EXHIBIT 9013

Hearing Examiner Galt

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of: HERZL-NER TAMID CONSERVATIVE CONGREGATION, Appellant, v. CITY OF MERCER ISLAND, a Washington State municipality, Respondent.	No. APL25-003 CITY OF MERCER ISLAND'S ***RESPONSE*** TO MOTIONS BY CONCERNED NEIGHBORS FOR THE PROTECTION OF THE NEIGHBORHOOD

I. INTRODUCTION

Pursuant to the Examiner's email of June 24, 2025, the City of Mercer Island ("City") makes this response to the Motions by Concerned Neighbors For the Protection of the Neighborhood ("Concerned Neighbors"), filed on June 20, 2025.

II. STATEMENT OF FACTS

APL 25-003 is the appeal by Applicant Herzl Ner Tamid of the City's issuance of a Revised SEPA MDNS. The Revised MDNS was issued on April 7, 2025. Ex. 24. Appellant/Applicant made its appeal on April 17, 2025. Ex. 30. The City received no other appeals of the SEPA MDNS. Exhibit A to this Response, Declaration of Andrea Larson at ¶¶ 3-5.

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III. ARGUMENT

1) The Hearing Examiner's Rules Do Not Provide Intervention Rights; The Rules Instead Provide For The Ability of the General Public To Present Testimony

Neither the MICC nor the Hearing Examiner's rules provide for a right of intervention to an appeal where they would be intervenors did not separately file an appeal. The general public is permitted to provide testimony, but otherwise, the Examiner's rules restrict participation to principal parties.

The Rules define "Principal parties" as "limited to the applicant(s), the appellant(s), and the respondent(s) to any given application/appeal." RoP 108(h). The rules establish filing deadlines for principal parties. RoP 224.

The rules do provide for testimony/evidence (both direct and rebuttal) by the general public within the order of presentation. RoP 304(e); see also RoP 304(a). But cross examination of witnesses may only be made by principal parties. RoP 312(b)(2). Finally, closing statements are only available to the principal parties. RoP 320.

Therefore, there is no authority to grant Concerned Neighbors with intervenor status. Concerned Neighbors did not independently appeal the City's Revised MDNS and are therefore not a principal party. However, the rules provide that Concerned Neighbors may participate by providing testimony at the hearing pursuant to RoP 304.

2) APL 25-003 Is A SEPA Appeal, Not a CUP Appeal

Respectfully, the City disagrees with the contention that the Hearing Examiner lacks subject matter jurisdiction on the basis that the Examiner cannot hear an appeal of a CUP. While Concerned Neighbors are correct that the Hearing Examiner holds a public hearing on CUPs in Mercer Island

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pursuant to MICC Ch. 19.15, APL 25-003 is an appeal of a SEPA threshold determination, pursuant to MICC 19.21.200. The instant proceeding is not an appeal of a CUP.

3) The Open Record Appeal Hearing APL 25-003 Is Being Jointly Heard With The Open Public Record Hearing for CUP 24-001.

The parties briefed the procedural/jurisdictional issues through a joint submission made on April 29, 2025. In the interest of efficiency, the City has attached that briefing as Exhibit B. Per email from the Examiner on May 8, 2025, in response to the joint brief on procedural/jurisdictional issues, the Hearing Examiner concluded "I concur that a consolidated CUP application/SEPA appeal hearing is the way to go." Exhibit C. To the extent that the Concerned Neighbors wish to voice their legal objections to the underlying CUP, they may present testimony within the consolidated hearing per their rights under the Examiner's rules.

IV. CONCLUSION

The City's review of the Hearing Examiner rules has revealed no right of intervention by those who are not Principal Parties; however, the general public may present testimony. The Hearing Examiner does have subject matter jurisdiction and the instant SEPA appeal has been appropriately consolidated with the open record hearing for CUP 24-001.

DATED this 30th day of June, 2025.

MADRONA LAW GROUP, PLLC

By: */s/ Eileen M. Keiffer*
Eileen M. Keiffer, WSBA No. 51598
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CITY OF MERCER ISLAND
OFFICE OF THE CITY ATTORNEY

By: */s/ Bio Park*
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Attorneys for City of Mercer Island

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DECLARATION OF SERVICE

I, Reina McCauley, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On this 30th day of June, 2025, I served a true copy of the foregoing **CITY OF MERCER ISLAND'S *RESPONSE* TO MOTIONS BY CONCERNED NEIGHBORS FOR THE PROTECTION OF THE NEIGHBORHOOD** on the following parties using the method of service indicated below:

Josh Friedmann HILLIS CLARK MARTIN & PETERSON, P.S. 999 Third Avenue, Suite 4600 Seattle, WA 98104 *Attorney for Appellant*	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: josh.friedmann@hcmp.com
Matthew Goldbach John Hall 9970 SE 40th Street Mercer Island, WA 98040 *Concerned Neighbors for the Protection of the Neighborhood*	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: blkship@yahoo.com velooceella@gmail.com

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

DATED this 30th day of June, 2025, at Auburn, Washington.

/s/Reina McCauley
Reina McCauley

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EXHIBIT “A”

EXHIBIT 9013

Hearing Examiner Galt

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of: HERZL-NER TAMID CONSERVATIVE CONGREGATION, Appellant, v. CITY OF MERCER ISLAND, Respondent.	No. APL25-003 DECLARATION OF ANDREA LARSON

I, Andrea Larson, declare and state:

1. I am over the age of eighteen, not a party to this action, and competent to testify herein.

2. I am the City Clerk with the City of Mercer Island and have been employed in this capacity since October 13, 2021.

3. The City Clerk's Office received only one appeal of the April 7, 2025 Withdrawal of March 17, 2025, SEPA Threshold Mitigated Determination of Non-Significance (MDNS) & Issuance of Revised SEPA Threshold Mitigation Determination of Non-Significance (MDNS) ("Revised MDNS").

4. That one appeal was filed on April 18, 2025 and was submitted by attorney Josh Friedmann on behalf of his client Herzl-Ner Tamid Conservative Congregation.

5. The City did not receive any other appeals of the Revised MDNS.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26 day of June, 2025, at Mercer Island Washington.

By: _____
Andrea Larson

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EXHIBIT “B”

EXHIBIT 9013

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.

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Hearing Examiner Letter APL 25-003(a), issued April 23, 2025, asked the Parties to brief whether the SEPA appeal may be heard combined with the underlying permit hearing (here, a CUP hearing) or if the appeal must wait to be heard with any judicial appeal of the underlying permit. On first blush, the provision of Mercer Island City Code ("MICC" or "Code") 19.21.200 that an "appeal must be consolidated with any appeal that is filed on the proposal or action" may be a source of confusion. This MICC provision appears to conflict with the applicable SEPA statute and WAC, which both provide that agencies administering SEPA may provide for administrative appeal of certain SEPA decisions.

RCW 43.21C.075(3)(b) provides that where a city "has a procedure for appeals of agency environmental determinations made under this chapter," then that SEPA administrative appeal procedure:

> "[s]hall consolidate an appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a 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]."

WAC 197-11-680(3)(a)(v) similarly provides:

> "Except [in those circumstances not relevant here, the administrative appeal] shall 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 hearing before one hearing officer or body. The hearing or appeal shall be one at which the hearing officer or body will consider either the agency's decision or a recommendation on 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."

The MICC expressly adopts WAC 197-11-680 by reference. MICC 19.21.040.

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Further, the 2014 Supreme Court case *Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn.2d 737, 745, 317 P.3d 1037 (2014) presented remarkably similar facts to those presented here. That case presented a question of whether an administrative appeal of a determination of non-significance ("DNS") should be consolidated with a related CUP hearing, and whether the record should be open or closed for that hearing. The Court cited to both the RCW and WAC provision above, saying:

> Thus state law requires that if a local government opts to provide a SEPA appeal, that appeal must occur simultaneously with a hearing on the underlying action. . . . an appeal of a SEPA threshold determination must be consolidated and simultaneous with a hearing on the underlying project permit decision, and must provide for the preparation of a record, 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 . . . .

Ellensburg Cement, 179 Wn.2d at 745 (also quoting RCW 36.70B.020(3)).

Finally, the combined hearing approach also gives effect to the MICC's express provision for a City-level administrative appeal to the Hearing Examiner of certain SEPA actions. MICC 19.21.200. By contrast, delaying a SEPA appeal until a judicial proceeding would circumvent the MICC's express provision of an administrative level appeal before the City's hearing examiner.

In conclusion, the parties agree on a combined open-record hearing for the SEPA appeal and related CUP decision, and would suggest the SEPA appeal portion precedes the CUP hearing, as the SEPA appeal may inform the CUP hearing.

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DATED this 29th day of April, 2025

By:

CITY OF MERCER ISLAND

/s/ *Eileen M. Keiffer*
Eileen M. Keiffer, WSBA #51598
Laurie Halvorson, WSBA #17313
Madrona Law Group, PLLC

/s/ *Bio Park*
Bio Park, WSBA #36994
City of Mercer Island
Office of the City Attorney

Attorneys for City of Mercer Island

APPELLANT – HERZL-NER TAMID CONSERVATIVE CONGREGATION

/s/ *Josh Friedmann*
Josh Friedmann, WSBA #52946
Hillis Clark Martin & Peterson P.S.

Attorney for Appellant Herzl-Ner Tamid Conservative Congregation

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EXHIBIT “C”

EXHIBIT 9013

From: jegalt755@gmail.com
To: "Josh Friedmann"; Andrea Larson; "Bio Park"; "Deb Estrada"; Eileen Keiffer; Laurie Halvorson; Mary Swan; Reina McCauley; "Ryan Harriman"
Subject: RE: APL25-003: Herzi-Ner Tamid v Mercer Island SEPA Official: Introductory letter attached
Date: Thursday, May 1, 2025 8:40:58 AM

Dear Principal Parties:

Thank you very much for your joint brief on the procedural/jurisdictional question. I would normally respond to your brief by a formal, written document. In this case, however, I think an email chain might be more efficient.

I accept and am very comfortable with your view of the interplay of the various laws, regs, and codes that apply. I concur that a consolidated CUP application/SEPA appeal hearing is the way to go.

The only thing holding me up is the simple fact that I have no knowledge of the status of the CUP application. In order to set a hearing date and trigger public notice, we need to know when the CUP application will be ready for hearing: How far along is Staff review? When does Staff expect to be able to issue a Staff Report? When will the applicant be ready? Etc.?

If you'd like to have a short Zoom conference in the immediate future to discuss scheduling, I'm amenable. I couldn't do it tomorrow, but anytime Monday or Tuesday between 9 a.m. and 3 p.m., or Wednesday after 1 p.m., or Friday after 1 p.m. would work for me.

As you think of hearing dates, please remember that the RoP 224 pre-filing process will apply to all exhibits for the hearing.

As far as hearing sequence, please consider RoP 304(e), second column ("Combined Project Permit and Appeal Hearings"). I prefer to not hold two entirely separate hearings one-after-the-other as I believe there would be a lot of testimonial duplication. It may be a minor point, but I also worry that a witness may testify differently about the same topic/issue in the two hearings. You will note that I set up the sequence so that the permit applicant first lays out the basics of the project, then the SEPA appellant presents its appeal issues. (In this case Herzi-Ner Tamid is both Applicant and Appellant.) That is followed by Respondent's (Planning's) testimony on both the merits and the SEPA appeal. Then the general public follows on both merits and appeal.

We can discuss pros and cons of alternative sequences during our Zoom chat.

Please let me know when you'd like to have the Zoom chat and I'll set it up.

Respectfully,

John E. Galt
Hearing Examiner
(425) 259-3144

From: Josh Friedmann <josh.friedmann@hcmp.com>
Sent: Tuesday, April 29, 2025 5:41 PM
To: jegalt755@gmail.com; Andrea Larson <Andrea.Larson@mercergov.org>; Bio Park <bio.park@mercergov.org>; Deb Estrada <Deborah.Estrada@mercerisland.gov>; Eileen Keiffer <eileen@madronalaw.com>; Laurie Halvorson <laurie@madronalaw.com>; Mary Swan <mary.swan@mercergov.org>; Reina McCauley <rmccauley@madronalaw.com>; Ryan Harriman <ryan.harriman@mercerisland.gov>
Subject: RE: APL25-003: Herzi-Ner Tamid v Mercer Island SEPA Official: Introductory letter attached

Dear Hearing Examiner Galt,

In response to your letter of April 23, attached please find a joint briefing on procedural matters, co-signed by myself (on behalf of applicant/appellant Herzl Ner Tamid), and Eileen Keiffer and Bio Park (on behalf of the City of Mercer Island). Ms. Keiffer and Mr. Park authorized me by email to affix their digital signatures to this briefing.

We look forward to working with you on the next steps towards an efficient and amiable hearing.

Best regards,
Josh Friedmann

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From: jegalt755@gmail.com <jegalt755@gmail.com>
Sent: Wednesday, April 23, 2025 12:11 PM
To: Andrea Larson <Andrea.Larson@mercergov.org>; Bio Park <bio.park@mercergov.org>; Deb Estrada <Deborah.Estrada@mercerisland.gov>; Eileen Keiffer <eileen@madronalaw.com>; Josh Friedmann <josh.friedmann@hcmp.com>; Laurie Halvorson <laurie@madronalaw.com>; Mary Swan <mary.swan@mercergov.org>; Reina McCauley <rmccauley@madronalaw.com>; Ryan Harriman <ryan.harriman@mercerisland.gov>
Subject: APL25-003: Herzi-Ner Tamid v Mercer Island SEPA Official: Introductory letter attached

EXHIBIT 9013

[EXTERNAL]

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