



**BUSINESS OF THE CITY COUNCIL  
CITY OF MERCER ISLAND, WA**

**AB 5158  
February 22, 2016  
Regular Business**

**MEMORANDUM OF UNDERSTANDING ("MOU")  
WITH THE MERCER ISLAND CENTER FOR THE  
ARTS ("MICA") REGARDING A LEASE FOR A  
PERFORMING ARTS CENTER AND RELATED  
ENVIRONMENTAL IMPACTS REVIEW**

**Proposed Council Action:**

Authorize the Interim City Manager to execute a MOU with MICA to conduct a review of the potential environmental impacts of constructing a performing arts center in the southwest corner of Mercerdale Park.

**DEPARTMENT OF**

City Attorney (Kari Sand)

**COUNCIL LIAISON**

n/a

**EXHIBITS**

1. Proposed MOU
2. Proposed Agreement to Lease Subject to Certain Conditions Precedent

**APPROVED BY CITY MANAGER**

<b>AMOUNT OF EXPENDITURE</b>	\$	n/a
<b>AMOUNT BUDGETED</b>	\$	n/a
<b>APPROPRIATION REQUIRED</b>	\$	n/a

**SUMMARY**

**BACKGROUND**

The City Council discussed a proposed Ground Lease with the Mercer Island Center for the Arts ("MICA") during the Council's November 16, 2015 and January 19, 2016 regular meetings. See AB 5133 and AB 5149, respectively. Modifications to the proposed Ground Lease, now re-titled "Proposed Agreement to Lease Subject to Certain Conditions Precedent" and attached hereto as Exhibit 2, discussed at those meetings have been incorporated into the version attached. Additionally, the City's insurance risk pool, the Washington Cities' Insurance Authority (the "WCIA"), has reviewed the proposed Lease and substantially revised the indemnification and insurance requirements set forth in Sections 13 and 14, respectively. Further, the WCIA added language in Section 2.1.6 that requires MICA's prime contractor to procure and maintain insurance of the types and coverage listed, including Builder's Risk insurance.

Following Council review of the proposed lease on January 19, staff met with representatives of the applicant (MICA) to discuss compliance with the environmental review requirements of the State Environmental Policy Act (SEPA). SEPA requires that environmental review be conducted prior to a governmental decision regarding a lease of public land (WAC 197-11-704(2)(a)(ii)). Staff has determined that approval of a Memorandum of Understanding (MOU), substantially in the form attached to this Agenda Bill as Exhibit 1, would both memorialize the City's and MICA's desire to enter into the proposed Lease (Exhibit 2) and would ensure that the environmental review and decision processes required by SEPA will be followed. Upon satisfactory completion of the SEPA environmental review process, the proposed Lease would be brought back to the City Council for final action.

## **THE MEMORANDUM OF UNDERSTANDING (“MOU”) ESTABLISHES THE SEPA REVIEW PROCESS**

The proposed MOU at Exhibit 1 establishes the process the City and MICA will follow in order to conduct a thorough and meaningful review of the potential environmental impacts of constructing and operating a center for the performing and visual arts and for arts education programs, including theatres, a recital hall, classrooms, a food and beverage venue and other arts and arts education spaces (the “Center”). The Center’s proposed location is on the Recycling Center site and a portion of Mercerdale Park, located generally at the southwest corner of 77<sup>th</sup> Avenue SE and SE 32<sup>nd</sup> Street.

Significantly, the MOU is not an “action” as that term is defined in the State Environmental Policy Act, Chapter 43.21C RCW, and the state and local implementing rules promulgated thereunder (collectively, “SEPA”). By contrast, a future decision by the Mercer Island City Council regarding a specific project – that is, whether to approve a long-term lease with MICA to construct the Center on a portion of Mercerdale Park – is an “action” as that term is defined by SEPA, and accordingly, triggers SEPA review. See WAC 197-11-704(2)(a)(ii); see also, Int’l Longshore & Warehouse Union, Local 19 v. City of Seattle, 176 Wn. App. 512, 309 P.3d 654 (2013) (the so-called “arena case,” wherein Division One held that a MOU between King County, the City of Seattle and private investor Chris Hansen’s company, ArenaCo., did not trigger SEPA review and judicial review was not available because the MOU was not an “action” but merely “a decision about the process that will be used to make a decision.”). Similarly, here, the MOU simply sets forth the SEPA review process to be followed, and it is merely a preliminary step and not a project approval. The MOU indicates the parties’ desire to move forward, but it does not limit or control the Council’s future decision on the proposed MICA lease. Once the SEPA review process is complete and the environmental impacts of the Center proposal are fully understood, then the Council may consider whether or not to go forward with the proposed MICA lease. Thus, it is the Council’s future consideration of the proposed Lease with MICA that triggers SEPA review now.

The City’s Development Services Group (“DSG”) staff is conducting the environmental review for the proposed Center pursuant to SEPA. The full SEPA review of the Center includes, but is not limited to, the following: a comprehensive traffic impact analysis, identification of adequate parking to meet the City code, identification of on-site environmental conditions, potential impacts and possible mitigating actions, such as mitigation for impacts to the nearby Category III wetland and its associated buffer and impacts related to any geotechnical hazards. The City may not take any action within the meaning of SEPA except as authorized by law, and the MOU is not intended to limit the City’s exercise of substantive SEPA authority in any way. MICA will reimburse the City for all costs incurred by the City as part of the SEPA review, including but not limited to peer reviews by qualified consultants to ensure the environmental assessment conducted is fair, competent and objective. MICA will be solely responsible for funding any required mitigation, whether or not imposed through the City’s exercise of its substantive SEPA authority.

## **SEPA REVIEW MUST BE COMPLETED PRIOR TO THE CITY COUNCIL’S CONSIDERATION OF THE PROPOSED “AGREEMENT TO LEASE SUBJECT TO VARIOUS CONDITIONS PRECEDENT”**

Once the SEPA review for the Center is concluded and the environmental impacts of the Center are known, then the Council may consider approval of the “Agreement to Lease Subject to Certain Conditions Precedent” in substantially the form attached as Exhibit 2 (the proposed Lease is Exhibit 1 to the MOU). As spelled-out in the proposed Lease, MICA’s construction of the Center at the former Recycling Center site and on a portion of the southwest corner of Mercerdale Park is expressly subject to several conditions precedent, as follows:

- completion of a thorough SEPA review by the City as set forth in the MOU;
- completion of a code text amendment for the special purpose Public Institution Zone to allow a performing and visual arts center as a permitted use within the P zone (see Section 2.2 of the proposed Lease at Exhibit 2);

- attainment of fundraising milestones by MICA (see Ex. 2, Section 3.7);
- receipt of a building permit and all other permits necessary for construction of the Center, and all related costs and fees shall be paid by MICA (see Ex. 2, Section 2.2.1);
- compliance with all applicable laws, regulations and ordinances in constructing, operating and maintaining the Center and in using the Premises (see Ex. 2, Section 2.2); and
- posting of a payment and performance bond for construction of the Center by MICA (see Section Ex. 2, Section 2.1.5).

## **RECOMMENDATION**

*City Attorney*

MOVE TO: Authorize the Interim City Manager to execute a MOU with MICA in substantially the form attached hereto at Exhibit 1.