

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

HERZL-NER TAMID CONSERVATIVE  
CONGREGATION,

Appellant,

v.

CITY OF MERCER ISLAND, a Washington State  
municipality,

Respondent.

No. APL25-003

CITY OF MERCER ISLAND’S **RESPONSE**  
TO MOTIONS BY CONCERNED  
NEIGHBORS FOR THE PROTECTION  
OF THE NEIGHBORHOOD

**I. INTRODUCTION**

Pursuant to the Examiner’s email of June 24, 2025, the City of Mercer Island (“City”) makes this response to the Motions by Concerned Neighbors For the Protection of the Neighborhood (“Concerned Neighbors”), filed on June 20, 2025.

**II. STATEMENT OF FACTS**

APL 25-003 is the appeal by Applicant Herzl Ner Tamid of the City’s issuance of a Revised SEPA MDNS. The Revised MDNS was issued on April 7, 2025. Ex. 24. Appellant/Applicant made its appeal on April 17, 2025. Ex. 30. The City received no other appeals of the SEPA MDNS. Exhibit A to this Response, Declaration of Andrea Larson at ¶¶ 3-5.

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### III. ARGUMENT

#### 1) The Hearing Examiner’s Rules Do Not Provide Intervention Rights; The Rules Instead Provide For The Ability of the General Public To Present Testimony

Neither the MICC nor the Hearing Examiner’s rules provide for a right of intervention to an appeal where they would be intervenors did not separately file an appeal. The general public is permitted to provide testimony, but otherwise, the Examiner’s rules restrict participation to principal parties.

The Rules define “Principal parties” as “limited to the applicant(s), the appellant(s), and the respondent(s) to any given application/appeal.” RoP 108(h). The rules establish filing deadlines for principal parties. RoP 224.

The rules do provide for testimony/evidence (both direct and rebuttal) by the general public within the order of presentation. RoP 304(e); see also RoP 304(a). But cross examination of witnesses may only be made by principal parties. RoP 312(b)(2). Finally, closing statements are only available to the principal parties. RoP 320.

Therefore, there is no authority to grant Concerned Neighbors with intervenor status. Concerned Neighbors did not independently appeal the City’s Revised MDNS and are therefore not a principal party. However, the rules provide that Concerned Neighbors may participate by providing testimony at the hearing pursuant to RoP 304.

#### 2) APL 25-003 Is A SEPA Appeal, Not a CUP Appeal

Respectfully, the City disagrees with the contention that the Hearing Examiner lacks subject matter jurisdiction on the basis that the Examiner cannot hear an appeal of a CUP. While Concerned Neighbors are correct that the Hearing Examiner holds a public hearing on CUPs in Mercer Island

1 pursuant to MICC Ch. 19.15, APL 25-003 is an appeal of a SEPA threshold determination, pursuant  
2 to MICC 19.21.200. The instant proceeding is not an appeal of a CUP.

3 **3) The Open Record Appeal Hearing APL 25-003 Is Being Jointly Heard With The**  
4 **Open Public Record Hearing for CUP 24-001.**

5 The parties briefed the procedural/jurisdictional issues through a joint submission made on  
6 April 29, 2025. In the interest of efficiency, the City has attached that briefing as Exhibit B. Per  
7 email from the Examiner on May 8, 2025, in response to the joint brief on procedural/jurisdictional  
8 issues, the Hearing Examiner concluded “I concur that a consolidated CUP application/SEPA appeal  
9 hearing is the way to go.” Exhibit C. To the extent that the Concerned Neighbors wish to voice their  
10 legal objections to the underlying CUP, they may present testimony within the consolidated hearing  
11 per their rights under the Examiner’s rules.  
12

13 **IV. CONCLUSION**

14 The City’s review of the Hearing Examiner rules has revealed no right of intervention by  
15 those who are not Principal Parties; however, the general public may present testimony. The Hearing  
16 Examiner does have subject matter jurisdiction and the instant SEPA appeal has been appropriately  
17 consolidated with the open record hearing for CUP 24-001.  
18

19 DATED this 30<sup>th</sup> day of June, 2025.

20 MADRONA LAW GROUP, PLLC

21 By: /s/ Eileen M. Keiffer  
22 Eileen M. Keiffer, WSBA No. 51598  
23 14205 SE 36th Street  
24 Suite 100, PMB 440  
25 Bellevue, WA 98006  
Telephone: (425) 201-5111  
Email: [eileen@madronalaw.com](mailto:eileen@madronalaw.com)

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**CITY OF MERCER ISLAND**  
**OFFICE OF THE CITY ATTORNEY**

By: /s/ Bio Park  
Bio Park, WSBA No. 36994  
9611 SE 36<sup>th</sup> Street  
Mercer Island, WA 98040  
Telephone: (206) 275-7652  
Email: [bio.park@mercerisland.gov](mailto:bio.park@mercerisland.gov)

Attorneys for City of Mercer Island

1 **DECLARATION OF SERVICE**

2 I, Reina McCauley, declare and state:

3 1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this  
4 action, and competent to be a witness herein.

5 2. On this 30<sup>th</sup> day of June, 2025, I served a true copy of the foregoing **CITY OF**  
6 **MERCER ISLAND’S RESPONSE TO MOTIONS BY CONCERNED NEIGHBORS FOR**  
7 **THE PROTECTION OF THE NEIGHBORHOOD** on the following parties using the method of  
8 service indicated below:  
9

<p>10 Josh Friedmann HILLIS CLARK MARTIN &amp; PETERSON, 11 P.S. 999 Third Avenue, Suite 4600 12 Seattle, WA 98104</p> <p>13 <i>Attorney for Appellant</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:josh.friedmann@hcmp.com">josh.friedmann@hcmp.com</a></p>
<p>14 Matthew Goldbach John Hall 15 9970 SE 40<sup>th</sup> Street 16 Mercer Island, WA 98040</p> <p>17 <i>Concerned Neighbors for the Protection of the Neighborhood</i></p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:blkship@yahoo.com">blkship@yahoo.com</a>  <a href="mailto:velooceella@gmail.com">velooceella@gmail.com</a></p>

18  
19 I declare under penalty of perjury under the laws of the State of Washington that the foregoing  
20 is true and correct.

21 DATED this 30<sup>th</sup> day of June, 2025, at Auburn, Washington.

22  
23 */s/Reina McCauley*  
24 Reina McCauley  
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# **EXHIBIT “A”**

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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:  
  
HERZL-NER TAMID CONSERVATIVE  
CONGREGATION,  
  
Appellant,  
  
v.  
  
CITY OF MERCER ISLAND,  
  
Respondent.

No. APL25-003  
  
DECLARATION OF ANDREA  
LARSON

I, Andrea Larson, declare and state:

1. I am over the age of eighteen, not a party to this action, and competent to testify herein.
2. I am the City Clerk with the City of Mercer Island and have been employed in this capacity since October 13, 2021.
3. The City Clerk’s Office received only one appeal of the April 7, 2025 Withdrawal of March 17, 2025, SEPA Threshold Mitigated Determination of Non-Significance (MDNS) & Issuance of Revised SEPA Threshold Mitigation Determination of Non-Significance (MDNS) (“Revised MDNS”).
4. That one appeal was filed on April 18, 2025 and was submitted by attorney Josh Friedmann on behalf of his client Herzl-Ner Tamid Conservative Congregation.
5. The City did not receive any other appeals of the Revised MDNS.



1 I declare under penalty of perjury under the laws of the state of Washington that the  
2 foregoing is true and correct.

3 DATED this 26 day of June, 2025, at Mercer Island Washington.

4  
5 By:  \_\_\_\_\_  
6 Andrea Larson

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# **EXHIBIT “B”**

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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF MERCER ISLAND

In the Matter of the Appeal of  
  
HERZL-NER TAMID CONSERVATIVE  
CONGREGATION  
  
For a Modification of Condition Text in  
Revised Mitigated Determination of Non-  
Significance

Hearing Examiner File Nos. APL 25-003  
  
JOINT BRIEFING ON PROCEDURAL  
MATTERS

In the interest of answering the Hearing Examiner’s inquiry in the most efficient way possible, counsel for Appellant Herzl-Ner Tamid Conservative Congregation and Respondent City of Mercer Island (jointly, the Parties) have conferred and agreed to jointly file this brief on the procedural processing of this appeal. The Parties agree that as set forth below, the appropriate procedural posture for this appeal is a consolidated open-record hearing for the instant SEPA appeal, combined with the open-record hearing for the related Conditional Use Permit (“CUP”) decision. Further, the Parties would suggest the SEPA appeal hearing portion of the hearing precedes the CUP hearing, as the SEPA appeal may inform the CUP hearing.

1 Hearing Examiner Letter APL 25-003(a), issued April 23, 2025, asked the Parties  
2 to brief whether the SEPA appeal may be heard combined with the underlying permit  
3 hearing (here, a CUP hearing) or if the appeal must wait to be heard with any judicial appeal  
4 of the underlying permit. On first blush, the provision of Mercer Island City Code (“MICC”  
5 or “Code”) 19.21.200 that an “appeal must be consolidated with any appeal that is filed on  
6 the proposal or action” may be a source of confusion. This MICC provision appears to  
7 conflict with the applicable SEPA statute and WAC, which both provide that agencies  
8 administering SEPA may provide for administrative appeal of certain SEPA decisions.  
9

10 RCW 43.21C.075(3)(b) provides that where a city “has a procedure for appeals of  
11 agency environmental determinations made under this chapter,” then that SEPA  
12 administrative appeal procedure:  
13

14 “[s]hall consolidate an appeal of procedural issues and of substantive determinations made  
15 under this chapter (such as a decision to require particular mitigation measures or to deny a  
16 proposal) with a hearing or appeal on the underlying governmental action by providing for  
a single simultaneous hearing before one hearing officer or body to consider the agency  
decision or recommendation on a proposal and any environmental determinations made  
under this chapter [with the exception of circumstances not applicable here].”

17 WAC 197-11-680(3)(a)(v) similarly provides:

18 “Except [in those circumstances not relevant here, the administrative appeal] shall  
19 consolidate any allowed appeals of procedural and substantive determinations under SEPA  
with a hearing or appeal on the underlying governmental action in a single simultaneous  
20 hearing before one hearing officer or body. The hearing or appeal shall be one at which the  
21 hearing officer or body will consider either the agency’s decision or a recommendation on  
22 the proposed underlying governmental action. For example, an appeal of the adequacy of  
an EIS must be consolidated with a hearing or appeal on the agency’s decision or  
recommendation on the proposed action, if both proceedings are allowed in agency  
procedures.”

23 The MICC expressly adopts WAC 197-11-680 by reference. MICC 19.21.040.  
24  
25

1 Further, the 2014 Supreme Court case *Ellensburg Cement Products, Inc. v. Kittitas*  
2 *County*, 179 Wn.2d 737, 745, 317 P.3d 1037 (2014) presented remarkably similar facts to  
3 those presented here. That case presented a question of whether an administrative appeal of  
4 a determination of non-significance (“DNS”) should be consolidated with a related CUP  
5 hearing, and whether the record should be open or closed for that hearing. The Court cited  
6 to both the RCW and WAC provision above, saying:  
7

8 Thus state law requires that if a local government opts to provide a SEPA appeal, that appeal  
9 must occur simultaneously with a hearing on the underlying action. . . . an appeal of a SEPA  
10 threshold determination must be consolidated and simultaneous with a hearing on the  
11 underlying project permit decision, and must provide for the preparation of a record,  
12 including testimony under oath, for use in subsequent proceedings. . . . At a minimum, then,  
the consolidated hearing on the SEPA appeal and the underlying action must provide for  
introduction of testimony under oath. That requirement is consistent with the definition of  
an open record hearing . . . which creates the local government's record through testimony  
and submission of evidence and information . . . .

13 *Ellensburg Cement*, 179 Wn.2d at 745 (also quoting RCW 36.70B.020(3)).

14 Finally, the combined hearing approach also gives effect to the MICC’s express  
15 provision for a City-level administrative appeal to the Hearing Examiner of certain SEPA  
16 actions. MICC 19.21.200. By contrast, delaying a SEPA appeal until a judicial proceeding  
17 would circumvent the MICC’s express provision of an administrative level appeal before  
18 the City’s hearing examiner.  
19

20 In conclusion, the parties agree on a combined open-record hearing for the SEPA  
21 appeal and related CUP decision, and would suggest the SEPA appeal portion precedes the  
22 CUP hearing, as the SEPA appeal may inform the CUP hearing.

23 //

24 //

1 DATED this 29th day of April, 2025

2 By:

3  
4 CITY OF MERCER ISLAND

APPELLANT – HERZL-NER TAMID  
CONSERVATIVE CONGREGATION

5  
6 /s/ Eileen M. Keiffer

/s/ Josh Friedmann

Eileen M. Keiffer, WSBA #51598

Josh Friedmann, WSBA #52946

Laurie Halvorson, WSBA #17313

Hillis Clark Martin & Peterson P.S.

Madrona Law Group, PLLC

Attorney for Appellant Herzl-Ner Tamid  
Conservative Congregation

7  
8  
9  
10 /s/ Bio Park

Bio Park, WSBA #36994

City of Mercer Island

Office of the City Attorney

11  
12  
13 Attorneys for City of Mercer Island

# **EXHIBIT “C”**

**From:** [jegalt755@gmail.com](mailto:jegalt755@gmail.com)  
**To:** "[Josh Friedmann](#)"; [Andrea Larson](#); "[Bio Park](#)"; "[Deb Estrada](#)"; [Eileen Keiffer](#); [Laurie Halvorson](#); [Mary Swan](#); [Reina McCauley](#); "[Ryan Harriman](#)"  
**Subject:** RE: APL25-003: Herzi-Ner Tamid v Mercer Island SEPA Official: Introductory letter attached  
**Date:** Thursday, May 1, 2025 8:40:58 AM

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Dear Principal Parties:

Thank you very much for your joint brief on the procedural/jurisdictional question. I would normally respond to your brief by a formal, written document. In this case, however, I think an email chain might be more efficient.

I accept and am very comfortable with your view of the interplay of the various laws, regs, and codes that apply. I concur that a consolidated CUP application/SEPA appeal hearing is the way to go.

The only thing holding me up is the simple fact that I have no knowledge of the status of the CUP application. In order to set a hearing date and trigger public notice, we need to know when the CUP application will be ready for hearing: How far along is Staff review? When does Staff expect to be able to issue a Staff Report? When will the applicant be ready? Etc.?

If you'd like to have a short Zoom conference in the immediate future to discuss scheduling, I'm amenable. I couldn't do it tomorrow, but anytime Monday or Tuesday between 9 a.m. and 3 p.m., or Wednesday after 1 p.m., or Friday after 1 p.m. would work for me.

As you think of hearing dates, please remember that the RoP 224 pre-filing process will apply to all exhibits for the hearing.

As far as hearing sequence, please consider RoP 304(e), second column ("Combined Project Permit and Appeal Hearings"). I prefer to not hold two entirely separate hearings one-after-the-other as I believe there would be a lot of testimonial duplication. It may be a minor point, but I also worry that a witness may testify differently about the same topic/issue in the two hearings. You will note that I set up the sequence so that the permit applicant first lays out the basics of the project, then the SEPA appellant presents its appeal issues. (In this case Herzi-Ner Tamid is both Applicant and Appellant.) That is followed by Respondent's (Planning's) testimony on both the merits and the SEPA appeal. Then the general public follows on both merits and appeal.

We can discuss pros and cons of alternative sequences during our Zoom chat.

Please let me know when you'd like to have the Zoom chat and I'll set it up.

Respectfully,

John E. Galt  
Hearing Examiner  
(425) 259-3144

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**From:** Josh Friedmann <josh.friedmann@hcmp.com>  
**Sent:** Tuesday, April 29, 2025 5:41 PM  
**To:** jegalt755@gmail.com; Andrea Larson <Andrea.Larson@mercergov.org>; Bio Park <bio.park@mercergov.org>; Deb Estrada <Deborah.Estrada@mercerisland.gov>; Eileen Keiffer <eileen@madronalaw.com>; Laurie Halvorson <laurie@madronalaw.com>; Mary Swan <mary.swan@mercergov.org>; Reina McCauley <rmccauley@madronalaw.com>; Ryan Harriman <ryan.harriman@mercerisland.gov>  
**Subject:** RE: APL25-003: Herzi-Ner Tamid v Mercer Island SEPA Official: Introductory letter attached

Dear Hearing Examiner Galt,

In response to your letter of April 23, attached please find a joint briefing on procedural matters, co-signed by myself (on behalf of applicant/appellant Herzi Ner Tamid), and Eileen Keiffer and Bio Park (on behalf of the City of Mercer Island). Ms. Keiffer and Mr. Park authorized me by email to affix their digital signatures to this briefing.

We look forward to working with you on the next steps towards an efficient and amiable hearing.

Best regards,  
Josh Friedmann

**Josh E. Friedmann**  
**Hillis Clark Martin & Peterson P.S.**  
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**From:** [jegalt755@gmail.com](mailto:jegalt755@gmail.com) <[jegalt755@gmail.com](mailto:jegalt755@gmail.com)>  
**Sent:** Wednesday, April 23, 2025 12:11 PM  
**To:** Andrea Larson <[Andrea.Larson@mercergov.org](mailto:Andrea.Larson@mercergov.org)>; Bio Park <[bio.park@mercergov.org](mailto:bio.park@mercergov.org)>; Deb Estrada <[Deborah.Estrada@mercerisland.gov](mailto:Deborah.Estrada@mercerisland.gov)>; Eileen Keiffer <[eileen@madronalaw.com](mailto:eileen@madronalaw.com)>; Josh Friedmann <[josh.friedmann@hcmp.com](mailto:josh.friedmann@hcmp.com)>; Laurie Halvorson <[laurie@madronalaw.com](mailto:laurie@madronalaw.com)>; Mary Swan <[mary.swan@mercergov.org](mailto:mary.swan@mercergov.org)>; Reina McCauley <[rmccauley@madronalaw.com](mailto:rmccauley@madronalaw.com)>; Ryan Harriman <[ryan.harriman@mercerisland.gov](mailto:ryan.harriman@mercerisland.gov)>  
**Subject:** APL25-003: Herzi-Ner Tamid v Mercer Island SEPA Official: Introductory letter attached

[EXTERNAL]

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John E. Galt  
Hearing Examiner  
(425) 259-3144