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**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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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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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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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 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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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

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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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.

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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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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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."