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BEFORE THE HEARING EXAMINER
CITY OF MERCER ISLAND

In the Matter of the Application of
MI TREEHOUSE, LLC
for a Reasonable Use Exception and Zoning
Variance

Project No. CAO15-001 & VAR18-002
APPLICANT’S CLOSING STATEMENT

I. INTRODUCTION

This is an application for a reasonable use exception and zoning variance to allow construction of a single family home on a residentially zoned property in a residentially developed area. The reasonable use exception is needed because the property is entirely constrained by wetland and stream critical areas and their buffers. The variance is to allow the home to intrude into a five-foot setback from an access easement in order to move the home further away from the wetland. The reasonable use exception has been pending since 2015 and the variance application since 2018. The proposal has been exhaustively reviewed by the City of Mercer Island (“City”) staff, its outside third-party expert consultants, and the experts retained by the Applicant. The criteria for approval are satisfied. City recommends approval. The applicant MI Treehouse, LLC (“Applicant”) requests the Examiner approve the applications.

1 **II. DISCUSSION**

2 **A. The proposal meets the approval criteria.**

3 The proposal meets the criteria for reasonable use exception and variance approval.
4 These criteria are discussed in detail in the Staff Report (Ex. 61) and the memorandum prepared
5 by George Steirer (Ex. 68). The Applicant will not repeat this analysis here.
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7 Case law also supports issuance of a reasonable use exception where, as here, the critical
8 areas regulations preclude construction of a home, the area is zoned and developed for residential
9 use, and the proposal is consistent with surrounding development. In *Goat Hill Homeowners*
10 *Ass'n. v. King County*, 686 F.Supp.2d 1130 (2010), for example, the Court upheld the King
11 County Hearing Examiner's approval of a reasonable use exception for a 2,940 square foot house
12 with a 755 square foot on-site access driveway, with a total of 3,695 square feet of site
13 disturbance. The Court determined the home was the minimum necessary for a reasonable use
14 after considering the character of the neighborhood, the zoning designation, and the type and
15 character of the critical area at issue. Here, the home is on a single-family zoned property in a
16 developed residential neighborhood, is smaller than average for the area, and there are no
17 significant adverse impacts to the wetland or stream. Ex. 46, 61, 68. The reasonable use criteria
18 are satisfied here.
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21 **B. The Applicant requests modification of Condition F.**

22 The Staff Report (Ex. 68, p. 12) recommends a condition (Condition F) prohibiting land
23 clearing, grading, filling and foundation work between October 1 and April 1. As stated at
24 hearing, the Applicant requests a minor revision to this condition to add the following language
25 "unless a waiver is granted under MIMC 19.07.160.F.2." The Mercer Island Municipal Code
26 ("MIMC" or "Code") section on which this condition is based, MIMC 19.07.160.F.2, prohibits
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1 land clearing, grading, filling and foundation work in landslide hazard areas between October 1
2 and April 1 unless the code official grants a waiver based on a critical areas study. The
3 Applicant simply seeks the ability to seek an adjustment of these dates if needed, a right afforded
4 to all property owners under the Code. At hearing, staff noted that the Applicant's civil
5 engineering memorandum (Ex. 50a) recommends restricted construction dates (dry season
6 construction only). However, the memorandum does not specify the specific dates of the dry
7 season, leaving open the possibility of an adjustment to (for example) extend the construction
8 season into October if Code standards are satisfied. The Applicant therefore requests this minor
9 change in Condition C.
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11 **C. The proposal is consistent with the prior short plat conditions.**

12 At the hearing, the Examiner asked if the proposal is consistent with Conditions #2, 5 and
13 6 of the short plat creating the lot on which the proposal is located (Ex. 16a). It is.

14 Condition #2 states: "That access and utility construction on Lot A be located so as to
15 save the 24" fir on lot A, just north of the proposed access easement." The City maintains
16 historic plans in an on-line database. The "Sanitary Sewer, Water and Road Plans" (a single
17 sheet) shows the location of the 24-inch fir tree to the north of the easement (it is marked "24" F"
18 just to the north of the driveway easement). The Applicant requests that the Examiner take
19 official notice of these plans under Examiner Rule 316(i), which provides that various documents
20 "in the public domain may be referenced, cited, quoted and relied upon." The plans are in the
21 public domain as they are readily available on the City's website.¹ The arborist's report for the
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26 ¹ They are at this link: https://publicdocs.mercergov.org/PAV/search/?CQID=114&OBKey_133_1=SUB7703-001. A copy is also provided as Ex. A to this Closing Statement for the convenience of the Examiner.

27 These plans show a garage on the property. One member of the public suggested that in 1977 the owner agreed
28 a garage was a reasonable use. This is not supported by the plans. There is a garage shown on the property to the

1 proposal (Ex. 24)¹ identifies a tree in this location as Tree #986. This is (now) a 38.2” diameter
2 at breast height (“dbh”) Douglas Fir (“DF”). Ex. 24, pp. 12, 14. The arborist’s report states that
3 this tree is north of the “limits of disturbance” fence, which will protect it. *Id.* at p. 7. Condition
4 #2 is satisfied.

5
6 Condition #5 states: “No construction shall occur within 25’ of the watercourse on Lot A
7 and C without Planning Commission approval.” The historic plans in the City’s file show the
8 watercourse and the 25-foot buffer located on the north end of the property. The proposed home
9 is located well outside this 25-foot buffer. Compare Ex. A to Closing Statement with Ex. 38.

10 Condition #5 is satisfied.

11
12 Condition #6 states: “A tight-lined storm drainage system shall be utilized which
13 provides for all impervious surface runoff and shall be connected at a catch basin at the existing
14 storm system on East Mercer Way. The designer [sic] of an adequate onsite storm water
15 drainage system shall be approved by the City Engineer prior to issuance of a building or
16 clearing permit.” At hearing, the Applicant’s civil engineer, Michael Moody, testified that the
17 stormwater system will be designed in conformance with the most recent Stormwater Manual.
18 This includes collecting runoff from impervious surfaces, detaining it in a vault under the
19 driveway, and releasing it in a tightline to the City’s stormwater system. Detailed stormwater
20 design plans will be prepared in connection with construction permit applications following
21 reasonable use exception/variance approval. Condition #6 is satisfied.
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south as well, but today this lot is developed with a garage and a home, belonging to Dr. Stivelman. Thus, it is clear
the plans show the potential location of garages, without precluding the construction of homes.

27 ¹ As the copy of Ex. 24 in the record is difficult to read, we are providing a higher resolution copy as Ex. B to
this Closing Statement. This is not a new exhibit, just a better copy of the same exhibit.

1 **D. Public comment has been fully addressed.**

2 The proposal’s closest neighbor, Dr. John Stivelman (owner of the property immediately
3 to the south), submitted a letter stating he “has no objection to and supports” the applications for
4 the proposal. Ex. 54g, p. 3. At hearing, a small number of other members of the public testified
5 about their concerns. Their comments relate mostly to matters that are not before the Examiner.
6
7 To the extent that their comments are relevant to the application, they are inaccurate or have
8 been fully addressed. The primary points raised in these comments are addressed below.

9 **1. Environmental impacts have been addressed.**

10 Most of the public comment relates to concerns about environmental impacts, specifically
11 impacts to the wetland and stream on the property, trees, slope stability and downstream flows
12 and siltation. These are all impacts to the environment that the City considered under the State
13 Environmental Policy Act (“SEPA”). Ex. 27. After thorough review, involving expert reports
14 and multiple rounds of review by the City’s outside experts and response by the Applicant’s
15 experts, the City issued a Mitigated Determination of Nonsignificance (“MDNS”). Ex. 46. The
16 is the City’s determination that environmental impacts of the proposal as mitigated will be less
17 than significant. No one appealed this determination. It is now final and binding. The Examiner
18 lacks jurisdiction to revisit this determination.
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21 **2. Comments relate to matters for which no exception or variance is sought.**

22 The two primary areas that were the focus of public comment are matters for which no
23 reasonable use exception or variance is sought, specifically slope stability and downstream flows
24 and siltation. As stated in the Staff Report and at the hearing, the proposal “may be build in
25 compliance with the applicable critical area protections and standards for geologically hazardous
26 areas,” and the applications “do not propose an exception or variance to the applicable critical
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1 area protections and standards for geologically hazardous areas.” Ex. 61, p. 4, Findings 24 and
2 25. This conclusion is well supported by the voluminous geotechnical analysis in the record by
3 the Applicant’s expert, which was reviewed and approved by the City’s outside expert, and the
4 testimony of the Applicant’s geotechnical engineer Bill Chang at hearing. See Ex. 10a-11e, 40a-
5 41b. Similarly, as Mr. Moody testified, the stormwater drainage system for the proposal will be
6 designed in conformance with the current Stormwater Management Manual. Whether a project
7 complies with these technical standards is a decision made at the staff level (in this case, with the
8 input of the City’s outside expert consultants), not by the Examiner. Members of the public have
9 suggested that the Examiner should nevertheless consider the potential for impacts in these areas
10 under the reasonable use exception criteria that “[t]he proposal does not pose an unreasonable
11 threat to the public health, safety, or welfare on or off the development proposal site.” But the
12 City’s critical area standards for geologically hazardous areas and Stormwater Management
13 Manual were adopted to (among other things) protect against slope instability and downstream
14 impacts, respectively. MIMC 19.07.010.F, H, 15.09.050, 15.090.080. The reasonable use
15 exception criteria do not require the Examiner to second-guess the sufficiency of the City’s
16 adopted technical standards.
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20 **3. The watercourse was professionally located.**

21 Members of the public assert the watercourses and wetland on the property may not be
22 accurately located. The watercourses and wetland were located in the field by Ed Sewall, a
23 biologist with more than 30 years of experience. Ex. 42b, 64. Mr. Sewall testified at hearing
24 regarding his location of the watercourses and wetland. There is no evidence showing these
25 features were not properly located.
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1 **4. The purchase of credits from King County’s Mitigation Reserve Program for**
2 **wetland mitigation is permissible.**

3 Members of the public rely on an old, superseded Code section to assert that a variance is
4 needed for the use of credits from King County’s Mitigation Reserve Program for wetland
5 mitigation. The current Code section allows use of credits from a wetland mitigation bank if
6 certain criteria are satisfied. MIMC 19.07.190.E.6. These criteria are met here. Ex. 42a, 42d.
7 In addition, the Mitigation Reserve Program is the U.S. Army Corps of Engineer’s preferred
8 method for wetland mitigation. Ex. 42d.

9
10 **5. Trees have been fully evaluated.**

11 Members of the public assert that the proposal may result in the removal of trees and the
12 impact of tree removal has not been evaluated. However, a professional arborist report evaluated
13 all the trees near the proposal, including their species, size, health and location. The report
14 identified the trees that would need to be removed, those that would be preserved and how they
15 would be protected. Ex. 24. There is no evidence in the record contradicting the arborist’s
16 report.
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18 **6. The City’s drainage easement across downstream property does not prohibit**
19 **development of the property.**

20 Some members of the public assert that a drainage easement granted to the City in 1998
21 by a downstream property owner (Ex. 14) prevents development of the property. This is
22 inaccurate.

23 The easement grants the City the right to “pass waters from upstream of East Mercer
24 Way . . . into the watercourse in existence on the [downstream owner’s] property.” Ex. 14, p. 2.
25 The water draining from the property at issue in this application will be directed into the City’s
26 stormwater system in East Mercer Way and then will flow downstream through this watercourse.
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1 As explained in the Staff Report, the easement prohibits the City from diverting water
2 from another drainage basin. The City is not diverting water from another drainage basin. The
3 property is in the drainage basin that drains to this watercourse already. Nothing in the easement
4 prohibits upstream development. Ex. 61, p. 5 (Findings 30, 31). The City has already rejected
5 the commenters' expansive reading of the easement.
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7 The City's interpretation of the easement is consistent with its plain language. On its
8 face, the easement does not burden the property subject to this application. The easement does
9 not reference or apply to any property other than the property subject to the easement. Ex. 14.
10 The easement does not appear on the title report for the property. Ex. 16b.
11

12 Further, the Short Plat approval that created the property in 1977 already approved water
13 from this property entering the public stormwater system in East Mercer Way. Condition #6
14 requires stormwater from this property to be directed to "the existing storm system on East
15 Mercer Way." Ex. 16a. Thus, well before the 1998 easement, the City approved – indeed,
16 required – discharge of stormwater from the property as currently proposed.
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18 Finally, if there is a disagreement about the meaning or effect of the easement, the party
19 subject to the easement may bring a quiet title action in superior court. The resolution of
20 easement disputes is beyond the jurisdiction of the Examiner in this matter.

21 **7. The property's purchase price does not preclude granting a reasonable use**
22 **exception.**

23 Members of the public have asserted that the application does not meet the first criterion
24 for a reasonable use exception due to the amount the Applicant paid for the property. This is
25 inaccurate. The first reasonable use exception criterion states, "[t]he application of this chapter
26 would deny all reasonable use of the property." It is uncontested that that the application of the
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1 critical area regulations relating to wetlands and streams would preclude construction of a home
2 on the property. Indeed, the only permissible use of the property with less impact would be open
3 space. Ex. 68. Members of the public conceded as much at the hearing by suggesting a picnic
4 table could be placed on the property. This is not a reasonable use of the property. Open space
5 provides no economic value to the owner resulting in total economic loss. This loss is not
6 necessary to prevent a public harm – to the contrary, the City has concluded the home has no
7 significant adverse environmental impacts, a decision that was not appealed. Ex. 46; MIMC
8 19.16.010.
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10 The members of the public making this comment rely on a prior version of the reasonable
11 use exception criteria, which added the following sentence: “The hearing examiner will consider
12 the amount and percentage of lost economic value to the property owner.” This sentence no
13 longer appears in the Code. The deletion of this language reflects the intent of the Council to no
14 longer require consideration of the amount and percentage of lost economic value. Members of
15 the public nevertheless urge the Examiner to resuscitate the old Code language, asserting the
16 applications are vested to this old language. The vesting doctrine has been narrowly interpreted
17 by the Courts in recent years. The Courts have held that under state law, only plats and building
18 permits vest. *Potala Village v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014). The
19 applications before the Examiner are not plats or building permits. A local code may provide for
20 vesting of other permit types. However, as the Community Planning & Development Director
21 Evan Maxim explained at the hearing, the City’s Code does not vest applications that seek a
22 deviation from Code requirements, such as the ones at issue here. This rationale and conclusion
23 have been upheld in court. *Goat Hill, supra*, 686 F.Supp.2d at 1134-1136 (reasonable use
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1 exception application does not vest because it is not a development regulation and because
2 vesting does not occur until submission of building permit application).

3 Finally, even if the old Code language still applied, which it does not, open space would
4 still not constitute a reasonable use. As previously stated, the economic loss to the owner would
5 be total.
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7 III. CONCLUSION

8 For these reasons, the Applicant requests the Examiner approve the reasonable use
9 exception and variance.

10 DATED this 29th day of July, 2020.

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