

**BEFORE the HEARING EXAMINER for the
CITY of MERCER ISLAND**

DECISION

FILE NUMBER: CUP25-001

APPLICANT: City of Mercer Island, Public Works Department
ATTN: Alaine Sommargren, Deputy Director
9601 SE 36th Street
Mercer Island, WA 98040

TYPE OF CASE: Conditional Use Permit for an Essential Public Facility: Water supply system Advanced Metering Infrastructure – Site 4 ¹

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: APPROVE subject to conditions

DATE OF DECISION: June 30, 2025

INTRODUCTION ²

The City of Mercer Island (“City”) Public Works Department (“Public Works”) seeks approval of a Conditional Use Permit (“CUP”) for an Essential Public Facility (“EPF”): Water supply system Advanced Metering Infrastructure (“AMI”) – Site 4.

¹ Prior to June 26, 2025, the Examiner heard and approved three Advanced Metering Infrastructure Site Conditional Use Permits, each of which Sites was referred to by a “Site” number based on documents in each hearing record. As a result of the two Advanced Metering Infrastructure Site Conditional Use Permits heard on June 26, 2025, the Examiner now realizes that the Site numbering he relied on in the prior cases will result in some duplicate numbers. To avoid Site number duplication, the Examiner will hereafter use the Site numbers found in the overall site map in the Public Participation Plan contained in each case record. The correct numbering for the sites, listed in correct Site number order, is:

<u>Site</u>	<u>Location</u>	<u>File No.</u>	<u>Decision Date</u>	<u>Site No. in Case File</u>
Site 1	Roanoke/70 th & 20 th	CUP24-002	9-27-2024	5
Site 2	WMW & 32 nd	CUP25-002	6-27-2025	1
Site 3	Crestwood		(Not heard yet)	
Site 4	WMW & EMW	CUP25-001	6-27-2025	2
Site 5	City Reservoir	CUP23-001	5-20-2024	4
Site 6	Island Crest Park	CUP23-002	5-20-2024	3

The Examiner regrets any confusion caused by the incorrect Site numbering.

² Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

Public Works filed the CUP application on March 4, 2025. (Exhibits 1, PDF 1; 2³) The Mercer Island Department of Community Planning & Development (“CP&D”) deemed the application complete on March 12, 2025. (Exhibit 5; and testimony)

The subject property is located within the W Mercer Way right-of-way, just west of the W Mercer Way/E Mercer Way “intersection” on the south end of Mercer Island.⁴ The proposed Site location is just north of the Lubner property at 8487 W Mercer Way. (Public rights-of-way do not have Assessor’s Parcel Numbers.) (Exhibits 1, PDF 1; 8, PDF 2)

The Mercer Island Hearing Examiner (“Examiner”) viewed the subject property via Google Earth imagery: Overhead imagery captured July 5, 2024; Street View imagery captured August 2024.

The Examiner held a remote predecision open record hearing pursuant to MICC 3.40.060 on June 26, 2025, using the “Zoom” platform. The City gave notice of the hearing as required by the MICC. (Exhibit 12)

The following exhibits were entered into the hearing record during the hearing:

- Exhibits 1 - 15: As enumerated in Exhibit 1, the CP&D Staff Report
- Exhibit 16: Email chain, principally between Ryan Harriman and Andrea Kristof, May 28 – June 25, 2025

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. The City operates a water service which serves some 7,900 customers, each of which has a water usage meter on its service line. The City’s old meters are of various vintages and many are near the end of their useful life. Among their “aging” problems, they are leaking and under-reading water usage. (Exhibits 1, PDF 2; 3; 7; and testimony)
2. In 2018 the City Council (“Council”) authorized a project to explore upgrading the water metering system. Several different systems were studied. The Council ultimately decided to pursue the AMI system and included implementation in the City’s 2021-22 Capital Budget. The Council awarded a bid for installation of the AMI system in 2022. (Testimony)

³ Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

⁴ W Mercer Way and E Mercer Way do not “intersect” in the traditional sense of that word. Rather, the two streets meet at the apex of a hyperbolic curve where one street name ends and the other street name begins.

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3. The AMI system consists of two primary components: The water meters; and the base stations. The water meters replace the old, existing meters. Each is equipped with a small, low power transceiver which “broadcasts” hourly water consumption data in short bursts (each only a few seconds long) every four to six hours. (Testimony)

The meters’ transmitter power is about 2 watts; transmission is essentially line-of-sight, so more than one receiving base station is required to cover the entirety of Mercer Island. Each base station consists of two components, a small aluminum box (22” W x 22” H x 10.5” D) containing the transceiver equipment; and an antenna. (Exhibits 1; 3) The transceiver equipment meets all applicable FCC requirements. (Exhibit 13)

4. Ideally, the signal from a meter will be received by at least two base stations. In order to determine the optimal base station locations, a signal propagation (coverage) study was performed which identified seven locations on the Island for base stations. Strong opposition from the public was expressed about two of the seven locations, one of which would have been located at the south end of the island. Public Works asked its consultant to eliminate those two locations and re-run the coverage study to identify alternative locations. That analysis resulted in the identification of six optimal locations. Site 4 is the replacement for one of the disputed sites. (Testimony)
5. Approximately 7,400 of the new meters were installed by a contractor between March and August, 2024. Most of the remaining meters were replaced by City staff. A few meters are specialized and do not need to be replaced; a few have more complex plumbing connections and will be replaced by City staff in the future. The AMI base station equipment has been installed and is operational at two of the six sites: Site 6 - Island Crest Park and Site 5 – the City’s water reservoir site adjacent to Rotary Park. The base station equipment has been installed at two other sites but has not yet been activated. The AMI system was activated in June, 2024. It is able to capture data from approximately 80% of the new meters using the two operational base stations. The remaining four base stations will be needed to capture the data transmissions from the remaining meters. (Testimony)
6. Base station Site 4 is located within the W Mercer Way right-of-way, just west of the W Mercer Way/E Mercer Way “intersection” on the south end of Mercer Island. The proposed Site location is just north of the Lubner property at 8487 W Mercer Way. The City proposes to install a 55-foot utility pole at that location. The City will then mount a 9’ 1” x 1.5” antenna on top of the new pole, resulting in a total height of 64’ 1”. (Exhibits 3; 7, PDF 23; 8; and testimony)
7. No vegetation will have to be removed for installation of the new utility pole. The portion of the nearby lots along both sides of W Mercer Way are heavily vegetated, deciduous trees predominating. An existing utility pole is located approximately 80 feet northwest of the proposed Site 4 pole location; a pair of utility poles are located approximately 50 feet east of the proposed Site 4 pole location. (Exhibits 7, PDF 23; 8; Google Street View imagery) One of the pair of poles to the east is taller than typical utility poles in the area and has wireless communication facility (“WCF”) panel

antennae mounted at its top. The nearby, smaller pole is older and appears to currently have only one cable TV or telephone cable run on it.⁵

8. Site 4 is in an area of mixed zoning. The area west of the east boundary of the Lubner lot, extended to the north and south, is zoned R-15; the area to the east of that line is zoned R-8.4. (Exhibit 15) Public utility facilities are a listed conditional use in all residential zones subject to three requirements: at least a 20-foot setback from abutting properties; off-street parking based on the square footage of the building; and shielding landscaping. [MICC 19.02.010(C)(1)(a) – (c)] Structure setbacks do not apply to utility poles located within public rights-of-way; there is no building area to need parking for; the existing trees on the adjoining lots provide screening. (Exhibit 7, PDF 23)
9. The proposed base station qualifies as a Small Wireless Communication Facility (“WCF”) except for its height (needed to achieve the necessary areal coverage) which exceeds the normal 50-foot MICC height limit for Small WCFs. Since the antenna height is needed for successful operation of the AMI system in parts of Mercer Island, the facility must be treated as an EPF. EPFs require issuance of a CUP in all zones. [MICC 19.06.100(D)] Local regulations cannot prohibit the location of an EPF. [MICC 19.06.100(A)(2)]
10. Mercer Island’s State Environmental Policy Act (“SEPA”) Responsible Official issued a threshold Determination of Nonsignificance (“DNS”) for AMI - Site 4 on April 21, 2025. The period within which one could appeal the SEPA DNS ended on May 5, 2025. (Exhibit 11) The DNS was not appealed. (Testimony)
11. Public Works conducted a broad-ranging public participation program for Site 2. The program included mailed notices and flyers to all property owners within 300 feet of Site 2, a public comment period, updates on the City’s web site, and responses to callers. (Exhibit 7)
12. The owner of the parcel three lots east of the Lubner lot (James and Andrea Kristof (collectively and individually “the Kristofs”)) have exchanged emails with City staff regarding their concerns about the Site 4 proposal. (Exhibit 16) Andrea Kristof testified at the hearing.

The Kristofs have two general areas of concern. First, they are concerned about the impact of the pole’s installation on area wildlife, more particularly eagles which live in and/or frequent the area. The City has regulations regarding eagles which were considered in the SEPA threshold determination process. (Exhibit 16, especially PDF 1 & 6) The SEPA appeal period ended before the first communication from the Kristofs (May 5 versus May 28). Even if that initial email had been construed as an appeal by the City, it would have been untimely by some 23 days.

The second area of concern is the precise location of the proposed pole and its potential impact on their property. There is a wood utility pole in a treed area along the south edge of the street right-of-

⁵ The Examiner takes personal knowledge that cable TV and telephone runs are located lower on utility poles than are electrical lines. The electrical lines and one cable run are located on the new, taller utility pole; the older pole appears from Google Earth Street View imagery to support only one cable or TV run.

way about 15 – 20 feet north of the northeast corner of the Lubner property. (Exhibit 8, PDF 2, identified as “WOOD POLE” in red ink) That pole can be seen on Google Earth Street View imagery. It is difficult to determine from the imagery whether any utility lines are attached to that pole; the area survey provided in the record does not show any lines attached to that pole. (Exhibit 8, PDF 2) The proposed AMI Site 4 pole location is within the public right-of-way (not on anyone’s private property), about 15 – 18 feet west-northwest of the “WOOD POLE.” Thus, the proposed location is approximately 120 feet north-northwest of the northwest corner of the Kristofs’ lot. (Exhibit 8, PDF 2) According to Google Earth imagery, the elevation of the Kristof residence (which is on the south end of their lot) is approximately 80 feet lower than the W Mercer Way/E Mercer Way right-of-way in the area and about 380 feet southeast of the proposed AMI Site 4 pole location.

13. CP&D has evaluated the application for compliance with both CUP approval criteria and EPF compliance items.⁶ (Exhibit 1, PDF 5 – 8) CP&D concludes that the proposal complies with all applicable criteria and recommends approval subject to six conditions. (Exhibit 1, PDF 8 & 9)

Public Works does not object to CP&D’s analysis or its recommended conditions. (Testimony)

14. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK⁷

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A CUP is a Type IV application. The Examiner conducts an open record hearing and renders a final decision on Type IV applications which is subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Tables A and B; MICC 19.15.140; Chapter 3.40 MICC]

The Examiner may “1. Approve; 2. Conditionally approve; 3. Continue the hearing; 4. Remand the application to staff; or 5. Deny the application.” [MICC 19.15.140(C)]

Review Criteria

The review criteria for a CUP application depend upon the zone in which the subject property is located. For sites not located in Town Center, the criteria are set forth at MICC 19.06.110(A)(2):

- a. The permit is consistent with the regulations applicable to the zone in which the lot is located;

⁶ The CP&D Staff Report (Exhibit 1) contains one inadvertent scrivener’s error: The code citation in the last line of § II.1 at PDF 3 should be MICC 19.06.100(D), not MICC 19.16.010(E). (Official notice)

⁷ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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- b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;
- c. The use is consistent with policies and provisions of the comprehensive plan; and
- d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance.

Additional review criteria apply to government services, public facilities, utilities, and museums and art exhibitions located in single-family residential zones:

- a. All structures shall be located at least 20 feet from any abutting property;
- b. Off-street parking shall be established and maintained at a minimum ratio of one parking space for each 200 square feet of gross floor area; and
- c. Utilities shall be shielded from abutting properties and streets by a sight obscuring protective strip of trees or shrubs.

Special considerations for EPFs are set forth at MICC 19.06.100(D):

... [R]egardless of the proposed location of the EPF, materials showing compliance with the following items must be submitted:

1. *Documentation of need.* The applicant must demonstrate the need for the proposed EPF. Included in the analysis of need should be the projected service population, an inventory of existing and planned comparable facilities and projected demand for this type of essential public facility.
2. *Consistency with applicant's plans.* The proposal shall be consistent with the applicant's own long-range plans for facilities and operations.
3. *Consistency with Mercer Island Comprehensive Plan.* The proposal shall be consistent with the Mercer Island Comprehensive Plan.
4. *Minimum site requirements.* The applicant shall submit documentation showing the minimum siting requirements for the proposed facility. Site requirements may be determined by the following factors: minimum size of the facility, access, support facilities, topography, geology, and mitigation needs. The applicant shall also identify future expansion needs of the facility.

5. *Alternative site selection.* The applicant shall search for and investigate alternative sites before submitting a proposal for conditional use permit approval. The proposal shall indicate whether any alternative sites have been identified that meet the minimum site requirements of the facility.
6. *Proposed impact mitigation.* The proposal must include adequate, appropriate and reasonable mitigation measures for the impacted area(s) and community. Mitigation measures may include, but are not limited to, natural features that will be preserved or created to serve as buffers, other site design elements used in the development plan, and/or operational or other programmatic measures contained in the proposal. The proposed measures shall be adequate to substantially reduce or compensate for anticipated adverse impacts created by the proposed facility.

(Italics in original)

Vested Rights

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

The City has adopted local regulations governing vesting of land use applications.

Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department’s issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[MICC 19.15.170(B)] The vesting date of the AMI-Site 2 application is March 12, 2025.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [MICC 19.15.060(A)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The Kristofs’ environmental concerns cannot be entertained in the context of this case as the period within which one could appeal the SEPA DNS expired long ago.

The AMI Site 4 pole will be some 120 feet northwest of the closest corner of the Kristofs' property. Given the dense trees along the south side of the W Mercer Way/E Mercer Way right-of-way in the vicinity, the steep downhill slope of the terrain south of the right-of-way, the distance from the nearest corner of the Kristofs' property, the distance from the Kristofs' residence, and the small size of the antenna (1.5" diameter), it is quite likely that the antenna will not even be visible from the Kristofs' yard.

Because the AMI site is an EPF, the Examiner would not be able to deny the requested CUP application even if there were evidence suggesting such action should be taken. But there is no such evidence in this record, so that potential decisional conundrum does not present itself.

2. Detailed exposition of compliance with approval criteria is unnecessary as this is otherwise an uncontested application. Recitation of CP&D's report text is also not needed. CP&D's analysis is appropriate and thorough. As such, it is incorporated herein by reference as if set forth in full.
3. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. The Examiner believes that the word "applicant" is generally no longer appropriate after a permit has been issued. A word such as "permittee," "developer," or "plattor," depending on the context, is usually preferable because "applicant" is often interpreted as applying only to the original permit applicant. Since land use permits run with the land, the eventual developer may not always be the same party as the original applicant. Since this is a City project, that situation is highly unlikely. Nevertheless, the Examiner will substitute "Permittee" for "applicant" in Recommended Condition 2.
 - B. Because of the Kristofs' concern that the site plan (Exhibit 8) does not precisely indicate the location of the proposed AMI utility pole (a concern that the Examiner does not personally share), the Examiner will add language to Recommended Condition 1 requiring that the AMI pole not be east of the Lubner property's east line, extended.
 - C. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended Conditions 1, 5, and 6 will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
4. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **GRANTS** the requested Conditional Use Permit for AMI – Site 4 **SUBJECT TO THE ATTACHED CONDITIONS**.

Decision issued June 30, 2024.

\s\ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁸

Alaine Sommargren
Ryan Harriman

Madelyn Nelson
Andrea Kristof

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: “1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision.” [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

“Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”
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⁸ The official Parties of Record register is maintained by the City’s Hearing Clerk.

CONDITIONS OF APPROVAL
CUP25-001
ADVANCED METERING INFRASTRUCTURE – SITE 4

This Conditional Use Permit for an Essential Public Facility is subject to compliance with all applicable provisions, requirements, and standards of the Mercer Island City Code, standards adopted pursuant thereto, and the following special conditions:

1. The project shall be in substantial conformance with Exhibit 8 and all applicable development standards contained within Mercer Island City Code (“MICC”) Title 19. In particular, the AMI Site 4 utility pole shall be erected within the public right-of-way not further east than the east line, extended, of the Lubner property.
2. The Permittee shall obtain any permits from state and federal agencies that are applicable to this project. The Permittee is also responsible for documenting any required changes in the project proposal due to conditions imposed by any applicable local, state, and federal government agencies.
3. A City of Mercer Island Building Permit may be required for construction of this project proposal.
4. Construction of this project proposal shall only occur during approved construction hours by the City of Mercer Island and/or as otherwise restricted by the Building Official.
5. Pursuant to MICC 19.15.200, revisions that result in substantial changes, as determined by the code official, shall be treated as a new application for purposes of vesting. For the purposes of this section, "substantial change" includes the creation of additional lots, the elimination of open space, substantial changes in access, or changes to conditions of approval. Additionally, the need for the modification was not known and could not have been reasonably known before the approval was granted.
6. Pursuant to MICC 19.15.150, land use review approvals shall expire three years from the date of notice of decision if the development proposal authorized by the land use review is not commenced. For the purposes of this section, the development proposal shall be considered established if construction or substantial progress toward construction of a development proposal for which a land use review approval has been granted must be undertaken within two years of the date of notice of decision of the land use review. Where no construction activities are involved, the use or activity shall be commenced within three years of the date of notice of decision of the land use review