



February 11, 2022

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RE: Comments regarding Town Center amendments to MICC-19.11.020(B)/retail downzone

Dear Sarah:

Thank you for the opportunity to comment regarding the proposed changes to MICC 19.11.020(B). In short, we are extremely concerned about the negative impacts of the retail downzone currently proposed by the City of Mercer Island ("City"). We represent the owners of the Islandia Center. The ordinance does not consider the larger impacts to Town Center and its property owners, and is not drafted in a manner consistent with the existing Town Center regulations or the Comprehensive Plan. Rather than "saving business" in Mercer Island, it will do the opposite—severely restrict and reduce the business that can and will operate in Town Center, slowly strangling the business district to an empty shell.

Our concerns include the following:

- **Ordinance renders much of existing Town Center uses as nonconforming.**

As currently drafted, the retail downzone ordinance places extreme restrictions on what is considered acceptable required street frontage uses. A majority of the existing uses in Town Center will be rendered nonconforming. All of the banks in Town Center will be nonconforming, street level office uses will be considered nonconforming, retirement community uses and residential lobbies for buildings will be considered nonconforming. Veterinary uses are not covered under any of these limited definitions and would therefore not be allowed at street level. This creates a significant problem for existing building owners and existing retail owners, as nonconforming uses are disfavored in the Code. Rather than restricting the types of uses that can be allowed in Town Center, the City should be open to as much business as wants to locate in Mercer Island. This ordinance is extremely unfriendly to business. Please do not create future leasing problems for building owners by drafting such a restrictive ordinance.

Sarah Bluvus  
 February 11, 2022  
 Page 2

- **Ordinance renders most existing Town Center buildings as nonconforming.**

As currently drafted, the maximum width of business provision renders many existing Town Center buildings nonconforming as relates to their tenants. For example, Island Books' frontage along SE 27<sup>th</sup> Street is approximately 100 feet wide. As a result, Island Books would be rendered nonconforming and this type of space would not be allowed under the ordinance if built today. Many uses, such as grocers, drugstores, bookstores, veterinarians/doctors/dentist offices require much wider retail spaces than 60 feet wide. Limiting the creativity of the market, and the needs of the market, with such limited regulations is unwise. For context, Mercer Island would be only the second City in the state of Washington to impose such a restrictive retail width restriction. The only other City to impose such a width requirement is the City of Seattle, and only on two streets in Seattle—Pike Street and Pine Street limited to the Pike/Pike Corridor in the Capitol Hill Conservation Overlay. See Seattle Municipal Code 23.73.008.C:  
[https://library.municode.com/wa/seattle/codes/municipal\\_code?nodeId=TIT23LAUSCO\\_SUBTITLE\\_IIILAUSRE\\_CH23.73PIPICOOVDI\\_SUBCHAPTER\\_IUSDEST\\_23.73.008STVEUS](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT23LAUSCO_SUBTITLE_IIILAUSRE_CH23.73PIPICOOVDI_SUBCHAPTER_IUSDEST_23.73.008STVEUS) Even the City of Seattle's regulations allow for greater flexibility than do the City of Mercer Island's overly restrictive ordinance.

- **Mercer Island's Nonconforming Provisions Compound the Downzone's Damage.**

Mercer Island's provisions related to nonconforming uses are extremely restrictive and compound the damage caused by the retail downzone ordinance. MICC 19.01.050.H.2 states that "while a legal nonconforming use exists on any lot, no separate or new use may be established thereon, even though such additional use would be a conforming one." This provision is highly distressing, as it would not allow the tenanting of a space in a center that maintains nonconforming uses, even if the proposed tenant were to conform. In addition, a change of use in a multi-tenant building may require compliance with code provisions (including the maximum width requirement) "reasonably related and applicable to the change in use." MICC 19.01.050.1.2.

The fact that the nonconforming provisions will compound the difficulty of leasing spaces show that the Retail Downzone ordinance is not well-thought out. The ordinance needs to be more carefully considered in the context of existing codes and regulations that already restrict the uses in Town Center.

- **The No Net Loss Provision and the Maximum Width Provisions Multiply the Damage to Islandia Center.**

The no net loss provision works together with the maximum width provision to specifically damage the Islandia Center. Islandia Center one of the centers on the island with the largest amount of non-grocer/non-drugstore retail (approximately 24,000 s.f.). The no net loss provision would require the replacement of that exact amount of retail, but would require the reconfiguring of that retail such that no individual business could have more than 60 feet in width along either of its street frontages. This results in a totally unworkable future retail plan, particularly given the L-shape and adjacencies of the Islandia Center. The City cannot

Sarah Bluvus  
 February 11, 2022  
 Page 3

have it both ways—it cannot require the same amount of square footage to be replaced, while requiring it to be replaced in a way that is physically impossible from a leasing reality perspective. The ordinance results in a downzone of the Islandia Center that is not consistent with the City’s Comprehensive Plan and other goals.

- **Maximum Width Provision Disallows Specialty Retail that Needs Extra Width.**

As stated above, certain businesses may need width or depth greater than 60 feet; the code as drafted allows for no flexibility. Currently, the width of Island Books exceeds this requirement as it relates to its street frontage, rendering Island Books nonconforming.

- **Retail Downzone Ordinance is Inconsistent with the Mercer Island Comprehensive Plan**

The Retail Downzone is inconsistent with several very important provisions of the Mercer Island Comprehensive Plan, including but not limited to:

- Public Participation Principles—the Comprehensive Plan states that “public participation should take place as early as possible in a decision process, preferably at the scoping or option identification stage...public input must be fully integrated with and sequenced with technical work and the decision process in order to be useful in raising and resolving emerging issues.”

Here, property owners were just now contacted directly by City of Mercer Island staff. To date, property owners have not been given direct notice of this retail downzone that will significantly impact their ability to lease their property. This is directly anathema to the City’s stated commitment to public participation by all, not just a few interested retail tenants looking to preserve their unowned individual spaces in perpetuity.

- Land Use Goal 2: “Create a policy and regulatory structure that will result in a diversity of uses that meets Islanders’ daily needs and helps create a vibrant, healthy Town Center serving as the City’s business, social, cultural and entertainment center.”

As stated above, the Retail Downzone severely restricts most properties in Town Center such that most businesses uses existing today could not be located where they are in the configuration that they are. The ordinance directly contradicts this goal.

- Land Use Goal 5/Inconsistency with Figure TC-1.

The Comprehensive Plan incorporates Figure TC-1 from the MICC to depict where retail use shall be located adjacent to street frontages. The Retail Downzone amends Figure TC-1 in a manner inconsistent with the Comprehensive

Sarah Bluvás  
 February 11, 2022  
 Page 4

Plan. The City cannot amend its development regulations in a manner inconsistent with its Comprehensive Plan—to do so flies in the face of a main tenant of the Growth Management Act—development regulations and a Comprehensive Plan must be consistent. RCW 36.70A.040(3) and (4). In order to comply with this provision, the City would be required to first to amend its Comprehensive Plan to reflect the newly required retail frontages.

- Land Use Goal 14.3: Maintain a diversity of downtown land uses.
- Land Use Goal 14.4 Support economic growth that accommodates Mercer Island's share of the regional employment target of 1,228 jobs from 2006-2035, by maintaining adequate zoning capacity, infrastructure, and supportive economic development policies.
- Land Use Goal 14.9 Proactively and persistently engage residents, community organizations, and businesses in a collaborative effort to establish a strategy for Mercer Island economic development.

As stated above, the Retail Downzone does exactly the opposite of these land use policies. It severely restricts and reduces the diversity of Town Center land uses that can and will be established in the future, leading to a problematic future in Mercer Island where storefronts become and stay vacant, leading to an extreme blight and decline in Town Center

- Failure to complete impact analysis to Buildable Lands/Growth Targets

The City's Comprehensive Plan acknowledges that its main employment and residential growth will occur in Town Center-zoned properties. There has been no analysis of the impact on the Retail Downzone that will now severely restrict uses within Town Center—will the no-net loss provision and the restriction on uses reduce the potential for sites to redevelop? How might this regulation impact compliance with growth targets and the ability for the City to comply with Growth Management? The city must take this analysis seriously prior to passing any downzone regulation.

- **Retail Downzone may constitute a Taking.**

As previously detailed, the Retail Downzone highly restricts future uses within the Town Center and, in any instance, may prevent any redevelopment of certain parcels. No takings analysis has been provided by the City.

- **Failure to Comply with Public Participation Requirements of RCW 36.70A.035.**

While the Retail Downzone ordinance purports to apply to all of Town Center, the no-net loss provisions apply to a handful of specific properties that include retail today. As

Sarah Blugas  
February 11, 2022  
Page 5

such, a higher degree of public participation requirements apply under GMA that would require site-specific notice to those individual properties most impacted. This notice did not occur until last week, despite this ordinance having been considered in various forms for several years. As a result, we request that this process be slowed to more fully consider the impacts of the ordinance and draft an ordinance that is consistent with the Growth Management Act.

Lastly, we also note that there is no analysis whatsoever of the additional traffic and associated air quality impacts that will occur as a result of Mercer Island residents being forced to travel to other jurisdictions to obtain goods and services that will no longer be available to them on the island, due to the Retail Downzone.

Very truly yours,

SCHWABE, WILLIAMSON & WYATT, P.C.

/S/ Kenneth Katzaroff

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