

**CITY OF MERCER ISLAND
HEARING EXAMINER
FINDINGS, CONCLUSIONS AND DECISION**

Applicant: Bill Summers for MI Treehouse, LLC

File No: CAO15-001

Application: Reasonable Use Exception for a single-family home on property occupied by a wetland, stream and geologically hazardous critical areas.

Staff Recommendation: Deny the application

Public Hearing: The Hearing Examiner held a public hearing on the application on February 13, 2017, at the Mercer Island Community and Event Center, 8236 SE 24th St, Mercer Island, Washington. Represented at the hearing were the applicant, MI Treehouse, LLC (“Applicant”), by G. Richard Hill, attorney-at-law, and the City's Development Services Group (“City”), by Evan Maxim, Planner, and Ann Marie J. Soto, attorney-at-law. A verbatim recording of the hearing is available at the City Clerk’s office.

For purposes of this decision, all section numbers refer to the Mercer Island City Code (“MICC” or “Code”). Having considered the evidence in the record and viewed the site, the Hearing Examiner enters the following findings of fact, conclusions and decision on the application.

Findings of Fact

1. The subject property is addressed as 5637 East Mercer Way, and is zoned R-15, Single-Family Residential with a minimum lot size of 15,000 square feet (“Property”). The lot size is approximately 37,554 square feet.
2. The site is developed with an access driveway serving an adjacent property, a public trail along the north side, and a private sewer.
3. The Property is forested with a mix of deciduous and evergreen trees, native understory growth and ivy. The site is contoured in a broad ravine or “v” shape generally sloping down from west to east. Slopes on the site range from thirty percent to seventy percent, with the steepest slopes located in the southeast portion of the Property.
4. Two Type 2 watercourses flow west to east across the Property. The two watercourses join at the east side of the Property, and are channeled under East Mercer Way. Approximately half of the subject site is covered by a Category III wetland area, and wetland buffers. The wetland extends from the west property line to the east property line, and

encompasses all but the steepest slopes on the south side of the Property, and the area north of the public trail.

5. The properties adjacent to the subject property to the south, west and north are developed with single family homes. East Mercer Way fronts the east property line. Across East Mercer Way the properties are also developed with single family homes.

6. The Applicant proposes to construct a new single family home with a building footprint of approximately 1,631 square feet. The proposed single family home would be accessed via a new driveway utilizing a portion of the existing driveway which serves a property to the south.

7. On January 16, 2015, the Applicant submitted an application for a reasonable use exception. The Applicant submitted an environmental checklist for the project on March 16, 2015. Exhibit 27. On May 4, 2015, the City published a notice of intent to issue a Determination of Non-significance (“DNS”) for the project. Exhibit 5.

8. The City issued its recommendation on the reasonable use exception on or about February 9, 2017, recommending denial of the application. The staff report for the recommendation stated in part:

The city has not issued a SEPA determination for the proposed reasonable use exception because the City has recommended that the Hearing Examiner deny the proposed reasonable use exception. If the Hearing Examiner determines that the reasonable use exception should be denied consistent with the City’s recommendation, this decision would not constitute an “action” pursuant to WAC 197-11-704.

Exhibit 1 at 5.

Thus, no State Environmental Policy Act (“SEPA”) analysis or threshold determination was completed at the time of the hearing on the application.

9. At the hearing on the reasonable use exception, the City stated that it does not have sufficient information on the project such that it could “meaningfully evaluate” the project for purposes of issuing a threshold determination.

10. The City indicated at the hearing that steep slopes and landslide hazard areas on the Property were not part of the City’s reasonable use exception analysis for the proposal. Further, testimony at the hearing indicated that geotechnical analysis performed for the project to date has only included an analysis of potential adverse impacts of the project relative to the steep slopes and landslide hazard areas up to the property line for the subject property, and did not include an analysis of potential adverse impacts on adjacent properties.

11. Following the close of the hearing the Applicant submitted a Request for Judicial Notice of three documents; two were from the administrative record, and the third was email correspondence between planner Evan Maxim and the Applicant's attorney. The Applicant argued in part that pursuant to ER 201 such judicial notice is mandatory if requested by a party. Exhibit 33.
12. MICC 19.07.030.B.1-2 provides that:

Application Process. If the application of these regulations deny reasonable use of a subject property, a property owner may apply to the hearing examiner for a reasonable use exception pursuant to permit review, public notice and appeal procedures set forth in Chapter 19.15 MICC.

Studies Required. An application for a reasonable use exception shall include a critical area study and any other related project documents, such as permit applications to other agencies, and environmental documents prepared pursuant to the State Environmental Policy Act.
13. MICC 19.07.120.I.6 provides that "The procedural requirements of SEPA and this section shall be completed prior to the issuance of a permit or final decision on a nonexempt proposal."
14. MICC 19.15.020.D.3.b provides that "If an open record hearing is required on the permit, the city shall . . . Issue any threshold determination required under MICC 19.07.120 at least 15 days prior to the hearing."
15. "Before a local government processes a permit application for a private land use project, it must make a "threshold determination" of whether the project is a "major action significantly affecting the quality of the environment." A threshold determination, made by the "responsible official" of the "lead agency" reviewing the project, is required for any project constituting a SEPA "action" unless it is "categorically exempt." The lead agency must make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal." *Moss v. City of Bellingham*, 109 Wn.App. 6, 14, 31 P.3d 703 (2001)
16. "One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993).
17. MICC 19.07.060 provides that "There are no buffers for geologic hazard areas, but a geotechnical report is required prior to making alterations in geologic hazard areas." By definition, a geotechnical report must include a description of "potential adverse impacts to adjacent and down-current properties." MICC 19.16.010 ("Geotechnical Report or Geotechnical Analysis").

Conclusions

1. The Hearing Examiner has jurisdiction over this application pursuant to MICC 19.15.010.E.
2. The Code requires that: (1) the results of the SEPA analysis be considered as part of the reasonable use exception application (MICC 19.07.030.B); (2) a threshold determination must be issued 15 days in advance of an open public meeting, such as the one in this case (MICC 19.15.020.D.3.b); and (3) the SEPA analysis must be completed before a final decision on the subject application (MICC 19.07.120.I.6). The City did not meet these requirements, because it did not issue a threshold determination. The Code provides that the hearing examiner may “approve,” “approve with conditions,” or “deny” the request. MICC 19.07.030.B. In the absence of a threshold determination the Hearing Examiner’s decision making capacity is limited, because there cannot be a decision on the application that would result in approval, or an approval with conditions. In addition, one of the primary purposes of SEPA is to assist decision makers in determining the environmental consequences of a proposal. Without the benefit of a completed SEPA review, the Hearing Examiner may be missing crucial information to determine if a reasonable use exception is appropriate in the context of sensitive critical areas without the benefit of a completed SEPA review. Even if the Hearing Examiner adopted the City’s recommendation of denial for the application, that decision should be informed by the analysis contemplated by SEPA. Finally, the mandate from the Code and SEPA statutory requirements calling for SEPA analysis at the earliest opportunity is circumvented when consideration of a reasonable use exception application proceeds without that analysis.
3. This decision does not reach the question raised by the Applicant in closing arguments, that the subject project may be exempt from SEPA analysis. No SEPA determination was issued by the City, and no SEPA appeal was filed. The Hearing Examiner does not have jurisdiction to unilaterally determine in a reasonable use exception application hearing that a project is exempt from SEPA analysis.
4. The City erred in adopting the position that the geologically hazardous areas analysis should be excluded from the review for the reasonable use exception. A reasonable use exception application can be submitted to avoid strict compliance with any, or all, of the City’s critical areas regulations. MICC 19.07.030.B.1 states that property owners can apply for reasonable use exception from “these regulations,” meaning the *entire* critical areas ordinance. When, as in this case, the Property contains multiple critical areas, all of these should be collectively reviewed at the same time. While the City reached a determination that the proposal fails to meet the criteria for a reasonable use exception due to issues raised by the project in relation to wetlands, there are gaps in the record concerning other critical areas.
5. The geotechnical report provided by the Applicant is not sufficient to determine if the project meets the reasonable use exception criteria to the degree it fails to provide an

analysis of “potential adverse impacts to adjacent and down-current properties.” MICC 19.07.060 and MICC 19.16.010.

6. The Hearing Examiner declines to admit the documents identified in Applicant’s Request for Official Notice pursuant to the Applicant’s expansive reading of HER 2.18 and ER 201. As the Applicant’s arguments imply “official notice” is the administrative hearing equivalent of “judicial notice.”

“Judicial notice” is:

The act by which a court, in conducting a trial, or framing its decision, will . . . without the production of evidence, recognize the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e.g., the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc. The cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. Such notice excuses party having burden [sic] of establishing fact from necessity of producing formal proof.

Black’s Law Dictionary (6th Edition, 1990).

ER 201 provides in part that: “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

HER 2.18 provides in part that: “The Hearing Examiner may take official notice of judicially cognizable facts. In addition, the Examiner may take notice of general, technical, or scientific facts within his or her specialized knowledge.”

Simply because a document is in the public record does not mean that it rises to the level of facts “which are universally regarded as established by common notoriety,” or are “generally known within the territorial jurisdiction” of the hearing examiner. Further, while ER 201 does make acceptance of judicial notice mandatory “when requested by a party and supplied with the necessary information,” this assumes that the information qualifies for judicial notice in the first place, and the documents presented here do not. However, the Hearing Examiner left the record open for additional comments from the public until the end of the day February 21, 2017, the Applicant is a member of the public, and the documents were submitted on February 21, 2017 before 5 PM. The documents are admitted for that reason.

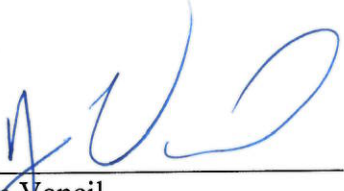
7. The application for a reasonable use exception should be remanded for the City to complete critical areas and SEPA analyses, and issue a threshold determination. The Hearing Examiner will not retain jurisdiction over this matter as requested by the Applicant.

While this does result in a potential loss of efficiency, as a hearing on the application has been held, the Hearing Examiner cannot measure how long it will take the Applicant and City to address the issues raised in this Decision. Further, the additional analysis required may result in changes to, or contradiction of information provided at the hearing.

Decision

The application for a reasonable use exception is **REMANDED**. The Hearing Examiner does not retain jurisdiction over this matter.

Entered this 8th day of March, 2017.



Ryan Vancil
Hearing Examiner

Testimony: The following people testified at the public hearing:

City of Mercer Island:	Evan Maxim, Planner, DSG
Applicant:	Bill Summers
	Robert London
	Gordon Ahalt
	Dr. John Stivelman
	Darrell S. Mitsunaga attorney-at-law, for Dr. John Stivelman
	Tina Ghen, arborist, for Dr. John Stivelman
	Eliyezer Kohen
	Sharon Samms
	Ron Healey, architect for Applicant
	Bill Chang, geotechnical engineer for Applicant
	Peter Anderson

Exhibits: The following exhibits were entered into the record:

1. Staff Report
2. Development Application, received on January 16, 2015
3. Plan Set
 - a. Boundary / Topographic Survey by CHS, dated January 14, 2014
 - b. Site Plan by Healey-Jorgensen Architects, received on October 18, 2016
 - c. Foundation Plan by Healey-Jorgensen Architects, received on October 18, 2016
 - d. Main Floor Plan by Healey-Jorgensen Architects, received on October 18, 2016
 - e. Upper Floor Plan by Healey-Jorgensen Architects, received on October 18, 2016

4. Public Notice of Application dated April 13, 2015
5. Public Re-Notice of Application dated May 4, 2015
6. Public comment:
 - a. Ahalt, dated April 27, 2015
 - b. Anderson, dated April 27, 2015
 - c. Bell, dated May 15, 2015
 - d. Brotherton, dated April 27, 2015
 - e. Brown, dated April 27, 2015
 - f. Department of Ecology, dated May 18, 2015
 - g. Duchaine, dated April 27, 2015
 - h. Graham, dated April 22, 2015
 - i. Jack, dated April 22, 2015
 - j. Kohen, dated April 20, 2015
 - k. London, dated April 19, 2015
 - l. Neighborhood Comment (multi-signature), dated April 27, 2015
 - m. Panelli, dated April 28, 2015
 - n. Samms email, dated April 24, 2015
 - o. Samms letter, dated April 27, 2015
 - p. Stivelman, dated May 5, 2015
 - q. Weber, dated April 27, 2015
 - r. Weber, dated May 18, 2015
7. Notice of Public Hearing dated January 30, 2017
8. Original Criteria Analysis document, undated
9. Revised Criteria Analysis document, received October 18, 2016
10. Geotechnical Report by GeoGroup Northwest
 - a. March 16, 2015
 - b. July 30, 2015
 - c. October 28, 2015
 - d. February 4, 2016
 - e. April 27, 2016 (attached to June 10, 2016 letter)
11. Perrone Consulting, Geotechnical Peer Review
 - a. June 12, 2015
 - b. September 3, 2015
 - c. November 18, 2015
 - d. March 4, 2016
 - e. May 3, 2016
12. Sewall Wetland Consulting
 - a. March 5, 2015
 - b. October 21, 2015
 - c. December 11, 2015
13. ESA, Wetland Peer Review
 - a. July 29, 2015
 - b. January 11, 2016
14. 1998 Drainage Easement and Settlement Agreement
15. Statutory Warranty Deed, dated September 29, 2014
16. Email from Bill Summers to Evan Maxim, dated July 8, 2016

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17. Permanent Stormwater/Utility and Pedestrian Trail Easement, dated April 25, 2007
18. Department of Ecology Email, dated February 9, 2017
19. (In staff report listed as Exhibit 18) Excerpted Land Use Materials – VAR04-008 and CAO07-002
 - a. Development Application, dated May 13, 2004
 - b. Project Description, dated May 13, 2004
 - c. Site Plan, revised March 31, 2004
 - d. Withdrawal letter, dated June 8, 2010
20. King County Assessor Official Property Value Notice, dated June 2, 2016
21. Declaration of Joseph L. Brotherton, dated February 10, 2017
22. Applicant generated site plan with color-coding
23. Triad Downstream Drainage Analysis, dated June 23, 2015 (received July 2, 2015)
24. Arborist Report by Gilles Consulting, dated July 14, 2015 (received July 15, 2015)
25. Cultural Resources Report by ESA, dated November 2016
26. Biologist Comment Letter by Sewall Consulting, dated February 12, 2017
27. Revised SEPA checklist, signed by Bill Summers on March 16, 2015
28. Two full page aerial photos provided by Robert London
29. Chart of taxpayer names, addresses, and adjoining assessed property values, provided by Gordon Ahalt
30. Department of Records Real Estate Excise Tax Affidavit
 - a. Dated September 29, 2014
 - b. Dated July 31, 2014
31. Statutory Warranty Deed(s)
 - a. Dated September 29, 2014
 - b. Dated July 31, 2014
32. Board of Equalization Decision, dated February 9, 2017
33. Applicant's Request for Official Notice
 - a. Notice of Incomplete Application, by Travis Saunders, dated February 13, 2015
 - b. Blank Indemnification and Hold Harmless Agreement
 - c. Email from Evan Maxim to Rich Hill, dated February 17, 2017
34. Duchaine Comment Letter, received February 21, 2017
35. Anderson Comment Letter, received February 21, 2017


**BEFORE THE HEARING EXAMINER
CITY OF MERCER ISLAND**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings, Conclusion and Decision** to each person listed below, or on the attached mailing list, in the matter of **Bill Summers for MI Treehouse LLC**, Hearing Examiner file: **CAO15-001** in the manner indicated.

Party	Method of Service
Evan Maxim City of Mercer Island Development Services 9611 SE 36 th Street Mercer Island, WA 98040 Evan.Maxim@mercergov.org Ann Marie Soto annmariesoto@mercergov.org	<input checked="" type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: March 8, 2017



Tiffany Ku
Legal Assistant