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LAWYERS

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Jeff Thomas
Interim CPD Director
Via Email: jeff.thomas@mercerisland.gov

Re: Cherberg Dock, PRE22-030, SHL14-031 & Building Permit 1501-218

Dear Jeff:

This letter is to supplement my letter of August 4, 2022 on behalf of Tom Graue III and Shannon Graue, the owners of the property immediately to the east of the Cherberg property. I want to thank the City for its prompt response to my Public Records Act request. I have reviewed those documents and have the following additional comments on the above applications.

The Cherbergs are currently attempting to process two prior applications, SHL 14-031 and Building Permit No. 1501-218, to construct a new dock. The City is allowing them to process these applications. After a thorough review of the history of this matter and applicable law, it is clear that the City does not have authority to process these old applications.

SHL 14-031 and Building Permit 1501-218 were applied for in 2014, but never ruled on. They are substantially identical to SHL 17-006, however, which was applied for in 2017, at the election of the Cherbergs. SHL 17-006 was denied in 2018. That denial was upheld by the Shorelines Hearings Board, and that decision was affirmed by the King County Superior Court in 2019. No further appeal was taken by the Cherbergs. Hence, the Cherbergs are bound by that decision. From 2015 through 2021, there has been parallel litigation between the Cherbergs and the Griffiths over the Griffiths' contractual obligations to the Cherbergs regarding the proposed dock, but that litigation is irrelevant to the authority of the City to now entertain the old applications.

The question is whether the City can now turn the clock back and process an application for the same project under superseded regulations after having already denied it. There is nothing in the records produced to suggest that either the Cherbergs attorney or the City have ever properly addressed this key question.

A review of the Mercer Island City Code confirms that there is no code provision allowing two applications for same project. Similarly, there is no code provision allowing an applicant to keep one application pending under a prior set of regulations while pursuing the

same project under newly adopted regulations. This is not surprising. I am not aware of any jurisdiction in Washington that allows such a process.

Mr. Klinge's letter of October 9, 2014 succinctly describes the situation presented to his clients given the pending transition to Ord. 15C-02, which added the one dock per lot requirement language. He described the situation as "unique," but it was not. Applicants routinely encounter such circumstances because land use regulations are dynamic, not static, with changes occurring regularly. While there were options for the Cherbergs, there was not an option to leave a placeholder under the old regulations and proceed under the new ones to test those regulatory waters.

Implicitly recognizing that fact, Mr. Klinge's October 9, 2014 letter asked the City process the pending applications and condition the outcome on their obtaining a Joint Use Agreement ("JUA") from the Griffiths. The City, however, declined to do that. When it became clear that the City was going to deny the application for want of the JUA, on July 15, 2015, Mr. Klinge reiterated his request to condition the permit, or, alternatively to defer the application. The City granted an extension on the application. Two months later, however, the Cherbergs, through Mr. Klinge, elected to submit a new application, which became SHL 17-006, the application that was denied. As noted above, it was substantially identical to the then pending applications. Mr. Klinge's September 16, 2017 email expressly acknowledged that it was a "new application," but that it would be relying on the "previous materials."

Rather than identifying a code provision, statute or case law that allowed him to have two applications pending for the same project, Mr. Kling stated in his September 16, 2017 email "I am not aware of any City regulation that prohibits a property owner from paying the City to process two applications, even if those applications might be perceived as competing." His comment regarding application fees was perhaps a clever bit of misdirection. Fees were not the issue, but they were a nice carrot to offer. He also claimed that "[a] property owner could have two Shoreline SDP approvals and then decide to seek a building permit on one of those approval." But he cited no authority for this assertion either. Finally, he stated "[i]t has come to our attention that seeking approval under the new SMP may be an alternative approach to obtaining City approval. Importantly, since my client is willing to pay the application fees, I don't see how the City could refuse to process a permit application." More misdirection, but more telling was the substitution of the amorphous "it has come to our attention" for any citation to the code or any other legal authority for this placeholder approach to permitting. As noted above, and presumably relying on Mr. Klinge's unsupported claims, it appears that the City never evaluated whether its code or state law would allow the Cherbergs to retain placeholder applications under the old code and simultaneously process the same application under the new code that was now in effect. The City simply kept issuing extensions without any substantive review, even after the denial of SHL 17-006 was upheld by the SHB and the Superior Court. Finally, there is no indication that this issue was properly addressed when the Cherbergs "resubmitted" the old applications in April of this year.

In addition to the lack of authority in the code for this placeholder approach to permitting, there is a body of law that expressly governs the treatment of successive applications for the same project. Under the doctrine of *res judicata*, it is well settled that another application for a project that has been previously denied (or conditioned) must be rejected unless there are material changes to the project that mitigate the reasons for the original rejection (or conditions). *DeTray v. City of Olympia,* 121 Wn. App. 777, 786-90 (2004). There is no question that the 2014 and 2017 applications are substantially identical, and the later considered applications do not cure the reason for rejection in 2018.

While there is no case law on point, one could argue that *res judicata* should not apply when there has been a material change in the controlling regulations between when the first application was vested and the second one was submitted, and the applicant wants to have the previously rejected application considered anew under the new regulations. But that is not what is occurring here. The Cherbergs elected to process the permit request under the ***new*** code, Ord. 15C-02. They now want to go back in time and process the original applications under the old rules. Under *res judicata,* an applicant cannot claim that a ***prior*** regulation is a material change in the regulations, and seek to process an application under the ***old*** regulations. There is no authority for such treatment in the case law, and the policy behind the exceptions to the bar of *res judicata* does not apply.

Thus, *res judicata* further precludes the "placeholder" approach that Mr. Klinge appears to have convinced the City to allow, albeit without ever addressing whether the code allows it and whether it is proper under controlling *res judicata* principles. Significantly, Mr. Klinge did not address *res judicata* in 2015 or in 2022. And there is nothing in the materials produced by the City to date that suggests that the City considered that bar either. In summary, the doctrine of *res judicata* and the corresponding lack of code authority for the processing of the old applications under the old regulations are a complete bar to processing those applications now.

Thank you for your attention to these concerns. Let me know if you have any questions.

Very truly yours,

GROFF MURPHY PLLC

/s/ Michael J. Murphy
Michael J. Murphy

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