
CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

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STAFF REPORT & RECOMMENDATION TO HEARING EXAMINER REASONABLE USE EXCEPTION AND ZONING VARIANCE

Project Nos:	CAO15-001 & VAR18-002
Description:	<p>The Applicant has revised a Reasonable Use Exception (CAO15-001) and has applied for a Variance (VAR18-002), to construct a proposed house and associated improvements at 5637 East Mercer Way.</p> <p>The proposed house and improvements will be located within a wetland, wetland buffer, and stream buffer, which is the basis for the Reasonable Use Exception (RUE) application. The proposed house is located within a required setback from an easement in order to reduce impacts to environmentally critical areas, which is the basis for the proposed Variance.</p>
Recommendation:	Reasonable Use Exception – Approve with Conditions Variance – Approve
Applicant/ Owner:	MI Treehouse, LLC (c/o Bill Summers)
Site Address:	5637 East Mercer Way, Mercer Island, WA, 98040; Identified by King County Assessor tax parcel number 1924059312
Zoning District:	R-15
Project Contact:	Claire Hoffman, Planner, Environmental Science Associates (ESA)
Staff Contact:	Jeff Thomas, Interim Community Planning & Development Director

INTRODUCTION

In January 2015, the applicant filed an application for a Reasonable Use Exception (RUE) to build a new single-family house on a lot constrained by geologically hazardous areas, a wetland, watercourses, and associated buffers. A RUE was required because the applicant could not meet the then-applicable protection standards for the wetland, watercourses, and associated buffers. Following review in February 2017, staff recommended that the Hearing Examiner deny the RUE based upon the then proposed design, file contents, and applicable regulations. The Hearing Examiner remanded the application back to the staff for further

review in March 2017, directing staff to issue a State Environmental Policy Act (SEPA) determination and to include geotechnical analysis of the proposed house in the staff recommendation on the RUE.

Following discussion with staff, the applicant substantially revised their application and the proposed location of the single-family house and site improvements, and applied for a Variance (May 2018) to required setbacks from an easement, with the goal of further minimizing impacts to the wetland, watercourse, and associated buffers on the site.

In January 2020, the City issued a SEPA Mitigated Determination of Nonsignificance (MDNS) on the proposed Variance. A hearing was held on the revised application in July 2020 before the Hearing Examiner, and staff recommended approval with conditions of the RUE and approval of the Variance. The Hearing Examiner remanded the application in August 2020, citing a need for analysis of potential impacts related to geologically hazardous areas and clarification of an incomplete and internally inconsistent project file.

To respond to the August 2020 Hearing Examiner's remand decision on the revised application, the applicant provided additional geotechnical analysis, a revised critical areas report, as well as an updated site plan showing a re-flagged ordinary high water mark (OHWM) of Stream B, a modified building footprint, and a number of corrections as outlined below. Based on the updated information, staff are recommending that the Hearing Examiner conditionally approve the proposed RUE and approve the Variance.

FINDINGS OF FACT

Hearing Examiner History and Remand

1. On February 13, 2017 the then-Hearing Examiner (Ryan Vancil) conducted a public hearing and received a staff report and recommendation (Exhibit 1) on the proposed RUE.
2. On March 8, 2017 the then-Hearing Examiner Vancil issued Findings of Fact, Conclusions of Law, and Decision (Exhibit 36), remanding the RUE to the City for further review and action.
3. Previously filed Exhibits 1 through 78c are incorporated into the City's exhibit list for this staff report and recommendation.
4. On July 20, 2020 the Hearing Examiner, John E. Galt conducted a public hearing and received a staff report and recommendation (Exhibit 61) on the revised proposed RUE and Variance.
5. On August 7, 2020 the Hearing Examiner issued Findings of Fact, Conclusions of Law, and Decision (Exhibit 79), remanding the RUE and Variance for further action by the applicant and review by the City. The Hearing Examiner stated that the proposal met the criteria required for approval of an RUE, but that the plans were unreliable and the impacts on adjacent properties were not properly considered.
6. The Hearing Examiner requested changes, clarifications, and/or additional information regarding:
 - a. Stream B: The building should be at least 10 feet back from Stream B and the location of the stream be verified.
 - b. Geotechnical Evaluation: The 2018 application did not include the geotechnical evaluation requested in the 2017 remand decision by then-Hearing Examiner Vancil. The 2020 remand decision included this same requirement to consider off-site conditions and impacts. The Hearing Examiner requested information to evaluate potential impacts, including, but not limited to the geologic makeup of the steep slopes and information about off-site conditions.

- c. Site Plan Errors/Omissions: The Hearing Examiner outlined a number of errors in the plans stating that the Site Plan did not comply with the City's requirements for RUE site plans.
7. Between February 1, 2021 and August 2, 2021, the applicant provided an updated survey, Site Plan, updated Critical Area Study, Mitigation Bank Use Plan and Critical Area Enhancement Plan, Supplemental Geotechnical Report, and updated Tree Report.

Site Description

8. The subject property is located at 5637 East Mercer Way; King County Assessor's Parcel Number 1924059312 and is zoned R-15 (Single-family Residential with a minimum lot size of 15,000 square feet). The front yard is on the east property line and requires a 20-foot depth. The rear yard is along the west property line and requires a 25-foot depth. Required side yard setbacks from the north and south property lines are 5 feet minimum with a total of 15 feet. A 5-foot setback from vehicular access easements is required.
9. The properties adjoining the subject property to the north, south, and west are zoned R-15 (Single-family Residential with a minimum lot size of 15,000 square feet). The west side of the subject property fronts on East Mercer Way; the property east of East Mercer Way is also zoned R-15.
10. The subject property is bounded by existing single-family houses to the south, southeast, and west. The east property line fronts East Mercer Way. Lots to the east of East Mercer Way are also developed with existing single-family houses. Adjoining lots developed with single-family houses range in area from approximately 19,000 square feet to 88,000 square feet. The subject property is bounded on the north by the Parkwood Ridge Open Space (approximately 155,000 square feet in area).
11. The lot size is approximately 37,554 square feet and is currently improved with driveway access serving an adjacent property to the south, a public trail along the north side of the property, and a private sewer.
12. The entire subject property is constrained by a wetland, two watercourses, geologically hazardous areas, and associated buffers.
13. The property is sloped from the west property line descending to the east property line, forming a depression that drains to two watercourses and a wetland. Slopes on the site range from 30% to 70%, with the steepest slope areas in the southeast corner of the property. The proposed area of site disturbance, including the proposed access and house, will affect the slopes on the south side of the subject property. The entire site is located within mapped landslide, seismic, and erosion hazard areas; the southeastern corner of the property and the central northern edge of the property is constrained by steep slopes in excess of 40% gradient.
14. There are two Type Np watercourses on the subject site flowing from west to east. The northern watercourse extends upstream from the subject site into the Parkwood Ridge Open Space area. The southern watercourse is fed from the onsite wetland. The watercourses converge at the east end of the property and continue under East Mercer Way.

15. Approximately half of the subject site is constrained by a Category III wetland. The wetland extends from the west property line to the east property line and constrains all but the steepest slopes on the south side of the property, and the area north of the existing public trail.
16. The entire site is covered by trees and is vegetated with a mix of evergreen and deciduous trees, with an understory of shrubs and groundcovers, including ferns, ivy, and some blackberries.
17. The subject lot was legally created through the "Sunrise Ridge" short plat (Recording No. 7703310851) and is identified in the short plat as lot A (Exhibit 39). The east portion of the subject lot (lot A) is constrained by an easement for utility and road purposes.
18. The subject site is constrained by an easement (Exhibit 17) for stormwater / utilities and a pedestrian trail easement. The easement area is generally located adjacent to and paralleling the northern property line of the subject site.
19. A cultural survey (Exhibit 25) was conducted on the subject site; the subject site has a moderately low to low risk of cultural resources.

Project Description

20. Between the August 7, 2020 Hearing Examiner's remand decision and the date of this staff report and recommendation, the applicant provided additional information as requested by the Hearing Examiner. The location of the house was shifted to the south and east so that it is located 10 feet back from the OHWM of Stream B. This shift reduced the area of wetland that would be filled as a result of the proposed development. The applicant provided a number of documents that are described below in response to the Hearing Examiner's remand decision (Exhibit 79).
21. The applicant submitted an updated Site Plan (Exhibit 87b), which reflects a proposal to construct a new 1,652 square foot single-family house and a new driveway with approximately 1,560 square feet of area. The revised area of the footprint of the house is slightly larger than the previous footprint of 1,631 square feet, the area of driveway is the same.
22. The Critical Area Enhancement Plan (Exhibit 80d) summarizes the area of wetland impact. The development would fill 3,075 square feet of Category III wetland (2,497 square feet of permanent impact and 578 square feet of temporary impact). A total of 3,078 square feet of wetland buffer would be impacted (2,102 square feet permanent and 976 square feet temporary impact). Proposed mitigation would include enhancement plantings on-site and participation in an off-site wetland mitigation bank.

Environmental Constraints

23. The subject site is constrained by geologically hazardous areas (Mercer Island City Code [MICC] 19.16.010); specifically, the site is constrained by landslide hazard areas, seismic hazard areas, and erosion hazard areas. Development and alterations are allowed within geologically hazardous areas, pursuant to MICC 19.07 in general, and in particular MICC 19.07.160.
24. The proposed single-family house and associated improvements have been reviewed extensively by the applicant's geotechnical engineer, and the City's peer review engineering consultants (Exhibits 10a through 10e, 11a through 11e, 40a through 40d, 41a through 41b) in response to the first Hearing Examiner's remand decision, and again in response to the 2020 Hearing Examiner's remand

decision (Exhibits 80g and 82). The geotechnical reports indicate that the proposed single-family house and associated improvements may be built in compliance with the applicable critical area protections and standards for geologically hazardous areas.

25. The proposed RUE and Variance do not propose an exception or variance to the applicable critical area protections and standards for geologically hazardous areas.
26. The subject site is constrained by a Category III wetland, two Type Np watercourses (referred to as Type 2 streams in the *Revised Critical Areas Report*, using the term from the old MICC), and associated buffers. Development and alterations are generally prohibited within wetlands, watercourses, and associated buffers. The proposed single-family house and associated improvements are located partially within the Category III wetland, and within the buffers of both the wetland and watercourses.
27. The proposed single-family house and associated improvements have been reviewed extensively by the applicant's biologist, and the City's peer review consultants, ESA (Exhibits 12a through 12c, 13a through 13b, 42a through 42d, 43a through 43d, and 50a through 50b) in response to the first Hearing Examiner's remand decision, and again in response to the 2020 Hearing Examiner's remand decision (Exhibits 80c through 80e, 81, and 86).
28. The City's peer review consultant, ESA, has recommended approval (Exhibit 43d and 86) of the proposed RUE, subject to conditions, which are incorporated into the recommended conditions of approval.

Procedural History

29. On January 16, 2015, the applicant submitted a Reasonable Use Exception application, which was processed pursuant to the then-adopted MICC 19.15.020. Following the submittal of additional information by the applicant, and pursuant to the then-adopted MICC 19.15.020(C), the application was deemed complete on March 30, 2015.
30. Pursuant to then-adopted MICC 19.15.010(D), a Public Notice of Application (Exhibit 4) was mailed to all property owners within 300 feet of the subject property, posted on the subject property, and published in the City's Weekly Permit Information Bulletin on April 13, 2015. Pursuant to MICC 19.15.020(D)(2)(g), a 14-day public comment period was provided from April 13, 2015 through 5:00 PM on April 27, 2015.
31. To correct a procedural error in posting the site an additional Public Re-Notice of Application (Exhibit 5) was mailed to all property owners within 300 feet of the subject property, posted on the subject property, and published in the City's Weekly Permit Information Bulletin on May 4, 2015. Pursuant to the then-adopted MICC 19.15.020(D)(2)(g), a 14-day public comment period was provided from May 4, 2015 through 5:00 PM on May 18, 2015.
32. Eighteen public comments (Exhibits 6a through 6r) were received in the 2015 comment period; some of the public comments contained multiple signatures. Three public comment (Exhibit 6d, 6e, 6m) supported the proposed development. The remaining public comments generally expressed the following:
 - a. A desire to review the application in light of the full site history;

- b. Concerns about the amount of time provided for public comment;
 - c. The basis for approving a reasonable use exception;
 - d. Possible destabilization of the steep hillside resulting from this project;
 - e. Concerns about the thoroughness of the geotechnical review;
 - f. Anticipated increased erosion and sedimentation in the watercourse impacting downstream property owners;
 - g. The owner's reasonable expectations for development of the subject property, given the purchase price (\$32,094.00), and the applicant's prior knowledge of withdrawn Variance and reasonable use exception applications;
 - h. Concerns over the applicant's compliance with MICC 19.07.030(B) that "balances the public interests against the regulation being unduly oppressive to the property owner";
 - i. Approval of the proposed reasonable use exception would constitute a violation of a Settlement Agreement (Exhibit 14) by resulting in an increase in water entering the onsite watercourse; and,
 - j. Opposition to the issuance of a Determination of Non-Significance (DNS) following SEPA review.
33. One agency comment (Exhibit 6f) was received from the Department of Ecology in 2015. The Department of Ecology notes that the filling of a regulated wetland requires an Army Corps of Engineers permit and may require approval by the Department of Ecology.
34. A Notice of Public Hearing (Exhibit 7) was mailed to all parties of record and to property owners within 300 feet of the subject property, posted on the subject property, and published in the City's Weekly Permit Information Bulletin on January 30, 2017.
35. The City issued a staff report and recommendation in advance of the public hearing (Exhibit 1). Following the public hearing, the Hearing Examiner issued a decision on March 8, 2017 (Exhibit 36), remanding the RUE to the City for further review and action and directing the City to issue a SEPA determination.
36. On May 8, 2018, the applicant submitted a complete application (Exhibit 37) for a Variance. The City issued a letter of completion on May 21, 2018. The Variance would reduce the required setback (MICC 19.02.020(H)(1)) from a vehicular access easement. The proposed Variance, if approved, would reduce the setback from 5 feet to 2 feet.
37. A Notice of Application (Exhibit 47) for the proposed Variance, and revision to the RUE was issued on June 4, 2018. The Notice of Application was mailed to all property owners within 300 feet of the subject property, posted on the subject property, and published in the City's Weekly Permit Information Bulletin. Pursuant to MICC 19.15.030, a 30-day public comment period was provided ending at 5:00 PM on July 5, 2018.
38. Several public comment letters were received during the 30-day public comment period (Exhibit 54a through 54g).
39. On September 17, 2018, the City Council adopted Ordinance No. 18C-08, which adopted significant amendments to the Mercer Island City Code related to the processing of land use applications.

40. On January 25, 2019, the applicant significantly revised the proposed RUE (Exhibit 56) to reduce proposed impacts to the wetlands, watercourses, and buffers on the subject site and addressing other staff review comments from November 2018.
41. On June 18, 2019, the City Council adopted Ordinance No. 19C-05, which provided a significant update to the Mercer Island City Code related to the protection of environmentally critical areas.
42. A Notice of Public Hearing (Exhibit 52) was issued on February 18, 2020 for a public hearing on March 19, 2020. The Notice of Public Hearing was mailed to all property owners within 300 feet of the subject property, posted on the subject property, and published in the City's Weekly Permit Information Bulletin. Pursuant to MICC 19.15.100 the notice was provided 30 days prior to the then-scheduled public hearing.
43. Several public comment letters were received (Exhibit 54a through 54g).
44. On March 5, 2020, the City Manager cancelled all public hearings and public meetings in response to the COVID-19 pandemic.
45. A Notice of Public Hearing (Exhibit 53) was issued on June 15, 2020 for a public hearing on July 20, 2020. The Notice of Public Hearing was mailed to all property owners within 300 feet of the subject property, posted on the subject property, and published in the City's Weekly Permit Information Bulletin. Pursuant to MICC 19.15.100 the notice was provided 30 days prior to the then-scheduled public hearing.
46. The City issued a staff report and recommendation in advance of the public hearing (Exhibit 61).
47. 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 COVID-19 pandemic.
48. Following the public hearing, the Hearing Examiner issued a decision on August 7, 2020 (Exhibit 79), remanding the RUE and Variance for further action by the applicant and review by the City.
49. On February 1, 2021 the applicant provided a letter (Exhibit 80a), an updated Site Plan (Exhibit 80b), revised Critical Areas Report (Exhibit 80c), Critical Area Enhancement Plan (Exhibit 80d), updated Mitigation Bank Use Plan (Exhibit 80e), survey (Exhibit 80f), Supplemental Geotechnical Report (Exhibit 80g), and updated Tree Report. The Tree Report was resubmitted again in April 2021 (Exhibit 85).
50. The City's consultant ESA, reviewed this information and requested details on grading within the slope wetland on site. The applicant's consultant, Core Design discussed this issue in their May 17, 2021 response letter (Exhibit 87a). However, it remains unclear if wetland hydrology would be affected by the project. Per guidance from ESA (Exhibit 86), an additional condition addressing such has been included below.
51. In May 2021, the applicant resubmitted building plans (Exhibit 84).

52. In August 2021, the City provided the applicant with a short list of incomplete items. In response, the applicant provided a response letter (Exhibit 87a), updated Site Plan (Exhibit 87b), and information on the 1978 sewer easement (Exhibit 87c).
53. On September 20, 2021, this staff report was distributed to parties of record and filed with the Hearing Examiner for review and action.

SEPA Review and Determination

54. Following review of a revised SEPA Checklist (Exhibit 55), dated May 5, 2017, the City issued a SEPA Determination of Significance (DS) on July 17, 2017 (Exhibit 44).
55. On August 19, 2019, following a significant re-design of the project and submittal of additional information, the SEPA Determination of Significance was withdrawn (Exhibit 45).
56. A Notice of Application (Exhibit 51) for the project SEPA review was issued on August 26, 2019. The Notice of Application was mailed to all property owners within 300 feet of the subject property, posted on the subject property, and published in the City's Weekly Permit Information Bulletin. Pursuant to MICC 19.15.030, a 30-day public comment period was provided ending at 5:00 PM on September 25, 2019.
57. Associated with the SEPA review of possible impacts related to noise and vibration, the applicant provided a GeoGroup Northwest Pipe Installation and Noise Memorandum (Exhibit 58) and Versatile Drilling Pipe Pilling Memorandum (Exhibit 59).
58. On January 13, 2020, a Mitigated Determination of Non-Significance (MDNS) was issued (Exhibit 46), establishing four mitigation conditions:
 - a. The proposed house, driveway, and associated construction work (e.g. grading, retaining walls, drainage improvements, etc.) shall be constructed as reflected in the Healey Alliance Site Plan received on November 13, 2019;
 - b. Prior to building permit issuance, the applicant shall submit plans reflecting the proposed Additional Best Management Practices (BMPs) in the Core Design memo, dated March 23, 2018 (Exhibits 50a and 50b). All proposed BMPs shall be implemented during site construction;
 - c. Prior to building permit issuance, the applicant shall have a qualified professional, in consultation with a hydrologist, update the proposed wetland, wetland buffer, and watercourse buffer impacts to identify the extent of any impacts related to the final design of the drainage system. Proposed mitigation plans shall be updated and subject to City review and approval to mitigate for all identified impacts; and,
 - d. Prior to building permit issuance, the applicant shall provide an updated Statement of Risk that identifies mitigation for all geologically hazardous areas on- and off-site, including the erosion hazard area. Proposed mitigation measures shall be reviewed and approved by the City.

SPECIFIC ERRORS AND COMMENTS FROM THE REMAND

59. As noted above, the Hearing Examiner's remand decision (Exhibit 79) stated the plans were unreliable and the impacts on adjacent properties were not properly considered. As this was a component to the remand decision, they are listed below and it is noted how they are addressed in the resubmitted Site Plan (Exhibit 87b) and plan set (Exhibit 84) or other documents. The Hearing

Examiner noted that submittal requirements were promulgated after the RUE and variance application are not applicable. However, he further stated that the submitted plans still should be accurate, consistent, and reliable (Conclusion 8, footnote 19).

- a. Plans in the record did not include a surveyor's seal (Conclusions 4 and 8);
A Professional Engineer's seal was added to all civil plans in the plan set (C1.01, C1.02, C2.01, C4.01, and C4.31) (Exhibits 84 and 87b).
- b. The western property line was incorrectly drawn (Finding 1, footnote 6);
The western boundary issue has been resolved on all applicable plan sheets (C1.01, C1.02, C2.01, C4.01, and "Site Plan" Sheets 1 of 2 and 2 of 2) (Exhibits 84 and 87b).
- c. All recorded easements that encumber the property (Finding 46) should be shown; including the Permanent Stormwater/Utility and Pedestrian Trail Easement (the "2007 Easement") (Finding 25) and the 1978 recorded side sewer easement (Finding 20, footnote 14) which were not included on the previous plan set;
A Stormwater/utility & Pedestrian Trail Easement Rec No 20070425001878 is shown on Sheets C1.01, C1.02, C2.01, and C4.01 (Exhibits 84 and 87b).
The applicant provided documentation supporting that the 1978 side sewer easement is likely included in error on the Title Report Restrictions and is referenced on a different plat (Exhibits 87a and 87c).
- d. The Fir tree referred to in Condition 2 of the Sunrise Ridge short plat is not accurately shown (Finding 19 and Conclusion 4);
Tree # 986 was identified by the applicant's arborist (Exhibit 90) and is shown on the site plan and Sheets C2.02 and C4.01 (Exhibits 84 and 87b) as F-41 (fir, 41-inch diameter at breast height [DBH]).
- e. Legend in on Site Plan does not match the figure (patterns in the legend that are not shown on the site plan and patterns on the site plan that are not in the legend) (Conclusion 4);
The legend on the site plan matches the figure (Exhibit 87b) are understandable and mostly match the sheets;
- f. Topography of the Site Plan is incorrect and does not comply with City requirements for RUE site plans (Finding 15 and Conclusions 4 and 8);
The topography has been updated on Sheets C1.01, C1.02, C2.01, and C4.01 and "Site Plan" Sheets (Exhibits 84 and 87b) to 2-foot contours and extended beyond the property line; however, the contours do not extend to 50 feet beyond the property as required for RUE site plans (Exhibit 75a). The applicant has made a reasonable effort to extend contours onto adjacent properties without trespassing (Exhibit 87a).
- g. The Site Plan did not comply with the City's requirements for RUE site plans, additional items listed by the Hearing Examiner as missing were title/cover sheet, zoning, parcel number, and it does not have a tree plan summary table (Conclusion 8).
Cover sheet, zoning, parcel number, and tree plan summary were included in the resubmitted plan set (Exhibit 84).

- h. The location of Stream B is not correct; it's should be verified and the building be set back at least 10-foot from the watercourse (Findings 14, 15, 36, and 39, and Conclusions 4 and 5); *Stream B was reflagged by the Sewall Wetland Consulting (Sewall), surveyed, and included on the updated survey and site plan (Exhibit 80f and 87b). The footprint of the house was moved to 10 feet from the OHWM of Stream B. The applicant stated they would update the plan set when review of building permit resumes (Exhibit 87a).*
- i. Update the wetland rating to reflect the 2014 Ecology rating system (Finding 14). *The Revised Critical Areas report prepared by Sewall, and supporting documents were reviewed by ESA on behalf of the City (Exhibit 80c). Sewall reevaluated the wetland using the 2014 rating system and ESA deemed their changes consistent with Ecology's translating category and functions scores (Exhibit 81).*
- j. The 2018 application did not include the geotechnical evaluation requested in the 2017 remand decision by then-Hearing Examiner Vancil. The 2020 Hearing Examiner's remand decision included the same remand to consider off-site conditions and impacts. The Hearing Examiner requested sufficient information including mapping of steep slopes, and depiction of the buffer on the site plans to determine impacts (Comments 6 and 7). *On behalf of the City, Wood Environment & Infrastructure Solutions, Inc. reviewed the geotechnical information and concluded that the information provided adequately addressed the geologic hazards at the site (Exhibit 82).*

60. The substantive omissions and majority of errors listed by the Hearing Examiner were addressed in the applicant's submissions. The outstanding omissions noted above are not substantive and do not preclude understanding of the proposed development.

CONCLUSION OF LAW

61. MICC 19.07.140(A) contains the applicable criteria for a RUE. The Hearing Examiner may approve the application for a RUE only if the development proposal meets all of the following criteria:

- a. *MICC 19.07.140(A)(1) The application of this chapter would deny all reasonable use of the property;*

Staff Analysis: The subject site is a legally-created, residential lot, with a zoning designation and land use designation intended to allow the construction of a single-family residence. "Reasonable Use" is defined by MICC 19.16.010; the definition notes that "[t]he decisionmaker must balance the public's interests against the owner's interests" and that "[p]ublic 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.

The subject site is constrained by critical areas (wetlands and watercourses) and their buffers. Building in critical areas results in permanent loss of the ecological values and functions these critical areas provide, and development of the site for a single-family house would not comply with MICC 19.07. Critical areas regulations address the potential impact of development on

critical areas by outlining how to avoid, minimize, restore, and compensate for potential impacts. However, application of these regulations would prevent the construction of a single-family house.

The applicant has provided a Critical Areas Report, a Mitigation Use Plan, and a Critical Area Enhancement Plan (Exhibits 80c through 80e) that outlines how they intend minimize and mitigate for impacts to critical areas. As with previous staff reviews and a review of the new application material, staff have concluded that reasonable use of the subject site is a single-family house. This criterion is met.

- b. *MICC 19.07.140(A)(2) There is no other reasonable use with less impact on the critical area;*

Staff Analysis: Other allowed uses in the R-15 zoning designation include, but are not limited to, private recreational areas, public schools, daycares, preschools, and places of worship. The creation of any of these allowed uses would also require an alteration of the wetlands, watercourses, and associated buffers on the subject site, and there is no other reasonable use with less impact on the critical area. The proposed single-family residence is designed to minimize impacts to the wetland, watercourse, and associated buffers. This criterion is met.

- c. *MICC 19.07.140(A)(3) Any alteration to critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property;*

Staff Analysis: The location of the building footprint was shifted to the south and east to be 10-foot back from the OHWM of Stream B as minimally requested by the Hearing Examiner (Exhibit 87b). The total area of the house footprint was increased from 1,631 square feet to 1,652 square feet. The change in the location of the building footprint reduced the area of wetland that would be permanently filled as well as decreased wetland buffer impacts (a decrease of 740 square feet of wetland impact and 14 square feet of buffer impact). Updated wetland and wetland buffer impact areas were provided by the applicant (Exhibit 80d). This change would move the house closer to the steep slope and would result in a small amount of temporary impact to the steep slope. This criterion is met.

- d. *MICC 19.07.140(A)(4) The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;*

Staff Analysis: On behalf of the City, Wood Environment & Infrastructure Solutions, Inc reviewed the geotechnical information and concluded that the information provided adequately addressed the geologic hazards at the site (Exhibit 82). No additional unreasonable threats to public health, safety, or welfare on or off the development proposal site have been identified. This criterion is met.

- e. *MICC 19.07.140(A)(5) The proposal is consistent with the purpose of this chapter (MICC 19.07) and the public interest; and*

Staff Analysis: The purpose of the critical area regulations is established in MICC 19.07.010. The proposed RUE represents a site-specific evaluation of the balance required between protecting the public interest in environmentally critical areas and the private property owner interest. It is not possible to allow both the development of a single-family residence on the subject site, and provide for protection of the wetlands, watercourses and their associated buffers; impacts to the environmentally critical areas are unavoidable. The proposed development minimizes impacts to the wetlands, watercourses and their associated buffers to the maximum extent feasible, and provides for appropriate mitigation. This criterion is met.

- f. *MICC 19.07.140(A)(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.*

Staff Analysis: There is no record of an action by the applicant or prior property owner that would affect their ability to derive reasonable use of the subject property. This criterion is met.

62. MICC 19.06.110(B)(2) contains the applicable criteria for a Variance. The Hearing Examiner may approve the application for a Variance only if the development proposal meets all of the criteria.

- a. *MICC 19.06.110(B)(2)(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 house on a legally created, residentially zoned lot;*

Staff Analysis: The applicant is proposing to construct a new single-family house on the subject site. The proposed Variance will allow for the reduction of a required 5-foot setback from the existing vehicular access easement. The applicant has also proposed a RUE to allow for alterations of the existing wetlands, watercourses, and associated buffers. Denial of the proposed Variance would likely result in increased impacts to critical areas and decrease the likelihood of approval of the proposed RUE. Denial of the RUE would prevent construction of the proposed single-family residence, resulting in an unnecessary hardship. This criterion is met.

- b. *MICC 19.06.110(B)(2)(b) The Variance is the minimum necessary to grant relief to the property owner;*

Staff Analysis: The proposed Variance will reduce the required 5-foot setback to 2 feet. The Variance is the minimum necessary to allow the applicant to reduce impacts to the wetland on the subject site, while also ensuring there is sufficient clearance between the proposed single-family house and the existing vehicle access easement. This criterion is met.

- c. *MICC 19.06.110(B)(2)(c) No use Variance shall be allowed;*

Staff Analysis: No use Variance has been requested. The proposed single-family house and associated site improvements are permitted by MICC 19.02.010. This criterion is met.

- d. *MICC 19.06.110(B)(2)(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;*

Staff Analysis: The subject site is significantly constrained by wetlands and watercourses and associated buffers; the protection standards in MICC 19.07 result in a special circumstance wherein a reduction in the vehicle access easements standard setback will provide for greater protection of these critical areas. This criterion is met.

- e. *MICC 19.06.110(B)(2)(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;*

Staff Analysis: The proposed Variance is related to the reduction of a 5-foot setback from the vehicle access easements. The proposed Variance will not be materially detrimental to the public welfare or improvements in the vicinity. This criterion is met.

- f. *MICC 19.06.110(B)(2)(f) The granting of the Variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property;*
Staff Analysis: The proposed Variance will allow for the construction of a new single-family house three feet closer to a vehicle access easement than would be normally allowed. The proposed Variance will not affect the appropriate use or development of adjacent property. The proposed single-family house is consistent with the residential character of the neighborhood. This criterion is met.
- g. *MICC 19.06.110(B)(2)(g) The Variance is consistent with the policies and provisions of the comprehensive plan and the development code;*
Staff Analysis: The proposed Variance will allow for the construction of a single-family house, which is consistent with the zoning designation, and land use policies related to the subject site. The proposed Variance also supports the reduction of impacts to onsite wetlands, watercourses, and associated buffers, which is also in the public interest. This criterion is met.
- h. *MICC 19.06.110(B)(2)(h) The basis for requesting the Variance is not the direct result of a past action by the current or prior property owner.*
Staff Analysis: There is no record of an action by the applicant that would have created the basis for the current request for a Variance. This criterion is met.
- i. *MICC 19.06.110(B)(2)(i) Public and private schools, religious institutions, private clubs and public facilities in single-family zones with slopes of less than 15 percent may request a Variance to increase the impervious surface to a maximum 60 percent impervious surface and such Variance application will be granted if the hearing examiner determines that the applicant has demonstrated that the criteria are satisfied.*
Staff Analysis: This criterion does not apply to the site because it is not a school, religious institution, private club, or public facility.

RECOMMENDED CONDITIONS OF APPROVAL

As noted below, the City recommends that the Hearing Examiner approve the Reasonable Use Exception (CAO15-001) and the Variance (VAR18-002) subject to the following recommended conditions of approval:

- A. Except as otherwise required by the conditions of approval contained herein, construction of the proposed single-family dwelling, driveway access, and other site improvements shall be completed in substantial compliance with the Site Plan by Core Design, received August 2, 2021 (Exhibit 87b).
- B. Follow the four mitigation conditions of the MDNS issued January 13, 2020 (Exhibit 46).
- C. The applicant is responsible for documenting any required changes in the project proposal due to conditions imposed by any applicable local, state, and federal government agencies.
- D. Prior to issuance of construction permits, authorizing site grading or other construction work, and pursuant to MICC 19.07.080, a financial guarantee, in the form of a bond or assignment of funds, shall be required to guarantee that approved mitigation plans will be undertaken and completed to the City's satisfaction. The amount shall be 150% of the total stated in a Bond Quantity Worksheet.
- E. Upon completion of the mitigation plantings, a letter written by a qualified professional detailing compliance with the approved mitigation plan shall be submitted to the City's Community Planning and Development Department. The compliance letter shall be accompanied by a set of as-built drawings depicting the type and location of mitigation plantings. A maintenance and monitoring memo shall be

shall be submitted to the City's Community Planning and Development Department annually for a period of five years. Plant survival rates are to meet or exceed those set out in Exhibit 80d.

- F. Conduct a wetland delineation five years after the project is completed to confirm that there is no net loss of wetland area or function. If there is a loss in wetland area or function, this loss will be mitigated through some form of mitigation as determined by appropriate regulators.
- G. Prior to issuance of construction permits, authorizing site grading or other construction work, the applicant shall provide development plans, for City review and approval, reflecting additional temporary and erosion sediment control BMPs, as generally described in Exhibit 50a.
- H. Land clearing, grading, filling, and foundation work shall be prohibited between October 1 and April 1 (Exhibit 50a).

DEVELOPMENT REGULATION COMPLIANCE – DISCLOSURE

- 1. The applicant is responsible for obtaining any required permits or approvals from the appropriate Local, State, and Federal Agencies. The applicant is responsible for meeting the conditions are required by the agencies pursuant to MICC 19.07.030(B).
- 2. All required permits must be obtained prior to the commencement of construction.
- 3. The applicant shall abide by the work windows for listed species established by the U.S. Army Corps of Engineers and Washington Department of Fish and Wildlife.
- 4. Construction or substantial progress toward construction of a development for which a permit has been granted must be undertaken within two years after the approval of the permit or the permit shall terminate. The code official shall determine if substantial progress has been made. A single extension before the end of the time limit, with prior notice to parties of record, for up to one year, based on reasonable factors may be granted.

RECOMMENDATION

Based upon the above noted Findings of Fact and Conclusions of Law, the City recommends that the Hearing Examiner **APPROVE WITH CONDITIONS** applications CAO15-001 and VAR18-002, as depicted on the Site Plan (Exhibit 87b). This decision is final, unless appealed in writing consistent with adopted appeal procedures, MICC 19.15.130, and all other applicable appeal regulations.

Approved this **20 day of** September, 2021

Approved this **20 day of** September, 2021

Claire Hoffman, Planner
Environmental Science Associates

Jeff Thomas, Interim Director
Community Planning & Development
City of Mercer Island