BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

OWNERS AND NEIGHBORS, et al., Petitioners, v. CITY OF MERCER ISLAND, Respondent.	**CASE No. 19-3-0003c** **(COEN III)** **SECOND ORDER OF CONSOLIDATION, NOTICE OF HEARING, AND REVISED PRELIMINARY SCHEDULE**

I. THE PETITION

On February 4, 2019, Mark Coen filed a Petition for Review (PFR) which was assigned Case No. 19-3-0003 challenging Ordinance Nos. 18-13 (specifically amendments 1, 6, 8, 10, 11, 12, 14 and 15) and 18C-14. Cheryl Pflug is the Presiding Officer. Deb Eddy and Bill Hinkle will also serve on the panel to hear this matter.

II. CONSOLIDATION

On January 22, 2019, 7800 Plaza Owners Association (Owners) filed a PFR challenging the City of Mercer Island's (City's) adoption of Ordinance No. 18-13, which amended the comprehensive plan,[1] and adoption of Ordinance No. 18C-14.[2] On January 29, 2019, Concerned Neighbors for the Preservation of Our Community (Neighbors) filed a PFR challenging Ordinance No. 18-13. These cases were consolidated into Case No. 19-3-0002c, Owners and Neighbors, et al. v. City of Mercer Island.

RCW 36.70A.290(5) provides:

> The board shall consolidate, when appropriate, all petitions involving the review of the same comprehensive plan or the same development regulation

[1] Specifically, Petitioner challenges Amendment 15 in Attachment B of Ordinance 18-q3.
[2] Both Ordinances were adopted November 20, 2018.

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or regulations.

Pursuant to RCW 36.70A.290(5), the Board hereby consolidates Case No. 19-3-0002c with Case No. 19-3-0003. The case will now be entitled Owners and Neighbors, et al. (COEN III) v. City of Mercer Island and designated Case No. **19-3-0003c**.

III. STATEMENT OF CHALLENGE AND ISSUES

In the prior Order of Consolidation dated January 31, 2019, counsel for Owners and Neighbors were asked to review the list of issues attached as Appendix A and suggest a consolidated list of issues.

Petitioner Coen additionally presents 114 issue statements challenging 7 amendments. Petitioner's recitation of the issue statements alone comprises 25 pages of his petition. Under the Board's rules, parties are expected to strive for clarity and brevity in submitting briefs.[3] The Board cannot allow hundreds of pages of briefing for each party. To carry his burden to prove that the City has failed to comply with statute, Petitioner's allegations should be presented in a less duplicative format. Perhaps issue statements could be organized according to the statute(s) allegedly violated by each action or otherwise consolidated. The presiding officer requests that Petitioner Coen submit his revised/consolidated issue statements no later than February 15, 2019.

Additionally, in order to clarify and assist in an orderly consideration of the issues presented, it would be helpful if all Petitioners developed, to the extent practicable, a joint consolidated list of issues by February 20, 2019,[4] in preparation for the Prehearing Conference, now rescheduled to February 22, 2019.[5]

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[3] WAC 242-03-590(3) Clarity and brevity are expected to assist the board in meeting its statutorily imposed time limits. A presiding officer may limit the length of a brief and impose format restrictions.

[4] It is not necessary for petitioners to assert the same challenges, but it would be helpful to identify which issues, if any, are duplicative.

[5] WAC 242-03-260(1) provides that a petition may be amended as a matter of right until fourteen days after filing, but the amendments are limited to amending the legal bases for challenging the matter raised and may not raise new challenges.

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IV. PRELIMINARY SCHEDULE

Notice is given in the table below of the Preliminary Schedule for hearings as well as for filing of briefs and documents with the Board. **Please also file your documents electronically, in Word format, at central@eluho.wa.gov.**

January 22, 2019	Owners' Petition Filed
January 29, 2019	Neighbors' Petition Filed
January 31, 2019	19-3-0002c Order of Consolidation, Notice of Hearing and Preliminary Schedule
February 4, 2019	Coen's Petition filed
February 7, 2019	**19-3-0003c Second Order of Consolidation, Notice of Hearing and Revised Preliminary Schedule**
February 15, 2019	**Petitioner Coen's Revised Issue Statements Due**
February 20, 2019	**Petitioners' Consolidated Issue Statements Due**
February 21, 2019	Index Due (Respondent to file)
February 22, 2019 10:00 a.m.	**Telephonic Prehearing Conference – Call 1 (800) 704-9804 and use pin 4472777#**
February 28, 2019	Additions to Index (parties to confer)
March 1, 2019	Anticipated Date of Prehearing Order[6]
March 7, 2019	Deadline for Dispositive Motions and for Motions to Supplement the Record (proposed supplements to be attached)
March 18, 2019	Deadline for Response to Dispositive Motions or Motions to Supplement the Record
March 25, 2019	Deadline for Reply to Dispositive Motions (optional)
April 8, 2019	Anticipated date of Order on Motions
April 22, 2019	Deadline for Petitioners' Prehearing Brief (with exhibits)
May 13, 2019	Deadline for Respondent's Prehearing Brief (with exhibits)
May 28, 2019	Deadline for Petitioners' Reply Brief (optional)
June 12, 2019 10:00 a.m.	**Hearing on Merits of Petition** Location to be determined
August 5, 2019	**Final Decision and Order**

[6] WAC 242-03-545(2). Any objection to such order shall be made in writing within seven days after the date the order is dated.

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V. PREHEARING CONFERENCE

At the Prehearing Conference, the parties should be prepared to discuss the action being challenged, the nature of the claims asserted in the Petition for Review, and the framing of the legal issues to be decided.

The Respondent should be prepared to indicate the nature of any dispositive motion it intends to file. The parties are advised that the Board will normally only decide the following issues on motions: timeliness of the filing of the petition for review, standing to raise the claims in the petition, and subject-matter jurisdiction. The Presiding Officer may ask for stipulations concerning threshold matters that are not in dispute, if any.

The case schedule will be discussed at the prehearing conference and may be modified to fit the needs of the parties insofar as the Board determines it can reasonably accommodate them and meet its statutory deadlines. Thereafter, any changes to the schedule must be proposed by motion.

VI. RULES OF PROCEDURE

The Board's Rules of Practice and Procedure, found in the Washington Administrative Code (WAC) at Chapter 242-03 WAC, shall apply to the proceedings in this case.[7]

VII. SETTLEMENT AND MEDIATION

Prior to the prehearing conference the Board expects the parties to engage in at least one settlement discussion. At the prehearing conference, the parties will report on their interest in further settlement discussions. If the parties agree that a member of the Growth Management Hearings Board who is not on the designated panel could be of assistance by serving as a settlement officer, the Presiding Officer will appoint a settlement officer to assist the parties in resolving any or all of the issues presented in the Petition for Review. If the parties reach settlement, the Presiding Officer shall be notified, and a Joint Motion for Dismissal filed with the Board. If settlement is not reached on all issues, the case

[7] The Board's handbook, available on the website, may also be useful to the parties.

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will proceed as scheduled. The parties are advised that the Board may extend the 180-day decision deadline for the purposes of settlement, for up to ninety days pursuant to RCW 36.70A.300(2)(b).

VIII. INTERPRETERS AND ACCOMMODATIONS

If a limited-English speaking or hearing impaired party needs an interpreter for any hearing, a qualified interpreter will be appointed at no cost to the party or participant. A form for a request for an interpreter is attached to this Notice.

IX. THE INDEX

Index - Pursuant to WAC 242-03-510, within 30 days of service of the petition the Respondent shall prepare an Index that lists all documents considered by the Respondent in taking the challenged action. Each document included in the Index should be given a unique number for identification purposes and to avoid duplication. Thereafter documents should be referenced by their index number when attached as exhibits to briefs.

The Petitioners shall review the Index prepared by the Respondent promptly and notify the Respondent of any omissions they believe have occurred. If the Respondent agrees, it shall file an Amended Index.

If there is a disagreement over whether the item should be included in the record, the proponent may file a motion to supplement the record, attaching the disputed documents and explaining why the party believes the document is necessary or of substantial assistance in the determination of the issues. Supplementation may be permitted "if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision." RCW 36.70A.290(4).

X. EXHIBITS

The Index shall contain a list of all of the documents considered by the Respondent in taking the challenged action. However, only those documents that are presented to the Board as exhibits are part of the evidence. To become part of the evidence, an exhibit must

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be presented to the Board as an exhibit to a brief or motion and so marked. **Exhibits shall** be attached to the brief in which they are referenced and shall **include the Index number(s) from which they are drawn**. A table of exhibits is required for the hearing briefs**. Parties shall tab the exhibits** for the benefit of Board members **using the appropriate index number.**

XI. FAILURE TO ATTEND OR PARTICIPATE

A party who fails to attend or participate in any hearing or other stage of the adjudicative proceedings before the Board in this case may be held in default and an order of default or dismissal may be entered pursuant to WAC 242-03-710.

XII. COMMUNICATION WITH THE BOARD

Pursuant to RCW 34.05.455, the parties may not communicate ex parte with the presiding officer or other Board members. The parties are directed to Desiree Ortiz, Administrative Assistant to the Board, at (360) 664-9170, or email at central@eluho.wa.gov, who shall be the Board's contact for any questions.

DATED this 7th day of February 2019.

_____

Cheryl Pflug, Presiding Officer

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INTERPRETER REQUEST

Case No. 19-3-0003c

Owners and Neighbors, et al. (COEN III) v. City of Mercer Island

I request that an interpreter be present as follows (Please circle as appropriate):

1. Limited English-speaking ability. My primary language is _____ (Indicate language)

2. Hearing impaired.

Dated this _____ day of _____ 2019.

Signature: _____
Party

Mail to:

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APPENDIX A: Owners' & Neighbors' Issue Statements

Owners	Neighbors
Ordinance 18-13 (CPA)	**Ordinance 18-13 (CPA)**
5. By failing to provide mailed notice of the Planning Commission hearings regarding the Comprehensive Plan ordinance, including a failure to provide mailed notice when Amendment 15 was added to the docket by Resolution 1545, did the City violate its own public participation program, described in MICC 3.46.080; 19.15.050.D.2.d; 19.15.010; 19.15.020.D, E (all citations to former code), and as required by the GMA, RCW 36.70A.035; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3); WAC 365-196-600(10)?	1. By failing to provide mailed notice of the Planning Commission hearings regarding the Comprehensive Plan ordinance, including a failure to provide mailed notice when Amendment 15 was added to the docket by Resolution 1545, did the City violate its own public participation program, described in MICC 3.46.080; 19.15.050.D.2.d; 19.15.010; 19.15.020.D, E (all citations to former code), and as required by the GMA, RCW 36.70A.035; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3); WAC 365-196-600(10)?
	2. By failing to identity "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?
	5. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d);

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	WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?
	6. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?
	10. By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), and create an internally inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?
	11. By applying a new land use designation (community facilities) to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any community facilities zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140;

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	WAC 365-196-600(3); WAC 365-196-600(10)?
	12. By creating a new land use designation (community facilities), and applying that new designation to a specific property, but without adopting new development regulations that would apply to the new designation, did the City create an inconsistency between its comprehensive plan and its zoning regulations, in violation of RCW 36.70A.040 and the holding in City of Bremerton v. Kitsap County, GMHB 04-3-0009c, at 10 (Final Decision and Order, Aug. 9, 2004)?
6. By adopting the Comprehensive Plan ordinance without placing Amendment 15 on the annual comprehensive plan amendment docket, as required by MICC 19.15.050.D (former) and MICC 19.15.230.C (current), and without declaring an emergency as required by RCW 36.70A.130(2)(b) and WAC 365-195-640(4), did the City fail to consider all amendment proposals concurrently, no more frequently than once per year, and as part of the docket cycle, as required by RCW 36.70A.130(2); RCW 36.70A.470; WAC 365-196-640(3); WAC 365-640(6); and WAC 365-196-600(3)(a)(i)?	
7. By amending the comprehensive plan land use map to change a portion of Aubrey Davis Park from “linear park” to “town center,” did the City disregard the provisions in the comprehensive plan protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, thereby creating an internally inconsistent plan in violation of MICC	

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19.15.020.G.1.a (former), MICC 19.15.230.F.1 (current), and RCW 36.70A.070?	
8. By amending the comprehensive plan to change a portion of Aubrey Davis Park from “linear park” to “town center,” did the City create an internal inconsistency with the provisions in the comprehensive plan limiting new multi-family development, including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.1.a (former), MICC 19.15.230.F.1 (current) and RCW 36.70A.070?	
9. By amending the comprehensive plan to change a large portion of the Greta Hackett Outdoor Sculpture Gallery from “linear park” to “town center,” did the City violate the requirements in MICC 19.15.230.F.2 (current) and MICC 19.15.020.G.1.a (former) that site-specific amendments must be compatible with the adjacent land use and development patterns and must benefit the community as a whole and must not adversely affect community facilities, all in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?	
10. By failing to make the findings required under MICC 19.15.230.F (current) and MICC 19.15.020.G.1 (former), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?	
11. By amending the comprehensive plan to eliminate a portion of the Gretta	

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Hackett Outdoor Sculpture Gallery, even though the 2014-2019 Parks and Recreation Plan Capital Improvement Projects List and the Mercer Island 2017-2022 Capital Improvement Fund both identified funds for improvements to the sculpture gallery, did the City violate the requirements to create and follow an internally consistent capital facilities plan and budget, RCW 36.70A.070(3) and (8); RCW 36.70A.120?	
12. By amending the comprehensive plan to allow high-density residential and commercial development without amending the capital facilities and transportation elements, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)?	
13. By amending the comprehensive plan to allow the construction of a City-owned commuter parking lot, without updating the City's traffic forecasts, and without providing for the financing of necessary transportation improvements and other capital improvements, did the City fail to show its work and violate the requirements of RCW 36.70A.070(3) and RCW 36.70A.070(6)?	
	4. By adopting a site-specific comprehensive plan amendment without a site-specific rezone, even though the City acknowledges that a rezone will ultimately be required, did the City violate the requirement to consider an amendment and a rezone together when both are required, MICC 19.15.050.F (former); MICC

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	19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?
Ordinance 18-14C (Rezone)	**Ordinance 18-14C (Rezone)**
14. By failing to provide mailed notice of the Planning Commission hearings regarding the rezone ordinance, did the City violate its own public participation program, described in MICC 19.15.010 and 19.15.020.D, E (former), and required by RCW 36.70A.035; RCW 36.70A.130(2); RCW 36.70A.140; and WAC 365-196-600(3); WAC 365-196-600(10)?	
15. By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, all in violation of MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?	
16. By rezoning the property from "public institution" to "town center," did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies limiting new multi-family development, , including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.2.a (former), MICC 19.15.240.C.1 (current) and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?	
17. By failing to make the findings required by MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), did the City fail to follow	3. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC

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procedures as required by RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?	19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?
18. By rezoning the property to eliminate a portion of the Gretta Hackett Outdoor Sculpture Gallery, even though the 2014-2019 Parks and Recreation Plan Capital Improvement Projects List and the Mercer Island 2017-2022 Capital Improvement Fund both identified funds for improvements to the sculpture gallery, did the City adopt a development regulation that fails to be consistent with and implement the comprehensive plan, in violation of RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)?	
19. By rezoning the property from "public institution" to "town center," did the City violate the requirement in MICC 19.05.010.B (current and former) that "the entire area within the Mercer Island I-90 right-of-way, including…recreations areas, linear greenbelts… shall be part of the public institution zone," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? *See West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at 7–8?	
20. By rezoning the property from "public institution" to "town center" in order to develop new residential and other uses on the property, did the City violate the requirement in MICC 19.05.010.B (current and former) that "all uses within the I-90 right-of-way	

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shall be maintained as set forth in city-approved I-90 related documents," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? *See West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at 7–8?	
21. If the Board finds the Comprehensive Plan ordinance violates the GMA, should the rezone ordinance also be found in violation and remanded, because the rezone ordinance is based on the Comprehensive Plan ordinance, and development regulations must be consistent with and implement the comprehensive plan, per RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)?	
SEPA	
22. By failing to update the July 30, 2018 SEPA Determination of Non-significance (which purports to analyze both the Comprehensive Plan ordinance and the rezone ordinance), even after substantial new information about the development proposals emerged in response to the City's Request for Proposals prior to the November 20, 2018 City Council vote, did the City violate SEPA's requirement to conduct the earliest review possible once the features of a project can be identified, and update such review in light of new information, MICC 19.07.120.I.5 (current and former) WAC 197-11-055; WAC 197-11-340(3)(a)?	

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