



PLANNING COMMISSION CITY OF MERCER ISLAND

PCB 25-06
March 26, 2025
Public Hearing

AGENDA BILL INFORMATION

TITLE:	PCB 25-06: Public Hearing on Permanent Regulations for Temporary Uses and Structures Including Outdoor Dining (Second Reading).	<input type="checkbox"/> Discussion Only <input checked="" type="checkbox"/> Action Needed: <input checked="" type="checkbox"/> Motion <input checked="" type="checkbox"/> Recommendation
RECOMMENDED ACTION:	Hold public hearing and make motions to recommend amendments and/or adoption of the proposed permanent regulations related to temporary uses and structures.	
STAFF:	Molly McGuire, Senior Planner	
EXHIBITS:	1. Draft Permanent Regulations for Temporary Uses and Structures 2. Temporary Uses and Structures Comment Matrix	

EXECUTIVE SUMMARY

The purpose of this agenda bill is to recommend the adoption of permanent regulations for temporary uses and structures in place of interim regulations which were originally adopted on June 4, 2024, under [Ordinance No. 24C-07](#) and are effective for one year.

- Temporary uses and structures are development or activities that take place on a property for a period of 180 days or less. They can include a wide range of development and activities from garage sales to outdoor festivals.
- Prior to 2024, the City did not have a permit process for temporary uses or structures and the development code lacked clarity about how such structures and uses were regulated. As a result, some temporary uses and structures were not allowed.
- At its December 5, 2023 meeting, the City Council docketed a project to develop regulations for temporary uses and structures when it approved [Resolution No. 1655](#).
- On June 4, 2024, the City Council adopted Ordinance No. 24C-07, which established the following:
 - Interim regulations and permitting procedures for temporary structures and uses, and
 - A work plan for developing permanent regulations for temporary structures and uses by the second quarter of 2025.
 - The interim regulations will expire in June 2025 unless the City adopts permanent regulations or renews the interim regulations.
- Staff prepared draft permanent regulations for temporary uses and structures for the Planning Commission to review and provide initial comments on (Exhibit 1).
- The draft regulations would establish:
 - Development standards for temporary uses and structures on real property not owned by the City of Mercer Island (“private property”);
 - Development regulations to continue a pandemic-era allowance for outdoor dining use within public rights of way and private parking spaces; and
 - A permitting process for temporary uses and structures.
- On February 26, 2025, the Planning Commission held a first reading of the draft permanent regulations and provided initial feedback to staff.

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- The Planning Commission provided comments and proposed amendments to the draft regulations, which were compiled and categorized by staff and included in Exhibit 2.
 - The Planning Commission should discuss the proposed amendments and draft regulations at its public hearing on March 26, 2025.

BACKGROUND

In 2023, the City Council approved [Resolution No. 1655](#) setting the 2024 Docket, which added Comprehensive Plan and development regulation amendments to the City’s Work Plan. City Council directed staff to proceed with developing interim regulations to address two docketed items related to temporary uses and structures and renew the existing interim regulations for outdoor dining. More information on the background of the interim regulations is provided in [PCB25-05](#), from the February 26, 2025 Planning Commission meeting.

The Planning Commission held a regular meeting on February 26, 2025 where it had the first reading of the draft regulations for temporary uses and structures. The Commission provided initial feedback on the draft regulations and asked staff questions related to various topics. Staff requested that the Planning Commissioners provide comments, amendments, and questions and established a deadline for these materials to be submitted, prior to the March 26, 2025 public hearing.

Based on the comments and questions received, included in Exhibit 2, staff identified several key topics that may require additional information and/or clarification. These topics are as follows:

- Zoning
 - Land uses
- Land Use Review Types
 - Type I land use reviews, Type II land use reviews, Type III land use reviews, Type IV land use reviews, Public notification, Public notice, Code official decisions, Hearing examiner decisions
- Nonconforming Structures, Sites, Lots, and Uses
 - Legal nonconforming status of structures, sites and uses and illegal nonconformance of structures, sites and uses
- Variances
 - Criteria for approval
- Existing Regulations for Commerce on Public Property
 - Right-of-way use permits and Summer Celebration

Further information on each of these topics is provided below to support the Commission in making an informed recommendation to City Council on the draft permanent regulations.

ZONING

Mercer Island contains 13 different zoning designations across the Island. Zones are used to guide the development goals of the City by incentivizing certain land uses in specific areas or prohibiting other land uses in areas where they would be undesirable. For example, “professional, scientific, and technical services” are not an allowed use in the single-family residential zoning district by way of exclusion of all unlisted uses. The zoning designation dictates what kinds of development can occur on a specific property (also known as land uses), and the standards by which these developments must comply with.

Land Uses

Land uses can be categorized into three different types: 1) uses that are permitted outright; 2) uses that are permitted through the authorization of a conditional use permit; and 3) uses that are prohibited.

Uses that are permitted outright typically require one or more land use permits and/or a building permit, unless specifically exempted through the code. Permits are used to regulate development to ensure certain uses and structures comply with the standards set out in the development code. For example, development that is allowed within critical areas, such as a wetland, requires a Critical Area Review application to determine that the development would not result in adverse impacts to the wetland by demonstration of compliance with wetland buffers, buffer averaging, or mitigation. All land use permits fall into one of the permit types listed in [MICC 19.15.030](#), Land Use Review Types, and are reviewed according to the procedures established by the code.

Uses that are permitted through the authorization of a conditional use permit are those that are allowed in a zone, but that are subject to additional conditions, usually designed to mitigate anticipated impacts. For example, government services are listed as a conditional use in the single-family zoning designation, and are required to meet standards related to setbacks, parking, and shielding of utilities since the surrounding land uses are likely residential uses. If a government service obtains a conditional use permit to operate in a single-family residential zone and demonstrates that the additional conditions are met to the satisfaction of the hearing examiner, the use is permitted.

Each zone also contains prohibited uses. Uses can be prohibited through either explicitly stating the use, or a blanket statement to prohibit any use that is not listed in the allowed uses. [MICC 19.02.010](#) establishes the allowed uses in single-family zones. This section includes the statement “A use not permitted by this section is prohibited. Please refer to [MICC 19.06.010](#) for other prohibited uses.”

The City does not have an existing process by which a use can be authorized if it does not conform to the development code in Title 19 MICC. Even a development that obtains a variance for a dimensional standard consistent with the criteria in [MICC 19.06.110\(B\)](#) is permitted and is not “nonconforming.”

LAND USE REVIEW TYPES

MICC 19.15.030 categorizes land use permits into four different categories of review. Each review type has different public noticing, review, decision, and appeal processes. There are currently interim regulations in place which re-organize the existing tables and clarify certain processes for specific land use permit applications related to compliance with Senate Bill 5290. The proposed draft regulations for temporary uses and structures do not consider the changes that were made by [Ordinance No. 24C-17](#), as these are interim regulations adopted by City Council and are subject to change as they go through Planning Commission review during the drafting of permanent regulations. MICC 19.15.030 defines each of the land use review types as follows:

- 1. Type I Land Use Reviews**

Type I reviews are based on clear, objective and nondiscretionary standards or standards that require the application of professional expertise on technical issues.

- 2. Type II Land Use Reviews**

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.

- 3. Type III Land Use Reviews**

Type III reviews require the exercise of discretion about nontechnical issues. These reviews include the development of a staff report, which includes Findings of Fact and Conditions of Permit Approval. Staff reports are not explicitly required by the code, but common practice for the types of permits under this land use review type necessitate a staff report to demonstrate the proposed development meets the standards established in the development code.

- 4. Type IV land use reviews**

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. These reviews also include the development of a staff report, which is common practice for applications requiring a public hearing and review by a hearing examiner. The staff report also includes Findings of Fact and Recommended Conditions of Permit Approval that the hearing examiner can adopt as part of their decision.

Public Notification

Type II land use reviews are required to provide public notification. This notification is provided at the time of complete application to allow the community to be notified of the application prior to approval of the permit. The public notification is posted in the Weekly CPD Bulletin, which is published every Monday and includes the permit number, name of the applicant, location, and description of the project, a link to the website where additional information can be found, and the name of the reviewer assigned to the project where the community can ask questions or submit comments.

Public Notice

Type III and IV land use reviews are required to provide public notice of application, which is different from a public notification. Notice is provided in the Weekly CPD Bulletin, mailed to all property owners within 300 feet of the property, posted on the site in a location that is visible to the public right-of-way, and made available to the general public upon request. These notices are more detailed than public notifications. The code requires that the dates of the application, determination of completeness, and the notice of application, name of the applicant, location and description of the request, requested actions and/or required studies, date and time of the open record hearing (if applicable), environmental documents, statement of the public comment period, staff contact information, other permits not included in the application, description of development regulations used in determining consistency with the City's comprehensive plan, and a link the website where additional information can be found to be provided on the notice.

Code Official Decisions

Type I, II, and III land use reviews are subject to a decision by the Code Official. The Code Official is defined as "the director of the community planning and development department for the city of Mercer Island or a duly authorized designee."

Hearing Examiner Decisions

Most Type IV land use reviews are subject to a decision by the hearing examiner following a public hearing. Shoreline Variances and Shoreline Conditional Use Permits must obtain a recommendation from the hearing examiner to the Department of Ecology for their final decision. Design Commission Design Review applications are decided by the Design Commission.

NONCONFORMING STRUCTURES, SITES, LOTS AND USES

Any use that is explicitly allowed in a zoning designation, whether through permitted uses lists or the approval of a conditional use permit, is a conforming use. Nonconforming uses occur when a structures, site, lot, or use does not meet the standards required for those structures, sites, lots, or uses established in the current code. A structure, site, lot, or use can become nonconforming due to code amendments that change standards in the zone where the structure, site, lot, or use exists. Such structures, sites, lots and uses can generally continue and be maintained subject to certain conditions intended to limit any expansion of the nonconformity.

[MICC 19.01.050](#) provides explicit standards and requirements for the continuation and maintenance of structures, sites, lots, and uses that are legally nonconforming.

Legal Nonconforming Status of Structures, Sites, and Uses

Nonconforming structures, sites, and uses must meet certain criteria in order to be considered “legally established” nonconformities. All structures, sites, and uses that lawfully existed prior to September 26, 1960, shall be considered legally nonconforming. Structures, sites, and uses that were constructed or initiated after September 26, 1960, that were in conformance with all applicable code provisions in effect at the time of their creation but are not in compliance with current land use codes as a result of subsequent changes in code requirements are deemed to be legally nonconforming structures, sites and uses.

A structure, site, lot, or use permitted through a conditional use permit must conform to the applicable code requirements at the time the conditional use permit is approved. For this reason, a conditional use is a “conforming use” at the time it is initiated and would not become a “nonconforming use” until regulations are amended to those that the use no longer conforms to. One of the ways an applicant can demonstrate their use is a legal nonconforming use following a code change is through the record of a previous building permit or land use permit, including a conditional use permit. A conditional use that was legally established through a conditional use permit that becomes nonconforming due to later development regulation changes may be maintained in legal nonconforming status as long as no new nonconformities are created, there is no expansion of any existing nonconformity, and legal nonconforming status is not lost. This is true for all legally nonconforming structures, sites, and uses.

Illegal Nonconformance of Structures, Sites, and Uses

Structures, sites, and uses that were not in conformance with all applicable code provisions in effect at the time of their creation are illegal and shall be brought into compliance with all applicable provisions of the code.

VARIANCES

Variations are available to any applicant or property owner to request to vary from any numeric standard in the code, with the exception of [Chapter 19.07 MICC](#), Environment. Variations may only be granted if the applicant can demonstrate they can meet all of the criteria in the criteria for approval section, which are construed extremely narrowly. Variations are decided by the hearing examiner following a public hearing.

Criteria for Approval

MICC 19.06.110(B)(2) lists the criteria that an applicant must demonstrate the variance request meets. The first criterion is generally the most difficult to meet for the R-8.4, R-9.6, R-12, and R-15 zoning designations, which states:

“The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an “unnecessary hardship” is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot.”

In the last 5 years, only one variance request has been granted, which was for a variance in the required 5-foot setback for structures from the edge of an access easement in MICC 19.02.020(H)(1). Nonresidential uses located in the residential zones are generally not eligible for a variance based on this provision.

EXISTING REGULATIONS FOR COMMERCE ON PUBLIC PROPERTY

Regulations for commerce on public property are established in [MICC 19.06.050 – Commerce on public property](#). This section allows business owners to use a portion of the right of way or public sidewalks for

private commerce. Commerce on public property is permitted through Community Planning and Development with a right of way use permit or through Parks and Recreation with a special event permit depending on the location and scale of the proposed use or activity. Commerce on public property permits are generally applicable for the exchange of goods or services by any person(s), corporation, or company when the applicant business has an active business license for a location immediately adjacent to the public property location where the use will take place. Special event permits are applicable to more large-scale events that will take place on public property, such as a wedding ceremony or ticketed event in one of Mercer Island's parks.

During the COVID-19 Pandemic, the City adopted interim regulations for commerce on public property to allow businesses to more easily utilize outdoor spaces. The interim regulations amended MICC 19.05.060 to consider existing eating and drinking establishments that temporarily provide outdoor food and beverage service on adjacent public property to be considered temporary and may be approved without review or approval by the Design Commission.

Right-of-Way Use Permits

The MICC defines right-of-way as: "Land acquired by reservation, dedication, prescription or condemnation, and intended to be used by a road, sidewalk, utility line or other similar public use". Right-of-Way Use Permits are currently required for any person(s), corporation, or company who wishes to use the public right-of-way for the exchange of goods or services, regardless of the duration, scale, and location of the proposed activity within the right-of-way. These activities are subject to the criteria for permit approval outlined in MICC 19.06.050(D), where private commerce on public property permits must be reviewed by the code official for compliance with approval criteria related to business license requirements, location conditions, nuisance controls, and design standards.

Right-of-Way Use Permits are currently processed as a Type I land use review, which are reviewed and decided by the City's Public Works Department as the designated code official. This permit process is used to regulate private commerce on public property and to ensure compliance with the approval criteria. Review and approval by the Public Works Department is necessary to ensure smooth operation of streets and utilities and to determine alternate routes for traffic, ensure emergency vehicle access, and regulate duration. The primary concern for the Public Works Department is the safety of pedestrians and motorists. Review for safety would need to occur with a commerce on public property permit. Should certain activities be exempted from needing to obtain a permit, enforcement of compliance with the approval criteria in this section would occur only on a complaint-basis after a code enforcement request is filed, or if the City Engineer determines that the use is causing a hazard.

Summer Celebration

[MICC 19.06.050\(I\)](#) exempts the annual City-sponsored event known as "Summer Celebration" from compliance with the provisions of this section. Summer Celebration is required to obtain a ROW Use Permit, but it is not subject to the review criteria in the commerce on public property section. This event is specifically exempted from this section because it would not meet the criteria for approval which requires the applicant to have an active business license for a location immediately adjacent to the public property location where the request is made; however, Summer Celebration provides a great community benefit.

ISSUE/DISCUSSION

PROPOSED CODE AMENDMENTS

The draft regulations provided in Exhibit 1 were created to establish regulations and a permitting process for temporary uses and structures that would otherwise be prohibited or unregulated. These regulations would

apply to temporary uses and structures on real property not owned by the City of Mercer Island, referred to as “private property”.

Following the briefing on February 26, 2025, the Planning Commissioners provided comments, questions, and proposed amendments to the draft regulations, which are included in Exhibit 2. The proposed amendments were sorted into two different categories: minor and substantive.

- **Minor.** Minor changes are those changes that are non-substantive and would not significantly change the policy direction of the development regulations. Examples of minor changes include wordsmithing, reorganization, or amendments for consistency with other changes that are more substantive. The following Log Numbers have been categorized as minor changes. The Commission may reclassify specific amendments if more detailed discussion is desired to make a recommendation, otherwise, the recommended motion includes the recommendation to adopt all of the following minor changes: Log Nos: 1, 6, 10, 11, 17, 20, 21, 22, and 24.
- **Substantive.** Substantive changes are those changes that would significantly impact the policy direction of the development regulations. These changes require review or discussion by the Planning Commission and often include several proposed alternatives. The Planning Commission should focus on the Log Items categorized as “Substantive” in Exhibit 2, during the meeting.

During the March 26, 2025 meeting, staff will walk through each of the proposed substantive amendments and the proposed motions, which are detailed in the Recommended Action section below.

NEXT STEPS

- March 26, 2025 – Planning Commission public hearing, deliberations, and potential recommendation.
- April 23, 2025 – Planning Commission continued deliberations and recommendation (*if needed*)
- (Meeting date TBD) – City Council briefing on PC recommendation and first reading of an ordinance to adopt permanent regulations for temporary structures and uses.
- (Meeting date TBD) – City Council second reading of an ordinance to adopt permanent regulations for temporary structures and uses.

RECOMMENDED ACTION

Staff recommends the following motions.

Main Motion: “Move to recommend that the City Council adopt the proposed amendments to MICC 19.06.050 – Commerce on public property as amended; proposed new section MICC 19.06.130 – Temporary use permits as amended; and proposed amendments to MICC 19.15.030 – Land use review types as amended.”

Note: once the main motion has been made and seconded, the Planning Commission can begin making amendments by motion as it sees fit.

Secondary Motion – Minor Amendments: “Move to approve the minor amendments and amend the draft materials as presented in PCB 25-06.”

Note: this motion would make all of the minor amendments outlined in Exhibit 2. If there are amendments categorized as minor that the Planning Commission would like to discuss further, the motion could be modified to: “move to approve the minor amendments except for proposed amendments [insert log numbers] and amend the draft materials as presented in PCB 25-06.” The excepted amendments can then be addressed with the same process proposed for substantive amendments.

Secondary Motion – Substantive Amendments: “Move to approve substantive amendment [insert log number] alternative [insert preferred alternative letter] as presented.”

Note: Each time a substantive amendment motion is made all the following variables will need to be inserted: (1) amendment log number and (2) the preferred alternative. The phrase “as presented” can be changed to “as amended” if the Planning Commission would like to make further changes to the alternative such as proposing specific language. If changes to an alternative are proposed the tertiary motion below would need to be made to detail the proposed change prior to voting on the secondary motion.

Tertiary Motion – Changes to a substantive amendment alternative: “Move to amend alternative [insert preferred alternative] as follows: [provide the proposed amendment].”

Motion to Table: “Move to table discussion of the main motion and substantive amendments [insert log numbers] until the April 23, 2025 Planning Commission meeting.”

Note: If the Planning Commission is unable to resolve all of the proposed amendments at the March 26 meeting, or if additional information or staff recommendations are required, this matter can be tabled until the April 23, 2025 meeting.