
CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

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PLANNING COMMISSION

TO: Planning Commission

FROM: Adam Zack, Senior Planner

DATE: December 9, 2021

SUBJECT: ZTR21-006 - Land use review types

ATTACHMENTS: A. Thompson Docket Request dated November 2, 2020

SUMMARY

The purpose of this memo is to provide the Planning Commission with the staff recommendation for ZTR21-006. This zoning code amendment was proposed in a Docket Request dated November 2, 2020 (Attachment A). The docket request proposed six amendments to [Title 19 Mercer Island City Code \(MICC\)](#). This staff report focuses on and provides the staff recommendation regarding the fifth request, a proposed amendment to MICC 19.15.030 Land use review types. The proposed amendment would change the land use review type for five types of land use permits, resulting in increased levels of public notice. At the December 15 meeting, staff seeks initial guidance from the commission on the proposed code amendment. Specifically, whether the commission would like to proceed with the amendment as proposed, pursue a revised amendment, or recommend no further action.

BACKGROUND

Daniel Thompson submitted a docket request for several amendments to Title 19 MICC on November 2, 2020 (Attachment A). The City Council considered whether to add the proposed amendments to the Community Planning and Development (CPD) work program during a public meeting on December 1, 2020. The City Council approved Resolution 1594 on December 1, 2020, which directed the Planning Commission to make a recommendation on the fifth proposed code amendment from the original docket request.

The docket request proposed six amendments to Title 19 MICC. Only the fifth requested amendment, a proposed amendment to [MICC 19.15.030 – Land use review types](#), was added to the final docket by the City Council. The proposed amendment of MICC 19.15.030 would change the notice requirements for five land use review actions:

- Seasonal Development Limitation Waivers;
- Tree Removal Permits;
- Final Short Plats;
- Lot Line Revisions; and

- Setback Deviations.

The application states the purpose of the proposed amendments is to provide greater public notice of permit applications and decisions.

MICC 19.15.030 – Land use review types.

[MICC 19.15.030](#) establishes four types of land use review, each with its own unique notice requirements. The four types are described as follows:

- “A. Type I. Type I reviews are based on clear, objective and nondiscretionary standards or standards that require the application of professional expertise on technical issues.
- B. Type II. Type II reviews are based on clear, objective and nondiscretionary standards or standards that require the application of professional expertise on technical issues. The difference between Type I and Type II review is that public notification shall be issued for Type II decisions.
- C. Type III. Type III reviews require the exercise of discretion about nontechnical issues.
- D. Type IV. Type IV reviews require discretion and may be actions of broad public interest. Decisions on Type IV reviews are only taken after an open record hearing.”

The permit types are differentiated largely by the amount of discretion and technical expertise that must be used in making permitting decisions. Type I and II permits are nondiscretionary and require the application of professional expertise on technical issues. Types III and IV permits require more discretion, with Type IV permits also being for larger, more impactful actions that are of broad public interest.

In addition to establishing four permit types, MICC 19.15.030 codifies the notice requirements, decisionmaker, and appeal authority for each land use review action in MICC 19.15.030 Table B, which states:

Table B. Review Processing Procedures				
	Type I	Type II	Type III	Type IV
	No Notice of Application No Notice of Decision Code Official	Public Notification No Notice of Application No Notice of Decision Code Official	Notice of Application Notice of Decision Code Official	Notice of Application Public Hearing Notice of Decision Hearing Examiner/Design Commission
Preapplication meeting required	No	No	Yes	Yes
Letter of completion (within 28 days)	No	No	Yes	Yes

Public Notification	No	Yes	No	No
Notice of Application (mailing and posting)	No	No	Yes	Yes
Public Comment Period	None	None	30 days	30 days
Public Hearing (open record pre-decision)	No	No	No	Yes
Notice of Decision	Code Official	Code Official	Code Official	Hearing Examiner ² or Design Commission
Notice of Decision	No	No	Yes	Yes
Appeal Authority	Hearing Examiner ¹	Hearing Examiner or Design Commission (code official design review)	Hearing Examiner	Superior Court or Shoreline Hearings Board (shoreline permits)

1 Appeals of final short plat approvals shall be to superior court. Appeals of shoreline exemptions shall be to the shoreline hearings board.

2 The hearing examiner will provide a recommendation to ecology for decisions on shoreline conditional use permits and shoreline variances.

Thus, together the permit type definitions and the review process establish a hierarchy wherein permit reviews requiring more discretion also have higher levels of public notice as well as opportunities for public comment and participation. Public notice is not required for Type I permits. Public notification posted in the weekly CPD Permit Bulletin is required for Type II permits. More public notice is required for Type III and IV permits compared with Type II. The additional notice includes posting on site, mailing to addresses within 300 feet and, in some cases, publication in the Mercer Island Reporter. Type III and IV permits also have a 30-day public comment period. Type IV permits require a public hearing.

This hierarchy matches decisions requiring substantial discretion with higher levels of public notice and opportunities for comment. This is appropriate because the decisions on these matters are not as objective or technical. Public comments can provide valuable input, and the staff are able to give some consideration to community concerns in making their decisions. On the other hand, decisions that are largely objective and/or technical and allow little discretion, less public notice is required. This is an appropriate approach because the decision maker is not able to consider community concerns in these decisions. Rather, if an application is compliant with the requirements of the code, the code official must approve it. Creating opportunities for the public to comment on these types of decisions can often lead to increased frustration

for the public and a misconception that the City is uninterested in public input; eroding public trust in the process.

SEASONAL DEVELOPMENT LIMITATION WAIVER

The first proposed amendment to MICC 19.15.030 would increase the land use review type required for Seasonal Development Limitation Waivers (SDLW) from Type I to Type II. The MICC restricts some clearing and grading work during the “wet season” from October 1 through April 1 to reduce potential impacts from erosion and landslides during these months. An SDLW is a waiver granted by the Code Official for land clearing, grading, filling and foundation work in an erosion hazard area or a landslide hazard area during the wet season. An SDLW is required in addition to the other required permits such as a building permit and grading permit for this type of work to proceed in between October 1 and April 1. Issuance of SDLW is authorized by [MICC 19.07.160\(F\)\(2\) – Geologically hazardous areas](#), which states:

2. Land clearing, grading, filling, and foundation work within: (a) an erosion hazard area, when 2,000 square feet or more of site disturbance is proposed, and/or (b) a landslide hazard area are not permitted between October 1 and April 1.
 - a. The code official may grant a waiver to this seasonal development limitation if the applicant provides a critical area study for the site concluding that:
 - i. Geotechnical slope stability concerns, erosion and sedimentation impacts can be effectively controlled on site consistent with adopted storm water standards; and
 - ii. The proposed construction work will not subject people or property, including areas off site, to an increased risk of associated impacts.
 - b. As a condition of the waiver, the code official may require erosion control measures, restoration plans, an indemnification, a release agreement and/or performance bond.
 - c. If site activities result in erosion impacts or threaten water quality standards, the city may suspend further work on the site and/or require remedial action.
 - d. Failure to comply with the conditions of an approved waiver shall subject the applicant to code compliance pursuant to chapter 6.10, code compliance, including but not limited to civil penalties and permit suspension.

As a Type I land use review action, public notice is not required for SDLWs. Public notification would be required if the land use review type were increased to Type II. The standards for public notification are established in MICC 19.15.080. Public notification for Type II actions does not include a public comment period. The notification is posted in the weekly CPD permit bulletin published on the City website at: <https://www.mercerisland.gov/cpd/page/weekly-permit-information-bulletin>

If MICC 19.15.030 is amended as proposed, SDLWs would be posted to the weekly CPD permit bulletin. For reference, CPD reviewed 85 SDLWs between 2016 and 2021, an average of 14 a year. Listing a land use review action on the CPD permit bulletin takes roughly fifteen minutes per review.

Staff Recommendation

Do not amend the land use review type for SDLWs. SDLWs are correctly categorized as a Type I land use review action. The City has limited discretion in whether to issue an SDLW. If an application meets the

requirements of the code, the City must issue a waiver. Increasing notice for this land use review action will add process to a routine review in which the City has limited discretion in issuing a decision.

TREE REMOVAL PERMIT

The second proposed amendment to MICC 19.15.030 would increase the land use review type for tree removal permits from Type I to Type II. The City requires a permit for all tree removal except those exempted under [MICC 19.10.030 – Exemptions](#) such as small trees (under 10” diameter at breast height) and hazardous trees. As with SDLWs, this change would mean that tree removal permits would be required to be listed on the weekly CPD permit bulletin.

For reference, CPD reviewed 852 tree removal permits between 2016 and 2021, an average of 142 a year. Listing a land use review action on the CPD permit bulletin takes roughly fifteen minutes per review. Increasing the permit review type for tree removal permits would take up an average of thirty-five hours of staff time annually.

Staff Recommendation

Do not amend the land use review type for tree removal permits. Tree removal permits are correctly categorized as a Type I land use review action. The decision of whether to issue a tree removal permit is based on the evaluation of objective standards and the application of technical expertise by the city arborist; the City has limited discretion in the decision. Increasing notice for this land use review action will add process to a routine review in which the City has limited discretion in issuing a decision.

FINAL SHORT PLAT

The third proposed amendment to MICC 19.15.030 would increase the land use review type for short plats from Type I to Type II. A short plat is a land division that creates four or fewer new parcels from an existing parcel. Final plat requirements are established in [MICC 19.08.050 – Final plats](#). Short plats are granted preliminary approval as a Type III land use review action. Because the preliminary approval is a Type III land use review, the short plat is listed on the CPD permit bulletin when it is initially applied for. Notice is also posted on site and mailed to addresses within 300 feet during the preliminary short plat review.

As with SDLWs and tree removal permits, the proposed amendment would require that final short plat approval be listed on the weekly CPD permit bulletin. Because the land use review action for preliminary approval of short plats is a Type III action, the proposed amendment would result in short plats getting listed on the permit bulletin twice. The first listing would be during the initial review of the application before the preliminary approval and then a second listing would be required when final approval is granted.

For reference, CPD reviewed 24 short plats between 2016 and 2021, an average of 4 a year. Listing a land use review action on the CPD permit bulletin takes roughly fifteen minutes per review.

Staff Recommendation

Do not amend the land use review type for final short plats. Adding more public notice for final short plat approval would be duplicative because notice is already required for preliminary short plat approval. Preliminary short plat approval is currently categorized as a Type III land use review action, necessitating an expanded public notice process. Final short plat approval is a technical process to ensure that the final plat meets the requirements established during the preliminary approval process. The preliminary approval is the step in the process where public comments can be considered by the decision maker and

incorporated into the approval. Public notice at the preliminary approval step (a Type III action) is adequate for the public to weigh in on the proposal; additional public notice is unnecessary at the final plat stage.

LOT LINE REVISION

The fourth proposed amendment to MICC 19.15.030 would increase the land use review type for lot line revisions from Type II to Type III. A lot line revision is an adjustment of boundary lines between existing lots that does not create any additional lots and which does not reduce the dimensions of an existing lot to the point that it fails to meet dimensional standards.

Increasing the land use review type for lot line revisions from Type II to Type III would significantly increase the process required. The proposed amendment would add the following steps to the review of lot line revisions:

- Preapplication meeting;
- Letter of completion within 28 days of application;
- Notice of application posted on site and mailed to neighboring property owners;
- 30-day public comment period; and
- Notice of decision sent to parties of interest.

All five of the above steps would significantly add to the review time and cost for lot line revisions. On average, increasing the permit from Type II to Type III would add three hours of review time per lot line revision. In addition to the time added for posting and publishing notice, changing the permit type to Type III would commit staff time to managing the public comments as they are received. CPD reviewed 24 lot line revisions between 2016 and 2021, an average of 1.7 a year.

Staff Recommendation

Do not amend the land use review type for lot line revisions. See discussion of lot line revision with the staff recommendation on setback deviations.

SETBACK DEVIATION

The fifth proposed amendment to MICC 19.15.030 would increase the land use review type for setback deviations from Type II to Type III. A setback deviation is a process established in [MICC 19.06.110\(C\) Criteria for approval—Conditional use permits, variances, and setback deviations](#). Setback deviations provide flexibility in designing a development proposal to allow for increased protection of critical areas or critical area buffers (MICC 19.06.110(C)(1)). They accomplish this by allowing developers to develop in setbacks when necessary to avoid impacting critical areas and their buffers.

Increasing the land use review type for setback deviations from Type II to Type III would significantly increase the process required. The proposed amendment would add the following steps to the review for setback deviations:

- Preapplication meeting;
- Letter of completion within 28 days of application;
- Notice of application posted on site and mailed to neighboring property owners;
- 30-day public comment period; and
- Notice of decision sent to parties of interest.

All five of the above steps would significantly add to the review time and cost for setback deviations. On average, increasing the permit type to Type III would add three hours of review time per setback deviation. In addition to the time added for posting and publishing notice, changing the permit type to Type III would commit staff time to managing the public comments as they are received. CPD reviewed 1 setback deviation between 2016 and 2021.

Staff Recommendation

Do not amend the land use review type for setback deviations. Amending the land use review types for lot line revisions and setback deviations would be inconsistent with the permit review type descriptions established by MICC 19.15.030(B). Lot line revisions and setback deviations are land use approvals where the City has clear, objective, and nondiscretionary standards or standards that require the application of professional expertise on technical issues. Because both lot line revisions and setback deviations meet this description, they are accurately categorized as Type II actions. Neither of these land use review actions are consistent with the description of Type III land use review established in MICC 19.15.030(C), which states: "Type III. Type III reviews require the exercise of discretion about nontechnical issues."

The City does not have as much discretion in the approval of lot line revisions and setback deviations as it does for more complex land use review actions. In other words, if the proposal meets the criteria for lot line revision or setback deviation, the City has fewer options for conditioning the approval than it would for Type III land use review actions. Furthermore, adding a public comment period to lot line revisions and setback deviations would add a public process to two land use review actions in which the City has limited discretion and would likely result in frustration for the public.

ALTERNATIVES

There are three alternatives the Planning Commission can consider for ZTR21-006:

- A. Amend MICC 19.15.030 as proposed.** Alternative A would change the land use review type for all five of the review actions listed above. This amendment would commit additional City resources, in the form of staff time, to the review and provision of notice for all five land use review actions.

Benefits: Increased public notice for land use decisions. Alternative A would help the public stay informed about what development is being approved in the City.

Drawbacks: Alternative A would commit additional City resources and increase review time and cost for routine land use review actions. Committing further City resources to the review of routine projects could reduce staff time available for more complex projects.

Another drawback to Alternative A is that it creates a situation where the public can provide comments that will not influence the decision-making process. Adding a public comment period to lot line revisions and setback deviations would add a comment period to two land use review actions for which the City has limited discretion. This can lead to increased frustration for the public and a misconception that the City is uninterested in public input.

- B. Amend MICC 19.15.030 to change the land use review type for some but not all of the land use review actions.** Alternative B allows the Planning Commission to increase the land use review type for certain land use review actions but stops short of amending all proposed land use review types. Under Alternative B, the Planning Commission could, for example, recommend changing the land

use review type for SDLWs and tree removal permits but not recommend changes to final short plat approvals, lot line revisions, and setback deviations.

Benefits: Amending the land use review type for some but not all of the review actions would increase public notice for some land use review actions while committing fewer City resources than Alternative A.

Drawbacks: Amending the land use review type for any of the five review actions discussed above would commit additional City resources to routine land use review; increasing review time and cost.

- C. Do not amend MICC 19.15.030 (Staff Recommended).** Making changes to MICC 19.15.030 is a local choice. Amending this code section is not required by state or local law.

Benefits: Option C would not commit further City resources to the land use review actions discussed above. It would not increase the cost or review time for routine land use review actions.

Drawbacks: Making no change to MICC 19.15.030 would not change the amount of public notice for the land use review actions discussed in this memo.

STAFF RECOMMENDATION

Alternative C do not amend MICC 19.15.030. MICC 19.15.030 correctly types the five land use review actions contemplated in the docket application. The notice requirements for these land use review actions are commensurate with the development they authorize, the amount of discretion afforded to each action, and the necessary levels of public notice and participation. Committing additional City resources to routine land use review actions will draw resources from more complex permit review. The drawback of committing additional City resources to these land use review actions is not outweighed by the benefit of the corresponding increase in public notice.