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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
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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.

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1 DATED this 29th day of April, 2025

2 By:

3
4 CITY OF MERCER ISLAND

APPELLANT – HERZL-NER TAMID
CONSERVATIVE CONGREGATION

5
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