



MARTEN LAW

October 30, 2015

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MERCER ISLAND
CITY ATTORNEY

Via Electronic and First-Class Mail

Kari Sand, City Attorney
City of Mercer Island
9611 S.E. 36th Street
Mercer Island, WA 98040

RE: **Mercer Island Center for the Arts (“MICA”) Wetland Issue**

Dear Ms. Sand:

We are responding to your October 9, 2015 letter requesting a legal opinion regarding the Mercer Island City Code (“MICC”) as it relates to the Mercer Island Center for the Arts’ (“MICA”) proposal to build a performing and visual arts center on City-owned property¹ at Mercerdale Park. We reviewed background materials the City provided, including documents prepared by MICA’s wetland consultant, The Watershed Company.² For reasons detailed below, it is our opinion that the MICC prohibits the City from allowing MICA to build as proposed because doing so would disturb protected critical area wetlands and buffers.

In May 2015, The Watershed Company completed a “wetland delineation study” and concluded that Mercerdale Park contains an over 2-acre wetland and associated 50-foot buffers partially within MICA’s proposed building footprint.³ The study concluded under MICC Chapter 19.07 that based on water quality, hydrology, and habitat functions, the wetland is a Category III. The Watershed Company’s September 4, 2015 memorandum and September 11, 2015 letter reaffirm its determination that the subject property contains a Category III wetland.

As mandated under Washington’s Growth Management Act (“GMA”), Chapter 36.70A RCW, Mercer Island has adopted city codes “to designate and protect critical areas.” MICC Chapter 19.07; MICC 19.07.010(A). Under the GMA, “critical areas” expressly includes “wetlands.” RCW 36.70A.030(5)(a). The MICC only allows alterations to critical areas and buffers if an applicant either meets a listed specific condition or establishes a “reasonable use exception.”

¹ Parcel No. 1224049068.

² The background materials are listed in Attachment A.

³ See Attachment B for a figure showing the wetland and buffers in relation to MICA’s proposed building footprint.

The Watershed Company posits that MICA's proposal would qualify to alter the Category III wetland under exception 13, which allows "[a]lterations to Category III and IV wetlands of low value under 2,500 square feet." MICC 19.07.030(13). The Watershed Company concluded that the reasonable use exception "is not applicable since an existing use (City Park) has already been established on the parcel."⁴

Exception 13 only allows alterations to wetlands that meet the following two criteria. One, the wetland must be Category III or IV. Two, the wetland must be under 2,500 square feet. The Watershed Company has concluded that the Mercerdale Park wetland is Category III, and over 2-acres. At over 2-acres, the Mercerdale Park wetland is much too large for the City to allow alterations under exception 13.

The Watershed Company incorrectly asserts that exception 13 is ambiguous and can be read to allow alterations to wetlands larger than 2,500 square feet if the *alteration* is less than 2,500 square feet. Exception 13 is unambiguous. The phrase "under 2,500 square feet" modifies the word "wetlands" not the word "alterations."

When a law is unambiguous, decision-makers give effect to its plain meaning and the law is not subject to interpretation. *Cerrillo v. Esparza*, 158 Wash.2d 194, 201 (2006). For exception 13 to allow wetland alterations under 2,500 square feet the City would have needed to write the exception as follows: "alterations under 2,500 square feet to Category III and IV wetlands of low value ~~under 2,500 square feet~~." Such an exception would be inconsistent with the GMA's and MICC's purpose of protecting critical areas, as it would allow piecemeal alterations of wetlands up to 2,500 square feet at a time.

Exception 13's history reinforces our conclusion that the City has consistently tied the exception to the size of the wetland, not the size of the alteration. Exception 13 has consistently only allowed alterations to wetlands that are 2,500 square feet and smaller. Pre-2005, MICC 19.07.040(A)(3) stated "[w]etlands of less than 2,500 square feet are exempt from city regulation." A February 2, 2004, draft of proposed changes to the MICC stated "Category III and IV wetlands under 2,500 square feet" are exempt. An October 28, 2004 draft new code would have allowed "[d]evelopment and/or fill within isolated Category III and IV wetlands under 2,500 square feet." Similarly, on August 17, 2005, the City of Mercer Island Planning Commission held a public meeting on proposed changes to MICC Chapter 19.07, including proposed changes to exception 13. A staff report to the Planning Commission stated, in part:

⁴ The Watershed Company's May 21, 2015 letter at p. 6.

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Proposed wetland exemption [13]...has been modified. The proposed exemption no longer require [sic] that a wetland be currently dominated by invasive vegetation to be eligible under the exemption and to no longer require mitigation for lost wetland functions (such as stormwater detention) when Type III or IV Wetlands under 2,500 square feet are eliminated.

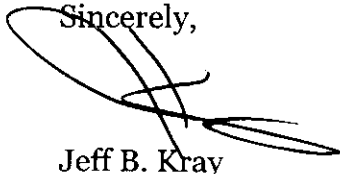
There is no indication that the City ever intended exception 13 to allow piecemeal alterations to wetlands and no indication that the City has ever considered potentially allowing such alterations.

Exception 13 is in harmony with MICC 19.07.080(D), which allows alterations to "Category III and IV wetlands of less than one acre in size ... if the applicant can demonstrate that the wetland will be restored, enhanced, and/or replaced with a wetland area of equivalent or greater function." Parallel to exception 13, the key criteria under MICC 19.07.080(D) is the size of the wetland. The two provisions differ only in that MICC 19.07.030(A)(13) allows alterations to small wetlands without mitigation and MICC 19.07.080(D) allows alterations to slightly larger wetlands with mitigation. Neither provision, however, allows MICA's proposed project. **At over 2-acres in size, the Mercerdale Park wetland is too large to be altered without mitigation under MICC 19.07.030(A)(13). It is also too large to be altered with mitigation under the one-acre criteria in MICC 19.07.080(D).**

Note that, if the MICC did not prohibit MICA's proposal, the project may need approval from the U.S. Army Corps of Engineers and one or more Washington State agencies. At the Federal level, the Corps of Engineers regulates wetlands under the Clean Water Act and Coastal Zone Management Act. Aspects of the Corp's federal authority have been delegated to Washington's Department of Ecology. State agencies further regulate wetlands under Washington's Hydraulic Code, Water Pollution Control Act, and Shoreline Management Act. Ecology also uses the State Environmental Policy Act (SEPA) process to identify potential wetland-related concerns early in the permitting process.

Thank you for the opportunity to address this issue. Please let us know if you have further questions.

Sincerely,



Jeff B. Kray

cc: Noel Treat, City Manager
Scott Greenberg, Development Services Group Director

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Enclosures: Attachment A
Attachment B

Attachment A

Materials City provided to Marten Law:

- October 9, 2015 letter from Kari Sand (City of Mercer Island) to Jeff Kray (Marten Law).
- Mercer Island City Code (“MICC”) Chapter 19.07.
- Documents from City of Mercer Island files regarding history of MICC Chapter 19.07, including:
 - September 2005 Final Report “Use of Best Available Science in the City of Mercer Island Critical Areas Regulations and Watercourses and Wetlands – Peer Review” from Adolphson Associates, Inc.
 - July 2004 Internal Draft “Use of Best Available Science in the City of Mercer Island Critical Areas Regulations and Watercourses and Wetlands” prepared by The Watershed Company for City of Mercer Island.
- May 21, 2015 letter from Katy Crandall (The Watershed Company) to Katie Oman (AMS Planning and Research), and enclosures.
- September 4, 2015 memorandum from Kenny Booth and Hugh Mortenson (The Watershed Company) to Scott Greenberg (City of Mercer Island).
- September 11, 2015 letter from Kenny Booth and Hugh Mortenson (The Watershed Company) to Scott Greenberg (City of Mercer Island).



-  50-Ft Buffer
 -  Proposed Lease Line
 -  Proposed Building
 -  Wetland Boundary
- 50-ft Buffer
Wetland and Premises Delineation**

