CITY OF MERCER ISLAND
ORDINANCE NO. 05C-12

AN ORDINANCE OF THE CITY OF MERCER ISLAND, WASHINGTON AMENDING CHAPTER 19.07 OF THE MERCER ISLAND CITY CODE, CRITICAL AREA REGULATIONS, COVERING WATERCOURSES, GEOLOGIC HAZARD AREAS, WETLANDS AND WILDLIFE HABITAT CONSERVATION AREAS, TO INCORPORATE BEST AVAILABLE SCIENCE; REPEALING SECTIONS 19.07.010, 19.07.020, 19.07.030, 19.07.040, 19.07.060 AND 19.07.070; AMENDING CHAPTER 19.16 TO ADD TECHNICAL TERMS AND LAND USE DEFINITIONS AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, RCW 36.70A.172 requires cities to include best available science in developing policies and development regulations to protect the functions and values of critical areas; and

WHEREAS, the City retained The Watershed Company, Adolfson and Associates and Michelle Lorilla, P.E., qualified consultants, with expertise in best available science, to research and evaluate the unique geologic and scientific features of the City of Mercer Island and to advise City staff on its critical areas regulations and consistency with best available science; and

WHEREAS, the public review process for the proposed critical area ordinance included five meetings in June and July of 2004 of the Critical Areas Policy and Regulation Stakeholders Forum, an ad hoc task force composed of development interests, elected and appointed officials, conservation interests and citizens, where environmental policies were reviewed and recommendations for revisions were made;

WHEREAS, the Planning Commission held a series of seven (7) public meetings to consider best available science and alternatives to the critical area ordinance; and

WHEREAS, the public review process for the critical area ordinance included a City Council Study Session on October 27, 2005 and City Council regular meetings on November 7, 2005 and November 21, 2005. with an opportunity for public comment on the critical area ordinance; and

WHEREAS, public notice was published in the Mercer Island Reporter for the September 15, 2004 and the August 17, 2005 planning commission meetings and for each City Council meeting, thus fulfilling all public noticing requirements; and

WHEREAS, the City also encouraged public participation and provided information on the critical areas ordinance update on its website (http://www.mercer-island.wa.us); and

WHEREAS, the Growth Management Act mandates each city in Washington to take action to review and, if necessary, revise its code to incorporate best available science by December 2005; and

WHEREAS, consistent with the Growth Management Act, the code amendments contained herein were developed using the best available science; and

WHEREAS, the critical areas ordinance allows the standard buffer requirement on wetlands and watercourses to be reduced in exchange for buffer restoration or enhancement and such improvement to the buffer is consistent with best available science; and

WHEREAS, the critical areas ordinance allows buffer averaging in watercourses to promote enhancement of degraded buffer areas consistent with best available science; and

WHEREAS, consistent with RCW 36.70A.106, state agencies received notice of Mercer Island's proposed critical areas ordinance on July 30, 2004, and comments were received regarding the wetland regulations and incorporated into the critical areas ordinance; and

WHEREAS, a State Environmental Policy Act Checklist was prepared and a Determination of Nonsignificance was issued on August 25, 2004; and NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF MERCER ISLAND, WASHINGTON DOES ORDAIN A FOLLOWS:

Section 1: Findings, Analysis and Conclusions. After reviewing the record and considering the arguments and evidence in the record and at public meetings, the City Council hereby adopts the findings, analysis and conclusions contained in the City Council staff reports dated November 7, 2005 and November 21, 2005.

Section 2: Legislative History – Adoption of Studies. The City Council hereby adopts as its legislative history and incorporates by this reference the following scientific studies: (1) Use of Best Available Science in the City of Mercer Island Critical Areas Regulations for Watercourses and Wetlands, prepared by The Watershed Company and dated July 2004; (2) City of Mercer Island Stream Typing Inventory, prepared by The Watershed Company and dated February 2003; (3) Mercer Island Stream and Stream Buffer Restoration Guidelines, prepared by The Watershed Company and dated February 2003; (4) Analysis of Geologic Hazard Areas, mapping and analysis prepared by Michelle Lorilla, P.E. during 2004, the city's consulting geotechnical engineer and (5) Use of Best Available Science in the City of Mercer Island Critical Areas Regulations for Watercourses and Wetlands and Peer Review prepared by Adolfson and Associates dated September 2005, all such studies are on file with the Mercer Island City Clerk.

Section 3: Repeal of Inconsistent Provisions. Upon adoption of the new Chapter 19.07 described in Section 5 below, the City Council hereby repeals the following sections of the Mercer Island City Code: MICC 19.07.010; MICC 19.07.020, MICC 19.07.030, MICC 19.07.040, MICC 19.07.060, and MICC 19.07.070.

Section 4: Adoption of New Definitions. The Mercer Island City Council hereby amends Chapter 19.16 of the Mercer Island City Code by adding the following new definitions or amending those existing definitions as shown by underlining to indicate new text and strikethroughs to indicate deleted text:

Alteration: Any human-induced action which adversely impacts the existing condition of the area including grading, filling, dredging, draining, channeling ~~cutting, topping, clearing, relocating or removing vegetation~~ and paving, (including construction, ~~modifying for surface water management purposes~~ and application of gravel) ~~Human activity that impacts the existing topography, vegetation, hydrology, or wildlife habitat~~. *Alteration* does not include walking, passive recreation, fishing or other similar activities.

Best Available Science: Current scientific information based upon scientifically valid methods used to analyze *critical areas,* as defined by WAC 375-195-900 through 925, as amended.

Best management practices: The practices that use the best available technologies or techniques, to prevent or minimize the degradation of any *critical area* or its *buffer*.

Buffer: A designated area adjoining a *critical area* intended to protect the *critical area* from degradation.

Critical areas: *Geologic hazard areas,* ~~critical slopes~~, *watercourses* ~~corridors~~, *wetlands* and *wildlife habitat conservation areas* ~~shorelines and publicly and privately owned passive open spaces. "Critical areas" have measurable characteristics which, when combined, create a value for or potential risk to the public health, safety, and welfare~~.

~~*Critical Slope:* Any slope of 30 percent or greater calculated by measuring the vertical rise over any 40-foot horizontal run. "Critical slopes" may cross property lines."~~

~~*Critical Slope Hazard Area: An area consisting of a critical slope and the land that extends for 10 feet past the top and toe of the slope.*~~

Critical area determination: An administrative action by the *code official* pursuant to MICC 19.15.010(E) to allow reduction or averaging of a *wetland* or *watercourse buffer*, or *alteration* of a *steep slope.*

Critical area study: A study prepared by a *qualified professional* on existing conditions, potential impacts and *mitigation* measures for a *critical area*, consistent with MICC 19.07.050.

Critical Tree Area: An area on a lot where trees are provided certain protections that contains any of the following:
1. A *geologic hazard area*;
2. A *watercourse* ~~corridor~~ or its *buffer*;

3. *Wetlands* or its *buffer* ~~together with the area that extends 25 feet beyond the delineated wetlands edge~~; or
4. *Protected slope area.*
~~5. Any area protected by a dedication or limitation on a recorded plat restricting the removal of trees or vegetation such as a native growth protective easement~~.

Ditch: A long, narrow human-built excavation that conveys storm water or irrigation water that is not identified by the State of Washington as a classified or unclassified stream.

Enhancement or enhance: Actions performed to increase the functions of *critical areas.*

Erosion Hazard Areas: Those areas greater than 15 percent slope and subject to a severe risk of erosion due to wind, rain, water, slope and other natural agents including those soil types and/or areas identified by the U.S. Department of Agriculture's Natural Resources Conservation Service as having a "severe," or "very severe" rill and inter-rill erosion hazard.

Fish Use or Used by Fish: Those areas within a *watercourse* where live fish normally exist for spawning rearing and/or migration. *Fish Use* may be presumed to occur in 1) those reaches of *watercourses* that have year round flow, are accessible from Lake Washington to juvenile *salmonid* fish and have an average bed slope of less than 12 percent. *Fish use* shall not be presumed for 1) intermittent or seasonal reaches; 2) for reaches with an average bed slope of 12 percent or greater; 3) for reaches upstream from road culverts with a bottom slope of 10 percent or greater; or 4) reaches with greater than a 12-inch drop from the downstream invert of the culvert to the downstream pool elevation at ordinary high water. If the uppermost point of *fish use* cannot be identified with simple, nontechnical observations, then the upper extent of *fish use* should be determined using the best professional judgment of a qualified professional after considering actual conditions and the physical abilities and capabilities of juvenile *salmonid* fish.

Geologic hazard areas: An area susceptible to erosion, sliding, earthquake or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or *alterations*, including *landslide hazard areas, erosion hazard areas* and *seismic hazard areas*.

~~*Geotechnical Engineer*: A practicing geotechnical engineer licensed as a professional engineer in the state of Washington.~~

Geotechnical professional: A practicing, geotechnical/civil engineer licensed as a professional civil engineer with the State of Washington, or a licensed engineering geologist with sufficient relevant training and experience as approved by the *city*.

Landslide Hazard Areas: Those areas subject to landslides based on a combination of geologic, topographic, and hydrologic factors, including:

a. Areas of historic failures;
b. Areas with all three of the following characteristics:
   (i) Slopes steeper than fifteen percent; and

(ii) Hillsides intersecting geologic contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock; and

(iii) Springs or ground water seepage;

c. Areas that have shown evidence of past movement or that are underlain or covered by mass wastage debris from past movements;

d. Areas potentially unstable because of rapid stream incision and stream bank erosion; or

e. *Steep Slope.* Any slope of 40 percent or greater calculated by measuring the vertical rise over any 30-foot horizontal run.

Mitigation or mitigate: The use of any or all of the following actions in a *critical area:*

A. Avoiding the impact by not taking a certain action;

B. Minimizing the impact by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce the impact;

C. Rectifying the impact by repairing, rehabilitating or *restoring* the affected *critical area;*

D. Minimizing or eliminating the impact over time by preservation or maintenance operations;

E. Compensating for the impact by replacing, *enhancing* or providing substitute *critical areas;* or

F. Monitoring the impact and taking appropriate corrective measures including any combination of the measures listed in subsections A through E above.

~~An action which minimizes the impacts of an alteration by limiting the degree or magnitude of the alteration with appropriate technology; reduces the impact of the alteration over time with preservation or maintenance techniques, or compensates for the impact of the alteration by replacing, enhancing or providing substitute critical areas.~~

Monitoring: Evaluating the impacts of *alterations* to *critical areas* and assessing the performance of required *mitigation* measures through the collection and analysis of data.

Native Growth Protective Easement (NGPE): An easement granted to the *city* for the protection of *native vegetation* within a *critical area* or *buffer*.

Native vegetation: Vegetation comprised of plant species which are indigenous to the Puget Sound region and which reasonably could have been expected to naturally occur on the site. *Native vegetation* does not include *noxious weeds*.

No net loss: An ecological concept whereby conservation losses in one geographic or otherwise defined area are equaled by conservation gains in function in another area.

Noxious weed: Any plant which when established is highly destructive, competitive, or difficult to control by cultural or chemical practices (see chapter 5.10 RCW). The state

noxious weed list in Chapter 16-750 WAC, as compiled by the State Noxious Weed Control Board, is the officially adopted list of *noxious weeds* for the *city*.

Qualified professional: A person who performs studies, field investigations, and plans on *critical areas* and has an educational background and/or relevant experience in the field, as determined by the *code official*.

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 decision-maker 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 MICC 19.07.030(B) balances the public interests against the regulation being unduly oppressive to the property owner.

Restoration or restore: Actions performed to return a *critical area* to a state in which its functions approach its unaltered state as closely as possible.

Salmonid: A member of the fish family salmonidae.

Seismic Hazard Areas: Seismic hazard areas are areas subject to severe risk of damage as a result of earthquake induced ground shaking, slope failure, settlement, soil liquefaction or surface faulting.

Steep Slope: Any slope of 40 percent or greater calculated by measuring the vertical rise over any 30-foot horizontal run. Steep slopes do not include artificially created cut slopes or rockeries.

Temporary Erosion and Sediment Control Plan: A plan that details the location and type of temporary physical, structural and/or managerial practices an applicant will use to reduce erosion, prevent pollution of water with sediment and comply with the adopted stormwater manual pursuant to MICC Chapter 19.09.

Utilities: Facilities providing infrastructure services ~~to individual lots within the city~~ by a public utility or private utility regulated by the state through fixed wires, pipes, or lines. Such facilities ~~services~~ may include water, sewer, stormwater facilities (lines, ditches, swales and outfalls) and private utilities such as natural gas lines, telecommunication lines, cable communication lines, electrical lines and other appurtenances associated with these utilities ~~the transmission or distribution of energy; the collection of sewage; the distribution of potable water; and the provision of information services such as telephone, internet, and cable through land lines~~. "Utilities" do not include wireless facilities.

Watercourses: A course or route, formed by nature ~~or modified by humans~~, 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 ~~specially designed~~ irrigation and drainage *ditches*, grass-lined swales, canals, stormwater runoff devices, or other courses unless they are *used by fish* ~~by salmonids~~ or to convey waters ~~courses~~ that were naturally occurring prior to construction.

~~Watercourse Corridor: An area of land running the length of a watercourse extending 25 feet horizontally from the centerline of a watercourse on each side.~~

Watercourses – Year round flow: Those *watercourses* that do not go dry any time during water-years with normal rainfall as determined from climatological data published for the Seattle Tacoma International Airport by the National Oceanic and Atmospheric Administration or its successor agency. For the purpose of *watercourse* typing, *watercourses* with *year round flow* may include *intermittent or seasonal* reaches below the uppermost point of year round flow during normal water-years.

Watercourses - Intermittent or seasonal flow: Those *watercourses* that go dry or exhibit zero surface discharge at any point during water-years with normal rainfall as determined from climatological data published for the Seattle Tacoma International Airport by the National Oceanic and Atmospheric Administration or its successor agency.

If the lowermost point of either *year round flow* or *intermittent or seasonal flow* cannot be identified with simple, nontechnical observations, or if climatological data show that rainfall is significantly above normal for the water-year, then the point of flow should be determined using the best professional judgment of a *qualified professional* after considering actual conditions and the climatological data.

Wetlands: Areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. *Wetlands* do not include artificial wetlands, such as irrigation and drainage ditches, grass-lined swales, canals, landscape amenities, and detention facilities or those wetlands that were unintentionally created as a result of the construction of a road or street unless the artificial wetlands were created to *mitigate* the *alteration* of a naturally occurring *wetland*. For identifying and delineating a regulated *wetland*, the *city* will use the *Wetland Manual*.

Wetland Classification System: Those categories set forth in the Washington State Wetland Rating System for Western Washington, Publication #04-06-025 dated August 2004. A summary of the classification system is provided below:

1. Category I. Category I wetlands are those that meet the following criteria:
   a. Wetlands that are identified by scientists as high quality or high function wetlands;
   b. Bogs larger than one-half acre;
   c. Mature and old-growth forested wetlands larger than 1 acre; or

d. Wetlands that are undisturbed and contain ecological attributes that are impossible to replace within a human lifetime.

2. Category II. Category II wetlands are not defined as Category I wetlands and meet the following criteria:
   i. Wetlands that are identified by scientists as containing "sensitive" plant species;
   ii. Bogs between one-quarter and one-half acre in size; or
   iii. Wetlands with a moderately high level of functions.

3. Category III. Category III wetlands do not satisfy Category I or II criteria, and have a moderate level of functions. These wetlands generally have been disturbed in some ways, and are often less diverse or more isolated from other natural resources than Category II wetlands.

4. Category IV. Category IV wetlands do not satisfy Category I, II or III criteria; and have the lowest level of functions; and are often heavily disturbed.

Wetland Manual: The Washington State Wetland Identification and Delineation Manual.

Wildlife Habitat Conservation Areas: Those areas the City Council determines are necessary for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created consistent with Title 365 WAC.

Section 5: Critical Areas Ordinance. Chapter 19.07 of the Mercer Island City Code is hereby amended to add MICC 19.07.010 through 19.07.090 as follows:

19.07.010 Purpose. These regulations are adopted for the following purposes:
A. To designate and protect *critical areas* as mandated by chapter 36.70A RCW;
B. To include *best available science* in developing policies to protect the functions of *critical areas* as mandated by chapter 36.70A RCW;
C. To prevent undue hazards to public health, safety, and welfare by minimizing impacts to *critical areas*;
D. To implement the *city*'s comprehensive plan; and
E. To respond to the goals and objectives of the Washington State Growth Management Act, while reflecting the local conditions and priorities of Mercer Island.

19.07.020 General Provisions.
A. **Applicability.** Any *alteration* of a *critical area* or *buffer* shall meet the requirements of this chapter unless an allowed alteration or reasonable use exception applies pursuant to MICC 19.07.030.
B. **Public Notice-Critical Area Determination.** A *critical area determination* requires public notice pursuant to MICC 19.15.020(E) and this action may be appealed to the planning commission.
C. **Critical Area Designation and Mapping .** The approximate location and extent of *critical areas* are shown on the *city's critical area* maps (Appendix E), as now existing or hereafter amended. These maps are to be used as a reference only. The applicant is

responsible for determining the scope, extent and boundaries of any critical areas to the satisfaction of the *code official.*

D. **Administrative Guidelines.** The *code official* may adopt administrative guidelines describing specific improvements to *critical areas* that are based on *best available science* and satisfy the *no net loss* standard described in this chapter.

E. **Compliance with Other Federal, State or Local Laws.** All approvals under this chapter, including *critical area determinations and reasonable use exceptions,* do not modify an applicant's obligation to comply in all respects with the applicable provisions of any other federal, state, or local law or regulation.

19.07.030 Allowed Alterations and Reasonable Use Exception.

A. **Allowed Alterations.** The following *alterations* to *critical areas* and *buffers* are allowed and the applicant is not required to comply with the other regulations of this chapter, subject to an applicant satisfying the specific conditions set forth below to the satisfaction of the *code official*; and subject further that the *code official* may require a *geotechnical report* for any *alteration* within a *geologic hazard area*:

1. **Emergency actions** necessary to prevent an immediate threat to public health, safety or welfare, or that pose an immediate risk of damage to private property. After the emergency, the *code official* shall be notified of these actions within 7 days. The person or agency undertaking the action shall fully *restore* and/or *mitigate* any impacts to *critical areas and buffers* and submit complete applications to obtain all required permits and approvals following such work. The *mitigation* and *restoration* work will be completed within 180 days from issuance of required permits.
2. **Operation, maintenance, renovation or repair** of existing structures, facilities and landscaping, provided there is no further intrusion or expansion into a *critical area.*
3. **Minor site investigative work.** Work necessary for land use submittals, such as surveys, soil logs, percolation tests, and other related activities, where such activities do not require construction of new access roads or significant amounts of excavation. In every case, impacts shall be *mitigated* and disturbed areas shall be *restored.*
4. **Boundary Markers.** Construction or modification of navigational aids and boundary markers.
5. **Existing Streets and Utilities.** Replacement, modification or reconstruction of existing *streets* and *utilities* in developed *utility* easements and in developed *streets* subject to the following:
   a. The activity must utilize *best management practices*;and
   b. The activity is performed to *mitigate* impacts to *critical areas* to the greatest extent reasonably feasible consistent with *best available science.*
6. **New Streets, Driveways, Bridges, and Rights-of-way.** Construction of new *streets* and driveways, including pedestrian and bicycle paths, subject to the following:
   a. Construction is consistent with *best management practices;*
   b. The facility is designed and located to *mitigate* impacts to *critical areas* consistent with *best available science;*
   c. Impacts to *critical areas* are *mitigated* to the greatest extent reasonably feasible so there is *no net loss* in *critical area* functions; and
   d. The *code official* may require a *critical area study* or *restoration* plan for this allowed alteration.

d. The *code official* may require a *critical area study* or *restoration* plan for this allowed alteration.

7. **New Utility Facilities.** New *utilities* not including substations, subject to the following:
   a. Construction is consistent with *best management practices*;
   b. The facility is designed and located to *mitigate* impacts to *critical areas* consistent with *best available science;*
   c. Impacts to *critical areas* are *mitigated* to the greatest extent reasonably feasible so there is *no net loss* in *critical area* functions;
   d. *Utilities* shall be contained within the footprint of an existing street, driveway, paved area, or *utility* crossing where possible; and
   e. The *code official* may require a *critical area study* or *restoration* plan for this allowed alteration.
8. **The removal of *noxious weeds*** with hand labor and/or light equipment provided that the appropriate erosion-control measures are used and the area is revegetated with *native vegetation.*
9. **Public and private non-motorized trails** subject to the following:
   a. The trail surface should be made of pervious materials, unless the *code official* determines impervious materials are necessary to ensure user safety;
   b. Trails shall be located to *mitigate* the encroachment; and
   c. Trails proposed to be located in a *geologic hazard area* shall be constructed in a manner that does not significantly increase the risk of *landslide* or *erosion hazard.* The *city* may require a geotechnical review pursuant to MICC 19.07.060.
10. **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 19.07.020(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;
    d. The functions of *critical areas* are preserved to the greatest extent reasonably feasible consistent with *best available science*;
    e. Impacts to *critical areas* are *mitigated* to the greatest extent reasonably feasible so that there is *no net loss* in *critical area* functions;
    f. Drainage capabilities are not adversely impacted; and
    g. The *city* may require a *critical area study* or *restoration* plan for this exemption.
11. **Conservation, preservation, *restoration* and/or *enhancement* of *critical areas* that does not negatively impact the functions of any *critical area.*** If the proposed work requires Hydraulic Project Approval from the State of Washington Department of Fisheries, the *code official* may require a *critical area study.*
12. **Tree pruning, cutting and removal in accordance with the permit requirements of chapter 19.10 MICC, Trees.**
13. **Alterations to Category III and IV *wetlands*** of low value under 2,500 square feet.

B. **Reasonable Use Exception**

1. **Application Process**. If the application of these regulations deny *reasonable use* of a subject property, a property owner may apply to the hearing examiner for a *reasonable use* exception pursuant to permit review, public notice and appeal procedures set forth in Chapter 19.15 MICC.
2. **Studies Required**. An application for a *reasonable use* exception shall include a *critical area study* and any other related project documents, such as permit applications to other agencies, and environmental documents prepared pursuant to the State Environmental Policy Act.
3. **Criteria:** The hearing examiner will approve the application if it satisfies all of the following criteria:
   a. The application of these regulations deny any *reasonable use* of the property. The hearing examiner will consider the amount and percentage of lost economic value to the property owner;
   b. No other *reasonable use* of the property has less impact on *critical areas*. The hearing examiner may consider alternative reasonable uses in considering the application;
   c. Any *alteration* to *critical areas* is the minimum necessary to allow for *reasonable use* of the property;
   d. Impacts to *critical areas* are *mitigated* to the greatest extent reasonably feasible consistent with *best available science*;
   e. The proposal does not pose an unreasonable threat to the public health, safety, or welfare; and
   f. The inability of the applicant to derive *reasonable use* of the property is not the result of actions by the applicant after the effective date of this chapter.

The hearing examiner may approve, approve with conditions, or deny the request based on the proposal's ability to comply with all of the above criteria. The applicant has the burden of proof in demonstrating that the above criteria are met. Appeals of the hearing examiner's decision may be made to Washington State Superior Court.

19.07.040 Review and Construction Requirements.

A. **Development Standards**. The applicant will comply with the general *development* standards set forth in chapter 19.09 MICC.

B. **Native Growth Protection Areas.**

1. *Native growth protection areas* may be used in *development* proposals for *subdivisions* and *lot line revisions* to delineate and protect contiguous *critical areas*.
2. *Native growth protection areas* shall be designated on the face of the plat or recorded drawing in a format approved by the *city*. The designation shall include an assurance that *native vegetation* will be preserved and grant the *city* the right to enforce the terms of the restriction.

C. **Setback Deviation.** An applicant may seek a *deviation* from required front and back *yard* setbacks pursuant to MICC 19.020.020(C)(4).

D. **Variances.** Variances pursuant to MICC 19.01.070 are not available to reduce any numeric requirement of this chapter. However, the allowed *alterations* and the

C. **Setback Deviation.** An applicant may seek a *deviation* from required front and back *yard* setbacks pursuant to MICC 19.020.020(C)(4).

D. **Variances.** Variances pursuant to MICC 19.01.070 are not available to reduce any numeric requirement of this chapter. However, the allowed *alterations* and the *reasonable use* exception allowed pursuant to MICC 19.07.030 may result in *city* approvals with reduced numeric requirements.

E. **Appeals.** Appeals of decisions made under the provisions of this chapter shall follow the procedures outlined in MICC 19.15.010(E).and 19.15.020(J).

F. **Fees.** Fees shall be set forth in a schedule adopted by City Council resolution. The fee should be based on a submittal fee and the time required to review *development* applications for *alterations* within *critical areas* and *buffers*.

G. **Hold Harmless/Indemnification Agreement and Covenant Not to Sue, Performance Guarantees, Performance Bonds, Insurance.** An applicant for a permit within a *critical area* will comply with the requirements of MICC 19.01.060, if required by the *code official*.

H. Erosion Control Measures.
   1. A *temporary erosion and sediment control plan* shall be required for *alterations* on sites that contain *critical areas*.
   2. Erosion control measures shall be in place, including along the outer edge of *critical areas* prior to clearing and grading. Monitoring surface water discharge from the site during construction may be required at the discretion of the *code official*.

I. **Timing.** All *alterations* or *mitigation* to *critical areas* shall be completed prior to the final inspection and occupancy of a project. Upon a showing of good cause, the *code official* may extend the completion period.

J. **Maintenance and *Monitoring*.**
   1. Landscape maintenance and *monitoring* may be required for up to five (5) years from the date of project completion if the *code official* determines such condition is necessary to ensure *mitigation* success and *critical area* protection.
   2. Where *monitoring* reveals a significant variance from predicted impacts or a failure of protection measures, the applicant shall be responsible for appropriate corrective action, which may be subject to further *monitoring*.

K. **Suspension of Work.** If the *alteration* does not meet *city* standards established by permit condition or applicable codes, including controls for water quality, erosion and sedimentation, the *city* may suspend further work on the site until such standards are met.

19.07.050 Critical Area Study. When a *critical area study* is required under MICC 19.07.030, .060, .070, .080 or .090, the following documents are required:

A. Site survey.

B. Cover sheet and site construction plan.

C. *Mitigation* and *restoration* plan to include the following information:
   1. Location of existing *trees* and vegetation and proposed removal of same;
   2. *Mitigation* proposed including location, type, and number of replacement *trees* and vegetation;
   3. Delineation of *critical areas*;
   4. In the case of a *wildlife habitat conservation area*, identification of any known endangered or threatened species on the site;

5. Proposed grading;
6. Description of impacts to the functions of *critical areas*; and
7. Proposed *monitoring* plan.

A *mitigation* and *restoration* plan may be combined with a stormwater control management plan or other required plan. Additional requirements that apply to specific *critical areas* are located in MICC 19.07.060, G*eologic Hazard Areas*; MICC 19.07.070, W*atercourses*; MICC 19.07.080, W*etlands* and MICC 19.07.090, *Wildlife Habitat Conservation Areas*.

D. Stormwater and erosion control management plan consistent with chapter 15.09 MICC. Off-site measures may be required to correct impacts from the proposed *alteration*.

E. Other technical information consistent with the above requirements, as required by the *code official*.

The *critical area study* requirement may be waived or modified if the *code official* determines that such information is not necessary for the protection of the *critical area*.

19.07.060 Geologic Hazard Areas.

A. **Designation**. All property meeting the definition of a *geologic hazard area* is designated as a *geologic hazard area*.

B. **Buffers.** There are no *buffers* for g*eologic hazard areas* but a geotechnical report is required prior to making *alterations* in *geologic hazard areas*. This provision shall not change *development* limitations imposed by the creation of building pads under MICC 19.09.090.

C. **Geotechnical Review.**

1. The applicant must submit a geotechnical report concluding that the proposal can effectively *mitigate* risks of the hazard. Consistent with MICC 19.07.050, the report shall suggest appropriate design and *development* measures to *mitigate* such hazards.
2. The *city* may require peer review of the geotechnical report by a second *qualified professional* to verify the adequacy of the information and analysis. The applicant shall bear the cost of the peer review.
3. The *code official* may waive the requirement for a geotechnical report when the proposed *alteration* does not pose a threat to the public health, safety, and welfare, in the sole opinion of the *code official*.

D. **Site Development.**

1. **Development Conditions.** *Alterations* of *geologic hazard areas* may occur if the *code official* concludes that such *alterations*:
   a. Will not adversely impact other *critical areas;*
   b. Will not adversely impact (e.g. landslides, earth movement, increase surface water flows, etc) the subject property or adjacent properties;
   c. Will *mitigate* impacts to the *geologic hazard area* consistent with *best available science* to the maximum extent reasonably possible such that the site is determined to be safe; and
   d. Include the landscaping of all disturbed areas outside of building footprints and installation of all impervious surfaces prior to final inspection.
2. **Statement of Risk**. *Alteration* within *geologic hazard areas* may occur if the *development* conditions listed above are satisfied and the *geotechnical professional*

provides a statement of risk with supporting documentation indicating that one of the following conditions can be met:

a. The *geologic hazard area* will be modified, or the *development* has been designed so that the risk to the *lot* and adjacent property is eliminated or *mitigated* such that the site is determined to be safe;
b. Construction practices are proposed for the *alteration* that would render the *development* as safe as if it were not located in a *geologic hazard area*;
c. The *alteration* is so minor as not to pose a threat to the public health, safety and welfare; or
d. An evaluation of site specific subsurface conditions demonstrates that the proposed *development* is not located in a *geologic hazard area.*

3. **Development Limitations**. Within a *landslide hazard area*, the *code official* may restrict *alterations* to the minimum extent necessary for the construction and maintenance of structures and related access where such action is deemed necessary to mitigate the hazard associated with *development.*
4. **Seasonal Limitations.**
Land clearing, grading, filling, and foundation work within *geologic hazard areas* are not permitted between October 1 and April 1. The *code official* may grant a waiver to this seasonal *development* limitation if the applicant provides a geotechnical report of the site and the proposed construction activities that concludes erosion and sedimentation impacts can be effectively controlled on site consistent with adopted stormwater standards and the proposed construction work will not subject people or property, including areas offsite, to an increased risk of the hazard. As a condition of the waiver, the *code official* may require erosion control measures, *restoration* plans, and/or an indemnification/release agreement. Peer review of the geotechnical report may be required in accordance with MICC 19.07.060(C). If site activities result in erosion impacts or threaten water quality standards, the *city* may suspend further work on the site and/or require remedial action.

19.07.070 Watercourses.

A. **Watercourses: Designation and Typing.** *Watercourses* shall be designated as Type 1, Type 2, Type 3 and Restored according to the following criteria:
1. **Type 1 Watercourse.** *Watercourses* or reaches of *watercourses used by fish*, or are downstream of areas *used by fish*.
2. **Type 2 Watercourse.** *Watercourses* or reaches of *watercourses* with *year-round flow,* not *used by fish*.
3. **Type 3 Watercourse.** *Watercourses* or reaches of *watercourses* with *intermittent or seasonal flow* and not *used by fish.*
4. **Restored Watercourse**. Any Type 1, 2 or 3 *Watercourses* created from the opening of previously piped, channelized or culverted *watercourses*.

B. **Watercourse Buffers.**
1. **Watercourse *buffer* widths.** Standard *buffer* widths shall be as follows, measured from the *ordinary high water mark* (OHW), or top of bank if the OHW cannot be determined through simple non-technical observations.

Watercourse Type	Standard (Base) Buffer Width (feet)	Minimum Buffer Width with Enhancement (ft)
Type 1	75	37
Type 2	50	25
Type 3	35	25
Restored	25	Determined by the *code official*

2. **Reduction of buffer widths.**
   a. The *code official* may allow the standard *buffer* width to be reduced to not less than the above listed minimum width in accordance with an approved *critical area study* when he/she determines that a smaller area is adequate to protect the *watercourse*, the impacts will be *mitigated* by using combinations of the below *mitigation* options, and the proposal will result in *no net loss* of *watercourse* and *buffer* functions. However, in no case shall a reduced *buffer* contain a *steep slope*.
   b. The *code official* may consider the following *mitigation* options:
      i. Permanent removal of impervious surfaces and replacement with native vegetation;
      ii. Installation of biofiltration/infiltration mechanisms such as bioswales, created and/or *enhanced* wetlands, or ponds supplemental to existing storm drainage and water quality requirements;
      iii. Removal of *noxious weeds*, replanting with *native vegetation* and 5 year *monitoring*;
      iv. Habitat *enhancement* within the *watercourse* such as log structure placement, bioengineered bank stabilization, culvert removal, improved *salmonid* passage and/or creation of side channel or backwater areas;
      v. Use of *best management practices* (e.g. oil/water separators) for storm water quality control exceeding standard requirements;
      vi. Installation of pervious material for driveway or road construction;
      vii. Use of "green" roofs in accordance with the standards of the LEED Green Building Rating System;
      viii. *Restoration* of off-site area if no on-site area is possible;
      ix. Removal of sources of toxic material that predate the applicant's ownership; and
      x. Opening of previously channelized and culverted *watercourses* on or off-site.
3. **Averaging of buffer widths.** The *code official* may allow the standard *buffer* width to be averaged if:
   a. The proposal will result in a net improvement of *critical area* function;
   b. The proposal will include replanting of the averaged *buffer* using *native vegetation;*
   c. The total area contained in the averaged *buffers* on the *development* proposal site is not decreased below the total area that would be provided if the maximum width were not averaged;
   d. The standard *buffer* width is not reduced to a width that is less than the minimum *buffer* width at any location; and
   e. That portion of the buffer that has been reduced in width shall not contain a *steep slope.*

4. **Restoring Piped Watercourses.**
   a. Removal of pipes conveying *watercourses* shall only occur when the *code official* determines that the proposal will result in a net improvement of ecological functions and will not significantly increase the threat of erosion, flooding, slope stability or other hazards.
   b. Where the *buffer* of the *restored watercourse* would extend beyond a required setback the applicant shall obtain written agreement from the affected neighboring property owner. The *city* may deny a request to *restore* a *watercourse* if it results in *buffers* being adjusted and increased onto adjacent properties.

C. **Impervious Surfaces.** Impervious surface shall not be permitted within a *watercourse* or *watercourse buffer* except as specifically provided in this chapter.

D. **Development Standards.**
1. Type 3 *watercourses* may be relocated when such relocation results in equivalent or improved *watercourse* functions. Type 1 and 2 *watercourses* shall not be relocated except through the *reasonable use* exception.
2. Existing *watercourses* shall not be placed into culverts except as provided by the allowed *alterations* or *reasonable use* exception. When culverts are allowed, they shall be designed to *mitigate* impacts to *critical area* functions. Oversize and open bottom culverts lined with rock that maintain a semi-natural stream bed are preferred to round culverts.

19.07.080 Wetlands.

A. **Wetland Designation.** All property meeting the definition of a *wetland* in the *Wetland Manual* is designated as a *wetland.*

B. **Wetland Ratings.** *Wetlands* shall be rated as Category I, Category II, Category III or Category IV according to the *Wetland Classification System.*

C. **Wetland Buffers.**
1. **Standard Wetland Buffer Widths.** The following standard *buffer* widths shall be established from the outer edge of *wetland* boundaries:

Wetland Type	Standard (Base) Buffer Width (feet)	Minimum Buffer Width with Enhancement (ft)
Category I*	100	50
Category II	75	37
Category III	50	25
Category IV	35	25

* Note: There are no known Category I wetlands in the *city*.

2. **Reduction of Wetland Buffer Widths.** The *code official* may allow the standard *wetland buffer* width to be reduced to not less than the minimum *buffer* width in accordance with an approved *critical area study* when he/she determines that a smaller area is adequate to protect the *wetland* functions, the impacts will be *mitigated* consistent with MICC 19.07.070(B)(2), and the proposal will result in *no net loss* of *wetland* and *buffer* functions.
3. **Averaging of Wetland Buffer Width.** The *code official* may allow averaging of the standard *wetland buffer* widths in accordance with the criteria of MICC 19.07.070(B)(3).

D. **Alterations.** Category III and IV *wetlands* of less than one acre in size may be *altered* if the applicant can demonstrate that the *wetland* will be *restored, enhanced*, and/or replaced with a *wetland* area of equivalent or greater function. In cases where the applicant demonstrates that a suitable on-site solution does not exist to *enhance, restore*, replace or maintain a *wetland* in its existing condition, the *city* may permit the applicant to provide off-site replacement by a *wetland* with equal or better functions. The off-site location must be in the same drainage sub-basin as the original *wetland*.

19.07.090 Wildlife Habitat Conservation Areas.

A. **Designation.** Bald eagles are the only endangered or, threatened non-aquatic wildlife species known to inhabit Mercer Island and the *city* designates those areas used by these species for nesting, breeding, feeding and survival as *wildlife habitat conservation areas*. If other non-aquatic species are later added by the State Washington Fish and Wildlife Department as endangered or threatened as set forth in WAC 232-12-011 through 014, as amended, the city council will consider amending this section to add such species. The provisions of this section do not apply to any habitat areas which come under the jurisdiction of the *city*'s shoreline master program. The *city's watercourse, wetland* and shoreline regulations in this chapter provide required protections for aquatic species.

B. **Establishment of Buffers**. For any *wildlife habitat conservation area* located within other *critical areas* regulated in this chapter, the *buffers* for those *critical areas* shall apply except where species exist that have been identified by the State Department of Fish and Wildlife as endangered or threatened. If such species are present, the applicant shall comply with all state or federal laws in connection with any *alteration* of the *wildlife habitat conservation area* and the *code official* may require a *critical area study*.

C. **Seasonal restrictions.** When a species is more susceptible to adverse impacts during specific periods of the year, seasonal restrictions may apply. Activities may be further restricted and *buffers* may be increased during the specified season.

Section 6: Shoreline Regulations. Chapter 19.07 MICC, "Environment" shall be amended to renumber MICC 19.07.050, "Shoreline areas" to MICC 19.07.100; to renumber MICC 19.07.080, "Shoreline Management Master Program" to MICC 19.07.110 and to renumber MICC 19.07.100, "Environmental Procedures" to MICC 19.07.120.

Section 7. <u>Setback Deviation</u>. MICC 19.02.020, "Lot requirements" shall be amended to add a new subsection (4) under "Yard Requirements" authorizing an administrative yard setback deviation process as follows:

MICC 19.02.020(C)(4). Setback Deviation. On any *lot* with a *critical area* that makes it impractical to locate a building pad on the *lot* except by intruding into required *yards*, the *code official* shall have discretion to grant a *deviation* from *yard* setbacks for single *lots, subdivisions* and *lot line revisions*.

A. The *city* shall provide notice of the proposed action as required by MICC 19.15.020(D) and (E).

B. The decision to grant the *deviation* shall be pursuant to procedures contained in MICC 19.15.010(E) and MICC 19.15.020(G)(5).

C. In granting any such *deviation*, the *code official* may require the submission of any reasonably necessary information.

D. Setback *deviations* for *lot line revisions* shall be recorded on final approved documents.
E. *Yard* setbacks shall not be reduced below the following minimums:
   1. Front and rear setbacks may not be reduced to less than ten (10) feet each;
   2. Side setbacks may not be reduced to less than five (5) feet.

Section 8. Property Development. Chapter 19.09 MICC, "Property Development" shall be amended to add a new MICC 19.09.010, MICC19.09.020, MICC 19.09.090 and 19.09.100 as follows:

19.09.010 Preapplication Meeting.

A. Preapplication meetings between the applicant, members of the applicant's project team and City staff are required for all *subdivisions* or *lot line revisions* and for building permits for projects at least 500 square feet in area and for any *alteration* of a *critical area* or *buffer*, except those alterations that are identified as allowed uses under subsections MICC 19.07.030(A)(1) through (5), (8) and (12).
B. The preapplication meeting will include a preliminary examination of the proposed project and a review of codes as described in MICC 19.15.020(A).
C. *City* staff are not authorized to approve any plan or design offered by the applicant at a pre-application meeting.

19.09.020 Field Markings

A. Prior to the start of construction, the applicant shall mark the following on the site to reflect the proposed site construction plan: the location of the building footprint, *critical area(s)* boundaries, the outer extent of *yard* setbacks, areas to remain undisturbed, and *trees* and vegetation to be removed.
B. The applicant shall maintain the field markings for *critical area(s)* and areas to remain undisturbed throughout the duration of the construction permit.
C. The *code official* may waive the requirement for field marking when no activity is proposed within or adjacent to a *critical area*.

19.09.090 Building Pad

A. **Designation.** New *subdivisions* must designate a *building pad* for each lot as follows:
   1. The applicant must determine the location of a *building pad* by considering vegetation, topography, *critical areas*, and the relationship of the proposed *building pad* to existing/proposed homes. Access to the *building pad* must be consistent with the standards for driveway access contained in MICC 19.09.040.
   2. *Building pads* shall not be located within *yard* setbacks, rights of way and *critical areas or its buffers*; provided, however, building pads may be located within *landslide hazard areas* when all of the following are met: (i) A *qualified professional* determines that the criteria of MICC 19.07.060(C), site *development*, is satisfied; (ii) *Building pads* are sited to minimize impacts to the extent reasonably feasible; and (iii) *Building pads* are not located in *steep slopes* or within ten (10) feet from the top of a *steep slope*, unless such slopes, as determined by a *qualified professional*, consist of soil types determined not to be landslide prone.
   3. No cross-section dimension of a *building pad* shall be less than 20 feet in width.

4. Approved *building pads* and *critical areas* shall be identified on the final recorded documents.
5. On lots with a designated *building pad* area, building construction is limited to the designated *building pad* area.

B. **No Designated Building Pad Area.** On lots without a designated *building pad* area, *development* shall be located outside of *critical areas* unless otherwise allowed by chapter 19.07 MICC.

19.09.100 Preferred Practices. The applicant must use reasonable best efforts to comply with the following preferred *development* practices:

1. Use common access drives and utility corridors.
2. *Development,* including roads, walkways and parking areas in *critical* areas should be avoided or if not avoided, adverse impacts to *critical areas* will be *mitigated* to the greatest extent reasonably feasible.
3. Retaining walls should be used to maintain existing natural slopes in place of graded artificial slopes.

Section 9. Administration. Chapter 19.15 MICC, "Administration" shall be amended by adding the new underlined text and deleting the strikethrough lined text, as follows:

E. Summary of Actions and Authorities. The following is a nonexclusive list of the actions that the city may take under the development code, the criteria upon which those decisions are to be based, and which boards, commissions, elected officials, or city staff have authority to make the decisions and to hear appeals of those decisions.

ACTION	DECISION AUTHORITY	CRITERIA	APPEAL AUTHORITY
Ministerial Actions			
Right-of-Way Permit	City engineer	Chapter 19.09 MICC	Hearing examiner
Home Business Permit	Code official	MICC 19.02.010	Hearing examiner
Special Needs Group Housing Safety Determination	Director of public safety	MICC 19.06.080 (A)	Hearing examiner
Lot Line Adjustment Permit	Code official	Chapter 19.08 MICC	Hearing examiner
Design Review – Minor Exterior Modification Outside Town Center	Code official	MICC 19.15.040, Chapters 19.11 and 19.12 MICC	Design commission
Design Review – Minor Exterior Modification in Town Center	Design commission	MICC 19.15.040, Chapters 19.11 and 19.12 MICC	Hearing examiner
Final Short Plat Approval	Code official	Chapter 19.08 MICC	Planning commission

Seasonal Development Limitation Waiver	Building official or city arborist	MICC 19.10.030, ~~19.07.020(B)(1)(a)~~ 19.07.060(D)(4)	Building board of appeals
Development code interpretations	Code official	MICC 19.15.020 (L)	Planning commission
Administrative Actions			
Accessory Dwelling Unit Permit	Code official	MICC 19.02.030	Hearing examiner
Short Plat	Code official	Chapter 19.08 MICC	Planning commission
Variance	Code official or hearing examiner	MICC 19.15.020 (G)	Planning commission
Deviation	Code official or hearing examiner	MICC 19.15.020 (G)	Planning commission
Critical Areas ~~Lands~~ Determination	Code official	Chapter 19.07 MICC	Planning commission
Shoreline – Substantial Development Permit	Code official	MICC 19.07.~~080~~ 110	Shoreline hearings board
Shoreline – Exemption	Code official	MICC 19.07.~~080~~ 110	City council*
SEPA Threshold Determination	Code official	MICC 19.07.~~100~~ 120	Planning commission
Discretionary Actions			
Conditional Use Permit	Planning commission	MICC 19.11.130 (2), 19.15.020 (G)	Hearing examiner
Reclassification (Rezone)	City council via planning commission*	MICC 19.15.020 (G)	Superior court
Design Review – Major New Construction	Design commission	MICC 19.15.040, Chapters 19.11 and 19.12 MICC	Hearing examiner
Preliminary Long Plat Approval	City council via planning commission**	Chapter 19.08 MICC	Superior court
Variance from Short Plat Acreage Limitation	Planning commission	MICC 19.08.020	City council
Critical Areas Reasonable Use Exception	Hearing Examiner	MICC 19.07.030(B)	~~Planning Commission~~ Superior court

Street Vacation	City council via Planning commission**	MICC 19.09.070	Superior court
~~Watercourse Variance~~	~~Planning commission~~	~~MICC 19.07.030~~	~~City council~~
Shoreline Deviation	Planning commission	MICC 19.07.080	City council
Legislative Actions			
Code Amendment	City council via planning commission**	MICC 19.15.020 (G)	Superior court
Comprehensive Plan Amendment	City council via planning commission**	MICC 19.15.020 (G)	Superior court
*Final rulings granting or denying an exemption under MICC 19.07.070 are not appealable to the shoreline hearings board (SHB No. 98-60).			
**The original action is by the planning commission which holds a public meeting and makes recommendations to the city council which holds an open record hearing and makes the final decision.			

Section 10. Transmittal to State. Pursuant to RCW 36.70A.106, this Ordinance shall be transmitted to the Washington Department of Community, Trade and Economic Development as required by law.

Section 11: Preparation of Final Critical Areas Ordinance. City staff are hereby directed to complete preparation of the final CAO, including correction of any typographical edits, and inclusion of appropriate graphics and illustrations.

Section 12: Severability/Validity. The provisions of this ordinance are declared separate and severable. If any section, paragraph, subsection, clause or phrase of this ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this ordinance. The City Council hereby declares that they would have passed this ordinance and each section, paragraph, subsection, clause or phrase thereof irrespective of the fact that any one or more sections, paragraphs, clauses or phrases were unconstitutional or invalid.

Section 13: **Ratification.** Any act consistent with the authority and prior to the effective date of this ordinance is hereby ratified and affirmed.

Section 14: Effective Date. This Ordinance shall take effect and be in force thirty (30) days after its passage and publication.

Passed by the City Council of the City of Mercer Island, Washington at its regular meeting on the 21st of November 2005, and signed in authentication of its passage.

CITY OF MERCER ISLAND

Alan R. Merkle, Mayor

ATTEST:

Alison Spietz, City Clerk

Approved as To Form:

Londi K. Lindell, City Attorney

Date of Publication: 12/7/05