**STATEMENT OF DAVID AND PETER ANDERSON IN OPPOSITION TO THE GRANTING OF A REASONABLE USE EXCEPTION IN CASES CAO15-001 AND VAR18-002**

## Introduction

David L. Anderson and his wife are the present owners of a home located at 9200 S.E. 57th Street, Mercer Island, situated on Lot 26, Mercer Firs. Although their lot does not directly abut on the lot owned by applicant MI Treehouse LLC ("Treehouse"), the Anderson lot is next to Lot 25, which is owned by Gordon Ahalt and his wife and which does abut the Treehouse property. Both the Anderson and Ahalt homes are situated on the south edge of a steep ravine. In this proceeding, Treehouse is seeking a reasonable use exception to build a single-family residence in the wetlands in the bottom of this ravine and in the setbacks from 2 type II watercourses.

From December 1970 to December 2018, the home on Lot 26 was owned by Peter M. Anderson and his wife Ann. On December 20, 2018, the home and lot were sold to David L. Anderson and his wife. David Anderson is the son of Peter and Ann Anderson. Peter Anderson and his wife continue to have a property interest in the home and lot through a mortgage that they hold on the property. Peter Anderson and his wife presently live on Mercer Island in a retirement community.

Peter Anderson has opposed the Treehouse application in this case since the very beginning. After the public notice of application, dated April 13, 2015, he filed with the City of Mercer Island ("City") on April 27, 2015 an objection to the application. (Exh. 6b) He appeared at the hearing before Hearing Examiner Ryan Vancil on February 13, 2017. After the hearing, Peter Anderson submitted a written post-hearing argument. (Exh. 35)

Since the first hearing, Peter Anderson has sent a number of written communications to the City providing factual information, documents, and arguments relating to this case. Relevant excerpts from these written communications, including the date of sending, have been collected in Exhibit B attached to a letter, dated July 2, 2020, from Peter Anderson to Evan Maxim. This July 2 letter was sent to Mr. Maxim in order to ensure that these communications were part of the record before the Hearing Examiner in the present hearing. The July 2 letter plus its exhibits are now the last part of Exhibit 54a. The documents found earlier in Exhibit 54a are the documents chosen by the City to include. Peter Anderson did not know the documents to be included by the City until the release of the City's staff report and recommendations on July 10. Therefore, there is some duplication of documents in Exhibit 54a.

Exhibit A to the July 2 letter are excerpts from the written comments made by David Anderson to Evan Maxim. Many of his comments relate to drainage issues on the Treehouse property. David Anderson is a licensed civil engineer in the State of Washington. He is president and principle of D.A. Hogan & Associates, an engineering firm which specializes in

providing consulting engineering, landscape architecture and project management services for sports fields and running tracks. The firm's work has included some of the major sports venues in the United States. See http://www.dahogan.com/. For sport fields, the handing of water and drainage is an important part of the firm's work.

This statement is intended to collect in one document the major facts and arguments upon which David and Peter Anderson rely in seeking a denial of the reasonable use exception application. This statement will also address the latest Staff Report and Recommendation (Exh. 61) which was not available until July 10, 2020. This statement is being submitted by David and Peter Anderson on their own behalf and not on behalf of any other persons.

## The Proceedings Before Hearing Examiner Ryan Vancil

On February 13, 2017, a hearing was held before Hearing Examiner Ryan Vancil with respect to the application in this case. Prior to the hearing, the City of Mercer Island through its then planning manager Evan Maxim issued a Staff Report and Recommendation in which the City recommended to the Hearing Examiner that the Treehouse application for a reasonable use exception be denied. This first report is now Exhibit 1. This first report contains certain findings and conclusions which are relevant to the present proceeding. These items will now be briefly discussed.

The first staff report stated that proposed home will have "a building footprint of approximately 1,631 square feet." (Exh. 1, p. 3) This is the same as in the second staff report and in the latest plan. (Exh. 38; Exh. 61, p. 3) The first report described the driveway as covering 1,463 square feet. (Exh.1, p. 3) In the second report, the driveway is increased to 1,560 square feet. (Exh. 61, p. 3)

At page 5 of the first report, there is a discussion of past permit activity with respect to the property in question prior to the purchase of the property by Treehouse. The report states that the prior land use applications "provide a context for evaluating the applicant's business expectations in acquiring the subject site." It states that a prior owner applied for a zoning variance in May 2004 and then later for a reasonable use exception. In June 2010, the prior owner withdrew all of the applications then under review. The report stated that the files relating to these earlier applications are "voluminous" and that Treehouse had indicated that it reviewed these files prior to the purchase of the lot.

At page 7 of the first report, the City finds that Treehouse "has failed to demonstrate that the property owner has lost economic value as a result of the application of critical area regulations." It notes that the "subject property was acquired for a sale price of $32,094 in September 2014" and that Treehouse "is aware of past efforts to build a single family home on the subject property." Therefore, "the City concludes that the sale price of the property reflects the property owner's awareness of past permit efforts on the subject property and property owner's reasonable business expectations in acquiring the property."

At page 8 of the first report, the City noted certain permitted uses for which the property has already been utilized. In this regard, it mentioned the driveway to access an adjoining

property, the public trail, and the private sewer. It stated that as a permitted use, a "private recreation area" could be designed to minimize impacts. On page 8, the City stated that a home could be designed over a two stall garage resulting "in building footprint of approximately 800 square feet or less."

After the hearing on February 13, 2017, Peter Anderson with the permission of Hearing Officer Vancil filed a 15-page written opposition to the Treehouse application. This document, which is Exhibit 35, was intended to supplement the facts and arguments made by the City and covered a number of different facts and arguments. Two of the points discussed in this document related to the failure of Treehouse to carry its burden of proof with respect to potential adverse impacts on adjacent and downstream properties.

At pages 4 through 11 of Exhibit 35, the potential adverse impact to the adjacent properties abutting the Treehouse property was discussed. In this section, it was stated:

> 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. [Emphasis in original] (Exh. 35, p. 7)

In Exhibit 35 at p. 9, it was stated: "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."

With respect to the potential adverse impact on the downstream properties, the written opposition submitted by Peter Anderson stated at p. 13:

> 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. 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.

Hearing Examiner Vancil issued his Finding, Conclusion and Decision on March 8, 2017. (Exh. 36) He remanded the case for a SEPA analysis and threshold determination and also for the completion of a critical areas analysis. (Exh. 36, p. 5) With respect to the latter, it is very important to note that Hearing Examiner Vancil found:

> The geotechnical report provided by the Applicant is not sufficient to determine if the project meets the reasonable use exception to the degree that it fails to provide an analysis of "potential adverse impacts to adjacent and down-current properties." (Exh. 36, pp. 4-5)

It is therefore clear that the Hearing Examiner held that a mere conclusory statement, such as made by Mr. Chang, is not sufficient and that more work needed to be done to provide a sufficient analysis with respect to both the adjacent and down-current properties.

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

As discussed above, the City in its Reasonable Use Exception Staff Report & Recommendation, dated February 13, 2017, placed considerable emphasis on the fact that Treehouse paid only $32,094 for the property and that Treehouse has not suffered an economic loss as a result of the regulations. (Exh. 1, pp. 5,7) In this earlier report, the City also stated that "the sale price of the property reflects the property owner's awareness of past permit efforts on the subject property and property owner's reasonable business expectations in acquiring the property." (Exh. 1, p. 7) However, the City in its latest report does not even mention the sales price except for a brief reference listing points made in the public comments. (Exh. 61, p. 6) The latest staff report also does not mention "economic loss."

It is true that the Code was amended in certain respects in August 2019. However, the element of economic loss is still 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]

This definition has not been recently amended except to change the Code number for the reasonable use exception to its new number.

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 used 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. The City in its latest report does in fact acknowledge the relevance of the definition by discussing it at page 8 of its report. (Exh. 61, p. 8) However, in its discussion, it choses now to ignore completely the parts of the definition emphasized above. Thus, there is no reference in the City's latest report to "economic loss" or the "regulation being unduly oppressive to the property owner" except for a brief description of the public comments. (Exh. 61, p. 6)

There is no excuse for this silence by the City except for the fact that these provisions do not support its current position. The City also does not explain the inconsistency between its analysis of Treehouse's business expectations in its first report and its latest report. 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.

In our case, there would be no "economic loss" experienced by Treehouse. Treehouse purchased a lot 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 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.

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 to this argument is that this second sentence 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's most recent report states: "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." 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 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 developer 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. As will now be discussed, there are other reasons for denying the application for a reasonable use exception as well.

## After More Than Three Years Following the Remand by the Hearing Examiner, Treehouse Still Has Not Provided an Adequate Analysis of the Potential Adverse Impacts to the Adjacent Properties

As noted above, Hearing Examiner Vancil in his remand of this case found that the report by Treehouse was not sufficient to the degree that it failed to provide an analysis of the potential adverse impacts to the adjacent properties. (Exh. 36, pp. 4-5) From this it is clear that the Hearing Examiner found that the prior reports and conclusory statements by Treehouse's geotechnical expert, GeoGroup Northwest ("GGNW"), were not sufficient. In the principal report of GGNW issued before the first hearing, GGNW made the following conclusory statement:

> "Based on the results from our geotechnical investigation of the project 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 site is determined to be safe, provided that the recommendations in this report are properly implemented." (Exh. 10a, p. 15)

In this report of March 13, 2015, there were numerous descriptions of the Treehouse property including test boring that had been previously made. The report included two site plans which include the Treehouse property and the house and part of the property of Dr. Stivelman, located to the southeast of the property. However, both site plans omitted any contour lines from lots 23 (Duchaine), 24 (then Weber), and 25 (Ahalt), although there was sufficient space on the plan to show the contour lines for those properties. Looking at the plans, one would have no idea the slopes rising from the Treehouse property line on lots 23, 24, and 25 are far steeper and higher than the relatively mild steep slopes leading to the Stivelman home. The result, whether intentional or not, is that a person reviewing those plans would focus on the relatively mild Stivelman slopes in considering the possible adverse impacts to adjacent properties and not on lots 23, 24, and 25. In the rest of this fairly long report, there was no reference to adjacent properties aside from the brief reference quoted above.

There are then three more reports from GGNW prior to the first hearing. (Exh. 10b, c, d) The report, dated October 28, 2015, discussed a new test boring conducted on a slope within the Treehouse property. (Exh. 10c) Based on these results, GGNW recommended construction of "an engineered catchment/retaining wall at or near the base of the steep slope south and southwest of the proposed resident location." (Exh. 10c, p. 4) In this report, GGNW stated that this wall should have a height of a minimum of six feet on the uphill side. In the GGNW report, dated February 4, 2016, GGNW stated that the wall should have a minimum height of eight feet on the uphill side and that it "should run south of the residence and continue around the southwest corner a distance of another approximately 20 feet." (Exh. 10d, p. 3)

As Peter Anderson pointed out to Hearing Examiner Vancil, a review of the documents disclosed that GGNW and its peer reviewer never stepped foot on the adjacent properties. They never requested permission to do so. They never conducted any testing on the adjacent properties. (Exh. 35, p.7) At the hearing, the representative of GGNW simply made the conclusory statement that the fixed structures of the proposed project would actually decrease the geologic risk to the adjacent properties. Hearing Examiner concluded that all of this was insufficient to provide an analysis of the potential adverse impacts to the adjacent properties.

In the subsequent three years, Treehouse has done nothing to provide an appropriate analysis relating to the adjacent properties. In the papers submitted by GGNW and its peer reviewer and in the plans submitted by Treehouse, lots 23, 24, and 25 remain a white blank. In fact, it appears that there is only one document submitted by Treehouse, its experts, or peer reviewers showing the contours lines of those lots. It is found in the King County iMaps attached as part of Exhibit A to the report of Triad, dated October 5, 2015. (Exh. 23, App. A) This report, prepared before the first hearing, did not relate to the adjoining properties but was rather a downstream analysis. The map was intended to show the areas drained by the stream. After the inclusion of the map in Appendix A, this topographical map was never referenced again.

It is hoped that the Hearing Examiner in this second hearing will carefully review this map. The map is very telling. One can compare the number and density of the contour lines on the slopes of lots 23, 24, and 25 with the contour lines on the slopes of the Treehouse property and the Stivelman property. The difference is startling. It is very apparent that the slopes on the former are far steeper and higher than the slopes for the later. Yet, the slopes on lots 23, 24, and 25 are essentially ignored by Treehouse, its experts, and peer advisors. To date none of them have in any way described these slopes, their elevations, their percentage slope, their vegetation, or anything else about them. To date, none of them have done any testing or field work on the adjoining properties or requested permission to do so. There is no indication that any of them have ever set foot on the adjoining properties.

These steep slopes are very relevant to this project. If one examines the contour lines within the Treehouse property, one can see that the elevations of the wetlands are substantially above the level of the stream. This is not a situation where the stream reaches a flat area and

forms a wetland. Rather, the wetlands are formed from water flowing from the bases of the steep slopes on lots 23, 24, and 25. This raises many questions. How does this water seepage affect the stability of these steep slopes? Do changes or disruptions in the wetlands affect the slopes which are the sources of the water for the wetlands? Does the removal on the Treehouse site of approximately a dozen trees, which anchor soil and absorb water, affect the stability of the slopes? There are other questions as well. None of these questions have been addressed or answered by Treehouse to date.

With respect to the steep slopes, it is important to note that this is a known landslide area. (Exh. 11a, p. 2) In Exhibit 6j, Eliyezer Kohen refers to the mudslides in the ravine and the great expenses required for repair. At the first hearing he described the sudden sinking of his yard. Peter Anderson, in his written post-hearing argument to Hearing Examiner Vancil, devoted an entire section of his argument to the slopes under the title: "Applicant has not Carried its Burden of Proof with Respect to the Safety of the Steep Slopes, classified as Geological Hazard Areas, of Neighboring Properties." This section of seven-pages discussed the safety issues related to these slopes in great detail. (Exh. 35, pp. 4-11)

Subsequent to the first hearing and the decision by Hearing Examiner Vancil, Peter Anderson has repeatedly stressed to Mr. Maxim of the City the need for Treehouse to respond to the remand of Hearing Examiner to provide a sufficient analysis of the potential adverse impacts to the adjacent properties. These are found in the record in Exhibit 54a, as, for example, the letter of July 4, 2018 (p. B-11), the email of March 15, 2019 (p. B-6), and the email of August 20, 2019 (p. B-5).

In the end, GGNW has made the following conclusory statements in its final report of October 23, 2019:

> The potential adverse impact to the uphill properties to the west and to the south is to excavate into the steep slope and undermine the slope. No excavation into the steep slope is proposed. The building pad will help drain excess water with the filter fabric protected crushed rock pad, and this will increase the stability of the slope at the west and south sides.
> ….
> Statement of Risk
>
> "The geological 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 site is determined to be safe."
>
> The comments by Shannon and Wilson ask for addressing the geologic hazards at the site, and we have addressed this issue that by having a stable building pad with cracked rock and filter fabric, such that the stability of the site is improved by providing improved drainage and stabilization of the building pad. The use of piling to support the proposed

> house mitigates potential liquefication affecting the house. There are no excavations into the steep slopes, and the house will be further protected by a catchment wall facing the steep slope. We conclude that the development will improve the stability of the house and lot such that development is determined safe. (Exh. 40d, p. 2)

These conclusory remarks simply do not satisfy the remand of Hearing Examiner Vancil to provide a sufficient analysis of the potential adverse impacts on the adjacent properties. From the documentation, it is apparent that GGNW has done no additional field work or research with respect to the steep slopes of lots 23, 24, and 25. It has never conducted any tests on them or requested to do so. The third boring performed on the Treehouse property is not the same area as the slopes on lots 23, 24, and 25, and one cannot say a priori that the results would be the same. There is no indication that a representative of GGNW has ever stepped foot on the slopes of lots 23, 24, or 25.

There is no explanation as to the conclusion that the only potential impact is to excavate the steep slopes. There is no explanation as to why the removal of water from the wetlands will increase the stability of the steep slopes. It is difficult to see how it is possible to reach such conclusions without actually conducting some form of study with respect to the slopes on these three lots and the waters flowing from their base. Indeed, a study of these steep slopes may even reveal that it is not safe to construct <u>any</u> home in the wetlands below them.

Subsequent to the GGNW report of October 23, 2019, the peer reviewer Shannon & Wilson wrote a letter to the City with the following comment:

> "GGNW provided a revised Statement of Risk stating the development will improve the stability of the house and the lot such that the site is determined to be safe. They state that the construction of the building pad, pipe pile foundation, and catchment wall will mitigate or eliminate the geologic hazards present at the site. The Statement of Risk addresses the landsliding and seismic hazards present at the site." (Exh. 41b, p. 1)

It is important to note that the comments by Shannon & Wilson only addressed the safety of "the site." It stated nothing about the safety of the neighbors.

In a previous letter, Shannon & Wilson lists in detail all of documents reviewed by it. (Exh. 41a) There is no reference in the letter which indicates in any way that the Treehouse site was actually visited by Shannon & Wilson. In the documents listed there is nothing which shows in contour lines, photos, or descriptions the sleep slopes of lots 23, 24, or 25. The Triad report, which did include a topographic contour map showing those three lots, was not in the list of documents reviewed. The letter does refer to the site plan dated August 9, 2018, but this, like all of Treehouse's site plans, does not show the topography of the three lots. The comment letters from Ahalt, Weber, and Duchaine to the City were not on the list.

It is very likely that Shannon & Wilson assumed that the steep slopes of primary concern were those on the property of Treehouse and Stivelman. This assumption is further strengthened by the GGNW statement in its October 23 report that "the house will be further protected by a catchment wall facing the steep slope." As can be seen from the latest site plan (Exh. 38), the catchment wall is facing the steep slope below the Stivelman home. This could certainly lead Shannon & Wilson to focus its review on the Stivelman slopes and not elsewhere.

It is also important to notice that the catchment wall built into the home faces the southeast and does not face the really high and extremely steep slopes on the southwest. Thus, this built-in wall does not provide complete protection from a landslide coming from lots 23 or 24. As mentioned earlier in our statement, GGNW had recommended in 2015 "an engineered catchment/retaining wall at or near the base of the steep slope south and <u>southwest</u> of the proposed resident location." (Exh. 10c, p. 4)(emphasis added) Thus, there would be a 6-8 foot catchment wall on the Treehouse property at the base of the steep slope originating, for example, from the Duchaine property (lot 23). The wall would be facing the Duchaine property and would help prevent a landslide from the property ever hitting the Treehouse residence. There is no indication that Shannon and Wilson was informed of the nature of the very steep slopes on lots 23, 24, or 25 or focused its attention on them.

No reason has ever been given for the abandonment of the original plan of GGNW. One can guess that the reason is that a high wall in this location to prevent the house being hit by landslides would certainly scare prospective buyers. Instead, a catchment wall is built into the home where it is less noticeable. However, it does not face the right direction to provide good protection from the really high slopes. Furthermore, a wall built into a house allows a landslide actually to hit the house. A wall at the base of the really high slopes means that the house itself may never be touched by the landslide. Even more importantly, a wall at the base of the very steep slopes would protect persons, and perhaps even playing children, who may be outside and near the house. A catchment wall built into the house would provide absolutely no protection to persons outside the home. Safety has been sacrificed.

Treehouse has the burden of proof with respect to establishing the necessary elements for a reasonable use exception. MICC 19.07.140 (B). One element is that the "proposal does not pose an unreasonable threat to the public health, safety, or welfare on <u>or off</u> the development proposed site." MICC 19.07.140 (A) (4); (emphasis added). With respect to the threat off the site, Hearing Examiner Vancil found that Treehouse reports have failed to provide a sufficient analysis of the potential adverse impacts to adjacent properties. Since that time, Treehouse has done no work, studies, or research, but has simply reworded its prior conclusory statements. Peter Anderson has repeatedly reminded the City of the terms of the remand and urged that a sufficient analysis be prepared. However, all of this has fallen on deaf ears.

Treehouse has now had over three years to respond to the remand and provide a sufficient analysis. It has not done so. After all of this time, Treehouse should not be given a further opportunity. The application should be denied.

**After More Than Three Years Following the Remand by the Hearing Examiner, Treehouse Still Has Not Provided an Adequate Analysis of the Potential Adverse Impacts to the Down-current Properties**

In addition to the adjacent properties, Hearing Examiner Vancil also remanded this case because Treehouse's report failed to provide an analysis of potential adverse impacts to down-current properties. (Exh. 36, pp. 4-5) Treehouse proposes to divert all of its runoff and drainage waters into the main stream that runs through the ravine. The "down-current properties" refer to the properties through which the stream passes east of East Mercer Way before entering Lake Washington. The down-current properties were originally one piece of property owned by James O'Sullivan and his wife Dorothy, whose waterfront home address was 5636 E. Mercer Way.

In 1982 Mr. and Mrs. O'Sullivan filed a lawsuit in King County Superior Court against the City for the flooding of their home by the stream. In May 1984 the City entered into a settlement agreement with Mr. and Mrs. O'Sullivan which provided, among other items, a drainage easement which limited the amount of water and silt that the City could channel though the O'Sullivan property to Lake Washington. The City's copy of the original settlement agreement is attached as Exhibit E to the Anderson letter of July 2, 2020. (Exh. 54a) A certified copy of the recorded drainage easement is found as the very last document in Exhibit 54a. The settlement agreement is simply background information, but the recorded easement is the operative legal document which currently governs the flow of water in the stream over the down-current properties. The City does not dispute the existence of this easement. (Exh. 61, p. 5) By its express terms, the drainage easement "shall run with the land."

In approximately 1999, the O'Sullivan property was subdivided into three lots and sold. At the time of the commencement these proceedings in 2015 and at present time, the original O'Sullivan home (5636 E. Mercer Way) and waterfront property were and are owned by Robert Graham and his wife. In 2015 Mr. Graham objected to the Treehouse application and requested the City to "refrain from any action that would add to this already overwhelmed watercourse." (Exh. 6h) He also stated that the project would add water to the watercourse and that this is prohibited by the legal agreement entered into by the City. In an attachment dated May 2014, he stated that the waters of the stream had gone two inches onto the siding of his house. He also referred to the silt and erosion caused by the stream.

The property adjoining and to the west of the Graham property was and is owned by Robin Samms and his wife (5634 E. Mercer Way). His objection to the application is Exhibit 6o. He states that the watercourse "is already at capacity during the rainy months." He attaches three photographs of the stream "taken during a typical summer rainfall in April 2014." The third photo shows the stream flowing approximately one foot from the Graham living room. As can be seen, if the level of the water rose even slightly, it would be flowing into their living room. The second photo shows the stream going over a waterfall on the Samms property. It appears that the waterfall in the Samms property and the channel by the Graham home had been

constructed by Mr. O'Sullivan. Mr. Samms states that the consistent increase of water flow, mud, and silt are in violation of the City's drainage easement. He raises the question of the fish habitat resulting from the flow of mud into Lake Washington.

The third property (5632 E. Mercer Way) was owned by Dr. Robert London and his wife. It is a large lot which extends to E. Mercer Way with the stream and a steep ravine running through it. Their object to the application is Exhibit 6k. They state that they "have been severely adversely affected by increases of water flow and significant erosion caused by this." They refer to the "reduction in percolation" that will be caused by the project and the increase in flow in violation of the drainage easement. One of the photos attached to the objection of Mr. Samms shows the settlement pond ("Glenhome Pond") located on the London property. At the hearing, Dr. London introduced a Google satellite photo showing the silt flowing into Lake Washington from the stream on a sunny summer's day. (Exh. 28)

Both Dr. Robert London and Sharon Samms testified at the first hearing. Robert Graham was not available for the first hearing, but he authorized Dr. London and Mrs. Samms to represent his interests at the hearing. Again, they strongly opposed the Treehouse application. Peter Anderson in his written opposition submitted to Hearing Examiner Vancil after this first hearing pointed out the failure of Triad, the firm that performed the downstream analysis for Treehouse, to perform its due diligence in investigating the facts. (Exh. 35, p. 13) For example, with respect to existing drainage problems in downstream area, Triad only examined the work orders in the City's drainage complaint log. These related primarily to problems relating to the Glenhome Pond. There was no mention of the stream passing extremely close to the Graham home. There was no mention of the written comments in this case previously made by owners of the downstream properties nor were these owners ever contacted by Triad. Peter Anderson also pointed out that there was no explanation as to how the waters on the large driveway below the elevation of the proposed detention vault would be handled or how the removal of trees on the Treehouse property would affect the amount of water flowing from the property. (Exh. 35, p. 12)

As in the case of the adjacent properties, Hearing Officer Vancil in his remand found that the applicable Treehouse expert report was insufficient in that it failed to provide an analysis of the potential adverse impacts to the down-current properties. (Exh. 36, pp. 4-5) However, after the lapse of more than three years, Treehouse has again failed to provide a sufficient analysis. It has also failed to reconcile its drainage plans with the terms of the City's drainage easement for waters flowing over the downstream properties. The subsequent Treehouse reports will now be discussed.

On January 9, 2018, Triad submitted a report that essentially stated that all of the answers had been provided by the Triad report of October 5, 2015. (Exh. 60) This obviously did not satisfy the remand as Hearing Examiner Vancil had in effect found the 2015 Triad report was insufficient. On March 8, 2018, Sewall Wetlands Consulting, Inc. ("Sewall") issued a revised critical areas report. (Exh. 42b) Under the heading "stormwaters" on page 13, it states:

> Stormwater from the new impervious surfaces on-site will be collected in a stormwater vault under the driveway and discharged to an existing culvert along the east end of the driveway. This water will then drain through the existing roadside ditch tpo [sic] the stream. This should mimic existing drainage patterns on the site.
>
> Once approval of the proposed conceptual mitigation is received, a final detailed mitigation plan will be provided to the city for review and approval.

This again says nothing more than was contained in the original Triad report. It says nothing about the waters on the large impervious driveway which is below the level of the detention vault. It says nothing about the effect on water on the property resulting from the removal of trees.

Treehouse then changed horses and substituted Core Design ("Core") for Triad. Core wrote its first report on March 23, 2018. (Exh. 50a). It referred to the stream having a siltation problem throughout the years and recommended certain measure to mitigate this problem during construction. With respect to the permanent condition, the report states:

> The proposed project is unlikely to impact siltation or flooding in the watercourse in the permanent condition. Refer to the *Revised Critical Areas Report* [Exh. 42b] for more information and detail regarding permanent impacts and proposed mitigation.

The simple conclusion that project is "unlikely to impact siltation or flood" does not constitute an analysis, and as discussed above, the Sewall revised critical areas report adds nothing new. The use of the word "unlikely" in fact implies that there is indeed a possibility for the project to impact flooding and siltation.

Beginning on November 15, 2018, David Anderson, a licensed civil engineer whose projects involve drainage and water issues, sent a series of five written communications to Mr. Maxim of the City. These written communications have been collected and made Exhibit A to the July 2, 2020 letter of Peter Anderson. (Exh. 54a) Among other points, these communications refer to the waters that will bypass the plan detention vault. For example, with the detention vault being located under the highest portion of the driveway next to the home, "nearly all of the stormwater runoff generated by the driveway would effectively bypass the collection and detention system effectively flowing down to the existing driveway pavement and into the existing collection system on the west side of East Mercer Way without being detained or treated." (Email of 11/15/18) It should be noted that the area of the driveway is 1,560 square feet, almost as large as the proposed footprint of the house which is 1,631 square feet. (Exh. 61, p. 3)

The written communications from David Anderson also discussed the drainage that would be required with respect to the retaining/catchment wall that would constitute one side of

the proposed home. Drainage would also be required for the building's foundations and other walls by the driveway. There is no plan to divert these waters into the detention vault, and it would appear impossible to do so. Treehouse suggested that the waters from the retaining/catchment wall on the house would be diverted into a "spreader" that would empty the water into the wetlands. David Anderson observed that the relevant elevations of the land would not permit this. (Email of 3/22/19) However, the Treehouse's suggestion of a "spreader" means that the waters would not go into the detention vault. David Anderson also discussed the fact that the detention vault itself and the retaining wall would act as a "sink" and draw waters into them. (Letter of 8/24/19) All of this shows how naïve it was for Triad to assume that all of the waters generated by the project would flow into the detention vault.

Core in its letter of February 21, 2019 does not dispute a single point raised by David Anderson. (Exh. 50b) It states in part:

> All points raised by Mr. Anderson and ESA are valid and worthy of consideration. Most of the solutions would typically come during the final engineering or building permit stage. In the final design process, project team expects to demonstrate full compliance with City code and standards and provide appropriate mitigation measures so that there is no significant adverse impact on the environment.

It also states: "Mr. Anderson is correct that eliminating bypass area on this project is likely infeasible." In essence, Core acknowledges the many problems facing the Treehouse project, but states that it will address these problems in the final design stage with the assistance of a hydrogeologist.

In a letter of October 3, 2019, GGNW sought to provide an answer to the potential adverse impact of the Treehouse project on the downstream properties by the following terse statement:

> The potential adverse impacts to downhill properties that are across East Mercer Way include potential water and mud that can flow across the street and impact downhill properties. However, the stream analysis performed by Triad indicates that actual problems downstream exist when debris clogs the catch basins along the street below the street. Maintenance of the catch basins across the street is the responsibility of the City of Mercer Island. With the development of the property the issue of debris and water discharged from the property to the Street is eliminated or minimized. (Exh. 40d, p.2)

This statement by GGNW simply demonstrates the ignorance of GGNW of the downstream properties which it apparently has never visited. GGNW apparently has never read the comments of the downstream owners in this case or is unaware of the final course of the stream. For example, it is clear that the serious problems faced by the Grahams is not clogged basins preventing the flow of waters in the stream, but by too much water entering the stream on their waterfront property.

In the final Shannon and Wilson peer review of November 25, 2019, the remarks relating to the potential adverse impact to the downstream properties is limited to the following:

> However, they [GGNW] do not clearly state how the erosion hazard will be addressed. Item No. 2, in the report, states downstream problems exist when mud and water flow across the street and impacts downhill properties and debris may clog catch basins along the street. They indicate that the City of Mercer Island is responsible for maintaining the catch basins and debris and water discharged from the property to the street is eliminated or minimized. GGNW does not provide an explanation on how the hazard is eliminated or minimized. (Exh. 41b, p. 1)

From this, it appears that Shannon and Wilson is referring to mud and water flowing across E. Mercer Way and clogging catch basins along E. Mercer Way. No one contends that this is the problem. In defense of Shannon and Wilson, it appears that the peer review firm was given very little information concerning the downstream properties. This can be seen from the documents which it reviewed and which are listed at Exh. 41a, pp. 5-6. For example, it is apparent that the firm did not see the comments from the downstream owners or the photographs attached. The firm was also not given a copy of the drainage easement which governs the conditions that the City can pass drainage waters into the stream and over the downstream properties. Even so, Shannon and Wilson found the GGNW deficient in that it did not address the erosion hazard.

From all of this, it is crystal clear that Treehouse has not provided a sufficient analysis of the potential adverse impacts to the downstream properties as required by the remand of Hearing Examiner Vancil. There are many unresolved questions. It is very apparent that the impact on the downstream properties hinges on the amount of water and silt flowing through the stream. One cannot determine the amount of water and silt that the Treehouse project will produce without knowing how the water on the project will be handled. It is clear that the amount of water sent to the stream with the Treehouse project will be greater than the amount under natural conditions. Under natural conditions, not every drop of water falling on the proposed footprint will end in the stream. A substantial amount of precipitation would be lost through ground percolation or absorbed by trees or other vegetation and never reach the stream. With the impervious surfaces of the Treehouse project, almost all of the water will end in the stream.

The failure of Treehouse to provide necessary answers can be seen in considering the example of the large impervious driveway and the waters from that driveway. The issue of the driveway was raised by Peter Anderson in his written submission to Hearing Examiner Vancil in February 2017. (Exh. 35, p. 12) The issue was repeatedly raised again by Peter Anderson in written communications with Mr. Maxim of the City. See emails of 8/23/19, 11/18/19, 1/27/20 (Exh. 51a at "Exh. B") The issue of how the waters of the driveway would be handled has simply been ignored by the City and by Treehouse and its experts and has never been answered. One cannot answer the question of the impact on the downstream properties without knowing how waters would be handled on large impervious surfaces such as the driveway.

The City in its most recent report and recommendations makes no findings as to whether the proposed project has a potential adverse impact on the downstream properties or even the adjacent properties. (Exh. 61) In this regard, it simply ignores the remand of Hearing Examiner Vancil on this point. With respect to health, safety, and welfare off the site, the City states: "No threats to public health, safety, or welfare on or off the development proposal site have been

identified." (Exh. 61, p. 12) In this regard, it acts as if the many pages of communications by neighbors did not exist.

Instead, the City is essentially now saying that it will consider the impact questions later during the final design phase of the Treehouse project. It does this by the conditions that it seeks to establish as part of the granting of a reasonable use exception. This is reflected in the following proposed conditions:

> B. Prior to issuance of construction permits authorizing site grading or other construction work, the applicant shall provide a revised Statement of Risk, for City review and approval, related to erosion hazards, potential adverse impacts, and recommended measures that will eliminate or mitigate the risks as described in Exhibits 41a and 41b.
>
> C. Prior to issuance of construction permits, authorizing site grading or other construction work, the applicant shall provide an updated critical areas study and construction plan set (as described in Exhibit 43d) for City review and approval, that:
>
> > a. Further evaluates impacts and mitigation for critical areas associated with the proposed drainage, conveyance and detention system;

The referenced Exhibits 41a and 41b are the two reports by Shannon and Wilson, which we have previously discussed. Exhibit 43d is the ESA report.

In considering paragraph B above, it appears that the future Statement of Risk issued prior to the issuance of construction permits must include an evaluation of the potential adverse impacts to the adjacent and downstream properties. With respect to paragraph C, this paragraph requires an updated critical areas study that addresses all of the issues relating to the handling of the waters on the project. In essence, what the City is seeking is to delay the evaluation of the possible adverse impact on the adjoining and downstream properties to the final construction permit stage of the project. These crucial issues would then be subject to the "City review and approval."

This would mean that the issues remanded by Hearing Examiner Vancil relating to adverse impact would not be decided by the Hearing Examiner in the present hearing but by the City alone at a latter time. Putting off the decision on these issues is perhaps an implicit acknowledgement that Treehouse has not yet given satisfactory answers to the key questions relating to adverse impacts to adjacent and downstream property owners. The postponement would mean that the decision on the issues would be not be made in a public hearing with the participation of neighbors. In effect, the City is telling Hearing Examiner Vancil that it need not comply with this portion of his remand, but will decide the matter on its own at a later date.

It is the position of Peter and David Anderson that Treehouse has the burden of proof in this proceeding including the health, safety, and welfare issue of the adverse impact of the proposed project on the adjacent and downstream owners. Treehouse has had over three years to do its necessary work on this issue and has utterly failed to prove the absence of adverse impacts. It should not be given additional time to do so. The application for the reasonable use exception should be denied.

It should also be noted that the drainage issues and the impact on the downstream properties does not only involve compliance with various governmental drainage or stormwater codes and regulations. Treehouse proposes to divert its waters in the stream. The right to do so is dependent on the terms of the City's recorded easement over the downstream properties. It is apparent that Mr. O'Sullivan was very concerned about the waters that run so close to his home, carries so much silt, and erodes his property. The easement which he demanded and to which the City agreed is therefore very restrictive. It provides in relevant part:

> 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.
>
> The Drainage Easement granted herein shall continue to exist so long as needed by Grantee and so long as Grantee does not divert water from any other drainage basin into the drainage course on Grantor's property other than water that was flowing into the watercourse as of May 31, 1984….
>
> This Drainage Easement shall run with the land…. (Exh. 54a, last document)

It is important to note that the easement refers to "water flows" and not "peak flows." The City is a sophisticated party, and if the parties meant peak flows, they would have said so. Instead, the easement restricts the total amount of water passed through the stream. Although not applicable to this case, the easement provides that it will cease completely if the City diverts water from another drainage basin into the stream. In that event, the City would have no easement at all.

The right to assert the terms of the easement belongs to the downstream property owners and not to the upstream property owners such as David Anderson. However, the downstream property owners have clearly asserted their rights as shown by their comments and testimony in this case. The City in turn has an obligation to abide by the terms of the easement and not approve drainage plans that would violate the terms of the easement. In view of the already overburdened nature of the stream that is the subject of the easement, it is extremely difficult and most likely impossible for Treehouse to devise a drainage plan that would comply with the terms of the City's easement over the downstream properties. Because of the impermeable surfaces, the total amount of the water passing through the stream will be increased because the natural loss of water through percolation and absorption by trees and vegetation on these surfaces will be eliminated. This increase in the amount of water flowing into the stream in turn violates the terms of the easement. This is another reason why this project should not be allowed and why the reasonable use exception should be denied.

## Treehouse Has Not Satisfied the Criteria Listed in MICC 19.07.140

It should be initially noted that the sentence immediately before the listed criteria has been modified in the recent amendments to the reasonable use exception. The prior version read:

"The hearing examiner will approve the application if it satisfies all of the following criteria." The use of the word "will" showed that approval of application was mandatory if all the criteria have been satisfied. In contrast, the current version reads: "The hearing examiner may approve the application for a reasonable use exception only if the development proposal meets all of the following criteria." The former version used the word "will" while the current version uses the word "may." The implication is that the hearing examiner is now given more discretion and may deny the application even if all of the criteria are satisfied. However, in our case, it is clear that all of the criteria have not been satisfied.

It is again extremely important to note that Treehouse has the burden of proof with respect to the criteria. Thus, MICC 19.07.140 (B) provides: "The applicant has the burden of proof in demonstrating that the above criteria are met." Treehouse has not carried this burden.

The first criterion is that application of the environmental chapter would deny all reasonable use of the property, while the second is that "there is no other reasonable use with less impact on the critical areas." The City found in its first staff report that there were other reasonable uses with less impact, and its findings in this regard were correct. It should be noted that reasonable use is not limited by a consideration of the nature of applicant's particular business or where the applicant has a primary residence. Rather, it is a question of whether the property would have a reasonable use for anyone. As previously discussed in our statement, there are various reasonable uses that adjoining property owners or neighbors could put the property. It could be used for the construction of a smaller structure for the storing of cars or boats. It could be used for construction of a small guest cottage. It has already been used for a public trail and a driveway easement. For the City, it could be used as a very nice addition to the existing open space, and its acquisition could allow the entire length of the public trail to be within a protected natural space. All of these and other options may be very attractive to others especially in view of the very low fair market value of the property and the resulting low taxes. As the City acknowledged in its first staff report, a reasonable use may exist even if it is not the "highest and best use." (Exh. 1, p. 8)

In considering various reasonable uses for the property, one cannot conclude that the only reasonable use to be considered is a single-family residence in view of the zoning of the lot as R-15. The designation R-15 also includes public schools and community centers. (Exh. 49) It would be absurd to contend that because of the designation R-15, it would be a reasonable use to build a public school or community center on the Treehouse lot. For the same reasoning, it cannot be argued that the R-15 designation dictates that construction of a single-family residence on this lot is a reasonable use. It should also be noted that the zoning is not designated by a lot by lot investigation by the City, but rather it is the designation of a very large area covering perhaps 90 percent of the Island. (Exh. 48)

The use of the property for the more limited purposes mentioned in the preceding paragraph would not violate the zoning. The circumstances relating to the original zoning are discussed by James Weber in Exhibit 6r. Although not expressly mentioned in the 1977 short plan, the owner of property verbally acknowledged at that time that the lot was not safe for human occupancy. It should also be observed that in 1977 the lot did not have on its eastern

portion a driveway to the adjoining lot. Without this driveway, there was more room for a building away from the wetlands. Furthermore, in 1977 there were less concerns with respect to environmental impacts.

Mr. Summers when he purchased the lot was not misled by the zoning of the lot. As found by the City in its first staff report and as discussed earlier in our statement, he was fully aware of the prior unsuccessful attempts to obtain City approval for construction of a single-family residence. This included a prior attempt to obtain a reasonable use exception. His reasonable business expectations must be shaped by this reality.

In addition, the building of a single-family residence on this lot is not even reasonable. Although the ravine is beautiful as viewed from above, it is a very inhospitable and hostile environment in which to live. Peter Anderson testified at the first hearing that in almost every major storm one hears the 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. On March 15, 2017, a month after the hearing, Peter Anderson sent an email to Mr. Maxim that stated in part:

> I walked up the trail in the ravine very recently and saw that one or more trees, a considerable distance from the house, have fallen during the recent snow storm and would have hit, as far as I could determine, the home if it were there. It is very graphic evidence that the point that I made has merit. Attach are a few photos that I took. The removal of trees scheduled for removal plus those that would have to be removed for safety reason would obviously mean less absorption of water by trees and less stability. (Exh. 54a at "Exh. B)

It is also our understanding that there are tall trees on or at the base of the steep slopes off the property of Treehouse which could hit the proposed residence if they fell. If these trees were removed for safety purposes, it would in turn further destabilize the steep slopes. Interestingly, the report of the Treehouse arborist evaluated only 15 trees on the property even though the report acknowledged that "there are many more trees on the property." (Exh. 24, p. 3) The trees examined were the 12 trees to be removed as part of the project and a few others very close to the house and driveway. No examination was made of trees with the potential of hitting the home.

The proposed house is at the base of very high steep slopes in a ravine that is a known landslide area. It is also an area that experiences earthquakes and will probably experience the expected "big one" that will finally hit the Seattle area. Although the recommendation was abandoned by GGNW for some unknown reason, GGNW originally recommended a wall with a height of eight feet at the base of the slopes to protect the house from landslides.

Living in a wetland is also an unhospitable environment. If one looks at the current site plan, the stairs from the deck descend to the muck of the wetlands. (Exh. 38) To believe that the family, with perhaps children and pets, will limit their movement within the wetlands to a few

feet from the home is entirely unrealistic. Also the high slopes to the south of the proposed home will prevent the sun from hitting the home for much of the year.

As stated above there are clearly reasonable uses which have a lesser impact that the proposed home. In fact a home in this inhospitable and sensitive environment is not reasonable.

The third criterion is that "any alteration to critical areas and associated buffers is the minimum necessary to allow for reasonable use of the property." The linked definition of "alteration" shows that term includes any human-induced action that impacts the existing condition of the area including draining. The failure of Treehouse to complete its homework means that the Hearing Examiner really is unable to make his determination on this criterion. For example, one does not know the exact extent that the detention vault and various retaining walls will drain the wetlands. Civil engineer David Anderson in "Exhibit A" of Exhibit 54a gives a reasoned and detailed explanation for his opinion that the vault and walls will drain areas of the wetlands. On the other hand, Treehouse does not concede that there will be a "sink" effect, but seeks to postpone consideration of the matter until the final construction permit stage. How can one say that the alteration is the minimum necessary when one does not know the exact nature and extent of the alteration? One cannot satisfy the various criteria by requesting the granting of a reasonable use exception with, for example, the condition that the applicant will limit any alterations to the minimum necessary for the project. The result of such a scheme is that it removes this issue from the review of the Hearing Examiner and means the Hearing Examiner grants a reasonable use exception without really ruling on this criterion. The failure of Treehouse to establish the extent of the alteration, such as draining, means that Treehouse has not satisfied its burden of proof with respect to this criterion.

The fourth criterion is that the "proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site." Certainly, the remand by Hearing Examiner Vancil with respect to potential adverse impacts to the adjacent and downstream properties relate to this criterion. If there is a threat of losing a part of the very steep and high slope on which one's house is perched or of having one's house flooded or having one's property adversely impacted by erosion and silt, there is clearly a threat to public health, safety, or welfare. As discussed in detail in two earlier sections of this statement, Treehouse has not satisfied its burden of proof of establishing the absence of such adverse impacts. It has essentially ignored the remand.

As in the case of alterations, one cannot delay a determination of these potential adverse impacts until after a reasonable use exception is granted through the utilization of a condition. For example, the impact on the downstream properties cannot be determined until one knows how the waters on the Treehouse property will be handled. Treehouse and apparently the City contend that the answers to this important issue will be determined after the granting of a reasonable use exception and during the final approval stage of a building permit. This essentially withdraws a consideration of the water issues from the Hearing Examiner and means that he is not fully ruling on the fourth criterion.

Treehouse has also not even satisfied the safety element with respect to its own property. The retaining wall built into the house does not face the really high and steep slopes to the south and southwest of the property. Rather, the wall faces the southeast (toward the Stivelman residence) and does not afford protection for parts of the house. (Exh. 38) The retaining wall built into the house also does not afford any protection from landslides to the family members or others who might be outside the house. On the other hand, the original GGNW recommendation was a wall away from the house and "at or near the base of the steep slope south and southwest of the proposed resident location." (Exh. 10c, p. 4)(emphasis added) This would give protection to the entire house and people outside the home. No explanation has been given for abandoning this far safer plan.

A boring was done by GGNW on the Treehouse property on the relatively mild steep slopes below the Stivelman house. (Exh.13c) GGNW concluded that the slope at the location of the boring was "relatively stable," but "there is the potential of failure of the loose sandy soils in the slope over the long term." (Exh. 13c, p. 4) However, neither GGNW nor anyone else has done any study of the really steep and high slopes to the southwest. Because the site plans and other documents have omitted information and even contour lines for these high properties to the southwest, the focus by Treehouse's experts and peer reviewers has been on the Stivelman slopes.

One cannot say that testing on the high slopes to the southwest would yield the same results as the testing on the slopes below the Stivelman home. In contrast to the Stivelman slopes, the southwest slopes may well be far less stable. This could be due to the large amount of water coming from their base. There have already been landslides in this ravine before. Testing and study of the slopes to the southwest may result in a finding that any house constructed near the base of these slopes would not be reasonable and would involve an unacceptable safety risk to the house and persons below. Treehouse has done no work in this regard and has not satisfied its burden of proof that the site would be safe.

There is also the threat of trees falling on or in the vicinity of the proposed home. Removal of these trees would further adversely affect the wetland areas. Trees on the steep slopes to the southwest could not be removed without further destabilizing those very steep slopes. Again, the safety factor has not been satisfied.

The fifth criterion is that "the proposal is consistent with the purpose of this chapter and the public interest." This criterion has already been discussed at length earlier in our statement. It is not consistent with the purpose of the environmental chapter and the public interest for the reasonable use exception to be a money machine to obtain large profits for developers. Rather, the exception is to avoid a situation where a regulation is "unduly oppressive to the property owner." This criterion has not been met.

The sixth criterion assumes that there is an "inability of the applicant to derive reasonable use of the property." Treehouse does not have such an "inability" so that this criterion is not relevant.

In conclusion, Treehouse has the burden of proof with respect to the criteria above. It has not satisfied that burden even after more than three years to do its homework.

## The Failure of the Andersons to File an Appeal to the Mitigated Determination of Non-Significance Does Not Prejudice Their Opposition to the Reasonable Use Exception

The City correctly notes in its second staff report that no appeals were filed to the Mitigated Determination of Non-Significance (MDNS), issued on January 13, 2020. (Exh. 61, pp. 7-8) As a result, Treehouse was not required to do an environmental impact statement. From the view point of the Andersons, their belief and position are that Treehouse project should not be approved at all. The way to obtained that objective is the defeat of the application for a reasonable use exception and not through an environment statement which would only further delay this matter.

Peter Anderson was also influenced by a letter, dated August 7, 2017, and written by Mr. Summers to Mr. Maxim. A copy of the letter was obtained by Peter Anderson pursuant to a public document request to the City. In the letter, Mr. Summers made the statement: "To the best of our knowledge, this [the issuance of a Determination of Significance in the Treehouse case on July17, 2017] is the first time any jurisdiction in the State of Washington has required an EIS to construct a single-family home." Peter Anderson believed that this statement by Mr. Summers was probably factually correct. Even though the Treehouse project will have a great adverse impact on the .88 acres of land, the size of the lot, in comparison to cases where an environmental impact is required, in very small.

For this reason, the Andersons believed that the likelihood of success on an appeal to require an environmental impact statement in this case was small. Furthermore, on the SEPA appeal, the Andersons would have the burden of satisfying some difficult appellate standards. In addition, Mr. Maxim informed Peter Anderson that for a SEPA appeal, the City would require a filing fee of over $900. For all of these reasons, it was decided not to appeal the MDNS, but rather to concentrate on defeating the application for the reasonable use exception. The failure to file a SEPA appeal is in no way an implied admission by the Andersons with respect to the issues relevant to this reasonable use exception proceeding.

## Conclusion

It is respectfully submitted that for the reasons stated in this Statement and in Exhibit 54a, for the reasons stated in the post-hearing statement of February 21, 2017, submitted by Peter Anderson, and for the reasons advanced by other neighbors, the application for a reasonable use exception by Treehouse should be denied. After having more than three years to do its due diligence, Treehouse has not satisfied its burden of proof.

DATED: July 19, 2020

Peter M. Anderson

David L. Anderson PE