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BEFORE THE MERCER ISLAND PLANNING COMMISSION

NOTICE OF APPEAL
IN RE: NOTICE OF APPROVAL OF
RE-ISSUED NOTICE OF DECISION
APPROVING DEV13-022

DANIEL THOMPSON'S APPEAL
OF REISSUED NOTICE OF DECISION
APPROVING IMPERVIOUS SURFACE
DEVIATION DEV13-022

I. IDENTITY OF APPELLANT/STANDING

Daniel Thompson is a directly adjacent landowner to the proposed impervious surface deviation and underlying subdivision. Approval of a 5% impervious surface deviation for this upper lot, together with prior approval of "Tract X," will result in an increase of approximately 12% of impervious surface over the base limits under the Code. Approval of DEV13-022 violates Goal 7 of the Comprehensive Plan, noting Mercer Island should remain principally a low-density, single-family community, as well as Goal 1, to insure single-family neighborhoods are compatible in quality, design, and intensity with surrounding land uses, and MICC 19.01.010 that states the defining purpose statement for the Mercer Island Residential Code is that the provisions of the Code are designed to consider light, air, and access; to conserve and protect natural beauty and other natural resources; to provide coordinated development; and to prevent overcrowding of land.

The approval of DEV13-022 in combination of the approval of Tract X will result in an out-of-scale and oversized house that will directly injure Thompson's adjoining property and reduce its property value, as well as impair the value of the neighborhood.

COPY

1 **II. THE DECISION BEING APPEALED**

2 Appellant is appealing Re-Issued Notice of Decision approving DEV13-022 dated March 13,
3 2017 issued by senior planner Robin Proebsting. A copy of the re-issued notice of decision with
4 attachments is attached to this appeal.
5

6 **III. SPECIFIC REASON WHY THE APPELLANT BELIEVES THE DECISION TO**
7 **BE WRONG**

8 **Summary of Factual and Procedural History**

9 On July 1, 2013, SUB13-008 – a two lot short plat including Tract X – and DEV13-022 were
10 publicly noticed. Daniel Thompson and another neighbor, Lou and Ron Glatz, submitted written
11 comments objecting to both proposed permit applications.
12

13 The original application for DEV13-022 listed criterion 2, irregular lot shape, as well as Tract
14 X as the sole basis for granting the ISD.

15 Due to irregularities in the permit applications, on October 30, 2013 the applicant confirmed
16 the City’s request to place SUB13-008 on hold to allow the City to have an “out-of-department”
17 third-party review of the short plat documents. Subsequently, on November 21, 2013, the applicant
18 agreed to the City’s request to place DEV13-022 and DEV13-026 on hold, thus allowing the City to
19 conduct the additional review for the short plat SUB13-008. For reasons never explained the City
20 elected to never perform its third-party out-of-department review, without notice to the parties of
21 record.
22

23 Sometime in September or October of 2016, DEV13-022 and 13-026 were taken out of hold
24 without notice to the parties of record. On October 3, 2016, Ms. Proebsting wrote to the applicant
25 noting both ISD requests were based on criterion 2, unique shape or proportion of the lot, which was
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1 not in fact a valid basis, and was in fact created through the subdivision in order to eliminate
2 impervious surfaces.

3 Subsequently, on or around October 13, 2016, the applicant resubmitted its ISD application
4 changing the bases to criterion 1 and criterion 3, and stating the applicant's use of preferred practices
5 supported the ISD. No public notice or any notice of any kind was issued for the new October 13,
6 2016 application, despite the material changes to the application.

7
8 On or around January 23, 2017 the applicant posted public notice of application DEV13-026.
9 Daniel Thompson submitted written comments and at the same time requested an update of his prior
10 PRA requests. In response to the PRA requests, it was noted that DEV13-022 had already been
11 approved and the appeal period had expired. Daniel Thompson subsequently contacted Ms.
12 Proebsting and noted that he was a party of record and had submitted written comments to DEV13-
13 022 during the 14-day comment period between June 1 and June 15, 2013 and had not received
14 notice of the approval of DEV13-022. At that point, Ms. Proebsting withdrew the original notice of
15 approval. On February 6, 2017, appellant Thompson submitted his written comments on both
16 DEV13-026 and 13-022, complete with exhibits 1-23, which is incorporated in this notice of appeal
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19 Subsequently, Ms. Proebsting reissued her notice of decision approving DEV13-022, a copy
20 of which is attached to this appeal.

21 IV. ASSIGNMENTS OF ERROR

22 Procedural Assignments of Error

23 During the 14-day comment period between July 1 and July 15, 2013, citizen neighbors Lou
24 and Ron Glatz submitted written comments to public notice of SUB13-008 and DEV13-022, and
25 therefore became parties of record. The file does not indicate that the Glatzes were provided either
26 notice of approval for DEV13-022 (just like Thompson). This defect is jurisdictional. Thompson has
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1 suggested to Ms. Proebsting that a copy of the re-issued notice of decision dated March 13, 2017 be
2 electronically served on the Glatzes and the appeal period be extended 14 days in order to cure this
3 jurisdictional defect.

4 **The Applicant's Resubmission of Its ISD Application on October 13, 2016 Completely**
5 **Changing the Bases for Impervious Surface Deviation and the Criterion Constitutes a New ISD**
6 **Application and Requires New Public Notice**

7 Public notice on July 1, 2013 of DEV13-022 led citizens to conclude that the bases for the
8 application were criterion 2, unique lot shape, which a citizen could reasonably assume would be
9 rejected by the DSG without public comment, since that is what happened in this case anyway. The
10 material changes by the applicant required new public notice and a permit number for DEV13-022.
11 In the alternative, approval of DEV13-022 must be limited to the original criteria selected by the
12 applicant, unique lot shape and Tract X.
13

14 **Legal Assignment of Error**

15 This appeal raises the ultimate issue whether an applicant can ignore every preferred practice
16 under the Code and yet be granted a maximum 5% impervious surface deviation on top of the extra
17 impervious surface from Tract X simply because the property uses a common access road.
18

19 In particular:

- 20 1. Recent documents discovered from the 1999 Comprehensive Code Rewrite establish the
21 legislative intent that the deviation from impervious surface maximums be based on specific
22 criteria identified in 19.15.020(G)(5), and that criteria set forth in MICC 19.02.020(D)(3) are
23 additional criteria that must be considered.
24
25 2. Administrative Interpretation 14-02, and any other Administrative Interpretation, does not
26 become final if not appealed within 14 days of issuance. Such a rule would render every
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1 previous administrative interpretation going back decades final and binding on the DSG,
2 Planning Commission, and Council absent formal Code amendment.


- 3 3. The reason the City Council has not amended MICC 19.15.020(G), .020(G)(5), .020(D)(3), or
4 .070(B) since Administrative Decision 14-02 was issued in 2014 is because 14-02 was never
5 brought before the Planning Commission or the Council, and was not raised in any permit
6 appeal.
7
- 8 4. The decision includes a substantial error because it incorrectly applies MICC 19.02.020(D)(3)
9 as the site criteria. The specific language of 19.01.070(B), .020(D)(3), and .020(G)(5) clearly
10 set forth that the granting of a impervious surface deviation is discretionary and may be
11 granted provided the applicant meet the criteria and intent set forth in .020(D)(3) and
12 .020(G)(5).
13
- 14 5. The decision includes a substantial error by incorrectly applying MICC 19.09.100(A). There
15 is no burden to the property and the access road is not a common access drive or a common
16 utility corridor. In fact, Tract X is a jointly-owned lot.
17
- 18 6. The plain language of the code, as well as its legislative history and Council actions, establish
19 that Administrative Interpretation 14-02 is an incorrect application of the Code, and
20 19.15.020(G)(5) must be satisfied before the DSG may exercise its discretion in granting any
21 impervious surface deviation.
22
- 23 7. The maximum 5% ISD is not warranted or applicable in this matter, considering the applicant
24 has already obtained in excess of 5% increase in impervious surface limits through the use of
25 Tract X, and has ignored every preferred practice.
26
- 27 8. The DSG's prior interpretation of Administrative Interpretation 14-02 is absurd on its face,
28 and has resulted in 261 ISD approvals out of 261 ISD applications from 2011 through 2016,

1 which has resulted in significant out-of-scale neighborhood development, the entire purpose
2 behind the impervious surface limits set forth in the Code, and the adoption of the Code in
3 1992 and its comprehensive recodification in 1999.

4 9. There is no basis set forth or justification for a maximum 5% ISD.

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6 10. In summary, MICC 19.01.070 is the specific controlling regulation applicable to impervious
7 surface deviations, and the plain language of .070(B)(2) and legislative history establish that
8 any impervious surface deviation must satisfy .020(G)(5) and .020(D)(3). Administrative
9 Interpretation 14-02 reaches the absurd conclusion, as is evidenced in this case, that an ISD
10 could be materially detrimental to the public welfare and injurious to the property or
11 improvements in the vicinity and zone, will alter the character of the neighborhood, will
12 impair the appropriate use or development of adjacent property, and is inconsistent with the
13 policies and provisions of the comprehensive plan and development code (.020(G)(5)),
14 development of impervious surfaces in critical areas is not avoided (.020(D)), and still a
15 maximum 5% ISD must be granted because the property uses a common access drive or
16 retaining walls.
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20 DATED this 27th day of March, 2017.

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22 
23 Daniel P. Thompson