

From: anderson9200@comcast.net
To: [Evan Maxim](#)
Subject: RE: CAO15-001; SEP15-001; VAR18-002
Date: Monday, September 30, 2019 1:28:35 PM

Dear Mr. Maxim,

Thank you for sending me a copy of your response to Mr. Ahalt. I do have a question. The City issued its DS on July 17, 2017. According to the DS, two of the areas for discussion in the required EIS were the potential adverse impact to adjacent properties and the effect on the downstream corridor. What has happened between July 17, 2017, and today that has resolved these issues? As far as I know, the only change is that Treehouse has moved the footprint of the residence a few feet. To my knowledge, this minor change does not have a significant impact on the slopes above the property or on the downstream corridor. Furthermore, no new studies have been made and no new information gathered relating to the slopes or downstream corridor since the issuance of the DS. As far as I know, peer reviewers have simply looked at the existing paperwork. The lack of an adequate investigation was discussed in detail in my letter of March 15, 2019, portions of which I have pasted below. WAC 197-11-350 provides in part: "If a proposal continues to have a probable significant adverse environmental impact, even with mitigation measures, an EIS shall be prepared." I simply do not see that anything significant has occurred since the issuance of the DS. There is no **new** basis for the City to withdraw its DS. Thank you for your consideration.
Peter M. Anderson

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.

From: Evan Maxim <evan.maxim@mercergov.org>

Sent: Friday, September 27, 2019 1:45 PM

To: gjahalt@gmail.com

Cc: davea@dahogan.com; anderson9200@comcast.net; londonimplant@gmail.com; robertroyalgraham@gmail.com; robin@sammsgroup.com; vduchaine@comcast.net; 'Rick Duchaine' <rduchaine17@gmail.com>; Bio Park <Bio.Park@mercergov.org>

Subject: RE: CAO15-001; SEP15-001; VAR18-002; Treehouse SEPA Review 5637 East Mercer Way, Mercer Island, WA 98040

Dear Mr. Ahalt,

Some of the concerns in your email appear to be related to a misconceptions regarding the SEPA review process, the scope of the Reasonable Use Exception, and the City's ability to regulate critical areas. The purpose of this email is to provide additional information regarding the SEPA review and Reasonable Use Exception processes.

There were several incorrect assertions in the email below:

- The City can establish limits on any development of the site (e.g. prohibiting drainage of a wetland by a future homeowner). The City has a strong code compliance chapter and strong conditioning authority on this project. If the project is approved, the City has regulatory tools to prevent a future property owner from using the remainder of the undeveloped yard space in an impactful way. If such work were done without permits, the City can require correction.
- The City is not misleading the applicant and has not forced them to spend more money. The

city has consistently expressed concerns to the applicant that the City likely cannot recommend approval of the RUE. The applicant is a sophisticated builder who has knowingly engaged in this process and has retained his own experts. Please note that the cost of the application and supporting information is not a factor in issuing a recommendation to approve or deny the RUE.

-
SEPA review:

The SEPA review does not solely determine what impacts are mitigated if the Reasonable Use Exception (RUE) is approved; mitigation is required by the City code independent of the SEPA review – please see the response under the “critical areas review” section of this email.

There are three possible outcomes to a SEPA review: 1) a Determination of Non Significance (DNS); 2) a Mitigated Determination of Non Significance (MDNS); or 3) a Determination of Significance (DS). In essence, the SEPA review is designed to identify and mitigate impacts that are otherwise not addressed by the existing development regulations (i.e. the City of Mercer Island critical area code) and would result in a probable significant impact to the environment (ref. [WAC 197-11-158](#) and [WAC 197-11-330](#)). A [project denial](#) may be based on the SEPA review only if there are significant impacts resulting from the project that cannot be mitigated.

The City initially issued a SEPA DS to further evaluate several of the areas of concern that you have identified (e.g. stability of adjacent property, downstream drainage impacts, etc). The applicant has provided additional information and revised the project design. After consultation with the City’s peer review consultants (ESA and Shannon & Wilson), I anticipate that impacts originally identified can be mitigated and there is an insufficient policy basis for a SEPA based project denial. Both of the City’s consultants have indicated that issuance of a Mitigated Determination of Non-Significance is appropriate and have identified recommended mitigation conditions.

The SEPA Notice of Application indicated that a MDNS is likely; I have not completed my SEPA review as of the date of this email, but I currently believe this is the likely outcome. The assertion in your email that SEPA MDNS will commit the City to approval of the RUE application is incorrect; the criteria for approval of an RUE are very different than the SEPA review exercise described above.

Critical areas review:

The City understands that the scope of the RUE application is to provide an exception for the applicant to build a home that does not otherwise comply with wetland and watercourse protections. The applicant has not requested an exception to any of the other protections and mitigation requirements contained in the City’s [critical areas code](#). In particular the code requires, and the applicant has not requested any exception the following recommendations:

1. An updated statement or risk as required by [MICC 19.07.130](#)
2. Mitigation of wetland impacts as required by [MICC 19.07.180](#)
3. No adverse slope impacts to upslope properties as required by [MICC 19.07.160](#)

There are several criteria for the [approval of a RUE](#). The City previously recommended denial of the RUE based upon the City’s assessment that the applicant did not meet several of the criteria. Please note that the scope of the criteria for a RUE are very different than the scope of a SEPA review. For

example, the evaluation of whether the RUE proposal is the “minimum necessary to allow for reasonable use” is outside the scope of a SEPA review. Similarly the determination of whether the critical areas code “would deny all reasonable use of the property” is outside the scope of a SEPA review. The City’s review for compliance with the critical areas code will continue throughout the permitting process; the detail and level of review increases with each corresponding stage.

Please let me know if you have any additional questions.

Regards,

[Evan Maxim](#)

Director

City of Mercer Island - Community Planning & Development

206.275.7732

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From: gjahalt@gmail.com <gjahalt@gmail.com>

Sent: Friday, September 27, 2019 9:07 AM

To: Evan Maxim <evan.maxim@mercergov.org>

Cc: davea@dahogan.com; anderson9200@comcast.net; londonimplant@gmail.com; robertroyalgraham@gmail.com; robin@sammsgroup.com; vduchaine@comcast.net; 'Rick Duchaine' <rduchaine17@gmail.com>; Debbie Bertlin <Debbie.Bertlin@mercergov.org>; Salim Nice <salim.nice@mercergov.org>; Lisa Anderl <lisa.anderl@mercergov.org>; Bruce Bassett <Bruce.Bassett@mercergov.org>; Wendy Weiker <Wendy.Weiker@mercergov.org>; David Wisenteiner <David.Wisenteiner@mercergov.org>; Benson Wong <Benson.Wong@mercergov.org>

Subject: RE: CAO15-001; SEP15-001; VAR18-002; Treehouse SEPA Review 5637 East Mercer Way, Mercer Island, WA 98040

Dear Mr. Maxim:

I appreciate that the SEPA review is distinct from the Reasonable Use Exception review however the two are directly linked by the City approval process that will lead to a final decision by the City. The SEPA review will determine what impacts will have to be mitigated if the City approves the RUE. The shortcoming of the current SEPA review is 1) it is not addressing the impacts on the uphill slope or the impacts of water flow on the downstream neighbors, and 2) it only addresses whether or not a residence can be constructed in a wetland, within the setback of one critical stream, and in the headwater of a second critical stream, and 3) and it fails to address the impact on the wetland and two critical streams by having a family living on this lot and the City’s inability to prevent the family from using their undeveloped yard space in an impactful way, such as installing more drain lines, building more retaining walls, installing more impervious surfaces, etc... If this future activity is permitted

then it is probably a forgone conclusion that the City will approve the RUE and there will be little or no mitigation requirements.

It appears that the City's process is to move this along one step at a time to the point where the City can't say no. A house in this sensitive location is not a reasonable use to the owner who paid \$32,094 for a lot that was declared a wetland with two critical streams when the prior developer tried to build on this lot. The City is misleading Treehouse by forcing them to spend more money on this approval process, increasing their cost and investment in the property and in essence making the potential economic loss to Treehouse larger.

The Hearing Examiner remanded this to the City to address the impact on the surrounding property and that has not been done. There is no supporting information in the reports by Treehouse's consultants to back up their claim that there are no negative impacts on the surrounding properties but the City does have the report from Shannon & Wilson date July 12, 2019 stating that "the proposed development does have potential adverse impacts" and "the Statement of Risk presented in that report is outdated because it was prepared before recent changes to the location and elevation of the proposed residence, not does it provide sufficient discussion to establish that the condition in MICC 19.07.060 D(2a) is met for the current design."

The impacts on the wetland, two critical streams, the surrounding property owners, and the future occupants of this proposed house are not just confined to the building pad (footprint) of this development. The City must address how the entire lot will be utilized by future occupants who would not be there otherwise.

Kicking the can down the road by trying to approve this application one step at a time and failing to address the impact on the surrounding property owners and future occupants on this lot and not balancing these impacts against an investment of \$32,094 by Treehouse is **Gross Negligence** on the part of the City. Please share this statement with the City Attorney because this is where this issue is headed.

Gordon J. Ahalt

From: Evan Maxim <evan.maxim@mercergov.org>

Sent: Thursday, September 26, 2019 4:06 PM

To: Gordon Ahalt <gjahalt@gmail.com>

Cc: davea@dahogan.com

Subject: RE: CAO15-001; SEP15-001; VAR18-002; Treehouse SEPA Review 5637 East Mercer Way, Mercer Island, WA 98040

Dear Gordon Ahalt,

Thank you for taking the time to comment on the SEPA Notice of Application and on this project overall.

In your email below, you requested the definition of “Reasonable Use”; this term is defined in the [City’s code](#). I also have copied the definition into my email below the signature line.

Please note that the SEPA review is distinct from the Reasonable Use Exception (RUE) review and that the City has previously recommended denial of the RUE. It is also important to note that the criteria for a SEPA review and determination are very different from the criteria associated with a RUE decision.

It is the nature of an RUE application that the project, if approved, will impact critical areas. If the City recommends approval of the RUE, it will also include recommended conditions intended to both mitigate and limit impacts.

Regards,

[Evan Maxim](#)

Director

City of Mercer Island - Community Planning & Development

206.275.7732

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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.

From: Gordon Ahalt <gjahalt@gmail.com>

Sent: Monday, September 23, 2019 8:05 PM

To: Evan Maxim <evan.maxim@mercergov.org>

Cc: davea@dahogan.com

Subject: CAO15-001; SEP15-001; VAR18-002; Treehouse SEPA Review 5637 East Mercer Way, Mercer Island, WA 98040

Dear Mr. Maxim:

I'm responding with my comments to the Notice of Application – Project SEPA Review. Copy Attached.

I continue to oppose development of the subject lot and approval of the reasonable use exemption. The Hearing Examiner remanded this issue back to the City to address impacts on the uphill slope above the subject property and impacts on the downstream homes as a result of potential increased waterflow resulting from the destruction of the existing wetlands. The documents I have reviewed have failed to address these offsite issues and have only addressed the ability to construct a residence on this site.

The attached Geotechnical Review which the City contracted to have completed as a Peer Review of the technical reports submitted by Treehouse concluded (highlighted in yellow), "the proposed development does have potential adverse impacts, yet none are identified in the addendum." , and further states, "In our opinion, The Statement of Risk presented in that report is outdated because it was prepared before recent changes to the location and elevation of the proposed residence, nor does it provide sufficient discussion to establish that the condition in the MICC 19.07.060 D(2a) is met for the current design."

The City and Treehouse have failed to address the negative impacts on the surrounding properties and have failed to protect the health, safety, and welfare of the residents living adjacent to and downstream from the proposed development site.

The City is also failing to address further negative impacts on the subject wetlands and critical streams that will result from having a new resident live on this site in the wetland and in the two critical streams. It is gross negligence on the part of the City to assume that a new resident will have no negative impact on the wetland, two critical streams, and the surrounding properties during the term of occupy a new home on this site. It is not reasonable to assume that a new resident will not utilize the undeveloped property to improve usage of the surrounding "yard space" which is a wetland. The City cannot reasonably restrict a new property owner from installing drainage systems to drain the wetland to create usable yard space. The wetland impacts will not be limited to only the building footprint.

I request the City to provide the surrounding property owners with a definition of "reasonable use" as it pertains to a lot the developer acquired for approximately \$32,000. Where is the dividing line in usage of this lot between reasonable and unreasonable? I contend that development of a single family residence on this lot is unreasonable and installation of a park bench on the adjacent walking trail would be the limit of reasonableness.

The lot sold for \$32,000 because it is not reasonable to build a house entirely in a wetland, within the buffer of one critical stream, and in the headwaters of the second critical stream.

I reserved my right to speak at the next scheduled Hearing Examiner meeting regarding this issue. I also ask that all of my prior letters regarding this project be incorporated as part of this response.

Gordon J. Ahalt
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