

McCULLOUGH HILL LEARY, PS

Bio Park, Interim City Attorney
City of Mercer Island
9611 SE 36th Street
Mercer Island, WA 98040

Re: RUE CAO 15-001
5637 East Mercer Way

Dear Bio:

This follows up on my December 18, 2017 letter to Evan Maxim, and then City Attorney Kari Sand's response dated December 26, 2017. I have attached both letters.

In my letter I stated that in response to a recent meeting with Mr. Maxim and Ms. Sand and an email from Ms. Sand dated October 16, 2017, Mr. Summers was willing to pursue one of the options that Ms. Sand had identified and to modify the application accordingly ("Modified Proposal"), assuming that there was a clear understanding with the City that the modification will result in the City withdrawing the DS and expeditiously issuing an MDNS, that the City will recommend approval of an RUE for the Modified Proposal, and that the City will agree to approve a variance allowing the Modified Proposal to intrude into the 5' easement setback area. In Ms. Sand's letter she identified additional information the City required. She concluded that "presuming the items identified above [the additional information set forth in Ms. Sand's letter] are addressed, the City could then support the Modified Proposal, modify the SEPA determination from a DS to a MDNS, and recommend approval of the RUE and zoning variance to the Hearing Examiner."

In reliance on Ms. Sand's representations, Mr. Summers submitted a variance application, and has supplied the information requested multiple times in various formats. Mr. Summers has in fact gone above and beyond the scope of reasonableness in responding to what has appeared to him as an endless stream of reviewer requests for additional information and analysis, all directed at addressing the same environmental concerns identified over four years ago. Mr. Summers has patiently, however, provided a response to each City request.

Here is a chronology:

**MI TREEHOUSE RESPONSES
(January 2018 – October 2019)**

**GEOTECHNICAL ENGINEERING
(GEO GROUP NORTHWEST, INC.)**

<u>Date</u>	<u>Description</u>
1/5/18	Pile Noise & Duration Impact
11/28/18	Confirmation of Relocation Impact
10/23/19	Reconfirmation of Relocation Impact
1/21/19	Versatile Drilling Pile Driving Impact

**WETLAND CONSULTANT
(SEWALL WETLAND CONSULTING, INC.)**

3/8/18	Revised Critical Areas Report
8/23/18	Impacts of Relocation
1/24/19	Response to ESA Questions
10/30/19	Response to ESA Questions & Revised Critical Area Report w/ Plans

**CIVIL ENGINEERING
(TRIAD & CORE DESIGN)**

1/9/18	Triad's Response to City's Questions
3/23/18	Core's Response to City's Questions
12/3/18	Core's Response to Anderson's Questions

**ARCHITECTURAL
HEALEY ALLIANCE**

10/23/19	Including Revised Plans Requested by City
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Indeed, over the course of the past two years, Mr. Summers has expended tens of thousands additional dollars to respond to the City's requests for additional information. I ask that you keep in mind that all of this work is for a single family residence with a footprint of only 1,630 sq. ft.

On August 19, 2019, the City finally withdrew its DS. At that time, Mr. Maxim sent an email to Mr. Summers stating that he anticipated issuing an MDNS on September 30th or

Bio Park
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October 7th, and then move forward to a Hearing Examiner hearing on the RUE and variance applications. It is now over three months later, and despite Mr. Summers' repeated requests for action, the City still has not issued its final MDNS, nor has the City scheduled this matter for a public hearing before the Hearing Examiner.

Ms. Sand's letter of December 26, 2017 specifically states that "the City will certainly act as efficiently and expeditiously as possible in bringing this project review to a close..." I trust that you will agree that based on the unambiguous statements in Ms. Sand's letter, the City has a clear duty to issue the MDNS and to schedule the hearing before the Hearing Examiner with no further delay.

Please let me know at your earliest convenience that the City is prepared to do so. Thank you.

Sincerely,



G. Richard Hill

Cc: Bill Summers
Kari Sand
Adam Rosenberg

McCULLOUGH HILL LEARY, PS

December 18, 2017

VIA EMAIL

Evan Maxim
Planning Manager
City of Mercer Island
9611 SE 36th Street
Mercer Island, WA 98040

Re: RUE CAO 15-001
5637 East Mercer Way

Dear Evan:

This follows up on our recent meeting about Bill Summers' application for a reasonable use exception for property ("Property") at 5637 East Mercer Way ("Initial Proposal"). The purpose of the meeting was to see if there was an opportunity to modify the Proposal ("Modified Proposal") such that the City could (a) support the Proposal as modified, and (b) withdraw the Determination of Significance issued for the Initial Proposal and issue a Mitigated Determination of Nonsignificance ("MDNS") as to the Modified Proposal.

Following that meeting, Kari Sand, Mercer Island City Attorney, sent me an email. In the email, dated October 16, 2017, Ms. Sand summarized some of the options we had discussed, and identified information that the City would consider as a basis to achieve these two objectives. The purpose of this letter, and its attachments, is to provide the information identified in Ms. Sand's email.

Ms. Sand indicated that Mr. Summers might consider modifying the footprint of the Initial Proposal closer to the zoning code setback limit required by the existing access easement that burdens the Property. This would minimize wetland impacts. Ms. Sand also pointed out that wetland impacts could be mitigated even further if the footprint of the proposal was moved even closer to the edge of the easement. She recognized that a variance would need to be granted by the Hearing Examiner for this to be accomplished. Evan, you had suggested at the meeting that the City would consider approving a variance request to accomplish that objective.

Mr. Summers has looked at this option, and is willing, upon the terms set forth in this letter, to pursue it. Attached as Exhibit A are architectural plans provided by Ron Healy that move the footprint of the Proposal as close as reasonably possible to the access easement boundary. It does include a 2' setback for the eaves. It is not exactly parallel to the easement boundary due to grade and stream considerations, but is as close to the boundary as the architect was reasonably able to place it.

As we have discussed, this modification of the Proposal would require a variance, because it sets the footprint of the home closer than 5' to the easement line. We understand that City staff would recommend approval of this variance. We also understand that, in the event the Hearing Examiner does not approve the variance, City staff would still support the Modified Proposal and the MDNS with a 5' setback to the easement line.

As to other footprint options, we have met with Dr. Stivelman, the beneficiary of the access easement, and his attorney, Darrell Mitsunaga. They have made it clear to us that they would not accept locating the footprint of the home at any location within the access easement, and have indicated an intention to actively support the current proposal.

We have also asked William Chang, P.E., Principal of GEO Group Northwest, Inc. to review the slope stability impacts associated with relocating the footprint of the Modified Proposal. Attached as Exhibit B is his December 12, 2017 letter. He notes that he had addressed potential adverse impacts to adjacent and downhill properties in his Report Addendum dated May 3, 2017 (copy attached as Exhibit C). He then reports on his investigation of the impacts of locating the house closer to East Mercer Way (this is the proposal described on Exhibit A), and a second alternative closer to and intruding into the steep slope to the south (this was the proposal conceptually drawn by Mr. Healy and discussed at our recent meeting). Mr. Chang confirms that the Modified Proposal will not intrude into any portion of the steep slope. Therefore, it does not appear that a steep slope determination will be required.

He observes that the second alternative is undesirable from a geotechnical engineering perspective, due to its intrusion into the steep slope area, which would unnecessarily disturb a well-established hillside, and the associated requirement of the addition of a \$100,000 steel soldier pile shoring wall to retain the excavation (the basis for this estimate is set forth in Mr. Chang's email attached as Exhibit D). Furthermore, the house would not have any windows at the west side, due to the shoring wall and associated catchment wall.

Finally, he offers his opinion that the use of pin piles to support the house should not have any adverse impact to Dr. Stivelman's property, due to the fact that the pin piles will be installed with a low energy impact hammer, and also due to the fact that Dr. Stivelman's house and property are located on dense Advance Outwash sands.

As for the issue of wetland mitigation, Ed Sewall, Senior Wetlands Ecologist, has submitted his letter, attached as Exhibit E, confirming that he has investigated the availability of both on and off-site mitigation possibilities within the same sub-basin and has found there are no such possibilities. Both the City's peer reviewer and the US Army Corps of Engineers' Daniel Krenz (a copy of his email is attached as Exhibit F) have confirmed that it is preferable wetland mitigation for the permittee to pay in-lieu fees rather than to perform the mitigation on a permittee-initiated basis. This is therefore the best and preferred method of mitigating the Modified Proposal's site wetland impacts, especially because we have no reasonable basis for demonstrating that alternative mitigation measures are more environmentally effective.

As stated above, Mr. Summers is willing to modify his Initial Proposal as described in this letter on the express understanding that this modification will result in the following:

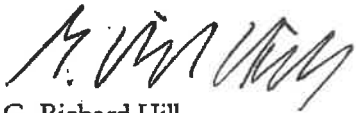
- (1) The City will withdraw the DS and expeditiously issue an MDNS;
- (2) The City will recommend approval of a RUE for the Modified Proposal;
- (3) The City will agree to approve a variance allowing the Modified Proposal to intrude into the 5' easement setback area;
- (4) In the event the Hearing Examiner disapproves the variance request, the City will support placing the Modified Proposal at a location 5' set back from the easement boundary; and
- (5) Due to the delays associated with processing the application over the past three years, combined with the seasonal restrictions on construction, the City will agree to expedite processing of all permits required for construction.

In addition, Mr. Summers understands that the City will process the RUE, any appeal of the variance, and any appeal of the MDNS, in one appeal hearing before the City Hearing Examiner. Mr. Summers also proposes that the City agree to an expedited processing schedule for the administrative review of the Modified Proposal.

In the event the City approves these terms, Mr. Summers will promptly amend his RUE application to reflect the Modified Proposal and submit a variance application.

We appreciate your good faith consideration of this Modified Proposal.

Sincerely,



G. Richard Hill

GRH:lav

cc: Bill Summers
Kari Sand
Adam Rosenberg

Enclosures



CITY OF MERCER ISLAND, WASHINGTON

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December 26, 2017

G. Richard Hill
Attorney at Law
McCullough Hill, PS
701 5th Avenue, Suite 6600
Seattle, WA 98104-7006

Re: Your client, Bill Summers of MI Treehouse, LLC
RUE CAO 15-001
5637 East Mercer Way, King County Parcel No. 192405-9312

Dear Rich:

I am writing in response to your letter and Exhibits A through F, dated December 18, 2017, regarding your client's Modified Proposal for a Reasonable Use Exception for the above-referenced property.

To paraphrase, the Modified Proposal is to relocate the house and associated improvements easterly on the property within approximately 18 inches to 5 feet from the easement on the property. The Modified Proposal requires a zoning variance for the revised house footprint location, and it avoids the need for a critical areas determination to alter the steep slope. To confirm, the Modified Proposal is consistent with one of alternatives identified by the City for further review in the project Determination of Scoping / Environmental Impact Statement.

We appreciate your client's Modified Proposal and consider it to be an important and significant step in the right direction for this project; however, more information is needed for the City to complete its review process. To date, the applicant has yet to provide sufficient information supporting the design, including the Modified Proposal. Without sufficient supporting information, the application, while representing an improved design, most likely will not withstand the scrutiny expected from the Hearing Examiner and any possible appellants (*i.e.*, the neighbors, who have already raised concern). The following should be addressed before the City is in a position to recommend withdrawal of the SEPA Determination of Significance and recommend approval of the Reasonable Use Exception (RUE):

- A. Geotechnical / civil (drainage) engineering.** The geotechnical information submitted to date does not sufficiently address the erosion and sedimentation in the downstream corridor resulting from the subject site. The geotechnical materials indicate that drainage will be "tightlined into the stormwater system." The referenced stormwater system is the watercourse that flows easterly to Lake Washington, and, anecdotally, is experiencing erosion and sedimentation problems that may be exacerbated by the proposed development. Additional analysis is required of current erosion and sedimentation within the watercourse, and possible impacts resulting from this project, accompanied by design changes intended to mitigate any identified impacts.
- B. Wetland / watercourse impacts.** The wetland / watercourse materials provided December 18, 2017, specifically Exhibits E & F, focus primarily on the appropriateness of the mitigation and generally support the idea of in-lieu-fee, off-island mitigation. Significantly, the material provided to date does not support the apparent conclusion that the Modified Proposal will result in less wetland / watercourse impacts as compared to the Initial Proposal. An updated critical areas report and revised site plans that include the following is necessary:
- 1) A delineation of the wetland / watercourse (with appropriate references to the flagged location of these features) on the site plans. The area of the wetland and wetland buffer should also be provided on the plans.
 - 2) A description of the wetland, wetland buffer, and watercourse buffer impacts (e.g., area of impact, type of impact (permanent / temporary)) associated with the Initial Proposal and the Modified Proposal.
 - 3) An analysis (narrative explanation / discussion) of the proposed house location under the Modified Proposal, and the resulting difference (or change) in impacts to the wetland, wetland buffer, and watercourse buffers as compared to the Initial Proposal is required.
- C. Noise / Vibration.** Exhibit B to the material provided December 18, 2017 is a geotechnical report, which provides a brief analysis of vibrations associated with the proposed house, and concludes that vibration will not negatively impact Dr. Stivelman's home. No discussion of noise impacts has been provided; an analysis of this item should be provided.
- D. Zoning Variance.** An application for a zoning variance should be processed concurrently with the revised RUE review, with combined comment periods and a consolidated hearing before the Hearing Examiner. Additional documentation from the applicant supporting a variance application will be needed.

G. Richard Hill, Attorney at Law
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E. Technical corrections. The proposed site plans should be revised for clarity and to accurately reflect temporary and permanent impacts to critical areas anticipated with the Modified Proposal.

Based on the above, the Modified Proposal is consistent with one of the alternatives identified by the City in discussion with the applicant regarding a proposed MDNS. Presuming the items identified above are addressed, the City could then support the Modified Proposal, modify the SEPA determination from a DS to a MDNS, and recommend approval of the RUE and zoning variance to the Hearing Examiner. While the City fully supports the efficient processing of this Modified Proposal, we would note that the City has requested the above-described information several times prior to this letter, which is lengthening the review period. The City will certainly act as efficiently and expeditiously as possible in bringing this project review to a close once the above-described information is received.

Should you have any questions about the contents of this letter or wish to discuss it further, please contact me directly. Thank you for your continued cooperation on this complex project.

Sincerely,

CITY OF MERCER ISLAND
CITY ATTORNEY'S OFFICE



Kari L. Sand
City Attorney

Cc: Evan Maxim, Planning Manager
Adam Rosenberg, Attorney at Law, Williams Kastner