
CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

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PLANNING COMMISSION

TO: Planning Commission

FROM: Molly McGuire, Planner

DATE: March 16, 2023

SUBJECT: ZTR23-001

ATTACHMENTS: A. Mercer Island Beach Club (MIBC) Docket Request dated September 29, 2022

PURPOSE

This memo provides the Planning Commission with the staff recommendation for ZTR23-001. This zoning code amendment was proposed in a Docket Request dated September 29, 2022 (Attachment A). The docket request proposed an amendment to the [Shoreline Master Program \(SMP\) Chapter 19.13 Mercer Island City Code \(MICC\)](#). At the March 22 meeting, the Planning Commission will hold a public hearing and make a recommendation to the City Council.

BACKGROUND

Background on the original proposal submitted by the Mercer Island Beach Club (MIBC) and associated docketing procedures can be found in the previous [Staff Memo dated February 15, 2023](#).

During the February 22 meeting, the Planning Commission requested additional information on the Shoreline Conditional Use Permit (SCUP) process and review criteria found in [WAC 173-27-160](#) and asked staff to revise Alternative B, now Alternative B.1, and draft an alternative amendment to [MICC 19.13.040 - Table B Shoreland Uses Waterward of the Ordinary High Water Mark](#) to include a new use that more directly and narrowly aligns with the MIBC's original proposal.

SCUP PROCESS AND REVIEW CRITERIA

During the February 22 meeting, the Planning Commission expressed concerns regarding the requirement for an applicant to demonstrate consistency with shoreland development standards contained in the SMP, as there are no standards that explicitly pertain to the type of facility proposed by the MIBC. Staff would like to address these concerns by proposing the following alternative (further discussed under Alternative B.1 below):

A use not listed in this table is not permitted within shorelands. Other uses which are not classified or set forth in this chapter may be authorized as conditional uses provided the

applicant can demonstrate consistency with the requirements of WAC 173-27-160 and the applicable shoreland development standards contained in this chapter. In the event that there are no applicable shoreland development standards, the conditional use will be reviewed for consistency with Chapter 173-27 WAC.

Shoreline Conditional Use Permits follow the permitting procedures outlined in [MICC 19.15.030](#) for Type IV permits. The Hearing Examiner makes a recommendation to the Washington State Department of Ecology (Ecology). Ecology issues the final decision SCUP. For a SCUP to be approved, the applicant must demonstrate compliance with WAC 173-27-160:

The purpose of a conditional use permit is to provide a system within the master program which allows flexibility in the application of use regulations in a manner consistent with the policies of RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by local government or the department to prevent undesirable effects of the proposed use and/or to assure consistency of the project with the act and the local master program.

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates all of the following:

(a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;

(b) That the proposed use will not interfere with the normal public use of public shorelines;

(c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;

(d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and

(e) That the public interest suffers no substantial detrimental effect.

(2) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

(3) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program.

(4) Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

Staff finds that the above criteria are clear enough to resolve the concerns raised by the MIBC and Planning Commission. Additionally, any proposed development that is undesirable would need to prove that the use is compatible with uses planned for the area under the comprehensive plan and shoreline master program. The Department of Ecology would review the proposal and make the final decision, following the Hearing Examiner's recommendation.

ALTERNATIVES

The alternatives the Planning Commission can consider for ZTR23-001 are listed below. When the Planning Commission provided its initial feedback on the proposed change during the meeting on February 22, they requested an additional alternative to amend MICC 19.13.040 Table B. The Planning Commission requested an alternative that would be more narrowly focused on allowing the type of boating facility proposed by the MIBC rather than allowing any uses that are not listed in the table by SCUP. The originally proposed Alternative B, presented below as Alternative B.1, is a broad approach that would allow any uses that are not listed in Table B by SCUP. The new alternative, presented below as Alternative B.2, reflects the Planning Commission request by narrowly allowing a new use by SCUP and subject to new standards that will be developed consistent with "boating facilities" standards in WAC 173-26-241(3)(c).

Alternative A: Amend MICC 19.13.040 Table B – Shoreland Uses Waterward of the Ordinary High Water Mark as proposed.

Alternative A would revise the footnote for MICC 19.13.040 Table B "A use not listed in this table is not permitted within shorelands" as proposed by the MIBC to allow existing private clubs or residential communities serving more than 10 families to use the SCUP process for redevelopment of moorage facilities, floating platforms, mooring piles, diving boards, diving platform, swim areas and other accessory uses. The proposed footnote amendment would read:

A use not listed in this table is not permitted within shorelands, provided, however, that this footnote does not preclude any existing private club or residential community serving more than 10 families from using a Shoreline Conditional Use Permit process for redevelopment of its moorage facilities, floating platforms, mooring piles, diving boards and diving platforms, associated swim areas and other accessory uses, all where the applicable development standards are to be determined on a case-by-case basis.

Benefits: Existing private clubs or residential communities serving more than 10 families would be authorized to redevelop their facilities with the approval of a shoreline conditional use permit.

Drawbacks: Alternative A does not contain language that is consistent with existing state law for processing uses not listed in the SMP. See Alternative B, which would provide a similar outcome for facilities like the MIBC, but also includes the language needed to remain consistent with state law.

Alternative B: Amend MICC 19.13.040 Table B - Shoreland Uses Waterward of the Ordinary High Water Mark Footnote and Amend MICC 19.13.010(E) (Staff Recommended).

Staff recommends Alternative B; however, the Planning Commission can decide which policy approach is preferred (broad: Alt. B.1, narrow: Alt. B.2). The two alternatives, B.1 and B.2, both address the problem highlighted in the original docket application. The changes proposed in either alternative would allow the development of a larger dock operated by a nonprofit organization such as the MIBC.

Broad Approach: Alternative B.1 – Amend MICC 19.13.040 Table B - Shoreland Uses Waterward of the Ordinary High Water Mark Footnote and Amend MICC 19.13.010(E) to Allow Unlisted Uses by SCUP.

Alternative B.1 would revise the footnote “A use not listed in this table is not permitted within shorelands” as proposed by Staff to language that is consistent with existing state law. WAC 173-27-160(3) states that “other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program”. The proposed staff alternative amendment would read:

A use not listed in this table is not permitted within shorelands. Other uses which are not classified or set forth in this chapter may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of WAC 173-27-160 and the applicable shoreland development standards contained in this chapter. In the event that there are no applicable shoreland development standards, the conditional use will be reviewed for consistency with Chapter 173-27 WAC.

Alternative B.1 and B.2 (below) would also amend MICC 19.13.010(E) to include an adoption by reference to Chapter 173-27 WAC Shoreline Management and Enforcement Procedures to establish the relationship with existing state law and provide clear procedures for processing various shoreline permits. The amendment to MICC 19.13.010(E) would read:

The provisions of this chapter shall not relieve any responsibility to comply with other federal and state laws or permits. The shoreline management permit and enforcement procedures contained within Chapter 173-27 WAC as presently constituted or hereinafter amended, are adopted by reference. All work waterward of the OHWM may require permits from one or all of the following: U.S. Army Corps of Engineers, Washington Department of Fish and Wildlife, Washington Department of Natural Resources, or Washington Department of Ecology.

Benefits: Amending the Table B Footnote to be consistent with existing state law would result in the same outcome for the applicant and other similar facilities. During the February 22 meeting, the MIBC and Planning Commission raised several concerns over the lack of clarity in shoreline permitting standards and criteria for uses that are not listed in the SMP but would be allowed through the conditional use permit process through this amendment, as the SMP does not contain review criteria for the specific type of development proposed by the MIBC. Those applicants pursuing a SCUP for unnamed uses would be required to participate in a preapplication meeting per MICC 19.15.030 – Table B. During this preapplication meeting, staff would evaluate the proposed use and provide the applicant with information detailing which regulations would apply to that specific use. In most cases, staff would evaluate the proposal and identify the named use with the closest impact and development intensity to determine which conditions would apply to the proposed use (hence, ‘conditional use permit’). This is a standard practice for allowing unnamed uses by conditional use permit.

Drawbacks: See the Staff Memo dated February 15, 2023, for a discussion of the drawbacks associated with Alternative B.1 (previously Alternative B).

Narrow Approach: Alternative B.2 – Amend MICC 19.13.040 Table B - Shoreland Uses Waterward of the Ordinary High Water Mark Uses and MICC 19.13.050 - Shoreland Development Standards and Amend MICC 19.13.010(E) to Allow the Proposed Use by SCUP.

Alternative B.2 would add a new use in MICC 19.13.040 Table B and standards in MICC 19.13.050. During the February 22 meeting, the Planning Commission requested that a new use be created and presented as an alternative that would apply specific standards and review criteria for uses similar to what the MIBC proposed. Alternative B.2 would require staff to develop standards for a new use that would allow the MIBC and similar uses to redevelop their facilities, while remaining consistent with state shoreline and environmental standards. If the Planning Commission decides to pursue Alternative B.2, staff will draft specific standards for the Planning Commission to consider. Drafting new development standards for a specific use is a significant enough departure from the original code development proposal to warrant a separate public hearing.

One option would be to adopt “marina” as a new use, and adopt development standards. Development standards for boating facilities, such as marinas, must be consistent with the requirements established in WAC 173-26-241(3)(c):

For the purposes of this chapter, "boating facilities" excludes docks serving four or fewer single-family residences. Shoreline master programs shall contain provisions to assure no net loss of ecological functions as a result of development of boating facilities while providing the boating public recreational opportunities on waters of the state.

Where applicable, shoreline master programs should, at a minimum, contain:

- (i) Provisions to ensure that boating facilities are located only at sites with suitable environmental conditions, shoreline configuration, access, and neighboring uses.
- (ii) Provisions that assure that facilities meet health, safety, and welfare requirements. Master programs may reference other regulations to accomplish this requirement.
- (iii) Regulations to avoid, or if that is not possible, to mitigate aesthetic impacts.
- (iv) Provisions for public access in new marinas, particularly where water-enjoyment uses are associated with the marina, in accordance with WAC 173-26-221(4).
- (v) Regulations to limit the impacts to shoreline resources from boaters living in their vessels (live-aboard).
- (vi) Regulations that assure that the development of boating facilities, and associated and accessory uses, will not result in a net loss of shoreline ecological functions or other significant adverse impacts.
- (vii) Regulations to protect the rights of navigation.
- (viii) Regulations restricting vessels from extended mooring on waters of the state except as allowed by applicable state regulations and unless a lease or permission is obtained from the state and impacts to navigation and public access are mitigated.

Drafting development standards would require additional staff time to develop this alternative and the Planning Commission would need to hold another public hearing. To prepare a draft of development standards, staff will review requirements in state law, evaluate approaches other jurisdictions take, and consult with state agencies. Should the Planning Commission choose to

move forward with Alternative B.2, staff will prepare a draft of development standards for the Planning Commission to consider at its April meeting. A public hearing on the proposed development standards would likely be scheduled for May.

Benefits: Alternative B.2 would give the City time to develop regulations for larger docks and marinas. Drafting development regulations for larger docks and marinas would result in more specific regulations than Alternatives A and B.1.

Drawbacks: Alternative B.2 would require additional staff time, including noticing and scheduling of another public meeting to discuss the details of the proposed standards. This would add an additional 5-6 weeks of review. Alternative B.2 would not allow for the same level of flexibility in the application of use regulations as Alternative B.1.

Alternative C: Do not amend MICC 19.13.040 Table B Notes or MICC 19.13.010(E).

Making changes to MICC 19.13.040 Table B Notes and MICC 19.13.010(E) is a local choice. Amending this code section is not required by state or local law. The City can elect to make no changes at this time.

Benefits: Alternative C would not allow for unforeseen uses to be authorized subject to a shoreline conditional use permit and would not establish a relationship between the SMP and state law for shoreline permit processing procedures.

Drawbacks: Making no change to MICC 19.13.040 Table B Notes or MICC 19.13.010(E) would not provide consistency with state law or clarity on shoreline permit processing. It would also prevent the MIBC from proceeding with reconfigurations to their docks as currently designed.

STAFF RECOMMENDATION

Staff recommends either Alternative B.1 or B.2 to amend MICC 19.13.040 Table B and 19.13.010(E). The question of whether to take a broad approach like Alternative B.1 or a narrow approach like Alternative B.2 is a local choice the Planning Commission can make a recommendation on. Analysis of Alternative B.1 is provided below. If the Planning Commission selects Alternative B.2, staff will prepare detailed analyses of that code amendment once a draft is prepared.

Alternative B.1 as presented is consistent with the policies of the Comprehensive Plan, the Mercer Island development code, and state requirements. Alternative B.1 would enable an organization like the MIBC to develop a larger dock to serve its members.

MICC 19.13.040 Table B - Shoreland Uses Waterward of the Ordinary High Water Mark Footnote does not currently allow for uses not listed to be permitted through any means. The proposed amendment would provide flexibility in the application of use regulations in a manner consistent with state law, including the policies of RCW [90.58.020](#). Further, the amendment would allow for the applicant to demonstrate compliance with only the applicable shoreland development standards in the SMP.

Alternative B.1 would amend MICC 19.13.010(E) to reference Chapter 173-26 WAC. MICC 19.13.010(E) does not currently establish a relationship with shoreline management and enforcement procedures. The purpose of this proposed amendment is to provide clarity for City staff and future applicants for reviewing

shoreline permits such as shoreline conditional use permits and shoreline variances, that do not have local requirements through the City's SMP. Taken together, the amendments proposed in Alternative B would better articulate the relationship between the City's SMP and state law while also allowing the MIBC to redevelop their aquatic facilities in a manner consistent with the City's SMP.

A State Environmental Policy Act (SEPA) determination of nonsignificance (DNS) for the proposed amendments will be published to the SEPA Register on March 20, 2023. The City published a notice of proposed amendment and completed SEPA checklist on February 13, 2023. The notice and SEPA Checklist assigned SEPA Register number 202300664. The comment period on the notice and SEPA checklist was open from February 13 to March 15. No comments on the SEPA checklist were received.

Consistency with the Code Amendment Criteria in MICC 19.15.250(D)

Decision criteria for amending the development code are established in MICC 19.15.250(D). The proposed amendments in Alternative B.1 are consistent with those criteria as follows.

MICC 19.15.250(D)(1)

MICC 19.15.250(D)(1) states that a code amendment may only be approved if, "The amendment is consistent with the comprehensive plan". The City's SMP goals and policies are established in [Comprehensive Plan Element 7 Shoreline Master Program Policies](#). Alternative B.1 would be consistent with the SMP policies in Element 7.

The Shoreline Master Program Element does not have policies that address unnamed or unlisted uses. Under Alternative B.1, any proposed unlisted uses would be required to be consistent with the Shoreline Master Program policies per WAC 173-26-160(1)(a), which requires conditional uses to be consistent with the SMP. Each proposal would be evaluated for whether it meets these policies during permit review. In this way, the amendment would ensure that new development is consistent with the Comprehensive Plan. This would include the Shoreline Master Program element [policies for piers and moorages](#), which state:

- (1) New piers and docks should be allowed only for water-dependent uses or public access. Piers and docks associated with single family residences are considered a water-dependent use.
- (2) New piers and docks should be designed and constructed to avoid or, if that is not possible, to minimize and mitigate the impacts to ecological functions.
- (3) The repair, renovation, and replacement of existing piers and docks should be allowed.
- (4) Property owners who repair, renovate or replace existing piers and docks should be provided information on the best materials and methods for environmental enhancement.

Under Alternative B.1, the proposed use would be required to be consistent with these policies. Applicants would be required to demonstrate how their proposal is consistent with the Comprehensive Plan. This would also include demonstration that the proposal would avoid, minimize, or mitigate the potential impacts to ecological functions, ensuring no net loss.

Alternative B.1 would also require applicants to demonstrate consistency with Comprehensive Plan [policy for boating facilities](#), which states:

New boating facilities should be designed to meet health, safety, and welfare requirements; mitigate aesthetic impacts; minimize impacts to neighboring uses; provide public access; assure no net loss of ecological functions and prevent other significant adverse impacts; and protect the rights of navigation and access to recreational areas.

The SCUP process would require new proposals to be consistent with the Comprehensive Plan.

MICC 19.15.250(D)(2)

The second criterion for approval of a development code amendment is established in MICC 19.15.250(D)(2), which states, "The amendment bears a substantial relation to the public health, safety, or welfare". The proposed amendments in Alternative B.1 would relate the public welfare by enabling orderly shoreline development of water dependent uses. Alternative B.1 would create specific processes by which proposed shoreline development can be permitted. The corresponding regulations would ensure that the development would occur with reduced impacts to neighboring uses and would not result in a net loss of shoreline ecological functions and values.

MICC 19.15.250(D)(3)

The third and final criterion for approval of a development code amendments is established in MICC 19.15.250(D)(3), which states, "The amendment is in the best interest of the community as a whole." The proposed Alternative B.1 would serve the community interest by setting clear processes and standards for permitting development in the shoreline.