

DAVID S. KERRUISH, P.S.

ATTORNEY AT LAW

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July 22, 2025

Mr. Tony Newton
Assistant Planner
City of Mercer Island Development Review
9611 SE 36th Street
Mercer Island, Washington 98040
tony.newton@mercerisland.gov

BY EMAIL ONLY

Re: 5818 West Mercer Way, Mercer Island, WA 98040
CAO25-003 Review Letter 1, April 2, 2025

Dear Mr. Newton:

I represent Artoush Fanaiyan owner of the property located at 5818 West Mercer Way concerning a pending application to obtain building permits for a new residence to be constructed at 5818 West Mercer Way, number CAO25-003. The application and approval process has been impacted by a misunderstanding by the City's Department of Community Planning and Development of the law applicable to easements, and interpretation of the language of MICC 19.02.020(H)(2). Accompanying this letter are the documents pertinent to my explanation of the issue, which include the easement recorded at King County Recording Number 198411050574, the short plat recorded at 8412209004, a letter and illustration from the engineer of record for the project, Duffy Ellis of Civil Engineering Solutions and the letter from the Department dated April 2, 2025, which prompted this response.

The easement in question at this site provides a sewer connection over a portion of 5818 West Mercer Way, my client's property. The building pad of 5818 West Mercer Way is connected to the public right of way by a strip of land which varies in width from 19.06 feet to the east and widens to 40.45 feet at the west where it connects to West Mercer Way. A sewer line, serving 5812 West Mercer Way, runs north to south in the west @75 feet of this strip of land. Based upon the limitations placed upon driveway grade by the City's code, a driveway connecting the building pad to the public right-of-way must not have a slope which exceeds 20%.

The topography of the site requires that the driveway for access to the building pad begin its climb to the higher elevation of the property before reaching the existing sewer line. This, in turn, requires that a retaining wall be constructed the sewer line

servicing 5812 West Mercer Way in order to provide lateral support for the slope of the new driveway. The retaining wall is planned to be constructed with ecology blocks.

According to the Department's letter of April 2, 2025, the Department has interpreted MICC 19.02.020(H)(2) to require the written permission of the owner of 5812 West Mercer Way, the property is benefited by the sewer easement, before construction of the retaining wall over the path of the easement. No explanation has been given to my client for its interpretation of MICC 19.02.020(H)(2) for requiring permission from the owner of 5812 West Mercer Way. It is my client's position that permission is not required, based upon the text of the easement, the terms of the short plat, applicable engineering data and Washington State law. The requirement of written permission described in the Department's letter of April 2, 2025 should be eliminated.

The owner of property burdened by an easement can use all of the owner's property so long as the use does not prevent the holder of the easement from using the easement for its intended purpose. The owner of 5812 West Mercer Way, the benefited property, is entitled to use the portion of 5818 West Mercer Way described in the easement for the underground connection of 5812 West Mercer Way's sewer line to the public sewer system, and for nothing else. Determination of whether or not the owner of the burdened property can use the land where an easement has been granted depends upon whether the owner's use "unreasonably burdens" the easement holder's use. The proposed construction of the retaining wall does not create an unreasonable burden upon the use of the sewer line.

As illustrated by the letter from Duffy Ellis, a licensed engineer with Civil Engineering Solutions who has analyzed the 5818 West Mercer Way site and designed the retaining wall which is the subject of this letter, the wall is needed to comply with the City's maximum slope driveway requirements. The original grant of the easement contemplated the construction of a driveway over the easement, since the strip of land in which the easement is located is the only means of ingress and egress for persons to travel from the building site to West Mercer Way.

As noted in Mr. Ellis' letter, the construction of the driveway and the retaining wall adds approximately 6 feet of depth between the sewer line and the graded surface of the proposed driveway over this portion of 5818 West Mercer Way. From an engineering perspective, the additional depth and the existence of the retaining wall makes no difference when performing maintenance, repair or replacement of the sewer line. The engineer's letter identifies two different means by which the sewer line can be maintained, repaired or replaced if needed, without disturbance of the surface above the sewer line. If use of a cured-in-place pipe or pipe bursting are unsuccessful, the added 6 feet of soil above the existing sewer line does not make a material difference in the work needed to complete replacement of the sewer line, even if an excavation from the surface becomes necessary. The construction of the driveway proposed by my client

July 22, 2025

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does not impose any unreasonable burden upon the easement's use for replacement, maintenance or repair of the underground sewer line.

Considering the fact that no unreasonable burden would be created by construction of the driveway and retaining wall, the City's requirement of a written agreement for construction over the easement is unreasonable, and not a proper application of MICC 19.02.020(H)(2). The construction of the driveway and retaining wall as proposed falls within the exception in the code for requiring written permission from the party benefited by the easement: "...No structure shall be constructed on or over any easement...*unless it is permitted within the language of the easement...*" The law applicable to easements permits the construction of sloped driveway proposed by my client over the underground sewer line, and should not require permission of the owner of 5812 West Mercer Way. The proposed use is permitted by the law applicable to easements; the proposed use is not prohibited by the text of the easement, nor does the text of the easement make use of its location exclusive to the owner of 5812 West Mercer Way. The design of the original short plat, which was completed with reference to the easement, contemplates the use proposed by my client because the short plat was based upon the topography already in existence, and the City's requirements concerning the slope of a driveway, which requires a retaining wall to allow the appropriate slope in this location. The City of Mercer Island and the original short plat proponent could not have intended to leave 5818 West Mercer Way without lawful vehicle access to its building site.

In light of the application of appropriate criteria to my client's application, the City of Mercer Island should not require any written permission from the owner of 5812 West Mercer Way as a condition of approval of the application. By doing so, the City is giving the owner of 5812 West Mercer Way a right to veto my client's efforts to build a home on a lot otherwise suitable for placement of a home, creating a right to which the adjoining property owner is not entitled. It is arbitrary and capricious for the City to impose this requirement for my client's project through its administrative decision based upon an incorrect application of its code and the law applicable to easements.

Please contact me upon receipt of this letter to confirm that the condition described in the first paragraph of the April 2, 2025 letter has been withdrawn.

Sincerely,

DAVID S. KERRUISH, P.S.



David S. Kerruish

cc: A. Fanaiyan
C. Luthi
D. Ellis

Memorandum

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To: City of Mercer Island
Development Review

From: Duffy Ellis, PE

Date: Wednesday, July 16, 2025

CES Job: 2105

Re: 5818 W Mercer Way
Mercer Island, WA
Permit 2502-028
Private Sewer Repair/Replacement Options

I am the engineer of record for subject single family project. I've been tasked to identify potential repair options for the short section of existing sewer pipe serving 5812 West Mercer address that passes under new retaining wall. See exhibit next page for reference.

The following two non-excavation options briefly summarized are recommended and common procedures for sanitary sewer pipe replacement. I don't expect the increased depth of pipe due to the new driveway grade will impact the future maintenance or replacement costs.

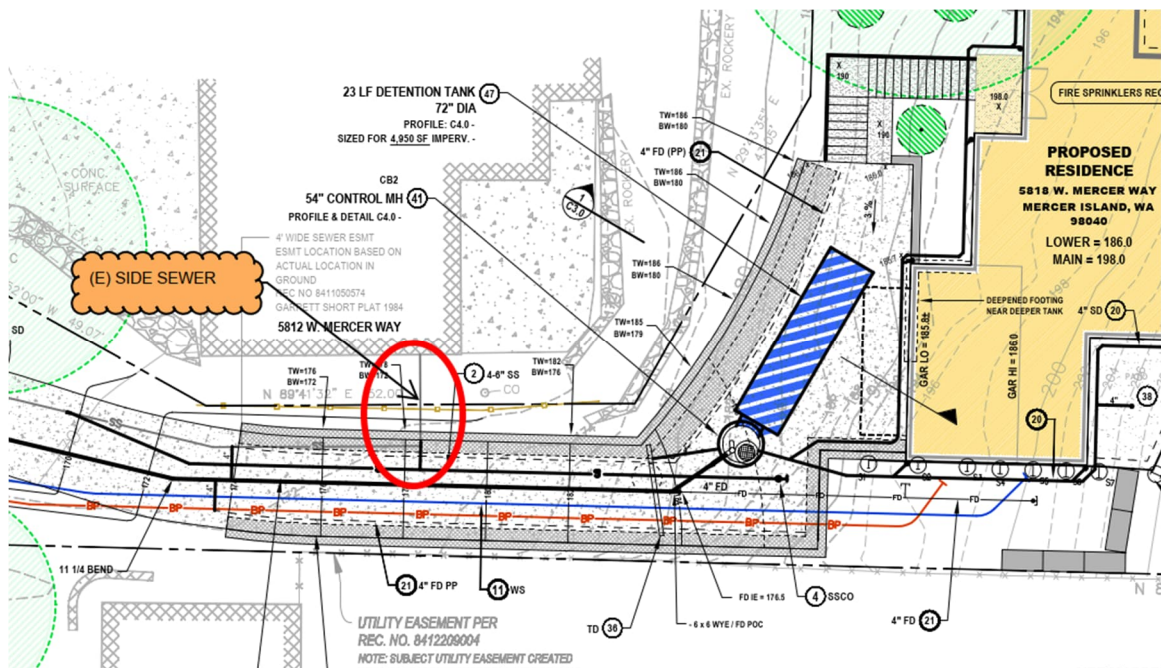
1. Cured-in-Place Pipe (CIPP) Lining:
 - Trenchless replacement
 - Creates a new pipe within existing pipe
 - New pipe is typically a epoxy resin soaked liner
 - Does not require extensive excavation
 - Faster installation relative to traditional dig-and-replace trench excavation
 - Typically lower cost than dig-and-replace trench.
 - Typical design life is 50 years or more
 - A resin-saturated felt tube is inserted into the pipe and cured.
 - No digging required, excellent option anywhere, especially for pipes under walls.

2. Pipe Bursting (if upsizing or replacing deteriorated pipe):
 - Breaks the old pipe while pulling in a new one.
 - New pipe is typically HDPE (high density polyethylene).

Memorandum

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- Very durable long term, 50-100 years
- Also characterized as less costly than dig-and-replace trench
- Limited ground disturbance





April 2, 2025

Attn: Chris Luthi
4737 37TH AVE SW
Seattle, WA 99126
Via: Email

RE: **CAO25-003** Review Letter 1; 5818 W Mercer Way, Mercer Island, WA 98040

Dear Chris Luthi,

The City of Mercer Island Community Planning and Development Department has completed a review for compliance with the zoning code, Title 19 of the Mercer Island City Code (MICC) for the above critical area review 2 application. The following issues need to be addressed in your resubmission:

Planning:

1. EASEMENT: 198412209004 is shown here. Per MICC 19.02.020(H)(2), "Utility and other easements. No structure shall be constructed on or over any easement for water, sewer, storm drainage, utilities, trail or other public purposes unless it is permitted within the language of the easement or is mutually agreed in writing between the grantee and grantor of the easement."
2. Per MICC 19.02.020(C)(3)(a)(i), Please show that the deck does not project more than three feet into any required yard
3. Per MICC 19.02.050(D)(5), Please clarify if the rockery in the yard setback is under the maximum allowed 72 inches.
4. Please provide a Disclosure and Notice on Title recorded with the King County Recorder's Office consistent with MICC 19.07.070 disclosing the presence of critical areas on the development proposal site and any mapped or identifiable critical areas within the distance equal to the largest potential required buffer applicable to the development proposal on the development proposal site.

Tree

1. Please correct and update the tree inventory worksheet. Tree #10 is listed as an exceptional tree as a Wester Red Cedar at 32" DBH. Replacement trees for exceptional trees require at least 6 replacement trees.
2. Per MICC 19.10.090(A)(3), Please show the replanting plan for the proposed location and number of any required replacement trees.

3. Please ensure that the arborist report addresses all of MICC 19.10.090(C)(2)(b), including:

For development applications, a discussion of timing and installation of tree protection measures. Such measures must include fencing and be in accordance with the tree protection standards as outlined in this chapter; and The suggested location and species of supplemental trees to be used when required. The report shall include planting and maintenance specifications to ensure long-term survival.

Geotechnical Review:

1. When the plan site receives final approval, please have the geotechnical engineer of record review the plan set and provide a letter indicating whether the proposed design conforms to their geotechnical design and construction recommendations. In addition please include an updated statement of risk in accordance with MICC 19.07.160.B.3.
2. Please provide shoring wall structural calculations for review. Please clearly indicate what lateral earth pressures were used in the design of the shoring wall. Please coordinate with the geotechnical engineer to verify that the pressures used are what is recommended for the existing sloping ground conditions above the wall.
3. The top of pile elevation does not correspond to existing ground elevations, please revise table and provide temporary grading plan to clarify how proposed shoring wall works with the grading to achieve the basement excavation.
4. The basement top of slab is at el. 186. The top of the shoring wall is at 210 and is 13 ft high. This means the excavation in front of the wall is at 197. Please indicate how this basement excavation will be achieved in front of the shoring wall that conforms to the geotechnical engineer's recommendation for temporary open cuts. The proximity of this basement excavation will reduce passive resistance used in the design of the shoring wall. Please coordinate with the geotechnical engineer to provide a reduced passive pressure recommendation. Please indicate which piles are designed using this reduced passive pressure and provide revised structural calculations and shoring design.
5. Please coordinate with civil engineer to provide temporary and permanent grading plans. Please clearly show top and bottom of proposed temporary cuts with associated elevations. Please clearly show permanent grading elevation contours on the permanent grading plan.
6. Does this mean an excavation on the designated steep slope is proposed above the shoring wall? The 1.5H:1V slope angle is a temporary cut slope recommendation from the geotechnical engineer of record not a permanent cut slope recommendation. Proposing an extensive permanent cut in the steep slope area would not be considered mitigating the potential impact to a geologic hazard (Ref. MICC 19.07.160). Please revise proposed grading to reduce impact on the geologic hazard at this site.

7. Please provide wall type proposed and include design calculations to verify that both static, seismic and surcharge loadings are included in the wall design. Please include assessment of potential impact of proposed wall imposing surcharge loading on the adjacent rockery and provide mitigation recommendations.
8. This indicates a second shoring wall. Please coordinate with structural engineer to provide temporary and permanent grading plans.

The City's processing of the critical area review 2 application has been put on hold until these issues are resolved. Pursuant to MICC 19.15.110, all requested information must be submitted within 60 days or a request for extension requested. The deadline for a complete response or request for extension is June 1, 2025. If a complete response is not received or an extension response has not been received prior to that date, the application will expire and be canceled for inactivity. No additional notification regarding this deadline or expiration of the application will be provided.

Sincerely,

Tony Newton

Tony Newton, Assistant Planner
City of Mercer Island Community Planning and Development
tony.newton@mercerisland.gov
(206) 275-7715

Responding and Resubmitting: [Click for More Detailed Instructions](#)

1. Reply to all review comments within the review letter.
2. Update your drawings, and any necessary supplemental documents or forms.
3. Upload updated drawings to the [Mercer Island Permit Submittal Portal](#).

Having Trouble? Please Review the Following:

[Accessing, Reviewing, and Responding to MlePlan Comments](#)

[Troubleshooting MlePlan](#)

[MlePlan Overview](#)

Thank you for your participation in the MlePlan review process.

THIS AGREEMENT, made this 2nd day of November, 1984
between Gerald F. Garrett and Loretta M. Garrett, his wife

OWNER
OWNERS OF Lot A

and Lot B of Garrett Short Plat (Mercer Island Short Plat No. MI-84-02-06)
respectively

WITNESSETH: That for and in consideration of the mutual covenants herein
expressed, it is hereby agreed between the above parties that:

1st - A side sewer shall be constructed as follows: Existing 4-inch sewer service shall be replaced with 6-inch pipe from easterly end of existing 6-inch side-sewer stub in W. Mercer Way to the south boundary line of Lot A.

2nd - There shall be an easement four (4) feet wide for sewer along
the line as constructed for the use of said properties.

3rd - The cost of construction of said sewer shall be borne by the
owners of the said properties as follows: Owner of Lot B

4th - The cost of maintenance, repair or construction of that portion
of the sewer used in common shall be borne in equal shares, except that the
owners of any lower parcel shall not be responsible for the part of the sewer
above their connection; and when necessary to repair, clean or reconstruct
the sewer, the parties to this agreement shall have a right of entry for that
purpose.

5th - This agreement shall be a covenant running with the land and
shall be binding upon all parties and their heirs and assigns forever.

IN WITNESS WHEREOF we hereunto set our hands and seals the day and year
first above written.

Loretta M. Garrett (Seal)

(Seal)

(Seal)

STATE OF WASHINGTON)
COUNTY OF KING)ss

This is to certify that on this 2 day of November, 1984
before me, the undersigned, a Notary Public in and for the State of Washington,
duly commissioned and sworn, personally came Loretta M. Garrett

to me known to be the part who executed the within instrument, and acknowledged
to me that SHE signed and sealed the same as HER free and voluntary
act and deed for the uses and purposes therein mentioned.

WITNESS my hand and seal the day and year in this certificate first above
written.

[Signature]
Notary Public in and for the State of
Washington

8411050574

8412209004

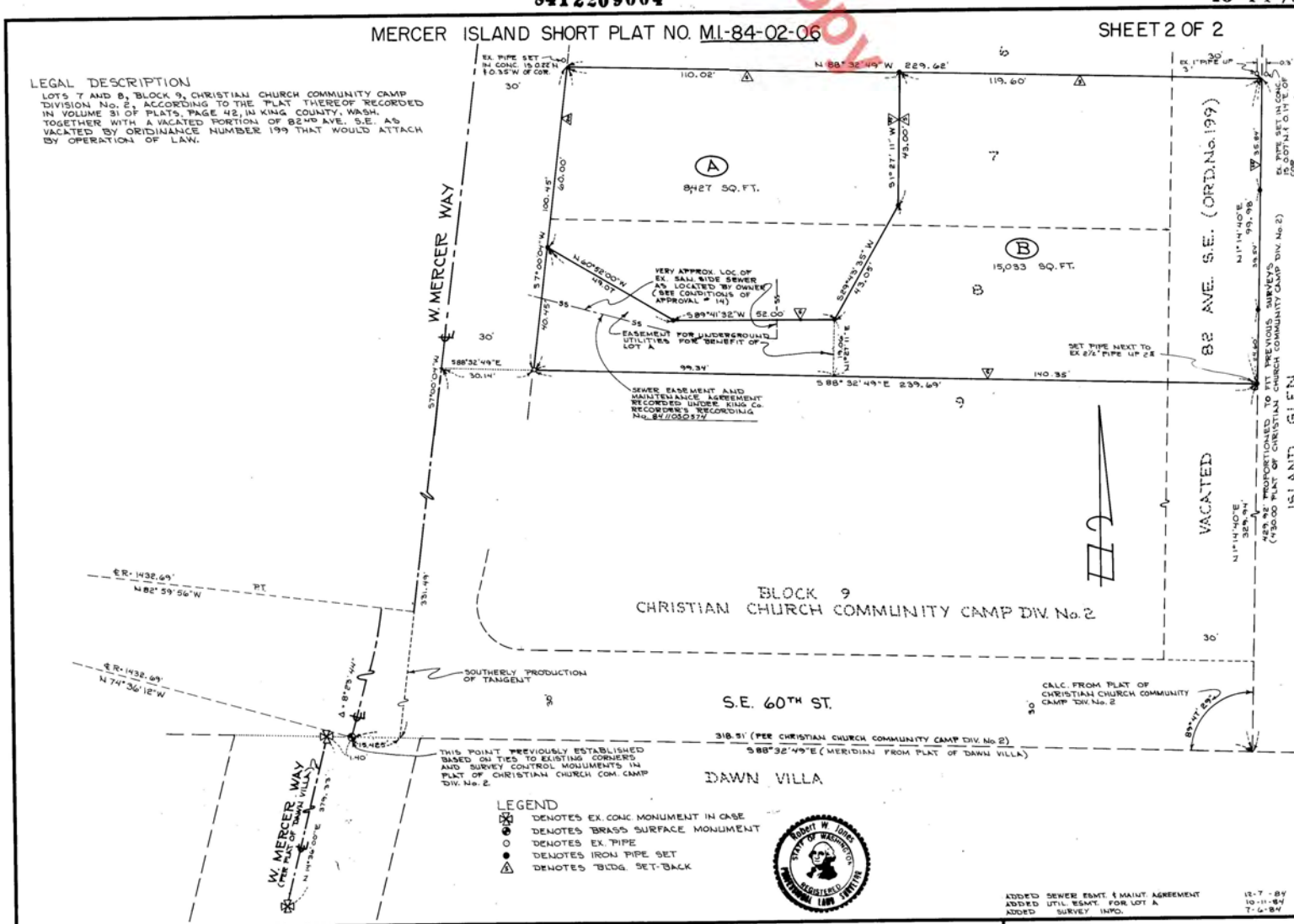
43-14-A

MERCER ISLAND SHORT PLAT NO. MI-84-02-06

SHEET 2 OF 2

LEGAL DESCRIPTION

LOTS 7 AND 8, BLOCK 9, CHRISTIAN CHURCH COMMUNITY CAMP DIVISION No. 2, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 31 OF PLATS, PAGE 42, IN KING COUNTY, WASH. TOGETHER WITH A VACATED PORTION OF 82ND AVE. S.E. AS VACATED BY ORDINANCE NUMBER 199 THAT WOULD ATTACH BY OPERATION OF LAW.



- LEGEND**
- ⊗ DENOTES EX CONC MONUMENT IN CASE
 - ⊙ DENOTES BRASS SURFACE MONUMENT
 - DENOTES EX PIPE
 - DENOTES IRON PIPE SET
 - ▲ DENOTES BLDG SET-BACK



ADDED SEWER ESMT & MAINT AGREEMENT 12-7-87
 ADDED UTIL ESMT FOR LOT A 10-11-87
 ADDED SURVEY 1980. T-6-87

SHORT PLAT OF LOTS 7 & 8, BLK. 9, CHRISTIAN CHURCH COMMUNITY CAMP DIV. No. 2, ACCORDING TO THE PLAT THEREOF RECORDED IN VOL. 31 OF PLATS, PAGE 42 AND A PORTION OF VACATED 82ND AVE. S.E. LOCATED IN THE N.E. 1/4 OF THE S.E. 1/4, SEC. 24, T. 24 N., R. 4 E., W.M.

RECORDER'S CERTIFICATE
 8412209004
 Filed for record this 20 day of DEC., 1984 at 1:08 P.
 In book 43 of SOR at page 14, A at the request of
 ROBERT W. JONES
 ELLEN HANSEN JAMES S. WEEKS
 Reg. Supr. of Records

SURVEYOR'S CERTIFICATE
 This map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act at the request of GEROLD F. GARRETT
 In JUNE, 1984
 Robert W. Jones
 Certificate No. 2634

JONES, BASSI & ASSOCIATES
 PROFESSIONAL LAND SURVEYORS
 7834 S.E. 32ND - 252-2222 - MERCER ISLAND, WASHINGTON 98040

DWN	M.W.M.	SCALE	DATE
		1"=20'	2-24-84
SVD	M.W.M.	P.R. NO.	PAGE
		522	30
APP'D	R.W.J.	JOB NO.	
		2560-75	

SANITARY SEWER IMPROVEMENTS

- 1 .
- 2 . 4 OR 6" SDR 35 PVC SANITARY SEWER(SS) @ MIN 1.0 %
- 3 .
- 4 .
- 7 .

WATER IMPROVEMENTS

- 10 . 1.5" WATER METER WITH 1.5" WATER SERVICE FROM MAIN TO METER REQUIRED PER STANDARD DETAIL W-13. 13R SPRINKLER SYSTEM REQ.
- 11 . (FIRE SPRINKLERS REQUIRED).....2.0" WATER SUPPLY REQUIRED FROM METER TO HOUSE. SPEC: 250 PSI PRIVATE HOPE (ASTM D2239). RECOMMENDED DEPTH=36".
- 12 .
- 14 .

STORM DRAIN

- 20 . 4" STORM DRAIN (3034 PVC) @ MIN 2 % GRADE
- 21 . 4" FOUNDATION DRAIN (3034 PVC) @ MIN 2 % GRADE
- 22 . 6" STORM DRAIN (3034 PVC) @ MIN 2 % GRADE
- 23 .
- 24 .
- 25 .
- 26 .

STORM DRAIN STRUCTURES

- 30 .
- 31 . TYPE 1 CB WITH VANED LID. MAX 5' RIM TO FL DEPTH. PROVIDE RISOR WITH TURNED-DOWN ELBOW IN DRIVEWAY.
- 32 .
- 33 .
- 34 .
- 35 .
- 36 . 6" WIDE NDS DURASLOPE CHANNEL DRAIN OR EQUAL. CLASS B VEHICLE RATED GRATE.
- 38A .
- 38 . PATIO AREA DRAIN: MIN 8" DIAMETER PEDESTRIAN GRATE
- 39 .
- 40 . PRIVATE TYPE 40 CATCH BASIN OR EQUAL. INCLUDE OIL TEE (OR INVERTED ELBOW) IN DRIVEWAY LOCATIONS.
- 41 . 54" ID TYPE 2 MH CONTROL STRUCTURE WITH SOLID LID. SEE ALL DETAILS AND PROFILE C4.0.
- 43 .
- 46 .
- 47 . 72" DETENTION PIPE. ALUMINIZED CMP OR EQUAL. CONTACT CONTECH FOR FABRICATION OF TANK. FORWARD FABRICATION PLANS TO ENGINEER FOR REVIEW. SEE PLAN FOR SIZE AND CONFIGURATION. SEE PROFILE, NOTES, AND DETAILS ON C4.0.

STORM BMP's

- 50 . COMPOST AMENDED SOIL TO ALL DISTURBED AREAS (SEE DETAIL SHEET C3.5). TILL 2.3" OF COMPOST INTO UPPER 8" OF SOIL. LOOSEN COMPACTED SUBSOIL. IF NEEDED BY RIPPING TO 12" DEPTH. MULCH LANDSCAPE BEDS AFTER PLANTING.
- 51 .
- 52 .
- 53 .
- 54 .
- 55 .
- 56 .
- 57 .
- 58 .

SOILS

SOILS REPORT SUMMARY	
Infiltration recommendation?	No: sloped site is within an infiltration infeasibility area
Project	Artoush Residence
Depth of Boring	16.5'
Soil profile	Weathered Outwash over Lawton Clay
Density	medium dense to very stiff
Soil classification:	SM over SM/ML
Date of digging:	October 29, 2024
Geotech consultant:	Phil Haberman, PE, LG, LEG, Cobalt Geosciences

SURVEYOR

TOPOGRAPHIC SURVEY BY:
TERRANE
11235 SE 6th STREET, SUITE 130
BELLEVUE, WA 98004
PHONE 425-458-4488
info@terrane.net

VERTICAL DATUM

NAVD 88 PER GPS OBSERVATIONS
SEE SURVEY

LEGAL DESCRIPTION

SEE C1.0

SOIL AMENDMENT REQUIRED

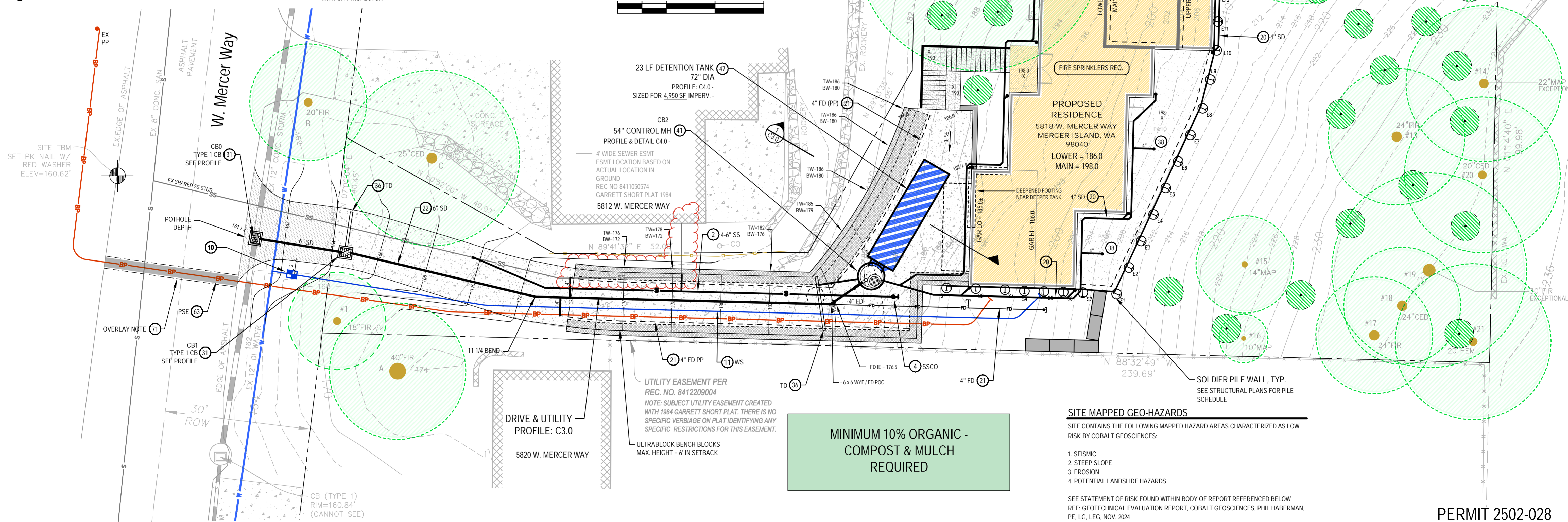
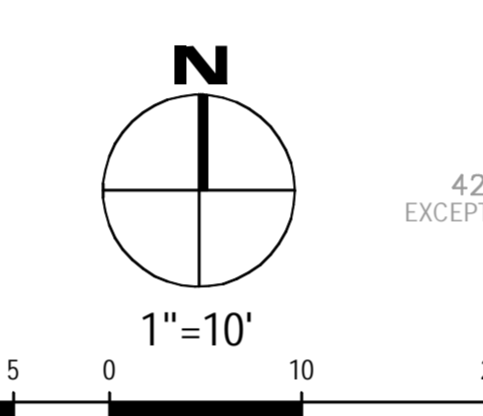
COMPOST AMENDED SOIL REQUIRED ON ALL LANDSCAPED AREAS AFTER CONSTRUCTION. SEE DETAIL ON C3.5.

SOIL INSPECTION REQUIRED BY ENGINEER

A POST CONSTRUCTION INSPECTION & CERTIFICATION OF AMENDED SOILS IS REQUIRED BY A LICENSED CIVIL ENGINEER. THIS IS REQUIRED BEFORE FINAL PERMITSIGN-OFF AND CERTIFICATE OF OCCUPANCY.

STREET IMPROVEMENTS

- 71 . PAVEMENT RESTORATION - COORDINATE SCOPE OF PAVEMENT RESTORATION WITH CITY INSPECTOR



NO.	DATE	BY	REVISIONS

<p>APPLICANT ARTOUSH CONSTRUCTION REMODELING LLC</p>	<p>DATE: Jun 07, 2025 JOB#: 2105 DRAFTED: DE DESIGN: DE DIGITAL SIGNATURE</p>	<p>CIVIL ENGINEERING SOLUTIONS 701 N 36th STREET, SUITE 450 206.930.0342</p> <p>SEATTLE, WA 98103 DUFFY@CESOLUTIONS.US</p>	<p>DRAINAGE / CIVIL PLAN</p> <p>PROPOSED RESIDENCE 5818 WEST MERCER WAY, MERCER ISLAND, WA 98040</p>	<p>DRAWING NO: C2.0</p> <p>APN 157470-0170 #2502-28</p>
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