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

9 In the matter of Design Standard Review
10 for 3700 E Mercer Way

City of Mercer Island Design Standard Review
file no. DSR25-009

11 **APPLICANT’S REPLY IN SUPPORT OF**
12 **REQUEST FOR RECONSIDERATION**

13
14 **I. INTRODUCTION**

15 Congregation Herzl-Ner Tamid (“*Applicant*”) has worshipped at its site on Mercer
16 Island for over fifty years. It has always endeavored to be a good partner and maintain good
17 relations with the City. If the Examiner finds and concludes that the current assessment of tree
18 fees is the cost of opening the Applicant’s proposed daycare and grade school, the Applicant
19 will pay those fees in short order so that it can move its educational project forward. It will
20 not appeal the Examiner’s decision on reconsideration to state court on questions of state
21 legality or constitutional compliance. Instead, the Applicant will need to accept for now that
22 this is the cost of the proposed day school.

23 Applicant therefore submits this Reply (“*Reply*”) in support of its Request for
24 Reconsideration (“*Request*”) pursuant to the Examiner’s post-hearing order (“*Post-Hearing*
25 *Order*”) of December 3, 2025. Among other things, this Reply respectfully asserts that the
26 codified term “other measures” be construed to encompass the detailed calculations and
27 analyses that the Applicant has submitted in support of its Tailored Replacement Obligation.

1 The Request has not asked the Examiner to invalidate any legislation, nor to supersede
2 the Code. It posits that where the City Council has provided two options (the default,
3 prescriptive tree-replacement option and the “alternative measures” option), the Examiner
4 should use his “alternative measures” authority to avoid serious risks of constitutional
5 problems and state law violations. The Examiner may not apply the Prescriptive Replacement
6 Ratio, because administrative bodies like the Examiner “cannot act contrary to constitutional
7 or statutory law,”¹ and is expressly tasked by the Code with granting or denying the
8 application “with such conditions, modifications, and restrictions as the hearing examiner
9 finds necessary to . . . carry out applicable state laws and regulations.”²

10 Terms capitalized but not defined in this Reply are defined in the Request.

11 II. AUTHORITY AND ARGUMENT

12 A. THE REQUEST WAS TIMELY, BECAUSE A CITY MAY NOT WEAPONIZE ITS OWN 13 INTERNAL DELAYS AGAINST AN APPLICANT.

14 The Examiner affixed his signature to his initial decision on November 21, 2025. The
15 City transmitted a copy of the Examiner’s Decision to the Applicant on November 22, 2025,³
16 and issued a formal Notice of Decision on November 24, 2025.⁴ During the hours between the
17 Examiner affixing his signature to his initial decision on November 21 and the City
18 transmitting the Decision to the Applicant on November 22, the Applicant had no constructive
19 or actual means of knowing or accessing the document to which the Examiner’s signature was
20 affixed. It would be categorically absurd to argue that the Applicant should have known of the
21 signed document in Ms. Estrada’s email inbox but not transmitted or posted anywhere, and
22 that the Applicant should have started drafting its reconsideration based on a document that
23 was nowhere available.

24
25 ¹ *Marino Property Co. v. Port of Seattle*, 97 Wn.2d 307 (1982)

26 ² MICC 3.40.020 (“Purpose-Function and jurisdiction”).

27 ³ See Email from Ms. Estrada to Parties, dated November 22, 2025.

28 ⁴ See Notice of Decision for DSR25-009, dated November 24, 2025.

1 The City’s response in opposition to reconsideration implicitly proposes that the
2 Code’s undefined date of “decision” should be construed to mean the date of “signature,”
3 rather than the date on which a signed document was transmitted or otherwise made available
4 to Applicant or anyone else outside of the City’s inner sanctum.

5 In the absence of a statutory definition, courts do often give a legislative term its plain
6 and ordinary meaning by reference to a standard dictionary. Here, the plain meaning of the
7 date of decision could mean either the date of signature or, equally, the date of transmittal.
8 But the latter interpretation is the only reasonable one here. Washington case law requires
9 avoiding an interpretation “which would result in unlikely, absurd, or strained consequences”
10 and should apply an interpretation that upholds “[t]he spirit or purpose of an enactment . . .”⁵

11 The City’s proposed interpretation of this undefined term would lead to any number of
12 absurd results. Under the City’s reasoning, a reconsideration deadline would run from the date
13 of signature even if:

- 14 • the Examiner signs a decision document and then forgets it on his desk for a week,
15 without transmitting it to City staff or anyone else; or
- 16 • the Examiner signs a decision document and then promptly transmits it to City
17 staff, who very reasonably could take multiple days to transmit it to the applicant or any other
18 member of the public;
- 19 • the Examiner signs a decision document and promptly transmits it to City staff,
20 who (intentionally or unintentionally) do not share it with any external parties until after the
21 reconsideration period has entirely run.

22 In this context, the only fair, orderly or rational way to interpret the undefined “date of
23 decision” is to follow the template of the Land Use Petition Act, which makes clearer than the
24 Mercer Island City Code that *issuance* of a decision is a condition precedent to a clock
25 beginning to run. Defining a “date of decision” only as “date of internal signature” would
26 create a precedent that welcomes gamesmanship and absurd results in all manner of future

27 ⁵ *Fraternal Ord. of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Ord. of Eagles*, 148 Wn.2d
28 224, 239, 59 P.3d 655 (2002) (internal citations omitted).

1 Hearing Examiner proceedings, so the Examiner should interpret “date of decision” as the
2 date on which the document has been both signed *and issued*.

3 **B. THE CODE ALLOWS, AND APPLICABLE CANONS OF CONSTRUCTION REQUIRE,**
4 **APPROVAL OF THE ALTERNATIVE REPLACEMENT RATIO THAT IS PROPOSED**
5 **AND SUPPORTED IN THE RECORD.**

6 In addition to acting as Mercer Island Hearing Examiner, with express codified
7 authority to “grant the application . . . with such conditions, modifications, and restrictions as
8 the hearing examiner finds necessary to . . . carry out applicable state laws and regulations,”
9 the Examiner is in this context acting as City Arborist, who has express codified authority to:

10 **“reduce the number of replacement trees as follows, where other**
11 **measures designed to mitigate the tree loss by restoring the tree canopy**
12 **coverage and its associated benefits are considered to be effective and**
13 **consistent with the purposes of this chapter.”⁶**

14 The Code provides the City Arborist broad discretion in what factors the City Arborist may
15 consider in making this determination.⁷

16 The question is whether the words “*other measures*” should be construed to mean
17 “other measures besides replacement trees” or “other measures besides the default number of
18 replacement trees assigned by the Prescriptive Replacement Obligation.”

19 In context of the full sentence, construing the term “other measures” as “other
20 measures besides replacement trees” would not make sense. It is unclear how *any* other
21 measures besides replacement trees could possibly “restor[e] the tree canopy coverage.”

22 In contrast, construing the term “other measures” as “other measures besides the
23 default number of replacement trees assigned by the Prescriptive Replacement Obligation”
24 *would* make sense. It would allow the City Arborist and City Examiner to adopt a tailored
25 replacement obligation where, as here, the record shows that the alternative number of
26 replacement trees still “restores the tree canopy coverage.”⁸

27 ⁶ MICC 19.10.070.B.4.

28 ⁷ *Id.*

⁸ *See also* Hearing Exhibit 16 (“In support of the City Arborist’ review into whether ‘other measures
designed to mitigate tree loss . . . are effective and consistent with the purposes of this chapter’ . . . the Project

1 Moreover, Washington law requires the Examiner to not construe a statute in a way
2 that creates constitutional problems, where, as here, an alternative construction is available
3 and plausible. In our state, “whenever possible,” an interpreter of statutes must “construe
4 statutes to avoid constitutional doubt . . . [and] constitutional difficulties when such
5 construction is consistent with the purposes of the statute.”⁹ There are clear and documented
6 constitutional doubts and difficulties here. First, there is no evidence in the record that the
7 Prescriptive Replacement Obligation is even roughly proportional to the actual tree canopy or
8 environmental services that the Project is permitted by the Code to displace. Second,
9 construing the “other measures” option in a way that contravenes RCW 82.02.020 is
10 forbidden under the state constitution’s rule that cities (and their Examiners) may only enforce
11 regulations “as are not in conflict with general laws” of the state.¹⁰ Here, the Examiner has a
12 choice between construing and enforcing the code language in a way that comports with
13 RCW 82.02.020 (and thus, does not flout the state constitution) or construing and enforcing it
14 in a way that is facially problematic.

15 The Examiner’s initial Decision also opined that “many objectives are not met” by the
16 Tailored Replacement Obligation, for example because “[r]educing the required number of
17 trees from 441 to 145 would undeniably reduce the Sylvan character of the project site.” This
18 reasoning applies a standard that is not in the code, *and* introduces a paradox. First, the Code
19 has no requirement that the proposed “other measures” maintain and advance all of the
20 Code’s purposes in exactly the same way or to exactly the same extent that the Prescriptive
21 Replacement Obligation would; it just required that the “other measures” be consistent with
22 the Code’s purposes. Here, the Request has respectfully posited that where a tailored number
23 and type of replacement trees has been shown to mitigate impacts and satisfy the Code, and

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25 team has commissioned the attached professional letter and its quantitative analysis . . . to demonstrate measures
that will mitigate the tree loss by restoring the tree canopy and its associated benefits. . .”)

26 ⁹ *State v. Blake*, 197 Wn.2d 170, 188, 481 P.3d 521 (2021), quoting *Utter ex rel. State v. Bldg. Indus. Ass'n*
27 *of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015) and *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 665,
853 P.2d 444 (1993).

28 ¹⁰ Washington State Constitution, Art. XI, Section 11.

1 no party has challenged that showing, the tailored number is consistent with the Code’s
2 purposes. The paradox in the reasoning is thus: if a reduction in the tree replacement
3 obligation cannot meet the purposes of the code simply because it reduces the number of
4 replacement trees that are proposed, then the Code’s replacement reduction option would
5 become unusable surplusage.¹¹

6 In short, the Examiner cannot interpret and apply the Prescriptive Tree Replacement
7 Obligation to the Project, both because of the interpretive canon of constitutional avoidance,
8 and because the Examiner “cannot act contrary to constitutional or statutory law.”¹²
9 Fortunately, there is a plausible alternative statutory interpretation that is available, and an
10 available decision that is supported by clear, cogent and uncontested evidence in the record. If
11 the Examiner simply construes the words “other measures” to include “other measures
12 besides the Prescriptive Replacement Obligation,” then he will have abundantly clear
13 authority to adopt the Tailored Replacement Obligation based on the plain language of the
14 Code and the evidence in the record. He should construe the code in a way that avoids
15 constitutional, statutory and jurisdictional problems: by holding the Tailored Replacement
16 Obligation to itself be an “other measure[] designed to mitigate the tree loss.”¹³

17 **C. THE REQUEST ADEQUATELY DESCRIBED PUBLIC COMMENTS RECEIVED**
18 **PRIOR TO THE CLOSING OF THE HEARING.**

19 A few members of the public responded to the Request with statements opposing the
20 Project. One of the statements referenced previous public comments concerning trees. The
21 Request did state that “neither the City’s professional staff nor the Project’s neighbors have
22

23 ¹¹ Finally, it is important to correct for the record that the Tailored Replacement Obligation would treat
24 the Sylvan character of the site **in the exact same way** as the Prescriptive Replacement Obligation – it would
remove the same number of trees, and plant the same number of replacement trees on the site.

25 ¹² *Marino Property Co. v. Port of Seattle*, 97 Wn.2d 307 (1982).

26 ¹³ The Examiner’s order briefly raises concerns about setting a precedent for any other applicant to propose
27 tailored replacement obligations rather than accepting the prescriptive replacement obligation set forth in the
Code. The Examiner does not need to be concerned about himself creating that precedent – the Code already
28 clearly lays out the availability of a tree replacement reduction, and specifically authorizes the Examiner to
contemplate external sources of law in approving such a reduction.

1 opposed or contested the Project’s calculated tree replacement proposal.”¹⁴ The Project
2 proposed its calculated tree replacement proposal on October 16, and transmitted that ratio to
3 the office of the City Arborist shortly thereafter.¹⁵ The calculated proposal entered the public
4 record well before the hearing was held. To Applicant’s knowledge, no public comment
5 between the Project Arborist’s transmission and the closing of the hearing addressed trees.

6
7 **III. CONCLUSION**

8 For the aforementioned reasons, the Request should be granted, and the Tailored
9 Replacement Obligation should be approved.

10 DATED this twelfth day of December, 2025.

11 HILLIS CLARK MARTIN & PETERSON P.S.

12 By s/ Joshua E. Friedmann

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¹⁴ *Id.* p. 2.

28 ¹⁵ *See* Ex. 16.

1 **CERTIFICATE OF SERVICE**

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

4 Phil Olbrechts, Hearing Examiner
5 olbrechtslaw@gmail.com

6 Bio Park, Attorney for the City of Mercer Island
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12 Mercer Island
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Delivery Via:

- U.S. Mail
- Overnight Mail
- Facsimile
- Legal Messenger
- E-Service
- E-Mail

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

18 DATED this 12th day of December, 2025.

19 s/ Debbie Chewning
20 Debbie Chewning, Legal Assistant