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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

CITY OF MERCER ISLAND OPEN  
RECORD HEARING

CUP 24-001

In Re CUP 24-001

PUBLIC COMMENTS BY  
CONCERNED NEIGHBORS FOR  
THE PROTECTION OF THE  
NEIGHBORHOOD TO PROPOSED  
CUP.

Open Record Hearing  
Date: July 9, 2025

TO: HEARING EXAMINER GALT  
AND TO: JOSH FRIEDMANN, APPELLANT COUNSEL OF RECORD FOR HERZL  
AND TO: EILEEN KEIFFER, COUNSEL FOR CITY OF MERCER ISLAND

**I. INTRODUCTION**

Concerned Neighbors files these public comments to Conditional Use Permit (CUP)  
24-001 Staff Report. Various members of Concerned Neighbors and neighbors have

1 previously filed public comments in their individual capacity. Concerned Neighbors has filed  
2 separate public comments on SEPA Appeal APL 25-003.

## 3 II. EVIDENCE RELIED UPON

4 **Exhibit 1** October 29, 2024 responses from the City of Mercer Island to two  
5 Public Records Act requests by Matthew Goldbach for any existing CUPs on the  
6 residentially zoned Herzl properties located at 3700 East Mercer Way, Mercer Island,  
7 Washington, and City responses noting “no existing CUP permits were found under  
8 the address 3700 East Mercer Way in response to your request”, noting that Herzl had  
9 filed but withdrawn two prior CUPs for the property in 2022 and 2023.

10 **Exhibit 2** Staff’s report and Herzl’s Project Narrative for the April 2, 2025 Design  
11 Commission Study Session that conflict regarding the permitting of Herzl’s residential  
12 properties.

13 **Exhibit 3** Design Schematic April 2, 2025 Design Commission Regular Hybrid  
14 Meeting Agenda Packet DCB25 Design Standards showing drop-off and pick-up lane.

15 **Exhibit 4** November 21, 2022 Development Code Interpretation 22-004 holding  
16 that a Conditional Use Permit in the residential zone is prohibited from obtaining a  
17 variance from any regulatory limit except impervious surfaces which must comply  
18 with the strict requirements in MICC 19.06.110(B).  
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### III. HISTORY OF PROJECT

1  
2 Concerned Neighbors incorporates the history set forth in its Motions to Intervene and  
3 Dismiss. However, it is important to understand how the current proposed project and CUP  
4 was arrived at.

5  
6 As noted in Exhibit 1, this is the third CUP Herzl has applied for since 2022.

7 Originally, Herzl filed its application to the Council to rezone its B Zone property to  
8 allow schools which DID NOT include a CUP on the residential properties for B Zone uses.  
9 At the time, City staff recommended additional requirements for B schools in the B zone  
10 regarding parking and playgrounds but those were not incorporated as part of the rezone.

11 The fundamental problems with using Herzl's B Zone property for a school are:

12 1) It is very small for a school of 150 students, plus however many staff and  
13 office workers, especially when adding school parking, drop-off and pick-up lanes with  
14 utilities, two playgrounds, along with a commercial office space.

15  
16 2) A proposed CUP on residentially zoned property for commercial uses has  
17 never been attempted on Mercer Island before, whether commonly owned or not.

18 3) Herzl's Residentially Zoned properties include lake waterfront and are much  
19 more valuable than the B Zoned property, so Herzl doesn't want to deed or permanently  
20 reserve property on the residential Zone properties for B Zone CUP uses, in particular parking  
21 and the holding lane. The normal procedure would have been for Herzl to request a lot line  
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1 revision to add some residential property to this B Zoned property and to seek a rezone from  
2 Residential to B Zone, or to site the school on the residentially zoned properties, but the  
3 residentially zoned property is more valuable.

4 4) Herzl's residential properties exceed the maximum allowed impervious surface  
5 limits even if grandfathered. Herzl wishes to "share" the parking between the synagogue and  
6 the B Zone property, along with a lane for drop-offs and pick-ups, but without any formal  
7 agreement or easement that runs with the land on residential properties that would preclude  
8 one of the uses when the other was entitled to the shared parking. Parking on Herzl's  
9 residentially zoned properties is currently a condition of the French American School's CUP  
10 for 435 students, and the loss of that parking will render the FAS CUP non-conforming unless  
11 the FAS can find alternative reserved parking.  
12

13 5) Herzl's original application to rezone its B property included a kind of co-  
14 mingling of the Residential Zoned and B Zoned properties without a formal CUP or lot line  
15 revision. However, Herzl soon realized that under MICC 19.01.040(G)(2) if these properties  
16 were formally combined or co-mingled their combined zoning defaults to the lowest or most  
17 restrictive zoning which would then convert the B Zoned property into a Residential Zoned  
18 property pursuant to MICC 19.01.040(G)(2). See City's staff analysis, page 2. So instead,  
19 this entire project is an attempt to co-mingle the properties without triggering MICC  
20 19.01.040(G)(2).  
21

22 6) The amount of property needed to accommodate drop-offs and pick ups for 150  
23  
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1 students is enormous, and the proposal is to wind cars around the complete perimeter of all of  
2 Herzl's residentially zoned properties without any binding agreement running with the land  
3 in case common ownership is broken. See Exhibit 3 to these comments.

4 7) The maximum number of parking stalls on Herzl's residential properties is 105.  
5 This number cannot be increased because Herzl already exceeds the limit for impervious  
6 surfaces. However, even accepting Herzl's optimistic parking requirements, the required  
7 parking stalls between the synagogue and school and office are 134. The City miscites the  
8 MICC section allowing this number to be reduced by 25%.

9 **IV. SUMMARY OF CONCERNED NEIGHBORS' OBJECTIONS**

10 Concerned Neighbors' objections fall into four main categories:

11 1) There is not an existing CUP for Herzl's residentially zoned properties, and no  
12 known conditions for such a CUP that would grandfather in non-conforming regulatory limits.

13 2) The proposed CUP for B Zoned uses on Herzl's separate Residential Zoned  
14 properties is not allowed under MICC 19.06.110(5)(c).

15 3) Herzl cannot increase impervious surface limits on its residentially zoned  
16 property through a variance pursuant to AI 22-004.

17 4) This is a systemic intersection and main arterial for Island residents living  
18 along the east side and south end of Mercer Island and is already heavily congested due to  
19 nearly 1,000 students between the French American School and the Jewish Community  
20 Center. Herzl's off-street parking which is limited to the amount of parking currently existing  
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1 on the Residential Zoned property has already exceeded its impervious surface limits and is  
2 inadequate.

3 **V. PUBLIC COMMENTS**

4 1) **The City and Herzl misstate the Mercer Island Comprehensive Plan Land**  
5 **Use Section 7.4.** In Staff's Report, the City states on pages 9 and 16 that Comprehensive Plan  
6 Land Use Goal 17.4 states:

7 "Social and recreational clubs, schools, and religious institutions  
8 are predominantly located in single family residential areas of the  
9 island. Development regulation **should** reflect the desire to retain  
10 viable and healthy social, recreational, educational, and religious  
11 organizations as community assets which are essential for the  
12 mental, physical and spiritual health of Mercer Island."

13 In its April 8, 2025 Memorandum, Herzl sought to modify and update changes to The  
14 Comprehensive Plan and on page 3 repeats this statement noting the November 2024 Periodic  
15 Update of The Comprehensive Plan.

16 However, Goal 17.4 was replaced in the updated Comprehensive Plan with Goal 7.4  
17 which states:

18 "The City Council **may** consider measures within the land use code  
19 to address maintenance, updating and renovation of these facilities,  
20 while ensuring compatibility with surrounding neighborhoods.  
21 Such facilities contribute to the mental, physical, and spiritual well-  
22 being of Mercer Island residents. Land use decisions should balance  
23 the retention of these facilities with overall community planning and  
24 zoning regulations."

25 This change came after a very comprehensive discussion among the Council. Certain

1 CUPs, including the Jewish Community Center, wanted the language to state “shall”, Staff  
2 recommended “should”, but the Council adopted “may” to show that there was no deference  
3 to Conditional Use Permits when it comes to Land Use, and the Hearing Examiner must  
4 balance this proposed CUP along with every other CUP in the neighbors with the impact to  
5 the neighborhood.

6 CUPs are not favored in the Mercer Island City Code or in The Comprehensive Plan,  
7 or granted special land use treatment. They don’t pay property taxes, consume precious  
8 housing, and create traffic and parking issues which are why they are subject to a Type IV  
9 permit. The CUPs in this part of Mercer Island serve nearly 1,000 students and over 10,000  
10 members, the vast majority of whom do not live on Mercer Island.

11 Therefore, contrary to the City’s and Herzl’s statements, the Hearing Examiner should  
12 show no deference to a CUP in the Residential Zone and must balance this proposed CUP that  
13 is the straw that will break the camel’s back with the impact on the surrounding residential  
14 community.  
15

16 **2) There is no evidence of an existing CUP for the Herzl Residential Zoned**  
17 **properties.**

18 Matthew Goldbach filed a Public Records Act request with the City requesting any  
19 existing CUPs for Herzl’s residential properties. Attached in Exhibit 1 to these comments is  
20 the response from the City noting that no CUP exists. Mr. Goldbach filed a second request.  
21 Again, the City clarified there is no existing CUP. Apparently, according to the City’s  
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1 response dated October 29, 2024, Herzl applied for a CUP in 2022 and 2023, but these were  
2 withdrawn.

3 Herzl has tried to recreate a procedural history from 1970 and 1979, but the record  
4 indicates that a formal CUP was never applied for or received although Herzl has proceeded  
5 as though it has a CUP, although any *conditions* are unknown.

6 Interestingly, the City’s permit history and Herzl’s permit history in the agenda packet  
7 for the April 2, 2025 Design Commission are inconsistent, with the City noting the synagogue  
8 was permitted in 1979 without a Conditional Use Permit and Herzl in its Project Narrative  
9 stating the synagogue was “permitted” in 1970. See Exhibit 2 to these public comments.  
10

11 This entire project rests upon the assumption that Herzl has a pre-existing CUP on its  
12 residential properties that grandfathers in non-conforming regulatory limits – specifically  
13 impervious surface limits (now called “lot coverage” since the 2017 rewrite of the  
14 Residential Development Standards), because Administrative Interpretation 22-004 issued in  
15 2022 in response to the JCC’s applications for variances from various regulatory limits holds  
16 the MICC and the Comprehensive Plan prohibit a CUP in the Residential Zone from  
17 obtaining a variance from the regulatory limits in the residential zone, including impervious  
18 surface limits, unless the requirements in MICC 19.06.110(B)(2)(i)(i-iv) and B(2)(a) through  
19 (i) are met. Herzl has not demonstrated it has met these criteria. See AI 22-004 Exhibit 4 to  
20 these comments.  
21

22 According to Staff’s report, these grandfathered impervious surface limits as of March  
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1, 2006 equal 50% but there is nothing to support that.

3) **The MICC and The Comprehensive Plan prohibit a CUP in the Residential Zone from Obtaining a Variance From the greater regulatory limits.** In 2021, the Jewish Community Center applied for a series of variances and CUPs for its residentially zoned property in order to redevelop the property. Although the Jewish Community Center currently has grandfathered regulatory limits that significantly exceed those currently allowed in the Residential Zone, it wanted even greater regulatory limits in order to increase the development on its property.

The City obtained a comprehensive legal opinion from outside counsel that was then adopted into Administrative Interpretation 22-004 that holds that a CUP in the Residential Zone is prohibited except impervious surface limits which must meet the criteria in MICC 19.06.110(B)(2)(a) through (i). See Exhibit 4 to these comments. The JCC then appealed the Administrative Interpretation 22-004 and denial of its application for variances but dismissed its appeal before going before the Hearing Examiner.

Whether Herzl has a pre-existing CUP or not, it cannot obtain a **variance** for any regulatory limit in its CUP, including impervious surfaces or lot coverage which already greatly exceed the current limits even for a CUP in the MICC, and couldn't meet the criteria in MICC 19.06.110(B)(2). A CUP in the Residential Zone is not allowed to obtain a "variance" to further exceed the regulatory limits – whether conforming or non-conforming - with the promise that other unidentified impervious surfaces will be converted to pervious surfaces at a later date.

1                   **4) MICC Prohibits a B Zoned or Commercially Zoned Property from Using a**  
2                   **CUP on Residentially Zoned Property for The Required Amenities on the B**  
3                   **Zoned or Commercially Zoned Property.**

4                   From the very beginning, two main objections that have been raised by Concerned  
5                   Neighbors have been:

6                   1)       A B Zoned or Commercially Zoned property may not used a CUP on a  
7                   Residentially Zoned property – whether there is current common ownership or not - to transfer  
8                   the required amenities to the Residential Zoned property; and

9                   2)       Even if this was allowed, the CUP would need to require easements that run with  
10                  the residential property and are permanent in case the common ownership of the property is  
11                  broken. Throughout this matter, Herzl and the City have misunderstood the difference between  
12                  common ownership and adjacent parcels.

13                  In 2020, the Council amended MICC 19.06.110(5) to adopt Section (C) which  
14                  prohibits a CUP in a residential zone from using an adjacent residential property for CUP  
15                  related uses if not part of the CUP even if the properties are held in common ownership.  
16                  MICC 19.06.110(5)(c)

17                  MICC 19.06.110(5)(c)

18                  5. *Change after conditional use permit granted.*

19                  c. *Applicability.* A conditional use permit shall be applicable only to  
20                  the property for which it was granted, as defined by the legal  
21                  description of the property boundaries submitted with the  
22                  conditional use permit application ("permitted property"). The  
23                  use(s) permitted under a conditional use permit shall not extend  
24                  beyond the permitted property to adjoining property or property  
25                  added to the permitted property unless the conditionally approved

1 use(s) are already allowed on the adjoining or added property or a  
2 new conditional use permit is granted for the adjoining or added  
3 property.

4 This land use trick was never contemplated when the Council rezoned the B Zone to  
5 allow schools as a use.

6 This would create a terrible precedent and effectively abrogate the distinction between  
7 zones on Mercer Island and jeopardize the residentially zoned neighborhoods that have less  
8 value and greater regulatory restrictions.

9 **5) Herzl's Proposed 105 Parking Stalls for its School and Office Complex are**  
10 **Inadequate and Staff's Parking Analysis is Based on an Inapplicable Part of**  
11 **the MICC.**

12 Miraculously, Herzl has determined that the required number of parking stalls for its  
13 150-student school and office complex is 105 stalls, the exact amount available on Herzl's  
14 parking lot on its Residential Properties that can't be increased due to the fact that Herzl already  
15 exceeds its impervious limits, and can't even include the required parking planters required in  
16 any other parking lot. The number of required parking stalls are solely based on the parking  
17 available on the Residentially Zoned property.

18 Staff's Report notes that the required combined parking for the synagogue and B Zone  
19 property is 139 parking spaces, which Concerned Neighbors believes is optimistic. However,  
20

1 Staff's Report further reduces this number by 25% to 105 stalls, citing MICC 19.04.040(e).

2 However, MICC 19.04.040 states at the very beginning:

3 **MICC 19.04.040 Parking Requirement**

4 **“A. The following parking requirements apply to all uses in the**  
5 **CO and B Zones and to all non-residential uses in the PBZ zone.”**

6 Therefore, a reduction of 25% of the necessary parking spaces is not allowed under  
7 MICC 19.04.040 for Herzl's residentially zoned properties.

8  
9 Even if MICC 19.04.040 did apply, based on the submissions by neighbors of the vast  
10 amounts of illegal parking on both sides of East Mercer Way and the danger it creates for both  
11 students and pedestrians, any reduction in the number of required parking stalls would be  
12 inappropriate and dangerous.

13 Firstly, this parking if allowed must be permanent and run with the land in case the  
14 common ownership of the properties is broken.

15 The French American School sits directly across the street from the proposed Herzl  
16 school. It currently has 435 students that is vastly greater than allowed under the original  
17 CUP. The French American Schools' updated 2006 CUP is predicated on the FASP leasing  
18 parking on the Herzl Residential Zoned property. Concerned Neighbors throughout this  
19 process have submitted numerous emails and photos of cars illegally parked up and down East  
20 Mercer Way when Herzl closes its parking for synagogue functions to the FAS which then  
21 forces that parking onto the street because there is no other alternative parking in this heavily  
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1 congested area.

2 Herzl has stated that it has informed the FAS that the FAS parking at the Herzl parking  
3 lot will terminate upon construction of the school/office building on Herzl's Business Zoned  
4 property. This issue must not be repeated with the B zoned property. Any shared parking  
5 through a CUP must be by permanent easement and not by lease because the school can't be  
6 demolished if the lease for the parking is revoked.

7 This is also why it is imperative that any parking for the Business Zoned property  
8 allowed on the Residential Zoned property through a CUP be by permanent easement with  
9 specific days of use for each parcel so the neighbors do not run into this problem again.  
10

## 11 6) CONCLUSION

12 For the foregoing reasons, Concerned Neighbors request that the Hearing Examiner  
13 deny Herzl's application for a CUP on its residential properties for B zone uses.


14 In the alternative, in addition to the left-turn lane and priority signal requested in the  
15 MDNS, Concerned Neighbors would request that the Hearing Examiner, should he allow the  
16 CUP, require the following mitigation in the CUP:

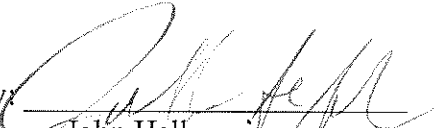
- 17
- 18 1) The proposed B Zone project must provide 139 parking stalls;
  - 19 2) The required parking and drop-off and pick-up lanes on Herzl's residentially  
20 zoned properties must contain permanent easements in case the common ownership is broken;
  - 21 3) Herzl's residential properties may not obtain a variance to increase its  
22 impervious surface limits, or add additional impervious surfaces on the basis that other existing  
23  
24  
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1 impervious surfaces will be converted to pervious surfaces.

2 DATED, this 2<sup>nd</sup> day of July 2025.

3  
4 **CONCERNED NEIGHBORS FOR THE PROTECTION OF THE**  
5 **NEIGHBORHOOD**

6 By:   
7 Matthew Goldbach

8 By:   
9 John Hall

# Exhibit 1

# Request 24-822 Closed

## Dates

Received

October 21, 2024 via web

## Requester

 Matthew T Goldbach

## Staff assigned

Departments

CPD (Community Planning and Development)

Point of contact

Deb Estrada

## Request

I would like a copy of the CUP covering" 3700 E Mercer Way, Mercer Island.

## Timeline

## Documents

 **Request published** Anyone with access to this request

October 29, 2024, 10:10am by Mary Swan, Paralegal/PRO (Staff)

**Request closed** <sup>^</sup> Anyone with access to this request

Good morning,

The City completed its response to your public records request for a copy of the CUP covering 3700 E Mercer. All records in response to your request were provided to you in one installment released today.

**This request is now closed because the City does not intend to address it further.** The 1-year statute of limitations to seek judicial review of this request has now begun.

If you have any questions, require assistance, believe that we have not provided all the records you were seeking, or if you believe your request was misinterpreted in any way, please reply to this email or call the number below within 10 business days of the date of this email.

You are welcome to submit a new request for records at any time: <https://mercerisland.nextrequest.com/>

Thank you,

**Mary Swan, Public Records Officer/Paralegal**

206.275.7651

October 29, 2024, 10:10am by Mary Swan, Paralegal/PRO (Staff)

 **Document(s) released** Anyone with access to this request

CUP24-001.zip

October 29, 2024, 10:07am by Mary Swan, Paralegal/PRO (Staff)

 **Department assignment** Anyone with access to this request

CPD (Community Planning and Development)

October 21, 2024, 9:07pm by Matthew T Goldbach, MR





 **Request opened** Anyone with access to this request

Request received via web

October 21, 2024, 9:07pm by Matthew T Goldbach, MR

October 21, 2024 via web

## Requester

 Matthew T Goldbach  
 matt@bitmax.net  
 9980 Southeast 40th Street, Mercer Island, US-0-WA, 98040  
 9548062489

## Invoices

No invoices due

## Staff assigned

### Departments

CPD (Community Planning and Development)

### Point of contact

Deb Estrada

## Timeline Documents

### Message to requester ^

Requester + Staff

Dear Mr. Goldbach,

Thank you for your clarification today that you are seeking records related to existing CUP permits for 3700 East Mercer Way, as opposed to the CUP under review (CUP24-001).

The City found records relating to two prior CUP applications, CUP22-002 and CUP23-001; however, these were withdrawn. You clarified that you are not seeking these records.

No existing CUP permits were found under the address 3700 East Mercer Way in response to your request.

Sincerely,

**Mary Swan, Public Records Officer/Paralegal**

October 29, 2024, 1:46pm by Mary Swan, Paralegal/PRO (Staff)

### Message from requester ^

Requester + Staff

Hi Mary I'm not inquiring about the CUP Application.....I'm asking to review the "current existing CUP". According to their application there is an existing school, Place of Worship, multiple parking lots, play field and a Dock. All of these activities are on residential lots. The applicant has referenced the "Current CUP" to the Planning Commission, City Council and in documents to the City. I hope that clears it up. Please call me if you need anything else. Matt Goldbach 954-806-2489

October 29, 2024, 1:26pm by Matthew T Goldbach, MR via email

### Request published

Anyone with access to this request

October 29, 2024, 10:10am by Mary Swan, Paralegal/PRO (Staff)

### Request closed ^

Anyone with access to this request

Good morning,

# Exhibit 2

NOT FOR CONSTRUCTION

**PROJECT NAME AND DESCRIPTION**  
BARNABIE POINT PROJECT  
3-STORY MIXED-USE BUILDING HOUSING A PRESCHOOL-8 PRIVATE SCHOOL AND COMMUNITY MULTIPURPOSE SPACE ON LEVELS 0, 1 AND 2; AND COMMUNITY OFFICE RENTAL SPACE ON LEVELS 2 AND 3.

**FILE NUMBER**  
CUP24-001

**OWNER**  
HERZL-NER-TAMID CONSERVATIVE CONGREGATION

**ADDRESS**  
3700 E MERCER WAY  
MERCER ISLAND, WA 98040

**ZONING DESIGNATION**  
B, R-9.6

**LEGAL DESCRIPTION**  
PARCEL A: (APN 082405-9045-07)  
THAT PORTION OF GOVERNMENT LOT 11, SECTION 8, TOWNSHIP 24 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON; TOGETHER WITH THAT PORTION OF THE SOUTHEAST QUARTER OF SECTION 7, TOWNSHIP 24 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:  
BEGINNING AT THE INTERSECTION OF THE WEST LINE OF GOVERNMENT LOT 11 WITH THE NORTH LINE OF DOYLE-HANSEN ADDITION, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 75 OF PLATS, PAGE 24, RECORDS OF KING COUNTY, WASHINGTON;  
THENCE SOUTH 89°09'34" EAST SLOING THE NORTH OF SAID DOYLE-HANSEN ADDITION, A DISTANCE OF 253.49 FEET TO THE WEST LINE OF LOT 7 OF CHANNEL CREST, ACCORDING TO THE PLAT THEREOF RECORDED IN COLUME 72 OF PLATS, PAGE 63, RECORDS OF KING COUNTY, WASHINGTON;  
THENCE NORTH 01°12'29" EAST ALONG SAID WEST LINE, A DISTANCE OF 111.48 FEET TO THE SOUTH LINE OF TRACT "A" OF SAID CHANNEL CREST; THENCE SOUTH 85°39'49" WEST ALONG SAID SOUTH LINE 173.15 FEET TO SOUTHEASTERLY LINE OF LAND CONVEYED TO STATE OF WASHINGTON TOLL BRIDGE AUTHORITY UNDER RECORDING NO. 3032009; THENCE SOUTH 65°24'55" WEST ALONG SOUTHEASTERLY LINE TO THE EASTERLY MARGIN OF EAST MERCER WAY, AS CONVEYED TO KING COUNTY UNDER RECORDING NO. 923897;  
THENCE SOUTH 01°02'29" WEST TO THE NORTH LINE OF SAID DOYLE-HANSEN ADDITION;  
THENCE SOUTH 89°09'34" EAST ALONG SAID NORTH LINE 70.61 FEET TO THE POINT OF BEGINNING.

PARCEL B: (APN 210700-0010-06)  
LOTS 1 THROUGH 5, INCLUSIVE, DOYLE-HANSEN ADDITION, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 75 OF PLATS, PAGE 24, RECORDS OF KING COUNTY, WASHINGTON.

PARCEL C: (APN 151560-0010-06)  
LOTS 1 THROUGH 7, INCLUSIVE, CHANNEL CREST, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 72 OF PLATS, PAGE 63, RECORDS OF KING COUNTY, WASHINGTON;

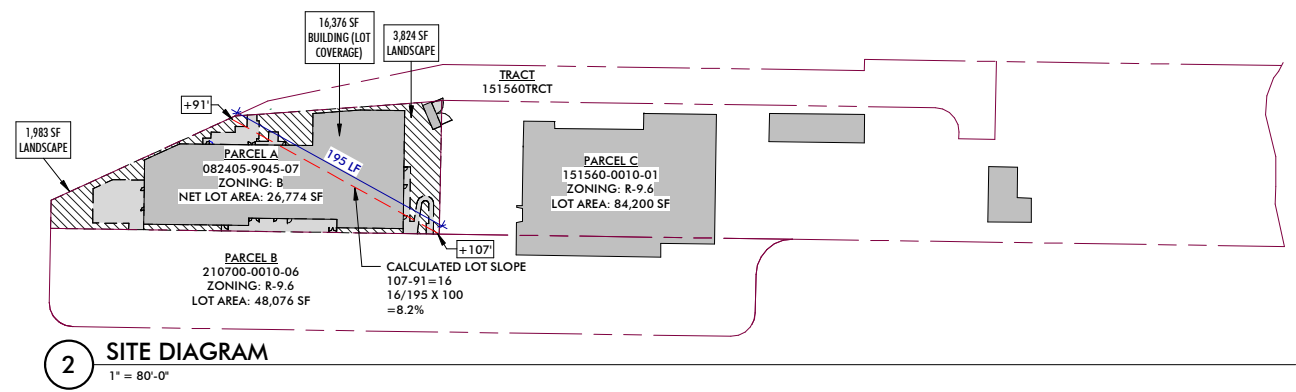
TOGETHER WITH AN UNDIVIDED 7/8THS INTEREST IN TRACT "A" OF SAID PLAT.

SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

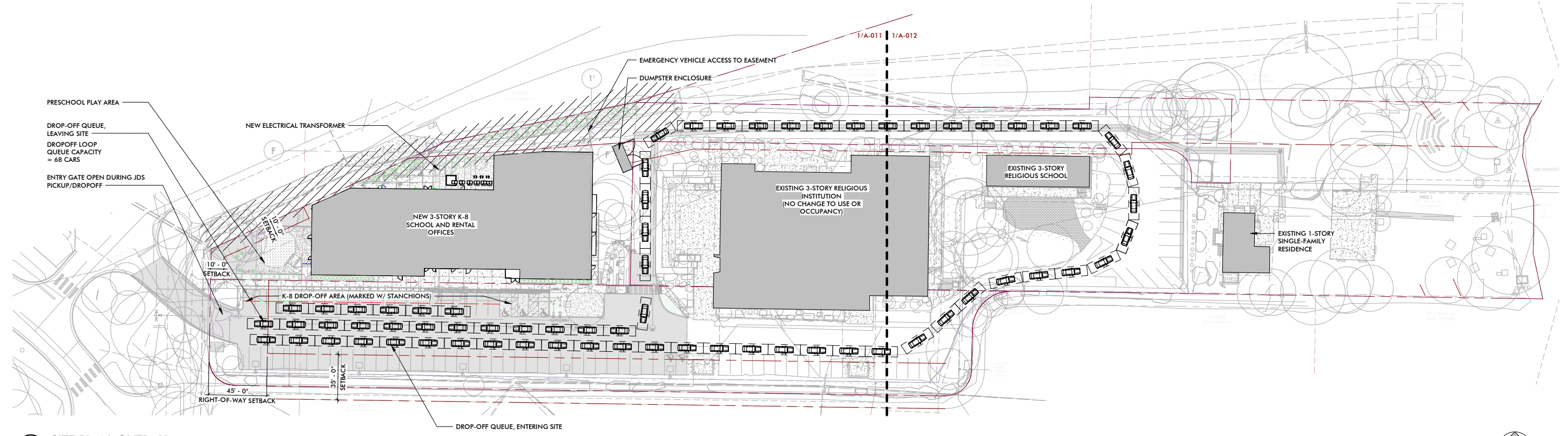
**ASSESSOR'S PARCEL NUMBER**  
0824059045, 1515600010, 2107000010, 151560TRCT

LOT AREAS (B-ZONED PARCEL)		
Comments	AREA	% OF TOTAL LOT AREA
BUILDING (LOT COVERAGE)	16,376 SF	61%
<b>HARDSCAPE</b>		
	3,925 SF	15%
<b>LANDSCAPE</b>		
	3,898 SF	14%
	1,983 SF	7%
	304 SF	1%
	449 SF	2%
	6,634 SF	25%
	26,935 SF	100%

MINIMUM LANDSCAPE REQUIREMENT FOR BUSINESS (B) ZONE - 25% OF GROSS LOT AREA.  
LOT AREA: 26,881 SF  
MINIMUM LANDSCAPE REQUIREMENT: 6,720 SF



**2 SITE DIAGRAM**  
1" = 80'-0"



**1 SITE PLAN-OVERALL**  
1" = 40'-0"

NO.	DATE	DESCRIPTION
4	FEBRUARY 2025	DESIGN REVIEW

PROJECT:

LAND USE/SITE PLAN

**A-010**

# Exhibit 3



# DESIGN COMMISSION CITY OF MERCER ISLAND

DCB 25-04  
April 2, 2025  
Regular Business

## AGENDA BILL INFORMATION

<b>TITLE:</b>	DCB 25-04: Design Standard Review (DSR) 24-004 Study Session for Herzl Ner-Tamid Conservative Congregation Preschool-8 Project	<input checked="" type="checkbox"/> Discussion Only <input type="checkbox"/> Action Needed: <input type="checkbox"/> Motion <input type="checkbox"/> Recommendation
<b>RECOMMENDED ACTION:</b>	N/A	

<b>STAFF:</b>	Ryan Harriman, Planning Manager Molly McGuire, Senior Planner
<b>EXHIBITS:</b>	1. Plan Set 2. Project Narrative and Discussion

## EXECUTIVE SUMMARY

On April 4, 2024, the Applicant applied for a study session with the Design Commission to review a proposal to construct a three-story, mixed-use building, housing a preschool and K-8 private school on the lower levels and rental office space on the upper level and a half. Parking, trash, utilities, and pedestrian paths are located on adjacent parcels owned by Herzl Ner-Tamid Conservative Congregation (HNT). Applicants for Design Commission Design Review are required to take part in a study session with the Design Commission prior to public hearing pursuant to Mercer Island City Code (MICC) 19.15.220(C)(2)(a); this study session fills this requirement.

The Applicant will need to submit a formal design review application for the proposed development, which will require approval by the Design Commission prior to issuance of any construction permits. Following completion of this study session and receipt of an application for design review, an open record public hearing in front of the Design Commission will be scheduled pursuant to MICC 19.15.220(C)(2).

## BACKGROUND

The Applicant is proposing to construct a preschool and K-8 school with rental office space on parcel number 0824059045. This parcel is within the Business (B) zoning designation, which permits outright both public and private schools accredited or approved by the state for compulsory school attendance and office uses. The associated pedestrian pathways, utilities, fencing, landscaping, trash enclosure, and parking would be located on parcel numbers 2107000010 and 1515600010 which are split zoned Business (B) and Single-Family Residential (R-9.6). Pursuant to MICC 19.01.040(G)(2), where a boundary between zones divides a lot into two or more pieces, the entire lot shall be deemed to be located in the first zone on the following list in which any part of the lot is located: R-15, R-12, R-9.6, R-8.4, MF-2L, MF-3, MF-2, PI, PBZ, C-0, TC, and B, parcel numbers 2107000010 and 1515600010 are designated R-9.6. The proposed development would be shared between the existing synagogue and the new preschool, K-8 school, and office building. The existing synagogue on parcel number 1515600010 was permitted in December of 1979, without the approval of a conditional use permit, as one was not required at the time. MICC 19.02.010(C)(3) allows places of worship when authorized by the issuance of a conditional use permit.

Location: The subject property is located at 3700 E Mercer Way (King County parcel numbers 1515600010, 2107000010, 0824059045, 151560TRCT), situated in the SW 1/4 of Section 8, Township 24 north, and Range 5 east, W.M., in the City of Mercer Island, King County, WA.

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**Existing Conditions:** The proposed development would be located on parcel number 0824059045, which is currently undeveloped and contains vegetation including ground cover, trees, and shrubs. Parcel numbers 2107000010 and 1515600010 contain existing facilities, including parking and several buildings currently used by HNT. Parcel number 151560TRCT is a tract that contains an access road to the east parking lot, located on parcel number 1515600010. An Arborist Report, prepared by Davey Resource Group, Inc., identified 129 regulated trees across all properties owned by HNT.

Pursuant to MICC 19.15.220(B)(1), no building permit or other required permit shall be issued by the city for any major new construction or minor exterior modification of any regulated improvement without prior approval of the design commission or code official as authorized pursuant to MICC 19.15.010(C)(4)(a). Certain development and activities that do not require a permit are subject to design review as provided in subsection (C)(1)(c) of this section.

The proposed development constitutes major new construction of a regulated improvement, as defined in MICC 19.16.010.

## ISSUE/DISCUSSION

Staff review and analysis of the proposed development considers the direction provided in MICC 19.12.010(D)(1):

For full application of design requirements, all design requirements of chapter 19.12 MICC shall apply, except as provided in MICC 19.01.050(D)(3)(a), when there is new construction from bare ground, or intentional exterior alteration or enlargement of a structure over a three-year period that incurs construction costs in excess of 50 percent of the existing structure's current King County assessed value as of the time of the initial application for such work is submitted; provided, application of chapter 19.12 MICC shall not be construed to require an existing structure to be demolished or relocated, or any portion of an existing structure that is otherwise not being worked on as part of the construction to be altered or modified.

As a result, the review and analysis provided below includes those design standards that apply based on the scope of the project. Those standards that do not apply are not included.

### Staff Analysis and Criteria for Review

#### A. MICC 19.12.010 – General.

##### *Design vision.*

Non-Town Center areas are largely characterized by residential settings that are heavily vegetated, topographically diverse and enhanced with short and long-range views that are often territorial in nature. The design of new and remodeled structures should respond to this strong environmental context. Site design should maintain the natural character of the island and preserve vegetation concentrations, topography and the view opportunities that make Mercer Island special.

Development of new and remodeled structures should conserve Mercer Island's special environmental characteristics, such as steep slopes, watercourses, and large concentrations of mature trees. Buildings shall be designed to be architecturally compatible with other structures in the neighborhood with respect to human scale, form and massing, and relationship to natural site features. High quality and durable materials, complementary colors, texture, and architectural detail should be incorporated into the design. Use of materials such as natural wood and stone, and design elements such as large building overhangs and window exposure to natural light, are encouraged.

Landscaping should reflect the natural wooded character of Mercer Island and provide visual separation between different land uses. Amenities such as street trees, plantings, and other

**PROJECT**

Barnabie Point Project  
3700 E Mercer Way  
Project Narrative, Design Review

4 February 2025

**Project Narrative**

The development site at 3700 E Mercer Way includes both residentially zoned and commercially zoned properties. On the commercially zoned property on the northwest corner of the site, the proposed uses are permitted outright.

The proposed project on the commercially zoned lot is a 3-story mixed-use building housing a Preschool-8 private school on levels 0, 1 and 2; and B-occupancy community rental space on levels 2 and 3. B occupancy includes offices and training/skill development not in a school or academic program.

The existing permitted uses on the residentially zoned lots at 3700 E Mercer Way site include a synagogue building (use approved 1970); caretaker's facility and outdoor play areas (1979); multipurpose building (1979); non-commercial recreational area used between 7 am and 10 pm (1979); and associated parking.

There is a proposed amendment to the existing conditional use permit(s) currently under review. The proposed physical changes to the existing property related to the Conditional Use Permit are limited to pedestrian pathways, underground utilities, fencing, and landscaping.

**Topics of Discussion**

1. Review and discuss height diagram and calculations.
  - a. We are below the height limit per the language of 19.11.030 (A)(3), but there is some room for discretion. The site is extremely long, and we are trying to meet both accessibility and existing grades. Emphasis added.

19.11.030 (a)(3) calculation of building height

A. The intent of the building height calculation in this section is to limit the visual mass of a building so that it does not **appear to** exceed the maximum height limit in subsection (a)(1) of this section.

B. The maximum allowable building height in subsection (a)(1) of this section shall be calculated as the vertical distance measured from the base of a building facade to the highest point of the roof structure excluding appurtenances. The base of the building facade shall be measured from the adjacent public sidewalk if applicable, or from the lower of existing or finished grade along building facades that are not adjacent to a public sidewalk. See figure 4.

C. If the bases of the opposite building facades are not at approximately the same elevation, then the building must be configured to go down in height as between the higher and lower facades in a manner similar to figure 4 or **in an equivalent manner** such that the **average of the building heights calculated between the facades is approximately equal to or less than the maximum permitted building height.**

2. Discuss screening of mechanical systems.
  - a. On the north edge, we'd like to use the landscape screening to screen the units from view. They are at grade and set back from the public way.
  - b. General overview of rooftop equipment, including PV panels, roof orientation, and setback from roof edges.
3. Discuss fencing.
  - a. We would like to consider the use of black chain link fence with a 1" mesh around the perimeter of the site for budgetary reasons. We believe that this will satisfy both the aesthetics and security concerns for the project.
4. Discuss approach to signage master plan.
5. Discussion of pervious/impervious coverage at residentially zoned lots.

**ISSUED BY**

Anjali Grant

# Exhibit 4

**Development Code Interpretation  
22-004**

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# CITY OF MERCER ISLAND

## COMMUNITY PLANNING & DEVELOPMENT

9611 SE 36TH STREET | MERCER ISLAND, WA 98040

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**TO:** CPD Staff

**FROM:** Jeff Thomas, Interim CPD Director

**DATE:** November 21, 2022

**RE:** Variances for Non-Residential Structures in Residential Zones

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**A. MICC SECTION(S) INTERPRETED**

MICC 19.06.110(B)

**B. AUTHORITY**

This development code interpretation is issued under the authority of sections 19.15.030 and 19.15.160 of the Mercer Island City Code (MICC).

**C. ISSUE**

MICC 19.06.110(B), *Variances*, imposes a hardship criterion that requires applicants requesting variances in residential zones to demonstrate that strict enforcement of Title 19 MICC will prevent the construction of a single-family dwelling on a legally created residentially zoned lot. MICC 19.06.110(B)(2)(a).

Can the City grant a variance from numeric standards for a non-residential structure sited in a residential zone, if under MICC 19.06.110(B)(1), all criteria in subsection(B)(2)(a) through (B)(2)(h) must be met, and that for a variance to lot coverage standards, the criteria in subsection (B)(2)(a) through (B)(2)(i) must be met?

**D. BACKGROUND**

The hardship criterion contained in MICC 19.06.110(B)(2)(a) was adopted by Ordinance No. 17C-15 on September 19, 2017. The criterion contained in MICC 19.06.110(B)(2)(i), relating to variances as to lot coverage for specific non-residential structures, existed in the MICC prior to the adoption of Ordinance No. 17C-15. However, that language was moved to MICC 19.06.110(B)(2)(i) within Ordinance No. 17C-15 to consolidate criteria relating to variances.

## E. FINDINGS

1. Per MICC 19.15.160, the Code Official may issue a written interpretation of the meaning or application of provisions of the development code.<sup>1</sup>
2. This written interpretation is intended to interpret the scope of the hardship criteria as applied to non-residential structures in residential zones.
3. MICC 19.06.110(B)(1)(a) could be read to foreclose variances from numeric standards for non-residential structures in residential zones because the hardship criterion limits the application of variances to instances where strict application of Title 19 would prohibit construction of one single family residence on a legally created residential lot. The applicant or property owner of a non-residential structure would not be able to demonstrate an unnecessary hardship because there are no circumstances where the adopted standards of Title 19 MICC are preventing construction of a single-family dwelling; rather the applicant or property owner is seeking a variance for a non-residential structure. It is not Title 19 that would preclude the construction of a residential structure, but rather the choice of the applicant or property owner. However, MICC 19.06.110(B)(2)(i) explicitly affords the applicant or property owner of a non-residential structure the opportunity for a variance from impervious surface standards for particular types of non-residential structures.
4. This apparent conflict within MICC 19.06.110(B) requires interpretation to administer.
5. A plain reading of MICC 19.06.110(B), giving meaning to all of the text within that section, results in the following conclusions:
  - a. Non-residential structures in residential zones are generally precluded from receiving variances from numeric standards of Title 19, because they cannot meet the hardship criterion—to wit, they cannot demonstrate that Title 19 prevents the construction of a single-family dwelling on a legally created residential lot.
  - b. The one exception is that certain enumerated non-residential structures (public and private schools, religious institutions, private clubs, and public facilities) within residential zones with slopes of less than 15 percent *can* receive a variance to increase impervious surface to a maximum of 60 percent if the Hearing Examiner determines the applicant has demonstrated satisfaction of the criteria contained within MICC 19.06.110(B)(2)(i)(i-iv).
  - c. Further, an applicant or property owner would also be required to demonstrate the other criteria outlined in subsection (B)(2)(a) through (B)(2)(i), with the exception of being able to demonstrate inability to construct a single-family residence on a legally created residential lot. The applicant or property owner would still have to demonstrate an unnecessary hardship to the property owner, because the first sentence of MICC 19.06.110(B)(2)(a) requires proof that “[t]he strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner.”
6. As discussed further below, the legislative history relating to Ordinance No. 17C-15 supports this conclusion. During the process of adopting Ordinance No. 17C-15, discussion between the City Council and the City’s then Community Planning and Development (CPD) Director reflected an intent to greatly reduce the number of variances granted, which was the impetus behind adding the hardship criterion now contained in MICC 19.06.110(B)(2)(a).
7. In issuing an interpretation, the Code Official is directed to consider eight factors specified in MICC 19.15.160(A). These factors are:

### **(1.) The plain language of the code section in question;**

Analysis: A reading of the plain language of MICC 19.06.110 results in the following findings:

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<sup>1</sup> Under the MICC, variances are granted by the Hearing Examiner. MICC 19.15.030 and Tables A-B.

- i. MICC 19.06.110(B), *Variances*, imposes a hardship criterion; an applicant or owner applying for variance must show that strict enforcement of Title 19 will create an unnecessary hardship to the property owner. MICC 19.06.110(B)(2)(a). For properties in residential zones, “unnecessary hardship” is limited to those circumstances where the adopted standards of Title 19 MICC prevent the construction of a single-family dwelling on a legally created residential zoned lot. *Id.*
- ii. However, MICC 19.06.110(B)(2) also includes a criterion for variances to impervious surface standards for “[p]ublic and private schools, religious institutions, private clubs and public facilities in single-family zones with slopes of less than 15 percent.” MICC 19.06.110(B)(2)(i).
- iii. MICC 19.06.110(B)(1) further provides: “[a] variance shall be granted by the city only if the applicant can meet all criteria in subsections (B)(2)(a) through (B)(2)(h) of this section. A variance for increased lot coverage for a regulated improvement pursuant to subsection (B)(2)(i) of this section shall be granted by the city only if the applicant can meet criteria in subsections (B)(2)(a) through (B)(2)(i) of this section.”

**(2.) Purpose and intent statement of the chapters in question;**

Analysis: Chapter 19.06 MICC does not contain a general purpose statement; however, MICC 19.06.110(B)(1) provides a purpose statement for the MICC section in question: “*Purpose.* An applicant or property owner may request a variance from any numeric standard, except for the standards contained within chapter 19.07 MICC. A variance shall be granted by the city only if the applicant can meet all criteria in subsections (B)(2)(a) through (B)(2)(h) of this section. A variance for increased lot coverage for a regulated improvement pursuant to subsection (B)(2)(i) of this section shall be granted by the city only if the applicant can meet criteria in subsections (B)(2)(a) through (B)(2)(i) of this section.”

**(3.) Legislative intent of the city council provided with the adoption of the code sections in question;**

Analysis: Review of the legislative history of MICC 19.06.110(B) results in the following findings:

- i. On September 19, 2017, the Mercer Island City Council adopted Ordinance No. 17C-15, adding the unnecessary hardship criterion currently contained in MICC 19.06.110(B)(2)(a).
- ii. The minutes from the relevant City Council meetings indicate the following:

The July 5, 2017 minutes contains the following discussion:

**Variance Criteria:**

- Planning Commission Recommendation: prohibit / limit variances to GFA, minimum lot size, height, fence height and staff does not recommend adopting this amendment
- Alternative: Limit variance approvals to those circumstances where a house could not otherwise be built on a legal, residential lot and remove ambiguous language regarding groundcover, trees, physical condition of the lot from “d.”

Council Direction: Staff propose a solution for “flag lots.” Support alternative to limit variance approvals to those circumstances where a house could not otherwise be built on a legal, residential lot and remove ambiguous language regarding groundcover, trees, physical condition of the lot from “d.”

iii. The packet from the July 5, 2017, reading of the later adopted ordinance included the following discussion of the options before City Council with respect to the hardship criterion ultimately added to MICC 19.06.110(B)(2)(a):

Variance Criteria				
Draft Page #	Planning Commission Recommendation	Proposed Amendment	Source	Staff Recommendation / Rationale
17 Page 71 – Variances	Allow for an application for a variance to any numeric standard, except for the standards in Chapter 19.07.	Prohibit the application for a variance to minimum lot area requirements, gross floor area, building height, or lot coverage.	Dan Grausz	Staff does not recommend adopting this amendment. There are some circumstances where allowing for a variance to these standards is appropriate to avoid a regulatory takings. The variance criteria have been revised to limit variances to only those circumstances where a variance is warranted.
		Alternatively, limit variance approvals to those situations where a property owner cannot both comply with existing standards and build a home on a legally created residential lot.		Staff recommends further revising the criteria for approval. In particular, staff recommends limiting variances to situations where a property owner cannot comply with all of the development standards and build a new single family home.  This item was discussed by the Planning Commission.

- iv. The discussion between the then CPD Director and City Council regarding the hardship criterion further indicates the intent of restricting variances in residential zones only to those instances where a variance is necessary to permit the construction of a single-family residence on a legally created residential lot.
- v. The Code Official is unaware of any discussion by City Council or other materials regarding the resulting conflict between the language in MICC 19.06.110(B)(2)(a) and the language in MICC 19.06.110(B)(2)(i).

**(4.) Policy direction provided by the Mercer Island comprehensive plan;**

Analysis: Review of the Comprehensive Plan results in the following findings:

- (1) The Comprehensive Plan envisions Mercer Island as a residential community:
  - (a) “Mercer Island prides itself on being a residential community. As such, most of the Island’s approximately 6.2 square miles of land area is developed with single family homes.” [Land Use Element, Introduction]
  - (b) “Single family residential zoning accounts for 88 percent of the Island’s land use. There are 3,534 acres zoned for single family residential development. This compares to 77 acres in the Town Center zones, 19 acres for Commercial Office zone, and 103 acres in multi-family zones (Table 2). City Hall is located in a Commercial Office zone, while other key civic buildings such as the Post Office and the Main Fire Station are located in the Town Center and City Hall. Many of the remaining public buildings, schools, recreational facilities and places of religious worship are located in residential or public zones.” [Land Use Element, II Existing Conditions and Trends, Areas outside the Town Center]
  - (c) “OUTSIDE THE TOWN CENTER (1) The community needs to accommodate two important planning values — maintaining the existing single family residential character of the Island, while at the same time planning for

population and housing growth.” [Land Use Element, IV. Land Use Issues, Outside the Town Center (1)]

(2) A primary component of the housing element is the City’s desire to protect single-family residential neighborhoods through development regulations and other City codes which restrict the bulk and scale of buildings, control noise and nuisances, minimize the impact of non-residential uses and help preserve the natural environment. City code provisions were specifically designed to protect residential areas from incompatible uses and promote bulk and scale consistent with the existing neighborhood character. This includes limiting the size and scope of nonresidential uses to be consistent with existing neighborhood character.

(a) “Housing Element

III. Neighborhood Quality

Mercer Island single family neighborhoods pride themselves on their narrow, quiet streets and dense plantings. The City protects these neighborhoods through development regulations and other City codes which restrict the bulk and scale of buildings, control noise and nuisances, minimize the impact of non-residential uses and help preserve the natural environment. Parks, open spaces and trails also contribute to the neighborhood quality.” [Housing Element, III. Neighborhood Quality]

(b) “GOAL 1: -

Ensure that single family and multi-family neighborhoods provide safe and attractive living environments, and are compatible in quality, design and intensity with surrounding land uses, traffic patterns, public facilities and sensitive environmental features.

1.1 Ensure that zoning and City code provisions protect residential areas from incompatible uses and promote bulk and scale consistent with the existing neighborhood character.” [Housing Element, III. Neighborhood Quality, Goal 1.1]

(3) The Comprehensive Plan evidences an intent to retain certain non-residential structures located in residential zones. However, the Comprehensive Plan is silent on whether such structures would be eligible for variances from otherwise applicable numerical standards.

(a) “GOAL 17: -

With the exception of allowing residential development, commercial designations and permitted uses under current zoning will not change.

17.4 Social and recreation clubs, schools, and religious institutions are predominantly located in single family residential areas of the Island. Development regulation should reflect the desire to retain viable and healthy social, recreational, educational, and religious organizations as community assets which are essential for the mental, physical and spiritual health of Mercer Island.” [Land Use Elements, IV Land Use Issues Outside the Town Center]

(4) The Comprehensive Plan also evidences an intent to preserve existing conditions and to generally permit changes only through amendments to the development code, rather than through granting numerous of variances to that development code. At the same

time, there is also recognition that some non-residential structures and uses are compatible with residential zones.

(a) "GOAL 15: -

Mercer Island should remain principally a low density, single family residential community.

15.1 Existing land use policies, which strongly support the preservation of existing conditions in the single family residential zones, will continue to apply. Changes to the zoning code or development standards will be accomplished through code amendments.

15.2 Residential densities in single family areas will generally continue to occur at three to five units per acre, commensurate with current zoning. However, some adjustments may be made to allow the development of innovative housing types, such as accessory dwelling units and compact courtyard homes at slightly higher densities as outlined in the Housing Element.

...

15.4 As a primarily single family residential community with a high percentage of developed land, the community cannot provide for all types of land uses. Certain activities will be considered incompatible with present uses. Incompatible uses include landfills, correctional facilities, zoos and airports. Compatible permitted uses such as education, recreation, open spaces, government social services and religious activities will be encouraged." [Land Use Elements, IV Land Use Issues Outside the Town Center].

**(5.) Relevant judicial decisions;**

Analysis: The Code Official is unaware of any relevant judicial decisions related to this issue. However, the Code Official is aware of several cases regarding code interpretation. Municipal ordinances are subject to the same rules of statutory interpretation as are statutory enactments. *Hassan v. GCA Production Services, Inc.*, 17 Wn.App. 625, 637, 487 P.3d 203 (2021). Additionally, the goal of code interpretation is to give effect to the intentions of the drafters. *Jametsky v. Olsen*, 179 Wash. 2d 756, 762, 317 P.3d 1003, 1006 (2014). Absurd results are to be avoided in construing ambiguous language, although the principle is to be used sparingly. *Seattle Hous. Auth. v. City of Seattle*, 3 Wash. App. 2d 532, 538–39, 416 P.3d 1280, 1283 (2018); *Samish Indian Nation v. Wash. Dep't of Licensing*, 14 Wash.App.2d 437, 444, 471 P.3d 261 (2020). Further, when possible, legislation must be construed so that no clause, sentence, or word is rendered superfluous, void, or insignificant. *Coates v. City of Tacoma*, 11 Wash. App. 2d 688, 695, 457 P.3d 1160, 1164 (2019).

**(6.) Consistency with other regulatory requirements governing the same or similar situation;**

Analysis: The Code Official is unaware of other regulatory requirements governing the same or similar situations.

**(7.) The expected result or effect of the interpretation; and**

Analysis: The interpretation will result in clarifying the position of the Code Official in that the MICC prohibits variances from numerical standards for non-residential structures in residential zones, with the sole exception of the specific types of non-residential structures enumerated in MICC 19.06.110(B)(2)(i) from impervious surface standards.

**(8.) Previous implementation of the regulatory requirements governing the situation.**

Analysis: The Code Official is unaware of any previous implementation of regulatory requirements relating to variances for non-residential structures within residential zones since the addition of the hardship criterion in September 2017.

**F. CONCLUSIONS**

1. MICC 19.06.110(B) contains conflicting language as to variances for non-residential structures in residential zones. Reconciling this conflict, the Code Official makes the following interpretations:
  - a. The specifically enumerated non-residential structures listed in MICC 19.06.110 (B)(2)(i) are eligible to receive a variance from impervious surface standards if:
    - i. The Hearing Examiner finds that the criteria contained within MICC 19.06.110(B)(2)(i)(i-iv) have been satisfied, and
    - ii. The Hearing Examiner finds compliance with the other criteria enumerated in subsection (B)(2)(a) through (i), including demonstrating an unnecessary hardship, per subsection (B)(2)(a), but disregarding the second sentence of (B)(2)(a) due to the conflict with subsection (B)(2)(i).
  - b. The MICC prohibits other variances from numerical standards for non-residential structures in residential zones.
2. Both conclusions enumerated above are based upon the following:
  - a. It is apparent from the relevant legislative history that City Council's stated intent was to restrict variances in residential zones only to those circumstances in which construction of a single-family residence upon a legally created residential lot would be prohibited. The Code Official did not find any evidence that City Council was aware of the conflict between MICC 19.06.110(B)(2)(a) and (B)(2)(i).

Because the language regarding variances from impervious surface standards for certain specified non-residential structures in residential zones was also reorganized by City Council to MICC 19.06.110(B) contemporaneously with the creation of the hardship criterion, it is the position of the Code Official that the language in MICC 19.06.110(B)(2)(i) must be also given effect as a narrow exception to the prohibition against variances for non-residential structures in residential zones as put forth in MICC 19.06.110(B)(2)(a). This conclusion is necessary in order to give the fullest effect to the legislative enactment of the City Council.

- b. Utilizing statutory interpretation principles, the Code Official is required to construe the MICC to give the fullest effect to the legislative intent of the City Council, to utilize the principles of avoiding absurd results (but in a sparing manner), and to avoid making code language superfluous, void, or insignificant. Other than variances from impervious surface standards, no other variances for non-residential structures within residential zones are listed in MICC 19.06.110(B)(2).
- c. There is nothing in the City's Comprehensive Plan to contradict the conclusions of the Code Official. The Comprehensive Plan prioritizes residential uses while also recognizing certain non-residential uses within residential zones. The interpretation of the Code Official does not prohibit the siting of non-residential structures in residential zones where otherwise permitted, but it does limit the type of variances available for such structures.

## **G. INTERPRETATION**

The specifically enumerated non-residential structures listed in MICC 19.06.110 (B)(2)(i) are eligible to receive a variance from impervious surface standards if the Hearing Examiner determines the application has demonstrated satisfaction of the criteria contained within MICC 19.06.110(B)(2)(i)(i-iv) and the applicant or property owner demonstrates compliance with the other criteria enumerated in subsection (B)(2)(a) through (i), including demonstrating an unnecessary hardship, per subsection (B)(2)(a), but disregarding the conflicting second sentence of (B)(2)(a).

Having not been expressly included in MICC 19.06.110(B)(2), the position of the Code Official is that all other variances from numerical standards for non-residential structures in residential zones are prohibited by MICC 19.06.110(B)(2)(a).