IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 93219-1

COURT OF APPEALS NO. 72809-1-I

DANIEL THOMPSON and THEODORE MISSELWITZ,

Appellants,

vs.

CITY OF MERCER ISLAND,

Respondent,

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

Additional Parties.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Daniel Thompson and Theodore Misselwitz, appellants below, hereby petition for review of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Appellants seek review of the Court of Appeals unpublished opinion issued by the Court of Appeals for Division One in the case of *Thompson and Misselwitz v. City of Mercer Island, et al.* (March 14, 2016) No. 72809-1-I (App. 1 hereto). On May 4, 2016 the Court of Appeals issued its Order Granting Additional Parties' Motion for Reconsideration and Amending Opinion, Granting Motion to Publish, and Denying Appellants' Motion for Reconsideration (App. 2 hereto), from which appellants petition for review.

III. ISSUES PRESENTED FOR REVIEW

The central issue raised in this petition is whether dismissal of the LUPA petitions to the superior court under CR 12(b) based upon the administrative record was error when the LUPA petition was timely filed and served, all available administrative remedies had been exhausted, a final land use decision had been issued, the petitioners are directly adjacent landowners who allege injury to their property, it is conceded one adjacent landowner will suffer injury in fact, the defense of lack of

standing was not raised at the administrative level, and petitioners were not allowed to supplement the administrative record with evidence of standing. In its decision affirming dismissal the Court of Appeals rendered the following holdings that conflict with existing precedent or statute.

1. According to GIB's motion to publish, the Court of Appeals' decision creates a unique LUPA pre-trial motion procedure that allows notice requirements under CR 12(b) along with review of the underlying administrative record, but a burden of proof based upon the merits under RCW 36.70C.130. This holding is in direct conflict with LUPA's provision in 36.70C.030(2) that states the rules of civil procedure apply to the initial hearing, and the holding in *Suquamish Indian Tribe v. Kitsap Co.*, 92 Wn. App. 816, 827 (1998).

2. Dismissal of Thompson's petition for failure to allege or prove injury in fact under CR 12(b) based on the underlying administrative record is an error of law in conflict with Supreme Court and Division One precedent. (The Court of Appeals' decision fails to address the procedural motion applicable to dismissal, CR 12(b) or CR 56, or the applicable burden of proof.)

3. The trial court's dismissal of Thompson's petition based upon an absence of "actual harm," and the Court of Appeals' holding that

harm cannot be "presumed" under CR 12 (b) from a permit decision, is in conflict with the project permit vesting statutes and holding in *J.Z. Knight v. City of Yelm*, 173 Wn.2d 325, 341-344 (2011).

4. Dismissal of Thompson's and Misselwitz's petitions for lack of standing without affording either the opportunity to supplement the administrative record with evidence of standing is in conflict with the holding in *Lauer v. Pierce Co.*, 173 Wn.2d 242, 254 (2011). (The Court of Appeals' decision fails to cite or address *Lauer*.)

5. The administrative record, even without supplementation under *Lauer*, establishes injury in fact for Thompson, and in the alternative the motions to dismiss were untimely under King Co. LR 12(d) and CR 56, both of which require 28 days notice.

6. The Court of Appeals' decision holds that Misselwitz lacked standing to appeal to the superior court because he did not submit written comments to the public notice of application and file his own administrative appeal, although Misselwitz participated to the full extent allowed at the open record hearing. The sole authority for the Court of Appeals' sweeping holding is MICC 19.15.020(E)(2)(e). Decision, p. 5. This provision, however, does not even exist in the MICC, (See App. 3, p. 11), and is in direct conflict with the project permit statute RCW 36.70B.110, and the holding in *Citizens for Mt. Vernon v. City of Mt.*

Vernon, 133 Wn.2d 861, 868-71 (1997), quoted with approval in *Lauer*, 173 Wn.2d at 255.

7. The Court of Appeals holding that the public notice issued by the City stating participation by Misselwitz at the open record hearing vested Misselwitz with standing to appeal to the superior court was ineffectual because it conflicted with provisions under the MICC is in conflict with Division Three's holding in *Prosser Hill Coal v. Co. of Spokane*, 176 Wn. App. 280 (2009).

8. The Court of Appeals' in a case of first impression held that substitution of a separate corporate defendant for the first time at the Court of Appeals is available under RAP 3.2 with relation back to the commencement of proceedings at the superior court without an analysis of inexcusable neglect or judicial estoppel, even when the transfer of interest was not *pendent lite*. This holding is in conflict with *Miller v. Campbell,* 164 Wn.2d 529 (2008); *Martin v. Dematic*, 182 Wn.2d 281 (2014); and *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 17-20 (1999), and renders substitution or joinder at the superior court under CR 17(a), 19, or 25 meaningless.

IV. STATEMENT OF THE CASE

A. Introduction

This case arises under the Land Use Petition Act, RCW 36.70C, and involves preliminary approval of a short subdivision on Mercer Island, SUB13-008 (subdivision, year, sequential number of subdivision application.)[1] Petitioners Thompson and Misselwitz are directly adjacent landowners to the proposed subdivision.

Both OTR and the City admit Thompson exhausted his administrative remedies and obtained a final land use decision, CP 61:11-24; CP 85:17-19; RP 23:24-24:3 but argue that Thompson, unlike Misselwitz who is also an adjacent land owner, will not suffer the same injury in fact as Misselwitz would, or any injury.[2]

Both OTR and the City concede that SUB13-008 will cause Misselwitz injury in fact. Although no case holds that only the administrative appellant has standing under LUPA to appeal from an open record appeal hearing, the trial court dismissed Misselwitz's petition under CR 12(b) on the basis that although Misselwitz participated in the open record hearing Misselwitz's failure to submit written comments to the public notice of application, and to file his own separate administrative

[1] The City's February 3, 2014 preliminary approval begins at CP 117, and the pre-administrative hearing staff report begins at CP 107. The Planning Commission's Decision and Order dated July 28, 2014 can be found at CP 25-27.

[2] Throughout the administrative process, Thompson alleged that the preliminary approval of the subdivision will injure his property. See Decl. of Thompson, CP 1391-1397; p. 1396 para. 13; RP 39:8-40:6. See also, Summary of Thompson's requested relief CP1124-1127; notice of administrative appeal, CP 221-230; Brief of Administrative Appellant CP 347-385, exhibit index CP 386-395.

appeal, prevented Misselwitz from having standing to appeal to the superior court. CP 1577.

The City's notice of open record hearing mailed to Thompson, Misselwitz and all landowners within 300 feet, and posted on a sign, stated:

> You may review the application and appeal on file for this matter at the City of Mercer Island, Development Services Group, 9611 SE 36th Street, Mercer Island, Washington. **Only those persons who submit written comments or testify at the open hearing will be parties of record, and only parties of record will receive a notice of the decision and have the right to appeal.**

CP 1413-1416. (emphasis added).

The Mercer Island Planning Commission's decision was not unanimous. CP 1453, p. 110:19-22; CP 1450 p. 97:20-100:25. In fact, during the administrative hearing for SUB 13-008 the Planning Commission passed a motion prohibiting in the future the use of "tricks" and "games" like Tract X in any future subdivisions on Mercer Island. CP 1453, p. 110:23-CP 1461, p. 137:22 (hearing transcript); CP 1463 (minutes of hearing). As one Commissioner noted: "*So the irony will be that we'll set a really good policy for the benefit of the future citizens, but the guy who contested over it loses out*". CP 1457, p.124: 10-12.

Neither OTR nor the City raised lack of standing at the administrative level even though the privilege log shows the City Attorney and the City's outside counsel were actively involved in the case as early as September and October 2013 respectively, CP 919, nine months before the July 23, 2014 administrative hearing (although Mr. Walter did not formally appear until the superior court, CP 43).

B. Preliminary Approval of SUB13-008

SUB 13-008 is a new three parcel short plat replacing an existing two lot short plat SUB 08-009 in a R-12 zone on Mercer Island. See Preliminary Approval, CP 117-134; plat map CP 138. The amended short plat creates three parcels: two lots, and "Tract X". Tract X is not a road or easement but a part of a road or easement and is approximately 6' of the required 18' width. CP 122-123. Tract X does not meet the area or dimension requirements for a lot in R-12. Id.

The purpose and effect of Tract X is recited in the Court of Appeals decision, pp. 1-2, as well as in the City's and On The Rock's briefings at the Court of Appeals. On The Rock stated:

> Pursuant to Section 19.02.020(D) of the Mercer Island City Code (MICC), the maximum impervious surface of a lot is limited to 35 percent of its gross square foot area. Under this standard, the entire area of the original shared access easement under the 2009 short plat would be characterized as "impervious surface" for purposes of calculating the maximum coverage limitation for Lot 1. CP 122-23, CP

> 1320. The prior easement thus restricted the available area on Lot 1 for the building footprint, patios, driveways, overhangs, etc., each of which would be considered impervious surfaces under the MICC. Incorporating the newly created Tract X into the plat design allowed additional usable impervious surface area to be available for the ultimate development of that lot. CP 122-23.

On The Rock opening brief, p. 4; *see also* City's opening brief, p. 2. According to OTR's calculations, Tract X results in a house approximately one-third larger than would be allowed under the MICC without Tract X.

C. July 23, 2014 Planning Commission Hearing

On July 23, 2014, a hearing was held before the Planning Commission in the above referenced appeal. Petitioners Thompson and Misselwitz submitted written comments and testified. CP 103 (Notice of Decision). Petitioner Misselwitz's testimony is found at CP 1439, p. 54-56, and his letter at CP 1422. (Misselwitz is nearly 90 and his testimony involved reading his letter).

The Commission held the MICC does permit Tract X, although administrative interpretation #07-05 specifically holds the opposite. *See* App. 6. The Planning Commission's decision was not unanimous. Commissioner McCann dissented. Commissioner McCann's testimony is in Exh. 8 to the appendix.

Since the definition of Tract under the MICC is open space, the Planning Commission had to hold that all roads, and all asphalt and impervious surface, is open space on Mercer Island in order to uphold Tract X. The Planning Commissions' testimony is attached in Exh. 9 to the appendix.

Immediately after issuing its oral ruling, the Commission discussed and passed a motion requesting City staff prepare either an administrative interpretation or "proposal" to the City Council as soon as possible, prohibiting the use of such Tracts in the future, which it described as a "trick." CP 1445, p. 113:1 – CP 1461, p. 137:2; CP 1463. A copy of the Planning Commission colloquy is found in App. 7 attached hereto.

Ultimately, the Planning Commission amended the motion to read: "Request the City Council to direct staff to restrict the definition of tract and short plat as it relates to vehicular access." CP 1463.

D. Procedure before the Superior Court

The initial hearing on jurisdictional and preliminary matters was originally set under the civil case schedule for October 3, 2014. CP 30.[3] However, based upon the trial court's schedule the trial court rescheduled the initial hearing for October 31, 2014. On September 23 the City and

[3] RCW 36.70C.080(1) requires the preliminary hearing to be set between 35 and 50 days of the service of the LUPA petition. The LUPA petition was served August 14, 2014. The October 31, 2014 hearing was 79 days after the filing of the petition.

OTR emailed the trial court stating each would be filing motions to dismiss on jurisdictional and standing issues. CP 1548. On the afternoon of October 23, 2014 OTR and the City filed their motions to dismiss. CP 54; 73. On the same afternoon of October 23, 2014, the City filed the 1213 page administrative record ("AR"), CP 101-102, and 116 page administrative hearing transcript.[4] CP 1258 although each were not required to be filed under the civil case schedule until November 17, 2014. CP 30. As noted in the declaration of service, the petitioners were served late in the afternoon on October 23, 2014 with an electronic copy of the administrative record, which had been remarked, and which obviously had been made available to the City, OTR, and the Applicant well in advance in order to prepare their motions to dismiss which were filed and served before the administrative record. CP 100.

On October 31, 2014 a hearing was held before the trial court. On November 7, 2014 the trial court signed the City's proposed order granting OTR's and the City's motions to dismiss petitioners' LUPA petitions. CP

[4] The actual hearing transcript is 137 pages and can be found at CP 1426-1461. Although the petitioner was required to pay for transcribing the administrative hearing, and pursuant to RCW 36.70C110(1) petitioner is to file the transcribed hearing record, the City insisted on filing the transcript and only filed pages 1- 113 of the transcript. CP 1259-1371. Pages 113-137 of the hearing transcript document the Planning Commission's discussion and motion to prohibit "Tract X" in any future subdivisions. CP 1455-1461.

1575. The order notes the trial court considered the administrative record and administrative hearing transcript. The order of dismissal held:

> "(2) Petitioner Daniel Thompson lacks standing ["*absent actual harm*" as interlineated by the Court] under, *inter alia*, RCW 36.70C.060(2); (3) Petitioner Theodore Misselwitz failed to exhaust required administrative remedies under the Mercer Island City Code (MICC 19.15.020(J)) as required by RCW 36.70C.020(2) and RCW 36.70C.060; (4) for the foregoing reasons the Court lacks jurisdiction under RCW 36.70C.020 to adjudicate Petitioners' claims in the LUPA Petition.

CP 1576:16-21.

E. On The Rock's Motion to Substitute GIB LLC for OTR

On Monday, June 1, 2015, legal counsel in an unrelated action on the property that is the subject of this petition appeared and emailed counsel in the matter a copy of a statutory warranty deed executed by On The Rock on August 12, 2014 conveying all interest in the property to another entity. The deed was filed August 19, 2014.

The applicant Anderson Architecture and owner On the Rock were represented at the administrative level by the law firm of Lasher, Hozapel, Sperry, and Ebberson. Attorney Taro Kusonose signed the Applicant's and On the Rock's brief to the Planning Commission. CP 344. Mr. Kusonose was the notary on the August 12, 2014 deed.

On August 14, 2014 petitioners filed and served their LUPA petition pursuant to RCW 36.70C.040(2). On August 14, 2014 petitioners served a courtesy copy of the petition and civil case schedule on Mr. Kusonose. CP 36-37. The deed was filed August 19, 2014. Lasher was the filing and receipt agent on the deed.

OTR filed a motion to substitute GIB under RAP 3.2. Appellants argued the supporting declarations clearly established inexcusable neglect, and substitution at the Court of Appeals was not available when the transfer of interest was not *pendent lite*. When appellants later learned that attorney Goerge Holzapfel removed himself as registered agent for both OTR and GIB on the same day appellants served their notice of appeal, appellants moved for judicial estoppel on the basis the failure to disclose the conveyance was a litigation strategy.

V. THE COURT OF APPEALS' DECISION CREATES A UNIQUE PRE-TRIAL PROCEDURE THAT CONFLICTS WITH EXISTING PRECEDENT AND RULES OF CIVIL PROCEDURE

King County LCR 7(b)(1) states that " [E]xcept when specifically provided in another rule, this rule governs all motions in civil cases," listing LCR 12. LCR 12(d) notes that motions under CR 12(b) shall be subject to the page limitations and scheduling requirements of CR 56 and LCR 56. LCR 56(2) states filing deadlines shall be pursuant to CR 56 and the order setting civil case schedule.

CR 12(b) notes that if on a motion under 12(b)(6) for failure to state a claim upon which relief can be granted matters outside the pleadings are presented to and not excluded by the trial court, the motion shall be treated as one for summary judgment and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion . In this matter OTR and City filed their motions to dismiss under CR 12(b) timelines, but based their motions on the underlying administrative record.

Both OTR and the City's motions to dismiss are replete with references to the record, and the "minimal effect" of SUB 13-008. OTR even attached documents from the Administrative Record to its motion to dismiss (CP 66-69), and brought blow ups of exhibits to the oral argument. RP 25:24-26:22. In its motion to dismiss OTR characterized SUB 13-008 as a "minor configural modification of a pre-existing short plat" CP 54: ll. 20-21, to alleviate "implicated certain development inefficiencies that unnecessarily restricted future use of the property" CP 55: 17-18 in the previous subdivision concerning "the 'impervious surface' restriction codified at Section 19.02.020(D) of the Mercer Island Code (MICC), which limits the maximum impervious surface of a lot to 35 percent of its gross square foot area" CP 55: ll. 23--CP 56: ll.1.

The City likewise in its motion to dismiss argued the *de minimus* impacts of SUB 13-008, which it described as "literally just moved lines on a piece of paper," CP 89: ll. 10-11, and that the neighbors' concerns over the already filed construction building plans for two houses were "blah, blah; that's pure speculation" (RP 19: 21).

The following testimony is from the October 31, 2014 initial hearing before Judge Bradshaw:

> "MR. WALTER: Secondly, we're not here to talk about the merits of the case at all. I know petitioners in their briefing made some argument that the City and, I think, the other parties were trying to argue the merits and we were not. The information that was provided and the fact --
>
> THE COURT: How can I evaluate the extent of any harm without doing that?"

RP P.6, ll. 6 -12.

The Court in *Suquamish Tribe v. Kitsap Co.*, 92 Wn. App. 816, 823 (1998) held that the rules of civil procedure are not inconsistent with LUPA, citing RCW 36.70C.030(2). The Court stated:

> The Screens contend that this statute creates a unique LUPA pre-trial motion. But there is nothing in the statute to suggest that "motions" do not include CR 12 motions or summary judgment motions under CR 56(c). Rather, the statute seems to require simply that any motions based on jurisdictional or procedural issues be made at an initial hearing. We therefore apply the summary judgment standard of review.

Id at 827. "Local rules that are inconsistent with rules adopted by the Washington Supreme Court shall be disapproved." *State v. McEnroe*, 175 Wn.2d 795, 808 fn. 7 (2012).

The Court of Appeals' decision never addresses or discusses which rule—CR 12 (b) or CR 56—is applicable to the motions to dismiss, and the applicable burden of proof. The decision creates a unique and fundamentally unfair pre-trial motion procedure. Since the local jurisdiction controls the administrative record, this unique pre-trial procedure allows the filing of the motions to dismiss along with the administrative record under CR 12(b) timelines that are then based on the underlying administrative record with a burden of proof based on the merits under RCW 36.70C.130.

VI. ALLEGATIONS OF FINANCIAL AND AESTHETIC HARM MUST BE PRESUMED TO BE TRUE UNDER CR 12(b), AND IN THE ALTERNATIVE THE MOTIONS TO DISMISS UNDER CR 56 WERE UNTIMELY

Appellants' assignments of error three, four, and six raise related issues. The first is a petitioner is not required to "prove" harm under CR 12(b) but simply to allege it; second, the motions to dismiss were untimely under both LR 12(d) and CR 56; and three, harm or injury in fact arises from the project permit, and it's vesting, and not from the actual construction under the permit.

In their opening brief, the appellants cited Division I's holding in *Durland v. San Juan Co.*, 175 Wn. App. 316 (2013), and quoted in full the holding from *West v. Stahley*, 155 Wn. App. 691, 696 (2010), setting forth the burden applicable to motions under CR 12(b). Appellants' opening brief, p. 31-32. *See also FutureSelect v. Tremont Holdings*, 180 Wn.2d 954, 962-63 (2014); *Woodward v. Taylor*, 184 Wn.2d 911, 917 (2016).

The Decision states "Thompson does not cite authority allowing a court to presume harm." Decision at 10. However, each of the cases cited above *requires* the appellate court to presume petitioners' allegations to be true, and further hold the Court can consider hypothetical facts supporting the claim, and dismissal is proper only if the court finds beyond a reasonable doubt no possible set of facts support recovery.

In appellants' second statement of supplemental authority, they cited *Burlington v. Liquor Control Board*, 187 Wn. App. 853 (2015). Division One held that there is no quantum of harm necessary, and an "identifiable trifle" is sufficient to establish injury in fact.[5]

[5] Appellate courts have held aesthetic injury to property is equal harm to financial injury. See, *Bierman v. City of Spokane*, 90 Wn. App. 817, 824 (1998) (Court of Appeals reversed the superior court and held as a matter of law a garage constructed beyond the permit and code caused the neighbor harm, including light and air blockage, and rejected the permit *suas ponte*.) *Patterson v. Segale,* 171 Wn. App. 251, 260 (2010) (Court of Appeals held the potential of a proposed bulkhead "to produce 'a negative effect on the petitioner's aesthetic enjoyment of the shoreline in this area'" considering the resolution of the claims is all the more immediate, concrete, and specific.) (The court, however, noted the parties' settlement of the issue rendered it moot.)

The Court of Appeals' decision in this matter holds as a matter of law a directly adjacent landowner who alleges financial and aesthetic harm fails to establish injury in fact under CR 12(b). This holding is clearly in conflict with the holding in *Knight* that in general parties owning property adjacent to a proposed project who allege that the proposed project will injure their property have standing, and discussing the importance of preliminary plat approval within the scheme and planning of subdivisions. *Knight* at 340-343.

VII. APPELLANTS MUST BE AFFORDED THE OPPORTUNITY TO SUPPLEMENT THE RECORD WITH EVIDENCE OF STANDING

The Court of Appeals' decision in this case does not cite or discuss the holding in *Lauer*, although appellants' quoted *Lauer* in full in their response to the motions to dismiss at the superior court, CP 1382-83, and their opening brief to the Court of Appeals. p. 43-44, and Motion for Reconsideration and Response to Motion to Publish.

It is indisputed that neither the City nor OTR raised lack of standing at the administrative level, and therefore the Planning Commission never addressed standing. Under *Lauer*, Thompson must be afforded the opportunity to supplement the administrative record with additional evidence of standing if necessary.

Appellants respectfully submit that a bright line rule is preferable in this issue, and ask the Supreme Court to hold that a party's failure to raise lack of standing at the administrative level waives standing at the superior court. Such a holding would be in keeping with the Supreme Court's decisions in *Lauer* and *Durland* emphasizing the importance of raising and adjudicating issues of standing at the administrative level.

VIII. A CITIZEN WHO PARTICIPATES IN AN OPEN RECORD HEARING HAS STANDING TO APPEAL TO THE SUPERIOR COURT

The Court of Appeals' decision holds Misselwitz, and by definition every citizen statewide, must file written comments to a permit application, and file a separate administrative appeal, in order to have standing to appeal to the superior court. Decision at p. 5, citing MICC 19.15.020(E)(2)(e). This code provision does not exist in the MICC. 19.15.020(E) relates to public notice of a *decision*, not an application.

This is more than a scrivener's error. It is a fundamental re-writing of the project permit statute RCW 36.70B.110, the MICC, and existing case law. This error is predicated on a misunderstanding of the sequential order of public notice for 1) a permit application, 2) decision, and 3) open record hearing.

D. Notice of Application

2. The notice of application shall include the following information:

g. A statement of the public comment period, which shall be not less than 14 days nor more than 30 days following the date of notice of application; and a statement of the rights of individuals to comment on the application, receive notice and participate in any hearings, request a copy of the decision once made and any appeal rights;

App. 3, p. 9.

E. Public Notice of Decision.

1. *In addition to the notice of application*, a public notice is required for all administrative, discretionary, and legislative actions listed in MICC 19.15.010(E).

2. Public notice shall be provided at least ten days prior to any required open record hearing. If no such hearing is required, *public notice shall be provided 10 days prior to the decision on the application.*

3. The public notice shall include the following:

e. *A statement that only those person who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will receive notice of the decision and have the right to appeal;*

(emphasis added)

App. 3, p. 11-12.

J. Appeals.

1. Any party on a decision may file a letter of appeal on the decision. Appeals shall be filed with the city clerk within 14 days after the notice of decision or after other notice that the decision has been made and is appealable. MICC 19.15(J).

4. Public notice of an appeal shall be provided in the manner specified in subsection E of this section.

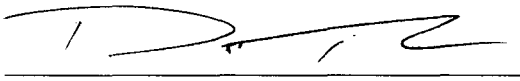
App. 3, p. 16-17.

The decision does not cite any case law for its holding, or the distinction between a member of the public and an administrative appellant. Indeed, the decision's holding is directly contradicted by the Supreme Court's holding in *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868-71 (1997), quoted with approval in *Lauer*, 173 Wn.2d at 255 (a citizen's three-minute testimony at the open record hearing satisfied the exhaustion of administrative remedies since that was the only remedy available to the citizen).

IX. CONCLUSION

Appellants respectfully request the Supreme Court grant review, reverse the Court of Appeals' decision, and either hold Thompson and Misselwitz have established standing or remand to the superior court to determine whether lack of standing was timely raised and established, allowing appellants the opportunity to submit additional evidence if necessary.

RESPECTFULLY SUBMITTED this 3rd day of June, 2016.

By 

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APPENDIX TO APPELLANTS' PETITION FOR REVIEW

Exhibit A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and THEODORE MISSELWITZ, Appellants, v. CITY OF MERCER ISLAND, Respondent, ANDERSON ARCHITECTURE, Applicant, and ON THE ROCK, Owner, Additional Parties Pursuant to RCW 36.70C.040(2)(b)-(d).	No. 72809-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 14, 2016

BECKER, J. — Daniel Thompson and Theodore Misselwitz appeal the trial court's dismissal of their land use petition for lack of standing. Misselwitz lacks standing because he failed to exhaust his administrative remedies under Mercer Island's city code. Thompson lacks standing because he fails to demonstrate that he was prejudiced by the land use decision. We affirm.

FACTS

On the Rock, a limited liability company, owned two vacant lots located on Mercer Island. In 2009, the city of Mercer Island approved a short plat dividing

Clmt ex. 1
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the vacant lots into two 12,000-square-foot buildable lots. The short plat created a private access and utility easement across lot one for the benefit of lot two. The entire area of the easement was characterized as impervious surface, which is hard surface that prevents water from entering the soil. Mercer Island's city code limits the maximum impervious surface of a lot to 35 percent of its gross square foot area. With the easement on lot one, there was that much less of an allowance of surface remaining for the building footprint, patios, and driveways, all of which would also count as impervious surface.

Seeking to avoid this limitation, On the Rock, through Anderson Architecture, filed an application to amend the 2009 short plat in early July 2013. The proposal was to alter the existing easement by turning part of it into a separate tract, called Tract X. Tract X would serve as a private roadway to access both lots. Tract X would be jointly owned by the owners of both lots. Under the Mercer Island City Code, Tract X would not count as impervious surface area against either lot. According to On the Rock, an additional 750 square feet of usable impervious surface area would thereby become available for the development of lot one.

A public comment period followed the filing of the application. Daniel Thompson is a neighbor to the property at issue. Thompson submitted written comments in opposition to the proposed short plat.

A Mercer Island city planner approved the preliminary short plat application on February 3, 2014. Thompson appealed the city planner's decision to the Mercer Island Planning Commission. A public open record appeal hearing

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was held before the planning commission on July 23, 2014. As the only appellant, Thompson was allotted 25 minutes to speak. Misselwitz, who lives just north of the property at issue, attended the appeal hearing as a member of the public. He was allotted 3 minutes to speak. At the end of the hearing, the planning commission voted to uphold the city planner's approval and deny Thompson's appeal. On July 28, 2014, the planning commission issued its written decision.

On August 14, 2014, Thompson and Misselwitz appealed the planning commission's decision by filing a land use petition in superior court as authorized by the Land Use Petition Act, chapter 36.70C RCW. On the Rock and Anderson Architecture, as owner and applicant on the land use decision, were named as additional parties.

The city and On the Rock moved to dismiss the land use petition, arguing that both Thompson and Misselwitz lacked standing to file a land use petition. On November 7, 2014, the trial court granted the motion to dismiss. Thompson and Misselwitz appeal, arguing that they both have standing.

TIMELINESS OF MOTIONS TO DISMISS

On the Rock and the city both filed their motions to dismiss based on lack of standing on October 23, 2014. They noticed hearing for October 31, 2014. Appellants contend the motions to dismiss were untimely.

Appellants argue that, according to a local court rule, motions to dismiss are subject to the scheduling requirements of CR 56, requiring 28 days' notice. The local rule states that deadlines for such motions "shall be as set forth in CR

Clmt ex. 1
P. 3

56 and the Order Setting Case Schedule." LCR 56(c)(2). Appellants cannot evade the plain language of the local rule, which contemplates that deadlines will be set in the case schedule order.

The case schedule order issued for this case stated that "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." Appellants do not persuasively explain why a motion to dismiss for lack of standing should not be characterized as a motion on a jurisdictional or procedural issue.

While neither party has cited case authority exactly on point, we note that the Supreme Court in another context has referred to standing under the Land Use Petition Act as "jurisdictional." Knight v. City of Yelm, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). The statute itself calls for motions on "jurisdictional and procedural issues" to be noted for resolution at the initial hearing, and it provides that the defense of "lack of standing" also is to be raised by timely motion noted for the initial hearing—in contrast to a hearing "on the merits," which can occur later. RCW 36.70C.080(2)-(4). We conclude it is most consistent with the statute 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. On the Rock and the city complied with the superior court's case schedule order because they filed their motions to dismiss based on lack of standing exactly eight days before the scheduled hearing.

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Because the motions to dismiss complied with the superior court's case schedule order, they were not untimely.

MISSELWITZ LACKED STANDING

The trial court found that Misselwitz lacked standing because he failed to exhaust his administrative remedies. Appellants assign error to this determination. Our review is de novo. See, e.g., City of Burlington v. Washington State Liquor State Control Board, 187 Wn. App. 853, 861, 351 P.3d 875 (2015).

A person who claims to be aggrieved or adversely affected by a land use decision has standing to bring a land use petition only if he has exhausted his administrative remedies to the extent required by law. RCW 36.70C.060(2)(d). "The Legislature sensibly confined the category of non-owners eligible to seek judicial review of such decisions to those who participated in the administrative process to the extent allowed. This approach vests greatest discretion in local decisionmakers, and is thus consistent with the Legislature's policy to accord deference to local government and allow only limited judicial interference." Ward v. Bd. of Skagit County Comm'rs, 86 Wn. App. 266, 271-72, 936 P.2d 42 (1997).

The Mercer Island City Code outlines the administrative approval process for a preliminary short plat application. Upon receiving the application, the city issues a public notice of the application. The notice must include a statement that only people who submit written comments will be parties of record and only parties of record will receive notice of the decision and have the right to appeal. MICC 19.15.020(E)(2)(e). After the public comment period, the city issues its

decision. Any party of record may appeal the decision to the Mercer Island Planning Commission by filing a letter of appeal with the city clerk. MICC 19.15.020(J)(1), .010(E). The city issues a public notice of the appeal. MICC 19.15.020(J)(4). An open record appeal hearing is then held before the planning commission, which issues the final administrative decision. MICC 19.15.020(J)(5)(b), .010(E). The planning commission's decision may be appealed "by a party of record with standing to file a land use petition in King County Superior Court." MICC 19.15.020(J)(5)(g).

Misselwitz did not submit written comments in response to the city's public notice of application. He did not file a letter of appeal to the planning commission. He did, however, attend and speak at the open record appeal hearing that occurred on July 23, 2014, before the planning commission. This participation did not confer standing to appeal the planning commission's decision to superior court because he spoke only as a member of the public, not as an appellant. Because Misselwitz did not use the administrative process to protest the application, he failed to exhaust administrative remedies.

Appellants argue that Misselwitz nevertheless has standing because of the wording of the public notice appeal form sent to him and to other neighboring property owners by the city. The form, "Public Notice of Open Record Appeal Hearing," states: "Only those persons who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will receive a notice of the decision and have the right to appeal." Appellants argue that Misselwitz, by virtue of this form, became a party of record and acquired the

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right to appeal to superior court because he testified at the July 23 open record hearing before the planning commission. The city concedes that the form language is mistaken. Under the city code, one becomes a party of record by submitting written comments on the initial application, and only a party of record has the right to appeal the administrative staff approval to the planning commission. The notice sent to Misselwitz incorrectly made it appear that he would become a party of record simply by speaking before the planning commission. The incorrect notice, however, does not override the provisions of the city code for purposes of determining whether Misselwitz exhausted his remedies. Misselwitz's opportunity to become a party of record occurred well before he received the public notice of open record appeal hearing. Unlike Thompson, Misselwitz did not submit written comments about the application and did not appeal the decision to the planning commission. These are the steps in the administrative process that he failed to complete.

Appellants further argue that Misselwitz did not need to exhaust administrative remedies to have standing on his own because he was in effect joining Thompson, who did become a party of record with the right to appeal to the planning commission. This argument contradicts the plain statutory language requiring exhaustion of remedies, which is written in the singular person: "A person is aggrieved or adversely affected . . . when . . . the petitioner has exhausted his or her administrative remedies to the extent required by law." RCW 36.70C.060(2).

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Appellants rely on Jones v. The Town of Hunts Point, 166 Wn. App. 452, 456, 272 P.3d 853 (2011), review denied, 174 Wn.2d 1016 (2012). That case is not about exhaustion of remedies. It is not helpful in deciding whether Misselwitz has standing.

We conclude Misselwitz lacked standing to file a land use petition in superior court because he failed to exhaust his administrative remedies.

THOMPSON LACKED STANDING

The trial court found that Thompson lacked standing because he did not establish that he was personally prejudiced by the land use decision. Appellants assign error to this determination.

An allegedly aggrieved person has standing to file a land use petition only if he shows that the land use decision has prejudiced him, or is likely to. RCW 36.70C.060(2)(a). To satisfy the prejudice requirement, a petitioner must show that he would suffer injury in fact as a result of the land use decision. Chelan County v. Nykreim, 146 Wn.2d 904, 934, 52 P.3d 1 (2002). To show an injury in fact, the petitioner must allege a "'specific and perceptible'" harm. Knight, 173 Wn.2d at 341, quoting Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 829, 965 P.2d 636 (1998). If the petitioner alleges a threatened rather than an existing injury, he "'must also show that the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing.'" Suquamish, 92 Wn. App. at 829, quoting Harris v. Pierce County, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996) (internal quotation marks omitted).

In Suquamish, there was evidence that Indian tribal members, one of whom lived 150 feet from the proposed project and another whose property would be surrounded on three sides by the proposed project, would be affected by the large predicted increase in traffic. This evidence was held sufficient to establish injury in fact. Suquamish, 92 Wn. App. at 831. In another case, a petitioner owned land 1,300 feet away from the proposed subdivisions and alleged that the development's use of an already-overdrawn aquifer would adversely affect her ability to exercise her senior water rights. Knight, 173 Wn.2d at 342-43. These allegations were held sufficient to establish injury in fact. Knight, 173 Wn.2d at 343. In another case, a petitioner testified that his 60-acre property adjacent to the proposed project would be damaged by storm water runoff from the proposed project site. This too was held sufficient to establish injury in fact. Anderson v. Pierce County, 86 Wn. App. 290, 300, 936 P.2d 432 (1997).

In contrast, in Nykreim, four married couples who owned property upstream from the property at issue alleged that their sole interest in the matter was to preserve zoning protections in their district. Unaccompanied by other allegations alleging specific injuries to petitioners or their properties, this interest was too abstract to confer standing. Nykreim, 146 Wn.2d at 935. 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." Nykreim, 146 Wn.2d at 935.

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Thompson believes the creation of Tract X violates the city's code and comprehensive plan for land use, as well as Washington law. His land use petition identifies 11 legal errors surrounding the creation and approval of Tract X. But it does not allege any specific injury to Thompson or his property. Thompson's sole interest is trying to enforce zoning protections in his neighborhood. His abstract interest in having others comply with the law is not enough to confer standing. See Nykreim, 146 Wn.2d at 935.

Thompson argues that this court must assume his allegations of legal error are true and "presume" harm to adjacent property. He argues that the proposed short plat application violates principles in the Mercer Island City Code that promote "air, light, open space, adequate roads, sufficient area to subdivide, consistent bulk and scale, prevention of overcrowding of land, all of which provide attractive neighborhoods and affect the value of surrounding property." He predicts that the "ultimate result" of this proposed short plat will be houses that are inconsistent with the zone and neighborhood, overcrowd land, create a negative effect on open space, air, light, comfort and aesthetics, and diminish the value of surrounding properties like his own.

Thompson does not cite authority allowing a court to presume harm. Granting that the creation of Tract X will increase the amount of impervious surface area available for development on lot one, Thompson has failed to show any "'immediate, concrete, and specific'" injury. Suquamish, 92 Wn. App. at 829, quoting Harris, 84 Wn. App. at 231 (internal quotation marks omitted). Because

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Thompson failed to show that the creation of Tract X prejudiced him, or is likely to, he lacked standing to bring a land use petition.

MOTION FOR SUBSTITUTION

On the Rock executed a statutory warranty deed conveying the property at issue to GIB Development LLC on August 12, 2014, two days before appellants filed their land use petition in superior court. The deed was recorded on August 19, 2014.

On June 16, 2015, On the Rock filed a motion to substitute GIB Development as the new owner of the property at issue. In support of the motion, On the Rock's attorney stated that he did not become aware that the property at issue had been conveyed to GIB Development until June 1, 2015, after he received a letter from an attorney representing appellant Misselwitz in a separate matter. Both limited liability companies are under the effective management authority of the same person, Scott Gibson. Gibson's attached affidavit stated that his tax advisors told him that the property at issue was more appropriately held by GIB Development because he planned to develop it. Gibson further stated that the failure to substitute GIB Development as the new owner was purely an oversight.

Appellants opposed On the Rock's motion to substitute. On June 16, 2015, they filed a motion asking this court to vacate the trial court's order of dismissal and remand. In June and July 2015, appellants filed additional motions to supplement the record with further evidence supporting their request to vacate and remand, to strike On the Rock's motion to substitute for lack of standing, to

compel On the Rock to submit further evidence regarding why it transferred the property at issue, and for judicial estoppel and attorney fees if this court vacates and remands.

On the Rock's motion to substitute is proper under the plain language of RAP 3.2(a): "The appellate court will substitute parties to a review when it appears . . . that the interest of a party in the subject matter of the review has been transferred." The property at issue has been transferred from On the Rock to GIB Development.

On the Rock further requests that the substitution relate back to the time the appellants' land use petition was filed. RAP 3.2 neither expressly permits nor prevents a substitution to relate back to the time of filing. Miller v. Campbell, 164 Wn.2d 529, 536-37, 192 P.3d 352 (2008). In Miller, the court allowed the substitution to relate back to the time of original filing because the party opposing substitution was not prejudiced. Miller, 164 Wn.2d at 538. Likewise here, appellants will not be prejudiced if GIB Development is substituted for On the Rock. GIB Development acknowledges that it will be bound by this court's decision on the merits. The identity of the limited liability company that holds the property is irrelevant to the basis on which the appellants opposed the land use decision—legal errors regarding the creation and approval of Tract X—and to the basis on which their land use petition was denied—lack of standing.

Appellants argue that substitution or joinder is available only at the trial court under CR 17(a) or CR 19 and that it requires consideration of inexcusable neglect under CR 15(c). In support of this proposition, appellants cite Stella

Sales, Inc. v. Johnson, 97 Wn. App. 11, 17-20, 985 P.2d 391, review denied, 139 Wn.2d 1012 (1999). But Stella Sales addressed substitution in the trial court; it does not discuss substitution on appeal under RAP 3.2.

We grant On the Rock's motion to substitute GIB Development. That substitution will relate back to the time the appellants' land use petition was filed. We deny the appellants' motion to vacate the order of dismissal. The remaining motions filed by appellants are also denied.

Affirmed.

Becker, J.

WE CONCUR:

Trickey, J

Ann, J

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DANIEL P. THOMPSON and THEODORE MISSELWITZ, Appellants, v. CITY OF MERCER ISLAND, Respondent, ANDERSON ARCHITECTURE, Applicant, and ON THE ROCK, Owner, Additional Parties Pursuant to RCW 36.70C.040(2)(b)-(d).	No. 72809-1-I ORDER GRANTING ADDITIONAL PARTIES' MOTION FOR RECONSIDERATION & AMENDING OPINION, GRANTING MOTION TO PUBLISH, AND DENYING APPELLANTS' MOTION FOR RECONSIDERATION

On March 23, 2016, Additional Parties GIB Development LLC (substituted for On the Rock) and Anderson Architecture submitted a motion for reconsideration on the issue whether they are entitled to attorney fees under RCW 4.84.370. Appellants filed an answer at this court's request. It appears that the court overlooked the request for attorney fees contained in the additional brief of Additional Parties. The Additional Parties' motion for reconsideration is granted, and the opinion will be amended by adding the following paragraph to the last page of the opinion before the word "Affirmed":

> Additional Parties GIB Development LLC (now substituted for On the Rock) and Anderson Architecture request an award of attorney fees under RCW 4.84.370. That request is granted.

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On March 28, 2016, a Joint Motion to Publish the opinion was filed by G. Richard Hill, the City of Mercer Island, and Additional Parties GIB Development LLC and Anderson Architecture. Appellants filed an answer at this court's request. The request to publish is granted.

On April 4, 2016, Appellants submitted a motion for reconsideration. No answer was called for. Appellants' motion for reconsideration is denied.

Now therefore it is hereby

ORDERED that the Additional Parties' motion for reconsideration is granted, and the opinion will be amended as indicated above. It is further

ORDERED that the Joint Motion to Publish the opinion is granted. The written opinion filed on March 14, 2016, shall be published and printed in the Washington Appellate Reports. And it is further

ORDERED that Appellants' motion for reconsideration is denied.

DATED this 4th day of May, 2016.

Becker, J.

Trickey, ACJ

Jan, J.

Chapter 19.15
ADMINISTRATION

Sections:

19.15.010 General procedures.

A. Purpose. Administration of the development code is intended to be expedient and effective. The purpose of this chapter is to identify the processes, authorities and timing for administration of development permits. Public noticing and hearing procedures, decision criteria, appeal procedures, dispute resolution and code interpretation issues are also described.

B. Objectives. Guide customers confidently through the permit process; process permits equitably and expediently; balance the needs of permit applicants with neighbors; allow for an appropriate level of public notice and involvement; make decisions quickly and at the earliest possible time; allow for administrative decision-making, except for those decisions requiring the exercise of discretion which are reserved for appointed decision makers; ensure that decisions are made consistently and predictably; and resolve conflicts at the earliest possible time.

C. Roles and Responsibilities. The roles and responsibilities for carrying out the provisions of the development code are shared by appointed boards and commissions, elected officials and city staff. The authorities of each of these bodies are set forth below.

1. City Council. The city council is responsible for establishing policy and legislation affecting land use within the city. The city council acts on recommendations of the planning

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commission in legislative and quasi-judicial matters, and serves as the appeal authority on discretionary actions.

2. Planning Commission. The role of the planning commission in administering the development code is governed by Chapter 3.46 MICC. In general, the planning commission is the designated planning agency for the city (see Chapter 35A.63 RCW). The planning commission is responsible for final action on a variety of discretionary permits and makes recommendations to the city council on land use legislation, comprehensive plan amendments and quasi-judicial matters. The planning commission also serves as the appeal authority for some ministerial and administrative actions.

3. Design Commission. The role of the design commission in administering the development code is governed by Chapter 3.34 MICC and MICC 19.15.040. In general, the design commission is responsible for maintaining the city's design standards and action on sign, commercial and multiple-family design applications.

4. Building Board of Appeals. The role of the building board of appeals in administering the construction codes is governed by Chapter 3.28 MICC. In general, the building board of appeals is responsible for hearing appeals of interpretations or application of the construction codes set forth in MICC Title 17.

5. Development Services Group. The responsible officials in the development services group act upon ministerial and administrative permits.

a. The code official is responsible for administration, interpretation and enforcement of the development code.

b. The building official is responsible for administration and interpretation of the building code, except for the International Fire Code.

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c. The city engineer is responsible for the administration and interpretation of engineering standards.

d. The environmental official is responsible for the administration of the State Environmental Policy Act and shoreline master program.

e. The fire code official is responsible for administration and interpretation of the International Fire Code.

6. Hearing Examiner. The role of the hearing examiner in administering the development code is governed by Chapter 3.40 MICC.

D. Actions. There are four categories of actions or permits that are reviewed under the provisions of the development code.

1. Ministerial Actions. Ministerial actions are based on clear, objective and nondiscretionary standards or standards that require the application of professional expertise on technical issues.

2. Administrative Actions. Administrative actions are based on objective and subjective standards that require the exercise of limited discretion about nontechnical issues.

3. Discretionary Actions. Discretionary actions are based on standards that require substantial discretion and may be actions of broad public interest. Discretionary actions are only taken after an open record hearing.

4. Legislative Actions. Legislative actions involve the creation, amendment or implementation of policy or law by ordinance. In contrast to the other types of actions, legislative actions apply to large geographic areas and are of interest to many property owners and citizens. Legislative actions are only taken after an open record hearing.

E. Summary of Actions and Authorities. The following is a nonexclusive list of the actions that the city may take under the

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development code, the criteria upon which those decisions are to be based, and which boards, commissions, elected officials, or city staff have authority to make the decisions and to hear appeals of those decisions.

ACTION	DECISION AUTHORITY	CRITERIA	APPEAL AUTHORIT
Ministerial Actions			
Right-of-Way Permit	City engineer	Chapter 19.09 MICC	Hearing exami
Home Business Permit	Code official	MICC 19.02.010	Hearing exami
Special Needs Group Housing Safety Determination	Police chief	MICC 19.06.080(A)	Hearing exami
Lot Line Adjustment Permit	Code official	Chapter 19.08 MICC	Hearing exami
Design Review – Minor Exterior Modification Outside Town Center	Code official	Chapters 19.11 and 19.12 MICC, MICC 19.15.040	Design commission
Design Review – Minor Exterior Modification in Town Center with a Construction Valuation (as defined by MICC 17.14.010) Less Than $100,000	Code official	Chapters 19.11 and 19.12 MICC, MICC 19.15.040	Design commission
Design Review – Minor Exterior Modification in Town Center with a Construction Valuation (as defined by MICC 17.14.010) $100,000 or Greater	Design commission	Chapters 19.11 and 19.12 MICC, MICC 19.15.040	Hearing exami
Final Short Plat Approval	Code official	Chapter 19.08 MICC	Planning commission

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Seasonal Development Limitation Waiver	Building official or city arborist	MICC 19.07.060(D)(4), 19.10.030	Building board appeals
Development Code Interpretations	Code official	MICC 19.15.020(L)	Planning commission
Shoreline Exemption	Code official	MICC 19.07.010	Hearing exami
Administrative Actions			
Accessory Dwelling Unit Permit	Code official	MICC 19.02.030	Hearing exami
Preliminary Short Plat	Code official	Chapter 19.08 MICC	Planning commission
Deviation (Except Shoreline Deviations)	Code official	MICC 19.01.070, 19.02.020(C)(4) and (D)(3), 19.02.050(F), 19.15.020(G)	Planning commission
Critical Areas Determination	Code official	Chapter 19.07 MICC	Planning commission
Shoreline – Substantial Development Permit	Code official	MICC 19.07.110	Shoreline heari board
SEPA Threshold Determination	Code official	MICC 19.07.120	Planning commission
Short Plat Alteration and Vacations	Code official	MICC 19.08.010(G)	Hearing exami
Long Plat Alteration and Vacations	City council via planning commission	MICC 19.08.010(F)	Superior court
Temporary Encampment	Code official	MICC 19.06.090	Superior court
Wireless Communications Facility	Code official	MICC 19.06.040	Hearing exami

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Wireless Communications Facility Height Variance	Code official	MICC 19.01.070, 19.06.040(H) and 19.15.020 (G)	Hearing examii
Minimum Parking Requirement Variances for MF, PBZ, C-O, B and P Zones	Code official via design commission and city engineer	MICC 19.01.070, 19.03.020(B)(4), 19.04.040 (B)(9), 19.05.020(B)(9) and 19.15.020 (G)	Hearing examii
Discretionary Actions			
Conditional Use Permit	Planning commission	MICC 19.11.130(B), 19.15.020(G)	Hearing examii
Reclassification (Rezone)	City council via planning commission*	MICC 19.15.020(G)	Superior court
Design Review – Major New Construction	Design commission	Chapters 19.11 and 19.12 MICC, MICC 19.15.040	Hearing examii
Preliminary Long Plat Approval	City council via planning commission**	Chapter 19.08 MICC	Superior court
Final Long Plat Approval	City council via code official	Chapter 19.08 MICC	Superior court
Variance	Hearing examiner	MICC 19.01.070, 19.15.020(G)	Superior court
Variance from Short Plat Acreage Limitation	Planning commission	MICC 19.08.020	City council
Critical Areas Reasonable Use Exception	Hearing examiner	MICC 19.07.030(B)	Superior court

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Street Vacation	City council via planning commission**	MICC 19.09.070	Superior court
Shoreline Deviation	Planning commission	MICC 19.07.080	City council
Shoreline Variance	Planning commission	MICC 19.07.110(C)(2)(d)	State Shoreline Hearings Boarc
Impervious Surface Variance	Hearing examiner	MICC 19.02.020(D)(4)	Superior court
Legislative Actions			
Code Amendment	City council via planning commission**	MICC 19.15.020(G)	Growth management hearings board
Comprehensive Plan Amendment	City council via planning commission**	MICC 19.15.020(G)	Growth management hearings board
*Final rulings granting or denying an exemption under MICC 19.07.110 are not appealable to the Shoreline Hearings Board (SHB No. 98-60).			
**The original action is by the planning commission which holds a public hearing and makes recommendations to the city council which holds a public meeting ar makes the final decision.			

(Ord. 11C-05 § 2; Ord. 11C-04 § 2; Ord. 10C-06 § 5; Ord. 10C-01 § 5; Ord. 08C-01 § 8; Ord. 06C-06 § 2; Ord. 06C-05 § 2; Ord. 05C-12 § 9; Ord. 04C-12 § 16; Ord. 04C-08 § 3; Ord. 03C-08 §§ 9, 10; Ord. 02C-04 § 5; Ord. 02C-01 § 6; Ord. 99C-13 § 1).

19.15.020 Permit review procedures.

The following are general requirements for processing a permit application under the development code. Additional or alternative requirements may exist for actions under specific code sections (see MICC 19.07.080, 19.07.100, and 19.08.020).

A. Preapplication. Applicants for development permits are encouraged to participate in informal meetings with city staff and property owners in the neighborhood of the project site. Meetings with the staff provide an opportunity to discuss the proposal in

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concept terms, identify the applicable city requirements and the project review process. Meetings or correspondence with the neighborhood serve the purpose of informing the neighborhood of the project proposal prior to the formal notice provided by the city.

B. Application.

1. All applications for permits or actions by the city shall be submitted on forms provided by the development services group. An application shall contain all information deemed necessary by the code official to determine if the proposed permit or action will comply with the requirements of the applicable development regulations.

2. All applications for permits or actions by the city shall be accompanied by a filing fee in an amount established by city ordinance.

C. Determination of Completeness.

1. The city will not accept an incomplete application. An application is complete only when all information required on the application form and all submittal items required by code have been provided to the satisfaction of the code official.

2. Within 28 days after receiving a development permit application, the city shall mail or provide in person a written determination to the applicant, stating either that the application is complete or that the application is incomplete and what is necessary to make the application complete. An application shall be deemed complete if the city does not provide a written determination to the applicant stating that the application is incomplete.

3. Within 14 days after an applicant has submitted all additional information identified as being necessary for a complete application, the city shall notify the applicant whether the application is complete or what additional information is necessary.

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4. If the applicant fails to provide the required information within 90 days of the determination of incompleteness, the application shall lapse. The applicant may request a refund of the application fee minus the city's cost of determining the completeness of the application.

D. Notice of Application.

1. Within 14 days of the determination of completeness, the city shall issue a notice of application for all administrative, discretionary, and legislative actions listed in MICC 19.15.010 (E).

2. The notice of application shall include the following information:

a. The dates of the application, the determination of completeness, and the notice of application;

b. The name of the applicant;

c. The location and description of the project;

d. The requested actions and/or required studies;

e. The date, time, and place of the open record hearing, if one has been scheduled;

f. Identification of environmental documents, if any;

g. A statement of the public comment period, which shall be not less than 14 days nor more than 30 days following the date of notice of application; and a statement of the rights of individuals to comment on the application, receive notice and participate in any hearings, request a copy of the decision once made and any appeal rights;

h. The city staff contact and phone number;

i. The identification of other permits not included in the application to the extent known by the city;

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j. A description of those development regulations used in determining consistency of the project with the city's comprehensive plan; and

k. Any other information that the city determines appropriate.

3. Open Record Hearing. If an open record hearing is required on the permit, the city shall:

a. Provide the notice of application at least 15 days prior to the hearing; and

b. Issue any threshold determination required under MICC 19.07.100 at least 15 days prior to the hearing.

4. Notice shall be provided in the bi-weekly DSG bulletin, posted at City Hall and made available to the general public upon request.

5. All comments received on the notice of application must be received by the development services group by 5 pm on the last day of the comment period.

6. Except for a determination of significance, the city shall not issue a threshold determination under MICC 19.07.100 or issue a decision on an application until the expiration of the public comment period on the notice of application.

7. A notice of application is not required for the following actions; provided, the action is either categorically exempt from SEPA or an environmental review of the action in accordance with SEPA has been completed:

a. Building permit;

b. Lot line revision;

c. Right-of-way permit;

d. Storm drainage permit;

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e. Home occupation permit;

f. Design review – minor new construction;

g. Final plat approval;

h. Shoreline exemption permit;

i. Critical lands determination; and

j. Seasonal development limitation waiver.

E. Public Notice.

1. In addition to the notice of application, a public notice is required for all administrative, discretionary, and legislative actions listed in MICC 19.15.010(E).

2. Public notice shall be provided at least 10 days prior to any required open record hearing. If no such hearing is required, public notice shall be provided 10 days prior to the decision on the application.

3. The public notice shall include the following:

a. A general description of the proposed project and the action to be taken by the city;

b. A nonlegal description of the property, vicinity map or sketch;

c. The time, date and location of any required open record hearing;

d. A contact name and number where additional information may be obtained;

e. A statement that only those persons who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will

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receive a notice of the decision and have the right to appeal; and

f. A description of the deadline for submitting public comments.

4. Public notice shall be provided in the following manner:

a. Administrative and Discretionary Actions. Notice shall be mailed to all property owners within 300 feet of the property and posted on the site in a location that is visible to the public right-of-way.

b. Legislative Action. Notice shall be published in a newspaper of general circulation within the city.

F. Open Record Hearing.

1. Only one open record hearing shall be required prior to action on all discretionary and legislative actions except design review and street vacations.

2. Open record hearings shall be conducted in accordance with the hearing body's rules of procedures. In conducting an open record hearing, the hearing body's chair shall, in general, observe the following sequence:

a. Staff presentation, including the submittal of any additional information or correspondence. Members of the hearing body may ask questions of staff.

b. Applicant and/or applicant representative's presentation. Members of the hearing body may ask questions of the applicant.

c. Testimony by the public. Questions directed to the staff, the applicant or members of the hearing body shall be posed by the chairperson at his/her discretion.

d. Rebuttal, response or clarifying statements by the applicant and/or the staff.

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e. The public comment portion of the hearing is closed and the hearing body shall deliberate on the action before it.

3. Following the hearing procedure described above, the hearing body shall:

a. Approve;

b. Conditionally approve;

c. Continue the hearing; or

d. Deny the application.

G. Decision Criteria. Decisions shall be based on the criteria specified in the Mercer Island City Code for the specific action. A reference to the code sections that set out the criteria and standards for decisions appears in MICC 19.15.010(E). For those actions that do not otherwise have criteria specified in other sections of the code, the following are the required criteria for decision.

1. Comprehensive Plan Amendment.

a. There exists obvious technical error in the information contained in the comprehensive plan;

b. The amendment is consistent with the Growth Management Act, the county-wide planning policies, and the other provisions of the comprehensive plan and city policies;

c. The amendment addresses changing circumstances of the city as a whole;

d. If the amendment is directed at a specific property, the following additional findings shall be determined:

i. The amendment is compatible with the adjacent land use and development pattern;

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ii. The property is suitable for development in conformance with the standards under the potential zoning;

iii. The amendment will benefit the community as a whole and will not adversely affect community facilities or the public health, safety, and general welfare.

2. Reclassification of Property (Rezones).

a. The proposed reclassification is consistent with the policies and provisions of the Mercer Island comprehensive plan;

b. The proposed reclassification is consistent with the purpose of the Mercer Island development code as set forth in MICC 19.01.010;

c. The proposed reclassification is an extension of an existing zone, or a logical transition between zones;

d. The proposed reclassification does not constitute a "spot" zone;

e. The proposed reclassification is compatible with surrounding zones and land uses; and

f. The proposed reclassification does not adversely affect public health, safety and welfare.

3. Conditional Use Permit.

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

b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;

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c. The use is consistent with policies and provisions of the comprehensive plan; and

d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance.

4. Variances.

a. No use variance shall be allowed;

b. There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; the trees, groundcover, or other physical conditions of the lot and its surroundings; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;

c. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated;

d. The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property; and

e. The variance is consistent with the policies and provisions of the comprehensive plan and the development code.

5. Deviation.

a. No use deviation shall be allowed;

b. The granting of the deviation will not be materially detrimental to the public welfare or injurious to the

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property or improvements in the vicinity and zone in which the property is situated;

c. The granting of the deviation will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property; and

d. The deviation is consistent with the policies and provisions of the comprehensive plan and the development code.

H. Notice of Decision.

1. Unless the city and applicant have mutually agreed in writing to an extension of time, project review shall be completed within 120 days from the date the application is determined to be complete. Time required for the submittal of additional information, preparation of environmental impact statement, and hearing of appeals shall be excluded from this 120-day period.

2. Written notice of the decision shall be provided to the applicant and all parties of record. Notice of decision shall also be provided in the biweekly DSG bulletin.

I. Optional Consolidated Permit Processing.

1. An application that involves two or more permits may be processed concurrently and the decision consolidated at the request of the project applicant. If an applicant elects the consolidated permit processing, the code official shall determine the appropriate application and review procedures for the project.

2. If a project requires action from more than one hearing body, the decision authority in the consolidated permit review shall be by the decision body with the broadest discretionary powers.

J. Appeals.

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1. Any party of record on a decision may file a letter of appeal on the decision. Appeals shall be filed with the city clerk within 14 days after the notice of decision or after other notice that the decision has been made and is appealable.

2. Appeals shall include the following information:

a. The decision being appealed;

b. The name and address of the appellant and his/her interest in the matter;

c. The specific reasons why the appellant believes the decision to be wrong. The burden of proof is on the appellant to demonstrate that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by evidence in the record, or that the decision is in conflict with the standards for review of the particular action;

d. The desired outcome or changes to the decision; and

e. The appeals fee, if required.

3. Authority for appeals is specified in MICC 19.15.010(E).

4. Public notice of an appeal shall be provided in the manner specified in subsection E of this section.

5. The rules of procedure for appeal hearings shall be as follows:

a. For development proposals that have been subject to an open record hearing, the appeal hearing shall be a closed record appeal, based on the record before the decision body, and no new evidence may be presented.

b. For development proposals that have not been subject to an open record hearing, the appeal hearing shall be an

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open record appeal and new information may be presented.

c. The total time allowed for oral argument on the appeal shall be equal for the appellants and the applicant (if not the appellants). If there are multiple parties on either side, they may allocate their time between themselves or designate a single spokesperson to represent the side. All testimony shall be given under oath.

d. If the hearing body finds that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by material and substantial evidence in view of the entire record, or the decision is in conflict with the city's applicable decision criteria, it may:

i. Reverse the decision.

ii. Modify the decision and approve it as modified.

iii. Remand the decision back to the decision maker for further consideration.

e. If the hearing body finds that none of the procedural or factual bases listed above exist and that there has been no substantial error, the hearing body may adopt the findings and/or conclusions of the decision body, concur with the decision of the decision body and approve the development proposal as originally approved, with or without modifications.

f. Final decision on the appeal shall be made within 30 days from the last day of the appeal hearing.

g. The city's final decision on a development proposal may be appealed by a party of record with standing to file a land use petition in King County superior court. Such petition must be filed within 21 days of the issuance of the decision.

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K. Expiration of Approvals. Except for building permits or unless otherwise conditioned in the approval process, permits shall expire one year from the date of notice of decision if the activity approved by the permit is not exercised. Responsibility for knowledge of the expiration date shall be with the applicant.

L. Code Interpretations. Upon request or as determined necessary, the code official shall interpret the meaning or application of provisions of the development code. The code official may also bring any issue of interpretation before the planning commission for determination. Anyone in disagreement with an interpretation by the code official may also request a review of the code official's interpretation by the planning commission. (Ord. 10C-06 § 6; Ord. 08C-01 § 8; Ord. 02C-04 § 7; Ord. 02C-01 § 6; Ord. 99C-13 § 1).

19.15.030 Enforcement.

A. Violations.

1. It is a violation of the development code, MICC Title 19, for any person to initiate or maintain or cause to be initiated or maintained the use of any structure, land or real property within the city of Mercer Island without first obtaining proper permits or authorizations required for the use by the development code.

2. It is a violation of the development code for any person to use, construct, locate, demolish or cause to be used, constructed, located, or demolished any structure, land or property within the city of Mercer Island in any manner that is not permitted by the terms of any permit or authorization issued pursuant to the development code or previous codes.

3. It is a violation of the development code to misrepresent any material fact in any application, plans or other information submitted to obtain any land use authorization.

4. It is a violation of the development code for anyone to fail to comply with the requirements of the development code, as set out in the specific sections of the code.

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Chapter 19.01
GENERAL PROVISIONS

Sections:

19.01.010 Purpose.

The general purpose of this code is to protect and promote health, safety, and the general welfare through the regulation of development within the city of Mercer Island.

To that end, this code classifies the land within the city into various zones and establishes the use of land and nature of buildings within those zones; controls the form of plats and subdivisions; regulates the construction of commercial and residential structures; and protects critical and sensitive areas within the city.

The provisions of this code are designed to consider light, air and access; to conserve and protect natural beauty and other natural resources; to provide coordinated development; to avoid traffic congestion; to prevent overcrowding of land; to facilitate adequate provisions for transportation, water, sewage, schools, parks and other public requirements; and to encourage the use of solar energy practices.

This code is to be interpreted as a whole, in view of the purpose set out in this section.

If the general purpose of this development code conflicts with the specific purpose of any chapter of this development code, the specific purpose shall control. (Ord. 99C-13 § 1).

19.01.020 Validity.

If any section, paragraph, subsection, clause or phrase of this code is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this code. The city council hereby declares that they would have passed this code and each section, paragraph, subsection, clause or phrase thereof irrespective of the fact that any one or more sections, paragraphs, clauses, or phrases were unconstitutional or invalid. (Ord. 99C-13 § 1).

19.01.030 Reasonable accommodation.

A. Eligibility. Any person claiming to have a handicap or disability, within the meaning of the Fair Housing Amendments Act (FHAA), 42 U.S.C. 3602(h) or the Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW, or someone acting on his or her behalf, who wishes to be excused from an otherwise applicable requirement of this development code pursuant to the requirement of

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Land Use Policies Outside the Town Center

GOAL 7: Mercer Island should remain principally a low density, single family residential community.

7.1 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.

7.2 Residential densities in single family areas will generally continue to occur at 3 to 5 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.

7.3 Multi-family areas will continue to be low rise apartments and condos and duplex/triplex designs, and with the addition of the Commercial/Office (CO) zone, will be confined to those areas already designated as multi-family zones.

7.4 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 land fills, correctional facilities, zoos and airports. Compatible permitted uses such as education, recreation, open spaces, government social services and religious activities will be encouraged.

GOAL 8: Achieve additional residential capacity in single family zones through flexible land use techniques.

8.1 Use existing housing stock to address changing population needs. Accessory housing units and shared housing opportunities should be considered in order to provide affordable housing, relieve tax burdens, and maintain existing, stable neighborhoods.

8.2 Through zoning and land use regulations provide adequate development capacity to accommodate Mercer Island's projected share of the King County population growth over the next 20 years.

8.3 Promote a range of housing opportunities to meet the needs of people who work and desire to live in Mercer Island.

8.4 Promote accessory dwelling units in single-family districts subject to specific development and owner occupancy standards.

8.5 Encourage infill development on vacant or under-utilized sites that are outside of critical areas and ensure that the infill is compatible with the surrounding neighborhoods.

maintenance of roads, utilities and other public services are necessary to maintain residential access to all amenities.

GOAL 1: To 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.

1.2 Promote single family residential development that is sensitive to the quality, design, scale and character of existing neighborhoods.

1.3 Promote quality, community friendly Town Center, CO and PBZ district residential development through features such as pedestrian and transit connectivity, and enhanced public spaces.

1.4 Preserve the quality of existing residential areas by encouraging maintenance and revitalization of existing housing stock.

1.5 Foster public notification and participation in decisions affecting neighborhoods.

1. 6 Provide for roads, utilities, facilities and other public and human services to meet the needs of all residential areas. (See Appendix G – Mercer Island Human Services Strategic Plan 1999 – 2000)

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DSG Policy Memorandum
Administrative Interpretation
#07-05

DEVELOPMENT SERVICES GROUP
9611 SE 36TH St., Mercer Island, WA 98040
(206) 236-5300

TO: DSG Staff

FROM: Steve Lancaster, Development Services Director

DATE: June 1, 2007

RE: Impervious surface calculation for Single Family lots

CC: City Attorney

MICC Section(s) Interpreted: 19.02.020(D)

ISSUE

Shall the area within an access easement be included in the area of the lot used for the purpose of calculating compliance with impervious surface coverage limitations?

FINDINGS

- The Code Official, pursuant to MICC 19.15.010(C)(5)(a) of the Mercer Island City Code (MICC), is authorized to make this administrative interpretation subject to the procedures established by MICC 19.15.020(L). The Development Services Group Director or the Director's duly authorized designee is designated as the Code Official under Section 19.16.010.

- MICC 19.16.010 defines "impervious surfaces" to include "driveways, streets, parking areas and other areas, whether constructed of gravel, pavers, pavement, concrete or other material, that can reasonably allow vehicular travel" and further defines "street" as "An improved of unimproved public or private right-of-way or easement which affords or could be capable of affording vehicular access to property."

- MICC 19.02.020(D)(1) establishes maximum impervious surface limits for lots in single family zones, ranging from 20% to 40% depending on slope.

- MICC 19.16.010 defines "lot" as "A designated parcel, tract or area of land established by plat, subdivision, or as otherwise permitted by law to be used, developed or built on as a unit."

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- MICC 19.02.020(A) establishes minimum lot areas for the various single family zones. MICC 19.02.020(A)(2) states: "In determining whether a lot complies with the lot area requirements, the following shall be excluded: the shorelands part of any such lot and the part of such lot which is part of a street" (emphasis supplied).

CONCLUSIONS

- Confusion has arisen concerning whether a part of a lot that is a private street must be excluded from the area of the lot used in calculating impervious surface coverage limitations. This confusion is due to the provisions of MICC regarding calculation of minimum lot area.

- If "lot area" for the purpose of calculating impervious surface coverage is considered to be the same as "minimum lot area," a significant hardship would be created for a specific class of single family lots (those providing private access to neighboring lots). This is due to the fact that under MICC 19.02.020(A)(2), the geographic area of any private street or access easement is subtracted from the calculation, while MICC 19.02.020(D)(1) requires that any driveway or other impervious surface within such easement must be included in the calculation. By including this area in the numerator of the equation while removing it from the denominator, impervious surface within a private street or access easement would essentially be "double-counted" when compared to other impervious surfaces.

- It is important to note that this situation arises due to an ownership issue as opposed to the physical quantity of impervious surface (and related impacts) associated with an individual home. Similarly situated homes whose access is provided by a publicly owned street or by an easement crossing another's property do not suffer this hardship.

- It is not necessary to consider "lot area" for the purpose of calculating impervious surface coverage to be the same as "minimum lot area." The subsection determining how to calculate minimum lot area (MICC 19.02.020(A)) specifically states this calculation is for the purpose of "determining whether a lot complies with the minimum lot area requirements" established within that same subsection. The subsection specifying how to calculate impervious surface coverage includes no reference to "minimum lot area" but instead refers simply to a "lot." It is therefore appropriate to refer to the general definition of "lot" which would include the entire area of "a designated parcel, tract or area of land established by plat, subdivision, or as otherwise permitted by law to be used, developed or built on as a unit."

INTERPRETATION

The area within an access easement or private street shall be included in the area of the lot used for the purpose of calculating compliance with impervious surface coverage limitations. The appropriate calculation is as follows:

$$\text{Impervious Surface Coverage} = \frac{\text{Impervious surfaces, including those on any part of the lot which is part of a street}}{\text{Lot area, including any part of the lot which is part of a street}}$$

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COMMISSIONER CAIRNS: But I am, I don't like this tract notion here as it's applied and I would like to see that it doesn't happen again. So my question is: if we wanted to request staff to define this in such a way that we don't have this ambiguous talk we have and prevents this sort of thing happening again, what is the process and how long would it take us to do that, so that it doesn't happen again.

MS. SCHUCK: Christina Schuck, Assistant City Attorney, for the record. And I will mention that we are hoping to rewrite, a rewrite of Chapter 19 next year. We're in the process of trying to get funding and this is something we could add to the list and bring back before you.

COMMISSIONER CAIRNS: I guess I would feel very much if this were to come up again before that is written, I would be inclined to lean on the discussion tonight and say, "no." You know, I'm -- you can interpret that different ways, but we have history apparently that has in the past usage. But I would not like to see it happen in the future.

VICE-CHAIR WEINMAN: We could ask for an administrative interpretation of that section in the code. I mean, I think Scott's kind of jiggering his de facto interpretation of the code, but we could ask for a more formal interpretation of that definition specific to this situation. And that could be, I think, additional grounds for impetus to ask staff to consider a change in the definition, so this technique is not used again.

CHAIR FRIEDMAN: Well, okay, and we could have staff make it so that it can't be used again, or clean it up so that if we're, if we want to allow—

COMMISSIONER CAIRNS: Well, I would like to clean it up as soon as we can, because if you, if it's known that this is our sentiment, but it's not cleaned up, then it would invite anybody in the interim to take advantage of the intervening period.

CHAIR FRIEDMAN: That's exactly right.

COMMISSIONER CAIRNS: Which I would like to see be extraordinarily short.

COMMISSIONER MCCANN: Tract X's popping up everywhere.

MS. SCHUCK: So another idea is to ask the Council to direct staff to make a quicker change.

CHAIR FRIEDMAN: So can we take that up after this agenda item, or link it to this agenda item?

MS. SCHUCK: Please do it on a separate motion.

CP 1453, p. 111: 3- 112:20.

COMMISSIONER McCANN:

The second thing, however, I have really harped on with is your Tract X game. I think it's a trick. I'm a homeowner. I think it's a game to make houses bigger. And sitting on the Commission, I think open space shouldn't have a road on it.

And I think we should take up a bigger action, that the Planning Department should come back and define "open space" and it shouldn't include tarmac. And I think gaming Tract X is a trick so the house can be larger. It's going to diminish the views of the people down there. I walked that lot tonight. So we're going to jam two McMansions in there where the other houses are more modest size, because we've gained it with the Tract X. So I think that the City Planning Department is almost bending over too much in favor of developers and isn't thinking about homeowners. And I'm a homeowner and I pay taxes. And I think the Planning Department has to balance its duty to citizens versus developers, and I feel right now that my perception is we've done a lot of really good email response to developers, and we're not too responsive to complaining homeowners. That's my perception.

And we listened here tonight, but I don't walk away feeling like this guy has had the same treatment as

the architect. And I read all the litany of communication. So the perception I've walked away with is if I just roll over and deny the appeal, I'm beginning to worry that we just do whatever developers want, and complaining homeowners get short shifted.

So I would vote for you could be right, they could still proceed, you may be right with our expert planner that the land is there. And if the land is there, I would still veto the Tract X. And if the upper house has to be smaller, tough luck. Because I think the Tract X is a game, and I say that as a homeowner. So I don't like Tract X, I think we should kill it as a tactic. And if you want to come back with no Tract X, two lots, yeah, there's 27,000 square feet here and you have your two homes. Tough luck on the architect. That would be what I would vote for, but I'm in the minority.

But I'm feeling really uncomfortable with just saying, "Appeal denied," because then what's all the citizen balance with City balance? So do we want to be balancing citizen to developers, or are we just going to do what developers want? That's how I, that's the perception I think you can derive from the facts.

CP 1450, p. 99:7-100:25

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COMMISSIONER MCCANN: Then we think road is open space? The Planning Commission thinks road is open space?

COMMISSIONER OLSON: We're having problems with that.

VICE-CHAIR WEINMAN: I think we're all having a little problem.

COMMISSIONER MCCANN: So in denying the appeal, you're saying essentially, "A road is open space?"

COMMISSIONER OLSON: That's the way—

COMMISSIONER MCCANN: So in the whole of Mercer Island and it's full of open space?

CHAIR FRIEDMAN: So that's the way that we are interpreting that currently. And I don't know if there is any, there may or may not need to be an administrative memo or something to clarify that for us, or like I said. But that's the way that it's been interpreted to this point and that's, I think, the way that we're going. So…

CP 1453, p. 110: 3-18

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and THEODORE MISSELWITZ, Appellants, v. THE CITY OF MERCER ISLAND, Respondent, and ANDERSON ARCHITECTURE, Applicant, and ON THE ROCK, Owner, GIB DEVELOPMENT, LLC, Respondents/Additional Parties.	SUPREME COURT NO. _____ COURT OF APPEALS CASE No. 72809-1-I DECLARATION OF SERVICE

I, Timera Drake, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the paralegal for Thompson and Delay herein. On the date in the manner indicated below, I caused:

APPELLANTS' PETITION FOR REVIEW

and this DECLARATION OF SERVICE to be served on:

Mario Bianchi LASHER HOLZAPFEL SPERRY & EBBERSON 601 Union St, Suite 2600 Seattle WA 98101 (206) 654-2429	Via U.S.Mail X Via Email Via Facsimile X Via Messenger
Zachary Lell, OGDEN, MURPHY & WALLACE 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 (206) 447-7000	Via U.S.Mail X Via Email Via Facsimile X Via Messenger
CITY OF MERCER ISLAND: Kari Sand, City Attorney CITY OF MERCER ISLAND 9611 SE 36th Street Mercer Island WA 98040	Via U.S.Mail X Via Email Via Facsimile Via Messenger X Via Hand Delivery
Court of Appeals, Division I One Union Square 600 University Street Seattle, WA 98101	X Via Messenger Via U.S. Mail Via Facsimile
Theodore Misselwitz tmisselwitz@juno.com	X Via Email
Fields Misselwitz 400wings@comcast.net	X Via Email
Ian Macrae ian@macrae.com	X Via Email

Dated this 3 day of June, 2016.

Timera Drake

Timera Drake
Paralegal
Thompson & Delay