

Jul 05, 2016, 1:33 pm

**RECEIVED ELECTRONICALLY**

NO. 93219-1

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SUPREME COURT OF THE STATE OF WASHINGTON

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DANIEL THOMPSON and THEODORE MISSELWITZ,

Appellants,

vs.

CITY OF MERCER ISLAND,

Respondent,

GIB DEVELOPMENT LLC (ON THE ROCK LLC) and ANDERSON  
ARCHITECTURE,

Additional Parties.

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**RESPONDENT CITY OF MERCER ISLAND'S ANSWER TO  
APPELLANT THOMPSON'S PETITION FOR REVIEW**

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## I. IDENTITY OF RESPONDENT AND INTRODUCTION

Respondent City of Mercer Island ("City") asks this Court to deny review of the decision of Division I of the Court of Appeals designated in Section II of this Answer. The Petition for Review ("Petition") filed by Daniel Thompson ("Thompson") fails to meaningfully address, let alone satisfy, the criteria governing acceptance of review set forth in RAP 13.4(b).

The decision of the Court of Appeals is consistent with established appellate case law, does not raise any constitutional issues, and does not present any matter of substantial public interest justifying review here. This Court should uphold the Court of Appeals' well-reasoned decision and deny Thompson's Petition.

## II. DECISION OF THE COURT OF APPEALS

Division I of the Court of Appeals filed its unpublished decision on March 14, 2016, unanimously affirming the trial court's dismissal of Thompson's appeal under the Land Use Petition Act, chapter 36.70C RCW ("LUPA"), due to Thompson's lack of standing, that is, his failure to demonstrate that he was prejudiced by the City's land use decision approving a preliminary short plat application. A copy of the originally unpublished decision of the Court of Appeals is included as Appendix I submitted with Thompson's Petition. Division I subsequently granted a Joint Motion to Publish on May 4, 2016, filed by land use attorney G.

Richard Hill, the City, and Additional Parties GIB Development LLC and Anderson Architecture. A copy of the Order Granting Additional Parties' Motion for Reconsideration and Amending Opinion, Granting Motion to Publish, and Denying Appellants' Motion for Reconsideration is included as Appendix 2 submitted with Thompson's Petition.

### III. RE-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Should this Court deny review where RAP 13.4(b)(1) and (2) are unsatisfied because the decision of Division I of the Court of Appeals is consistent with the decisions of this Court and other divisions of the Court of Appeals?

B. Should this Court deny review where RAP 13.4(b)(3) and (4) are unsatisfied because the decision of Division I of the Court of Appeals is fact-specific and involves neither a significant, constitutional legal issue nor any issue of substantial public interest?

### IV. RE-STATEMENT OF THE CASE

The central issue in this case is whether or not the petitioner, Thompson, has standing under the Land Use Petition Act, chapter 36.70C RCW ("LUPA"). The underlying decision attacked by Thompson is the City's approval of a two-lot short subdivision (or short plat) at 7254 and 7260 N. Mercer Way in Mercer Island, SUB 13-008. CP 117-138. Thompson lives at 7265 N. Mercer Way and is a neighbor uphill from the

short plat. CP 4. On June 7, 2013, On the Rock, (the property owner at the time of application) applied for a re-division of an already existing two-lot short plat. CP 140-41. The application sought to alter the design of the existing layout of the two lots by creating a small driveway to the two properties, described as “Tract X.” CP 121; 140-41. The proposal did not change the number of existing building lots and only proposed to add Tract X to concentrate impervious surface on Tract X, thereby allowing greater impervious surface on the two building lots.

On February 14, 2014, Thompson alone filed an appeal of the short plat approval to the City’s Planning Commission. CP 406. During the administrative appeal to the Planning Commission, Thompson made no allegations of real and direct injury to himself or his property. CP 347-395. To the contrary, Thompson emphasized that “the development of 7260 [N. Mercer Way] will not affect my view due to the steep slope and 25 ft. yard,” and the removal of a cedar tree “will improve my view significantly more.”<sup>1</sup> CP 348. At no time during the administrative process did Thompson allege he would suffer specific and perceptible harm as a result of the City’s land use decision; rather Thompson opposed this decision because he “simply believe[s] [SUB] 13-008 is illegal under

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<sup>1</sup> Thompson’s “Summary of Appellant’s [r]equested [r]elief” is also devoid of allegations of injury, but instead focuses on the illegality of Tract X, diagonal property lines and procedural and due process considerations. CP 1124-1127.

the [Mercer Island City Code (“MICC”)], SMA<sup>2</sup> and the city’s comprehensive plan.” CP 348. Overall, Thompson’s testimony before the Planning Commission focused upon his claim that there was insufficient square footage to subdivide the property, that Tract X is illegal and that the City was not following its own code.<sup>3</sup> CP 1291-1303. Thompson did not specify how these issues would injure him or his property. CP 1292-1303.

At the conclusion of the administrative appeal hearing, the Planning Commission voted to confirm City staff’s approval of SUB 13-008 and deny Thompson’s appeal. CP 1371. The Planning Commission issued its written decision on July 28, 2014, upholding the decision to approve the preliminary short plat, without modification. CP 103-05. After reviewing the testimony and exhibits entered into the record at the administrative appeal hearing, the Planning Commission concluded that Thompson failed to demonstrate a substantial error in the decision; that the proceedings were materially affected by irregularities in procedure; that the decision was unsupported by material and substantial evidence in the record; or that the decision was in conflict with the applicable decision

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<sup>2</sup> Although not explicitly cited in the Brief, Thompson is likely referring to the Shoreline Management Act, chapter 90.58 RCW.

<sup>3</sup> Thompson cites RP 39:8-40:6 [CP 1297-1298] in support of his contention that he alleged harm to his property throughout the administrative process; however, this testimony appears to concern information found in residential listings and a 1967 agreement related to the subject property and does not allege an injury-in-fact as to him.



criteria and consequently failed to meet the burden of proof set forth in MICC 19.15.020(J)(5)(d). CP 103-05.

Thompson appealed the Planning Commission's decision in a Land Use Petition filed in King County Superior Court on August 14, 2014, alleging 11 statements of error. CP 9-24. On the same day, King County Superior Court issued the Order Setting Land Use Case Schedule ("Case Schedule Order"), which set the case schedule and provided notice to all parties specific to seeking review of a land use decision. CP 28-30. In particular, the Case Schedule Order informed parties and attorneys that to comply with the case schedule, they must "pursue their appeals vigorously from the day they are filed. All events must occur promptly." CP 28. The Case Schedule Order also explicitly addressed motions on jurisdictional and procedural issues, ordering: "Motions on jurisdictional and procedural issues shall comply with Civil Rule 7 and King County Local Rule 7, except that the minimum notice of hearing requirement shall be 8 days." CP 29. Thompson signed the Case Schedule Order. CP 28. The trial court scheduled the initial hearing for October 31, 2014. CP 1575-78. On October 23, 2014, the City timely noted its Motion to Dismiss for October 31, 2014 and then filed and served the motion. CP 71-92. On this same date, GIB Development also timely noted, filed and served its own Motion to Dismiss. CP 52-65.

The crux of the Motions to Dismiss filed by the City and GIB Development was that neither Thompson nor Misselwitz had standing. CP 73. Specifically, the City and On the Rock contended that Misselwitz lacked standing because he had failed to exhaust administrative remedies, never appealing the decision before the Planning Commission. CP 82-83. The City and On the Rock both argued Thompson had no standing because he failed to articulate any real or perceptible harm or prejudice. CP 61-65; 84-91. The trial court heard oral argument on the motions on October 31, 2014. At the hearing, the City argued that “this particular project on its face literally creates no impacts to anyone.” RP 16:7-8. This statement went unchallenged by Thompson. In response to the Honorable Timothy Bradshaw’s question regarding how Thompson was harmed by the approval of SUB 13-008, Thompson responded: “I’m alleging harm because they [the applicants] are improperly manipulating the zoning code and the building regulations and the impervious surface so they can build a house that is inappropriate for the site.” RP 39:25-40:3. Thompson also claimed: “These two houses are going to be so out of scale with the neighborhood that it is going to harm.” RP 42:22-24. On November 7, 2014, the trial court entered an order granting the City’s and On the Rock’s Motions to Dismiss, finding and concluding that:

(1) Both Petitioners lack standing to obtain relief under LUPA; (2) Petitioner Daniel Thompson lacks standing, absent actual harm, under, inter alia, RCW 36.70C.060(2); (3) Petitioner Theodore Misselwitz failed to exhaust required administrative remedies under the Mercer island [sic] City Code (MICC 19.15.020(J)), as required by RCW 36.70C.020(2) and RCW 36.70C.060; for the foregoing reasons the Court lacks jurisdiction under RCW 36.70C.020 to adjudicate Petitioner's claims in the LUPA petition. . .

CP 1577:15-22. The trial court subsequently denied Thompson's and Misselwitz's motion for reconsideration. CP 1648. Nothing in the record or Clerk's Papers indicates that Thompson ever asked the trial court to supplement the record with additional evidence of standing.<sup>4</sup>

#### V. ARGUMENT FOR DENIAL OF REVIEW

This Court should deny discretionary review because Thompson's Petition fails to satisfy the criteria for accepting review in RAP 13.4(b).

##### A. Criteria Governing Acceptance of Discretionary Review.

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

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<sup>4</sup> Additionally, despite filing more than nine motions with the Court of Appeals, including two motions to supplement the record, Thompson never asked the Court of Appeals to consider evidence of standing outside of the administrative record.

- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Thompson's Petition does not cite to RAP 13.4(b), and his "Issues Presented for Review" do not include discussion of the criteria included in RAP 13.4(b). Rather, his Petition merely restates the legal arguments unsuccessfully offered to the City's Planning Commission, the trial court and the Court of Appeals. Thompson's failure to address, let alone satisfy, RAP 13.4(b) is by itself sufficient basis for this Court to deny review.

To the extent that this Court proceeds, the City offers the following additional argument.

B. The Decision of the Court of Appeals Is Consistent with Decisions of This Court and Other Divisions of the Court of Appeals.

In reviewing Thompson's Petition, the City is unable to identify any portion in which Thompson actually identifies a conflict with other appellate decisions, as opposed to his mere disagreement with the decision of the Court of Appeals below. "Where contentions raised on appeal are not supported by citation of authority [this Court] will not consider them unless well taken on their face." *Griffin v. Dept. of Social and Health Svcs.*, 91

Wn.2d 616, 630, 590 P.2d 816 (1979) (citing *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976)).

1. Thompson Did Not Establish the Land Use Decision Prejudiced Him and Therefore Lacked Standing.

Thompson incorrectly asserts that the administrative record establishes injury in fact as to him. At no point in the administrative process did Thompson allege that he will suffer an injury-in-fact as a result of the City's land use decision. Thompson cites CP 1391-1397 to support his claim that he alleged throughout the preliminary approval process that the short subdivision will injure his property. This is a citation to his declaration in support of his response to the City's Motion to Dismiss before the Superior Court. Thompson declares that "[t]o understand the harm to Mr. Misselwitz and Thompson it's necessary to briefly review the City's actions in this matter beginning in 2008." CP 1393. Thompson then alleges only generally that SUB 13-008 violates the MICC and Comprehensive Plan and allows houses that are inconsistent with the neighborhood. CP 1396, ¶ 13. His allegations of harm consisted of mere generalized, theoretical harm rather than any specific injury as to him. He did not, and cannot, establish the prejudice needed for standing under LUPA because he has failed to show he would suffer an injury-in-fact. Decision at 8 – 11. Thompson's status as an adjacent landowner who merely alleges general and abstract harm does not

suffice. *Knight v. City of Yelm*, 173 Wn.2d 325, 341-43, 267 P.3d 973 (2011) (“a conjectural or hypothetical injury will not confer standing”) (internal citation omitted); *see also Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002) (to have standing, a petitioner’s interest “must be more than simply the abstract interest of the general public in having others comply with the law.”).

2. The City’s and GIB Development’s Motions to Dismiss Were Timely.

The City’s and GIB Development’s motions to dismiss were timely filed consistent with the applicable Case Schedule Order issued by the King County Superior Court, which reflects state law’s expedited review and timely appeal provisions under LUPA. CP 28-30. The Case Schedule Order specifically states: “Motions on jurisdictional and procedural issues shall comply with Civil Rule 7 and King County Local Rule 7, except that the minimum notice of hearing requirement shall be 8 days.” CP 29 (emphasis added). Division I held that “[w]e conclude it is most consistent with the statute [RCW 36.70C.080(2)-(4)] to interpret the local rule as including a motion to dismiss for lack of standing in the category of a motion on a jurisdictional or procedural issue. Such motions under the case schedule order require only eight days’ notice.” Thompson asks this Court to disregard the Case Schedule Order’s clear direction regarding an eight-day

minimum notice requirement and to instead extend the notice requirement to 28 days. Thompson fails to provide any legal authority in support of his position that the Case Schedule Order should be disapproved. An issue lacking adequate argument and supported by only conclusory statements should not be considered. *See Amalgamated Transit v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000).

C. No Significant, Constitutional Issue or Substantial Public Interest Is Involved to Justify Review by This Court.

This case presents no significant, constitutional issue under either the state or federal Constitutions; instead, this is a garden-variety LUPA appeal dismissed by the trial court, and which dismissal was affirmed by Division I, due to Thompson's lack of standing. Put simply, Thompson failed to allege any actual harm caused by the City's decision to approve the preliminary short plat application. Rather, it seems Thompson's goal was to ensure the City's zoning regulations were followed – essentially a private attorney general-type role – that is simply too abstract to confer standing in the absence of any specific injuries to him or his property. As stated in *Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002), to have standing, a petitioner's interest “must be more than simply the abstract interest of the general public in having others comply with the law.”

Further, Thompson's Petition fails to include an argument that substantial public interest justifies review under RAP 13.4(b)(4). Division I of the Court of Appeals applied well-established standing principles to the specific facts at issue. Given the fact-specific inquiry to determine whether Thompson lacked standing to pursue his LUPA appeal, no substantial public interest justifies review here.

D. Thompson's Arguments on Behalf of Theodore Misselwitz Should Not Be Considered.

In his Petition, Thompson purports to represent Theodore Misselwitz, yet Thompson filed a Motion to Withdraw from Representation of Appellant Theodore Misselwitz with Division I, effective May 30, 2016. The Motion to Withdraw from Representation of Appellant Theodore Misselwitz is submitted herewith as Appendix A. Thompson is no longer Misselwitz's designated counsel and no representative relationship exists currently between the two. Accordingly, this Court should not consider Thompson's arguments related to standing on behalf of Mr. Misselwitz. *See* Petition, at 5 – 6, 18-20.

VI. CONCLUSION

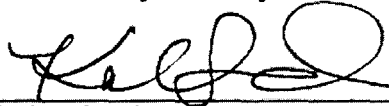
This Court should deny review. The Court of Appeals correctly applied well-established precedent to affirm the dismissal of a land use appeal due to Appellant Thompson's lack of standing. The criteria in




RAP 13.4(b) have not been met, and Thompson simply reiterates his previously unsuccessful arguments in a conclusory manner. This case is not worthy of the Supreme Court's resources for review, and Appellant Thompson's Petition should be denied.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of July, 2016.

CITY OF MERCER ISLAND  
Office of the City Attorney

By   
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CITY OF MERCER ISLAND  
Office of the City Attorney

By   
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Mercer Island

### DECLARATION OF SERVICE

I, Mary Swan, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

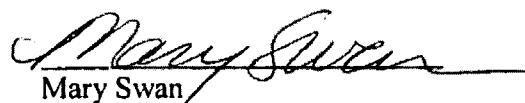
2. On the 5th day of July, 2016, I served a true copy of *Respondent City of Mercer Island's Answer to Appellant Thompson's Petition for Review* and *Appendix* on the following counsel of record and additional parties using the method of service indicated below:

<p>Attorney for Appellant Daniel Thompson:</p> <p>Daniel P. Thompson Thompson &amp; Delay Attorneys at Law 506 Second Avenue, Suite 2500 Seattle, WA 98104</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:danielpthompson@hotmail.com">danielpthompson@hotmail.com</a></p>
<p>Attorneys for Additional Parties GIB Development, LLC and Anderson Architecture</p> <p>J. Zachary Lell Ogden, Murphy, Wallace PLLC 901 5<sup>th</sup> Ave., Suite 3500 Seattle, WA. 98164-2008</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:zell@omwlaw.com">zell@omwlaw.com</a></p>

<p>Attorneys for Additional Parties On the Rock</p> <p>Mario Bianchi Lasher, Holzapfel, Sperry &amp; Ebberson 601 Union Street, Suite 2600 Seattle, WA. 98101</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid</p> <p><input checked="" type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> Facsimile</p> <p><input checked="" type="checkbox"/> E-Mail: <a href="mailto:bianchi@lasher.com">bianchi@lasher.com</a></p>
<p>Other Party:</p> <p>Theodore Misselwitz 7250 North Mercer Way Mercer Island, WA 98040</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid</p> <p><input type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> Facsimile</p> <p><input checked="" type="checkbox"/> E-Mail: <a href="mailto:tmisselwitz@juno.com">tmisselwitz@juno.com</a></p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of July, 2015, at Mercer Island, Washington.

  
Mary Swan

Jul 05, 2016, 1:33 pm

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SUPREME COURT OF THE STATE OF WASHINGTON

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DANIEL THOMPSON and THEODORE MISSELWITZ,

Appellants,

vs.

CITY OF MERCER ISLAND,

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ARCHITECTURE,

Additional Parties.

---

**APPENDIX TO CITY OF MERCER ISLAND'S ANSWER TO  
APPELLANT THOMPSON'S PETITION FOR REVIEW**

---

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**APPENDIX A**

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MAY 20 2016

MERCER ISLAND  
CITY ATTORNEY

NO. 72809-1-i

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) and ANDERSON  
ARCHITECTURE

*Additional Parties.*

---

**NOTICE OF INTENT TO WITHDRAW**

(Clerk's Action Required)

---

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WSBA No. 18189  
Thompson and Delay  
506 Second Avenue, Suite 2500  
Seattle, WA 98104  
Phone (206) 622-0670  
Counsel for Appellants

TO: THEODORE MISSELWITZ, PETITIONER/APPELLANT  
AND TO: KARI SAND, ATTORNEY FOR CITY OF MERCER  
ISLAND  
AND TO: MARIO BIANCHI, ATTORNEY FOR ON THE ROCK  
AND TO: ZACHARY LELL, ATTORNEY FOR ON THE ROCK;  
GIB LLC; AND APPLICANT ANDERSON  
ARCHITECTURE

YOU WILL PLEASE TAKE NOTICE that DANIEL P.  
THOMPSON, attorney for DANIEL P. THOMPSON AND THEODORE  
MISSELWITZ, Appellants, hereby withdraws as attorney of record for  
THEODORE MISSELWITZ. The aforesaid withdrawal of counsel shall  
be effective without order of the Court unless an objection thereto is  
served upon the withdrawing attorney. Withdrawal will become effective  
ten days from the date of service of this notice of intent to withdraw, or  
upon Court order, whichever occurs earlier. You are directed to serve a  
copy of all further pleadings and papers in this cause on THEODORE  
MISSELWITZ, 7250 N. Mercer Way, Mercer Island, WA 98040; email  
address tmisselwitz@juno.com.

RESPECTFULLY SUBMITTED this <sup>th</sup> 22 day of May, 2016.

By



Daniel P. Thompson, WSBA #18189  
Thompson and Delay  
506 Second Avenue, Suite 2500  
Seattle, WA 98104  
Phone (206) 622-0670  
Withdrawing Counsel for Theodore Misselwitz

#### Declaration of Service

The undersigned hereby subscribes, swears, and declares under penalty of perjury of the laws of the State of Washington that a true and correct copy of this Notice of Intent to Withdraw was sent to Theodore Misselwitz at his last known address on today's date, and copies by email have been forwarded to Theodore Misselwitz, Fields Misselwitz, and Ian Macrae:

Theodore Misselwitz  
7250 N. Mercer Way  
Mercer Island, WA 98040

X Via Certified U.S. Mail  
X Via Email

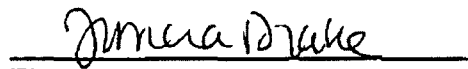
Ian Macrae  
ian@macrae.com

X Via Email

Fields Misselwitz  
400wings@comcast.net

X Via Email

Signed in Seattle, WA this 20<sup>th</sup> day of May, 2016.



Timera Drake  
Paralegal