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

5 Phil Olbrechts, Hearing Examiner

6

RE: Medici Architects	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION
Design Review	
DSR24-010	

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10 **INTRODUCTION**

11 Jeffrey Glad of Medici Architects requests design review approval of an eight-unit
12 apartment building to be located at 2900 78th Ave SE. The application is approved
subject to conditions.

13 The Applicant has requested relief from a design standard that requires 75% façade
14 transparency along 78th Ave. The 75% standard is mandatory and the Examiner has no
authority to waive that standard.

15 A condition of approval has been added to the staff recommended conditions requiring
16 a sheltered exterior entryway.

17 Numerous concerns were raised about the proposal from adjoining neighbors. In effect
18 many of these concerns challenged the adequacy of the City's design standards as
opposed to demonstrating noncompliance with those standards. The City's design
19 standards set what the City Council determined to be acceptable setbacks, open space,
height, color and use requirements for buildings constructed in the Town Center zoning
20 district. If those standards are met, the project must be approved. If the City fails to
approve a code compliant proposal, the Applicant can easily obtain a judicial decision
21 requiring approval along with a substantial damages award that would have to be
reimbursed by Mercer Island taxpayers. As detailed in the findings and conclusions
22 below, the City's design standards authorize a four story residential development at the
project location with the design proposed by the Applicant.
23

24 **ORAL TESTIMONY**

25 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 20 exhibits listed on pages 1-2 of the staff report were admitted into the record during the October 10, 2025 hearing.

FINDINGS OF FACT¹

Procedural:

1. Applicants. Medici Architects c/o Jeffrey Glad, 11711 SE 8th St, STE 100, Bellevue, WA 98005.

2. Hearing. A virtual hearing was held on the applications at 9:00 am on October 10, 2025.

Substantive:

3. Site/Proposal Description. Jeffrey Glad of Medici Architects requests design review approval of an eight-unit apartment building to be located at 2900 78th Ave SE. The proposed development is a new four (4) story multi-family building with garage parking on the ground floor. The Applicant requests an increase in building height from the maximum two stories to four stories in exchange for providing affordable housing as authorized by Town Center design standards. The project site fronts the intersection of 78th Ave SE and SE 29th Street, with vehicular access coming from 78th Ave SE. The project site is currently developed with a commercial building, formerly Baskin-Robbins.

4. Characteristics of the Area. Neighboring development includes a senior living facility to the east, 78th Ave SE to the west, a multi-story mixed use building to the north, and a parking lot for a financial institution to the south.

5. Affordable housing. The Applicant proposes to provide one affordable housing unit out of the eight total proposed units, which is equal to 12.5 percent of the total units in the development. A condition of approval requires that the affordable housing unit must be affordable to households earning 60 percent of median income level for rental housing or 90 percent of median income level for ownership housing.

6. Parking. The proposal provides required parking.

¹ The Findings of Fact starting at Finding of Fact No. 5 address the major contested issues of the proposal. Findings of Fact include reliance upon staff expertise in applying code provisions. Significant issues of code interpretation or instances where staff interpretations are not found consistent with code are addressed in the Conclusions of Law.

1 MICC 19.11.130B1a requires 1 to 1.4 parking stalls per residential unit. The applicant
2 proposes 8 stalls for the 8 proposed units.

3 The parking stalls will be located in an at-grade, open parking garage below the
4 proposed residential units. There will be no need for persons to use a garage opener
5 from the access roads as noted in one comment letter. No off-site parking is proposed
6 as asserted in another comment letter.

7 Public comment raised concern about underground parking. The final proposal doesn't
8 include any underground parking.

9 7. Open Space. MICC 19.11.060(D) requires that public open space have a
10 minimum size of 3% of gross floor area and minimum width of 20 feet. The proposed
11 public open space is 465 square feet, which is 3.2 percent of the proposed gross floor
12 area. The width of the proposed open space is 20-feet from the north property line to
13 the driveway.

14 Concerns were raised about the adequacy of open space. Acceptable levels of open
15 space were adopted into MICC 19.11.060D as identified above. There is no design
16 review authority to require more.

17 8. Colors. The proposal is consistent with design standards regarding color.

18 One commentator noted that the grey and black colors are not consistent with
19 surrounding buildings and are depressing.

20 MICC 19.11.110 governs materials and color. As noted in that standard, color should
21 be carefully considered in relation to the overall design of the building and surrounding
22 buildings. Color and materials should highlight architectural elements. Variations in
23 materials and colors should be generally limited to what is required for contrast or to
24 accentuate architectural features.

25 As identified in the staff report, the proposed design includes textured materials and
varied colors to contribute to the visual interest of the design as required by MICC
19.11.110.

The commentator's observation that the colors are depressing is highly subjective
Others could find the proposed white coloring to be too bright and not harmonious with
the more muted coloring of the bank and mixed-use buildings on either side. Still
others, perhaps most people, would find the coloring to be aesthetic and compatible
with surrounding uses. The latter opinion would likely be the prevalent opinion given
that the building is professionally designed and the Applicant's financial incentive is
to create an attractive building that will attract tenants or purchasers.

1 Ultimately, a color scheme that one could reasonably conclude meets the color
2 requirements of MICC 19.11.110 must be approved under this state's court opinions.
3 An ordinance violates due process if its terms are so vague that persons of common
4 intelligence must necessarily guess at its meaning and differ as to its application.
5 *Anderson v. City of Issaquah*, 70 Wash. App. 64, 75, 851 P.2d 744, 751 (1993).
6 Ordinances that fail to meet the *Anderson* test are unenforceable *Id.* at 755.
7 Consequently, vague standards such as those requiring color compatibility can only be
8 applied to the extent that persons could reasonably agree that there's a compatibility
9 problem.

10 9. Privacy/Light and Air. The proposal provides for adequate privacy of neighboring
11 properties and passage of light and air via compliance of TC setback standards.
12 Concerns were raised about privacy and light and air impacts due to the proximity of
13 the proposed building to the mixed-use building to the north. TC zone setback
14 standards govern acceptable separation for protection of privacy and passage of light
15 and air. The side yard setback in for the TC zone is 0 feet per MIMC 19.11.030. No
16 design review standards require additional protection for privacy, light and air.

17 10. Façade Transparency. It is uncontested that only 54 percent of the street façade is
18 transparent.

19 11. Landscaping. The proposal complies with the City's landscaping requirements.
20 MIMC 19.11.070B1 requires landscaping equal to 25% of the development site. This
21 site is 7,200 SF so at least 1,800 SF (25%) shall be landscaped (Exhibit 2, Pages 6, 8,
22 and 9). As detailed in Table 3 of the staff report, the Applicant proposes 1,800 square
23 feet of landscaping with incorporation of credits and debits for specified types of
24 landscaping.

25 12. Entryway. Written comment questioned whether the proposed entryway is
recessed and sheltered. The entryway is recessed from other elements of the street side
façade as shown in the exhibit 2 renderings and plan drawings. It is difficult to
ascertain, but it doesn't appear that the entry way is sheltered with any overhanging
building elements.

13 13. Through-Block Feasibility. A through-block connection at the project site is not
14 feasible. The relatively small lot is additionally constrained by a fifteen-foot access
15 easement on the south side as shown in the Ex. 2 project drawings. As further shown
16 in those drawings, the remaining area is only wide enough to accommodate roughly
17 1,300-1,400 square foot residential units along with an access corridor.

18 A best as can be ascertained from the Ex. 2 project drawings, the lot is only 60 feet
19 wide. With exclusion of the easement area, only 45 feet remains for building width.
20 MIMC 19.11.060E2a requires through-block connections to be twenty feet wide. That
21 only leaves 25 feet for apartments accessed by an elevator, stairs and access corridor.
22 That doesn't leave a reasonable or feasible amount of space for the multi-family use
23 authorized by the TC zoning district.

14. Trees. Written comment expressed concern about tree retention. The City has adopted regulations that identify when trees can be removed and how they should be protected during construction. As identified in the staff report, City staff will review compliance with City tree protection standards during building permit and associated permit review.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. The hearing examiner is required to hold a hearing and issue a final decision on the subject design review application.

MIMC 3.34.005 requires the Hearing Examiner to assume the role of the Design Review Commission in all quasi-judicial matters assigned to the Commission. MIMC 19.15.220C1cia requires design review commission review for all new buildings. MIMC 19.15.030 Table D classifies design commission review of design review as a Type IV review in which the Commission holds a public hearing and issues a final decision.

2. Vesting. MIMC 19.15.170B authorizes the vesting of complete site development applications. The proposal vested to City development standards on or prior to July 26, 2022 when the Applicant's site development application was deemed complete. Portions of the TC design standards were subsequently amended by Ordinance No. 24C-18, which went into effect on December 16, 2024, Ordinance No. 24C-08, which went into effect on June 16, 2024 and Ordinance No. 22C-09, which went into effect on December 1, 2022. Since all of these ordinances went into effect after the site development permit application vested, their amendments do not apply to the proposal.

Substantive:

3. Zoning Designations. The area is zoned Town Center Subarea 4 (TC-4).

4. Review Criteria and Application. The criteria for design review are set by MIMC 19.06.120B.

MIMC 19.06.120B1: *Criteria for design review decisions. Design objectives and standards for regulated improvements within the Town Center are set forth in [chapter 19.11](#) MICC. ... Following the applicable review process in [chapter 19.15](#) MICC, the design commission or code official shall deny an application if it finds that all the following criteria have not been met, or approve an application, or approve it with conditions, based on finding that all the following criteria have been met:*

1. The proposal conforms with the applicable design objectives and standards of the design requirements for the zone in which the improvement is located,

1 5. Criterion Met. The criterion is met for the reasons identified in the staff
report, adopted by this reference, and Conclusions of Law 6-14 below.

2 6. Authorized Use. One of the comment letters asserted that the project area
3 was designated for commercial use only and that the prior Baskin Robbins use should
4 have remained. MIMC 19.11.020 authorizes residential use as a permitted use for
5 properties zone TCMF-4. The property is zoned TCMF-4. The use is permitted
6 outright. The City is barred by state law from prohibiting that use. RCW 36.70B.030
provides that code provisions addressing type of authorized land use are determinative
and cities “shall not reexamine alternatives” for those authorized uses.

7 The comment letter further identified that street level retail use is “encouraged” by the
comprehensive plan. The operative word is “encouraged,” which encourages and
8 doesn’t require retail street frontage. The City implemented this policy by requiring
9 retail level use along a large portion of the street frontage in the TC district as shown
10 in Figure 2 of Chapter 19.11 MIMC. The project site wasn’t one of those areas under
the regulations to which the project vested as shown at page 10 of the staff report. No
retail frontage is required of the project.

11 To the extent that anyone would construe “encouraged” as a mandatory term, the City’s
12 design standards (including Figure 2) supersede any conflicting provisions of the City’s
comprehensive plan. A comprehensive plan is a guide and not a document designed
13 for making specific land use decisions. *Citizens for Mount Vernon v. City of Mount*
14 *Vernon*, 133 Wash. 2d 861, 873, 947 P.2d 1208, 1215 (1997). A specific zoning
ordinance will prevail over an inconsistent comprehensive plan. *Id.*

15 7. Views. One of the comment letters asserted that the proposal would block
16 views of adjoining residences. No evidence was presented to support this comment.
17 In any event, no City regulations prohibit the blocking of views in TC zoning districts.
MIMC 19.11.070 identifies protecting views as a factor in the design review of
18 development outside the TC, but no such regulations applies within the TC zone.

19 8. Volatile Organic Compounds. Concern was raised over volatile organic
20 compounds (VOC). Such compounds are toxins present in some construction materials
such as paint. These compounds are regulated by the Environmental Protection Agency
21 (EPA). The EPA regulates VOCs under the Clean Air Act, setting national limits for
products like architectural coatings and aerosol paints. The impacts of such chemicals
22 are outside the scope of design review. In the unlikely event that there was something
unique about the proposal that rendered EPA regulations insufficient, VOC impacts
23 could have been addressed in the State Environmental Policy Act (SEPA) review of
the project. However, the SEPA review has been completed and is thus also outside
24 the scope of Hearing Examiner review.

25 9. Daylight plane. Assertions in public comment were made over compliance
with the daylight plane requirements of MIMC 19.11.030A7. The proposal fully
complies with those requirements.

1 The daylight plane imposed by MIMC 19.11.030A7 requires that the first horizontal
2 30 feet of a building facing a public street must be setback at an angle of 45 degrees at
3 heights above 25 feet. Portions of the building that encroach past this plane are
4 authorized to the extent that an identical or greater volume of building falls short of the
plane, i.e. “debits” of volume exceeding the plane must be offsets of “credits” of
volume that fall short of the plane.

5 For this project staff determined that the debits of encroaching volume are fully off-set
6 by volumes falling short of the plane. As proposed, 9,476 CF of "debit" volume is
7 being used to extend the upper two floors to provide a flush facade over the cantilevered
8 portion of the structure. The northwest corner of this site features public open space
9 which pushed the remaining frontage inward and provided 17,295 CF of "credit"
volume. The application included the average daylight plane calculations on Sheet G1.2
of the plan set (Exhibit 2).

10 The daylight plane is only required along the 78th Street frontage. It is not required
11 along the side facing the mixed-use building to the north as requested by one
commentator.

12 10. Façade Transparency. The Applicant requests relief from MIMC
13 19.11.100B1b, which requires 75% transparency along the ground floor façade for
14 major construction along 78th Avenue. The Examiner has no authority to waive that
standard absent a variance request.

15 It is uncontested that the project as proposed falls short of the required 75%
16 transparency. As shown in the Ex. 2 plan set,, p. 6, the ground floor of the project site
17 is limited to the parking garage and elevator lobby for the residential units. At hearing
the Applicant noted that requiring transparency would invade the privacy of the
residents of the building.

18 Unfortunately (for the Applicant), as noted by staff at the hearing, MIMC
19 19.11.100B1b requires that the façade “shall” have 75% transparency. Unlike some
20 design codes of other municipalities, the MIMC code doesn’t have any internal
21 provisions that authorize modifications of “shall” standards. The only way to modify
22 this requirement would be through approval of a variance as governed by MIMC
23 19.06.110B. It is debatable whether the Applicant would qualify for variance approval
24 given that the Applicant would have to establish special circumstances to qualify for
the variance. The Applicant may have to implement some interior design features to
compensate for the lack of privacy, such as interior partial walls in which residents
could hide themselves while waiting for the elevator.

25 At hearing the Applicant also inquired whether the façade referenced in MIMC
19.11.100B1b was limited to street frontage façade or whether it extended to all of the
ground level façade. The requirement only applies to street frontage. MIMC
19.11.100B1a identifies that the purposes of the transparent facades “*should be created*

1 along pedestrian rights of way and that architectural features that prevent pedestrian
2 view into the ground floor building spaces are not allowed. Given this focus, it's clear
3 that the transparency requirement is directed at enabling right of way pedestrian views
into the ground floor of fronting buildings. That purpose is not met for rear or side
yard frontage.

4 11. Roof-top Landscaping. Written comment questioned the use of roof top
5 sedum trays to meet landscaping requirements. MIMC 19.11.070B1b expressly allows
6 "green roof" landscaping. The staff report appropriately discounted this type of
landscaping by 50% as required by MIMC 19.11.070B1b. The sedum trays proposed
by the Applicant meet the landscaping requirements of MIMC 19.11.070.

7 12. 78th Setback. MIMC 19.11.030A6 requires a setback of 15 feet between
8 buildings and the face of the street curb. A written comment questioned the use of open
9 space to meet this setback requirement. MIMC 19.11.030A6 doesn't exclude open
10 space from meeting the requirement. The use of open space doesn't diminish the
objective of the setback requirement, which is passage of light and air. The proposed
setback is compliant with MIMC 19.11.030A6.

11 13. Entryway. MIMC 19.11.100B6 requires that entrance ways "*shall be*
12 *recessed from the facade surface to emphasize the entrance and provide a sheltered*
13 *transition to the interior of the building.*" As identified in Finding of Fact No. 12, the
14 entryway is recessed but not "sheltered." Although the extended lobby to the south may
15 arguably provide some shelter to the wind, it doesn't provide shelter from rain. A
condition of approval requires the addition of an exterior sheltered entryway.

16 14. Through-Block Connection. Written comments assert numerous
17 violations of through-block connection requirements. Design standards don't require a
18 through-block connection for the project and none is proposed.

19 MIMC 19.11.060B as vested to the subject application requires through-block
20 connections for all buildings exceeding two stories that abut a through-block connection
shown in MIMC 19.11.060 Figure 7
21 "*subject to design commission determination that such connection is feasible and*
22 *achievable.*" Figure 7 shows a the subject parcel abutting a through-block connection
located on the north side of the project site.

23 The project is not found feasible for the reasons identified in Finding of Fact No. 13.
24 As detailed in that finding, a through-block connection would only leave a buildable
area that is 25 feet wide. That is not reasonably sufficient width to accommodate the
multi-family development.

25 There are also a couple constitutional constraints that compel a finding of infeasibility.
As previously noted, subjective development standards cannot be imposed against an
applicant to the extent that persons could reasonably disagree about their application.

1 See Finding of Fact No 8. Further, requiring the through-block connection for this
2 project would hazard failing to comply with nexus and proportionality requirements
3 under the federal takings clause as ruled by the United States Supreme Court in *Nollan*
v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987);
Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

4 The *Nollan* decision is particularly pertinent to the through-block requirement at issue.
5 In *Nollan* the California Coastal Commission requires a beachfront lot owner to dedicate
6 a public walkway to the beach as a condition for building a single-family residence. The
7 Court in that case found the condition to violate the Takings Clause because the
8 walkway was not necessary to mitigate any impacts created by the proposed residential
9 construction, i.e. there was no nexus between project impacts and project mitigation.
10 This case is somewhat distinguishable because in *Nollan* the homeowner would not need
11 the walkway to access the beach themselves. In this case the building residents would
12 use and benefit the through-block construction if it ever punched through the adjoining
property to the east. However, if the project could get past the nexus requirement of
Nollan it would have an even harder time getting past the proportionality requirements
of *Tigard*. The *Dolan v. Tigard* case requires proportionality between project impacts
and mitigation. Reducing the limited 45 width of the building area to 25 feet to
accommodate some limited foot traffic generated by the proposal would likely be
considered disproportional to project impacts.

13 **MIMC 19.06.120B1ai:** ...provided further:

14 a. *In the Town Center, particular attention shall be given to whether:*

15 i. *The proposal meets the requirements for additional building height, if the*
16 *proposal is for a building greater than two stories; and*

17 15. Four Stories Authorized. The Applicant meets the requirements for its
18 proposed four-story height.

19 MIMC 19.11.040C authorizes a four-story building in the TC zone if the residential
20 development includes at least 10%² housing units that are affordable³ to 60% of median
21 income level for rental housing and 90% of median income level for ownership
22 housing. As determined in Finding of Fact No. 5 the Applicant is proposing 12.5% of
its units to be affordable and a condition of approval requires that the unit meet the
affordability requirements of MIMC 19.11.040C.

23 **MIMC 19.06.120B1aii:** ...

24 ² The current on-line MIMC 19.11.040B requires that 15% of units be affordable. However, as identified
25 in Conclusion of Law No. 2, the subject design review application is vested to the version of MIMC
19.11.040B that was in effect at the time of vesting, i.e. when a complete application was filed. As
shown in Ordinance No. 24C-18, MIMC 19.11.040B only required 10% of units to be affordable to
qualify as affordable when the proposal vested in June 2024.

³ MIMC 19.16.010 defines "affordable" to be rent or mortgage that doesn't exceed 30% of household
income, adjusted for household size.

or approvals, and for submitting revised drawings to the City for its review and approval, if necessary to reflect these state or federal conditions of approval.

8. Prior to the issuance of the building permit, an agreement regarding the requirements and qualifications of the affordable unit will be created and recorded with King County. The affordable unit must be available at the same time as all other units in the development. The affordable unit must be similar in size to the other units with the same number of bedrooms. The affordable unit must be affordable to 60% of median income level for rental housing and 90% of median income level for ownership housing.
9. Impact fees will be reviewed at site development and required to be paid at the time of building permit issuance.
10. The applicant shall provide proof of LEED or Built Green certification within 180 days of issuance of a final certificate of occupancy, or such later date as may be allowed by the code official for good cause, by submitting a report analyzing the extent credits have been earned toward such rating. Failure to submit a timely report regarding LEED or Built Green ratings by the date required is a violation of the conditions of approval.
11. The Applicant shall provide a lighting plan at building permit submittal that demonstrates the lighting associated with the proposed development is consistent with MICC 19.11.090 and that the proposed lighting will be contained within the subject property boundaries.
12. The applicant shall provide a detailed analysis at building permit submittal that demonstrates the building transparency complies with MICC 19.11.100, including the requirement in MICC 19.11.100(B)(1)(b) that 75 percent of the ground floor building façade between the height of 2 and 7 feet is devoted to windows and doors.
13. Concrete walls shall be architecturally treated where they are visible from the right of way.
14. The Applicant shall provide details at building permit submittal that demonstrate how the how the right of way will be improved to the satisfaction of the City Engineer consistent with MICC 19.11.120.
15. The Applicant shall provide a detailed analysis at building permit submittal, which demonstrates that the proposed loading zone is adequate size to accommodate the proposed use such that no vehicle would protrude into the public right of way.
16. The Applicant shall provide a landscaping plan at building permit submittal that details how landscaping will be installed conforming to MICC 19.11.070 and as

shown in **Exhibit 2**. The landscaping plan must include the following details for landscaped areas:

- a. Soil types to be used;
- b. Plants to be planted and documentation that those plants are either native or drought-tolerant;
- c. Depth of plantings;
- d. Tilling;
- e. Mulch application;
- f. Scarification;
- g. Irrigation; and
- h. Maintenance plans for landscaped areas

11. The applicant shall add an exterior sheltered entryway to its design plans at building permit submittal that provides for sheltered transition to the interior of the building sufficient for persons to adjust umbrellas, hats and similar protective weather gear before entering the building or becoming fully exposed to inclement weather while exiting the building.

Dated this 24th 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.