TO: DSG Staff

FROM: Richard Hart, Development Services Director

DATE: May 12, 2005

RE: Loss of legally nonconforming status for docks

The Code Official under Section 19.15.010(C)(5)(a) of the Unified Land Development Code makes this administrative policy determination and interpretation of the Unified Land Development Code of Mercer Island.

The purpose of this administrative interpretation is to clarify when a dock loses its legally non-conforming status, requiring it to be brought into conformance, and when replacement of portions of a dock is considered to be ordinary repairs and maintenance.

MICC 19.01.050 governs nonconforming structures, sites, lots and uses and 19.01.050 (D)(1)(ii) specifically governs accessory buildings and structures. This section of the code sets out when accessory structures, including, but not limited to carports, garages, sheds, gazebos, decks, and fences lose their nonconforming status. However, MICC is silent regarding how to measure when a dock loses its legally non-conforming status. A question has been raised by a permit applicant as to whether a complete replacement of a non-conforming dock, including all of the pilings, is considered ordinary repairs and maintenance, which would allow the dock to be rebuilt in the same configuration as it was previously, or if the complete replacement of a dock and pilings causes the loss of legally non-conforming status.

Code section MICC 19.01.050 D. 1. ii. states:

Accessory Buildings or Structures. A legally nonconforming attached or detached accessory building or structure, including but not limited to a carport, garage, shed, gazebo, deck or fence, may be altered or enlarged without losing its legal nonconforming status as long as no more than 40 percent of its exterior perimeter (or length in the case of a fence) is structurally altered. A wall that is shared with the main dwelling shall not be included in the calculation for the attached accessory building. In no event shall any alteration or enlargement increase any existing nonconforming
aspect of the building or structure or create any new nonconformance. Legal nonconforming status shall be lost, and the structure shall be required to come into conformance with current code requirements, if the 40-percent threshold is exceeded.

Perimeter is not a defined term in the Mercer Island City Code. Common dictionary definitions include:

1. The outer boundary of a surface or figure
2. The distance around such boundary
3. The outer line or edge of an area or object

Code Section 19.01.050(B)(1) states:

Ordinary Repairs and Maintenance. Ordinary repairs and maintenance of a legally nonconforming structure are permitted. In no event may any repair or maintenance result in the expansion of any existing nonconformity or the creation of any new nonconformity.

Code Section 19.16.010 defines Ordinary Repairs and Maintenance as:

An activity in response to the effects of aging or ordinary use, wear and tear that restores the character, scope, size, footprint or design of a serviceable area, structure, or land use to it previously existing, authorized or undamaged condition; however, this is not intended to allow total replacement, substitution or reconfiguration of a nonconforming structure. Activities that change the character, size, footprint or scope of a project beyond the original shall not be considered ordinary repairs and maintenance and shall result in loss of nonconforming status.

It is recognized that docks are somewhat unique in that they are much more exposed to the elements than other accessory structures on a property and therefore require maintenance which will sometimes include total replacement of structural portions of the dock. However, one of the main purposes of the nonconforming code section is to bring previously nonconforming structures into conformance with current codes when the structure is beyond its useful life and must be completely replaced or substantially structurally altered to bring it back to a useful condition.

The definition of ordinary repairs and maintenance, as stated above, specifically excludes “total replacement or substitution”. The applicant has pointed to the broader definition of “normal repair and maintenance” in MICC 19.07.080(C)(2)(b)(ii) and in State Law as the standard which should be applied. However, this standard only explicitly regulates whether a project qualifies for a Shoreline Exemption Permit rather than a Shoreline Substantial Development Permit. Furthermore “normal repair and maintenance” is distinct from the defined term “ordinary repairs and maintenance”.

The City of Mercer Island can and does regulate nonconforming structures. Regulation of such nonconforming shoreline structures are subject to both the Shoreline Master Program Regulations developed under the requirements of the State Shoreline Management Act and the specific requirements of the MICC 19.01.050 –
Nonconforming structures, sites, lots and uses. The Shoreline Master Program regulations contained in Chapter 19.07 do not specifically deal with nonconforming structures. Therefore, the standard of Ordinary Repairs and Maintenance as applied in MICC 19.01.050(B)(1) and defined in MICC 19.16.010 is the more specific and controlling language here.

It is also recognized that applying the 40 percent rule to the structural alteration of exterior perimeter of the dock would be contrary to the intent of this section because the word “perimeter” would include non-structural, minor elements such as railings and decking, and would not normally include major structural elements, e.g. piles. Use of a “perimeter” standard would also require unnecessary replacement and reconfiguration of piles that would otherwise not be included in the scope of the project, and would create additional disturbance to the shoreline environment.

In the past, staff has consistently applied MICC 19.01.050(D)(1)(ii) to docks by requiring a dock to come into conformance when more than 40 percent of the pilings are replaced. However, we now find the need to more fully document this requirement.

This interpretation has been applied because it is reasonable to expect that when more than 40 percent of the pilings of a dock are removed and new piles are driven in their place, essentially a new dock is being constructed and it is beyond the scope of ordinary repair and maintenance of a dock. Furthermore, if the City determines that reconstruction of a non-conforming pier in its nonconforming location and/or configuration would result in the same number or a greater number of replacement piles than would be required if the dock was brought into conformance (or more into conformance), that this would also be beyond the scope of ordinary repair and maintenance. For example, on the Gedvila dock at 8435 SE 87th St., if all of the four southern most pilings need to be replaced, then the four replacement piles must be placed in a location that would make the width of that section of the dock conforming.

In Summary, it is concluded that:

1) If more than 40 percent of the pilings that make up a dock are replaced, the dock loses its nonconforming status and must be brought into conformance with the existing regulations.

2) Piles which are repaired through splicing techniques would not count against the allowed 40 percent replacement quota.

3) In no case may a new pile, i.e. a pile that does not replace an existing pile, be placed in a non-conforming location.

4) Replacement piles may be placed in a non-conforming location only if the total number of such piles is determined to be less than the number of replacement piles than would be required if the dock was brought into conformance (or more into conformance). Said another way, if the City clearly demonstrates that the applicant can reduce the number of required replacement piles by bringing the dock more into conformance, this will be required. In no case shall this provision
be used to require an applicant to reconstruct a dock to an inadequate functional width or length.

5) Individual mooring piles that are nonconforming and are not physically connected to a dock are considered individual structures and such piles may only be repaired.

Pursuant to MICC 19.15.010(E), this decision constitutes a development code interpretation and may be appealed to the Mercer Island Planning Commission. Such appeal must be made by 5 PM on May 27, 2005. If you desire to file an appeal, you must submit the appropriate form, available from the Development Services Group together with the required $546 appeal fee and file it with the City Clerk within fourteen (14) days from the date this decision is signed. Upon receipt of a complete appeal application, a public hearing will be scheduled. If you have any questions, please call the Development Services Group at (206)236-5300.