize the appropriation of $32,917 from the Equipment Rental Fund to purchase the upgraded hydraulic driven drop-in sander as part of the previously authorized replacement of FL-0422.

It was moved by Anderl; seconded by Jacobson to:
Approve the Consent Calendar as revised.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

REGULAR BUSINESS

AB 5658: Resolution No. 1580 Appointing City Manager

Each councilmember expressed strong support and gratitude for City Manager Bon's leadership over the past 8 months and thanked her for accepting the position.

It was moved and duly seconded to:
Approve Resolution No. 1580 appointing Jessi Bon as City Manager and authorizing the Mayor to execute the City Manager Employment Agreement thereto attached.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5663: Community Facility Code Amendment: Planning Commission Recommendation, Ordinance 20-04; 1st Reading & Adoption

Community Planning and Development Director Evan Maxim reviewed the history of the Community Facility zoning designation and the City Council's August 2019 direction to the Planning Commission to:

1. Review the "problem statement" and determine if an alternative approach is warranted;
2. Explore alternative decision-making processes; and
3. Report back to the City Council for further direction.

Director Maxim then explained that the Planning Commission evaluated four different alternative approaches which included:

Alternative 1: No change to the current regulations:
Alternative 2: A change to the criteria for approval of a Conditional Use Permit ("CUP");
Alternative 3: A change to the CUP approval criteria and development of a tool (Master Plan); and
Alternative 4: Continuing the work that was "paused" in June of 2019.

Following discussion of these approaches, the Planning Commission developed a three-part recommendation to the City Council that included:

Part A – Discontinue Community Facility zone process
Part B – Review/update CUP process and pursue code amendments
Part C – Resume Community Facility zone process at a future date

Director further explained that staff concurred with the Planning Commission recommendation on Part A.

It was moved and duly seconded to:
Suspend the City Council Rule of Procedure 6.3, requiring a second reading for an ordinance.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

It was moved and duly seconded to:
Adopt Ordinance No. 20-04, to repeal portions of the 2018 Comprehensive Plan amendments related to the Community Facility zone.
Passed 7-0
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5665: City Council Rules of Procedure Amendments

City Clerk Deb Estrada reported that at the February 4 meeting City Council directed staff to further review and modify the Board and Commission appointment process in the Rules of Procedure. Specific requests were to ensure applicants received a minimum of four votes and to provide more clarity as to the steps in the voting process. Staff reviewed the appointment process used by other cities, particularly those governed under the Council-City Manager form of government and made revisions accordingly.

It was moved and duly seconded to:
Approve Resolution No. 1579 amending the City Council Rules of Procedure as set forth in Exhibit A.
Passed 7-0

FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5666: Boards & Commissions Code Amendments (2nd Reading, Ordinance No. 20C-02)

City Clerk Deb Estrada reported that at the February 4 meeting City Council directed staff to make additional changes. She explained that Ordinance No. 20C-02 amends the membership appointment process for the Design Commission, the Planning Commission, the Utility Board, the Parks and Recreation Commission, and the Mercer Island Arts Council. Estrada further noted that Ordinance No. 20C-02 does not apply to the Open Space Conservancy Trust because prior to any proposed amendment to the Trust's Articles, the Council is required to request recommendations and comments from the Trustees regarding the proposed amendment and hold a public hearing for the purpose of considering the community and Trustees' recommendations and comments.

It was moved and duly seconded to:
Adopt Ordinance No. 20C-02 amending membership appointment process in Chapters 3.34 Design Commission, 3.46 Planning Commission, 3.52 Utility Board, 3.53 Parks & Recreation Commission, and 3.55 Mercer Island Arts Council.
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

AB 5667: City Council Letter of Support - East Channel Required Navigation Procedures Arrivals & Departures

Councilmember Salim Nice explained that the City of Renton owns and operates the Renton Municipal Airport. In his advisory capacity, he has long since advocated for safer and less impactful flight operations out of Renton Airport. In pursuit of this endeavor, he has worked with Retired Captain Thomas Imrich, a retired Boeing Experimental Test Pilot and retired FAA administration official, as well as an island resident. He recommended that Council authorize the Mayor to sign the letter of support.

It was moved and duly seconded to:
Authorize the Mayor to sign a letter recommending FAA take the necessary steps to propose upgrading the priority for Required Navigation Performance procedures for Renton Airport as "Priority 1."
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

OTHER BUSINESS

Planning Schedule

Interim City Manager Bon reviewed the planning schedule and reminded Council that the March 3 meeting was canceled. In its place, a special meeting for March 10 was scheduled. She also noted that she would not be present at the March 10 meeting due to a prescheduled vacation.

Councilmember Reports

Councilmember Reynolds - complimented the YFS Breakfast

Councilmember Rosenbaum - wished the Mercer Island High School basketball team luck

Councilmember Anderl – summarized her visit to the Recology facility and the Do's and Don'ts of recycling

Deputy Mayor Weiker – reported on the opportunity to recognize one of our students for the AWC scholarship

Councilmember Jacobson – reported on his experience on the Recology Facility tour and the PROS questionnaire, which can be accessed online, and the Eastside Transportation Partnership meeting.

Mayor Wong – reported on the March 2 SCA Meeting on Regional Homelessness Authority, the April 23 invite with the Mercer Island School District Board of Directors and discussion topics, 20th Anniversary celebration of the Sister City Association.

Renton Airport Advisory Voting Proxy

It was moved by Weiker and seconded by Jacobson to:
Authorize the Mayor to sign a letter of support addressed to the Renton Airport Advisory Committee acknowledging that Captain Thomas Imrich will serve as the City of Mercer Island's designated proxy in Councilmember Nice's absence.
FOR: 7 (Anderl, Jacobson, Reynolds, Rosenbaum, Nice, Weiker, and Wong)

Councilmember Absences

Deputy Mayor Weiker reported that she would not be present for the March 17 Regular Meeting.

EXECUTIVE SESSION

At 8:40 pm, Mayor Wong convened an Executive Session for approximately two hours and 60 minutes to to discuss pending or potential litigation with legal counsel pursuant to RCW 42.30.110(1)(i).

No action was taken.

At 9:41 pm, Mayor Wong adjourned the Executive Session; no action was taken.

ADJOURNMENT

There being no additional business to come before City Council, the Regular Meeting adjourned at 9:42 pm.

Benson Wong, Mayor

Attest:

Deborah A. Estrada, City Clerk

EXHIBIT 33

REQUEST FOR LEGAL OPINIONS

FROM: Robert A. Medved

TO: Mayor Wong, Deputy Mayor Weiker, Councilmember Anderl, Councilmember Jacobson, Councilmember Nice, Councilmember Reynolds, Councilmember Rosenbaum and City Manager Bon

CC: Interim City Attorney Parks and Community Planning & Development Director Maxim

DATE: March 2, 2020

RE: *Request For Legal Opinions*

TABLE OF CONTENTS

I. REQUEST FOR AND SCOPE OF LEGAL OPINIONS

This Request For Legal Opinions requests the City to render or obtain written legal opinions on the matters set forth below ("Legal Opinions") and requests that the City Manager, as part of her duties,[1] oversees the rendering of those Legal Opinions. To the extent any of the Legal Opinions are qualified, those qualifications and the legal authority for those qualifications should be set out fully in and become part of the qualified Legal Opinion. For purposes of rendering and overseeing the Legal Opinions, the City and the City Manager should assume that the facts set forth in this Request For Legal Opinions are accurate.

The Legal Opinions should be rendered and delivered to me and to all Councilmember not later than the close of business two days prior to the day the City Council takes final action on how the City will move forward on the Hill Proposal (as defined below) and the Planning Commission Recommendation (as defined below).

II. DEFINED TERMS

As used in this Request For Legal Opinions, the following terms shall have the following meanings:

1. "City" means the City of Mercer Island, Washington.

2. "Code" means Chapter 19.15 of the Mercer Island City Code.

3. "Comprehensive Plan Map" means the maps that the Growth Management Act requires as an included component of a Comprehensive Plan. *See, e.g.,* RCW 36.70A.070.

4. "Comprehensive Plan Text" means the text that the Growth Management Act requires as an included component of a Comprehensive Plan. *See, e.g.*, RCW 36.70A.07.

5. "Director" means the Director of Mercer Island's Community Planning & Development Department.

6. "FASP" means the French American School Of Puget Sound, a private school.

7. "FASP Site" means the real property which is owned by the JCC and upon which the FASP School is located. The FASP Site is zoned commercial. No part of the FASP Site is zoned single-family residential. The commercially zoned FASP Site abuts the single-family residentially zoned JCC Site. The commercially zoned FASP Site does not include any part of the single-family residentially zoned JCC Site.

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[1] The City Manager's duties include, without limitation, seeing "that all laws and ordinances are faithfully executed…." *See* RCW 35A.13.080(3) *and see* Mercer Island City Code (" MICC") 3.02.010.

8. "Former Director" means a former Director of Mercer Island's Community Planning & Development Department.

9. "GMA" means the Growth Management Act, Chapter 36.70A RCW.

10. "Hill Proposal" means the application presented by the Director to the City Council on February 18, 2020. The Hill Proposal is only applicable to sites that abut a commercial zone. *See* Video at: 1:33 through 1:37. A copy of the Hill Proposal is attached as **Exhibit 7**.

11. "JCC" means the Samuel and Althea Stroum Jewish Community Center of Greater Seattle.

12. "JCC Site" means the real property upon which the JCC is located. For purposed of this Request For Legal Opinions, a small single-family residential site which is owned by the FASP is included in the definition of the JCC Site. The JCC Site is zoned single-family residential. No part of the JCC Site is zoned commercial. The single-family residentially zoned JCC Site does not include any part of the commercially zoned FASP Site. The single-family residentially zoned JCC Site abuts the commercially zoned FASP Site. There is only one commercial zone on Mercer Island. *See* **Exhibits 1-2**. The single-family residentially zoned JCC Site is the only the single-family residentially zoned site that abuts a commercially zoned site on Mercer Island. *See* **Exhibits 1-4**. Two JCC Site maps are attached as **Exhibits 2-4**.

13. "JCC's Architect" means Ed Weinstein.

14. "JCC's Attorney" means Richard Hill.

15. "LUPA" means the Land Use Petition Act, Chapter 36.70C RCW.

16. "MICA" means the Mercer Island Center For The Arts.

17. "Planning Commission Recommendation" means the Planning Commission Recommendation presented by the Director to the City Council on February 18, 2020. The Director's Planning Commission Recommendation Staff Report is attached as **Exhibit 5**.

18. "Video" means the video of the February 18, 2020 City Council meeting.

III. LEGAL OPINIONS

A. The Hill Proposal Requires Comprehensive Plan Text Amendments And Comprehensive Plan Map Amendments

Partial Statement Of The Law:

A Comprehensive Plan is comprised two required documents. The first required Comprehensive Plan document is the Comprehensive Plan Text. The second required Comprehensive Plan document is the Comprehensive Plan Map. The Comprehensive Plan Text must be consistent with the Comprehensive Plan Map. The Comprehensive Plan Text shall consist of descriptive text covering objectives, principles, and standards used to develop the Comprehensive Plan. *See, e.g.*, RCW 36.70A.070.

Some rezones that are already authorized by the Comprehensive Plan Text of an existing Comprehensive Plan only need to amend the Comprehensive Plan Map. Other rezones that have not been authorized by the Comprehensive Plan Text of an existing Comprehensive Plan need to amend both the Comprehensive Plan Text and Comprehensive Plan Map. *See, e.g.,* **Subsection I**, *infra*, and **Subsection J**, *infra*.

Partial Statement Of The Facts:

The Director has determined that the Hill Proposal creates a Non-Project Executive Rezone. *See* **Exhibit 7**, at p. 2. A Non-Project Rezone requires Comprehensive Plan amendments. *See* **Subsection I**, *infra*. The Hill Proposal creates an Overlay Zone. *See* **Subsection J**, *infra*. A Former Director has determined that: "A … rezone would … require a comprehensive plan amendment." *See* **Exhibit 8**. MICA, just like the Hill Proposal, applied for a Zoning Code Text Amendment. *See* **Exhibits 10-11**. *Compare* **Exhibit 7** *with* **Exhibit 11**. MICA's application for a Zoning Code Text Amendment required a Comprehensive Plan Amendment. *See* **Exhibit 12**. The Hill Proposal creates a site-specific rezone. *See* **Subsection I**, *infra*, and **Subsection J**, *infra*. The Hill Proposal is only applicable to sites that abut a commercial zone. See Video at: 1:33 through 1:37. The JCC Site is less than ten acres in area. The JCC Site is zoned single-family residential. No part of the JCC Site is zoned commercial. The single-family residentially zoned JCC Site does not include any part of the commercially zoned FASP Site. The single-family residentially zoned JCC Site abuts the commercially zoned FASP Site. The Hill Proposal is only applicable to sites that abut a commercial zone. There is only one commercial zone on Mercer Island. *See* **Exhibits 1-2**. The single-family residentially zoned JCC Site is the only the single-family residentially zoned site that abuts a commercially zoned site on Mercer Island. *See* **Exhibits 1-4**.

Request For Legal Opinions:

Please provide a written legal opinion that the Hill Proposal requires Comprehensive Plan Text amendments.

Please provide a written legal opinion that the Hill Proposal requires Comprehensive Plan Map amendments.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require Comprehensive Plan Text amendments for the Hill Proposal.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require Comprehensive Plan Map amendments for the Hill Proposal.

B. The Comprehensive Plan Text Amendments And The Comprehensive Plan Map Amendments For The Hill Proposal Must Be Docketed

Partial Statement Of The Law:

MICC 19.15.230(D)(1)(b) provides:

> 1. *Preliminary Docket Review*. By September 1, the city will issue notice of the annual comprehensive plan and code amendment cycle for the following calendar year. The amendment request deadline is October 1. Proposed amendment requests received after October 1 will not be considered for the following year's comprehensive plan and code amendment process but will be held for the next eligible comprehensive plan and code amendment process.
>
> ***
>
> b. The code official shall review all complete and timely filed applications and suggestions proposing amendments to the comprehensive plan or code and place these applications and suggestions on the preliminary docket along with other city-initiated amendments to the comprehensive plan or code.

Partial Statement Of The Facts:

The Hill Proposal requires Comprehensive Plan Text amendments and Comprehensive Plan Map amendments. *See* **Subsection A**, *supra*.

Request For Legal Opinions:

Please provide a written legal opinion that the Comprehensive Plan Text amendments for the Hill Proposal must be placed on the Preliminary Docket.

Please provide a written legal opinion that the Comprehensive Plan Map amendments for the Hill Proposal must be placed on the Preliminary Docket.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if City does not require the Comprehensive Plan Text amendments for the Hill Proposal to be placed on the Preliminary Docket.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require the Comprehensive Plan Map amendments for the Hill Proposal to be placed on the Preliminary Docket.

C. <u>The Hill Proposal Requires Code Amendments</u>

Partial Statement Of The Facts:

The Director has determined that the Hill Proposal requires Code amendments. *See* Video at: 1:56 through 2:15.

Request For Legal Opinions:

Please provide a written legal opinion that the Hill Proposal requires Code amendments.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require Code amendments for the Hill Proposal.

D. <u>The Hill Proposal Code Amendments Must Be Docketed</u>

Partial Statement Of The Law:

Code amendments, Comprehensive Plan Text amendments and Comprehensive Plan Map amendments must be place on the Preliminary Docket.

MICC 19.15.230(D)(1)(b) provides:

> 1. *Preliminary Docket Review*. By September 1, the city will issue notice of the annual comprehensive plan and code amendment cycle for the following calendar year. The amendment request deadline is October 1. Proposed amendment requests received after October 1 will not be considered for the following year's comprehensive plan and code amendment process but will be held for the next eligible comprehensive plan and code amendment process.
>
> ***
>
> b. The code official shall review all complete and timely filed applications and suggestions proposing amendments to the comprehensive plan or code and place these applications and suggestions on the preliminary docket along with other city-initiated amendments to the comprehensive plan or code.

Code Amendments, Comprehensive Plan Text amendments and Comprehensive Plan Map amendments must be considered together and therefore must be placed on the Preliminary Docket together.

MICC 19.15.230(G) provides:

> G. *Combined Comprehensive Plan Amendment and Rezone*. In cases where both a comprehensive plan amendment and a rezone are required, both shall be considered together, and all public notice must reflect the dual nature of the request.

MICC 19.15.240(C)(7) provides:

> 7. If a comprehensive plan amendment is required in order to satisfy subsection (C)(1) of this section, approval of the comprehensive plan amendment is required prior to or concurrent with the granting of an approval of the rezone.

The Final Decision And Order in *Owners And Neighbors v. City of Mercer Island* ("Coen III") provides:

> This Board does not presume to advise the City on what it should have done; we limit our holding here to the conclusion that the adoption of these ordinances created inconsistencies between the comprehensive plan, the land use map and the development regulations, in violation of RCW 36.70A.040.
>
> ***
>
> The Petitioners have met their burden in Issue 25 showing that adoption of the challenged ordinances created an inconsistency between the comprehensive plan and the development regulations concerning JCC property, in violation of RCW 36.70A.040.

Partial Statement Of The Facts:

The Director has determined that the Hill Proposal requires amendments to the Code. *See* Video at: 1:56 through 2:15.[2] The Hill Proposal requires Comprehensive Plan Text amendments. The Hill Proposal requires Comprehensive Plan Map amendments. *See* **Subsection A**, *supra*.

[2] The Hill Proposal was filed before February 18, 2020 and if standing alone arguable would not be required to be placed on the Preliminary Docket. The Hill Proposal does not stand alone. The Hill Proposal requires Comprehensive Plan Text amendments and Comprehensive Plan Map amendments. *See, e.g.*, **Subsection A**, *supra*, and **Subsection B**, *supra*.

Request For Legal Opinions:

Please provide a written legal opinion that the Code amendments for the Hill Proposal must be must be considered together with the Comprehensive Plan Text amendments for the Hill Proposal.

Please provide a written legal opinion that the Code amendments for the Hill Proposal must be considered together with the Comprehensive Plan Map amendments for the Hill Proposal.

Please provide a written legal opinion that the Code amendments for the Hill Proposal must be placed on the Preliminary Docket together with the Comprehensive Plan Text amendments for the Hill Proposal.

Please provide a written legal opinion that the Code amendments for the Hill Proposal must be placed on the Preliminary Docket together with the Comprehensive Plan Map amendments for the Hill Proposal.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if City does not require the Code amendments for the Hill Proposal to be placed on the Preliminary Docket together with the Comprehensive Plan Text amendments for the Hill Proposal.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if City does not require the Code amendments for the Hill Proposal to be placed on the Preliminary Docket together with the Comprehensive Plan Map amendments for the Hill Proposal.

E. The Planning Commission Recommendation Requires Comprehensive Plan Text Amendments And Comprehensive Plan Map Amendments

Partial Statement Of The Law:

A Comprehensive Plan is comprised two required documents. The first required Comprehensive Plan document is the Comprehensive Plan Text. The second required Comprehensive Plan document is the Comprehensive Plan Map. The Comprehensive Plan Text must be consistent with the Comprehensive Plan Map. The Comprehensive Plan Text shall consist of descriptive text covering objectives, principles, and standards used to develop the Comprehensive Plan. *See, e.g.*, RCW 36.70A.070.

Partial Statement Of The Facts:

The Planning Commission Recommendation is intended to benefit Mercer Island widely. The Planning Commission Recommendation intends to update Conditional Use Permit criteria to will benefit all Conditional Use Permit Reviews. The Planning Commission Recommendation intends to amend the gross floor area limits and the height limits in residential zones. The

Planning Commission Recommendation intends to undertake a holistic review of the Code. *See* **Exhibit 5**.

Request For Legal Opinions:

Please provide a written legal opinion that the Planning Commission Recommendation requires Comprehensive Plan Text amendments.

Please provide a written legal opinion that the Planning Commission Recommendation requires Comprehensive Plan Map amendments.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require Comprehensive Plan Text amendments for the Planning Commission Recommendation.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require Comprehensive Plan Map amendments for the Planning Commission Recommendation.

F. <u>The Comprehensive Plan Text Amendments And The Comprehensive Plan Map Amendments For The Planning Commission Recommendation Must Be Docketed</u>

Partial Statement Of The Law:

MICC 19.15.230(D)(1)(b) provides:

> 1. *Preliminary Docket Review*. By September 1, the city will issue notice of the annual comprehensive plan and code amendment cycle for the following calendar year. The amendment request deadline is October 1. Proposed amendment requests received after October 1 will not be considered for the following year's comprehensive plan and code amendment process but will be held for the next eligible comprehensive plan and code amendment process.
>
> ***
>
> b. The code official shall review all complete and timely filed applications and suggestions proposing amendments to the comprehensive plan or code and place these applications and suggestions on the preliminary docket along with other city-initiated amendments to the comprehensive plan or code.

Partial Statement Of The Facts:

The Planning Commission Recommendation requires Comprehensive Plan Text amendments. The Planning Commission Recommendation requires Comprehensive Plan Map amendments. *See, e.g.*, **Subsection E**, *supra*.

Request For Legal Opinions:

Please provide a written legal opinion that the Comprehensive Plan Text amendments for the Planning Commission Recommendation must be placed on the Preliminary Docket.

Please provide a written legal opinion that the Comprehensive Plan Map amendments for the Planning Commission Recommendation must be placed on the Preliminary Docket.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if City does not require the Comprehensive Plan Text amendments for the Planning Commission Recommendation to be placed on the Preliminary Docket.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require the Comprehensive Plan Map amendments for the Planning Commission Recommendation to be placed on the Preliminary Docket.

G. <u>The Planning Commission Recommendation Requires Code Amendments</u>

Partial Statement Of The Facts:

The Director has determined that the Planning Commission Recommendation requires Code amendments. *See* Video at: 1:56 through 2:15.

Request For Legal Opinions:

Please provide a written legal opinion that the Planning Commission Recommendation requires Code amendments.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City does not require Code amendments for the Planning Commission Recommendation.

H. <u>The Planning Commission Recommendation Code Amendments Must Be Docketed</u>

Partial Statement Of The Law:

MICC 19.15.230(D)(1)(b) provides:

> 1. *Preliminary Docket Review*. By September 1, the city will issue notice of the annual comprehensive plan and code amendment cycle for the following calendar year. The amendment request deadline is October 1. Proposed amendment requests received after October 1 will not be considered for the following year's comprehensive plan and code amendment process but will be held for the next eligible comprehensive plan and code amendment process.
>
> ***

> b. The code official shall review all complete and timely filed applications and suggestions proposing amendments to the comprehensive plan or code and place these applications and suggestions on the preliminary docket along with other city-initiated amendments to the comprehensive plan or code.

Partial Statement Of The Facts:

The Director has determined that the Planning Commission Recommendation requires amendments to the Code. *See* Video at: 1:56 through 2:15.

Request For Legal Opinions:

Please provide a written legal opinion that the Code amendments for the Planning Commission Recommendation must be placed on the Preliminary Docket.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if City does not require the Code amendments for the Planning Commission Recommendation to be placed on the Preliminary Docket.

I. The Hill Proposal Creates A Non-Project Rezone

Partial Statement Of The Law:

A site-specific rezone that is authorized by an existing comprehensive plan is a project rezone project permit approval. A site-specific rezone that is not authorized by an existing comprehensive plan is a non-project rezone under the GMA and under LUPA. *See, e.g., Schnitzer v. City Of Puyallup*, 416 P.3d 1172 (2018), *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn.App. 555 (2013).

Partial Statement Of The Facts:

The Director has determined that the Hill Proposal creates "a non-project legislative rezone." *See* **Exhibit 7**, at p. 2. The Hill Proposal non-project legislative rezone is site-specific. *See* **Subsection K**, *infra*. *See also* **Exhibits 1-4**. The Hill Proposal rezone does not create a project rezone because the Hill Proposal rezone is not authorized by the City's existing Comprehensive Plan. The Hill Proposal does create "a non-project legislative rezone" because the Hill Proposal rezone is not authorized by the City's existing Comprehensive Plan.

Request For Legal Opinions:

Please provide a written legal opinion that the Hill Proposal creates a non-project legislative rezone.

Please provide a written legal opinion regarding the City's legal exposure and legal risks associated with the creation of a non-project legislative rezone.

J. The Hill Proposal Creates An Overlay Zone

Partial Statement Of The Law:

Schnitzer v. City Of Puyallup, 416 P.3d 1172, 1174 (2018) defines an overlay zone by example:

> In 2009, the city of Puyallup (City) created the "Shaw-East Pioneer Overlay Zone" (SPO zone) as part of an amendment to the City's comprehensive plan. An overlay zone, such as the SPO zone, establishes development criteria and standards to supplement the base zoning standards that already exist. (quotation marks in the original).

Allingham v. City Of Seattle, 109 Wn.2d 947, 949 (1988) also defines an overlay zone by example:

> The Greenbelt Ordinance creates an "overlay zone", superimposing upon the existing or underline zoning regulations. The underlying zones affected include single-family residential zones, three levels of multi-family residential zones, and manufacturing and industrial zones. (quotation marks in the original).

Partial Statement Of The Facts:

The existing base or underlying zoning of the JCC Site is single-family residential. The existing base or underlying zoning of the JCC Site has existing development criteria, development standards and zoning regulations. The Hill Proposal seeks to overlay new development criteria, development standards and zoning regulations on the JCC Site only. *See* Subsection **K**, *infra*. *See also* **Exhibits 1-4**.

Request For Legal Opinions:

Please provide a written legal opinion that the Hill Proposal creates an overlay zone on the JCC Site.

Please provide a written legal opinion regarding the City's legal exposure and legal risks associated with the creation of an overlay zone on the JCC Site.

K. The Hill Proposal Creates A Spot Zone

Partial Statement Of The Law:

Chrobuck v. Snohomish County, 78 Wn.2d 858, 872 (1971) defines spot zoning as follows:

> Spot zoning is a zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole.

Smith v. Skagit County, 75. Wn.2d 715, 743-45 (1969) provides:

> The vice of a spot zone is its inevitable effect of granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors….
>
> ***
>
> We would accept as good sense the proposition … that the matter of size in zoning a spot is relative and should be considered in relation to all other circumstances and conditions.
>
> ***
>
> This court has said that spot zoning is and should be universally condemned…. (internal citations omitted).

MICC 19.15.240(C)(4) provides:

> 4. The proposed reclassification does not constitute an illegal site-specific rezone.

Partial Statement Of The Facts:

The Hill Proposal creates a site-specific rezone. *See, e.g.*, **Subsection I**, *supra*, and **Subsection J**, *supra*. The Hill Proposal is only applicable to sites that abut a commercial zone. See Video at: 1:33 through 1:37. The JCC Site is less than ten acres. The JCC Site is zoned single-family residential. No part of the JCC Site is zoned commercial. The single-family residentially zoned JCC Site does not include any part of the commercially zoned FASP Site. The single-family residentially zoned JCC Site abuts the commercially zoned FASP Site. The Hill Proposal is only applicable to sites that abut a commercial zone. There is only one commercial zone on Mercer Island. *See* **Exhibits 1-2**. The single-family residentially zoned JCC Site is the only the single-family residentially zoned site that abuts a commercially zoned site on Mercer Island. *See* **Exhibits 1-4**. The Hill Proposal site-specific rezone only benefits the JCC. The Hill Proposal site-specific rezone is detrimental to JCC's neighbors. The Hill Proposal site-specific rezone does not benefit the community as a whole.

Request For Legal Opinions:

Please provide a written legal opinion that the Hill Proposal creates a spot zone.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City allows the creation of a spot zone.

L. The JCC Site Is Not A "Noncommercial Recreational Area"

Partial Statement Of The Law:

MICC 19.16 defines a noncommercial recreational area as follows:

> *Noncommercial Recreational Area*: A recreational area maintained and operated by a nonprofit club or organization with specified limitations upon the number of members or limited to residents of a block, subdivision, neighborhood, community or other specific area of residence for the exclusive use of members and their guests.

Partial Statement Of The Facts:

JCC's Architect advised in writing that the "Proposed Code Amendment [should] Update 'Regulated Improvements' to bring existing private schools, religious buildings, and community centers into code conformance…" *See* **Exhibit 6**. The Hill Proposal attempted to accomplish this by adding "noncommercial recreational areas" into MICC 19.15.060(A.) which deals with "regulated improvements." *See* **Exhibit 7**. More than 25% of the JCC's members do not live on Mercer Island. The JCC is open to the public. The JCC does not have "specific limitations upon the number of [its] members." The JCC does not limit its members "to residents of a block, subdivision, neighborhood, community or other specific area of residence." The JCC is not limited to "the exclusive use of members and their guests."

Request For Legal Opinions:

Please provide a written legal opinion that the JCC Site is not a noncommercial recreational area.

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City continues to allow the JCC to assert that the JCC Site is a noncommercial recreational area.

M. <u>The JCC's Undefined Uses Of The JCC Site</u>

Partial Statement Of The Law:

Any use in a single-family residential zone that is not expressly permitted by MICC 19.02 is prohibited. *See* MICC 19.02.010.

Partial Statement Of The Facts:

An August 23, 2016 e-mail from JCC's Architect to Scott Greenberg and Nicole Gaudette provides: "Scott then discussed our need to establish the definition of the existing use for the facility as it would be important for our ongoing entitlement purposes. A quick review of the copies of the existing Conditional Use Permit did not clarify this issue." *See* **Exhibit 9**. The JCC never established a definition for the existing use of the JCC Site until the Hill Proposal was filed with the City. The Hill Proposal attempted to define the existing use of the JCC Site as a "noncommercial recreational area." The existing use of the JCC Site is not "noncommercial recreational area." *See* **Subsection L**, *supra*. The existing use of the JCC Site is still undefined.

Request For Legal Opinion:

Please provide a written legal opinion regarding the City's legal exposure and legal risks if the City continues to allow the JCC to not define its use of the JCC Site.

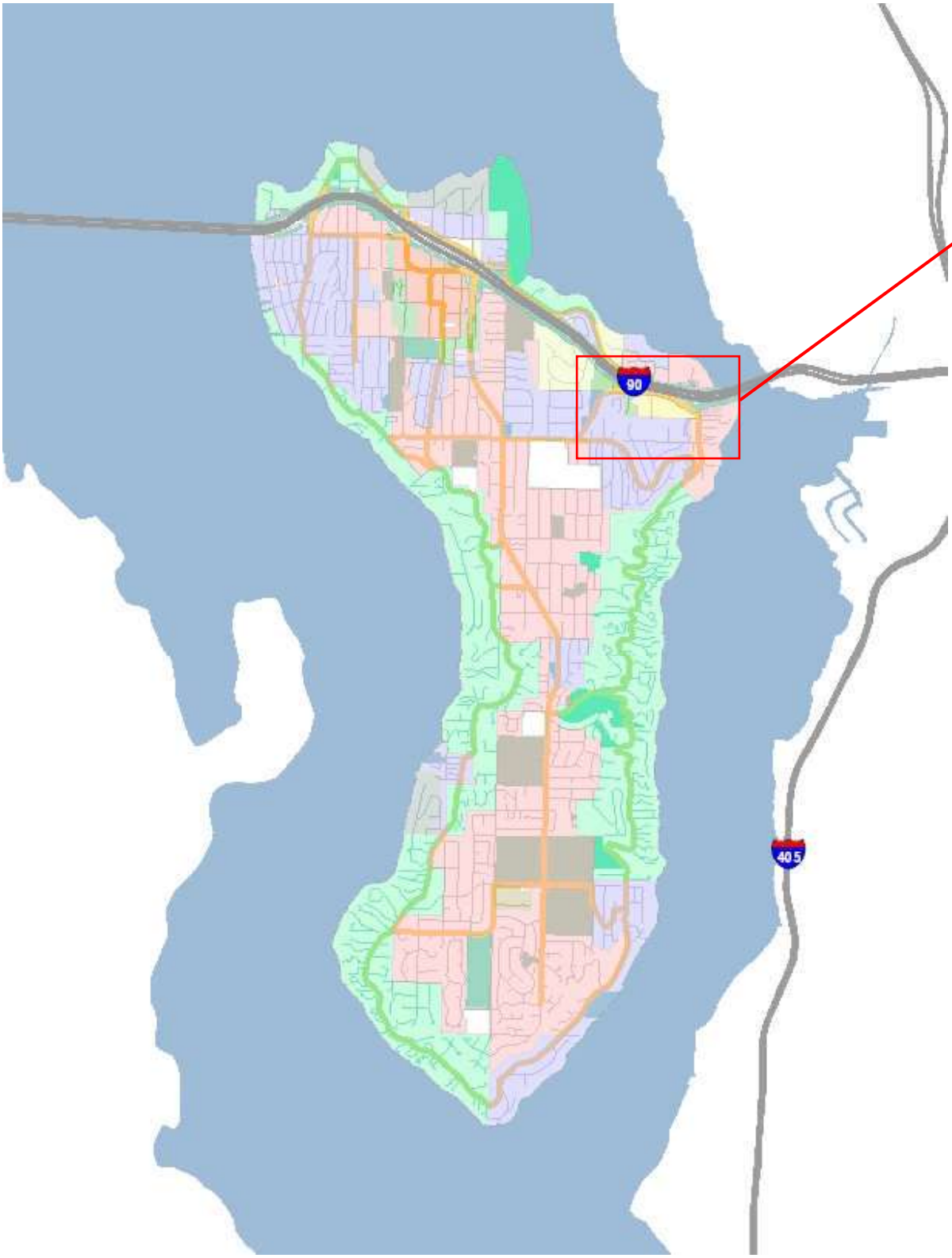
IV. LIST OF EXHIBITS

1	City Of Mercer Island Map
2	Mercer Island Zoning Map
3	JCC Site Map (large scale)
4	JCC Site Map (small scale)
5	Planning Commission Recommendation
6	February 7, 2020, Meeting Agenda
7	Hill Proposal
8	August 12, 2016, E-Mail
9	August 23, 2016, E-Mail
10	June 16, 2016, MICA Application For A Zoning Code Text Amendment
11	MICA Zoning Code Text Amendment
12	September 30, 2016, MICA Application For A Comprehensive Plan Amendment

EXHIBIT 1

City of Mercer Island

Information & Geographic Services



Legend

Zoning

- B
- C-O
- PBZ
- R-12
- R-15
- MF-2
- MF-2L
- MF-3
- R-8.4
- R-9.6
- TC
- P

Freeway

Major Street

Street

Parks

Lake Washington

1: 47,281

1.1 0 0.57 1.1 Miles

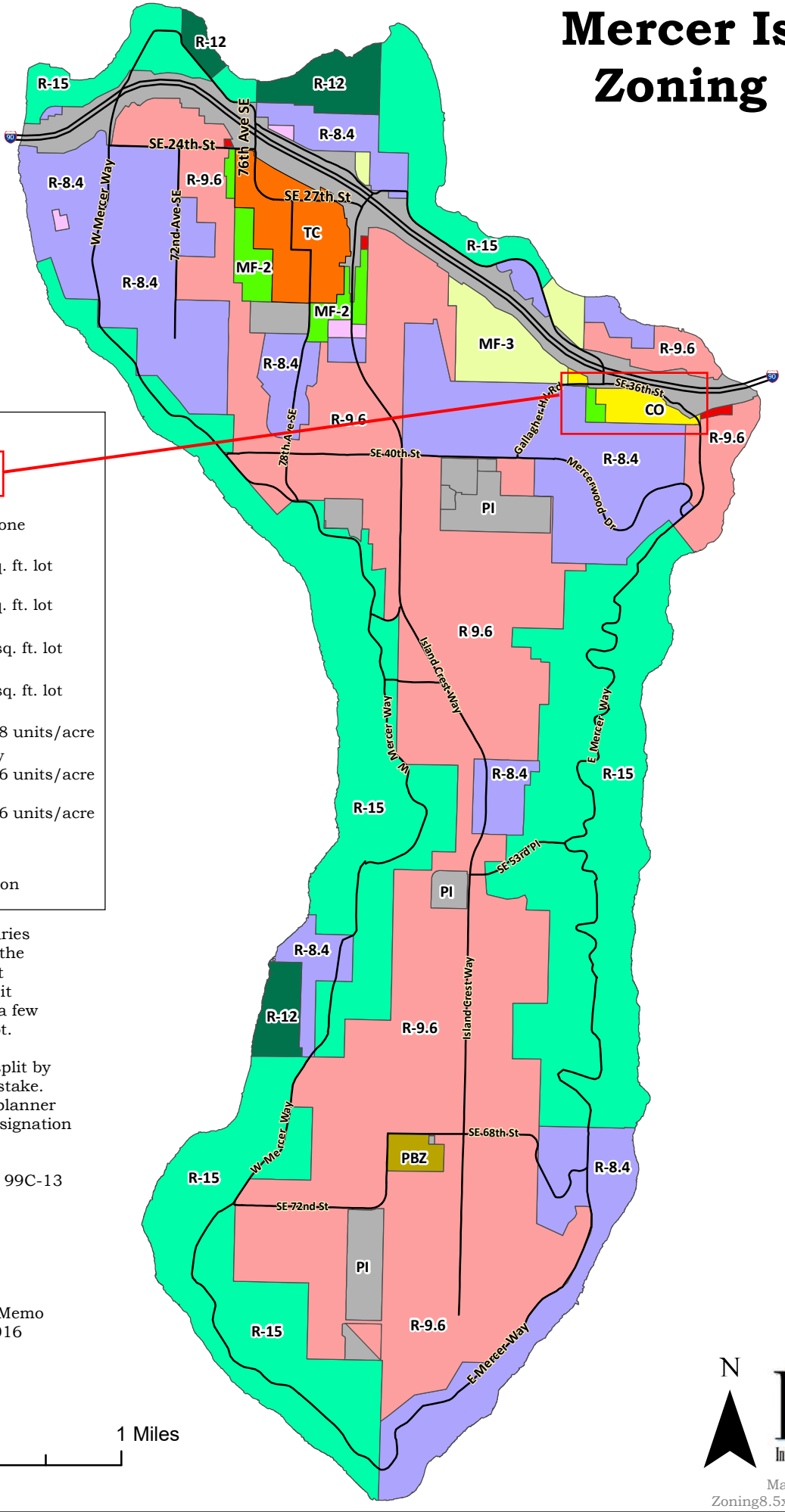
Map Printed: February 20, 2020

Disclaimer: These maps were developed by the City of Mercer Island and are intended to be a general purpose digital reference tool. These maps are not an accepted legal instrument for describing, establishing, recording or maintaining descriptions for property concerns or boundaries. The City makes no representation or warranty with respect to the accuracy or currency of these data sets, especially in regard to labeling of surveyed dimensions, or agreement with official sources such as records of survey, or mapped locations of features.

Notes

EXHIBIT 2

Mercer Island Zoning Map



- B: Business
- C-O Commercial Offices
- PBZ Planned Business Zone
- R-8.4 Residential 8,400 sq. ft. lot
- R-9.6 Residential 9,600 sq. ft. lot
- R-12 Residential 12,000 sq. ft. lot
- R-15 Residential 15,000 sq. ft. lot
- MF-2 Multi-Family Maximum density 38 units/acre
- MF-2L Multi-Family Maximum density 26 units/acre
- MF-3 Multi-Family Maximum density 26 units/acre
- TC Town Center
- PI Public Insititution

In general the zone boundaries coincide with the center of the public right of way and plat boundaries. In other areas it coincides with lot lines. In a few cases it splits a parcel or lot.

In some areas parcels are split by two zones. This is not a mistake. Please consult with a City planner to determine the correct designation for your property.

Original map Adopted: Ord 99C-13
Amended: Ord 00C-06
Amended: Ord 05C-13
Amended: Ord 13C-02
Amended: Ord 14C-07
Amended: Ord 14C-10
Amended: DR16-01
DSG Director's Memo dated 06/10/2016
Amended: Ord 17C-24
Amended: Ord 18C-14

0 0.25 0.5 1 Miles

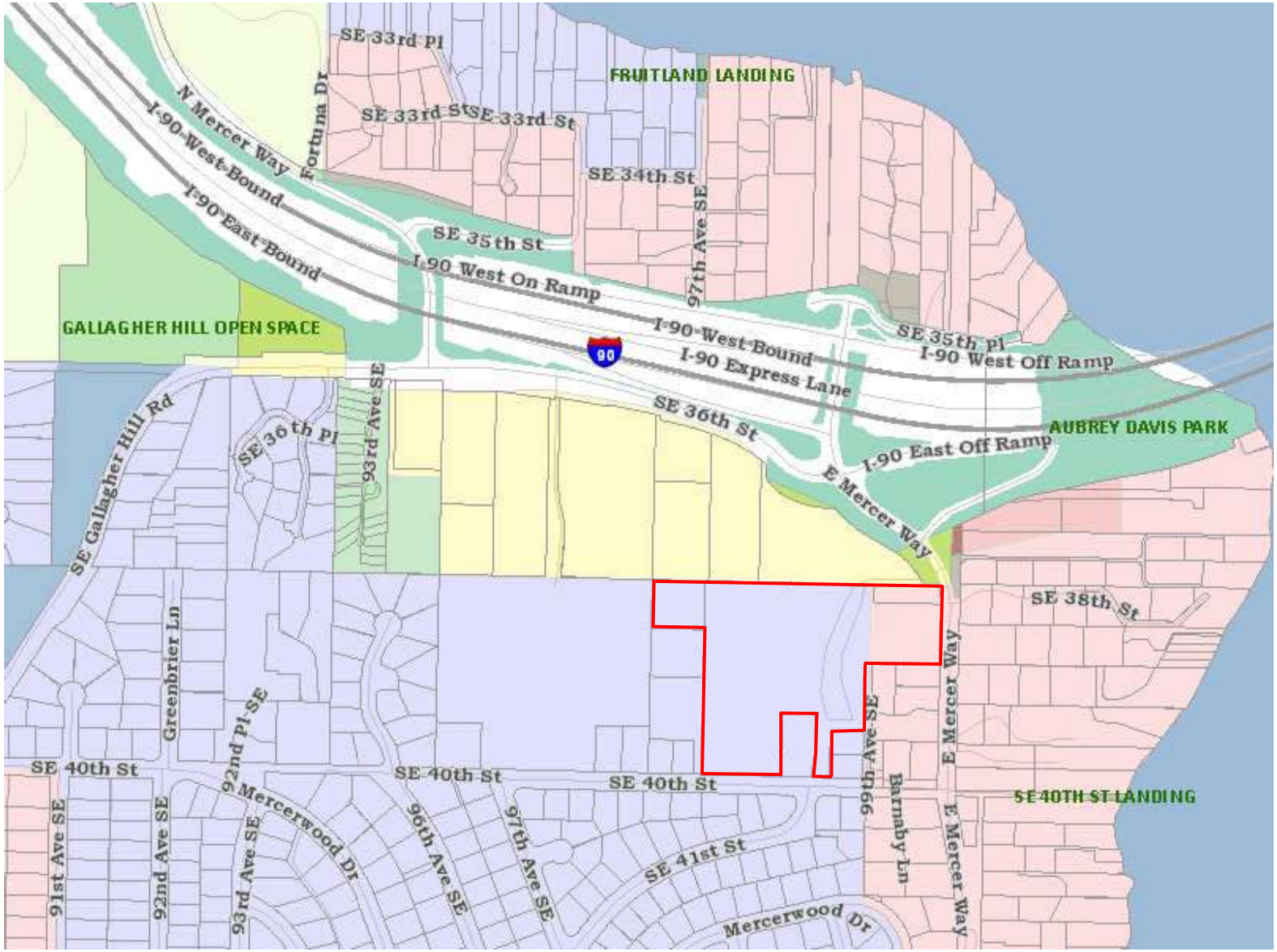
N

IGS Information & Geographic Services

Map Date: 11/29/2018
Zoning8.5x11_11-29-2018.mxd

EXHIBIT 3

City of Mercer Island



Legend

- Property Line
- Zoning
  - B
  - C-O
  - PBZ
  - R-12
  - R-15
  - MF-2
  - MF-2L
  - MF-3
  - R-8.4
  - R-9.6
  - TC
  - P
- Freeway
- Street
- Parks
- Lake Washington

0 493 985 Feet

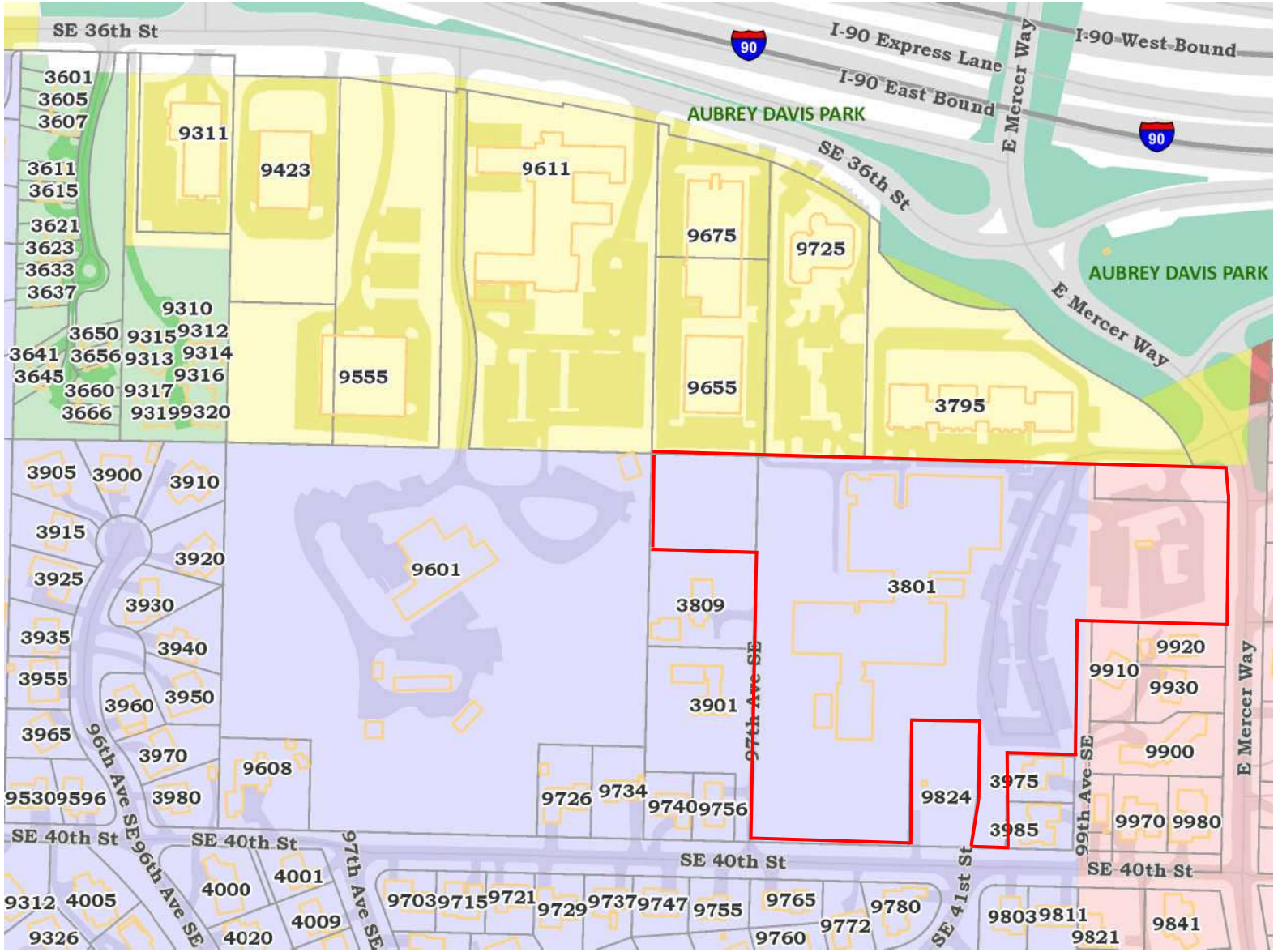
1 inch = 985.0115905 feet

Map Printed: February 20, 2020

Notes

EXHIBIT 4

City of Mercer Island



Legend

- Address
- Building
- Property Line
- Docks
- Zoning
  - B
  - C-O
  - PBZ
  - R-12
  - R-15
  - MF-2
  - MF-2L
  - MF-3
  - R-8.4
  - R-9.6
  - TC
  - P
- Freeway
- Street
- Paved Road
- Paved Driveway
- Paved Parking Area
- Parks
- Lake Washington

0 246 493 Feet

1 inch = 492.505795333333 feet

Map Printed: February 20, 2020

Notes

EXHIBIT 5

BUSINESS OF THE CITY COUNCIL
CITY OF MERCER ISLAND

AB 5663
February 18, 2020
Regular Business

AGENDA BILL INFORMATION

TITLE:	AB 5663: Community Facility Code Amendment: Planning Commission Recommendation, Ordinance 20-04; 1st Reading & Adoption	☐ Discussion Only ☒ Action Needed:
RECOMMENDED ACTION:	Adopt Ordinance 20-04	☒ Motion ☒ Ordinance ☐ Resolution

DEPARTMENT:	Community Planning and Development
STAFF:	Evan Maxim, Director
COUNCIL LIAISON:	n/a
EXHIBITS:	1. Planning Commission: Problem Statement 2. Ordinance 20-04 with Attachment A and B
CITY COUNCIL PRIORITY:	n/a

AMOUNT OF EXPENDITURE	$ n/a
AMOUNT BUDGETED	$ n/a
APPROPRIATION REQUIRED	$ n/a

SUMMARY

In November of 2018, the City Council approved the 2018 Comprehensive Plan amendments, which included policy language related to the establishment of a Community Facility zoning designation and related development regulations. In 2019, staff began working with the Planning Commission on draft regulations. This work was "paused" in June of 2019.

After adoption of the 2018 Comprehensive Plan amendments, an appeal was filed to the Growth Management Hearings Board ("GMHB") identifying 35 appeal issues. The City prevailed on 33 out of the 35 issues. One of the issues the City did not prevail on is related to the Community Facility zone amendment process. The GMHB established a compliance date in January 2020. Compliance with the GMHB decision requires that the City to either: A) adopt development regulations related to the Community Facility zone; or B) repeal the 2018 Comprehensive Plan amendments related to the Community Facility zoning designation.

On August 20, 2019, the City Council and Planning Commission held a joint study session (AB 5594) to discuss the proposed Community Facility regulations and zoning designation. Following the joint study session, the City Council asked the Planning Commission to:

1. Review the "problem statement" and determine if an alternative approach is warranted;
2. Explore alternative decision-making processes; and
3. Report back to the City Council for further direction.

The Planning Commission completed this work on January 29, 2020.

PLANNING COMMISSION RECOMMENDATION

The Planning Commission developed a problem statement related to the technical challenges associated with the current approach to regulating community organizations through the residential zoning designation. The Planning Commission then evaluated four different alternative approaches to formulate a recommended approach (Exhibit 1). In summary, the four alternative approaches evaluated include:

Alternative 1: No change to the current regulations;
Alternative 2: A change to the criteria for approval of a Conditional Use Permit ("CUP");
Alternative 3: A change to the CUP approval criteria and development of a tool (Master Plan); and
Alternative 4: Continuing the work that was "paused" in June of 2019.

Following discussion, the Planning Commission developed a three-part recommendation to the City Council:

- **Part A – Discontinue Community Facility zone process:** Discontinue the work on the Community Facility zone. As a reminder, this planning process was "paused" in June of 2019.

- **Part B – Review/update CUP process and pursue code amendments:** Direct the Planning Commission to prepare a code amendment related to the following, as soon as possible:
    - Revise the CUP approval criteria for clarity and to address community concerns.
    - Review the "cap" on Gross Floor Area (GFA) for institutional uses.
    - Review the height limit for institutional uses.

- **Part C – Resume Community Facility zone process at a future date:** Consider re-initiating the code amendment associated with the Community Facility zone at a future date to be determined by the City Council.

The Planning Commission recommended the above three-part approach because in their opinion it represents a relatively narrow set of code amendments that would benefit the City widely. Specifically, the Commission opined that an update to the CUP criteria (as described in Part B) will modernize and clarify the criteria, which will benefit all CUP reviews. Similarly, a targeted amendment now to the GFA "cap" and the height limits, will address the potentially unintended consequences of the 2017 Residential Development Standards amendment, in particular the establishment of a GFA "cap" for non-residential uses in the residential zoning designations. The last component of the recommendation (Part C - to re-initiate the review at a later date), was intended to support a holistic review of the code related to community facilities at a time when there is community support to do so.

RECOMMENDATION

The Planning Commission recommends that the City Council abandon the original Community Facility rezone and development regulations as described previously (Part A). The staff concurs with the Planning Commission recommendation on Part A and further recommends that the City Council suspend the City Council Rule of Procedure 6.3 and approve Ordinance No. 20-04 (Exhibit 2). This ordinance will repeal those portions of the

2018 Comprehensive Plan amendments related to the Community Facilities zone and development regulations and will achieve compliance with the Growth Management Hearings Board (GMHB) decision.

If the City Council desires to review Part B and/or Part C of the Planning Commission recommendations, the staff suggestion is to defer these discussions to a future City Council meeting.

NEXT STEPS

French American School and Stroum Jewish Community Center Code Amendment

In December 2019, the French American School ("FAS") and Stroum Jewish Community Center ("SJCC") notified the City that they were considering applying for a code amendment to be submitted by February 18, 2020. The City received a preliminary draft of this code amendment on February 7, 2020. The complete application for the code amendment was received on February 11, 2020, a day prior to the deadline for completing this packet material.

Based on a preliminary review of the code amendment, the FAS and SJCC application proposes a change to the development standards for the single-family residential zoning designations, specific to gross floor area limits, height limits, and lot coverage regulations. Additional staff time is needed to review the application prior to initiating further discussion with the City Council.

City Council review of the code amendment application will be scheduled for a future meeting and is tentatively planned for March 10, 2020. If the City Council desires to review and discuss Part B and/or Part C of the Planning Commission recommendation, a follow-up discussion may be planned for these items on the same night.

RECOMMENDATION

1. Suspend the City Council Rule of Procedure 6.3, requiring a second reading for an ordinance.
2. Adopt Ordinance No. 20-04, to repeal portions of the 2018 Comprehensive Plan amendments related to the Community Facility zone.

EXHIBIT 6

northwest studio
architects urban designers

1402 3rd ave, no 808, seattle, wa 98101
206.788.8155
www.northweststudio.com

AGENDA

Mtg Date: February 7, 2020
Project: SJCC / FASPS / HNT Joint Campus Master Plan
Subject: Proposed Code Amendment

Approach

1. Update "Regulated Improvements" to bring existing private schools, religious buildings, and community centers into code conformance while allowing property owners the ability to reasonably renovate and develop their properties.
2. Limit the applicability of most amendments to lots that abut commercial zones.

Proposed Amendments

	Pre-Residential Code Update	Residential Code Update (Current Code)	Proposed Amendments (Regulated Improvements Only)
Gross Floor Area (19.02.020.D)	45% of lot area for SF structures only. Regulated Improvements not specifically restricted; governed by height, setbacks, and lot coverage.	40% of lot area for all structures, or: • R-8.4: 5,000 sf, whichever is less. • R-9.6: 8,000 sf, whichever is less. • Etc.	40% of lot area • Allow exceptions for substantially below grade parking structures (less than 4'-0" above grade). • Allow increase for lots less than 3-acres that abut a commercial zone.[1] (See 19.02.060.B.)
Height (19.02.020.E)	30', or 35' measured on the downhill side.	30', measured from average building elevation. Downhill façades measured from existing or finished grade, whichever is lower.	36' • Allow increase to 45' farther than 150' from a public ROW or within 300' of a commercial zone. (See 19.02.060.E.) • Provide method of measurement to allow buildings to respond better to sloping sites. (See 19.02.060.F.)
Lot Coverage (19.02.060)	40%	40%	40%[2] Allow 25% increase for lots that abut a commercial zone (See 19.02.060.C.). Allow exceptions for usable open spaces, such as: • Athletic and similar play fields • Occupiable green roofs or other structured landscaped area. • Grass block access drives solely for the use of emergency vehicles (See 19.02.060.D.)

[1] GFA in the C-O zone: max. building footprint = 35% of lot area; max. height = 36', which allows 3 floors; max. effective GFA as multiple of lot area is 0.35 x 3 = 1.05 times lot area.
[2] Change 19.02.060 from impervious surface to lot coverage. Impervious surfaces are regulated by the MICC Title 15 and construction codes.

EXHIBIT 7

CITY USE ONLY		
PROJECT#	RECEIPT #	FEE
Date Received:		
Received By:		

APPLICATION FOR ZONING CODE TEXT AMENDMENT

Applicant: **G. Richard Hill**
701 5th Avenue
Suite 6600
Seattle, WA 98104
(206) 812-3388

1. Completed Pre-Application:

The applicant has conferred with the Director of Community Planning and Development ("Director") and has reviewed the Application with him. The Director has accordingly advised the applicant that this conference suffices to fulfill the Pre-Application processing requirement.

2. Development Application Sheet:

The completed Development Application Sheet accompanies this Application for Code Amendment.

3. Project Narrative:

This Application for a Mercer Island Zoning Code ("Code") Text Amendment ("Code Amendment") is a non-project, legislative proposal that addresses the unintended consequences of the recent Residential Code Update, as to Regulated Improvements. The Code Amendment would address Gross Floor Area, Height, and Lot Coverage issues to render them compatible with existing Regulated Improvements, and to allow reasonable redevelopment of them. A description of the Approach taken with respect to the drafting of the Code Amendment is set forth on Exhibit A to this Application, as is a Matrix

comparing the Gross Floor Area, Height, and Lot Coverage regulations under the Pre-Residential Code, the Residential Code Update (the current Code), and the Proposed Amendments, which would apply to Regulated Improvements only. The proposed Code Amendment itself is attached as Exhibit B and constitutes a red-line of the current Code provisions indicating where changes are proposed. The Code Amendment is consistent with the Growth Management Act. RCW 36.70A, because it will facilitate development of Regulated Improvements (as defined in the Code), including community centers, recreational facilities, schools and educational uses that serve Mercer Island urban residents within the urban area. Approval of the Code Amendment will facilitate the efficient use of land. The Code Amendment is consistent with the county-wide planning policies for the same reasons. The Code Amendment will further encourage and implement the City's Comprehensive Plan, in particular Land Use Goal 17.4, which recognizes that "social and recreation clubs, schools and religious institutions are predominantly located in single family residential areas of the Island," and that "development regulations should reflect the desire to retain valuable and healthy social, recreational, educational, and religious organizations as community assets which are essential for the mental, physical and spiritual health of Mercer Island."

4. **Title Report:**

The Director has advised that because this is a non-project legislative rezone, no Title Report will be required in connection with this application.

5. **SEPA Checklist:**

A completed non-project SEPA Checklist accompanies this Application.

6. **Fees:**

A fee of $23,559.22 (SEPA @ $2,657.00 + Code Amendment @ $20,902.22) accompanies this Application.

7. **Vicinity Map:**

Because the Code Amendment is a non-project action, the requirement for a Vicinity Map is not applicable.

Dated this 11th day of February 2020.

G. Richard Hill, Applicant

Exhibit A

Approach

1. Update "Regulated Improvements" to bring existing private schools, religious buildings, and community centers into code conformance while allowing property owners the ability to reasonably renovate and develop their properties.
2. Limit the applicability of most amendments to lots that abut commercial zones.

Proposed Amendments

	Pre-Residential Code Update	**Residential Code Update** (Current Code)	**Proposed Amendments** (Regulated Improvements Only)
Gross Floor Area (19.02.020.D)	45% of lot area for SF structures only. Regulated Improvements not specifically restricted; governed by height, setbacks, and lot coverage.	40% of lot area for all structures, or: • R-8.4: 5,000 sf, whichever is less. • R-9.6: 8,000 sf, whichever is less. • Etc.	40% of lot area • Allow exceptions for substantially below grade parking structures (less than 4'-0" above grade). • Allow increase for lots less than 3-acres that abut a commercial zone.[1] (See 19.02.060.B.)
Height (19.02.020.E)	30', or 35' measured on the downhill side.	30', measured from average building elevation. Downhill façades measured from existing or finished grade, whichever is lower.	36' • Allow increase to 45' farther than 150' from a public ROW or within 300' of a commercial zone. (See 19.02.060.E.) • Provide method of measurement to allow buildings to respond better to sloping sites. (See 19.02.060.F.)
Lot Coverage (19.02.060)	40%	40%	40%[2] Allow 25% increase for lots that abut a commercial zone (See 19.02.060.C.). Allow exceptions for usable open spaces, such as: • Athletic and similar play fields • Occupiable green roofs or other structured landscaped area. • Grass block access drives solely for the use of emergency vehicles (See 19.02.060.D.)

[1] GFA in the C-O zone: max. building footprint = 35% of lot area; max. height = 36', which allows 3 floors; max. effective GFA as multiple of lot area is 0.35 x 3 = 1.05 times lot area.

[2] Change 19.02.060 from impervious surface to lot coverage. Impervious surfaces are regulated by the MICC Title 15 and construction codes.

Exhibit B

19.02.005Purpose and applicability.

A. *Purpose.* The purpose of the residential chapter is to identify land uses and to establish development standards that are appropriate within the residential zoning designations. The development standards provide a framework for a site to be developed consistent with the policy direction of the adopted Mercer Island Comprehensive Plan.

B. *Applicability.*

1. The provisions of this chapter shall apply to all development proposals in the R-8.4, R-9.6, R-12, and R-15 zoning designations.

2. Unless otherwise indicated in this chapter, the applicant shall be responsible for the initiation, preparation, and submission of all required plans or other documents prepared in support of or necessary to obtain a permit and to determine compliance with this chapter. (Ord. 17C-15 § 1 (Att. A).

19.02.010Single-family.

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

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

1. Single-family dwelling.

2. Accessory buildings incidental to the main building.

3. Private recreational areas.

4. Public schools accredited or approved by the state for compulsory school attendance, subject to design commission review and all of the following conditions:

a. All structures shall be located at least 35 feet from any abutting property and at least 45 feet from any public right-of-way.

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space per classroom with high schools providing an additional one parking space per 10 students.

c. A one-fourth acre or larger playfield shall be provided in one usable unit abutting or adjacent to the site.

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

a. The home business may make those improvements to the home business normally allowed for single-family residences. For a day care, play equipment and play areas are not allowed in front yards.

b. Only those persons who reside on the premises and one other person shall be permitted to engage in the business on the premises at any one time; provided, that a day care or preschool may have up to three nonresident employees on the premises at any one time. This limitation applies to all owners, managers, staff or volunteers who operate the business.

c. There shall be no exterior storage or display of materials except as otherwise allowed for single-family residences, and no sign advertising the home business located on the premises except as specifically allowed by MICC 19.12.080(B).

d. No offensive noise, vibration, smoke, dust, odor, heat or glare or excessive traffic to and from the premises shall be produced or generated by the home business.

e. The home business shall not involve the use of more than 30 percent of the gross floor area of the residence, not including the allowed basement exclusion area consistent with subsection E of this section and MICC 19.16.010. However, a day care or preschool may use up to 75 percent of said gross floor area.

f. No home business shall be permitted that generates parking demand that cannot be accommodated on the lots consistent with the applicable maximum impervious surface coverage limits of MICC 19.02.060. Parking shall be provided to handle the expected parking demand. In the case of a day care or preschool, parking for residents and employees shall occur on site; resident and employee parking shall not occur on an adjacent street.

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

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

6. Public park subject to the following conditions:

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

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

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

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

7. Semi-private waterfront recreation areas for use by 10 or fewer families, subject to the conditions set out in MICC 19.07.110.

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

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

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

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

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

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

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

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

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

12. Places of worship may have a stage theater program as an accessory use. Stage theater programs are defined as productions of live presentations involving the performances of actors or actresses, singers, dancers, musical groups, or artists. Stage theater programs also include related classes and instructional workshops. Adequate parking must be provided, as determined by the code official.

13. Open space.

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

C. *Conditional Uses.* The following uses are permitted when authorized by the issuance of a conditional use permit when the applicable conditions set forth in this section and in MICC 19.15.040 have been met:

1. Government services, public facilities, utilities, and museums and art exhibitions, subject to the following conditions:

a. All structures shall be located at least 20 feet from any abutting property;

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space for each 200 square feet of gross floor area; and

c. Utilities shall be shielded from abutting properties and streets by a sight obscuring protective strip of trees or shrubs.

2. Private schools accredited or approved by the state for compulsory school attendance, subject to conditions set out in subsection (A)(4) of this section.

3. Places of worship subject to the following conditions:

a. All structures shall be located at least 35 feet from any abutting property.

b. Off-street parking shall be established and maintained at a ratio of one parking space for each five seats in the chapel, nave, sanctuary, or similar worship area.

4. Noncommercial recreational areas, subject to the conditions contained in subsection (A)(6) of this section.

5. Semi-private waterfront recreation areas for use by more than 10 families, subject to conditions set out in MICC 19.07.110.

6. Retirement homes located on property used primarily for a place of worship subject to the following conditions:

a. Retirement home structures shall not occupy more than 20 percent of the lot; provided, the total lot coverage for the retirement home, the place of worship, and all other structures shall not exceed the lot coverage specified in MICC 19.02.060.

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

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

i. Demonstrated need;

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

iii. Nature of the surrounding neighborhood; and

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

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

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

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

a. The bed and breakfast facility shall meet all applicable health, fire, and building codes.

b. Not more than four rooms shall be offered to the public for lodging.

c. There shall be no external modification of any structure that alters the residential nature of the premises.

d. The bed and breakfast shall be the primary residence of the operator.

e. In addition to the parking required set out in MICC 19.02.020(G), one off-street parking space, not located in the lot setbacks, shall be provided for each rental room.

f. Meals shall be made available only to guests, and not to the general public.

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

a. No use or proposed use shall be more intensive than the school activity it replaced. Consideration shall be given to quantifiable data, such as, but not limited to, traffic generation, parking demand, noise, hours of operation;

b. All activities, with the exception of outdoor recreation shall be confined to the interior of the building(s);

c. Exterior modification of the building(s) shall not be permitted if such a modification would result in an increase in the usable area of the building(s);

d. Minor changes in the building exterior, landscaping, signs, and parking may be permitted subject to the review and approval of the design commission; and

e. Off-street parking for all activities at the site shall be provided in existing school parking lots.

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

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

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

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

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

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

b. Signage shall be consistent with the provisions of MICC 19.12.080(B)(3). (Ord. 19C-04 § 1 (Exh. A); Ord. 17C-15 § 1 (Att. A); Ord. 15C-03 § 1; Ord. 09C-04 §§ 1, 2; Ord. 08C-01 § 1; Ord. 05C-16 § 1; Ord. 04C-08 § 9; Ord. 03C-08 § 3; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.020Development standards.

A. *Minimum Net Lot Area.*

R-8.4:	The net lot area shall be at least 8,400 square feet. Lot width shall be at least 60 feet and lot depth shall be at least 80 feet.
R-9.6:	The net lot area shall be at least 9,600 square feet. Lot width shall be at least 75 feet and lot depth shall be at least 80 feet.
R-12:	The net lot area shall be at least 12,000 square feet. Lot width shall be at least 75 feet and lot depth shall be at least 80 feet.
R-15:	The net lot area shall be at least 15,000 square feet. Lot width shall be at least 90 feet and lot depth shall be at least 80 feet.

1. Minimum net lot area requirements do not apply to any lot that came into existence before September 28, 1960. In order to be used as a building site, lots that do not meet minimum net lot area requirements shall comply with MICC 19.01.050(G)(3).

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

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

C. *Yard Requirements.*

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

a. Front yard depth: 20 feet or more.

b. Rear yard depth: 25 feet or more.

c. Side yards shall be provided as follows:

i. *Total Depth.*

(a) For lots with a lot width of 90 feet or less, the sum of the side yards' depth shall be at least 15 feet.

(b) For lots with a lot width of more than 90 feet, the sum of the side yards' depth shall be a width that is equal to at least 17 percent of the lot width.

ii. *Minimum Side Yard Depth.*

(a) The minimum side yard depth abutting an interior lot line is five feet or 33 percent of the aggregate side yard total depth, whichever is greater.

(b) The minimum side yard depth abutting a street is five feet.

iii. *Variable Side Yard Depth Requirement.* For lots with an area of 6,000 square feet or more, the minimum side yard depth abutting an interior lot line shall be the greater of the minimum side yard depth required under subsection (C)(1)(c)(ii) of this section, or as follows:

(a) Single-family dwellings shall provide a minimum side yard depth of seven and one-half feet if the building:

(1) For nongabled roof end buildings, the height is more than 15 feet measured from existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard; or

(2) For gabled roof end buildings, the height is more than 18 feet measured from existing or finished grade, whichever is lower, to the top of the gabled roof end adjoining the side yard.

(b) Single-family dwellings with a height of more than 25 feet measured from the existing or finished grade, whichever is lower, to the top of the exterior wall facade adjoining the side yard shall provide a minimum side yard depth of 10 feet.

2. *Yard Determination.*

a. *Front Yard.*

i. *Front Yard – General.* For lots that are not corner lots or waterfront lots, the front yard shall extend the full width of the lot and is determined using the following sequential approach, in descending order of preference, until a front yard is established:

(a) The yard abutting an improved street from which the lot gains primary access.

(b) The yard abutting the primary entrance to a building.

(c) The orientation of buildings on the surrounding lots and the means of access to the lot.

ii. *Front Yard – Corner Lots.* On corner lots the front yard shall be measured from the narrowest dimension of the lot abutting a street. The yard adjacent to the widest dimension of the lot abutting a street shall be a side yard; provided:

(a) If a setback equivalent to or greater than required for a front yard is provided along the property lines abutting both streets, then only one of the remaining setbacks must be a rear yard.

iii. *Front Yard – Waterfront Lots.* On a waterfront lot, regardless of the location of access to the lot, the front yard may be measured from the property line opposite and generally parallel to the ordinary high water line.

iv. This section shall apply except as provided for in MICC 19.08.030(F)(1).

b. *Rear Yard.* Except as allowed in subsections (C)(2)(a)(ii) and (iii) of this section, the rear yard is the yard opposite the front yard. The rear yard shall extend across the full width of the rear of the lot, and shall be measured between the rear line of the lot and the nearest point of the main building including an enclosed or covered porch. If this definition does not establish a rear yard setback for irregularly shaped lots, the code official shall establish the rear yard based on the following method: The rear yard shall be measured from a line or lines drawn from side lot line(s) to side lot line(s), at least 10 feet in length, parallel to and at a maximum distance from the front lot line.

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

3. *Intrusions into Required Yards.*

a. *Minor Building Elements.*

i. Except as provided in subsection (C)(3)(a)(ii) of this section, porches, chimney(s) and fireplace extensions, window wells, and unroofed, unenclosed outside stairways and decks shall not project more than three feet into any required yard. Eaves shall not protrude more than 18 inches into any required yard.

ii. No penetration shall be allowed into the minimum side yard setback abutting an interior lot line except where an existing flat-roofed house has been built to the interior side yard setback line and the roof is changed to a pitched roof with a minimum pitch of 4:12, the eaves may penetrate up to 18 inches into the side yard setback.

b. *Hardscape and Driveways.* Hardscape and driveways not more than 30 inches above existing grade or finished grade, whichever is lower, may be located in any required yard.

c. *Fences, Retaining Walls and Rockeries.* Fences, retaining walls and rockeries are allowed in required yards as provided in MICC 19.02.050.

d. *Garages and Other Accessory Buildings.* Garages and other accessory buildings are not allowed in required yards, except as provided in MICC 19.02.040.

e. *Heat Pumps, Air Compressors, Air Conditioning Units, and Other Similar Mechanical Equipment.* Heat pumps, air compressors, air conditioning units, and other similar mechanical equipment may be located within any required yard provided they will not exceed the maximum permissible noise levels set forth in WAC 173-60-040, which is hereby incorporated as though fully set forth herein. Any such equipment shall not be located within three feet of any lot line.

f. *Architectural Features.* Detached, freestanding architectural features such as columns or pedestals that designate an entrance to a walkway or driveway and do not exceed 42 inches in height are allowed in required yards.

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

4. *Setback Deviation.* The code official may approve a deviation to front, side, and rear setbacks pursuant to MICC 19.15.040.

D. *Gross Floor Area – Single Family Dwellings.*

1. Except as provided in subsection (D)(3) of this section, the gross floor area of a single-family dwelling shall not exceed:

a. R-8.4: 5,000 square feet or 40 percent of the lot area, whichever is less.

b. R-9.6: 8,000 square feet or 40 percent of the lot area, whichever is less.

c. R-12: 10,000 square feet or 40 percent of the lot area, whichever is less.

d. R-15: 12,000 square feet or 40 percent of the lot area, whichever is less.

This section does not apply to regulated improvements.

2. *Gross Floor Area Calculation.* The gross floor area is the sum of the floor area(s) bounded by the exterior faces of each building on a residential lot, provided:

a. The gross floor area shall be 150 percent of the floor area of that portion of a room(s) with a ceiling height of 12 feet to 16 feet, measured from the floor surface to the ceiling.

b. The gross floor area shall be 200 percent of the floor area of that portion of a room(s) with a ceiling height of more than 16 feet, measured from the floor surface to the ceiling.

c. Staircases shall be counted as a single floor for the first two stories accessed by the staircase. For each additional story above two stories, the staircase shall count as a single floor area. For example, a staircase with a 10-foot by 10-foot dimension that accesses three stories shall be accounted as 200 square feet (100 square feet for the first two stories, and 100 square feet for the third story).

d. For the purposes of calculating allowable gross floor area, lots created in a subdivision through MICC 19.08.030(G), Optional Standards for Development, may apply the square footage from the open space tract to the lot area not to exceed the minimum square footage of the zone in which the lot is located.

3. *Allowances.*

a. The gross floor area for lots with an area of 7,500 square feet or less may be the lesser of 3,000 square feet or 45 percent of the lot area; or

b. If an accessory dwelling unit is proposed, the 40 percent allowed gross floor area may be increased by the lesser of five percentage points or the actual floor area of the proposed accessory dwelling unit, provided:

i. The allowed gross floor area of accessory buildings that are not partially or entirely used for an accessory dwelling unit shall not be increased through the use of this provision;

ii. The lot will contain an accessory dwelling unit associated with the application for a new or remodeled single-family home; and

iii. The total gross floor area shall not exceed 4,500 square feet or 45 percent of the lot area, whichever is less.

E. *Building Height Limit – Single Family Dwellings.*

1. *Maximum Building Height.* No Single Family Dwelling ~~building~~ shall exceed 30 feet in height above the average building elevation to the highest point of the roof.

2. *Maximum Building Height on Downhill Building Facade.* The maximum building facade height on the downhill side of a sloping lot shall not exceed 30 feet in height. The building facade height shall be measured from the existing grade or finished grade,

whichever is lower, at the furthest downhill extent of the proposed building, to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.

3. Antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces, solar panels, and other similar appurtenances may extend to a maximum of five feet above the height allowed for the main structure in subsections (E)(1) and (2) of this section; provided:

a. Solar panels shall be designed to minimize their extension above the maximum allowed height, while still providing the optimum tilt angle for solar exposure.

b. Rooftop railings may not extend above the maximum allowed height for the main structure.

4. The formula for calculating average building elevation is as follows:

Formula:	Average Building Elevation = (Weighted Sum of the Mid-point Elevations) ÷ (Total Length of Wall Segments)
Where:	Weighted Sum of the Mid-point Elevations = The sum of: ((Mid-point Elevation of Each Individual Wall Segment) x (Length of Each Individual Wall Segment))

For example for a house with 10 wall segments:

(Axa) + (Bxb) + (Cxc) + (Dxd) + (Exe) + (Fxf) + (Gxg) + (Hxh) + (Ixi) + (Jxj)

a + b + c + d + e + f + g + h + i + j

Where:	A, B, C, D… = The existing or finished ground elevation, whichever is lower, at midpoint of wall segment.
And:	a, b, c, d… = The length of wall segment measured on outside of wall.

F. *Lot Coverage – Single-Family Dwellings.*

1. *Applicability.* This section shall apply to the development of single-family dwellings including, but not limited to, the remodeling of existing single-family dwellings and construction of new single-family dwellings. This section does not apply to regulated improvements.

2. *Landscaping Objective.*

a. To ensure that landscape design reinforces the natural and wooded character of Mercer Island, complements the site, the architecture of site structures and paved areas, while maintaining the visual appearance of the neighborhood.

b. To ensure that landscape design is based on a strong, unified, coherent, and aesthetically pleasing landscape concept.

c. To ensure that landscape plantings, earth forms, and outdoor spaces are designed to provide a transition between each other and between the built and natural environment.

d. To ensure suitable natural vegetation and landforms, particularly mature trees and topography, are preserved where feasible and integrated into the overall landscape design. Large trees and tree stands should be maintained in lieu of using new plantings.

e. To ensure planting designs include a suitable combination of trees, shrubs, groundcovers, vines, and herbaceous material; include a combination of deciduous and evergreen plant material; emphasize native plant material; provide drought-tolerant species; and exclude invasive species.

3. *Lot Coverage – Landscaping Required.*

a. *Minimum Area Required.* Development proposals for single-family dwellings shall comply with the following standards based on the net lot area:

Lot Slope	**Maximum Lot Coverage (house, driving surfaces, and accessory buildings)**	**Required Landscaping Area**
Less than 15%	40%	60%
15% to less than 30%	35%	65%
30% to 50%	30%	70%
Greater than 50% slope	20%	80%

b. *Hardscape.*

i. A maximum of nine percent of the net lot area may consist of hardscape improvements including, but not limited to, walkways, decks, etc., and provided:

(a) The hardscape for lots with a net lot area of 8,400 square feet or less may be the lesser of 755 square feet or 12 percent of the net lot area.

ii. Hardscape improvements are also permitted in the maximum lot coverage area established in subsection (F)(3)(a) of this section.

c. *Softscape and Driveways.*

i. The required landscaping area in subsection (F)(3)(a) of this section shall consist of softscape improvements, except where used for hardscape improvements pursuant to section (F)(3)(b) of this section.

ii. Driveways and other driving surfaces are prohibited within the landscaping area.

For example, a flat lot with a net area of 10,000 square feet shall provide a minimum 6,000 square feet of landscaped area. Up to 900 square feet of the landscaped area may be used for a walkway, patio, or deck or other hardscape area. The remainder of the area shall be used for softscape improvements, such as landscaping, tree retention, etc.

d. Development proposals for a new single-family home shall remove Japanese knotweed (Polygonum cuspidatum) and Regulated Class A, Regulated Class B, and Regulated Class C weeds identified on the King County Noxious Weed list, as amended, from required landscaping areas established pursuant to subsection (F)(3)(a) of this section. New landscaping associated with new single-family home shall not incorporate any weeds identified on the King County Noxious Weed list, as amended. Provided, that removal shall not be required if the removal will result in increased slope instability or risk of landslide or erosion.

e. *Allowed Adjustments.* A one-time reduction in required landscaping area and an increase in the maximum lot coverage are allowed, provided:

i. The total reduction in the required landscaping area shall not exceed five percentage points, and the total increase in the maximum lot coverage shall not exceed five percentage points; and

ii. The reduction in required landscaping area and increase in maximum lot coverage are associated with:

(a) A development proposal that will result in a single-story single-family dwelling with a wheelchair accessible entry path, and may also include a single-story accessory building; or

(b) A development proposal on a flag lot that, after optimizing driveway routing and minimizing driveway width, requires a driveway that occupies more than 25 percent of the otherwise allowed lot coverage area. The allowed reduction in the required landscaping area and increase in maximum lot coverage shall not exceed five percent, or the area of the driveway in excess of 25 percent of the lot coverage, whichever is less.

For example, a development proposal with a driveway that occupies 27 percent of the otherwise allowed lot coverage may increase the total lot coverage by two percent; and

iii. A recorded notice on title, covenant, easement, or other documentation in a form approved by the city shall be required. The notice on title or other documentation shall describe the basis for the reduced landscaping area and increased lot coverage.

G. *Parking.*

1. *Applicability.* Subsection (G)(2) of this section shall apply to all new construction and remodels where more than 40 percent of the length of the structure's external walls have been intentionally structurally altered.

2. *Parking Required.*

a. Each single-family dwelling with a gross floor area of 3,000 square feet or more shall have at least three parking spaces sufficient in size to park a passenger automobile; provided, at least two of the stalls shall be covered stalls.

b. Each single-family dwelling with a gross floor area of less than 3,000 square feet shall have at least two parking spaces sufficient in size to park a passenger automobile; provided, at least one of the stalls shall be a covered stall.

3. No construction or remodel shall reduce the number of parking spaces on the lot below the number existing prior to the project unless the reduced parking still satisfies the requirements set out above.

4. Except as otherwise provided in this chapter, each lot shall provide parking deemed sufficient by the code official for the use occurring on the lot; provided, any lot that contains 10 or more parking spaces shall also meet the parking lot requirements set out in Appendix A of this development code.

H. *Easements.* Easements shall remain unobstructed.

1. *Vehicular Access Easements.* No structures shall be constructed on or over any vehicular access easement. A minimum five-foot yard setback from the edge of any easement that affords or could afford vehicular access to a property is required for all structures; provided, that improvements such as gates, fences, rockeries, retaining walls and landscaping may be installed within the five-foot yard setback so long as such improvements do not interfere with emergency vehicle access or sight distance for vehicles and pedestrians.

2. *Utility and Other Easements.* No structure shall be constructed on or over any easement for water, sewer, storm drainage, utilities, trail or other public purposes unless it is permitted within the language of the easement or is mutually agreed in writing between the grantee and grantor of the easement.

I. *Large Lots.* The intent of this section is to ensure that the construction of a single-family dwelling on a large lot does not preclude compliance with applicable standards related to subdivision or short subdivision of the large lot. Prior to approval of a new single-family

dwelling and associated site improvements, accessory buildings, and accessory structures on large lots, the applicant shall complete one of the following:

1. *Design for Future Subdivision.* The proposed site design that shall accommodate potential future subdivision of the lot as follows:

a. The proposed site design shall comply with the applicable design requirements of Chapters 19.08, Subdivision, 19.09, Development, and 19.10, Trees, MICC.

b. The proposed site design shall not result in a circumstance that would require the removal of trees identified for retention, as part of a future subdivision.

c. The proposed site design shall not result in a circumstance that would require modifications to wetlands, watercourses, and associated buffers as part of a future subdivision.

d. Approval of a site design that could accommodate a potential future subdivision does not guarantee approval of such future subdivision, nor does it confer or vest any rights to a future subdivision.

2. *Subdivide.* Prior to application for a new single-family dwelling, the property is subdivided or short platted to create all potential lots and building pads permitted by zoning. The proposed single-family dwelling shall be located on a lot and within a building pad resulting from a recorded final plat.

3. *Limit Subdivision.* Record a notice on title, or execute a covenant, easement, or other documentation approved by the city, prohibiting further subdivision of the large lot for a period of five years from the date of final inspection or certificate of occupancy.

J. *Building Pad.* New buildings shall be located within a building pad established pursuant to Chapter 19.09 MICC. Intrusions into yard setbacks authorized pursuant to MICC 19.02.020(C)(3) may be located outside of the boundaries of the building pad. (Ord. 19C-04 § 1 (Exh. A); Ord. 18C-05 § 1 (Att. A); Ord. 17C-15 § 1 (Att. A); Ord. 17C-02 § 1; Ord. 10C-07 § 1; Ord. 09C-17 § 1; Ord. 08C-01 § 1; Ord. 06C-05 § 1; Ord. 05C-12 § 7; Ord. 03C-01 § 3; Ord. 02C-09 § 4; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.030Accessory dwelling units.

A. *Purpose.* It is the purpose of this legislation to implement the policy provisions of the housing element of the city's comprehensive plan by eliminating barriers to accessory dwelling units in single-family residential neighborhoods and provide for affordable housing. Also, to provide homeowners with a means of obtaining rental income, companionship, security and services through tenants in either the accessory dwelling unit or principal unit of the single-family dwelling.

B. *Requirements for Accessory Dwelling Units.* One accessory dwelling unit is permitted as subordinate to an existing single-family dwelling; provided, the following requirements are met:

1. *Owner Occupancy.* Either the principal dwelling unit or the accessory dwelling unit must be occupied by an owner of the property or an immediate family member of the property owner. Owner occupancy is defined as a property owner, as reflected in title records, who makes his or her legal residence at the site, as evidenced by voter registration, vehicle registration, or similar means, and actually resides at the site more than six months out of any given year.

2. *Number of Occupants.* The total number of occupants in both the principal dwelling unit and accessory dwelling unit combined shall not exceed the maximum number established for a family as defined in MICC 19.16.010 plus any live-in household employees of such family.

3. *Subdivision.* Accessory dwelling units shall not be subdivided or otherwise segregated in ownership from the principal dwelling unit.

4. *Size and Scale.* The square footage of the accessory dwelling unit shall be a minimum of 220 square feet and a maximum of 900 square feet, excluding any garage area; provided, the square footage of the accessory dwelling unit shall not exceed 80 percent of the total square footage of the primary dwelling unit, excluding the garage area, as it exists or as it may be modified.

5. *Location.* The accessory dwelling unit may be added to or included within the principal unit, or located in a detached structure.

6. *Entrances.* The single-family dwelling containing the accessory dwelling unit shall have only one entrance on each front or street side of the residence except where more than one entrance existed on or before January 17, 1995.

7. *Additions.* Additions to an existing structure or newly constructed detached structures created for the purpose of developing an accessory dwelling unit shall be designed consistent with the existing roof pitch, siding, and windows of the principal dwelling unit.

8. *Detached Structures.* Accessory dwelling units shall be permitted in a detached structure.

9. *Parking.* All single-family dwellings with an accessory dwelling unit shall meet the parking requirements pursuant to MICC 19.02.020(G) applicable to the dwelling if it did not have such an accessory dwelling unit.

C. *Exceptions – Ceiling Height.* All existing accessory dwelling units that are located within a single-family dwelling, which was legally constructed but does not now comply with current ceiling height requirements of the construction codes set forth in MICC Title 17, shall be allowed to continue in their present form.

D. *Notice on Title.* Approval of the accessory dwelling unit shall be subject to the applicant recording a document with the King County department of records and elections which runs with the land and identifies the address of the property, states that the owner(s) resides in either the principal dwelling unit or the accessory dwelling unit, includes a statement

that the owner(s) will notify any prospective purchasers of the limitations of this section, and provides for the removal of the accessory dwelling unit if any of the requirements of this chapter are violated.

E. *Elimination/Expiration.* Elimination of an accessory dwelling unit may be accomplished by the owner recording a certificate with the King County department of records and elections and development services stating that the accessory dwelling unit no longer exists on the property. (Ord. 18C-08 § 1 (Att A.); Ord. 08C-01 § 1; Ord. 04C-12 § 10; Ord. 99C-13 § 1).

19.02.040Garages, other accessory buildings and accessory structures.

A. Accessory buildings, including garages, are not allowed in required yards except as herein provided.

B. *Attached Accessory Building.* An attached accessory building shall comply with the requirements of this code applicable to the main building.

C. *Detached Accessory Buildings and Accessory Structures.*

1. *Gross Floor Area.*

a. The combined total gross floor area for one or more accessory building(s) shall not exceed 25 percent of the total gross floor area allowed on a lot within applicable zoning designations pursuant to MICC 19.02.020. For example, on a lot where the total allowed gross floor area is 4,000 square feet, the combined total gross floor area for all accessory buildings is 1,000 square feet.

b. The gross floor area for a detached accessory building that is entirely or partially used for an accessory dwelling unit may be increased by the additional floor area authorized pursuant to MICC 19.02.020(D)(3)(b).

2. *Height.*

a. Detached accessory buildings, except for buildings that contain an accessory dwelling unit, are limited to a single story and shall not exceed 17 feet in height above the average building elevation computed from existing grade or finished grade, whichever is lower, to the highest point of the roof. Average building elevation is calculated using the methodology established in MICC 19.02.020(E)(4).

b. Detached accessory buildings that are entirely or partially used for an accessory dwelling unit shall meet the height limits established for the primary building.

3. Detached accessory buildings are not allowed in required yard setbacks; provided, one detached accessory building with a gross floor area of 200 square feet or less and a height of 12 feet or less may be erected in the rear yard setback. If such an accessory building is to be

located less than five feet from any property line, a joint agreement with the adjoining property owner(s) must be executed and recorded with the King County department of records and thereafter filed with the city.

4. *Accessory Structures.* The maximum height of an accessory structure that is not also an accessory building shall not exceed 17 feet. The height of an accessory structure is measured from the top of the structure to the existing grade or finished grade, whichever is lower, directly below the section of the structure being measured.

D. *Garages and Carports.* Garages and carports may be built to within 10 feet of the property line in the front yard; provided:

1. There is greater than four vertical feet measured between the elevation at the bottom of the wall of the building and the ground elevation at the front yard property line where such property line is closest to the building. The elevations of both the intersection of the building and the ground, and the point of the property line closest to the wall of the building, shall be measured using the lower of the existing and finished grade; and

2. The height of such garage or carport shall not exceed 12 feet from existing or finished grade, whichever is lower, for that portion built within the front yard.

E. *Pedestrian Walkways.* Enclosed or covered pedestrian walkways may be used to connect the main building to a garage or carport. Enclosed pedestrian walkways shall not exceed six feet in width and 12 feet in height calculated from finished grade or 30 feet above average building elevation, whichever is less. (Ord. 19C-04 § 1 (Exh. A); Ord. 17C-15 § 1 (Att. A); Ord. 08C-01 § 1; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

19.02.050Fences, retaining walls and rockeries.

A. *Location in Required Yard.* Fences, retaining walls and rockeries may be located within any required yard as specified below.

B. *Location in Street.*

1. *Fences.* No fence shall be located in any improved street. Fences may be allowed in unimproved public streets subject to approval of the city engineer and the granting of an encroachment agreement as required by MICC 19.06.060.

2. *Retaining Walls and Rockeries.* Retaining walls and rockeries may be allowed in any street subject to the approval of the city engineer and the granting of an encroachment agreement covering any public street as required by MICC 19.06.060.

C. *Height Measurement.*

1. *Fences/Gates.* The height of a fence or gate is measured from the top of the fence or gate, including posts, to the existing grade or finished grade, whichever is lower, directly below the section of the fence or gate being measured.

2. *Retaining Walls and Rockeries.* The height of a retaining wall or rockery is measured from the top of the retaining wall or rockery to the existing grade or finished grade, whichever is lower, directly below the retaining wall or rockery.

3. *Multiple Retaining Walls.* Retaining walls outside of required yard setbacks shall be stepped to meet a 1:1 ratio of separation with 45 degrees of grade to be considered separate. For example, two six-foot-tall retaining walls would need to be separated by at least six feet of horizontal distance measured from the toe of the upper wall to the top of the bottom wall, to be considered separate and not combined for maximum height calculations.

D. *Retaining Walls and Rockeries – Requirements.*

1. *Building Permit.* A building permit is required for retaining walls or rockeries not exempted from permit by Section 105.2 of the Construction Administrative Code, Chapter 17.14 MICC.

2. *Engineer.* Any rockery requiring a building permit shall be designed and inspected by a licensed geotechnical engineer.

3. *Drainage Control.* Drainage control of the area behind the rockery shall be provided for all rockeries.

4. *Maximum Height in Required Yard – Cut Slopes.*

a. No retaining walls or rockeries, or any combination of retaining walls or rockeries, to the extent used to protect a cut or cuts into existing grade within any required yard, shall exceed a total of 144 inches in height.

b. All retaining walls and/or rockeries within a required yard shall be included in calculating the maximum height of 144 inches.

c. Retaining walls or rockeries may be topped by a fence as provided in subsection E of this section.

5. *Maximum Height in Required Yard – Fill Slopes.*

a. No retaining walls or rockeries, or any combination of retaining walls or rockeries, to the extent used to raise grade and protect a fill slope, shall result in an increase in the finished grade by more than 72 inches at any point.

b. All retaining walls and/or rockeries within a required yard shall be included in calculating the maximum height of 72 inches.

c. Retaining walls or rockeries may be topped by a fence as provided in subsection E of this section.

E. *Fences and Gates.*

1. *Fences or Gates in Required Yard.*

a. *Height Limits.*

i. *Side and Rear Yards.* Fences and gates are allowed to a maximum height of 72 inches within required side or rear yards, provided the combined height of a fence and retaining wall or rockery for a fill slope authorized pursuant to subsection (D)(5) of this section shall not exceed a total height of 72 inches.

ii. *Front Yards.* Fences, gates, or any combination of retaining walls, rockeries and fences are allowed to a maximum height of 42 inches within required front yards.

b. *Exceptions to Height Limits.*

i. Fences within front yards may be designed to incorporate an open latticework or similar architectural feature at the entrance of a walkway, provided the total height of the entryway feature shall not exceed 90 inches. The open latticework or architectural feature shall be designed such that at least 50 percent of its total surface area consists of evenly distributed open spaces.

ii. Fences or gates located within the front yard may have a maximum height of 72 inches, provided:

(a) The proposed fence or gate is located along a property line contiguous to either: Island Crest Way north of SE 53rd Place, or SE 40th Street between 92nd Avenue SE and 78th Avenue SE; and

(b) The proposed fence or gate is located a minimum of five feet from the street property line and will be screened by landscaping designed to soften the presence of the fence; and

(c) The proposed fence or gate will not create a traffic, pedestrian, or public safety hazard.

2. *Fill/Berms.* No person shall place fill upon which to build a fence unless the total height of the fill plus the fence does not exceed the maximum height allowable for the fence without the fill.

3. *Shorelines.* Fences, rockeries and retaining walls located within any shoreland shall also comply with Chapter 19.07 MICC.

F. *Electric and Barbed Wire Fences.* Electric fences, barbed wire fences, or similar fences that could pose a safety risk are not allowed.

G. *Exceptions.* These provisions do not apply to fences required by state law to enclose public utilities, or to chain link fences enclosing school grounds or public playgrounds, or to screens used for safety measures in public recreation areas such as ballfields. (Ord. 19C-04 § 1 (Exh. A); Ord. 18C-05 § 1 (Att. A); Ord. 17C-15 § 1 (Att. A); Ord. 04C-12 § 11; Ord. 02C-09 § 2).

19.02.060~~Lot coverage~~– Regulated improvements.

A. *Applicability.* This section shall only apply to regulated improvements (for example, schools, noncommercial recreational areas, or religious buildings) in the residential zoning designations of R-8.4, R-9.6, R-12, and R-15.

B. *Gross Floor Area.* The total gross floor area of all structures on a lot shall not exceed:

1. 40% of the gross lot area, except:

a. For lots less than 3 acres that abut a commercial zone, the total gross floor area shall not exceed 75% of the gross lot area.

b. Parking structures or portions of parking structures accessory to conditional uses allowed under section 19.02.010.C and less than 4 feet above finished grade shall not be included in the gross floor area calculation.

C. Maximum ~~Impervious Surface Limits for Lots~~Lot Coverage. The total percentage of ~~a lot that can be covered by impervious surfaces (including buildings)~~ lot coverage is limited by the slope of the lot for all single-family zones as follows, based on the net lot area:

Lot Slope	**Lot Coverage (limit for impervious surfaces)**
Less than 15%	40%*
15% to less than 30%	35%
30% to 50%	30%

Lot Slope	Lot Coverage (limit for impervious surfaces)
Greater than 50% slope	20%

*Public and private schools, religious institutions, private clubs and public facilities (excluding public parks or designated open space) in single-family zones with slopes of less than 15 percent may be covered by the percentage of legally existing impervious surface that existed on May 1, 2006, or may multiply the limits set forth subsection C by 1.25, provided the lot abuts a commercial zone, as determined by the code official.

~~C~~D. *Exemptions.* The following improvements will be exempt from the calculation of the maximum ~~impervious surface~~lot coverage limits set forth in subsection ~~B~~ C of this section:

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

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

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

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

5. *Rockeries/Retaining Walls.* Rockeries and retaining walls shall be exempt from the maximum lot coverage~~impervious surface~~ limits.

6. *Residences for Religious Leaders Located on Properties Used by Places of Worship.*

a. A structure primarily used as a residence for a religious leader provided by its congregation and located on the same lot or lots as the improvements for a church, synagogue, mosque, or other place of worship shall be exempt from the maximum lot coverage~~impervious surface~~ limits, subject to the limitations under subsection (C)(6)(b) of this section. All impervious surface areas directly and commonly associated with the residence such as, but not limited to, the footprint of the residence, an attached or detached garage, a patio and/or deck not otherwise exempted by subsections (C)(1) and (3) of this section, and a driveway not otherwise used for general access to the place of worship, shall be exempt.

b. A residence and its associated impervious improvements, as described above, may only be exempted if 4,999 square feet or less or up to 20 percent of lot area, whichever is less. For these purposes, lot area means the lot or lots on which the place of worship is located.

c. ~~Impervious surface~~ Lot coverage exceeding 60 percent shall not be allowed whether by variance to this section or by this exemption.

7. Unenclosed recreational areas, athletic fields, and similar areas with underdrainage systems, provided the rate of stormwater discharge is limited to that under natural conditions prior to development.

8. The area of green roofs on structures on the lot, provided that the rate of stormwater discharge is limited to that under natural conditions prior to development.

9. Access drives solely for the use of emergency vehicles, provided the driveway surface is constructed of grass block, or similar porous paving material.

~~D~~E. Height. Structure height shall not exceed 36 feet, except that structure height shall not exceed 45 feet father than 150 feet from a public right of way or within than 300 feet of a commercial zone.

F. Height measurement. The calculation of structure height in subsection 19.02.020.E. may be modified, at the discretion of the applicant, as follows to permit the structure to respond to the topography of the lot:

1. Draw the smallest rectangle that encloses the principal structure.

2. Divide one side of the rectangle, chosen by the applicant, into sections at least 15 feet in length using lines that are perpendicular to the chosen side of the rectangle.

3. The sections delineated in this subsection E.2 are considered to extend vertically from the ground to the sky.

4. The maximum height for each section of the structure is measured from the average building elevation for that section of the structure, which is calculated as the average elevation of finished lot grades at the midpoints of the two opposing exterior sides of the rectangle for each section of the structure.

G. *Variance.* Regulated improvements in the R-8.4, R-9.6, R-12, and R-15 zoning designations may request a variance to increase lot coverage ~~impervious surface~~ pursuant to MICC 19.15.230(F). (Ord. 17C-15 § 1 (Att. A)).

19.02.070Swimming pools[1].

A. A swimming pool is not allowed in any front yard.

B. A swimming pool is not allowed closer than five feet from any adjacent property measured from the edge of the water to the property line.

C. A swimming pool located in a public park or noncommercial recreation area shall conform to the setback regulations governing such areas.

D. All fences surrounding outdoor swimming pools shall conform to the requirements of MICC Title 17. (Ord. 04C-12 § 12; Ord. 99C-13 § 1. Formerly 19.02.060).

1Code reviser's note: Ord. 17C-15 added a new Section 19.02.060 (Lot coverage – Regulated improvements). This section has been editorially renumbered to 19.02.070 in order to accommodate the addition of the new section.

EXHIBIT 8

From: /O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7ED30A5234EE4C0B82CA08B70BB10EE9-SCOTT.GREEN
To: EdWeinstein
Cc:
Subject: RE_ SJCC Contract Rezone
Date: 8/12/2016 12:01:12 PM
Attachments:

Hi Ed. I don't think a development agreement would work, unless we amend our code first. That leaves a contract rezone or conditional use permit.

Our code is silent on how to do a contract rezone, and the SJCC's use may not be allowed in the C-O zone (which is what I assume you would be requesting). A contract rezone would also require a comprehensive plan amendment, which would be reviewed sometime in 2017. A code amendment may be required to allow the SJCC use. I assume the use is noncommercial recreation area? What was the use called in your prior permits?

A conditional use permit would work, but I recall you would also need some variances for setbacks and maybe impervious surface?

A final option we discussed was a code amendment to create a "master plan" process (or something like that), which would allow the City to approve the overall layout, uses, etc. and modify development standards as part of that process. This code amendment may not occur until sometime in 2017.

Maybe it would make sense to meet again, with some of my new staff, to discuss the SJCC's plans? Let me know if we could do that sometime next week or the week after.

Thanks,
Scott

From: Ed Weinstein [mailto:edw@weinsteinau.com]
Sent: Thursday, August 11, 2016 9:09 AM
To: Scott Greenberg <Scott.Greenberg@mercergov.org>
Cc: Kim Waldbaum <kmuscatel@aol.com>; Judy Neuman <JudyN@Sjcc.org>
Subject: Re: SJCC Contract Rezone

Scott,
When we met a few months ago, you indicated that you would research the alternatives for a Contract Rezone or a Development Agreement for the Stroum Jewish Community Center. The leadership of the SJCC would like to move ahead with this process, so it is important for our purposes that we sort out your preferred process. Please let me know when we might meet to advance this discussion.

Ed Weinstein, FAIA
Principal
(206) 443-8606 (office)
(206) 454-8487 (direct)

EXHIBIT 9

From: [redacted]
To: Nicole Gaudette; Scott Greenberg
Cc: Judy Neuman; Kim Waldbaum
Subject: Storm Jewish Community Center
Date: 8/23/2016 8:01:39 AM
Attachments:

Scott and Nicole,
Thank you very much for taking the time to meet with me yesterday to discuss alternative entitlement routes for establishing the increased development potential for the Stroum Jewish Community Center. I greatly appreciated that Scott had taken the time to meet previously with Nicole to orient her to the project circumstances and to investigate potential entitlement possibilities. As I indicated at the conclusion of our meeting yesterday afternoon, I am writing this e-mail to document our discussion and to give you both the opportunity to edit my comments if they contradict your recollection of our conversation.

We began the meeting with me giving a brief presentation of the site circumstances and our potential ambitions for the future development of the site. I indicated that we were aware that our impervious surface calculations demonstrated that we were over the 40% threshold for the R-8.4 (47%) and R-9.6 (49%) portions of the site, but below the 60% threshold for the C-O (52%) portion of the site. I also indicated that we were aware, from numerous previous conversations with the City of Mercer Island, that we probably had a parking shortfall for the current uses on the site and that we had been previously advised that both the impervious surface limitations and the parking shortfall would need to be addressed as part of the next phase of development of the site.

In this regard, I then indicated that I assumed that an important component of our entitlement would be a Conditional Use Permit Amendment to the existing Conditional Use Permit. Scott then discussed our need to establish the definition of the existing use for the facility as it would be important for our ongoing entitlement purposes. A quick review of the copies of the existing Conditional Use Permit did not clarify this issue. In a quick discussion, Scott indicated that the use might be best described as a Private Club, which is an Allowable Use in the Residential Zones, but that further research will be required. We all agreed that the resolution of this use issue should not be problematic.

We then discussed the challenges of the impervious surface non-compliance and discussed three alternative scenarios; a Contract Rezone to C-O to increase the maximum impervious surface area to 60%, a variance to the ordinance to exceed the existing 40% maximum impervious surface area for the R-8.4 and R-9.6 parcels, or the purchase of the French American School Parcels to increase the SJCC overall pervious area.

A quick discussion ensued. Regarding the first alternative for the Contract Rezone, Scott indicated further complexities to this approach, especially the City Council review, which would make it a lengthy and potentially contentious process. Regarding the third alternative for the acquisition of the FAS properties, I indicated that this was currently not financially feasible and out of the SJCC's

control. Therefore, we collectively focused on the variance to the impervious surface limitation as the most appropriate mechanism to increase the development potential for the site. Scott indicated that there will be a comprehensive review of the Impervious Surface limitations in the Residential Zones that the City of Mercer Island is intending to take up shortly and that it is conceivable that the area limitations might be increased as part of this process, thereby diminishing the need for a variance. But, we also agreed that the timing and outcome of this process is also indeterminate, so we then agreed that the variance was probably the most effective strategy for addressing the impervious surface non-compliance in the near future.

In relation to these discussions, Scott and Nicole recommended the following actions that we should pursue comprehensively and concurrently:

1. SEPA Threshold Determination
2. Conditional Use Permit Amendment
3. Impervious Surface Variance

The Sepa Threshold Determination is a straightforward process with the determination being made by the City of MI staff, with appeal to the Planning Commission. The CUP Amendment is Heard by the Planning Commission, with an appeal heard by the Hearing Examiner. And, the Variance is reviewed by the Hearing Examiner, with appeals being heard in State Superior Court. None of these processes involve the City Council.

Scott and Nicole proposed that this process be initiated with a Pre-Application meeting previous to filing the individual applications. In addition to the participation of Scott Greenberg, Development Services Group Director, and Nicole Gaudette, Senior Planner, others who might participate include Patrick Yamashita, City Engineer, Ding Ruji, Senior Development Engineer, and Herschel Rostov, Fire Marshall. With the clarification of issues, the application for all three actions could proceed. A Development Application Coversheet should be attached to all three applications.

Scott offered his opinion that this was probably the most expedient and appropriate mechanism for resolving the land use issues associated with the future expansion of the Stroum Jewish Community Center property. He indicated that this process might only require 4-5 months from application to issuance of the SEPA Threshold Determination, the CUP Amendment, and the Impervious Surface Variance. As indicated, there would be no need for review by the City Council. Also, there would be no need for advanced design to be reviewed by the Design Commission as the only design-related issues for the CUP Amendment process would include the approximate size and location of proposed facilities, their use, and their related parking and traffic impacts. Design Commission review would be required as part of the Building Permit process. I assured Scott and Nicole that the SJCC would reach out to adjacent neighbors who live along SE 40th ST. to proactively address their concerns and to propose mitigation strategies previous to the Planning Commission review.

We concluded the meeting with me expressing my appreciation for Scott and Nicole's research and suggestions that led us to consensus agreement for the viability of this approach. I indicated that I would review this recommendation with the SJCC leadership and upon their agreement, I would follow up by scheduling the Pre-Application meeting and the submission of the comprehensive

applications.

Ed Weinstein, FAIA
Principal
(206) 443-8606 (office)
(206) 454-8487 (direct)

2200 Western Avenue, Suite 301 Seattle, WA 98121

EXHIBIT 10

CITY OF MERCER ISLAND
DEVELOPMENT SERVICES GROUP

9611 SE 36TH STREET | MERCER ISLAND, WA 98040
PHONE: 206.275.7605 | www.mercergov.org

CITY USE ONLY		
PERMIT #	RECEIPT #	FEE
ZTR16-002	152501	4263.17
Date Received:	6/16/16	

DEVELOPMENT APPLICATION

Received By: SG 6/16/16

STREET ADDRESS/LOCATION	ZONE
SE 32nd St. & 77th Ave SE	P
COUNTY ASSESSOR PARCEL #'S	**PARCEL SIZE (SQ. FT.)**
1224049068	41,346 sf.

PROPERTY OWNER: City of Mercer Island	ADDRESS: 9611 SE 36th St. M.I 98040	CELL/OFFICE: E-MAIL: 275-7605
PROJECT CONTACT NAME: Lesley Bain	ADDRESS: 1429 12th Ave. Seattle, WA Suite D 98122	CELL/OFFICE: 679-0421 E-MAIL: lesley@weareframework.com
TENANT NAME: Mercer Island Center for the Arts	ADDRESS: P.O. Box 1702	CELL PHONE: 715-7671 E-MAIL:

DECLARATION: I HEREBY STATE THAT I AM THE OWNER OF THE SUBJECT PROPERTY OR I HAVE BEEN AUTHORIZED BY THE OWNER(S) OF THE SUBJECT PROPERTY TO REPRESENT THIS APPLICATION, AND THAT THE INFORMATION FURNISHED BY ME IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Bruce C. Lorig — SIGNATURE

JUNE 16, 2016 — DATE

PROPOSED APPLICATION(S) AND CLEAR DESCRIPTION OF PROPOSAL:

zoning text amendment proposed for P zone

(Please use additional paper if needed) ATTACH RESPONSE TO DECISION CRITERIA IF APPLICABLE

CHECK TYPE OF USE PERMIT(S) REQUESTED (3% Technology Fee is included in fees below):

APPEALS
- ☐ Building (+cost of file preparation) $898.16
- ☐ Land use (+cost of verbatim transcript) $898.16
- ☐ Code Interpretation $898.16

CRITICAL AREAS
- ☐ Determination $2,778.94
- ☐ Reasonable Use Exception $5,560.97

DESIGN REVIEW
- ☐ Administrative Review (of sign & colors) $444.96
- ☐ Administrative Review (of other than sign & colors) $742.63
- ☐ Change to Final Design Approval $742.63
- ☐ Design Commission Study Session $742.63

DESIGN REVIEW & WIRELESS COMMUNICATIONS FACILITIES
- ☐ $0-5,000 $742.63
- ☐ $5,001-25,000 $1,852.97
- ☐ $25,001-50,000 $2,779.97
- ☐ $50,001-$100,000 $4,262.14
- ☐ Over $100,001 Valuation $7,413.94

DEVIATIONS
- ☐ Changes to Antenna requirements $1,854.00
- ☐ Changes to Open Space $1,854.00
- ☐ Fence Height $927.00

DEVIATIONS (Continued)
- ☐ Critical Areas Setback $2,779.97
- ☐ Impervious Surface (5% Lot overage) $2,779.97
- ☐ Shoreline $3,706.97
- ☐ Wet Season Construction Moratorium $966.14

ENVIRONMENTAL REVIEW (SEPA)
- ☐ Checklist: Single Family Residential Use $556.20
- ☐ Checklist: Non-Single Family Residential Use $1,854.00
- ☐ Environmental Impact Statement (Revision = 40% of Fee) $2,779.97

SHORELINE MANAGEMENT
- ☐ Exemption $449.08
- ☐ Permit Revision $741.60
- ☐ Semi-Private Recreation Tract (modification) $741.60
- ☐ Semi-Private Recreation Tract (new) $1,854.00
- ☐ Substantial Dev. Permit $2,779.97

SUBDIVISION LONG PLAT
- ☐ 2-3 Lots $9,267.94
- ☐ 4-5 Lots $12,974.91
- ☐ 6 Lots or greater $16,680.85
- ☐ Subdivision Alteration to Existing Plat $4,633.97
- ☐ Final Subdivision Review $3,706.97
- ☐ Fire Review $126.69/Hr

SUBDIVISION SHORT PLAT
- ☐ Two Lots $4,633.97
- ☐ Three Lots $5,560.97
- ☐ Four Lots $6,486.94
- ☐ Deviation of Acreage Limitations $927.00
- ☐ Short Plat Amendment $2,316.47
- ☐ Final Short Plat Approval $927.00
- ☐ Fire Review $126.69/Hr

VARIANCES (Plus Hearing Examiner Fee)
- ☐ Type 1* $3,706.97
- ☐ Type 2** $1,979.66

OTHER LAND USE
- ☐ Accessory Dwelling Unit (ADU) $186.43
- ☐ Code Interpretation Request (+$149.35/hr. over 6 hrs.) $899.19
- ☐ Comp Plan Amendment (CPA) $4,263.17
- ☐ Conditional Use Permit (CUP) $7,413.94
- ☐ Lot Line Revision $2,779.97
- ☐ Lot Line Consolidation $927.00
- ☐ Noise Variance (+$149.35/hr. over 3 hrs.) $449.08
- ☐ Reclassification of Property (Rezoning) $4,633.97
- ☐ Right-of-Way Encroachment Agreement (Requires Separate ROW Use Permit) $550.02
- ☒ Zoning Code Text Amendment $4,263.17

* Includes all variances of any type or purpose in all zones other than single family residential zone: B,C-O,PBZ,MF-2,MFZL,MF-2L, MF-3,TC,P)

** Includes all variances of any type or purpose in single family residential zone: R-8.4, R-9.6, R-12, R-15)

CITY USE ONLY				
SEPA Categorically Exempt:	Yes	(No)	Permit Fee:	
SEPA Checklist Required:	(Yes)	No	Permit Fee:	
			Total Fees:	

EXHIBIT 11

19.05.010 Public institution – P.

A. Uses Permitted.

1. Government services.

2. Public schools under the administration of Mercer Island School District No. 400 subject to the requirements in subsection F of this section. Subsections B, C and E of this section do not apply to public schools. Uses other than public schools located on land owned by the Mercer Island School District shall comply with applicable provisions of Chapter 19.02 MICC.

3. Public park.

4. Transit facilities including transit stops and associated parking lots.

5. On-site hazardous waste treatment and storage facilities are allowed as accessory uses to a use permitted in this zone. These facilities shall comply with the state siting criteria as set forth in Chapter 173-303 WAC.

6. Wireless communications facilities subject to the conditions set out in MICC 19.06.040.

7. Public Facilities in public parks, with primary uses of theatre, lecture hall, classroom, performing studio, visual arts studio, exhibition gallery, gathering and meeting spaces, café and bar, and accessory functions thereof, subject to the requirements in subsection G of this section.

B. Mercer Island I-90 Right-of-Way Added to Public Institution Zone. The entire area within the Mercer Island I-90 right-of-way, including, but not limited to, the roadway, street overcrossings, lids, open space, recreation areas, linear greenbelts and the park-and-ride lot area as approved by the city on November 14, 1983, and incorporated in the right-of-way plan approved by WSDOT on May 1, 1987, shall be part of the public institution zone. All uses within the I-90 right-of-way shall be maintained as set forth in city-approved I-90 related documents.

C. Design Requirements. Any development within the public institution zone shall comply with the applicable sections of Chapter19.11 MICC, Town Center Development and Design Standards, except as otherwise allowed in subsection G of this section.

D. Parking Requirements. All uses permitted in this zone shall comply with the parking requirements set out in MICC 19.05.020.

E. Structures, excluding stacks, shall not exceed 36 feet or three stories in height, whichever is less; provided, the height of buildings located on sites exceeding five acres may be increased by 12 feet or one story, whichever is less, for each additional two and one-half acres of area when specifically approved by the city council upon recommendation of the design commission in accordance with the following conditions:

1. Approval by the Federal Aviation Administration.

2. Adequate provision for ultimate off-street parking needs.

F. Public Schools. The following requirements apply to public schools: (NOT INCLUDED)

G. Public Facilities in public parks, with primary uses of theatre, lecture hall, classroom, performing studio, visual arts studio, exhibition gallery, gathering and meeting spaces, café and bar, and accessory functions thereof, shall be subject to the following requirements:

Setback from Property	No minimum setback required, except as necessary	

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Lines	to comply with MICC 19.11.030.A.1.[1]	
Height Limit (as defined by MICC 19.16,010[2])	As allowed pursuant to MICC 19.05.010.E.	
Street Standards	The Street Standard requirements of MICC 19.11.120 are inapplicable.	

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19.05.020 Parking requirements.

A. The following parking requirements apply to all uses in the P zone.

B. General Requirements. The following apply except as otherwise required or allowed pursuant to MICC 19.05.020.C.

1. Surfacing and Grading. All off-street parking areas shall be graded and surfaced to a standard comparable to the street which serves the parking area. The parking area shall be developed and completed to the required standards before an occupancy permit for the building to be served is issued.

2. Traffic Control Devices. All traffic control devices such as parking strips designating car stalls, directional arrows or signs, bull rails, curbs and other structures shall be installed and completed as shown on the approved plans. Hard surfaced parking areas shall use paint or similar devices to delineate parking stalls and directional arrows.

3. Design. Parking lot design should conform to the diagrams set out in Appendix A of this development code, unless alternative design standards are approved by the design commission and city engineer.

4. Location. Off-street parking shall be located on the same lot or on an adjoining lot or lots to the building to be served; except, that off-street parking may be located in an area beginning within 500 feet of the building to be served; provided there are no intersecting street between the parking area and building to be served.his requirement does not apply to transit facilities.

5. Ingress and Egress. The city engineer shall have the authority to fix the location and width of vehicular ingress or egress to and from property, and to alter existing ingress and egress as may be required to control street traffic in the interest of public safety and general welfare.

6. Handicapped Standards. Off-street parking shall meet the relevant state design standards for the physically disabled.

7. Compact Vehicles. Up to 50 percent of the required off-street parking spaces may be designed for accommodating compact vehicles. Such parking spaces must be clearly designated as compact stalls. The design commission may increase the percentage of compact stalls permitted if the applicant can demonstrate that no adverse impacts will occur.

8. Loading Space. An off-street loading space, having access to a public street, shall be required adjacent to each building hereafter erected or enlarged. Such loading space shall be of adequate size to accommodate the maximum number and size of vehicles simultaneously loaded or unloaded, in connection with the business or businesses conducted in such building. No part of the truck or van using the loading space may project into the public right-of-way.

[1] MICC 19.11.030.A.1. states: "No minimum setback required except where necessary to provide landscaping, façade modulation, through-block connection or an easement for sidewalk width.

[2] MICC 18.16.010.A defines "Building Height" as "Outside of the Town Center: The vertical distance measure from the average building elevation to the highest point of the roof structure excluding appurtenance. A mezzanine shall not be counted as a story for determining the allowable number of stories when constructed in accordance with the requirements of the construction codes set forth in MICC Title 17."

9. Variances. Notwithstanding any of the minimum parking requirements set out in subsection C of this section, the code official may grant variances from the minimum parking requirements with the approval of the design commission and the city engineer for projects reviewable by the design commission.

C. Minimum Parking Requirements for Specific Uses.

1. Government buildings shall provide one parking space per 200 square feet of gross floor area.

2. Public elementary and middle schools shall provide a minimum of two parking spaces per classroom. Public high schools shall provide a minimum of one parking space per classroom plus an additional one parking space per 10 students. If the parking spaces that would need to be provided as specified above are in excess of the actual parking demands of the school's staff, students, and visitors, the code official may allow a reduction in minimum parking requirements based on a parking analysis prepared by a qualified professional, with the approval of the city engineer and the design commission, for projects reviewable by the design commission.

3. Public Ffacilities ~~and Theaters~~ in public parks shall provide parking as follows:

a. A parking demand study shall be prepared by a professional traffic engineer and approved by the City Engineer determining the parking requirements for the proposed public facility.

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b. The amount of parking required by the approved parking demand study may be met by entirely off-site with a combination of on-street parking and shared off-street parking pursuant to a traffic management plan approved by the City Engineer determining that parking demand for all land uses shall not significantly overlap and that uses will be served by adequate parking if on-street parking and shared parking reductions are authorized.

c. Prior to establishing shared parking, the property owner or owners shall enter into an unrecorded written agreement approved by the code official that can only be terminated upon not less than ninety (90) day notice to the code official, provided that one of the affected property owners has agreed to either enter into a replacement parking contract or make alternative parking arrangements, such as shuttle service, in either case satisfactory to the code official prior to the end of the notice period.

4. Public Facilities shall be exempt from the requirements of MICC 19.05.020.B.4.

D. Mixed Use Parking. In the case of mixed uses, the total requirements for off-street parking facilities shall be the sum of the requirements for the various uses computed separately. Off-street parking facilities for one use shall not be considered as providing required parking facilities for any other use, except as hereinafter specified for cooperative use.

E. Cooperative Parking. Cooperative parking between two or more adjoining property owners is allowed; provided, the code official, with approval from the design commission and city engineer, may reduce the total required spaces by when the applicant has demonstrated that no adverse impact will occur due to the reduced number of stalls.

F. Parking Lot Dimension. All parking areas shall conform to the design standards set out in Appendix A of this development code unless alternative design standards are approved by the design commission and city engineer. (Ord. 14C-06 § 4; Ord. 99C-13 § 1).

EXHIBIT 12

CITY OF MERCER ISLAND

DEVELOPMENT SERVICES GROUP

9611 SE 36TH STREET | MERCER ISLAND, WA 98040
PHONE: 206.275.7605 | www.mercergov.org

CITY USE ONLY		
PERMIT #	RECEIPT #	FEE
CPA 16-001		426.32
Date Received:		

DEVELOPMENT APPLICATION

Received By:

STREET ADDRESS/LOCATION	ZONE
Mercerdale Park - 77th SE & SE 32nd	
COUNTY ASSESSOR PARCEL #'S	PARCEL SIZE (SQ. FT.)
3205 77TH AVE SE	

PROPERTY OWNER: City of Mercer Island	ADDRESS: 9611 SE 36th Street	CELL/OFFICE: 206-236-5300 E-MAIL:
PROJECT CONTACT NAME: Jami Cairnes	ADDRESS: PO Box 1702	CELL/OFFICE: 206-715-7671 E-MAIL: jami@mercerislandarts.org
TENANT NAME: MICA - Joshua Rosenstein, Vice President	ADDRESS	CELL PHONE: E-MAIL: info@mercerislandarts.org

DECLARATION: I HEREBY STATE THAT I AM THE OWNER OF THE SUBJECT PROPERTY OR I HAVE BEEN AUTHORIZED BY THE OWNER(S) OF THE SUBJECT PROPERTY TO REPRESENT THIS APPLICATION, AND THAT THE INFORMATION FURNISHED BY ME IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Joshua Rosenstein — SIGNATURE

9/30/16 — DATE

PROPOSED APPLICATION(S) AND CLEAR DESCRIPTION OF PROPOSAL:

Application for Comprehensive Plan Amendment

(Please use additional paper if needed) ATTACH RESPONSE TO DECISION CRITERIA IF APPLICABLE

CHECK TYPE OF USE PERMIT(S) REQUESTED (3% Technology Fee is included in fees below):

APPEALS		**DESIGN REVIEW Continued**		**SUBDIVISION SHORT PLAT Continued....**	
☐ Building (+cost of file preparation)	$896.16	☐ New Wireless Communications Facility	$6,153.22	☐ Four Lots	$7,692.04
☐ Land use (+cost of verbatim transcript)	$896.16	**DEVIATIONS**		☐ Deviation of Acreage Limitation	$ 927.00
☐ Code Interpretation	$896.16	☐ Changes to Antenna requirements	$1,854.00	☐ Short Plat Amendment	$5,383.81
CRITICAL AREAS		☐ Changes to Open Space	$1,854.00	☐ Final Short Plat Approval	$ 927.00
☐ Determination	$2,778.94	☐ Fence Height	$ 927.00	☐ Fire Review	$126.69/hr
☐ Reasonable Use Exception	$5,560.97	☐ Critical Areas Setback	$2,779.97	**VARIANCES (Plus Hearing Examiner Fee)**	
DESIGN REVIEW		☐ Impervious Surface (5% Lot overage)	$2,779.97	☐ Type 1	$3,706.97
☐ Administrative Review of sign & colors	$ 614.91	☐ Shoreline	$3,706.97	(includes all variances of any type or purpose in all zones other than a single family residential Zone B, C-O, PBZ, MF-2L, MF-3, TC, P)	
☐ Administrative Review of other Sign & Colors	$ 742.63	☐ Wet Season Construction Moratorium	$ 966.14		
		ENVIRONMENTAL REVIEW (SEPA)			
☐ Administrative Review of Development Signs	$ 769.41	☐ Checklist: Single Family Residential Use	$ 556.20	☐ Type 2	$1,979.66
☐ Change to Final Design Approval	$ 742.63	☐ Checklist: Non-Single Family Residential Use	$1,854.00	(includes all variances of any type or purpose in single family residential zones: R-8.4, R9.6, R-12, R-15)	
☐ Design Commission Study Session	$1,538.82	☐ Environmental Impact Statement	$2,779.97	**OTHER LAND USE**	
☐ Design Review - Major		☐ (Revision = 40% of Fee)		☐ Accessory Dwelling Unit	$ 186.43
☐ $ 0-$ 5,000	$1538.82	**SHORELINE MANAGEMENT**		☐ Code Interpretation Request (*plus $149..35/hr over 6 hours*)	$ 922.88
☐ $ 5,001-$ 25,000	$3,076.61	☐ Exemption	$ 449.08		
☐ $25,001-$ 50,000	$3,846.02	☐ Permit Revision	$ 741.60		
☐ $50,001-$100,000	$4,615.43	☐ Semi-Private Recreation Tract (modification)	$ 741.60	☒ Comprehensive Plan Amendment (CPA)	$4,263.17 *
☐ Over $100,000 Valuation	$7,692.04	☐ Semi-Private Recreation Tract (new)	$1,854.00	☐ Conditional Use (CUP)	$7,413.94 $426.3
☐ Design Review - Minor		☐ Substantial Dev. Permit	$2,779.97	☐ Lot Line Revision	$3,076.61
☐ $ 0-$ 5,000	$1,031.03	**SUBDIVISION LONG PLAT**		☐ Lot Consolidation	$3,076.61
☐ $ 5,001-$ 25,000	$2,061.03	☐ Long Plat	$19,229.07	☐ Noise Exception – Type 1	$1,230.85
☐ $25,001-$ 50,000	$2,577.06	☐ Subdivision Alteration to Existing Plat	$ 4,633.97	☐ Noise Exception – Type 2	$ 614.91
☐ $50,001-$100,000	$3,092.06	☐ Final Subdivision Review	$ 4,615.43	☐ Noise Exception – Type 3	$ 461.44
☐ Over $100,000 Valuation	$5,461.06	☐ Fire Review	$126.69/hr	☐ Reclassification of Property (Rezoning)	$4,633.97
☐ Wireless Communications Facilities - 6409 Exemption	$1,538.82	**SUBDIVISION SHORT PLAT**		☐ ROW Encroachment Agreement (*requires separate ROW Use Permit*)	$ 550.02
		☐ Two Lots	$5,383.81	☐ Sign Fee	$ 50.00
		☐ Three Lots	$6,461.19	☐ Zoning Code Text Amendment	$4,263.17

* Includes all variances of any type or purpose in all zones other than single family residential zone: B,C-O,PBZ,MF-2,MF2L,MF-2L, MF-3,TC,P)
** Includes all variances of any type or purpose in single family residential zone: R-8.4, R-9.6, R-12, R-15)

CITY USE ONLY				
SEPA Categorically Exempt:	☐ Yes	☐ No	Permit Fee:	
SEPA Checklist Required:	☐ Yes	☐ No	Permit Fee:	
			Total Fees:	

CITY OF MERCER ISLAND

DEVELOPMENT SERVICES GROUP
9611 SE 36TH STREET | MERCER ISLAND, WA 98040
PHONE: 206.275.7605 | www.mercergov.org
Inspection Requests: Online: www.MyBuildingPermits.com VM: 206.275.7730

Application For A Comprehensive Plan Amendment

A **Comprehensive Plan amendment** is a Legislative Action, which involves the creation, amendment or implementation of policy or law by ordinance. Please refer to Mercer Island City Code (MICC) Section 19.15.050 for details about the Comprehensive Plan amendment process. Comprehensive Plan amendment applications are reviewed in a two-step process:

Step 1: Preliminary Docket Review

Docketing refers to compiling and maintaining a list of suggested changes to the Comprehensive Plan in a manner that will ensure each suggested change will be considered by the City and will be available for review by the public. The following process will be used to create the docket:

A. By September 1, the City will issue notice of the annual Comprehensive Plan amendment cycle for the following calendar year. The amendment request deadline is October 1 (or the following business day if October 1 is a weekend). Proposed amendment requests received after October 1 will not be considered for the following year's Comprehensive Plan amendment process but will be held for the next eligible Comprehensive Plan amendment process.

B. The Code Official will add complete amendment applications to the preliminary docket along with other City-initiated amendments to the Comprehensive Plan.

C. The Planning Commission will review the preliminary docket at a public meeting and make a recommendation on the preliminary docket to the City Council by the end of the year.

D. The City Council will review the preliminary docket at a public meeting. By December 31, the City Council will establish the final docket. Once approved, the final docket defines the work plan and resource needs for the following year's Comprehensive Plan amendments. The City Council's establishment of a final docket of proposed amendments is not subject to appeal.

E. The following criteria shall be used by the Planning Commission and City Council to determine whether a proposed amendment is added to the final docket:
   1. The request has been filed in a timely manner, and either:
      a. State law requires, or a decision of a court or administrative agency has directed, such a change; or
      b. All of the following criteria are met:
         i. The proposed amendment presents a matter appropriately addressed through the Comprehensive Plan;
         ii. The City can provide the resources, including staff and budget, necessary to review the proposal, or resources can be provided by an applicant for an amendment;
         iii. The proposal does not raise policy or land use issues that are more appropriately addressed by an ongoing work program item approved by the City Council;
         iv. The proposal will serve the public interest by implementing specifically identified goals of the Comprehensive Plan or a new approach supporting the City's vision; and

v. The essential elements of the proposal and proposed outcome have not been considered by the City Council in the last 3 years. This time limit may be waived by the City Council, if the proponent establishes that there exists a change in circumstances that justifies the need for the amendment.

Step 2: Final Docket Review

Placement on the final docket does not mean a proposed amendment will be approved. The purpose of the final docket is to allow for further analysis and consideration by the City.

A. All items on the final docket shall be considered concurrently so that the cumulative effect of the various proposals can be ascertained. Proposed amendments may be considered at separate meetings or hearings, so long as the final action taken considers the cumulative effect of all proposed amendments to the Comprehensive Plan.

B. The Code Official will prepare a staff report including recommendations for each proposed amendment. The code official is responsible for developing an environmental review of the combined impacts of all proposed amendments on the final docket, except that applicants seeking a site-specific amendment are responsible for submittal of a SEPA environmental checklist and supporting information. The code official may require an applicant to pay for peer review and/or additional resources needed to review the proposal.

C. The Planning Commission will conduct a public hearing on the final docket and make a recommendation on the proposed amendments and transmit the recommendation to the City Council.

D. The City Council will consider the Planning Commission's recommendations consistent with the criteria set forth in MICC 19.15.020(G)(1) and approve, approve with changes or deny the proposed amendment.

PRE-APPLICATION

Applicants are encouraged to participate in pre-application meetings with City staff. Call Development Services Staff at 206.275.7605 to schedule a pre-application meeting. Meetings with the staff provide an opportunity to discuss the proposal in concept terms, identify the applicable City requirements and the project review process. Meetings or correspondences by the applicant with the neighborhood serve the purpose of informing the neighborhood of the project proposal prior to the formal notice provided by the City.

APPLICATION

All applications for permits or actions by the City shall be submitted on forms provided by the Development Services Group. An application shall contain all information required by the applicable development regulations, and shall include the following information if applicable.

Due to the short time frame to create the final docket, an application for a Comprehensive Plan Amendment will not accepted by the City for submission unless the application has been determined to be complete. If an application is placed on the final docket, the code official will contact the applicant for any additional information or filing fees that are needed, and establish a deadline for submittal.

FILING REQUIREMENTS (REQUIRED)

- ☑ Comprehensive Plan Amendment Application Fee: **See Development and Permit Fee Schedule** A
- ☑ SEPA Environmental Checklist may be required. Development Services Group personnel can assist you in determining if your proposal requires a checklist, which is available online
- ☑ SEPA Environmental Checklist Fee, if applicable: **See Development and Permit Fee Schedule**
- ☑ A detailed description of the proposed amendment in nontechnical terms.
- ☑ Written narrative and response to applicable Decision Criteria (noted above)
- ☑ Vicinity Map (if applicable)

If the proposed Comprehensive Plan amendment is directed at a specific property please also provide the following:

1. ✓ A verified statement by the applicant that the property is the subject of the application, is in the exclusive ownership of the applicant, or that the applicant has submitted the application with the consent of all owners of the property.
2. ✓ A legal description of the site and parcel number.
3. ✓ Site Plan and Vicinity Map to scale.

19.15.050 Comprehensive Plan Amendments

A. Purpose. The Growth Management Act (GMA), chapter 36.70A RCW, requires that the city include within its development regulations a procedure for any interested person to suggest plan amendments. The suggested amendments will be docketed for consideration. The purpose of this section is to establish a procedure for amending the city's comprehensive plan text and maps. Amendments to the comprehensive plan are the means by which the city may modify its 20-year plan for land use, development or growth policies in response to changing City needs or circumstances. All plan amendments will be reviewed in accordance with the GMA, and other applicable state laws, the countywide planning policies, the adopted city of Mercer Island comprehensive plan, and applicable capital facilities plans.

B. Application Requirements. Proposed amendment requests may be submitted by the public, city manager, city department directors or by majority vote of the city council, planning commission or other city board or commission. Proposed amendments submitted by the public shall be accompanied by application forms required by this title and by the code official and the filing fees established by resolution. All application forms for amendments to the comprehensive plan shall include a detailed description of the proposed amendment in nontechnical terms.

C. Frequency of Amendments.
   1. Periodic Review. The comprehensive plan shall be subject to continuing review and evaluation by the city ("periodic review"). The city shall take legislative action to review and, if needed, revise its comprehensive plan to ensure the plan complies with the requirements of the GMA according to the deadlines established in RCW 36.70A.130.
   2. Annual Amendment Cycle. Updates, proposed amendments, or revisions to the comprehensive plan may be considered by the city council no more frequently than once every calendar year as established in this section (the "annual amendment cycle"). During a year when periodic review of the comprehensive plan is required under RCW 36.70A.130, the annual amendment cycle and the periodic review shall be combined.
   3. Annual Amendment Cycle. Updates, proposed amendments, or revisions to the comprehensive plan may be considered by the city council no more frequently than once every calendar year as established in this section (the "annual amendment cycle"). During a year when periodic review of the comprehensive plan is required under RCW 36.70A.130, the annual amendment cycle and the periodic review shall be combined.

D. Docketing of Proposed Amendments. For purpose of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan in a manner that will ensure such suggested changes will be considered by the city and will be available for review by the public. The following process will be used to create the docket:
   1. Preliminary Docket Review. By September 1, the city will issue notice of the annual comprehensive plan amendment cycle for the following calendar year. The amendment request deadline is October 1. Proposed amendment requests received after October 1 will not be considered for the following year's comprehensive plan amendment process but will be held for the next eligible comprehensive plan amendment process.

a. The code official shall compile and maintain for public review a list of suggested amendments and identified deficiencies as received throughout the year.
b. The code official shall review all complete and timely filed applications proposing amendments to the comprehensive plan and place these applications on the preliminary docket along with other city-initiated amendments to the comprehensive plan.
c. The planning commission shall review the preliminary docket at a public meeting and make a recommendation on the preliminary docket to the city council each year.
d. The city council shall review the preliminary docket at a public meeting. By December 31, the city council shall establish the final docket based on the criteria in subsection E. Once approved, the final docket defines the work plan and resource needs for the following year's comprehensive plan amendments.

2. Final Docket Review.
   a. Placement on the final docket does not mean a proposed amendment will be approved. The purpose of the final docket is to allow for further analysis and consideration by the city.
   b. All items on the final docket shall be considered concurrently so that the cumulative effect of the various proposals can be ascertained. Proposed amendments may be considered at separate meetings or hearings, so long as the final action taken considers the cumulative effect of all proposed amendments to the comprehensive plan.
   c. The code official shall review and assess the items placed on the final docket and prepare a staff report including recommendations for each proposed amendment. The code official shall be responsible for developing an environmental review of the combined impacts of all proposed amendments on the final docket, except that applicants seeking a site-specific amendment shall be responsible for submittal of a SEPA environmental checklist and supporting information. The code official may require an applicant to pay for peer review and/or additional resources needed to review the proposal. The code official shall set a date for consideration of the final docket by the planning commission and timely transmit the staff report(s) prior to the scheduled date.
   d. The planning commission shall review the proposed amendments contained in the final docket based on the criteria set forth in MICC 19.15.020(G)(1). The planning commission shall hold at least one public hearing on the proposed amendments. The planning commission shall make a recommendation on the proposed amendments and transmit the recommendation to the city council.
   e. After issuance of the planning commission's recommendation, the code official shall set a date for consideration of the final docket by the city council. The city council shall review the proposed amendments taking into consideration the recommendations of the planning commission and code official. The city council may deny, approve, or modify the planning commission's recommendations consistent with the criteria set forth in MICC 19.15.020(G)(1). The city council's establishment of a final docket of proposed amendments is not appealable.
   f. The planning commission and the city council may hold additional public hearings, meetings, or workshops as warranted by the proposed amendments.

E. Docketing Criteria. The following criteria shall be used to determine whether a proposed amendment is added to the final docket in subsection D:
   1. The request has been filed in a timely manner, and either:
      a. State law requires, or a decision of a court or administrative agency has directed, such a change; or
      b. All of the following criteria are met:
         i. The proposed amendment presents a matter appropriately addressed through the comprehensive plan;

ii. The city can provide the resources, including staff and budget, necessary to review the proposal, or resources can be provided by an applicant for an amendment;
iii. The proposal does not raise policy or land use issues that are more appropriately addressed by an ongoing work program item approved by the city council;
iv. The proposal will serve the public interest by implementing specifically identified goals of the comprehensive plan or a new approach supporting the city's vision; and
v. The essential elements of the proposal and proposed outcome have not been considered by the city council in the last 3 years. This time limit may be waived by the city council, if the proponent establishes that there exists a change in circumstances that justifies the need for the amendment.

F. Combined Comprehensive Plan Amendment and Rezone. In cases where both a comprehensive plan amendment and a rezone are required, both shall be considered together, and all public notice must reflect the dual nature of the request.

G. Expansion of Land Use Map Amendment. The city may propose to expand the geographic scope of an amendment to the comprehensive plan land use map to allow for consideration of adjacent property, similarly situated property, or area-wide impacts. The following criteria shall be used in determining whether to expand the geographic scope of a proposed land use map amendment:
1. The effect of the proposed amendment on the surrounding area or city;
2. The effect of the proposed amendment on the land use and circulation pattern of the surrounding area or city; and
3. The effect of the proposed amendment on the future development of the surrounding area or city.

DECISION CRITERIA SHEET

Describe the requested change to the current Mercer Island Comprehensive Plan. If possible, identify (by section: element, policy or goal) the existing provisions of the Code, which would be changed or identify (by section: element, policy or goal) where the proposed amendment would be located within the existing Comprehensive Plan. Please address the Decision Criteria listed below. These criteria are based on ULDC 19.15.020(G) 1.

Your response does not have to be limited to the space provided below and can be provided in a separate written response.

a. The amendment is consistent with the Growth Management Act, the county-wide planning policies, and the other provisions of the Comprehensive Plan and City policies;

see attached letter for decision criteria responses

b. There exists obvious technical error in the information contained in the Comprehensive Plan, or the amendment addresses changing circumstances of the City as a whole;

c. If the amendment is directed at a specific property, the following additional findings shall be determined:

i. The amendment is compatible with the adjacent land use and development pattern;

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

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

EXHIBIT 34

BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

March 6, 2020

Via Email Only to:
council@mercergov.org
evan.maxim@mercergov.org

Mercer Island City Council
9611 SE 36th St.
Mercer Island, WA 98040

Re: Jewish Community Center, Herzl-Ner Tamid, and French American School proposal to amend the residential code

Dear City Council:

On behalf of our client, the Concerned Neighbors for the Preservation of Our Community, we submit this comment in opposition to the proposal by the Jewish Community Center, Herzl-Ner Tamid, and French American School (hereafter, collectively, "JCC") to amend the residential code.

The JCC failed to explain what plans it has for its property that would require the residential code to be amended. The amendments it proposes would, if adopted, violate the Growth Management Act. As explained below, the amendments are inconsistent with and fail to implement the Comprehensive Plan. The JCC's proposed amendments to the residential code represent another attempt by the JCC to short-circuit the requirements of the Growth Management Act. The proposed amendments should be rejected, not forwarded to the Planning Commission.

In its letter to the Council dated February 25, the JCC describes a "Shared Goal" of "improving [the JCC's] facilities to meet the evolving needs of the Mercer Island community." No further description of this so-called Shared Goal is given. The JCC claims this Shared Goal represents the "general community consensus," but no evidence for that is given, either.

Although no one other than the JCC actually knows what the JCC's so-called Shared Goal is for its property, the JCC nonetheless proposes a major overhaul of the Mercer Island residential code. The JCC's proposal should be rejected.

If the JCC wishes to expand its property, the Growth Management Act provides a clear process for doing so: The City must amend the Comprehensive Plan for residential neighborhoods to allow expansion of major facilities; adopt development regulations in the residential neighborhoods to implement the new vision; and then re-designate and rezone the JCC property.

Last year, the Growth Management Hearings Board rejected an attempt by the City to short-circuit this process with the "Community Facility Zone" re-designation of the JCC property. This latest proposal by the JCC will fare no better, because it makes the same mistake: It fails to follow the planning sequence required by the Growth Management Act.

The City Council should decline to forward the JCC's proposed zoning regulations to the Planning Commission. Instead, the Council should invite the JCC, and the rest of the community, to collaborate on amendments to the Comprehensive Plan—the first step in the process the Growth Management Act requires. Following this process will allow the actual "general community census" to be heard, not a false consensus that only serves one constituent.

I. JCC's proposal

The JCC attempts to downplay the significance of its proposal. The JCC claims it proposes "minor modifications" to the existing provisions relating to gross floor area, height, and lot coverage. The JCC claims that the proposed changes are "narrowly tailored to only to those properties that abut existing commercial zones. As a result, it will not be perceived as a threat to single-family zones in other parts of the city." "That is all," says the JCC's letter. "It is that simple."

That is not all, and it is not that simple. In reality, the JCC's proposal is not a minor modification but a complete overhaul of the rules that currently govern the JCC property. In addition, the impact of the proposal goes beyond the JCC property and extends city-wide.

1. Gross floor area

First, the JCC proposal vastly expands the gross floor area limits in the residential zone as those limits are applied to "regulated improvements." *See* JCC Application, at 13 ("This section [meaning the gross floor area limits] does not apply to regulated improvements").

Currently, the gross floor area of uses in the residential zones are capped at:

a. R-8.4: 5,000 square feet or 40 percent of the lot area, whichever is less.

b. R-9.6: 8,000 square feet or 40 percent of the lot area, whichever is less.

c. R-12: 10,000 square feet or 40 percent of the lot area, whichever is less.

d. R-15: 12,000 square feet or 40 percent of the lot area, whichever is less.

These restrictions preserve open space and view, because, no matter how large a landowner's lot is, the total floor area cannot exceed these limits. The JCC's proposal vastly expands these limits for regulated improvements. Single-family houses would still be subject to the limits.

Regulated improvements include any use allowed in the residential zones except single-family houses (and appurtenant structures), so things like private recreational areas (*e.g.*, outdoor and indoor climbing walls; horseback riding facilities; tennis courts, swimming pools); public schools; home businesses as an accessory use to the residential use; ADUs; special needs group housing; work-release facilities and other transitional housing; day cares as an accessory use; and religious centers. All of these would receive expanded gross floor limits under the JCC proposal.

Under the JCC's proposal, regulated improvements citywide (not just those near commercial zones) would have a 40% lot coverage cap, except lots less than three acres in size abutting a commercial zone would have a 75% lot coverage cap. *See* JCC Application at 25.

This means that large lots could exceed the square footage limits that currently apply, and small lots are granted a much higher cap than currently apply

Contrary to the JCC's claim (JCC letter at 3), the new 40% lot coverage cap applies citywide, not just in lots adjacent to commercial.

A couple of illustrations demonstrates the significant impact of the proposal:

- Currently, a two-acre lot in the R-9.6 zone, and abutting a commercial zone, would be limited to 8,000 square feet of development.

  Under the JCC proposal, that same two-acre lot would have a floor area limit of 65,340 square feet of development, more than eight times as much.[1]

- Currently, a four-acre lot in the R-12 zone would be limited to 10,000 square feet.

  Under the JCC proposal, that same four-acre lot would have a floor area limit of 69,696 square feet, nearly seven times as much. And, this new limit applies anywhere in the city, not just near commercial zones.[2]

2. Height

Currently, all uses in the residential zones, single-family houses and regulated improvements alike, are subject to a 30-foot height limit. The JCC proposal would increase those limits for regulated improvements in the following fashion:

All regulated improvements, citywide, would have a 36-foot height limit.

[1] Calculation: Two acres is 87,120 square feet. 75% of two acres is 63,340 square feet.
[2] Calculation: Four acres is 174,240 square feet. 40% of four acres is 69,696 square feet.

Regulated improvements further than 150 feet from a public right of way would gain a 45-foot height limit.

Regulated improvements 300 feet or closer to a commercial zone would have a 45-foot height limit.

Again, contrary to the JCC's letter, this is a citywide amendment. It does not apply only to the JCC property. Any property more than 150 feet from a public right-of-way, which would likely include properties within subdivisions that have private streets rather than public streets, could take advantage of the new 45-foot height limit for regulated improvements. A 45-foot-tall private, standalone, indoor swimming pool, for example, would be an allowed use under these regulations. (And, if the squash court were on a lot abutting a commercial zone, the squash courts could occupy a floor area consisting of 75% of a three-acre lot. For reference, this is more than double the area of the QFC in Town Center.)

3. Lot Coverage

Currently, all uses in the residential zones, single-family houses and regulated improvements alike, are subject to a 40% lot coverage limit.

The JCC proposal would increase this limit to 50% for schools, religious institutions, private clubs, and public facilities. *See* JCC Application, at 26.

However, the JCC proposal adds that certain uses do not count against the lot coverage limit, including: unenclosed recreational areas, athletic fields, and similar areas with underdrainage systems; green roofs on structures; and access drives for emergency vehicles.

Under these rules, the hypothetical giant, private swimming pool described above would be subject to no lot coverage limits at all, so long as it had a green roof.

II. Violation of the Growth Management Act

The Growth Management Act requires all development regulations to be consistent with, and implement, the Comprehensive Plan. RCW 36.70A.040(3).

"Consistency" means that no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. WAC 365-196-210(8). "Consistency" means that one plan provision or regulation does not preclude achievement of any other plan provision. *Central Wash. Growers Ass'n v. Chelan Cty.*, EWGMHB No. 16-1-0002, FDO (May 19, 2017), at 5.

"Implement" has a more affirmative meaning than merely "consistent." "Implement" connotes not only a lack of conflict but also a sufficient scope to fully carry out the goals, policies, standards and directions contained in the comprehensive plan. WAC 365-196-800(1).

Mercer Island's Comprehensive Plan contains strong protections for the city's residential neighborhood. These protections include:

> **Goal 15**: Mercer Island should remain **principally** a low density, single family residential community.
>
> **Goal 15.1**: Existing land use policies, **which strongly support the preservation of existing conditions in the single-family residential zones**, will continue to apply. Changes to the zoning code or development standards will be accomplished through code amendments
>
> **Goal 17**: With the exception of allowing residential development, commercial designations and permitted uses under current zoning will not change.

The JCC's plan not only fails to implement these policies, it is inconsistent with them. The JCC's plan increases density at the cost of the single-family residential community. The allowance of new buildings, 50% taller and seven or eight times larger in bulk, does not "preserve existing conditions in the single-family residential zones." On the contrary, the allowance for expanded facilities allows large, commercialized structures in the residential zones. As more of these expanded facilities get built over time, the residential zones will cease to be "principally" low-density, single-family communities and will become, instead, commercialized zones characterized by expanded facilities whose height and bulk dominate the surrounding houses. The presence of these expanded structures precludes the neighborhood protection goals cited above from being carried out, which is the definition of inconsistency under the GMA.

In support of its proposal, JCC cites only one goal, 17.4, which says:

> Social and recreation clubs, schools, and religious institutions are predominantly located in single family residential areas of the Island. Development regulation should reflect the desire to retain viable and healthy social, recreational, educational, and religious organizations as community assets which are essential for the mental, physical and spiritual health of Mercer Island.

However, the JCC's proposed regulations do not implement this goal. The JCC's proposed regulations allow not just social clubs, schools, and religious institutions but *all* regulated improvements to take advantage of the increased size limits. Nothing in Goal 17.4 authorizes an increase in these other uses.

Moreover, even Goal 17.4 must still be consistent with the neighbor protection policies cited above. Currently, the code achieves consistency because it provides for the same size limits in the residential zones regardless of use type. Thus, a school in a residential zone is allowed under current regulations, but only if it is limited in size such that it fits in with the neighborhood. This assures that the residential uses do not get overrun by the non-residential uses – in the words of the Plan, that the district remains "principally" single family. The JCC's proposal does away with this careful balance and instead imposes enormous, commercial sized structures in the residential zones, with no attempt made to fit in with the principal, single-family use.

As the examples above show, the JCC's proposal allows for far more than some modest increase, consistent with the long-standing regulations that have governed the single-family neighborhoods for decades. The proposal is, in reality, a total overhaul of the size, scale and bulk of uses allowed

in the neighborhoods. Such a drastic increase is not contemplated in the existing Comprehensive Plan. Implementing such an increase would be inconsistent with, and would fail to implement, the existing Comprehensive Plan, in violation of the GMA.

III. Conclusion

If the JCC is interested in expanding its existing use, it must first obtain a Comprehensive Plan amendment to allow such expanded use, and only then propose development regulations to implement the new vision for Mercer Island's neighborhoods.

There are no short-cuts to this process. It is slow by design. The process is intended to allow for a careful, citywide political dialogue to determine if, in fact, this community really does want to see 45-foot-tall, 60,000-square-foot structures in its single-family residential zones.

The JCC invites the City to ignore all that in the name of a false "general community consensus" that does not actually exist. The City should decline the JCC's invitation to violate the GMA. The Council should not refer the proposed amendment to the Planning Commission.

Very truly yours,

BRICKLIN & NEWMAN, LLP

Alex Sidles
Attorney for the Concerned Neighbors for the Preservation of Our Community

Cc: Client

EXHIBIT 35

From: Rich Hill <rich@mhseattle.com>
Sent: Monday, February 1, 2021 3:30 PM
To: Holly Mercier <holly.mercier@mercergov.org>
Cc: Jeff Thomas <jeff.thomas@mercerisland.gov>; Alison Van Gorp <alison.vangorp@mercergov.org>
Subject: Re: Withdrawal of Development Application for Code Amendment

Holly --

On second thought, could you send the check directly to the JCC?

Amy Lavin
Stroum JCC
3801 E Mercer Way
Mercer Island, WA 98040

Thanks!

Rich

G. Richard Hill
Attorney at Law
McCullough Hill Leary, ps
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Tel: 206.812.3388
Fax: 206.812.3389
rich@mhseattle.com

www.mhseattle.com

From: Holly Mercier <holly.mercier@mercergov.org>
Sent: Monday, February 1, 2021 12:33 PM
To: Rich Hill <rich@mhseattle.com>
Cc: Jeff Thomas <jeff.thomas@mercerisland.gov>; Alison Van Gorp <alison.vangorp@mercergov.org>
Subject: RE: Withdrawal of Development Application for Code Amendment

Sounds good, we'll send the check to your attention. You should expect to see it within two weeks.

Thanks,
Holly

From: Rich Hill <rich@mhseattle.com>
Sent: Monday, February 01, 2021 12:30 PM
To: Holly Mercier <holly.mercier@mercergov.org>
Cc: Jeff Thomas <jeff.thomas@mercerisland.gov>; Alison Van Gorp <alison.vangorp@mercergov.org>
Subject: Re: Withdrawal of Development Application for Code Amendment

Yes please, thanks Holly. I very much appreciate your prompt response.

G. Richard Hill
Attorney at Law
McCullough Hill Leary, ps
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Tel: 206.812.3388
Fax: 206.812.3389
rich@mhseattle.com
www.mhseattle.com

On Feb 1, 2021, at 12:17 PM, Holly Mercier <holly.mercier@mercergov.org> wrote:

Hello Mr. Hill,

I am working on processing the refund for the filing fee discussed in the email below.

The refund check will be made out to the Stroum Jewish Community Center. Should the check be mailed to your attention at 701 Fifth Avenue, Ste. 6600, Seattle, WA 98104?

Thank you,

Holly

Holly Mercier
Permit Services Manager

City of Mercer Island - Community Planning & Development
206.275.7707 | mercerisland.gov/cpd|
<image001.png>

<image002.jpg>

Due to the COVID-19 outbreak, Community Planning and Development has modified our operations. City Hall and the Permit Center are closed to the public. There is no "walk in" permit service; staff are working remotely and services are being continued via remote operations. More information is available on the City's website:www.mercerisland.gov/cpd. Please contact us by phone for general customer support at 206-275-7626.

From: Jeff Thomas
Sent: Monday, February 1, 2021 9:38 AM
To: Rich Hill <rich@mhseattle.com>
Cc: Bio Park <bio.park@mercergov.org>; Jessi Bon <jessi.bon@mercergov.org>
Subject: RE: Withdrawal of Development Application for Code Amendment

Mr. Hill,

Thank-you for the messages - the City is in receipt of both.

Your withdrawal request will be processed as will a full refund for the application fee.

Please allow two to three weeks for refund processing.

Best regards, Jeff Thomas

From: Rich Hill <rich@mhseattle.com>
Sent: Monday, February 1, 2021 9:10 AM
To: Jeff Thomas <jeff.thomas@mercerisland.gov>
Cc: Bio Park <Bio.Park@mercergov.org>; Jessi Bon <jessi.bon@mercergov.org>
Subject: Withdrawal of Development Application for Code Amendment

Jeff --

This confirms the voice mail message I left with you this morning.

As you know, I have submitted a Development Application for Code Amendment. ("Application"). It was stamped received by the Mercer Island Department of Community

Planning and Development ("Planning") on February 11, 2020. It was accompanied by an application filing fee of $23,559.22 ("Filing Fee").

At that time, Evan Maxim, the then Director of Planning, confirmed to the Applicant that the Application was accepted by the City, was complete, and that the Filing Fee that accompanied the Application was for the fee required by the City to accept and process the Application (SEPA @ $2657.00 + Code Amendment @ $20,902.22). Mr. Maxim also confirmed to the Applicant that the filing fee would be returned in the event the Application was withdrawn prior to the City's commencement of processing the Application.

The Application was for a Mercer Island Zoning Code Text Amendment, a non-project legislative proposal to address the unintended consequences of the recent Residential Code Update, as to Regulated Improvements.

To date, the City Council, due to other legislative priorities, has yet to authorize Planning to commence processing the Application.

The Applicant has determined, due to the exigencies of COVID, and in recognition of the priorities of the City Council, that it is appropriate at this time to withdraw the Application. The Applicant reserves the right to re-submit the Application at some future date, either in its current or in some modified form.

Accordingly, and in this light, the Applicant hereby withdraws the Application.

Since, as of this date, the City has not commenced processing the Application, the Applicant also respectfully requests the Filing Fee be returned to the Applicant. The Applicant understands, of course, that if the Application, in its current or in some modified form, is re-submitted, that it will be accompanied by the filing fee required by such a Development Application in effect at the time of re-submission.

Please confirm receipt of this withdrawal of Development Application and that the City accepts its withdrawal.

Your courtesy is appreciated.

Sincerely,

G. Richard Hill, Applicant

G. Richard Hill
Attorney at Law
McCullough Hill Leary, ps

701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Tel: 206.812.3388
Fax: 206.812.3389
rich@mhseattle.com

www.mhseattle.com

EXHIBIT 36

HAJRUDIN KUSTURA, GORDANA LUKIC, MAIDA MEMI SEVIC, Petitioners,
v.
DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.
ENVER MESTROVAC, Petitioner,
v.
DEPARTMENT OF LABOR AND INDUSTRIES and BOARD OF INDUSTRIAL INSURANCE APPEALS, Respondents.
IVAN FERENCAK, Petitioner,
v.
DEPARTMENT OF LABOR AND INDUSTRIES and BOARD OF INDUSTRIAL INSURANCE APPEALS, Respondents.

No. 81478-3
Nos. 81480-5
81481-3
81758-8
81759-6

The Supreme Court Of The State Of Washington

Filed June 17, 2010

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J.M. JOHNSON, J.

J.M. JOHNSON, J. This case requires us to define the contours of government-paid interpreter services for limited English proficiency (LEP) individuals under chapter 2.43 RCW. Petitioners are all LEP individuals who filed workers' compensation claims with the Department of Labor and Industries (Department). The Department determined each worker's compensation benefit, and petitioners appealed those decisions to the Board of Industrial Insurance Appeals (Board). Petitioners proceeded through the appeals process, raising a variety of claims, including a claim for government-paid interpreter services, for all interactions with the Department and the Board during the workers' compensation claims process. The first Court of Appeals decision to address this claim, *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008), found no right to such expansive interpreter services under chapter 2.43 RCW. Relying on *Kustura,* the succeeding Court of Appeals decisions came to the same conclusion.

We hold that nonindigent LEP individuals' statutory right to government-paid interpreter services under chapter 2.43 RCW is triggered when a government agency initiates a legal proceeding involving the LEP

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individual. Here, neither the Department nor the Board initiated a legal proceeding, so the nonindigent petitioners had no statutory right to interpreter services. However, if the Board *in its discretion* appoints an interpreter to assist an LEP party at an appeal hearing, current regulations require the Board to pay for the interpreter's services, and chapter 2.43 RCW requires the Board to permit the interpreter to translate whenever necessary to assist the LEP individual at the hearing. This provision of interpreter services at a board hearing does not depend on indigency nor does it extend beyond the hearing itself. We affirm the result of the Court of Appeals' decisions in *Kustura* and the subsequent cases on the scope of the statutory right to government-paid interpreter services.

Factual and Procedural History

This is a civil case, not a criminal case. Petitioners Hajrudin Kustura, Gordana Lukic, Maida Memisevic, Enver Mestrovac, Ivan Ferencak, Emira Resulovic, and Ferid Masic are LEP individuals who speak Bosnian. Each was injured at his or her workplace, and each filed a claim with the Department seeking a workers' compensation award. The Department investigated to determine petitioners' workers' compensation benefits.

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During the course of the Department's actions, some petitioners received some department-paid interpreter services, but no petitioner received free services for all aspects of the Department's investigation. Petitioners appealed the Department's decisions to a board industrial appeals judge (IAJ). The Department and the Board are separate governmental agencies. Petitioners were not found to be indigent, and all were represented by counsel during the workers' compensation claims process before the Department and the Board.

The IAJ held hearings on the record.[1] Interpreters were provided for the petitioners at these hearings, but interpreter services were not provided by the IAJ for petitioners' communications with counsel and in one case were not provided for some witness testimony. In each case, IAJ decisions were appealed to the full Board, then to the superior court, and, in turn, to the Court of Appeals. The first and lead decision published by the Court of Appeals was *Kustura,* 142 Wn. App. 655.[2] *Kustura* held that chapter 2.43 RCW did not provide petitioners a statutory right to interpreter services paid

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for by the government because petitioners were the "initiating" parties of the administrative proceedings and department workers' compensation determinations are not "legal proceedings" within the meaning of RCW 2.43.020(3). *Id.* at 680.

The *Kustura* decision also held that if the Board, in its discretion, appoints an interpreter at appeal hearings, WAC 263-12-097 and chapter 2.43 RCW require the Board to permit the interpreter to assist throughout the hearing, including translating witness testimony and assisting communication between the LEP individual and his or her attorney. *Id.* at 681. The Court of Appeals decisions in the other cases followed *Kustura*'s analysis and conclusions regarding the proper scope of interpreter services. *Mestrovac v. Dep't of Labor & Indus.,* 142 Wn. App. 693, 176 P.3d 536 (2008); *Ferencak v. Dep't of Labor & Indus.,* 142 Wn. App. 713, 175 P.3d 1109 (2008); *Resulovic v. Dep't of Labor & Indus.,* noted at 144 Wn. App. 1005 (2008); *Masic v. Dep't of Labor and Indus.,* noted at 144 Wn. App. 1008 (2008).[3]

We consolidated petitioners' cases and granted review limited to the question of the scope of the right to government-provided interpreter services

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at the department and board levels. *Kustura v. Dep't of Labor & Indus.,* 165 Wn.2d 1001 (2008). This issue is governed by chapter 2.43 RCW and WAC 263-12-097.

Analysis

Statutory interpretations are questions of law reviewed de novo. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). We note at the outset that the legislature has codified a policy broadly securing the rights of LEP individuals who need interpreter services during legal proceedings. *See* RCW 2.43.010. However, the legislature has also provided specific statutory guidance to define the contours of the rights to government paid services. This specific guidance is directly applicable to the current controversy. "A specific statute will supersede a general one when both apply." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n,* 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) (citing *Gen. Tel. Co. ofNw., Inc. v. Utils. & Transp. Comm'n,* 104 Wn.2d 460, 464, 706 P.2d 625 (1985)). We therefore begin our analysis with the applicable specific statutory provisions. To do otherwise would be to pretend to respect the legislature's intent while ignoring the clearest indication of that intent as codified by the legislature.

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1. Statutory Right to Government-Paid Interpreter Services

RCW 2.43.040 is clear that LEP individuals only have a statutory right to government-paid interpreter services when they are involved in a legal proceeding initiated by the State:

(2) In all *legal proceedings* in which the non-English-speaking person is a party... the cost of providing the interpreter shall be borne by the governmental body *initiating* the legal proceedings.

(3) In other legal proceedings, the cost of providing the interpreter *shall be borne by the non-English-speaking person* unless such person is indigent according to adopted standards of the body.

RCW 2.43.040 (emphasis added). Subsection (2) allocates the cost of interpreter services to the government if the government entity *initiates* an action that is properly characterized as a *legal proceeding,* a term defined by RCW 2.43.020(3). (See *infra* note 7). Thus, for an LEP individual to have a statutory right to interpreter services at government expense, the government action must (1) be initiated by the government entity and (2) satisfy the definition of a "legal proceeding."[4] If the government action is not a legal proceeding or if a legal proceeding is initiated by an LEP, the LEP bears the

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cost of interpreter services. RCW 2.43.040(3).[5]

a. *Initiation of proceedings*

Petitioners do not meet the statutory requirements to be entitled to government-paid interpreter services under RCW 2.43.040 because petitioners initiated claims to both the Department and the Board. When a worker is injured on the job, the statutorily required course of action is for the worker to report the accident to the worker's employer, who in turn is required to report the accident to the Department. RCW 51.28.010(1). However, the legislature has recognized that injured workers generally report their injuries to physicians, who then report to the Department. RCW 51.28.015(1)(a). "Upon receipt of such notice of accident, the [D]epartment shall immediately forward to the worker or his or her beneficiaries or dependents notification, in nontechnical language, of their rights" regarding compensation. RCW 51.28.010(2). The worker may seek workers' compensation benefits by filing a claim with the Department within one year from the date of the accident. RCW 51.28.020,.050. If a worker disagrees

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with the Department's workers' compensation decision, the worker may appeal to the Board. RCW 51.52.050,.060.

Petitioners argue that the Department initiates the workers' compensation decision process by sending information to injured workers and that the Department's action initiates the Board's appeal hearings. These arguments are not an accurate description of the statutory claim and appeal processes.[6] If a worker is injured on the job, the worker is statutorily required to make a report, which is transmitted to the Department. Upon receipt of a report, the Department is statutorily required to send the worker information regarding the worker's rights. These informational disclosures trigger no administrative proceeding and are always preceded and induced by a petitioner's report of an injury. Aside from the worker's accident report triggering the Department's disclosure, neither of these actions has any further legal ramifications for the Department or the claimants. The act that actually triggers and thus initiates the Department's workers' compensation decision process is the worker's act of filing a claim with the Department. As

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the workers/petitioners were the parties who triggered the Department's decision-making process, the Department did not initiate the administrative proceedings involving the petitioners.

Petitioners additionally argue that, upon receiving a report of a workplace injury, the Department conducts an investigation under RCW 51.04.020(6), which requires the investigation of "serious injuries" at the workplace. This argument also fails. There is no indication that any investigations were made until after petitioners filed their claims. Additionally, if such an investigation occurred before a claim was filed, it would not trigger the Department's administrative action; petitioners would still be required to file a claim under RCW 51.28.020 to initiate the claims process. In any event, we decline to read facts into the record merely because they could have occurred, especially where petitioners have had ample opportunity to build the record. Here, the claims process did not and could not begin until the petitioners filed their claims. Only once a claim is filed does the claims process officially begin. Thus, petitioners' claim filings initiated the processes.

Petitioners make no additional arguments that the Board is the initiating

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party of the Board's appeal hearings. In these cases here, petitioners appealed the Department's decisions to the Board, and the Board took no action until moved by the petitioners. Thus, the Board did not initiate the appeal hearings.

Petitioners were denied no statutory right to government-paid interpreter services because neither the Department nor the Board initiated any proceedings involving the petitioners as required by RCW 2.43.040.

b. *Legal Proceeding*

Because of the preceding analysis, it is unnecessary for this court to determine whether the Department's actions were legal proceedings within the statutory definition provided in RCW 2.43.020(3).[7] However, we note that the right under RCW 2.43.040 for LEP individuals to receive government-paid interpreter services requires both (1) that the government entity initiate the action and (2) that the action satisfy the statutory definition of a "legal proceeding." If either of these conditions is not satisfied, then a nonindigent LEP individual is responsible for interpreter costs in administrative

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proceedings under chapter 2.43 RCW.

As RCW 2.43.040 specifically addresses and definitively establishes that petitioners are not statutorily entitled to government-paid interpreter services at the department or board level, we do not analyze the issue under the general policy provisions of RCW 2.43.010.

2. <u>Conditional Right to Government-Paid Interpreter Services</u>

Though petitioners have no statutory right to government-paid interpreter services at either the department or board level, petitioners *do* have a right to paid interpreter services throughout a hearing if the Board *in its discretion* appoints an interpreter at the Board's hearings. This right comes from the interplay between RCW 2.43.030(1) and WAC 263-12-097. RCW 2.43.030(1) defines the scope of the right to an appointed interpreter's services in a legal proceeding:

Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority *shall,* in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person *throughout the proceedings.*

(Emphasis added.) If the Board appoints an interpreter to assist an LEP individual in a legal proceeding, including board hearings, the Board "shall"

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appoint the interpreter to assist the LEP "throughout the proceedings." Here, the Board, in its discretion, decided to appoint interpreters to assist petitioners at their hearings. However, the IAJ forbade interpreter services for some attorney-client communication and, in one case, barred translation of witness testimony other than that of the petitioner. Communicating with counsel and understanding testimony offered during a hearing are both legitimate aspects of a legal proceeding, and the mandatory language of RCW 2.43.030(1) does not permit the Board to appoint an interpreter and then restrict the scope of the interpreter's services during a hearing. *If* the Board appoints an interpreter at appeals hearings, chapter 2.43 RCW requires the Board to allow interpreter services for all aspects of the hearing, including translating attorney-client communications and testimony of all witnesses.[8]

The Board has discretion to appoint and pay for an interpreter at a Board hearing even if not statutorily required to do so. WAC 263-12-097, provided below in pertinent part, provides the contours of this discretion:

(1) When... a non-English-speaking person as defined in

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chapter 2.43 RCW is a party or witness in a hearing before the board of industrial insurance appeals, the industrial appeals judge *may* appoint an interpreter to assist the party or witness throughout the proceeding.

(4) The board of industrial insurance appeals *will* pay interpreter fees and expenses when the industrial appeals judge has determined the need for interpretive services as set forth in subsection (1).

WAC 263-12-097 (emphasis added). Subsection (1)'s permissive language gives the Board discretion to appoint an interpreter for a party or witness, regardless of whether the "initiating the legal proceedings" requirement of RCW 2.43.040(2) is satisfied. However, this discretion does not extend to the scope of services the interpreter may provide, which as stated above, is governed by RCW 2.43.030(1). The mandatory language in WAC 263-12-097(4) requires the Board to pay for interpreter services if the Board elects to appoint an interpreter. Read with RCW 2.43.030(1), the rule that arises is *if* the Board decides to appoint an interpreter, the Board *shall* pay for the associated interpreter costs and must allow the interpreter to translate "whenever necessary to assist the claimant during the hearing."[9] Kustura,

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142 Wn. App. at 681. However, this right is limited to the hearing itself. Nothing in chapter 2.43 RCW or WAC 263-12-097 requires paid interpreter services outside of the actual board hearing. Our holding is thus limited to the hearing itself and does not extend to any hearing preparation, including interviews, medical evaluations, and preparing or responding to discovery.[10]

Conclusion

The petitioners as claimants initiated interactions with both the Department and the Board. As petitioners were not indigent, they therefore had no statutory right to interpreter services at government expense under chapter 2.43 RCW.

However, the Board has discretion to appoint interpreters for LEP individuals. If the Board exercises its discretion and appoints interpreters, RCW 2.43.030(1) requires the Board to allow the interpreter to provide services throughout the proceeding, including attorney-client communications,

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but this requirement does not extend beyond the hearing itself. Finally, WAC 263-12-097 requires the Board to pay for any interpreter services it provides. We affirm the result of the Court of Appeals decisions on the issue of government-provided interpreter services.

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AUTHOR: Justice James M. Johnson

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Susan Owens

ce Charles W. Johnson

Justice Mary E. Fairhurst

ce Gerry L. Alexander

Christine Quinn-Brintnall, Justice Pro Tem.

Notes:

[1.] These hearings were the only hearings held at the administrative level.

[2.] The Court of Appeals in *Kustura* consolidated claims raised by Hajrudin Kustura, Gordana Lukic, and Maida Memisevic.

[3.] *Resulovic* and *Masic* are unpublished opinions governed by RCW 2.06.040.

[4.] It is undisputed that an LEP individual falls within the scope of a "non-English-speaking person" within the meaning of chapter 2.43 RCW.

[5.] Indigent status may require different analysis under the express provision of RCW 2.43.040(3). Because none of the petitioners were found in any of the proceedings below to be indigent, we do not discuss the impact of indigent status upon LEP individuals' rights under chapter 2.43 RCW at this time.

[6.] As the Department and the Board are separate administrative bodies involved in different functions, it is highly questionable whether the actions of one can initiate a proceeding on behalf of the other. However, because the Department did not initiate any proceedings here, we need not reach this question in this case.

[7.] RCW 2.43.020(3) states that a "'[l]egal proceeding' means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof." It is undisputed that the Board's hearings were legal proceedings.

[8.] The Board initially maintained that the IAJ could restrict interpreter assistance from some aspects of the hearing. *See Kustura,* 142 Wn. App. at 681. However, respondents represented at oral argument that the Board's position changed after the *Kustura* decision's holding to the contrary. *See also* Answer of Resp't Bd. of Indus. Ins. Appeals to Pet. [Ferencak] Am. Pet. for Review at 12-13.

[9.] We note that the right to government-paid interpreter services in this context is based on a regulation, not on chapter 2.43 RCW. If the regulation is changed, then the right to government-provided interpreter services at legal proceedings not initiated by the government may be impacted.

[10.] The Court of Appeals arrived at the same holding solely on the grounds of WAC 263-12-097(1). *Kustura,* 142 Wn. App. at 681. Although this subsection does include the phrase "throughout the proceeding," the discretionary "may" in the statute suggests that other readings are possible. We decide this case based on the clearer, mandatory language of RCW 2.43.030(1). We do not address the Court of Appeals' interpretation of WAC 263-12-097.

EXHIBIT 37

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**FUTUREWISE, Appellant,
v.
SPOKANE COUNTY and Growth Management Hearings Board, Respondents.**

No. 38657-1-III

Court of Appeals of Washington, Division 3.

Filed September 22, 2022

Tim Trohimovich, Futurewise, 816 2nd Ave. Ste. 200, Seattle, WA, 98104-1535, for Appellant.

Jessica Alice Pilgrim, Spokane County Prosecutor's Office, 1115 W Broadway Ave., Spokane, WA, 99260-2051, for Respondent.

Lisa M. Petersen, Washington State Attorney General's Office, 800 5th Ave. Ste. 2000, Seattle, WA, 98104-3188, for Other Parties.

OPINION PUBLISHED IN PART

Pennell, J.

¶1 The Growth Management Act (GMA), chapter 36.70A RCW, requires counties of specified populations to produce and regularly update detailed comprehensive land use plans. One of the mandatory components of a comprehensive plan is a capital facilities plan element. The capital facilities element requires an inventory and assessment of public infrastructure with an eye toward development and growth.

¶2 In 2020, Spokane County (County) updated its comprehensive plan (Plan or Comprehensive Plan), including the capital facilities plan element. Futurewise challenges the Plan, citing numerous problems with the capital facilities element. The County concedes several of Futurewise's challenges and agrees this matter must be remanded for reassessment of the capital facilities element. Nevertheless, the parties dispute some of the finer points of what is required of a capital facilities element.

¶3 We accept the parties' agreement that remand is required and we further provide interpretive guidance on the capital facilities plan element for use on remand.

BACKGROUND

¶4 This case turns largely on statutory interpretation. Our discussion of the facts and procedural background is therefore brief.

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On June 23, 2020, the Spokane County Board of Commissioners (Commissioners) passed Resolution No. 20-0129, adopting the statutorily required[1] eight-year[2] periodic update to the County's Comprehensive Plan, including an updated capital facilities plan element and associated developmental regulations.

¶5 Futurewise filed a petition for review of Resolution No. 20-0129 with the Growth Management Hearings Board (Board), contending the resolution violated various provisions of the GMA. The Board upheld the 2020 Comprehensive Plan over Futurewise's objections.

¶6 Futurewise then filed a petition for judicial review of the Board's final decision and order in Thurston County Superior Court. By agreement of the parties, the superior court certified the case under RCW 34.05.518(1)(a) to Division Two of this court for direct review. A Division Three panel considered this appeal with oral argument after receipt of an administrative transfer of the case from Division Two.

ANALYSIS

The GMA

¶7 "The legislature enacted the GMA in 1990 and 1991 largely 'in response to public concerns about rapid population growth and increasing

development pressures in the state.' " *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd* ., 154 Wash.2d 224, 231, 110 P.3d 1132 (2005) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.* , 142 Wash.2d 543, 546, 14 P.3d 133 (2000)). Unlike environmental measures such as the Shoreline Management Act of 1971, chapter 90.58 RCW, and the State Environmental Policy Act, chapter 43.21C RCW, "the GMA was spawned by controversy, not consensus." Richard L. Settle, *Washington's Growth Management Revolution Goes to Court* , 23 SEA. U. L. REV. 5, 34 (1999). As a result, Washington courts have held the statute is "not to be liberally construed." *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.* , 164 Wash.2d 329, 342, 190 P.3d 38 (2008). Strict (as opposed to liberal) construction means we will not rewrite the GMA even if the plain meaning of the statute might appear problematic. *Woods v. Kittitas County* , 162 Wash.2d 597, 614, 174 P.3d 25 (2007).

¶8 A major feature of the GMA is the requirement that counties with specified populations adopt comprehensive growth management plans. Former RCW 36.70A.040 (2014). "The comprehensive plan is the central nervous system of the GMA." Settle, *supra* , at 26. A jurisdiction's comprehensive plan "must contain data and detailed policies to guide the expansion and extension of public facilities and the use and development of land, as prescribed by the [GMA]." *Id* .

¶9 The Growth Management Hearings Board is empowered to adjudicate disputes over GMA compliance and "invalidate noncompliant comprehensive plans." *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.* , 164 Wash.2d at 340, 190 P.3d 38. Judicial review of board actions is governed by the Administrative Procedures Act, chapter 34.05 RCW. *Id* . at 341, 190 P.3d 38. The Board's interpretation of the GMA is accorded substantial weight, but we nevertheless review issues of law de novo. *Id* .

Capital facilities

¶10 One of the mandatory components of any comprehensive plan under the GMA is the capital facilities plan element, which must consist of

> (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess

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> the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

RCW 36.70A.070(3).

¶11 The parties agree Spokane County's 2020 Comprehensive Plan failed to satisfy the required components of the capital facilities plan element. Specifically, they agree the Plan failed to address noncounty-owned public facilities such as schools and failed to include unincorporated rural areas. The parties further agree remand is required to address these deficiencies. However, the parties disagree as to some of the details regarding the capital facilities plan element. We address the areas of disagreement in turn.

1. What is the definition of "capital facilities?"

¶12 The parties dispute the foundational issue of what the legislature meant by "capital facilities," as that term is used in RCW 36.70A.070(3). This term is not defined in the GMA. *See* RCW 36.70A.030. Thus, we must engage in statutory interpretation. "Our goal in interpreting a statute is to ascertain and carry out the intent of the Legislature." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Valley* , 135 Wash.2d 542, 564, 958 P.2d 962 (1998). "We look to the language of the statute, interpreting all provisions in relation to each other, to determine that intent." *Id* . Because the GMA is to be strictly construed, we do not attempt to interpret the GMA in a manner favoring some sort of policy goal. If our legislature has not provided for something in the GMA, "we will not rewrite the statute." *Id* . at 567, 958 P.2d 962.

¶13 The Growth Management Hearings Board has recognized that "public facilities" as defined by RCW 36.70A.030(20) qualify as "capital facilities." *See Wilma v. Stevens County* , No. 06-1-0009c, 2007 WL 1153336, at *15 (E. Wash. Growth Mgmt. Hr'gs Bd. Mar. 12, 2007), codified at WAC 365-196-415(1)(a). While we accord substantial weight to the Board's interpretation of the GMA, its legal proclamations are not binding. *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.* , 176 Wash. App. 555, 565, 309 P.3d 673 (2013). Nevertheless, given the consensus that public facilities are capital facilities and the legislature's choice not to amend the GMA to state otherwise, it appears the legislature has acquiesced in this interpretation. *See Skagit Surveyors* , 135 Wash.2d at 542, 958 P.2d 962.

¶14 While it appears to be well established that "public facilities" as defined by RCW 36.70A.030(20) qualify as "capital facilities" as set forth in RCW 36.70A.070(3), any conclusion that the two terms are synonymous would require impermissible rewriting of the GMA. A well-established rule of statutory construction holds that when the legislature uses different terminology, it intends different definitions. *Densley v. Dep't of Ret. Sys.* , 162 Wash.2d 210, 219, 173 P.3d 885 (2007). Thus, while we accept that all public facilities qualify as capital facilities, we cannot conclude that the reverse holds true.

¶15 Based on the different language used, it appears the legislature intended the term "capital facilities" to include, but not necessarily be limited by, the term "public facilities." We may consult dictionary definitions when a term is left undefined by the legislature. *Newton v. State* , 192 Wash. App. 931, 937, 369 P.3d 511 (2016). Thus, we discern the meaning of the term "capital facilities" by reviewing the definition of "public facilities" along with the dictionary definition applicable to "capital facilities."

¶16 The legislature has defined "public facilities" as including "streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools." RCW 36.70A.030(20).

¶17 Merriam-Webster defines "capital" as "accumulated assets, resources, sources of strength, or advantages utilized to aid in accomplishing an end or furthering a pursuit." WEBSTER'S THIRD NEW INT'L DICTIONARY 332 (1993). "Facility" is defined as

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"something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Id* . at 812-13.

¶18 From the foregoing definitions it necessarily follows that an asset or resource built, constructed, installed, or established to perform a particular function falls within the scope of a capital facility, as contemplated by RCW 36.70A.070(3). This would naturally include the narrower list of "public facilities" contained in RCW 36.70A.030(20), but it would also extend to other facilities built or installed to perform some sort of service identifiable under the GMA, such the "public services" in RCW 36.70A.030(21).[3]

¶19 The language of the capital facilities plan element also indicates the term "capital facilities" refers to fixed, physical assets or resources, not moveable or intangible property such as vehicles or school bus routes. Under RCW 36.70A.070(3)(a), an inventory of capital facilities must show the "locations" of all capital facilities. This requirement makes sense only if one understands the term "capital facility" to refer to a fixed facility that cannot change locations.

¶20 According to Spokane County, the definition of "capital facilities" must further be narrowed to include only those facilities "necessary to support development." The authority cited for the County's claim is RCW 36.70A.020(12), which lists the following as one of the GMA's 13 planning goals: "Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."

¶21 We disagree with the County that RCW 36.70A.020(12) modifies the definition of the term "capital facility." The definition of a "capital facility" as set forth above contemplates that a facility is one that performs some sort of service. As noted above, it stands to reason that the service contemplated by a capital facility under the GMA must be GMA-related, such as the "public services" set forth in RCW 36.70A.030(21). But nothing in the GMA empowers local jurisdictions to exclude capital facilities from the capital facility plan element because the locality deems the facility unnecessary for development. This is contrary to a strict reading of the statute.

¶22 In summary, a "capital facility" as contemplated by RCW 36.70A.070(3) is a fixed, physical facility that has been built, constructed, or installed to perform a service relevant to the considerations at issue in the GMA, such the "public services" listed in RCW 36.70A.030(21). Capital facilities include the "public facilities" listed in RCW 36.70A.030(20), but are not necessarily limited to facilities falling under the "public facilities" definition.

2. Are transportation facilities included as capital facilities under RCW 36.70A.070(3) ?

¶23 The parties take different positions on whether transportation facilities qualify as capital facilities for purposes of RCW 36.70A.070(3). According to Futurewise, transportation facilities fall within the definition of "capital facilities" and thus must be included as part of the capital facilities plan element. The County disagrees.

¶24 Were we to view RCW 36.70A.070(3) in isolation, Futurewise's position would carry some weight. After all, an airport or a transit station is a fixed facility built or installed to provide a government service such as facilitating public transportation. But in interpreting the GMA, we must not look at statutory provisions in isolation. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.* , 142 Wash.2d at 560, 14 P.3d 133. We therefore must assess whether interpreting the capital facilities plan element to include transportation facilities runs contrary to other portions of the GMA.

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¶25 The GMA identifies a specific component of the comprehensive plan as the transportation element. RCW 36.70A.070(6). The transportation element requires an inventory of "air, water, and ground transportation facilities and services." RCW 36.70A.070(6)(a)(iii)(A). It also covers most if not all of the more general components contemplated by the capital facilities plan element contained in RCW 36.70A.070(3). A well-accepted rule of statutory construction is that a specific statute will supersede a general one when both apply. *Kustura v. Dep't of Labor & Indus.* , 169 Wash.2d 81, 88, 233 P.3d 853 (2010). Given the well-established general-specific rule, it appears to be the legislature's intent that transportation facilities need be addressed only in the transportation element of a comprehensive plan (RCW 36.70A.070(6)), not both the transportation and capital facilities elements.

¶26 Had the legislature intended localities to address transportation facilities in both the capital facilities and transportation elements of a comprehensive plan, it would have said so more clearly. Take the example of park and recreation facilities. Like transportation facilities, park and recreation facilities fall under the definition of "capital facilities" as set forth above. Also, like transportation facilities, the legislature has specified that park and recreation facilities must be addressed in their own comprehensive plan element. RCW 36.70A.070(8). Pursuant to the general-specific rule referenced above, one might assume that park and recreation facilities need be addressed only in the park and recreation element. However, in apparent recognition of this assumption, the legislature specifically included park and recreation facilities in the capital facilities plan element. RCW 36.70A.070(3). This double reference makes plain the legislature's intent that park and recreation facilities must be addressed in both elements. In contrast, the legislature did not reference transportation facilities in its discussion of the capital facilities plan element. This difference is significant and suggests the legislature did not intend transportation facilities to be given double treatment within a comprehensive plan. By its plain terms, the language used in RCW 36.70A.070 indicates transportation facilities need be addressed only in the detailed transportation element set forth in RCW 36.70A.070(6).

¶27 Recent amendments to the GMA reinforce our interpretation of the transportation element. Engrossed Senate Substitution Bill 5593, which became effective on June 9, 2022, added subsection (c) to RCW 36.70A.130(3), and permitted counties to revise an urban growth area (UGA) if, during regularly scheduled review, a county determines the patterns of development have created pressure in areas that exceed the available and developable lands within the UGA. *See* LAWS OF 2022, ch. 287. RCW 36.70A.130(3)(c) lists eight requirements that must be met before a county may revise a UGA. One of these requirements is "[t]he transportation element and capital facility plan element have identified the transportation facilities, and public facilities and services needed to serve the urban growth area and the funding to provide the transportation facilities and public facilities and services." RCW 36.70A.130(3)(c)(v). The structure of this sentence indicates the "transportation element" covers "transportation facilities" and the "capital facility plan element" encompasses "public facilities and services."

¶28 Futurewise has not assigned error to the adequacy of the County's transportation element under RCW 36.70A.070(6). Thus, our order on remand does not require reassessment of transportation facilities.

3. What are the ownership requirements of capital facilities?

¶29 As stated above, the capital facilities plan element must include "(a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; [and] (c) the proposed locations and capacities of expanded or new capital facilities ...." RCW 36.70A.070(3).

¶30 Futurewise contends subsections (a) and (b) of RCW 36.70A.070(3) apply to all publicly owned facilities, regardless of whether the county preparing a comprehensive plan is the owner of such a facility. We agree

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with this interpretation of the statute. By its plain terms, subsection (a) refers broadly to all publicly owned facilities. If the legislature had intended to limit the scope of subsection (a) to facilities owned by the county, it would have said so more clearly. In addition, subsection (b) refers to "such capital facilities," i.e., the same scope of facilities set forth in the preceding sentence, subsection (a). Given the wording of subsections (a) and (b),[4] the capital facilities plan element of a comprehensive plan must include facilities such as public schools that are not owned by a county

but nevertheless fall under the category of a facility owned by a public entity.

¶31 But subsection (c) of RCW 36.70A.070(3) is worded differently from subsections (a) and (b). Subsection (c) refers simply to "capital facilities," not publicly owned facilities or "such capital facilities." The Growth Management Hearings Board has consistently interpreted RCW 36.70A.070(3)(c) to apply only to facilities " 'owned and operated by the city or county' " as opposed to any public entity. *Wenatchee Valley Mall P'ship v. Douglas County* , Case No. 96-1-0009, 1996 WL 731191, at *16-17 (E. Wash. Growth Mgmt. Hr'gs Bd. Dec. 10, 1996) ; *Concerned Citizens for Sky Valley v. Snohomish County* , No. 95-3-0068c, 1996 WL 73491, at *49-50 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Mar. 12, 1996). No final enactment of the legislature has ever disturbed this longstanding interpretation.

¶32 There is a rational basis for treating subsection (c) of RCW 36.70A.070(3) differently from subsections (a) and (b). Spokane County has little ability to control the planning and development of other public entities. It makes sense that the County is not required to make plans for expanded or new capital facilities outside its control.

¶33 We adopt the Board's interpretation. Unlike subsections (a) and (b) of RCW 36.70A.070(3) that require an inventory of "existing capital facilities owned by public entities," subsection (c) requires only "the proposed locations and capacities of expanded or new capital facilities."

4. Must the capital facilities element include not only the sources of public money, but also a breakdown of the amounts of money to be secured from each source?

¶34 The capital facilities plan element must include "at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes." RCW 36.70A.070(3)(d). According to Futurewise, the capital facilities element contained in Spokane County's 2020 Comprehensive Plan fails to meet this requirement because it does not include a detailed itemization of the amounts of money to be derived from public sources.

¶35 The plain meaning of RCW 36.70A.070(3)(d) defeats Futurewise's argument. A capital facilities plan element requires a planner to clearly identify only "sources" of public money. There is no requirement for a planning jurisdiction to provide additional information on the specific amounts of public money each source is to provide. To read such a requirement into the GMA would be to improperly add to it. We therefore affirm the Board's determination that Futurewise failed to demonstrate the 2020 Comprehensive Plan's treatment of sources of public money was inadequate.

¶36 We affirm in part, reverse in part, and remand to the Board with instructions that the following corrections be made to the Spokane County Comprehensive Plan:

> • Schools and other publicly owned capital facilities other than transportation facilities must be included within the capital facilities plan element under RCW 36.70A.070(3)(a) and (b).
>
> • The capital facilities plan element must cover Spokane County's entire planning area, not just UGAs, and cannot simply rely on prior capital facility plans without reanalyzing present validity.

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¶37 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Unpublished Text Follows

Whether the capital facilities plan element is internally inconsistent

¶38 Futurewise claims Spokane County's capital facilities plan element is internally inconsistent, in violation of RCW 36.70A.070(3)(e). Specifically, Futurewise points to an implementation schedule in the capital facilities plan indicating there will be a capital facilities plan update every seven years. In contrast, budget forecasts by the County in the Plan cover only five-year or six-year increments. According to Futurewise, this creates a danger of a one-year or two-year gap during which a seven-year comprehensive plan will not have a corresponding budget.

¶39 Futurewise's claim of inconsistency fails. There is a difference between the length of time covered by a budget plan and the schedule for plan updates. At any point in time, Spokane County must have a six-year budget plan in place. RCW 36.70A.070(3)(d). But this does not mean the budget cannot or will not be updated before it expires. Spokane County anticipates updating its budget annually. *See* Admin. Record at 155. This expectation is consistent with regulatory goals that recommend six-year budget plans be updated "at least biennially so financial planning remains sufficiently ahead of the present." WAC 365-196-415(2)(c)(ii). So long as the County regularly updates its six-year budget forecast, the six-year forecast will constantly move forward in time and there will be no danger of a gap between an existing budget and a full update of its Comprehensive Plan.[5]

Public participation under Spokane's zoning code

¶40 The GMA requires covered jurisdictions to allow for early and continuous participation in the development and amendment of comprehensive land use plans. RCW 36.70A.140. Futurewise contends portions of the Spokane County Zoning Code (Zoning Code)[6] fail to comport with this requirement because the provisions do not allow for early and continuous public comment when a proposed plan amendment is initiated by a private party. At issue are sections 14.402.080 and 14.402.100 of the Zoning Code.

¶41 At the time of the Growth Management Hearing Board's decision in this case, the relevant portions of the foregoing codes provided as follows:

> 1. Initiation of the Amendment:
>
> a. The Board[7] or Department of Building and Planning may initiate an amendment to the text of the Zoning Code.
>
> b. An interested party may request that the Board initiate a zoning text amendment by submitting a request to the Department which will then be forwarded to the Board for consideration. A request to initiate an amendment is subject to a nonrefundable review fee. If initiated by the Board the request will be processed by the Department subject to formal application and applicable fees.

Zoning Code 14.402.080(1).

> 2. Initiation of Annual Comprehensive Plan Amendment by the Board, Department or Commission.
>
> The Board, at its discretion, may initiate annual Comprehensive Plan amendments by resolution, including consideration of requests from the Director or Commission. Requests from individuals shall be subject to the requirements under 14.402.100(3) below.
>
> 3. Individual Requests for Initiation of Annual Comprehensive Plan Amendment
>
> Individuals may request initiation of

> an annual Comprehensive Plan Amendment as follows:
>
> a. The individual shall submit a "Request for Initiation of Comprehensive Plan Amendment" subject to a nonrefundable review fee as determined by the Board. The request shall be submitted between November 1st and December 20th or the end of the last business day prior to December 20th, for amendments to be considered in the following year.
>
> b. Upon receipt of the initiation requests, the Department shall conduct a preliminary review of the proposal(s). The preliminary review shall then be forwarded to the Board for consideration in January or as soon as possible thereafter. After consideration by the Board, they may either deny the request or approve the request for consideration in the annual amendment cycle. If the request is denied there will [sic] no further consideration of the request during the amendment cycle. Requests that are approved for further consideration may proceed to the application phase of the process. The Board shall provide their decision by resolution which shall be forwarded to the Department.
>
> c. The Board shall have full sole authority in the determination of initiation and further review of Comprehensive Plan amendment requests.

Former Zoning Code 14.402.100(2)-(3) (2004).

¶42 As Futurewise asserts, the foregoing portions of the Spokane County Zoning Code allowed the Spokane County Board of Commissioners to consider an individual request for an amendment to a comprehensive plan without public input. This is contrary to the requirements of the GMA. However, while this matter was pending review, Spokane County amended Zoning Code 14.402.100 to read as follows:

> 2. Initiation of Annual Comprehensive Plan Amendment by the Board, Department or Commission.
>
> The Board, at its discretion, may initiate annual Comprehensive Plan amendments by resolution, including consideration of requests from the Director or Commission. Requests from individuals shall be subject to the requirements under 14.402.100(3) below.
>
> a. Prior to initiation of a Comprehensive Plan Amendment under this subsection, the Planning Commission shall hold at least one duly noticed public hearing. The Planning Commission shall thereafter forward a recommendation to the Board on whether or not to initiate the requested amendment.
>
> b. After receipt of the Commission's Recommendation, the Board shall hold a public meeting at which they may either approve or deny the initiation of the Comprehensive Plan Amendment.
>
> c. If the request is denied there will [sic] no further consideration of the request during the amendment cycle. Requests that are approved for further consideration may proceed to the application phase of the process. The Board shall provide their decision by resolution which shall be forwarded to the Department.

d. The Board shall have full sole authority in the determination of initiation and further review of Comprehensive Plan amendment requests.

3. Individual Requests for Initiation of Annual Comprehensive Plan Amendment

Individuals may request initiation of an annual Comprehensive Plan Amendment as follows:

a. The individual shall submit a "Request for Initiation of a Comprehensive Plan Amendment" subject to a nonrefundable review fee as determined by the Board. The request shall be submitted between November 1st and December 20th or the end of the last business day prior to December 20th, for amendments to be considered in the following year.

b. Upon receipt of the initiation requests, the Department shall conduct a preliminary review of the proposal(s). The preliminary review shall then be forwarded to the Planning Commission for consideration and recommendation at a duly noticed Public Hearing in March or as soon as possible thereafter. The Planning Commission will thereafter forward a recommendation to the Board on whether or not to initiate the proposed amendment.

c. After receipt of the Commission's Recommendation, the Board shall hold a meeting at which they may either deny the request or approve the request for consideration in the annual amendment cycle. If the request is denied there will [sic] no further consideration of the request during the amendment cycle. Requests that are approved for further consideration may proceed to the application phase of the process. The Board shall provide their decision by resolution which shall be forwarded to the Department.

d. The Board shall have full sole authority in the determination and initiation and further review of Comprehensive Plan amendment requests.

Zoning Code 14.402.100(2)-(3).[8]

¶43 According to Spokane County, the amendment to Zoning Code 14.402.100 moots Futurewise's concerns regarding the Zoning Code's failure to provide for early public participation regarding amendment proposals submitted by individuals. We agree. The amendments to Zoning Code 14.402.100(2) and (3) make plain a public hearing must take place regarding all proposed comprehensive plan amendments, regardless of whether the amendment is initiated by the County or an outside individual. Under Zoning Code 14.402.100(3)(b), all individual requests for amendments will be to the Spokane County Planning Commission for consideration at a public hearing. At the hearing, the Planning Commission will formulate a recommendation regarding the request and then forward the recommendation to the Spokane County Board of Commissioners. The Commissioners must then act on the Planning Commission's recommendation at a subsequent public hearing as set forth in Zoning Code 14.402.100(3)(c). This process allows for early and continuous public participation prior to any action accepting or rejecting the proposed amendment. This is fully consistent with the public participation requirements of the GMA.

¶44 Futurewise claims the amendments to the code are inadequate because they do not change Zoning Code 14.402.080(1). Futurewise appears

to argue this section still allows the Commissioners to consider individual requests for amendments outside of a public hearing process. We disagree. Zoning Code 14.402.080(1) does not allow for an end-run around the public participation process set forth in Zoning Code 14.402.100(3). All Zoning Code 14.402.080(1) does is identify the fact that proposals for amendments may be made internally by the Commissioners or the Spokane County Building and Planning Department or externally by an interested party. Zoning Code 14.402.080(1) does not address the process for how proposed amendments are considered. The process for consideration is set forth in Zoning Code 14.402.100(3), as set forth above.[9] Futurewise fails to specify how the process set forth in the amendments to Zoning Code 14.402.100(3) exclude public participation. We therefore agree with the County that this aspect of Futurewise's appeal is moot.

Geiger Spur

¶45 Futurewise and the County agree that disputes over the Geiger Spur are now moot. We therefore need not consider this aspect of Futurewise's challenge to the Plan.

Other conceded assignments of error

¶46 Futurewise and Spokane County agree that, as to the majority of Futurewise's assignments of error, the Board failed to recognize that the capital facilities plan element must be performed county wide and cannot simply rely on prior assumptions or assessments. We accept these concessions.

ORDER ON REMAND

¶47 Pursuant to the foregoing analysis and the parties' agreement, we affirm in part, reverse in part, and remand to the Board with instructions that the following corrections be made to the Spokane County Comprehensive Plan:

> • Schools and other publicly owned capital facilities other than transportation facilities must be included within the capital facilities plan element under RCW 36.70A.070(3)(a) and (b).
>
> • The capital facilities plan element must cover Spokane County's entire planning area, not just UGAs, and cannot simply rely on prior capital facility plans without reanalyzing present validity.

End of Unpublished Text

WE CONCUR:

Sidoway, C.J.

Lawrence-Berrey, J.

Notes:

[1] *See* RCW 36.70A.130(4) ; former RCW 36.70A.130(5) (2020).

[2] Spokane County's previous comprehensive plan had been adopted in 2007; however, no update to this plan was approved until 2020.

[3] "Public services" are defined to "include fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services." RCW 36.70A.030(21).

[4] The parties agree RCW 36.70A.070(3)(b) implicitly requires Spokane County to set level of service standards for capital facilities in order to forecast future needs. We accept this agreement, and further note that as RCW 36.70A.070(3)(b) applies to all publicly owned capital facilities, on remand the County is required to set level of service standards for all such facilities.

[5] The parties also make reference to a strategy set forth in the appendix to the Spokane County Comprehensive Plan, that mentions yearly updates to the capital facilities plan. The County

claims this statement is a recommendation, not a directive. We agree. *See* Spokane County Comprehensive Plan, App. A, at A-3, https://spokanecounty.org/DocumentCenter/View/36241/Comp-Plan-2020?bidId= (Implementation strategies are recommendations "that *may* be used by the County to facilitate accomplishing the goals and policies within the Comprehensive Plan.") (emphasis added).

[6] The Zoning Code is available in its entirety at https://www.spokanecounty.org/DocumentCenter/View/26429/2021-Zone-Code?bidId=.

[7] As used in the Zoning Code, "Board" refers to the Spokane County Board of Commissioners. Zoning Code 14.300.100.

[8] The amendments to the Spokane County Zoning Code have been appended as Attachment A to the County's second supplemental brief, filed on July 20, 2022.

[9] Similarly, the flow chart set forth in Zoning Code 14.402.140 does not provide a method for avoiding the public hearing requirements of Zoning Code 14.402.100(3). The flow chart must be read in conjunction with Zoning Code 14.402.100(3), which specifies public hearings must take place before any decisions are made regarding proposed plan amendments.

EXHIBIT 38

495 P.3d 257

LAKESIDE INDUSTRIES, INC., Appellant,
v.
WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.

No. 81502-4-I

Court of Appeals of Washington, Division 1.

FILED September 13, 2021

Brett S. Durbin, Lane Powell PC, 1420 5th Ave. Ste. 4200, Seattle, WA, 98101-2375, Callie Anne Castillo, Lane Powell, P.O. Box 91302, Seattle, WA, 98111-9402, for Appellant.

Heidi A. Irvin, Andrew J. Krawczyk, Atty. Generals Office/Revenue & Finance D, P.O. Box 40123, Olympia, WA, 98504-0123, for Respondent.

PUBLISHED OPINION

Bowman, J.

¶1 Lakeside Industries Inc. is an asphalt manufacturer and retailer that uses much of its product for its own public road construction activities. Lakeside appealed the Department of Revenue's (DOR's) specific written instructions that Lakeside must utilize comparable sales instead of a "cost basis" method to calculate the amount of asphalt use-tax owed. DOR upheld the written instructions, and Lakeside petitioned for judicial review under the Administrative Procedure Act (APA), chapter 34.05 RCW, in King County Superior Court. The court dismissed the petition for lack of subject matter jurisdiction and failure to state a claim upon which the court can grant relief because Lakeside sought relief under the APA instead of Title 82 RCW, and did not follow the statutory requirements to appeal a tax matter. We conclude the trial court erred by dismissing Lakeside's petition for lack of subject matter jurisdiction, but affirm the dismissal for failure to state a claim.

FACTS

¶2 Lakeside is an asphalt manufacturer, retailer, and paver. It uses much of its asphalt on its own public road construction projects. Lakeside must pay a "use tax" on the value of the self-manufactured asphalt utilized in their projects. RCW 82.12.010(7)(b) ; WAC 458-20-171. To calculate the use tax, the value of the asphalt is based on "sales at comparable locations in [Washington] [S]tate of similar products of like quality and character, in similar quantities, under comparable conditions of sale, to comparable purchasers." WAC 458-20-112(3). If no comparable sales exist, Lakeside may use the cost of manufacturing the asphalt to determine its value. WAC 458-20-112(3).

¶3 According to Lakeside, very few comparable sales exist because of the hundreds of different types of asphalt they manufacture, and because sales are influenced by job specification, location, conditions, and market forces. As a result, Lakeside has historically relied on the "cost basis" method to calculate its use tax, and DOR has accepted its valuation.

¶4 In June 2018, DOR performed a partial audit of Lakeside's vehicle sales for January 1, 2014 to March 31, 2018. The partial audit led to no tax adjustment or assessment of additional taxes for vehicle sales. But along with the audit results, DOR issued "specific written instructions,"[1] directing Lakeside to use comparable sales to calculate the value of its self-manufactured asphalt used in future public construction projects. The instructions informed Lakeside it could no longer calculate value on a cost basis.

[495 P.3d 260]

¶5 Lakeside petitioned DOR for "an adjudication and the withdrawal" of the instructions, seeking both formal review under the APA and informal administrative review under WAC 458-20-100. Lakeside argued that DOR could not issue specific written instructions as part of an unrelated audit and that the instructions were arbitrary and capricious because they were not based on

Lakeside's "actual records," which showed no comparable sales for asphalt.

¶6 DOR conducted an informal administrative review, the only type available for rulings on future tax liability. See WAC 458-20-100(1)(a). A tax review officer from DOR's Administrative Review and Hearings Division held a hearing on Lakeside's petition and issued Determination No. 19-0219 (Wash. Dep't of Revenue, Admin. Review & Hr'gs Div., Aug. 28, 2019) (unpublished). The determination upheld the written instruction with modifications. It also authorized Lakeside to seek a "Letter Ruling" from DOR approving a return to the cost-basis method if Lakeside "ceases to have comparable sales." But Lakeside would have to "include copies of one year of invoices to substantiate its Letter Ruling request."

¶7 Lakeside petitioned for reconsideration. A tax review officer issued Determination No. 19-0219R (Wash. Dep't of Revenue, Admin. Review & Hr'gs Div., Dec. 20. 2019) (unpublished), denying Lakeside's petition but revising the effective date of the written instructions. The decision became DOR's final action and remains "binding"

> until the facts change, the applicable statute or rule changes, or is ruled invalid by a published appellate court decision not subject to review, [DOR] publicly announces a change in the policy upon which these instructions are based, or [DOR] notifies the taxpayer in writing that these instructions are no longer valid.

¶8 Lakeside then petitioned the King County Superior Court for judicial review under the APA. Lakeside asked the court to set aside Determination No. 19-0219R and DOR's written instructions. DOR moved to dismiss Lakeside's petition under CR 12(b)(1), (3), and (6), claiming the case "was filed at the wrong time, in the wrong county, and under the wrong statute."

¶9 The court granted the motion to dismiss under CR 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The court noted that case law establishes "there's no mechanism for direct judicial review of [DOR]'s denial of a ruling request," and access to court review requires taxes be "paid ... in full." The court dismissed the case "for failure to follow the [Title 82 RCW] statutory requirements for a challenge such as the one that's before the court."

¶10 Lakeside appeals.

ANALYSIS

¶11 Lakeside argues the trial court erred in dismissing its petition under CR 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which the court can grant relief. Whether a court has subject matter jurisdiction is a question of law reviewed de novo. Young v. Clark, 149 Wash.2d 130, 132, 65 P.3d 1192 (2003). We also review de novo a trial court's ruling to dismiss for failure to state a claim. Kinney v. Cook, 159 Wash.2d 837, 842, 154 P.3d 206 (2007).

Subject Matter Jurisdiction

¶12 Lakeside claims the trial court erred by dismissing its petition under CR 12(b)(1) because the legislature "authorized superior courts to review excise tax controversies under Title 82 RCW." We agree.

¶13 "Generally speaking, jurisdiction is the power of a court to hear and determine a case." In re Marriage of Buecking, 179 Wash.2d 438, 447, 316 P.3d 999 (2013). "Subject matter jurisdiction" refers to "the court's ability to entertain a type of case." Buecking, 179 Wash.2d at 448, 316 P.3d 999. Under the Washington Constitution, the superior court has original jurisdiction in all cases that involve "the legality of any tax," and appellate jurisdiction in cases "as may be prescribed by law." Art. IV, § 6. Title 82 RCW confers appellate jurisdiction over tax related matters to the superior court. See RCW 82.32.180 ; RCW 82.03.180.

[495 P.3d 261]

¶14 The legislature cannot restrict the court's jurisdiction where the constitution has specifically conferred dominion to the court. Buecking, 179 Wash.2d at 448, 316 P.3d 999. But the legislature may direct "in what manner, and in what courts, suits may be brought against the state." WASH. CONST. art. II, § 26. And it can "establish certain conditions precedent before suit can be brought against the [s]tate." McDevitt v. Harborview Med. Ctr., 179 Wash.2d 59, 66, 316 P.3d 469 (2013). This is particularly true when a party seeks the court's appellate jurisdiction rather than original jurisdiction. See ZDI Gaming Inc. v. State ex rel. Wash. Gambling Comm'n, 173 Wash.2d 608, 619, 268 P.3d 929 (2012) ("[T]he legislature has greater power to sculpt the appellate jurisdiction of the individual superior courts.").

¶15 The legislature has established two paths under Title 82 RCW by which a party may access the superior court's appellate jurisdiction for tax related matters. First, a party, "having paid any tax as required and feeling aggrieved by the amount of the tax," may appeal directly to Thurston County Superior Court. RCW 82.32.180. Alternatively, a party can first seek administrative review by the Washington State Board of Tax Appeals, and then appeal to the superior court. RCW 82.03.180. If the party is appealing from a formal administrative hearing, the APA governs judicial review. RCW 82.03.180 ; RCW 34.05.510. When, as here, a party appeals an informal administrative decision, judicial review occurs under RCW 82.03.180. No matter the path a tax payer follows to judicial review, "the taxpayer shall have first paid in full the contested tax, together with all penalties and interest." RCW 82.03.180 ; RCW 82.32.150, .180.[2]

¶16 DOR argues the superior court lacked subject matter jurisdiction to hear Lakeside's appeal of DOR's decision because Lakeside failed to pay its taxes before seeking judicial review. But statutory limitations on the exercise of a court's jurisdiction do not have the effect of depriving the court of its jurisdiction altogether. Buecking, 179 Wash.2d at 449, 316 P.3d 999. Either a court has subject matter jurisdiction or it does not. Williams v. Leone & Keeble, Inc., 171 Wash.2d 726, 730, 254 P.3d 818 (2011). Instead, statutory procedural requirements limit when the superior court will invoke its jurisdiction. Stewart v. Dep't of Emp't Sec., 191 Wash.2d 42, 52, 419 P.3d 838 (2018).

¶17 Here, the legislature conferred appellate subject matter jurisdiction over tax related matters to the superior court under Title 82 RCW. As a result, the superior court has the authority to hear Lakeside's appeal from DOR's informal ruling upholding the written instructions that direct Lakeside's future method of calculating its use tax. But the legislature limited when the court will invoke that jurisdiction by proscribing a procedural barrier—full payment of the disputed tax. Failure to satisfy the procedural barrier does not deprive the court of its subject matter jurisdiction.[3] Rather, it bars Lakeside from accessing the court's jurisdiction. The court erred by dismissing Lakeside's petition for judicial review under CR 12(b)(1).

Failure To State a Claim

¶18 Lakeside claims the trial court erred in granting DOR's motion to dismiss its petition for failure to state a claim upon which the court can grant relief under CR 12(b)(6). DOR asserts that Lakeside's petition for review was properly dismissed because Lakeside petitioned under the APA instead of RCW 82.03.180. We agree with DOR.

¶19 A CR 12(b)(6) motion questions the legal sufficiency of the allegations in a pleading, asking "whether there is an insuperable

[495 P.3d 262]

bar to relief." Markoff v. Puget Sound Energy, Inc., 9 Wash. App. 2d 833, 839, 447 P.3d 577 (2019), review denied, 195 Wash.2d 1013, 460 P.3d 183 (2020). A court may dismiss an action for failure to state a claim only if it appears beyond a reasonable doubt that no facts justifying recovery exist. Durland v. San Juan County, 175

Wash. App. 316, 320, 305 P.3d 246 (2013), aff'd, 182 Wash.2d 55, 340 P.3d 191 (2014).

¶20 The APA is the exclusive means of judicial review of an agency action unless de novo review is expressly authorized elsewhere by statute. RCW 34.05.510(3). As discussed above, the legislature expressly authorized two separate paths for de novo review of tax challenges in Title 82 RCW. See RCW 82.32.180 ; RCW 82.03.180. Where general and specific statutes address the same matter, the specific statute prevails. Booker, 158 Wash. App. at 90, 241 P.3d 439. "Thus, the APA's general provisions cannot overcome [Title 82 RCW] specific ones. The APA does not circumvent the legislature's precisely governed system for obtaining superior court review of an excise tax challenge." Booker, 158 Wash. App. at 90, 241 P.3d 439.

¶21 Lakeside tries to sidestep the application of Title 82 RCW by arguing it is "not challenging the assessment of any excise taxes or seeking to obtain a tax refund." According to Lakeside, DOR's written instructions are not an assessment of a tax, and "the procedural requirements set forth in those statutes simply do not apply."

¶22 Lakeside cites a recent United States Supreme Court case, CIC Services, LLC v. Internal Revenue Service, ––– U.S. ––––, 141 S. Ct. 1582, 209 L. Ed. 2d 615 (2021), in support of its argument.[4] In that case, the Court considered whether the anti-injunction statute, 26 U.S.C. § 7421(a), barring suits to restrain the assessment or collection of any tax, prohibits a challenge to an IRS[5] information reporting requirement. CIC, 141 S. Ct. at 1586-87. The reporting requirement compels tax payers and advisors in certain insurance agreements to provide a detailed description of the transaction so that the IRS can understand the tax structure and determine whether the insurance contract "is a sham" designed to escape tax liability. CIC, 141 S. Ct. at 1587. Failure to submit the detailed reports is punishable by civil tax penalties and criminal penalties. CIC, 141 S. Ct. at 1587.

¶23 In assessing whether the reporting requirement was a tax assessment barred by the anti-injunction statute, the Court looked to the lawsuit's "purpose," and inquired "not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests." CIC, 141 S. Ct. at 1589. The Court determined that the petitioner sought relief from a reporting requirement, which does not levy a tax, but "compels taxpayers and their material advisors to collect and submit detailed information" to discern whether the transaction is taxable. CIC, 141 S. Ct. at 1591. The Court noted the "reporting rule and the statutory tax penalty are several steps removed from each other," requiring a "threefold contingency" before tax liability attached. CIC, 141 S. Ct. at 1591. It stated the petitioner "stands nowhere near the cusp of tax liability: Between the upstream Notice [to report information] and the downstream tax, the river runs long." CIC, 141 S. Ct. at 1591. Because of the long path between the reporting requirement and the tax, the Court concluded, "The suit contests, and seeks relief from, a separate legal mandate" rather than a tax, and is not barred. CIC, 141 S. Ct. at 1593-94.[6]

¶24 Unlike the IRS reporting requirements in CIC that may or may not lead to

[495 P.3d 263]

tax liability, DOR's written instructions direct Lakeside to start using the comparable sales method for calculating its future use tax. Payment of the use tax is imminent. And the objective of Lakeside's lawsuit is to challenge the amount of taxes it owes. Lakeside's petition is a challenge to tax liability that must be brought under Title 82 RCW.

¶25 Division Three of our court reached the same conclusion in Booker. There, DOR issued prospective written instructions for excise tax on farm equipment Booker Auction Co. sold at auctions. Booker, 158 Wash. App. at 86-87, 241 P.3d 439. Booker petitioned the superior court for review under the APA, seeking to vacate DOR's instructions. Booker, 158 Wash. App. at 87, 241

P.3d 439. The court determined the APA did not apply because Title 82 RCW provides de novo review for tax challenges. Booker, 158 Wash. App. at 89, 241 P.3d 439. And "[a]pplying the APA to afford review of prospective reporting instructions, without payment of a tax, would directly conflict with RCW 82.32.150 by allowing review of an excise tax dispute in superior court without payment of the tax in full." Booker, 158 Wash. App. at 89, 241 P.3d 439.

¶26 Because Lakeside petitioned under the APA rather than RCW 82.03.180 and had not yet paid the use tax, it fails to state a claim upon which relief can be granted. See Blue Spirits Distilling, LLC v. Wash. Liquor & Cannabis Bd., 15 Wash. App. 2d 779, 794, 478 P.3d 153 (2020) ; Gorman v. Garlock, Inc., 155 Wash.2d 198, 218-19, 118 P.3d 311 (2005) ; Asche v. Bloomquist, 132 Wash. App. 784, 788, 133 P.3d 475 (2006). Lakeside's claim is legally insuperable and properly dismissed under CR 12(b)(6).

¶27 Affirmed.

WE CONCUR:

Hazelrigg, J.

Verellen, J.

Notes:

[1] If a taxpayer disregards "specific written instructions as to reporting or tax liabilities," DOR "must" assess a penalty of 10 percent of the amount of tax owed. RCW 82.32.090(5).

[2] Constitutional challenges to a tax assessment are the only exceptions to the rule that taxes must be paid in full before obtaining judicial review. RCW 82.32.150.

[3] We recognize that Division Three of our court arrived at a different conclusion in Booker Auction Co. v. Washington Department of Revenue, 158 Wash. App. 84, 89, 241 P.3d 439 (2010), where it determined that failure to pay a tax before petitioning for review deprived the court of subject matter jurisdiction. But subsequent case law has "narrowed the types of errors that implicate a court's subject matter jurisdiction." Buecking, 179 Wash.2d at 448, 316 P.3d 999. We disagree with Booker's characterization that failure to meet a procedural requirement deprives the superior court of subject matter jurisdiction.

[4] Lakeside submitted this case in a notice of supplemental authority, filed May 24, 2021.

[5] United States Internal Revenue Service.

[6] Lakeside also cites AOL, LLC. v. Washington Department of Revenue, 149 Wash. App. 533, 205 P.3d 159 (2009), and Wells Fargo Bank, N.A. v. Washington Department of Revenue, 166 Wash. App. 342, 271 P.3d 268 (2012), in support of its argument. Neither case is persuasive. AOL acknowledges that the term " 'assessment' " and the phrase " 'such tax, penalties, and interest' " are used interchangeably in Title 82 RCW. AOL, 149 Wash. App. at 549 n.20, 205 P.3d 159 (quoting RCW 82.32.100(2)). Even so, the provisions in Title 82 RCW clearly require payment of all taxes, penalties, and interest (or assessments) before initiating an appeal. In Wells Fargo, the court determined the APA governed a dispute over a settlement agreement between DOR and a taxpayer because the provision authorizing DOR to execute settlement agreements does not provide for de novo review. Wells Fargo, 166 Wash. App. at 353-54, 271 P.3d 268. As discussed above, Title 82 RCW provides for de novo review of Lakeside's appeal.

EXHIBIT 39

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133 Wn.2d 861
947 P.2d 1208
CITIZENS FOR MOUNT VERNON, a Washington nonprofit corporation, Respondent,
v.
CITY OF MOUNT VERNON, a municipal corporation; Robert S. Peterson, as his separate estate; Briar Development Company; a Washington corporation; Haggen, Inc., a Washington corporation, Appellants.
No. 63823-3.
Supreme Court of Washington, En Banc.
Argued May 20, 1997.
Decided Dec. 18, 1997.

[947 P.2d 1209]

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C. Thomas Moser, Mount Vernon, Buck & Gordon, Peter L. Buck, Kitteridge Oldham, Seattle, Linford C. Smith, Mount Vernon, Hutchison, Foster & Weigelt, William B. Foster, III, Lynnwood, for Appellants.

Law Offices of J. Richard Aramburu, J. Richard Aramburu, Jeffrey Eustis, Seattle, for Respondent.

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JOHNSON, Justice.

Appellants, Briar Development Company and Haggen, Inc. (Haggen), appeal a superior court order which reversed a decision of the Mount Vernon City Council approving a commercial planned unit development. Appellants contend Mount Vernon's comprehensive plan and zoning code authorize approval [947 P.2d 1210] of a commercial planned unit development in a neighborhood zoned residential and on property zoned for single family residences. We affirm the superior court.

FACTS

On April 14, 1995, Haggen applied to the planning director of the city of Mount Vernon for approval of a commercial planned unit development (PUD). Haggen requested a 39.3-acre property be annexed into the city of Mount Vernon and rezoned "R-2A" (single family attached townhouse residential district) and "P" (public park). Additionally, Haggen requested approval of a commercial PUD which would overlay the entire 39.3-acre property and potentially permit construction of the commercial project in a residential neighborhood. Haggen wanted to construct a commercial PUD consisting of a 63,000+ -square-foot grocery/specialty store covering 8.3 acres of the 39.3-acre property. Haggen also intended to construct a 1.4-acre commercial pad and a residential development of approximately 42 to 58 units on 8.4 acres.

In January 1995, before the Haggen development request, the Mount Vernon City Council adopted a new comprehensive plan for the city under the Growth Management Act (GMA), RCW 36.70A. At this time the Mount Vernon City Council had not yet adopted specific

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development regulations as required by RCW 36.70A.040. Mount Vernon did have an existing zoning code.

The zoning regulations governing this specific property are somewhat unclear. Prior to the annexation and the rezone, the site was an unincorporated island, wholly surrounded by city property, zoned "P" (Public/Park) and "C-LI" (Commercial/Light Industrial) under Skagit County zoning regulations. Under the comprehensive plan adopted by the city council in accordance with the GMA, the property appears to be zoned multiple family and medium density single family residential. Although the comprehensive plan suggests the area in which

this property is located may need some type of commercial development in the future, the comprehensive plan does not specify the size, intensity, or location of any future commercial development. These areas of potential future commercial development are designated by large circles in the Mount Vernon comprehensive plan.

The comprehensive plan includes five different types of commercial retail zones. These retail centers include: downtown, mall area, community, neighborhood, and convenience. The comprehensive plan designates areas within Mount Vernon for these commercial zones, and the comprehensive plan describes the standards governing commercial development. The comprehensive plan also designates areas with "future potential need for Neighborhood Community Retail." The Haggen property lies within the Neighborhood Community Retail area under the plan.

On August 1, 1995, the Mount Vernon planning commission voted on the underlying zoning of R-2A and P; the planned unit development overlay; the master plan for the entire parcel; and the preliminary planned unit development for the commercial portion. The planning commission vote on the entire proposal ended in a 3-3 tie. The issue was passed to the city council without recommendation from the planning commission.

Public hearings on the annexation, the proposed initial zoning, the master plan, and the preliminary planned unit

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development were held on two separate dates in September 1995 by the city council. On each occasion, residents voiced their opinions both for and against the project. At the September 27, 1995 meeting of the city council two votes were taken. The first vote approved the annexation of the approximately 40 acres into the city of Mount Vernon and the underlying rezone to R-2A and P. The second vote approved adoption of the master plan and the preliminary planned unit development.

On October 18, 1995, Respondent Citizens for Mount Vernon (Citizens) filed an action as a land use petition under the Land Use Petition Act [1] in Skagit County Superior Court. After reviewing the record and hearing oral argument, the superior court entered [947 P.2d 1211] an order reversing the city council's approval of the Haggen commercial planned unit development. Specifically, the court determined: (1) without implementing development regulations, the comprehensive plan fails to provide specific standards for making specific land use decisions; (2) even if the comprehensive plan can be used as an approval document, the approval of this project and the R-2A zone is inconsistent with the comprehensive plan; (3) the project is inconsistent with existing zoning regulations; and (4) Citizens exhausted its administrative remedies and was not required to appeal specific land use issues to the Growth Management Hearing Board (Board). Haggen appealed this decision to this court, which accepted direct review.

ANALYSIS

Exhaustion of Remedies

Before reaching the merits of the case, we must address Haggen's argument that a city council's approval of a land use project must be appealed to the Growth Management Hearings Board to comply with the exhaustion of administrative

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remedies requirement. The trial court found Citizens did not fail to exhaust its remedies and had standing because issues of noncompliance with zoning and planning laws were adequately raised at public hearings and through written correspondence.

The doctrine of exhaustion of administrative remedies is well established in Washington. A party must generally exhaust all available

administrative remedies prior to seeking relief in superior court. See RCW 34.05.534; Simpson Tacoma Kraft Co. v. Department of Ecology, 119 Wash.2d 640, 646, 835 P.2d 1030 (1992). The court will not intervene and administrative remedies need to be exhausted when the "relief sought ... can be obtained by resort to an exclusive or adequate administrative remedy." South Hollywood Hills Citizens Ass'n v. King County, 101 Wash.2d 68, 73, 677 P.2d 114 (1984) (quoting State v. Tacoma-Pierce County Multiple Listing Serv., 95 Wash.2d 280, 284, 622 P.2d 1190 (1980)).

The principle is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges. South Hollywood Hills Citizens, 101 Wash.2d at 73, 677 P.2d 114; Retail Store Employees Local 1001 v. Washington Surveying & Rating Bur., 87 Wash.2d 887, 906, 558 P.2d 215 (1976) (citing Robinson v. Dow, 522 F.2d 855, 857 (6th Cir.1975)). The United States Supreme Court has stated in McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) the policies underlying this principle: (1) insure against premature interruption of the administrative process; (2) allow the agency to develop the necessary factual background on which to base a decision; (3) allow exercise of agency expertise in its area; (4) provide for a more efficient process; and (5) protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts. McKart, 395 U.S. at 193-94, 89 S.Ct. at 1662-63; South Hollywood Hills Citizens, 101 Wash.2d at 73-74, 677 P.2d 114.

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Haggen asserts because Citizens did not appeal the city council's decision to approve the project to the Board, Citizens did not exhaust the "administrative remedies to the extent required by law." RCW 36.70C.060(2)(d). Due to this failure, Haggen argues Citizens did not meet the standing requirement for judicial review as set forth in RCW 36.70C.060. [2]

[947 P.2d 1212] Under RCW 36.70A.280, the Board has a very limited power of review.

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

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RCW 36.70A.280(1)(a) and (b). Contrary to the position of Haggen, the challenge to the approval of the Haggen development by Citizens does not involve the issue of whether the Mount Vernon City Council properly complied with the GMA, but rather involves the effect of the comprehensive plan on specific land use decisions. The Board does not have jurisdiction over these types of issues and cannot provide the remedy or relief sought by Citizens.

Citizens' complaint does not assert that the comprehensive plan implemented by the city of Mount Vernon does not comply with the requirements of the GMA. Rather, Citizens allege that the approval of the rezone and the approval of this specific development project do not comply with the underlying zoning or with the comprehensive plan, and that the comprehensive plan cannot be used to make specific land use decisions. The Board is not able to render a decision on this issue because the approval

granted by the city council falls outside the scope of review granted to the Board. Citizens sought to prevent the development of this property for a commercial use. The Board cannot render a decision on a specific development project; thus, Citizens properly brought the issue to the superior court for judicial review.

Haggen also agues Citizens cannot look to the courts for a remedy because Citizens failed to raise the issue of the rezone and the project approval specifically enough in the public hearing process. Haggen contends this failure eliminates Citizens' standing to challenge approval of the project in court.

As noted, exhaustion of administrative remedies is clearly required by RCW 36.70C.060 before a party will have standing to seek judicial review of a land use petition. The statute states nothing of the degree of participation or the specificity with which issues must be raised to seek judicial review. Traditionally, the doctrine of exhaustion looks to determine whether administrative remedies have been pursued. Fred P. Bosselman & Clifford L.

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Weaver, Judicial Review in Donald G. Hagman et al., Urban Planning & Land Development Control Law § 23.5 (2d ed.1986). The only administrative remedy available to Citizens under the Land Use Petition Act, prior to seeking review in superior court, was participation in the public hearings. The record reflects Citizens did participate, and Haggen makes no claim they did not.

This court has not specifically addressed how much participation at a public hearing is required to exhaust an administrative remedy. Haggen urges us to adopt precedent applying the Administrative Procedure Act's statutory exhaustion requirement. Prior cases may be helpful in understanding how exhaustion has been applied, but are not analogous or binding. In the present case, individual citizens were permitted to speak for three minutes before the city council; the cases cited by Haggen involve an administrative process that was more formal and more adversarial. See RCW 34.05.554; King County v. Boundary Review Bd., 122 Wash.2d 648, 860 P.2d 1024 (1993) (citing Griffin v. Department of Soc. & Health Servs., 91 Wash.2d 616, 631, 590 P.2d 816 (1979) and Kitsap County v. Department of [947 P.2d 1213] Natural Resources, 99 Wash.2d 386, 393, 662 P.2d 381 (1983)).

One case applying the Administrative Procedure Act's statutory exhaustion requirement has established that prior to judicial review of an administrative action, the appropriate issues must first be raised before the agency. Boundary Review Bd., 122 Wash.2d at 668, 860 P.2d 1024. In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record. Boundary Review Bd., 122 Wash.2d at 670, 860 P.2d 1024. Our cases require issues to be first raised at the administrative level and encourage parties to fully participate in the administrative process. See, e.g., Boundary Review Bd., 122 Wash.2d at 670, 860 P.2d 1024; Department of Natural Resources, 99 Wash.2d at 393, 662 P.2d 381; Griffin, 91 Wash.2d at 631, 590 P.2d 816.

The record here reflects Citizens participated in all

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aspects of the administrative process and raised the appropriate project approval issues. Haggen suggests the issue is R-2A zoning; Haggen is wrong. The issue is the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential. The precise, legal argument is compatibility between the project and the underlying zoning. Citizens opposed the Haggen commercial development project before the city council on the grounds it was inconsistent with the comprehensive plan; that the Haggen proposal was not a neighborhood grocery store; and that the Haggen proposal was inconsistent with the residential zoning regulations surrounding the

site. Citizens opposed the Haggen project through written correspondence to the city council and through testimony at the public hearings. The issue of zoning for this property was before the city council. The compatibility of a large commercial development project with the comprehensive plan, with the residential neighborhood, and with the residential rezone was before the city council.

Haggen contends Citizens' failure to specifically raise the technical, legal argument of compatibility between R-2A zoning and a commercial PUD demands the project be approved without an examination of the case on the merits. Individual citizens did not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing. The fact remains that the city council's approval of the commercial PUD project conflicted with the city of Mount Vernon's zoning regulations, undermined established Washington zoning precedent, and was illegal. Finally, Haggen suggests the compatibility problem between the R-2A zone and the commercial PUD could have been corrected by the city council; however, Haggen fails to explain how a zoning correction drastic enough to accommodate the commercial project would escape the vices of spot zoning. Here, Citizens exhausted its administrative

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remedies and has standing to seek judicial review of its land use petition.

Mount Vernon's Zoning Code

Haggen argues a commercial PUD is compatible with the R-2A rezone and the comprehensive plan. Haggen also asserts a commercial PUD is permitted in R-2A zones because PUDs are permitted under the terms of the Mount Vernon R-2A zoning regulations and because the comprehensive plan suggests some commercial development may be necessary in the area in which this site is located.

An examination of Mount Vernon's zoning code is necessary to determine the uses permitted on a site zoned R-2A and to determine how Mount Vernon resolves issues surrounding the complex nature of PUDs. This is a legal issue, which we review de novo. Sunderland Family Treatment Servs. v. City of Pasco, 127 Wash.2d 782, 788, 903 P.2d 986 (1995).

The purpose of Mount Vernon's R-2A zone and the uses permitted in R-2A zones are codified under Mount Vernon Municipal Code (MVMC) 17.21. The intent of the R-2A zone is "to provide for small areas within neighborhoods containing single-family attached dwellings in the form of 'townhouses'...." MVMC 17.21.010. PUDs are permitted in R-2A zones under MVMC [947 P.2d 1214] 17.21.020(C), which states, "[p]lanned unit developments may be permitted according to procedures outlined in Chapter 17.66." [3] (Emphasis added.) PUDs are permitted, but the inquiry into the type of PUD permitted in R-2A zones cannot be answered without looking to MVMC 17.69.

The zoning code requires us to look to the procedures outlined in MVMC 17.69, planned unit development districts. First, MVMC 17.69.030 states:

Any uses permitted outright or as a conditional use in the

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zone where the PUD is located shall be permitted in a PUD, subject to the criteria established in this chapter; provided, that duplexes or multifamily dwellings may be permitted as a PUD in any residential zone. No use shall be permitted except in conformity with a specific and precise final development plan pursuant to the procedural and regulatory provisions of this chapter.

(Emphasis added.) The Haggen commercial PUD proposal is not a use permitted outright in the R-2A zone.

The Mount Vernon zoning code specifically separates residential PUDs from commercial PUDs. Haggen concedes this is not a residential PUD. [4] The Haggen commercial PUD is therefore governed by the commercial PUD section of Mount Vernon's zoning code, MVMC 17.69.410, business and commercial PUDs:

A. The foregoing PUD procedures may be employed in established business or commercial zones to encourage business or commercial site layout serving the public in a more satisfactory manner than generally would be possible with the conventional zoning regulations. The same general provisions apply to acceptability of a business or commercial PUD proposal as a residential PUD.

(Emphasis added.)

In order to comply with this section, the proposed commercial PUD must be located in established business or commercial zones which, as noted, this area was not. Planned unit developments are permitted in R-2A zones, but only in accordance with MVMC 17.69. By its own terms the zoning code explicitly prohibits the commercial planned unit development proposed by Haggen on a site zoned R-2A.

RCW 36.70B.030

Haggen's asserts Mount Vernon's comprehensive plan

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is the only required document necessary to make this specific land use decision. Haggen also states the comprehensive plan provides sufficient guidelines to approve the commercial planned unit development. Haggen cites RCW 36.70B.030 to support these arguments. RCW 36.70B.030(1) describes the project approval process:

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

Mount Vernon has adopted a comprehensive plan, Mount Vernon has existing zoning regulations, but Mount Vernon had not adopted specific development regulations as of the start of this action.

The present case presents a problem because the statute above suggests, and Haggen argues in its brief and during oral argument, a comprehensive plan can be used to make a specific land use decision. Our cases hold otherwise. In Barrie v. Kitsap County, 93 Wash.2d 843, 613 P.2d 1148 (1980), we held comprehensive plans generally are not used to make specific land use decisions. Instead, we stated a comprehensive plan is a "guide" or "blueprint" to be used when making land use decisions. Barrie, 93 Wash.2d [947 P.2d 1215] at 849, 613 P.2d 1148. Although the court confirmed there need not be "strict adherence" to a comprehensive plan, any proposed land use decision must generally conform with the comprehensive plan. Barrie, 93 Wash.2d at 849, 613 P.2d 1148.

Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. Cougar Mountain Assocs. v. King County, 111 Wash.2d 742, 757, 765 P.2d 264

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1988). If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. Weyerhaeuser v. Pierce County, 124 Wash.2d 26, 43, 873 P.2d 498 (1994). These rules require that conflicts between a

general comprehensive plan and a specific zoning code be resolved in the zoning code's favor.

As explained earlier, the Haggen commercial PUD is not consistent with the underlying R-2A zoning regulations. If the commercial PUD is not consistent with the underlying R-2A zoning, the project cannot be approved despite general consistency with the comprehensive plan. Employing the rule stated earlier to the facts of this case, we find that when underlying zoning regulations explicitly prohibit a commercial PUD, but the comprehensive plan allows the development, the zoning regulations must govern the land use decision.

PUDs and Zoning

Haggen argues the city council's decision to approve the PUD, despite its apparent incompatibility with the underlying R-2A zone, was correct because MVMC 17.69.010 states the PUD is an overlay zone requiring a rezone and because the comprehensive plan requires rezoning through the PUD process. Haggen interprets the need for rezoning to imply the underlying zoning is immaterial to the land use analysis and the rezone is merely a "reversionary" zone should the PUD not be constructed. The trial court did not agree. It looked to the underlying R-2A zone, and held the commercial PUD could not be constructed in a R-2A zone because only those uses permitted in the underlying zone are permitted in the PUD and no commercial uses are permitted in a R-2A zone. Haggen's interpretation of Mount Vernon's zoning regulations and Washington case law is not correct.

The legal effect of approving a planned unit development is an act of rezoning. Lutz v. City of Longview, 83 Wash.2d 566, 568-69, 520 P.2d 1374 (1974). The following

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general rules apply to rezone applications: (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the original zoning; and (3) the rezone must bear a substantial relationship to the public health, safety, morals, or welfare. Parkridge v. City of Seattle, 89 Wash.2d 454, 462, 573 P.2d 359 (1978).

Haggen agrees the approval of a PUD is an act of rezoning, but Haggen has failed to demonstrate how conditions have changed to warrant a rezone. The record does not indicate and the trial court did not find this area had become a commercial or business area. Therefore, we will not address the issue of whether conditions have changed.

Haggen argued to this court, for the first time, the city council could have fixed the problem with the R-2A zoning and avoided the time spent in court by retaining Skagit County's original commercial zoning on the site. As we noted in Lutz, in certain circumstances, the approval of a planned unit development may constitute spot zoning. Lutz, 83 Wash.2d at 573-74, 520 P.2d 1374. Spot zoning is a zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from, and inconsistent with, the classification of surrounding land and not in accordance with the comprehensive plan. Lutz, 83 Wash.2d at 573-74, 520 P.2d 1374 (citing Smith v. Skagit County, 75 Wash.2d 715, 743, 453 P.2d 832 (1969)). The main inquiry is whether the zoning action bears a substantial relationship to the general welfare[947 P.2d 1216] of the affected community. Save a Neighborhood Env't v. City of Seattle, 101 Wash.2d 280, 286, 676 P.2d 1006 (1984).

Professor Richard L. Settle wrote in Washington Land Use and Environmental Law and Practice,

The vice of "spot zoning" is not the differential regulation of adjacent land but the lack of public interest justification for such discrimination. Where differential zoning merely accommodates some private interest and bears no rational relationship

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to promoting legitimate public interest, it is "arbitrary and capricious" and hence "spot zoning."

Richard L. Settle, Washington Land Use and Environmental Law and Practice § 2.11(c) (1983) (footnotes omitted).

Spot zoning emphasizes why the planned unit development does not trump underlying zoning; if a planned unit development can be placed at any location within a city regardless of the underlying or surrounding zoning, as Haggen argues, it might raise issues of spot zoning and it might undermine the overall zoning plan. Planned unit developments allow for flexibility in planning, in design, or in density. They do not permit ad hoc land use decisions merely because a developer has decided to employ the PUD process.

The commercial use proposed by Haggen is inconsistent with, and distinctly different from, the surrounding neighborhood zoning. As this court stated in Lutz:

[T]he PUD achieves flexibility by permitting specific modifications of the customary zoning standards as applied to a particular parcel. The developer is not given carte blanche authority to make any use which would be permitted under traditional zoning.

Lutz, 83 Wash.2d at 568, 520 P.2d 1374. The PUD process does not override underlying zones, nor does a PUD trump specific zoning regulations.

CONCLUSION

Citizens exhausted its administrative remedies and adequately identified the issues and objections to the project to have standing to bring this challenge.

Although RCW 36.70B.030 requires the comprehensive plan be used as the foundation for project review in the absence of development regulations, a proposed project must generally conform to the comprehensive plan. Even

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if the Haggen commercial PUD generally conformed to the comprehensive plan, the proposal directly conflicts with the underlying R-2A zoning regulations. The zoning regulations prohibit this type of development in a R-2A zone. This conflict is resolved in favor of zoning regulations. Additionally, approval of a planned unit development is an act of rezoning, which must be accompanied by a showing of significant changed circumstances. No such showing was made which would justify approval of the project in this case.

The decision of the superior court is affirmed.

DURHAM, C.J., and DOLLIVER, SMITH, ALEXANDER and TALMADGE, JJ., concur.

SANDERS, Justice (dissenting).

Although the majority discusses several different issues, at the end of the day it reverses the Mount Vernon City Council, concluding this commercial project is inconsistent with the city's R-2A residential zone. Had this been a commercial zone the majority would have affirmed the council by the same logic.

Assuming the majority is correct on the merits, we still must ask if the court is at liberty to decide the merits, given our prior pronouncements on the necessity to raise appropriate objections before an administrative agency to test their disposition on subsequent judicial review. Compare King County v. Boundary Review Bd., 122 Wash.2d 648, 860 P.2d 1024 (1993) ("[C]ase law has established that prior to judicial review of an administrative action, the appropriate issues must first be raised before the agency." Majority at 1212 (citing Boundary Review Bd. at 668, 860 P.2d 1024)). Preservation of the zoning issue for judicial review is the problem here--and it is a very great

problem--because, in point of fact, the Citizen group never claimed at the administrative level this [947 P.2d 1217] project (or the proposed PUD which embodied the project) would violate the R-2A zone. It is that simple.

Of course, there were many other objections raised but

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never this one. Able counsel for the Citizens submitted to the city council a detailed letter in opposition to the project raising several concerns, [1] but not zoning. Many citizens spoke to and wrote the council in opposition to the project; however, none simply stated project approval would violate the R-2A zone. About as close as the record comes to a proper objection is the claim that the proposal would place a commercial project in a residential neighborhood; however, while this might constitute notice of a claim of potential neighborhood incompatibility, it is hardly notice of a claimed zoning violation as the specific requirements of the zoning ordinance cannot be determined by the character of the prior actual use.

In response the majority states:

The record here reflects Citizens participated in all aspects of the administrative process and raised the appropriate project approval issues. Haggen suggests the issue is R-2A zoning; Haggen is wrong. The issue is the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential. The precise, legal argument is compatibility between the project and the underlying zoning.

Majority at 1213. The subtlety of the majority's distinction escapes me. What is the difference between stating "the issue is R-2A zoning" on the one hand and "the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential"

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on the other? While the majority states Citizens "raised the appropriate project approval issues" (Majority at 1213), in fact Citizens did not raise the issue in any form.

Failure to raise the R-2A zone claim before the city council is so obvious upon this record it simply does not permit denial. It was obvious to both parties, as well as the superior court judge, when judicial review was first conducted. Hence, it was then the claim of the Citizen group that specifically raising the zoning objection as a condition to judicial review should be excused as imposition of such a requirement would be too great a burden on the Citizen participants. Verbatim Report of Proceedings (RP) (Feb. 13, 1996) at 166. [2] Accepting the Citizens' argument, the superior court legally erred when it agreed the zoning objection need not be specifically raised to be preserved for judicial review. Notwithstanding its legal error the superior court correctly identified the precise issue when it asked whether there is a legal requirement "that one of the persons before that City Council had to say, listen R-2A is the wrong zone for this and these are the reasons." RP (Feb. 13, 1996) at 163.

Responding to this question the project proponent replied, "Absolutely." Id. He was correct that Boundary Review Bd. says just that. The majority agrees Boundary Review is applicable and even admits it stands for the proposition "[i]n order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record [citing Boundary Review at 670, 860 P.2d 1024]." Majority at 1213. Yet the majority subverts in practice the very rule it articulates in theory. If the rule is not to be applied consistently, it is better we have it not at all, as the reasons asserted for its [947 P.2d 1218] adoption and continued vitality are thereby defeated and its continued existence simply becomes an open invitation for discriminatory enforcement.

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A review of the facts of this case demonstrate if ever the rule has a reason, the reason is served by application here.

We begin by recalling the proposed situs of the project (Haggen's tract) originally lay in an unincorporated, commercially zoned island of Skagit County surrounded by the Mount Vernon municipality. The original county zoning on Haggen's tract was commercial/limited industrial (C-LI) and public. [3] As a matter of fact, the original development proposal was submitted at a time when the property was zoned commercial by the county.

However, the proponents saw it advantageous to encourage annexation of the tract into the Mount Vernon municipality and essentially packaged up a proposal for annexation with a proposal that the newly annexed property be appropriately zoned to accommodate the proposed development.

Given the present reality that a man's desire to improve his property is often cast in terms of a political question, the proponent realistically attempted to persuade the appropriate governmental decision-makers to adopt those actions necessary to allow the project to proceed. And, of course, those who disagreed with that objective attempted to marshal whatever political resources at their disposal to make sure this did not happen.

Eventually all met before the city council which convened to adopt the annexation, proposed zoning, and PUD proposal as a package. It is fair to say, and I do not think it is subject to dispute, the matter had progressed this far because it was driven by the natural desire of the project proponent to have whatever legislative action taken as was necessary for project approval. Decidedly the action ultimately taken was not an academic exercise in land use planning for the coming century--rather, all had gathered together to do battle over a proposed supermarket.

The learned superior court judge understood the reality of this record very well upon his initial review, although he disagreed in legal consequence:

It's abundantly clear to this Court that the decision of the City was project driven. Such appears clear. Haggen was in there with the City staff at least six months before the Comprehensive Plan was adopted. Haggen proposed the annexation, proposed the zoning, but it strikes me that the City decided it was going to put this plan in place and it did, but wrongfully as far as this Court is concerned. So the decision was molded to accommodate the Haggen project proposal....

RP (Feb. 16, 1996) at 7. Given that the annexation and the proposed zone adoption was "project driven," it is an undeniable inference that the council indeed intended to do what was necessary to lawfully approve the project. Certainly it was within their legislative prerogative to adopt a commercial zone compatible with their comprehensive plan, especially for property previously zoned commercial prior to annexation. In fact, with the same result, the council could have approved the annexation without adopting any zone at all! Moreover, the comprehensive plan, adopted in January 1995, targeted the area containing the Haggen tract as one available for a retail center, which is defined as a commercial outlet of fewer than 70,000 square feet on no more than 10 acres. Administrative Record at 1325-27. (Haggen's proposed retail center is a 63,000-square-foot supermarket on 8.3 acres.)

However, the council adopted an R-2A zone at the same time it approved the annexation and commercial PUD, unmistakably evidencing its intention that the project be approved although, according to the majority, mistaking the law in the process. The failure of a project opponent to object on zoning grounds before final action presents an important added dimension--the failure to timely object removed the only realistic prospect[947 P.2d 1219] that the council would cure the objection while saving the project by

simply adopting a commercial zone compatible with this "project

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driven" proposal. But the objection was not made until long after it was too late for the council to take corrective action.

I do not assume the objection was intentionally withheld; however, under the majority's scenario there is every reason why it could have been with the same result. Certainly that would have been to the profit of the opponent. Indeed, any attorney worth his salt would specifically counsel opponents to withhold such objection for fear the council would timely correct its error, thereby making the project all the less vulnerable to subsequent legal attack on judicial review. Such is precisely one of the reasons we have stated the rule as set forth in Boundary Review--to preserve an objection for judicial review it must first be asserted to the agency to allow the agency to avoid its own error.

In Boundary Review one of the issues on judicial review was whether a particular King County ordinance applied to prohibit the subject land annexation. 122 Wash.2d at 668, 860 P.2d 1024. The interested landowner defended by asserting the theory had never been presented to the county agency, and therefore the opponents had not adequately exhausted their remedies. In response, the opponents (very much like the case before us) asserted they had generally raised the issue below, even if they had not done so specifically. But on review this court held petitioners must raise their theory with specificity below or it is lost. Id. at 669, 860 P.2d 1024. The court noted while the opponents "presented extensive testimony before the Board" in opposition to the annexation, they "never mentioned the ordinance" and "never argued to the Board that the proposed annexations were prohibited by Ordinance 9849...." Id. at 669, 860 P.2d 1024. Because the opponents never argued their precise theory before the agency, we refused to consider it. Id. at 669, 860 P.2d 1024 ("[W]e decline to consider the effect of Ordinance 9849 because it was not raised before the Board."). We explained, "This rule is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in

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protecting the integrity of administrative decisionmaking." Id. at 668, 860 P.2d 1024. We noted it furthered important purposes of:

(1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

Id. at 669, 860 P.2d 1024 (quoting Fertilizer Inst. v. United States Envtl. Protection Agency, 935 F.2d 1303, 1312-13 (D.C.Cir.1991)). As we held in Boundary Review: "In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." 122 Wash.2d at 670, 860 P.2d 1024.

The case before us presents the prototypical example of why this rule exists. Had a proper objection been made at the administrative level, several years of judicial appellate proceedings could have been avoided as well as the no doubt substantial cost associated with this litigation, not to mention the delay and consequential damage to those whose interests were dependent upon the outcome of this review. Most importantly, the city council could have avoided the error to begin with by adopting a zone ordinance compatible with this project and beyond justified legal objection. To this the majority responds:

Finally, Haggen suggests the compatibility problem between the R-2A zone and the commercial PUD could have been corrected by the city council; however, Haggen fails to explain

how a zoning correction drastic enough to accommodate the commercial project would escape the vices of spot zoning.

Majority at 1213. I find this argument less than persuasive. Indeed, it is no argument at all. Whatever Mr. Haggen did or did not do has no bearing whatsoever on the adequacy of the Citizens' presentation. It certainly [947 P.2d 1220] was not incumbent

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upon Mr. Haggen to justify a zoning ordinance which the city council did not pass. Beyond that, the majority seems to forget the subject property was acquired through annexation and, by national majority rule, annexed land comes into the acquiring jurisdiction unzoned, thereby permitting any use not a nuisance per se. See, e.g., Ben Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 598-99, 448 P.2d 209 (1968) (citing 101 C.J.S. Zoning § 134, at 892 and other authorities). Cf. Olympic View-Mukilteo Action Group v. City of Mukilteo, 97 Wash.2d 707, 710, 649 P.2d 116 (1982) (referencing the claim that annexed acquisitions are unzoned, the court found this land was zoned by simultaneous ordinance to retain its unincorporated zoning designation); RCW 35A.14.330 (code city may prepare proposed zoning ordinance to be effective on annexation). The same result would even follow under the minority rule, which generally holds that newly annexed property retains its previous zoning designation, here commercial. Given (1) the lack of legal necessity to zone at all, (2) the commercial zoning prior to annexation, and (3) the Mount Vernon comprehensive plan which designated this parcel and environments suitable for a commercial zone, I suspect it would take the presence of factors not apparent from this record to persuade any court the adoption of a commercial zone for this area would be somehow invalid. In short, the whole tenor of the majority's claim regarding what Mr. Haggen "fails to explain" and/or the "vices of spot zoning" testifies to the very weakness of its argument on the issue it will not confront: the zoning objection has not been preserved for judicial review because it was not properly raised at the administrative level.

If the majority were to overrule that line of cases which requires an administrative litigant to state an objection in order to preserve it for judicial review--having determined, for example, the requirement placed an unfair burden on litigants at the administrative level--at least that result would provide some prospective consistency and clarity. Unfortunately, however, we now have a rule of unknown dimensions, finding honor only in its breach,

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which is simply an open invitation to confusion and discriminatory enforcement. I dissent.

MADSEN and GUY, JJ., concur.

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1 The land use petition is the new process the Legislature has established for parties seeking judicial review of local land use decisions. This process replaces the writ system. See RCW 36.70C; Laws of 1995, ch. 347.

2 RCW 36.70C.060(2) states in part:

"Standing to bring a land use petition under this chapter is limited to the following persons:

...

"(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

"(a) The land use decision has prejudiced or is likely to prejudice that person;

"(b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

"(c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and

"(d) The petitioner has exhausted his or her administrative remedies to the extent required by law."

3 Although this section states the procedures are found in MVMC 17.66, this is a typographical error. Planned unit development districts are governed by MVMC 17.69.

4 Haggen made this concession because MVMC 17.69.400(C) and (D) require the commercial portion of a residential PUD to be built after the residential portion it is designed or intended to serve, and the commercial portion must primarily serve the residents of the PUD.

1 On September 20, 1995, a detailed letter was hand-delivered to the city council on behalf of the Citizens group outlining five specific objections to the proposal (which I paraphrase):

1. Development regulations were not adopted to implement the comprehensive plan;

2. The comprehensive plan and map is incomplete;

3. The proposed development is not permitted under the comprehensive plan;

4. The proposal is not supported by an appropriate economic analysis;

5. The subject proposal is not vested.

Administrative Record at 1247-1250.

2 The Citizens' attorney argued to the court: "Its [requirement that specific objection be raised has] never been applied to citizens and when the Court looks at what citizens are required to do, we go back to Sterling v. Spokane County [, 31 Wash.App. 467, 642 P.2d 1255, review denied, 97 Wn.2d 1041 (1982)]."

3 Apparently some 20 to 39 acres were C-LI. Such C-LI uses include any business use and any commercial use, even specifically including on-site hazardous waste treatment. Skagit County Code § 14.04.070.

EXHIBIT 40

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873 P.2d 498
William WEYERHAEUSER and Gail Weyerhaeuser, husband and wife, Respondents,
v.
PIERCE COUNTY, a municipal corporation; Land Recovery, Inc., a Washington corporation; Resource Investments, Inc., a Washington corporation; Appellants,
Resource Recovery, Inc., a Washington corporation; Norman Lemay, as Nominee; Mickael Velke and Carol Velke, husband and wife; Lois Johnson, as trustee under the will of Ruth G. Gund, deceased; Elmer Erickson, as his separate estate; Jane Lawton Southcott, as her separate estate, Defendants.
No. 60222-1.
Supreme Court of Washington, En Banc.
May 26, 1994.
Reconsideration Denied Sept. 27, 1994.

[873 P.2d 500]

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Eisenhower & Carlson, Charles K. Douthwaite, Sp. Deputy Pros. Atty., Tacoma, for appellant Pierce County.

Heller, Ehrman, White & McAuliffe, Daniel D. Syrdal, Polly L. McNeill, Seattle, for appellants Land Recovery, et al.

Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, William T. Lynn, Annette Thompson, Tacoma, for respondents.

BRACHTENBACH, Justice.

This is an appeal from a superior court decision invalidating a conditional use permit for a sanitary landfill project in Pierce County. The trial court held that the hearing examiner denied respondents Weyerhaeusers

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the right to confront and examine county staff members in violation of Pierce County Code 2.36.090 and due process, and that the hearing examiner's findings of fact, conclusions of law, and decision are inadequate as a matter of law. We agree that the ordinance requires cross examination of the county staff, and that the findings, conclusions, and decision are inadequate. We further hold that the environmental impact statement for the project is inadequate as a matter of law, that the project is in sufficient conformance with the Pierce County Comprehensive Land Use Plan, and that the Tacoma-Pierce County Solid Waste Management Plan contains mandatory criteria which must be met, but this record does not establish whether those criteria have been met. We affirm the trial court.

In 1989 appellants, Land Recovery, Inc. and Resource Investments, Inc. (LRI), applied to Pierce County for a conditional use permit to construct a municipal solid waste landfill on 317 acres at 304th and Meridian in unincorporated Pierce County about 15 miles south of Puyallup. The disposal site is adjacent to respondents William and Gail Weyerhaeusers' land.

LRI has handled Pierce County collection and disposal of solid waste for many years, including operation of the Hidden Valley Landfill in Pierce County, which is expected to reach capacity in 1996. In 1986, pursuant to a contract between LRI and the Tacoma-Pierce County Health Authority, LRI began looking for a new solid waste disposal site, and in time began the permitting process at the 304th Street site.

Portions of the site lie within a 100-year floodplain. There are about 70 acres of wetlands on the site. The project calls for cutting and filling about 30 acres of the wetlands, with creation of replacement wetlands elsewhere on the site. The

site has a fish-bearing stream which empties into the Nisqually River, and which LRI proposes to relocate in the future as actual disposal of wastes on the land expands by "cells". There are numerous wells around the site; well water is the only drinking water source for residents in the area.

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On September 18, 1990, the County issued a draft environmental impact statement (DEIS) in connection with the project. The DEIS was generally favorable to the project. It generated considerable comment. A final EIS was issued by the County on November 28, 1990. The Weyerhaeusers and others appealed the adequacy of the final environmental impact statement (hereafter EIS) issued by the County. Beginning December 4, 1990, a public hearing was held on the EIS appeal and the conditional use permit application. The hearing examiner ruled that county staff members would not be subject to examination by the parties, but that written questions could be submitted to the County (not individual staff members) and the questions and answers deemed relevant by the hearing examiner would be made part of the record. The Weyerhaeusers and others objected to this procedure, arguing they had a right to confront and examine the staff.

The hearing was then continued to allow the EIS appeal period to expire, and was reopened for testimony on January 29, 1991. On that day, the Pierce County Planning and Natural Resources Department, which reviewed[873 P.2d 501] the permit application, issued a staff report to the hearing examiner. Ex. 1(a). Nine evenings were devoted to the hearing. The Weyerhaeusers and LRI submitted written questions to the County, and both presented expert witnesses, most of whom were cross-examined. Many members of the public spoke at the hearing, generally opposing the project.

On April 10, 1991, the hearing examiner released a report and decision approving the conditional use permit application, subject to conditions, and dismissing the EIS appeals. He found that the staff report "accurately sets forth the issues, general findings of fact, and applicable policies and provisions in this matter ... and is incorporated into this report [report and decision of the hearing examiner] by reference as set forth in full herein". Hearing Examiner Decision, case CP 8-89, finding of fact 3. Among conditions imposed were all the mitigation measures identified in the EIS.

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The decision was appealed to the county council, which remanded to the hearing examiner for additional findings on several issues. The hearing was reopened. On January 31, 1992, the hearing examiner released a report and decision on remand, including additional findings and conclusions, and again approving the permit application subject to conditions.

The county council then resumed its hearing on the appeals on April 13, 1992, and approved the hearing examiner's decisions and denied the EIS appeals. The council thereafter denied a motion for reconsideration. The Weyerhaeusers petitioned Pierce County Superior Court for a writ of review. The trial court entered a judgment on February 12, 1993, reversing the issuance of the conditional use permit and the dismissal of the Weyerhaeusers' EIS appeal.

LRI and Pierce County then sought direct review by this court, which was granted. They first argue that the trial court erred in holding that the Weyerhaeusers have the right to orally cross-examine the county staff members who prepared the EIS and the staff report considered by the hearing examiner. They maintain the hearing examiner properly limited the Weyerhaeusers to written questions of the County as an entity.

The hearing examiner limited cross examination to expert witnesses who orally testified, and ruled that "[q]uestions on areas covered by the Pierce County Planning Department shall be submitted to the Hearing Examiner in writing and will be answered in

writing and made a part of the visual record if the question is deemed on that [which] is relevant." Transcript of Proceedings (Dec. 4, 1990), at 19. The hearing examiner gave as the reasoning for this procedure the time needed by county staff to prepare answers to complex questions.

The trial court held that this method of questioning the county staff violated Pierce County Code (PCC) 2.36.090 and due process. The Weyerhaeusers also argue that the procedure violates the appearance of fairness doctrine. Because

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we decide this issue on the basis that oral cross examination of the county staff is required under Pierce County Code 2.36.090, we do not address the due process and appearance of fairness doctrine arguments. In light of the local ordinances, this is not a case where we need to examine the extent of procedural rights afforded in a quasi-judicial administrative hearing in the absence of such ordinances. Similarly, we do not here decide whether cross examination is required under the State Environmental Policy Act of 1971 (SEPA).

Pierce County Code 2.36.090 provides that in a hearing

The Examiner shall have the power to prescribe rules and regulations for the conduct of hearings before the Examiner; and also to issue summons for and compel the appearance of witnesses.... The privilege of cross examination of witnesses shall be accorded all interested parties or their counsel in accordance with the rules of the Examiner.

This ordinance must be read in conjunction with PCC 2.36.010, which recognizes that one purpose of the Pierce County Hearing Examiner Code is "to ensure and expand the principles of fairness and due process in public hearings ...". Thus, the code emphasizes expanded principles of fairness in public [873 P.2d 502] hearings, and the nature of cross examination required under PCC 2.36.090 must be determined in light of that express purpose.

LRI argues the hearing examiner's rule providing for only written cross examination of staff is authorized by the ordinance, as it states the right of confrontation is a "privilege", cross examination may only be made of "witnesses", and then only in accord with rules prescribed by the hearing examiner.

Regardless of whether the cross examination required by the ordinance is termed a "right" or a "privilege" under the ordinance, the ordinance provides that cross examination shall be accorded the interested parties. The first distinction drawn by LRI is irrelevant.

The second question is whether county staff were "witnesses" who could be cross-examined. LRI states that with one exception, none of the county staff were called to give

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oral testimony. We first note that the ordinance authorizes the hearing examiner to "issue summons for and compel the appearance of witnesses", and that there is no reason that county staff members could not be called to give oral testimony. Further, the county staff were responsible for the preparation of two documents which have been critical to the hearing examiner's ultimate decisions, the EIS, which was directly at issue, and the staff report, which the hearing examiner incorporated by reference into his findings, conclusions, and decision.

We conclude that the county staff members who prepared the documents must be deemed witnesses within the meaning of the ordinance. In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), investigators who prepared written reports which were submitted recommending termination of welfare benefits were considered to be adverse witnesses subject to cross examination. Similarly, here the county staff authored written materials which were favorable to the granting of the conditional use

permit. Merely because the information which was provided is written does not immunize the authors from being "witnesses" subject to cross examination under PCC 2.36.090. Of crucial importance, although LRI and the County strenuously argue that the County is a "neutral" party to this proceeding, the County has a direct interest in these proceedings sufficiently adverse to the Weyerhaeusers such that the county staff authors of the EIS and the staff report should be considered witnesses subject to cross examination within the meaning of the ordinance. As discussed below, the County has a huge stake in the outcome of these proceedings because the County has the ultimate responsibility for the collection and disposal of solid waste. It is no surprise that the County appealed from the trial court's decision.

Moreover, there is no question but that the accuracy and truthfulness of the information in the EIS is of paramount importance to the ultimate approval or disapproval of the landfill project and the issuance of the conditional use permit. There may be significant risks to the environment

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and drinking water from this project which is designed to be operational for 30 to 50 years and then to serve as a permanent storage site. Cross examination of the preparers of the EIS is part and parcel of the testing of the information in the EIS.

Next, returning to our focus at the outset of this discussion, the code itself strongly emphasizes fairness. Under the circumstances of this case, where the County has an interest adverse to the Weyerhaeusers, written questions asked of the County simply do not satisfy the code's requirement of fairness in procedures. Oral cross examination can be used to test credibility, and can be shaped to elicit and develop testimony as the cross examination progresses. In contrast, the written question procedure employed by the hearing examiner satisfied neither of these purposes of cross examination. It is no small matter, too, that the County's answers to the written questions contained citations to legal authority. Carefully drafted written answers devised with the apparent assistance of counsel are not the kind of responses we associate with full and fair cross examination where the County has an interest at stake. We do not wish to impugn the integrity of any individual staff member, and do not do so. The questions were submitted to the County, and could not, under the hearing examiner's [873 P.2d 503] rules, be directed to any particular staff person. Nor do we presume any impropriety on the County's part. However, the method employed at the hearing does not comport with the fairness requirement of PCC 2.36.010.

We conclude that under the circumstances of this case, PCC 2.36.090 requires that the Weyerhaeusers be permitted oral cross examination of the county staff who wrote the staff report and the EIS. We reject the argument by LRI and the County that the hearing examiner had the authority to limit cross examination to written questions under that part of PCC 2.36.090 which says that cross examination shall be accorded "in accordance with the rules of the [hearing] Examiner." We do not identify the parameters of that authorization. Whatever else it may mean, however, that

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language cannot mean something less than cross examination which satisfies principles of fairness. Here, no less than oral cross examination will serve that purpose.

We therefore affirm the trial court's holding that the opportunity for oral cross examination of the county staff must be accorded the Weyerhaeusers.

The trial court held that the hearing examiner's report and decision and the report and decision on remand did not set forth findings of fact, but instead recited conclusory statements and conclusions of law which do not establish the bases for the decision or the process by which the

examiner resolved disputed facts. The court said that the decision documents did not provide enough information for the court to determine whether the required review of legal issues was made or whether findings were supported by substantial evidence. The trial court held the decision documents are inadequate as a matter of law, and this constitutes an independent basis for its reversal of the County's actions.

Under PCC 2.36.100, the hearing examiner was required to make and enter findings and conclusions which supported his decision, and which "set forth and demonstrate[d] the manner in which the decision or recommendation carries out and helps to implement the goals and policies of the Comprehensive Plan and the standards set forth in the various land use regulatory codes." PCC 18.10.630(F)(7) requires "findings and decision as provided by law".

"Findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court." State ex rel. Bohon v. Department of Pub. Serv., 6 Wash.2d 676, 694, 108 P.2d 663 (1940); State ex rel. Duvall v. City Coun., 64 Wash.2d 598, 602, 392 P.2d 1003 (1964). The purpose of findings of fact is to ensure that the decisionmaker "has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved" and the appellate court "may be fully informed as to the bases of his [or her] decision when it is made." (Quotation marks and citations omitted.) In re

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LaBelle, 107 Wash.2d 196, 218-19, 728 P.2d 138 (1986). Findings must be made on matters "which establish the existence or nonexistence of determinative factual matters ...". In re LaBelle, at 219, 728 P.2d 138. The process used by the decisionmaker should be revealed by findings of fact and conclusions of law. Hayden v. Port Townsend, 28 Wash.App. 192, 622 P.2d 1291 (1981). Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an "indefinite, uncertain, undeterminative narration of general conditions and events", are not adequate. State ex rel. Bohon, 6 Wash.2d at 695, 108 P.2d 663.

The bulk of the hearing examiner's decision documents consists of summarizing evidence presented, without any guidance as to how issues involving disputed evidence were resolved by the hearing examiner. For example, one important issue is whether the proposed landfill project is a public or private project. The sole "finding" on the issue is: "The proposal advanced by the applicant is for a private project as defined by WAC 197-11-440(d) [sic, should be 197-11-780]." Hearing Examiner Decision, case CP 8-89, finding of fact 14. The exact same sentence is then repeated as a conclusion of law. Hearing Examiner Decision, case CP 8-89, conclusion of law 3. Another crucial issue is [873 P.2d 504] whether the EIS adequately discusses alternatives to the proposed project. Findings include: "Based upon the evidence presented, it appears that the environmental evaluation of the Planning Division is adequate." Hearing Examiner Decision, case CP 8-89, finding of fact 2. "All Pierce County policies, state statutes and regulations are being met...." Hearing Examiner Decision, case CP 8-89, finding of fact 13. As a conclusion of law, the hearing examiner concluded: "The Environmental Impact Statement filed as a final EIS is adequate." Hearing Examiner Decision, case CP 8-89, conclusion of law 4.

The findings and conclusions are clearly inadequate to determine the basis for the hearing examiner's decision upholding the adequacy of the EIS. While a finding recites that the project is a private project, there is no clue as to the basis for that conclusion. There is also no way to tell how the

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hearing examiner concluded the EIS was adequate--he never addressed whether the EIS contains a proper discussion of alternatives to the

proposed site, as required, yet that issue involves a major challenge to the adequacy of the EIS.

Additional findings of fact which are inadequate are discussed below with regard to whether the landfill project must conform to the Tacoma-Pierce County Solid Waste Management Plan.

We agree with the trial court that the findings and conclusions are inadequate as a matter of law. The parties dispute whether this conclusion requires that the decision be reversed, or whether remand for correction of errors is appropriate. However, this case involves more than just inadequate findings and conclusions. We have held that the opportunity for oral cross examination of the county staff must be provided, and, as explained below, additional errors of law require reversal of the decision.

LRI and the Weyerhaeusers urge the court to reach certain substantive issues. The County maintains the Weyerhaeusers did not cross-appeal, and therefore the Weyerhaeusers improperly addressed the substantive issues in their respondents' brief. However, LRI, which did appeal, raised the issues in its brief, and the Weyerhaeusers were entitled to respond. See RAP 10.3(b).

The trial court did not reach the substantive issues, on the basis that the hearing examiner's findings and conclusions and decision were inadequate to permit review. However, we reach the issues because they may be decided as a matter of law despite the inadequacy of the findings and conclusions.

The first substantive issue raised by LRI concerns the adequacy of the final EIS. The adequacy of an EIS is a question of law subject to de novo review. Klickitat Cy. Citizens Against Imported Waste v. Klickitat Cy., 122 Wash.2d 619, 632, 860 P.2d 390 (1993); Citizens for Clean Air v. Spokane, 114 Wash.2d 20, 34, 785 P.2d 447 (1990); Barrie v. Kitsap Cy., 93 Wash.2d 843, 854, 613 P.2d 1148 (1980); Leschi Imp. Coun. v. State Hwy. Comm'n, 84 Wash.2d 271, 285, 525

P.2d 774, 804 P.2d 1 (1974). EIS adequacy involves the legal sufficiency of the data in the EIS. Klickitat Cy., 122 Wash.2d at 633, 860 P.2d 390 (citing Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 14(a)(i) (4th ed. 1993)). Adequacy is assessed under the "rule of reason", Klickitat Cy., at 633, 860 P.2d 390, which requires a " 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision." Klickitat Cy., at 633, 860 P.2d 390 (quoting Cheney v. Mountlake Terrace, 87 Wash.2d 338, 344-45, 552 P.2d 184 (1976)). The court will give the agency determination substantial weight. RCW 43.21C.090.

The adequacy issue raised at this time is whether the EIS contains sufficient discussion of alternatives to the proposed project. RCW 43.21C.030 requires that an EIS contain a detailed discussion of alternatives to the proposed action. The required discussion of alternatives to a proposed project is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts. Pursuant to WAC 197-11-440(5)(b), the reasonable alternatives which must be considered are those which could "feasibly attain or [873 P.2d 505] approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation".

Under the present statutes and administrative code, the question now before the court as to whether the EIS is adequate turns on whether the proposed project is a "public project" or a "private project". [1]

WAC 197-11-440(5)(d) provides in relevant part:

When a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site....

(Italics ours.) A "private project" is defined in WAC 197-11-780: " 'Private project' means any proposal primarily initiated

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or sponsored by an individual or entity other than an agency."

Thus, if the project is a private project, the EIS need only contain a sufficient discussion of onsite alternatives and the no-action alternative, while if the project is a public project, the EIS must contain a discussion of offsite alternatives. Assessing the adequacy of the discussion of alternatives in the EIS thus requires a determination of whether the project is a private project, as LRI maintains, or a public project, as the Weyerhaeusers maintain.

We agree with the Weyerhaeusers that, as a matter of law, the proposed landfill is a public project, and the EIS must contain a sufficient discussion of offsite alternative proposals. Because it does not do so, it is inadequate as a matter of law.

LRI asserts it initiated and sponsored the project--investigating and selecting the site, applying for permits, making project decisions, and using its own money to do so. LRI states that the landfill site was purchased privately by an affiliated company.

According to testimony, however, a 1986 contract between LRI and the Tacoma-Pierce County Health Authority required LRI to seek to permit a new "in-county landfill to replace the Hidden Valley Landfill and/or a waste to energy facility". Transcript of Proceedings (Jan. 29, 1991), at 33. Also, the project is described as a "municipal solid waste facility", e.g., Ex. 1(i) (first page) (final EIS, letter from Pierce County Planning and Natural Resource Management Director). The record contains numerous such references.

There has been a longstanding relationship between the County and LRI for handling and disposing of solid waste. The County asked three garbage haulers to form a corporation (LRI), and subsequently turned over to that corporation the operation of the "whole Pierce County solid waste system ...". Transcript of Proceedings (Jan. 29, 1991), at 33. The County by ordinance approved LRI's budget for 1990, including $150,000 for permitting at the 304th Street site. Transcript of Proceedings (Feb. 5, 1991), at 325-29; Ex. 34, schedule 9.

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We think it clear that the County has been involved in the initiation of the landfill project, regardless that it has done so through contracting out aspects of waste collection and disposal.

Our holding that the project is a public project is based on other grounds, however. The handling and disposal of solid waste is a governmental function. RCW 70.95.020 provides that while private entities may contract with local government for solid waste handling, the primary responsibility is that of the local government. In several cases, Washington courts have characterized garbage handling and landfills as governmental functions. E.g., Citizens for Clean Air v. Spokane, 114 Wash.2d 20, 39, 785 P.2d 447 (1990) ("[d]isposal of solid waste is a recognized governmental function"; therefore, contract with private company for disposal of solid waste is not an unconstitutional gift of public moneys); King Cy. v. Algona, 101 Wash.2d 789, 681 P.2d 1281 (1984) (disposal [873 P.2d 506] of solid waste is a governmental function and, therefore, absent express statutory authority a municipality may not tax a county's solid waste transfer station); Shaw Disposal, Inc. v. Auburn, 15 Wash.App. 65, 546 P.2d 1236 (1976). In Shaw, the court held that code cities were not required under a bidding statute to let garbage contracts to the lowest responsible bidder. The court then said that there was good reason for the lack of any such requirement:

The accumulation of garbage and trash within a city is deleterious to public health and safety. The collection and disposal of garbage and

trash by the city constitutes a valid exercise of police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best means in their possession to protect the public health....

Shaw, at 68, 546 P.2d 1236 (quoting Davis v. Santa Ana, 108 Cal.App.2d 669, 676, 239 P.2d 656 (1952)).

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Thus, regardless of whether the County deals with a private company, the collection and disposal of solid waste is the County's responsibility.

Under LRI's argument a government agency could avoid the requirement of environmental consideration of alternative sites and the comparison with a proposed project which that entails simply by contracting with a private entity to carry out the project. While it is true that LRI cannot condemn alternative sites, the County can. See RCW 8.08.010; RCW 36.58.010.

The EIS therefore must contain a sufficient discussion of offsite alternatives. It plainly does not.

Not all potential alternatives must be examined. Solid Waste Alternative Proponents v. Okanogan Cy., 66 Wash.App. 439, 443, 445, 832 P.2d 503, review denied, 120 Wash.2d 1012, 844 P.2d 435 (1992). Adequacy is determined under the "rule of reason". Barrie v. Kitsap Cy., 93 Wash.2d 843, 854, 613 P.2d 1148 (1980). There must be a reasonably detailed analysis of a reasonable number and range of alternatives. Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 14(b)(ii) (4th ed. 1993). Under WAC 197-11-440(5)(c), the alternatives section of the EIS must describe the objectives, proponents and principal features of reasonable alternatives, including the proposed action with any mitigation measures; describe the location of alternatives, including a map, street address and legal description; identify phases of the proposal; tailor the level of description to the significance of environmental impacts; devote sufficiently detailed analysis to each alternative so as to permit a comparison of the alternatives; present a comparison of the environmental impacts of the alternatives; and discuss benefits and disadvantages of reserving implementation of the proposal to a future time.

LRI claims it has complied with these requirements, and cites the final EIS at pages 19 to 33 (Ex. 1(c)) as containing sufficient discussion of offsite alternatives. However, pages 19 to 33 of the final EIS do not contain the required discussion. Instead, those pages contain a discussion of LRI's site

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selection process, and the brief descriptions of rejected sites consist of conclusory statements of LRI's assessment of possible sites examined in the site selection process. [2] They do not contain any location information such as a map, street address, and legal description. They do not contain any description[873 P.2d 507] of principal features of any alternatives. They do not tailor the level of description to the significance of environmental impacts, and, in fact, it is impossible from the brief, conclusory descriptions to engage in any meaningful comparison of the alternatives. There is absolutely no useful comparison of the environmental impacts of the alternatives.

The EIS format is telling as to whether these descriptions were ever intended to be a discussion of alternative proposals. They are in a section titled "Site Selection", beginning at page 19. Ex. 1(c), at 19. A "Description of Alternatives, Including the Proposal" begins on page 33 of the

EIS. Ex. 1(c), at 33. The latter section contains some discussion of onsite alternatives, but no discussion of offsite alternatives.

Because the EIS completely fails to discuss any offsite alternatives, it is inadequate as a matter of law. The EIS must be revised to contain a discussion of alternative sites. Barrie, 93 Wn.2d at 857. The trial court's invalidation of the conditional use permit must be upheld in light of the inadequate EIS.

Next, LRI and the Weyerhaeusers argue about whether the proposed landfill project must comply with the Pierce County Comprehensive Land Use Plan, and, if so, whether it does.

Pierce County's comprehensive plan calls for the proposed site to be "Rural-Residential" with a recommendation for "low-density residential use". The parties do not dispute that

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the property is zoned "G". Under this classification, a landfill is a permitted use. PCC 18.10.390(B)(2).

Generally, a specific zoning ordinance will prevail, even over an inconsistent comprehensive plan. Cougar Mt. Assocs. v. King Cy., 111 Wash.2d 742, 757, 765 P.2d 264 (1988); Nagatani Bros., Inc. v. Skagit Cy. Bd. of Comm'rs, 108 Wash.2d 477, 480, 739 P.2d 696 (1987). Thus, to the extent the comprehensive plan prohibits the landfill use, while the zoning code permits it, the use would be a permitted use under this general rule.

However, the zoning code itself expressly requires that "[s]olid waste facilities that require a Solid Waste Permit shall indicate on a site plan that the facility meets ... any comprehensive land use plan." (Italics ours.) PCC 18.10.560. Thus, for landfills, the zoning code requires consistency with the comprehensive plan. LRI maintains the landfill is consistent with the "Rural-Residential" designation. The Weyerhaeusers argue that a landfill is not consistent with the "Rural-Residential" designation, and therefore PCC 18.10.560 prohibits siting of a landfill at the proposed site.

The comprehensive plan states that it "deals with policy concerning broad categories and extensive areas of land use. It is conceptual and predictive in nature, being based on an estimate of future land requirements." Clerk's Papers, at 65. It says that

[l]ow density residential use is recommended in these areas to:

(1) Avoid premature and uneconomic extension of public facilities and services.

(2) To reserve potential residential land in sufficiently large ownership parcels to permit proper subdivision at a future date.

(3) To provide areas within reasonable commuting distance of major employment centers where rural living can be enjoyed with a minimum of use restrictions.

Clerk's Papers, at 78.

The Pierce County Comprehensive Land Use Plan, which is a brief document, was written in 1962, and, as characterized in the plan itself, is concerned with broad categories and is conceptual in nature. The recommendations

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for the rural-residential designation identified in the staff report emphasize reserving space for later development and providing rural living space. We agree that a landfill is not a residential use, but the extremely broad nature of the comprehensive plan, the broad purposes of the "rural-residential" designation, and the notion that landfills must be sited somewhere lead us to the conclusion that a landfill at the 304th and Meridian site is not so incompatible with the rural-residential designation as to be proscribed by the comprehensive plan. " '[A] [873 P.2d 508] comprehensive plan is no more than a general policy guide....' " Cougar Mt. Assocs. v. King Cy.,

supra 111 Wash.2d at 757, 765 P.2d 264 (quoting Carlson v. Beaux Arts Village, 41 Wash.App. 402, 408, 704 P.2d 663, review denied, 104 Wash.2d 1020 (1985)).

The next issue is whether the proposed landfill project must comply with the Tacoma-Pierce County Solid Waste Management Plan (SWMP), and, if so, whether it does.

RCW 70.95.080 requires that each county have a comprehensive solid waste management plan. RCW 70.95.090(9) requires that the plan contain a review of potential areas that meet the state's siting criteria. RCW 70.95.185 and .190 require that both the Department of Ecology and the Department of Health find that the project "conforms" to the SWMP.

The SWMP explains its format, Ex. 1(i), at 2-21, stating that after a discussion of each of the locational standards and local siting issues, a summary review of exclusionary criteria identified in the discussion will follow.

Exclusionary criteria, sometimes called "fatal flaw criteria[,]" are those factors that would definitively eliminate an area from any consideration for a waste disposal site. Fatal flaws include restrictions placed on siting by regulations or by local ordinances. They can also be defined by the local governing body or by enforceable plans such as the solid waste management plan.

Ex. 1(i), SWMP at 2-21.

PCC 18.10.560 provides that "[s]olid waste facilities that require a Solid Waste Permit shall indicate on a site plan that the facility meets the ... Solid Waste Plan". PCC

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18.10.560. Similar to the question of compliance with the comprehensive plan, discussed above, this provision mandates compliance with the SWMP.

Thus, both the SWMP itself and the Pierce County Zoning Code mandate the project's compliance with the SWMP.

The hearing examiner's conclusion that the SWMP is only a guideline is thus contrary to law, and must be reversed. The Weyerhaeusers argue that application of the wrong legal standard is fatal, and that it is not possible to know how the hearing examiner would have decided the case had the hearing examiner treated the SWMP provisions as determinative rather than as guidelines. LRI maintains, to the contrary, that even if the SWMP is mandatory, rather than merely a guideline as the hearing examiner concluded, the hearing examiner properly found the project conforms to the SWMP.

We agree with the Weyerhaeusers. There is a fundamental difference between a mere guideline and mandatory criteria, and we are not prepared to say that the difference had no effect on the hearing examiner's findings, conclusions, and decision.

Moreover, we disagree with LRI's characterization of the findings which were entered. The findings upon which LRI relies for the proposition that the hearing examiner properly found compliance with the SWMP do not support that proposition.

Several of the criteria in the SWMP have been the subject of dispute in this case; compliance with the SWMP is a major issue. Some areas of dispute, for example, have involved whether the project is impermissibly sited within 200 feet of a stream, whether it is impermissibly sited on wetlands, and whether it is impermissibly sited on a sole-source aquifer. One mandatory SWMP criteria provides that "[n]o facility's active area shall be located within two hundred feet measured horizontally, of a stream ... nor in any wetland ...". Ex. 1(i), at 2-34. Another provides that "[n]o landfill shall be located over a sole source aquifer ...". Ex. 1(i), at 2-24. There is no exception in the SWMP for

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relocating either wetlands or streams which are subject to mandatory criteria.

LRI points to findings of fact 6, 7, 8, and 15 (on remand). These findings are as follows:

6. The project as planned is consistent with the solid waste management plan and meeting the public need criteria.

7. An initial regional study of sites was conducted by the applicant as required [873 P.2d 509] by the Tacoma Pierce County Solid Waste Management Plan.

8. The project site was subjected to the site specific criteria listed in the SWMP.

....

15. The proposed site does not fail to meet the siting requirements of the Pierce County Solid Waste Management Plan.

Hearing Examiner Decision on Remand, case CP 8-89, findings of fact 6, 7, 8, and 15.

There must be findings on matters which "establish the existence or nonexistence of determinative factual matters ...". In re LaBelle, 107 Wash.2d 196, 219, 728 P.2d 138 (1986). None of these findings gives any indication of the decisionmaker's resolution of whether the active area of the site is within 200 feet of a stream, whether it is located on wetlands, or whether it is over a sole-source aquifer. Any of these conditions would be a "fatal flaw", and thus be a determinative factual matter. Like other findings discussed above, these findings are no more than conclusory statements.

LRI also suggests that finding of fact 14 (on remand) resolves the question whether the project is impermissibly sited on wetlands. That finding is that

[t]he various definitions of wetlands as contained in the minimum functional standards [MFS] versus the federal methodology, utilized by the Corps of Engineers, creates a condition requiring a permit to fill wetlands in question on the proposed site even though the wetlands do not meet the definition of wetlands as defined by the MFS.

Hearing Examiner Decision on Remand, case CP 8-89, finding of fact 14. LRI maintains that this finding establishes that although there are wetlands on the site under federal standards, there are no wetlands as defined by state law, i.e., the MFS.

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LRI misstates the finding. The finding does not say there are no wetlands as defined by state law on the site nor does it say that no part of the facility's active area is on wetlands as defined under the MFS. Plainly the finding is directed to whether there must be a permit in order for certain wetlands on the site to be filled; it says there are wetlands requiring a permit to be filled. The finding is completely silent as to whether there may be wetlands on the site which are wetlands within the meaning of the SWMP. [3]

Finally, conclusion of law 6 (on remand) completely destroys LRI's claim that there has been a definitive determination that there are no wetlands involved within the meaning of the term in the SWMP. The hearing examiner concluded in part that "[i]n the event of a future decision that the so-called wetlands are adjudged to meet the SWMP criteria the applicant may follow the procedure for obtaining a variance ...". [4] Hearing Examiner Decision on Remand, conclusion of law 6. Thus, not only is there no finding stating that there are no wetlands as the term has meaning within the SWMP, there is in fact a conclusion of law indicating that the issue is still open.

In summary, we hold that the SWMP exclusionary criteria are mandatory, and the findings and conclusions fail to address adequately whether there has been compliance with those mandatory criteria.

Conclusion

The hearing examiner's decisions on the conditional use permit and the EIS appeal are reversed. The EIS must be revised to adequately address alternatives to the proposed project. In any new public hearing on this proposed project where county-staff-authored reports and an environmental impact statement are involved, the opportunity for oral cross examination of the staff members must be accorded. The

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project must be in compliance with the exclusionary (mandatory) criteria of the Tacoma-Pierce County Solid Waste Management Plan.

[873 P.2d 510] ANDERSEN, C.J., and UTTER, DOLLIVER, SMITH, GUY and JOHNSON, JJ., concur.

MADSEN, Justice (concurring in part, dissenting in part).

Because the majority would unjustifiably expand the notion of "fairness" far beyond any cross examination right previously accorded in a public hearing of this nature, I respectfully dissent with respect to this portion of its opinion. Contrary to time-honored rules of statutory construction, the majority tortures the Pierce County Hearing Examiner Code (the Code), Pierce County Code (PCC) ch. 2.36, to reach its dubious result. Then, claiming that a due process analysis is unnecessary to support its reading of the Code, the majority goes beyond the Code and asserts incorrectly that its conclusion is supported by due process case law, citing Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The majority then compounds the confusion by ignoring the fact that any consideration of the issue of cross examination outside the Code is inexorably tied to due process. The result of these machinations is to convert an already time-consuming public hearing procedure into an outright marathon.

First, PCC 2.36.090 contains a number of significant words and phrases, only one of which the majority gives effect in its analysis. PCC 2.36.090 reads:

The Examiner shall have the power to prescribe rules and regulations for the conduct of hearings before the Examiner; and also to issue summons for and compel the appearance of witnesses, to administer oaths, and to preserve order. The privilege of cross-examination of witnesses shall be accorded all interested parties or their counsel in accordance with the rules of the Examiner.

Under longstanding rules of statutory construction, " 'a statute should be interpreted so as not to render one part inoperative' ". Xieng v. Peoples Nat'l Bank, 120 Wash.2d 512,

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530, 844 P.2d 389 (1993) (quoting Davis v. City & Cy. of San Francisco, 976 F.2d 1536 (9th Cir.1992) (quoting South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n. 22, 106 S.Ct. 2039, 2046 n. 22, 90 L.Ed.2d 490 (1986))). "[S]tatutes must be read in their entirety, not in a piecemeal fashion" and all the language used must be given effect. Vaughn v. Chung, 119 Wash.2d 273, 282, 830 P.2d 668 (1992); In re Marriage of Timmons, 94 Wash.2d 594, 600, 617 P.2d 1032 (1980). If unclear, words are to be given their "plain and ordinary meaning". Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 813, 828 P.2d 549 (1992). "If the Legislative intent or meaning of a statute is unclear, the meaning of doubtful words may be determined through their relationship to associated words and phrases." State v. Rice, 120 Wash.2d 549, 560-61, 844 P.2d 416 (1993). Courts must not focus on individual words in a statute alone, but must consider the language of the statute as a whole, its underlying policies, and the language and underlying policies of the entire act of which it is part. Vaughn, 119 Wash.2d at 282, 830 P.2d 668. Statutes are to be construed so as to effect their underlying purpose and avoid "unlikely, absurd or strained consequences". Kadoranian v. Bellingham Police Dep't, 119 Wash.2d 178, 189, 829 P.2d 1061 (1992) (quoting

State v. Fjermestad, 114 Wash.2d 828, 835, 791 P.2d 897 (1990)).

By singling out the words "shall be accorded" as determinative of the issue of cross examination, the majority ignores these rules. When read as a whole, the ordinance cannot be construed to "require" cross examination of the county staff as the majority holds. PCC 2.36.090 first states that the examiner "shall have the power to prescribe rules and regulations for the conduct of hearings". This power is not limited in the ordinance. Then, PCC 2.36.090 states that the examiner "shall have the power ... to issue summons for and compel the appearance of witnesses". This language does not require the examiner to compel the appearance of witnesses but only gives the examiner the power to do so. This statement also follows language giving the examiner the power to set up rules and regulations. The next sentence

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says that the "privilege of cross-examination of witnesses shall be accorded all interested parties or their counsel in accordance with the rules of the Examiner". [873 P.2d 511] PCC 2.36.090. (Italics mine.) While PCC 2.36.090 uses the phrase "shall be accorded", it is qualified in that any cross examination is "in accordance with the rules of the Examiner". Moreover, the sentence uses the word "privilege", not the word "right". The sentence further limits the privilege of cross examination to "witnesses".

While the ordinance does not define the word, "witness" is used primarily in reference to individuals testifying under oath before a judicial tribunal. Instead of adopting the common understanding of the term, the majority relies on less recognized definitions which include potential or proposed testifiers or those who provide evidence. See Black's Law Dictionary 1603-04 (6th ed. 1990); Webster's Third New International Dictionary 2627 (1986). However, when something beyond witnesses who testify is meant, a distinction usually will be made by either including the modifier "nontestifying" before the term witness or by discussing these individuals differently. See, e.g., Pavlik v. United States, 951 F.2d 220, 224 (9th Cir.1991). The modifier is not used here, nor is any distinction made. Further, if the ordinance had intended that all individuals who could potentially provide adverse evidence must be called, as the majority asserts, it would "compel" rather than "empower" the hearing examiner to subpoena them. [1] Instead, the language when read as a whole supports the conclusion that the fact and manner of cross examination are to be determined by the hearing examiner and are not due as a matter of law. The majority's interpretation ignores the ordinary meaning of the term "witness" and would render the remaining language in the ordinance, other than "shall be accorded", inoperative.

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Next, the majority cites only one of the professed purposes behind the Code to support its conclusion and ignores the remaining purposes which do not. PCC 2.36.010 recognizes:

A. The need to separate the County's land use regulatory function from its land use planning function;

B. The need to ensure and expand the principles of fairness and due process in public hearings; and

C. The need to provide an efficient and effective land use regulatory system which integrates the public hearing and decision-making processes for land use matters; it is the purpose of this chapter to provide an administrative land use regulatory system which will best satisfy these needs.

The resolution adopting the Code also states:

[T]he Board ... believes that a land use hearing examiner system will be very beneficial to all concerned or involved with land use decisions, and said system will (1) provide a more efficient and effective land use decision procedure; (2) provide the Planning Commission more time to

devote towards studying and recommending land use policy changes to the Board; (3) provide an experienced expert to hear and decide land use cases based upon policy adopted by the Board; and (4) provide the Board of County Commissioners more time to spend on other County concerns by relieving them from hearing land use cases, except any appeals ... [.]

Pierce County Resolution 20489 (1978).

While the Code was intended to expand principles of fairness and due process in public hearings, it is an unwarranted conclusion that the Code intended that public hearings' procedures should be "expanded" to those of a regular trial. A public hearing is meant to be a different creature altogether and serve different purposes. "The purpose of the hearing may range from the determination of a specific past event ... to an endeavor to ascertain community feeling about a proposed change in zoning or to determine the efficacy of a new drug." Henry J. Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1270-71, 1277-79 (1975). As Justice Frankfurter explained, "differences in the origin[873 P.2d 512] and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of the courts' ". Friendly, at 1269. The term "hearing" may connote

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a written rather than oral hearing or a different panoply of procedures in any given case. Friendly, at 1270-71.

Further, the Code also provides that in addition to its purpose to "expand" these principles, it intends "to provide an efficient and effective land use regulatory system". (Italics mine.) PCC 2.36.010. Without the county employees' testimony, the hearing took ten days of testimony and arguments, not including the time the examiner needed for consideration and preparation of a decision. The hearing examiner took an additional day of testimony on remand. These numbers do not even account for the hours the planning department and other agencies spent considering the option and preparing the reports. Moreover, the County is required to prepare these advisory reports in a significant number of cases before the hearing examiner. See PCC 2.36.080. To require county employees to testify in each of these cases would unduly burden the planning department in performing its functions despite the intent of the Code to free the department up to do so. In short, the majority's decision today would, without any solid basis, ignore rules of statutory construction and undermine the Code's purpose in favor of its own construction. The majority's interpretation robs the examiner of his statutory discretion and the provision of its enacting purpose--to release the planning department from this part of the process. Without clear language in PCC 2.36.090, or elsewhere in the Code that such a procedure is required, I cannot agree with the majority's reading.

Secondly, the majority's analysis of whether cross examination is required in a particular case independent of the PCC is confusing, misleading, and incorrect. While the majority asserts that it need not reach the issue of due process, the question of required cross examination in civil hearings as a general matter is inextricably tied to such issues because the confrontation clause only applies to criminal proceedings. See SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984). When articulating its purposes, the Code itself incorporates the

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issue of due process as well. The majority in fact acknowledges this when it cites Goldberg.

As a general rule, due process does not require the result advocated by the majority, despite what the majority attempts to imply. Adverse witnesses need not be compelled to testify in a civil hearing. See, e.g., Thomas v. Baker, 925 F.2d 1523, 1525-26 (D.C.Cir.1991) (agency officer who wrote a recommendation). Moreover, "confrontation and cross-examination

of those furnishing evidence against" an individual's position are not required in administrative hearings. Wolff v. McDonnell, 418 U.S. 539, 567, 94 S.Ct. 2963, 2980, 41 L.Ed.2d 935 (1974); see also Pavlik, 951 F.2d at 224-25 (agency investigator); Chmela v. Department of Motor Vehicles, 88 Wash.2d 385, 392-93, 561 P.2d 1085 (1977) (police report author); Johnston v. Grays Harbor Cy. Bd. of Adj., 14 Wash.App. 378, 383-84, 541 P.2d 1232 (1975) (environmental impact statement author). Hearsay evidence can be used and relied upon in administrative hearings. See RCW 34.05.452(1); 2 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 10.4 (3d ed. 1994); Washington Administrative Law Practice Manual § 9.09, at 9-57.0 to -57.1 (Richard A. Finnigan et al. eds. in chief 1992). Even courts which have held that in a given case, parties should be allowed to cross-examine authors of reports have acknowledged that such a call is within the administrative judge's discretion and have limited their holdings to the facts. See Demenech v. Secretary of Dep't of Health & Human Servs., 913 F.2d 882 (11th Cir.1990); Wallace v. Bowen, 869 F.2d 187 (3d Cir.1989); but see Lidy v. Sullivan, 911 F.2d 1075 (5th Cir.1990), cert. denied, 500 U.S. 959, 111 S.Ct. 2274, 114 L.Ed.2d 725 (1991); Coffin v. Sullivan, 895 F.2d 1206 (8th Cir.1990). [2] In a [873 P.2d 513] given administrative hearing, what is required by due process depends upon first identifying the interest protected by due process and then upon balancing the factors enumerated

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in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

To constitute a protected interest requiring due process protection, a government action must "constitute the impairment of some individual's life, liberty or property". 2 Ronald D. Rotunda & John E. Nowak, Constitutional Law: Substance and Procedure § 17.2 (2d ed. 1992). "Where government actions adversely affect an individual but do not constitute a denial of that individual's life, liberty or property, the government does not have to give the person any hearing or process whatsoever." Rotunda & Nowak § 17.2, at 581. The Supreme Court has given the phrase "life, liberty or property" restrictive meaning and no procedure is due unless an alleged interest falls within this meaning. Generally, liberty interests are derived from "those provisions of the Bill of Rights which the Court deems to be 'incorporated' into the due process clause as well as 'fundamental rights' which are derived either from the concept of liberty or other constitutional values". Rotunda & Nowak § 17.4, at 597. Property interests are derived from constitutional limitations on the government's ability to define or limit property rights such as the First Amendment, equal protection, and substantive due process. Rotunda & Nowak § 17.5. The majority cites no constitutionally protected interest in this case which would entitle the Weyerhaeusers to cross-examine adverse, nontestifying witnesses. [3]

When a protected interest exists, the procedural protections required by due process will still differ from case to case. Mathews states that which procedural safeguards are required in any hearing that would deprive any individual of a protected interest depends upon "consideration of three distinct factors":

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

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finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, at 335, 96 S.Ct. at 903. The Court further noted that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances". Mathews, at 348, 96 S.Ct. at

909. "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." Mathews, at 349, 96 S.Ct. at 909 (quoting Goldberg, 397 U.S. at 268-69, 90 S.Ct. at 1020-21).

Even if the protected interest problem could be overcome in this case, the Mathews analysis does not support the majority's result. First, the risk of erroneous deprivation and the probable value of allowing cross examination of county staff in this case are small because the reports at issue here could be effectively criticized without calling the county employees who wrote them. The Weyerhaeusers and others opposing the conditional use permit were able to call witnesses, present evidence to rebut the reports' recommendations, and cross-examine their opponents' expert witnesses. They also had an opportunity to ask county employees written questions. Lastly, the administrative burden adopting such a procedure would impose outweighs any small benefit. If such a procedure were to be imposed, county employees would have to testify in every case before the hearing examiner. Hearings would be significantly longer without much reason because the same or unnecessary information[873 P.2d 514] would be elicited. It would therefore be a great imposition on the County and the hearing process if county employees were to be subject to oral examination on these reports. Such a requirement could interfere with the County's performance of its functions and would be contrary to the articulated purposes for which the Code was enacted.

The facts and holding of Mathews itself also contradict the majority's reasoning. The Court held that even the decision to terminate protected disability benefits could be made

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based completely on written submissions and written medical reports and did not require an evidentiary hearing. The Court stated that "while there may be 'professional disagreement with the medical conclusions' the 'specter of questionable credibility and veracity is not present.' " Mathews, 424 U.S. at 344, 96 S.Ct. at 907 (quoting Richardson v. Perales, 402 U.S. 389, 407, 91 S.Ct. 1420, 1430, 28 L.Ed.2d 842 (1971)).

Instead of evaluating this issue in light of Mathews, the majority's holding implies that an unprotected interest would receive more procedural protection than a protected interest. It then erroneously cites Goldberg as supporting its position. First, in so doing, the majority ignores that Goldberg was uniquely tied to the protected interest at issue, the termination of welfare benefits, an interest quite unlike and far more important than any in debate here. Second, the majority fails to note that the Supreme Court has not said anything similar since that case and in fact, while not overruling it completely, has significantly limited its meaning in subsequent progeny. See Mathews, 424 U.S. at 333, 96 S.Ct. at 902 ("In only one case, Goldberg v. Kelly, ... has the Court held that a hearing closely approximating a judicial trial is necessary."); Davis & Pierce § 9.5, at 51 ("Goldberg is the only case in which a majority of the Court has held that due process requires an agency to provide a trial-type hearing before it takes an action that deprives an individual of an interest protected by due process.").

Finally, sound policy does not dictate the majority's result. Commentators have astutely pointed out that in administrative proceedings, cross examination yields little benefit and its main effect is more often delay. See Davis & Pierce § 9.5, at 48; Friendly, at 1283-86. Credibility attacks through cross examination are generally not very useful when a witness is an expert either. 1 Charles H. Koch, Administrative Law and Practice § 6.25 (1985). Davis & Pierce argue that requiring the confrontation and cross examination of report authors would actually cause administrative decisions to be less accurate. Davis & Pierce § 9.11.

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In conclusion, without clear language in the ordinance, any holding that cross examination of the authors of adverse reports is required is not justified given the limited benefit, if any, such a procedure could yield and the costs such a procedure would entail. As the ordinance alludes, the decision as to the procedures merited under PCC 2.36.090 best rests with the hearing examiner. This conclusion comports both with the law and sound policy.

DURHAM, J., concurs.

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1 It is unnecessary in this case to determine whether the "public"/"private" distinction drawn in the administrative code accords with SEPA policy. We recognize that one commentator has suggested that in certain cases, the distinction may be unsound. See Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 14(b)(ii) (4th ed. 1993).

2 For example, one description follows:

"Another site near Dupont was considered as a potential alternative location. The cost and effort to assemble a parcel large enough for the landfill, however, made this site impracticable. It would have involved purchasing a large number of small parcels to compile the requisite acreage. In addition, the area was planned for relatively dense residential development that may not have been compatible with the landfill. The soils here were also substantially more permeable, reducing the natural groundwater protection afforded by the proposed site." Ex. 1(c), at 29.

3 In addition, there has been no determination that only MFS-defined wetlands fall within the meaning of the term in the SWMP criteria.

4 We caution that we do not decide the issue whether a variance from the SWMP criteria may be sought and granted.

1 In fact, the provision does not give interested parties any right to subpoena or call witnesses. This omission works against the majority's conclusion as well because if the Code truly intended to "require" cross examination of all adverse individuals, it would have, at a minimum, contained language regarding such important issues.

2 Highly regarded administrative commentators Davis and Pierce point out that these cases only rely on dicta in Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), and argue against such a conclusion. 2 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 9.11 (3d ed. 1994).

3 Nor does the majority argue that PCC 2.36.090 itself creates due process protection. See In re Cashaw, 123 Wash.2d 138, 145, 866 P.2d 8 (1994); Conard v. University of Wash., 119 Wash.2d 519, 529, 834 P.2d 17 (1992), cert. denied, --- U.S. ----, 114 S.Ct. 91, 126 L.Ed.2d 59 (1993).

EXHIBIT 41

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765 P.2d 264, 19 Envtl. L. Rep. 20,721
COUGAR MOUNTAIN ASSOCIATES,
Appellant,
v.
KING COUNTY, Respondent.
No. 53841-7.
Supreme Court of Washington,
En Banc.
Dec. 15, 1988.

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[765 P.2d 265] Hillis, Clark, Martin & Peterson, Richard R. Wilson, Glenn J. Amster, Seattle, for appellant.

Norm Maleng, King County Prosecutor, Ann Schindler, Deputy, Seattle, for respondent.

Law Offices of J. Richard Aramburu, J. Richard Aramburu, Seattle, for Washington Environmental Council.

Richard L. Andrews, Bellevue City Atty., Richard Gidley, Asst. Bellevue City Atty., Bellevue, Amicus Curiae, for respondent City of Bellevue.

CALLOW, Justice.

Cougar Mountain Associates (Cougar Mountain) challenges King County's denial of its subdivision application. The County denied the application primarily because of the potential adverse environmental impacts that could result from the development of the proposed subdivision. We hold that the County erred in the procedure by which it denied Cougar Mountain's application. The County failed to set forth precisely the significant environmental impacts it considered in denying Cougar Mountain's application. Furthermore, the County failed to either describe mitigating measures available to Cougar Mountain or state that the potential environmental impacts could not be mitigated. We reverse the decision of the trial court upholding the County's denial of Cougar Mountain's subdivision application and remand the cause for further consideration.

In July 1982, Cougar Mountain filed an application in King County for preliminary plat approval of the proposed Ames Lake Hills Subdivision. An environmental checklist

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accompanied the application. Cougar Mountain initially sought permission for the development of 101 single-family residential lots on 135 acres located on a plateau above the Snoqualmie River Valley. The site was selectively logged in 1980-81, and has not been reforested due to the likelihood of future conversion to urban development. Ames Creek crosses the southwest corner of the property, and the Ames Lake 57 Wetland is immediately adjacent to the northwest corner of the property. The subject property was included within the "Residential Reserve" area pursuant to the 1964 King County Comprehensive Plan. The recommended maximum density in such areas was one dwelling unit per five acres. In 1985, the County adopted a new comprehensive plan. Under the new plan, the subject property is classified as "Rural", but the recommended maximum density continues to be one dwelling [765 P.2d 266] unit per five acres. However, the zoning classification for the property is "G", which allows a maximum density of approximately one dwelling unit per acre. The land surrounding the proposed subdivision consists of agricultural and residential lots ranging in size from 5 to 10 acres.

After reviewing Cougar Mountain's application, the King County Building and Land Development Division (BALD) issued a Declaration of Significance pursuant to the State Environmental Policy Act (SEPA), thus necessitating the preparation of an environmental impact statement (EIS) for the proposal. At the same time, the Subdivision Technical Committee, consisting of the head of the subdivision control section of BALD, a member of the Planning Division, and a member of the Department of Public Works recommended that Cougar

Mountain's proposal be denied because of incompatibility of the proposed use with the surrounding area and the inability to conform the proposal to the King County Code requirements regarding availability of water. This recommendation was made pursuant to then-existing King County Code (KCC) § 20.44.100(E), which stated:

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When denial of a private proposal, which is determined to be significant, can be based on existing county ordinances, the responsible official may deny the request without preparing an EIS in order to save the applicant and the county from incurring needless expense ... Provided, that the examiner may find that there is reasonable doubt that grounds for denial are sufficient, and therefore remand the application for consideration following preparation of an EIS ...

Pursuant to the recommendation of the Subdivision Technical Committee, the Zoning and Subdivision Examiner held a hearing in October 1982. The Examiner concluded that there was a reasonable doubt that the plan should be denied outright, and remanded the application for reconsideration following preparation of an EIS. Cougar Mountain prepared a draft EIS, which the County issued in September 1985. The EIS analyzed the effects of the proposed subdivision on erosion, surface water, fish and wildlife habitat, land use, public services, and utilities. The draft EIS was then circulated to affected agencies, libraries, newspapers, and special interest groups. The County subsequently issued an EIS addendum to reflect the comments made by interested parties. By this time, the proposed subdivision consisted of 90 lots on 128 acres; an average density of .7 dwelling units per acre.

In May 1986, after reviewing the EIS, BALD issued a preliminary report on the proposed Ames Lake Hills Subdivision. BALD recommended that the plat be approved, subject to numerous conditions. The King County Zoning and Subdivision Examiner held a public hearing on the subdivision in June 1986. Following the hearing, the Examiner recommended denial of the plat, based on his conclusion that the proposal conflicted with the 1985 King County Comprehensive Plan, the Zoning Code, the Agricultural Preservation Program, and the purposes and policies of SEPA. However, the Examiner offered Cougar Mountain the option of amending its proposal to include 25 sites with a minimum lot size of 5 acres.

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Cougar Mountain subsequently appealed the plat denial to the King County Council (Council). Following a hearing in October 1986, the Council passed Ordinance 7811, denying the appeal. The ordinance adopted and incorporated the findings and conclusions made by the Zoning and Subdivision Examiner. However, the Council later determined that these findings and conclusions did not accurately reflect the Council's October decision. As a result, the Council drafted new findings and conclusions supporting its denial of Cougar Mountain's application. Copies of the revised findings and conclusions were sent to the parties of record. A revised ordinance adopting the new findings and conclusions was introduced in January 1987, and a hearing on the proposed ordinance was held in February. On February 2, 1987, the Council adopted Ordinance 7945, which included the new findings and conclusions. The new ordinance reflected the Council's determination that Cougar Mountain's proposal should be denied because the subdivision[765 P.2d 267] would result in significant adverse environmental impacts that could not reasonably be mitigated. The Council also concluded that the proposal conflicted with several policies of the 1985 King County Comprehensive Plan.

In November 1986, Cougar Mountain sought review of the Council's denial of its subdivision application in King County Superior Court, pursuant to a writ of certiorari, writ of mandamus, and complaint for declaratory judgment. Cougar Mountain filed its complaint before the King County Council revised the ordinance denying Cougar Mountain's plat

application. Cougar Mountain subsequently amended its complaint in light of the revised ordinance. After a hearing in March 1987, the trial court entered judgment in favor of King County. Cougar Mountain appealed the decision directly to this court, contending that this case raises "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4).

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I.

Cougar Mountain contends that the County's denial of its subdivision application should be reviewed under the clearly erroneous test. The County asserts that the proper standard of review is the arbitrary and capricious test. In upholding the County's denial of Cougar Mountain's plat, the trial court apparently applied both standards of review, stating,

for purposes of clarity we do find that there was appropriate compliance with the statutory mandates so that we now as a review court are unable to say that the action of the Council was either arbitrary and capricious or that it was clearly erroneous.

Under the clearly erroneous standard of review, the court "does not substitute its judgment for that of the administrative body and may find the decision 'clearly erroneous' only when it is 'left with the definite and firm conviction that a mistake has been committed.' " Polygon Corp. v. Seattle, 90 Wash.2d 59, 69, 578 P.2d 1309 (1978) (quoting Ancheta v. Daly, 77 Wash.2d 255, 259-60, 461 P.2d 531 (1969)). See also Norway Hill Preserv. & Protec. Ass'n v. King Cy. Coun., 87 Wash.2d 267, 552 P.2d 674 (1976). The court should "examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision." Polygon, 90 Wash.2d at 69, 578 P.2d 1309.

Cougar Mountain relies on Polygon to support its argument in favor of application of the clearly erroneous standard of review. In Polygon, a developer sought a building permit for construction of a 13-story condominium on Queen Anne Hill. After the developer submitted an environmental information worksheet, the Seattle Building Department determined that the proposal constituted a "major [action] significantly affecting the quality of the environment" under RCW 43.21C.030(2)(c), and that therefore an EIS would be required. Polygon, 90 Wash.2d at 61, 578 P.2d 1309. After the EIS was submitted, the Superintendent of Buildings

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denied the developer's application pursuant to the standards set forth in SEPA. Polygon, at 61, 578 P.2d 1309. The Superintendent based the denial on his conclusion that the project was inconsistent with the aims of SEPA. He cited the visual impact of the building, the adverse effects on property values, and the trend toward more intense land use on Queen Anne Hill. Polygon, at 62, 578 P.2d 1309. The developer appealed the Superintendent's decision to the King County Superior Court, which granted summary judgment in favor of the City. The developer then sought direct review in this court.

Polygon recognized that "SEPA confers substantive authority to the deciding agency to act on the basis of the impacts disclosed [in the EIS]." Polygon, at 64, 578 P.2d 1309. The court then determined the standard by which the Superintendent's decision should be reviewed. It began by reviewing Norway Hill Preserv. & Protect. Ass'n v. King Cy., supra, in which the court applied the clearly erroneous standard of review to a negative threshold determination. [1][765 P.2d 268] 1] Polygon stated that the result in Norway Hill was based on the determination that "close review was necessary to ensure that the policies of SEPA were achieved." Polygon, 90 Wash.2d at 68, 578 P.2d 1309. The court stated additionally:

We find it equally important that the same broad standard of review be available to a property

owner whose property use has been limited by the denial of a building permit on the basis of SEPA.

... This is particularly true in view of the fact that environmental factors, especially those involving visual considerations, are not readily subject to standardization or quantification. That potential for abuse is even stronger where the decision must be made in a climate of intense political pressures.

Polygon, at 68-69, 578 P.2d 1309. The court concluded that

this potential for abuse, together with a need to ensure that an appropriate balance between economic, social,

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and environmental values is struck, requires a higher degree of judicial scrutiny than is normally appropriate for administrative action. Consequently, in order that there be a broad review, we apply the clearly erroneous standard to the superintendent's denial of Polygon's building permit.

Polygon, at 69, 578 P.2d 1309.

The denial of the building permit in Polygon is analogous to the denial of Cougar Mountain's subdivision application in this case. As noted in Polygon, decisions based on environmental factors are not readily quantifiable, and often are made in an atmosphere of intense political pressure. SEPA should not be used to block construction of unpopular projects. Parkridge v. Seattle, 89 Wash.2d 454, 466, 573 P.2d 359 (1978). One commentator has set forth additional reasons why the clearly erroneous standard of review is appropriate for substantive decisions based on SEPA:

First, in order to ensure that the policies promoted by SEPA are in fact incorporated into agency decisionmaking, it is necessary that the decisions be subject to critical review. Second, the major basis for judicial deference to administrative decisions--the expertise of the particular agency--does not apply when the agency is acting outside the area of that expertise, as is usually the case under SEPA. Third, the fundamental nature of the rights protected by SEPA makes a more intense standard of review appropriate. Finally, because the legislature has made it clear that the mandate announced by SEPA is statewide, broader review of administrative decisions is necessary to ensure that the statewide policy is not undermined by inappropriate political or economic pressures at the local level.

(Footnotes omitted.) Note, A Standard for Judicial Review of Administrative Decisionmaking Under SEPA--Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 578 P.2d 1309 (1978), 54 Wash.L.Rev. 693, 699-700 (1979). For these reasons, application of the clearly erroneous standard of review is appropriate.

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The County contends, however, that the arbitrary and capricious standard of review should be applied. Arbitrary and capricious conduct is defined as

willful and unreasonable action, without consideration and [in] disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached.

Barrie v. Kitsap Cy., 93 Wash.2d 843, 850, 613 P.2d 1148 (1980) (quoting Buell v. Bremerton, 80 Wash.2d 518, 526, 495 P.2d 1358 (1972)). As noted in Polygon, the clearly erroneous standard of review is broader than under the arbitrary and capricious test and avoids placing the responsibility for an ultimate decision within the [765 P.2d 269] sole subjective discretion of the administrative or legislative body. Polygon, 90 Wash.2d at 67, 578 P.2d 1309.

The County cites Nagatani Bros., Inc. v. Skagit Cy. Bd. of Comm'rs, 108 Wash.2d 477, 739 P.2d 696 (1987) in support of its argument that the arbitrary and capricious standard of review should be applied. In Nagatani, the County denied approval of a preliminary plat for the development of 29 residential lots. The denial was based in part on potential adverse environmental impacts. This court concluded that "[b]ased on this record, denial on that basis was an arbitrary and capricious decision." (Italics ours.) Nagatani, at 482, 739 P.2d 696. However, this decision does not represent a purposeful determination by the court to apply a narrower standard of review in such cases. The parties in that case did not challenge the application of the arbitrary and capricious test. In addition, the court held that the County could not satisfy even the more relaxed arbitrary and capricious standard of review. The clearly erroneous standard of review used in Polygon should also be applied in this case.

II.

In 1971, the Washington Legislature passed the State Environmental Policy Act. The purposes of SEPA are:

(1) To declare a state policy which will encourage productive and enjoyable harmony between man and his

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environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

RCW 43.21C.010. [2] SEPA's primary enforcement tool has been the EIS. An EIS must be prepared on proposals that will have a probable significant adverse environmental impact. RCW 43.21C.031. " 'Significant' as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1). In the past we have found significant impacts in cases wherein there was major opposition to a project, a primary change of direction in the use or activity on a large area, a meaningful threat posed to flora or fauna, or the perceived beginning of accelerating development. Noel v. Cole, 98 Wash.2d 375, 655 P.2d 245 (1982); Asarco, Inc. v. Air Quality Coalition, 92 Wash.2d 685, 601 P.2d 501 (1979); Department of Natural Resources v. Thurston Cy., 92 Wash.2d 656, 601 P.2d 494 (1979); Polygon Corp. v. Seattle, supra; Sisley v. San Juan Cy., 89 Wash.2d 78, 569 P.2d 712 (1977); Leonard v. Bothell, 87 Wash.2d 847, 557 P.2d 1306 (1976); Swift v. Island Cy., 87 Wash.2d 348, 552 P.2d 175 (1976); Norway Hill Preserv. & Protect. Ass'n v. King Cy., supra; Narrowsview Preserv. Ass'n v. Tacoma, 84 Wash.2d 416, 526 P.2d 897 (1974); Toandos Peninsula Ass'n v. Jefferson Cy., 32 Wash.App. 473, 648 P.2d 448 (1982). It is important impacts such as these upon an area that are classified as "significant" and while they require the preparation of an EIS, they also require the full panoply of procedural protection. See also Rogers, The Washington Environmental Policy Act, 60 Wash.L.Rev. 33 (1984).

The Washington courts have recognized that the SEPA legislation has bestowed broad and far reaching powers. We

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have recognized that SEPA confers substantive authority on agencies to act on the basis of impacts disclosed in an EIS. See Polygon, 90 Wash.2d at 64, 578 P.2d 1309; Department of Natural Resources v. Thurston Cy., 92 Wash.2d 656, 663, 601 P.2d 494 (1979). However, before an agency can condition or deny a proposal based on SEPA, it must comply with certain statutory and regulatory requirements. Cougar Mountain contends that the King County Council failed to comply with these requirements when it denied Cougar Mountain's subdivision application. We agree, and reverse the trial court's decision upholding[765 P.2d 270] the Council's denial of Cougar Mountain's application.

RCW 43.21C.060 provides that any governmental action may be conditioned or denied pursuant to SEPA. See also Polygon, 90 Wash.2d at 64, 578 P.2d 1309. Any denial must be based "upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency." RCW 43.21C.060; WAC 197-11-660(1)(a). King County Code (KCC) § 20.44.080(B) sets forth policies, plans, rules, and regulations that may serve as potential bases for the exercise of the County's authority under SEPA. The potential bases for County action include, inter alia, SEPA, the King County Comprehensive Plan, and the King County Zoning Code. KCC 20.44.080(B). Additionally, in order to deny a proposal on SEPA grounds, an agency must find that:

(1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.

RCW 43.21C.060; WAC 197-11-660(1)(f). WAC 197-11-660(1)(b) adds that "The decision maker shall cite the agency SEPA policy that is the basis of any condition or denial under this chapter."

In this case, the King County Council apparently based its denial of Cougar Mountain's application on conflicts with SEPA and the 1985 King County Comprehensive

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Plan. However, the Council failed to describe the specific SEPA policies with which Cougar Mountain's application conflicted. The Council merely stated that "the proposal as presently envisioned would likely result in significant adverse environmental impacts which cannot be mitigated by reasonable mitigation measures."

In Ordinance 7945 denying Cougar Mountain's application, the County Council concluded that:

1. As presently envisioned, the proposal would be likely to result in significant adverse environmental impacts on water quality and wildlife habitat, specifically Ames Lake Wetlands Nos. 57 and 58 and Ames Creek, assorted public services including schools, fire protection and solid waste disposal, and land use by heightening the trend toward more intense land use in the area and creating pressure to alter surrounding land use, both in and of itself, and considered as part of the cumulative impact with other similar developments.

2. Reasonable mitigation measures are insufficient to mitigate these identified adverse environmental impacts in that the evidence established that native growth protection easements would not effectively protect the impacted creeks and wetlands, and that the pressures on existing public services and heightened trend towards more intensive land use unavoidably follow from the introduction of 90 homes housing in excess of 300 individuals in a predominantly rural area.

These conclusions are not sufficiently specific to comply with the requirements of RCW 43.21C.060 and WAC 197-11-660 regarding denials of proposals on SEPA grounds. The Council merely stated in a conclusory fashion that the proposal would result in significant environmental impacts and that these impacts could not reasonably be mitigated. Much the same could be said for the settlement of the cities and towns of the state during the last century. The purpose of SEPA is to control the expansion of our population upon the land in such a way as to harmonize the interaction between humans and the environment and to protect nature. SEPA seeks to achieve balance, restraint and control rather than to preclude all development whatsoever. Its

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scheme cuts both ways as an instrument of control placed in the hands of government, but not an unbridled control that can ignore due process and fair treatment of landowners. Although the Council did set forth significant adverse impacts that would result from development of Cougar Mountain's proposed subdivision, it failed to state why the mitigation [765 P.2d 271] measures included in the EIS were insufficient to offset these impacts. [3]

The Council began by concluding that Cougar Mountain's proposal would be likely to result in significant adverse environmental impacts on water quality and wildlife habitat. The Council noted that one suggested mitigation measure, native growth protection easements, would be difficult to enforce. However, the Council failed to discuss the numerous other mitigation measures recommended in the EIS. Thus, it is unclear whether the Council's decision is based solely on the potential difficulty in enforcing native growth protection easements, or whether the Council also determined that the other recommended mitigation measures were insufficient to protect water quality and wildlife habitats.

The Council then noted that Cougar Mountain's proposal would be likely to result in significant adverse impacts on public services in the area of the proposed development, including schools, fire protection, and solid waste disposal. Again, the Council did not specifically state why reasonable mitigation measures would be insufficient to alleviate the impact of the proposed development.

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Finally, the Council pointed to the adverse impacts on land use that would result from Cougar Mountain's proposal. The Council stated the obvious--that the addition of 90 new homes to the area would result in an impact on the existing area land use. However, the only concern raised by the Council involved the potential conflict between traffic to the development and slow-moving agricultural traffic currently using the roads near the site of the proposed development. The Council cannot merely state that a proposed development will have an impact on existing land use in an area. If this were the case, no development could occur in rural areas. The Council cannot use SEPA as an excuse for the denial of proposals. If proposals are rejected on the basis of SEPA concerns, the agency must spell out its objections and how they can be satisfied or, if not, why not. Thus, before denying a proposal on SEPA grounds, we hold that an agency must (1) specifically set forth potential adverse environmental impacts that would result from implementation of the proposal, and (2) specifically set forth reasonable mitigation measures to counteract these impacts, or, if such measures do not exist, (3) specifically state why the impacts are unavoidable and development should not be allowed. The King County Council did not follow this procedure.

III.

Cougar Mountain also asserts that the Council erred when it used the King County Comprehensive Plan as a means for denying Cougar Mountain's subdivision application. Cougar Mountain contends that because its application complied with applicable zoning requirements, the fact that the application fails to comply with the provisions of the Comprehensive Plan is irrelevant.

RCW Chapter 36.70, the County Planning Enabling Act, defines a comprehensive plan as:

[T]he policies and proposals approved and recommended by the planning agency or initiated by the board and approved by motion by the board (a) as a beginning step

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in planning for the physical development of the county; (b) as the means for coordinating county programs and services; (c) as a source of reference to aid in developing, correlating, and coordinating official regulations and controls; [765 P.2d 272] and (d) as a means for promoting the general welfare. Such plan ... shall serve as a

policy guide for the subsequent public and private development and official controls so as to present all proposed developments in a balanced and orderly relationship to existing physical features and governmental functions.

RCW 36.70.020(6). Thus, the comprehensive plan provides an overall guide for development. Zoning regulations, on the other hand, set forth specific requirements for land use in a particular area. "The heart of a typical zoning ordinance defines the various districts and the regulations of use, lot size, site coverage, density, height, landscaping, parking, signs and other matters." R. Settle, Washington Land Use and Environmental Law and Practice § 2.3(a) (1983).

In this case, the density requirements of the King County Comprehensive Plan are in conflict with those set forth in the King County Zoning Code. Cougar Mountain asserts that the provisions of the Zoning Code should control, while the Council relied on the provisions of the Comprehensive Plan to deny Cougar Mountain's proposal. In Ordinance 7945, the Council concluded that "the proposal as presently envisioned also conflicts with numerous policies of the King County Comprehensive Plan." The policies cited by the Council included those describing recommended uses for areas classified as "Rural". The subject property is classified as a Rural area under the Plan, with a recommended maximum density of one dwelling unit per five acres. However, under the King County Zoning Code, the property is classified as "G", with a recommended density of one dwelling unit per acre. Cougar Mountain contends that the recommended density provisions of the Zoning Code should prevail over those described in the Comprehensive Plan. Cougar Mountain argues that its subdivision application

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should have been approved, since it complied with the recommended density requirements set forth in the Zoning Code.

In Nagatani Bros., Inc. v. Skagit Cy. Bd. of Comm'rs, 108 Wash.2d 477, 739 P.2d 696 (1987), the Skagit County Planning Commission denied the developer's proposed plat in part because of the proposal's failure to comply with the policies of the Skagit County Comprehensive Plan. Nagatani, at 479, 739 P.2d 696. The plat did comply with applicable zoning requirements, however. We stated that an "inconsistency between the zoning ordinance and the comprehensive plan must be resolved by application of the zoning ordinance." Nagatani, at 480, 739 P.2d 696 (citing Norco Constr., Inc. v. King Cy., 97 Wash.2d 680, 649 P.2d 103 (1982)): Carlson v. Beaux Arts Village, 41 Wash.App. 402, 408, 704 P.2d 663 (1985). "[A] comprehensive plan is no more than a general policy guide to the later adoption of official controls which is subordinate to specific zoning regulations." Carlson, at 408, 704 P.2d 663. Cougar Mountain's application complied with applicable zoning requirements, although it conflicted with the guidelines set forth in the King County Comprehensive Plan. Thus, the County erred in relying on the provisions of the King County Comprehensive Plan to deny Cougar Mountain's application. The application complied with the relevant zoning requirements and should not have been denied on the basis of density guides in the comprehensive plan.

IV.

In order for an agency to deny a proposal based on SEPA grounds, the agency must conclude that the proposal would result in significant adverse environmental impacts and that reasonable mitigation measures are insufficient to mitigate these impacts. Further, the agency must specifically describe the adverse environmental impacts, and either outline mitigation measures or specifically state why such measures are insufficient. Once the agency complies with these requirements, its decision will be reviewed on appeal

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under the clearly erroneous standard, and the court will not overturn the agency's decision unless "left with the definite and firm conviction that a mistake has been committed." The King County Council did not comply with the requirements necessary for a SEPA denial. We remand the cause [765 P.2d 273] to the Superior Court with instructions that it enter an order referring the matter to the King County Council for reconsideration of the proposal of Cougar Mountain Associates.

UTTER, BRACHTENBACH, DOLLIVER, ANDERSEN and DURHAM, JJ., concur.

DORE, Justice (dissenting).

I dissent. King County did comply with the requisite statutory and regulatory requirements and, it did not err in relying on the provisions of the King County Comprehensive Plan in denying Cougar Mountain's subdivision application.

I would affirm the trial court.

FACTS

This case is about the approval of a subdivision of a 128-acre undeveloped parcel of land into 90 building lots for new residences. The proposed site for this subdivision is adjacent to Ames Lake Wetland 57 which is rated as a unique and outstanding wetland. The water flowing into this wetland flows into a nearby wetland, Ames Lake Wetland 58. A wetland is a swamp, marsh or bog that supports vegetation typically adapted for life in saturated soil condition. The site itself contains several small knolls, ravines and depressions throughout. These ravines and depressions form the headwater extensions of tributaries that flow primarily into the wetlands. The majority of the eastern half of the site is an erosion hazard area. Terrain on the site varies from relatively level to steep slopes.

Cougar Mountain Associates filed an application for approval of this subdivision. An environmental impact statement was required because the proposal would have

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significant adverse environmental impacts. After the environmental information was reviewed, the King County Council, in ordinance 7945 (February 2, 1987), denied the proposal pursuant to its authority under SEPA.

STATUTORY REQUIREMENTS

In order to deny a proposal under SEPA, "an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact." (Italics mine.) RCW 43.21C.060. King County followed this mandate when it adopted and incorporated findings, conclusions and decision in ordinance 7945 denying Cougar Mountain's proposal. While the conclusions may not be "sufficiently specific", as the majority holds, the incorporated findings of ordinance 7945 are sufficiently specific to comply with the statutory requirements. These findings are discussed below.

The EIS and finding 5 detailed the unavoidable adverse impacts of the project and identified surface water runoff, erosion, public services, water quality, wildlife and impacts on existing land use as major issues.

Finding 7 discussed the impacts on the wetlands and Ames Creek as follows:

A ... Development in the density proposed [by the subdivision] can be expected to significantly disturb Wetland 57 with an adverse impact on this unique and outstanding wetland. The impact on this wetland can be expected to be particularly adverse during March through June which is the breeding season for both migratory fowl and resident wildlife species.

B. Flowing out of Ames Lake Wetland No. 57 is Ames Creek which is rated by the Department of Natural Resources as a Type 3 water. [This classification] is applied to natural waters which among other things are used by significant

numbers of fish for spawning, rearing and migration, are used by significant numbers of resident, game fish, or are highly significant for the protection of downstream water quality.

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The recommended mitigation measures for both the wetlands and the creek were detention/retention ponds and native [765 P.2d 274] growth protection easements. The King County Council found this mitigating measure to be insufficient in finding 7:

A ... Although the proposal contemplates mitigation of any impacts on the wetlands by the provision of a native growth easement between the wetland and any development, such native growth protection easements are difficult to enforce and therefore risk losing their integrity....

B ... As with the mitigation for Ames Lake Westland [sic] No. 57, a native growth protection easement is proposed to mitigate the adverse impacts of the development on Ames Creek.

The EIS and finding 6 identified the significant impacts on public services: The proposal would create a need to upgrade the fire station in Carnation. It would also require the addition of one more police officer to the area precinct. The solid waste disposal transfer station is currently operating at capacity and the new site for a use facility has not been determined. The junior and senior high schools would be placed above their planned capacity and could have adverse effects on the ability of the school district to staff and provide educational services, particularly due to current state funding levels and the lag time of the new homes being placed on the tax rolls.

The Council in its findings was concerned with the funding for these needed public services. The Council's concern was well grounded, given the recent political climate in rural areas against the passage of new bond issues. The Council found that the proposal adversely impacted public services in the area. The measures to deal with the cost of these services were insufficient to mitigate the impacts discussed.

In finding 8, the Council also considered the pressure to alter surrounding land use. A proposed project's potential for creating pressure to alter surrounding land use may properly be evaluated in a decision of this nature. Polygon

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Corp. v. Seattle, 90 Wash.2d 59, 70, 578 P.2d 1309 (1978). Specifically, the Council found an

unavoidable adverse impact of the proposal through the creation of pressure for similar density developments in the area through the introduction of ... an estimated 307 people ... and the concomitant expansion and extension of services into previously undeveloped areas for purposes of providing service to the proposal.

The Council considered this and found the resulting pressures unavoidable.

The King County Council's incorporated findings of ordinance 7945 identified the significant adverse impacts, the insufficient mitigation measures suggested, and the Council's conclusion was that based on SEPA this subdivision as currently presented should be denied. King County Ordinance 7945 was "sufficiently specific" to comply with the statutory requirements.

USE OF COMPREHENSIVE PLAN

In the subject case, the majority holds that the zoning code repeals and/or supersedes SEPA if the comprehensive plan is not in accordance with the zoning code. The majority, without reasoning or authority, unilaterally gives legislative bodies of municipal corporations veto powers over SEPA. By doing this the majority overrules all those cases which hold that SEPA "overlays local ordinances and must be enforced even where a particular use is allowed by local law or policy." These cases are Cook v. Clallam Cy., 27 Wash.App. 410, 415, 618 P.2d 1030 (1980), review

denied, 96 Wash.2d 1008 (1981); West Main Assocs. v. Bellevue, 106 Wash.2d 47, 53, 720 P.2d 782 (1986); Polygon Corp. v. Seattle, 90 Wash.2d 59, 65, 578 P.2d 1309 (1978).

The majority relies on Nagatani Bros., Inc. v. Skagit Cy. Bd. of Comm'rs. 108 Wash.2d 477, 480, 739 P.2d 696 (1987), (citing Norco Constr., Inc. v. King Cy. 97 Wash.2d 680, 649 P.2d 103 (1982)) for its proposition that an " 'inconsistency between the zoning ordinance and the comprehensive plan must be resolved by application of the zoning ordinance.' " These cases relied on by the majority did not involve the

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use of standards in a comprehensive[765 P.2d 275] plan where the plan standards have been specifically adopted as a basis for making local SEPA decisions. In view of this, the majority's reliance on Nagatani is misplaced.

The majority's position that a plan should be approved since it is in compliance with the zoning code misconstrues the nature of the SEPA mandate for environmental considerations. Department of Natural Resources v. Thurston Cy., 92 Wash.2d 656, 665, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830, 101 S.Ct. 98, 66 L.Ed.2d 35 (1980).

An environmental review process reveals impacts that general zoning regulations do not and could not take into account. An example of such impacts would be the discovery of wetlands, steep slopes, or unstable soils on a particular piece of property. Thus, a proposal that is in compliance with a zoning regulation may nonetheless have environmental impacts, and under SEPA this proposal may be denied. Polygon, 90 Wash.2d at 66, 578 P.2d 1309; West Main Assocs. v. Bellevue, 49 Wash.App. 513, 525, 742 P.2d 1266 (1987); Cook v. Clallam Cy., 27 Wash.App. at 415, 618 P.2d 1030; see Department of Natural Resources, 92 Wash.2d at 667, 601 P.2d 494.

It is important to note that SEPA policies have regulatory effect only when a proposed project has been determined to significantly affect the environment. West Main Assocs., 106 Wash.2d at 525, 720 P.2d 782. When SEPA is not involved the question of whether a specific zoning ordinance prevails over a general comprehensive plan becomes a different situation from the present case.

Here, SEPA is involved in Cougar Mountain's proposed subdivision and is a "major action significantly affecting the quality of the environment." The King County Council has enacted a SEPA ordinance which expressly adopts the comprehensive plan as a local SEPA policy. The King County Council, in addition to adverse environmental impacts, specifically based its denial of the Cougar Mountain proposal on policies and plans identified in this ordinance. In finding 10, the substantive basis for the County to deny the proposal of Ames Lake Hills was set forth:

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10. In 1984, ... King County identified in King County Code 20.44.080 both the policies of the state environmental policy act and the King County Comprehensive Plan as policies ... which, among others, form the basis for the exercise of the county's substantive authority under Chapter 43.21C RCW.

The decision itself in ordinance 7945 states the basis for denial:

The proposal as presently envisioned would likely result in significant adverse environmental impacts which cannot be mitigated by reasonable mitigation measures. The proposal also conflicts with numerous policies of the King County Comprehensive Plan-1985. Therefore, pursuant to the authority provided by Chapter 43.21C RCW and King County Code Chapter 20.44, the proposal is denied with leave to submit a revised application.

Since the Council adopted the comprehensive plan as a local SEPA policy, it was entitled to rely on the comprehensive plan in denying the proposal under SEPA. West Main Assocs., at 522, 720 P.2d 782.

CONCLUSION

In sum, the Council complied with applicable statutory requirements in setting forth the basis for its decision, and this decision is supported by information set forth in the EIS and the adopted SEPA policies. Furthermore, the County did not err in relying on the comprehensive plan in denying the application. The record does not substantiate the majority's position that the court is "left with the definite and firm conviction that a mistake has been committed" by the Council. The Council's decision to deny Cougar Mountain's application passes the clearly erroneous test. I would affirm.

PEARSON, C.J., concurs.

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1 A negative threshold determination is a decision by an agency that a particular project does not represent a "major [action] significantly affecting the quality of the environment." WAC 197-11-330. If a negative threshold determination is made, an EIS does not have to be prepared. WAC 197-11-330.

2 "SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision makers." Save Our Rural Environment v. Snohomish Cy., 99 Wash.2d 363, 371, 662 P.2d 816 (1983).

3 The observation of Sisley v. San Juan Cy., 89 Wash.2d 78, 85, 569 P.2d 712 (1977) indicating the need for specificity is apropos:

[T]he record of a negative threshold determination by a governmental agency must "demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." Juanita Bay Valley Community Ass'n v. Kirkland, [9 Wash.App. 59, 73, 510 P.2d 1140 (1973)].

The opinion continues with a criticism of the record made by the governmental authority stating: "Unfortunately the Board's conclusion ... is accompanied by no reasoning, explanation or findings of fact, however informal." Sisley, 89 Wash.2d at 85-86, 569 P.2d 712.