From: anderson9200@comcast.net
To: Evan Maxim
Cc: "Dave Anderson"; robertroyalgraham@gmail.com
Subject: Important letter to Evan Maxim
Date: Thursday, July 2, 2020 3:52:42 PM
Attachments: Letter 7-2-20.pdf
EXHIBIT A.pdf
EXHIBIT B.pdf
Exhibit C.pdf
Exhibit D.pdf
Exhibit E.pdf
Exhibit F.pdf

Dear Mr. Maxim,

Attached to this email is a letter to you as well as Exhibits A through F, which are expressly incorporated into the letter by reference. As requested by the hearing examiner, I have used a pdf format for the letter and exhibits. Thank you for your consideration. Sincerely yours, Peter Anderson

July 2, 2020

Evan Maxim
Director, Community Planning & Development
City of Mercer Island
9611 SE 36th Street
Mercer Island, WA 98040

Re: CAO15-001 & VAR18-002

Dear Mr. Maxim,

On July 1, 2020, I sent you an email stating that I was "interested in knowing the documents which were provided by the neighbors and which you are intending to include" in the package of documents under Rule 220(a). I was hoping that a discussion of this might simplify the hearing. You responded later in the day that the list of the exhibits and the staff report would not be released until approximately ten days prior to the hearing. You did state that the exhibits from the first hearing would be included.

Of course, I hope that the post-hearing documents selected by you will fairly include not only documents which reflect and are relevant to the position of the applicant but also to the positions taken by the neighbors. Whether this occurs in the selection of post-hearing documents will not be known until the package of documents has actually been released. However, Rule 220(a) specifically provides that "all substantive letters from citizens regarding the application shall be included." This letter including all of the attached exhibits, which now are expressly incorporated herein by reference, is intended to be such a "substantive letter" that "shall be included."

All of the information in the attached exhibits have already been communicated to you months or years ago. Exhibit A includes written communications to you by my son, David L. Anderson. He and his wife have owned the property at 9200 SE 57th Street since December 2018. My wife and I owned the property from 1970 until that time. However, my wife and I continue to hold a mortgage on the property and therefore have a property interest in it. My son and I are now working together on these proceeding, and he has expressly authorized me to submit this letter with exhibits to you on behalf of both of us. My son would have co-signed this letter, but he is traveling today and is not available.

Exhibit B consists of excerpts from the many emails and letters that I have written to you. The dates of the letters and emails are given before each excerpt. Exhibit C is the copy of the proposed decision of the Board of Tax Appeals, dated August 28, 2017, relating to the Treehouse property in this case. This proposed decision subsequently became the final decision. The decision was forward to you as an email attachment on February 20, 2019.

Robert Graham, who lives at 5636 East Mercer Way, has communicated with you on many occasions with respect to these proceedings and the terms of the drainage easement over his property. When I informed him that I was planning to submit this letter to you, he requested that I include certain additional items. I have done so. However, I wish to make it very clear that neither my son nor I is representing Mr. Graham in these proceedings and that he is representing himself. His requested exhibits are D, E, and F. You have been previously informed of the contents of these exhibits.

Exhibit D is a copy of the drainage easement over his property. The drainage easement was Exhibit 14 in the first hearing. However, the copy in Exhibit D was obtained online from the website of the King County Recorder's Office. https://recordsearch.kingcounty.gov/LandmarkWeb/search/index?theme=.blue§ion=searchCriteriaName&quickSearchSelection= The easement has a "recording number" of 199806011443. The easement was recorded on June 1, 1998, at 2:36 p.m. This information was provided to you by email on January 20, 2020. It is my understanding that the Recorder's Office is now preparing an officially certified copy of the easement which will be provided to you as soon as it is received.

Exhibit E is a copy of the settlement agreement between the City of Mercer Island and James and Dorothy O'Sullivan which gave rise to the recorded easement. It should be noted that this particular copy, stamped "Original," came from the files of the City of Mercer Island. It was produced by the City on July 2, 2019, pursuant to document request #20-357.

Exhibit F is a photograph showing the water in the stream flowing next to the Graham residence. I believe that this photo was an exhibit in the first hearing and has been submitted to you on at least a number of occasions.

Again, I request that this letter be included with the documents accompanying the staff report and recommendations as required by Rule 220(a). This morning, I telephoned the City of Mercer Island and inquired whether this letter with exhibits could be hand-delivered to your office today. I was informed that the offices were closed and that I should rather email these items to you instead. I am following those directions. Because the hearing examiner prefers that documents be in pdf format, I have used that format for this letter and the exhibits.

Thank you for your consideration.

Sincerely yours,

Peter M. Anderson
9142 N. Mercer Way #7306
Mercer Island, WA 98040

EXHIBIT A

EXCERPTS FROM PRIOR WRITTEN COMMENTS MADE BY DAVID L. ANDERSON TO EVAN MAXIM

Email to Maxim, 12/1/2019

I disagree with the 10-30-19 response from Mr. Sewall that the foundation drainage system will not impact the hydrology of wetland as the site has "soils that do not appear prone to drainage". The Geotechnical Engineering Study prepared by GEO Group Northwest dated March 13th, 2015 as well as the supplemental information provided in the responses to third party review dated July 30th, 2015 and October 28th, 2015 would appear to contradict this statement. This information shows sandy outwash soils to a depth in excess of 16 feet. The report indicates that this sand contains relatively small percentage of silt and fines. The logs also show very low blow counts which indicate the outwash sand layer is soft and relatively uncompacted. These sandy outwash soils should be considered permeable and I am very surprised by these responses given the previously documented geotechnical report.

It is my understanding that the foundation drainage system including that associated with the proposed retaining wall will be approximately 10 feet below the existing wetland elevation. This is required to prevent hydraulic forces associated with the ground water from applying pressure on these walls. This will require the perched water table elevation to be lowered to below an approximate elevation of 178 feet (at least 18 inches below the garage elevation of 179.5). Much of the water intercepted by these drains would be seeping out of the wetland slope into the existing type 2 watercourse. The movement of this water through a pipe will be quicker and more efficient than this seepage. As the existing sandy soils are very wet or saturated, lowering the perched water table elevation will almost certainly impact the adjacent upland wetland areas. Given the drainage characteristics typically associated with sandy outwash soils and that these soils are currently saturated, the impact to could extend quite some distance to the west. The site plan and the associated disturbed wetland areas still do not reflect or account for these impacts that will be permanent.

Please note that the recommendations included in Section 5.6 of the geotechnical report for drainage are also not acknowledged on the site plan or in the tabulated areas of wetland disturbance. This includes a recommendation to slope the ground surface away from the proposed building at a gradient of at least 3% for a distance of at least 10' away from the building for all areas that are not paved. This would include grading and surface impacts to the existing wetland areas south and west of the building site.

Email to Maxim, 10/4/2019

The statement that the SEPA submittal and RUE application "*materials are not entirely as detailed*" does not accurately represent what has been provided by MI Treehouse. Details aside, the revised site plan does not include any schematic drainage plan or the proposed discharge locations. The vault and any references to the proposed storm drainage system have been removed from the updated plan. There is no reference whatsoever to the retaining wall drainage, perforated drainage for the proposed detention vault, and any foundation drainage in either the plan or the SEPA checklist. The written responses in the SEPA checklist are limited to vague one-sentence responses. The proposed project is located within a wetland, within water course buffers, and in an area where there has been downstream drainage issues in the past. How can we be expected to provide any meaningful review or comment on the proposal without any information on these drainage systems?

Letter to Maxim, 8 [9]/24/2019

The response from the wetland consultant relative to ESA's comments and my previous e-mail includes the statement that water will be conveyed from the retaining wall drain to a spreader northwest of the building site that would recharge the existing wetlands. However, the elevation of the retaining wall drain will be below the existing surface grades in the wetlands to the northwest. This will not allow for positive drainage from a gravity system. The existing wetland elevation at the northwest corner of the proposed residence is 182. To achieve

positive drainage from the wall to the northwest, the spreader trench would need to be very close to the water course to daylight at an elevation around 178. This would create additional temporary and permanent impacts to the existing wetlands beyond what are currently accounted for in the area summaries identified in the current reports and site plans. I appreciate the fact that detailed design documents are typically not part of a SEPA process. But short written responses do not accurately quantify the wetland, watercourse, and associated storm water impacts. Preliminary or design development level drainage plans that account for the site topography, the water table elevation, and required discharge elevations must be provided to accurately identify the wetland and watercourse buffer impacts.

The SEPA response also does not reference what certainly will be a permanent impact to the existing up-gradient wetland areas. As previously noted in earlier correspondence a perforated drain placed well below the surface will almost certainly be a permanent impact on the existing wetland areas south, west, and potentially northwest of the proposed building location. A portion of this area is indicated on the 2018 site plan as temporary wetland disturbance due to grading activities. The wall construction with drainage collection well below the wetland surface will permanently impact the wetland area and could de-water a significant portion of the potentially including those that extend beyond the parcel limits.

The level spreader devices proposed are most effective when used in areas that have fairly uniform downstream slopes. In this application, the spreader would be effectively on a high point between two existing water courses. It would be reasonable to expect that the flow immediately downstream of the spreader would quickly converge or concentrate in a relatively short distance into the watercourses significantly reducing its effectiveness for recharging the wetlands. As these flows would bypass the storm water detention facility, it is also reasonable to expect by intercepting both surface water and ground water with the retaining wall backfill and foundation drain and conveying it quickly to the watercourse that the peak storm water discharge rates from the site would be increased and water would be diverted from the water courses directly into the downstream storm drainage system on East Mercer Way.

The location of the stormwater detention storage tank could also impact the existing wetland area beyond what is shown in the revised 2018 plan. The tank identified in the preliminary calculations included a 17.45’ by 17.45’ footprint with a 5’ depth. The tank would typically need at least 2’ of cover from the lowest surface elevation to allow for installation of the driveway and to provide cover for the associated storm drainage conveyance piping that connects the development area to the detention storage. The tank installation would typically include granular bedding and backfill materials. As the excavation would boarder a wetland, the area would need to be de-watered to install the tank. The granular bedding and backfill would typically include a perforated drain to provide the required de-watering and to eliminate potential buoyancy of the tank. This drain could be in the range of 8’ below the driveway elevation further impacting the down-gradient wetland area and flow into the adjacent water course on a permanent basis.

Given very low runoff rates from this type of wooded area, matching or reducing the peak stormwater discharge rates can be very difficult if there are significant areas of impervious surface that bypass the detention and flow control system. The stormwater detention facility location has been removed from the current plan but has previously been shown just east of the building location at the top of the driveway. With this location, 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. This was not accounted for in the preliminary runoff calculations which showed no areas as bypassing the detention system.

The bypass flows for the sloped sections of driveway and perimeter that do not have detention storage and flow control could exceed those of the existing site conditions resulting in increased peak discharge rates from the site. The previous runoff calculations that were submitted did not account for any bypass and included area quantities that differed from those indicated on the current plans. Previous statements have been made by the developer’s consultants that the development would not adversely impact previously documented downstream storm water issues and that in some cases they may even be improved. As part of the SEPA process is appropriate and reasonable to have these statements backed up with an accurate analysis.

Email to Maxim, 3/22/2019

I have reviewed the recent civil and wetland consultant responses associated with the proposed development for parcel # 1924059312 (5637 East Mercer Way or MI Treehouse LLC). These responses provided written descriptions that identify a general approach to how the storm water and wetland impacts will be potentially mitigated. However, to accurately quantify the extent of these impacts, a more detailed drainage analysis is required as elaborated below:

The response from the wetland consultant relative to ESA's comments and my previous e-mail includes the statement that water will be conveyed from the retaining wall drain to a spreader northwest of the building site that would recharge the existing wetlands. However, the elevation of the retaining wall drain will be below the existing surface grades in the wetlands to the northwest. This will not allow for positive drainage from a gravity system. The existing wetland elevation at the northwest corner of the proposed residence is 182. To achieve positive drainage from the wall to the northwest, the spreader trench would need to be very close to the water course to daylight at an elevation around 178. This would create additional temporary and permanent impacts to the existing wetlands beyond what are currently accounted for in the area summaries identified in the current reports and site plans. I appreciate the fact that detailed design documents are typically not part of a SEPA process. But short written responses do not accurately quantify the wetland, watercourse, and associated storm water impacts. Preliminary or design development level drainage plans that account for the site topography, the water table elevation, and required discharge elevations must be provided to accurately identify the wetland and watercourse buffer impacts.

Please note the location of the southern watercourse has changed on the more recent plans from pervious site plans. The 2018 plan shows the southern watercourse shifted to the north further away from the proposed building site and from the low area as designated by the contour lines. If the revised location for the watercourse is correct it would appear that the topography in this area may need to be adjusted on the plan. If the topography is correct, then the watercourse location should be more thoroughly confirmed and could conflict with the proposed building location.

To date, there still has not been any revised documents that show what certainly will be a permanent impact to the existing up-gradient wetland areas. As previously noted in earlier correspondence a perforated drain placed well below the surface will almost certainly be a permanent impact on the existing wetland areas south, west, and potentially northwest of the proposed building location. A portion of this area is indicated on the 2018 site plan as temporary wetland disturbance due to grading activities. The wall construction with drainage collection well below the wetland surface will permanently impact the wetland area and could de-water a significant portion of the potentially including those that extend beyond the parcel limits.

The level spreader devices proposed are most effective when used in areas that have fairly uniform downstream slopes. In this application, the spreader would be effectively on a high point between two existing water courses. It would be reasonable to expect that the flow immediately downstream of the spreader would quickly converge or concentrate in a relatively short distance into the watercourses significantly reducing its effectiveness for recharging the wetlands. As these flows would bypass the storm water detention facility, it is also reasonable to expect by intercepting both surface water and ground water with the retaining wall backfill and foundation drain and conveying it quickly to the watercourse that the peak stormwater discharge rates from the site would be increased.

As previously discussed, it is possible that the bypass flows for the sloped sections of driveway and perimeter that do not have detention storage and flow control could exceed those of the existing site conditions resulting in increased peak discharge rates from the site. The previous runoff calculations that were submitted did not account for any bypass and included area quantities that differed from those indicated on the current plans. Previous statements have been made by the developer's consultants that the development would not adversely impact previously documented downstream storm water issues and that in some cases they may even be improved. As part of the SEPA process is appropriate and reasonable to have these statements backed up with an accurate analysis.

Email to Maxim, 11/15/18

Thank you for soliciting input from ESA on the wetland impacts associated with the proposed development for parcel # 1924059312 (5637 East Mercer Way or MI Treehouse LLC). They make some excellent points, however, without a detailed drainage plan it will not be feasible to accurately evaluate the extent of both the temporary and permanent impacts on the existing wetland areas and adjacent water courses. There are additional technical factors associated with proposed development that must be considered beyond those addressed in the October 1st, 2018 ESA memorandum to truly quantify the permanent impacts to the existing water course and surrounding wetlands.

The proposed development includes a retaining wall on south and west of the proposed building location. With the garage floor elevation of 179.5 the bottom of the wall would typically be below 178 which is approximately 10 feet below the existing grade at the southwest corner of the house. The retaining wall will typically require permeable materials behind the wall with drainage collection at the base of the wall and around the structure foundation or slab. With a perforated drain approximately 10 feet below the surface there will almost certainly be a permanent impact on the existing wetland areas south, west, and potentially northwest of the proposed building location. A portion of this area is indicated on the 2018 site plan as temporary wetland disturbance due to grading activities. The wall construction with drainage collection 10 feet below the wetland surface will permanently impact the wetland area and could de-water a significant portion of the up-gradient wetland areas potentially including those that extend beyond the parcel limits.

The location of the stormwater detention storage tank could also impact the existing wetland area beyond what is shown in the revised 2018 plan. The tank identified in the preliminary calculations included a 17.45’ by 17.45’ footprint with a 5’ depth. The tank would typically need at least 2’ of cover from the lowest surface elevation to allow for installation of the driveway and to provide cover for the associated storm drainage conveyance piping that connects the development area to the detention storage. The tank installation would typically include granular bedding and backfill materials. As the excavation would boarder a wetland, the area would need to be de-watered to install the tank. The granular bedding and backfill would typically include a perforated drain to provide the required de-watering and to eliminate potential buoyancy of the tank. This drain could be in the range of 8’ below the driveway elevation further impacting the down-gradient wetland area and flow into the adjacent water course on a permanent basis.

Given very low runoff rates from this type of wooded area, matching or reducing the peak stormwater discharge rates can be very difficult if there are significant areas of impervious surface that bypass the detention and flow control system. The stormwater detention facility location has been removed from the current plan but has previously been shown just east of the building location at the top of the driveway. With this location, 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. This was not accounted for in the preliminary runoff calculations which showed no areas as bypassing the detention system.

Locating any detention storage at the bottom of the proposed driveway to avoid these bypass flows would require excavation activities in close proximity to the existing water course or would take the driveway for the adjacent residence out of service. Intercepting and collecting the runoff from all of the driveway areas to eliminate any storm water bypass may not be feasible as the current design for the driveway grading has 20% surface slope and does not include any accommodation for intercepting surface water runoff. If the detention storage facilities were to be located at the lower section of the driveway, the elevation of the detention structure would be even lower, further impacting the adjacent wetlands and water course.

On a separate note that we discussed during our meeting last summer, the stormwater detention calculations did not account for any bypass flows. Typically, the retaining wall and building foundation drains would bypass the stormwater detention and flow control as the flows are relatively minor with a low peak. However, given the depth of the drains with the proposed development occurring within an existing wetland, these flows should be addressed in some manner to ensure that the peak discharge rate is not increased as a result of the development especially given the previous downstream drainage capacity issues. The existing wooded wetland areas provide significant

quantities of stormwater storage that will be impacted by the proposed development. With wetland de-watering and the potential for significant bypass flows more detailed design and evaluation is required before the developer can unequivocally state that the flow rates and durations could be limited to the pre-development/forested levels.

EXHIBIT B

EXCERPTS FROM PRIOR WRITTEN COMMENTS MADE BY PETER M. ANDERSON TO EVAN MAXIM

Email to Maxim, 1/27/20: Examiner's ruling precludes the delay of drainage considerations

As you are well aware, one of the two reasons why the hearing examiner in this case did not make a final ruling on the RUE application is that the Treehouse evidence was "not sufficient to determine if the project meets the reasonable use exception criteria to the degree that it fails to provide an analysis of 'potential adverse impacts to adjacent and down-current properties.'" At the time of this ruling, the admitted exhibits included the reports by Triad, Geo Group, Perrone, Sewall, and ESA. It is very apparent from the remand by the hearing examiner that he found that the existing evidence was not sufficient to make a decision on the potential adverse impacts to adjacent and down-stream properties. The clear message from the hearing examiner is that more work is needed with respect to determining the potential adverse impacts. It is likely that this remand was influenced at least in part by the arguments advanced by the neighbors to the examiner, such as the point made in my written argument to him that water on the large imperious surface of the driveway below the detention vault would obviously not flow into the vault.

One cannot comply with this portion of the remand without knowing what will happen to the waters on the Treehouse property. One cannot determine the adverse effect on the down-current properties without knowing whether the amount of water flowing into the stream to the down-current properties will increase. If it does increase, it would violate the terms of the recorded easement. Even aside from the terms of the easement, an increase of water would also increase erosion and the potential of flooding. Without a drainage plan, one does not know what will happen to the waters on much of the impervious driveway, what will happen to the waters behind the containment wall, whether the detention vault will act as a sink, and similar matters. All of these affect the amount of water flowing downstream. The ESA letter of December 17, 2019 confirms that many of the aspects relating to draining and stream hydrology are not known at the present time. The Shannon & Wilson letter of November 25, 2019 confirms that the erosion hazards have not been clearly addressed.

It should also be noted that what happens to the water on the Treehouse site also may affect the homeowners living at the top of the very steep slopes above the Treehouse property. The water in the Treehouse wetlands comes from the base of these steep slopes. What happens to the waters below could affect the slopes themselves.

The remand in effect calls for the evidence on potential adverse impacts to adjacent and down-current properties to be brought before the hearing examiner for consideration. In seeking to delay obtaining information, such as an analysis of drainage, the flow of water, and erosion, until after the RUE proceedings, the City is in effect telling the hearing examiner that it is withdrawing from him consideration of such issues highly relevant to the potential adverse impacts to adjacent and down-current properties and that the City itself will consider such information sometime after his decision. Simply stated, such a withdrawal would be highly inappropriate.

Email to Maxim, 1/25/20: More on Treehouse - no economic loss

I have just noticed this weekend that the recently amended Code provisions relating to the reasonable use exception adds a new criterion that must be satisfied for the application of the reasonable use exception. This new criterion, MICC 19.07.140(A)(5) provides: **The proposal is consistent with the purpose of this chapter and the public interest.** It is inconceivable how it is in the "public interest" to allow major violations of the wetlands, watercourses, and other provisions of "this chapter [Chapter 19.07 – Environment]" so as to allow a developer to obtain a great profit.

Email to Maxim, 1/24/20: Treehouse - no economic loss

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 that 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.

Email to Maxim, 1/20/20: The recorded downstream easement

As you are well aware, the downstream owners in the Treehouse proceedings have repeatedly raised to the City the drainage easement resulting from negotiations between James and Dorothy O'Sullivan and the City of Mercer Island. I also have made arguments based on the terms of this easement. See, e.g., Section IV of my written argument to the hearing examiner. It is my understanding from the downstream owners that the City maintains that it has no knowledge of this easement or that it does not exist. The copy of the easement in the possession of the downstream owners expressly states that the drainage easement would be recorded. Yesterday, I spent a few hours to do an online record search using the website of the King County Recorder's Office. In my search, I found the drainage easement including its complete text. The easement has a "recording number" of 199806011443. The drainage easement was recorded on June 1, 1998, at 2:36 p.m. You can easily repeat my research by using https://recordsearch.kingcounty.gov/LandmarkWeb/search/index?theme=.blue§ion=searchCriteriaName&quickSearchSelection= and entering the foregoing recording number. This will allow you to access a photocopy of the five-page document that was recorded. In view of the fact that this is a public record, it is difficult to see the basis for the City claiming that it does not have knowledge of the drainage easement or that the easement does not exist.

The reality of the matter is that the City is legally bound by the strict terms of the recorded drainage easement. If the City recommends to the hearing examiner the approval of a plan which violates the terms of the drainage easement, the City becomes an active participant in violating those terms. The terms of the drainage easement provide in 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."**

It should be noted that this language refers to "water flows." It does not refer to "peak flows." If the parties intended the latter, they would have used the word "peak" to show that. Also it is apparent that waters flowing from this project do not result from "improvements existing as of…May 31, 1984." My son, who is a licensed civil engineer, is in a better position than I to explain how the total and cumulative volume of water flowing from the Treehouse land parcel into the stream through the downstream properties will be increased by the proposed project. It is even obvious to me, as a layman, that this would be the case. In the natural state, a certain percentage of the precipitation falling within the area of the proposed footprint would be absorbed by the ground through percolation and would never reach the stream in question. Under the proposed plan with its impermeable surfaces, all of the precipitation within the footprint would be diverted into the stream at some point in time even if a detention vault is used.

I do not intend this short email to be a full and complete argument of all of the points to be made with respect to the recorded drainage easement. However, I do wish to stress at this point in time that the City will not be meeting its legal obligations if it recommends approval of a plan that would violate the strict terms of the easement. Thank you for your thoughtful consideration. I hope that the City will live up to its legal commitments.

Email to Maxim, 11/18/19: An initial comment [Glenhome Pond]

Thank you for providing us the opportunity to review the most recent documents. I know that my son, Dave Anderson, who is recovering from a respiratory bug, plans to respond to the latest reports from Sewall and GEO Group. However, as a non-engineer, I would like to comment on the paragraph of the GEO letter relating to potential adverse impact to the downhill properties. This paragraph states that "actual problems downstream exist when debris clogs the catch basins" – namely the "Glenhome Pond." It is my understanding from Dr. London, who lived next to the Pond for many years, is that potential flooding concerns is not the Pond flooding but the great volume of water that passes in the channel below the Pond. I have attached a photo which has been previously submitted to you and which shows the level of the water next to the Graham's home during a rainy period, but not during an unusual storm. The fact that the water is at this high level has **absolutely nothing** to do with debris in the Glenhome Pond. If the water were a few inches higher, it would be in the Graham's living room. From my understanding, the restrictions in the City's easement over this area was to limit the flow of water passing through this area.

The GEO letter states: "With the development of the property the issue of debris and water discharged from the property to the Street is eliminated or minimized." First, the concern in not the discharge of water "to the Street" but rather to the stream flowing to Lake Washington. Second, minimizing the flow is not enough as even a small increase in the flow creates a danger of flooding and would also violate the terms of the easement. Third, as a non-engineer, it is obvious to me that the flow of water must increase due to the paved driveway, much of which is below the elevation of the detention vault as shown on the most recent plans.

Email to Maxim, 8/23/19: Your message to Dr. London

I have reviewed your response to Dr. London. With respect to the concerns expressed by Dave Anderson, you state that those concerns have been reviewed by ESA. In that regard, I am attaching a copy of the ESA letter of December 6, 2018. ESA in no way disagreed with the concerns expressed by Dave Anderson. The third paragraph of the ESA letter states in part:

> **Although not shown on the plans, it is likely that a drainage system will need to be installed on the backside of retaining wall and adjacent to the building foundation to alleviate static pressure on these structures by transporting groundwater down-gradient. The retaining wall drainage system would likely impact wetland hydrology up-gradient of the wall by acting as a groundwater "sink." Similarly, the foundation drainage system would impact wetland hydrology adjacent to the of the building (i.e., southwest). The extent and degree of impact to wetland hydrology is unknown at this time and ESA is not qualified to make this determination. ESA recommends that design plans detail the proposed drainage system for the project and the City consult a hydrogeomorphologist to determine likely impacts to wetland area.**

From this, it is clear that the plans will need to be modified to show a drainage system on the backside of the retaining wall and adjacent to the building foundation. According to ESA, this drainage system will likely act as a "sink" to remove water from the upslope area. The foundation drainage system would furthermore impact the wetlands adjacent to the building. This could well mean that areas upslope and adjacent to the building will not longer be wetlands and that the effect on the wetlands will be far greater than Treehouse contends. ESA in its letter states that ESA is "not qualified" to make a determination as to the extent and degree of the impact and recommends

that "the City consult a hydrogeomorphologist to determine likely impacts to wetland area."   This the City has not done.

The fourth paragraph of the ESA letter includes the following:

> **Mr. Anderson points out that the tank's proximity to the wetland boundary and required excavation to install may have a negative impact on wetland hydrology. The area around the tank may need to be backfilled with coarse material and drainage may need to be provided to address buoyancy of the tank. Should continuous drainage of the area surrounding the tank be required, this project element may act as a "sink" similar to the drainage system discussed above. ESA recommends the applicant provide additional details on the stormwater detention tank to address the potential for indirect impacts to the adjacent wetland.**

From this, it is apparent that the area around the storm water detention tank may also act as a "sink" and drain even more of the wetlands. The end result is that the drainage system could mean that far more of the wetlands could be adversely affected than shown on Treehouse's present proposal. This determination is not something that should be postponed until a later time. In making a RUE ruling, the hearing examiner is entitled to know how much for the wetlands would be affected by the proposed project. If twice as much wetland area would be affected than Treehouse now contends, should the hearing examiner not know this? The final drainage proposal will also affect the flow of water through the properties of the downstream owners. The hearing examiner remanded the case in part to determine any possible adverse impact on the downstream owners. This is another reason why the final drainage plan should be known now. ESA has not opined on the effect on the downstream owners, and it is in fact impossible for them to do so until the drainage details are known. Also none of the consultants have addressed the point that Treehouse has presented no plan to deal with the effect on flow caused by the impervious surface of the driveway which is below the level of the tank. None of the consultants have commented on this obvious omission.

In your email, you state: **ESA reviewed the impacts to the wetland and stream and possible further erosion, including the concerns expressed by Mr. Dave Anderson.** How can your statement be true? In the attached letter, ESA states that it is "not qualified" to determine the "extent and degree of impact." Instead, ESA recommended that that "the City consult a hydrogeomorphologist," and the City has not done so.

How the water is handled on this project is also critical to an assessment of the geotechnical issues reviewed by Shannon & Wilson in its letter of July 12, 2019 (also attached). The letter comments on the GGNW report relating to "Potential Adverse Impacts to Adjacent and Downhill Properties." The letter also states that one of the documents reviewed was the Core Design report which relates to drainage and water flow through the downstream properties. Dave Anderson's letter does address the drainage and flow issue. For example, his letter states: **With wetland de-watering and the potential for significant bypass flows more detailed design and evaluation is required before the developer can unequivocally state that the flow rates and durations could be limited to the pre-development/forested levels.** This statement and its reasoning by Dave Anderson demonstrate major defects in the above GGNW report and the Core Design report. As Shannon & Wilson reviewed these reports, fundamental fairness and even-handed treatment on the part of the City requires the furnishing another part of the City's files, namely the correspondence from Dave Anderson, a licensed civil engineer.

Email to Maxim, 8/20/19: Treehouse -- failure to provide analyses

I also think that it would be appropriate for Shannon & Wilson to review the points made below. As you know, one of the reasons that the hearing examiner remanded this case was to do an analysis of the potential adverse impacts to the adjacent and down-current properties. As stated below, this simply has not been done. To date, it appears that the review of Shannon & Wilson has been limited to a paper review of those papers that City has chosen to provide them. Not a single document provided by the neighbors to the City has been furnished to Shannon & Wilson. The City has not even given Shannon & Wilson the correspondence to you by David Anderson, who is a profession civil engineer licensed in the State of Washington. Also, the points made in the attachment

have not been presented to Shannon & Wilson. [Letter of March 4, 2019, below] As it stands now, we will certainly contend at any future hearing that the analysis mandated by the hearing examiner has not been done.

Email to Maxim, 3/15/19: Treehouse -- failure to provide analyses

Before leaving on my trip tomorrow morning, I want to raise one point which will be included in greater depth in a letter to be sent upon my return in a week and a half. That letter will also include other points. The point that I wish to raise now is the continuing failure of Treehouse to provide an analysis relating to the potential long term hazard to upstream and downstream landowners. Rather Treehouse and its experts simply state conclusions in this regard.

Appellant's [Treehouse's] Closing Argument before the hearing examiner discusses at pages 16-17 the concerns of the upslope and downstream neighbors. In the Argument, counsel for Treehouse stated that the various reports concluded that the proposed construction would have no adverse effect on slope stability. He also referred to the testimony by Mr. Chang at the hearing that the proposal, if anything, would provide greater stability to the upslope homes. With respect to the downstream neighbors, counsel for Treehouse refers to the Triad report for the conclusion that the recommended flow control measures would minimize the downstream drainage problems.

As you know, the hearing examiner remanded the Treehouse application for several reasons. The hearing examiner found at pages 4-5 of his decision that Treehouse had failed "to provide an analysis of 'potential adverse impacts to adjacent and down-current properties.'" Clearly, the hearing examiner found that the existing record was inadequate in this regard and that the conclusions stated by Treehouse's experts were not sufficient. Rather, an "analysis" was required.

Since that time, Treehouse has not provided an analysis. It has simply recited information that was already in the record before the hearing examiner and stated the same type of conclusions made at the hearing. To the best of my knowledge, the experts have made no new studies or gather new empirical data. They have not walked the downstream watercourse to examine the erosion there. They have not stepped foot on the steep slopes outside of the Treehouse property. They have done no new tests.

For example, if one looks at the GEO Group letter of May 3, 2017, there is nothing new that was not in the record before the hearing examiner. The letter really boils down to six short sentences (see page 3) of which two are conclusions. If a customer commissioned an engineering firm to do an analysis on an engineering issue that was of great importance to the customer and received six short sentences, it would be a joke.

The March 23, 2018 memorandum from Core Design discusses the downstream effect during the construction period, but only has one conclusory sentence with respect to the period after that. It states: "The proposed project is unlikely to impact siltation or flooding in the watercourse in the permanent condition." There is no analysis here. Furthermore, it refers to siltation or flooding, but makes no reference to the serious problem of erosion which is of great concern to the neighbors. In addition, the use of the word "unlikely" hardly gives much comfort. It clearly indicates that it is possible that it will result in an impact. One can imagine a customer's reaction if the safety certificate on an electric range certified that the range was "unlikely" to produce fires. The Core Design memorandum does refer to the revised report by Sewall, dated March 8, 2018, but the Sewall report provides for no discussion or analysis with respect to the impact on the downstream properties. In fact, the downstream situation is not even mentioned or alluded to in the revised report.

With respect to the Triad letter of January 9, 2018, this letter essentially states that Triad has already answered all of the questions in its earlier downstream report. However, the earlier Triad report was an exhibit at the hearing, and the remand order shows that the hearing examiner did not consider this report to be sufficient.

In this regard, it should be remembered that the applicant has the burden of proof with respect to establishing safety and other elements required for a reasonable use exemption.

Letter to Maxim, March 14, 2019: Loss of economic value of property

I understand that you forwarded to Treehouse my email of February 20, 2019, relating to the decision of the Washington State Board of Tax Appeals ("Board of Appeals"). Today, you kindly sent to me the response from Treehouse, dated March 4, 2019. Significantly, Treehouse in its response provides no explanation or justification for those statements that it made in Exhibit E to its letter of January 24, 2019, which are totally inconsistent with the decision of the Board of Appeals or its contentions before that Board.

The purpose of my present letter is not only to point out the inconsistencies, but also to summarize my argument relating to loss of economic value in light of the Board of Appeals' decision.

In Exhibit E to the letter from Treehouse, dated January 24, 2019, Mr. Summer discusses the value of his property. Thus, in the first paragraph of the exhibit, Mr. Summers states:

> "The Applicant acquired the property in 2014 for the nominal cash payment of $32,094 to Joseph L. Brotherton, a 25-year partner and close person friend of the Applicant's principal. This purchase was a private transaction, the purchase price having been determined based on factors other than market value considerations. As clearly stated by Mr. Brotherton in a sworn declaration dated February 10, 2017: 'The sale of the Property to Mr. Summers was clearly not consummated in an arms-length transaction, and the funds received by me upon sale did not reflect the property's fair market value…Rather, the consideration of the property included recognition of our twenty years of personal friendship and partnership activities between me and Mr. Summers.' *Declaration*, ¶ 6-7. Thus, the nominal amount paid for the property is irrelevant to the consideration of this Application."

This is similar to the position taken by counsel for Treehouse in Applicant's Closing Argument to the hearing examiner at pages 9-10. There it is argued that the purchase price of $32,094 is "at best of limited relevance." Rather, "as testified by Mr. Summers, and confirmed by Mr. Brotherton's Declaration, the 'sale' was an arrangement between long-term business partners rather than an arms-length transaction, and involved other consideration beyond the cash payment of $32,094." Instead of this figure, the Argument stresses that it is "undisputed that the assessed value of the Property is currently $417,000, and that although Mr. Summers appealed the evaluation to King County just this year, that appeal was denied by King County's Board of Equalization." Using this figure, the Argument states that "the lost economic value to the property owner is at a minimum $417,000."

In mid-February 2019, my son David Anderson (who with his wife now owns the ravine property at 9200 SE 57th St for which I still have a security interest) checked the assessed values of the property on the website of King County Department of Assessments. The website showed for the property the following appraised values beginning with 2014, the year of the purchase by Treehouse: 2014 - $32,094; 2015 - $32,094; 2016 - $32,094; 2017 - $35,000; 2018 - $38,000. From this, it can be seen that the fair market value for the years 2014 through 2016 is exactly the purchase price. For the years 2017 and 2018, it is only a small amount above the purchase price.

This prompted further research on my part. I discovered that Treehouse appealed the decision of the King County Board of Equalization to the Board of Appeals. On August 28, 2017, the Board of Appeals issued a proposed decision which apparently became final in the absence of exceptions. At the hearing, Treehouse was represented solely by Mr. Summers. The case was assigned docket numbers 89294, 90537, and 92289.

In its decision, the Board of Appeals stated the issue as follows: "The issue of this appeal is the January 1, 2014, January 1, 2015, and January 1, 2016, true and fair market values of the vacant land located at 5637 East Mercer Way, Mercer Island, Washington." The first page of the decision shows a table with the "valuation of the assessor and county board," the "contended valuation of the owner(s)," and the "valuation of the Board of Tax Appeals." For the contended valuation of the owner, the table lists the sum of $32, 094 for each of the three years. For the valuation of the Board of Tax Appeals, namely results of the appeal, $32,094 is also listed for each of the three

years. Thus, Treehouse contended before the Board of Appeals that the purchase price was the "true and fair market values" for the years 2104, 2015, 2016, and the Board of Appeals agreed with this contention by Treehouse. It should be noted that the evaluation on January 1, 2014, was before the sale of the property to Treehouse later in that year.

As far as I can determine, Treehouse never brought the decision of the Board of Appeals to the attention of the City prior to my email of February 20, 2019. The decision is certainly relevant to these proceedings. Indeed, the prior decision of the Board of Equalization was even made an exhibit (Exhibit 32) in the hearing before the hearing examiner. Perhaps the reason for withholding this information from the City is that Treehouse has been making inconsistent arguments to the City and to the Board of Appeals. The decision of the Board of Appeals is nowhere mentioned in Treehouse's letter of January 24, 2019, including the portion where the issue of value is expressly discussed. As quoted above, Treehouse contended in that letter that the purchase price did not reflect the fair market value of the property – a position totally opposite to the position taken by Treehouse before the Board of Appeals.

In a portion of the Board of Appeals' decision, entitled "*Owner's Evidence and Arguments*," the following paragraph is found:

> 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.

From the foregoing, it is absolutely clear that the argument advanced by Treehouse to the hearing examiner that the "assessed value of the Property is currently $417,000 and that the "lost economic value to the property owner is at a minimum $417,000" must be rejected. It has now been determined that the fair market value immediately before the purchase in 2014 and for the years 2015 and 2016 was $32,094 – as reflected in the purchase price. After stating before the Board of Appeals, presumably under oath, that the fair market value of the property was $32,094 or less, Treehouse cannot now argue a greater value as it has now done in Exhibit E of its letter of January 24, 2019.

MICC 19.07.030(B)(3)(a) directs that the "hearing examiner will consider the amount and percentage of lost economic value to the property owner." 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* above. Because of this, the fair market value of the property is $32,094 as reflected in the purchase price and in the current assessed value by the King County Department of Assessments. 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 he could obtain a huge financial gain by convincing the City to allow its development. MICC 19.07.030 (B) was not intended to facilitate huge financial windfalls, but rather to provide relief against oppressive losses. This is apparent from MICC 19.16.010 where the definition of "reasonable use" is found. This provision states in part: "A reasonable use exception set forth in MICC 19.07.030 (B) balances the public interests against the regulation being unduly oppressive to the property owner." Denying a person a huge financial windfall does not constitute oppression.

Construing MICC 19.07.030 (B) 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 the lost economic value under MICC 19.07.030(B)(3)(a), 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.

Treehouse in its letter of March 4, 2019, contends that if the reasonable use exemption were denied, the value of the property would be reduced to zero. There is no factual evidence to support a contention that no one would be interested in purchasing the property if it were placed on the market at, for example, its present assessed value of $38,000. For example, if Treehouse made an offer to sell at this price, there is always the possibility that an adjoining landowner might be interested in the property. In this regard, it should be noted that deciding whether there is a reasonable use for the property, aside from building a residence, one should not be limited solely to the perspective of a developer. An adjoining landowner, who already has a residence, could possibly find reasonable uses for the property or parts of it, without building a second residence.

Letter to Maxim, March 4, 2019: Catchment wall

On July 25, 2018, you and City Attorney Kari Sand were kind enough to meet with neighbors from the vicinity of the proposed residence. At that time, I raised a number of points including my concern that the then applicable plan for the residence did not include a containment wall which satisfactorily resolves the landslide risk for the future owners of the proposed residence. In reviewing the documents subsequently produced by the City to me, I see that the latest plan also does not correct this problem. Because of this, I am again raising this problem which involves the issue of safety. I am writing a separate letter on this matter as it involves a narrow and discrete point that is not closely related to other issues. I plan to write to you shortly concerning the other issues.

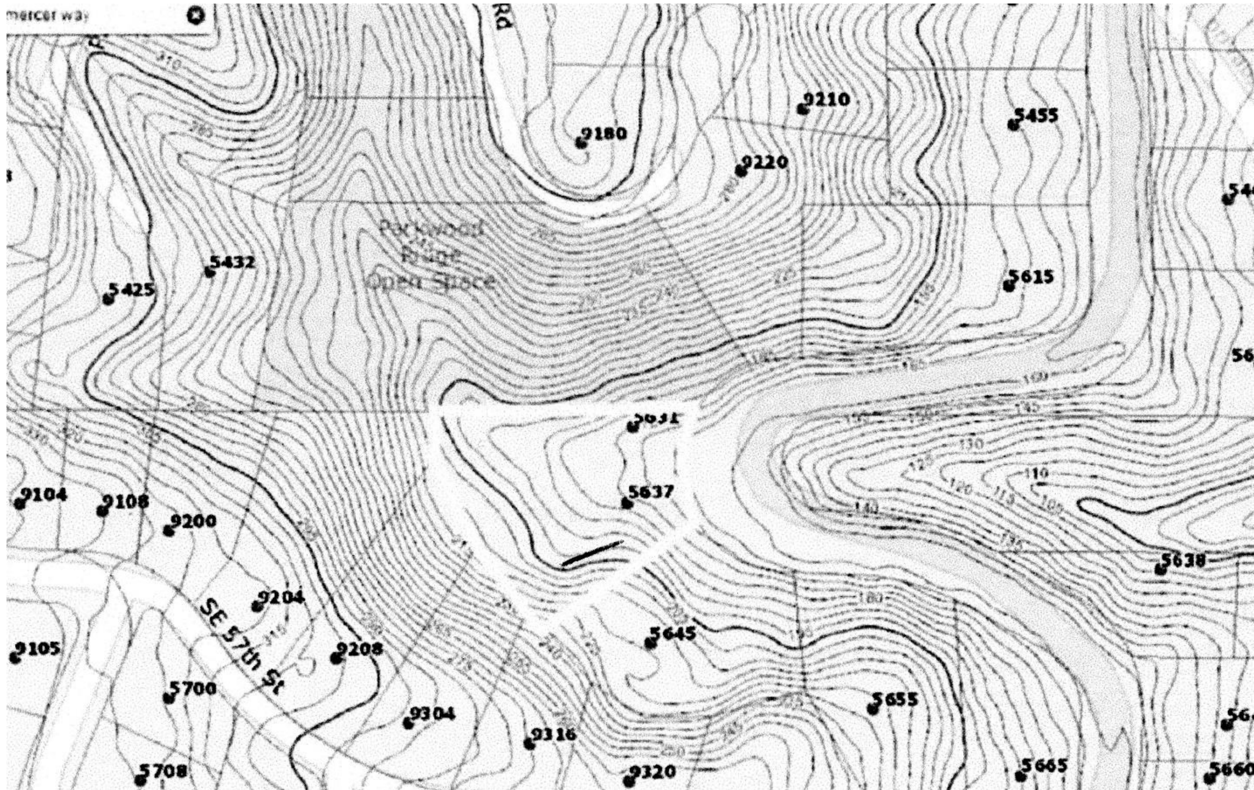
In discussing this, it is helpful to review the correspondence by the Treehouse expert GEO Group Northwest, Inc. ("GEO") and peer reviewer Perrone Consulting Inc. ("Perrone"). This correspondence is found in Exhibits 10a-e and Exhibits 11a-e in the hearing before the Hearing Examiner. In Perrone's initial comments dated June 12, 2015, the recommendation is made that GEO address the question as to whether "additional protections such as a debris catchment wall will be required to protect the proposed structure." In this regard, Perrone points out that GEO incorrectly referred to the steep ravine slopes as a "potential" landslide area when it was in fact a "known" landslide area and could pose a threat.

GEO on July 30, 2015, responded with a number of recommendations including one that provides that "the bottom 4 feet of the above-grade portion of the exterior southeast wall of the residence be designed as a catchment wall to retain potential debris in the unlikely event of significant slope movement." The Perrone letter of September 3, 2015, then opined that the GEO "geotechnical engineering conclusions and recommendations are based on insufficient subsurface information." It also stated: "The large thickness of loose, wet soil on the lower portions of the steep slope suggests a significant risk of landsliding that should be evaluated and quantified."

On October 2, 2015, GEO directed the drilling of a new exploratory soil boring which was in addition to the two boring that had been performed years earlier in 1999. With this new information, GEO described in its letter of October 28, 2015, a greater risk that it had previously. It stated: "However, there is a potential for failure of the loose sandy soils in the slope over the long term, particularly in high-intensity seismic events or if exceptionally high groundwater levels develop in the sandy soils up the slope." It is very important to note that in view of the higher risk, GEO no longer advocated using the exterior southeast wall of the residence as a catchment wall. Rather, it makes the following recommendation at page 4 of its letter:

Protection of the residence from slope failure of the types identified from the slope stability analysis results can be provided by constructing an engineered catchment/retaining wall at or near the base of the steep slope **south and southwest** [emphasis added] of the proposed residence location. We recommend that the wall have a minimum height of 6 feet above final grade as measured on its upper slope.

The reference to the "steep slope south and southwest of the proposed residence" is clearly understandable as the steepest slopes are in those directions. This can be seen by the topographic map of the area found in the GEO letter of February 4, 2016, at page 3 and shown below:



The black line superimposed on the map is the approximate location of the southeast wall of the proposed residence. The slope to the southeast of the residence is relatively mild compared to the very steep slopes south and southwest of the residence.

Perrone responded to the GEO letter of October 28, 2015, on November 18, 2015. Perrone found that the horizontal seismic coefficient factor used by GEO was not correct. It therefore recommended that the seismic slope stability analysis be revised and used to provide the catchment wall design parameters including wall height needed to contain the unstable volume of landslide material. Based on the revised calculations, GEO in its letter of February 4, 2016, raised the minimum height of the catchment wall from six to eight feet. It stated that the wall should be placed "at or near the base of the steep slope." It also stated that "the wall alignment should run south of the residence and continue around the southwest corner a distance of another approximately 20 feet."

In a letter dated April 27, 2016, GEO refers to a catchment wall being incorporated into the building. However, there is no reference in the letter to the direction in which the catchment wall should be aligned. The GEO letter of October 2, 2015, refers to placing the wall "at or near the base of the steep slope south and southwest of the proposed residence location." As shown by the topographic map above, the very steep slopes are to the southwest and south of the residence, and **not** to the southeast.

The plan submitted by Treehouse subsequent to the hearing shows a catchment wall built into the southeast wall of the residence facing the slope to the southeast. GEO had originally proposed in its letter of July 30, 2015, a catchment wall for the southeast wall of the residence, but this idea was subsequently abandoned. Rather, GEO recommended that "the wall alignment should run south of the residence **and continue around the southwest corner a distance of another approximately 20 feet**." [Emphasis added.] Using the southeast wall of the residence

as a catchment wall simply does not comply with this requirement. The proposed residence remains exposed to landslides from the steep slopes to the southwest and south of the residence. Aside from the topographic map, one can readily see from a visit to the site that the slopes to the southwest and south of the residence are far steeper, more precipitous, and much higher than the slope to the southeast.

Based on the foregoing, it is submitted that the current plan for the proposed residence does not comply with the safety criterion specified in 19.07.030(B)(3)(e). This is simply one of many reasons why the Treehouse application should not be supported by the City.

Email to Maxim, 2/20/19:

My son Dave Anderson has sent to me the latest information with respect to the values assessed by the King County Assessor on the Treehouse property. This information can be accessed at https://blue.kingcounty.com/Assessor/eRealProperty/Dashboard.aspx?ParcelNbr=1924059312 . The relevant information has also been pasted on the email below.

My recollection of the hearing is that Treehouse produced evidence that the value assessed by the King County assessor on the Treehouse property was $417,000. As I recall, there was also testimony by Treehouse that it had appealed this assessment and that the appeal had been denied. I have not seen in the subsequent documents submitted by Treehouse and produced to us by the City anything that would change this information. Treehouse used this information to argue that the property was much more valuable that the $32,094 paid by Treehouse for the property and that there was other consideration in addition to this dollar figure. Treehouse continues to assert this argument. In Exhibit E of the Summers letter of January 24, 2019, it is stated that the funds paid for the property was a "nominal amount." Exhibit E also quotes the Brotherton declaration that "the funds received by me [Brotherton] upon sale did not reflect the property's fair market value." Exhibit E also states as a fact that "the King County Assessor valued the property in 2014 at $417,000."

As can be seen from the records pasted below, Treehouse appealed to the state level the assessment of $417,000 and prevailed on this second appeal. As a result, the assessed values of the property are now officially listed as the following:

2014 $32,094; 2015 $32,094; 2016 $32,094; 2017 $35,000; 2018 $38,000

From my further research, the second appeal was to the State Board of Tax Appeals (No. 92289). See attached. The proposed decision, which was adopted as the final decision, is dated August 28, 2017. In the decision, the Board states that the owner presents his purchase for $32,094 as "an arm's- length transaction."

However, now, Treehouse is representing to the City of Mercer Island that the $32,094 is simply a "nominal amount." It would be interesting to know if Treehouse has ever informed the City about the second appeal and the dollar figures at the which the property was assessed as a result of the appeal.

Letter to Maxim, 7/4/18: Comments – Treehouse project

My wife and I own property on the ridge which forms the southern boundary of the steep ravine in which the Applicant seeks to build a house and improvements. The proposed house and improvements are in the wetlands at the base of the ravine and are in very close proximity to the streams in the ravine. We have strongly opposed this project in the past and now express our opposition in the above cases. We support your Determination of Significance. It appears that later this year our home will be sold to our son, David Anderson. He also joins in opposing the Application and joins in this letter.

We have submitted to the Hearing Examiner in this case a formal written Argument, dated February 13, 2017, and a written argument to the City, dated November 28, 2016. These arguments are incorporated herein by

reference. The latest application has not resulted in any changes which address the points made by these arguments, and these arguments are still applicable.

Paragraph 5 of the Conclusions of the Hearing Examiner Decision, dated March 8, 2017, provides:

> The technical report provided by Applicant is not sufficient to determine if the project meets the reasonable use exception criteria to the degree it fails to provide an analysis of "potential adverse impacts to adjacent and down-current properties." MICC 19.07.060 and MICC 19.16.010.

It is therefore very clear that the Hearing Examiner found the reports submitted at the hearing by the Applicant were insufficient. I have carefully reviewed the latest application and its exhibits. The insufficiency found by the Hearing Examiner simply has not been cured by the latest application and exhibits.

From the latest submitted plans, it also appears that Applicant has not even followed the recommendations of its own experts.

Email to Maxim, 7/5/17: Follow-up on meeting

In your letter of March 20, 2017 to Mr. Summers, you made a statement concerning geotechnical review which I had difficulty understanding. First, you stated:

"During testimony at the public hearing, the applicant indicated that the scope of the proposed RUE included a request for modification of the standards in Chapter 19.07 MICC with regard to geologic hazardous areas. It is not apparent, based on a review of the file, where the current proposal does not comply with the development standards for geologic hazardous areas."

Several sentences later in your letter, you stated:

> "Conclusion 5 of the Hearing Examiner's decision indicates that the current geotechnical report provided by the applicant is not sufficient to address potential adverse impacts to adjacent and down-current properties."

In view of the conclusion of the Hearing Examiner that the current geotechnical report is not sufficient, I have difficulty understanding how one can conclude at the date of your March 20 letter that it "is not apparent…that the current proposal does not comply with the development standards for geologic hazardous areas."

On May 5, 2017, Mr. Summers submitted a letter to you in which he stated: "As you indicated, our proposal does **not** contemplate any modifications or deviations from Chapter 19.07's standards applicable to geologic hazardous areas." [emphasis in original]

At the end of our meeting on June 30, 2017, I sought to obtain clarification from you as to the meaning of your letter of March 20. From your response at the meeting, I understand that your letter of March 20 was not intended to reflect any judgment on your part as to whether the applicant has in fact fulfilled all of the requirements imposed by Chapter 19.07 MICC with respect to geologic hazardous areas.

"Geologic hazard areas" is defined in MICC 19.16.010 as follows: "Areas susceptible to erosion, sliding, earthquake, **or** other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, **or** alterations, including landslide hazard areas, erosion hazard areas and seismic hazard areas." [Emphasis added.] It is important to note that the two series of nouns found in this long sentence are in the disjunctive as shown by the use of the word "or." Even the applicant's geotechnical expert, GEO Group Northwest, Inc. ("GEO") acknowledged the existence of geologic hazard areas. Thus, GEO stated: "According to the information available on the Mercer Island GIS Portal [http://www.mercergov.org/Page.asp?NavID=2793],

geologic hazard areas have been mapped as present at the site. These include erosion, steep slope, potential slide, and seismic hazards." (Exhibit 10a, p. 3) Applicant's peer geotechnical expert, Perrone Consulting, Inc. P.S., found that the reference above to a "potential slide" was incorrect. Rather, Perrone stated that the "slope includes a headscarp on the southerly portion of the property and landslide deposits cover all of the area, which classifies this site as a *known* landslide area." (Exhibit 11a, p. 2)[emphasis in original]. Indeed, the Mercer Island GIS Portal shows five "identified landslide locations" (marked by pink triangles) in the upstream portion of this ravine. At the hearing, Eliyezer Kohen referred to mudslides in the ravine and the sinking in his yard as a result.

Under the provisions of MICC 19.07.060 (C), the applicant must submit a "geotechnical report" if geologic hazards are involved. Under the definition of "geotechnical report" found in MICC 19.60.010, the report must include "the potential adverse impacts to adjacent and down-stream properties." Under the provisions of MICC 19.07.060, one of the requirements for allowing alteration of a geologic hazard area is a finding the alteration "[w]ill not adversely impact (e.g. landslides, earth movement, increase surface water flows, etc.) the subject property or **adjacent properties**." [Emphasis added.]

The Hearing Examiner found that the geotechnical reports were not sufficient because they failed to provide an analysis of "potential adverse impacts to adjacent and down-current properties." The new May 3 report by GEO has only one short paragraph which addresses impacts on adjacent and down-current properties, and this paragraph only contains conclusions without any real analysis. In my post-hearing submission to the Hearing Examiner, I raised many points with respect to the adverse impact on the adjacent and down-current properties. This earlier submission is incorporated herein by reference. These points have simply not been rebutted by the applicant or by its reports.

Email to Maxim, 3/15/17: Trees down in the ravine

You may recall that I testified during the hearing about the trees crashing in the ravine during storms, and I stated that anyone living in the proposed home in the ravine would want also to cut down any tree that could possibly hit the home. 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.

THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

MI TREEHOUSE, LLC,	)	
	)	
Appellant,	)	Docket Nos. 89294, 90537 and 92289
	)	
v.	)	RE: Property Tax Appeal
	)	
JOHN WILSON,	)	PROPOSED DECISION
King County Assessor,	)	
	)	
Respondent.	)	
	)	

This matter came before Lisa Marsh, Member, presiding for the Board of Tax Appeals (Board), on August 21, 2017, in an informal hearing pursuant to the rules and procedures set forth in chapter 456-10 WAC (Washington Administrative Code). William C. Summers, Member, represented Appellant, MI Treehouse, LLC (Owner). Brendon George, Residential Appraiser, represented Respondent, John Wilson, King County Assessor (Assessor).

The Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. The Board now makes its decision as follows:

VALUATION FOR 2014, 2015, and 2016 ASSESSMENT YEARS

DOCKET NO. ASSESSMENT YEAR PARCEL NO.	VALUATION OF THE ASSESSOR AND COUNTY BOARD	CONTENDED VALUATION OF THE OWNER(S)	VALUATION OF THE BOARD OF TAX APPEALS
89294 2014 192405-9312	Land: $350,000 Impr: $0 Total: $350,000	Land: $32,094 Impr: $0 Total: $32,094	Land: $32,094 Impr: $0 Total: $32,094
90537 2015 192405-9312	Land: $378,000 Impr: $0 Total: $378,000	Land: $32,094 Impr: $0 Total: $32,094	Land: $32,094 Impr: $0 Total: $32,094
92289 2016 192405-9312	Land: $417,000 Impr: $0 Total: $417,000	Land: $32,094 Impr: $0 Total: $32,094	Land: $32,094 Impr: $0 Total: $32,094

ISSUE

The issue in this appeal is the January 1, 2014, January 1, 2015, and January 1, 2016, true and fair market values of the vacant land located at 5637 East Mercer Way, Mercer Island, Washington.

PROCEDURAL HISTORY

The Assessor assigned the subject property the values shown in the table above. The Owner appealed to the King County Board of Equalization (County Board), which upheld the Assessor's values. The Owner now appeals to this Board, contending the values above. The Assessor asks the Board to sustain the assessed values.

FACTS AND CONTENTIONS

The subject property is approximately 37,554 square feet of vacant land, described by the City of Mercer Island[1] (City) as:

> currently improved with driveway access serving an adjacent property to the south, a public trail along the north side of the property, and a private sewer.
>
> The entire subject property is constrained by wetland area, watercourses, geohazard areas, and buffers associated with the wetland and watercourses.
>
> The property is sloped from the west property line descending to the east property line, forming a depression that drains to two existing streams and a wetland area. Slopes on the site range from 30% to 70%, with the steepest slope areas in the southwest corner of the property. . . . The entire site is located within mapped landslide, seismic, and erosion hazard areas; the southeastern corner of the property and the central northern edge of the property is constrained by steep slopes in excess of 40% gradient.
>
> There are two Type 2 watercourses on the subject site flowing from west to east. The northern watercourse extends upstream from the subject site into the Parkwood Ridge Open Space area. The southern watercourse is fed from an onsite wetland area. Both watercourses flow into each other at the east end of the property and continue under East Mercer Way.
>
> Approximately half of the subject site is constrained by a Category III wetland area. The wetland extends from the west property line to the east property line and constrains all but the steepest slopes on the south side of the property, and the area north of the existing public trail.

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[1] City of Mercer Island, Reasonable Use Exception, Staff Report & Recommendation, February 13, 2017, p. 3.

The property is coded by the Assessor as having moderate traffic issues, as well as environmental and other nuisances.

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.

Although the Owner still believes that the property will one day be found buildable, it contends that has not been the case during the time periods at issue, and continues to not be buildable until the City stops bowing to the political desires of the vociferously opposed neighbors. The Owner cites RCW 84.40.030 for the proposition that the property needs to be valued with the current limitations imposed by the City. The Owner presents the January 16, 2015, submission of his request to the City for a reasonable use exception, over 390 pages of documentation and the 19 studies it has been required to procure for the City, costing over $100,000 and showing that the land can be developed with proper cautions and restrictions, and the March 8, 2017, additional delay by the City's Hearing Officer prior to making a determination by requiring at least one additional study be undertaken over the next year. Finally, the Owner argues that, because it has developed so much public record with all the studies that have been required and all the resistance from the City, his property is now worth nothing, and will remain that way until and unless the City acts positively on his permit.

Assessor's Evidence and Arguments

In support of the original assessed value for the subject, the Assessor states that using "the current land schedule, a similar sized lot with no impacts would have a base land value of $1,250,000. The Assessor recognizes the subject parcel is heavily impacted by topography and a type 2 watercourse and has reduced the subject's base land value by 70%." The Assessor also provides five sales on Mercer Island, but admits that none of the sales has limitations as significant as the subject property:

a. Assessor's Sale No. 1 is the March 4, 2013, sale of parcel number 257950-0155 for $350,000, time-trended to $382,000. The property is in the same subarea as the

subject property and is a vacant 11,595 square foot lot that is coded for topography and environmental nuisances.

b. Assessor's Sale No. 2 is the August 11, 2011, sale of 5818 West Mercer Way for $300,000, time-trended to $352,000. The property is a vacant 15,033 square foot lot, coded for traffic, topography, and environmental nuisances.

c. Assessor's Sale No. 3 is the December 26, 2012, sale of 7621 West Mercer Way for $505,000, time-trended to $562,000. At the time of sale, the property had a construction-quality grade 4, fair-condition, 1953 structure of 420 square feet on a 36,220 square foot lot that is coded for topography nuisances.

d. Assessor's Sale No. 4 is the April 8, 2014, sale of parcel number 257950-0154 for $350,000. The property is in the same subarea as the subject property and is a vacant 23,745 square foot lot that is coded for environmental nuisances.

e. Assessor's Sale No. 5 is the September 24, 2014, sale of the subject property for $32,094.

Owner's Rebuttal of Assessor's Evidence

The Owner notes that all the Assessor's sales are for buildable lots and asserts that these are not, at this time, comparable to the subject property.

Assessor's Rebuttal of Owner's Evidence

The Assessor notes that, when the property was on the market, it was listed for over $200,000. The Assessor also testified that the property is currently coded as buildable.

Additional information, including the parties' other documentary evidence, is contained in the hearing record and was reviewed by the Board.

APPLICABLE LAW

General Principles of Property Valuation for Taxation Purposes. Washington law provides that "property must be valued at one hundred percent of its true and fair value."[2] The phrase "true and fair value" is synonymous with *market value* or *fair market value*,[3] which "is

[2] RCW 84.40.030(1).
[3] *Cascade Court Ltd. Partnership v. Noble*, 105 Wn. App. 563, 567, 20 P.3d 997 (2001) (observing that "[t]he phrase 'true and fair value in money' has been consistently interpreted to mean 'fair market value'").

the amount of money a buyer of property willing but not obligated to buy would pay a seller of property willing but not obligated to sell."[4]

Allowable Approaches to Valuation. The law provides for three approaches for determining the fair market value for assessment purposes. They are the sales comparison, income, and cost approaches.[5]

Sales Comparison Approach. The law endorses the "sales comparison approach," whereby an appraiser arrives at the property's fair market value by considering "[a]ny sales of the property being appraised or similar properties with respect to sales made within the past five years."[6] Among the key factors for determining whether a sale property and the subject property are similar are (1) their locations; (2) the age, size, construction quality, and condition of their improvements; and (3) any special features the sites share (such as their views or waterfront footage). [7] Greater weight is accorded to properties similar to the subject that sold closer to the assessment date.[8] RCW 84.40.030(3)(a) requires that consideration also be given to all "*governmental policies or practices* in effect at the time of appraisal that affect the use of property, *as well as physical and environmental influences*." (Emphasis added.)

The Presumption of Correctness, Standard of Proof, and Burden of Persuasion. The law requires the Board to presume that an assessor's original valuation of the property is correct.[9] To overcome the presumption that an assessor's valuation is correct, the taxpayer must provide "clear, cogent and convincing evidence."[10] Washington courts have explained that the "clear, cogent, and convincing" standard of proof means "a quantum of proof that is less than 'beyond a reasonable doubt,' but more than a mere 'preponderance;'" evidence is "clear, cogent, and convincing" if it shows "that the fact in issue is 'highly probable.'"[11]

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[4] WAC 458-07-030.
[5] RCW 84.40.030.
[6] RCW 84.40.030(3)(a).
[7] Appraisal Institute, *The Appraisal of Real Estate*, 377, 366, 381 (14th ed. 2013).
[8] *See* WAC 458-14-087(4) (requiring the County Board to assign "[m]ore weight . . . to similar sales occurring closest to the assessment date which require the fewest adjustments for characteristics").
[9] RCW 84.40.0301.
[10] *Id*.
[11] *Tiger Oil Corp. v. Yakima County,* 158 Wn. App. 553, 562, 242 P.3d 936 (2010) (quoting *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980), and *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)).

ANALYSIS AND CONCLUSIONS

The Board's goal in its hearings is to acquire, hear, and weigh evidence sufficient to support a determination of a property's "true and fair value" as defined by the laws and rules of Washington.[12]

"The goal [of the sales comparison approach] is to find a set of comparable sales as similar as possible to the subject property to ensure they reflect the actions of similar buyers."[13] The parties agree that none of the offered sales has limitations as significant and severe as the subject property, nor was any evidence provided that the other properties had organized, active, and vitriolic neighbor resistance. There is, however, one sale that had lengthy market exposure, occurred within five years of the assessment dates at issue, and shares the severe limitations: the subject property sale for $32,094.

The Owner expressed concerns about the Assessor's office requiring that it appeal each year's assessed value until the City of Mercer Island makes a final decision. In appeals of individual taxpayers' real property valuations, this Board's authority is limited to determining the market value of the subject property, based on available evidence, and issuing an order accordingly.[14] This Board does not have the statutory authority to supervise or direct county assessors or county boards in the conduct of their general operating procedures and duties. The Washington State Legislature assigns such authority to the Washington State Department of Revenue.[15]

The Board understands the Owner's concern that he has reduced the value of the property below the purchase price by making visible the City's aversion to taking a final action in this matter, but without additional, quantifiable evidence such as the value, if any, of the subject parcel as recreational property, the Board lacks the necessary information to calculate the resulting impact on the subject property's market value. Without adequate evidence to objectively quantify Owner's contentions, the Board would be required to speculate: an indulgence not permitted to the trier of fact.[16]

The Owner's charge is to show by clear, cogent, and convincing evidence that the Assessor's original value is erroneous. The evidence before the Board meets this standard. Thus,

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[12] RCW 84.40.030 and WAC 458-07-030.
[13] *The Appraisal of Real Estate, supra*, at 381.
[14] RCW 82.03.130(1)(b); RCW 84.08.130.
[15] RCW 84.08.010; RCW 84.08.060; RCW 84.08.070; RCW 84.08.120.
[16] *Safeway v. County Assessors*, BTA Docket Nos. 56263, et seq. (2002).

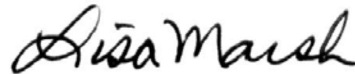
the Board concludes that the Owner has met its burden of showing it is highly probable the Assessor overvalued the subject property for assessment-years 2014, 2015, and 2016. The Board finds that the evidence supports a $32,094 value for January 1, 2014, January 1, 2015, and January 1, 2016. The Board therefore sets aside the values established by Assessor and the County Board.

DECISION

In accordance with RCW 84.08.130, the Board sets aside the determination of the King County Board of Equalization and orders the values as shown on page one of this decision. The King County Assessor is hereby directed that the assessment and tax rolls of King County are to accord with, and give full effect to, the provisions of this decision.

DATED this 28th day of August, 2017.

BOARD OF TAX APPEALS



LISA MARSH, Member

Right of Review

Pursuant to WAC 456-10-730, you may file a written exception to this Proposed Decision. You must file the letter of exception with the Board of Tax Appeals within 20 calendar days of the date of mailing of the Proposed Decision. You also must serve a copy on all other parties. The written exception must clearly specify the factual and legal grounds upon which the exception is based. No new evidence may be introduced in the written exception, nor may a party or parties raise an argument that was not raised at the hearing.

The other parties may submit a reply to the exception within 10 business days. The Board will then consider the matter and issue a Final Decision. There is no reconsideration from the Board's Final Decision.

If a written exception is not filed, the Proposed Decision becomes the Board's Final Decision 20 calendar days after the date of mailing of the Proposed Decision.

DRAINAGE EASEMENT

COMES NOW, JAMES O'SULLIVAN AND DOROTHY O'SULLIVAN, hereinafter "Grantors", and grant to the City of Mercer Island, hereinafter "Grantee", a drainage easement over, across, along and under the following described real property, situated in King County, State of Washington, to wit:

> "That portion of government lot 3, in Section 19, Township 44 north, Range 5 East, W.M. lying between lines parallel with and 2,220 and 2,350 feet north of the southerly line of said section, and lying easterly of East Mercer Way, TOGETHER WITH 2nd Class Shorelines adjoining, in King County, Washington, and commonly known as: 5636 East Mercer Way, City of Mercer Island."

Unofficial Copy

9806011443

The intent of the Grantors in granting the Drainage Easement herein is to fulfill the requirements of Paragraph 2.4 of the settlement agreement entitled "Agreement" between Grantors and Grantee in settlement of litigation in King County Superior Court under King County Superior Court Cause No. 82-2-02540-2. A copy of the settlement agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

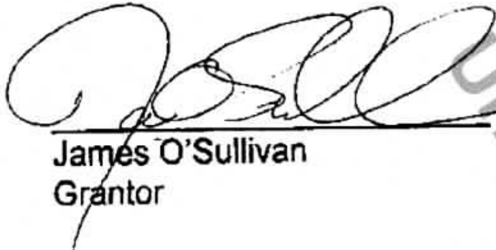
The purpose of the Drainage Easement is to permit Grantee to pass waters from upstream of East Mercer Way, and from the south of the Grantors' property along East Mercer Way, into the watercourse in existence on the Grantors' property, in an easterly direction to the waters of Lake Washington.

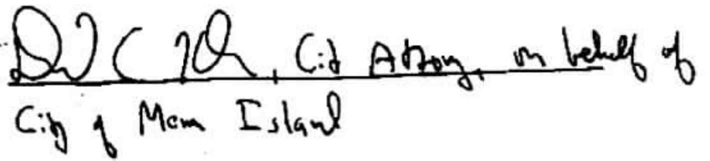
The waters which may be passed into the watercourse in existence on the Grantors' property shall be limited to water flows which result from conditions, diversions or improvements existing as of the date of the settlement agreement, May 31, 1984, including any and all siltation contained in said water 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 Grantors' property other than water that was flowing into the watercourse as of May 31, 1984. Grantors agree to be responsible for the construction and installation of the stream bed improvements contemplated in Paragraphs 2.1 and 2.2 of the settlement agreement and for subsequent maintenance of the stream bed and all improvements of the stream bed on Grantors' property with the

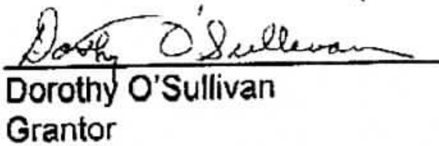
exception of the pond constructed on the property and located west of Glenhome Road, which will be maintained by the City of Mercer Island and as part of that maintenance the City will be responsible for the removing of siltation in the siltation holding pond as necessary and assuring it remains in good and operational condition.

This Drainage Easement shall run with the land and shall be binding on the Grantors, their heirs and assigns, and shall be recorded in the Office of the King County Auditor.





James O'Sullivan
Grantor



Dorothy O'Sullivan
Grantor

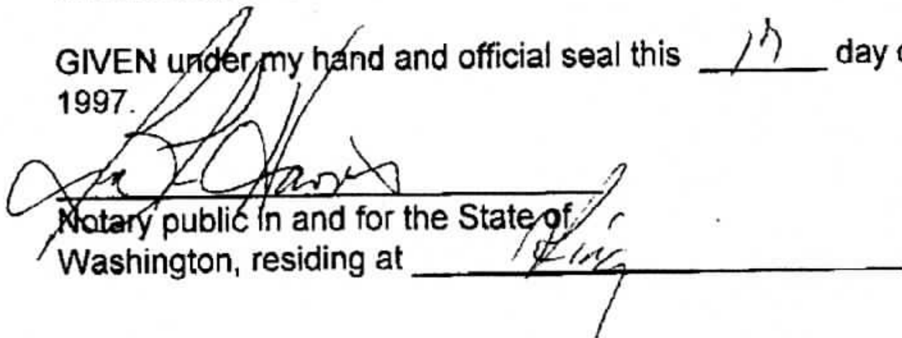
Unofficial Copy

9806011443

STATE OF WASHINGTON)
)
County of King)

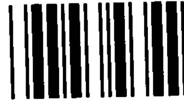
On this day personally appeared before me James O'Sullivan and Dorothy O'Sullivan to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned..

GIVEN under my hand and official seal this 17 day of October, 1997.



Notary public in and for the State of Washington, residing at King

ORIGINAL



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Return to:
J. Brown

File with
O'Sullivan Watercourse
File

AGREEMENT

This agreement is made and entered on the date last below written between James O'Sullivan and Dorothy O'Sullivan, his wife, and the City of Mercer Island, a municipal corporation. Hereinafter, these parties will be referred to as "O'Sullivan" and "the City".

I. RECITALS

1.1 O'Sullivan and the City are parties to litigation in King County Superior Court under King County Cause No. 82-2-02540-2.

1.2 The parties hereto wish to settle this litigation and to enter into an agreement to do so. The parties contemplate the execution of additional documents which include an easement for drainge, an order of dismissal of the above-entitled litigation, a release of all claims, and a more formal settlement agreement. However, the parties enter into this agreement to indicate their general agreement.

1.3 The watercourse on the O'Sullivan property has been subject to erosion, in some places to a severe degree, in the area from East Mercer Way to Lake Washington.

II. AGREEMENTS

2.1 The City agrees to pay O'Sullivan $25,000, total, to cover the costs of the construction of stream bed improvements and the construction management of the same, on the upper 340 feet of the O'Sullivan property. In particular, O'Sullivan contemplates the construction of bank and stream bottom erosion protection by either reinforced concrete free-form sections or gravel and raip-rap fill, or combination thereof, along the stream on the O'Sullivan property. These improvements may include one or more "drops" or energy dissipators. Subject to the receipt of satisfactory design drawings for said project, the City agrees that such work is generally consistent with City ordinances and agrees to support applications for construction permits which may be required from the City or any other governmental agency to perform this work.

2.2 The City further agrees to pay, at the same time as payment provided in paragraph 2.5, an additional sum of $5,000, total, for completition of additional erosion protection work on the remainder of the stream on the O'Sullivan property. O'Sullivan contemplates completion of this additional work at a later time, perhaps in conjunction with work on a road for a subdivision on his remaining property. In this section O'Sullivan contemplates stream bed

and bank erosion protection by gravel, raip-rap, fill or the like. These improvements may include one or more "drops" or energy dissapators. Subject to the receipt of satisfactory design drawings for these additional stream bed improvements, the City agrees that such work is generally consistent with City ordinances and agrees to support applications for construction permits which may be required from the City or any other governmental agency. The parties recognize that the total costs for all the contemplated stream bed improvements may exceed the City's total combined payments of $30,000, as set forth in paragraphs 2.1 and 2.2. O'Sullivan agrees to be solely responsible for such additional costs to the extent they exceed the City's total payments.

2.3 In addition to the payments contemplated in paragraphs 2.1 and 2.2 of this agreement, the City agrees to pay an additional sum of $3,400 to O'Sullivan to reimburse him for the costs of design and consultation work by John Norman, consulting hydraulics engineer, for the stream bed improvements, per the letter agreement between O'Sullivan's attorney and the attorney for the City of Mercer Island dated May 7, 1984. This sum is to be paid upon execution of the formal settlement agreement contemplated by this general settlement agreement.

2.4 O'Sullivan agrees to give the City a drainage easement across the entirety of his property from East Mercer

Way to Lake Washington, to pass waters from upstream of East Mercer Way into the water course on his property. This easement shall be limited to water flows which result from conditions, diversions or improvements existing as of the date of this agreement plus siltation in said water flows in an amount not to exceed 50 cubic yards per year. The City specifically agrees that it will not divert water from any other drainage basins into the stream of the O'Sullivan property other than that existing as of the date of this agreement.

2.5 The City will pay to O'Sullivan the above-described sum of $25,000, total, provided in paragraph 2.1, for construction and construction management of the improvements contemplated in paragraph 2.1 at the time O'Sullivan submits to the City a proper application to build the stream bed improvements for the upper 340 feet of the stream, as may be required under City ordinances. Once all permits are received and the funds for construction are disbursed to O'Sullivan, he agrees to construct the improvements applied for in accordance with an approved design as soon as possible, consistent with weather and other construction factors. O'Sullivan agrees to be responsible for the construction and installation of the stream bed improvements contemplated in paragraphs 2.1 and 2.2 and for the subsequent maintenance of the stream bed and all improvements of the stream bed on his property.

2.6 The City agrees to waive any fees payable to it as application fees, etc., on the contemplated work in the stream bed.

2.7 O'Sullivan agrees to dismiss this lawsuit with prejudice, execute and deliver a full release for the existing claims for damages and relief, and execute and deliver the drainage easement to the City contemplated in paragraph 2.4 upon receipt of the $25,000 provided for in paragraphs 2.1 and 2.5 of this agreement, the $5,000 contemplated in paragraph 2.2, and the $3,400 provided for in paragraph 2.3 of this agreement.

2.8 The parties agree that no further action shall be taken on this litigation pending compliance with this agreement.

2.9 The parties agree breach of this agreement may amount to an additional or separate cause of action beyond that already pleaded in King County Cause No. 82-2-02540-2. If either party successfully recovers a judgment to enforce this agreement, the parties agree that the prevailing party shall be entitled to recover a reasonable attorney's fee as part of such judgment.

2.10 Attorneys signing this agreement for the City

stipulate they have the authority to act for the City.

DATED this 31 day of May, 1984.

CITY OF MERCER ISLAND

By: [signature], city attorney

[signature]

JAMES O'SULLIVAN

Dorothy J. O'Sullivan

DOROTHY O'SULLIVAN