

East Mercer Highlands Homeowner Association
c/o Timothy B. Fitzgerald
4817 E. Mercer Way
Mercer Island, WA 98040
206.389.9338
tfitzgerald@mcnaul.com

November 20, 2017

Via Hand Delivery and Electronic Mail (nicole.gaudette@mercergov.org)

Ms. Nicole Gaudette, Senior Planner
Development Services Group
City of Mercer Island
9611 SE 36th Street
Mercer Island, WA 98040

Re: 4825 East Mercer Way, Mercer Island, WA 98040;
File No. CAO17-010

Dear Ms. Gaudette:

I write on behalf of the East Mercer Highlands Homeowner Association (“EMHHA”), of which I am a member. As you know, EMHHA has appointed me to voice the collective concerns of its members regarding the above-referenced property (the “Eagle Tree Property”), and more specifically, the owner’s currently pending request for a Critical Area Determination (the “Request”) and proposed development plans. As explained below, EMHHA and its individual members have significant concerns regarding the Request and any proposed development of the Eagle Tree Property. Accordingly, and in response to the Public Notice of Application issued in connection with the Eagle Tree Property, EMHHA and its individual members hereby submit the following comments for consideration by the Development Services Group (“DSG”).

Because the issues addressed in this letter are a matter of significant public concern, we are providing a copy to the Seattle Times, the Mercer Island Reporter, the Washington Department of Fish and Wildlife, and the U.S. Fish and Wildlife Service. Because any development of the Eagle Tree Property would create significant occupational and health issues, we also are providing a copy of this letter to OSHA.

The comments below are in addition to the various points we intend to discuss during our meeting later this evening, in which I and numerous other members of EMHHA will directly express our concerns to you and other City employees regarding these and other matters.

A. Relevant Background

1. The Eagle Tree Property

The Eagle Tree Property, located at 4825 East Mercer Way, is a lush, steeply sloped, and undeveloped half acre of land, approximately fifty percent of which is a designated wetland. The Eagle Tree Property contains a stream that runs through its boundaries year-round, and is home to innumerable species of plant and animal life, including an ancient Douglass Fir tree (diameter 80 inches) that is a documented bald eagle habitat protected by federal, state, and local law (the “Eagle Tree”). For as long as anyone can remember, and continuing through the present, the Eagle Tree has at all times contained an active bald eagle’s nest or been a location frequented by bald eagles. We, the residents of East Mercer Highlands, observe bald eagles in the Eagle Tree on a regular basis, and many of us were drawn to East Mercer Highlands because of this unique neighborhood feature.

Indeed, as records maintained by the City of Mercer Island indicate, East Mercer Highlands is the only neighborhood on Mercer Island with three designated eagle trees (one of which is the Eagle Tree) within a 300 foot radius of one another. That distinction is particularly noteworthy in light of the fact that, because of property developments like the one now under consideration, there are just fourteen eagle trees remaining on Mercer Island. *See City of Mercer Island, Properties Affected by Bald Eagles, available at http://www.mercergov.org/files/BaldEagles2016_32x60_withHouseNumbers.pdf.* As residents of Mercer Island, we feel a deep obligation to ensure our precious natural resources are preserved and protected to the fullest extent possible. We have thousands of houses here on Mercer Island, many of them new construction. We have few remaining eagle trees, all of them “old construction.”

2. The Owner of the Eagle Tree Property

The current owner of the Eagle Tree Property, George Janiewicz, is not from Mercer Island, the Seattle metropolitan area, or even Washington. He lives on the East Coast and appears to have purchased the Eagle Tree Property solely for development and resale. When Mr. Janiewicz purchased the Eagle Tree Property more than a decade ago, there were already numerous pre-existing federal, state, and local rules, regulations, laws, and guidelines that limited development. He elected to purchase the Eagle Tree Property anyway, and has since engaged in a prolonged effort to side-step the many applicable development and environmental regulations.

3. Mr. Janiewicz's Prior Unsuccessful Efforts to Develop the Eagle Tree Property

Mr. Janiewicz most recently undertook an effort to develop the Eagle Tree Property in 2008 and 2009. Those efforts came to an end when the U.S. Fish and Wildlife Service sent a letter threatening fines and jail time to anyone who harmed the Eagle Tree. Not unsympathetic to Mr. Janiewicz's situation, several members of EMHHA responded by pooling their resources and offering to purchase the Eagle Tree Property from him above market value, for conservation purposes. That transaction, if consummated, would have mitigated Mr. Janiewicz's losses and possibly allowed him to turn a modest profit. Mr. Janiewicz declined.

Fully aware of the pre-existing development limitations that encumber the Eagle Tree Property when he purchased it, and having been threatened with fines and even jail time should he proceed with his development plans, it is telling that Mr. Janiewicz declined an opportunity to walk away. He continues to be focused upon maximizing profits, and apparently has little regard for the people and wildlife that would be significantly harmed by his development plans, or, indeed, for the fines and jail time that could result from his conduct.

EMHHA and its individual members believe Mr. Janiewicz, like all property owners, enjoys the right to make reasonable use of his property. What is reasonable, however, depends entirely upon the circumstances. No one has the right to harm a protected eagle tree, to threaten a protected eagle habitat, to engage in conduct that is dangerous and harmful to others, or to violate federal, state, or local law. Mr. Janiewicz's proposed development would do all of those things, and is therefore a patently unreasonable use of property, particularly in light of the fact that he had an opportunity to walk away with little or no financial impact. Any financial loss Mr. Janiewicz may sustain in connection with the Eagle Tree Property would be a problem entirely of his own making, and should not factor into DSG's consideration of the pending application.

B. The Concerns of EMHHA and its Individual Members Regarding the Request and Proposed Development of the Eagle Tree Property

The concerns of EMHHA and its individual members are many. In the following subsections, I briefly summarize several concerns in no particular order.

1. The Proposed Development is Likely to Drive Eagles Away From a Known and Long-Standing Nesting Place

As noted above, East Mercer Highlands is the only neighborhood on Mercer Island with three eagle trees (one of which is the Eagle Tree) within a 300 foot radius of one another. Although it hardly requires saying, any development that even potentially threatens this known

eagle habitat must be stopped. Not only does that outcome foster preservation of our precious natural resources, but federal, state, and local law all require that outcome as well.

Mr. Janiewicz tries to dispute that the Eagle Tree Property is a known and continuing habitat for bald eagles. Indeed, while the Critical Area Determination Report (“CAD Report”) submitted by Mr. Janiewicz acknowledges the Eagle Tree Property is “[a] wildlife habitat conservation area, consisting of one Douglas fir tree known to have an active bald eagle nest at one time,” CAD Report at § 4.2, it attempts to downplay the significance of that observation by stating that “[t]he last verified activity in this tree was in 2005. During site visits in 2006 and 2017, eagle activity was not observed.” CAD Report at § 4.2.3.

Respectfully, the “last verified activity” was not in 2005. As noted above and in the numerous sworn declarations appended hereto as **Exhibit A**, members of EMHHA, including me, routinely observe eagles in the Eagle Tree. Had Mr. Janiewicz or his paid experts spoken with me (or any other member of EMHHA) regarding this issue prior to submitting the pending application, they would have learned that the Eagle Tree continues to be a highly active habitat for bald eagles.

In this respect and others, the CAD Report is notable for its result-driven methodology. Indeed, Mr. Janiewicz’s paid experts sought to observe eagle activity on only two days over 11 years, and did so without consulting any of the numerous long-standing residents who possess relevant information regarding the presence of eagles. Mr. Janiewicz’s application also makes no mention as to how much time his paid experts spent seeking to observe eagle activity on the two days in question. We do not know whether they devoted two minutes or two hours to this task. If Mr. Janiewicz’s paid expert truly wanted to know whether eagles frequent the Eagle Tree, and if his analysis of that issue truly was fair and objective, he would have spent more than two days at the Eagle Tree Property over the course of eleven years,¹ and would have consulted at least one of the residents who have lived next to that tree for decades. Tellingly, he did not do so.

Instead, the CAD Report implies that, because eagles supposedly were not present on the two days in question, the Eagle Tree is no longer an active eagle habitat. Respectfully, that conclusion is as unreliable as the process on which it was predicated. One might reasonably expect Mr. Janiewicz and his paid experts to have a thumb on the scale regarding this issue, as they clearly are advocating for a desired result. DSG, however, is a public service entity tasked with fairly enforcing applicable law and protecting the residents of Mercer Island. Unlike Mr. Janiewicz back on the East Coast, DSG cannot bury its head in the sand regarding the

¹ An eleven year period encompasses 4,000 days. Mr. Janiewicz’s experts admit that they did not attempt to observe eagle activity at the Eagle Tree Property for 3,998 of those days. We, the residents of MHHA, were present in the area for the duration of that period and observed eagle activity during the majority of those days.

documented and continuing presence of bald eagles here on Mercer Island, and certainly cannot do so based upon the unreliable materials accompanying Mr. Janiewicz's application. The fact that bald eagles continue to be present in and around the Eagle Tree, and the fact that any development activity would seriously threaten their continued presence, requires DSG to deny the Request and to reject Mr. Janiewicz's proposed development plans.

2. The Proposed Development is All But Certain to Impair the Root System of the Eagle Tree

Mr. Janiewicz seems to understand that any effort to remove the Eagle Tree would cause swift denial of his pending application. As he was previously advised by the federal government, doing so also could land him in jail. For those reasons, Mr. Janiewicz does not propose to remove the Eagle Tree, but instead proposes to develop the property around it. That proposal does not address – and only exacerbates – our collective concerns.

Developing the Eagle Tree Property, however carefully it may be done, would, among other things, compromise the delicate root structure of the Eagle Tree, and thereby create an untenable hazard for EMHHA and its individual members. Mr. Janiewicz's environmental expert seems to understand this reality, and therefore went out of his way to distance himself from his own conclusions: "These findings do not guarantee future safety nor are they predictions of future events. . . . Furthermore, the evaluator in no way holds that the opinions and recommendations are the only actions required to insure that the tree will not fail. A second opinion is recommended." Giles Report at 10. Mr. Janiewicz has not submitted a second opinion as part of his application, and does not address the opinions offered by numerous other experts who have already concluded that any development of the Eagle Tree Property would seriously threaten the Eagle Tree and those who live nearby.

Those other expert reports – prepared by a biologist from the Washington Department of Fish and Wildlife ("WDFW"), a Mercer Island City Arborist, an independent arborist, and the Associate Dean at the University of Washington's College of Forestry – were provided to Mr. Janiewicz and the City of Mercer Island on February 6, 2008. A copy of the correspondence transmitting the reports is enclosed for your reference as **Exhibit B**. In one of those reports, a WDFW biologist observed that "[o]ld trees like this one are very fragile and depend on the surrounding forest in many ways. The excavations, grade changes and removal of several adjacent forest trees will harm the tree."

Based upon those observations, the WDFW biologist stated he could "see no possibility," regardless of how carefully or creatively Mr. Janiewicz may try to navigate around the Eagle Tree's delicate root structure, "that the criteria [for safely placing a driveway on the Eagle Tree Property] can be accomplished given the topography of the site and the location of the tree." The

WDFW biologist opined that, if the Eagle Tree Property is developed, “the wildlife tree will decline and eventually die.”

As noted in Mr. Janiewicz’s own environmental report, “[o]nce trees are damaged, the treatment options available are limited.” Giles Report at 10. In other words, to the extent development of the Eagle Tree Property causes damage to the Eagle Tree – and numerous experts have opined, without contradiction, that such a result is all but certain – the damage is likely to be irreversible and untreatable. In the meantime, and as the WDFW biologist previously concluded, any development of the Eagle Tree Property would cause the Eagle Tree to “become a ‘hazardous tree’” – i.e., the risk that the Eagle Tree will fall would be greatly increased. Like many of our neighbors in the Pacific Northwest, we understand and accept the risk of living near large trees. We do not accept and will not tolerate conduct that unnecessarily increases that risk, such as the proposed development at issue here, and DSG must therefore reject the Request for this independently-sufficient reason as well.

3. The Proposed Development Would Alter the Carefully Managed Flow of Water in East Mercer Highlands

Significant water emanates from the hillside on the west and southwestern parts of the Eagle Tree Property. As a designated wetland, soil conditions throughout the lot are extremely boggy with several streams running year round towards a ditch and culvert located near the northeast corner of the property. A ditch runs south to north along the east side of the Eagle Tree, which would be impaired by any driveway or construction access to the Eagle Tree Property. Development of the Eagle Tree Property would impact water flow in other ways as well. While the wetland / watercourse set-back for the Eagle Tree Property used to be 25 feet, it was later increased to 50 feet, seemingly in recognition of these significant water-related issues.

Any disruption to the carefully managed flow of water in the neighborhood would have an adverse impact upon one or more individual residents, particularly those who live below (i.e., downstream from) the Eagle Tree Property. Moreover, EMHHA recently paid a significant sum to repave its access road, and any development activity would divert water onto the road, result in significant damage, and impose considerable additional maintenance costs upon EMHHA and its individual members.

Additionally, a pipe carrying run-off from the Eagle Tree Property runs beneath the neighborhood access road. In the past, debris has become lodged in that pipe, which has caused significant water flow problems on the road itself and for individual property owners. In one instance, a member of EMHHA was forced to cut a hole in her driveway in order to dislodge debris that had become lodged in the pipe. Development of the Eagle Tree Property would

generate significant debris and exacerbate the risk of further back-ups. For this reason, too, the Request should be denied.

C. The City Should Purchase the Eagle Tree Property, Which Should be Conserved for the Benefit of the Mercer Island Eagle Population and Mercer Island Residents

EMHHA and its individual members respectfully suggest that the City negotiate with Mr. Janiewicz for a potential purchase of the Eagle Tree Property, and if a mutually-agreeable deal can be reached, to conserve the Eagle Tree Property for the benefit of our local eagle population and all Mercer Island residents.²

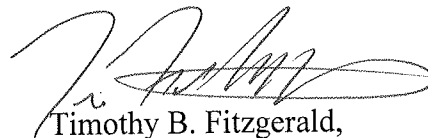
D. Reservation of Rights

In the event any federal, state, or local law is violated in connection with consideration of Mr. Janiewicz's Request and/or any subsequent development of the Eagle Tree Property, and/or to the extent EMHHA and/or its individual members are actually or potentially harmed as a result of that conduct, EMHHA and its individual members reserve the right to pursue all legal, equitable, administrative, and statutory remedies, including injunctive and declaratory relief.

* * * *

We thank you for your prompt attention to the matters addressed above. Should you have any questions of EMHHA and/or its individual members, you may direct them to me. My email address is tfitzgerald@mcnaul.com, and my direct dial is 206.389.9338.

Sincerely,



Timothy B. Fitzgerald,
4817 E. Mercer Way, Mercer Island, WA 98040

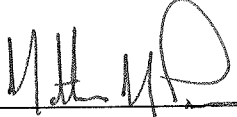
[Signatures of additional EMHHA members on following pages]

² Because of his membership on the Financial Challenges Community Advisory Group, Brian Thomas, resident of 4811 E. Mercer Way, abstains from EMHHA's request that the City Purchase the Eagle Tree Property, but otherwise joins in the comments set forth herein.


Enclosures

cc: George and Judy Janiewicz
The Seattle Times
The Mercer Island Reporter
Washington Department of Fish and Wildlife
U.S. Fish and Wildlife Service
OSHA


THE FOREGOING COMMENTS HAVE BEEN ADOPTED BY EACH OF THE
UNDERSIGNED MEMEBERS OF EMHHA:




Print Name: Nathan Porez
Address: 4915 E. Mercer Way



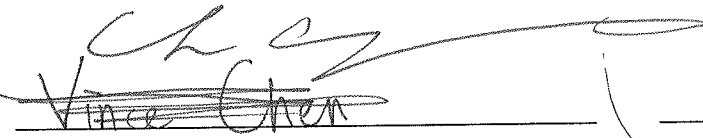
Print Name: PETER HUNDRIESER *Jill Landauer*
Address: 4925 E. MERCER WAY



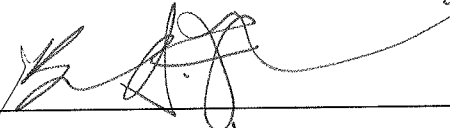
Print Name: JEFF Smyth
Address: 5011 E. Mercer Way



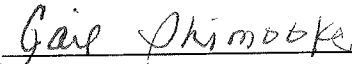
Print Name: Sumin Li
Address: 4921 E Mercer Way


~~Vince Chen~~

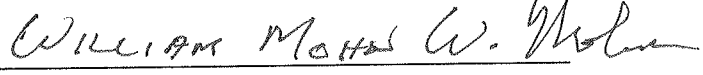
Print Name: Tung Cheng Chen
Address: 5015 E. Mercer Way



Print Name: BRIAN J. THOMAS
Address: 4811 EAST MERCER WAY



Print Name: Gail Shimobka
Address: 5012 EMW



Print Name: William Mottal
Address: 4809 E. Mercer Way

Lawrence Gottlieb

Print Name: Lawrence Gottlieb

Address: 4805 E. Mercer Way

Arnold Eggbrecht

Print Name: Arnold Eggbrecht

Address: 4911 E. Mercer Way

A. B. Standlers

Print Name: A. B. Standlers

Address: 4409 EMU

Cheryl A. Hayes

Print Name: Cheryl A. Hayes

Address: 5021 E. Mercer Way

Clare Holtan

Print Name: Clare Holtan

Address: 5003 E Mercer Way

Lililah Archuleta

Print Name: Lililah Archuleta

Address: 4815 E Mercer Way

Gerard Kaelin

Print Name: GERARD KAELIN

Address: 4819 E MERCER WAY

Lisa Shertland

Print Name: Lisa Shertland

Address: 4807 East Mercer Way

Deborah Hanson

Print Name: Deborah Hanson


Address: 4905 E. Mercer Way

Cell / Seth Davis *

Print Name: Cell / Seth Davis

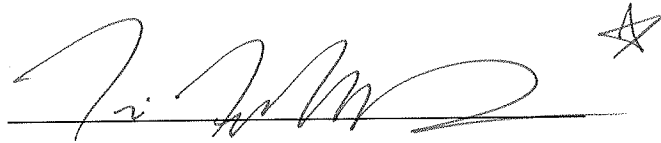
Address: 4917 E. Mercer way

* Per email authorization, Timothy Fitzgerald has signed on behalf of Cell / Seth Davis.

 ★

Print Name: Karen Beck

Address: 4813 E. Mercer way

 ★

Print Name: Shelly Johnson

Address: 4907 E. Mercer way

★★ Per email authorization, Karen Beck and Shelly Johnson have authorized Timothy Fitzgerald to sign on their behalf.

EXHIBIT A

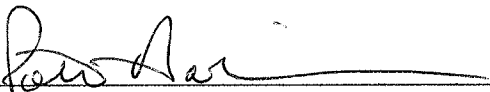
DECLARATION OF PETER B. HUNDRIESER

I, PETER B. HUNDRIESER, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen and competent to testify to the matters set forth herein. My address is 4925 E. Mercer Way, Mercer Island, WA 98040, King County Washington.

2. I have lived at the foregoing address since 2010. My property has a view of the top of the Eagle Tree in question, located at 4825 E. Mercer Way (also known as "The Eagle Tree Property"). Since 2010, I have frequently observed bald eagles in and around the Eagle Tree, and have made such observations as recently as the summer of 2017. In my many years living in the Pacific Northwest I have observed the deformation of the top of trees where Eagles reside and always notice the damage caused by their presence. The branches are bent over, the Apical Meristem is damaged, and the needles are gone. If they don't return, a new leader starts to form from one of the top branches, and the top starts to recover. The branches on this tree at the top are bare from recent activity during the last 8 years I have resided here on East Mercer Highlands. I do not hesitate in declaring, based upon my direct and ongoing personal observations, that the Eagle Tree Property is an active habitat for bald eagles.

DATED this 11th day of November, 2017 at Mercer Island, Washington.

By: 
Print Name: PETER HUNDRIESER

DECLARATION OF GERARD A. KAELIN

I, Gerard A. Kaelin, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen and competent to testify to the matters set forth herein. My address is 4819 E Mercer Way, Mercer Island, WA 98040, King County Washington.

2. I have lived at the foregoing address since 2006. Our property is on a hillside, adjacent to the "eagle tree property" with direct views of the "eagle tree" throughout our property. I've seen eagles in and around the "eagle tree" on a regular basis since we moved here, including numerous times this year. I do not hesitate in declaring, based upon my direct and ongoing personal observations over the course of over ten years, that the Eagle Tree Property is an active habitat for bald eagles.

DATED this 19th day of November, 2017 at Mercer Island, Washington.

By: _____

Print Name: Gerard A. Kaelin


DECLARATION OF TIMOTHY B. FITZGERALD

I, TIMOTHY B. FITZGERALD, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen and competent to testify to the matters set forth herein. My address is 4817 E. Mercer Way, Mercer Island, WA 98040, King County Washington.

2. I have lived at the foregoing address since 2011. My property sits on a hill above 4825 E. Mercer Way (the "Eagle Tree Property"), and has a view of the Eagle Tree located on that parcel. Since 2011, I have frequently observed bald eagles in and around the Eagle Tree, and have made such observations as recently as this month. I do not hesitate in declaring, based upon my direct and ongoing personal observations over the course of more than six years, that the Eagle Tree Property is an active habitat for bald eagles.

DATED this 18th day of November, 2017 at Mercer Island, Washington.

By:  _____

Print Name: Timothy B. Fitzgerald

DECLARATION OF JILL LANDAUER

I, JILL LANDAUER, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen and competent to testify to the matters set forth herein. My address is 4925 E. Mercer Way, Mercer Island, WA 98040, King County Washington.

2. I have lived at the foregoing address since 2010. My property has a view of the Eagle Tree located at 4825 E. Mercer Way (also known as "The Eagle Tree Property"). Since 2010, I have frequently observed bald eagles in and around the Eagle Tree, and have made such observations as recently as the summer of 2017. I do not hesitate in declaring, based upon my direct and ongoing personal observations, that the Eagle Tree Property is an active habitat for bald eagles.

DATED this 19 day of November, 2017 at Mercer Island, Washington.

By: Jill Landauer

Print Name: Jill Landauer *Jill Landauer*

DECLARATION OF BRIAN D. THOMAS

I, Brian D Thomas, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen and competent to testify to the matters set forth herein. My address is 4811 East Mercer Way, Mercer Island, WA 98040, King County Washington.

2. I have lived at the foregoing address since 2002. My property is approximately 500 feet from the Eagle Tree Property and I witness inhabitation and use by the tree on a fairly frequent basis. On at least six times in the past six months I have observed eagle's (adults and one child) perched in the trees and flying to and from the tree in the immediate proximity. I do not hesitate in declaring, based upon my direct and ongoing personal observations over the course of more than six years, that the Eagle Tree Property is an active habitat for bald eagles.

DATED this 17th day of November, 2017 at Mercer Island, Washington.

By: _____

Print Name: _____


BRIAN D. THOMAS

DECLARATION OF JEFF SMYTH

I, Jeff Smyth, declare under penalty of perjury of the laws of the state of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen and competent to testify to the matters set forth herein. My address is 5011 East Mercer Highlands, Mercer Island, WA 98040, King County Washington.

2. I have lived at the foregoing address since 1992. I have rounded the bend next to the eagle tree in question for 25 years. It is approximately 100 yards from my home. I have watched eagles fly into the tree in question for almost three decades. I do not hesitate in declaring, based upon my direct and ongoing personal observations over the course of more than six years, that the Eagle Tree Property is an active habitat for bald eagles.

DATED this 17th day of November, 2017 at Mercer Island, Washington.

By: _____

Print Name: Jeff Smyth

DECLARATION OF Celestine Davis

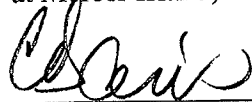
I, Celestine Davis, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen and competent to testify to the matters set forth herein. My address is 4917 East Mercer Way, Mercer Island, WA 98040, King County Washington.

2. I have lived at the foregoing address since 1994. My property borders the south boundary of the Eagle Tree Property. I can attest to countless sightings of Eagles, old and young, flying around and nesting in this tree as recently as several weeks ago. I do not hesitate in declaring, based upon my direct and ongoing personal observations over the course of more than six years, that the Eagle Tree Property is an active habitat for bald eagles.

DATED this 17th day of November, 2017 at Mercer Island, Washington.

By: _____



Print Name: Celestine Davis

EXHIBIT B

February 6, 2008

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Joint Letter To:

1. Jeffrey and Maureen Skall (Developers and potential owners)
11218 SE 64th St.
Bellevue, WA 98006
2. George and Judy Janiewicz, (present owner)
7 Oak Hill Drive
Newnan, GA 30263
3. The City of Mercer Island
Bob Sterbank, City Attorney
City Hall
9611 SE 36th St.
Mercer Island, WA 98040
4. The State of Washington
Jeff Koenings, Director of Fish & Wildlife
600 Capital Way N.
Olympia, WA 98501-1091

RE: Notice of Liability relating to the development of the property @ 4825 E. Mercer Way, Mercer Island, WA 98040

Kindly be advised that this office represents the interests of the following property owners and their families:

1. Gerard A. Kaelin & Christina M. Demopoulos, 4819 E. Mercer Way, Mercer Island, WA
2. Seth and Celestine Davis, 4917 E. Mercer Way, Mercer Island, WA
3. Dave and Barbara Rose, 4919 E. Mercer Way, Mercer Island, WA
4. Roger Kammerer, 4921E. Mercer Way, Mercer Island, WA
5. Amie and Jeanette Eggebrecht, 4911 E. Mercer Way, Mercer Island, WA
6. Ken and Karen Beck, 4813 E. Mercer Way, Mercer Island, WA
7. Dan and Debbie Hanson, 4905 E. Mercer Way, Mercer Island, WA

It is our understanding (and we have reviewed extensive material thereto) that it is the intention of Jeffrey and Maureen Skall to purchase the captioned property and that they have filed Application #CAO07-003 for the development thereof, with the Development Services Group, City of Mercer Island, dated 8/1/07, Tax Parcel Number 216000070. Such application seeks a reduction of the standard 50 foot Wetland Buffer to the minimum 25 foot buffer, which application is presently under appeal & protest by letter of Notice of

11/27/07 by various parties of interest.

Irrespective of such Application and Appeal and as it specifically relates to the interests of my seven clients, please be advised as follows:

“Should this Application be granted and construction and development of the subject property commence, you are on Notice that my clients intend to hold you all jointly and severally liable & will look to you all for compensation for any ensuing damage whatsoever, inclusive of property damage (& consequential thereof), as well as any personal injury, of any type, sort or description, including death.”

This notice is most particularly directed to that which relates to the City of Mercer Island’s decision to approve a reduction of the standard 50 foot wetlands buffer to the minimum of 25 feet (in appeal) and the validity of the Washington Department of Fish and Wildlife’s Bald Eagle Management Plan (BEMP) prepared by William Ritchie and sent to Jeffrey Skall, approved 11/7/2007. In order to proceed, the proposed development presented by Jeffrey Skall requires a reduced wetlands buffer. According to expert findings presented later in this notice, this development would cause damage to the root structure of the old growth Douglas Fir tree (protected eagle’s nest tree), measuring 80” DSH which is located in close proximity to my clients’ homes. The concern is the prospect of such “Tree” (or any other tree or timber of any kind on the site) falling on my client’s properties as a result of the damage caused from this development. (Reference Appendix EM 1)

It should also be noted, that certain falling of timber occurred on this property a few years prior in the general vicinity of this large “eagle’s nest or wildlife tree” without development and construction damage to the root structure.

Please see and make particular and specific reference with respect thereto, Paragraph #5, Page 5 of 8 of previously mentioned letter of Appeal to your Application dated 11/27/07, and set forth below as follows:

“5. Of additional great concern is the related issue of the health and welfare of the large 80” diameter Douglas Fir, mentioned above. In a meeting with Jay Shepard and Kathy Parker on September 24, 2007, it was stated by Jay that not many trees of this size are found on the eastside any longer. This protected tree is a special feature of our neighborhood and is a rarity not only on Mercer Island, but on the eastside in general. We have been told by Kathy Parker that the current building plans on this property put the tree in jeopardy. At this meeting, Kathy stated that there is a 50% chance that the tree will be killed by the construction as planned. Reducing the wetland buffer allows construction to be closer to this tree in general and, in essence, will contribute directly to the potential death of this large, protected tree. Both Jay Shepard and Kathy Parker expressed remorse over this issue and encouraged neighbors to write letters to decision makers.”

Furthermore, and more importantly, (in much greater specificity), see copy of letter (Appendix EM 1), enclosed, from Scott D. Baker, R.C.A. dated 1/13/08 to Mr. Jay Shepard of the Washington Department of Fish & Wildlife, MillCreek, WA. 98012. Said letter from an Arborist and Professional Expert, enumerates and specifies in great detail, the potential resultant tree damage from such proposed development, (or possibly any construction at all).

Although the Baker letter is self explanatory please note the following in particular:

1. His review of a site plan and three letters from the Washington Department of Fish and Wildlife (WDFW), one dated Dec. 4, 2002 signed by Ms. Julie Stofel, biologist, (Appendix EM 2) regarding the BEMP requirements, states that two arborists for the City of Mercer Island, Kathy Parker and Paul West consider the plan for a driveway south of the “wildlife” tree to be unacceptable due to the damage to the tree root system that would result. The second letter from Julie Stofel (Appendix EM 3) suggests that the driveway should be as far north of the tree as possible and suggests that the protection area for such a tree is typically 1.5 times the drip line of the tree (approximately 34’ radius) & that as little excavation as possible should be done to help protect the root system. The proposed Skall development calls for a 20’ tree buffer, and significant excavation into the hillside for the driveway (approximately 4 feet).

Robert L. Edmonds, Ph.D., Professor and Associate Dean of the College of Forest Resources, University of Washington agrees with Mr. Baker's assessment in a letter dated 9/7/07 to Mr. Jay Shepard (Appendix EM 4). Dr. Edmonds was asked how much buffer zone is recommended around a 7'-8' circumference conifer to assure its survival during construction. He stated: "At a minimum, the zone should be as large as the crown drip line plus twenty to forty feet more in diameter to be safe. Heavy equipment movement can be very damaging to root systems. Pile driving in the vicinity of the tree is not recommended."

2. A third letter (Appendix EM 5) by Mr. William Ritchie a biologist from the WDFW dated 4/12/07 is a site specific BEMP which states that "the driveway must be constructed in such a way that there is no damage to the nest tree." Also among the conditions that are included in the BEMP, #3 states that "the driveway construction shall not cause damage to the tree roots. Mr. Baker states that he could "see no possibility that the criteria can be accomplished given the topography of the site and the location of the tree."

3. Opinion was further offered that, if only a 20' radius is protected, that the wildlife tree will eventually decline and die.

Mr. Baker goes on to say that apparently Mr. See's report (See Appendix EM 5) is being used to justify the construction *near the tree* (emphasis added) since Mr. See states that the critical root zone is not on the uphill side of the tree. However Mr. Baker further notes that the report gives no information on the actual work the arborist did to evaluate the wildlife tree and provides no measurements or specifics about how he arrives at the other conclusions. Mr. Baker concludes by then stating that the quality of the report is "in my opinion, very poor and it should not be considered as accurate or used as a basis for decision."

Mr. Baker was also unable to observe any signs that someone, anyone, had excavated around the base of the tree to locate roots, a procedure necessary, he opines, in order to have the data to make such a statement regarding the location, etc., of the roots in question. Baker concludes: "I find it hard to believe that a tree of this size has grown for several hundred years with supporting roots only on one side."

In addition Mr. Baker opines that both the driveway and the foundation of the proposed house are far too close to the tree to avoid impact and will cause adverse impact to all of the trees including the wildlife tree on the road side of the site. Again he states that *if* this project were to proceed "the wildlife tree will decline and eventually die." (emphasis added). Furthermore Baker states: "The excavation and compaction will compromise the tree's root structure in a 100 degree arc from south to west. This will likely increase the tree's susceptibility to blow down during wind storms coming out of the south."

In conclusion Mr. Baker suggests that if the tree fails at its base (as suggested), it "is within range of at least five houses with the most likely target being Gerry Kaelin's home to the north. The new house will be a sixth target." Finally he states that "If this development proceeds & the tree remains, in my opinion, based on my observations and training, the wildlife tree *will become a "hazardous tree,"*" (emphasis Added).

Therefore, it seems abundantly clear from our own review, but most especially from that of Mr. Scott D. Baker, R.C.A., (Arborist and Professional Expert), that a most extraordinarily and unwarranted risk, and the creation of a hazard, (if not thus an inherently dangerous instrumentality), would be created in the event development were to go forward, even if under the most careful plans and the most favorable of conditions.

It is for these, and other good and sufficient reasons, that this office, and all clients thus listed, wish to place every one of you so notified, on Formal Notice with reference to any possible resultant damage whatsoever, as more specifically set forth on page 2, paragraph 2.

Very truly yours,

GERARD J. KAELIN, ESQUIRE

EXHIBIT A: SIGNATORIES

1. Gerard A. Kaelin & Christina M. Demopoulos, 4819 E. Mercer Way, Mercer Island, WA 98040

2. Seth and Celestine Davis, 4917 E. Mercer Way, Mercer Island, WA 98040

3. Dave and Barbara Rose, 4919 E. Mercer Way, Mercer Island, WA 98040

4. Roger Kammerer, 4921E. Mercer Way, Mercer Island, WA 98040

5. Arnie and Jeanette Eggebrecht, 4911 E. Mercer Way, Mercer Island, WA 98040

6. Ken and Karen Beck, 4813 E. Mercer Way, Mercer Island, WA 98040

7. Dan and Debbie Hanson, 4905 E. Mercer Way, Mercer Island, WA 98040