

From: anderson9200@comcast.net
To: [Evan Maxim](#)
Subject: Treehouse - no economic loss
Date: Friday, January 24, 2020 2:33:37 PM

Dear Mr. Maxim,

In your Reasonable Use Exception Staff Report & Recommendation, dated February 13, 2017, you stated at page 7: "The applicant has failed to demonstrate that the property owner has lost economic value as a result of the application of critical area regulations." This was one of the grounds that you used in recommending that the hearing examiner deny the reasonable use exception sought in this case. The same reasoning is applicable now. 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]

At the present time, the factual basis for your statement at page 7 of your February 2017 report and recommendation is even stronger than it was in 2017. In 2017 counsel for Treehouse based his arguments with respect to economic loss primarily on the fact that the King County Department of Assessments had determined that the assessed value of the Treehouse property was \$417,000. As you are now aware, this amount was reduced by the Board of Appeals to the purchase price, \$32,094. Although this reduction helps Treehouse with respect to its tax bill, it is fatal to its argument on economic loss in this proceeding. As far as I know, Treehouse did not inform you of this reduction, but rather you received the information from me. If indeed Treehouse failed to inform you, it is certainly possible that the reason for its failure was the fact that this information would be prejudicial with respect to its argument on economic loss. This point is addressed in even greater detail in my letter to you, dated March 14, 2019.

The definition of "reasonable use" in MICC 19.16.010, quoted above, is obviously controlling in the use of that term in MICC 19.07.140. Indeed, on the City's website, the phrase "reasonable use," repeatedly utilized in MICC 19.07.140, is electronically linked to this definition. The definition makes a consideration of "the economic loss" mandatory as shown by the phrase, "[t]he decisionmaker **must** balance" [emphasis added]. Treehouse purchased the property with knowledge that "the prior owner had tried twice to get permission from the City to develop the property and was unsuccessful." See *Owner's Evidence and Arguments* from the decision of the

Board of Appeals. Because of this, the fair market value of the property is \$32,094 as reflected in the purchase price and in the assessed value by the King County Department of Assessments after appeal. A third denial by the City will have little effect on the fair market value of \$32,094. Thus, Treehouse will not experience a loss.

The relevant question should be the loss incurred by the property owner as opposed to a gain. Here Treehouse bought the property for \$32,094 with the hope that it could obtain a huge financial gain by convincing the City to allow its development. MICC 19.07.140 was not intended to facilitate huge financial windfalls, but rather to provide relief against oppressive losses. This is apparent from the definition of reasonable use quoted above. The last sentence of the definition 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.” Denying a person a huge financial windfall is not “oppressive.”

Construing MICC 19.07.140 as a means for developers to obtain huge financial windfalls perverts the purpose of the exception. For example, if gains were considered losses, it would mean that when the hearing examiner considers economic loss under MICC 19.07.140 and 19.16.010 , the larger the windfall gain, the greater the loss would be. Thus, a developer who could increase of the value of the land 25-fold, though avoidance of a regulation, would have a stronger case for a reasonable use exception than a developer who would increase the value of the land only two-fold through the avoidance. In short, the bigger the windfall gain, the stronger the case for an exception. This simply does not make sense. The reasonable use exception adopted by the City was intended to prevent a “regulation being unduly oppressive” and not to be a money machine to produce huge profits for developers. **Recommending approval of a reasonable use exception in this case would set a terrible precedent. It would encourage developers to purchase Mercer Island land, bound by environmental restrictions and therefore obtainable for a very cheap price for Mercer Island land, and then to build a home on the property and to sell it at great profit.** Environmental restrictions on wetlands, watercourses, and hazardous areas serve an extremely important public and environmental purpose and should not be ignored so as to allow developers to obtain windfall profits.

With respect to “economic loss,” there is absolutely no basis for the City now to contradict its conclusion in 2017 that the “applicant has failed to demonstrate that the property owner has lost economic value as a result of the application of critical area regulations.” In fact, there is now more reason than before to reach this conclusion.

Peter M. Anderson