



HEARING EXAMINER PUBLIC HEARING AGENDA

Friday, September 26, 2025, at 9:00 AM

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Join the meeting at 9:00 am by:

- 1) **Telephone:** Call 253.205.0468 and enter Webinar ID **863 5741 4183**, Passcode **452881**.
- 2) **Zoom:** Click this [Link](#) Webinar ID **863 5741 4183**, Passcode **452881**

CALL TO ORDER

CRITICAL AREAS REASONABLE USE EXCEPTION & SETBACK DEVIATION

1. **CAO24-029 / DEV25-005:** A request for a Critical Areas Reasonable Use Exception and Setback Deviation with SEPA Review for the demolition of an existing single-family residence and construction of a new single-family residence and attached garage on a property constrained by open and piped watercourses, wetlands, their associated buffers and setbacks, and geologically hazardous areas.

ADJOURNMENT

CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

9611 SE 36TH STREET | MERCER ISLAND, WA 98040

PHONE: 206.275.7605 | www.mercergov.org



STAFF REPORT

CRITICAL AREAS REASONABLE USE EXCEPTION & SETBACK DEVIATION

Project No.:	CAO24-029; DEV25-005
Description:	A request for a Critical Areas Reasonable Use Exception and Setback Deviation with SEPA Review for the demolition of an existing single-family residence and construction of a new single-family residence and attached garage on a property constrained by open and piped watercourses, wetlands, their associated buffers and setbacks, and geologically hazardous areas.
Applicant / Owner:	Regan McClellan (McClellan Tellone) / Tim and Kathy Bauman
Site Address:	5928 77th Avenue SE, Mercer Island, WA 98040; Identified by King County Assessor tax parcel number 242404-9037.
Zoning District:	Single Family Residential (R-12)
Staff Contact:	Molly McGuire, Senior Planner
Exhibits:	1. CAO24-029 & DEV25-005 Staff Report 2. Development Application for CAO24-029, received by the City of Mercer Island on August 26, 2024 3. Development Application for DEV25-005, received by the City of Mercer Island on March 3, 2025 4. Revised Development Plan Set, dated May 6, 2025 5. Project Images, dated February 14, 2025 *Note: the setback from the access easement is not accurate in these images. Please refer to the site plan for accurate setbacks. 6. Reasonable Use Exception Project Narrative 7. Setback Deviation Project Narrative 8. Setback Deviation Criteria Compliance Narrative 9. Storm Drain Narrative 10. Stream Delineation and Wetland Assessment Report, prepared by DCG Watershed, dated March 5, 2024 11. Response to Reasonable Use Exception Review Comments, prepared by Otto Rosenau & Associates, Inc., dated May 2, 2025 12. Zoning Map, generated by the City of Mercer Island on June 12, 2025 13. Title Report, dated August 8, 2023

14. 2001 Lot Line Revision, recorded November 8, 2001 under King County Recorder's No. 20011108900001
15. Email from Chase Alvord, Applicant's Legal Counsel, dated May 22, 2025
16. 2000 Easement, recorded December 6, 2000 under King County Recorder's No. 20011206001392
17. Termination of 1953 Easement, recorded February 9, 2024 under King County Recorder's No. 20240209000605
18. Hazard Report generated by the City of Mercer Island on January 10, 2025
19. Wetland and Watercourse GIS Portal Map, generated by the City of Mercer Island on January 10, 2025
20. Geologically Hazardous Areas Map for Surrounding Properties, generated by the City of Mercer Island on September 15, 2025
21. Wetlands and Watercourses Map for Surrounding Properties, generated by the City of Mercer Island on September 15, 2025
22. Determination of Complete Application for CAO24-029 issued by the City of Mercer Island on November 4, 2024
23. Determination of Complete Application for DEV25-005 issued by the City of Mercer Island on March 12, 2025
24. Notice of Application for CAO24-029, dated November 12, 2024
25. Public Notification for DEV25-005, dated March 17, 2025
26. City of Mercer Island Review Letters
 - 26.1. Review Letter 1, dated January 17, 2025
 - 26.2. Review Letter 2, dated April 17, 2025
27. Applicant Response to City Review Letter 2
28. Public Comments
 - 28.1. Riley, received September 10, 2024
 - 28.2. Feldman, received November 15, 2024
 - 28.3. Washington Department of Fish and Wildlife, received November 25, 2024
 - 28.4. Colyer, received December 9, 2024
 - 28.5. Department of Ecology, received December 11, 2024
29. Applicant Response to Public Comments
 - 29.1. Response to Riley
 - 29.2. Response to Feldman
 - 29.3. Response to Washington Department of Fish and Wildlife
 - 29.4. Response to Colyer
 - 29.5. Response to Department of Ecology
30. SEP24-017 SEPA Checklist
31. SEP24-017 SEPA Determination of Nonsignificance issued by the City of Mercer Island on August 4, 2025
32. Notice of Public Hearing, issued on August 24, 2025

INTRODUCTION

I. Project Description

The applicant has requested approval of a Critical Areas Reasonable Use Exception and Setback Deviation for the demolition of an existing single-family residence and construction of a new single-family residence

and attached garage on a property constrained by open and piped watercourses, wetlands, their associated buffers and setbacks, and geologically hazardous areas.

The proposal consists of the following components:

A request for an exception to demolish an existing 1,830 square foot single-family residence and construct a new 4,097 square foot single-family residence on a site constrained by critical areas subject to the standards of Mercer Island City Code (MICC) 19.07.140, Reasonable use exception.

A request for a setback deviation for the protection of critical areas and associated buffers to demolish the existing single-family residence and construct a new single-family residence on a site constrained by critical areas subject to the standards of MICC 19.06.110(C), Setback deviations.

Proposed development within the seismic and erosion geologically hazardous areas would require a Critical Area Review 2, which would be required at the time of construction permit submittal, as conditioned. Development within these critical areas is not prohibited under MICC 19.07.160, provided certain criteria are met. These analyses are not included in the requests for the reasonable use exception and setback deviation.

II. Site Description and Context

The proposed activity is to occur at 5928 77th Avenue SE, Mercer Island, WA 98040. The site is designated Single Family Residential (zoned R-12). Adjacent properties are within the R-12 zone and contain residential uses.

The subject property is currently developed with a 1,830 square foot single-family residence with no garage that was previously used as a cabin for a Boy Scouts leader. The residence was constructed in 1953 and does not currently comply with the current zoning code. The applicant further asserts that the residence does not comply with the structural code, seismic code, or energy code. The subject site contains mapped potential landslide, erosion, and seismic geologically hazardous areas. The east side of the property contains areas with greater than 15 percent grade, which constitutes the landslide hazard area. The subject site also contains Type F and Piped watercourses running along the north property line and along the east side of the property. The adjacent property to the northeast contains a Category IV wetland which has an associated 40-foot standard buffer that encroaches onto the subject property. These critical areas are shown in **Exhibits 18 & 19**, however, the critical areas shown have not been field verified. The stream delineation and wetland assessment prepared by DCG Watershed was prepared by a qualified professional and should be used to determine the watercourses and wetlands on or adjacent to the property (**Exhibit 10**). The site is further constrained by an access easement that bisects the property at the south-west corner (**Exhibit 16**) and a view covenant documented in the 2001 Lot Line Revision (**Exhibit 14**) that effectively increases the rear yard setback from 25 feet to 42 feet. It should be noted that the view covenant provided in the public comment from Riley (**Exhibit 28.1**) does not appear to have been recorded, as shown in the Title Report for the subject property (**Exhibit 13**). Additionally, the 10-foot setback shown from the edge of the access easement in **Exhibit 14** does not appear to have been included in any of the easement documents (**Exhibit 16**), as documented in an email from the applicant's legal counsel on May 22, 2025 (**Exhibit 15**); therefore, the five-foot standard setback from the edge of this access easement as required in MICC 19.02.020(H)(1) should be applied.

Findings of Fact & Conclusions of Law

III. Application Procedure

1. The application for a Critical Areas Reasonable Use Exception was received by the City of Mercer Island on August 26, 2024. The application was determined to be incomplete on September 11, 2024, resubmitted on October 2, 2024, determined incomplete on October 14, 2024, and resubmitted again on October 16, 2024. The application was determined to be complete on November 4, 2024 (**Exhibit 22**).
2. The application for a Setback Deviation was received by the City of Mercer Island on March 3, 2025. The application was determined to be complete on March 12, 2025 (**Exhibit 23**).
3. Under MICC 19.15.030, Table D, applications for Critical Areas Reasonable Use Exceptions must undergo Type IV review. Type IV reviews require notice of application (discussed below). A public hearing and notice of decision is required for this application.
4. Under MICC 19.15.030, Table A, applications for Setback Deviations must undergo Type II review. Type II reviews require public notification (discussed below).
5. Pursuant to MICC 19.15.030(F), an application for a development proposal that involves the approval of two or more Type II, III and IV reviews may be processed and decided together, including any administrative appeals, using the highest numbered land use decision type applicable to the project application. Consolidated land use reviews shall be subject to the longest review time period identified in MICC 19.15.040.
6. The City of Mercer Island provided public notice of application for the Critical Area Reasonable Use Exception, as set forth in MICC 19.15.090 (**Exhibit 24**). The comment period for the public notice period lasted for 30 days, from November 12, 2024 to December 11, 2024. The following methods were used for the public notice of application:
 - 1) A mailing sent to neighboring property owners within 300 feet of the subject parcel.
 - 2) A sign posted on the subject parcel in a location visible to the public right-of-way.
 - 3) A posting in the City of Mercer Island's weekly permit bulletin; and
 - 4) Made available to the general public upon request.
7. The City of Mercer Island provided public notification for the Setback Deviation, as set forth in MICC 19.15.080 (**Exhibit 25**). The following methods were used for the public notification:
 - 1) A posting in the City of Mercer Island's weekly permit bulletin.
8. The City of Mercer Island provided notice of public hearing for the Critical Areas Reasonable Use Exception and Setback Deviation, as set forth in MICC 19.15.100 (**Exhibit 32**). The following methods were used for the notice of public hearing:
 - 1) A mailing sent to neighboring property owners within 300 feet of the subject parcel.
 - 2) Mailed to all parties of record.
 - 3) A sign posted on the subject parcel in a location visible to the public right-of-way.
 - 4) A posting in the City of Mercer Island's weekly permit bulletin.
9. Several public comments were received during the public comment period (**Exhibit 28**), summarized in the table below. The applicant provided responses to each public comment, contained in **Exhibit 29**.

Name	Date Received	Summary
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Jennifer Riley and Thomas Hoole	September 10, 2024	Objections to any changes related to the view covenant and building pad restriction, and any encroachments or variance allowances into the north building pad setback and protected view area.
Robert Feldman	November 15, 2024	Concerns regarding erosion at the south west border of the wetland, vehicular access, construction access across Feldman's property, construction potentially blocking or congesting the access road, and tree removal.
State of Washington Department of Fish and Wildlife	November 25, 2024	Comment related to lack of demonstrated reasonable use necessity, reasonable use does not include full redevelopment, non-compliance with reconstruction standards in MICC 19.07.130, no evidence of efforts to minimize impact, environmental issues if approved, case law does not support overdevelopment, and lack of demonstrated hardship.
Jessica and Marcus Colyer	December 9, 2024	Concerns related to the critical slope area and environment, objection to reducing the storm drain setback, and impact to the community.
Washington State Department of Ecology	December 11, 2024	Comments related to soil sampling in an area that may have been contaminated with heavy metals due to the air emissions originating from the old Asarco smelter in north Tacoma.

IV. State Environmental Policy Act (SEPA)

A Determination of Nonsignificance (DNS) was issued on August 4, 2025 following the optional DNS process per Washington Administrative Code (WAC) 197-11-355 (**Exhibit 31**). The SEPA application is identified by City of Mercer Island project number SEP24-017. No appeals were filed of this threshold determination.

V. Consistency with Criteria for Approval – Setback Deviations

1. MICC 19.06.110(C) contains criteria for approval of setback deviation requests. The purpose of a setback deviation is to increase protection of a critical area or critical area buffer. A setback deviation provides flexibility in designing a development proposal to allow for increased protection of critical areas or critical area buffer.

Staff Analysis: A setback deviation has been requested for the increased protection of the off-site Category IV Wetland and its associated 40-foot standard buffer located in the northeast portion of the subject property. The setback deviation would improve the distance from the wetland by 10 feet,

from 32 feet to 42 feet at the nearest face of the garage. The footprint of the proposed development would be reduced within the 40-foot standard buffer by 100 percent; the 5-foot setback by 88 percent; and the 5 to 10-foot setback by 36 percent than without the granting of the setback deviation (**Exhibit 4, Sheet A1.1**).

The setback deviation would lessen the impact on the piped watercourse and associated 45-foot setback across the north half of the property since a greater portion of the proposed development's footprint could then be located outside of the piped watercourse setback. The setback deviation would improve the distance from the piped watercourse by 10 feet, from 10 feet to 20 feet. The building footprint within the 45-foot setback would be reduced by approximately 861 square feet, which is a reduction of 40 percent of the building footprint without the granting of the setback deviation.

The setback deviation would not provide total relief from the remaining critical areas on the site, including the piped watercourse and associated buffer, Type F watercourse buffer, and landslide hazard area; however, the development would be located further away from these critical areas, and thus, increase protection. Since the Type F watercourse buffer encumbers the entire buildable area of the subject property, the footprint of the proposed development within this buffer would not be decreased as a result of the setback deviation (**Exhibit 4, Sheet A1.1**).

2. A setback deviation shall be granted by the City only if the applicant demonstrates all of the following:

- a. No use deviation shall be allowed.

Staff Analysis: The proposed development is for the construction of a single-family residence. The subject property is located within the R-12 zoning designation. Single-family residences are permitted within the R-12 zoning designation. No use deviation is requested; therefore, this criterion is met.

- b. The granting of the deviation 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.

Staff Analysis: The existing single-family dwelling is located five feet from the south property line, well within the required 20-foot front yard setback. The requested deviation would allow for the construction of a new single-family residence no less than 10 feet from the south property line.

The granting of the setback deviation would allow the proposed residence to be located further away from the critical areas than if the standard 20-foot front yard setback was enforced. Single-family residences are an allowed use within the R-12 zoning designation. Staff determines that the granting of the setback deviation request would 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 since the setback from the public right-of-way would be increased from the existing condition, and the proposed residence would be located further away from the critical areas than if the normal 20-foot setback was applied; therefore, this criterion is met. The setback deviation would allow for the proposed development to be located entirely outside of the standard 40-foot buffer for the offsite Category IV Wetland and would decrease the footprint within the 45-foot setback from the piped watercourse.

- c. The granting of the deviation will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property.

Staff Analysis: The setback deviation is requested for the required yard setback fronting city right-of-way. The location of the proposed single-family residence would be outside of the established access easement (**Exhibits 14 & 16**) so as not to impair the appropriate use or development of adjacent property. The existing single-family residence is located within 5-feet from the front property line. As the proposed residence would be located further away from the front property line with the granting of this deviation request, a grant of the deviation would not alter the character of the neighborhood. This criterion is met.

- d. The deviation is consistent with the policies and provisions of the comprehensive plan and the development code.

Staff Analysis: The request for the setback deviation would result in development that is consistent with the following goals and policies:

Goal 7.1 – Preserve the neighborhood character in residential zones. For the purpose of implementing this element, neighborhood character only refers to the form, bulk, scale, and intensity of the built environment. The setback deviation would preserve the neighborhood character in increasing the front yard setback in relation to the existing single-family residence. The existing single-family residence is approximately 5 feet from the front property line. The proposed location of the new single-family residence would be 10 feet from the front property line, the minimum distance allowed. Additionally, the city access street to the home is completely separated from the surrounding neighbors so that the setback is difficult to see from the main access street. The existing single-family residence cannot be seen in relation to the neighbor's setbacks from their respective streets (**Exhibit 6, Appendix B**).

Goal 7.6 – Manage impacts that could result from new development in residential zones by establishing standards to:

Policy 7.6.1 – Regulate on- and off-street parking. The granting of the setback deviation would allow for the construction of a garage, which would allow for off-street parking. The existing single-family residence does not contain a garage.

Policy 7.6.2 – Encourage the retention of landscaped areas and the retention and planting of trees. The granting of the setback deviation would allow for the retention of greater landscape areas within the bounds of the critical areas. The proposed single-family residence would be located further away from the critical areas, while allowing for the construction of a residence.

Policy 7.6.4 – Control new development to be compatible in scale, form, and character with surrounding neighborhoods. The deviation, along with the requested Reasonable Use Exception would allow for the development of a single-family residence that is comparable in scale, form, and character with the surrounding residences in the neighborhood, provided the applicant can demonstrate there is no other reasonable use with less impact on the critical area.

Goal 8 – Achieve additional residential capacity in residential zones through flexible land use techniques and land use entitlement regulations. The setback deviation is a key part of the reasonable use exception request which would allow new development on the subject property that is comparable to the average size of the neighboring residences, provided the applicant can demonstrate there is no other reasonable use with less impact on the critical area. The proposed single-family residence is larger than the existing single-family residence and would accommodate a medium-sized family. The proposed single-family residence has been designed to allow the owners to age in place by creating an attached garage at the same level as the living

areas of the residence and a stair that would be able to accommodate a future mobility device in case of impairment in the owner's mobility.

Goal 10 – Protecting the natural environment will continue to be a priority in all Island development. Protection of the environment and private property rights will be consistent with all state and federal laws. The development code allows for the property owners to deviate from standard required setbacks for the protection of critical areas, as documented in Findings of Fact V.1 through V.2.

- e. The basis for requesting the deviation is not the direct result of a past action by the current or prior property owner.

Staff Analysis: The basis for the setback deviation request is not a direct result of a past action by the current or prior property owner. The required 40-foot standard buffer and 10-foot setback for the Category IV wetland encumbers a large portion of the subject property. The property is also entirely encumbered by a 120-foot buffer and 10-foot setback for an off-site Type F watercourse and partially encumbered by a 45-foot setback for a piped watercourse along the north and east sides. The east side of the property contains a slope with a grade greater than 15 percent, making this a landslide hazard area (**Exhibit 4**). The setback deviation would allow for protection of the Category IV wetland, as the proposed development would be located entirely outside of the 40-foot standard buffer. The setback deviation would also allow the proposed residence to be located further from the other critical areas on the property and thereby increase protection. This criterion is met.

- f. The setback deviation is associated with the approval of development of a single lot or subdivision that is constrained by critical areas or critical area buffers.

Staff Analysis: The setback deviation is associated with the development of a single lot that is constrained by critical areas and critical area buffers (**Exhibits 10, 18, & 19**) for the demolition of an existing single-family residence and construction of a new single-family residence. This criterion is met.

- g. The building pad resulting from the proposed deviation will result in less impact to critical areas or critical area buffers.

Staff Analysis: The resulting building pad would lessen the impact to the piped watercourse and Category IV wetland and associated buffer by allowing the new single-family residence to be constructed entirely outside of the 40-foot standard buffer and the footprint would be lessened within the 45-foot piped watercourse setback. Impacts to the remaining Type F watercourse and landslide hazard area would not be alleviated with the granting of the setback deviation, however, the granting of the setback deviation would allow the proposed development to be located 10 feet further from these critical areas than without the deviation. This criterion is met.

- h. Yard setbacks shall not be reduced below the following minimums:
 - i. Front and rear setbacks may not be reduced to less than ten feet each.
 - ii. Side setbacks may not be reduced to less than five feet.

Staff Analysis: The proposed front yard setback would be 10 feet with an 18-inch eave encroachment as allowed in MICC 19.02.020(C)(3)(a)(i). The rear and side yard setbacks would not be reduced. This criterion is met.

The above staff analysis concludes that the criteria for a setback deviation have been met.

VI. Consistency with the Critical Areas Code – Reasonable Use Exception

1. MICC 19.07.090 describes the purpose and procedures by which the city will review and authorize development and verify consistency with this chapter.
 - a. Reasonable use exceptions shall be reviewed using the criteria in section 19.07.140, using the procedures required for a Type 4 land use review.

Staff Analysis: Compliance with MICC 19.07.140 is discussed in Findings VI.2 through VI.3 below.

2. MICC 19.07.140 lists criteria for a reasonable use exception. If the application of the 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 the chapter in accordance with the provisions for Type IV reviews in chapter 19.15. The hearing examiner may approve the application for reasonable use exception only if the development proposal meets all of the following criteria:
 - a. The application of this chapter would deny all reasonable use of the property.

Staff Analysis: Based on the applicant's narrative, the existing single-family residence was constructed in 1953 as a cabin for a local Boy Scouts leader (**Exhibit 6**). The existing single-family residence is smaller than surrounding homes at 1,708 square feet with no garage. For reference, the eight surrounding homes have an average of 3,975 square feet of finished area, with 1-3 car garages. The applicant has explored the following options available for additions and alterations:

MICC 19.07.130 allows for additions 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, subject to several criteria, including that the addition may not exceed an increase of 200 square feet of the building footprint and no further expansion is within the wetland or watercourse buffers greater than 75 percent of the applicable standard buffer. The 120-foot standard buffer for the Type F watercourse encumbers 100 percent of the building pad established in the underlying plat (**Exhibits 4 & 14**). The applicant asserts that there is no location on the site for a 200 square foot addition that has no further expansion into 75 percent of the watercourse buffer. The City agrees with this determination.

MICC 19.01.050(A)(4) allows for a legally nonconforming structure to be maintained in legal nonconforming status as long as no new nonconformances are created, there is no expansion of any existing nonconformity, and legal nonconforming status is not lost under any of the circumstances set forth in the section. If legal nonconforming status is lost, the structure must be brought into compliance with all applicable code requirements. The existing single-family residence was originally constructed in 1953 as a cabin, and the structure does not comply with current residential development standards, structural code, seismic code, or energy code, according to the applicant. To alter or enlarge the exterior of the existing single-family residence and maintain legal nonconforming status, no more than 40 percent of the length of the dwelling's exterior walls may be structurally altered. Structural alteration means a wall segment that is completely demolished such that no structural elements remain per MICC 19.01.050(D)(1)(b)(iii). A building survey performed by Mercer Builders (**Exhibit 6, Appendix C**) finds that the existing residence is undergoing significant rot in the framing of the lower level on the east side. Movement at the mid span of the east side was also observed by the outdoor building pad that is sinking or falling away from the house. Based on these findings, the applicant asserts that

remodeling the residence would require the remediation of the foundation system and portions of the exterior walls would need to be rebuilt, which would likely result in the structural alteration of more than 40 percent of the exterior walls and the loss of legal nonconforming status. The City agrees with the determination that if 40 percent of the exterior walls are structurally altered, the residence would lose legal nonconforming status and the entire structure would be required to comply with the residential development standards, including setbacks and critical area buffers. Since there is no location within the building pad outside of the Type F watercourse buffer, this option is not feasible.

The applicant has also explored the possibility of watercourse buffer averaging, as allowed in MICC 19.07.180(C)(4). The site is entirely encumbered by a 120-foot buffer for the Type F watercourse, which is located off-site to the northeast. Due to this constraint, there would be no point where the watercourse buffer could be reduced to allow for the proposed development and maintain the minimum 75 percent of the standard buffer (90 feet). The City agrees with this determination.

MICC 19.07.180(C)(6)(d) also allows for the possibility of a piped watercourse setback reduction to ten feet if a qualified professional determines that daylighting would result in one or more of the following outcomes:

- i. Increased risk of landslide or other potential hazard that cannot be mitigated;
- ii. Increased risk of environmental damage (e.g., erosion, diminished water quality) that cannot be mitigated;
- iii. The inability of a legally established existing lot to meet the vehicular access requirements of this title; or
- iv. The inability of a legally established existing lot to meet the building pad standards in section 19.09.090.

The piped watercourse is buried between 8-13 feet underground. The applicant asserts that excavating the piped watercourse and daylighting the stream would not be feasible since a stable slope pitch of 1:4 would result in a width of excavation approximately 100 feet wide. A steeper pitch would be vulnerable to both erosion and landslide events. Additionally, any excavation activity would negatively impact the other critical areas on the property, including the Type F watercourse and Category IV wetland by re-grading within their associated buffers. Based on this information, a Critical Area Review 2 for a piped watercourse setback reduction may be applied for during building permit review, which may allow for the piped watercourse setback to be reduced to 10 feet.

The City agrees with applicant's assertion that remodeling the existing single-family residence would not be economically feasible, or even possible due to the constraints of the development code discussed above. Reasonable use of the property would result in the demolition of the existing single-family residence and construction of a new single-family residence that conforms to current development and building codes; however, the site is heavily constrained by critical areas that would prevent this construction without the granting of this reasonable use exception. This criterion is met.

- b. There is no other reasonable use with less impact on the critical area.

Staff Analysis: "Reasonable use" is defined in MICC 19.16.010 as "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 MICC 19.07.140 balances the public interests against the regulation being unduly oppressive to the property owner.”

The subject property is located within the R-12 zoning designation, which primarily allows single-family residential construction. Any development associated with another allowed use would be subject to the same constraints as a single-family residence. The subject property is currently developed with a 1,780 square foot single-family residence with an approximate 1,585 square foot footprint, which includes the roof area. The existing single-family residence contains a main level and a daylight basement. The site also contains several rockeries and walkways to the west, north, and east of the existing residence. The existing single-family residence is located approximately five feet from the front property line to the south, 31.6 feet from the offsite Category IV wetland, 33 feet from the Type F watercourse, 21.75 feet from the piped watercourse, and an existing 126 square foot shed encroaches 8.5 feet into the landslide hazard area.

The proposed single-family residence would have a 3,589 square foot footprint, including roof area, which is an approximate 220 percent increase from the existing. The proposed new daylight basement would be 1,474 square feet, the main floor plus garage would be 2,362 square feet, and the upper floor would be 932 square feet. The proposed residence is configured in such a way that the main floor and basement areas are not directly stacked on top of each other. The footprint also includes roof area, both of which account for the difference in footprint area and main floor square footage. Assuming approval of the requested setback deviation, the proposed residence would be located 10 feet from the front property line to the south, 42.3 feet from the offsite Category IV wetland, 33 feet from the Type F watercourse, 14 feet from the piped watercourse, and would encroach 12 feet into the landslide hazard area with the construction of a three-car garage next to the existing shed. While the proposed residence maintains the existing distance from the Type F watercourse as the existing residence at its closest point, the proposed residence is in a different location, and the footprint is enlarged by approximately 220 percent within the Type F watercourse buffer. The proposal also includes areas of six feet and greater excavation within the Type F watercourse buffer and partially within the piped watercourse setback. The existing 126 square foot shed is currently located within the landslide hazard area, but the proposed garage would be constructed in a different location, also within the landslide hazard area. Construction within landslide hazard areas is not prohibited, provided certain criteria are met.

Exhibit 4, Sheet A1.0 shows a proposed 2,937 square foot mitigation area along the northeast sides of the proposed residence and garage, between the residence and the Type F watercourse and within the landslide hazard area. As conditioned, a detailed mitigation plan must be prepared, demonstrating compliance with MICC 19.07.180(E), which requires mitigation measures to achieve equivalent or greater ecological function.

Based on the information submitted by the applicant, the design of the proposed single-family residence appears to make minimal effort to reduce the footprint to within areas of the site that are currently developed with either the existing footprint or hardscape. While the proposed

design could make more of effort to minimize impact on critical areas, including providing livable space above the 768 square foot three-car garage and adjacent mud and powder rooms, the impact to the critical areas for the demolition and new construction would likely be very similar. Regardless of the footprint size of the proposed residence, significant excavation would be necessary to demolish the rotting foundation of the existing residence, hardscape, and driveways within critical areas. The proposed residence would generally be located within these already disturbed areas (**Exhibit 4**).

The applicant states that the proposed residence of 3,589 square feet would be smaller than 3,975 square feet, which is the average size of the surrounding residences; however, these surrounding properties are not located on sites with the same critical area constraints (**Exhibits 20 & 21**). While some of the surrounding properties contain constraints related to the Category IV wetland, Type F watercourse, and other geologically hazardous areas, the existing residences are either nonconforming or built on areas of their properties located outside critical areas. Should these nonconforming residences be remodeled, or rebuilt, they would be subject to the same development standards as the subject property. The applicant also states that if the property owners were constrained to the size of the existing residence with no garage, the property would be seriously devalued, and the tax burden would be disproportionately high compared to the other residences on Mercer Island. The owners purchased the property for \$2,575,000 in 2023. In 2023, the appraised total value of the property, including the improvements, was \$1,808,000, with the improvements appraised at \$273,000. The applicant presents three options for the property owners to pursue should this Reasonable Use Exception be denied:

1. *Remodel the current home.* The applicant estimates the cost of a remodel between \$800,000 and \$1,000,000. The property owners would suffer the economic loss of not only the cost of the improvements, but the devaluation of the land. The applicant asserts that remodeling the existing 1,780 square foot residence to the full extent as allowed by the code, without losing its legal nonconforming status, would devalue the land because no further improvements could be made in the future. The applicant further asserts that there does not exist a buyer that would pay \$3,757,000 for a home of this size with no garage on the west side of Mercer Island. The City has not examined the validity of this argument, however, the City does agree that a remodel which does not bring any of the exterior walls up to current building and energy codes would likely not be economically viable.
2. *Sell the property at a loss.* The applicant asserts that the property would be worth far less if no reasonable development can occur on the site. Additionally, the Reasonable Use Exception application is part of the public record so potential buyers would be aware that the home size is constrained and far below what is offered on similar properties on the island and no garage would be allowed. While the City agrees that the property value would be decreased if no development is allowed on the property, per the MICC criteria relating to reasonable use exceptions, the size of any future residence should not be based on the size of the residences on surrounding properties, but rather the reasonable size of a residence relative to the impacts to the critical areas. In general, the code criteria require the least impact on critical areas; here, the proposed footprint is located generally within areas that are already developed, which would result in a similar impact as if the proposed footprint was located only within the existing footprint.

3. *Let the property go vacant and withhold maintenance.* The applicant identifies this option as the most economically viable. The property owner would withhold maintenance until it becomes derelict and can be condemned by the city. Another Reasonable Use Exception attempt would be made without the burden of the existing structure; however, this would entail considerable economic hardship in carrying the \$2,575,000 investment with no ability to make use of it for one to two years. The unmaintained home would also be a burden on the neighboring property owners. The City does not agree that a future reasonable use exception for the same property with a condemned residence would result in a different outcome than the current request. The impact of the proposed residence on the critical areas would likely be the same.

The hearing examiner must consider the harm the regulation 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. In this case, the harm the regulation intended to prevent is the adverse impacts of an alteration within the Type F watercourse buffer, piped watercourse setback, Category IV wetland buffer setback, and the landslide hazard area, all of which is prohibited under Chapter 19.07 MICC, apart from the work within the landslide hazard area. The existing single-family residence is legally nonconforming, as discussed above. Since a full remodel of the existing residence would include exterior modifications to bring the residence into conformance with the current building and energy codes, more than 40 percent of the exterior walls would need to be structurally altered, which would require the residence to come into conformance with all residential development standards, including setbacks and critical areas buffers. Even if the existing residence was demolished and rebuilt in the exact same footprint and configuration, a Reasonable Use Exception would be required, which demonstrates that based on current development standards, there would be no reasonable use of the property remaining to the owner without the granting of this exception. Additionally, the effectiveness of an alternative design that may reduce the footprint and condense the proposed residence is minimal compared to the level of disturbance that would be required to demolish the existing residence and associated site improvements, as is necessary to establish reasonable use of the property.

The definition of “reasonable use” also requires the hearing examiner as the decisionmaker to balance the public’s interest against the owner’s interests which include the factors discussed above. 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. The public problem identified in this request is the protection of critical areas required by Chapter 19.07 MICC precludes the development of a single-family residence on the subject property, which is already developed with an existing single-family residence. The subject property contains several critical areas, one of which entirely encumbers the buildable area (**Exhibit 4, Sheet A3.0**). Typically, development would be prohibited within this Type F watercourse buffer pursuant to MICC 19.07.180(C)(2). Since the subject property is currently developed with a legally nonconforming single-family residence, and current development standards would preclude a remodel that brings the structure into compliance with current building and energy codes, the reasonable, less oppressive solution would be the demolition of the existing structure and construction of a new single-family residence. The applicant makes minimal effort to maintain the existing level of

disturbance within the Type F watercourse buffer and piped watercourse setback. The proposal would not result in additional negative impacts to the critical areas.

The City's analysis of the application results in the finding that there is no reasonable use of the property with less impact on the critical areas; therefore, this criterion has been met by the proposal, as conditioned.

- c. Any alteration to critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property.

Staff Analysis: The requested reasonable use exception would reduce the buffers and setbacks as follows:

	Standard Buffer/Setback	Reduced Buffer/Setback without Setback Deviation	Reduced Buffer/Setback with Setback Deviation	Existing Buffer/Setback
Category IV Wetland	40 feet with a 10-foot setback	32.42 feet	40 feet with a 2.33-foot setback	31.67 feet
Type F Watercourse	120 feet with a 10-foot setback	23.17 feet	33 feet	33 feet
Piped Watercourse	45 feet (10-foot setback possible under MICC 19.07.180(C)(6)(d) with the approval of a Critical Area Review 2)	4.33 feet	14 feet	21.75 feet
Landslide Hazard Area	0 feet, subject to implementation of geotechnical design recommendations	Would encroach 15.33 feet into landslide hazard area	Would encroach 12 feet into landslide hazard area	Encroaches 8.5 feet into landslide hazard area

The proposed single-family residence has been designed to minimize the impact on the critical areas by considering the placement of the residence within areas of the property that are already developed and/or disturbed, and by providing a mitigation area (**Exhibit 4, Sheet A1.0**). The City's analysis of the proposal results in the finding that the alteration to the critical areas and associated buffers proposed is the minimum necessary to allow for reasonable use of the property, which is the construction of a new single-family residence located within areas of the property that are currently developed. The proposed development would not encroach further into the Category IV wetland buffer or closer to the Type F watercourse. The 220 percent expansion in building footprint is not insignificant, and it is clear that the proposed design could

have reduced the sprawling footprint by proposing a taller, more compacted residence; however, the proposed footprint is generally located where existing development has occurred and will be removed. The alteration appears to be the minimum necessary to construct a residence of the proposed design, and mitigate the economic loss borne by the applicant, as discussed in Findings of Fact VI.2.b.

- d. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site.

Staff Analysis: The proposed development is for the construction of a new single-family residence, which is an allowed use in the R-12 zoning designation. The protection of critical areas is essential for public health and welfare, as documented in Goals 10 and 11 of the Land Use Element in the 2024 Mercer Island Comprehensive Plan. While the proposal would not pose an “unreasonable” threat to the public health or welfare on or off the development proposal site, it is possible that the impact to the critical areas could be reduced by reducing the proposed footprint. However, the proposed disturbance is located generally within areas of the property that is already developed and the submission of a mitigation plan is included as a recommended condition of approval. The threat to public health, safety, or welfare is not unreasonable.

- e. The proposal is consistent with the purpose of this chapter and the public interest.

Staff Analysis: Staff provides the following analysis for the proposal’s consistency with the regulations adopted for the following purposes of Chapter 19.07 MICC:

- *To implement the goals and policies for the Growth Management Act, RCW Chapter 36.70A.* The applicable goals and policies for the Growth Management Act have been implemented, including timely permit processing and environmental protection. The application has been processed consistently with the City’s requirements in Chapter 19.15 MICC, and the recommended conditions of approval, combined with the proposed design meeting the criteria above, provide protection and enhancement of the environment.
- *To maintain the functions and values of critical areas and enhance the quality of habitat to support the sustenance of native plants and animals.* The proposal does not appear to enhance the quality of habitat due to the 220 percent increase in footprint within the Type F watercourse buffer and piped watercourse setback. A mitigation area is proposed, and a detailed mitigation plan is required to be provided that demonstrates that the functions and values of the critical areas are maintained and the quality is enhanced, as conditioned.
- *To balance property owner interests with the public interest.* City analysis of the balance of property owner interests with the public interest is discussed in detail in Finding of Fact VI.2.b. In summary, the proposal appears to balance the public interest of the protection of critical areas with the property owner interest.
- *To promote biodiversity within critical areas and buffers by encouraging planting with mostly native vegetation.* If the Hearing Examiner is inclined to recommend approval of the applicant’s requested reasonable use exception, The City recommends a condition for the applicant to provide a detailed mitigation plan, which shall consist of mostly native vegetation.

- *To establish review criteria for land use reviews that maintain and improve the ecological health of wetlands, watercourses, and Lake Washington.* The application has been reviewed under the review criteria established in Chapter 19.07 MICC for the reasonable use of the property, which has been designed to maintain and improve the ecological health of critical areas.
 - *To establish standards for new development that avoid increasing the risk of harm to people, property, and public infrastructure from natural hazards.* The proposal appears to avoid increasing the risk of harm to the critical areas, as discussed in Finding of Fact VI.2.
 - *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.* The proposal appears to protect the functions and values of fish and wildlife habitat conservation areas due to the increase in footprint within the Type F watercourse buffer being located in areas where development has previously occurred and the mitigation area, as discussed in Finding of Fact VI.2.
 - *To increase the safety of development within and adjacent to geologically hazardous areas through the use of buffers.* The proposal appears to increase the safety of development within geologically hazardous areas as the proposed design will comply with standards for development within landslide hazard areas, as conditioned and further discussed in Finding of Fact VI.2.
 - *To require mitigation measures when unavoidable impacts to critical areas are proposed.* Mitigation measures have been included as recommended conditions.
 - *To establish tools to ensure the protection and mitigation measures are applied and maintain ecological value and function consistent with the provisions of this chapter.* Tools to ensure the protection and maintenance of ecological value and function have been implemented through this reasonable use exception application, as discussed in Findings of Fact VI.2.
 - *To avoid impact to the critical areas when 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.* The proposal appears to minimize impacts to critical areas and buffers to the greatest extent feasible, as discussed in Findings of Fact VI.2.
 - *To encourage the restoration of existing compromised critical areas.* The proposal generally includes the restoration of existing compromised critical areas; however, the development and submission of a mitigation plan is included in the recommended conditions.
 - *To minimize negative impacts from the built environment on the functions and values of critical areas.* The City finds that the negative impacts from the proposal on the functions and values of the critical areas has been minimized to the greatest extent feasible, as discussed in Findings of Fact VI.2.
- f. The inability of the applicant to derive the reasonable use of the property is not the result of actions by the current or prior property owner.

Staff Analysis: While the property is currently developed with an existing single-family residence, the applicant has demonstrated that remodeling or constructing an addition within the constraints of the development code is not economically feasible or possible. The 1953 residence does not currently comply with the current zoning code, structural code, seismic code, or energy code. The existing residence is legally nonconforming and, therefore, subject to the criteria for alteration and enlargement listed in MICC 19.01.050(D)(1)(b)(i). In order to bring the existing residence up to the current codes listed above, it is likely that structural alteration of more than 40 percent of the dwelling's existing exterior walls must occur, which would result in the loss of legal nonconforming status. Should legal nonconforming status be lost, the structure shall be required to come into conformance with current code requirements, including setbacks and the critical areas code.

As further discussed in Findings VI.2.a, the development code requirements for critical areas do not currently allow for the construction of a single-family residence on the subject property due to the application of buffers and setbacks. The application of these standards was not a result of actions by the current or prior property owner; therefore, this criterion is met.

3. The hearing examiner may approve, conditionally approve, continue the hearing, remand the application, 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.

Staff Analysis: The City finds that the proposed reasonable use does not increase negative impacts to the critical areas as described in Finding of Fact VI.2.b, and that the proposed alteration to the critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property as described in Finding of Fact VI.2.c. The Staff Recommendation to the Hearing Examiner below is to approve the application with direction to the applicant to submit with the below recommended conditions of approval.

RECOMMENDED CONDITIONS OF APPROVAL

1. The proposal shall be in substantial conformance with **Exhibit 4** and all applicable development standards contained within Mercer Island City Code (MICC) Chapter 19.07.
2. The applicant is responsible for documenting any required changes in the project proposal due to conditions imposed by any applicable local, state, and/or federal government agencies.
3. Construction or substantial progress toward construction of a development for which a permit has been granted must be undertaken within three years after the approval of the permit or the permit shall terminate. The code official shall determine if substantial progress has been made.
4. The development proposal shall incorporate the measures in MICC 19.07.190(D)(3), unless the applicant can demonstrate that they would result in no net environmental benefit or that they are not applicable. Implementation shall be documented in the application for the building permit for the proposed development.
5. A mitigation plan for the impacts to the Type F watercourse and associated buffer and the piped watercourse and associated setback shall be prepared by a qualified professional that achieves equivalent or greater ecological function including, but not limited to:
 - a. Habitat complexity, connectivity, and other biological functions;
 - b. Seasonal hydrological dynamics, water storage capacity and water quality; and

- c. Geomorphic and habitat processes and functions.

The mitigation plan shall be submitted for review and approval along with the future building permit application for the proposed development.

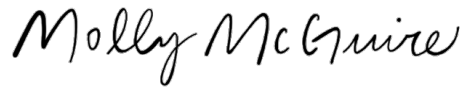
DEVELOPMENT REGULATION COMPLIANCE – DISCLOSURE

1. The applicant is responsible for obtaining any required permits or approvals from the appropriate Local, State, and Federal Agencies.
2. All required permits must be obtained prior to the commencement of construction.

RECOMMENDATION

Staff reviewed the proposed development application in accordance with standards for setback deviations and reasonable use exceptions. The staff report and recommendations to the Hearing Examiner are based on the application and all supplemental information. Pursuant to MICC 19.15.140(C), the Hearing Examiner may approve, conditionally approve, continue the public hearing, remand the application, or deny the application. The City recommends that the Hearing Examiner **conditionally approve**, City File Numbers CAO24-029 and DEV25-005.

Recommended this 26th day of September, 2025



Molly McGuire
Senior Planner
Community Planning & Development
City of Mercer Island

**BEFORE THE HEARING EXAMINER FOR THE CITY OF MERCER
ISLAND**

Phil Olbrechts, Hearing Examiner

RE: Kathryn and Tim Bauman	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION
Reasonable Use and Setback Deviation	
CAO24-029; DEV25-005	

INTRODUCTION

Kathryn and Tim Bauman request a reasonable use exception and a setback deviation to replace a single-family residence with a new 4,097 square foot residence at 5928 77th Avenue SE. The requested setback deviation would reduce the required front yard setback from twenty feet to ten feet. The requested reasonable use exception would reduce the required ten-foot building setback of a Category IV wetland to 2.3 feet, encroach up to 97 feet into the 120-foot buffer of an off-site Type F stream and encroach 31 feet into the 45-foot setback of a piped watercourse. The applications are approved subject to conditions.

This proposal only marginally meets reasonable use criteria. As demonstrated in the comment letter from the Washington State Department of Fish and Wildlife, Ex. 28(3), the large size of the proposed home is significantly more than many would consider minimum reasonable use of the project site. However, this decision must be based upon the evidence presented in this review proceeding. That evidence establishes that the existing home is 72 years old and not suitable for long-term occupation. The evidence further establishes that a significantly smaller home would not be feasible given the 2.575 million dollars the Applicants paid to purchase the property. It is certainly within the realm of possibility that a detailed market study would reveal that a significantly smaller home would be feasible. However, that evidence was not presented. The Applicants made a prima facie case that their proposal was necessary for reasonable use. There was no evidence to the contrary. The reasonable use request was approved on that basis.

Some neighbors asserted that the proposal may not be consistent with a view covenant. The Applicants' attorney responded that the covenant is not recorded. See Ex. 28(1) and 29(1). Private disputes regarding view covenants are beyond the scope of this proceeding. See, e.g. *Halverson v. Bellevue*, 41 Wn. app. 457 (1985)(Bellevue City Council has no authority to resolve adverse possession claim between neighbors in subdivision review). If the neighbors would like to litigate that issue the proper forum would be King County Superior Court.

ORAL TESTIMONY

A computer-generated transcript of the hearing has been prepared to provide an overview of the hearing testimony. The transcript is available for informational purposes only as Appendix A. No assurances are made as to accuracy of the transcript. Those needing an accurate transcription will have to purchase a copy of the recording from the City.

EXHIBITS

The 32 exhibits listed on pages 1-2 of the staff report were admitted into the record during the September 26, 2025 hearing.

FINDINGS OF FACT

Procedural:

1. Applicants. Kathryn and Tim Bauman, 5928 77th Ave SE, Mercer Island, WA 98040-4800.
2. Hearing. A virtual hearing was held on the applications at 9:00 am on September 26, 2025.

Substantive:

3. Site/Proposal Description. Kathryn and Tim Bauman request a reasonable use exception and a setback deviation to replace a single-family residence with a new 4,097 square foot residence. The requested setback deviation would reduce the required front yard setback from twenty feet (MICC 19.02.020C1a) to ten feet. The requested reasonable use exception would allow the proposal to reduce the required ten foot building setback (MICC 19.07.190C7) to a Category IV wetland to about 2.3 feet, encroach up to 87 feet into the 120-foot buffer and ten foot setback (MICC 19.07.190C1 and 7) of an off-site Type F stream and 31 feet into the 45-foot building setback (19.07.180C6b) of a piped watercourse. The entire property is encumbered with the 120 foot stream buffer.

The project site is a 15,510 square foot lot that is currently developed with a 1,830 square foot single-family residence with no garage that was previously used as a cabin for a Boy Scouts leader. The residence was constructed in 1953. The applicant further asserts that the residence does not comply with structural or seismic building code standards. The east side of the property contains areas with greater than 15 percent grade, which constitutes a landslide hazard area. The subject site is also encumbered with a piped watercourse and the buffer to a Type F stream. The adjacent property to the northeast contains a Category IV wetland which has an associated 40-foot standard buffer that encroaches onto the subject property.

The site is further constrained by an access easement that bisects the property at the south-west corner (Exhibit 16) and a view covenant documented in the 2001 Lot Line Revision (Exhibit 14) that effectively increases the rear yard setback from 25 feet to 42 feet.

4. Characteristics of the Area. The project site is surrounded by single-family development. The eight closest surrounding homes have an average of 3,975 square feet of finished area with 1-3 car garages.

5. Reasonable Use Adverse Impacts. As conditioned, the requested reasonable use exception will not create any significant adverse impacts to the stream and wetland resources of the project site. A condition of approval requires that a detailed mitigation plan must be prepared demonstrating compliance with MICC 19.07.180(E), which requires a showing of no net loss of ecological function. Such mitigation plans are typically prepared before a final decision on a reasonable use request is made so that hearing participants staff have an opportunity to assess the feasibility and adequacy of proposed mitigation¹. However, staff testified at the hearing that the current building site and surrounding yards are already degraded. Under these circumstances it would appear that effective improvements to existing ecological function can be readily achieved and that this can be fully addressed in the implementation of the conditions of approval.

Some concerns were raised about vehicular access impacts to adjoining homes during construction. Since construction activity is a resulting impact of reasonable use approval, construction impacts are arguably within the scope of review. Condition of Approval No. 6 mitigates against these potential construction impacts.

6. Setback Deviation Adverse Impacts. The proposed setback deviation will not create any adverse impacts. Approval would improve upon existing conditions. The existing home is located five feet from the front property line. The proposed deviation would place the new home ten feet from the front property line. City staff have reviewed the proposal and have not identified any adverse impacts with placement of the within ten feet of 77th Ave (the front property line). No traffic site distance problems associated with this proximity are evident from the record and the ten foot separation provides reasonable space for on-site parking and light and air separation from the street.

7. Necessity of Reasonable Use Exception. There are no reasonable alternatives to replacing the existing home within the Type F and piped watercourse buffers.

¹ MICC 19.07.110A requires that a critical areas study be prepared for development proposals that alter critical areas or critical area buffers. The reports are also required “*when required to determine the potential impact to a critical area.*” The reports include an assessment of critical area impacts and mitigation sequencing. Such a report is critical to assessing a reasonable use request, since reasonable use standards require assessment and full mitigation of any critical area impacts. WDFW was correct in identifying that such a report should have been prepared for the reasonable use request.

At the outset it should be recognized that the entire lot is encumbered by the Type F stream buffer. Consequently, the only choices for single-family use as it relates to the stream buffer is to retain/expand the existing home or replace it as proposed.

The existing residence is too old, primitive and dilapidated to be retained as a Mercer Island residence. Retention is not a reasonable option. The existing residence is 72 years old and was built as a cabin. According to the Applicant the home doesn't conform to modern building code structural and seismic standards. It is without a garage. A building survey performed by Mercer Builders (Exhibit 6, Appendix C) finds that the existing residence is undergoing significant rot in the framing of the lower level on the east side. Movement at the mid span of the east side was also observed by the outdoor building pad that is sinking or falling away from the house.

The Applicants assert and City staff agree that remodeling the residence would require the remediation of the foundation system and portions of the exterior walls would need to be rebuilt. Such actions would likely result in the structural alteration of more than 40 percent of the exterior walls, which would result in the loss of legal nonconforming status under MICC 19.01.050(D)(1)(b)(iii).

8. Minimum Reasonable Use. The most challenging part of the application is ascertaining whether the proposed home size qualifies as minimum reasonable use. Based upon surrounding home sizes, the proposal is found to qualify as minimum reasonable use of the project site.

A 4,097 square foot home is typically not considered the minimum size necessary for reasonable use. However, it is acknowledged that isn't always the case. Mason County, for example, recognizes a 3,000 square foot building footprint (equating to a 6,000 sf two story home) as minimum reasonable use. See Mason County Code 8.52.220e; SHR2024-00009 Mason Examiner Variance Decision (detailing legislative history of Mason minimum reasonable use)².

Unlike Mason County, Mercer Island hasn't adopted any standard for what qualifies as a minimum home size necessary for reasonable use. That is typical of most cities and counties. In the absence of any code standard on minimum reasonable use, the Applicant has fallen back on the common metric of comparing the size of the proposed home to surrounding homes. Surrounding home sizes provide a rough approximation of the size necessary to make a home marketable in a particular community.

The finished size of the proposed home is 3,753 square feet. The average finished home size of the eight homes in closest proximity to the project site is 3,975 square

² Although 6,000 square foot homes could theoretically be built as minimum reasonable use, the Examiner takes judicial notice of the reasonable use decisions issued over the last 30 years, none of which proposed any homes close to that size.

feet³. Ex. 6, App. A. The proposed size of the home is in line with surrounding home sizes.

The owners also purchased the property for \$2,575,000 in 2023. Staff report, p. 12. In the absence of any other real estate data, it would appear difficult to sell a home significantly smaller than proposed for more than \$2,575,000. For a house of such large proposed size, the record could have certainly benefitted from more data about average home sizes and associated sales prices in Mercer Island. Given surrounding home sizes, however, it is reasonable to conclude that more likely than not it would be challenging to sell a home smaller than that proposed for more than \$2,575,000.

9. Necessity of Setback Deviation. The requested setback deviation is necessary to minimize critical area impacts. Approval of the deviation would eliminate the 7.58 foot encroachment of the proposal into the 40-foot on-site wetland buffer, would decrease the Type F buffer encroachment and piped water course encroachment by about ten feet each and the landslide hazard encroachment by about three feet.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. The hearing examiner has authority to hold a hearing and issue a final decision on the reasonable use and deviation requests. MICC 19.15.030 provides that reasonable use requests are Type IV reviews and that setback deviation requests are Type II requests. The two applications are consolidated under the highest review process, Type IV, pursuant to MICC 19.15.030(F). MICC 19.15.030 Table D provides that the hearing examine shall hold hearings and issue final decision on Type IV applications.

Substantive:

2. Zoning Designations. The area is zoned Single-Family Residential (R-12).

3. Review Criteria and Application. The criteria for reasonable use exceptions to critical area stream and wetland buffers are governed by MICC 19.07.140A. The criteria for setback deviation requests are governed by MICC 19.06.110C. Applicable criteria are quoted in italics below and applied through corresponding conclusions of law.

Reasonable Use

MICC 19.07.140A1: *...The hearing examiner may approve the application for a reasonable use exception only if the development proposal meets all of the following criteria:*

³ The reference to 6088th 77th in appendix A is presumably a typographical error for 6008 77th.

1. The application of this chapter would deny all reasonable use of the property;

4. Criterion Met. The criterion is met.

MICC 19.16.010 defines reasonable use as follows:

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 MICC 19.07.140 balances the public interests against the regulation being unduly oppressive to the property owner.

The City's definition does in fact faithfully reflect federal and state regulatory takings cases. There is surprisingly little case law directly addressing stream and wetland regulations. However, the little that there is makes it clear that takings liability is a major hazard in application of those standards. In the context of regulatory takings caused by wetland regulations, a taking will most often occur under either a *Lucas* analysis where the property owner is deprived of all reasonable economical use or a *Penn Central* analysis where the burden on the property owner is weighed against the public need and benefit of the regulations in question.

The *Lucas* analysis comes from the US Supreme Court Case, *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). In that case, a property owner owned two vacant oceanfront lots in South Carolina. The Beachfront Management Act, passed two years after his purchase of the lots, effectively prevented him from erecting homes on properties due to the effects it would have on the public beach. The *Lucas* case set the precedent for "categorical takings", where no balancing of public verses private interests is required to determine if a property owner is entitled to compensation under the takings clause. The U.S. Supreme Court in *Lucas* ruled that when regulations deprive a property owner of all economically viable use, a categorical takings has occurred and compensation is due unless the regulations fall into some very limited exceptions.

In the absence of a categorical takings, the remaining way to establish a regulatory takings is through a *Penn Central* analysis. *Penn Central* is a United States Supreme Court case that created the concept of regulatory takings, where just compensation under the federal constitution 5th Amendment takings clause can be required by over-

1 regulation of property without any physical appropriation. *See Penn Central v. New York*
 2 *City*, 438 U.S. 104 (1978) The *Penn Central* court ruled that whether a regulatory
 3 action that diminishes the value of a claimant's property constitutes a "taking" of that
 4 property depends on several factors, including the economic impact of the regulation on
 5 the claimant, particularly the extent to which the regulation has interfered with distinct
 6 investment-backed expectations, as well as the character of the governmental action.

7 There have been very few cases that have applied 5th Amendment takings claims to
 8 wetland and/or stream buffer regulation. None have assessed *Penn Central* takings
 9 claims in the State of Washington to wetland regulations. One case outside of
 10 Washington provides some insight as to how *Penn Central* should be applied. *See*
 11 *Friedenburg v. New York State Dept. of Environmental Conservation*, 3 A.D.3d 86
 12 (2003). In *Friedenburg* the property owner was denied a permit to build a single-family
 13 home on a 2.5-acre waterfront parcel. The only remaining use for the property was
 14 access rights to the shoreline. The denial of the permit devalued the property from
 15 \$665,000 to \$31,500. The value of the property would have been \$50,000 if additional
 16 use rights alleged by the government defendant applied, such as the construction of a
 17 catwalk or moorage for a houseboat. The New York Supreme Court applied federal
 18 constitutional takings case law and ruled that a takings occurred whether the property
 19 was valued at \$50,000 or \$35,000. The Court reasoned that the property owner
 20 experienced either a 95% or 92.5% reduction in value and that in either case the
 21 reduction was significant. The Court found that the public benefit conferred by wetlands
 22 protection did not justify the taking of public property. It noted that if there are no
 23 direct reciprocal benefits to the property owner, the property owner should not bear the
 24 burden of providing those benefits to the general public. Due to the significant loss in
 25 value and the lack of reciprocity in the benefits of wetland protection, the Court found
 a takings under *Penn Central*.

Other opinions have reached similar results. In *Baycrest Manor, Inc. v. City of N.Y.* (In
 re New Creek Bluebelt, Phase 3), 2017 N.Y. Slip Op. 7994 (N.Y. App. Div. 2017), the
 court found it "likely" in assessing the value of property in a condemnation action that
 a property owner would have prevailed in a takings claim solely due to the fact that
 wetlands regulations reduced the value of the property by 88%. The court made this
 finding even though the takings claim was based upon an owner who would have
 purchased the property after adoption of the wetland regulations instead of before (i.e.
 the owner would have purchased the property knowing that wetland regulations severely
 limited development potential).

The only Washington case that provides some useful insight on when zoning regulations
 should be waived to protect private property rights is *Buechel v. Dept. of Ecology*, 125
 Wn.2d 196, 884 P.2d 910 (1994). In applying a "reasonable use" term in Mason
 County's shoreline variance standards, the *Buechel* court largely used the same factors
 employed by the US Supreme Court in its *Penn Central* analysis. In the *Buechel* case,
 the Applicant requested a shoreline variance to build a home within a shoreline setback
 along Hood Canal. The Mason County shoreline variance criteria at the time required
 the Applicant to establish that if he complied with shoreline regulations, "...he cannot

1 *make any reasonable use of his property.*” Without the variance there was no space for
 2 a single-family home. The subject lot only had 1,000 square feet of developable space
 3 because the rest of the property was submerged. The property was zoned for residential
 4 use. The County denied the variance request.

5 The State Supreme Court sustained the County’s denial on the basis that the property
 6 could be used for recreational use, such as for a dock or boathouse. Although the
 7 Supreme Court did not directly identify takings law in its assessment, the factors it
 8 applied are largely the same used in a *Penn Central* takings analysis, probably not
 9 coincidentally. In assessing whether recreational use qualified as a reasonable use, the
 10 *Buechel* court noted that “[t]he size, location, and physical attributes of a piece of
 11 property are relevant when deciding what is a reasonable use of a particular parcel of
 12 land.” 125 Wn.2d at 208. Other factors the *Buechel* court found relevant was
 13 investment backed expectations, including the zoning of the property at the time of
 14 purchase. *Id.* In the *Buechel* case the size of the developable portion of the property
 15 was small, the property had significant regulatory and physical constraints at the time
 16 of purchase and the use of many surrounding waterfront properties was limited to
 17 recreational use. For all these reasons, the Court determined that recreational use was a
 18 reasonable use of the property and, therefore, the Applicant was not denied all
 19 reasonable use because he wasn’t allowed to build a home.

20 In its comment letter the Washington State Department of Fish and Wildlife (WDFW)
 21 cited two cases purportedly setting precedent against the proposal. Those cases have no
 22 legal standing to serve as precedent for the Bauman application. WDFW provided no
 23 citation to any court reporter so the issuing courts are unknown. The cases are not any
 24 issued Washington Court of Appeals decision, suggesting that they may be superior
 25 court cases. Superior court cases don’t serve as legal precedent. The reasoning of the
 26 opinions could prove helpful in assessing the merits of the subject application.
 27 However, WDFW didn’t provide copies of the decision so that information isn’t
 28 available⁴. The distinguishing feature of the proposal is that the existing home is not
 29 suitable for any further long-term occupancy and is clearly not consistent with the large
 30 size and high property values of the surrounding areas. Without access to the actual
 31 court opinions referenced by WDFW, there’s no way of knowing whether those cases
 32 have any bearing on the unique characteristics of the Applicants’ proposal.

33 Given the case law above, it is clear that a minimum takings entitlement to a reasonably
 34 size lot zoned for single-family use is a single-family home. The 15,510 area of the
 35 project site is well above the minimum 12,000 net lot area required for lots in the R12
 36 zone required by MICC 19.02.020. As noted in Finding of Fact No. 7, retention of the
 37 currently existing 72-year-old home is not a reasonable alternative to construction of a
 38 new home. At the least, the Applicants are entitled under federal takings law to
 39 demolition and replacement of the existing single-family home. The City’s critical areas

4 Legal databases such as Westlaw and Lexus available to attorneys don’t include superior court decisions. If such decisions are used to support a position copies must be provided.

ordinance denies that entitlement because the Type F stream buffer prohibits any residential construction anywhere on Applicants' lot.

MICC 19.07.140A2: *There is no other reasonable use with less impact on the critical area;*

5. Criterion met. The criterion is marginally met for the reasons identified in Finding of Fact No. 8. In showing that the proposed home is of similar size to surrounding homes, the Applicants have established a prima facie case that the home size is the minimum necessary to provide for economical use of the property. Investment backed expectations, as identified in Conclusion of Law No. 4, is an important factor in reasonable use analysis. More likely than not a smaller home would make it much more difficult to recoup the Applicants' \$2,575,000 purchase price. No evidence was presented to show that this investment expectation could be maintained with a smaller home. In any event it is also significant that a smaller home would also not result in any significant added protection of affected critical areas. According to the testimony of staff the project area is significantly degraded by the existing house, terracing and landscaping. Staff do not see any significant public benefit to requiring a smaller home.

MICC 19.07.140A3: *Any alteration to critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property;*

6. Criterion met. The criterion is marginally met. As noted in the staff report the Applicants have generally limited the proposed development to project areas that have already been disturbed. The Applicants have also successfully acquired a front yard setback deviation to maximize separation from critical areas. The proposed design could have reduced the sprawling footprint by proposing a taller, more compacted residence; however, the proposed footprint is generally located where existing development has occurred and will be removed.

MICC 19.07.140A4: *The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;*

7. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 5.

MICC 19.07.140A5: *The proposal is consistent with the purpose of this chapter and the public interest; and*

8. Criterion met. The criterion is met. The purposes of the City's critical areas ordinance (Chapter 19.07 MICC) are detailed in MICC 19.07.010A-M. Those purposes generally require protection and mitigation of critical areas while also requiring balancing of property owner interests with the public interest. Those purposes are met in the Applicants' proposal by allowing for the reasonable use of property in a manner that is fully mitigated and minimizes adverse impacts to critical areas.

MICC 19.07.140A6: *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.*

9. Criterion met. The criterion is met. The project site is completely encumbered by critical areas and associated buffers. This natural condition has nothing to do with the actions of the current or prior property owner.

Setback Deviation

MICC 19.06.110C2: *Criteria. A setback deviation shall be granted by the city only if the applicant demonstrates all of the following:*

a: No use deviation shall be allowed;

10. Criterion met. The criterion is met. The proposed single-family home is an allowed use in the R-12 district.

MICC 19.06.110C2b: *The granting of the deviation 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;*

11. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 6.

MICC 19.06.110C2c: *The granting of the deviation will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property;*

12. Criterion met. The criterion is met. The modest reduction in front setback will have no discernable impact upon neighborhood character and will have no impact on uses of surrounding properties.

MICC 19.06.110C2d: *The deviation is consistent with the policies and provisions of the comprehensive plan and the development code;*

13. Criterion met. The criterion is met for the reasons identified at pages 7-8 of the staff report.

MICC 19.06.110C2e: *The basis for requesting the deviation is not the direct result of a past action by the current or prior property owner;*

14. Criterion met. The criterion is met. The need for the deviation is to protect critical areas, which is a natural condition of the property and not a circumstances attributable to owners of the property.

MICC 19.06.110C2f: *The setback deviation is associated with the approval of development of a single lot or subdivision that is constrained by critical areas or critical area buffers;*

15. Criterion met. The criterion is met. The sole purpose of the deviation request is to help minimize impacts to critical areas.

MICC 19.06.110C2g: *The building pad resulting from the proposed deviation will result in less impact to critical areas or critical area buffers; and*

16. Criterion met. The criterion is met. The deviation request will result in greater separation from critical areas as identified in Finding of Fact No. 9, which in turn minimizes impacts.

MICC 19.06.110C2h. *Yard setbacks shall not be reduced below the following minimums:*

- i. Front and rear setbacks may not be reduced to less than ten feet each;*
- ii. Side setbacks may not be reduced to less than five feet.*

17. Criterion met. The criterion is met. The front yard setback will not be reduced to less than ten feet.

DECISION

The reasonable use and deviation requests are approved subject to the following conditions:

1. The proposal shall be in substantial conformance with Exhibit 4 and all applicable development standards contained within Mercer Island City Code (MICC) Chapter 19.07.

2. The applicant is responsible for documenting any required changes in the project proposal due to conditions imposed by any applicable local, state, and/or federal government agencies.

3. Construction or substantial progress toward construction of a development for which a permit has been granted must be undertaken within three years after the approval of the permit or the permit shall terminate. The code official shall determine if substantial progress has been made.

4. The development proposal shall incorporate the measures in MICC 19.07.190(D)(3), unless the applicant can demonstrate that they would result in no net environmental benefit or that they are not applicable. Implementation shall be documented in the application for the building permit for the proposed development.

5. A mitigation plan for the impacts to the Type F watercourse and associated buffer and the piped watercourse and associated setback shall be prepared by a qualified professional that achieves equivalent or greater ecological function including, but not limited to:

- a. Habitat complexity, connectivity, and other biological functions;
- b. Seasonal hydrological dynamics, water storage capacity and water quality; and
- c. Geomorphic and habitat processes and functions.

The mitigation plan shall be submitted for review and approval along with the future building permit application for the proposed development.

6. As assured in Ex. 29(2), the Applicants' contractor shall provide neighboring homes with a direct mobile phone number of the construction site supervisor to address access and parking problems caused during construction. Neighboring homes are defined at the least as those adjoining homes using the same vehicle access as that used by the project site. The contractor will provide a parking plan for all construction vehicles. The contractor will abide by all the requirements and regulations of the City of Mercer Island regarding construction parking and access.

Dated this 10th day of October, 2025.



Phil A. Olbrechts

Mercer Island Hearing Examiner

Appeal Right and Valuation Notices

This land use decision is final and subject to appeal to superior court as governed by the Land Use Petition Act, Chapter 36.70C RCW.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.