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October 18, 2022

Via Submittal by Seaborn

Ryan Harriman, Planning Manager
Community Planning & Development
City of Mercer Island

**Re: File No. SHL 14-031/SEP 14-025, Building Permit 1501-218
Cherberg Dock at 9418 SE 33rd Street
RESPONSE TO PUBLIC COMMENTS**

Dear Mr. Harriman:

This letter is submitted on behalf of the Cherbergs and provides a response to public comments in regard to the above referenced applications. A number of comments in the past, 2015 and 2017, were provided by or on behalf of the Griffiths. It should be noted that the Cherbergs and Griffiths were previously in litigation, but that litigation on the issues raised in the Griffiths' prior comments has been resolved and the Cherbergs and Griffiths have signed a Joint Use Agreement regarding the size and location of the Cherbergs dock.

The following are the Cherbergs responses to public comments:

Document (4/xx/15): Tom Graue

Comment: Need verification of dock placement in relation to property line setback.

Response: We are not sure whether the City generally requires the constructed dock location in relation to the lateral line setback to be verified by a surveyor, but the applicant has no objection to such a condition of approval.

Letter (4/23/15): Hal Griffith

Comment: Dock is too large and too long.

Response: Dock size and location comply with all applicable City Code requirements. The Griffiths signed Joint Use Agreement (8/1/22) indicating approval of proposed dock size and location.

Email (4/22/17): Tom Graue

Comment: Dock location will affect use and safe water way navigation.

Response: Dock size and location comply with all applicable City Code requirements, including the 10-foot setback from the joint lateral line/property line with the Graues and the 35-foot separation of the Graue moorage structures in the vested SMP regulations. Note that the Graues agreed to the location of the lateral line in 2016 after this application was submitted and after Tom Graue raised concerns about the property line setback location (King County Recording Nos. 20160408000135 and 20160408900001). The Army Corps of Engineers has the responsibility for navigation issues and must approve the project. It must be noted that the Cherbergs have a right to use their second class shorelands and also a right equal to the Graues to use Lake Washington as a navigable water under State and Federal law.

Letter (6/6/17): G. Richard Hill on behalf of Hal and Joan Griffith

Comment: Dock is too big and will affect safety and navigation.

Response: The Griffiths signed Joint Use Agreement (8/1/22) indicating approval of the proposed configuration. Dock size and location comply with all applicable City Code requirements. The Army Corps of Engineers has the responsibility for navigation issues and must approve the project. It must be noted that the Cherbergs have a right to use their second class shorelands and also an equal right to use Lake Washington as a navigable water under State and Federal law.

Letter (8/5/22): Michael J. Murphy on behalf of Tom Graue III and Shannon Graue

Comment 1: Mitigation plan calls for planting of trees on Graue property without their consent even though that area is subject to a landscape easement in favor of the Cherbergs.

Response 1: The revised mitigation plan removes the trees from the area within the Cherbergs' landscape easement on the Graue property. The Cherbergs contend that they have a right to plant the trees as previously shown, but have removed trees at that location to avoid any concern raised by the Graues.

Comment 2: Concern regarding exact dock location.

Response 2: The dock plans show the exact location of the dock and the plans are based on surveyor data.

Comment 3: Dock location will be a hazard to safe navigation.

Response 3: Dock size and location comply with all applicable City Code requirements, including the 10-foot setback from the joint lateral line/property line with the Graues and the 35-foot separation of moorage structures in the vested SMP regulations. Note that the Graues agreed to the location of the lateral line in 2016 after this application was submitted and after Tom Graue raised concerns about the property line setback location (King County Recording Nos. 20160408000135 and 20160408900001). The Army Corps of Engineers has the responsibility for navigation issues and must approve the project. It must be noted that the Cherbergs have a right to use their second class shorelands and also a right equal to the Graues to use Lake Washington as a navigable water under State and Federal law.

Comment 4: Dock location could cause taking of Graue property.

Response 4: The dock location is on the second class shorelands owned by the Cherbergs and the side lines of those shorelands, the lateral lines/property lines, were agreed to by the Graues in 2016 (King County Recording Nos. 20160408000135 and 20160408900001). The Graues' attorney cited to no case, nor can he, concluding that construction of a dock on one property could cause a taking of an adjacent property.

Letter (9/23/22): Michael J. Murphy on behalf of Tom Graue III and Shannon Graue

Comment 1: The Cherbergs are bound by the decisions denying application SHL-17-006.

Response 1: Application SHL-17-006 was based on the new Shoreline Master Program (SMP) regulations that went into effect on March 18, 2015. The applications being processed now, SHL 14-031/Building Permit 1501-218, are vested to the previous SMP regulations based on the complete application and vesting date of March 13, 2015. See attached letter from the City to Seaborn Pile Driving Company (3/16/15). The applications being processed are based on different SMP regulations which were not reviewed or considered in the decisions denying application SHL-17-006, thus those decisions have no relevance to this process. The filing of application SHL-17-006 was caused by litigation with the Griffiths to attempt a different approach to obtaining a dock, but that litigation on the pertinent issues has now been resolved.

Comment 2: The City Code does not permit the review of the pending applications.

Response 2: The City Code specifically authorizes the City to extend the life of an application if litigation affects the permit application. Mercer Island Municipal Code § 17.14.010, § 105.3.2 subpart 3. The purpose of this rule is to preclude a party from using litigation to alter or destroy an applicant's vested rights. When a complete building permit application accompanies a shoreline permit application, the courts have made it clear that State law, RCW 19.27.095(1), triggers vested rights and the applications are considered under the regulations, including SMP regulations, in effect on the date of the complete building permit application. *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wa. App. 191, 203 (2014). That rule applies here. The City's extensions of the applications implemented State law protecting the Cherbergs' vested rights.

Comment 3: Improper to have two permit applications for same property.

Response 3: This concern was addressed in an email from Charles Klinge to Senior Planner Travis Saunders dated September 16, 2015 (not 2017 as stated in the Murphy letter). The email was copied to then City Attorney Kari Sand. Mr. Saunders responded the next day and indicated satisfaction with explanation (email was also copied to the City Attorney).

Comment 4: Review of the applications is barred by *res judicata*.

Response 4: The theory of *res judicata* does not apply here. The case cited precluded a challenge during a second application to an issue decided in the first application. *DeTray v. City of Olympia*, 121 Wa. App. 777, 791 (2004). Here, the issue decided in the earlier application was compliance with the 2015 SMP regulations which was different than the issue decided now, namely compliance with the earlier SMP regulations.

Please contact me if you require any further information or explanation in response to public comments.

Sincerely,

STEPHENS & KLINGE LLP

Charles A. Klinge

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ATTACHMENT



CITY OF MERCER ISLAND

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March 16, 2015

Seaborn Pile Driving Company
Attn: Ted Burns
9311 SE 36th Street, Suite 204
Mercer Island, WA 98040

RE: 9418 SE 33rd Street
Mercer Island, WA 98040;
King County Tax Parcel # 4139300405

Dear Mr. Burns:

This letter is to acknowledge that the City of Mercer Island received a valid and complete building permit plan resubmittal for the subject property on March 13, 2015. Permit number 1501-218 has been assigned to it. As you may be aware, the City's new Shoreline Master Program's (SMP) effective date is March 18, 2015. Due to your building permit being submitted before the effective date of the new SMP, your request will be reviewed under the regulations in effect at the time of your valid and complete building permit application.

Due to the larger than normal number of requests for shoreline permits during this period of transitioning to the new SMP, processing times may be longer than typical. We appreciate your understanding and patience.

Should you have any questions, please contact me at 206-275-7717 or via e-mail at travis.saunders@mercergov.org.

Sincerely,

A handwritten signature in blue ink, appearing to be "Travis Saunders". The signature is stylized and somewhat abstract.

Travis Saunders, Senior Planner
City of Mercer Island Development Services Group