

DSG Policy Memorandum
Administrative Interpretation
#08-01



DEVELOPMENT SERVICES GROUP
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TO: DSG Staff

FROM: Steve Lancaster, Development Services Director

DATE: February 1, 2008

RE: Calculation of impervious surface for purposes of analysis of the PEAK project, and requirements for simultaneous resubdivision of the related property for sale or lease.

CC: City Attorney
Amanda Clark, Chair, Islanders for Common Sense
Charles R. Wolfe, Attorney at Law

MICC SECTION(S) INTERPRETED

19.02.020(D)
19.08.010(E)

ISSUES

This code interpretation is issued in response to the request for code interpretation dated August 23, 2007, submitted by Amanda Clark, Chair, Islanders for Common Sense (Attachment A). This request was amended by letter transmitted by e-mail on September 21, 2007 (Attachment B). Together, the requests asked the following questions (reference numbers provided):

1. *For purposes of analysis of the PEAK application, what is the appropriate area of land upon which to measure impervious surface? The entire high school campus or only the land intended as "surplus" for PEAK? Should these measurements include portions of streets surrounding the high school campus?*
2. *Given that the Development Agreement/Amendment and the MISD surplus decision and lease segregate and describe the property area slated for*

development with particularity and project intent, should the land be re-subdivided for sale or lease simultaneous with the CUP application in accord with MICC 19.08.010 et seq.?

3. *If each individual parcel is required to indicate percent of impervious surface, how does this affect the issue we identified regarding the use of the entire campus in impervious surface calculations?*
4. *What exactly is the intended location of the PEAK project? It is still unclear if a complete survey has been done of the entire campus; it appears from the drawing that only newly drawn proposed "lots" have been surveyed and that the proposed PEAK location is somewhat ambiguous.*
5. *Can staff continue with processing the application for the conditional use permit and associated SEPA review if the impervious surface amount and relevant property boundaries (i.e. the PEAK project "parcel" and the entire campus) have not been correctly identified?*

Questions numbers 1 through 3 are addressed below. Questions numbers 4 and 5 are factual questions, not questions of code interpretation, and are outside the jurisdiction of the Code Official (Development Services Director) and, therefore, are not addressed here.

FINDINGS

Background

This code interpretation request was submitted in relation to a proposal by the Boys and Girls Clubs of King County for various approvals and permits to allow construction of the PEAK project (hereafter "the Project"). PEAK is proposed to comprise a 45,000 square foot Boys and Girls Club facility with exclusive and shared parking, as well as an outdoor children's play area. Uses proposed for the facility include a teen center, multi-purpose room, music room, teaching kitchen, field house and licensed daycare. The facility would be built by the Boys & Girls Club on property owned by the Mercer Island School District (hereinafter "MISD"), commonly referred to as the Mercer Island High School campus (hereafter "the Property"), and used jointly by the Club and the MISD. The Property is zoned "Single Family R-9.6" by the Mercer Island City Code. The proposed project is allowed in this zone with a conditional use permit.

On December 14, 2005, attorney G Richard Hill, on behalf of the Boys and Girls Clubs of King County and the Mercer Island School District, submitted an application for a Zoning Code Amendment. The request was to amend the Code to increase impervious surface limitations for public facilities in single family residential areas, "[I]n order to help the Boys and Girls Club Proposal to succeed" (letter from G. Richard Hill to Richard Hart, December 14, 2005).

On June 5, 2006 the Mercer Island City Council adopted Ordinance No. 06C-05 amending Section 19.02.020 of the Mercer Island City Code to “grandfather” the existing impervious surfaces of schools, religious institutions, private clubs and certain public facilities in single family zones and to provide a variance process to allow increased impervious surfaces for such uses.

On June 5, 2006 the Mercer Island City Council adopted Resolution No. 1374, authorizing the City Manager to enter into a Development Agreement pursuant to RCW 37.70B.170 between the City and the Mercer Island School District, relating to property commonly known as the Mercer Island High School site. The Development Agreement was executed by the Mercer Island School District on May 25, 2006 and by the City of Mercer Island on October 2, 2006.

On October 25, 2006, Mercer Island Interim Development Services Director Kirsten Taylor informed Weinstein A/U, the applicant’s designated contact person, that:

“The entire high school campus (+/- 43 acres) can be used for the purpose of calculating development standards such as impervious surface coverage and landscaping for the PEAK project.”

City Principal Planner Jeff Thomas made the same determination when he e-mailed MISD consultant Liz LeRoy on March 27, 2007, writing that the “intent of the [Development Agreement] impervious surface language is for the entire high school campus.”

On December 6, 2006 the Boys and Girls Clubs of King County, with the consent of the Mercer Island School District, submitted an application for a Conditional Use Permit to allow construction of the Project (file no. CUP06-001).

On June 11, 2007 the Boys and Girls Clubs of King County, with the consent of the Mercer Island School District, submitted an application for an Impervious Surface Deviation to allow an increase in allowable impervious surface coverage for the Property (file no. DEV07-017).

On August 15, 2007 the Mercer Island School District submitted an application for a Lot Line Adjustment (also known as a “Lot Line Revision”) to modify parcel boundaries within the Property for the purpose of legally describing a portion of the Property to be leased to the Boys and Girls Club for the Project (file no. SUB07-08).

Interpretation

Pursuant to Section 19.15.010(C)(5)(a) of the Mercer Island City Code (“MICC”), the Code Official is authorized to make administrative interpretations of the City Code, subject to the procedures set forth in MICC 19.15.020(L). The Development Services Group Director, or the Director’s designee, is designated as the Code Official. See,

MICC 19.16.010. Code interpretations by the Code Official are reviewable by the Planning Commission. See, MICC 19.15.010(E).

Question No 1: For purposes of analysis of the PEAK application, what is the appropriate area of land upon which to measure impervious surface? The entire high school campus or only the land intended as “surplus” for PEAK? Should these measurements include portions of streets surrounding the high school campus?

Answer: For purposes of analysis of the PEAK application, and pursuant to the June 5, 2006 Development Agreement and the April 1, 2007 First Amendment to Development Agreement which govern the PEAK project, the appropriate area of land upon which to measure impervious surface is the entire high school campus. These measurements should not include portions of streets surrounding the high school campus.

The June 5, 2006 Development Agreement authorized under Mercer Island City Council Resolution No. 1374 and the April 1, 2007 First Amendment to Development Agreement set forth the development standards that shall apply to and govern the Project. Section 1 of the June 5, 2006 Agreement reads in its entirety as follows:

1. Establishment of Development Standards. The following development standards shall govern the development and use of the Project and Property:
 - a. Maximum Impervious Surface Limits for the Property. The total percentage of the Property that can be covered by impervious surfaces (including buildings) shall be limited to 55% lot coverage subject to the following conditions:
 - (i) The Director of Development Services must approve a storm drainage report submitted by the District and prepared by a licensed civil engineer which assures the City that City infrastructure, in concert with the project design, is adequate to accommodate storm drainage from the Project, or identifies appropriate improvements to public and/or private infrastructure to assure this condition is met;
 - (ii) All stormwater discharge from new and replaced impervious surfaces on the Property shall be mitigated in accordance with the methodology contained in the most recent Washington State Department of Ecology Stormwater Management Manual for Western Washington, including attenuation of flow and duration. Mitigation will be required for any and all new and replaced impervious surfaces. In designing such mitigation, the use of a continuous simulation hydrologic model such as KCRS or WWHM shall be required; event based models will not be allowed;
 - (iii) Mitigation designs shall endeavor to utilize flow control best management practices (BMP's) and low impact development (LID) techniques to infiltrate, disperse and/or retain stormwater on site to

mitigate the increased volume or runoff to the maximum extent feasible;

- (iv) The impervious surface increase will only be allowed on those portions of the Property having a slope of less than 15%; and
- (v) The maximum impervious surface may be increased by an additional 5%, up to a maximum of 60%, if the District applies for and is granted a deviation consistent with Mercer Island City Code (MICC) 19.02.020(D)(3).

- b. The development regulations set forth in all other provisions of the MICC as of the date a completed building permit application is submitted to the City (collectively, "Development Standards").

The Development Agreement is a land use contract, binding on the City and the MISD. Subsection "a" of Section 1 modifies the general standard for maximum impervious surface coverage found at MICC 19.02.020.D.1, Maximum Impervious Surface Limits. To conclude otherwise would require simultaneous compliance with two incompatible sets of standards. That the Mercer Island City Council intended that Subsection "a" of Section 1 of the Development Agreement rather than MICC 19.02.020.D.1 to apply to the Project, is further clarified by inclusion of Subsection "b." Subsection "b" provides that Subsection "a," together with "all other provisions of the MICC" (that is, provisions other than those limiting impervious surfaces) collectively comprise the Development Standards for the Project (emphasis supplied).

Section 1 of the Development Agreement establishes maximum impervious surface limits for the "Property" (as opposed to the inapplicable provisions of MICC 19.02.020.D.1, which establishes maximum impervious surface limits for "lots"). Therefore, determination of "the appropriate area of land upon which to measure impervious surface" turns on what the City Council designated as "the Property" subject to the Development Agreement.

The documents prepared for Council consideration together with the legislative history of the Council's action indicate the Council's clear intention that the "Property," for the purpose of determining impervious surface limits for the PEAK project, comprise the entire ownership of the Mercer Island School District commonly referred to as the "Mercer Island High School site" or "Mercer Island High School campus." Examples indicating Council's legislative intent include the following:

Council Consideration of Ordinance No. 06C-05

The City Council first took up the matter of modifying the impervious surface standard for PEAK and similar facilities in response to an application for amendment to the Mercer Island City Code submitted by the Boys and Girls Clubs of King County and the Mercer Island School District (file no. ZTR05-003). Application and staff report materials, testimony and Council discussion during consideration of the proposed

amendment indicate that among the purposes of considering this proposal was to facilitate development of the PEAK project. Examples include:

- Application materials explain that the proposal's intent was, among other things, to “help the Boys & Girls Club Proposal to succeed” (letter from G. Richard Hill to Richard Hart, December 14, 2005).
- On May 1, 2006, following a public hearing on the proposed code amendment, the City Council “directed staff to bring back Ordinance No, 06C-05 that will reflect an impervious surface limitation at 55% plus a 5% deviation that will apply only to the Mercer Island High School property and joint projects with that property...” (City Council Minutes, May 1, 2006, emphasis supplied).
- On May 15, 2006, staff brought forth three alternatives for Council consideration: “(1) adopt a code text amendment covering only school sites larger than 42 acres;ⁱ (2) adopt a code text amendment covering all school sites; or (3) direct City Attorney to return with a development agreement” (City Council Minutes, May 15, 2006). This third alternative was offered “[i]f Council wishes to limit the increase in impervious surface to only the Mercer Island High School site” (Agenda Bill AB 4088, May 15, 2006, emphasis supplied).
- On May 15, 2006 the City Council directed staff to bring back for third reading an ordinance applying generally to schools, churches and clubs, and a separate development agreement specifically addressing the Mercer Island High School site (City Council Minutes, May 15, 2006).ⁱⁱ

Resolution No. 1374

In response to City Council Direction at its May 15 meeting, staff prepared a proposed development agreement and a resolution authorizing the City Manager to execute the agreement. Resolution No.1374 was adopted by the City Council on June 5, 2006. The title and recitals of Resolution 1374 make clear Council's intention that the entire “Mercer Island High School site” be used for the purpose of determining impervious surface limits for the PEAK development project. For example:

- The title of Resolution No. 1374 summarizes the resolution as authorizing a Development Agreement “covering certain real property commonly known as the Mercer Island High School Site and setting forth the maximum allowable impervious surface on such site.”
- The resolution identifies the “Property” as that “certain real property commonly known as the Mercer Island High School site and located generally at 4160 86th Ave. SE...” 4160 86th Ave, SE is the address of the existing school district administration building located on the High School campus.
- The resolution recognizes the desire of the School District “to enter into an agreement with the Boys and Girls Club” for construction of “a multi-purpose facility” and identifies this facility as “the Project.” The resolution further “finds that the Project will be consistent with the various Comprehensive Plan policies ...”
- The resolution indicates that “the City desires to encourage the timely and orderly development of the Property and avoid unnecessary litigation costs to taxpayers

surrounding staff's interpretation of the MICC and applicable deviation and variance criteria.”

Development Agreement

The recitals and specific terms of the Development Agreement authorized under Resolution 1374 make clear the City Council's intention that the entire “Mercer Island High School site” be used for the purpose of determining impervious surface limits for the PEAK project. The recitals of the Development Agreement largely echo the findings of Resolution 1374, including identification of both the “Property” (the Mercer Island High School site) and the “Project” (the proposed multi-purpose facility proposed by the Boys and Girls Club, to be built on the Property).ⁱⁱⁱ

The specific terms of the Development Agreement relating to Maximum Impervious Surface Limits for the Property are excerpted and discussed above. It is useful to also note that Section 2 of the Agreement establishes a five-year “development period” during which the Development Standards (established by Subsections a and b of Section 1), “insofar as they affect the Property and are specifically applicable to the Project, shall remain unchanged...” (emphasis supplied). It is clear that the City Council considered the Property and the Project directly linked with regard to the Development Standards established by the Development Agreement.

As the analysis presented above demonstrates, the appropriate area of land upon which to measure impervious surface is the entire ownership of Mercer Island School District site, commonly known as the Mercer Island High School site or campus. There is nothing in the record or legislative history of Ordinance No. 06C-05, Resolution 1374 or the associated Development Agreement or First Amendment to the Development Agreement to suggest that surrounding streets should be included. Had this been the intent of the parties to the Development Agreement (the City and the MISD), language to this effect would have been included in the Agreement.

Question 2: Given that the Development Agreement/Amendment and the MISD surplusing decision and lease segregate and describe the property area slated for Development with particularity and project intent, should the land be re-subdivided for sale or lease simultaneous with the CUP application in accord with MICC 19.08.010 et seq.?

Answer: The portion of the Mercer Island High School site to be leased to the Boys and Girls Clubs of King County must be legally segregated from the remainder of the campus. This may be accomplished through various means, including a Lot Line Revision. A Lot Line Revision need not be processed simultaneously with a Conditional Use Permit (CUP) application.

The division or segregation of land for the purposes of transfer of ownership or lease must be accomplished in conformance with Chapter 19.08 of the Mercer Island City Code (Subdivisions). The City Code allows this to occur through a Lot Line Revision,

which is defined as: “An adjustment of boundary lines between existing lots that does not create any additional lots and which does not reduce the area of any existing lot to the point that it fails to meet minimum development code requirements for area and dimensions” (MICC 19.16.010). The requirements for review and approval of Lot Line Revisions are included in Chapter 19.08 and Section 19.15.020 MICC.

MICC 19.08.010(E) requires that “lot line revision applications shall be processed simultaneously with all applications for rezones, variances, planned unit developments, and site plan approvals to the extent the procedural requirements of those actions allow simultaneous action” (emphasis supplied). There is no requirement that a Lot Line Revision be processed simultaneously with a Conditional Use Permit (CUP) application.

On August 8, 2007 the Mercer Island School District submitted an application for a lot line adjustment (the same as a lot line revision) (File No. SUB07-08). This application is currently under review.

The fact that a division or segregation of land is needed for the transfer of ownership or lease of a part of the MISD campus site to the Boys and Girls Club, or that the an application for a boundary line revision (lot line revision) application has been submitted for the campus site does not alter the language or requirements of the Development Agreement, the PEAK project proposal, or the code interpretation or analysis regarding Question 1 above.

Question 3. *If each individual parcel is required to indicate percent of impervious surface, how does this affect the issue we identified regarding the use of the entire campus in impervious surface calculations?*

Answer. In light of the answer to Question 1, above, no interpretation is necessary in response to Question 3. As discussed in response to Question 1, and consistent with the Development Agreement, impervious surface limitations for the Mercer Island High School site are calculated on a campus-wide basis.

Question 4. *What exactly is the intended location of the PEAK project? It is still unclear if a complete survey has been done of the entire campus; it appears from the drawing that only newly drawn proposed “lots” have been surveyed and that the proposed PEAK location is somewhat ambiguous?*

Answer: As noted above, this is a factual question, not an interpretation of the City Code, and is, therefore outside of the jurisdiction of the Code Official. See, MICC 19.15.030(L).

Question 5. *Can staff continue with processing the application for the conditional use permit and associated SEPA review if the impervious surface amount and relevant property boundaries (i.e. the PEAK project “parcel” and the entire campus) have not been correctly identified?*

Answer: As noted above, this is a factual question, not an interpretation of the City Code, and is, therefore outside of the jurisdiction of the Code Official. See, MICC 19.15.030(L) and 19.15.020(B) and (G).

CONCLUSIONS

1. For purposes of analysis of the PEAK application, and pursuant to the June 5, 2006 Development Agreement and the April 1, 2007 First Amendment to Development Agreement which govern the PEAK project, the appropriate area of land upon which to measure impervious surface is the entire high school campus. These measurements should not include portions of streets surrounding the high school campus.
2. The portion of the Mercer Island High School site to be leased to the Boys and Girls Clubs of King County must be legally segregated from the remainder of the campus. This may be accomplished through various means, including a Lot Line Revision. A Lot Line Revision need not be processed simultaneously with a Conditional Use Permit (CUP) application.

Dated: _____

Signed: _____

FINALITY OF DECISION & APPEAL/REVIEW

This Code Interpretation constitutes a final decision. Pursuant to MICC 19.15.020(L), this decision may be subject to review by the Planning Commission. A request for review must be made in the form and within the time limits of administrative appeals pursuant to MICC 19.15.020(J).

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- i The City Attorney recommended against this alternative (Agenda Bill 4088, May 15, 2006).
 - ii Ordinance No. 06C-05 and Resolution No. 1374 were both adopted by the City Council on June 5, 2006 (City Council Minutes, June 5, 2006).
 - iii In researching this Code Interpretation request, City Staff learned, on January 18, 2008, that the description of the property included as Exhibit A to the recorded June 5, 2006 Development Agreement describes only a portion of the Mercer Island High School site, rather than the entire site or “campus.” This legal description was not included in documents provided to the City Council. Staff is just now researching this incomplete and inaccurate property description, and believes that it was attached to the Development Agreement by staff following Council approval of the Agreement and prior to recording. Based upon the clear and unambiguous intent of the City Council as described and documented herein, this is clearly a Scrivener’s error. By its specific terms, the Development Agreement clearly applies to the entire Mercer Island High School site.