BEFORE the HEARING EXAMINER for the
CITY of MERCER ISLAND

DECISION

FILE NUMBER:	APL25-003 (Reference File No. SEP24-003)
APPELLANT:	Herzl-Ner Tamid Conservative Congregation C/o Hillis Clark Martin & Peterson P.S. ATTN: Josh Friedmann 999 Third Avenue, Suite 4600 Seattle, WA 98104 josh.friedmann@hcmp.com
RESPONDENT:	City of Mercer Island Community Planning & Development, SEPA Responsible Official C/o Madrona Law Group, PLLC ATTN: Eileen Keiffer & Laurie Halvorson 14205 SE 36th Street, Suite 100, PMB 440 Bellevue, WA 98006 eileen@madronalaw.com laurie@madronalaw.com AND City of Mercer Island ATTN: Bio F. Park, City Attorney 9611 SE 36th Street Mercer Island, WA 98040 bio.park@mercergov.org
APPLICANT:	[Same as Appellant]
TYPE OF CASE:	State Environmental Policy Act ("SEPA") Appeal: Two mitigation measures within the Revised Mitigated Determination of Nonsignificance ("RMDNS") issued for the *Barnabie Point Project* should be revised
EXAMINER DECISION:	Appeal GRANTED: Mitigation Measures 1 and 3 REVISED
DATE OF DECISION:	July 18, 2025

INTRODUCTION [1]

Herzl-Ner Tamid Conservative Congregation ("HNT") appeals from two mitigation measures (Mitigation Measures 1 and 3) within the SEPA RMDNS issued by the City of Mercer Island ("City") Community Planning & Development ("CP&D") Responsible Official for the *Barnabie Point Project.* [2] (Exhibit 9005 [3]) HNT filed the appeal on April 18, 2025. (Exhibit 9006)

The HNT property is located at 3700 East Mercer Way. The HNT property is composed of four abutting Assessor's Parcels: 0824059045 ("Lot 1"); 2107000010 ("Lot 2"); 1515600010 ("Lot 3"); and 151560TRCT (the "Tract") depicted on the following graphic:

(Exhibit 1, PDF 12) The Tract boundary is faintly visible (a black line) north of and generally parallel with the north line of Lot 1 and the western two-thirds of Lot 2; it ends where the jog in the north boundary of Lot 2 is located.

On June 20, 2025, Concerned Neighbors for the Protection of the Neighborhood ("Concerned Neighbors") filed a Motion to intervene, for dismissal of HNT's appeal due to alleged lack of subject matter jurisdiction,

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1 Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

2 The Responsible Official withdrew the initial MDNS and replaced it with the RMDNS to correct a distribution error. Prior to that withdrawal, HNT filed an appeal from the original MDNS. (Exhibits 9001; 9002) When the MDNS was withdrawn, the Examiner declared the original appeal moot. (Exhibit 9004) The RMDNS was issued and HNT re-filed its appeal. (Exhibits 9005; 9006) This decision addresses only events after issuance of the RMDNS.

3 Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

and for dismissal due to premature SEPA appeal of the CUP. (Exhibit 9010) HNT and CP&D filed responses. (Exhibits 9012; 9013) On July 1, 2025, the Examiner issued an Interlocutory Order Denying Concerned Citizens' Motions. (Exhibit 9014)

The Examiner held a remote open record appeal hearing pursuant to MICC 3.40.060 on July 9, 2025, using the "Zoom" platform. [4] The City gave notice of the hearing as required by the MICC. (Exhibit 31)

Pursuant to Hearing Examiner Rule of Procedure ("RoP") 224(c), the Examiner entered the following administrative exhibits into the hearing record:

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
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 [5]
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
Exhibit 9014:	Interlocutory Order on Motions by Concerned Citizens for Protection of the Neighborhood, issued July 1, 2025
Exhibit 9015:	Concerned Neighbors' Public Comments for Herzl's SEPA Appeal of the Revised MDNS, dated July 1, 2025

[4] The SEPA Appeal and a related Conditional Use Permit ("CUP") Revision application were heard at one open record hearing. A Decision on the CUP Revision application has been issued this date under separate cover.

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

Pursuant to RoP 224(d), Respondent CP&D pre-filed Exhibits 1 - 34 and provided an index listing of those exhibits. There was no objection to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

Pursuant to RoP 224(e), Appellant HNT pre-filed Exhibits 1001 - 1005 and provided an index listing of those exhibits. There was no objection to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

The City has the record copy of the exhibits and the exhibit index lists.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. CP&D performed a SEPA threshold determination under City File No. SEP 24-003 for what is sometimes referred to in the hearing record as the *Barnabie Point Project,* described in the SEPA RMDNS as follows:

> Review under the State Environmental Policy Act (SEPA) for the construction of 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 24, PDF 1)

2. On April 7, 2025, the CP&D Responsible Official issued an RMDNS for the *Barnabie Point Project*. The RMDNS described traffic-related impacts which, if not adequately mitigated, would result in significant adverse environmental impacts:

> The City's transportation consultant, KPG Psomas (KPG), reviewed the Traffic Impact Analysis with the associated Transportation Concurrency Certificate application (TCC24-004) and identified aspects of the project which would likely have significant impacts without proper mitigation. The City has incorporated the comments from KPG's review letters into the SEPA threshold determination as required mitigation measures to ensure that these issues are addressed by the applicant.

(Exhibit 24, PDF 2) The CP&D Responsible Official imposed four mitigation measures in response to the identified impacts:

1. Provide a left turn lane from southbound East Mercer Way to the Frontage Road serving the site. All lane widths (left and through) shall comply with American Association of State Highway and Transportation Officials ("AASHTO") and Washington State Department of Transportation ("WSDOT") standards. The turn lane length shall be designed to accommodate left turn demand during the AM and PM peak hour and site peak if it does not coincide with the AM and PM peak hour.
2. The addition of the southbound left turn lane may reduce the length of adjacent northbound left turn lane at the SE 36th Street/East Mercer Way intersection. Verify with a traffic operations analysis that, with the addition of the southbound left turn lane to the Frontage Road, the northbound left turn lane at the SE 36th Street/East Mercer Way intersection will have sufficient storage length to accommodate vehicles during the AM and PM peak hours.
3. Confirm adequacy of curb radii for right turning vehicles exiting from the Frontage Road onto northbound East Mercer Way based on lane width designed for East Mercer Way if lane width is narrower than existing condition. Modify curb radii if warranted.
4. The Transportation Impact Analysis states that the school bus unloading/loading will occur at the east end of the school. The site plan and circulation plan do not show the location of the bus loading zone or walkways along the east side of the building for students to access the bus loading zone. Revise the site plan and circulation plan to show the bus loading zone and how students will safely access the bus loading zone. Parent drop-off and pick-up traffic will also use the roadway east of the school. The Transportation Impact Analysis should describe how the school buses will safely interact with parent drop-off and pick-up queuing and traffic that is using the same roadway.

(Exhibit 24, PDF 3

3. On April 18, 2025, HNT, the owner of the subject property and the applicant, filed an appeal from the RMDNS. HNT's appeal statement makes clear that HNT does not object to issuance of the RMDNS for the *Barnabie Point Project*; rather, HNT only asked for text changes to Mitigation Measures 1 and 3:

1. Provide a left turn lane from southbound East Mercer Way to the Frontage Road serving the site. All lane widths (left and through) shall comply with American Association of State Highway and Transportation Officials ("AASHTO") and Washington State Department of Transportation ("WSDOT") standards, or to functionally adequate and appropriate specifications as may reasonably approved by the City Engineer if needed to make this condition reasonable and capable of being accomplished. The turn lane length shall be designed to accommodate left

turn demand during the AM and PM peak hour, and during the site's peak hour if that site peak hour ~~and site peak if it~~ does not coincide with the AM and PM peak hour.

2. The addition of the southbound left turn lane may reduce the length of adjacent northbound left turn lane at the SE 36th Street/East Mercer Way intersection. Verify with a traffic operations analysis that, with the addition of the southbound left turn lane to the Frontage Road, the northbound left turn lane at the SE 36th Street/East Mercer Way intersection will have sufficient storage length to accommodate vehicles during the AM and PM peak hours.
3. Confirm adequacy of curb radii for right turning P and S-BUS-40 vehicles exiting from the Frontage Road onto northbound East Mercer Way based on lane width designed for East Mercer Way if lane width is narrower than existing condition. Modify curb radii if reasonably warranted and capable of being accomplished.
4. The Transportation Impact Analysis states that the school bus unloading/loading will occur at the east end of the school. The site plan and circulation plan do not show the location of the bus loading zone or walkways along the east side of the building for students to access the bus loading zone. Revise the site plan and circulation plan to show the bus loading zone and how students will safely access the bus loading zone. Parent drop-off and pick-up traffic will also use the roadway east of the school. The Transportation Impact Analysis should describe how the school buses will safely interact with parent drop-off and pick-up queuing and traffic that is using the same roadway.

(Exhibit 9006.B; green underline and ~~red strike-through~~ in original) HNT's appeal was assigned City File No. APL25-003.

4. Subsequent to filing the appeal, HNT had dialogue with City Public Works and Washington State Department of Transportation ("WSDOT") seeking wording that would satisfy the concerns of both agencies and HNT. The result of that effort is Exhibit 1005, submitted on or about July 2, 2025:

1. Provide a left turn lane from southbound East Mercer Way to the Frontage Road serving the site. The turn lane length shall be designed to accommodate left turn demand during the AM and PM peak hour, and during site peak if it does not coincide with the AM and/or PM peak hour. Where the Washington State Department of Transportation (WSDOT) has permitting authority over the right-of-way, the widths of all lanes of East Mercer Way shall comply with Washington State Department of Transportation ("WSDOT") standards and procedures (including, without limitation, standards and procedures for deviations). The applicant shall apply for and obtain all necessary approvals that WSDOT may require. To the extent any improvements are within solely City right-of-way (not subject to WSDOT authority, design or otherwise), the widths of all lanes of East Mercer Way shall comply with applicable American Association of State Highway and Transportation Officials ("AASHTO")

standards. Requests for deviations from AASHTO design guidelines shall be supported with written justification that has been stamped and signed by a licensed civil engineer; the City shall have the sole discretion to approve or deny such requests. ~~All lane widths (left and through) shall comply with American Association of State Highway and Transportation Officials ("AASHTO") and Washington State Department of Transportation ("WSDOT") standards. The turn lane length shall be designed to accommodate left turn demand during the AM and PM peak hour and site peak if it does not coincide with the AM and PM peak hour.~~

2. The addition of the southbound left turn lane may reduce the length of adjacent northbound left turn lane at the SE 36th Street/East Mercer Way intersection. If such a reduction in the length of said northbound left turn lane is necessary, ~~V~~verify with a traffic operations analysis that, with the addition of the southbound left turn lane to the Frontage Road, the northbound left turn lane at the SE 36th Street/East Mercer Way intersection will have sufficient storage length to accommodate vehicles during the AM and PM peak hours.
3. The left turn lane from southbound East Mercer Way to the Frontage Road serving the site may consequently require narrowing of the northbound lane on East Mercer Way, especially as approaching the Frontage Road serving the site. Confirm adequacy of curb radii for right turning vehicles exiting from the Frontage Road onto northbound East Mercer Way based on lane width designed for East Mercer Way, if said East Mercer Way lane width is narrower than existing condition. The design vehicle shall be a S-BUS-40 (school bus). Modify curb radii if reasonably warranted.
4. The Transportation Impact Analysis states that the school bus unloading/loading will occur at the east end of the school. The site plan and circulation plan do not show the location of the bus loading zone or walkways along the east side of the building for students to access the bus loading zone. Revise the site plan and circulation plan to show the bus loading zone and how students will safely access the bus loading zone. Parent drop-off and pick-up traffic will also use the roadway east of the school. The Transportation Impact Analysis should describe how the school buses will safely interact with parent drop-off and pick-up queuing and traffic that is using the same roadway.

(Exhibit 1005; blue underline and ~~red strike-through~~ in original)

5. The City's Chief of Operations asks the Examiner to adopt the Exhibit 1005 text. (Testimony)

6. Concerned Citizens (Matthew Goldbach and John Hall, spokespersons) and three neighboring residents (Jeff Davis, Winky Lai, and Mark Hall) testified about general traffic safety and excessive volume concerns regarding the road system in the neighborhood of the subject property. (Exhibit 9015; testimony)

7. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK [6]

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority
Issuance of a SEPA threshold determination is a Type 1 administrative land use action. [MICC 19.15.030(E), Table A] An appeal from a Type 1 action is subject to an open record hearing before the Examiner. [MICC 19.15.030(E), Table B]

> 1. If the [Examiner] finds that there has been substantial error, or the proceedings [below] were materially affected by irregularities in procedure, or the decision [below] was unsupported by material and substantial evidence in view of the entire record, or the decision [below] is in conflict with the city's applicable decision criteria, it may:
> a. Reverse the decision.
> b. Modify the decision and approve it as modified.
> c. Remand the decision back to the decision maker for further consideration.
> 2. If the [Examiner] finds that none of the procedural or factual bases listed above exist and that there has been no substantial error, the [Examiner] may adopt the findings and/or conclusions of the decision body, concur with the decision of the decision body and approve the development proposal as originally approved, with or without modifications.

[MICC 19.15.130(G)(1) & (2)] The Examiner's decision on the appeal is final subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Table B; MICC 3.40.110]

The scope of the Examiner's authority in a SEPA appeal is constrained, however, by state rule and City ordinance. (See Standard of Review, ¶ 2, below.)

Vested Rights
Mitigation measures or denials under authority of SEPA must be based upon adopted SEPA policies "in effect when the DNS or [Draft] EIS is issued." [WAC 197-11-660(1)(a), adopted by reference at MICC 19.21.040]

Standard of Review
The clearly erroneous standard is the appropriate test to apply in an appeal of a SEPA threshold determination: the action of the responsible official is not disturbed unless, after reviewing all the evidence in the record, the appellate decision maker is left with the definite conviction that a mistake has been made. *[Leavitt v. Jefferson Cy.,* 74 Wn. App. 668, 680 (1994)]

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[6] Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

The appellant has the burden of proof. State law requires that "[i]n any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight." [RCW 43.21C.090] That requirement is echoed in both state rule [WAC 197-11-680(3)(a)(viii)] and, by adoption, municipal code [MICC 19.21.040].

Scope of Consideration
The Examiner has considered: all the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The issues in an appeal are limited to those set forth in the written appeal – often described as being limited to "the four corners of the appeal." The only exception to this rule would be where one or more parties to an appeal formally seek to expand the issues and such request is granted by the hearing officer/presiding official.

2. Such a request and approval process has not happened in this appeal. Thus, the issues which are now before the Examiner are limited to consideration of the wording of Mitigation Measures 1 and 3 because HNT is the only appellant and those are the only mitigation measures for which HNT requested changed text.

3. The Examiner finds and concludes that the suggested, agreed upon replacement text for Mitigation Measures 1 and 3 is more precise and certainly no less protective of the environment than the original text in the RMDNS. The revised text may appropriately be substituted.

4. Since the appeal did not challenge the text of Mitigation Measure 2, changing that text would be beyond the scope of the Examiner's jurisdiction. Even though the proposed change is relatively minor, clarifies when an action is to occur, and is acceptable to HNT, the City, and WSDOT, the Examiner simply has no jurisdiction to change the text of Mitigation Measure 2.

5. However, the Examiner may insert text into Mitigation Measures 1 or 3 based upon evidence in the hearing record. Mitigation Measure 1 addresses the southbound left turn lane. Mitigation Measure 2 also addresses the southbound left turn lane. The intent of the proposed changes to Mitigation Measure 2 can be incorporated into Mitigation 1 by a textual addition at its end. Such addition will be made.

6. The concerns raised by the neighbors are outside the limited scope of this appeal and will not be addressed.

7. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner **GRANTS** the appeal of HNT from SEP24-003 Mitigation Measures 1 and 3 as set forth below. (The original text color scheme from Exhibit 1005 is preserved for clarity; the Examiner's additions to Mitigation Measure 1 are shown in underlined green.)

1. Provide a left turn lane from southbound East Mercer Way to the Frontage Road serving the site. The turn lane length shall be designed to accommodate left turn demand during the AM and PM peak hour, and during site peak if it does not coincide with the AM and/or PM peak hour. Where the Washington State Department of Transportation (WSDOT) has permitting authority over the right-of-way, the widths of all lanes of East Mercer Way shall comply with Washington State Department of Transportation ("WSDOT") standards and procedures (including, without limitation, standards and procedures for deviations). The applicant shall apply for and obtain all necessary approvals that WSDOT may require. To the extent any improvements are within solely City right-of-way (not subject to WSDOT authority, design or otherwise), the widths of all lanes of East Mercer Way shall comply with applicable American Association of State Highway and Transportation Officials ("AASHTO") standards. Requests for deviations from AASHTO design guidelines shall be supported with written justification that has been stamped and signed by a licensed civil engineer; the City shall have the sole discretion to approve or deny such requests. ~~All lane widths (left and through) shall comply with American Association of State Highway and Transportation Officials ("AASHTO") and Washington State Department of Transportation ("WSDOT") standards. The turn lane length shall be designed to accommodate left turn demand during the AM and PM peak hour and site peak if it does not coincide with the AM and PM peak hour.~~

   The addition of the southbound left turn lane may reduce the length of the adjacent northbound left turn lane at the SE 36th Street/East Mercer Way intersection. If such a reduction in the length of said northbound left turn lane is necessary, the analysis called for by Mitigation Measure 2 shall be undertaken.
2. The addition of the southbound left turn lane may reduce the length of adjacent northbound left turn lane at the SE 36th Street/East Mercer Way intersection. Verify with a traffic operations analysis that, with the addition of the southbound left turn lane to the Frontage Road, the northbound left turn lane at the SE 36th Street/East Mercer Way intersection will have sufficient storage length to accommodate vehicles during the AM and PM peak hours.
3. The left turn lane from southbound East Mercer Way to the Frontage Road serving the site may consequently require narrowing of the northbound lane on East Mercer Way, especially as approaching the Frontage Road serving the site. Confirm adequacy of curb radii for right turning vehicles exiting from the

Frontage Road onto northbound East Mercer Way based on lane width designed for East Mercer Way, if said East Mercer Way lane width is narrower than existing condition. The design vehicle shall be a S-BUS-40 (school bus). Modify curb radii if reasonably warranted.

4. The Transportation Impact Analysis states that the school bus unloading/loading will occur at the east end of the school. The site plan and circulation plan do not show the location of the bus loading zone or walkways along the east side of the building for students to access the bus loading zone. Revise the site plan and circulation plan to show the bus loading zone and how students will safely access the bus loading zone. Parent drop-off and pick-up traffic will also use the roadway east of the school. The Transportation Impact Analysis should describe how the school buses will safely interact with parent drop-off and pick-up queuing and traffic that is using the same roadway.

Decision issued July 18, 2025.

\s\ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS [7]

Joshua Friedmann, unsworn counsel
Jason Kintner
Matthew Goldbach
Winky Lai
Ryan Harriman
Eileen Keiffer, unsworn counsel
John Hall
Jeff Davis
Mark Hall

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: "1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the

[7] The official Parties of Record register is maintained by the City's Hearing Clerk.

interests of persons directly affected by the decision." [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

"Any judicial appeal of the hearing examiner's decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act ('LUPA'). The land use petition must be filed within 21 days of the issuance of the hearing examiner's decision." [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."