

**BEFORE the HEARING EXAMINER for the
CITY of MERCER ISLAND**

DECISION

FILE NUMBERS: CAO15-001 & VAR18-002

APPLICANT: MI Treehouse, LLC
ATTN: Bill Summers
P.O. Box 261
Medina, WA 98039

TYPE OF CASE: Consolidated: 1) Critical Areas Reasonable Use Exception to construct a single-family residence and associated improvements within a regulated wetland and required wetland and stream buffers; and 2) Variance from the setback requirement from an access easement

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: REMAND

DATE OF DECISION: August 7, 2020

INTRODUCTION ¹

MI Treehouse, LLC (“Summers”) seeks two land use approvals from the City: 1) a Critical Areas Reasonable Use Exception (“RUE”) from the provisions of Chapter 19.07 Mercer Island City Code (“MICC”), Environment, to construct a single-family residence and associated improvements within a regulated wetland and required wetland and stream buffers; and 2) a Variance from the provisions of MICC 19.02.020(H)(1) to reduce the required setback from an access easement from five (5) to two (2) feet.

Summers filed the RUE application on January 16, 2015. (Exhibit 2 ²) The Mercer Island Department of Community Planning & Development (“CP&D”) deemed the RUE application complete on March 30, 2015. (Exhibit 47) CP&D issued a Notice of Application for the RUE on April 13, 2015. (Exhibits 4; 5)

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Most of the Exhibits were filed electronically as PDF documents; the remainder were converted to PDF documents post-hearing. Specific page citations will use PDF page numbers, not any page numbers that might be on the original document. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

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The subject property is located at 5637 East Mercer Way. Its Assessor's Parcel Number is 1924059312 ("Parcel 9312"). (Exhibit 2)

The City's then-Hearing Examiner, Ryan Vancil ("Examiner Vancil"), held a predecision open record hearing on February 13, 2017, pursuant to MICC 3.40.060 to consider the RUE (the "2017 Hearing"). The City gave notice of the 2017 Hearing as required by the MICC. On March 8, 2017, Examiner Vancil issued a Decision to Remand the application to the City for further review and action (the "2017 Remand"). (Exhibits 7; 36)

Summers filed the Variance application on May 8, 2018. (Exhibits 37; 47) CP&D deemed the Variance application complete when filed. (Testimony) CP&D issued a consolidated Notice of Application for both applications on June 4, 2018. (Exhibit 47)

The current, undersigned Mercer Island Hearing Examiner ("Examiner") viewed the subject property on June 18, 2020.

The Examiner held a consolidated predecision open record hearing pursuant to MICC 3.40.060 on July 20, 2020. The hearing was conducted remotely using the "Zoom" program due to assembly restrictions attendant to the current COVID-19 pandemic. The City gave notice of the hearing as required by the MICC. (Exhibit 53³)

The following exhibits were entered into the hearing record during the hearing:

- Exhibits 1 - 61: As enumerated in the Exhibit List dated July 10, 2020
- Exhibit 62: E-mail, Muckleshoot Indian Tribe, September 25, 2019, submitted to the record July 20, 2020
- Exhibit 63: E-mail, jane dieckman & Lori Hanson, July 19, 2020 (capitalization as in original), submitted July 20, 2020
- Exhibit 64: Resume, Edgar K. Sewall, III, submitted July 20, 2020
- Exhibit 65: Resume, Michael A. Moody, submitted July 20, 2020
- Exhibit 66: Resume, George Steirer, submitted July 20, 2020
- Exhibit 67: Resume, William Chang, submitted July 20, 2020
- Exhibit 68: Hearing Statement, George Steirer, submitted July 20, 2020
- Exhibit 69: High resolution copy of Exhibit 42d, pp. 4 & 5, submitted July 20, 2020
- Exhibit 70: Color copy of Exhibit 38, submitted July 20, 2020
- Exhibit 71: Statement of David and Peter Anderson in Opposition, submitted July 20, 2020
- Exhibit 72: Statement of Gordon J. Ahalt in Opposition with Exhibits AH-1 – AH-8, to be cited as Exhibits 72-AH-1 – 72-AH-8, submitted July 20, 2020
- Exhibit 73: Petition in Opposition, submitted July 20, 2020
- Exhibit 74: Triad Downstream Analysis, October 15, 2015 Update, submitted July 20, 2020
- Exhibit 75: E-mail, Dave Anderson, July 20, 2020, submitted July 20, 2020

³ The hearing was originally scheduled for an earlier date in 2020, but had to be canceled due to the COVID-19 pandemic. (Exhibits 52; 61, PDF p. 7, Findings 45 & 46)

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Exhibit 75a: City of Mercer Island, Land Use Application – Plan Set Guide, submitted July 20, 2020

The Examiner held the record open through July 27, 2020, to allow hearing attendees to submit responses to Exhibits 62 – 75a and through July 29, 2020, for submittal of Summers’ written closing statement.⁴ The following responsive documents were received during that period:

Exhibit 76: Gordon J. Ahalt Rebuttal, submitted July 27, 2020
Exhibit 77: Response of David and Peter Anderson, submitted July 27, 2020
Exhibit 78: Applicant’s Closing Statement, submitted July 29, 2020
Exhibit 78a: Declaration of Service, submitted July 29, 2020
Exhibit 78b: 1977 Short Plat (annotated) and associated plans (“Exhibit A” to Exhibit 78), submitted July 29, 2020⁵
Exhibit 78c: Color copy of Exhibit 24 (“Exhibit B” to Exhibit 78), submitted July 29, 2020

The hearing record closed on July 29, 2020, with submittal of Exhibits 78 – 78c.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

Setting

1. Parcel 9312 is Lot A in the 1977 *Sunrise Ridge* short plat. It is a roughly wedge-shaped parcel with one concave side as if it were located on a cul-de-sac bubble. The concave side is the east boundary abutting a hair-pin curve in East Mercer Way. The length of that concave line is approximately 110 feet. The north property line is about 258 feet long. The west property line is composed of three segments totaling about 242 feet.⁶ The south property line is about 183 feet long. Parcel 9312 contains 37,554 square feet (“SF”). (Exhibit 39) Parcel 9312 is zoned R-15, a single-family residential zone which requires a 15,000 SF minimum lot size. (Exhibit 1, PDF p. 2, Finding 6)

⁴ Summers’ counsel requested and was granted leave to submit a written closing statement rather than an oral one.

⁵ Exhibit 78b (Exhibit A to Exhibit 78) is admitted solely for the asserted depiction of a 24” Fir tree located immediately north of a driveway depicted on the second and third sheets of Exhibit 78b (PDF pp. 2 & 3). No other information on Exhibit 78b has been considered.

⁶ The west property line segment call-out lengths on the currently proposed site plan (Exhibit 38) match the call-out segment lengths on the original short plat that created Parcel 9312 (Exhibit 39). However, the line segments as drafted on Exhibit 38 do not match the call-out lengths: The north segment which should be 47 feet is drawn as 57 feet; the middle segment which should be 94 feet is drawn as 65 feet; and the south segment which should be 101 feet is drawn as 119 feet. The total length is about the same, but the segment lengths and resulting angles are inaccurate. Thus, it appears that Parcel 9312’s shape is inaccurately presented on Exhibit 38.

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2. Summers desires to construct a single-family residence on Parcel 9312. For reasons explained below, the current proposal does not comply with the City's critical areas regulations regarding wetlands and streams, does not meet a zoning setback requirement from an access easement, and may not comply with steep slope buffer requirements. Thus, Summers is seeking approval of an RUE and a Variance.

The design, size, and location of the proposed residence has evolved since the plan set that was before Examiner Vancil was filed in 2016. The shape and size of the current proposed residence is essentially the same, but it has been shifted eastward some 15 feet to reduce driveway length, amount of required excavation, and percentage of the structure physically located within a delineated wetland area. (Cf. Exhibit 3a with Exhibit 38) An earlier plan by a previous owner had a much larger structure located in the center of Parcel 9312, wholly within the delineated wetland. (Exhibit 19c)

The current proposal would share a driveway with the residence on the abutting lot to the south. The residence's footprint would be 1,631 SF with a 1,650 SF driveway. (Exhibit 38) The development would impact 3,815 SF of on-site wetland and 3,092 SF of on-site wetland buffer.⁷ An unspecified amount of overlapping stream buffer would also be impacted. Proposed mitigation would include enhancement plantings on-site and participation in an off-site wetland mitigation bank. (Exhibits 42b; 69; and testimony)

3. In 2015 Summers filed the present RUE application, seeking relief from critical areas regulations to build a single-family residence on Parcel 9312 as depicted on Exhibit 3. (Exhibit 2) Examiner Vancil held a predecision open record hearing on that application on February 13, 2017, and issued the 2017 Remand on March 8, 2017. (Exhibits 7; 36) Exhibits 1 – 35 were before Examiner Vancil at that time.

The Variance application was filed about a year later while Summers and City staff were evaluating how wetland impacts could be further reduced by adjusting placement of the proposed residence. (Exhibit 37)

4. Parcel 9312 is bordered on its north by the Parkwood Ridge Open Space tract which contains about 155,000 SF. (Exhibits 1, PDF p. 2; 48)

Parcel 9312 is bordered on the west by the rear lot lines of Lots 22 (partial), 23, 24, and 25 in the *Mercer Firs* plat which front on SE 57th Street. (Exhibits 39; 48)

Parcel 9312 is bordered on the south by Lot B in the *Sunrise Ridge* short subdivision. Lot B is currently owned by John Stivelman ("Stivelman"). Lot B will be referred to herein as the "Stivelman Lot". (Exhibits 39; 54g)

⁷ The record contains numerous documents listing various amount of wetland and wetland buffer impact. (Exhibits 42b; 42c; 56c) The numbers used here are the testimony of Summers' wetland consultant as he testified about Exhibit 69. He stated that those numbers are the correct figures.

As noted, Parcel 9312 fronts on the west side of East Mercer Way at the apex of a hairpin turn. (Exhibit 48)

5. In the interest of judicial economy this Decision will focus on those matters particularly relevant to the outcome of the case.
6. The Findings of Fact in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the decision as a whole.
7. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

Physical Characteristics

8. Parcel 9312 is located within a large, regional, steep-sided ravine. The ravine begins to the north and northwest of Parcel 9312 as three separate, steep-sided ravines, the largest of which is in the Parkwood Ridge Open Space tract. The three ravines join to become one ravine near the northwest corner of Parcel 9312 which then turns to the east as it crosses Parcel 9312, trends easterly towards Lake Washington, and flattens out before reaching the lake shoreline. Parcel 9312 is essentially a wide, relatively flat area immediately west of East Mercer Way within the steep-sided ravine. The Stivelman Lot to the south also exhibits a smaller, relatively flat area at a higher elevation than Parcel 9312, but still well below the crest of the ravine to the south, west, and north. The off-site slope to the north begins essentially at the property line and rises uniformly about 105 feet in a horizontal distance of about 175 feet (a 60% slope). The off-site slope to the west and southwest also begins essentially at the property line and rises uniformly between 50 - 80 feet in a horizontal distance of between 45 - 65 feet (a 70% slope). (Exhibit 23, Appendix A, PDF pp. 6 & 7)

Neither the off-site northern or western steep slopes are depicted on the proposed site plan, Exhibit 38.

9. Parcel 9312 itself is somewhat like a bowl with a low edge facing easterly. It has a narrow band of steep slopes along its north and south edges. The bulk of the parcel exhibits much gentler grades than are found on the surrounding parcels.⁸ The low spot on Parcel 9312 is along its East Mercer Way frontage at about elevation 160; it's high point is at the southwest corner at about elevation 226. (Exhibits 4a, PDF p. 7; 38; 40a, PDF p. 25)
10. Summers' geotechnical consultant, GEO Group Northwest, Inc. ("GEONW") prepared one geotechnical report and augmented it with four memoranda between March, 2015, and the 2017 Hearing. Prior to and in the course of that work three soil borings were performed, all within the confines of Parcel 9312. (Exhibits 10a – 10e)

⁸ The inference from the contour lines on Exhibit 38 near the north property line that the parcel to the north exhibits gentle slopes is most likely quite mis-leading. Exhibit 23, Appendix A, PDF pp. 6 & 7 strongly suggests that the slope becomes significantly steeper immediately to the north.

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GEONW concluded that the on-site soils were loose to medium loose sands over dense silty clays. It concluded that some of the loose sands on the flatter portions of the site were likely landslide debris from mass wasting events in the ancient past. It concluded that the upper sands on Parcel 9312 were susceptible to liquefaction and were only marginally stable. It recommended utilizing a catchment wall to protect the proposed house from potential slope raveling/sliding from the direction of the Stivelman property. It found water seeping out of the hillside where the sands contacted the clays. All of the surface soils on the flatter portion of Parcel 9312 were saturated to the surface. (Exhibits 10a – 10e)

No comments or analysis regarding the surrounding steep slopes was provided in the pre-2017 Hearing materials.

11. After the 2017 Remand GEONW issued four memoranda. The first, in May, 2017, noted the presence of a major landslide scarp above the western property line but concluded that the proposed development would not adversely affect it. Although two streams had been identified on Parcel 9312 by that time, GEONW mentioned the existence of only one. (Exhibits 40a – 40d)

As best as can be determined from the record, GEONW performed no additional field work after the 2017 Remand.

12. Summers' wetland and stream consultant, Sewall Wetland Consulting, Inc. ("Sewall"), provided three complete critical areas reports between March, 2015 and the 2017 Hearing – one original and two revisions. The original report identified one Category III wetland ("Wetland A") and one "Type 2" stream ("Stream A"). Wetland A covers the entirety of the site except for the steepest slope areas along the north and south edges of the parcel. Stream A flows out of the Parkwood Ridge Open Space tract and makes a sharp turn to the east to flow along the northern portion of the site. After exiting Parcel 9312, it flows through a culvert beneath East Mercer Way and then downslope through the ravine to empty into Lake Washington. (Exhibit 12a)

By the time the first revised report was issued in October, 2015, Sewall had identified a second "Type 2" stream on Parcel 9312 ("Stream B"). Stream B rises somewhere in or near the middle of Parcel 9312 and flows easterly (south of Stream A) to the edge of the East Mercer Way right-of-way. According to the plans contained in the record, Stream B simply disappears at the right-of-way line; according to Sewall's text, Stream B enters a catchbasin in the right-of-way, joins Stream A, and flows through a culvert beneath East Mercer Way. (Exhibit 12b)

13. After the 2017 Remand Sewall issued one additional revised critical areas report (Exhibit 42b) and three response memoranda (Exhibits 42a, 42c, and 42d). None of these significantly altered Sewall's description and analysis of either Wetland A or Streams A and B. Sewall did support the City's peer reviewer's suggestion that footing drains on the uphill side of the proposed catchment wall would allow subsurface flows to be carried around the house site and reintroduced into Wetland A north and northwest of the construction area, thus helping to maintain wetland hydrology. Sewall concluded that doing so would not dewater the soils upslope of the catchment wall. Sewall also

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explained the genesis of and the benefit of the use of a wetland mitigation bank for some of the required mitigation.

14. All of Sewall's work was performed before Chapter 19.07 MICC was amended by the City in 2019. All of his wetland and stream ratings are based on the old code. The current code uses a different stream typing system and different wetland buffer standards. There is no longer a Type 2 stream classification. Since Sewall states that both Streams are perennial, non-fish-bearing, they would now be classified as Type Np streams. The wetland rating system is different and yields different habitat point ranges. Expert knowledge, beyond the Examiner's personal scope of knowledge, is required to make the habitat point conversion.⁹
15. Stream B is depicted in various locations and with various lengths on the maps and plans contained in the record. (Exhibits 12b, PDF pp. 3 & 20¹⁰; 12c, PDF p. 7; 38; 42d, PDF p. 5) On the latest project plan (Exhibit 38) Stream B defies geographical logic: It is depicted as flowing diagonally down the shallow side wall of a small, on-site draw. Streams simply do not do that in the real world.¹¹ Streams flow down the centerline of draws or ravines, not slaunchwise down their sides. If the topography on Exhibit 38 is accurate and if Stream B were properly mapped, it would originate at or flow beneath the northeast corner of the proposed residence, depending on its length. By drawing Stream B on the side of the slope, it misses the house by about seven feet. (Exhibit 38)
16. Property owners east of East Mercer Way (downstream of Parcel 9312) currently experience drainage and localized flooding problems associated with Stream A as it flows through their properties on its way to Lake Washington. Several of those property owners assert that the proposed development will increase flows through Stream A, which will exacerbate the problems they presently experience and will violate the terms of a 1997 drainage easement granted to the City by one of their predecessors. (See Finding of Fact 21, below.) (Exhibits 6h; 6o; 54d; and testimony)
17. The subject property is wooded with deciduous species predominating. Understory vegetation is primarily typical hydrophytic plants. (Exhibit 12b)

History

- 18 Parcel 9312 is Lot A in the four-lot *Sunrise Ridge* short subdivision,¹² approved in 1977. The four lots run from north to south along the west side of East Mercer Way, with Lot A at the north end.

⁹ The Examiner believes that the Department of Ecology has generated a document to facilitate conversion of old to new wetland rating point scores. The Examiner has not gone outside the record to seek out that document.

¹⁰ Two different lengths and alignments in the same exhibit.

¹¹ The undersigned Examiner has a Master's Degree in Geography, was a professional cartographer while attending graduate school, and served as an Imagery Interpretation Officer in the U.S. Army. The Examiner is taking official notice of matters known from his education, training, and experience.

¹² A "subdivision" ("short" or "long") "is the division or redivision of land into ... lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership". [RCW 58.17.020(1) or (6)] A "plat" ("short" or "long") "is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys, or other divisions and dedications." [RCW 58.17.020(2)] These two words are often used interchangeably although they are not, strictly speaking, interchangeable. The Examiner tries to use them in their legally correct fashion.

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The short plat contains two easements for access and utilities, one shared by Lots A & B (the Stivelman Lot), the other shared by Lots C & D. The easement shared by Lots A & B can best be described as roughly “Y” shaped, with the base of the “Y” abutting East Mercer Way. The base of the “Y” is about 45 feet wide; it is almost 32 feet long on its north side but only 7 feet long on its south side.¹³ The north arm is 30 feet wide and 41 feet long. The south arm is 32 feet wide and 31 feet long. The base and the north arm are wholly located within Lot A; the south arm is wholly located within Lot B. (Exhibit 39) This access and utility easement is depicted on Exhibit 38.

19. The face of the *Sunrise Ridge* short plat contains six Conditions of Approval, three of which are particularly germane in this case:

2. That access and utility construction on Lot A be located so as to save the 24” fir on Lot A, just north of proposed access easement. [*sic*]
5. No construction shall occur within 25’ of the watercourse on Lot A and C without Planning Commission approval.
6. A tight-lined storm drainage system shall be utilized which provides for all impervious surface runoff and shall be connected at a catch basin at the existing storm system on East Mercer Way. ...

(Exhibit 39) The short plat does not depict any trees, so the location of the tree called out in Condition 2 was not contemporaneously memorialized.

20. On April 10, 1978, a 4-foot wide side sewer easement was recorded (Recording number 7804100820) which encumbers a strip along some portion of one of Parcel 9312’s property lines. (Exhibits 1, PDF p. 7; 15, PDF p. 3) The side sewer easement is not depicted on any of the site plans in the record.¹⁴

21. On or about October 17, 1997, the O’Sullivans granted a Drainage Easement to the City over their property as part of the settlement of litigation between the two parties (the “O’Sullivan Drainage Easement”). The O’Sullivans’ property was a 130-foot wide strip running between East Mercer Way and Lake Washington which was directly across East Mercer Way from Parcel 9312. The O’Sullivans’ address was 5636 East Mercer Way. The O’Sullivan Drainage Easement was recorded on June 1, 1998. (Exhibit 14, PDF p. 2)

The litigation was over upstream water flows onto the O’Sullivans’ downstream property:

¹³ The width of the base of the easement is not stated on the short plat. The dimension stated here is the scaled distance as shown on Exhibit 38.

¹⁴ It is more likely than not that the side sewer lies within the “Y”-shaped access and utility easement and contains the side sewer serving the Stivelman house on *Sunrise Ridge* Lot B.

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The purpose of the Drainage Easement is to permit [the City] to pass waters from upstream of East Mercer Way, and from the south of the Grantors' property along East Mercer Way, into the watercourse in existence on the Grantors' property, in an easterly direction to the waters of Lake Washington.

The waters which may be passed into the watercourse in existence on the Grantors' property shall be limited to water flows which result from conditions, diversions or improvements existing as of the date of the settlement agreement, May 31, 1984, including any and all siltation contained in said water flows in an amount not to exceed 50 cubic yards of siltation per calendar year.

(Exhibit 14, PDF p. 2) The O'Sullivan Drainage Easement requires the City to maintain a pond located west of Glenhome Road (the "Glenhome Pond"). The O'Sullivan Drainage Easement runs with the land. (Exhibit 14, PDF p. 3) The O'Sullivan Drainage Easement does not physically encumber Parcel 9312.

The settlement also included payment of \$31,400.00 by the City to the O'Sullivans. (Exhibit 14, PDF pp. 4 & 5)

22. March-MacDonald, Inc. ("March-MacDonald") purchased Parcel 9312 in 1999. (Exhibit 54a, PDF p. 5)
23. At some time prior to 2004, March-MacDonald filed an application with the City to divide Parcel 9312 into two lots. For reasons not contained in this hearing record, that proposal was abandoned. (Exhibit 16)
24. In May, 2004, Clay and Megan March filed an application for a "Critical Area Variance" (as it was known at the time) to construct a single-family residence on Parcel 9312. They proposed a three-story, with 3-car tucked-under garage, 3,749 SF single-family residence essentially in the center of Parcel 9312. On June 8, 2010, March-MacDonald withdrew the 2004 application and associated applications.¹⁵ (Exhibits 19a – 19d)
25. On March 16, 2007, March-MacDonald granted to the City a Permanent Stormwater/Utility and Pedestrian Trail Easement (the "2007 Easement") over most of the northerly 40 feet of Parcel 9312. The 2007 Easement was granted so that the City could "construct improvement to restore an eroded watercourse, improve drainage, replace a sewer line, and construct a pedestrian trail". (Exhibit 17, PDF p. 1, Recital B) The 2007 Easement is not depicted on any project plans in the record.
26. March-MacDonald sold Parcel 9312 to Joseph Brotherton in July, 2014, who sold it to Summers in September, 2014. (Exhibit 54a, PDF p. 5)

¹⁵ No hearing was ever held.

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27. Summers filed the current RUE application in January 2015. (Exhibit 2) As previously noted, the 2015 RUE application came on for hearing before Examiner Vancil in February, 2017. On March 8, 2017, Examiner Vancil issued the 2017 Remand. (Exhibits 7; 36)
28. Examiner Vancil's 2017 Remand was based on two issues. First, he concluded that the State Environmental Policy Act ("SEPA") threshold determination process had to be completed before he could render any substantive decision on the RUE application. Since CP&D had not completed the threshold determination process before presenting the application for hearing (because it was recommending denial and saw no need to go through the SEPA process before a denial), Examiner Vancil remanded the application so that the SEPA process could be completed. (Exhibit 36, PDF p. 4, Conclusion of Law 2)

Second, Examiner Vancil concluded that CP&D had erred by not requiring that the steep slopes surrounding Parcel 9312 be included in the geotechnical analyses: "When, as in this case, the property contains multiple critical areas, all of these should be collectively reviewed at the same time." (Exhibit 36, PDF p. 4, Conclusion of Law 4) "The geotechnical report provided by [Summers] is not sufficient to determine if the project meets the reasonable use exception criteria to the degree it fails to provide an analysis of 'potential adverse impacts to adjacent and down-current properties.' [Former] MICC 19.07.060 and MICC 19.16.010." (Exhibit 36, PDF pp. 4 & 5, Conclusion of Law 5)

Examiner Vancil declined to retain jurisdiction over the application for two reasons: He had no idea how long it might be before the application was ready for additional hearing; and he felt that the additional required analysis might well lead to revisions in the proposal and/or might "result in changes to, or contradiction of information provided at the hearing." (Exhibit 36, PDF p. 6, Conclusion of Law 7)

29. On July 17, 2017, CP&D issued a SEPA threshold Determination of Significance ("DS") for Summers' proposal. (Exhibit 44) CP&D withdrew the DS in August, 2019, and issued a Mitigated Determination of Nonsignificance ("MDNS") on January 13, 2020. (Exhibits 45 and 46, respectively) The MDNS was not appealed. (Exhibit 1, PDF p. 8, Finding 53)
30. On July 10, 2020, CP&D issued a Staff Report recommending approval of both the RUE and the Variance subject to six conditions. (Exhibit 61; recommended conditions on PDF pp. 11 & 12)

Summers requested that Recommended Condition F be revised by the addition of the following clause at the end of the condition: "unless a waiver is granted under MICC 19.07.160(F)(2)." (Testimony; see also Exhibit 78, PDF p. 2)

CP&D has no objection to addition of the requested words. (Testimony)

Regulatory Provisions

31. "Vesting" serves to "fix" the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), review denied, 182 Wn.2d

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1004, 342 P.3d (2015)] “While it originated at common law, the vested rights doctrine is now statutory.” [*Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014)]

There is no state law establishing vesting for RUE or Variance applications.

The City has adopted local regulations governing vesting of land use applications.

Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department’s issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[MICC 19.15.170(B)] The first sentence in MICC 19.15.170(B) lists the type of land use applications which are subject to and benefitted by Mercer Island’s vesting regulations. Neither RUE applications nor Variance applications are listed in the first sentence.

Since RUE and Variance applications are not subject to vesting under either state law or local ordinance, neither application enjoys any vested rights.

32. Chapter 19.07 MICC was substantially amended in June, 2019. (Exhibit 1, PDF p. 6, Finding 44) All code references used herein are to the current version unless expressly stated otherwise.
33. “Geologic hazard areas, watercourses, wetlands and wildlife habitat conservation areas” as defined in the MICC are “Critical areas.” [MICC 19.16.010]
34. The term “Geologically Hazardous Areas” means “Areas susceptible to erosion, sliding, earthquake, or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or alterations, including landslide hazard areas, erosion hazard areas and seismic hazard areas.” [MICC 19.16.010] “Landslide hazard areas” include:
 1. Areas of historic failures;
 2. Areas with all three of the following characteristics:
 - a. Slopes steeper than 15 percent; and
 - b. Hillsides intersecting geologic contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock; and
 - c. Springs or ground water seepage;
 3. Areas that have shown evidence of past movement or that are underlain or covered by mass wastage debris from past movements;
 4. Areas potentially unstable because of rapid stream incision and stream bank erosion; or

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

[MICC 19.16.010] “Erosion hazard areas” include “Those areas greater than 15 percent slope and subject to a severe risk of erosion due to wind, rain, water, slope and other natural agents including those soil types and/or areas identified by the U.S. Department of Agriculture’s Natural Resources Conservation Service as having a ‘severe’ or ‘very severe’ rill and inter-rill erosion hazard.” [MICC 19.16.010] “Seismic hazard areas” include “areas subject to severe risk of damage as a result of earthquake induced ground shaking, slope failure, settlement, soil liquefaction or surface faulting.” [MICC 19.16.010]

35. Steep slopes must be protected with buffers at both their top and their toe. The width of the buffer for a slope of 40% or more must equal the height of the steep slope up to a maximum width of 75 feet. [MICC 19.07.160(C)(2)(a)] Exhibit 38 does not depict any required steep slope buffers.
36. Type Np streams require a protective buffer of 60 feet. [MICC 19.07.180(C)(1)] Exhibit 38 depicts a combined 50-foot buffer from Streams A and B (based on the likely incorrect location of Stream B and reliance on the old code requirement).
37. Category III wetlands with a habitat score of 6 – 7 require a 110-foot buffer; those with a lower habitat score require a 50-foot buffer. [MICC 19.07.190(C)(1)] Virtually the entire site is either Wetland A or its required buffer: A very small area on the slope adjacent to the Stivelman Lot may fall outside of the required buffer if the required buffer is only 50 feet wide. (Exhibit 38)
38. The MICC does not require that critical areas and their required buffers be placed in permanently protected tracts. The MICC does require recordation of a notice against title on any development site containing a regulated critical area or required buffer. [MICC 19.07.070(B)] That requirement would come into play when a building permit was being reviewed.

Summers’ current plans do not contemplate establishing a critical areas tract. (Exhibit 38)

39. Subsection 19.07.180(C)(7) MICC requires that all buildings must maintain at least a 10-foot setback from the edge of a required stream buffer. An exception is available if certain conditions are present; not all of the required conditions are present here. The Exception would not apply.
40. Subsection 19.07.190(C)(7) MICC requires that all buildings must maintain at least a 10-foot setback from the edge of a required wetland buffer. An exception is available if certain conditions are present; not all of the required conditions are present here. The Exception would not apply.
41. The MICC says the City “may require permanent fencing and signage to be installed around the wetland or buffer.” [MICC 19.07.190(E)(8)]

Summers’ current plans do not contemplate establishing permanent fencing and signage. (Exhibit 38)

42. The term “reasonable use” is defined in MICC 19.16.010:

Reasonable Use: A legal concept that has been and will be articulated by federal and state courts in regulatory takings and substantive due process cases. The decisionmaker must balance the public’s interests against the owner’s interests by considering the nature of the harm the regulation is intended to prevent, the availability and effectiveness of alternative measures, the reasonable use of the property remaining to the owner and the economic loss borne by the owner. Public interest factors include the seriousness of the public problem, the extent to which the land involved contributes to the problem, the degree to which the regulation solves the problem, and the feasibility of less oppressive solutions. A reasonable use exception set forth in MICC 19.07.140 balances the public interests against the regulation being unduly oppressive to the property owner.

43. The review criteria for RUE applications are set forth at MICC 19.07.140(A):

A. ... The hearing examiner may approve the application for a reasonable use exception only if the development proposal meets all of the following criteria:

1. The application of this chapter would deny all reasonable use of the property;
2. There is no other reasonable use with less impact on the critical area;
3. Any alteration to critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property;
4. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;
5. The proposal is consistent with the purpose of this chapter and the public interest; and
6. The inability of the applicant to derive reasonable use of the property is not the result of actions by the current or prior property owner.

[Emphasis added]

44. The purpose which is served by the Variance provision in a zoning code is similar to that served by the RUE provision. A Variance is “[a] modification of standard development code provisions based on special circumstances and complying with the city’s variance criteria.” [MICC 19.16.010 “V” definitions]

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45. The review criteria for Variance applications are set forth at MICC 19.06.110(B)(2)(a) – (h):

- 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 construction of a single-family dwelling on a legally created, residentially zoned lot;
- b. The variance is the minimum necessary to grant relief to the property owner;
- c. No use variance shall be allowed;
- d. There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;
- e. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated;
- f. The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property;
- g. The variance is consistent with the policies and provisions of the comprehensive plan and the development code;
- h. The basis for requesting the variance is not the direct result of a past action by the current or prior property owner;

46. In December, 2018 CP&D issued a Land Use Application - Plan Set Guide. The Plan Set Guide spells out submittal requirements for many types of land use applications, including RUEs. From December, 2018 forward, RUE applications required a survey by a licensed land surveyor, a site plan, a tree plan, a critical areas study and plans, and a conceptual grading and utilities plan. The site plan must depict all easements of record that encumber an application site. It must also include zoning, the parcel number, contours extending at least 50 feet beyond the perimeter of the application site, and a tree plan summary table. (Exhibit 75a)

Public Involvement

47. There has been intense public interest in the Summers’ RUE since the application was filed in 2015. Participation in the process has come primarily from two groups: Those whose properties either abut Parcel 9312 or are situated on the higher elevations above the western side of Parcel 9312; and those whose properties are located along Stream A between Parcel 9312 and Lake Washington.

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48. Stivelman initially opposed the RUE, but now supports approval of the application. (Exhibit 54, PDF p. 3)
49. The upslope opponents generally live along SE 57th Street in the *Mercer Firs* subdivision. Simply put, they do not believe that Summers has proven that his proposed site alterations would not harm the structural integrity of the steep bank that descends from their properties to Parcel 9312. (Exhibits 6a; 6b; 6c; 6g; 6q; 6r; 34; 35; 54a; 54b; 54c; 54e; 71 – 73; 76; 77; and testimony)
50. The downstream opponents generally believe that development of Parcel 9312 would increase the volume of runoff water passing through their properties, would thus exacerbate existing localized flooding problems, and would be in violation of the O’Sullivan Drainage Easement restrictions. (Exhibits 6h; 6k; 6o; 54f; and testimony)
51. A petition in opposition to issuance of a Determination of Nonsignificance (“DNS”) for the proposal was submitted on April 27, 2015. (Exhibit 6l) It will be recalled that C&PD did not issue a SEPA threshold determination before the 2017 Hearing.

A similar petition in opposition to issuance of a DNS was submitted on July 11, 2020. (Exhibits 63; 73) That petition was submitted more than six months after C&PD had issued the MDNS for the Summers proposal. The appeal period had long passed.
52. Three statements of general opposition to the project were submitted. (Exhibits 6i; 6j; 54d)
53. Three statements in support of the RUE were submitted. (Exhibits 6d (Brotherton, the prior owner); 6e; 54g (Stivelman))
54. None of the opponents mentioned the Variance.

LEGAL FRAMEWORK ¹⁶

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

Both RUEs and Variances are Type IV applications. The Examiner conducts an open record hearing and renders a final decision on Type IV applications which is subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Tables A and B; MICC 19.15.140; Chapter 3.40 MICC]

The Examiner may “1. Approve; 2. Conditionally approve; 3. Continue the hearing; 4. Remand the application to staff; or 5. Deny the application.” [MICC 19.15.140(C)]

¹⁶ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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Review Criteria

The review criteria for RUE [MICC 19.07.140(A)(1) – (6)] and Variance [MICC 19.06.110(B)(2)(a) – (h)] applications have been set forth in the Findings of Fact, above.

Vested Rights

See Finding of Fact 31, above.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [MICC 19.07.140(B); MICC 19.15.060(A)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The facts in evidence, as summarized in the Findings of Fact, above, demonstrate without question that an RUE is appropriate for this site. Parcel 9312 is entirely encumbered by a wetland and its required buffer, two streams and their required buffers, and/or steep slopes and their required buffers. No reasonable use can be made of Parcel 9312 without some degree of relief from the MICC's critical areas regulations.
2. The question is whether Summers' current proposal meets the criteria required for approval of an RUE. To answer that question one must have accurate information: One cannot determine criteria compliance when the plans are unreliable and the impacts on adjacent properties have not been properly considered. The Summers' application, as presently constituted, suffers from both deficiencies.
3. Given the above two Conclusions of Law, remand is the only appropriate action.
4. As has been demonstrated in the Findings of Fact, the current site plan contains numerous errors. The current plan seems to be based on survey work done at some time in the distant past by prior consultants which has been handed down from consultant to consultant to architect over the years. Some of the consultants who handed project files off to or received project files from other consultants expressed concerns about the condition of the materials. (Exhibit 72, PDF pp. 15 – 19) Exhibit 38 (all plans in the record for that matter) lacks a surveyor's seal; no one is taking legal responsibility for the accuracy of what is depicted on the plan. Given the sensitivity of the site and surrounding area, this is not acceptable. The Examiner should be able to rely on the basic accuracy of the data on the site plan. The Examiner cannot in this case.

The western property line is incorrectly drawn: The segment length call-outs are correct based on the original short plat, but the segment line lengths aren't correct.

Stream B appears to run diagonally down a side slope – in a geographically impossible alignment. Stream B is short on some versions of the plan, and substantially longer on others. Stream B magically ends right at the edge of the East Mercer Way right-of-way – an unlikely reality.¹⁷

The Fir tree referred to in Condition 2 of the *Sunrise Ridge* short plat isn't where it's supposed to be, or it may be a Maple instead of a Fir, or it may not exist.¹⁸ In fact, *Sunrise Ridge* short plat Condition 2 specifically says the Fir tree is outside of the then-proposed access easement. The tree that Summers' agents are referring to (which does not appear to be labeled as a Fir) is consistently depicted as being inside the access easement, not north of it. That merely adds another element of confusion since the short plat did not depict trees. The Examiner cannot approve a permit which would violate a condition of short subdivision approval. The Fir tree must be accurately located.

Exhibit 38 has a legend (of sorts) in its lower left corner depicting patterns for slope, wetland, and stream & buffer. But those patterns are not used anywhere on Exhibit 38 other than in that legend. If they aren't used, they shouldn't be there. The impact area figures in the "Summery" [*sic*] in the lower right corner have numbers that do not match Sewall's testimony.

Exhibit 38 has a snake-like "candy cane" or "barber pole" element depicted within the East Mercer Way right-of-way in front of Parcel 9312. What that symbol is supposed to represent is not disclosed anywhere in the record.

If the topography on Exhibit 38 is accurate, then the depiction of Stream B is erroneous. If the topography is accurate, the northeast corner of the proposed house is literally over Stream B. If Stream B is really where it has been drawn, then the topography is incorrect. And if the topography is incorrect in that area, how can the Examiner be sure it is accurate anywhere else on the plan?

These are not inconsequential concerns in an RUE case centered around impacts to streams and steep slopes.

5. The MICC requires a 10-foot building setback from a required stream buffer. That requirement cannot be met here. But there is absolutely no reason why a 10-foot building setback cannot be maintained from the stream itself. That would be the least amount of protection that ought to be afforded a regulated stream under an RUE approval.

If Stream B is correctly located on Exhibit 38, the proposed deck does not comply with such a 10-foot building setback. And if Stream B is incorrectly located on Exhibit 38, it is probable that the proposed residence would actually be over the stream. Neither situation should be allowed. The footprint of any proposed building may need to be revised to minimize critical areas impacts.

¹⁷ Sewall has verbally described its course beyond the property's edge, but there is no depiction of that course on any of the project plans. The plans which the Examiner is asked to rely on should be complete.

¹⁸ Summers' Closing Statement says the Fir is shown on Exhibit 24. That may be, but Exhibit 24 is an old, unclear plan, not the plan for which Summers seeks approval. If the Fir still exists, it needs to be clearly visible on the current plan.

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6. Examiner Vancil clearly indicated in the 2017 Remand that the geotechnical evaluation had to consider off-site conditions and impacts. The MICC says the same thing. But GEONW conducted no further field work nor did it thoroughly describe and evaluate the off-site conditions after Examiner Vancil's 2017 Remand was issued. All that was done was to prepare some brief analyses based upon the previously gathered data.

GEONW never produced a detailed map showing just how steep and high the slope is just west of Parcel 9312. The regional topography maps included in the record show beyond any doubt that the slopes on *Mercer Firs* Lots 22 – 25 to the west of Parcel 9312 are far steeper and far higher than anything on Parcel 9312. And those regional maps indicate that those extremely steep slopes begin immediately adjacent to the west boundary of Parcel 9312. Whether those regional maps are accurate cannot be determined from this record because those slopes are not depicted on any plan prepared by Summers' consultants. Exhibit 38, the proposed site plan, has absolutely no contours beyond the west property line, but it does depict some off-site contours for the Stivelman lot to the south.

The record does not include even a description of the geologic makeup of the steep slopes to the west. They may or may not be geologically consistent with the makeup of the slope on the Stivelman lot. They are much higher, so maybe they are consistent or maybe they are not. Data is required in order to make a reasoned determination of the proposal's effect on surrounding properties.

According to the MICC, slopes of 40% or above are to be protected at their top and toe by a buffer equal to the height of the slope, up to a maximum width of 75 feet. Based upon the regional topography maps in the record, the slope to the west is far steeper than 40% and may be 75 or more feet high. If the slope starts at the west property line, then the required 75-foot buffer extends into the development area where Summers proposes some excavation. That required buffer is not even recognized on Exhibit 38 nor anywhere else in the record.

7. The argument has been put forward that since Summers is not seeking relief from the MICC's steep slope regulations, they need not be considered. The Examiner disagrees to the extent that there must be evidence based on thorough data and analysis that the proposal will not cause problems on adjacent properties. The MICC says no less. Examiner Vancil asked for that information; the undersigned again asks for it.
8. Exhibit 38 does not comply with the City's current requirements for RUE site plans, as adopted in late 2018. (Exhibit 75a) It doesn't show all recorded easements that encumber the property, it lacks a title/cover sheet, it does not depict zoning, it does not include the parcel number, it does not bear the seal of a licensed land surveyor, it does not depict contours 50 feet beyond the north and west property lines, and it does not have a tree plan summary table.

Neither RUE nor Variance applications enjoy vested rights. Therefore, both applications are subject to current regulations. However, compliance with purely procedural regulations must apply the rule of common sense: If a procedural regulation changes after an un-vested application has progressed

beyond the point in the process where that procedural regulation is applied, then the application does not have to go back and again go through that changed process.

A silly example may help explain: Say an application was filed on a Friday and that two months later the City changed the rules such that no applications could be filed on Fridays. Would the new rule apply to the application that was filed two months previous when Friday filings were allowed? Common sense says it would not.

Therefore, the submittal requirements which were promulgated after both the RUE and the Variance applications were filed and accepted by the City are not applicable.¹⁹

9. The Examiner has no authority to render a legal interpretation of the content of the O'Sullivan Drainage Easement. Legal interpretation of such documents lies within the purview of the court system.
10. The need for the Variance is inextricably linked to the specific layout depicted on Exhibit 38. Since Exhibit 38 cannot be approved (at least not at this time for the reasons set forth above), approval of the related Variance would be inappropriate. Suffice it to say that at this point there does not appear to be evidence militating against eventual approval of such a Variance, if needed: Minimization of impact to critical areas would generally outweigh adherence to a setback requirement from a private access easement, especially where the portion of the easement affected serves only the building for which the Variance is requested and would not affect the other user of the access easement.
11. The Examiner would normally not remand an application twice.²⁰ But the lack of a reliable plan makes it impossible to intelligently evaluate the current proposal. On the other hand, denial is unwarranted at this point because Parcel 9312 does qualify for some exception from the critical areas regulations. Thus, the only appropriate action is to remand the application.
12. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner:

- A. **REMANDS** the requested Reasonable Use Exception; and
- B. **REMANDS** the requested Variance,

¹⁹ That does not excuse the need for accuracy, consistency, and reliability in the submitted plans.

²⁰ In fact, the Examiner call recall only one case, early in his 42-year career as a Hearing Examiner, where he has done so, and the fact pattern in that case was far different than the present situation.

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\s\ John E. Galt (Signed original in official file)

John E. Galt

Hearing Examiner

HEARING PARTICIPANTS ²¹

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Vicki Duchaine
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Bio Park, unsworn City Attorney
Robert Graham

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Michael Moody
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NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: “1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision.” [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

“Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

²¹ The official Parties of Record register is maintained by the City’s Hearing Clerk.

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The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”