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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:
CHRISTOPHER AND NICOLE NIEDERMAN,
Petitioners,
v.
CITY OF MERCER ISLAND,
Respondent,
and,
STEVE AND SOPHY YANG,
Applicants.

No. APL21-007

CITY OF MERCER ISLAND’S
RESPONSE TO APPLICANTS’
MOTION TO DISMISS

I. INTRODUCTION

The City of Mercer Island (“City”) agrees with Applicants’ assertion that this appeal was untimely and respectfully requests the Hearing Examiner dismiss this proceeding pursuant to the Hearing Examiner Rule of Procedure 228(a). Lot line revision SUB 21-003 was approved by the City on May 12, 2021. The MICC provides an administrative appeal window of 14 days after the effective date of the appealed decision for decisions not requiring a notice of decision, such as lot line revisions. The instant appeal was filed in October, four months after the May approval. Pursuant to the plain language of MICC, the appeal is months

1 late and must be dismissed per Hearing Examiner Rule of Procedure 228(a).

2 II. RELEVANT FACTS

3 Steve Yang and Yingjun Wang applied for a Lot Line Revision (LLR) on March 10,
4 2021. Declaration of Eileen M. Keiffer In Support of City of Mercer Island’s Response to
5 Applicants’ Motion to Dismiss (“Keiffer Decl.”), Exhibit A. Lot line revisions are processed
6 as Type II decisions under the Mercer Island City Code (MICC). MICC 19.15.030, Table A.
7 Type II decisions are not subject to notice of application or notice of decision requirements
8 pursuant to MICC 19.15.030, Table B.

9 The Yang/Wang application for LLR was assigned permit number SUB21-003. The
10 application was determined complete on April 15, 2021 and public notification thereof was
11 published in the Mercer Island Weekly Bulletin for April 19, 2021. Keiffer Decl., Exhibit B
12 at p. 10. The City approved SUB21-003 on May 12, 2021.¹ Keiffer Decl. at Exhibit C. SUB21-
13 003 was recorded in the King County real property records on May 26, 2021. *Id.*

14 The Yangs’ neighbors, Chris and Nicole Niederman, filed an appeal of the LLR on
15 October 4, 2021. Applicants filed a “motion” to dismiss this proceeding pursuant to Hearing
16 Examiner rule 228(a) by way of emails to the Hearing Examiner dated October 13, 2021 and
17 October 18, 2021. The Hearing Examiner requested responses by November 29, 2021.

18 III. ISSUES PRESENTED

19 Should the Hearing Examiner dismiss the appeal because it was untimely filed? Yes.

20 IV. ARGUMENT

21 The Hearing Examiner lacks jurisdiction to hear this appeal because the appeal was
22 not timely filed. Under the City of Mercer Island’s Hearing Examiner Rules of Procedure
23 (“RoP”) 228(a), any party may request dismissal on the grounds that the appeal was untimely

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25 ¹ The City notes that counsel for the Applicants believes the LLR was approved on or about May 25, 2021.
26 However, the email provided by Applicants’ counsel references the building permit for the Yangs, not the
lot line revision SUB 21-003. The signature of the approving City official, Robin Proebsting, is dated May
12, 2021. Keiffer Decl. at Ex. C.

1 filed (among other grounds). Further, the Examiner may summarily dismiss an appeal in
2 whole or in part on the same grounds on his own motion. RoP 228(a).

3 The Niedermans are appealing a lot line revision approved by the City in May. MICC
4 19.15.130(B) provides that appeals of these types of decisions must be filed within 14 days
5 after either a) the notice of decision is made available per MICC 19.15.120, if a notice of
6 decision is required, or b) the effective date of the decision if no notice of decision is required.
7 Lot line revisions do not require a notice of decision under the Mercer Island City Code. Per
8 MICC 19.15.030, Table A, lot line revisions are processed as a Type II Decision. Type II
9 Decisions do not require notices of decisions pursuant to Table B, MICC 19.15.030, Table B.
10 The lot line revision in question was approved by the City on May 12, 2021. Therefore, any
11 appeal of the lot line revision would have had to have been made on or before May 26, 2021.
12 The Niedermans initiated this appeal on October 4, 2021, months after the deadline to do so.

13 The City expects the Niedermans will argue that they lacked notice of the effective
14 date of the lot line revision. However, that argument is irrelevant, as the MICC does not
15 require the City to issue a notice of decision for lot line revisions. MICC 19.15.030, Table B.
16 Counsel for the Niedermans has previously raised issues relating to perceived insufficiencies
17 with the City's responses to Public Records Requests (which the City disputes). This
18 argument is again, irrelevant. The Public Records Act is a separate, statutory creature and is
19 not a discovery mechanism for administrative appeals. The fact that the Niedermans utilized
20 the Public Records Act does not provide them with a right to notice not otherwise required by
21 the MICC. Nor does the Hearing Examiner have any jurisdiction over any matters regarding
22 the City's responses to requests under the Public Records Act.

23 Finally, the Niedermans may argue that they were required to be provided with a
24 notice of decision per MICC 19.15.120. However, MICC 19.15.120 expressly conflicts with
25 MICC 19.15.030, Table B, which states not once, but twice, that there is no Notice of Decision
26 for Type II land use approvals. Further, both provisions were added simultaneously by

1 Ordinance No. 18C-08 (2018).² Therefore, given the conflict between MICC 19.15.030 and
2 19.15.120, we must turn to the principles of statutory interpretation to resolve the conflict. “In
3 interpreting conflicting statutory language, a court may ascertain legislative intent by
4 examining the legislative history of particular enactments.” *Gorman v. Garlock, Inc.*, 155
5 Wash.2d 198, 211, 118 P.3d 311 (2005). The goal of statutory interpretation is to discern and
6 carry out legislative intent. *Cannabis Action Coalition v. Kent*, 108 Wn.App. 455, 469, 322
7 P.3d 1246 (2014). As discussed in detail below, the applicable legislative history indicates an
8 explicit intent by the Mercer Island City Council to change Type II decisions from requiring
9 a notice of decision to only requiring “public notification” via weekly bulletin posting.

10 Ordinance No. 18C-08 was an omnibus redraft of the City’s review, notice, and appeal
11 procedures for land use approvals. The ordinance was first presented to the Mercer Island City
12 Council on September 4, 2018, first at a study session at the beginning of the meeting, and
13 then a first reading on the same date near the end of the meeting. Former Community Planning
14 and Development Director Evan Maxim presented the ordinance at this meeting and explained
15 the goal behind the proposed change in procedure for Type II land use reviews.³ The relevant
16 portion of the study session begins at 00:06:47 of the recorded meeting. During the study
17 session, Director Maxim described the proposal to change Type II land use reviews from
18 requiring notice of decision to only public notification. Specifically, he explained that “public
19 notification is provided in the weekly bulletin...” He further explicitly stated with respect to
20 Type II decisions, the revisions would include “no formal comment period and there is no
21 specific notice of decision or notice of application.” *Id* at. 00:07:42. The agenda packet
22 materials for the September 4, 2018 meeting also illuminate the proposed change for Type II
23 decisions. Keiffer Decl, at Ex. D, pp. 3 & 6 (indicating prior code language required notice of
24

25 ² Ordinance 18C-08 is available online at:

26 https://library.municode.com/wa/mercer_island/munidocs/munidocs?nodeId=2a92318eb3674.

³ The September 4, 2018 meeting is available to view online at: <https://youtu.be/1tDZE4Kq7Ms>.

1 decision for lot line revisions and the desire for the proposed code to instead require **only**
2 public notification).

3 On second reading by the Mercer Island City Council on September 17, 2018, then
4 Councilmember (now Mayor) Wong raised a question about notice of decisions for Type II
5 land use reviews in particular and whether they should require notices of decision.⁴ At
6 03:28:45 of the September 17, 2021 meeting, Councilmember Wong asked “we received an
7 email....two questions were raised...this is the [MICC 19.15.030] Table B, as far as the
8 processing procedures, I guess there was one question that was raised about Type II and notice
9 of decision and whether or not there should be an... there is a ‘no’ under that category and
10 whether that should be a ‘yes’....” Director Maxim explained with respect to the Type II
11 designation, the issue was discussed thoroughly by the Planning Commission and that the
12 concept was to switch to only public notification rather than notices of application or notices
13 of decision.⁵ He explained those types of permit decisions in detail, stating that many of them,
14 including lot line revisions, were decisions staff lacked the authority to condition or to address
15 neighborhood concerns.⁶ He explicitly explained that “the land use reviews that fall into the
16 Type II category are things that typically people want to know about but don’t necessary need
17 to appeal or can’t meaningfully comment about.”⁷ After hearing Director Maxim’s
18 explanation, the City Council then voted on Ordinance 18C-08 without amendment (and
19 specifically without changing that Type II decisions would not be subject to notice of decision
20 requirements). *Id.* at 3:35:44 through 3:36:36; Keiffer Decl. Ex. E at 5.

21 The Appellants will likely argue that without an issued notice of decision, it is difficult
22 for potential appellants to know when to appeal. However, this is a result that the City Council
23 expressly considered and accepted in the exchange between Councilmember Wong and

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25 ⁴ The September 17, 2018 meeting is available to view online at: <https://youtu.be/8NbGgWq21CA>.

26 ⁵ *Id.* at 3:30:00.

⁶ *Id.* at 3:30:24.

⁷ *Id.* at 3:30:18.

1 Director Maxim described above. Director Maxim explained that Type II decisions do not
2 easily lend themselves to appeal.⁸ For example, he cited the fact that lot line revisions are
3 authorized by RCW 58.17.040(6) as an exemption from the traditional subdivision process.
4 Director Maxim explained that the City’s process for LLRs is restricted to verifying that the
5 proposed revision is truly exempt from the traditional subdivision requirements.⁹ Because the
6 City lacks the ability to generally condition such approvals, Director Maxim explained there
7 is typically no need to have the ability to appeal such decisions.

8 Therefore, the legislative history definitively demonstrates the intent of the Mercer
9 Island City Council to remove the pre-existing requirement for Notice of Decision for Type
10 II land use decisions that existed prior to Ordinance 18C-08, and instead move only to public
11 noticing requirements, through posting to the weekly bulletin. The conflicting language
12 remaining in MICC 19.15.120 relating to Type II decisions appears to have been left in due
13 to oversight.¹⁰ Pursuant to the principles of statutory interpretation, and in order to give effect
14 to the intent of the City Council, one can only conclude that there is no notice of decision
15 required for lot line revisions—just public notification.

16 With respect to the LLR at hand in this appeal, the City appropriately posted public
17 notification to the bulletin in the edition dated April 19, 2021. Keiffer Decl. at Ex. B. This
18 was all the notice required. Because no notice of decision was required, the deadline to appeal
19 the LLR began on its effective date of May 12, 2021. The appeal at hand was not filed until
20 October 4, 2021, months after the deadline to do so. Accordingly, Appellants’ appeal is
21 untimely and must be dismissed.

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24 ⁸ *Id.* at 3:30:00.

25 ⁹ *Id.* at 3:31:13 through 3:31:30.

26 ¹⁰ *See, e.g.* Keiffer Decl. Ex. D, page 35 where the phrase “notice of decision” is expressly struck from MICC 19.15.040(B) with respect to Type II land use reviews. It is likely that the extraneous reference to Type II in MICC 19.15.120 was simply missed.

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V. CONCLUSION

The appealed decision was finalized on May 12, 2021. This began the 14-day deadline to institute an appeal to the hearing examiner. That period expired May 26, 2021. Appellants did not file this appeal until October. The appeal is thus untimely. The hearing examiner should dismiss this proceeding as untimely according to RoP 228(a). The City takes no position on any of the other issues raised by Applicants' counsel in his emails urging dismissal of this appeal.

DATED this 29th day of November, 2021.

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Attorneys for the City of Mercer Island

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DECLARATION OF SERVICE

I, Tori Harris, declare and state:

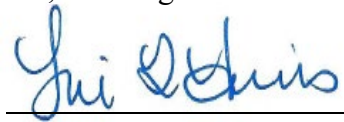
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 29th day of November, 2021, I served a true copy of the foregoing City of Mercer Island’s Response to Applicants’ Motion to Dismiss to on the following counsel of record using the method of service indicated below:

Cassidy J. Ingram, WSBA No. 56063 Ryan Sternoff, WSBA No. 37021 Ahlers, Cressman & Sleight, PLLC 1325 Fourth Avenue, Suite 1850 Seattle, WA 98101 Counsel for Applicants	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: cassidy.ingram@acslawyers.com ryan.sternoff@acslawyers.com <input type="checkbox"/> EService pursuant to LGR
Mark Rosencrantz, WSBA No. 26552 Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104 Counsel for Petitioners	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: rose@carneylaw.com <input type="checkbox"/> EService pursuant to LGR

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

DATED this 29th day of November, 2021, at Seattle, Washington.



Tori Harris