

City of Mercer Island, WA  
Attn: Jessi Bon, City Manager  
Bio Park, City Attorney  
Jeff Thomas, Interim CPD Director  
9611 SE 36<sup>th</sup> Street  
Mercer Island, WA 98040

November 28, 2021

RE: CAO15-001 & VAR 18-002  
MI Treehouse, LLC

I request this letter to be submitted as an exhibit to be considered by the Hearing Examiner, John Galt, or his replacement, during the public meeting to be held Dec. 2, 2021, at 9:00am by a Teams Conference Call regarding the MI Treehouse, LLC applications for a Reasonable Use Exception and a Zoning Variance for property located at 5637 E. Mercer Way, Mercer Island, WA 98040 (File Numbers as referenced above).

I continue to oppose the development of the subject lot and approval of the RUE and Zoning Variance requested by MI Treehouse, LLC.

I request this public meeting to be delayed to a future date on the grounds that the City of Mercer Island, WA has not properly responded to the public information requests made by Peter Anderson (refer to Attachment 1) and has not provided the public sufficient time to receive and review all the information held by the City of Mercer Island that pertains to this case. Documents that have been provided by the City of Mercer Island to date has excluded communication between me, Gordon J. Ahalt, and Jeff Thomas, Interim CPD Director (refer to Attachment 2) where I requested a meeting with Jeff Thomas to discuss the RUE application. Mr. Thomas has declined on multiple occasions to meet with me to discuss the MI Treehouse development proposal.

My objections to approval of the subject RUE and Zoning Variance are as follows:

**1)** Extracted from the Hearing Examiner's decision date August 7, 2020: *(italicized)*

*"HEARING EXAMINER DECISION RE: CAO15-001 & VAR18-002 (MI Treehouse Consolidated Reasonable Use Exception and Zoning Variance) August 7, 2020 Page 13 of 21*

*42. The term "reasonable use" is defined in MICC 19.16.010: 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.”*

“A reasonable use exception set forth in MICC 19.07.140 balances the public interest against the regulation being unduly oppressive to the property owner.” In view of the fact that Treehouse paid only \$32,094 for the property, the application of the regulations is not “unduly oppressive to the property owner.” However, granting Treehouse the RUE and Zoning Variance is unduly oppressive to the public and the adjacent property owners as there will be a substantial impact upon and potential destruction of the existing wetlands and two critical streams. This negative impact on the wetlands and two critical streams was acknowledged by Hearing Examiner Galt in his fact findings and in his questioning of the City during the last Hearing.

The Hearing Examiner’s August 7, 2020 decision listed Fact #41:

“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)). “Summers’ current plans do not contemplate establishing permanent fencing and signage. (Exhibit 38)”

The risk of the wetlands being substantially destroyed will come from two sources in the future. First, the occupants of the proposed single family house will want to use their backyard to plant a garden, build a deck or patio, have a play or recreation area, etc... and in the wetlands’ current physical state the residents will be ankle to calf deep in mud, unless they start trying to divert the existing small watercourses that feed the southern critical watercourse or install drainage trenches to try to dry out their yard area. The second potential source of draining the wetlands will come from the proposed 25’ long 48” to 60” detention pipe to be installed in the driveway. This pipe will be installed in the wetland area, 10’ to 15’ from the southern critical watercourse and will require a perf drain surrounding the detention pipe to prevent the detention pipe from floating to the surface. The perf drainage system surrounding the detention pipe will accelerate drainage of the wetlands.

In weighing the balance between the public interest and the regulation being unduly oppressive to the property owner the scale clearly tips in favor of the public. Draining the wetlands by the future residents of the home and the installation of the detention pipe and perf drainage system will put the downstream homeowners at increased risk of flooding, change the hydrology of the steep slopes to the south of the development site, and substantially impact the function of the existing wetlands. Therefore the RUE and Zoning Variance should be denied.

At a minimum, the City should require the wetlands that are not covered by the house and driveway to be fenced off and preserved as a functioning wetland.

**2)** The updated Core survey dated 8/31/20 Exhibit 80f appears to now show the proper location of the southern critical stream B, however, the survey is incomplete as it fails to show the multiple smaller flowing streams that feed into the primary stream shown in the Core survey. The “feeder” streams are predominantly south and west of the primary southern stream and

the proposed house will be located on top of the feeder streams. The southern stream shown on the survey is like a tree trunk – what is missing is the equivalent of the tree branches – the feeder streams to the primary stream. Below is a picture of one of the feeder streams that feed the primary southern critical stream. The feeder stream below runs directly through the location of the proposed house foundation.



**3)** Exhibit 87b 18039 MI Treehouse Site Plan (2021-07-29) is the site plan used by the City in it's Staff Report. This Site Plan is not dated and there are discrepancies between this Site Plan and the Core Survey dated 8/31/20 Exhibit 80f. Therefore, it is not clear that the Staff was using the most recent site survey. Most of the discrepancies are the locations and number of trees on the property. The Site Plan shows far fewer existing trees.

**4)** After the first Hearing Examiner meeting on the Treehouse request for the RUE and Zoning Variance, the City of Mercer Island revised the building code to permit the mitigation of wetlands impacts via the purchase of mitigation credits to be used elsewhere outside the City limits of Mercer Island. At the time of the first Hearing Examiner meeting the building code required wetlands mitigation to be performed within the same drainage basin where the property is located. This revision of the wetlands mitigation requirement was the then acting CPD Director's action to subvert the mitigation requirement in order to permit the applicant to proceed with the RUE and Zoning Variance application. This should be taken into consideration by the Hearing Examiner when trying to balance the public interest against the regulation being unduly oppressive to the property owner.

City Staff has suggested that there be a "lookback" regarding wetlands impacts and if there is a significant negative impact on the remaining wetlands then Treehouse may be required to purchase additional mitigation credits to resolve wetland impacts off-island. The problems with this proposal are many. How will the impacts be measured 5 years from now, how will the City enforce future financial requirements on Treehouse, which will likely be a single purpose entity with no future assets after the house is sold, how will the City correct the negative impact on this drainage basin, and how will uphill and downstream property owners be compensated for future damages should they occur?

**5)** I have not seen a response from the City to the technical issues related to the proposed detention pipe that were raised in Dave Anderson's email dated 4/8/21 to Robin Proebsting, former City Manager (refer to Attachment 3). Dave is a licensed Professional Engineer who deals with water drainage issues on a daily basis. The City's peer review engineers have provided no response to the technical issues raise by Dave Anderson and their peer review letters have not provided any technical information, only broad generalized statements without supporting information.

**6)** ESA has a conflict of interest in acting as a peer reviewer and as a co-author of the Staff Report. The City Staff should be acting independently of all peer reviewers and should be diving deeper into the project details and being more specific in asking questions of the Treehouse engineers and consultants. The City Staff appears to be checking the boxes only and relying solely on the Treehouse advisors without challenging their representations.

**7)** The latest site plan used by the City (Exhibit 87b) shows a 48-inch detention pipe while the drainage plan (Exhibit 84) shows a 60-inch detention pipe. Which is it? How long will the detention pipe be, how close to the southern stream will it be, how deep will the trench have to be to bury the detention pipe and how will the de-watering of the area be handled? What water flow measurements have been taken and during what time of year to determine the size, depth, and material to be used to construct the perf drainage system surrounding the detention pipe?

8) The Treehouse engineers do not adequately address how the house will be constructed in the wetlands without de-watering the surrounding area and there are not adequate limits put on Treehouse as to how much of the wetlands may be disturbed during construction and how the disturbed areas will be restored.

9) Hearing Examiner Galt requested an evaluation of both the uphill slope to the south of the site and the downstream impacts on the properties below the site. Only visual statements by the Treehouse consultant have been made. There have been no soil sampling or water flow measurements taken during the past several years. Without baseline water flow measurements there will be no method for determining whether the proposed development has adversely impacted the uphill hydrology or the downstream water flows past the downhill properties. There is no technical analysis performed by any of the Treehouse consultants to support their generalized statements that are solely based on visual inspection.

I have been involved in commercial and residential construction projects as an investor for over 45 years and this is the most technically deficient site development analysis I have ever seen supported by the most generalized statements that lack supporting information from the engineering consultants. The risk/reward ratio is far too high on the risk side in order to gain one residential house at the cost of eliminating a functioning wetland and exposing adjacent property owners to potential risk and loss.

The wetland and zoning variance regulations are not unduly oppressive to Treehouse, LLC as they acquired a lot for \$32,094 in the hope of creating a \$1,000,000 residential lot by navigating loopholes in the building code and convincing the City to change the building code to permit wetland mitigation via purchasing credits to solve wetland impacts elsewhere while leaving the damage in place on Mercer Island. Treehouse was fully aware of the wetland situation prior to acquiring the property and knew the risk of entitlement approval. It is irresponsible development and a poor use of land resources.

Gordon J. Ahalt

**Attachment 1:**

**From:** [anderson9200@comcast.net](mailto:anderson9200@comcast.net) <[anderson9200@comcast.net](mailto:anderson9200@comcast.net)>

**Sent:** Friday, November 26, 2021 3:38 PM

**To:** [cityclerk@mercerisland.gov](mailto:cityclerk@mercerisland.gov)

**Cc:** 'Dave Anderson' <[davea@dahogan.com](mailto:davea@dahogan.com)>; 'Gordon Ahalt' <[gjahalt@gmail.com](mailto:gjahalt@gmail.com)>

**Subject:** Document Request 21-555

We submitted to the City our document request on September 1, 2021. Now, almost three months later, we have still not been notified that your document production is complete. Certain documents have been provided to us in installments, the last being on November 12, 2021. This last installment indicated that more documents will be produced and a redaction and exemption log will be provided. When will these be provided?

In order to prepare for the hearing on December 2, we need to see all of the requested documents and the logs. The failure to provide these to us in a timely manner is prejudicial to us and impedes our preparation.

Peter M. Anderson

**Attachment 2:**

**From:** Jeff Thomas <[jeff.thomas@mercerisland.gov](mailto:jeff.thomas@mercerisland.gov)>  
**Sent:** Tuesday, October 12, 2021 9:49 AM  
**To:** Gordon Ahalt/USA <[Gordon.Ahalt@cushwake.com](mailto:Gordon.Ahalt@cushwake.com)>  
**Cc:** Dave Anderson <[davea@dahogan.com](mailto:davea@dahogan.com)>; [anderson9200@comcast.net](mailto:anderson9200@comcast.net)  
**Subject:** RE: Treehouse RUE case

External Mail

Mr. Ahalt,

Identical to the message you were just copied on, the City Clerk is coordinating with the Hearing Examiner to identify a date to reconvene on this matter. My understanding is the Hearing Examiner will conduct an open record public hearing, therefore any interested party will have an opportunity to address the Hearing Examiner at that time.

Best regards, Jeff Thomas

**From:** Gordon Ahalt/USA <[Gordon.Ahalt@cushwake.com](mailto:Gordon.Ahalt@cushwake.com)>  
**Sent:** Monday, October 4, 2021 8:08 PM  
**To:** Jeff Thomas <[jeff.thomas@mercerisland.gov](mailto:jeff.thomas@mercerisland.gov)>  
**Cc:** Dave Anderson <[davea@dahogan.com](mailto:davea@dahogan.com)>; [anderson9200@comcast.net](mailto:anderson9200@comcast.net)  
**Subject:** Treehouse RUE case

Dear Mr. Thomas:

Please advise us of the next steps in this process. Will there be a public meeting with the Hearing Examiner?

My position is Treehouse and the City has not responded to all of the issues and questions raised by the Hearing Examiner.

I would appreciate an opportunity to meet with you personally to discuss this RUE application. Please let me know a time that works for you.

Thank you.

Gordon J. Ahalt

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### **Attachment 3:**

**From:** Dave Anderson <[DaveA@dahogan.com](mailto:DaveA@dahogan.com)>  
**Sent:** Thursday, April 8, 2021 9:23 PM  
**To:** Robin Proebsting <[robin.proebsting@mercergov.org](mailto:robin.proebsting@mercergov.org)>  
**Cc:** [anderson9200@comcast.net](mailto:anderson9200@comcast.net); 'Gordon Ahalt' <[gjahalt@gmail.com](mailto:gjahalt@gmail.com)>; 'Rick Duchaine' <[rduchaine17@gmail.com](mailto:rduchaine17@gmail.com)>; 'Vicki Duchaine' <[vduchaine@comcast.net](mailto:vduchaine@comcast.net)>;

[robertroyalgraham@gmail.com](mailto:robertroyalgraham@gmail.com)

**Subject:** RE: MI Treehouse

Robin,

Thank you for sharing the updated plans for the proposed residence at 5637 East Mercer Way, submitted by MI Treehouse LLC. It is good to see that the type 2 watercourse is now aligned with the contour lines. Based on the updated site plan, it would appear that the building footprint and deck area have been reduced on the north side of the house to maintain a setback from this corrected stream location. It also appears that the entry on the south side of the house has been eliminated. The finish floor elevations for the garage and main floor have been raised and it would appear that the building footprint has shifted south. The storm water detention facilities have been added with a 48-inch diameter pipe, a type 2 catch basin on the west side and a flow control structure on the east side. It is concerning that the catchment wall that was previously shown on the south side of the structure has been deleted and is not shown on the plan.

The Critical Area Enhancement Plan has been updated with the corrected stream location and the smaller building footprint. The impact areas shown around the proposed construction remain exceedingly tight, considering the deep excavation that will be required for the retaining walls and storm water detention facilities. In my opinion, the negative impacts to the surrounding wetland area and the adjacent stream are not accurately depicted on this plan and will far exceed what is currently shown. In order to evaluate these impacts, more detailed information needs to be provided in the plans. During the hearing the Hearing Examiner noted that the RUE application was not vested prior to 12-2018 and the published requirements should be included in the plan set for the application to be considered complete. The RUE application must include plans that comply with the City of Mercer Island requirements that I introduced during the last hearing. The following submittal items required by the City for a complete RUE application are still not shown on the plans:

Site Plan:

- E. Designate areas with greater than six (6) feet of cut and/ or fill
- O. Existing and proposed utility and drainage improvements;

Critical Area Study:

- D. Stormwater and erosion control management plan consistent with MICC 15.09

Conceptual Grading and Utility Plan:



H. Proposed conceptual drainage system design;

J. The number of cubic yard of soil to be added, removed, and relocated;

K. Type and location of fill origin, and destination of any soil to be removed from site, including the foundation areas;

M. A statement indicating the method to be followed on erosion control and restoration of land during and immediately following the construction period of plat improvements;

N. Utility drawings:

2. Existing and proposed water, sewer, and storm water utility locations, including: pipe diameter, ditches, slope/ grade, connections, manhole or catch basin locations, inverts, etc.

Until this information is still missing from the plans the RUE application is not complete. Showing all of the drainage components including the foundation and retaining wall drains, along with the type and depth of fill materials, is required to properly quantify the impacts the project will have on the stream and adjacent wetland areas.

An example of this is the storm water detention pipe and associated drainage structures that have been shown on the plan without any elevations. This type of detention facility requires all of the storage volume to be below the overflow elevation within the restrictor catch basin at the east end of the storage pipe. The storage pipe needs to be installed without slope. The rim elevation for the restrictor catch basin in the driveway will need to be approximately 174. To provide enough clearance for the overflow and the catch basin top with frame and grate, the top of the detention pipe will need to be at least 2 feet below the rim elevation. This would put the invert elevation of the 4' detention pipe at approximately 168. The catch basin at the west end of the pipe will be very close to the entrance to the garage which has a finish floor elevation of 186. The bottom of this catch basin will require an excavation that is at least 2 feet below the detention pipe invert making the structure approximately 20 feet deep. The excavation to install this structure will be 12 feet below the toe of the proposed driveway retaining wall and will extend well below the adjacent stream elevation. Construction of a 20' deep storm structure in a sloping wetland within 15' of a stream will certainly have a much wider impact than what is currently delineated on the plan. Showing a construction impact only 5 feet beyond this wall and so close to such a deep excavation is not accurate or reasonable. Requiring the applicant to comply with the requirements for a complete application including showing the slopes and elevations of the drainage system and the depths and description of the fill materials is critical to properly evaluate and quantify the impacts to the wetlands and adjacent stream.

Another example is the grading and perforated piping that will be required for drainage around the building to comply with the applicant's geotechnical report. This will also impact the wetland area and is not shown on the plan. The recommendations included in Section 5.6 of the geotechnical report for drainage is not acknowledged on the site plan or in the tabulated areas of wetland disturbance. This

includes a recommendation to slope the ground surface away from the proposed building at a gradient of at least 3% for a distance of at least 10' away from the building for all areas that are not paved. This would include grading and surface impacts to the existing wetland areas south and west of the building site.

Although it has been left off of the plan, the elevation of the garage will require a retaining wall at the southwest corner of the building footprint. With the garage floor elevation of 186, the bottom of the wall would typically be below 184 which is approximately 10 feet below the existing grade at the southwest corner of the house. The retaining wall will typically require permeable materials behind the wall with drainage collection at the base of the wall and around the structure foundation or slab. With a perforated drain approximately 10 feet below the surface, there will almost certainly be a permanent impact on the existing wetland areas south, west, and potentially northwest of the proposed building location. The wall construction with drainage collection 10 feet below the wetland surface will permanently impact the wetland area and could de-water a significant portion of the up-gradient wetland areas, potentially including those that extend beyond the parcel limits. The previous responses from the wetland consultant relative to ESA's comments and my previous e-mails included the statement that water will be conveyed from the retaining wall drain to a spreader northwest of the building site that would recharge the existing wetlands. This is also not indicated on the plans. I am not sure how this would be accommodated as the elevation of the retaining wall drain will be below the existing surface grades in the wetlands to the northwest.

As previously noted, I disagree with the 10-30-19 response from Mr. Sewall that the foundation drainage system will not impact the hydrology of wetland as the site has "soils that do not appear prone to drainage". The Geotechnical Engineering Study prepared by GEO Group Northwest dated March 13<sup>th</sup>, 2015 as well as the supplemental information provided in the responses to third party review dated July 30<sup>th</sup>, 2015 and October 28<sup>th</sup>, 2015 appear to contradict this statement. This information shows sandy outwash soils to a depth in excess of 16 feet. The report indicates that this sand contains relatively small percentage of silt and fines. The logs also show very low blow counts which indicate the outwash sand layer is soft and relatively uncompacted. These sandy outwash soils should be considered permeable. I am very surprised by these responses given the previously documented geotechnical report.

Thank you in advance for your consideration of these comments and we look forward to being able to review and comment on a complete application with all of the required plan details. Please feel free to call me at (206) 230-8373 or (206) 660-8944 if you would like to discuss them with me directly, Dave

Dave Anderson PE

Principal

DA Hogan & Associates Inc.

[www.dahogan.com](http://www.dahogan.com)

P (206) 285-0400

C (206) 660-8944

**From:** Robin Proebsting <[robin.proebsting@mercergov.org](mailto:robin.proebsting@mercergov.org)>  
**Sent:** Monday, March 29, 2021 5:16 PM  
**To:** [anderson9200@comcast.net](mailto:anderson9200@comcast.net)  
**Cc:** Dave Anderson <[DaveA@dahogan.com](mailto:DaveA@dahogan.com)>  
**Subject:** RE: Treehouse

Greetings Peter,

It was good to speak just now, and thank you for the comments below. As we discussed, I and the other reviewers are still working our way through the latest submittal from the applicant, and I welcome input on these latest materials. Please email me any additional comments you may have.

Best regards,

Robin

### **Robin Proebsting**

Senior Planner

City of Mercer Island – Community Planning and Development

206-275-7717 | [mercerisland.gov/cpd](http://mercerisland.gov/cpd)

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*Due to the COVID-19 outbreak, Community Planning and Development has modified our operations. City Hall and the Permit Center are closed to the public. There is no “walk in” permit service; staff are working remotely and services are being continued via remote operations. More information is available on the City’s website: [mercerisland.gov/cpd](http://mercerisland.gov/cpd). Please contact us by phone for general customer support at 206-275-7626.*

*\*Please note that I will be **out of the office beginning Thursday Apr. 1<sup>st</sup>**. I will be back in the office Tuesday Apr. 6<sup>th</sup>.\**

**From:** [anderson9200@comcast.net](mailto:anderson9200@comcast.net) <[anderson9200@comcast.net](mailto:anderson9200@comcast.net)>

**Sent:** Friday, March 26, 2021 3:31 PM

**To:** Robin Proebsting <[robin.proebsting@mercergov.org](mailto:robin.proebsting@mercergov.org)>

**Cc:** 'Dave Anderson' <[davea@dahogan.com](mailto:davea@dahogan.com)>

**Subject:** Treehouse

Dear Ms. Proebsting,

I tried to reach you this morning by telephone. I am interested in knowing the latest as to what is happening with Treehouse case. Also, I want to mention to you that my son, Dave Anderson, who is a party to the case, has been swamped with work at his engineering firm, but plans to contact you soon with his thoughts relating to the latest Treehouse submission. I do not know all of the points that he intends to mention to you. However, he has mentioned to me that the detention pipe shown on the new drawings must be horizontal in placement. With the slope of the driveway, that means that the pipe at the top of the driveway must rest about 20 feet below the ground level. As shown by the two previous test drillings, the soil is porous. The effect is that the design will act as a sink and drain the wetlands. Also the drainage from the containment wall cannot be conveyed by gravity to the wetlands because of the elevation levels. Also the Geotech Consultants rendered their opinion without ever stepping foot on the properties to the south and west. Furthermore, they say absolutely nothing about the properties to the east. These are just some of the thoughts that come to my mind.

Looking forward to hearing from you. Peter Anderson