**BEFORE THE HEARING EXAMINER for the**
**CITY of MERCER ISLAND**

# INTERLOCUTORY ORDER on MOTIONS by CONCERNED NEIGHBORS FOR The PROTECTION of the NEIGHBORHOOD

File No.: APL25-003

Appellant: Herzl-Ner Tamid Conservative Congregation
C/o Hillis Clark Martin & Peterson P.S.
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Respondent: City of Mercer Island
Community Planning & Development, SEPA Responsible Official
C/o Madrona Law Group, PLLC
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AND

City of Mercer Island
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Applicant: Herzl-Ner Tamid Conservative Congregation
C/o Hillis Clark Martin & Peterson P.S.
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Proposed Intervenor: Concerned Neighbors for the Protection of the Neighborhood
C/o Matthew Goldbach
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**WHEREAS**, the City of Mercer Island Hearing Examiner ("Examiner") has before him an appeal filed by Herzl-Ner Tamid Conservative Congregation ("Herzl") from the wording of Mitigation Measures 1 and 3 in the State Environmental Policy Act ("SEPA") Revised Mitigated Threshold Determination of Nonsignificance ("RMDNS") issued on April 7, 2025, under City file number SEP24-003 by Community Planning & Development ("CP&D); and

**WHEREAS**, the RMDNS was issued for Herzl's proposal to construct

> a new, three-story preschool and K-8 school with rental offices, shared parking, and associated site improvements. The preschool, K-8 school, and rental offices are proposed on parcel 0824059045, which are permitted uses in the B zoning designation. The shared parking and associated site improvements would be located in the R-9.6 zoning designation and are subject to a conditional use permit per MICC 19.02.010(C)(2).

(Exhibit 9005, PDF 1) Parcel 0824059045 is in the B zone; and

**WHEREAS**, on June 20, 2025, Concerned Neighbors for the Protection of the Neighborhood ("Concerned Neighbors") filed a three-part Motion: 1) "To Intervene"; 2) "Dismiss Appeal of [Herzl] for Lack of Subject Matter Jurisdiction"; and 3) "Dismiss the Appeal of [Herzl] for Premature SEPA Appeal Of Conditional Use Permit (CUP)"; and

**WHEREAS**, to facilitate reference to the several documents relating to the Herzl appeal now in the Examiner's possession, the Examiner herewith assigns the following administrative exhibit numbers for identification: [1]

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| Exhibit 9001: | SEPA MDNS, issued March 17, 2025 |
| Exhibit 9002: | Appeal from Exhibit 9001, filed March 31, 2025, by Herzl |
| Exhibit 9003: | Scheduling Letter from Examiner to Principal Parties, April 2, 2025 |
| Exhibit 9004: | Email chain, Eileen Keiffer – Examiner – Principal Parties, April 4 – 7, 2025, re: withdrawal of MDNS and closure of appeal |
| Exhibit 9005: | Withdrawal of March 17, 2025 SEPA Threshold Mitigated Determination of Non-Significance (MDNS) & Issuance of Revised SEPA Threshold Mitigated Determination of Non-Significance (MDNS), file SEP24-003, issued April 7, 2025 |
| Exhibit 9006: | Appeal from Exhibit 9005, filed April 18, 2025, by Herzl |
| Exhibit 9007: | Scheduling Letter from Examiner to Principal Parties, April 23, 2025 |
| Exhibit 9008: | Joint Briefing on Procedural Matters, filed April 29, 2025, by Herzl and CP&D |
| Exhibit 9009: | Email chain, Goldbach – Friedmann – Examiner (to Principal Parties), June 20 – 24, 2025; re: Concerned Neighbors' Motion |

[1] The following exhibit numbers are assigned in accordance with the procedure for assigning administrative exhibit numbers in appeal cases as spelled out in RoP 224.

Exhibit 9010: Motions by Concerned Neighbors for the Protection of the Neighborhood, Intervenors, filed June 20, 2025, with Exhibits 1 – 5, to be cited as Exhibits 9010.1 - .5 [2]

Exhibit 9011: Email chain, Goldbach – Friedmann – Examiner (to Principal Parties), June 20 – 24, 2025

Exhibit 9012: Herzl-Ner Tamid's Response to Concerned Neighbors' Motion, filed June 27, 2025

Exhibit 9013: City of Mercer Island's Response to Motions by Concerned Neighbors for the Protection of the Neighborhood, filed June 30, 2025, with Exhibits A – C to be cited as Exhibits 9013.A - .C; and

**WHEREAS**, Herzl's SEPA appeal challenges only part of the text of two of the four mitigation measures imposed on the April 7, 2025, RMDNS: Mitigation Measures 1 and 3. Herzl does not challenge the existence of those mitigation measures, just some of their wording. Mitigation Measure 1 pertains to provision of a left turn lane from southbound East Mercer Way into Frontage Road (which serves Herzl's site). Mitigation Measure 3 pertains to the curb radii for right-turning vehicles from Frontage Road onto East Mercer Way. (Exhibit 9005); and

**WHEREAS**, Concerned Neighbors' Motions offer many objections to Herzl's proposal, but make no specific reference to the RMDNS wording which Herzl is appealing (Exhibit 9010); and

**WHEREAS**, an appeal is limited to the issues set forth within the appeal. Neither the appellant, the respondent, an intervenor, or any non-intervenor participant may expand the scope of an appeal to include matters not included with the four corners of the appeal itself; and

**WHEREAS**, a person or entity seeking to become an intervenor must share "a common question of law or fact with the existing case". [https://www.law.cornell.edu/wex/intervene, last visited June 30, 2025, hyperlinks in original]; and

**WHEREAS**, although Concerned Neighbors have indicated that they have numerous objections to Herzl's proposal (and development history), their stated objections do not directly relate to the extremely limited scope of Herzl's appeal; and

**WHEREAS**, the Examiner concludes that intervention in the SEPA appeal is not warranted nor required. Concerned neighbors will be able to participate in the SEPA appeal just as will any other citizen and may speak with respect to the limited issues within the scope of the appeal just as will any other citizen who chooses to participate; and

**WHEREAS**, Concerned Neighbors assert that the Examiner must dismiss Herzl's appeal because "the Examiner does not have subject matter jurisdiction under the Mercer Island City Code to hear an appeal of a CUP when a CUP originates in a Public Hearing before the Hearing Examiner." (Exhibit 9010, PDF 5, ll. 15 – 17); and

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[2] Not received by the Examiner until June 24, 2025. Punctuation within Motions title *sic*.

**WHEREAS**, the Examiner would go one step further: the Examiner has original jurisdiction over a CUP application which is exercised through a pre-decision open record hearing. The Examiner's authority is generally to grant, grant with conditions, remand, or deny an application. [MICC 19.15.140(C)] A CUP is one type of application over which the Examiner has that authority. [MICC 19.15.030(H), Table D] The Examiner has no authority to appeal his own decisions; appeal from the Examiner's decisions is to Superior Court. [*Ibid.*]; and

**WHEREAS**, Herzl is appealing text within a SEPA RMDNS, not the approval or denial of a CUP. Concerned Neighbors' argument for dismissal for lack of subject matter jurisdiction is based on substantial misunderstanding of the structure of the MICC and lacks merit; and

**WHEREAS**, Concerned Neighbors assert that the Examiner must dismiss Herzl's appeal

> under SEPA as it is a piecemeal appeal when a SEPA appeal must be consolidated with any appeal that is filed under the proposed action. In this matter, since the applicant has not yet sought a Conditional Use Permit before the Hearing Examiner as part of this development, this appeal is premature and does not allow Concerned Neighbors the opportunity to raise their legal objections to the underlying CUP which is a predicate for the waiting lane.

(Exhibit 9010, PDF 5); and

**WHEREAS**, here again, Concerned Neighbors are confused about the process. The law and code requirement is to consolidate any administrative SEPA appeal hearing with a required administrative hearing on the related application, be it a predecision hearing or an administrative appeal. Concerned Neighbors' argument is based on substantial misunderstanding of the structure of the MICC and lacks merit; and

**WHEREAS**, any Recital herein deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

**NOW, THEREFORE**, the Hearing Examiner issues the following:

## INTERLOCUTORY ORDER

The Motions by Concerned Neighbors for the Protection of the Neighborhood, Intervenors, filed June 20, 2025, are herewith **DENIED**.

**ORDER** issued July 1, 2025.

\s\ John E. Galt

JOHN E. GALT
Hearing Examiner