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**BEFORE THE HEARING EXAMINER
FOR THE CITY OF MERCER ISLAND**

In the matter of the Revised Mitigated
Determination of Nonsignificance (MDNS)
issued for 3700 E Mercer Way on April 7,
2025

Hearing Examiner File No. APL 25-003
SEPA Application No. SEP24-003

**HERZL-NER TAMID’S RESPONSE TO
CONCERNED NEIGHBORS’ MOTION**

I. INTRODUCTION

In response to the appeal filed by Herzl-Ner Tamid Conservative Congregation (“Herzl”) requesting clarification of certain conditions in the Revised Mitigated Determination of Non-Significance issued April 7, 2025 (“Revised MDNS”), a coalition called Concerned Neighbors for the Protection of the Neighborhood (“Concerned Neighbors”) filed a motion (the “Motion”) seeking formal intervention in and dismissal of Herzl’s appeal . Because the Concerned Neighbors did not themselves appeal by the Revised MDNS’s deadline, their Motion is an erroneous collateral attack on the Revised MDNS. They are not parties to the Revised MDNS or to Herzl’s appeal.

The Hearing Examiner should also deny the Concerned Neighbors’ Motion because the Concerned Neighbors have had repeated opportunities to be heard (and will have further opportunities to be heard) with respect to the Revised MDNS and to Herzl’s proposed

1 amendment to its existing Conditional Use Permit (“CUP”) under MICC 19.06.110.A.5.b; and
 2 19.15.030.H, at Table D.

3 II. BACKGROUND

4 On March 17, 2025, the City issued an MDNS for Herzl’s Barnabie Point Project
 5 (“Project”), which proposes to provide a new preschool and K-8 school with rental offices,
 6 shared parking, and associated site improvements on Herzl’s assemblage of parcels (together,
 7 “Site”) commonly known as 3700 East Mercer Way. The City then issued a Revised MDNS
 8 on April 7, 2025 to correct for the possibility of error in execution of public notice
 9 procedures. The Revised MDNS stated that “[a]ny party of record may appeal this
 10 determination to the City Clerk at 9611 SE 36th Street, Mercer Island, WA 98040 **no later**
 11 **than 5 pm on April 21, 2025** by filing a timely and complete appeal application and paying
 12 the appeal fee.” (bold and underlined emphases original).

13
 14 On April 18, 2025, Herzl filed its appeal of the Revised MDNS. The City received no
 15 other appeals before the bolded and underlined legal deadline.

16 The Concerned Neighbors filed their Motion more than two months later, on June 20,
 17 2025. Their Motion asks the Hearing Examiner (1) to grant the Concerned Neighbors formal
 18 intervenor status in Herzl’s appeal of the Revised MDNS; (2) to dismiss Herzl’s appeal for
 19 lack of subject matter jurisdiction; and (3) to dismiss Herzl’s appeal on grounds of SEPA
 20 piecemealing. These requests are each untimely and misplaced.

21 III. ARGUMENT

22 A. **The Concerned Neighbors’ Motion Incorrectly Attempts to Challenge the Revised MDNS Without a SEPA Appeal.**

23 The Concerned Neighbors first ask that they “be allowed to intervene as a party in this
 24 matter.” Motion at 5. But intervention is not a substitute means of attacking a decision for
 25 those who could have appealed but declined to do so. Here, the Concerned Neighbors
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1 refrained from filing a SEPA appeal by the legal deadline. As a result, they now lack any
 2 standing as a party to the Revised MDNS or its appeal, because they are not the applicant, an
 3 appellant, or the responsible agency. The Examiner has already reviewed procedural questions
 4 and determined, in consultation with the City and Herzl, that the Revised MDNS should be
 5 heard in a consolidated hearing with the underlying permit decision, in accordance with the
 6 laws of Washington State generally and Mercer Island specifically.¹ If the Concerned
 7 Neighbors disagree with that procedural determination, they may challenge it in the correct
 8 forum at the correct time. This is not that forum, and this is not that time.

9
 10 Furthermore, intervention is only allowed where the prospective intervenor claims an
 11 interest relating to the subject of the action in which he or she seeks to intervene.² Here, the
 12 subject Revised MDNS appeal is very limited in scope. It only requests clarification of the
 13 conditions to “correct for two concerns: unnecessary vagueness in some text, and unnecessary
 14 prescriptiveness in other text.”³ The Concerned Neighbors’ Motion claims no interest in
 15 textual vagueness or prescriptiveness in the conditions of the Revised MDNS.

16 **B. The Neighbors’ Concerns Regarding Conditional Use Permit (“CUP”)**
 17 **Processes Are Premature and Incorrect.**

18 The Concerned Neighbors allege, without evidence, that Herzl’s existing structures
 19 and uses were not authorized by a valid CUP in 1979.⁴ At the upcoming hearing, the City and
 20 Herzl will present clear and compelling evidence that a CUP was duly granted in 1979 and
 21 has remained effective since that time. Paradoxically, the Concerned Neighbors’ Motion also
 22 appears to allege that Herzl appealed its own existing 1979 CUP.⁵ It has not done so. It has

23
 24 ¹ See generally the Joint Briefing on Procedural Matters filed with the Examiner on April 29, 2023.

25 ² See CR 24(a)(2); *Westerman v. Cary*, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994); *Nw. Forest Res. Council*
 26 *v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (denying motion to intervene under CR 24(a)(2) because “a
 prospective intervenor’s interest must relate to the litigation in which it seeks to intervene.”) (internal citation
 omitted).

27 ³ Appeal for Modification of Condition Text in Revised MDNS at 2.

28 ⁴ Motion at 3.

⁵ Motion at 4.

1 only appealed the verbiage of the Revised MDNS's conditions. As previously briefed by the
 2 City and Herzl, and accepted by the Hearing Examiner, Herzl's appeal of the Revised MDNS
 3 will be reviewed together with Herzl's application for a proposed amendment to its existing
 4 CUP in the upcoming consolidated hearing. Finally, the allegations of deficient jurisdiction in
 5 the Concerned Neighbors' Motion is erroneous and lacks any basis in fact or law.

6 **C. The Concerned Neighbors Have Had Ample Opportunity to be Heard,
 7 And Will Have Further Opportunities To Be Heard.**

8 Despite the untimely and misplaced concerns set forth in the Concerned Neighbors'
 9 Motion, the Hearing Examiner can be confident that denying the Motion will not deny them
 10 the opportunity to be fully heard. They have already been heard through public comment
 11 periods with respect to the Revised MDNS and the proposed amendment to the existing
 12 CUP.⁶ Should the Herzl's appeal of the Revised MDNS proceed to a hearing, the Concerned
 13 Neighbors will be afforded the opportunity to be amply heard at that time.⁷ Further, the
 14 Concerned Neighbors' requests for dismissal stem from alleged errors related to the proposed
 15 amendment of the existing CUP. These concerns may be fully aired during the upcoming
 16 hearing.⁸ The Hearing Examiner should decline the Concerned Neighbors' Motion.

17 The Concerned Neighbors' Motion also includes several errors in its descriptions of
 18 both the Project and the review processes that apply to it. Dismissing the Concerned
 19 Neighbors' Motion now will allow for any needed clarifications or corrections to be fully
 20 aired by the City, Herzl or the Concerned Neighbors at the upcoming hearing.
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 25 ⁶ The Revised MDNS and other Project-related public notices have provided the public with detailed
 26 information about the application process, the timeline of applicable comment period(s), and the timeline of
 applicable appeal opportunities. The Project's proposed amendment to its existing CUP follows the Type IV
 review process, including its public comment period. MICC 19.06.110A.5.b; 19.15.030.H at Table D.

27 ⁷ See Mercer Island Hearing Examiner Rule 304 (allowing ample public participation in combined project
 permit and appeal hearings like the one scheduled for July 9, 2025 in this matter).

28 ⁸ *Id.*

IV. CONCLUSION

The Concerned Neighbors' Motion is a procedurally incorrect attempt to delay or derail Herzl's reasonable appeal for clarification of the conditions in the Revised MDNS. Because the Concerned Neighbors declined to appeal the Revised MDNS themselves, and have asserted no interest in the clarification of its conditions, the Hearing Examiner should respectfully deny their Motion. Should the Concerned Neighbors wish to be heard further on their various concerns, they may raise the same by submitting spoken or written public comments into the record at the upcoming public hearing.

DATED this 27th day of June, 2025.

HILLIS CLARK MARTIN & PETERSON P.S.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document by method indicated below and addressed to the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of June, 2025.

s/ Debbie Chewning
Debbie Chewning, Legal Assistant