

CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT

9611 SE 36TH STREET | MERCER ISLAND, WA 98040

PHONE: 206.275.7605 | www.mercerisland.gov



CITY USE ONLY

PROJECT#	APPEAL#	FEE
	APL25-002	

Date Received: **March 31, 2025**

APPEAL

Received By: **City Clerk's Office**

SITE ADDRESS OF PROPERTY WHERE THE DECISION IS BEING APPEALED:

PROPERTY OWNER NAME:	ADDRESS:	PHONE: E-MAIL:
APPELLANT NAME (if different from property owner):	ADDRESS:	PHONE: E-MAIL:
APPELLANT ATTORNEY INFORMATION (if applicable):	ADDRESS:	PHONE: E-MAIL:

What is the decision that you are appealing? Include any applicable project file number.

What are your reasons for appealing this decision? (Attach additional pages if necessary)

(You must indicate specifically that there were substantial errors, the decision is unsupported by the facts presented, the decision is in conflict with the standards for review of the action or there were irregularities in the procedure. Attachments or supporting information may be included.)

What is the outcome or changes in the decision that you are seeking? (Attach additional pages if necessary)

Signature: _____

Josh Friedmann

Date: _____

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BEFORE THE HEARING EXAMINER FOR MERCER ISLAND

In the matter of the Mitigated Determination of Nonsignificance (MDNS) issued for 3700 E Mercer Way on March 17, 2025

Hearing Examiner File No. _____
SEPA Application No. SEP24-003

APPEAL FOR MODIFICATION OF MDNS CONDITION TEXT

I. INTRODUCTION AND DECISION BEING APPEALED

Pursuant to Mercer Island City Code (“MICC” or “Code”) 19.21.200(A)(2), (A)(4) and other applicable authority, Herzl-Ner Tamid Conservative Congregation (“Appellant”) hereby appeals the current text of mitigation measures and conditions (“Contested Conditions”) drafted by the City of Mercer Island (“City”) as part of the Mitigated Determination of Non-Significance issued March 17, 2025 (“MDNS”) under file no. SEP24-003. The MDNS concerns Appellant’s Barnabie Point Project (“Project”) which proposes to provide a new preschool and K-8 school with rental offices, shared parking, and associated site improvements on Appellant’s assemblage of property (“Site”) at 3700 East Mercer Way. A copy of the MDNS is attached as *Exhibit A*.

The Appellant appreciates the City’s work and its MDNS issuance, but unfortunately must respectfully assert that the Contested Conditions are legally erroneous under the the State Environmental Policy Act, Ch. 43.21c RCW (“SEPA”) and applicable implementing regulations, insofar as the Contested Conditions are (A) not sufficiently based on specific, probable, and

1 adequately identified adverse environmental impacts; (B) not sufficiently necessary; (C) not
 2 sufficiently reasonable or capable of accomplishment; and (D) do not contain required citations.

3 II. MODIFICATION REQUESTED.

4 For the City's convenience and to aid in resolution of this dispute, the Appellant below
 5 provides the requested modifications and clarifications ("Requested Modifications") that would
 6 allow the Contested Conditions to be workable for the Project, which would enable the Appellant
 7 to withdraw this appeal without delay. The Requested Modifications would correct for two
 8 concerns: unnecessary vagueness in some text, and unnecessary prescriptiveness in other text.

9 1. Provide a left turn lane from southbound East Mercer Way to the Frontage Road serving
 10 the site. All lane widths (left and through) shall comply with American Association of State Highway and
 11 Transportation Officials ("AASHTO") and Washington State Department of Transportation ("WSDOT")
 12 standards, or to functionally adequate and appropriate specifications as may reasonably approved by
 13 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.

14 2. The addition of the southbound left turn lane may reduce the length of adjacent
 15 northbound left turn lane at the SE 36th Street/East Mercer Way intersection. Verify with a traffic
 16 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.

17 3. Confirm adequacy of curb radii for right turning P and S-BUS-40 vehicles exiting from
 18 the Frontage Road onto northbound East Mercer Way based on lane width designed for East Mercer Way
 19 if lane width is narrower than existing condition. Modify curb radii if reasonably warranted and capable
of being accomplished.

20 4. The Transportation Impact Analysis states that the school bus unloading/loading will
 21 occur at the east end of the school. The site plan and circulation plan do not show the location of the bus
 22 loading zone or walkways along the east side of the building for students to access the bus loading zone.
 23 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.

24 A freestanding copy of the Requested Modifications has also been provided to applicable
 25 City staff for their consideration and convenience, and that freestanding copy is also attached as
 26 *Exhibit B* to this Appeal.

III. APPELLANT'S INTERESTS AND STANDING

The Appellant is a Washington nonprofit corporation. The Appellant's mailing address is at the Site, 3700 East Mercer Way, Mercer Island, WA 98040. The Appellant's attorney is Josh Friedmann, whose mailing address is 999 Third Avenue, Ste. 4600, Seattle, WA 98104.

The MDNS provides that "[a]ny party of record may appeal this determination" by timely filing a complete appeal and paying the applicable fee. *Id.* at 2. The Appellant is a party of record with standing to file this appeal because the Appellant is the applicant for the subject SEPA review, is the applicant and proponent of the underlying Project, and is the owner of the Property. *See generally* RCW 43.21C.075.

The Appellant is aggrieved by the Contested Conditions, because if they are sustained, they jeopardize the Appellant's ability to be confident in this nonprofit Project's viability.

IV. JURISDICTION AND AUTHORITY

The City's MDNS is appealable to the Examiner generally under MICC 19.21.120 and 19.21.200(A), and the Contested Conditions are specifically appealable under MICC 19.21.200(A)(2) and (A)(4). The Appellant does not challenge the City's underlying determination that the Project will not have a probable, significant adverse impact on the environment, if completed with appropriate mitigation measures. However, the Appellant must petition for clarifying revisions of the City's description of those mitigation measures.

V. SPECIFIC ASSIGNMENTS OF ERROR

Appellant respectfully submits that the MDNS's Contested Conditions are incorrect as currently drafted because they are substantially erroneous, inadequately supported by evidence in the record, and conflict with applicable legal standards. MICC 19.15.130(C), (D)(4), (G)(1).¹

The Appellant submits that the Requested Revisions would resolve the most critical uncertainties created by the Contested Conditions. However, absent such revisions, the Appellant

¹ At present, the Appellant does not have specific reason to believe that procedural irregularities occurred, but reserves the right to amend its appeal with such claims if evidence of such irregularities is uncovered during the appeal process.

1 must submit each of the following reasons why the Contested Conditions are substantially
2 erroneous, insufficiently supported, and conflicting with applicable legal standards.

3 **A. The Current Conditions, as Drafted, are Not Adequately Based on Specific,
4 Probable, and Adequately Identified Adverse Environmental Impacts.**

5 First, the Contested Conditions are substantially erroneous, insufficiently supported, and
6 impermissibly in conflict with standards because they are not sufficiently based on specific,
7 probable, and adequately identified environmental impacts within the meaning of
8 RCW 43.21C.060, MICC 19.21.040 and 19.21.190(B)(1), WAC 197-11-660(1)(b) and other
9 applicable law. These and other legal authorities require that all adopted SEPA mitigation
10 conditions mitigate specific, adverse environmental impacts that have been adequately identified
11 in appropriate environmental documents. *Id.* Notably, the Code augments the baseline statewide
12 requirements of SEPA, by only allowing mitigation conditions where the identified, specific
13 adverse project impacts are also *probable*. MICC 19.21.190(B)(1). The record does not include a
14 finding of such probability.

15 Perhaps most notably, the Contested Conditions' prescriptive and inflexible right-of-way
16 construction widths (as set forth in Condition 1) would not mitigate adverse environmental
17 impacts that are sufficiently specific, probable, or adequately identified. While the City does
18 reasonably anticipate that the Project will generate new vehicle trips, the City has not adequately
19 identified any specific, probable adverse impacts from such trips, or cited any evidence of
20 anticipated road degradation or safety concerns that can be imputed to the anticipated traffic and
21 therefore can serve as a legal basis for prescriptive and inflexible right-of-way dimensions
22 required by the Contested Conditions.

23 While the MDNS includes a conclusory statement that the City's consultant "identified
24 aspects of the project which would likely have significant impacts without proper mitigation," and
25 therefore the City "has incorporated the comments . . . into the SPEA threshold determination as
26 required mitigation measures to ensure that these issues are addressed by the applicant," neither

1 these conclusory statements nor any known supporting records identify such impacts specifically,
2 and certainly do not adequately document that any such impacts are also probable.

3 **B. The Contested Conditions, As Drafted, Are Not Necessary.**

4 Next, the current text of the Contested Conditions is substantially erroneous, insufficiently
5 supported, and impermissibly in conflict with standards because the Contested Conditions are
6 both unnecessarily vague in some terms and unnecessarily prescriptive and inflexible in other
7 terms. Neither problematic vagueness, nor problematic prescriptiveness, is necessary. Therefore,
8 the current text impermissibly contravenes MICC 19.21.190.B.1 (augmenting RCW 43.21C.060
9 and WAC 197-11-660 with a codified requirement for *necessity*).

10 The Appellant only desires to retain the opportunity to seek reasonable deviations in
11 the event that alternative configurations that provide functional and safe roadways. In this
12 instance, the City cannot show that the Contested Conditions' current prescriptive roadway
13 configurations, nor its currently vague undefined terms, are *necessary*. Simply put, the City
14 cannot legally require one specific mitigation configuration where others are available,
15 perfectly adequate (if not functionally equivalent) for resolving environmental concerns, and
16 more reasonable for this nonprofit to provide.

17 **C. The Contested Conditions, As Currently Drafted, Are Not Reasonable, and**
18 **May Not Be Capable of Being Accomplished.**

19 Further, the current text of the Contested Conditions is substantially erroneous,
20 insufficiently supported, and impermissibly in conflict with standards because the Contested
21 Conditions as currently drafted are not reasonable, and may not be capable of being
22 accomplished, within the meaning of RCW 43.21C.060, MICC 19.21.040 and 19.21.190(B)(3),
23 and WAC 197-11-660(1)(c).

24 The current text of the Contested Conditions is not *reasonable* within the meaning of
25 applicable SEPA rules for two reasons. First, it is not reasonable for the Appellant to adhere to
26 strict codified standard roadway designs, without any allowance for sound engineering judgment

1 or reasonable deviations that may become necessary, given engineering conditions on the ground.
2 Second, the Contested Conditions are not reasonable insofar as their currently vague terms leave
3 the Appellant unsure how they will be interpreted and applied to actual civil engineering
4 proposals. The Requested Modifications would cause them to be more reasonable both by being
5 clearer and by being more flexible in their implementation.

6 Further, the current text of the Contested Conditions might not even be *capable of being*
7 *accomplished* for two reasons. First, the application of two standard sets of drawings (AASHTO
8 *and* WSDOT), without any specific allowance for deviation or engineering judgment, may create
9 irreconcilable conflicts between these two sets of standards, other applicable law or standards, or
10 engineering constraints such as topography, geography, or property rights. For example, the
11 shoulder width for WSDOT is wider than the shoulder width for AASHTO, leaving the applicant
12 with a lack of clarity about which shoulder dimension the City will ultimately require. At this
13 stage in design, so far in advance of right-of-way design, it is impossible to know whether this
14 level of prescriptiveness is capable of being accomplished or not. Secondly, vague terms in the
15 Contested Conditions allow for a wide range of later interpretative or implementing judgments
16 that could render the site incapable of providing the requested mitigations, for many different
17 reasons. For example, roadway widening subject to uncertain constraints or standards could be
18 problematic in the event of a conflict with preexisting stormwater facilities or underground
19 utilities.

20 The Requested Modifications would, from the Appellant's perspective, render the
21 MDNS's conditions sufficiently reasonable and capable of being accomplished.

22 **D. The Contested Conditions, As Currently Drafted, Are Not Adequately**
23 **Supported by the Required Policy Citations.**

24 Finally, the current text of the Contested Conditions is substantially erroneous,
25 insufficiently supported, and impermissibly in conflict with standards because the Contested
26 Conditions are not sufficiently supported by policy citations to the extent required by

1 RCW 43.21C.060, MICC 19.21.040 and 19.21.190(B)(5), and WAC 197-11-660(1)(b).
2 Importantly, the Code adds an additional, common-sense requirement to underlying SEPA
3 guidelines, by specifying that the applicable license or other decision document *must include a*
4 *citation* to the one or more policies upon which any conditioning is based. *See* MICC 19.21.190.

5 Here, the City has erred by failing to satisfy the state SEPA statute's baseline requirement
6 as well as its own elevated standard. The MDNS includes no citation to MICC 19.21.190
7 generally, and certainly no citation to the SEPA policy documents listed in MICC 19.21.190.D.3
8 specifically. Unless the City can proffer documentation where the required citations are written in
9 connection with the MDNS, the current text of the Contested Conditions fail on their face to
10 comply with the Code, and substantively fails to comply with SEPA.

11 **VI. REQUESTED RELIEF**

12 The Appellant has respectfully requested that the City clarify or modify the current text of
13 the MDNS's Contested Conditions at the staff level. To preserve its rights, the Appellant hereby
14 also requests that the Examiner exercise the Examiner's authority to grant the Requested
15 Modifications under MICC 3.40.020(B)(2); or under MICC 19.15.130(G)(1) and (G)(2)
16 (authorizing the Examiner's modification of the Contested Conditions with *or without* a finding of
17 error).

18
19 DATED this 31st day of March, 2025.

20
21
22 HILLIS CLARK MARTIN & PETERSON P.S.

23
24 By

25 *s/Josh Friedmann*

26 Josh E. Friedmann, WSBA #52946

Attorney for Congregation Herzl Ner Tamid

COMMUNITY PLANNING & DEVELOPMENT

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SEPA THRESHOLD MITIGATED DETERMINATION OF NON-SIGNIFICANCE (MDNS)

NOTICE IS HEREBY GIVEN for the application described below:

Application No.:	SEP24-003
Permit Type:	Type III
Description of Request:	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).
Applicant:	Anjali Grant / Herzl-Ner Tamid Conservative Congregation
Location of Proposal:	3700 E Mercer Way, Mercer Island, WA 98040 King County Assessor tax parcel number: 0824059045, 1515600010, 151560TRCT, 2107000010
Lead Agency:	City of Mercer Island, Department of Community Planning & Development
Project Documents:	Copies of all studies and/or environmental documents are available through the following link: https://mieplan.mercergov.org/public/CUP24-001 and SEP24-003
Application Process Information:	Date of Application: April 3, 2024 Determined to be Complete: April 24, 2024 Bulletin Notice: April 29, 2024 Date of Mailing: April 29, 2024 Date of Sign Posting: April 29, 2024 Comment Period Ended: 5:00PM on May 30, 2024

The lead agency determined that the proposed development will not have a probably significant adverse impact on the environment. An environmental impact statement (EIS) is not required pursuant to RCW 43.21C.031(2). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information is available to the public on request.

EXHIBIT A TO APPEAL FOR MODIFICATION OF MDNS CONDITION TEXT

EXHIBIT 002

<input type="checkbox"/>	There is no comment period for this DNS.
<input checked="" type="checkbox"/>	This MDNS is issued after using the optional DNS process in WAC 197-11-355. There is no further comment period on the MDNS.
<input type="checkbox"/>	This DNS is issued under WAC 197-11-340(2); the lead agency will not act on this proposal for 14 days from the date below. Comments must be submitted by N/A <u>at 5:00 PM.</u>

Responsible Official: Ryan Harriman, Planning Manager
ryan.harriman@mercerisland.gov | (206) 275-7717

Issued Date: March 17, 2025 Signature: /s/ Ryan Harriman, Planning Manager

Findings:

1. 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.

Mitigation Measures:

Pursuant to the provisions of RCW 43.21C.060, WAC 197-11-350, and the above Findings, the SEPA Lead Agency requires the following mitigation measures:

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

EXHIBIT A TO APPEAL FOR MODIFICATION OF MDNS CONDITION TEXT

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.

APPEAL INFORMATION

This decision to issue a Determination of Non-significance (DNS) rather than to require an EIS may be appealed pursuant to Section 19.21 of the Mercer Island Unified Land Development Code, Environmental procedures.

<input checked="" type="checkbox"/>	Any party of record may appeal this determination to the City Clerk at 9611 SE 36 th Street, Mercer Island, WA 98040 no later than 5pm on March 31, 2025 by filing a timely and complete appeal application and paying the appeal fee. You should be prepared to make specific factual objections. Contact the City Clerk to read or ask about the procedures for SEPA appeals. To reverse, modify, or remand this decision, the appeal hearing body must find that there has been substantial error, the proceedings were materially affected by irregularities in procedure, the decision was unsupported by material and substantial evidence in view of the entire record, or the decision is in conflict with the city's applicable decision criteria.
<input type="checkbox"/>	There is no agency appeal.

**EXHIBIT B TO APPEAL FOR MODIFICATION OF MDNS CONDITION TEXT:
MODIFICATION REQUESTED**

For the City's convenience and to aid in resolution of this dispute, the Appellant below provides the requested modifications and clarifications ("Requested Modifications") that would allow the Contested Conditions to be workable for the Project, which would enable the Appellant to withdraw this appeal without delay. The Requested Modifications would correct for two concerns: unnecessary vagueness in some text, and unnecessary prescriptiveness in other text.

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.

* * *

Once again, the applicant appreciates the City's hard work on this application and its issuance of the MDNS, and looks forward to working with the City to ensure that the final text of the MDNS conditions is reasonable, capable of being accomplished, and otherwise fully compliant with SEPA, the Code, and applicable regulations.