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**BEFORE THE HEARING EXAMINER FOR
MERCER ISLAND**

**In re the Application for a Reasonable
Use Exception for Property at 5637 East
Mercer Way**

CAO15-001

**APPLICANT'S REQUEST FOR
OFFICIAL NOTICE**

Request for Official Notice

Applicant respectfully asks the Hearing Examiner to take official notice of three documents, pursuant to Seattle Hearing Examiner Rule ("HER") 2.18 and ER 201.

The first two documents are from the administrative file in this matter, and should have been included by staff as exhibits to its staff report in the first instance. They are:

Correspondence from Senior Planner Travis Saunders to Bill Summers dated February 13, 2015 (Exhibit A), and an attachment to that correspondence entitled Indemnification and Hold Harmless Agreement (Exhibit B).

Exhibit A is relevant because it is evidence that City staff from the beginning considered that geotechnical and drainage issues were key components of the applicants' reasonable use exception application, contrary to the representations of current Planning Manager Evan Maxim.

**APPLICANT'S REQUEST FOR
OFFICIAL NOTICE**

Page 1 of 3

McCullough Hill Leary, PS

701 Fifth Avenue, Suite 6600
Seattle, Washington 98104-7042
206.812.3388
206.812.3389 fax

1 Exhibit B is relevant because it is an agreement which the City required the applicant to sign in
2 connection with the Reasonable Use Exception application. The City mandated the applicant to
3 indemnify and hold harmless the City from impacts of the project on critical areas, including
4 "steep slope or slide-prone slope" impacts. If geotechnical issues were not a component of the
5 reasonable use exception, it would have made no sense for the City to have required execution of
6 such an agreement.¹

8 The third document is email correspondence from Evan Maxim to G. Richard Hill dated
9 February 17, 2017 (Exhibit C). It confirms that the City has reviewed its files and has not
10 located any reasonable use exception decisions beginning in the year 2005 to the present date
11 2005 was the year the code provision was first adopted. Exhibit C is relevant because it supports
12 applicant's contention that no deference should be due to the interpretation by staff of the
13 provisions of MICC 19.07.030(B). This application is a matter of first impression for staff. Staff
14 has no familiarity with or expertise in construing the provisions of MICC 19.07.030(B). The
15 Hearing Examiner should consider this matter de novo, affording no deference to staff.

17 As the Hearing Examiner knows, HER 2.18(a) allows the Hearing Examiner to take
18 official notice of judicially cognizable facts. Judicially cognizable facts are defined in ER 201 as
19 facts "not subject to reasonable dispute" because among other factors, they are "capable of
20 accurate and ready determination by resort to sources whose accuracy cannot reasonably be
21 questioned."

23 All three of these documents are City of Mercer Island documents. They are therefore
24

25
26 ¹ Applicant respectfully asks the Examiner for leave to substitute the signed agreement in the event it is located in
the City's files or in applicant's files, prior to the date that oral argument is due.

1 documents that are capable of accurate and ready determination.

2 ER 201 further states that it is mandatory for the court to accept these facts if requested
3 by a party, and that judicial notice may be taken at any stage of the proceeding.

4 Accordingly, applicant respectfully asks the Hearing Examiner to take official notice of
5 Exhibits A, B, and C.
6

7 Dated this 21st February, 2017.
8

9 MCCULLOUGH HILL LEARY, PS

10
11 
12 _____
13 G. Richard Hill, WSBA #8806
14 Attorney for Appellant



CITY OF MERCER ISLAND, WASHINGTON

9611 SE 36th Street • Mercer Island, WA 98040-3732

(206) 275-7605 • FAX (206) 275-7725

www.mercergov.org

February 13, 2015

Bill Summers
PO Box 261
Medina, WA 98039

RE: Notice of Incomplete Application for File No. CAO15-001 at 5637 East Mercer Way, Parcel 1924059312

Dear Mr. Summers:

On January 16, 2015, the City of Mercer Island received your application for a reasonable use exception at 5637 East Mercer Way, Parcel 1924059312. After a review of the materials received by the City of Mercer Island's Development Services Group, staff has determined that the following information is needed in order to complete the application pursuant to the Mercer Island City Code (MICC). The following required submittal items are listed on the City's Reasonable Use Exception application form. Items that have a check mark (✓) next to them have been satisfied in the submittal. Items that are not checked (☐), need to be submitted in order to deem the application complete; a brief description of the needed items is provided following.

✓ 1. Development Application (MICC 19.15.020.A)

☐ 2. Site plan (MICC 19.15.020.A and 19.07.050.E) – Please see the below details required on the site plan:

- ✓ Property boundary lines
- ☐ Building setbacks/yards – *Please show setbacks on the proposed site plan (CHS Engineers Sheet 1 of 1). Please see 19.02.020(C).*
- ✓ Existing structures
- ☐ Proposed structures – *The storm detention vault is described as being located within the driveway. The site plan shows the storm detention vault partially within the driveway, partially outside the driveway. Please resolve this discrepancy. Please also indicate point of discharge as well as the location of other utilities. Additionally, please show all proposed structures on all applicable documents, including the critical areas study;*
- ☐ Existing Critical Areas (i.e. wetland boundaries, OHWM of watercourses) – *The site plan does not clearly delineate the critical areas and their associated buffers. Please clearly label.*
- ☐ "Standard Buffers" for wetlands and watercourses, as specified by MICC 19.07.070.A and 19.07.080.C - *The site plan does not clearly delineate the critical areas and their associated buffers. Please clearly label.*
- ☐ Proposed alterations of Critical Areas – *Please clearly define extent of disturbance, which includes any proposed clearing and grading.*
- ✓ Adjacent streets
- ☐ Drawn to scale – *Measurement of the site plan using the stated scale of 1"=20' indicates that the site plan is distorted, likely a printing error. Please provide a site plan that is correct to the stated scale.*

√ North Arrow

- 3. SEPA checklist (MICC 19.07.120.H) – *The checklist that was provided does not address Section B.5.a, regarding animals. Please complete the checklist. Please also reference any other environmental information you know about that has been prepared, or will be prepared, directly related to this project (Section A.8), such as the geotechnical report, stormwater and erosion control plan, and mitigation plan requested below.*
- 4. Hold Harmless/Indemnification (MICC 19.07.040) – *Please complete the enclosed Indemnification and Hold Harmless Agreement.*
- 5. Critical Areas Study (MICC 19.07.030.B.2 and 19.07.050):

Two critical area studies were provided: October 10, 2001 Wetland Resources, Inc., and January 7, 2015 Sewall Wetland Consulting, Inc. Both reports utilize the Washington State Department of Ecology Wetlands Identification and Delineation Manual, March, 1997 Edition. The City currently uses the Washington State Wetland Rating System for Western Washington, Publication #04-06-025, dated August, 2004. An updated critical area study is required, using the appropriate rating system. This study must address mitigation sequencing, consistent with best available science. Please note that the Department of Ecology has updated its wetland rating system, effective January 1, 2015, which may be required by other agencies. Please contact agencies with jurisdiction to ensure compliance with their requirements. Additionally, it appears that the Sewall report assumes the proposed development is unchanged from the proposal described by Wetland Resources. Please ensure the updated report/study reflects the current proposal and that all application documents are updated accordingly.

- A. Site survey – *The survey/site plan (CHS Engineers, page 1 of 1) does not contain a surveyor seal or signature, and as such, is not considered a survey. Please provide a current survey that is sealed and signed by a licensed professional land surveyor. The survey needs to delineate critical areas, pursuant to 19.07.050.*
- B. Cover sheet and site construction plan – *Please provide in the updated critical areas study.*
- C. Mitigation and restoration plan to include the following information: *Please provide with the items detailed below.*
 - 1. Location of existing trees and vegetation and proposed removal of same; – *Please provide as detailed in 19.10.080(A)(3)(a)&(b).*
 - 2. Mitigation proposed including location, type, and number of replacement trees and vegetation; – *Please provide in the updated critical areas study.*
 - 3. Delineation of critical areas; – *Please provide in the updated critical areas study.*
 - 4. In the case of a wildlife habitat conservation area, identification of any known endangered or threatened species on the site; - *Please discuss in the updated critical areas study. If any know species are present, please identify.*
 - 5. Proposed grading; - *Please provide in the updated critical areas study.*
 - 6. Description of impacts to the functions of critical areas; *Please provide in the updated critical areas study.*
 - 7. Proposed monitoring plan; - *Please provide in the updated critical areas study. Please see 19.07.050 and 19.07.040(J).*
 - 8. A mitigation and restoration plan may be combined with a storm water control management plan or other required plan; - *Please provide in the updated critical areas study.*
 - 9. Storm water and erosion control management plan consistent with MICC 15.09. Off-site measures may be required to correct impacts from the proposed alteration; - *Please provide in the updated critical areas study.*
 - 10. Other technical information consistent with the above requirements, as required by the code official. - *Please provide a geotechnical report and storm water control plan, specific to the proposed development, pursuant to 19.07.060 and 15.09.*

√ 6. Filing fee (MICC 19.15.020.B)

√ 7. A statement by the applicant addressing the criteria for approval in MICC 19.07.030.B.3.a-f.

Please be as thorough as possible in responding to the following criteria; remember, the burden of proof is on the applicant to show that they meet all the following requirements for a reasonable use exception.

It is noted that additional items were submitted to the City on February 4, 2015, which included the following:

- a. Geotechnical report by Geo Group NW, dated September 24, 1999/updated October 28, 2005.

The report was prepared for the former property owner, Clay March, and is not specific to the current proposal. Please have the geotechnical report updated to reflect the proposed development and to address any relevant changes (site or code) since the original report and subsequent update. Please updated the geotechnical report to address 19.07.06 - requirements of geotechnical review, which includes a statement of risk by a geotechnical professional.

- b. Wetland mitigation report by Sewall Wetland Consulting, dated January 30, 2015.

Please see comments in #5 above regarding critical areas study –The City currently uses the Washington State Wetland Rating System for Western Washington, Publication #04-06-025, dated August, 2004. Please provide an updated critical areas study and mitigation and monitoring plan. Please note that the City reserves the right to have the updated report peer reviewed at the applicant's expense.

- c. "Boundary/topographic survey - base survey" by CHS Engineers.

The document does not contain a surveyor seal or signature, and as such, is not considered a survey. Please provide a current survey that is sealed and signed by a licensed professional land surveyor. The document was provided on an 8.5"x11" sheet, which is not to scale, and is illegible for review purposes. Please provide a to-scale document that is legible, preferably on an 18"x24" or larger sheet.

- d. "Boundary/topographic survey - critical areas", by CHS Engineers

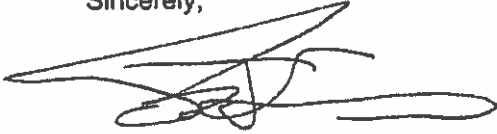
The document does not contain a surveyor seal or signature, and as such, is not considered a survey. Please provide a current survey that is sealed and signed by a licensed professional land surveyor. The document was provided on an 8.5"x11" sheet, which is not to scale, and is illegible for review purposes. Please provide a to-scale document that is legible, preferably on an 18"x24" or larger sheet. Please also indicate the footprint of the proposed residence and clearing/grading limits of the project to illustrate impacts to critical areas.

- e. "Boundary/topographic survey - "tree removal plan", by CHS Engineers.

The document does not contain a surveyor seal or signature, and as such, is not considered a survey. Please provide a current survey that is sealed and signed by a licensed professional land surveyor. The document was provided on an 8.5"x11" sheet, which is not to scale, and is illegible for review purposes. Please provide a to-scale document that is legible, preferably on an 18"x24" or larger sheet. Please also indicate the footprint of the proposed residence and clearing/grading limits of the project to illustrate tree impact. Please provide as detailed in 19.10.080(A)(3)(a)&(b).

Pursuant to MICC 19.15.020(C)(4), if the applicant fails to provide the required information within 90 days from the date of this notice of incomplete application (5:00 PM on May 14, 2015), the application shall lapse, and become null and void. If you have any questions, please do not hesitate to contact me at 206-275-7717 or via e-mail at travis.saunders@mercergov.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Travis Saunders', with a long horizontal flourish extending to the right.

Travis Saunders, Senior Planner
City of Mercer Island Development Services Group

EXHIBIT B

AFTER RECORDING, MAIL TO:
City of Mercer Island, Attn: _____
9611 SE 36th Street
Mercer Island, WA 98040

INDEMNIFICATION AND HOLD HARMLESS AGREEMENT

This Indemnification and Hold Harmless Agreement Not to Sue (Agreement") is effective this ____ day of _____, 20 __. The Parties ("Parties") to this Agreement are the City of Mercer Island, a Washington Municipal corporation ("City") and the following owners (all owners with complete names must be listed) of private property ("Owner(s)").

A. The applicant(s) is/are the Owner(s) of the real property situated in the City of Mercer Island located at _____.

B. The Legal Description of the real property ("Property") is as follows:

[If not enough space, attach separate sheet labeled Exhibit A.]

C. The Parcel Number of the Property is as follows: _____.

D. The applicant Owner(s) has/have applied to the City for a _____ permit which bears
MAIN PERMIT NO. _____ for the
purpose of: _____

This agreement applies to all related permits issued, and/or amended at any time in the future, pursuant to this Main Permit.

E. The parties have agreed to enter into this Agreement to address concerns regarding the following circumstances:

1. Permitted activity will take place on, or may impact a:

- Watercourse
- Wetland
- Shoreline
- Steep slope or slide-prone slope
- Poor soil conditions
- Seismic Liquefaction
- Other geologic hazard or critical area consideration (describe)

2. Adjacency of permitted activity to roadways or structures
- Alternate materials, methods of design or methods of construction will be used (alternate to International Building Code or International Residential Code specifications)
- Other (describe)

NOW, THEREFORE, the Parties agree as follows:

1. INDEMNIFICATION AND HOLD HARMLESS AGREEMENT AND COVENANT NOT TO SUE "(AGREEMENT)":

Pursuant to Mercer Island City Code Section 19.01.060, and in consideration of the City issuing the permit identified in (D) above, which constitutes good and valuable consideration, the receipt of which the Owner(s) acknowledge(s), the Owner(s) covenant(s) not to sue and agree(s) to defend, indemnify, and hold the City of Mercer Island, its officers, officials, employees, agents and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with activities or operations performed by the Owner or on the Owner's behalf out of issuance of this permit, except for injuries and damages caused by the sole negligence of the City.

2. RECORDING:

This Agreement shall be recorded by the applicant with the King County Recorder's Office. The permit identified in (D) above shall not be valid until the City has obtained written proof of such recording. Alternately, the City may record this Agreement.

3. COVENANT RUNNING WITH THE LAND:

This Agreement shall be a covenant running with the land and the rights and obligations contained herein shall run with and burden the property identified above, and shall inure to the benefit of and be binding upon the Parties to this Agreement, their heirs, successors and assigns:

- 3 years from approval of final inspection of the permitted work; or
- ___ years from approval of final inspection of the permitted work; or
- without limitation as to a period of years.

4. INSPECTION. The City's inspection or acceptance of any of the Owner's construction or other work either during construction or when completed shall not be grounds to avoid any of the obligations of this Agreement.

5. COMPLIANCE WITH LAWS: ~~All permitted activities shall be conducted in accordance with all applicable federal, state, and City laws including, without limitation, the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), the Model Toxics Control Act ("MTCA"), the Superfund Amendment Reauthorization Act ("SARA"), The Endangered Species Act ("ESA"), and the State Environmental Policy Act ("SEPA").~~

DATED this _____ day of _____, 20____.

OWNER (signature)

Name: _____
(please print)

OWNER (signature)

Name: _____
(please print)

(If married, both spouses must sign, and both signatures must be notarized.)

STATE OF WASHINGTON)
) ss [INDIVIDUAL ACKNOWLEDGMENT]
COUNTY OF KING)

I certify that I know or have satisfactory evidence that _____

(is/are) the person(s) who appeared before me and said person(s) acknowledged that (he/she/they) signed this instrument and acknowledged it to be (his/her/their) free and voluntary act for the uses and purposes therein mentioned in the instrument.

Given under my hand and seal the _____ day of _____ 20____.

Notary Public in and for the State of Washington

Printed Name
My Appointment Expires _____

STATE OF WASHINGTON)
) ss [INDIVIDUAL ACKNOWLEDGMENT]
COUNTY OF KING)

I certify that I know or have satisfactory evidence that _____

(is/are) the person(s) who appeared before me and said person(s) acknowledged that (he/she/they) signed this instrument and acknowledged it to be (his/her/their) free and voluntary act for the uses and purposes therein mentioned in the instrument.

Given under my hand and seal the _____ day of _____ 20____.

Notary Public in and for the State of Washington

Printed Name
My Appointment Expires _____

EXHIBIT C

Rich Hill

From: Evan Maxim <evan.maxim@mercergov.org>
Sent: Friday, February 17, 2017 4:03 PM
To: Rich Hill; Bill Summers (bill@summersdevelopment.com)
Cc: Scott Greenberg; Ann Marie Soto; Ali Spietz
Subject: Request for MI Treehouse - CAO15-001

Dear Mr. Hill,

I understand that you contacted Scott Greenberg and requested a list of any previous reasonable use exceptions.

It appears that the "reasonable use exception" process was created with the adoption of Ordinance 05C-12 in November / December 2005. The City was unable to identify any applications for a reasonable use exception since 2005, with the exception of the two application identified in the MI Treehouse review – CAO15-001 and CAO07-002.

To conduct this review, the City searched for the term "reasonable use exception" and "MICC 19.07.030(B)". With the analysis for 19.07.030(B), we did identify a number of records (listed below) that included the code citation 19.07.030(B).

I have reviewed each file individually, it appears that these are "critical area determinations" for wetland / watercourse buffer reductions, not reasonable use exception applications (i.e. the criteria and process for approval are different than the reasonable use exception criteria and process). Most of these applications were approved.

CAO0006-001	approved
CAO0012-001	approved
CAO01-001	approved
CAO06-001	approved
CAO06-002	approved
CAO07-002	withdrawn
CAO07-003	appealed
CAO09-001	approved
CAO09-004	approved
CAO09-005	approved
CAO11-001	approved
CAO11-002	approved
CAO12-002	approved
CAO13-001	approved
CAO13-003	approved
CAO14-001	approved
CAO14-002	approved

You are, of course, welcome to review any public record at the City of Mercer Island. I believe the above has fulfilled your public information request; if you need additional information, please let me know.

Regards,

Evan Maxim
Planning Manager
City of Mercer Island Development Services

9611 SE 36th Street, Mercer island, WA 98040
p: 206.275.7732
f: 206.275.7726
