

October 31, 2019

Evan Maxim
Community Planning & Development Director
City of Mercer Island Community Planning and Development
9611 SE 36th Street
Mercer Island, WA 98040

Re: Code Interpretation Request – Kiviat Residence

The Watershed Company Reference Number: 181125

Dear Evan:

This letter is intended to outline a formal code interpretation request. The request relates to a residential improvement project proposed by Aaron and Leigh Anne Kiviat to their existing home at 8147 West Mercer Way. The home is located entirely within the overlapping buffer of a nearby watercourse and wetland (the home is within less than 10 feet of the watercourse boundary). Due to the presence of the watercourse and wetland, the owners have proposed to expand their home upward in order to accommodate a need for additional space. That is, rather than expand the footprint of the home within the buffer, the owners have chosen to maintain the existing footprint and expand the home vertically. The Watershed Company has assisted the owners through the early design process, both with delineation of the wetland and watercourse features, and also with consultation and interpretation of the City's land use code. As part of this process, City staff has provided an informal interpretation of a specific land use code provision applicable to the proposed project. The project team has interpreted this same code provision differently. As such, we have prepared this code interpretation request to formally address this issue.

The specific code provision in question is Mercer Island City Code (MICC) 19.07.130.A. This section of the code states (**emphasis added**):

- A. ***Addition to or reconstruction** of an existing legally established structure or building within a critical area and/or buffer constructed on or before January 1, 2005, provided the following criteria are met:*

1. *The seasonal limitations on land clearing, grading, filling, and foundation work described in MICC 19.07.160(F)(2) shall apply.*
2. **Additions** shall be allowed if all of the following criteria are met:
 - a. *The structure is enlarged not more than a cumulative total of 200 square feet larger than its footprint as of January 1, 2005;*
 - b. *If the existing, legally established structure is located over or within a wetland or watercourse, no further expansion within the wetland or watercourse is allowed;*
 - c. *If the existing legally established structure is located within a wetland or watercourse buffer, the **addition** may be no closer to the wetland or watercourse than a distance equal to 75 percent of the applicable standard buffer and must also be no closer to the watercourse or wetland than the existing structure;*
 - d. *A critical area study approved by the city demonstrates that impacts have been avoided or minimized and mitigated consistent with MICC 19.07.100, Mitigation sequencing;*
 - e. *If the modification or addition is proposed within a geologically hazardous area or associated buffer, a qualified professional provides a statement of risk consistent with MICC 19.07.160(B)(3).*
3. **Reconstruction** of legally established nonconforming structures shall meet the standards in MICC 19.01.050. The code official may require a critical area study and mitigation plan addressing temporary impacts to critical areas and buffers.

Through initial correspondence with Senior Planner, Nicole Gaudette, the owners have been informed that, pursuant to MICC 19.07.130.A.2.c, any improvement to the home needs to be “no closer to the wetland or watercourse than a distance equal to 75 percent of the applicable standard buffer.” Therefore, Ms. Gaudette has indicated that new square footage cannot be constructed over the existing home’s footprint (since it would be within the inner 75 percent of the buffer).

As the code states, MICC 19.07.130.A. authorizes ‘addition to/additions’ or ‘reconstruction’ of existing structures within critical area buffers. Standards for ‘additions’ are addressed in MICC 19.07.130.A.2, with standards for ‘reconstruction’ addressed in MICC 19.07.130.A.3. Neither term is defined by the MICC. ‘Reconstruction’ would presumably apply if the entire structure was to be removed and rebuilt. Such a ‘reconstruction’ scenario is not proposed by the current project; thus, the question is whether the current project meets the criteria for an ‘addition’, as outlined in MICC 19.07.130.A.2.c.

Specific to MICC 19.07.130.A.2.a, it is clear that the footprint of existing structures within buffers can be enlarged as part of an 'addition' (by up to 200 SF), though the 'addition' must be located no closer to the critical area than the existing structure. Thus, new impacts associated with an 'addition' within the buffer are allowed. In this regard, the term 'addition' appears to align with the term 'expansion' which was used in the previous version of the critical areas code. The previous version, which was codified as MICC 19.07.030.A.10, clearly allowed for a horizontal expansion of the footprint, as well as an upward addition to an existing home (within any portion of the buffer), provided that no portion of the improvements extended closer to the critical area. The outdated specific provision was as follows (**emphasis added**):

*Existing single-family residences may be **expanded** or reconstructed in buffers, provided all of the following are met:*

- a. The applicant must demonstrate why buffer averaging or reduction pursuant to MICC 19.07.070(B) will not provide the necessary relief;*
- b. **Expansion** within a buffer is limited to 500 square feet beyond the existing footprint that existed on January 1, 2005;*
- c. The **expansion** is not located closer to the critical area than the closest point of the existing residence;*

As part of the old code, reconstruction (rebuilding within the same footprint) was clearly allowed, while expansion (building new structure beyond the existing footprint) was also clearly allowed. Thus, any reasonable interpretation of (current code) MICC 19.07.130.A.2 assumes that 'additions' include enlargement of the footprint of existing structures in critical area buffers. Because 'addition' clearly includes enlargement of the footprint, MICC 19.07.130.A.2.c must be interpreted such that the term 'addition' is referring to an enlargement of the footprint. This is consistent with the assumption that the City desired that any enlargement of the footprint occurs within the outer 25 percent of the buffer.

This interpretation is further reinforced by an examination of MICC 19.07.130.A.3. Specifically, unless the City requires that any 'reconstruction', pursuant to MICC 19.07.130.A.3, be carried out such that the new residence is built to the identical height, scale, etc., then no reasonable interpretation of the current situation could prohibit any upward construction, within the same footprint. Any different interpretation would grant special privilege to those owners financially capable of removing and rebuilding an entire structure, rather than simply adding upward, on top of the existing structure. Such an interpretation would fail to meet the intent of Chapter 19.07, including mitigation sequencing requirements, as more temporary buffer disturbance

would clearly result from a full rebuild than a minor addition. Further, more indirect impacts, including extensively more vehicle trips, noise, carbon emissions, etc. would result from rebuilding the entire house. Thus, provided that any upward construction to the residence is directly above the existing footprint, there is no reasonable scenario in which such an improvement could be interpreted to be prohibited, when a complete rebuild (within any portion of the buffer) is possible.

In sum, two specific determinations support the interpretation that an existing residence can include upward construction within the inner 75 percent of a critical area buffer:

- 1) The term 'additions' in MICC 19.07.130.A.2 includes the enlargement of the footprint, as allowed by MICC 19.07.130.A.2.a. Thus, the same term ('addition') used in MICC 19.07.130.A.2.c, refers to enlargement of the footprint.
- 2) MICC 19.07.130.A.3 allows for existing residences to be removed and entirely rebuilt within any portion of a critical area buffer. This allowed activity is more impactful than upward construction to an existing residence. Thus, any interpretation that prohibits upward construction is contradictory to the intent of the CAO and with environmental stewardship, in general.

Thank you for your consideration on this matter. We look forward to hearing from you.

Sincerely

A handwritten signature in black ink, appearing to read "Kenny Booth". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kenny Booth, AICP
Principal / Senior Planner