

**BEFORE the HEARING EXAMINER for the
CITY of MERCER ISLAND**

DECISION

FILE NUMBER: SUB19-002

APPLICANT: OB Mercer Island Properties, LLC
C/o Eric Hansen
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Bellevue, WA 98009

And

C/o Dean Williams, Attorney at Law
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11201 SE 8th Street, Suite 120
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TYPE OF CASE: Preliminary long subdivision (*2825 W Mercer Way*)

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: APPROVE subject to conditions

DATE OF DECISION: January 29, 2024

INTRODUCTION ¹

OB Mercer Island Properties, LLC (the “Applicant”) seeks approval of a preliminary long subdivision ² of *2825 W Mercer Way*, a 14-lot single-family residential subdivision of a 2.9 acre site, ³ owned by the Applicant, which is zoned R-8.4.

The Applicant filed the preliminary long subdivision application on March 1, 2019. (Exhibits 2; 3 ⁴) The Mercer Island Department of Community Planning & Development (“CP&D”) deemed the application complete on March 29, 2019. (Exhibit 3) CP&D issued a Notice of Application on April 8, 2019. (Exhibit 4)

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

² Many people refer to this type of application as a “preliminary long plat.” Legally, a “plat” is the drawing of a “subdivision;” a “preliminary plat,” thus, is the preliminary drawing of a proposed subdivision. [RCW 58.17.020(1), (2), & (4)] The Examiner, whenever possible, uses the terms in their legally correct manner.

³ Rounded to one decimal place from 2.877 acres. (Exhibit 31, PDF 1)

⁴ Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF

The subject property is located at 2825 West Mercer Way. Its Assessor's Parcel Number is 2174502425 ("Parcel 2425"). (Exhibit 1, PDF 1)

The Mercer Island Hearing Examiner ("Examiner") viewed the subject property via Google Earth imagery: Overhead imagery dated August 21, 2022; Street View imagery dated July 2018 (62nd Avenue SE and SE 28th Street); May 2019 (SE 30th Street); and August 2021 (West Mercer Way).

The Examiner held a remote predecision open record hearing pursuant to MICC 3.40.060 on January 24, 2024, using the "Zoom" platform. The City gave notice of the hearing as required by the MICC. (Exhibits 28; 32)

The following exhibits were entered into the hearing record during the hearing:

- Exhibits 1 - 28: As enumerated in Exhibit 1, the CP&D Staff Report
- Exhibit 29: Anonymous email, December 13, 2023
- Exhibit 29.01: Sarah Fletcher email, December 18, 2023
- Exhibit 29.02: Sarah Fletcher email, December 21, 2023
- Exhibit 29.03: Daniel Thompson email, December 22, 2023
- Exhibit 29.04: Daniel Thompson email, December 26, 2023
- Exhibit 29.05: Daniel Thompson email, December 26, 2023
- Exhibit 29.06: Daniel Thompson email, December 26, 2023
- Exhibit 29.07: Daniel Thompson email, December 26, 2023
- Exhibit 29.08: Daniel Thompson email, December 26, 2023
- Exhibit 30: Draft final plat
- Exhibit 31: Lot closures, June 25, 2021
- Exhibit 32: Declaration of Public Notice, January 10, 2024
- Exhibit 33: Tom Leonard email, January 21, 2024
- Exhibit 33.01: Sarah Fletcher email, January 22, 2024
- Exhibit 33.02: Daniel Thompson email (hearing statement), January 23, 2024
- Exhibit 33.03: Marianne Leslie email, January 23, 2024
- Exhibit 34: Jeremy Bean/Jacqueline Balinbin email, January 24, 2024
- Exhibit 34.01: Michael Dierdorffer email, January 24, 2024
- Exhibit 34.02: Roxanne Navrides email, January 24, 2024
- Exhibit 34.03: Linda Scalzo email, January 24, 2024
- Exhibit 34.04: Tom Odell email, January 24, 2024
- Exhibit 34.05: Diane Odell email, January 24, 2024
- Exhibit 34.06: Tom Odell email, January 24, 2024
- Exhibit 35: Excerpt from recorded plat of *East Seattle*, Blocks 12 and 13 and surrounding area, recorded in the late 1800s
- Exhibit 36: Aerial photograph of the area around Parcel 2425; Source: King County iMap

use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

Exhibit 37: Regulated Tree Tip Sheet, CP&D, November 1, 2017

The hearing record closed when the open record hearing was adjourned at approximately 1:30 p.m., January 24, 2024, with one possible exception. Because a number of emails were received during the hearing which neither the Applicant nor CP&D had an opportunity to review before adjournment (Exhibits 34 – 34.06), the Examiner held the record open until 5:00 p.m., January 26, 2024, for the Applicant and CP&D to submit responses/comments. Neither the Applicant nor CP&D chose to submit a response/comment.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. The Applicant seeks to subdivide Parcel 2425 into 14 lots for single-family residential development. Each of the proposed lots complies with MICC requirements for dimensions and area. All lots will be served by public water and sewer services. All utilities will be underground. No variances or exceptions from code requirements have been sought. (Exhibits 5 *et al.*)
2. Parcel 2425 is the current form of Blocks 12 and 13 in the *East Seattle* plat, recorded in the late 1800s.⁵ The *East Seattle* plat is located in the northwest portion of Mercer Island, the earliest settled portion of the island. (Exhibit 10, PDF 171; 13, PDF 18; 35) Block 13 was essentially a rectangle while Block 12 was more-or-less triangular in shape. As platted, Block 13 contained 26 lots, most 30’ wide by 100’ deep; Block 12 contained 14 lots of similar dimensions. Blocks 12 and 13 were separated by Vilas Street (later named 65th Avenue SE). The blocks were bordered on the north by Park Avenue, a 75-foot wide right-of-way currently named SE 28th Street; on the east by Rainier Avenue, a 75-foot wide right-of-way now named West Mercer Way; on the south by Garfield Avenue, a 75-foot wide right-of-way currently named SE 30th Street; and on the west by Mercer Street, a 40-foot wide right-of-way now named 62nd Avenue SE. The surrounding blocks in *East Seattle* were similar in size and composition to Block 13. (Exhibit 35)
3. A school was built on Block 13 in 1890. It burned down in 1914 and was replaced by a new school in 1912 – 1914. A 1938 vintage gym on the south end of the school was replaced in 1990 by a concrete, tilt-up gymnasium. Because of the slope of Block 13, the school appeared to be one story when viewed from the east and two stories when viewed from the west. The school was known as the “East Seattle School” (the “School”). Block 12 contained a church. The school district purchased Block 12 from the church in 1959, tore down the church, and had Vilas Street between SE 28th and SE 30th Streets vacated, thus merging the two blocks into one large block, the current Parcel 2425. (Exhibit 10, PDF 15, 19, 172, 174, 187 – 196, and 467)

⁵ The northwest portion of Mercer Island was called “East Seattle” at the time. (Exhibit 10, PDF 171)

The school district closed the School in 1982. The Boys and Girls Club of King County (“Boys and Girls Club”) leased the property from the school district in 1984 and purchased it outright in 1986. In 2007 the Boys and Girls Club sold the property to the Applicant, retaining a 12-year lease on the property. The Boys and Girls Club subsequently built a new facility elsewhere on Mercer Island and closed the School building. As late as 2019, the parking lots on Parcel 2425 were being used as park-and-ride parking for Amazon employees. (Exhibit 10, PDF 21 & 22)

The School was determined to be eligible for inclusion in the National Register of Historic Places (“National Register”) in 2017, but it was never nominated for or placed on either the National Register or the local historic register. (Exhibit 10, PDF 31 & 32)

4. On September 15, 2017, the Applicant filed a demolition permit application (File #1704-191) to demolish the School. The City’s State Environmental Policy Act (“SEPA”) Responsible Official determined that demolition would have more than a moderate impact upon the environment and issued a Determination of Significance (File # SEP17-020) for the demolition permit on June 3, 2019. A Draft Environmental Impact Statement (Draft “EIS”) was issued on February 10, 2020, and a Final EIS was issued on August 24, 2020. (Exhibits 8, PDF 2; 10, PDF 2 & 47) The Final EIS was not appealed.
5. The Final EIS listed five mitigation measures to off-set the impacts associated with demolition of the School. Those measures and their current status are:
 - A. Establish a 242 square foot (“SF”) public open space easement in the northeast corner of Parcel 2425 and provide commemorative signage on that parcel. (Exhibit 10, PDF 43) A 242 SF public open space easement is depicted in the northeast corner of the proposed plat. (Exhibits 5; 21, PDF 1)
 - B. Document the School’s history before its demolition. (Exhibit 10, PDF 44) A documentation report was prepared, submitted to, and accepted by the State Department of Archeology and Historic Preservation. (Exhibit 21, PDF 1)
 - C. Prepare and post on an historic website an article about the School. (Exhibit 10, PDF 44) Such an article was prepared and posted. (Exhibit 21, PDF 2)
 - D. Prepare a “context statement.” (Exhibit 10, PDF 44) A “context statement” was prepared and posted on the internet. (Exhibit 21, PDF 2)
 - E. Salvage for re-use as much of the School as possible. (Exhibit 10, PDF 44) A commercial re-use facility surveyed the School and concluded that nothing was in a condition for practical re-use. Donor plaques associated with the Boys and Girls Club were salvaged and given to the Boys and Girls Club. (Exhibit 21, PDF 2)
6. Demolition of the School occurred in January, 2021. (Exhibit 1, PDF 4) What remains are the east and west parking lots, the east foundation wall (or at least most of it) serving as a retaining wall

between the grade difference where the school stood, and a sand volleyball court in a fenced-in area in the northeast quarter of Parcel 2425. (Exhibit 36; Google Earth imagery)

7. Parcel 2425 is surrounded by *East Seattle* plat lots, virtually all of which are fully developed with one single-family residence each. There are no alleys in the *East Seattle* plat; thus, all lots and their residences take direct access onto the streets on which they front. While the dominant lot pattern within the *East Seattle* plat blocks is 30' wide by 100' deep, aerial photographs indicate that most, if not all, residences have been built on assemblages of two or more lots. For example, while the east tier of lots in Block 14 along the west side of 62nd Avenue SE contains 11 lots, there are only six residences along that side of 62nd Avenue SE. The neighborhood appears to be a mix of old (perhaps) original houses, remodeled houses, and new houses, varying in size from small to rather large. (Exhibits 35; 36; Google Earth Street View imagery)

East Seattle Block 22, a small, triangular block along the west side of West Mercer Way immediately north of SE 28th Street, is owned by the City and contains Secret Park. Secret Park is mostly wooded, but has a small play area at its north end. (Exhibits 35; 36; testimony; Google Earth Street View imagery)

8. Parcel 2425 slopes downward from its northeast to its southwest corner. Elevation change across the property is on the order of 30 – 35 feet. Site soils are predominantly glacial till, a dense soil type which is unsuitable for stormwater infiltration. The site contains no geologically hazardous areas. (Exhibit 13, PDF 9 – 11 & 15) Existing surface water runoff sheet flows towards the west and southwest and discharges into City drainage conveyance systems along the shoulders of SE 28th and SE 30th Streets which, in turn, discharge into Lake Washington about two blocks to the west. (Exhibit 15, PDF 7 – 21)
9. There are no regulated critical areas on Parcel 2425. (Exhibits 13; 14)
10. Vegetation on Parcel 2425 is the result of the decades of its use as first a school and later a Boys and Girls Club. The dominant understory vegetation is mown lawn. Shrubs were planted along the west edge of Parcel 2425 to screen the view of the west side of the school. When the new gym was built in 1990, a row of coniferous trees was planted along the south wall and a portion of the west wall of the building. Flowering fruit trees were planted in the eastern lawn. A mature Madrona stands near the center of the north property line and a mature Cypress⁶ stands in the SE 30th Street right-of-way just south of the center of the south property line. As previously noted, a sand volleyball court remains in the northeast quarter of Parcel 2425. (Exhibits 16, PDF 11; 36; Google Earth Street View imagery)
11. The proposed plat design has been revised at least four times since initial submittal. (See Exhibit 5, PDF 1, Revisions section of the titling block) Contrary to the assertions made by several project opponents, the initial 2019 application was for a 14-lot subdivision, not a 13-lot subdivision.⁷

⁶ See Conclusion of Law 12, below: This tree could be an Austrian pine.

⁷ Anything that may have been considered or proposed before the current application was filed is not of record.

Exhibit 16, the Arborist's Report, at PDF 11 contains a copy of the original February 21, 2019, preliminary plat before any revisions had occurred. That proposal depicted: a private road entering the site from 62nd Avenue SE to provide access to three lots; six lots directly fronting on 62nd Avenue SE; four lots directly accessing SE 28th Street; and one lot directly accessing SE 30th Street. (Exhibit 16, PDF 11)

12. The plat design currently before the Examiner has: six lots directly fronting on 62nd Avenue SE; two lots sharing a driveway onto SE 28th Street; and a 20-foot wide north-south private road running north to south through Parcel 2425 to provide access for six lots onto either SE 28th or SE 30th Street (depending on which direction one chose to go on the private road). A retaining wall of up to four feet in height borders the west edge of the interior private road to accommodate grade change. Proposed Lots 3 – 10 and 13 are designed to accommodate “tuck-under” residences where the garage is entered at the lower level and most of the living area is on an upper level. On each of those lots, preliminary site grading will create two building pads, one about 10 feet higher than the other to accommodate the two building levels. (Exhibit 5, PDF 4; and testimony)
13. West Mercer Way is a designated secondary arterial. (Exhibit 19, PDF 7) 62nd Avenue SE and SE 28th and SE 30th Streets are local access streets. (Testimony) Direct lot access onto arterials is prohibited. [MICC 19.08.030(F)(1)]

The required standards for local access public streets are set forth in MICC 19.09.030(C): At least 16 feet of paved travel surface with rolled curb and at least one foot of gravel shoulder. The Applicant proposes to widen the three abutting local access streets on the plat side of the streets to provide at least a 16-foot wide travel surface with a rolled curb, 7-foot wide gravel shoulder, and 5-foot wide asphalt walkway on the project side of the street. The asphalt walkway will completely encircle Parcel 2425, including along the West Mercer Way frontage. (Exhibit 5, PDF 6)

The required standards for private roads are set forth in MICC 19.09.040(B): Private roads serving three or more single-family residences must be 20 feet wide. The Applicant's proposed private road is 20 feet wide and will be paved. (Exhibit 5, PDF 6)

14. The City has adopted, with amendments, the thresholds, definitions, minimum requirements and exceptions, adjustment, and variance criteria found in Appendix I of the NPDES Phase II municipal storm water permit, including the mandatory incorporated provisions of the 2019 manual as the minimum standards for stormwater management. [MICC 15.09.050(A)] The adopted regulations allow direct discharge⁸ without detention in certain cases. The proposed 2825 W Mercer Way subdivision meets the requirements for direct discharge. (Exhibit 1, PDF 14)

The Applicant has submitted a preliminary drainage plan showing that runoff from impervious surfaces, including from the east side of 62nd Avenue SE abutting Parcel 2425, will be collected and routed to either of two on-site water quality filtration facilities. After passing through the water quality facilities, runoff will enter the SE 30th Street conveyance system and direct discharge into

⁸ Direct discharge means to discharge runoff without first passing through a detention facility.

Lake Washington. The preliminary drainage plan indicates compliance with adopted stormwater regulations. (Exhibit 1, PDF 14 & 15; 5, PDF 5, 7, & 8;15) The entire *East Seattle* neighborhood's stormwater runoff direct discharges to Lake Washington. (Testimony)

15. The City has tree retention regulations. [Chapter 19.10 MICC] In summary, the regulations require retention of at least 30% of on-site trees with a diameter at breast height (“DBH”) of 10 inches or more. If the retention standard cannot be met, replacement tree planting or payment of a fee-in-lieu is required. The tree retention regulations do not apply to most trees under 10 inches DBH or to “species identified in the weeds of concern, noxious, or invasive weed lists established by Washington State or King County, as amended.” [MICC 19.10.030(B)] Planting of replacement trees is required for any removed trees. [MICC 19.10.010] Retention or replacement of most trees under 10 inches DBH is not required. [MICC 19.10.030] Tree retention requirements apply to proposed subdivisions. [MICC 19.10.060(A)(1)(c)] A permit is required before most tree removal may occur, with special application requirements for removal associated with a land development proposal. [MICC 19.10.090(C)]

Exceptional trees, large trees, and trees in a grove are prioritized for retention. [MICC 19.10.060(A)(2)(b)(ii)] An “exceptional tree” is “[a] tree or group of trees that because of its unique historical, ecological, or aesthetic value constitutes an important community resource. ...” [MICC 19.16.010, Tree, exceptional] The definition includes an extensive table of DBHs associated with classifying different species as exceptional. Neither Leyland cypress nor *Arbor vitae* are listed in the Exceptional Tree table; Austrian black pine is listed in that table as a non-native tree whose minimum DBH for consideration as an exceptional tree is 24 inches. A “large tree” is “[a]ny tree with a diameter of ten inches or more, and any tree that meets the definition of an exceptional tree.” [MICC 19.16.010, Tree, large (regulated)] A “grove” is “a group of eight or more trees each ten inches or more in diameter that form a continuous canopy. Trees that are part of a grove shall also be considered exceptional trees, unless they also meet the definition of a hazardous tree.” [MICC 19.16.010, Tree, grove] A “hazardous tree” is “[a]ny tree that receives an 11 or 12 rating under the International Society of Arboricultural rating method set forth in Hazard Tree Analysis for Urban Areas ... and may also mean any tree that receives a 9 or 10 rating, at the discretion of the city arborist.” [MICC 19.16.010, Tree, hazardous]

Retention of an exceptional tree is not required if retention would “prevent creation of a residential lot through a subdivision or short subdivision that is otherwise allowed by this title.” [MICC 19.10.060(A)(3)(c)] A tree is not viable for retention if it exhibits “poor health, high risk of failure due to structure, defects, unavoidable isolation (windfirmness), or unsuitability of species, etc.”. [MICC 19.10.090(C)(2)(b)(iv)]

16. The Applicant’s Arborist Report was prepared in February, 2019 by Greenforest Incorporated (“Greenforest”) based on field work conducted in December, 2018. (Exhibit 16) The field work and report occurred before the School was demolished.

The Greenforest tree inventory identified 32 trees, each of which had a DBH of 10” or more or, for multi-stemmed trees, a combined quadratic mean DBH of 10” or more. Of those 32 trees, 13 were

Leyland cypress, 9 were flowering plum, 4 were English hawthorn, 2 were laurel, and 1 each Madrone (Tree 2), Empress, pear, and plum. One of the listed Leyland cypress (Tree 25) was actually in the SE 30th Street right-of-way south of Parcel 2425. Greenforest concluded that all but the Madrone were not viable for retention. The Leyland cypresses were considered non-viable because of their proximity to the gym walls and their likelihood to fail after the gym was demolished.

Notwithstanding that 32 trees are catalogued with a DBH greater than 10 inches, the Greenforest Report lists only 17 trees as “Significant”⁹ or “Exceptional” and thus subject to regulation under Chapter 19.10 MICC. (Exhibit 16) Greenforest stated that “[t]wo species included in the previous submitted inventory, Portugal laurel and Leyland cypress, though shown on an earlier survey, are not trees regulated by City and are excluded from tree retention calculations.” (Exhibit 16, PDF 2) The City’s arborist testified that in 2017 he had decided not to regulate Leyland cypress as trees. (Testimony)

Of the remaining 17, the plan states that one (the Madrone) is viable and the other 16 are non-viable. The plan proposes removal of all but the Madrone and the one Leyland cypress in the SE 30th Street right-of-way (which the City wants retained). 37 replacement trees are proposed to be planted; most within a proposed perimeter open space easement, some in the adjoining public right-of-way between the pedestrian walkway and the property line. (Exhibit 5, PDF 9 & 10)

17. The proposed preliminary plat includes two types of “open space.” The 242 SF, triangular open space in the northeast corner is to be set aside as an easement for the public as required by the School demolition Final EIS. (Exhibit 5, PDF 1) The commemorative plaque will be created and placed within that easement.

Separate from the preceding open space, a private open space easement is proposed to encumber a portion of the north 10 feet of Proposed Lot 1, the east 15 feet of Proposed Lots 1, 2, and 11 – 14 (the entire length of Parcel 2425’s West Mercer Way frontage), and the south 10 feet of Proposed Lot 11. (Exhibit 5, PDF 1) That open space easement is the location of most of the proposed replacement trees. (Exhibit 5, PDF 9)

18. Mercer Island’s SEPA Responsible Official issued a threshold Determination of Nonsignificance (“DNS”) for the 2825 W Mercer Way subdivision on March 6, 2023.¹⁰ (Exhibit 12) The DNS was not appealed. (Exhibit 1, PDF 4)

⁹ The term “significant tree” is not used in the Mercer Island tree regulations. The Examiner is personally aware that other jurisdictions use the term “significant tree” within their tree regulations, but Mercer Island does not.

¹⁰ The record contains a complaint about the accuracy of the SEPA Checklist submitted by the Applicant for the 2825 W Mercer Way SEPA threshold determination process. (Exhibit 6.53, PDF 6 - 8) The City’s SEPA Responsible Official considers much more than the Checklist when making a threshold determination: “This decision was made after review of a completed environmental checklist and other information on file with the lead agency.” (Exhibit 12, emphasis added) Omissions and/or inaccuracies in a SEPA Checklist do not render a related application null and void. In fact, SEPA Checklist errors cannot be appealed. [WAC 197-11-680(3)(a)(iii)]

On November 8, 2023, after the plat design was changed to include the private through street, the Responsible Official issued an Addendum to the SEPA DNS. (Exhibit 26) SEPA Addenda are not subject to either comment periods or administrative appeal.

19. The record contains numerous public comments. (Exhibits 6.01 – 6.56; 29; 29.01 – 29.08; 33; 33.01 - 33.03; 34; 34.01 – 34.06; and testimony) Most of the comments were received during the initial public comment period in 2019 before any decision had been made on the School demolition application and before the current plat design existed. Many of those comments voice opposition to demolition of the School (a subject which is well beyond the scope or jurisdiction of this preliminary subdivision review). All but one of the commenters oppose the subdivision as currently designed.

The major requests as reflected by the comments are to retain more existing trees, limit replacement tree height to protect westward views, set aside all or a portion of Parcel 2425 as a public park, require useable open space area within the plat, and reduce the number of proposed lots. Smaller numbers of commenters oppose direct access from any new lots to the perimeter streets, worry about construction noise disturbance, worry that large homes will harm the character of the *East Seattle* plat area, and worry that drainage will harm downslope properties.

20. Several commenters cited the *Coval* project as a precedent for a far preferable way to design a plat with useable open space.¹¹ (*Coval* is now apparently known as *Summerwell*.) (Exhibit 6.38)

The *Coval* property was a rectangular tract of 5 acres on Mercer Island. In or around 2013 the applicant in that case applied to subdivide the property into 18 lots for single-family residential development. (File # SUB13-009) Based on the project graphics and text in this record, it appears that the *Coval* property bordered only the west side of 84th Avenue SE. The parcel apparently contained one rather large residence. The application was heard by the City Planning Commission and City Council in or around early 2014. The City Council concluded that the initial proposal failed to make appropriate provisions for, among other things, open space (there was none in the initial proposal), tree retention (trees to be saved were apparently on individual lots rather than subject to community control), and streets (the design had more than one point of access onto 84th Avenue SE). The City Council remanded the application for redesign. (Exhibits 6.38; 29.06)

When *Coval* returned for consideration in or around July, 2014, the number of requested lots had been reduced from 18 to 16, an open space tract had been proposed, proposed lots had been removed from a steep slope area, tree retention easements had been proposed, and the plat had been reconfigured so that there was only one access point onto 84th Avenue SE. The information in this record provides no indication as to why the City Council believed that open space was a requirement. (Exhibits 6.38; 29.06)

¹¹ The *Coval* project occurred before the undersigned became Mercer Island's Hearing Examiner, so the undersigned's only knowledge of the *Coval* project is the information entered into this hearing record. In that regard, the Examiner has not explored the hyperlinks contained in some of the submittals.

21. CP&D has conducted a detailed review of the proposed preliminary subdivision from which it concludes that, properly conditioned, the proposal meets all criteria for approval. CP&D recommends approval subject to 24 recommended conditions and two disclosure notices. (Exhibit 1, PDF 21 – 27)
22. The Applicant has no objection to the recommended conditions but points out that Recommended Conditions 9.e.i and 9.e.ii are duplicates of one another. CP&D concurs that those two conditions are scrivener’s error duplicates. (Exhibit 1, PDF 22; and testimony)
23. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ¹²

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A preliminary long subdivision is a Type IV application. The Examiner conducts an open record hearing and renders a final decision on Type IV applications which is subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Tables A and B; MICC 19.15.140; Chapter 3.40 MICC]

The Examiner may “1. Approve; 2. Conditionally approve; 3. Continue the hearing; 4. Remand the application to staff; or 5. Deny the application.” [MICC 19.15.140(C)]

Review Criteria

The review criteria for a preliminary long subdivision application are set forth at MICC 19.08.020(D)(1):

Findings of fact. All preliminary approvals or denials of long subdivisions or short subdivisions shall be accompanied by written findings of fact demonstrating that:

- a. The project does or does not make appropriate provisions for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school;
- b. The public use and interest will or will not be served by approval of the project; and
- c. The project does or does not conform to applicable zoning and land use regulations.

Vested Rights

¹² Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

The City has adopted local regulations governing vesting of land use applications.

Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department’s issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[MICC 19.15.170(B)]

The vesting date of the 2825 W Mercer Way application is March 29, 2019.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [MICC 19.15.060(A)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. If an application has become null and void for some procedural reason before a substantive decision on it is issued, then any substantive decision would be likewise null and void. A challenge to the validity of an application thus raises a fundamental jurisdictional issue which must be resolved before any substantive consideration of the application may occur. This hearing record contains just such a challenge.

The author of Exhibit 6.53, an opponent of the proposed preliminary subdivision,¹³ asserts that the subdivision application expired when no decision on its merits was issued within 18 months of the date of application. The author cites “105.3.2 Time limitation of application.” as the basis for the assertion. The author further states that that citation is from “Chapter 17.12 - UNIFORM HOUSING CODE | City Code | Mercer Island, WA | Municode Library”. (Exhibit 6.53; bold removed from first quote; hyperlink removed from second quote)

¹³ “I am against the subdivision of 14 houses which does nothing for the community” (Exhibit 33.01, PDF 1)

In fact, “105.3.2” is not a provision within Chapter 17.12 MICC, the Uniform Housing Code. Rather, it is a provision within Chapter 17.14 MICC, the Construction Administrative Code. The cited provision is found at MICC 17.14.010, within the provisions relating to “Section 105 Permits.”

Everything in Title 17 MICC relates to building construction issues, not land subdivision. The permits addressed in section “105.3.2” are building permits, not subdivision permits. Subdivision regulations are contained in Title 19 MICC, Unified Land Development Code, Chapter 19.08 MICC, Subdivisions.

The author has unfortunately taken a provision related to building permits and erroneously applied it to subdivisions. There is no 18-month expiration rule for subdivision applications in Chapter 19.08 MICC. The 2825 W Mercer Way subdivision application has not expired.

2. The same author makes a similar error regarding open space regulations. The author cites MICC 19.08.030(G) for the proposition that open space is required in every subdivision. (Exhibit 6.11) In fact, MICC 19.08.030(G) has absolutely no applicability to the 2825 W Mercer Way application.

Section 19.08.030 MICC sets forth Design Standards to be met in all subdivisions. Section 19.08.030 MICC has seven subsections, (A) – (G). Subsections (A) – (F) contain regulations regarding: Compliance with other regulations; public improvements; control of hazards; streets, roads and rights-of-way; residential lots; and design standards for special conditions, specifically, for subdivisions abutting arterial streets and subdivisions impacted by critical areas.

Subsection (G) is entitled “*Optional standards for development.*” [Italics in original]

In situations where designing a subdivision to the requirements of subsections A through F of this section would substantially hinder the permanent retention of trees; interfere with the protection of critical areas; preclude the provision of parks, playgrounds, or other noncommercial recreational areas for neighborhood use and enjoyment; or negatively impact the physiographic features and/or existing ground cover of the subject area, the applicant may request that the project be evaluated under the following standards:

[MICC 19.08.030(G), underlining added] In other words, the provisions in Subsection (G) are an alternative to the requirements in Subsections (A) – (F) and would come into play only if an applicant requested that they be applied in lieu of the Subsections (A) – (F) requirements.

The Applicant has not requested that it be allowed to follow the Subsection (G) alternative standards. Therefore, nothing in Subsection (G) is applicable to the 2825 W Mercer Way application.

3. One commenter argues that any open space in a subdivision must be publicly owned. (Exhibits 29.04; 33.02) That argument is incorrect. When open space is proposed, it need not be publicly owned. Where the MICC requires open space under the alternative subdivision design regulations,

the code explicitly states that the open space may be public or private: “An area suitable for a private or public open space tract shall be set aside for such use.” [MICC 19.08.030(G)(3)]

4. One of the legal premises underlying the land use planning and regulatory system in Washington State is that decisions on individual applications must be based upon adopted ordinances and policies rather than upon the personal preferences or “general fears” of those who may currently live in the neighborhood of the property under consideration. [*Department of Corrections v. Kennewick*, 86 Wn. App. 521, 937 P.2d 1119 (1997); *Indian Trail Prop. Ass’n. v. Spokane*, 76 Wn. App. 430, 439, 886 P.2d 209 (1994); *Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 805, 801 P.2d. 985 (1990); *Woodcrest Investments v. Skagit County*, 39 Wn. App. 622, 628, 694 P.2d 705 (1985)] The evaluation of the 2825 W Mercer Way application must, therefore, be based upon officially adopted City ordinances, plans and policies as well as legally accepted principles.
5. The role of a comprehensive plan in development review is different now than it was before enactment of the Growth Management Act (“GMA”), Chapter 36.70A RCW, in 1990 and the Local Project Review Act, Chapter 36.70B RCW, in 1995. The Local Project Review Act establishes a mandatory “consistency” review for “project permits”, a term defined by the Act to include subdivisions. [RCW 36.70B.020(4)]

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project’s consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

- (a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;
- (b) Density of residential development in urban growth areas; and
- (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

[RCW 36.70B.030, emphasis added] Thus, state law holds that a comprehensive plan is applicable during project review only where development regulations have not been adopted to address a particular topic. The regulatory assumption is that plans set a framework for subsequent regulations which serve to control development actions.

6. The state Supreme Court has also addressed this issue. In *Citizens v. Mount Vernon* [133 Wn.2d 861, 947 P.2d 1208 (1997), *reconsideration denied*] the Court ruled that “[RCW 36.70B.030(1)] suggests ... a comprehensive plan can be used to make a specific land use decision. Our cases hold otherwise.” [at 873]

Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code’s favor.

[*Mount Vernon* at 873-74, citations omitted]

7. Another applicable general principal is that a developer cannot be required to correct existing problems. A developer can be required to mitigate impacts caused by a proposed development. A developer may also be required to mitigate those situations where the proposed development will exacerbate an existing problem. To be legally supportable, a mitigation requirement must have a rational nexus to a problem created or exacerbated by the proposed development and the amount of mitigation required must be roughly proportional to the impact caused by the development.
8. Under RCW 58.17.110, the City is required to determine if “appropriate provisions” are present in the subdivision application for a whole host of topical areas. The courts, generally speaking, do not allow a municipality unbridled discretion in determining what is “appropriate”. Rather, courts generally hold that in order to preserve the substantive due process rights of all the parties, decisions must be based upon officially adopted ordinances and policies. Since the advent of the GMA, courts have generally held that adopted regulations, not adopted policies, form the basis for project review. Application of that concept to the items enumerated in RCW 58.17.110 leads to the position that “appropriate provisions” are present in any given topical area if the proposal meets the requirements of adopted law or policy (only where there is no adopted law) relating to that area. Common sense must be used where there are no guiding adopted policies.
9. The record contains evidence that appropriate provisions have been made for:
 - A. Open space. The reality is that no provision in the MICC requires open space, either publicly or privately owned, to be set aside in a standard long subdivision unless critical areas requiring protection are present on the subdivision site. The standards for such subdivisions are contained in MICC 19.08.030(A) – (F), none on which require open space. If a site has critical areas, then those areas must be protected, typically through Native Growth Protection Area set-asides. [Chapter 19.10 MICC] The only time open space is mentioned in MICC 19.08.030 is in Subsection (G) whose provisions apply only where an applicant has opted to deviate from the normal requirements because of on-site difficulties. Under Subsection (G),

an applicant can reduce lot sizes below the minimum set for the zone, in exchange for which the applicant must provide some open space.

There are no regulated critical areas on Parcel 2425. (Exhibits 13; 14) The Applicant has not asked to develop 2825 W Mercer Way under auspices of the alternate Subsection (G) provisions. Any open space provided is more than required by code.¹⁴

The proposed open space essentially provides a protected area for replacement trees to be planted and for the signage required as mitigation under the School demolition Final EIS. Nothing more can be legally required. The proposal makes appropriate provisions for open space.

- B. Drainage ways. The preliminary drainage plan has been prepared to demonstrate compliance with adopted City drainage regulations. It shows that stormwater runoff will be collected, including that from the east side of 62nd Avenue SE abutting Parcel 2425, run through water quality filtration devices, and then discharged through City conveyances to Lake Washington as allowed by code. The proposal makes appropriate provisions for drainage.
- C. Streets and roads. The City's standards for local access streets (which 62nd Avenue SE and SE 28th and SE 30th Streets are) call for 16 feet of pavement, a rolled curb, and a 1-foot gravel shoulder. The Applicant is proposing improvements to those three streets that will result in at least 16 feet of pavement, rolled curb, 7-foot of gravel shoulder, and a 5-foot wide, separate paved walkway. The paved walkway will extend along the West Mercer Way frontage as well, creating a paved walkway around the entire site. The proposed public street improvements exceed the required standards.

The interior private road and shared driveway meet the requirements for private roads/shared driveways as set out in the MICC.

Nothing in the MICC requires that all lots in a subdivision must take access from a single interior street. Where, as here, a small proposed subdivision site is bordered on all four sides by public streets, it is entirely reasonable to expect that some, if not all, of the proposed lots would take access from the bordering streets. In fact, every block in the *East Seattle* plat that is in the near vicinity has every residence taking direct access from the street which it abuts. There are no alleys or other interior streets in the blocks. The six residences on the west side of 62nd Avenue SE opposite Parcel 2425 each take direct access onto 62nd Avenue SE. The Applicant is proposing nothing more than what has been established as the norm by the surrounding development. The additional traffic will not overburden 62nd Avenue SE any

¹⁴ "Coval" does not establish a precedent. First, we do not know what the MICC provisions were when Coval became a vested application. Section 19.08.030 MICC was enacted in 1999 and amended in 2008 and 2017. The record contains no evidence to show what the requirements were between 2008 and 2017. Second, the documents in this record provide no analysis of why the Planning Commission and City Council felt they had authority to demand open space (if it wasn't required by code); there is no legislative history in this record. Third, the sites are physically different and presumably have different zoning. And lastly, a legally binding precedent is not created below the Court of Appeals level.

more than it presently is in the blocks to the north and south. The proposal makes appropriate provisions for streets and roads.

- D. Alleys. The interior private road could be considered as an alley: It provides a “rear” access for the lots that abut West Mercer Way. Direct access from lots onto a designated arterial is prohibited by MICC 19.08.030(F)(1). The private road “alley” is needed. The proposal makes appropriate provisions for alleys.
 - E. Other public ways. No need for other public ways within the subdivision exists. (Exhibit 5)
 - F. Transit stops. Parcel 2425 is not served by a transit route. (Exhibit 1, PDF 10) The record contains no request for transit stops. No need exists to provide for transit stops.
 - G. Potable water supply. The City will provide public water service through underground pipes. The Applicant will be upgrading parts of that system. The proposal makes appropriate provisions for potable water supply.
 - H. Sanitary wastes. The City will provide public sewer service through underground pipes. The proposal makes appropriate provisions for sanitary wastes.
 - I. Parks and recreation. The MICC does not require each subdivision to include a public park or recreation area. Instead, the City requires that a developer pay a park impact fee as mitigation for impacts to the City’s park system. The City may then use accumulated funds to build or improve parks in appropriate locations to best serve the entire City. The proposal makes appropriate provisions for parks and recreation.
 - J. Playgrounds. See Conclusion of Law 9.I, above. Each lot in this subdivision will contain at least 8,400 SF of land area. Maximum lot coverage by buildings is 40% of each lot. (Exhibit 1, PDF 8) Thus, 60% of every lot (approximately 5,000 SF) will be available to each family for its recreational use. The proposal makes appropriate provisions for playgrounds.
 - K. Schools and schoolgrounds. The school district has not asked that any portion of Parcel 2425 be set aside for public school use. The school district does not collect impact fees. No need exists to provide for schools or schoolgrounds.
 - L. Safe walking conditions for students who only walk to and from school. All public school students will be bussed to their respective schools. Three school bus stops are located on the streets abutting the proposed subdivision. (Exhibit 18) The Applicant will be providing a paved pathway encircling Parcel 2425. Students will be able to safely walk to any of those three school bus stops on a paved walkway. The proposal makes appropriate provisions for safe walking conditions for students who only walk to and from school.
10. There must be some criteria by which to judge whether a proposed subdivision serves the public health, safety and welfare. The content of adopted City policies and regulations form reasonable

criteria. 2825 W Mercer meets all applicable review criteria. Therefore, it must also be concluded that it serves the public health, safety and welfare.¹⁵

11. As CP&D states:

Goal 2.7 of the Housing Element of the City's Comprehensive Plan states that the City should "Encourage infill development on vacant or under-utilized sites that are outside of critical areas and ensure that the infill is compatible with the scale and character of the surrounding neighborhoods." The proposed development is located within a single-family residential zone with adjacent single-family residential uses. The proposed development would foster infill development on a site with adequate lot area outside of critical areas. The proposed development is single-family, with a density commensurate with existing development in the vicinity. The public use and interest will be served by approval of the project due to compliance with the MICC, Comprehensive Plan, growth targets, and coordinated growth.

(Exhibit 1, PDF 11)

12. The Greenforest report and the proposed preliminary tree retention plan do not demonstrate compliance with Chapter 19.10 MICC by a preponderance of the evidence. The failure to demonstrate compliance does not necessitate denial of the preliminary subdivision as the shortcomings can be corrected when a final tree retention plan is prepared before site development work commences.

Chapter 19.10 MICC is clear that all trees having a DBH of 10 inches or more are regulated trees with but one exception: "species identified in the weeds of concern, noxious, or invasive weed lists established by Washington State or King County, as amended." [MICC 19.10.030(B)] There is no evidence in the record that Leyland cypress is a species contained within that list. There is also no evidence that either the City's arborist or an applicant's arborist can unilaterally declare a species to be of no concern. If the City wants to declare certain species as not subject to Chapter 19.10 MICC's regulations, then the City Council must make appropriate code amendments to do so. It was wrong for Greenforest to simply dismiss Leyland cypress from the retention calculations.

More than one person asserts that the trees near the southern edge of the property (next to the demolished gym's former south wall) are Austrian pine, not Leyland cypress. The Examiner has no idea whether that assertion is correct. But given Greenforest's outright dismissal of those trees from retention calculations, the uncertainty needs to be removed by an impartial third-party species identification.

¹⁵ It would be illogical to conclude that a project which met every established standard of review was nevertheless contrary to public health, safety and welfare. If such were the case, then the adopted standards must be woefully deficient. Even if some believe that the adopted standards are deficient, there is no basis in this case to conclude that compliance with those standards is not sufficient: the application is vested to the standards which existed when it was deemed complete regardless of any subsequent changes. New standards would apply to new applications but not to applications in process.

When the Greenforest arborist's report was prepared in 2019, the gym was still standing and Greenforest believed that the trees along its walls (whatever species they are) would not survive after the gym was removed. It turns out that the gym was a slab-on-grade structure whose underpinnings were shallow; those trees have survived for three years after demolition of the gym and, to a layperson, do not appear any the worse for wear. The declaration that all of them are non-viable needs to be revisited.

Clearly, some of those trees will have to be removed to allow construction of the interior private road, a feature of the plat which is needed because of the code's prohibition against any access onto West Mercer Way. But it may well be possible to retain several of those trees. That possibility needs to be evaluated in the development engineering phase after preliminary subdivision approval. Even if they cannot be retained, additional replacement trees may well be required.

13. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. Use of the noun "Applicant" in permit conditions could cause confusion down the road. Land use permits, including preliminary subdivision approvals, "run with the land." That phrase means that the permit is tied to the land, not to the applicant for the permit. The original applicant may sell the property and its development rights to another developer after preliminary subdivision approval. It is possible that a subsequent owner/developer could argue that "Applicant" referred to the original applicant, not to the current developer. While such an argument would (should) likely fail in the end, it could cause unnecessary disruption. Therefore, the Examiner prefers to use a word that more clearly attaches to the current developer. The Examiner sometimes uses "Developer," sometimes "Plattor," depending on the type of permit involved. Here, the Examiner will use "Plattor."¹⁶
 - B. Recommended Conditions 9.e.i and 9.e.ii are duplicates. Recommended Condition 9.e.ii will be omitted and the subsequent conditions in 9.e renumbered.
 - C. Recommended Conditions 13 – 19 pertain to tree retention. Only Recommended Conditions 13 and 16 need to be revised.

Recommended Condition 13 implies that Exhibit 16 is an approved preliminary tree retention plan. As previously stated, it is not. Therefore, this condition needs to be revised to reflect the additional work required by previous conclusions.

Recommended Condition 16 calls for replacing two proposed replacement tree species with different species to foster diversity. The City's arborist (Keeny) testified, in response to an Examiner question, that the mature height of the two suggested replacement species would

¹⁶ There are a few places in the recommended conditions where CP&D is clearly using "applicant" to refer to the current preliminary subdivision applicant. No change will be made in those places.

be greater than 40 feet. The mature height of the other proposed replacement species along West Mercer Way is on the order of 25 – 30 feet. (Exhibit 5, PDF 9) While the Examiner recognizes that the City has no express view protection regulations, it would make sense since the City wants two replacement tree species swapped out for other species, that the new species have a mature height of about 30 feet, matching the other replacement trees.¹⁷ The condition will be revised to so provide.

- D. A few minor, non-substantive structure, grammar, and/or punctuation revisions will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
14. This Decision has addressed those topics and issues relevant to consideration of a preliminary long subdivision application. In doing so, it has, either directly or indirectly, addressed most of the concerns and questions raised by the numerous comments in the record. Those comments that it has not addressed, such as opposition to demolition of the School, assertions that the Applicant has reneged on prior promises about the future of Parcel 2425, matters not related to preliminary subdivision approval, etc., are beyond the scope of the Examiner’s jurisdiction and rightfully not addressed herein.
15. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner’s site view, the Examiner **GRANTS** the requested preliminary long subdivision of 2825 W Mercer Way **SUBJECT TO THE ATTACHED CONDITIONS**.

Decision issued January 29, 2024.

/s/ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS¹⁸

Ryan Harriman
Brett Pudists

Dean Williams, unsworn counsel
Daniel Thompson

¹⁷ The Applicant has stated that it is willing to plant trees with a lower maturity height. (Exhibit 7, PDF 1)

¹⁸ The official Parties of Record register is maintained by the City’s Hearing Clerk.

Harriet Mendels
Else Soelling
Patrick Yamashita
Ruji Ding
Jeanne Bayley

Jeremy Bean
Roxanne Navrides
John Kenny
Tom Odell

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: “1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision.” [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

“Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”

CONDITIONS OF APPROVAL SUB19-002 2825 W MERCER WAY

This preliminary long subdivision is subject to compliance with all applicable provisions, requirements, and standards of the Mercer Island City Code, standards adopted pursuant thereto, and the following special conditions:

1. The final plat for SUB19-002 shall be in substantial conformance with the preliminary plan set attached as Exhibit 5, except for the required changes as conditioned by the Hearing Examiner.

2. The Plator shall provide a revised plan set at the site development phase of the proposed development that includes all required changes as conditioned by the Hearing Examiner.
3. Expiration of approval – The final plat shall be recorded prior to the expiration deadline set forth in Chapter 19.15 MICC – Administration.
4. Park and transportation impact fees shall be paid at the issuance of each building permit unless deferral of payment is sought pursuant to MICC 9.18.060 or MICC 19.19.060. Impact fees are not subject to vesting and the amount paid will be the impact fee amount in effect at the time of payment.
5. The Final Plat shall be prepared in conformance with Title 58 RCW and surveys shall comply with Chapter 332-130 WAC. Submit using Mercer Island's datum and tie the plat to at least two monuments.
6. A City of Mercer Island title block for approval signatures (Mayor, Code Official, and City Engineer) shall be provided on the final plat along with the designated long plat number.
7. All utilities serving the plat shall be under grounded in accordance with MICC 19.08.040.
8. The design and construction of all improvements for access, utilities, storm drainage, and site work shall comply with all applicable City regulations and requirements of the City Engineer.
9. A Site Development Permit is required for all plat improvements (access, utilities, storm drainage, sidewalks, grading, etc.). Plat improvement plans and a complete stormwater report prepared by a Washington State licensed engineer shall be submitted for review and approval by the City Engineer. The improvement plans shall include, at a minimum, the following:
 - a. Plat private access road - Comply with the Fire Code requirements and standards contained in MICC 19.09.040.
 - b. Temporary Erosion Control measures.
 - c. Grading Plan.
 - d. Demolition Plan.
 - e. Water main, water meters, and appurtenances.
The applicant requested to be allowed to abandon the existing 6-inch cast iron city water main that bisects the subject property and to extinguish two public water main easements (recording numbers 5361487 and 5081481). This creates the ability to improve the subdivision lot layout. In exchange, the Plator shall abandon the existing 6-inch cast iron water main in 62nd Avenue SE and replace it to increase capacity to bring the main up to City

standard. The specific main size will be based on water system modeling that the Plator must pay for and use the City's water modeling contact (HDR). The estimated size of the new water main is 8-inches to 12-inches in diameter. The applicable conditions are listed below:

- i. Abandon the existing 6-inch cast iron city water main in 62nd Avenue SE.
- ii. Construct a new ductile iron water main in 62nd Avenue SE.
- iii. The size of the new water main in 62nd Avenue SE shall be determined through modeling. The Plator shall work directly with the city's water modeling consultant (HDR) to run the water model and determine the proper size of the new water main in 62nd Avenue SE. In no event shall the size of the main be smaller than 8-inches in diameter. The Plator shall bear all related costs.

Water modeling contact at HDR:

HDR c/o David Kuhns, PE
Water/Wastewater Engineer
606 Columbia Street NW, Suite 200,
Olympia, WA 98501-1085
Phone: (360) 570-7250
Email: david.kuhns@hdrinc.com

- f. Water meters, services, and appurtenances
 - i. Provide water services for each lot. Locate water meters outside of the future driveway areas and any paved areas. The water meters must be in the public right-of-way as determined by the City Engineer. The sizes of the water services and meters shall comply with size requirements contained in the Fire Code and Building Code for the future building permits.
 - ii. Abandon all existing water services currently serving the existing lot. Abandonment shall be at the city water main.
 - iii. Show the locations of all existing and proposed fire hydrants as required by City Fire Marshal.
- g. Sanitary sewer and appurtenances
 - i. Provide sewer connections for each lot.
 - ii. Abandon all existing side sewers at the city sewer main.

- iii. The proposed 6-inch private sewer pipe from the city sewer main on SE 30th Street into the property and the sanitary sewer systems serving lots 3, 4, 11, 12, 13, and 14 shall be a private sewer system.
 - iv. The public sewer main extension on SE 30th Street shown on the Preliminary Utility Plan shall be removed and not be included in the site development plan set.
- h. Stormwater
- i. Stormwater design for the plat shall comply with Chapter 15.09 MICC.
 - ii. Show the storm drainage stub outs for all lots.
 - iii. A Department of Ecology Construction General Permit is required for this project.
 - iv. Improve the public storm drainage systems along SE 28th Street, SE 30th Street, 62nd Avenue SE, and West Mercer Way as generally depicted in Exhibit 5.
 - v. The public drainage system in the public right-of-way on 62nd Avenue SE shown on the Preliminary Utility Plan (CB 17, CB18, CB19, and associated storm drainage pipes) shall not be connected to a private drainage system located inside the private property.
 - vi. Additional survey will be required for the public storm drainage system improvements along SE 30th Street and 62nd Avenue SE.
- i. Dry utilities
- i. Show the proposed dry (power, gas, etc.) utility corridor on the plan.
- j. Pedestrian Access
- i. All proposed sidewalks along the frontage of the subject property shall be designed and constructed in compliance with the Americans with Disabilities Act (ADA).
 - ii. The proposed sidewalk at the northwest corner of SE 30th Street and West Mercer Way shall connect to the adjacent corners in compliance with the ADA. The detail design will be provided at the site development phase.
- k. Easements

12. The Plator shall ensure that all work performed on the subject property, and in relation to the proposed development, is executed in accordance with the recommendations provided in the Geotechnical Engineering Study (“geotechnical engineering report”) prepared by Earth Solutions NW, LLC., Dated November 29, 2018. (Exhibit 13). Earth Solutions NW, LLC shall be on site to monitor site grading, erosion control, foundation drainage placement, excavations, fill compaction, and soil bearing in footing areas. All recommendations in the geological engineering report shall be incorporated into the final design drawings and construction specifications.
13. A final tree protection plan shall be submitted during the site development review phase. The final tree protection plan shall address and resolve the shortcomings of the preliminary tree retention plan identified in Conclusions of Law 12 and 13.C, above. No further tree removal will be allowed unless it is justified under MICC 19.10.060(A). The final tree protection plan shall show tree protection fencing at the Arborist stated tree protection zone (TPZ).
14. The Project Arborist shall be on site and in control of any excavation or grading within trees dripline. They will document and clean cut any root over 1-inch in diameter that needs to be removed. Call this out on Tree Plan during building review.
15. A replanting plan is required to be submitted during the site development review phase to confirm replacement trees can be fit on proposed lots. At least half of the trees shall be native to the Pacific Northwest. The replacement trees shall be at least 10-feet apart from each other, structures, fences and utilities. If the Plator can demonstrate no room exists on the subject property for all the replacement trees, the remainder of the replacement trees may be allowed to be replaced through a fee-in-lieu payment. The Plator shall pay a fee in lieu payment consistent with the current City of Mercer Island Fee Schedule for any tree that cannot be planted at least 10-feet away from each other, existing trees, and infrastructure such as fences.
16. The pear and red maple replacement trees on the property line depicted on the preliminary tree retention plan shall be replaced with different species acceptable to the City Arborist that are less invasive/overplanted. Replacement species shall have an expected height at maturity of 30 feet or less. A tree watering plan must also be submitted to ensure the trees survive long term.
17. Pursuant to MICC 19.10.070(D), the Plator shall maintain all replacement trees in a healthy condition for a period of five years after planting. The Plator shall be obligated to replant any replacement tree that dies, becomes diseased, or is removed during this five-year time period. A financial guarantee shall be provided to the City to cover the replacement, labor, and monitoring costs for five years. The financial guarantee shall be 150 percent of the identified cost provided on a bond quantity worksheet by the Plator during the site development phase.
18. The public right-of-way restoration area shall be fenced off with no parking. This is in the area of Tree 1. Tree 1 has been removed by the City, and replacement trees have been planted.

19. Tree protection chain link fence shall be shown during building plan review in the area labeled CRZ on the subdivision site plan. This protection will be to the greatest extent possible and described in the Arborist Report. The tree protection fence shall be a 6-foot chain-link fence secured into the ground. This will be called out on the Tree Plan during building review.
20. Include the following conditions to the face of the final plat:
 - a. Maintenance and repair of joint use side sewers (sewer lines from the building to the City sewer main), shared roads, access easements, storm drainage facilities shall be the responsibility of the owners of each lot served (with the exception that owners of any lot which is lower in elevation shall not be responsible for that portion of a private side sewer above their connection.) In the event that maintenance and repair of any facilities enumerated above are not performed to the satisfaction of the City Engineer, after a timely demand has been made for such action, the City or its agent shall have the right to enter upon the premises and perform the necessary maintenance and repair to protect the safety and general welfare of the public and shall have the right to charge the owner of each lot an equal share of the total maintenance and repair costs. The City or the owner of any lot within this long plat shall have the right to bring action in Superior Court to require any maintenance or repair and to recover the costs incurred in making or effecting repairs to improvements.
 - b. The monitoring, cleaning, maintenance and repair of storm drainage systems in accordance with Chapter 15.10 MICC is required for all lot owners within this Plat to control stormwater runoff and control erosion and flooding downstream. All costs related to stormwater runoff control shall be borne by the owners of each lot in equal share. This obligation shall be recorded separately with each individual lot sale and shall travel with the land.
 - c. All staging for construction shall occur on site and shall not be located in the public right-of-way.
 - d. Prior to the issuance of a building permit, each application shall be accompanied with a temporary erosion and sedimentation control plan, clearing and grading plan, access and utility service plan, a landscape plan (which shall identify existing vegetation to be retained, limits of all clearing and grading), and a schedule for the construction. The Plator's Civil Engineer, experienced in soils geology and mechanics, shall review the proposed site and building construction and provide recommendations that will limit site disturbance, minimize risk of soils movement, evaluate site slope stability and define materials and construction practices for the work. The Building Official may require that the Engineer be present during construction, monitor the work, and recommend special techniques or mitigating measures. The costs associated with the Engineer's monitoring and mitigation measures shall be borne by the Plator.
 - e. No permanent landscaping, structures, or fences shall be placed on or within public utility or storm drainage easements without the written approval of the City Engineer. If in the opinion of the City Engineer, utilities or storm drainage facilities require maintenance, repair or

replacement, the City or its agent shall have the right to enter those lots adjoining the facility for the purpose of maintaining, repairing, relocating or replacing said facilities. Lot owners shall be responsible for the restoration of any private improvements or landscaping within said easements.

- f. Installation of private landscaping and/or structures including trees, shrubs, rocks, berms, walls, gates, and other improvements are not allowed within the public right-of-way without an approved encroachment agreement from the City prior to the work occurring.
 - g. The plan showing numbered retained trees and building pad will be recorded as part of the plat. This plan should be the same or consistent with the Preliminary Tree Plan.
 - h. No tree identified for retention may be removed unless otherwise approved by the City Arborist.
 - i. All building permits are subject to meeting current fire code requirements at the time of permit submittal. Access shall be provided as outlined in the International Fire Code Appendix D and MICC 19.09.040. Fire plan reviews will be conducted at the time of building permit submittal and may require additional fire protection systems and/or additional fire prevention measures for building approval.
 - j. The approval of this subdivision does not guarantee that the lots will be suitable for development now or in the future. The legal transfer of the property must be done by separate instrument unless all lots herein are under the same ownership.
 - k. At building permit application, the Applicant shall pay park and transportation impact fees based on the fee schedule in place at the time of application.
 - l. Maintenance of all landscape strips along the plat roads shall be the responsibility of the Homeowners Association or adjacent property owners. Under no circumstances shall the City bear any maintenance responsibilities for landscaping strips created by the plat.
21. The public right-of-way behind the sidewalks on SE 28th Street and SE 30th Street shall be replanted based on the requirements of the City Engineer and reviewed during final engineering. The areas shall contain native vegetation that shall not exceed 42-inches in mature height. All proposed trees shall be planted on private property outside of public right-of-way unless otherwise authorized by the City Engineer.
22. The proposed landscaping strips and native vegetations along the frontages of the subject property in the City Right of Way are private improvements in the Public Right of Way. Either the abutting property owners or HOA will be required to record Right of Way Encroachment Agreements for constructing private improvements in the Public Right of Way prior to applying for the final plat approval or as determined by the City Engineer.

23. The Plator shall ensure that the proposed development meets the requirements of the Mercer Island Fire Marshal. Specifically, the Plator shall ensure the shared private access easement is designed so fire apparatus vehicles can access the shared private access easement without obstruction.
24. The Plator may financially guarantee the trees and associated landscaping with the condition that trees should be installed with the construction of each home. If the Plator decides to install trees with the construction of the homes, a note shall be included on the final plat and a financial guarantee shall be posted for the trees. If trees are not installed with the construction of the homes, then the City will not release any performance financial guarantees until the trees are installed in accordance with an approved landscaping plan.

DEVELOPMENT REGULATION COMPLIANCE – DISCLOSURE

1. Compliance with all local, state and federal regulations is required.
2. No construction, tree removal, grading, installation of utilities on land within a proposed long or short subdivision shall be allowed prior to preliminary approval of the long or short subdivision and until the Applicant has secured the permits required under the MICC. Following preliminary approval, tree removal, grading, and installation of utilities shall be the minimum necessary to allow for final plat approval of the long or short subdivision. [MICC 19.08.020(5)]