RESPONSE OF DAVID AND PETER ANDERSON TO THE MEMO OF GEORGE STEIRER (EXH. 68)

Although our Statement of July 19, 2020, describes in detail our grounds for opposition to the reasonable use exception (RUE) application, we believe that it would be helpful to comment on certain statements made by Mr. Steirer in his Memo (Exh. 68). In addition, the failure of Mr. Steirer to address certain important aspects should also be noted.

The effect of the failure to file a SEPA appeal

Mr. Steirer states at page 2 of his memo: "The MDNS was not appealed and this determination is now final and binding on all persons." In the MDNS, the City concluded: "An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(c)." Subsection (c) provides in relevant part:

> c) Include in every recommendation or report on proposals for legislation and **other major actions** significantly affecting the quality of the environment, a detailed statement by the responsible official on:
> (i) the environmental impact of the proposed action; [emphasis added]

The Treehouse project is neither legislation nor a major action. This is the reason why Mr. Summers could inform the City: "To the best of our knowledge, this [the issuance of a Determination of Significance in the Treehouse case on July 17, 2017] is the first time any jurisdiction in the State of Washington has required an EIS to construct a single-family home." Since the hearing on July 20, we have attempted to find online a situation where an EIS was required for a single-family home. We have found none. Construction of a single-family home is not a major action (unless perhaps one is talking about a huge complex such as the Gates mansion).

Although we firmly believe that the Treehouse project significantly affects the quality of the environment of the lot, one cannot in good faith contend that this is a major action within the meaning of Subsection (c). In order to preserve one's position to contend in a RUE proceeding that the proposal significantly affects the environment of a .88 acre lot, one is not required to file a SEPA appeal which would in fact be frivolous in view of the "major action" requirement.

The relevance of geotechnical issues and the burden of proof with respect to safety

Treehouse not only contended that no one can now maintain that its proposal significantly affects the environment, but Treehouse also contended at the hearing that any consideration of geotechnical aspects is irrelevant in this proceeding, because Treehouse is not seeking any exception with respect to the geotechnical provisions of the MICC. In this regard, it is important to note that Mr. Steirer at page 3 of his memo relies on the geotechnical reports of

Mr. Chang in seeking to carry Treehouse's burden of proof that the proposal does not pose an unreasonable threat to safety on or off the site. Thus, Treehouse relies on these geotechnical reports by Mr. Chang in contending that the safety requirements have been met but contends that the neighbors are precluded from raising any geotechnical safety issues (such as landslides). That simply does not make sense.

For the granting of a reasonable use exception, MICC 19.07.140(A)(4) requires a specific finding by the Hearing Examiner that the "proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site." The language of the previous MICC 19.07.030(B)(3)(e) was not materially different. The language of this subsection is broad and cannot be read so as to exclude any consideration of threats that are geotechnical in nature. In fact, with respect to this site, many of the threats are geotechnical in nature. These include the undisputed facts that the ravine is a known landslide area and the slopes bordering the Treehouse lot on the southwest (lots 23, 24, 25, owned by Duchaine, Dieckman & Hanson, and Ahalt respectively) are extremely high and steep. There are very high and large Douglas firs on these slopes (visible on any viewing of the Treehouse lot) which could fall and easily hit the proposed Treehouse house. Any removal of these trees for the safety of the Treehouse home would in turn adversely affect the stability of these very steep slopes.

As noted above, the memo by Mr. Steirer relies on the report by Mr. Chang to support the proposition that the Treehouse proposal does not present an unreasonable threat "on or off" the Treehouse site. At the hearing, Mr. Chang acknowledged that he did not do any work with respect to the very steep slopes on the southwest and testified that those properties were <u>outside the scope of his work</u>. Thus, Mr. Steirer cannot use the report of Mr. Chang to carry Treehouse's burden of proof that there are no unreasonable threats to safety "off" the site. After the candid acknowledgement by Mr. Chang, Mr. Maxim indicated at the hearing that during the building permit stage, the City would require an investigation of these slopes including possible testing on them. However, under Section (4), Treehouse has the burden of proofing safety <u>now</u> in these reasonable use proceedings and cannot excuse its present lack of proof by suggesting that the Hearing Examiner can attach a condition that the City will subsequently require an investigation of these slopes. This would mean that the City would ultimately determine the safety issue and not the Hearing Examiner. Under Subsection (4), it is the responsibility of the Hearing Examiner to make the safety determination.

With respect to Subsection (4), Mr. Steirer also states that the reports by Mr. Chang were subject to peer reviews by Perrone Consulting and Shannon & Wilson. All of the peer review by Perrone Consulting was done prior to the first hearing. With respect to this work done by Mr. Chang and Perrone Consulting prior to the first hearing, Hearing Examiner Vancil expressly held that Treehouse's geotechnical report was "not sufficient" in that it failed to provide an analysis of the potential adverse impacts to adjacent and down-current properties. Mere conclusions are not sufficient as an analysis. That holding is now the law of the case. The geotechnical peer reviewer after the first hearing was Shannon & Wilson. As noted at pages 11-12 of our earlier Statement, it appears that Shannon & Wilson never physically visited the site, and none of the

documents reviewed by them even indicated that the high and steep slopes on the southwest existed. As the scope of the work by Mr. Chang did not include those slopes, it also follows that the scope of the peer review of his work did not cover those slopes. In short, the reference by Mr. Steirer to the reports by Mr. Chang and his peer reviewers simply does not carry Treehouse's burden of proof as to safety issues relating to lots 23, 24, and 25.

The reports by Mr. Chang, upon which Mr. Steirer relies, also do not carry Treehouse's burden of proof with respect to the health, safety, and welfare of the downstream property owners. As discussed at page 16 of our prior Statement, the report by Mr. Chang on October 3, 2019, with respect to those properties contends that the actual problem relating to those properties is "when debris clogs the catch basins along the street." However, if Mr. Chang would have read the comments filed in this proceeding by the downstream owners in April 2015 (Exh. 6h, k, o), he would have realized, for example, that the problems experienced by Mr. Graham, the waterfront owner, was not that water was prevented from entering his property due by clogged catch basins upstream (Glenhome Pond), but by too much water entering the channel which flows next to his living room.

Mr. Graham testified at the second hearing that he must spend approximate $10,000 each year to maintain the channel through his property because of the amount of water flowing through it. The stream by his home has already exceeded its maximum capacity. Neither Mr. Chang nor anyone else has addressed, for example, the bypass waters that will fall on the planned 1,560 square feet impervious surface of the Treehouse driveway. Contrary to the position of Mr. Steirer, Treehouse has not met its burden of proving to the Hearing Examiner the absence of an unreasonable threat to the health, safety, or welfare to the downstream properties. Under Subsection (4), the determination needs to be made <u>now</u> by the Hearing Examiner and not deferred to the City at a later stage. Treehouse has had over three years to do its homework in this regard and has failed to do so.

<u>The economic loss incurred by Treehouse and the applicable Code provisions</u>

In footnote 1, Mr. Steirer makes the following statement:

> At the time the application was submitted in 2015, a prior version of the Code applied, and the criteria were contained in former MICC 19.07.030.B.3. The determination of which criteria apply is a decision to be made under MICC 19.15.170. In the Staff Report, staff has indicated that the current criteria apply and those are the ones discussed in this memo.

In footnote 2, Mr. Steirer states:

> This [first] criterion used to read: "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." The City

Council eliminated the second sentence. Consideration of the amount and percentage of lost economic value is no longer required.

It is true that all of us, including the undersigned, have assumed that Mr. Maxim in his staff report was correct in stating that the most recent version of the reasonable use exception provisions is applicable to this case. We have simply taken his word on this and have not examined this issue closely. However, now that we have actually examined the issue, we agree with the statement by Mr. Steirer in footnote 1 that the "determination of which criteria apply is a decision to be made under MICC 19.15.170." In the second staff report and recommendation (Exh. 61), Mr. Maxim simply assumed, without any explanation, that the new provisions of MICC 19.07.140 are applicable to the instant RUE proceeding rather than the former provisions of 19.07.030 (B). However, with all due respect to Mr. Maxim, the Hearing Examiner and all of us must be guided by the actual language of the MICC and not by the opinion or assumption of Mr. Maxim.

In reviewing the actual language of MICC 19.15.170, the only possible construction dictates that the RUE application was vested under the earlier provisions of the RUE. Thus, MICC 19.15.170 (B) provides:

> *Vesting for Land Use Reviews*. Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department's issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

A reasonable use exception is a Type IV decision as stated by MICC 19.15.030, Table A. As stated in Table B of this section, a "letter of completion" is required for a Type IV land use decision. A variance is also deemed under Table A to be a Type IV decision. The testimony by Mr. Maxim at the second hearing that a reasonable use exception should be considered under the first sentence of the above quoted provision, and not the second sentence, flies in the face of the MICC provisions. Again, one must be guided by the language of the MICC and not by Mr. Maxim's opinions.

There appears to be no dispute in this case as to the date of the completion of the RUE application. Thus, the first staff report states:

> On January 16, 2015, the applicant submitted a reasonable use exception application, which was processed pursuant to MICC 19.15.020. Following the submittal of additional information by the applicant, and pursuant to MICC 19.15.020(C), the application was deemed complete on March 30, 2015. (Exh. 1, p. 4)

Although not an exhibit (it was one of many documents posted online by the City before the first hearing), Mr. Travis Saunders, senior planner for the City, sent a letter, dated March 31, 2015, informing Mr. Summers of the City's determination on March 30, 2015, that his application in case CAO 15-001 for a reasonable use exception was complete.

The second staff report also states that the reasonable use exception application "was deemed complete on March 30, 2015." (Exh. 61, p. 5) With respect to the zoning variance, the second staff report states that the "City issued a letter of completion on May 21, 2018." (Exh. 61, p. 6) The second staff report then notes that on September 17, 2018, the City Council adopted significant amendments to the MICC related to the processing of land use applications and that on June 18, 2019, the City Council adopted a significant update to the MICC related to the protection of environmentally critical areas. (Exh. 61, p. 6)

It is important to note that the letters of completion for the both the RUE and variance applications were issued before the above-mentioned Code amendments by the City Council. Thus, in accordance with MICC 19.15.170 (B), the RUE and variance applications in the instant case must be judged by the Code provisions in effect at the time of the completion of the respective applications. This is true even if one considered the vesting issue, as urged by Mr. Maxim, under the first sentence of MICC 19.15.170 (B). In our case, "the date a complete application is filed" and the date of the "issuance of a letter of completion" would both be in 2015.

One should also note that under MICC 19.15.170 (A), the vesting provisions relate to "regulations and procedures existing at one moment in time and regardless of changes that may have been made later and prior to final completion of a project or use." (Emphasis added) "Procedures" would encompass the RUE procedures and criteria. In addition, MICC 19.15.170 (C)(2) provides:

> Land use reviews that are subject to the provisions of this section shall be considered under the zoning and land use control ordinances (MICC Titles 15 and 19) in effect on the date of complete application. Supplemental information and revisions to a development proposal design required by the city after vesting of a complete application shall not affect the validity of the vesting for such application.

MICC 19.15.170 (C)(3) does provide for an exception to the vesting provision under the "authority of the city to protect and enhance the public safety, health and welfare" and under SEPA and the City's SEPA regulations and policies in effect as of the date of vesting. However, the provision of the former MICC 19.07.030 (B)(3)(a), requiring the Hearing Examiner to "consider the amount and percentage of economic value to the property owner," does not involve safety, health, or welfare and does not involve SEPA. Therefore, the exception in Subsection (C)(3) is not applicable.

The applicability of MICC 19.07.030 (B)(3)(a), with its requirement that the Hearing Examiner consider the economic loss, provides an additional argument that should be added to the section of the Anderson's Statement of July 19 relating to "economic loss" and "unduly oppressive." (Exh. 71, pp. 4-8) In the memo by Mr. Steirer, no mention is made of the fact that Mr. Summers paid only $32,094 for the property. Although Mr. Steirer quotes the definition of "reasonable use" found in the MICC and thus acknowledges the relevance of this definition, he essentially ignores the final part of the definition relating to "the regulation being unduly oppressive to the property owner."

Application of the Chapter would not deny all reasonable use of the property

Mr. Steirer in his memo maintains that the environmental chapter would deny all reasonable use of the property and that there is no other reasonable use with less impact on the critical area. (Exh. 68, pp. 1-2) His memo provides a table of "other use permitted outright in the R-15 zone." One of the uses is "private recreation areas." Although this use for the lot would be available to a homeowner on an adjacent lot, Mr. Steirer states that Treehouse does not own an adjacent lot or residence. As pointed out in our Statement, there could certainly be an adjoining lot owner who would be interested in purchasing the Treehouse lot for this purpose, especially at its fair market price of $32,094. The criteria do not refer to "reasonable use for the particular applicant," but simply "reasonable use." It is certainly possible that Treehouse could sell the property to someone who could use it for one of the uses under R-15.

The same is true for the R-15 use of "open space." MICC 19.16.010 defines "open space" and states that one of the uses of open spaces is to "provide links between important environmental or recreational resources." The Treehouse property is perfectly suited for this use. It would allow the public trail that starts in the existing open space to continue for its entire length in open space and in a natural setting. With respect to this use, Mr. Steirer simply states that "open space is not an applicable reasonable use for this residentially zoned property in a residential area." However, "open space" is one of the uses "permitted outright" for R-15 zoning. Again, as stated in our prior Statement, if Treehouse does not wish to devote the lot to an open space, there may be others, including the City, a neighbor, or a neighborhood association, who may wish to purchase the property at its very low fair market value in order to preserve the lot's natural state as an open space.

In this regard, it should be noted that the short plat of 1977 does not dictate that the lot be used for a single-family home. If one examines the short plat (Exh. 39), there is not a single reference to a house or residence. The plat simply divided a larger piece of property into four smaller lots with certain conditions. The conditions do not mandate that a house be built or specifically approve the building of a home on each of the lots.

The memo by Mr. Steirer also attaches a map showing the total finished area (TFA) of certain houses in the neighborhood of the Treehouse lot. Significantly, four of the houses have a smaller FTA than the proposed Treehouse home. One of the houses has a TFA of 2,240

compared to the Treehouse FTA of 2,756. Clearly, a house of 2,240 square feet would have less impact on the critical areas than the proposed Treehouse home of 2,756. In the first staff report, Mr. Maxim suggested a house with a "building footprint of approximately 800 square feet or less." (Exh. 1, p. 8) Although we believe that no house would be reasonable on the Treehouse lot, a house with 2,240 square feet or smaller would obviously have less impact on the critical areas than the much larger house proposed by Treehouse.

The alternations proposed by Treehouse do not constitute the minimum necessary

Mr. Steirer on pages 2-3 of his memo discusses this third criterion ("minimum necessary") of the current Code provision, which is very similar to Subparagraph (c) of the previous Code provision. This criterion has already been discussed in our prior Statement. (Exh. 71) Mr. Steirer discusses changes in the site plan that have supposedly been made by Treehouse at the request of the City to minimize impact. In this regard it is extremely important for the Hearing Examiner to compare carefully the site plan that was the subject of the first hearing (Exh. 3b) with the latest site plan that is the subject of the second hearing (Exh. 38). As discussed at page 2 of our Statement, the first site plan, received by the City on October 18, 2016, gives a house footprint of 1631 square feet while the latest plan also gives a footprint of 1631 square feet. In the latest plan, the size of the driveway is actually <u>increased</u> from 1463 to 1560 square feet. In the latest plan, the "site disturbance" is also <u>increased</u> from 6318 to 6926 square feet.

Mr. Steirer states that the "driveway, disturbance area, and hardscapes were also reduced by 11.8% to 26.2% since the application was originally submitted." He gives no citations to the record for this statement. As discussed above, the size of the driveway and the disturbance area have actually been significantly <u>increased</u> by Treehouse since its 2016 plan. The 2016 plan does have a chart showing "old version" and "new version" with percentages similar to those cited by Mr. Steirer. There is no exhibit showing the source of the "old version." It is very possible that the old version relates to a proposed plan by an earlier owner of the lot. In any event, the statement by Mr. Sheirer is certainly not correct as one can see from comparing the 2016 Treehouse plan with the final 2019 plan. Also if one compares the location of the proposed residence on the 2016 plan with the location on the latest plan, the change is relatively minor.

In this section of the memo, Mr. Steirer also refers to wetland mitigation and health, safety, and welfare. As discussed at great length at pages 8-19 of our prior Statement, Treehouse through its various expert reports has not satisfied its burden of proof with respect to the health, safety, and welfare of the adjacent and downstream properties or even with respect to its own lot. In view of the fact that the vesting provisions of MICC 19.15.170 dictate that the 2015 MICC provisions be applied to this application, it is important to note that MICC 19.07.08 (D) in 2015 stated that wetland mitigation "must be in the same drainage sub-basin as the original wetland." Use of the King County Mitigation Reserves program does not comply with this. If opportunities for mitigation in the same sub-basin do not exist, it would highlight an additional

reason for preserving the wetlands in the lot in question as those wetlands would be unique in the sub-basin.

<u>The purpose of the chapter on the environment</u>

Mr. Steirer uses over four pages of his memo to discuss the thirteen purposes (A through M) of the chapter on the environment (MICC 19.07) as enumerated in MICC 19.07.010. These purposes actually support leaving the property in its natural state. With respect to A, the Growth Management Act has a goal of protecting the environment and retaining open spaces. With respect to B, not having a home on the property will "maintain the functions and values of critical areas and enhance the quality of habitat to support the sustenance of native plants and animals." With respect to promoting biodiversity with native vegetation (D), the existing vegetation on the lot appears to be almost exclusively, if not entirely, native. The project will remove a substantial amount of native vegetation including mature trees that will take decades, if ever, to replace. With respect to E, denial of the RUE will "maintain and improve the ecological health of wetlands, watercourses and Lake Washington." Almost all of the proposed house is in wetlands, which obviously damages the wetlands and does not "maintain and improve" them.

With respect to F, building a home on the lot will <u>not</u> "avoid increasing the risk of harm to people, property, and public infrastructure from natural hazards," but rather increase the risk. The ravine is a known landslide area, and the proposed home is located at the base of very steep and high slopes which Treehouse has avoided studying. The proposed house is also subject to falling high trees from these slopes. Mr. Duchaine testified that a tree fell just this last winter. The catchment wall (built into the home) proposed by Treehouse faces in the wrong direction and does not provide complete protection to the house and provide <u>no</u> protection for people outside the home with respect to landslides.

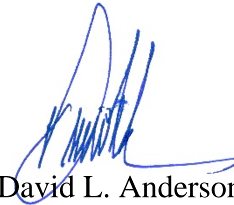
Subsections G and H relate to the use of buffers for wetlands, watercourses, and geologically hazardous areas. It is undisputed that the Treehouse project greatly infringes on the wetlands and watercourse buffers. With respect to geologically hazardous areas, a new MICC 19.07.060 requires a buffer for a landslide hazard area such as this. Although Treehouse may be relieved from compliance with the latter through its 2015 vesting, it should be noted that the proposed home infringes on such a buffer as well. Thus, every type of buffer will be violated.

Subsections I through L relate to mitigation. This subject has already been discussed in our prior Statement and in this Response. However, one matter should be briefly noted. With respect to mitigation, Treehouse has submitted a proposed "Planting Plan." (Exh. 69) This plan provides for no planting of new trees in the wetlands area. The latest site plan shows that seven mature trees in the wetlands will be removed in the construction of the proposed home. It is submitted that the owners of the home will need to remove additional trees in the wetlands, because they will pose a danger to the house in a windstorm. These trees perform a valuable role in absorbing water from the wetlands and anchoring the soil in the wetlands. Their removal will have a very negative effect which has not been mitigated.

Conclusion

The foregoing is intended as a rebuttal to the Memo of Mr. George Steirer. For the reasons stated in this Response, in our prior Statement of July 19, and in our arguments presented to Mr. Maxim in the communications collected in Exhibit 54a and c, it is respectfully submitted that the reasonable use exception should be denied in this case. Treehouse has simply not met its burden of proof for each of the elements required, although it has had over three years to do so.

Dated: July 27, 2020



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