STATEMENT OF DAVID AND PETER ANDERSON AFTER SECOND REMAND

Treehouse Has Not Suffered an "Economic Loss" and the Regulations Are Not "Unduly Oppressive" to Treehouse

It is undisputed that Treehouse purchased the property in question, consisting of .88 acres, for $32,094. If the reasonable use exception application is denied, the lot still has a fair market value of $32,094 or a little more. Prior to the purchase, there had been two unsuccessful attempts to develop the property including one involving a reasonable use exception application. Adding a third unsuccessful attempt to the prior two will not make much difference in the fair market value to the property.

At the first hearing, Treehouse argued that the undisputed purchase price of $32,094 did not reflect the fair market value to the property. With respect to this, Treehouse argued that the King County Department of Assessments had determined that the assessed value of the Treehouse property was $417,000. To support this, Treehouse introduced into evidence, as Exhibit 20, the assessment notice of $417,000 and as Exhibit 32, the denial of the Treehouse appeal of this amount by King County Board of Equalization.

Treehouse also submitted at the hearing Exhibit 21 a declaration from Joseph L. Brotherton, the person who sold the property to Treehouse, which is wholly-owned by William C. Summers. The declaration stated that the "sale of the Property to Mr. Summers was clearly not consummated in an arms-length transaction, and the funds received by me on sale did not reflect the property's fair market value." (Exh. 21, para. 6) The declaration continued: "Rather, the consideration of the property included recognition of over twenty years of personal friendship and partnership activities between me and Mr. Summers." (Exh. 21, para. 7) At the 2017 hearing, Mr. Summers likewise testified that the sale price did not reflect the property's fair market value.

In February 2019, Peter Anderson discovered a decision of the Washington State Board of Tax Appeals ("Board of Appeals") which relates to the Treehouse property and which sustained the appeal by Treehouse of the earlier decision of the King County Board of Equalization. It appears that Treehouse had not earlier informed the City of this decision. The full text of the proposed, now final, decision of the Board of Appeals has been attached as Exhibit C to the letter dated July 2, 2020 from Peter Anderson to Evan Maxim. (Exh. 54a – near the end of this exhibit). The decision of the Board of Appeals has the following paragraph as part of the section entitled, "Owner's Evidence and Arguments:"

> In support of a reduced value for the subject property, the Owner presents its purchase of the subject property on February 13, 2014, in an arm's-length transaction, for $32,094. The Owner reports that its purchase followed a five-year listing with Windermere, during which time the property did not sell because the prior owner had tried twice to get permission from the City to develop the property and was unsuccessful.

Thus, Treehouse no longer has its argument made at the first hearing that the property was worth $417,000, and it is clear that the fair market value at the time of purchase was the price actually paid, $32,094.

Furthermore, even at the time of the first hearing, neither Mr. Summers nor Mr. Brotherton was in a position legally to challenge $32,094 as the fair market value. On the Real Estate Excise Tax Affidavit, both stated under penalty of perjury that the "selling price" was $32,094. (Exh. 30a) Under RCW 82.45.060, the excise tax on the sale of real property is based on a percentage of the "selling price." RCW 82.45.030 in turn defines "selling price" as the "true and fair value of the property conveyed." Thus, both Mr. Summers and Mr. Brotherton represented to the State that $32,094 reflected the property's "true and fair market value." Thereafter, they were precluded from contending otherwise now.

Thus, with respect to the value of property in question, there would not be an economic loss if the reasonable use application were denied. The element of economic loss is a critical part of the reasonable use exception as shown in the definition of "reasonable use" found in MICC 19.16.010. This provides as follows:

> *Reasonable Use*: A legal concept that has been and will be articulated by federal and state courts in regulatory takings and substantive due process cases. The decisionmaker must balance the public's interests against the owner's interests by considering the nature of the harm the regulation is intended to prevent, the availability and effectiveness of alternative measures, the reasonable use of the property remaining to the owner **and the economic loss borne by the owner**. Public interest factors include the seriousness of the public problem, the extent to which the land involved contributes to the problem, the degree to which the regulation solves the problem, and the feasibility of less oppressive solutions. A reasonable use exception set forth in MICC 19.07.140 balances the public interests **against the regulation being unduly oppressive to the property owner**. [Emphasis added]

Hearing Examiner Galt quoted this definition in full at page 13 of his Decision.

There is no doubt that the reasonable use exception provisions in MICC 19.07.140 must be read in conjunction with this definition. The term "reasonable use" is found six times in MICC 19.07.140, and the definition is in fact electronically linked on the City's website to each of the six usages. It is extremely important to note that the definition in MICC 19.16.010 makes the consideration of "the economic loss borne by the owner" mandatory. It is a factor that the "decisionmaker must" consider.

Treehouse may now argue that the prior version of the reasonable use exception in the MICC included the following paragraph: "The application of these regulations deny [sic] any reasonable use of the property. The hearing examiner will consider the amount and percentage of lost economic value to the property owner." In the latest version of the MICC, the second sentence has been omitted. The simple answer is that this amendment cannot be used as a basis for ignoring the express words of the definition of "reasonable use" found in MICC 19.16.010. The words are there and must be applied. As noted above, the phrase "reasonable use" is found

six times in the current MICC 19.07.140, and thus its definition must be used in applying the current MICC 19.07.140.

Although the intent of the City Council in dropping the quoted language is not relevant in view of the express language, the dropping of the language does make sense because it was redundant. The definition of reasonable use already contained a provision that the decisionmaker must consider "the economic loss borne by the owner." In eliminating the redundancy and choosing which of the two references to retain, it makes more sense to retain the reference in the definition as it is very relevant to language in the definition about "the regulation being unduly oppressive to the property owner." The elimination of the second sentence also prevents some possible confusion as the second sentence referred to "lost economic value" while the definition referred to "economic loss." The survival of the latter phrase shows that the relevant consideration is the actual economic loss borne by the owner.

Treehouse may argue that if it is denied a reasonable use exception, the property would be worth nothing. As noted above, a third unsuccessful attempt to develop the property added on to the two earlier unsuccessful attempts should not make a difference in the fair market value of the property. Furthermore, one cannot say that if almost an acre of Mercer Island property were offered for sale today for the sum of $32,094, no one would be interested in buying it. It is certainly possible that a neighbor, a group of neighbors, or even a neighborhood association might be willing to pay that amount to keep this land and the ravine in its natural state. An adjoining neighbor may have an interest in the property for doing such things as building a small structure for storing boats or cars. It is also important to note that the property adjoins a large green belt. In this regard, the City states in Exhibit 61: "The subject property is bounded on the north by the Parkwood Ridge Open Space (approximately 155,000 square feet in area)." (Exh. 61, p. 2) The public trail descends through this "Open Space." The Treehouse property would be a very natural addition to the Open Space and would allow the entire public trail to be on open space where nature is preserved. At this point in time, one cannot say with certainty that a majority of the newly elected Mercer Island City Council would not be interested in purchasing the property for $32,094 as an addition to this Open Space. Even if the fair market value of the property became zero after a denial of a third development attempt, the loss of $32,094 by a real estate developer in today's world is not "unduly oppressive."

Treehouse applied for a reasonable use exception only a few months after purchasing the property for $32,094. It is apparent that this is an attempt to convert land with a fair market value of $32,094 into land worth perhaps one million dollars. It represents a huge gain on one's investment. This poses the question of whether Mercer Island's reasonable use exception is intended to be a money machine for developers. As quoted above, the definition of "reasonable use" mandates that the decisionmaker consider "the economic loss borne by the owner." The definition also states: "A reasonable use exception set forth in MICC 19.07.140 balances the public interests against the regulation being **unduly oppressive** to the property owner." [Emphasis added.] This shows that the reasonable use exception is intended to provide relief to persons really hurt by regulations and not to provide windfall gains to developers.

As stated by the City in its first staff report, "applicant has failed to demonstrate that the property owner has lost economic value as a result of the application of critical area regulations." (Exh. 61, p. 7) Denial of a huge profit cannot be considered a "economic loss" and is not "unduly oppressive." If the denial of profits was considered "economic loss," it would mean that the greater the profit, the stronger the argument would be for granting a reasonable use exception. A developer who would reap a 20-fold profit would have a stronger argument than one who would have only a two-fold profit. One simply cannot ascribe to the City an intent to give preference to applicants who would reap the greatest profit by the avoidance of environmental regulations. This would be a perversion of the exception.

It is also important to note that the most recent version of the reasonable use exception code provisions contains a new paragraph not found in the prior version. It adds at MICC 19.07.140(A)(5) the following to the list of criteria:

"The proposal is consistent with the purpose of this chapter and the public interest."

When one considers this provision in conjunction with the definition which states that the exception "balances the public interests against the regulation being unduly oppressive to the property owner," it is inconceivable that the reasonable use provisions in the City Code were intended to allow developers to buy heavily restricted properties at a very low price and then obtain a huge profit by obtaining a reasonable use exception. This is simply not consistent with the purposes of the chapter and the public interest.

To the best of our knowledge, this property represents the first instance for Mercer Island where developers have purchased heavily restricted properties at a very low price and then sought to obtain a reasonable use exception so as to increase vastly the value of the property and obtain a very large profit. The granting of an exception in this case would obviously set a precedent. However, the exception should be denied in this case because of the absence of economic loss, the lack of an unduly oppressive situation, and the fact that the proposal is not inconsistent with the purposes of the environment chapter and the public interest.

Treehouse Has Still Not Performed the Necessary Geotechnical Analysis with Respect to the Down-Current Properties

As found by Hearing Examiner Galt, one of the reasons why the proceedings were remanded by Hearing Examiner Vancil in March 2017 was that Treehouse's geotechnical report failed to provide an analysis of "potential adverse impacts to adjacent and down-current properties." Hearing Examiner Galt also noted at page 18 of his Decision:

> Examiner Vancil clearly indicated in the 2017 Remand that the geotechnical evaluation had to consider off-site conditions and impacts. The MICC says the same thing. But GEONW conducted no further field work nor did it thoroughly describe and evaluate the off-site conditions after Examiner Vancil's 2017 Remand was issued. All that was done was to prepare some brief analyses based upon the previously gathered data."

Now after this second remand, Treehouse has chosen to focus on the steep slopes situated west of East Mercer Way. It has failed to consider "off-site conditions and impacts" relating to

the "down-current properties." There is no indication from the report of Geotech Consultants, Inc., that its representatives ever crossed East Mercer Way to view the three properties located on the ravine stream between East Mercer Way and Lake Washington. See Exhibit 80f. Unlike the steep slopes to the west of the Treehouse property, the vast majority of the area covered by the three down-current properties is not visible from the Treehouse property. Wood Environment & Infrastructure Solutions, Inc., which performed the peer review of the work of Geotech Consultants, did not make a site visit even to the Treehouse property and based its opinion simply on a review of a limited number of documents. See Exhibit 82.

Thus, to use the words of Hearing Examiner Galt quoted above, Treehouse after the second remand "conducted no further field work nor did it thoroughly describe and evaluate the off-site conditions" relating to the down-current properties. Treehouse failed to perform the necessary geotechnical analysis of the down-current properties prior to the first hearing, then failed again after the first remand, and now failed after the second remand. After having three opportunities to do the necessary field work with respect to the down-current properties, Treehouse should be considered "out." The RUE application should be denied.

Treehouse Has Not Proven That the Alteration caused by its Proposed Building Footprint is the "Minimum Necessary to Allow Reasonable Use of the Property"

For granting a reasonable use exemption, MICC 19.07.140(A)(3) requires: "Any alteration to critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property." [Emphasis added.] At the time of the first hearing, Treehouse proposed a home with a footprint of approximately 1,631 SF. See Exhibit 36 (Vancil Decision) at p. 2. Now, the latest detailed building plans show a larger building footprint of 1,694. See Exhibit 84. At the time of the first hearing, the proposed home had a living area (excluding garage) of 2,558 SF. Under the plans now submitted, the proposed home will have a greatly increased living area (excluding garage) of 3,371 SF. Thus, it is clear that throughout this proceeding, Treehouse has not sought to minimize the size of the proposed home, but has rather gone in the opposite direction by increasing its size.

The entire area of the proposed building footprint is located in the critical areas or the associated buffers. See Exhibit 84 (Critical Area Enhancement Plan). Thus, any change in the size of the footprint translates directly into a corresponding "alteration to critical areas and associated buffers" within the meaning of MICC 19.07.140(A)(3). The question presented by this subsection is whether a building with a footprint of less than 1,694 SF would still be a "reasonable use of the property." If a smaller footprint would still be "reasonable," Treehouse has not shown that its current proposed footprint and resulting alteration constitute "the minimum necessary to allow for reasonable use of the property." [Emphasis added.] Indeed, Treehouse itself had proposed during the first hearing a footprint smaller than the presently proposed 1,694 SF.

In considering the reasonableness of home sizes on Mercer Island, assume, for example, a home with a building footprint of 1,500 SF – substantially less than the home proposed by Treehouse. With this smaller footprint, one should be able to construct a two-floor home with

more than 2,800 SF of living space. Using the King County Parcel Viewer, one can find many homes in the immediate neighborhood of David Anderson (co-signer of this statement and a co-owner of a home on the rim of the ravine in question) that have a square footage less than 2,800. The block directly south of the Anderson home is the 5700 block of 92nd Avenue SE and is generally regarded as a nice residential neighborhood. The following is the square footage of most of these homes: 5700 – **2480 SF**; 5712 – **2390 SF**; 5709 –**2280 SF**; 5713 – **2420 SF**; 5724 – **2230 SF**; 5716 – **1860 SF**; 5720 – **2180 SF**; 5725 – **2230 SF**; 5721 – **2600 SF**. The home of witnesses Rick and Vicki Duchaine, whose property abuts the Treehouse property, has a square footage of **2650 SF**. Although Mercer Island has its mega-homes (which may have a disproportionate effect on the calculation of averages), there are many homes on Mercer Island that are similar in size or smaller than those on the 5700 block of 92nd Avenue S.E. It is submitted that Mercer Island homes such as these involve a "reasonable use" of their respective properties.

One cannot say that construction of a home with a size significantly less than that proposed by Treehouse is not a "reasonable use" within the meaning of the subsection. This is not a situation where Treehouse paid a vast sum for the lot so that it would make no sense for it to build a smaller home on the lot. As noted above, Treehouse only paid $32,094 for the lot. With a smaller size home, Treehouse would still obtain a great profit by the sale of such a home. The environment should not suffer in order to allow Treehouse to construct the proposed larger home simply to obtain an even greater profit. In addition, a smaller home would allow a family with lesser income to buy a new home on Mercer Island -- a laudable result.

In conclusion, Treehouse has the burden of proof under MICC 19.07.140(3) to establish that the "alteration to critical areas and associated buffers" caused by its proposed footprint of 1,694 SF is the "minimum necessary to allow for reasonable use of the property." It has not satisfied this burden of proof. On the contrary, a smaller footprint would cause a lesser "alteration" and would still allow for "reasonable use of the property." Because Treehouse is not proposing the "minimum necessary," MICC 19.07.140(3) has not been satisfied, and the RUE application should be denied.

The Storm Water System Will Drain the Wetlands

As described in detail in the Statement of David L. Anderson submitted with his joint statement, the latest drainage plan submitted by Treehouse is very likely to cause drainage of wetland areas. With respect to the latest drainage plan, ESA stated:

> It remains difficult to determine if wetland hydrology will be affected post-project; therefore, ESA recommends that a wetland delineation be conducted in the spring, as part of the Year 5 mitigation monitoring requirement to determine onsite wetland extents. Should wetland area decrease post-project, ESA recommends the applicant purchase additional credits from the King County Mitigation Reserves Program. (Exh. 86)

With respect to this, the City proposes in its latest Staff Report a condition "F," which provides as follows:

> Conduct a wetland delineation five years after the project is completed to confirm that there is no net loss of wetland area or function. If there is a loss in wetland area or function, this loss will be mitigated through some form of mitigation as determined by appropriate regulators.

This condition is very vague as to what the "form of mitigation" might be and as to who the "appropriate regulators" might be. It is so vague as to be unenforceable and meaningless.

The appropriate solution is to find a better design which will not have the very likely effect of causing wetland drainage as does the present design. Treehouse has not shown that modern engineering technology is incapable of designing a practical or reasonable solution to this problem. It is the responsibility of Treehouse to design a system which will have the "minimum necessary" "alternation" to the wetlands. See MICC 19.07.140(A)(3).

With respect to the wetlands, two other points should again be mentioned. The Treehouse project will require the removal of a considerable number of trees growing in the wetlands. These trees not only increase stability of the area but also absorb a substantial amount of water. Their removal will increase the runoff. Interestingly, none of the trees that Treehouse proposes to plant are situated within the wetland area. See Exhibit 82b, sheet 2.

In the natural state, a significant part of the precipitation falling on the area to be covered by the impervious surfaces would be absorbed by the soil and dissipated by percolation. It would not reach the streams. With the impervious surfaces and drainage system, almost all of the precipitation falling on those surfaces would flow through the streams and the downstream properties.

Other Issues Raised by David L. Anderson are also Reasons for not Approving the Treehouse Application

As stated above, David L. Anderson has submitted a separate statement which is being submitted concurrently with this joint statement. The separate statement relates primarily to engineering issues that are within his particular area of expertise as a licensed civil engineer. Rather than repeat all of the points made, this separate statement is incorporated herein by reference. These additional points provide further reasons for denying the Treehouse application.

The Analysis Relating to the Steep Slopes is Insufficient

In approximately October 2020, two neighbors on the rim of the steep ravine were contacted by a person related to William Summers with a request to walk the hillside for approximately five minutes. On behalf of the neighbors, Gordon Ahalt sent an email to Jeff Thomas, the City's Interim CPD Director. The email included the following statement:

> "Based on the recent access requests made by Treehouse stating they need 5 minutes to study the subject steep slopes there is no reason we as adjacent homeowners have any

> confidence the Treehouse consultants will do a proper and thorough study of the steep slopes or the downhill water run off issues.
>
> We have no objection to having the steep slopes on our property and the water runoff issues studied but believe this should be removed from the hands of Treehouse who we believe will not do an unbiased study."

Ahalt requested Thomas to telephone him so that the matter could be discussed. See Statement of Gordon Ahalt concerning access. However, Thomas never contacted Ahalt to discuss if a mutually agreeable arrangement for access could be worked out.

In assessing the steep slopes, Geotech Consultants, Inc. stated:

> "It was not necessary for us to cross onto the adjacent western and southwestern properties to observe the conditions on the slope. We could assess the slope conditions from the western property line of the Mercer Island Treehouse property, and from the trail in the adjacent northern Parkwood Ridge Open Space." (Exhibit 80g, p. 3)

It is submitted that simply looking at the slopes at a distance and looking at certain documents is not performing due diligence in investing the slopes. Furthermore, five minutes on the slope, as requested by the person related to William Summers, is not due diligence. Although there has been testing on the Treehouse lot at three different locations, no testing at all was conducted on the steep slopes of the neighbors.

It is also important to note that the report by Geotech Consultants does not mention a word about the considerable amount of water that flows from the base of the steep slopes of the neighbors. As discussed in prior statements, it is these waters that have created the wetlands on the Treehouse property and not the main stream of the ravine. See Exhibit 35, p. 6. These waters are a special characteristic of the slopes on the west and southwest of the Treehouse property. There remain unanswered questions as to whether the seepage of waters in considerable volume from the base of the steep slopes affects the stability of the slopes.

Geotech Consultants did not review in connection with its work the testimony by neighbors whose statements are part of the record in this case. For example, Eliyezer Kohen, who lives on the edge of the ravine, testified at the first hearing how his yard had suddenly sunk. He referred to the mudslides that had occurred in the ravine and the great expense required for repair. See Exhibit 6j. James Weber, who purchased his home on the edge of the ravine in 1969, referred to the continued sloughing off of the hillsides causing the wetlands area in this ravine to rise more and more. See Exhibit 6q. These and other persons actually witnessed with their own eyes what was happening in this particular ravine. Yet, Geotech Consultants failed to tap what is the most valuable source of information as to what had happened in this ravine during recent decades – namely those who view this particular ravine almost every day.

It should also be noted that the report of Geotech Consultants states: "Including the slide catchment wall into the design of the house will provide protection against damage that could result from slide debris reaching the structure." Exhibit 80g, p. 4. However, as can be seen by Exhibit 87b, the catchment wall faces the slopes below the Stivelman residence and does not face the really steep slopes to the west and southwest. Thus, the catchment wall does not provide protection where protection is most needed.

Admittedly, Geotech Consultants said more about the steep slopes in question than the few sentences expressed by the prior geotechnical consultants. However, it is still insufficient. Treehouse has not met its burden of proof that its "proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site." See MICC 19.07.140(A)(4).

The Conditions Proposed by the Latest Staff Report are Insufficient or Conflicting

The latest Staff Report (September 20, 2021) provides at pages 13-14 certain conditions for the granting of a reasonable use exception. It is the position of the undersigned that the application for a reasonable use exception should be denied in its entirety, so that the conditions are irrelevant. However, if the Hearing Examiner does grant the application, the conditions should be modified as described below.

The Hearing Officer in his Decision at page 12 makes the following observation: "The MICC says the City 'may require permanent fencing and signage to be installed around the wetland or buffer.' [MICC 19.07.190(E)(8)]." Even though the Hearing Examiner at the last hearing expressed an interest in such fencing, the City has inexplicitly omitted any mention of such fencing in its proposed conditions. The wetlands should be protected by a fence, and signage should be required warning the owner and others so as to "minimize impacts to the wetland and associated habitat."

The latest Staff Report in subparagraph B requires Treehouse to "[f]ollow the four mitigation conditions of the MDNS issued January 13, 2020 (Exhibit 46)." The first mitigation condition in the MDNS is that the "proposed house, driveway, and associated construction work (e.g. grading, retaining walls, drainage improvements, etc.) shall be constructed as reflected in the Healey Alliance Site Plan received on November 13, 2019." On the other hand, subparagraph A of the latest Staff Report proposes the following condition: "Except as otherwise required by the conditions of approval contained herein, construction of the proposed single-family dwelling, driveway access, and other site improvements shall be completed in substantial compliance with the Site Plan by Core Design, received August 2, 2021 (Exhibit 87b)." There is therefore a conflict in that the condition incorporated from the MDNS requires compliance with the November 2019 site plan while the condition stated in subparagraph A requires compliance with the August 2021 site plan.

There are also problems with the Site Plan by Core Design, received August 2, 2021 (Exhibit 87b). For example, the Site Plan shows a building footprint of 1,652 SF, while the more detailed building plans (Exhibit 84) show a building footprint of 1,694 SF. The Site Plan shows

a “48″ CMP detention pipe,” while the more detailed building plans show a “5′ CMP detention pipe.” See Exhibit 84. There are also inconsistencies between the Survey (Exhibit 80f) and the Site Plan (Exhibit 87b). One difference that is easily visible is that on the Survey there are numerous trees that are close to, but within, the western boundary of the Treehouse property. On the site plan, these trees are completely absent.

There is also not a condition requiring compliance with all of the mitigation measures to be undertaken during construction and all of the mitigation measures to be taken generally. Such a provision should be added.

It Was Improper for the City to Delegate to ESA the Responsibility of Drafting the Staff Report

Environmental Science Associates (ESA) has had a very important role in this case as the peer review witness on the wetland issues from the very beginning of these proceedings in 2015. Since the second remand, ESA has generated two documents that are now Exhibits 81 and 86. These documents were signed by Scott Olmsted. Prior to this time, ESA generated a number of important documents which are also exhibits in this case.

Because of a staff shortage, the City retained ESA to draft the latest Staff Report, Exhibit 90. ESA assigned its employee Claire Hoffman to this responsibility. On the first page of the Report, Hoffman is designated the “Project Contact,” and she co-signed the Report with Jeff Thomas, interim director CPD. Treehouse has paid the City’s bills with respect to the peer review services of ESA, while the City has paid the ESA bills with respect to the drafting of the Report.

Presumably, in an attempt to avoid a conflict of interest, one ESA employee, Olmsted, worked on the peer review issues while another ESA employee, Hoffman, worked on the drafting of the Report. However, it is very clear that in legal matters, such as these proceedings, a firm cannot avoid a conflict of interest by having two different persons working on the two separate matters that give rise to the conflict. For example, large law firms would never have a conflict of interest if the use of separate attorneys would be a solution. One considers the firm and not the individual employee in viewing conflict issues. The same is true here. ESA was both the peer reviewer and the one that had the laboring oar in drafting the Report.

Part of the responsibility of the City in preparing its Staff Report is to evaluate the facts and the expert testimony in reaching its recommendation. An ESA drafter of the report does have a conflict of interest in evaluating the testimony of an ESA expert witness. There is also a conflict of interest for ESA to draft the Staff Report in that Treehouse, the party seeking the reasonable use exception, pays part of the bills of ESA, even though not the parts directly related to the drafting work. Again, ESA must be considered a single entity for conflict purposes, and separate billing does not solve the conflict.

The fact that persons at the City reviewed the Staff Report after it was prepared by ESA and the fact that Thomas co-signed the Staff Report does not eliminate the conflict. For example, it is clear that a law firm that has a conflict of interest cannot properly continue to

handle the matter by having another law firm, which does not have a conflict, review and approve its work. The same is true here.

Admittedly, the City may have needed someone to draft the Staff Report. Evan Maxim, who represented the City at the first two hearings and who had drafted the first two Staff Reports, left his employment with the City immediately after the second hearing. After the departure of Evan Maxim, the City assigned the case to Robin Proebsting, who in turn left the employment of the City on June 4, 2021. See Statement of Peter M. Anderson Concerning ESA Involvement. Jeff Thomas began his employment with City as interim director of CPD on September 28, 2020, subsequent to the last hearing.

Presumably, the City wished to hire an organization with some institutional knowledge of this long and involved case to draft the report. With respect to institutional knowledge, ESA was a logical choice as it was involved in the Treehouse matter since May 2015. See Exhibit 13a. Although logical, it is improper for ESA to play a dual role – expert witness and drafter of the City's Staff Report. In this regard, it is improper to ESA to consider and weigh the documents that it has produced itself. It is also improper for ESA to draft the City's Staff Report when ESA is in fact receiving checks from Treehouse. It is certainly permissible for the City to hire a firm to prepare the Staff Report, but it should not be a firm that is already performing another important role in the case and is receiving checks from the applicant.

The final question is what should the proper remedy be for the conflict of interest in preparation of the Staff Report. It is submitted that the proper remedy is that the fruits of the conflict of interest, namely the Staff Report, should be disregarded by the Hearing Examiner.

Conclusion

The Andersons have filed with Hearing Examiner Galt two prior statements providing the basis for denying the application by Treehouse for a reasonable use exception. These statements are dated July 19, 2020 (Exhibit 71) and July 27, 2020 (Exhibit 77). For the reasons stated in Exhibits 71 and 77 and for the reasons expressed in this statement, it is respectfully submitted that the Treehouse application should be denied. If the application is granted, the conditions should be modified as stated herein.

DATED: December 1, 2021

David L. Anderson PE

Peter M. Anderson