BEFORE THE HEARING EXAMINER
FOR THE CITY OF MERCER ISLAND

Phil Olbrechts, Hearing Examiner

RE: Herzl-Ner Tamid Conservative Congregation (Barnabie Point Project) Design Review DSR25-009	**FINAL DECISION UPON RECONSIDERATION**

The Applicant's request for reconsideration is denied.

The Applicant's reconsideration request is based upon a challenge to the validity of the tree replacement rations adopted by the City Council. The Applicant disagrees with the Council's replacement ratio. The Applicant has proposed a much smaller ratio in the guise of alternative mitigation. The Applicant asserts that the City Council's ratio is unconstitutional and violates the federal Religious Land Use and Institutions Act. The Examiner has no authority to invalidate the tree replacement ratio adopted by the City Council. If the City's legislatively adopted tree replacement ratio should be reduced because of constitutional or federal statutory issues, that is a decision to be made by the City Council.

Evidence Relied Upon

1. Applicant's 12/2/25 Request for Reconsideration
2. 12/4/25 Order Authorizing Reconsideration Argument
3. Two 12/4/25 Sarah Fletcher emails addressing recon
4. 12/5/25 email from Merkys Gomez
5. 12/5/25 email from Michael Bundesmann
6. 12/10/25 City of Mercer Island Response
7. Applicant's 12/12/25 Reply

Legal Analysis

There are two issues pertinent to resolution of the Applicant's reconsideration request (1) whether the request was timely; and (2) whether the Examiner has the authority to address it. The reconsideration request is likely timely. However, the Examiner is not found to have the authority to grant the request because it involves invalidating City Council legislation.

As to timeliness, MICC 3.40.110(A) provides as follows:

> *"[a]ny final decision by the hearing examiner may be reconsidered by the hearing examiner, provided a request for reconsideration by a party of record is received within ten days of* ***the date of the decision by the hearing examiner…****"*

(emphasis added).

The reconsideration request is found to be timely since the Applicant filed its request within ten days of receipt of the Final Decision. The City argues that the bolded language invokes the date on the Examiner's decision. If that is the case it's uncontested that the request for reconsideration is untimely. The Applicant makes the more compelling point the "*date of the decision*" can only be reasonably interpreted as the date of transmittal since under several scenarios Appellants would be given little to no time at all to file a reconsideration request. "As applied," the Applicant was not given an unreasonably short amount of time to file its reconsideration request. The Final Decision of this matter was dated November 21, 2025 and was transmitted to the Applicant on a Saturday, November 22, 2025. However, in the interest of providing a uniform ten-day response opportunity for all projects regardless of delays in transmission, it is most equitable and consistent with due process to construe the date of issuance/transmittal as the "*date of the decision*" in MICC 3.40.110(A).

Timely or not, the Applicant's reconsideration request must be denied because the hearing examiner is not found to have the authority to reduce the tree replacement ratio adopted by the City Council.

As a preliminary matter, the Applicant equates its disagreement with the City Council's adopted tree replacement ratio as an alternative mitigation authorized by the MICC. That position is not supported by the language of the MICC. The key provision addressing authorized alternative mitigation is MICC 19.10.070B4, which provides as follows:

> *Reduction. The city arborist may reduce the number of replacement trees as follows, where* ***other measures*** *designed to mitigate the tree loss by restoring the tree canopy coverage and its associated benefits are considered to be effective and consistent with the purposes of this chapter. The city arborist may consider, but is not limited to, the following measures:*
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> > *a. Replacement of hazardous, undesired, or short-lived trees with healthy new trees that have a greater chance of long-term survival;*
> > *b. Restoration of critical tree areas with native vegetation; and*
> > *c. Protection of small trees to provide for successional stages of tree canopy.*

(emphasis added).

The Applicant argues that "other measures" as referenced in MICC 19.10.070B4 above includes smaller replacement ratios. To qualify as an "other measure," the measure must be something "other" than the mitigation required by the City Council. MICC 19.10.070B4 is a subsection of MICC 19.10.070, entitled "Tree Replacement." This section adopts the Council's required tree replacement ratio, identifies the requirements for the replacement trees and sets out alternatives, i.e. , MICC 19.10.070B4 as quoted above and in lieu fees. The "other" measures referenced in MICC 19.10.070B4 clearly contemplates mitigation for tree removal "other" than the Council adopted tree replacement ratio.

The Applicant asserts that "other" measures referenced in MICC 19.10.070 can include lower replacement ratios. Such an interpretation renders the City Council's adopted tree replacement meaningless. Courts require that statutes should be construed so that no clause, sentence, or word is made superfluous, void, or insignificant; however, in special cases the court can ignore statutory language that appears to be surplusage when necessary for a proper understanding of the provision. *State v. Evergreen Freedom Foundation*, 1 Wash.App.2d 288, 299 (2018). The Applicant's justification for the reduced tree reduction has nothing to do with any unique characteristics of the project site. The Applicant also has identified nothing unique about its proposed use of maple trees that would make it more effective than other trees authorized for Council required tree replacement. As such, if the Applicant's tree replacement ratio is accepted it could be used in lieu of the Council adopted tree replacement ratio for any project site, rendering the Council adopted more onerous ratio little more than an unenforceable suggestion as opposed to a mandatory mitigation requirement.

Even if the Applicant's tree replacement ratio were considered to qualify as an "other" mitigation measure, it still wouldn't conform to MICC 19.10.070B4. Allowing a less protective replacement ratio subverts the purpose of adopting the ratio in the first place. To conform to MICC 19.10.070B4 the alternative mitigation must be "*considered to be effective and consistent with the purposes of this chapter*." The Council's tree replacement ratio is based upon the obvious premise that more retained trees create greater benefit, since the number of trees required to be replaced increases along with the number removed. Given the proximity of the project site to I-5, the trees of the project site provide a significant noise, pollution, and aesthetic buffer to the residential uses to the south and east. All of those buffering functions are identified as objectives of the City tree retention standards in MIMC 19.10.005. The more the Council's adopted replacement ratio is reduced, the more those objectives are compromised. Consequently, the Applicant's "other" replacement ratio cannot be construed as "*consistent with the purpose of this chapter*."

The most significant barrier to the Examiner's approval of the Applicant's replacement ratio is that the Examiner has no authority to invalidate City ordinances as outlined in Ex. 2. The Applicant asserts that adopting its ratio is a matter of interpretation as opposed to invalidation. That is simply not the case for what the Applicant attempts to accomplish with its alternative ratio. To authorize the Applicant's replacement ratio,

the Examiner would have to evaluate the justification for the Council's adopted ratio. The Examiner would then have to conclude that the Applicant's justification for its ratio was more legally sound. Then the Examiner would have to adopt an interpretation that would render the Council's ratio inapplicable to all future development. Such a review not only exceeds the Examiner's authority to apply constitutional and federal law, it also has the Examiner exercising the legislative functions of the City Council. The US Supreme Court granted itself that type of authority for constitutional issues 222 years ago in *Marbury v. Madsion* 5 US 137 (1803). That authority has yet to extend to hearing examiners.

As noted in Ex. 2, it is not the Examiner's place to invalidate Council adopted ordinances. As is evident from the numerous public comments submitted for the Applicant's project, tree retention is a highly significant issue for the Mercer Island community. If the City's tree replacement ratios and/or in lieu fees are vulnerable to statutory or constitutional challenge, it should be up to the Council to decide how far it wants to go to defend those regulations. Those types of policy choices are well beyond hearing examiner jurisdiction.

DECISION UPON RECONSIDERATION

The Applicant's December 2, 2025 request for reconsideration is denied. The Applicant's alternative tree replacement ratio is not found to conform to MICC 19.10.070B4.

Dated this 16th day of December, 2025.

Phil Olbrechts
Mercer Island Hearing Examiner

Appeal Right and Valuation Notices

This land use decision is final and subject to appeal to superior court as governed by the Land Use Petition Act, Chapter 36.70C RCW.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.