

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

**DECISION**

FILE NUMBER: APL21-004  
(Reference File No. CAO20-004)

APPELLANT: The Carol Ann Cook Revocable Living Trust  
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RESPONDENT: City of Mercer Island  
Community Planning & Development Department  
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APPLICANT: Same as Appellant

TYPE OF CASE: Appeal from a Critical Area Review 1 holding that a watercourse on adjoining properties is a regulated Type Ns stream

EXAMINER DECISION: SUSTAIN

DATE OF DECISION: May 5, 2020

**INTRODUCTION**<sup>1</sup>

The Carol Ann Cook Revocable Living Trust (“Cook Trust”) appeals from the Critical Area Review 1 (“CAR 1”) administrative decision of the City of Mercer Island (“City”) Community Planning & Development Department (“Department”), issued on February 19, 2021, under file number CAO20-004 holding that a watercourse on adjoining properties is a regulated Type Ns stream. (Exhibit 4<sup>2</sup>)

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

<sup>2</sup> 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 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.

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The Cook Trust filed the appeal on March 4, 2021. (Exhibit 12)

The subject property is located at 7025 North Mercer Way. Its Assessor's Parcel Number is 735570-0191. (Exhibit 3) The subject property will be referred to herein simply by its street number ("Lot 7025"). References in this Decision to other lots will use the same protocol.

The Hearing Examiner ("Examiner") held an open record hearing on April 28, 2021. The hearing was conducted remotely using the "Zoom" program due to assembly restrictions attendant to the current COVID-19 pandemic. Notice of the hearing was given as required by the Mercer Island City Code ("MICC"). (Exhibit 11)

Pursuant to Hearing Examiner Rule of Procedure ("RoP") 224(c), the Examiner entered the following administrative exhibits into the hearing record:

- Exhibit 9001: Letter, Hearing Examiner to Principal Parties, March 5, 2021 (Scheduling guidance)
- Exhibit 9002: City of Mercer Island's Partial Motion to Dismiss, filed April 19, 2021, at 3:32 p.m.
- Exhibit 9003: Declaration of Robin Proebsting in Support of City of Mercer Island's Partial Motion to Dismiss, filed April 19, 2021, at 3:32 p.m.
- Exhibit 9004: E-mail, Hearing Examiner to Principal Parties, April 19, 2021, at 4:49 p.m. (Guidance on handling Exhibit 9002)
- Exhibit 9005: City of Mercer Island's Motion to Exclude Certain Exhibits, filed April 22, 2021, at 1:55 p.m.
- Exhibit 9006: Declaration of Jeff Thomas in Support of City of Mercer Island's Motion to Exclude Certain Exhibits, filed April 22, 2021, at 1:55 p.m.
- Exhibit 9007: E-mail, Hearing Examiner to Principal Parties, April 22, 2021, at 3:03 p.m. (Guidance on handling Exhibit 9005)

Pursuant to RoP 224(d), Respondent Department pre-filed Exhibits 1 - 13 and provided an index listing of those exhibits. Appellant Cook Trust did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

Pursuant to RoP 224(e), Appellant Cook Trust pre-filed Exhibits 1001 - 1009 and provided an index listing of those exhibits.<sup>3</sup> Respondent Department objected to entry of proposed Exhibits 1004 - 1008. (Exhibit 9005) Appellant Cook Trust filed a Response. (Exhibit 1009) The Examiner sustained the objection and entered only Exhibits 1001 - 1003 and 1009 into the hearing record. (See Prehearing Motions, below, for further information.)

The City has the record copy of the exhibits and the exhibit index lists.

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<sup>3</sup> Exhibit 1009, Appellant's response to Exhibit 9005, was not included in the list as it was submitted after the other pre-filed exhibits.

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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.

### **PREHEARING MOTIONS**

On April 19, 2021, Respondent Department filed a Partial Motion to Dismiss asking the Examiner to dismiss Appellant Cook Trust's argument that the Department's CAR 1 decision resulted in a "taking" of the Cook Trust's property. (Exhibits 9002; 9003) After receiving a brief oral response from Cook Trust at the outset of the hearing, the Examiner orally ruled that Appellant Cook Trust's third ground for appeal (unconstitutional taking) was outside the scope of the Examiner's jurisdiction. The Examiner therefore summarily dismissed that argument pursuant to MICC 3.40.050 and Hearing Examiner Rule of procedure ("RoP") 228(a). The Examiner further stated that if he had jurisdiction, which he does not, he would find that a taking claim was not ripe for adjudication. No land use application has been submitted for redevelopment of Parcel 0191. The mere determination that a regulated stream exists on abutting property would not be determinative of the degree of impact that would be felt on Lot 7025 from such regulations. The MICC provides for stream buffer averaging [MICC 19.07.180(C)(4)], buffer reduction [MICC 19.07.180(C)(5)], and reasonable use exception [MICC 19.07.140]. Without an actual redevelopment application it would not be possible to determine the actual impact that would occur nor whether that impact would rise to the level of a taking.

On April 22, 2021, Respondent Department filed a Motion to Exclude Appellant Cook Trust's proposed Exhibits 1004 – 1008. (Exhibits 9005; 9006) Appellant Cook Trust filed a written Response to that Motion. (Exhibit 1009) Proposed Exhibits 1004 and 1008 related to an earlier request by Cook Trust for a code interpretation by the Department. The Department declined to issue the requested interpretation. The Examiner held that a decision to not make a decision did not constitute an appealable decision. And, even if it did, Cook Trust had not appealed that action, so it would not have been properly before the Examiner. Proposed Exhibits 1005 – 1007 related to the City's fee schedule and processing procedures, neither of which was before the Examiner. Therefore, the Examiner orally excluded proposed Exhibits 1004 – 1008 pursuant to RoP 316(b) on the grounds that they were irrelevant and immaterial. The Examiner also noted that Exhibit 1 included some text about the code interpretation issue. Rather than to take the time to parse the irrelevant text from the exhibit, the Examiner will simply ignore it.

### **FINDINGS OF FACT**

1. Lot 7025 is a rectangular, residential lot on the south side of North Mercer Way. It has roughly 100 feet of frontage on North Mercer Way and a north-south depth of roughly 200 feet. It presently contains a single-family residence. The area in which Lot 7025 is located slopes generally from south to north toward Lake Washington. Lake Washington is a Type S water body. A watercourse flows from south to north in a draw (or ravine) through the two lots which abut Lot 7025 on the west: Lots 1818 and 1804, listed from south to north. The watercourse is roughly parallel with and about 30 to 40 feet west of the west boundary of Lot 7025. (Exhibits 2, PDF 7 & 9; 6; Olmstead

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testimony) The watercourse is identified on the City's GIS Portal, Watercourses and buffer layer, as a Type Ns stream south of North Mercer Way and as a Piped Watercourse north of North Mercer Way. (Exhibit 7) A Type Ns stream is a seasonal, nonfish habitat stream. (Exhibit 8) The standard buffer width for a Type Ns stream in the City is 60 feet. [MICC 19.07.180(C)(1)]

2. The watercourse flows through an open channel at the bottom of a ravine on Lots 1818 and 1804. Its bed and bank are delineated by a clear break. The bed is 4 – 5 feet wide, dominated by gravel and cobbles with silt and sand present. Several angular stones are also present in the bed. The banks are about 4 – 6 inches high with no visible undercutting. Ground cover on both sides of the watercourse is dominated by English ivy with a variety of native and ornamental shrubs and trees providing overstory. (Exhibits 1, PDF 16, 17, & 19; 2)

The watercourse is fed by runoff from the surrounding area, including discharge from two (apparently 4" PVC) drain pipes which enter the watercourse along its left bank.<sup>4</sup> The City's storm water conveyance system serving nearby streets discharges into the watercourse immediately upstream of North Mercer Way. (Exhibit 2)

The watercourse flows through a culvert beneath North Mercer Way after which it continues in a pipe some 400 feet to discharge into Lake Washington. (Exhibit 2)

3. The Cook Trust desires to sell Lot 7025. To that end, on November 18, 2020, the Cook Trust made application to the Department for a CAR 1 determination of the status of the watercourse on Lots 1818 and 1804. (Exhibit 1) "The Type 'Ns' watercourse designation has negatively impacted the value of the Property. Therefore, the City is requested to correctly interpret the City's ordinance as it relates to the Property." (Exhibit 1, PDF 1)
4. On February 19, 2021, the Department issued the requested CAR 1 determination. The Department concluded that the watercourse on Lots 1818 and 1804 was, in fact, a Type Ns stream. (Exhibit 4)

The Cook Trust's appeal followed on March 4, 2021. (Exhibit 12) The appeal presented three assignments of error. First, it argued that since the surface segment on Lots 1818 and 1804 flows through an underground pipe before reaching Lake Washington it does not have an "aboveground" connection to Lake Washington and cannot, therefore, be a Type Ns stream.

Second, it argued that the underground portion of the watercourse cannot be a "piped watercourse" because stormwater from part of the City's collection system flows into it.

Finally, it argued that designating the surface watercourse on Lots 1818 and 1804 a Type Ns stream constituted an unconstitutional taking of private property. (This third argument was dismissed on motion of Respondent Department. See Prehearing Motions, above.)

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<sup>4</sup> Stream/river banks are named from the perspective of a person looking downstream. [Official notice]

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5. The Cook Trust retained Patrick Togher (“Togher”) of PBS, a Seattle environmental consulting firm, to evaluate the watercourse for it. Togher provided a report in December, 2020, based upon office research and a site inspection. (Exhibit 2)

The Department retained Scott Olmstead (“Olmstead”) and Rachele Tews (“Tews”) of ESA, also a Seattle environmental consulting firm, to provide a third-party review of Togher’s report. Olmstead and Tews provided their evaluation in February, 2021, based on office research and observation of the watercourse from North Mercer Way. (Exhibit 3)

Togher and Olmstead testified during the hearing. Both are trained environmental scientists.

6. The outcome of this case depends upon three definitions in the MICC. First, the definition of watercourses:

*Watercourses*: A course or route, formed by nature and generally consisting of a channel with a bed, banks, or sides throughout substantially all its length, along which surface waters, with some regularity (annually in the rainy season), naturally and normally flow in draining from higher to lower lands. This definition does not include irrigation and drainage ditches, grass-lined swales, canals, storm water runoff devices, or other courses unless they are used by fish or to convey waters that were naturally occurring prior to construction.

[MICC 19.16.010, “W” definitions, italics in original] Next, the definition of a Type Ns watercourse:

Type Ns, which include all segments of natural waters within the bankfull width of the defined channels that are not Type S, F, or Np waters. These are seasonal, nonfish habitat streams in which surface flow is not present for at least some portion of a year of normal rainfall and are not located downstream from any stream reach that is a Type Np water. Ns waters must be physically connected by an aboveground channel system to Type S, F, or Np waters.

[MICC 19.16.010, “W” definitions, Watercourses, ¶2, § 4, underlining added] Finally, the definition of a piped watercourse:

Piped watercourses, which are pipes or other conveyances through which surface waters, with some regularity (annually in the rainy season), naturally and normally flow in draining from higher to lower lands. This definition does not include irrigation and drainage ditches, grass-lined swales, canals, storm water runoff devices, or other courses unless they are used by fish or to convey waters that were naturally occurring prior to construction.

[MICC 19.16.010, “W” definitions, Watercourses, ¶2, § 5]

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7. Togher posits that the watercourse on Lots 1818 and 1804 meets the definition of a “watercourse,” but does not meet the definition of any of the types of watercourses listed in the MICC. His argument is based on the observation that the piped downstream segment of the watercourse is not aboveground. (Exhibit 2, PDF 4)

Olmstead/Tews posit that the watercourse is a Type Ns stream because the open segment flowing across Lots 1818 and 1804 becomes a piped watercourse when it enters the culvert beneath North Mercer Way. They argue that it would have to naturally infiltrate into the ground before reaching Lake Washington in order not to be a Type Ns stream. (Exhibit 3; Olmstead testimony)

8. The lead agency for water typing in Washington State is the state Department of Natural Resources (“DNR”):

The department [DNR] in cooperation with the departments of fish and wildlife, and ecology, and in consultation with affected Indian tribes will classify streams, lakes and ponds. The department will prepare water type maps showing the location of Type S, F, and N (Np and Ns) Waters within the forested areas of the state.

[WAC 222-16-030, ¶ 1, emphasis added] The City’s definition of a Type Ns stream is identical with the state’s definition. (Exhibit 8)

While DNR is the lead state agency for typing waters, the state Department of Fish and Wildlife (“WDFW”) regulates water bodies within non-forested areas of the state. That would include Mercer Island. WDFW agrees with the Olmstead/Tews interpretation of Type Ns streams. WDFW’s position is that a “culvert is an approved conveyance system and does not disqualify the watercourse as an Ns stream, since it does not flow naturally subsurface.” (Exhibit 9, PDF 1; Reinbold testimony)

9. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## LEGAL FRAMEWORK <sup>5</sup>

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

### Authority

A CAR 1 is a Type 1 administrative land use action. [MICC 19.15.030(E), Table A] An appeal from a Type 1 action is subject to an open record hearing before the Examiner. [MICC 19.15.030(E), Table B]

1. If the [Examiner] finds that there has been substantial error, or the proceedings [below] were materially affected by irregularities in procedure, or the decision [below] was

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<sup>5</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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unsupported by material and substantial evidence in view of the entire record, or the decision [below] is in conflict with the city's applicable decision criteria, it may:

- a. Reverse the decision.
- b. Modify the decision and approve it as modified.
- c. Remand the decision back to the decision maker for further consideration.

2. If the [Examiner] finds that none of the procedural or factual bases listed above exist and that there has been no substantial error, the [Examiner] may adopt the findings and/or conclusions of the decision body, concur with the decision of the decision body and approve the development proposal as originally approved, with or without modifications.

[MICC 19.15.130(G)(1) & (2)] The Examiner's decision on the appeal is final subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Table B; MICC 3.40.110]

Vested Rights

"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 Cook Trust's CAR 1 application is November 18, 2020, the date it was filed. (Exhibit 1)

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

Standard of Review

The standard of review is preponderance of the evidence. The appellant has the burden of proof. [MICC 19.15.130(C)]

The burden of proof is on the appellant to demonstrate that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by evidence in the record, or that the decision is in conflict with the standards for review of the particular action.

### 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. “[I]t is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency.” [*Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 595, 90 P.3d 659 (2004) (alteration in original) (quoting *Dep't of Ecology v. Pub. Utility Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994))] Here the agency with “specialized knowledge and expertise” regarding stream types in urban areas is WDFW, not DNR. WDFW’s Area Habitat Biologist Fisher (Exhibit 8) and his supervisor, Assistant Regional Habitat Manager Reinbold, (Testimony) both support the determination that the surface segment of the watercourse flowing northerly through Lots 1818 and 1804 is a Type Ns stream. That determination must be accorded substantial weight and deference.
2. The evidence, especially Exhibits 5 and 6, show an historical swale/ravine originating south (upslope) of Lot 7025 and descending all the way to the Lake Washington shoreline, interrupted only by the North Mercer Way road fill. Given the terrain in the area, it is far more likely than not that a watercourse has flowed through that ravine for years.

The watercourse has obviously been modified at times in the past by landscaping activities. But despite that, the segment across Lots 1818 and 1804 is an open watercourse with defined banks and bed, which contains flowing water seasonally. The storm drainage from the City’s surrounding streets is discharged into the watercourse immediately upstream of the North Mercer Way culvert – at the downstream end of the surface segment. Therefore, that water is not what is flowing across Lots 1818 and 1804. The discharge from the two white PVC pipes is likely foundation drain discharge or downspout discharge from the houses on Lots 1818 and 1804. Even if that is the source of some of the water in the open watercourse, it would not disqualify it as a Type Ns stream. A watercourse which “convey[s] waters that were naturally occurring” remains a watercourse even if it is used to also convey stormwater runoff. [MICC 19.16.010, “W” definitions, “Watercourse,” quoted in full above]

3. The crux of Cook Trust’s argument is the concluding sentence in the definition of Type Ns streams (“Ns waters must be physically connected by an aboveground channel system to Type S, F, or Np waters.”), especially the “connected by an aboveground channel” provision. Cook Trust’s interpretation is understandable: The stream goes into a pipe 400 feet before discharging into Lake Washington, so how can those 400 feet be an “aboveground channel”? And if they aren’t an aboveground channel, then the watercourse on Lots 1818 and 1804 can’t be a Type NS stream.

But when the definition of “piped watercourse” is also considered, WDFW’s and Olmstead’s/Tew’s interpretation makes sense. The surface channel that used to be a surface channel all the way until discharging into Lake Washington now enters a pipe after passing through the North Mercer Way



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culvert, becoming a piped watercourse. There is no evidence that it ever infiltrated into the ground before reaching Lake Washington. That stormwater from the City's collection system also flows through the piped segment does not disqualify that segment from being a "piped watercourse." The piped watercourse definition, quoted in full above, states that the "definition does not include ... storm water runoff devices, ... unless they are used ... to convey waters that were naturally occurring prior to construction." The preponderance of the evidence <sup>6</sup> shows that it is more likely than not that a natural stream existed in the ravine before the area became developed.

4. The surface watercourse flowing north across Lots 1818 and 1804 is a Type Ns stream and, therefore, is regulated under Chapter 19.07 MICC, especially MICC 19.07.180, Watercourses. It is vastly premature to infer any particular level of impact from application of those regulations because no development plan has even been generated for evaluation. Section 19.07.180 MICC includes opportunities to average required buffer widths and reduce buffer widths. [MICC 19.07.180(C)(4) and (C)(5)] The regulations also include a reasonable use exception provision which, theoretically, might possibly be of some avail. [MICC 19.07.140]
5. The Department's CAR 1 determination must be sustained and the Cook Trust's appeal denied.
6. 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, and the testimony and evidence submitted at the open record hearing, the Examiner **SUSTAINS** the Critical Area Review 1 issued under file number CAO20-004.

Decision issued May 5, 2021.

*/s/ John E. Galt*

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John E. Galt  
Hearing Examiner

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<sup>6</sup> The preponderance test merely requires that a fact at issue be shown by evidence to be more probably true than not. [*Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962)] "Proof ... by a preponderance of the evidence merely means the greater weight of the evidence. *State v. Harris*, 74 Wash. 60, 64, 132 P. 735 (1913)." [*City of Spokane v. Beck*, 130 Wn. App. 481, 486 (2005)]

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**HEARING PARTICIPANTS <sup>7</sup>**

Eileen Keiffer, unsworn counsel  
Maureen Mayo  
Stewart Reinbold  
Robin Proebsting

Kristen Reid, unsworn counsel  
Scott Olmstead  
Patrick Togher

**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.

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<sup>7</sup> The official Parties of Record register is maintained by the City’s Hearing Clerk.

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### **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]

<p>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.”</p>
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