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# CITY OF MERCER ISLAND

## COMMUNITY PLANNING & DEVELOPMENT

9611 SE 36TH STREET | MERCER ISLAND, WA 98040

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## STAFF REPORT & RECOMMENDATION TO HEARING EXAMINER

### ZONING VARIANCE - VAR22-001 (EXHIBIT 1)

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| <b>Project No:</b>             | VAR22-001  |
| <b>Permit Type:</b>            | Type IV  |
| <b>Description of Request:</b> | A variance request from the front yard depth requirements pursuant to Mercer Island City Code (MICC) 19.02.020(C)(1)(a) and MICC 19.06.110(B).   |
| <b>Applicant / Owner:</b>      | Market Place Properties, LLC, C/O Josh Thurman, 2212 Queen Avenue N., #273<br>Seattle, WA 98109  |
| <b>Location of Property:</b>   | 9027 SE 60th Street, Mercer Island WA 98040<br>Identified by King County Assessor tax parcel number: 8650900030  |
| <b>SEPA Compliance:</b>        | This project is exempt from SEPA review pursuant to WAC 197-11-800(6)(e).  |
| <b>Project Documents:</b>      | Please follow this file path to access the associated documents for this project:<br><a href="https://mieplan.mercergov.org/public/VAR22-001">https://mieplan.mercergov.org/public/VAR22-001</a> |
| <b>Recommendation</b>          | Approve with conditions.   |
| <b>Zoning Designation</b>      | R-9.6  |
| <b>Staff Contact:</b>          | Ryan Harriman, EMPA, AICP – Planning Manager   |

#### INTRODUCTION

The Applicant requests a variance from the front yard depth requirements pursuant to Mercer Island City Code (MICC) 19.02.020(C)(1)(a). Specifically, the Applicant is requesting a variance which would reduce the required front yard setback from 20 feet to distances ranging between 15.55 feet to 17.82 feet as measured from the front of the new residence, which has already been substantially constructed (**Exhibits 8 and 9**).

The subject property is located at 9027 SE 60th Street in a neighborhood zoned R- 9.6. In preparation for obtaining a building permit, a survey was performed and used as the basis for the building permit site plan submitted to the City for construction of a new single-family residence at the Property. The survey was prepared by a state licensed professional land surveyor (**Exhibit 9, page 6 and page 8**). The City reviewed and approved the site plan, based in part on the survey and issued building permit 2001-170 to the Applicant

on May 14, 2021 (**Exhibit 12**). The surveyor then staked off the foundation forms for the proposed development to comply with the 20-foot front yard setback according to the approved plan set.

After the foundation was poured and the proposed development was nearly complete, the Applicant discovered an error in the survey and the mapped location of the site features. Specifically, the survey depicted rear and front yard fence lines as being located approximately five (5) feet south of the rear and front property lines. A forensic survey performed subsequent to the discovery of the error confirmed the fence lines are located along the subject property lines (**Exhibit 9, page 2**). The erroneously mapped location of the fence lines impacted the original staking of the corners of the subject property and later staking of the foundation forms. As a result of the survey error, the foundation of the subject property was incorrectly staked in a location which encroached into the front yard setback by approximately 2.18 to 4.45 feet. The surveyor acknowledged the error, however this didn't occur until the proposed development was nearly complete.

Strict enforcement of the 20-foot front yard setback would prevent the nearly completed proposed single family home from being finished and approved for occupancy pursuant to building permit 2001-170. The proposed development is otherwise fully compliant with applicable zoning, side yard setbacks, the Comprehensive Plan and other land use requirements.

Terms used in this staff report:

| <b>Term</b>          | <b>Refers to, unless otherwise specified:</b>   |
|----------------------|---|
| Developer /Applicant | Market Place Properties, LLC  |
| Proposed Development | Single-family residence located at 9027 SE 60th Street, Mercer Island, WA 98040                 |
| Subject Property     | 9027 SE 60th Street, Mercer Island, WA 98040  |
| City                 | City of Mercer Island   |
| MICC                 | Mercer Island City Code   |
| Code Official        | Community and Planning Development Director city of Mercer Island or a duly authorized designee |

**Findings of Fact & Conclusions of Law**

**Public Process**

1. The variance application (**Exhibit 2**) was received on September 6, 2022 and deemed complete on September 13, 2022 (**Exhibit 3**).
2. The Applicant submitted a Project Narrative Request for Variance (**Exhibit 8**), a number of exhibits to support the project narrative (**Exhibit 9**), and a letter from WILLIAMS, KASTNER & GIBBS PLLC, dated September 30, 2022 (**Exhibit 10**), supplementing the project narrative and associated exhibits.
3. Pursuant to MICC 19.15.030, variances are Type IV land use reviews, for which the decision authority is the City Hearing Examiner.
4. On September 19, 2022, the Notice of Application (**Exhibit 4**) was issued, mailed to neighbors within 300 feet of the subject property, included in the City's weekly bulletin and posted on the subject property.

5. The initial public comment period ran from September 19, 2022 through October 19, 2022.
6. Three (3) public comments (**Exhibits 5.1, 5.2, and 5.3**) were received during the open public comment period. The City does not directly respond to public comments and requires the Applicant to provide a response letter to each commentor. The Applicant's response letters are contained within **Exhibits 6.1 and 6.2**. Of the comments received, one (1) was in support of granting the proposed variance and two (2) were in opposition.
7. A Notice of Public Hearing was issued November 7, 2022 for a public hearing to be held on December 14, 2022. The notice of public hearing was issued to the public by mailing the notice to neighbors within 300 feet of the subject property, posting the notice on the subject property with a public notification sign, and publishing the notice in the City's weekly permit bulletin, and provided to the Applicant and parties of record (**Exhibit 12**).
8. A variance request is categorically exempt from SEPA review pursuant to WAC 197-11-800(6)(e) (Granting of variance based on special circumstances).

#### **Proposed Development and Subject Property Description**

9. The subject property is bordered by SE 60th Street to the north and lots zoned R-9.6 developed with single-family homes to the east, west, and south. North of SE 60th Street, there are residentially developed lots also zoned R-9.6.
10. The subject property is partially developed with a nearly complete single-family residence.
11. Standard zoning setbacks are established by MICC 19.02.020; the minimum front yard setback from the east property line is 20 feet, the minimum rear yard setback from the west property line is 25 feet, and the minimum side yard setback from the north is 5 feet.

#### **Variance Criteria**

12. **MICC 19.06.110(B)(1)**: *Purpose. An applicant or property owner may request a variance from any numeric standard, except for the standards contained within Chapter 19.07 MICC. A variance shall be granted by the city only if the applicant can meet all criteria in subsections (B)(2)(a) through (B)(2)(h) of this section. A variance for increased lot coverage for a regulated improvement pursuant to subsection (B)(2)(i) of this section shall be granted by the city only if the applicant can meet criteria in subsections (B)(2)(a) through (B)(2)(i) of this section.*

**Staff Analysis:** The Applicant applied for a zoning variance to reduce the required front yard setback, which is a numeric standard that is not contained within Chapter 19.07 MICC. The proposed variance may only be approved if the Applicant can meet all criteria in MICC 19.06.110 subsections (B)(2)(a) through (B)(2)(h).

13. **MICC 19.06.110(B)(2)(a)**: *The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an "unnecessary hardship" is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot;*

**Applicant's Response:** A variance is being requested from the following code section: MICC 19.02.020(C)(1)(a). Specifically, the Applicant is requesting a variance which would reduce the front yard setback from 20 feet to distances ranging between 15.55 feet to 17.82 feet as measured from the front of the new residence.

The property is located at 9027 SE 60th Street (the Property), in a neighborhood zoned R-9.6. In preparation for obtaining a building permit, a survey was performed and used as the basis for the building permit site plan submitted to the City for construction of a new single-family residence at the Property. The City reviewed and approved the site plan and issued building permit 2001-170 to the Applicant. The surveyor then staked off the foundation forms for the new residence to comply with the 20-foot front yard setback according to the permitted and approved plan set.

After the foundation was poured and the residence fully framed out, an error was discovered in the survey and the mapped location of the site features. Specifically, the survey depicted rear and front yard fence lines as being located approximately 5 feet south of the rear and front Property lines. A recent forensic survey confirms the fence lines are located along the Property lines. The erroneously mapped location of the fence lines infected the original staking of the corners of the Property and later staking of the foundation forms. As a result of the error, the foundation of the Property was staked in a location which encroached into the front yard setback by approximately 3-4 feet. The surveyor acknowledged the error, but not until many months after the mistake was made.

Strict enforcement of the 20-foot front yard setback would prevent completion of a single-family residence pursuant to the building permit issued by the City. Such a result would impose an oppressive financial burden on the Owner and negate the financial viability of the residential project. The project is otherwise fully compliant with applicable zoning, side yard setbacks, the Comprehensive Plan and other land use requirements, as acknowledged by the City when it issued building permit 2001-170.

Under Washington law, issuance of the building permit constitutes a final land use decision by the City, regardless of the mistaken approval of a residence that encroaches on the front yard setback. The appropriate remedy to answer what is now known to be an erroneous building permit site plan is to grant the requested variance for modest relief from the 20-foot front yard setback. **(Exhibits 8 and 9).**

**Staff analysis:** The strict enforcement of the provisions of this title creates an unnecessary hardship for the Applicant. Pursuant to MICC 19.06.110(B)(2)(a) for the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an "unnecessary hardship" is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot. Due to the errors of licensed surveyors, the Applicant is forced into a difficult situation where they must decide whether to remove or substantially reconstruct the nearly completed single-family residence to meet the required setbacks. The errors of licensed surveyors prevent the Applicant from keeping and completing the construction of this single-family dwelling on a legally created residentially zoned lot. Likewise, strict enforcement of 20-foot front yard setback will create an unnecessary hardship to the Applicant, because they will be prevented from finishing the construction of the single-family dwelling that is nearly completed. Preventing the completion of the single-family residence would, according to the Applicant, impose an extremely significant financial burden on them. The proposed development is otherwise fully compliant with applicable zoning, side yard setbacks, the Comprehensive Plan, and other land use requirements. This criterion is met.

14. **MICC 19.06.110(B)(2)(b):** *The variance is the minimum necessary to grant relief to the property owner;*

**Applicant's response:** The proposed roughly 3 to 4-foot variance to the front yard setback represents at most a 20% reduction to the setback area. The requested reduction is the minimum which would allow the single-family home to remain as it is currently situated on the Property. **(Exhibit 8).**

**Staff analysis:** Pursuant to the applicant's submitted survey (Exhibit 9, page 2), the constructed single-family residence varies in its encroachment into the required front yard setback from 2.18 to 4.45 feet. Therefore, a variance to the required front yard setback of 4.45 feet is the minimum necessary to grant relief to the Applicant. This criterion is met.

15. **MICC 19.06.110(B)(2)(c):** *No use variance shall be allowed;*

**Applicant's response:** No use variance is being requested.

**Staff analysis:** No use variance is proposed: Single-family dwellings are an allowed use in the R-9.6 zone, and a single-family dwelling is the use proposed **(Exhibit 8)**. Variance from setback requirements is not a use variance. This criterion is met.

16. **MICC 19.06.110(B)(2)(d):** *There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;*

**Applicant's response:** The necessity of a variance is the result of a survey error which mistakenly mapped the location of site features on the Property. The error led to the inadvertent encroachment of the building in the front yard setback. **(Exhibits 8, 9, and 10).**

A court in North Carolina addressed a similar situation where, after issuance of a building permit for a duplex and commencement of construction, a second conflicting survey was discovered concerning the subject property. In conflict with the first survey, the second survey showed the duplex encroaching into the setback area. The owner sought a variance which was granted. The court found that the conflicting surveys were a special circumstances peculiar to the subject property and gave consideration to the fact that the owner relied in good faith on a survey from a licensed surveyor.

Likewise, the survey error here is unique to the Property and the physical improvements on the Property. This unusual circumstance was not the result of any deliberate act by the Applicant, rather it arises from circumstances beyond the control of Applicant and which are applicable only to this Property.

**Staff analysis:** MICC 19.06.110(B)(2)(d) requires showing that there are special circumstances applicable to the subject property in question.

A survey error led to a mistake in the location of the foundation and the encroachment into the setback for which this variance is sought. The survey error was the result of a physical feature unique to the Subject Property – a bearing break affecting City survey monuments to the east at the Island

Crest Way/SE 60th St. intersection and the monument to the west at the 92nd AVE SE/SE 69th St. intersection. (See, Survey noting “bearing break per Plat of Timberland No. 4” attached in **Exhibit 9** at **Exhibit G**). The noted break in bearing is only evident from review of the final plat records. A survey conducted simply by referencing the two physical survey monuments does not disclose the break.

Due to the bearing break of the underlying plats and survey errors, the foundation form for the proposed development was staked in a location that encroached into the actual front yard setback. The “break in bearing” between monuments is a physical feature unique to the lot location. The survey kitty-corner to the subject property failed to account for this physical feature affecting all lots in the block containing the subject property, which is a special circumstance unique to these parcels, and warrants variance relief under the facts of this application.

This criterion is met.

17. **MICC 19.06.110(B)(2)(e):** *The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated;*

**Applicant’s response:** A small variance to the front yard setback will have no impact to the public welfare or surrounding properties. The 3 to 4-foot reduction will be imperceptible to the neighboring property owners and will be of no consequence to any future development on neighboring properties. Likewise, full use of the SE 60th Street right of way will still be available to the public and to the fire department and other emergency responders. A slight reduction in the front yard setback will not hinder access to the Property during emergency events.

**Staff analysis:** Granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated (**Exhibit 8 and 9**). The setback reduction will be virtually unnoticeable to the neighboring property owners and will be of no consequence to any future development on neighboring properties. Likewise, full use of the SE 60th Street right of way is fully available to the public and to the fire department and other emergency responders. This criterion is met.

18. **MICC 19.06.110(B)(2)(f):** *The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property;*

**Applicant’s response:** See Applicant’s response to Criteria (e).

**Staff analysis:** The neighborhood is developed with single-family dwellings, and the requested variances would enable the construction of a single-family dwelling. This criterion is met.

19. **MICC 19.06.110(B)(2)(g):** *The variance is consistent with the policies and provisions of the comprehensive plan and the development code;*

**Applicant’s response:** Granting the requested variance will allow the Applicant to finish construction of a single-family residence on the property. Construction of a single-family residence furthers Comprehensive Plan policies encouraging preservation of a low density, single family residential community on Mercer Island. See, Land Use Issue (1); Land Use Goal 15;

Housing Element Policy 1.4. Additionally, allowing a reduction in the front yard setback and completion of a single-family residence is consistent with the R-9.6 use designation of the property under the Development Code.

**Staff analysis:** The proposed variances would allow the completion of a single-family dwelling, which is consistent with the uses shown on Figure 1 – Land Use Map in the Land Use Element of the comprehensive plan. The variance is also consistent with following comprehensive plan policies:

- Land Use Policy 16.2 Through zoning and land use regulations provide adequate development capacity to accommodate Mercer Island’s projected share of the King County population growth over the next 20 years.
- Land Use Policy 16.3 Promote a range of housing opportunities to meet the needs of people who work and desire to live in Mercer Island.
- Land Use Policy 18.7 Services and programs provided by the City with regards to land use should encourage residents to minimize their own personal carbon footprint, especially with respect to energy consumption and waste reduction.
- Housing Policy 2.1 Through zoning and land use regulations, provide adequate development capacity to accommodate Mercer Island’s projected share of the King County population growth over the next 20 years.
- Housing Policy 2.2 Promote a range of housing opportunities to meet the needs of people who work and desire to live in Mercer Island.
- Housing Policy 2.9 Through a mix of new construction and the preservation of existing units, strive to meet Mercer Island’s proportionate amount of the countywide need for housing affordable to households with moderate, low, and very low incomes, including those with special needs.

The proposed development enabled by the approved building permit and granting of the requested variances is consistent with the above policies by providing an additional housing opportunity (consistent with Land Use Policy 16.3 and Housing Policy 2.2) of a smaller size that will have a smaller carbon footprint than larger single-family dwellings (consistent with Land Use Policy 18.7). The addition of a single-family dwelling where there was previously a vacant lot also helps the City to meet its growth target (Land Use Policy 16.2, Housing Policies 2.1 and 2.9). This criterion is met.

20. **MICC 19.06.110(B)(2)(h):** *The basis for requesting the variance is not the direct result of a past action by the current or prior property owner;*

**Applicant’s response:** The need for the requested variance arose as the direct result of an error by a surveyor. The Applicant had no role in performing the survey or marking the boundary line of the Property and the foundation forms. These acts were solely done by the surveyor. The hardship was not created by any deliberate act of the Applicant.

**Staff analysis:** The erroneous survey is the basis for Applicant’s request for this variance. This situation arose from an error in a survey, completed by a licensed professional surveyor, that caused the front yard setback encroachment. The basis for requesting the variance, consequently, is not the direct result of a past action by the current or prior property owner. This criterion is met.

## RECOMMENDED CONDITIONS OF APPROVAL

1. The Applicant shall record the survey contained in Exhibit 9, page 2 illustrating the encroachment onto the required front yard setback with the King County Recorder's Office.
2. The Applicant shall record a notice on the subject property's title with the King County Recorder's Office. The notice on title must contain the Hearing Examiner's decision (if the proposed variance is granted).

## RECOMMENDATION

Based upon the above Findings of Fact and Conclusions of Law, the City recommends that the Hearing Examiner **APPROVE** the proposed variance application, VAR22-001, subject to the recommended conditions of approval listed in this staff report.

**Recommended this 21st day of November, 2022.**

*Ryan Harriman*

Ryan Harriman, EMPA, AICP  
Planning Manager  
City of Mercer Island  
Community Planning & Development

## EXHIBITS:

- Exhibit 1 – Staff Report
- Exhibit 2 – Development Application
- Exhibit 3 – Determination of Completeness
- Exhibit 4 – Notice of Application
- Exhibit 5 – Public Comments
  - Exhibit 5.1 – Public Comments from Robert Farrell
  - Exhibit 5.2 – Public Comments from Barbara Veldee
  - Exhibit 5.3 – Public Comments from Tony and Missy Johnson
- Exhibit 6 – Applicant's Response to Public Comments
  - Exhibit 6.1 – Applicant's Response to Public Comments from Barbara Veldee
  - Exhibit 6.2 – Applicant's Response to Public Comments from Tony and Missy Johnson
- Exhibit 7 – Pre-Application Form and Notes
- Exhibit 8 – Project Narrative Request for Variance
- Exhibit 9 – Project Narrative Exhibits
- Exhibit 10 – Letter from WILLIAMS, KASTNER & GIBBS PLLC, September 30, 2022
- Exhibit 11 – Approved Building permit, 2001-170
- Exhibit 12 – Notice of Public Hearing