

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

DECISION after a REMAND HEARING

FILE NUMBERS: CAO15-001 & VAR18-002

APPLICANT: MI Treehouse, LLC
ATTN: Bill Summers
P.O. Box 261
Medina, WA 98039

TYPE OF CASE: Consolidated: 1) Critical Areas Reasonable Use Exception to construct a single-family residence and associated improvements within a regulated wetland and required wetland and stream buffers; and 2) Variance from the setback requirement from an access easement

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: GRANT subject to conditions

DATE OF DECISION: December 15, 2021

INTRODUCTION ¹

This case is again before the current Mercer Island Hearing Examiner (“Examiner”) following a Remand Decision issued August 7, 2020 (the “2020 Remand”). (Exhibit 79 ²) MI Treehouse, LLC (“Summers”) seeks two land use approvals from the City: 1) a Critical Areas Reasonable Use Exception (“RUE”) from the provisions of Chapter 19.07 Mercer Island City Code (“MICC”), Environment, to construct a single-family residence and associated improvements within a regulated wetland and required wetland and stream buffers; and 2) a Variance from the provisions of MICC 19.02.020(H)(1) to reduce the required setback from an access easement from five (5) to two (2) feet.

The subject property is located at 5637 East Mercer Way. Its Assessor’s Parcel Number is 1924059312 (“Parcel 9312”). (Exhibit 2)

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 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. Most of the Exhibits were filed electronically as PDF documents; the remainder were converted to PDF documents post-hearing. Specific page citations will use PDF page numbers, not any page numbers that might be on the original document. 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.

On February 13, 2017, the City's then-Hearing Examiner, Ryan Vancil ("Examiner Vancil"), held a predecision open record hearing to consider the RUE (the "2017 Hearing"). On March 8, 2017, Examiner Vancil issued a Decision to Remand the application to the City for further review and action (the "2017 Remand"). (Exhibits 7; 36).

Summers filed the Variance application on May 8, 2018. (Exhibits 37; 47)

On July 20, 2020, the Examiner held a remote, consolidated predecision open record hearing pursuant to MICC 3.40.060 (the "2020 Hearing"). On August 7, 2020, the Examiner issued a Decision to Remand the application to the City for further review and action (the "2020 Remand"). (Exhibits 53; 79)³

On December 2, 2021, the Examiner held a remote, consolidated predecision open record hearing pursuant to MICC 3.40.060 (the "2021 Hearing"). The Mercer Island Department of Community Planning & Development ("CP&D") gave notice of the hearing as required by the MICC. (Exhibit 91)

All exhibits from the 2017 and 2020 Hearings were entered into the record of the 2021 Hearing. In addition, Exhibits 79 – 97, as enumerated in the City's on-line "mieplan" file for this case, were entered into the hearing record during the hearing.

The City has the record copy of all entered exhibits.

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. This 2021 Decision builds upon the 2020 Remand. Every reasonable effort has been made to not repeat the Findings of Fact contained in the 2020 Remand. The 2020 Remand Findings of Fact are incorporated by reference as if set forth in full, subject to correction, augmentation, and/or supplementation contained in the Findings of Fact in this Decision. The same acronyms and shorthand references used in the 2020 Remand are used herein.
2. The first two Conclusions of Law in the 2020 Remand were:
 1. The facts in evidence, as summarized in the Findings of Fact, above, demonstrate without question that an RUE is appropriate for this site. Parcel 9312 is entirely encumbered by a wetland and its required buffer, two streams and their required buffers, and/or steep slopes and their required

³ A more detailed exposition of the chronology of the case will be found in Exhibit 79, PDF 1 – 3.

buffers. No reasonable use can be made of Parcel 9312 without some degree of relief from the MICC's critical areas regulations.

2. The question is whether Summers' current proposal meets the criteria required for approval of an RUE. To answer that question one must have accurate information: One cannot determine criteria compliance when the plans are unreliable and the impacts on adjacent properties have not been properly considered. The Summers' application, as presently constituted, suffers from both deficiencies.

(Exhibit 79, PDF 16 & 17) This Decision begins with identification of the information deficiencies identified in the 2020 Remand and the current status of each.

3. 2020 Deficiency: The western boundary of Parcel 9312 was incorrectly drawn on Exhibit 38, the proposed site plan under consideration during the 2020 Hearing. (Exhibit 79, Findings of Fact 1 & 6; Conclusion of Law 4)

2021 Finding: The current site plan (Exhibit 87b) is based on a revised survey prepared and stamped by a licensed land surveyor (Exhibit 80f). The western boundary as drawn on both matches the legal description of the property. The deficiency has been corrected.

4. 2020 Deficiency: Off-site steep slopes to the north and west were not depicted on Exhibit 38. (Exhibit 79, Finding of Fact 8, ¶ 2; Conclusions of Law 4 & 6)

2021 Finding: Summers' surveyor and engineering consultant have mapped as much of the western off-site steep slopes as they could without trespassing on the lots to the west.⁴ (Exhibits 80f & 87b) The deficiency has been corrected.

5. 2020 Deficiency: Summers had not provided an adequate analysis of the steep slopes which border the north and west sides of Parcel 9312. Evidence of their stability was needed. (Exhibit 79, Finding of Fact 10, ¶ 3; Conclusion of Law 7)

2021 Finding: Finding of Fact 10 in the 2020 Remand quite adequately summarized the soil conditions within Parcel 9312. The Finding did not summarize the then available information regarding the steep slopes surrounding the basin portion of Parcel 9312.

⁴ The record indicates a disagreement between Summers' representatives and at least some of the owners of the western lots regarding access and the conditions for access to the steep slopes on the owners' lots. Some owners felt that Summers' agents were only interested in a superficial exploration of the slope; the owners wanted the City to hire and pay for a consultant to perform an in-depth analysis of the slope. (Exhibits 92, PDF 7 - 9; 96a; 96b; and testimony) The City does not perform or pay for basic site investigations for applicants. If the City does not have a qualified expert in an applicable topic area on its staff, it may contract with a qualified consultant to review an applicant's work on behalf of the City. The access terms requested by the owners were not acceptable to Summers or the City. The slope information in the record is the best available under the conditions here present.

Borings done on-site prior to the 2020 Hearing revealed that the on-site basin consists of loose, sandy outwash materials overlying dense, compacted silts (glacial till). (Exhibit 10c, PDF 1, 2, & 9) Regional geological maps indicate that the area exhibits outwash materials overlying extremely dense, impermeable silt deposits (glacial till). The borings confirm the regional geological maps. Seeps were commonly found at the contact plane between the two different formations. (Exhibit 10a, PDF 9 & 10) No evidence of any landslide activity was observed between 1999 and 2015. (Exhibit 10a, PDF 10 & 11)

In November, 2020, Summers retained Geotech Consultants, Inc. (“Geotech”) to perform an evaluation of the conditions on the steep western slopes. Geotech visited the site on November 3, 2020.

It was not necessary for us to cross onto the adjacent western and southwestern properties to observe the conditions on the slope. We could assess the slope conditions from the western property line of the Mercer Island Treehouse property, and from the trail in the adjacent northern Parkwood Ridge Open Space. The steep slopes rising to the west and southwest from the building site on the Mercer Island Treehouse property are 90 to 100 feet in height. Based on available topographic information from the Boundary and Topographic Survey, and our on-site measurements with a hand-held clinometer, the steep slopes within the property boundaries are inclined at approximately 50 percent. However, the heavily-treed, steeper slope to the west southwest is inclined at 65 to 75 percent. The slopes to the west and southwest of the site are heavily treed with large evergreen trees. We were able to observe the steep slope west and southwest of the site over its full height. Based on anecdotal information provided, and review of the Mercer Island Landslide Hazard Assessment, there has been previous landsliding behind the adjacent western homes, likely near the top of the steep slope. There were no obvious indications of recent instability that we could observe. While deciduous trees on the slope displayed their typical curved trunks, there were no signs that this curvature was related to slope movement. The evergreen trees, which will typically grow with straight trunks, did not display the multiple curves in their trunks that would be indicative of deeper slope movement. In fact, there are some very large evergreen trees on the slope that have no curvature to their trunks at all. We did observe some of the typical “pistol butting” of the base of some of the trees. This is typical on steep slopes, where seedlings can be tipped sideways by shallow soil creep, falling branches, etc. before they are bigger and deeply rooted. This causes a curve or “pistol butt” in the base of the trunk, while the remainder of the evergreen tree then grows straight upward. We also saw stumps of old growth evergreen trees in, and around, the planned development area, a further testament to the deep stability of the area. It is important to realize that the soil conditions comprising the steep slopes rising to the west and southwest of the site are substantially different, and more stable, than those found in the development area in the base of the ravine. The geologic mapping found on the Geologic Information Portal confirms that the upland area along Southeast 57th Street, as well as the steep slopes below the homes on that street, is underlain by

Glacial Till. This soil is a glacially compressed mixture of gravel, silt, and fine-grained sand. It is cemented, and is often referred to as hardpan. Glacial Till has a very high internal strength, often allowing tall vertical banks to stand for many, many years with only limited spalling off the face of the bank. This is evident throughout the Pacific Northwest not only in marine bluffs, but also in manmade excavations, such as those made for roads. Our observation of the conditions on the steep slopes extending west and south of the development site showed established underbrush and numerous mature trees on the slopes. Glacial Till soils are not susceptible to deep-seated instability, even on the steeply-inclined natural slopes around the site.

(Exhibit 80g, PDF 3)

6. 2020 Deficiency: The 2015 critical areas report and site plan used an outdated stream typing system and depicted incorrect stream buffer widths. (Exhibit 79, Findings of Fact 12, 14, & 36)

2021 Finding: The Revised 2015 Critical Areas Report stated that the two on-site streams were Type 2 requiring a 50-foot buffer under MICC regulations. (Exhibit 80c, PDF 7) The City had amended its critical areas regulations in 2019. The correct nomenclature for the two on-site streams is Type Np, as acknowledged by Summers' environmental consultant ("Sewall") during the 2020 Hearing. (Exhibit 79, Finding of Fact 14) Under current MICC regulations, Type Np streams require a 60-foot buffer. (Exhibit 79, Finding of Fact 36)

Sewall prepared a Revised Critical Areas Report in January, 2021. (Exhibit 80c) The Revised report still identified the two on-site streams as Type 2 requiring a 50-foot buffer. (Exhibit 80c, PDF 7 & 8)

The current site plan does not depict any regulatory stream buffer, neither the correct 60-foot buffer nor the incorrect 50-foot buffer. (Exhibit 87b)

7. 2020 Deficiency: An outdated wetland rating system had been used. (Exhibit 79, Finding of Fact 14)

2021 Finding: The wetland rating has been updated to be consistent with the 2014 Department of Ecology Wetland Rating System. The "wetland scored a total of 16 points with 5 for habitat. This indicates a Category III wetland. According to City of Mercer Island Municipal Code (MIMC) [sic] Chapter 19.07.080.C.1, [sic] Category III wetlands have a 60' standard buffer." (Exhibit 80c, PDF 7) The deficiency has been corrected.

8. 2020 Deficiency: The location and length of Stream B was inconsistently depicted on submitted plans. (Exhibit 79, Finding of Fact 15; Conclusion of Law 4)

2021 Finding: Sewall flagged Stream 2's right bank⁵ ordinary high water mark ("OHWM"). Summers' surveyor shot the flag locations and Summers' engineers placed them on the site plan. (Exhibits 80c; 87b; and testimony) The deficiency has been corrected.

Seeps flow from the area of the base of the western steep slope; at least some of them form the headwaters of Stream 2. (Exhibit 95, PDF 2 & 3) Those seeps have not been mapped as they do not meet the definition of a stream. (Testimony) The deficiency has been corrected.

9. 2020 Deficiency: The Fir tree required by the 1977 short subdivision to be preserved was not identifiable on the proposed site plan. (Exhibit 79, Finding of Fact 19; Conclusion of Law 4)

2021 Finding: The 1977 short subdivision required preservation of a 24" Fir tree. Over 40 years has passed since that short subdivision condition was imposed. It is reasonable to expect that the Fir tree, if still standing, would be significantly larger than it was in 1977. Summers' professional arborist has evaluated the trees in the area described on the short plat as the location of the 24" Fir and has identified a 41" Fir which he believes to be the subject tree. No other tree in that part of Parcel 9312 comes close to being a likely candidate. The 41" Fir is located about 19 feet north of the existing paved driveway serving the Stivelman Lot. Given the presumed age of that driveway, the arborist is quite confident that the 41" Fir will not be harmed by construction of the driveway to serve the new house provided that reasonable protective measures, as recommended by the arborist, are employed. (Exhibits 85; 87b) The deficiency has been corrected.

10. 2020 Deficiency: A 1978 side sewer easement was missing from the site plan. (Exhibit 79, Findings of Fact 20 & 46)

2021 Finding: Further research indicates that the side sewer easement belongs on another short plat done at about the same time by the same developer. Summers' surveyor is convinced that there is no side sewer easement encumbering Parcel 9312. (Exhibit 87c) Based upon the evidence in the record, the Examiner accepts the surveyor's conclusion as accurate: Parcel 9312 is not encumbered by a side sewer easement. The deficiency has been corrected.

11. 2020 Deficiency: A 2007 Stormwater/Utility/Trail easement was missing from the site plan. (Exhibit 789, Findings of Fact 25 & 46)

2021 Finding: The easement, which runs along the north edge of Parcel 9312, has been included on the proposed site plan. The proposed development does not intrude into the easement. (Exhibit 87b) The deficiency has been corrected.

12. 2020 Deficiency: The site plan did not depict the required buffers from the toe of the steep slopes. (Exhibit 79, Finding of Fact 35; Conclusion of Law 6)

⁵ Stream/river banks are labelled from the perspective of a person looking downstream. The "right bank" of Stream 2 is its south bank.

2021 Finding: The regulated steep slope and required buffer is depicted on the current site plan for the on- and off-site steep slope along the north edge of Parcel 9312, for the on- and off-site steep slope in the northwest corner of Parcel 9312, and for the on- and off-site steep slope in the southwest corner and along the south edge of Parcel 9312. (Exhibit 87b) It would appear that a regulated off-site steep slope exists west of the middle segment of the west property line. (No regulated steep slope exists on-site in that area.) No boundary of the off-site regulated steep slope or required buffer (off- and on-site) is depicted in that area. Given the terrain visible on Exhibit 87b, the required buffer from an off-site steep slope in that area would intrude onto Parcel 9312 but not into the proposed development area – the development area is too far to the east.

13. 2020 Deficiency: The site plan did not fully comply with the December, 2018 Plan Set Guide requirements. (Exhibit 79, Finding of Fact 46; Conclusions of Law 4 & 8)

2021 Finding: The 2018 Plan Set Guide did not apply to any plans submitted prior to its adoption, but since neither an RUE nor a Variance application enjoy any vested rights, the Guide does apply to new or revised plans submitted subsequent to its adoption. The deficiencies enumerated in Conclusion of Law 4 have been corrected on Exhibit 87b.

Conclusion of Law 8 makes a statement that is misleading because of an error of omission. The Conclusion ended with the following one sentence paragraph:

Therefore, the submittal requirements which were promulgated after both the RUE and the Variance applications were filed and accepted by the City are not applicable.

(Exhibit 79, Conclusion of Law 8, ¶ 4; footnote omitted) The Examiner should have said:

Therefore, the submittal requirements which were promulgated after both the RUE and the Variance applications were filed and accepted by the City are not applicable to the plans filed before adoption of the submittal requirements, but are applicable to all revised plans filed after their adoption.

Summers and his consultants apparently understood what the Examiner meant because, with the exception of the depiction of contours at least 50 feet beyond the property boundary, Exhibit 87b contains the required elements.

14. 2020 Deficiency: The proposed site plan contained errors in its legend. (Exhibit 79, Conclusion of Law 4)

2021 Finding: The legend errors have been corrected in Exhibit 87b. The deficiency has been corrected.

15. The currently proposed RUE site plan (Exhibit 87b) has been changed from the RUE site plan that was before the Examiner during the 2020 Hearing (Exhibit 38). Many of the changes would be hard to describe in text. In general, the proposed residence has been rotated slightly counterclockwise and

shifted south and east; the house is slightly longer and narrower; the main entrance has been shifted from the south side to the east side; the floor elevations have been increased; the construction limits have been tightened (by proposing to use soldier pile retaining walls during construction to minimize site disturbance); the deck has been reduced in size; the house will be no closer to the Stream 2 right bank OHWM than 10 feet.

The following table provides a comparison of many of the plan elements that can be expressed as numbers.⁶

| Item | Exhibit 38 | Exhibit 87b |
|---|------------|-------------|
| Impervious area | 3,710 SF | 3,739 SF |
| Building footprint | 1,631 SF | 1,652 SF |
| Maximum house dimension: N – S | ≈ 43' | ≈ 36' |
| Maximum house dimension: E - W | ≈ 50' | ≈ 55' |
| Driveway area | 1,560 SF | |
| Garage floor elevation | 179.5' | 184' |
| First floor elevation | 189.5' | 194.8' |
| Setbacks (all measured at right angles to property lines) | | |
| Southeast corner of building | ≈ 42' | ≈ 37' |
| Southwest corner of building | ≈ 61' | ≈ 52' |
| Closest point to East Mercer Way | ≈ 83' | ≈ 80' |
| Retaining wall heights | | |
| Driveway – North side (fill) | 2' – 6' | 1' – 4' |
| Driveway – South side (cut) | | 0.2 – 10' |
| Deck width – North side of house | ≈ 18' | ≈ 4' |
| Trees to be removed | 13 | 10 |

16. Mercer Island’s State Environmental Policy Act (“SEPA”) Responsible Official issued a Mitigated Determination of Nonsignificance (“MDNS”) on January 13, 2020. (Exhibit 46) The MDNS was not appealed. The MDNS contained four mitigation measures:

Applicant Proposed Mitigation:

1. The proposed house, driveway, and associated construction work (e.g. grading, retaining walls, drainage improvements, etc.) shall be constructed as reflected in the Healey Alliance Site Plan received on November 13, 2019;
2. Prior to building permit issuance, the applicant shall submit plans reflecting the proposed Additional Best Management Practices (BMPs) in the Core Design Memo, dated March 23, 2018. All proposed BMPs shall be implemented during site construction;

⁶ Numbers shown as approximate (“≈”) had to be interpolated from the plans. The Examiner had access only to on-line plans which the Examiner could not print at their original scales.

Additional Mitigation:

3. Prior to building permit issuance, the applicant shall have a qualified professional, in consultation with a hydrologist, update the proposed wetland, wetland buffer, and watercourse buffer impacts to identify the extent of any impacts related to the final design of the drainage system. Proposed mitigation plans shall be updated and subject to City review and approval to mitigate for all identified impacts; and,
4. Prior to building permit issuance, the applicant shall provide an updated Statement of Risk that identifies mitigation for all geologically hazardous areas on- and off-site, including the erosion hazard area. Proposed mitigation measures shall be reviewed and approved by the City

(Exhibit 46, PDF 2; underlining in original) The site plan cited in Mitigation Measure 1 is Exhibit 38, not Exhibit 87b, the current site plan. The CORE Design memorandum cited in Mitigation Measure 2 is Exhibit 50a. The BMPs listed in that memorandum do not conflict with the current plans.

17. Gordon Ahalt (“Gordon”), David Anderson (“David”), and Peter Anderson (“Peter”), participants in the prior hearings, participated in the 2021 proceedings.⁷ Gordon resides at 9204 SE 57th Street (Exhibit 6a); his lot abuts the northern end of Parcel 9312’s west property line (Exhibit 48). David resides at 9200 SE 57th Street (Exhibit 94); his lot abuts the west side of Gordon’s lot and does not abut Parcel 9312 (Exhibit 48). Peter used to reside at 9200 SE 57th Street (Exhibit 6b), but has subsequently sold the property to David and currently holds a mortgage on the property. (Testimony)

Gordon, David, and Peter share similar concerns. Simply put, they do not believe that Summers has sufficiently proven that development of the proposed residence can be done safely. David and Peter assert that: 1) Summers has failed to show that he would suffer an economic loss were the RUE denied; 2) Summers has not provided a geotechnical analysis of “down current properties,” by which they mean properties located downslope of the site on the east side of East Mercer Way; 3) Summers has not shown that the proposed amount of site disturbance is the minimum necessary for a reasonable use; 4) the wetlands will be drained; 5) the steep slope analysis is inadequate; 6) the conditions recommended by Planning are inadequate and inconsistent; and 7) the City improperly contracted out preparation of the Staff Report to ESA, creating a conflict of interest. (Exhibit 92) David also asserts that required plan elements are missing. (Exhibit 94)

Gordon shares most of the same concerns. In addition, he asserts that: The lack of a critical area fencing requirement means that future residents will harm/destroy the remaining wetlands; there are problems with the proposed wetland monitoring plan; the size of the detention pipe is shown differently on the proposed RUE site plan (Exhibit 87b) and the submitted building permit plans (Exhibit 84). (Exhibits 95a; 95b)

⁷ The Examiner would not normally address participants by first name. Here, two of the three have the same last name. In order to distinguish among them and to treat all equally, the Examiner will use first names. No disrespect is intended.

18. One of the “down current” owners (“Blohm”) submitted a statement in opposition. The stream runs adjacent to Blohm’s residence (after passing beneath East Mercer Way). Blohm says he has problems now with stream flow and fears more will follow development of Parcel 9312. (Exhibit 97)
19. One of Summers’ agents testified that the building permit plan set (Exhibit 84) was entered into the record of this proceeding for information only and that it is not intended to be the RUE site plan.
20. Planning recommends approval of the requested RUE and variance subject to eight conditions. (Exhibit 90, PDF 13 & 14) Recommended Condition A specifically incorporates Mitigation Measure 1 from the 2018 SEPA MDNS.
21. Any Conclusion of Law determined to be a Finding of Fact is herewith adopted as such.

LEGAL FRAMEWORK ⁸

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

Authority

Both RUEs and Variances are Type IV applications. 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

Reasonable Use Exceptions

The review criteria for RUE applications are set forth at MICC 19.07.140(A)(1) – (6):

- A. If the application of this chapter will deny all reasonable use of the owner's property, then the applicant may apply to the community planning and development department for an exception from the requirements of this chapter in accordance with the provisions for Type IV reviews in chapter 19.15. The hearing examiner may approve the application for a reasonable use exception only if the development proposal meets all of the following criteria:
 1. The application of this chapter would deny all reasonable use of the property;
 2. There is no other reasonable use with less impact on the critical area;
 3. Any alteration to critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property;

⁸ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

4. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;
5. The proposal is consistent with the purpose of this chapter and the public interest; and
6. The inability of the applicant to derive reasonable use of the property is not the result of actions by the current or prior property owner.

Variances

The review criteria for Variance applications are set forth at MICC 19.06.110(B)(2)(a) – (h):⁹

2. *Criteria.*

- 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;
- b. The variance is the minimum necessary to grant relief to the property owner;
- c. No use variance shall be allowed;
- 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;
- 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;
- f. The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property;
- g. The variance is consistent with the policies and provisions of the comprehensive plan and the development code;
- h. The basis for requesting the variance is not the direct result of a past action by the current or prior property owner; and

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)] “While it originated at common law, the vested rights doctrine is now statutory.” [*Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014)]

There is no state law establishing vesting for RUE or Variance applications.

⁹ Criterion (B)(2)(i) pertains solely to “Public and private schools, religious institutions, private clubs and public facilities in single-family zones with slopes of less than 15 percent” and has no relevance to the current application which is not seeking approval; of any of those named uses.

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 first sentence in MICC 19.15.170(B) lists the type of land use applications which are subject to and benefitted by Mercer Island's vesting regulations. Neither RUE applications nor Variance applications are listed in the first sentence.

Since RUE and Variance applications are not subject to vesting under either state law or local ordinance, neither application enjoys any vested rights.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [MICC 19.07.140(B); 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. The site plan that was before the Examiner during the 2020 Hearing (Exhibit 38) contained numerous errors. The current plan (Exhibit 87b) has corrected virtually all of those errors. The only short-falls can best be described as *de minimis*.¹⁰

The most significant of the short-falls is the absence of depiction of the toe-of-slope off-site to the west and of the toe-of-slope buffer on-site. The toe-of-slope line is shown for all on-site steep slopes; field work has been done to investigate those slopes. The toe-of-slope is not depicted for the off-site steep slope area to the west. Contours have been depicted as much as possible given the lack of access to that area.¹¹ The contours clearly show that the toe of the steep slope lies west of Parcel

¹⁰ "The de minimis doctrine allows a court to 'not care for, or take notice of, very small or trifling matters.' Black's Law Dictionary 388 (5th ed. 1979)." [*Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 786 P.2d 285 (1990)]

¹¹ The Examiner declines to fault Summers or the City for the stalemate over access to the off-site properties. Neighboring property owners have no right to dictate how project site work is to be accomplished. They could certainly challenge the results, but they cannot control how the investigation is done. They can deny access, but they can't tell the applicant what

9312 in the central section of the west property line where it is not depicted. Given that no development is proposed east of that area, the omission is *de minimis*. As to the buffer, it is intuitively clear that the steep slope buffers would most likely subsume the entirety of Parcel 9312.

2. Examiner Vancil clearly indicated in the 2017 Remand that the geotechnical evaluation had to consider off-site conditions and impacts. The MICC says the same thing. But the notion that steep slopes down slope and across East Mercer Way must be included in the analysis is without merit. The evidence shows beyond any reasonable doubt that the proposed work will not affect the down-hill slopes across the street.
3. The Examiner has no authority to render a legal interpretation of the content of the O'Sullivan Drainage Easement. Legal interpretation of such documents lies within the purview of the court system.

Nothing in Summers' proposal seeks exemption from any stormwater management regulations. Development of Parcel 9312 will have to comply with all applicable stormwater management regulations. Nothing in this record indicates that applicable stormwater management regulations cannot be met. Therefore, those regulations are not relevant to the analysis of either the RUE or the Variance.

4. The MICC definition of "reasonable use" includes mention of "economic loss":

Reasonable use: A legal concept that has been and will be articulated by federal and state courts in regulatory takings and substantive due process cases. The decisionmaker must balance the public's interests against the owner's interests by considering the nature of the harm the regulation is intended to prevent, the availability and effectiveness of alternative measures, the reasonable use of the property remaining to the owner and the economic loss borne by the owner. Public interest factors include the seriousness of the public problem, the extent to which the land involved contributes to the problem, the degree to which the regulation solves the problem, and the feasibility of less oppressive solutions. A reasonable use exception set forth in MICC19.07.140 balances the public interests against the regulation being unduly oppressive to the property owner.

[MICC 19.16.010, "Reasonable use"; italics in original, underlining added]

The opponents argue that since Summers ostensibly purchased Parcel 9312 for somewhere around \$32,000, he would not suffer a significant economic loss if he were not able to construct the proposed residence. Ignoring for the moment the substantial sums that Summers has likely expended since 2015 in consultant and attorney fees to get his application to this point, it would be wrong to

they want done. (The exception to this would be if an applicant wanted to dig up a neighbor's lot. The neighbor could most certainly reject any such /request by an applicant.)

say that he would suffer no economic loss. If nothing could be done with the parcel, at the very least his initial \$32,000 investment would be lost. No matter how one looks at it, that is an economic loss.

The opponents have suggested that the City or a group of neighbors could buy Parcel 9312 to preserve it as undeveloped property. The record of neither the 2020 Hearing nor the 2021 Hearing contains any evidence that the City or the neighbors have proposed purchase of Parcel 9312 from Summers. There has been plenty of time (about seven years) for such an offer to be made.

A fair consideration of economic loss (or economic profit) must consider the costs of development. As noted, Summers has had about seven years of consultant and attorney fees to get his application to this point. The Examiner has no idea what those costs amount to, but they must be considerable. Further, development of a residence on Parcel 9312 will be an expensive undertaking: Soldier pile retaining walls, pin pile foundation, very limited work area, special water control requirements, mitigation plantings and monitoring, etc. Getting a product on the market will be costly.

The Examiner concludes that simply balancing the initial purchase price against a hypothetical future sales price is not appropriate.

5. The Examiner does not agree that the City created any conflict of interest by contracting with ESA for both peer review work and Staff Report preparation. The ESA staff performing those functions were both working for Planning, not for Summers. If Mercer Island were a large enough city with a large enough budget, it would likely have its own specialists in a number of technical fields on staff. Such specialists might include wetland scientists, geotechnical engineers, etc. (The Examiner is personally familiar with one area city which had its own well-qualified wetland specialist on staff for many years.) In that case, a City staffer would perform the peer review and another city staffer would most likely prepare the Staff Report. There would be no conflict of interest because they both would be working for the City. There is no conflict of interest in the present case since both ESA staffers were working under the City's guidance.
6. The current proposal meets RUE Criterion (A)(1). Parcel 9312 is entirely encumbered by wetlands, steep slopes, wetland buffers, steep slope buffers, and/or stream buffers. Literal adherence to Chapter 19.07 MICC regulations would bar any development on Parcel 9312.
7. The current proposal meets RUE Criterion (A)(2). Parcel 9312 is zone R-15. Allowed uses in the R-15 zone, in addition to single-family residences, include public schools, group housing, transitional housing, day cares, and places of worship, as well as various park-type uses. [MICC 19.02.010] With the possible exception of low-intensity parks, none of those uses would have a lesser impact on the critical areas than would a single-family residence.¹² Even parks could easily have a greater impact as parking for users is often required. And further, a park is not an economically viable use for a private land owner.

¹² This criterion is not addressing the size of the use, just the type. Size consideration come later.

8. The current proposal meets RUE Criterion (A)(3). This is the criterion which considers the size of the proposed use. One could arguably build a 20' x 20' cabin on Parcel 9312 with less impact to the critical areas. But a 20' x 20' cabin would not be a reasonable use. Summers has adjusted the site plan to reduce the impact to a reasonable minimum. The Examiner accepts the development depicted by Exhibit 87b as reasonable with minimum impact to the critical areas. But in so doing, Exhibit 87b sets the upper limit of site disturbance allowed under this RUE.
9. The current proposal meets RUE Criterion (A)(4). The record has no evidence of any on-site threat to public health, safety, or welfare. The soldier pile retaining walls will stabilize the slope to the south and southwest during construction. The steep slopes further west and northwest are underlain by glacial till which is not susceptible to landslides. No development is proposed at the base of those slopes in any event. The record has no evidence that building the residence as proposed will adversely affect any steep slopes on the east side of East Mercer Way.
10. The current proposal meets RUE Criterion (A)(5). The words "this chapter" refer to Chapter 19.07 MICC. The purpose of Chapter 19.07 MICC is set forth at MICC 19.07.010:
 - A. To implement the goals and policies for the Growth Management Act, RCW Chapter 36.70A;
 - B. To maintain the functions and values of critical areas and enhance the quality of habitat to support the sustenance of native plants and animals;
 - C. To balance property owner interests with the public interest;
 - D. To promote biodiversity within critical areas and buffers by encouraging planting with mostly native vegetation;
 - E. To establish review criteria for land use reviews that maintain and improve the ecological health of wetlands, watercourses and Lake Washington;
 - F. To establish standards for new development that avoid increasing the risk of harm to people, property, and public infrastructure from natural hazards;
 - G. To protect the functions and values of fish and wildlife habitat conservation areas, including wetlands, watercourses and habitat for priority species and species of local importance, through the use of buffers;
 - H. To increase the safety of development within and adjacent to geologically hazardous areas through the use of buffers;
 - I. To require mitigation measures when unavoidable impacts to critical areas are proposed;
 - J. To establish tools to ensure that protection and mitigation measures are applied and maintain ecological value and function consistent with the provisions of this chapter;
 - K. To avoid impact to the critical areas where possible, and, if avoidance is not reasonably possible, minimize impacts to critical areas and buffers to the greatest extent feasible, and mitigate any remaining impacts;
 - L. To encourage the restoration of existing compromised critical areas; and
 - M. To minimize negative impacts from the built environment on the functions and values of critical areas.

In short: To protect critical areas wherever possible, minimize disturbance of critical areas where allowed, and mitigate for those impacts. Summers' current proposal is doing just that.

11. The current proposal meets RUE Criterion (A)(6). Summers had nothing to do with the existence of the overlapping critical areas and their buffers on Parcel 9312.
12. Minimization of impact to critical areas would generally outweigh adherence to a setback requirement from a private access easement, especially where the portion of the easement affected serves only the building for which the Variance is requested and would not affect the other user of the access easement.
13. The current proposal meets Variance Criterion (2)(a). If the required setback were implemented, the structure would have to be pushed three feet further west into the slope.
14. The current proposal meets Variance Criterion (2)(b). One could arguably build a 20' x 20' cabin on Parcel 9312 with less impact to the critical areas. But a 20' x 20' cabin would not be a reasonable use. Summers has adjusted the site plan to reduce the impact to a reasonable minimum. The Examiner accepts the development depicted by Exhibit 87b as reasonable with minimum impact to the critical areas. But in so doing, Exhibit 87b sets the upper limit of site disturbance allowed under this Variance.
15. The current proposal meets Variance Criterion (2)(c). This is not a use variance: The proposed use (single-family residence) is allowed under the applicable R-15 zoning.
16. The current proposal meets Variance Criterion (2)(d). The special circumstances are the steep slopes, slope wetlands, and streams which severely limit where a house could be built.
17. The current proposal meets Variance Criterion (2)(e). The record has no evidence of any on-site threat to public health, safety, or welfare. The soldier pile retaining walls will stabilize the slope to the south and southwest during construction. The steep slopes further west and northwest are underlain by glacial till which is not susceptible to landslides. No development is proposed at the base of those slopes in any event. The record has no evidence that building the residence as proposed will adversely affect any steep slopes on the east side of East Mercer Way.
18. The current proposal meets Variance Criterion (2)(f). A single-family residence on a ¾ acre lot will not be out of character with the surrounding area.
19. The current proposal meets Variance Criterion (2)(g). The proposed Variance will allow for the construction of a single-family residence, which is consistent with the zoning designation and land use policies related to the subject site. The proposed Variance also supports the reduction of impacts to onsite wetlands, watercourses, and associated buffers, which is also in the public interest.

20. The current proposal meets Variance Criterion (2)(h). Summers had nothing to do with the existence of the overlapping critical areas and their buffers on Parcel 9312. Nor did he have anything to do with the layout and size of the driveway easement created in the 1977 short subdivision.
21. The recommended conditions of approval as set forth in Exhibit 90 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. Recommended Condition B. This condition contains a direct conflict with recommended Condition 1. Mitigation Measure 1 requires that Exhibit 38 be the approved site development plan. But Exhibit 38 is, by everyone's agreement, an outdated plan. Exhibit 87b is the plan that is being approved. This conflict must be eliminated before engineering plans are approved, building permits are issued, and site development work begins. How that conflict is eliminated is within the purview of the City's SEPA Responsible Official, not the Examiner.
 - B. Recommended Condition F. David and Peter's objection to this recommended condition is well founded: It is rather vague, especially the "through some form of mitigation" clause. On the other hand, when crafting condition language for a circumstance that may never happen and whose nature cannot even be contemplated in the present, precise wording is unrealistic. As the mitigation plan indicates, the entire site (for all intents and purposes) is a wetland in a relatively undisturbed condition which does not need enhancement. As a practical reality, if additional mitigation were needed in the future, it would most likely have to be accomplished through purchase of wetland bank credits. The Examiner will tighten up the wording to some extent.
 - C. The Examiner concludes that critical area fencing is needed to ensure that the site will remain undisturbed after construction. The clearing limits shown on Exhibit 87b provide a logically defensible boundary: Everything beyond the clearing limits will be undisturbed critical areas and should remain so in order to minimize impact to the critical areas. Split rail or equivalent fencing will be required to be installed along the clearing limit line once construction has been completed.
 - D. The current mitigation plan (Exhibit 80d) needs to be included as an element of the approval.
22. 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:

- A. **GRANTS** the requested Reasonable Use Exception; and

B. **GRANTS** the requested Variance,

BOTH SUBJECT TO THE ATTACHED CONDITIONS.

Decision issued December 15, 2021.

/s/ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ¹³

Courtney Kaylor, unsworn counsel
Ed Sewall
Brian Gilles
Jeff Thomas
Gordon J. Ahalt

Michael Moody
Marc McGinnis
Claire Hoffman
Peter M. Anderson
Bio Park, unsworn City Attorney

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]

¹³ This list is for the 2021 Hearing only. The official Parties of Record register is maintained by the City’s Hearing Clerk.

HEARING EXAMINER DECISION after a REMAND HEARING

RE: CAO15-001 & VAR18-002 (MI Treehouse Consolidated Reasonable Use Exception and Zoning Variance)

December 15, 2021

Page 19 of 21

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
CAO15-001 & VAR18-002
MI TREEHOUSE, LLC

This consolidated Reasonable Use Exception and Variance 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:

- A. Except as otherwise required by the conditions of approval contained herein, construction of the proposed single-family dwelling, driveway access, and other site improvements shall be completed in substantial compliance with the Site Plan by Core Design, received August 2, 2021 (Exhibit 87b).

The Variance granted hereby is limited to reduction in the required setback between the proposed residence and the on-site driveway access easement from 5 feet to 2 feet as generally depicted on Exhibit 87b. No other variance is either expressed or implied.

Mitigation measures contained within the Critical Area Enhancement Plan, last updated December 2, 2020 (Exhibit 80d), shall be undertaken at the appropriate stage(s) of the project. All mitigation measures shall have been completed (except monitoring) before final inspection and approval for occupancy has been granted by the City; PROVIDED, that if completion of the residence does not align with the best planting season for enhancement plantings, a performance bond or assignment of funds may be posted to guarantee installation during the next appropriate planting season. The amount of the bond or assignment of funds shall be set by the City. The amount shall be 150% of the total stated in a Bond Quantity Worksheet.

- B. Prior to approval of any site development permits or initiation of any site development work, the mitigation measures in the SEPA MDNS issued January 13, 2020 (Exhibit 46) shall be revised through whatever procedure is legally available such that they do not conflict with the conditions imposed herein..
- C. The applicant is responsible for documenting any required changes in the project proposal due to conditions imposed by any applicable local, state, and federal government agencies.
- D. Prior to issuance of construction permits, authorizing site grading or other construction work, and pursuant to MICC 19.07.080, a financial guarantee, in the form of a bond or assignment of funds, shall be required to guarantee that approved mitigation plans will be undertaken and completed to the City's satisfaction. The amount shall be 150% of the total stated in a Bond Quantity Worksheet.
- E. Upon completion of the mitigation plantings, a letter written by a qualified professional detailing compliance with the approved mitigation plan shall be submitted to the City's Community Planning and Development Department. The compliance letter shall be accompanied by a set of as-built drawings depicting the type and location of mitigation plantings. A maintenance and monitoring

memo shall be submitted to the City's Community Planning and Development Department annually for a period of five years. Plant survival rates are to meet or exceed those set out in Exhibit 80d.

- F. The property owner shall conduct a wetland delineation five years after the project is completed to confirm that there is no net loss of wetland area or function. If there is a loss in wetland area or function, this loss shall be mitigated through purchase of credits in an approved wetland bank or on-site mitigation as approved by local, state, or federal regulators.
- G. Prior to issuance of construction permits, authorizing site grading or other construction work, the developer shall provide development plans, for City review and approval, reflecting additional temporary and erosion sediment control BMPs, as generally described in Exhibit 50a.
- H. Land clearing, grading, filling, and foundation work shall be prohibited between October 1 and April 1 (Exhibit 50a).
- I. Upon completion of construction and prior to final inspection and approval for occupancy by the City, the developer shall have installed a split rail or equivalent fence around the north, west, and south sides of the clearing limits as depicted on Exhibit 87b.

DEVELOPMENT REGULATION COMPLIANCE – DISCLOSURE

- 1. The applicant is responsible for obtaining any required permits or approvals from the appropriate Local, State, and Federal Agencies. The applicant is responsible for meeting the conditions are required by the agencies pursuant to MICC 19.07.030(B).
- 2. All required permits must be obtained prior to the commencement of construction.
- 3. The applicant shall abide by the work windows for listed species established by the U.S. Army Corps of Engineers and Washington Department of Fish and Wildlife.
- 4. Construction or substantial progress toward construction of a development for which a permit has been granted must be undertaken within two years after the approval of the permit or the permit shall terminate. The code official shall determine if substantial progress has been made. A single extension before the end of the time limit, with prior notice to parties of record, for up to one year, based on reasonable factors may be granted