
CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

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TO: CPD Staff

FROM: Jeff Thomas, Interim CPD Director

DATE: April 25, 2022

RE: Additions to Legally Established Structures and Site Improvements Located within a Wetland or Watercourse Buffer

A. MICC SECTION(S) INTERPRETED

MICC 19.07.130(A)(2)

MICC 19.01.050(F)(3)(b)

B. AUTHORITY

This development code interpretation is issued under the authority of Section 19.15.030 and 19.15.160 of the Mercer Island City Code (MICC).

C. ISSUE

The purpose of this interpretation is to clarify:

- 1) The meaning of the term "addition" in MICC 19.07.130(A)(2) as applied to modifications of legally nonconforming structures or buildings constructed on or before January 1, 2005 located within wetland and/or watercourse buffers.
- 2) The application of MICC 19.01.050(F)(3)(b) to modifications of single family sites that are legally nonconforming because of lot coverage and/or hardscape within wetland and/or watercourse buffers.

D. BACKGROUND

On June 18, 2019, the Mercer Island City Council adopted Ordinance No. 19C-05, repealing MICC 19.07.010 through 19.07.090 and adopting a new chapter 19.07 MICC. Ordinance No. 19C-05 became effective on July 1, 2019.

On May 21, 2019, the Mercer Island City Council adopted Ordinance No. 19C-04, amending MICC 19.01.050(F)(3)(b). Ordinance No. 19C-05 became effective on June 3, 2019.

The intent of MICC 19.07.130(A)(2) is to allow modest additions to legally nonconforming structures or buildings constructed on or before January 1, 2005 located within wetlands and/or watercourses and/or buffers. The permitted additions are limited in size and location to avoid impacts to wetlands and/or watercourses and/or buffers. MICC 19.07.130 states (in part):

19.07.130 Modifications.

Activities of the following types may be authorized with approval of an application for a critical area review 1. The activities in this section are exempt from the development standards in subsequent sections within this chapter; provided, that additional measures to protect life and property or to protect environmental quality may be required.

- A. *Addition to or reconstruction of an existing legally established structure or building within a critical area and/or buffer constructed on or before January 1, 2005, provided the following criteria are met:*
 - 1. *The seasonal limitations on land clearing, grading, filling, and foundation work described in section 19.07.160(F)(2) shall apply.*
 - 2. *Additions shall be allowed if all of the following criteria are met:*
 - a. *The structure is enlarged not more than a cumulative total of 200 square feet larger than its footprint as of January 1, 2005;*
 - b. *If the existing, legally established structure is located over or within a wetland or watercourse, no further expansion within the wetland or watercourse is allowed;*
 - c. *If the existing legally established structure is located within a wetland or watercourse buffer, the addition may be no closer to the wetland or watercourse than a distance equal to 75 percent of the applicable standard buffer and must also be no closer to the watercourse or wetland than the existing structure;*
 - d. *A critical area study approved by the city demonstrates that impacts have been avoided or minimized and mitigated consistent with section 19.07.100, mitigation sequencing;*
 - e. *If the modification or addition is proposed within a geologically hazardous area or associated buffer, a qualified professional provides a statement of risk consistent with section 19.07.160(B)(3).*

The language of MICC 19.07.130(A)(2) is unclear and requires interpretation to administer. The term “addition” is not defined in MICC 19.16.010. The term “structure or building” indicates that this subsection applies broadly to all structures and is not limited exclusively to buildings. The sole reference for “addition” is “footprint” instead of a specific development standard, such as lot coverage, hardscape or gross floor area. The review timing and sequencing of the critical area review 1 is not specified.

MICC 19.01.050(F)(3)(b) generally addresses sites that are legally nonconforming with lot coverage and/or hardscape standards. MICC 19.01.050(F)(3)(b) states:

- 3. *Landscaping, open space and buffer requirements.*

- b. *Lot coverage—Single-family dwellings. A site developed with a single-family dwelling that is legally nonconforming because the required landscaping area pursuant to chapter 19.02 MICC has not been provided, or because maximum allowable hardscape has been exceeded, can be increased in height and gross floor area (up to the maximum height and gross floor area permitted). No new hardscape or further reduction in landscaping area is permitted unless:

 - i. *The site is either brought into conformance with all applicable lot coverage requirements of MICC 19.02.020; or*
 - ii. *For lots where the maximum hardscape is exceeded, two square feet of legally existing hardscape are removed for every one square foot of new hardscape; or*
 - iii. *For lots where the maximum lot coverage is exceeded, two square feet of landscaping area are provided for every one square foot of additional nonlandscaping area.**

MICC 19.01.050(F)(3)(b) is not specific to single family sites that are legally nonconforming with lot coverage and/or hardscape and have existing lot coverage and/or hardscape within wetland and/or watercourse buffers. Clarification of how subsections (F)(3)(b)(ii) and (F)(3)(b)(iii) apply to legally existing hardscape or lot coverage in wetland and/or watercourse buffers is required.

The purpose of this interpretation is to clarify how the City will administer and apply MICC 19.07.130(A)(2) and 19.01.050(F)(3)(b).

E. FINDINGS

1. Per MICC 19.15.160, the code official may issue a written interpretation of the meaning or application of provisions of the development code.
2. This written interpretation is related to MICC 19.07.130(A)(2), which is a development regulation contained within the Modifications section of the Environment (Critical Area) Chapter of the MICC. It is also related to MICC 19.01.050(F)(3), which is a development regulation contained within the Nonconforming Structures, Sites, Lots and Uses section of the General Regulations Chapter of the MICC.
3. MICC 19.07.130(A)(2) establishes standards for additions to legally nonconforming structures or buildings constructed on or before January 1, 2005 located within wetlands and/or watercourses and/or buffers.
4. The language of MICC 19.07.130(A)(2) is unclear and requires interpretation to administer.
5. MICC 19.01.050(F)(3)(b) addresses modification to sites that are legally nonconforming with lot coverage and/or hardscape standards.
6. The language of MICC 19.01.050(F)(3) is not specific to sites that are legally nonconforming because of lot coverage and/or hardscape within wetland and/or watercourse buffers. This requires interpretation to administer.
7. In issuing an interpretation, the code official is directed to consider eight factors specified in MICC 19.15.160(A). These factors are:

- a. **The plain language of the code section in question;**

Analysis: A reading of the plain language of MICC 19.07.130(A)(2) results in the following findings:

- i. The subsection uses the term “addition,” “which is not defined in MICC 19.16.010 or elsewhere in the MICC.
- ii. The subsection applies to “existing legally established structure[s] or building[s].” “Structure” is defined in MICC 19.16.010 as “That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.” The use of the term “structure” means that this subsection applies to other site improvements in addition to buildings.
- iii. Subsection (A)(2)(a) establishes a maximum “enlargement” of “a cumulative total of 200 square feet *larger than its footprint* as of January 1, 2005.” (*Emphasis added*)
- iv. MICC 19.16.010 defines “building footprint” as, “That portion of the lot that is covered by building(s).”
- v. As applied to buildings, “addition” in the context of subsection (A)(2) means enlargement of the building footprint within the buffer.
- vi. Enlargement of a legally nonconforming building without increasing its footprint in the buffer is not an “addition” in the context of subsection (A)(2).
- vii. Since it is not an “addition,” enlargement of a legally nonconforming structure without increasing its footprint in the buffer is not subject to the 200 square feet limitation of subsection (A)(2)(a).
- viii. Since it is not an “addition,” enlargement of a legally nonconforming structure without increasing its footprint in the buffer is not subject to the requirement to be located no closer to the wetland or watercourse than a distance equal to 75 percent of the applicable standard buffer per subsection (A)(2)(c).
- ix. Since such an addition does not expand the building footprint, enlargement of a legally nonconforming structure without increasing its footprint in the buffer will not be closer to the watercourse or wetland than the existing structure.
- x. As applied to structures and site improvements other than buildings, “addition” in the context of subsection (A)(2) means enlargement of lot coverage and/or hardscape within the buffer. Such additions are limited to a net increase of 200 square feet and must be located within the outer 25% of the buffer.

Analysis: A reading of the plain language of MICC 19.01.050(F)(3)(b) results in the following findings:

- xi. Sites that are legally nonconforming because they exceed maximum lot coverage or hardscape coverage are not required to come into full compliance when adding additional lot coverage or hardscape coverage.
- xii. Sites that are legally nonconforming because they exceed maximum hardscape coverage can add new hardscape by removing existing hardscape at a 1:2 ratio (i.e. one new square foot of hardscape for every two square feet of removed hardscape).
- xiii. Sites that are legally nonconforming because they exceed maximum lot coverage can add new hardscape by removing existing lot coverage at a 1:2 ratio (i.e. one new square foot of lot coverage for every two square feet of removed removed lot coverage).
- xiv. Nothing in this subsection prohibits removal of lot coverage or hardscape within a wetland and/or watercourse buffer.

b. Purpose and intent statement of the chapters in question;

Analysis: Review of the purpose and intent statements of MICC 19.07.130(A)(2) and 19.01.050(F)(3)(b) results in the following findings:

- i. The purpose statement of MICC 19.07.130(A)(2) is as follows:

- A. *To implement the goals and policies for the Growth Management Act, RCW Chapter 36.70A;*
- B. *To maintain the functions and values of critical areas and enhance the quality of habitat to support the sustenance of native plants and animals;*
- C. *To balance property owner interests with the public interest;*
- D. *To promote biodiversity within critical areas and buffers by encouraging planting with mostly native vegetation;*
- E. *To establish review criteria for land use reviews that maintain and improve the ecological health of wetlands, watercourses and Lake Washington;*
- F. *To establish standards for new development that avoid increasing the risk of harm to people, property, and public infrastructure from natural hazards;*
- G. *To protect the functions and values of fish and wildlife habitat conservation areas, including wetlands, watercourses and habitat for priority species and species of local importance, through the use of buffers;*
- H. *To increase the safety of development within and adjacent to geologically hazardous areas through the use of buffers;*
- I. *To require mitigation measures when unavoidable impacts to critical areas are proposed;*
- J. *To establish tools to ensure that protection and mitigation measures are applied and maintain ecological value and function consistent with the provisions of this chapter;*
- K. *To avoid impact to the critical areas where possible, and, if avoidance is not reasonably possible, minimize impacts to critical areas and buffers to the greatest extent feasible, and mitigate any remaining impacts;*
- L. *To encourage the restoration of existing compromised critical areas; and*
- M. *To minimize negative impacts from the built environment on the functions and values of critical areas.*

ii. The purpose statement of MICC 19.07.130(A)(2) is as follows:

The purpose of this section is to allow for the continuance and maintenance of legally established nonconforming structures, sites, lots and uses, and to provide standards delineating the circumstances in which nonconforming structures, sites, lots and uses must be brought into conformance with the provisions of all applicable code requirements.

c. Legislative intent of the city council provided with the adoption of the code sections in question;

Analysis: Review of the legislative history of MICC 19.07.130(A)(2) and 19.01.050(F)(3)(b) results in the following findings:

- i. On June 18, 2019, the Mercer Island City Council adopted Ordinance No. 19C-05, repealing MICC 19.07.010 through 19.07.090 and adopting a new chapter 19.07 MICC. Ordinance No. 19C-05 became effective on July 1, 2019.
- ii. The minutes from the May 21, June 4 and June 18, 2019, City Council meetings do not include any discussion of wetlands, watercourse or modifications to legally nonconforming structures.
- iii. On May 21, 2019, the Mercer Island City Council adopted Ordinance No. 19C-04, amending MICC 19.01.050(F)(3)(b). Ordinance No. 19C-05 became effective on June 3, 2019.
- iv. The minutes from the May 21 and June 4, 2019, City Council meetings do not include any discussion of modifications to legally nonconforming sites.
- v. Legislative intent cannot be determined.

d. Policy direction provided by the Mercer Island comprehensive plan;

Analysis: Review of the Comprehensive Plan results in the following findings:

- i. Goal 16.1 of the Comprehensive Plan states, "Use existing housing stock to address changing population needs and aging in place."
- ii. Goal 18 of the Comprehensive Plan states, "Protection of the environment and private property rights will be consistent with all state and federal laws."

e. Relevant judicial decisions;

Analysis: Staff is unaware of any relevant judicial decisions related to this issue.

f. Consistency with other regulatory requirements governing the same or similar situation;

Analysis: Review of MICC Title 19 results in the following findings:

- i. MICC 19.01.050(F)(3)(a) addresses regulated improvements that are legally nonconforming with landscaping, open space and buffers as follows: "Landscaping, open spaces and buffers should be brought into conformance with current code requirements as much as is feasible whenever any changes are made to a legal nonconforming structure." This provides more specificity and allows greater flexibility than the same situation for single family sites under MICC 19.01.050(F)(3)(b).
- ii. MICC 19.01.050(F)(3)(a) requires, with limited exceptions, that an increase in height of that portion of a structure that is legally nonconforming because it intrudes into a required yard is an increase in the nonconformity and is not allowed unless the additional height meets the current yard requirements. However, this requirement is based on the intent to minimize mass and scale of portions of structures over 15 feet in height. It is not related to potential impacts to wetland and/or watercourse buffers. The requirement of MICC 19.01.050(F)(3)(a) would continue to apply to upper floor additions of all structures legally nonconforming with setbacks.
- iii. MICC 19.07.(A)(2)(a) allows Critical Area Review 1 to be completed concurrently with building permit review without a separate land use review application.
- iv. MICC 19.07.180(C)(2) prohibits lot coverage and hardscape in wetland buffers except under specific provisions. Lot coverage and hardscape are prohibited in buffers because they have equivalent impacts on the function of wetland buffers by eliminating vegetation, retarding infiltration, and increasing stormwater runoff volumes and rates.
- v. MICC 19.07.190(C)(4) prohibits lot coverage and hardscape in watercourse buffers except under specific provisions. Lot coverage and hardscape are prohibited in buffers because they have equivalent impacts on the function of watercourse buffers by eliminating vegetation, retarding infiltration, and increasing stormwater runoff volumes and rates.

g. The expected result or effect of the interpretation; and

Analysis: The interpretation is expected to result in the ability of property owners to add upper story additions (i.e. gross floor area) within the inner 75% of wetland and/or watercourse buffers that do not increase building footprint or lot coverage. Additionally, the interpretation is expected to result in the ability of property owners to reduce lot coverage and/or hardscape in buffers and to add limited new replacement in the outer 25% of the buffer at a 1:2 ratio (i.e. one square foot of new for every two square feet of removed).

h. Previous implementation of the regulatory requirements governing the situation.

Analysis: Staff is unaware of any previous implementation of regulatory requirements relating to modifications to structures and site that are legally nonconforming with wetland and/or watercourse buffers.

F. CONCLUSIONS

It is possible to enlarge a structure without increasing its footprint. Partial or full upper stories can increase the gross floor area of a structure without increasing the building footprint. Such additions create no physical impacts to the wetland and/or watercourse buffer. Therefore, no impacts to the function of the buffer result from gross floor area additions to structures that do not increase building footprint.

For sites that are legally nonconforming because they exceed maximum lot coverage or hardscape coverage, reducing lot coverage and/or hardscape site improvements within the buffer results in a net ecological lift to the function of the buffer. This applies to net decreases in lot coverage and/or hardscape within buffers. New lot coverage and/or hardscape is limited to a of 200 square feet, must be located within the outer 25% of the buffer, and must be no closer to the wetland and/or watercourse than the existing lot coverage and/or hardscape site improvements.

G. INTERPRETATION

1. For legally nonconforming buildings constructed on or before January 1, 2005 located within wetlands and/or watercourses buffers:
 - a. Expansion of building footprint or lot coverage within the buffer is limited to 200 sf, must be located within the outer 25% of the buffer, and must be no closer to the wetland and/or watercourse than the existing building footprint or lot coverage.
 - b. Expansion of gross floor area that does not increase building footprint or lot coverage within the buffer is not limited to 200 sf and is not restricted to the outer 25% of the buffer.
2. For sites that i) are legally nonconforming because they exceed maximum lot coverage or hardscape coverage; and, ii) have lot coverage or hardscape within the wetland and/or watercourse buffers that was constructed on or before January 1, 2005:
 - a. Because lot coverage and hardscape have equivalent impacts on the function of watercourse buffers, new lot coverage and/or hardscape can be added interchangeably within buffers by removing existing lot coverage and/or hardscape at a 1:2 ratio (i.e. one new square foot of new for every two square feet of removed).
 - b. All lot coverage and/or hardscape additions in the buffer is limited to a maximum of 200 square feet, must be located within the outer 25% of the buffer, and must be no closer to the wetland and/or watercourse than the existing lot coverage and/or hardscape site improvements.
 - c. Additions of lot coverage and/or hardscape within the buffer is subject to the other applicable standards and processes in MICC Chapter 19.07, including, but not limited to, buffer averaging, buffer reduction and reasonable use exemption.
3. For the modifications to legally nonconforming buildings and sites discussed above, Critical Area Review 1 is required. The Critical Area Review 1 be completed concurrently with building permit review without a separate land use review application.