

CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

9611 SE 36TH STREET | MERCER ISLAND, WA 98040

PHONE: 206.275.7605 | www.mercergov.org



CITY USE ONLY

PROJECT#

APPEAL#

FEE

Date Received:

Received By:

APPEAL

Name Trustees of the Carol Ann Cook Revocable Living Trust c/o Kristen Reid, Belcher Swanson Law Firm PLLC

Address 900 Dupont Street, Bellingham, WA 98225

Phone (360) 360-2168

Email kristen@belcherswanson.com

What is the decision that you are appealing? Include any applicable project file number.

CAO20-004 Notice of Decision dated February 19, 2021

What are your reasons for appealing this decision?


(You must indicate specifically that there were substantial errors, the decision is unsupported by the facts presented, the decision is in conflict with the standards for review of the action or there were irregularities in the procedure. Attachments or supporting information may be included.)

See attached Exhibit "A"

What is the outcome or changes in the decision that you are seeking?

See attached Exhibit "A"

Signature:


Kristen C. Reid, WSBA# 38723
Attorney for Appellant

Date:

3/3/21

EXHIBIT "A"

NOTICE OF APPEAL

7025 NORTH MERCER WAY - CRITICAL AREA REVIEW 1
(CA020-004)

TO THE CITY OF MERCER ISLAND HEARING EXAMINER:

Pursuant to Mercer Island City Code ("MICC") Chapter 19.15, the undersigned files this Notice of Appeal on behalf of The Carol Ann Cook Revocable Living Trust ("Appellant"), as set forth below.

1. The action or decision appealed, including the date thereof:

The action being appealed is the Critical Area Review 1 Notice of Decision dated February 19, 2021 under CA020-004 ("Decision"). A copy of the Decision is attached.

2. The development code interpretation associated with the appeal:

MICC 19.07.010, 19.07.180, 19.15.130, 19.16.010.

3. Property that is the subject of the Appeal:

The property which is subject to the Decision is identified as 7025 North Mercer Way, Mercer Island, WA; King County Assessor's Tax Parcel No: 7355700191 (the "Property").

4. The name, address, and telephone number of the Appellant and their interest in the matter and Appellant's attorney:

The Appellant information is as follows:
The Carol Ann Cook Revocable Living Trust
c/o Maureen Mayo
3926 Forest Beach Drive NW
Gig Harbor, WA 98335
(360) 734-6390

The Appellant owns the Property in fee simple and has been harmed by the City's Decision as explained below.

The representing attorney information for the Appellant is as follows:

Kristen C. Reid
Belcher Swanson Law Firm, P.L.L.C.
900 Dupont Street
Bellingham, WA 98225
Direct (360) 360-2168
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kristen@belcherswanson.com

5. The Specific reasons why the Appellant believes the decision to be wrong:

Located directly west of the Property is an area the City has improperly designated as a “Type Ns” watercourse (“Feature A”). The Type Ns designation, in turn, requires a sixty (60) foot buffer and a ten (10) foot setback as set forth in MICC 19.07.180. This “Type Ns” designation requires a buffer and setback from Feature A that has significantly impaired development or redevelopment of the Property. This is despite the fact that Feature A is not located on the Property at all. The Property is already constrained by several “exceptional trees” as defined in MICC 19.16.010 that must be retained (see MICC 19.10.060). The Appellant has already suffered damages in the form of a lost sale of the Property due to this “Type Ns” designation.

The City’s definition of a “Type Ns” watercourse requires that it be “physically connected by an aboveground channel system to Type S, F, or Np waters.” However, Feature A flows north into an 18-inch concrete pipe located approximately ten (10) feet below North Mercer Way that the City has designated as a “Piped Watercourse.” The pipe continues north for approximately 400 feet, discharging into Lake Washington. At no point is the pipe “aboveground.” Since Feature A is not physically connected to an aboveground channel system it does not meet the definition of a Type Ns watercourse.

Words used in statutes and ordinances are to be given their ordinary and plain meaning in the absence of the use of defined terms. If the language is clear, a court may not look beyond that language to other sources. Interpretation of a statute or ordinance should not render any term meaningless or superfluous. Here, “aboveground” is not a defined term in the MICC. Therefore, its ordinary and plain meaning is to be used. The definition of “aboveground” is obvious – Webster’s 3rd New International Dictionary defines it as “located on or above the surface of the ground.” The pipe that Feature A is connected to is below the ground so it is not “aboveground.” The City’s interpretation of “aboveground” leads to an absurd result. It is presumed the legislature intended the words used and the City’s interpretation obfuscates that intent.

In the alternative, in the event the Hearing Examiner looks outside of the plain meaning of the words used, it is important to note the City’s designation of the “piped watercourse” is incorrect as well. A “piped watercourse” specifically does not include “storm water runoff devices.” This pipe is listed as part of the “storm utilities” on the City’s GIS portal and shows several City owned catch basins leading into the pipe. Therefore, the pipe is not a “piped watercourse” because it is clearly part of the City’s “storm water runoff devices.”

Finally, the Hearing Examiner is charged with interpreting ordinances in a way that preserves the Appellant’s constitutional rights. The City’s interpretation of the definition of a “Type Ns” watercourse is not proportionate to the impacts of any redevelopment of the Property within the buffer and setback. For this reason, the City’s interpretation results in an unconstitutional taking.

6. Desired Outcome or Change to Decision Requested.


The Appellant respectfully requests the Hearing Examiner find the Feature A is not a “Type Ns”

watercourse.

The Appellant reserves the right to amend this Notice of Appeal as well as brief and argue additional legal issues not raised herein.

DATED this 3 day of March 2021.

BELCHER SWANSON LAW FIRM, PLLC



Kristen C. Reid, WSBA # 38723

Attorney for Appellant, The Carol Ann Cook Revocable Living Trust



CITY OF MERCER ISLAND

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February 19, 2021

Kristen C. Reid
Belcher Swanson
900 Dupont St
Bellingham WA 98225
Via email

RE: CAO20-004 Notice of Decision (7025 North Mercer Way Critical Area Review 1)

Dear Ms. Reid,

Thank you for your Critical Area Review 1 (CAR 1) application submitted November 18, 2020, and Mayo Property Watercourse Assessment Memorandum submitted December 28, 2020. In your application, you requested that the City of Mercer Island provide verification of whether a Type Ns watercourse was present on the property directly to the west of the property addressed as 7025 North Mercer Way. As you are aware, the definition of "Type Ns watercourse" is found in the Mercer Island City Code (MICC) Chapter 19.16.

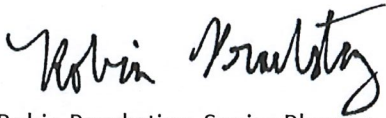
Based on review of the information submitted in support of this application, the City has found that the feature in question does meet the definition of a Type Ns watercourse. As documented in the third-party review memo included as Attachment 1, the feature shows indicators of an active channel and does not meet the definition of Type S, F, or Np waters, and its features instead support the presence of a Type Ns watercourse. That the feature flows into a pipe downstream does not cause the feature to be excluded from the definition of Type Ns watercourse because piped watercourses are considered part of the aboveground channel system. (In a contrasting example, a feature that infiltrated into the ground before reaching Lake Washington would *not* be considered a watercourse, because infiltration would exclude the feature from being connected by an aboveground channel system).

CAR 1 applications are a Type I land use review, which are appealable to the City's Hearing Examiner, pursuant to MICC 19.15.030 Table B. To file an appeal, please submit the information required by MICC 19.15.130(D) within 14 days of this letter, pursuant to MICC 19.15.130(B). Mercer Island City Hall remains closed due to the COVID-19 pandemic; to submit appeal materials please mail them to the address above, attn: City Clerk, or make an appointment via email with the City Clerk to deliver it materials. The City Clerk can be reached at deb.estrada@mercerisland.gov.

As noted in previous correspondence, please recall that this CAR 1 review does not provide any vested rights or entitlements different from or in excess of those provided by the MICC or Washington State

law (either in scope or duration). It does not replace any other necessary land use review approvals, such as but not limited to, building permits. This CAR 1 review does not guarantee that any particular project is feasible or permissible on the property subject to the CAR 1 review or that the subject property is suitable for any particular use. Nothing in this CAR 1 review constitutes legal advice; applicants are advised to consult with legal advisors such as yourself as to laws, regulations, and decision criteria applicable to any proposed project and/or use of the subject property.

Sincerely,

A handwritten signature in black ink that reads "Robin Proebsting". The signature is written in a cursive, flowing style.

Robin Proebsting, Senior Planner
City of Mercer Island Community Planning and Development
robin.proebsting@mercerisland.gov
(206) 275-7717

Attachments:

1. Memorandum prepared by Scott Olmsted and Rachelle Tews, ESA, dated February 18, 2021



5309 Shilshole Avenue NW
Suite 200
Seattle, WA 98107
206.789.9658 phone
206.789.9684 fax

Attachment 1 sassoc.com

memorandum

date February 18, 2021

to Robin Proebsting, Senior Planner, City of Mercer Island

from Scott Olmsted, Senior Ecologist
Rachelle Tews, Ecologist

subject 7025 North Mercer Way (Parcel #735570-0191) Critical Areas Evaluation (CAO20-004); Third Party Review

Environmental Science Associates (ESA) prepared this memorandum on behalf of the City of Mercer Island (City) to provide third-party review of the *Mayo Property Watercourse Assessment Memorandum* (Memo) prepared by PBS Engineering and Environment (PBS), dated December 28, 2020. The Memo addresses site conditions west of 7025 North Mercer Way (Parcel #735570-0191). The property owner intends to sell the parcel and was informed the watercourse buffer may constrain future development and the property's value.

The purpose of this review memorandum is to verify the accuracy of the findings within the Memo and determine whether the Memo is consistent with the Mercer Island City Code's (MICC) environmental regulations for critical areas, specifically watercourses in MICC 19.07.180.

Document Review

In addition to the Memo, ESA reviewed information available in the public domain including:

- Washington Department of Fish and Wildlife web-mapping tools (Priority Habitats and Species mapping and Salmonscape)
- King County GIS mapping website (iMap)
- City of Mercer Island Information and Geographic Services online Mapping Portal (IGS)

Salmonscape and iMap do not depict a stream adjacent to the subject property. However, a 1936 aerial image on iMap shows a vegetated corridor along the entire reach of the watercourse alignment, and hill shade and topographic maps indicates the presence of a linear depression in the same footprint. This imagery indicates the likely presence of an aboveground stream before the area was redeveloped. The City's IGS indicates the presence of a Type Ns (Non-Fish Seasonal) watercourse that originates on Parcel #735570-0235. From here, the watercourse flows north through Parcels #735570-0220, 735570-0210, and 7355700200 before discharging to an 18-inch concrete pipe located under North Mercer Way. The watercourse then continues to flow north in the pipe until it discharges into Lake Washington. The

City's IGS both the Type Ns section and piped watercourse section on the Environmental and Stormwater Utilities data layers.

According to the Memo submitted by PBS, the portion of watercourse (referred to as Feature A) located south of North Mercer Way exhibits all three primary indicators of an "active channel," as termed in the Memo, and is consistent with the ordinary high water mark (OHWM) of a non-perennial stream in the region. The Memo states that while the open channel of Feature A satisfies the flow requirements of a Type Ns watercourse as described in MICC 19.16.010, the piped portion of the drainage feature beneath North Mercer Way and continuing to the north does not constitute an aboveground channel system that connects it to Lake Washington, and as a result, the Memo concludes that the watercourse does not satisfy the City of Mercer Island's definition of a Type Ns watercourse.

Review of Site Conditions

ESA ecologist Rachelle Tews conducted a site visit on January 8, 2021. The visit included a visual observation of existing site conditions from the public right-of-way specifically focused on Feature A.

At the time of the site visit, Feature A was visible on Parcel #735570-0210 (1818 70th Avenue SE) and continued north across Parcel #735570-0200 (1804 70th Avenue SE). From here, Feature A flows north into the 18-inch concrete pipe located under North Mercer Way. This pipe continues north for approximately 400 feet to its outfall at Lake Washington. While the discharge point into Lake Washington was not visually confirmed due to lack of access, its location coincides with the mapped feature shown on the City's IGS Stormwater Utilities data layer. About one inch of water was present in Feature A at the time of the site visit. There were also overland flow and stormwater pipes directing residential runoff into Feature A south of the roadway.

All three primary indicators of an "active channel" described in the memo were observed: a break in slope south of North Mercer way, changes in sediment character, and changes in vegetation. In the channel, there was evidence of scour and silt deposits.

Mercer Island Watercourses

Definition of Watercourse

Section 19.16.010 of MICC defines a watercourse as:

"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."

By this definition, Feature A meets the criteria for a watercourse: it has a channel with a defined bed and bank, intermittent to seasonal surface water, and flows from higher to lower elevation.

Definition of Type Ns Watercourse

MICC 19.16.010 defines a Type Ns water as follows:

“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.”

Feature A conveys natural waters and does not meet the definition of Type S, F, or Np waters. The watercourse flows seasonally, likely does not provide fish habitat, and is not located downstream of a Type Np water. Mercer Island City Code states a Type Ns water must also be physically connected to another water by an “aboveground channel system.” ESA understands this section of code to mean that Type Ns watercourses do not drain naturally into subsurface soils. This understanding has been further supported by a separate communication with Larry Fisher, WDFW Area Habitat Biologist (personal communication February 4, 2021). Mr. Fisher confirmed that WDFW would still regulate the watercourse as a stream because the pipe is an approved conveyance system and the stream flow does not naturally infiltrate subsurface. Therefore, a piped segment of watercourse would still be considered an aboveground channel system and the open channel segment of Feature A would be regulated as a Type Ns watercourse.

Separately, MICC defines a piped watercourse under MICC 19.16.010 as:

“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.”

The City regulates piped watercourses under this definition and development near them under MICC 19.07.180.C.6. The regulation supports ESA’s understanding that City code does not exclude channels upgradient of pipes from regulation as a particular type of watercourse if those segments meet the applicable definition of the applicable type of watercourse consistent with the direction from WDFW.

Recommendation

Due to the presence of an open channel segment of watercourse upgradient of a piped watercourse and our understanding of Type Ns watercourses as defined in MICC 19.16.010 and supporting communication with WDFW, ESA recommends the open water segment of Feature A be regulated as a Type Ns watercourse.