ARGUMENT BY PETER M. ANDERSON IN OPPOSITION TO THE APPLICATION FOR A REASONABLE USE EXEMPTION IN MERCER ISLAND PROJECT NO. CAO15-001

I. INTRODUCTION

My wife and I are the owners of the home and lot (King County Parcel No. Parcel 5450500260) located at 9200 S.E. 57th Street, Mercer Island. Although our lot does not abut the property subject to this hearing, the subject property does abut the lot of our next-door neighbor, Gordon Ahalt. Our home is on the very edge of a steep slope of a ravine at the base of which is a stream flowing through the subject property. We have owned our home at this location since December 1970.

The application in this case was filed by MI Treehouse LLC ("Applicant"), whose principal is William C. Summers. Applicant seeks a reasonable use exception under the provisions of MICC 19.070.030(B) to construct a single-family home on a lot located at 5637 East Mercer Way on Mercer Island. The application was filed with the City on January 16, 2015. (Exhibit 2)

On April 27, 2015, I submitted to the City of Mercer Island a letter with objections to the application for a reasonable use exemption in Project No. CAO15-001. (Exhibit 6b) As an interested party in these proceedings, I support the recommendation in the Mercer Island Staff Report ("Staff Report"), Exhibit 1, that the proposed reasonable use exemption should be denied. I submit that the conclusions in the Staff Report used as a basis for the recommended denial should be adopted by the hearing officer.

My Argument, which I am now submitting solely on behalf of my wife and myself, is intended to supplement the reasoning used in the Staff Report and also to advance additional arguments for denying the application. In this Argument, I have not attempted to discuss each and every ground used by the Staff as a basis for recommending denial of the application. This is because I believe that the rationales for those grounds are set forth in the Staff Report and will also be discussed in the arguments to be filed by the Staff.

It should be noted that my Argument is based solely on the testimony and the exhibits that form the record in this case. No attempt is made in my Argument to present new evidence. It is my understanding that Applicant and the City Staff will submit their written arguments to the Hearing Examiner on Monday, February 27, 2017.

II. THE APPLICATION OF THE REGULATIONS HAS NOT RESULTED IN LOST ECOMONIC VALUE TO THE OWNER.

Under MICC 19.07.030(B)(3)(a), one of the criteria to be considered by the hearing examiner in ruling on an application for a reasonable use exemption is the following:

> The hearing examiner will consider the amount and percentage of lost economic value to the property owner;

In our case it is undisputed that Applicant purchased the property in question in September 2014 from Joseph L. Brotherton for a total consideration of $32,094. This price is shown by the excise tax information stamped on the first page of the warranty deed, Exhibit 15. In connection with this transaction, both Applicant, through its representative Mr. William C. Summers, and Mr. Brotherton signed under penalty of perjury a "Real Estate Excise Tax Affidavit," Exhibit 30. This Affidavit shows a "gross selling price" of $32,094.00. Also, the Affidavit has the following handwritten explanation:

> Purchase price based on environmental restrictions applicable to the property, which has no encumbrances.

This explanation was presumably added to explain to the State of Washington Department of Revenue the reason why the price was so low compared to typical Mercer Island real estate values. That explanation, stated by Applicant and Mr. Brotherton under penalty of perjury, appears to be true. In addition, there was the 11-year history of unsuccessful efforts to obtain City approval for construction on the lot. Exhibit 18d shows the withdrawal in 2010 by the prior owner of multiple applications filed with the City in 2004 and 2007 to construct a residence on the lot. The 2004 development application to build a single-family home is reflected in Exhibit 18a and Exhibit 18b. There was also an attempt to obtain approval to build two homes on the lot in 2000. See Exhibits 6q. Thus, there were not only the environmental restrictions, but the outlook for obtaining an exception to these restrictions looked very bleak in view of the past unsuccessful efforts.[1] Thus, a very low price was to be expected.

At the hearing Applicant submitted a declaration from Joseph Brotherton with respect to this sale. (Exhibit 21) In the declaration Mr. Brotherton states that he has been a close personal friend of Mr. Summers for over 20 years and indicates that the very low price was due to that friendship. He also asserts that "the funds received by me upon sale did not reflect the property's fair market value." The declaration does not state what the actual fair market value was on the date of the sale, but only gives an approximation of its value "[a]ssuming the Property can be

[1] It should be noted that the present language of the reasonable use exception in MICC 19.07.030 dates back to the enactment of Ordinance 05C-12 in 2005. (https://www.mercergov.org/files/ab4029x1.pdf) As can be seen from the relatively few strikeovers and underlines in the reasonable use exception provisions in the 2005 ordinance, the reasonable use exception also existed in very similar form before 2005.

reasonably used as the site of a single-family residence." At the hearing William Summers likewise testified that the sale price did not reflect the property's fair market value.

It is submitted that the purchase price of $32,094 was not unreasonable where the lot had multiple environmental restrictions, where the house would need to be built in the middle of a wetland, and where eleven years of effort to obtain approval for construction of a house had not been successful. Furthermore, neither Mr. Summers nor Mr. Brotherton is 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. 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." They cannot contend otherwise now.

If Applicant is denied a reasonable use exception in the instant case, "the amount and percentage of lost economic value to the property owner" within the meaning of MICC 19.07.020(B)(3)(a) would be zero. The property in question would remain a lot where multiple environmental restrictions exist, where the house would need to be built in the middle of a wetland, and where efforts to obtain approval for construction of a house had not been successful. Mr. Summers, who is not only a developer but has also been a lawyer, purchased the property with full knowledge of the legal restrictions and was certainly aware of the prior unsuccessful efforts to get approval to build a single-family residence on the property. Mr. Summers essentially took a gamble with his eyes completely open. If he could obtain approval to build on the lot, his investment in the lot of only $32,094 could change into an asset which Mr. Summers asserts would be worth $1,000,000.

The purpose of the reasonable use exception is not to enable persons to obtain huge financial gains -- in this case more than a 3,000 percent increase in value. Applicant contends that his "lost economic value" is the failure to obtain this huge return on his original investment. In considering this, it is extremely important to consider the definition of "reasonable use" found in MICC 19.16.010. This definition states in part:

> A reasonable use exception set forth in MICC 19.07.030(B) balances the public interests against the regulation being unduly oppressive to the property owner. [Emphasis added.]

To contend that denying a huge increase in value is being "unduly oppressive" does not even pass the straight face test. The reasonable use exception should be applied to true hardships and not to efforts to obtain great increases in values.

It is submitted that MICC 19.07.030(B)(3)(a) refers to the actual "lost economic value to the property owner" and not to some theoretical loss based on the assessed tax value of the lot. The assessed tax value, which is still well below typical Mercer Island land assessments, must already reflect the fact that the property is subject to many critical area regulations. Even if one

used the assessed tax value, Applicant would still reap a huge increase by the granting of a reasonable use exemption in view of his testimony that the land would be worth $1,000,000 if granted.

In conclusion, the Staff Report was absolutely correct in concluding that the Applicant has failed to prove "lost economic value as the result of the application of critical area regulations. (Exhibit 1, p. 7) As set forth in MICC 19.16.010, the reasonable use exception is intended to provide relief against a "regulation being unduly oppressive to the property owner." The application of the regulations in our case is not "unduly oppressive" where the property owner purchased the property at a very low price and certified on the Real Estate Excise Tax Affidavit that this low price was "based on environmental restrictions applicable to the property." Applicant entered into the transaction completely aware of the situation and should not be able to use the reasonable use exception as a means of obtaining a 30-times increase in the value of the asset.

III. APPLICANT HAS NOT CARRIED ITS BURDEN OF PROOF WITH RESPECT TO THE SAFETY OF THE STEEP SLOPES, CLASSIFED AS GEOLOGIC HAZARD AREAS, OF NEIGHBORING PROPERTIES.

A review of the written objections filed in April 2015 by the "upstream owners" (those with property on the west side of East Mercer Way) relate to great concerns that the alterations made at the site may have an adverse effect on the stability of the very steep slopes on their properties which drop sharply towards the floor of the ravine. This was also clear from the oral testimony at the hearing. The steepness of their slopes can be seen from the density of the contour lines visible on the King County iMap found in Appendix A of Exhibit 26. The map shows that the contour lines on neighboring properties are far more concentrated and far more in number than anywhere on the Applicant's property. The slopes on the Applicant's property pale in comparison to those of the neighboring properties. Generally, the homes of the neighbors are perched on the edge of these very steep slopes.

The opposition of the neighboring property owners to efforts to develop the site in question goes back at least to the year 2000 when the first efforts were made to develop the lot. Some of this history is described in the letters of James Weber, Exhibits 6q and 6r, who purchased his home on the south side of the ravine in 1969. Weber's property directly abutted the southwest side of applicant's property. In Exhibit 6q, he referred to the "landslides from the unstable hill-side to the north, unpredictable water flows from the artesian water coming down the ravine from above, continuing sloughing off of the hill-sides to the north and the south causing the wetland-bog area to rise as more and more soil is added to it, and the major inevitable earthquake that will affect all of these." (With respect to the last item, it has now been determined that the Seattle Fault crosses Mercer Island!) Weber also described how three Mercer Island City Council members visited the site in question in 2004, and each concluded that it was totally unsuitable for human habitation.

A letter from Eliyezer Kohen refers to the mudslides in the ravine and the great expenses required for repair. (Exhibit 6j) At the hearing he described the sudden sinking of his yard. Concerns were also expressed at the hearing by Dr. John Stivelman, the closest neighbor to the site in question. Rick and Vicki Duchaine, whose property directly abuts the site, submitted a two-page letter in opposition to the application. (Exhibit 6g) Among the many points made, the letter states: "During our 21 years residency we have become increasingly concerned about the stability of the hillside in back of our home. We have witnessed large trees that have fallen down or broken in half. For every tree that is lost, there is more groundwater in the hillside and a greater risk of erosion and landslide." The letter points out that the applicant made no efforts to measure the hydrostatic pressures on the steep hillside of the properties adjoining the site. The Duchaines express the concern that the construction of a house in the wetlands will change the runoff patterns and increase hydrostatic water levels in the hills of neighboring properties. They conclude that allowing the "construction of a home on this parcel will place properties at risk and jeopardize our safety and other residents in the area." Other letters by upstream neighbors expressing concerns about the effect of the project on the steep slopes were also submitted in April 2015. See, for example, the letter of Gordon Ahalt (Exhibit 6a), the letter of Peter Anderson (Exhibit 6b), and the letter of Bill and Margo Bell (Exhibits 6c).

The concerns of the neighbors have a real basis in fact. MICC defines "geologic hazard area" as follows:

> Geologic Hazard Areas: Areas susceptible to erosion, sliding, earthquake, or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or alterations, including landslide hazard areas, erosion hazard areas and seismic hazard areas.

It should be noted that the words "erosion, sliding, earthquake" in the definition are in the disjunctive. Any one of the three can cause an area to be classified as a "geologic hazard area." Applicant's geotechnical expert, GEO Group Northwest, Inc. ("GEO") acknowledged:

> According to the information available on the Mercer Island GIS Portal [http://www.mercergov.org/Page.asp?NavID=2793], geologic hazard areas have been mapped as present at the site. These include erosion, steep slope, potential slide, and seismic hazards. (Exhibit 10a, p. 3)

Applicant's peer geotechnical expert, Perrone Consulting, Inc. P.S. ("Perrone"), found that the reference above to a "potential slide" was incorrect. Rather, Perrone stated that the "slope includes a headscarp on the southerly portion of the property and landslide deposits cover all of the area, which classifies this site as a *known* landslide area." (Exhibit 11a, p. 2)(emphasis in original). Indeed, the Mercer Island GIS Portal shows five "identified landslide locations" (marked by pink triangles) in the upstream portion of this ravine. From the foregoing it can be

seen that the area in question qualifies as a "geologic hazard area" not just for one reason, but actually for three different reasons. In short, it can be considered a triple geologic hazard area.

It should also be noted that wetlands at the site are not the result of a watercourse empting into a flat area. As shown by the site contour map (Exhibit 3b), Watercourse A forms a fairly deep channel running along the northern boundary of the site, and the wetland areas on the site are located on a gradual slope that descends from the base of steep slopes to that channel. It is thus clear that the water to create the wetlands does not come from Watercourse A, but rather from the base of the steep slopes. GEO acknowledged "the presence of groundwater seepage from the slopes." (Exhibit 10a, pp. i-ii) Accordingly, the wetlands and the steep slopes are not two independent geologic features, but what occurs in one feature affects the others.

The GEO geotechnical report of March 13, 2015 (Exhibit 10a) was not the first report issued by GEO on the site. GEO had also issued a report on the same site in 1999 and an updated report in 2005. See Exhibit 10a, pp. 1-2. With experience with the site spanning 16 years, it must be assumed that GEO was aware that the opposition of the upstream neighbors to the project was primarily based on concerns for their steep slopes. In short, it was a "big issue" for them. In view of that, one would expect that the effect of the project on the slopes of the neighbors would be a major part of the study done by GEO. If the project would have no adverse effect on the neighbors' steep slope, one would assume that GEO would spell out the results of its investigation in that regard and thus allay the neighbors' great fears.

An analysis of any possible adverse effect on neighboring properties is also a required part of a "geotechnical report" under the Mercer Island Civil Code. MICC 19.60.010 defines "geotechnical report" as follows:

> Geotechnical Report or Geotechnical Analysis (SMP): A scientific study or evaluation conducted by a qualified expert that includes a description of the ground and surface hydrology and geology, the affected land form and its susceptibility to mass wasting, erosion, and other geologic hazards or processes, conclusions and recommendations regarding the effect of the proposed development on geologic conditions, the adequacy of the site to be developed, the impacts of the proposed development, alternative approaches to the proposed development, and measures to mitigate potential site-specific and cumulative geological and hydrological impacts of the proposed development, **including the potential adverse impacts to adjacent and down-current properties**. Geotechnical reports shall conform to accepted technical standards and must be prepared by qualified professional engineers or geologists who have professional expertise about the regional and local shoreline geology and processes. (Emphasis added)

The requirement to address in the report the issue of whether there is any adverse effect to adjacent properties is also buttressed by the provisions of MICC 19.07.060 relating to geologic hazard areas. Subsection D(1) thereof provides in relevant part:

> Alterations of geologic hazard areas may occur if the code official concludes that such alterations:
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> ....
>
> b. Will not adversely impact (e.g., landslides, earth movement, increase surface water flows, etc.) the subject property or **adjacent properties**; (Emphasis added.)

From the foregoing, it is very apparent that it is essential that any geotechnical report addresses possible "adverse impacts to adjacent and down-current properties."

A review of the geotechnical reports in our case does not show any study relating to possible adverse impact on adjacent properties. A careful review of the GEO reports (Exhibits 10a, b, c, d) and the Perrone correspondence (Exhibits 11a, b, c, d) discloses that representatives of GEO and Perrone **never set foot on the adjacent properties, but limited themselves to the site in question.** There was absolutely **no testing on the steep slopes of the adjacent properties.** Furthermore, they never requested permission to enter any of the adjacent properties. Under MICC 19.07.030B , the "applicant has the burden of proof in demonstrating" that all of the specific criteria are met, including safety. Applicant has simply not met its burden of proof that the project will not adversely affect the adjacent properties.

A careful review of all of the geotechnical reports and correspondences shows that this burden has not been satisfied. In GEO's primary report (Exhibit 10a), there is mention of the effect on adjoining properties in only one sentence, which is found at page 15. This conclusory sentence reads:

> Based on the result from our geotechnical technical investigation of the site and our review of the current plans for the proposed residence, it is our opinion that the geologic hazard area will be modified, or the development has been designed, so that the risk to the lot and adjacent property is eliminated or mitigated such that the lot is determined to be safe, provide that the recommendations in this report are properly implemented.

Prior to this one-sentence conclusion, there is no discussion of the risk to the adjacent property or how the adjacent property would be affected. Even an analysis of this sentence gives no comfort to adjacent property owners. The reference to mitigation of risk could certainly mean that the project would increase the risk to adjacent property but that the recommendations would reduce this increased risk – but that still a degree of increased risk to adjacent property would exist. The sentence in no way eliminated this ambiguity. More importantly, the sentence goes on to state, "such that the lot is determined to be safe." In this crucial part of the sentence, there is absolutely no mention that the adjacent property is determined to be safe. This omission is telling.

The GEO report of March 13, 2015 did not involve any new testing, but rather relied on two borings (B-1 and B-2) that GEO performed at the site 16 years earlier in 1999. "The borings were performed at the approximate proposed location [of] the proposed residence at the time of the investigation." (Exhibt 10a, p.1) After the borings in 1999, GEO prepared a geotechnical report, dated September 214, 1999. The latter report by GEO contains the following observation:

> There exists a potential that development-related disturbance of the soils at the base of the steep slopes along the southern part of the site may adversely affect stability of the site and the neighboring property to the south. (Testimony of Gordon Ahalt)

This sentence was omitted in the 2015 GEO's 2015 report.

On June 12, 2015, Perrone issued its peer review of the GEO report of March 13, 2015. On one occasion in the peer review report, Perrone made the following observation: "As such it is our opinion that the site is marginally stable and could pose a risk to public safety, health, and welfare of the owner and adjacent property owners if appropriate measures are not taken to mitigate construction impacts." Exhibit 11a, p. 2. There are subsequently eight pieces of correspondence authored by GEO or Peronne relating to the geotechnical review. **In none of this correspondence is there ever again any reference to the adjacent or neighboring property owners.** After June 12, 2015, the adjacent or neighboring property owners disappear from the GEO and Perrone radar scopes, and their focus is solely on means to protect the Applicant's proposed house from the hazardous steep slopes.

In a letter dated September 3, 2015, Perrone observed that GEO "geotechnical conclusions and recommendations are based on insufficient subsurface information." Exhibit 3b, p. 1. Perrone recommended that GEO provided further information on the steep slope. The steep slope in question is located at the far southern corner of Applicant's property. In a letter dated October 28, 2015, GEO reported that it had made a boring (B-3) at far southern corner. (Exhibit 10c, pp. 1-2) The exact location of boring B-3 is shown on the first plate to Exhibit 10c. This GEO report concluded:

> Based upon the results from the subsurface investigation and slope stability analysis that we have completed, it is our opinion that **the steep slope in proximity to the proposed residence location** is relatively stable in its current condition. However, based on the observed conditions, it also is our opinion that the slope is susceptible to shallow raveling or sloughing, particularly if it is disturbed by earthwork or significant clearing. With regard to larger-scale movements, we concluded that the slope has a low potential for failure in its existing condition over the short term. However, there is a potential for failure of the loose sandy soils in the slope over the long term, particularly during high-intensity seismic events or if exceptionally high groundwater levels develop in the sandy soils up the slope. (Exhibit 10c, p. 4)(emphasis added)

From this GEO recommended the placement a catchment wall with a minimum height of 6 feet above grade to protect the proposed residence from slides.

It is important to note that the opinion of GEO was limited to "the steep slope in proximity to the proposed residence location." The B-3 boring occurred at the extreme southern end of Applicant's property and a considerable distance from the steep slopes that extend along the long southwestern boundary of Applicant's property. See the King County iMap found in Appendix A of Exhibit 26. In addition, the degree of slope at the location of the B-3 boring is not nearly as steep as slopes on some of the adjoining properties. It was therefore understandable that GEO's opinion was limited to the slope in proximity to the proposed residence and did not extend to the much larger areas encompassing the steep slopes of adjacent properties.

On November 18, 2015, Perrone took issue with certain parts of the most recent GEO analysis. (Exhibit 11c) In response, GEO on February 4, 2016, revised its findings of October 28, 2015. Among other changes, it concluded that the height of the catchment wall should be increased from a minimum height of 6 feet to a minimum height of 8 feet[2]. (Exhibit 10d) Again, all of the attention now is focused on protecting Applicant's proposed residence from geologic hazards, but not a word is said about protecting adjacent properties.

At the hearing Mr. Chang of GEO made the conclusory statement that the fixed structures of the proposed project would actually decrease the geologic risk to the adjacent properties. He gave no analysis or proof for this conclusion. This statement was not even subject to cross-examination as the neighboring property owners did not have the right of cross-examination and the City Staff had taken the position that the scope of the hearing did not even include the geologic risk. Most importantly Mr. Chang's conclusory statement relating to the adjacent properties is in no way reflected in the reports and the extensive correspondence generated by

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[2] GEO also stated: "Protection of the residence from slope failure as identified from the slope stability analysis can be provided by constructing an engineered catchment/retaining wall at or near the base of the steep slope. The wall alignment should run south of the residence and continue around the southwest corner a distance of another approximately 20 feet." (Exhibit 10d, p. 3) See also Exhibit 11e, p. 1. In additional, GEO specified various technical requirements for the construction of the wall. See, e.g., Exhibit 11e, pp. 1-2. However, Applicant's final site plan, submitted on October 18, 2016, shows no catchment wall. See Exhibit 3b. Instead, there was testimony by Mr. Healey that the foundation wall would function as the catchment wall. It is understandable that Applicant may be very reluctant to use a separate catchment wall as it would presumably be more expensive. In addition, to explain to prospective buyers that the 8-foot catchment wall is necessary to protect the house from landslides would probably frighten most prospective buyers. However, there is absolutely no evidence in the record from GEO, Perrone, or anyone else that use of a foundation wall as the catchment wall would provide safety comparable to the 8-foot catchment wall located at or near the base of the slope and some distance from the house. Furthermore, the drawing submitted for the foundation level of the house does not appear to reflect a foundation catchment wall. See Exhibit 3c. As can be seen from the site plan, Exhibit 3b, the corner of the house faces the slope in question. Would the two sides of the foundation meeting at the corner each be a catchment wall? In short, Applicant has clearly deviated from the specific recommendations of GEO and Perrone. Applicant has provided no technical details concerning the proposed catchment-foundation, and there is not a scintilla of evidence that the catchment-foundation would provide safety equal to that of the free-standing catchment wall described in detail by GEO and Perrone. This is just another example of Applicant failing to meet its burden of proof.

GEO and Perrone in this case. If such a simplistic and conclusory statement provided a satisfactory answer to this key issue, one would expect that it would been stated in the extensive writings that are part of the record in this case. This simplistic and conclusory statement simply does not satisfy Applicant's burden of proof relating to the safety of the very steep slopes found on the adjacent properties.

Neither GEO nor Perrone mentioned at all the removal of trees at the site and the effect their removal would have on the stability of the area and the flow and amount of water at the site. The root system of these mature trees obviously helps to anchor the land and also to absorb large amounts of water. The arborist retained by Dr. John Stivelman spoke at the hearing about her concerns in this regard when testifying in opposition to the application. The arborist report submitted by Applicant specifies that 12 trees will be removed during the process of constructing the proposed residence. Five are within the building footprint, and seven are outside the footprint. Exhibit 24, p. 7. Nothing was said by Applicant's arborist about the effect of the removal on stability and water absorption. Peter Anderson, who has lived on the edge of the ravine since 1970, testified at the hearing that in almost every major storm one hears crashing of trees in the ravine. He stated that due to the instability of soil in the ravine area, a reasonable homeowner would feel compelled for safety reasons to remove any tree that could possibly hit the home. That would involve far more trees than the twelve. Applicant's arborist stated: "While there are many more trees on the property, fifteen trees were evaluated as part of this report." Exhibit 24, p. 3 Thus, Applicant's arborist made no evaluation of all of the trees that could hit the house if they fell. The failure of Applicant to cover the issue of the effect of the removal of trees is another deficiency in its application.

In conclusion Applicant has not satisfied its burden of proof with respect to establishing a reasonable use exception as to the geologic hazards, especially with respect to the steep slopes of neighboring properties. A reasonable use exception cannot be used as a justification for increasing to any degree the risk faced by neighboring property owners with respect to slides and other geologic hazards. For houses perched on the top of the steep ravine slopes, this is indeed a safety issue of great importance.[3] Exhibit 29 reflects the property values of the homes along the edge of the ravine and shows what is at stake for those property owners, compared to the value of Applicant's property. As stated above, the upstream ravine is indisputably a triple geologic hazard area – landslide, seismic, and erosion. The Mercer Island GIS Portal, referenced in the first GEO report, shows five known landslides in the upstream ravine. One witness at the hearing testified to his yard sinking. MICC 19.07.060 and MICC 19.07.060 make clear that a

[3] Because the City Staff found that the geologic hazards were not within the scope of Applicant's reasonable use exemption application, the staff report (Exhibit 1) did not discuss the merits of the geological hazard issues. In this regard the staff review stated: "The proposed reasonable use exception is limited to the impacts to the wetland area and the watercourse and the wetland buffer areas. The city concurs that there are no foreseeable threats to the public health, safety, or welfare resulting from the proposed reasonable use exemption." Exhibit 1, p. 10. Thus, the City has not taken any position to date on whether the application would involve any threats to health, safety, or welfare in regard to geologic hazards.

consideration of possible adverse impact on adjacent properties is a required part of a geotechnical report relating to geologic hazard areas. Although Perrone acknowledges on June 12, 2015, that the project "could pose a risk to public safety, health, and welfare of the...adjacent property owners," the adjacent property owners are never again mentioned in any of the many reports and letter generated by GEO and Perrone after that date. Testing is limited to the Applicant's property, and no testing is done or requested with respect to the adjacent properties. Indeed, it appears that representatives of GEO and Peronne never step foot on any of the adjacent properties. Rather, all of the attention of GEO and Perrone is directed to protecting the Applicant's home from the known landslide dangers. For these and other reasons advanced herein, Applicant has not met its burden of proof of establishing that there is no threat posed to the adjacent properties by its application.

IV. APPLICANT'S PLAN FOR DISPOSING OF THE WATER RESULTING FROM THE IMPERVIOUS SURFACES AND THE TREE AND VEGETATION REMOVAL IS BARRED BY THE TERMS OF CITY'S EASEMENT OVER THE PROPERTY OF THE DOWNSTREAM OWNERS.

As stated in the Staff Report, the two watercourses in question "flow into each other at the east end of the property and continue under East Mercer Way." (Exhibit 1, p. 3) After passing under East Mercer Way, the stream flows through the property of the three "downstream owners" – London, Graham, and Samms. Each of these owners protested the granting of a reasonable use exception in favor of Applicant. (Exhibits 6h, 6k, and 6o) For example, the protest letter by Robert Graham (Exhibit 6h) describes some of the very serious problems with this stream even before the project proposed by Applicant. Mr. Graham stated that the water has reached "two inches onto the siding of my house." Two of the downstream owners, Dr. Robert London and Mrs. Sharon Samms, testified against the application at the hearing. According to these witnesses, the third downstream owner, Robert Graham, was not able to make the hearing and authorized the two other owners to represent his interests at the hearing. All three downstream owners have asserted that diverting the waters resulting from the improvements proposed by the Applicant would violate the terms of the easement held by the City over their properties.

As an upstream owner, the City's easement over the property of the downstream owners is not applicable to my property. However, to the extent that the terms of the easement would show that the plans submitted by Applicant for disposal of increased runoff of water from his property could not be legally implemented, it would be grounds for denying the application which would be relevant to me.

The terms of the easement are set forth in Exhibit 14 and also in Exhibits 6h and 6o. It provides in relevant part as follows:

"The water which may be passed into the watercourse in existence on the Grantors' property shall be limited to water flows which result from conditions, diversions and improvements existing as of the date of the settlement agreement, May 31, 1984, including any and all siltation contained in said water flows in an amount not to exceed 50 cubic yards of siltation per calendar year."

Thus, increased water resulting from impervious surfaces and removal of trees and vegetation on the Applicant's property cannot be allowed to flow through the watercourse that is the subject of the easement. The Applicant's proposed improvement is simply not an improvement "existing as of the date of the settlement agreement, May 31, 1984," within the language of the easement. It should also be noted that the easement refers to "[t]he water" and the "water flows" and does not refer to peak flows. Thus, the terms of the easement would be violated if the total amount of water from Applicant's property would increase, even if the peak flows are not affected.[4]

At the hearing Mr. Summers testified that his project would actually decrease the amount of runoff from his property. There was no testimony or other proof as to how this would happen. There was testimony that water from the imperious surfaces would be directed to the detention vault. However, as the detention vault is a closed chamber, it difficult to see how evaporation or any other process would decrease the amount of water in the vault. What goes into the detention vault would need, at some point, to come out. Further, the water from the sloping driveway (1,463 sq. ft.) would apparently not be diverted to the detention vault, located under the surface of the top of the driveway, but to a catch basin (with no detention vault) at the bottom of the driveway. See Exhibit 3b. The removal of numerous trees, both inside and outside the footprint, would mean that their great absorption capabilities would no longer be present. No explanation was given as how the total amount of water leaving the site would be decreased, and it is extremely difficult to see how that could happen.

Even with respect to the detention vault, the final site plan (Exhibit 3b) does not comply with the vault dimensions specified by the Level 1 Downstream Analysis (Exhibit 23). At page 2-12 of the Analysis, it is specified that "a live storage volume of approximately 1,300 cubic feet would be required to provide level 2 flow control." The 1,300 cubic feet of "live" space would not include the additional "dead" space required below the metered outlet and above the overflow outlet. The "model outputs" required to achieve this are then set out in Appendix C of the Analysis. Appendix C in turn shows the minimum internal dimensions for the vault to "pass" would be 17.45 feet by 17.45 feet by 4 feet (or 5 feet to include dead space) – which is a very

[4] At the hearing, the Hearing Examiner stated that private settlement agreements are not within his jurisdiction, or words to the effect. Although the easement was the product of a settlement agreement, the resulting easement does reflect an interest in land and should be relevant in proceedings such as this. For example, a settlement agreement may result in the conveyance of land. Although the settlement agreement may not be admissible, the resulting deed should be relevant to prove who has an interest in property and what those interests are. Thus, it is respectfully submitted that the Hearing Examiner should consider the terms of the easement which are found in the three exhibits, even if the terms of the settlement agreement are not considered.

large vault. These figures obviously reflect the internal dimensions of the vault. If examines the final site plan and uses the scale on that plan, the external dimensions of the planned vault are only 10 feet by 15 feet. Its internal dimensions would probably be approximately 9.5 by 14.5 feet. If one assumes an internal depth of 5 feet, the capacity of the planned vault would be approximately 689 cubic feet for both the live and dead space – far below the required 1,300 cubic feet for live space alone. Furthermore, although the required capacity is stated in the Analysis, Applicant has never stated in any of its papers or testimony that it would comply with these required dimensions. It should also be noted that the detention vault on the site plan is to be buried partially on wetlands and partially on wetlands buffer. It would be only 12 feet from Watercourse B. If the much larger vault required by the Analysis is used, it would require a very large excavation in the wetlands and buffer and would be even closer to the stream.

Furthermore, Triad, the firm performing the Analysis, did not do its due diligence in investigating the facts. In determining whether there were any existing problems in the downstream area, it examined only the work orders in the City's drainage complaint log. These related primarily to problems with the settlement pond, referred to as the Glenhome Pond. The Analysis did not mention problems with the area of the stream between Glenhome Pond and Lake Washington and the key fact that the channel of the waterway flows extremely close to the Graham home. Most conspicuously, the documents examined by Triad did not include the letters from Graham, London, and Samms which were submitted to the City several months before Triad began its work. Presumably, Triad did not even know about them. The Graham letter (Exhibit 6h) refers to the waters of the stream reaching several inches up the siding of his house and refers to photos previously sent to the City. The Samms letter (Exhibit 6o) includes photos of the threatening water of the stream "taken during a typical spring rainfall." See also Exhibit 28[5]. In addition, there is no indication in the Analysis that Triad contacted the downstream owners to ascertain their experience with the watercourse. Triad's conclusion that the downstream conveyance system is adequate is simply based on an incomplete and inadequate investigation.

Applicant has simply not met its burden of proof of showing that its project will not affect the health, safety, and welfare of the downstream owners. Applicant should not be granted a reasonable use exception to the detriment of the downstream owners.

[5] These are the photos introduced by Dr. London at the hearing. One of the photos shows the plume of silt from the waterway extending far into Lake Washington. It should be noted from the foliage in the photo that the leaves are on the deciduous trees. Thus, the Google aerial photo was not taken during a severe winter storm, but rather during the good weather times of the year. One can image the plume during a winter deluge.

V. APPLICANT'S PLAN FOR PAYMENT INTO THE KING COUNTY WETLAND MITIGATION BANK DOES NOT COMPLY WITH MICC 19.070.080.

With respect to mitigation for the wetlands eliminated and adversely affected, Applicant proposes to make a payment into the King County wetland mitigation bank. However, this does not comply with MICC 19.070.080(D). This subsection provides:

> D. Alterations. Category III and IV wetlands of less than one acre in size may be altered if the applicant can demonstrate that the wetland will be restored, enhanced, and/or replaced with a wetland area of equivalent or greater function. In cases where the applicant demonstrates that a suitable on-site solution does not exist to enhance, restore, replace or maintain a wetland in its existing condition, the city may permit the applicant to provide off-site replacement by a wetland with equal or better functions. The off-site location must be in the same drainage sub-basin as the original wetland. [Emphasis added]

As can be seen, any off-site replacement must occur in the "same drainage sub-basin" and mitigation elsewhere in King County does not comply with this requirement.

At the hearing, the Applicant seemed to claim surprise that the Staff Report used this as one of the grounds to recommend denial of the application. However, Applicant should not be surprised. On July 29, 2015, ESA, the wetland peer reviewer, in its revised critical area report wrote as follows:

> MIMC [sic] 19.07.080.D allows for alternations of Category III and IV of less than one acre in size if the applicant can demonstrate that the wetland will be restored, enhanced, and/or replaced with a wetland area of greater or equivalent function. If suitable onsite mitigation is not available, offsite mitigation may occur, within the same drainage sub-basin as the original wetland. This requirement likely eliminates the use of King County's In-Lieu Fee program. (Exhibit 13a, p. 3) (emphasis added)

Later in the report, ESA summarizes its recommendations. One of those recommendations reads as follows:

> Additional wetland mitigation, to help ensure no net loss of wetland functions should occur offsite, but within the same drainage sub-basin as the impacted wetlands. (Exhibit 13a, p. 5) (emphasis added)

Applicant has had over one and one-half years to implement this recommendation of its own peer reviewer and has not done so. Applicant has had over two years to prepare for this reasonable use exception hearing and to get all of its ducks in a row. This matter should be decided on the present record and not delayed further.

VI. THE CONSTRUCTION OF A HOUSE ON THIS PROPERTY IS NOT A "REASONABLE USE."

By its very terms, the "reasonable use exception" requires that the use proposed by the applicant be "reasonable." Certainly, there is no axiom that the construction of a home is always reasonable on any piece of property regardless of the nature of the property. In this case the construction of a home on wetlands at the bottom of a steep unstable ravine, in a triple geologic hazard area, and in very close proximity to two streams, one of which can become a torrent (see Exhibit 6q), is not reasonable. This is not a case where limited exceptions are sought. Thus, Applicant is not simply seeking to build a house within the prohibited minimum wetland buffer, but rather to construct the house entirely on the wetlands. Applicant is proposing to construct the house not only within the buffer zone of one stream but two streams – one being extremely close to the proposed house. Even the latest house plans submitted by Applicant shows a house that exceeds the allowable building height. The magnitude and the number of regulatory exceptions sought by Applicant are very great. One reaches a point when a reasonable person concludes "that is too much," and that point has been exceeded in this case.

Applicant in its revised compliance document (Exhibit 9) states that the lot is zoned R-15. Applicant then lists the 13 uses that are "permitted outright" in the R-15 zone. One of these uses is: "4. Public Schools." No one could possibly contend that a construction of a public school in the wetlands at the base of a steep ravine in a known slide area is a reasonable use of this lot. It is therefore apparent that the mere listing of a use as "permitted outright" is not a governmental determination that each of these listed permitted uses is deemed reasonable for a lot so zoned. For the same reason it is clear that the listing of "single-family dwelling" as a use "permitted outright" does not mean that the City, in assigning R-15 to the general area including this lot, has carefully investigated the facts and determined that a single-family dwelling would be reasonable for the specific lot in question. Indeed, the letter from James Weber (Exhibit 6q) demonstrates that City officials considered the lot too hazardous for a residence.

It is also naïve to believe that the effect on the wetlands would be limited to the footprint of the house and the driveway. During storms and perhaps due in part to loose soil conditions, the ravine has been subject to frequent falling trees and large limbs. Property owners, including myself, on the rim of the ravine can attest to hearing crashes in the ravine during almost every large storm. For a home owner in the bottom of the ravine, this poses a real danger and will require even more environmental damage by the cutting of trees that could possibly hit persons or damage property. This is in addition to the trees cut for the construction. Because the house is located at the bottom of the ravine and at the base of a high hill to the south, an owner may also desire to clear trees to obtain more light. Especially for a family with children, it would be very hard to enforce a rule that all areas of the property are "off limits," except for the house and driveway. For a family with a dog, there would be some need to create a dog yard. For a gardener, there would be a continual temptation to create an area where gardening is feasible. These and similar natural and expected human activities for a landowner constitute further

threats to the wetlands. These constitute additional reasons why the construction of a house in the wetlands of this ravine is unreasonable.

The question is not whether modern technology can somehow construct a residence in the wetlands, but rather would it be reasonable to do so. The cumulative effort of all of the facts relating to this lot located in the wetlands at the base of a steep and unstable ravine compels a finding that a residence is not a reasonable use of this property.

VII. CONCLUSION.

In conclusion Applicant has the burden of proof with respect establishing each element of the reasonable use exception. It has not done so.

This Argument is intended to supplement the Staff Report and is not intended to duplicate the many valid points made in the Staff Report. It is assumed that the arguments to be filed next Monday by the City Staff will cover such points as reasonable uses with less impact or house sizes or locations with less impact. For the reasons advanced in this Argument and for the reasons advanced by the City Staff and any other persons opposing the application, it is respectfully submitted that Applicant's application for a reasonable use exception should be denied by the Hearing Examiner. This Argument is being submitted on behalf of my wife and me, and not on behalf of others.

Dated: February 21, 2017

Peter M. Anderson

Peter M. Anderson