



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

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November 25, 2024

City of Mercer Island
ATTN: Molly McGuire, Planner
9611 SE 36th Street
Mercer Island, WA 98040

Dear Molly:

Thank you for the opportunity to comment on the Bauman Residence (SEPA #202404985) located at 5928 77th Ave SE, Mercer Island, WA 98040 as proposed by Regan McClellan. The Washington Department of Fish and Wildlife (WDFW) is dedicated to preserving, protecting, and perpetuating the state's fish, wildlife, and ecosystems while providing sustainable fish and wildlife recreational and commercial opportunities. In recognition of our responsibilities, we submit the following comments for Bauman Critical Areas Reasonable Use Exception. Other comments may be offered in the future.

Fish and Wildlife Resources and Recommendations:

- **Lack of Demonstrated Reasonable Use Necessity**
 - The reasonable use exception is designed to allow development only when a property has no other reasonable economic use. However, the property currently has an existing single-family residence, indicating it already has reasonable economic use. Additional development, such as expanding the housing footprint and incorporating a three-car garage, is not essential for ensuring economic viability.

- **Reasonable Use Does Not Include Full Redevelopment**
 - Mercer Island Municipal Code (MIMC 19.07.100) and related case law clarify that the reasonable use exception is intended to allow some level of economically viable use of a property, not to permit full-scale redevelopment that would increase conflicts with critical area protections.
 - While the existing home is being removed, the property already supports a viable economic use as it was developed with a single-family residence.
 - Proposing a significantly larger, more elaborate structure (three stories with a three-car garage) does not constitute "reasonable use" under the code. Instead, it reflects a desire for a substantial upgrade that exceeds what is necessary for economic viability.

- **Non-Compliance with Reconstruction Standards (MIMC 19.07.130)**
 - Size Expansion Exceeds Limits: Additions or reconstruction of structures in critical areas may only expand up to 200 square feet larger than the original footprint. The proposed structure far exceeds this limit.
 - Buffer Encroachment Violations: New construction must maintain or exceed the original structure's distance from wetlands and watercourses. The proposed structure's increased size would result in greater encroachment.
 - Lack of Critical Area Mitigation: The required critical area study does not adequately demonstrate that impacts have been minimized or mitigated in accordance with MIMC 19.07.100.

- **No Evidence of Efforts to Minimize Impact**
 - Even with the removal of the existing home, Mercer Island's critical areas ordinance requires applicants to minimize the environmental impact of redevelopment. Under MIMC 19.07.100, applicants seeking a reasonable use exception must demonstrate that they have explored all feasible alternatives to reduce encroachment into critical areas and their buffers. The following alternatives appear to have been ignored:
 - Downsizing the New Home: A smaller home with a reduced garage size would minimize the building footprint and buffer encroachment.
 - Alternative Placement: If rescaled, the new structure could be repositioned to reduce impacts on Stream A's 120-foot buffer and 45-foot setback.
 - Design Adjustments: Eliminating unnecessary features, such as a three-car garage, or utilizing vertical space more efficiently could reduce the footprint without sacrificing livability.
 - Without exploring these alternatives, the proposal to replace the old home with a significantly larger structure is inconsistent with the reasonable use exception criteria.

- **Environmental Issues if Approved**
 - Mercer Island's critical areas ordinance (MIMC 19.07.180) is intended to ensure no net loss of ecological functions. Construction of a three-story house and three-car garage:
 - Violates Intent to Minimize Buffer Impact: The proposed development would result in substantial encroachment into the 120-foot stream buffer and 45-foot setback from the piped section, both of which are critical for maintaining the ecological integrity of the watercourse.
 - Increases Runoff and Habitat Disturbance: A large building footprint and expansive driveway increase impervious surface coverage, contributing to habitat degradation and hydrological impacts inconsistent with the purpose of the buffer requirements.

- **Case Law Does Not Support Overdevelopment**
 - Washington State courts have consistently ruled that the reasonable use exception must balance property rights with public interests, such as critical area protection. Key precedents include:
 - Heidelberg v. City of Seattle (1997): The court ruled that economic viability does not justify development at the expense of critical areas when less impactful uses are feasible.
 - Hayes v. City of Medina (2008): Emphasized that reasonable use does not entitle a property owner to a particular size, design, or configuration of development if alternatives exist that allow for use while protecting critical areas.
 - The proposed design is inconsistent with these rulings, as it prioritizes luxury features (e.g., a large garage and multistory home) over minimizing critical area impacts.

- **Lack of Demonstrated Hardship**
 - Even with the old home being removed, the applicant must prove that denial of the proposed redevelopment would result in an undue hardship, rendering the property unusable. However:
 - The presence of the existing home before demolition demonstrates that the property can support reasonable use without the proposed upscale redevelopment.
 - The proposal for a three-story home and three-car garage reflects a preference for luxury, not a necessity to achieve economically viable use.

In summary:

- **Existing Reasonable Economic Use:** The property already supported reasonable economic use with the existing single-family residence and replacing it with a larger structure is not essential for economic viability.
- **Reasonable Use Exception Limits:** The exception is intended to permit some economically viable use, not full-scale redevelopment or substantial upgrades that exceed what is necessary under Mercer Island Municipal Code (MIMC 19.07.100).
- **MIMC 19.07.130:** The proposed project violates Mercer Island’s reconstruction standards (MIMC 19.07.130) by exceeding the 200-square-foot expansion limit, increasing encroachment into critical area buffers, and failing to adequately demonstrate impact minimization or mitigation.
- **Failure to Minimize Impact:** The proposal does not demonstrate efforts to minimize critical area impacts, such as downsizing the structure, repositioning the home, or eliminating unnecessary features like the three-car garage.
- **Environmental Impact Violations:** The project would substantially encroach on the 120-foot buffer and 45-foot setback, increasing impervious surface coverage and disrupting ecological functions, contrary to MIMC 19.07.180.

- **Inconsistency with Case Law:** Washington courts have ruled that reasonable use exceptions must balance development with critical area protection, rejecting luxury-focused projects like this when less impactful alternatives exist.
- **No Demonstrated Hardship:** The applicant has not proven that denying the redevelopment would create undue hardship, as the property was already economically viable with the prior residence.

The Washington Department of Fish and Wildlife provides our comments and recommendations in keeping with our legislative mandate to preserve, protect, and perpetuate fish and wildlife and their habitats - a mission we can only accomplish in partnership with local governments. If you have any questions or concerns, please feel free to contact me at 360-890-2975 or Maria.Mcnaughton@dfw.wa.gov.

Sincerely,



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