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

Phil Olbrechts, Hearing Examiner

<p><b>RE:</b> Herzl-Ner Tamid Conservative Congregation (Barnabie Point Project)</p> <p>Design Review</p> <p>DSR25-009</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION</b></p>
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Whereas, a decision approving the above-captioned application was issued on November 21, 2025; and

Whereas, the Applicant submitted a request for reconsideration on December 2, 2025; and

Whereas, the public and City are given an opportunity by this Order to provide responsive briefing; and

Whereas, unfortunately deadlines will have to be short since the deadline for issuing a final decision on the reconsideration request is 14 days from the request as required by MICC 3.40.110, NOW, THEREFORE,

**ORDER**

Members of the public who provided written or hearing comment on the above-captioned application are authorized to submit a written response to the Applicant’s December 2, 2025 Request for Reconsideration by 5 pm, December 8, 2025. The City may file a response by 5 pm December 10, 2025 and the Applicant a reply by 5 pm December 12, 2025. All written briefing should be emailed to [Deborah.Estrada@mercerisland.gov](mailto:Deborah.Estrada@mercerisland.gov).

The Applicant’s Reconsideration Request misses the reason why the Examiner has no authority to address its constitutional and statutory proportionality requirements. As noted in the Examiner’s Final Decision, a request for a tree reduction must be based upon “other,” i.e. alternative mitigation. The Applicant’s didn’t present any alternative mitigation to the Council’s adopted tree replacement ratio. Instead, they just offered mitigation that was less than the Council’s ratio with an accompanying explanation as to why the reduced ratio was just as effective.

1 In short, instead of providing an alternative the Applicants presented an argument that  
2 the ratio adopted by the City Council was too high. The Examiner has no authority to  
3 invalidate City Council adopted legislation upon constitutional or RLUIPA grounds.  
4 *See, e.g., Lejeune v. Clallam County*, 64 Wn. App. 257 (Wash. Ct. App. 1992)(County  
5 commissioners have no authority to reconsider a permit application without implied or  
6 express codified right to do so). *Exendine v. City of Sammamish*, 127 Wn. App. 574,  
7 586–87, 113 P.3d 494 (2005)(hearing examiner has no authority to enforce, interpret  
8 or rule on constitutional challenges).

9 If the Examiner were to supersede the City Council’s adopted ratio, that would set a  
10 precedent that every future applicant could use to argue for a reduced replacement ratio.  
11 Acceding to the Applicant’s request invalidates the Council in effect if not in actual  
12 terms.

13 As noted in the Final Decision,

14 *Absent a showing that the proposed 2-inch maple trees are above and*  
15 *beyond what is already required by the City’s tree replacement standards,*  
16 *the proposed tree replacement doesn’t qualify as “other measures” to*  
17 *justify a reduction in required tree replacement.*

18 Final Decision, p. 13.

19 The Applicant has as yet shown nothing that qualifies its mitigation as an alternative to  
20 that of the City Council. For example, if the type of tree proposed for replacement  
21 were more effective than other types of trees authorized by the City Council, then the  
22 proposed replacement may well qualify as alternative mitigation. Absent any such  
23 showing, the Applicant is just disagreeing with City Council legislation.

24 If the City and/or Applicant can make a compelling argument in their responses and  
25 replies that the Applicant has in fact proposed effective **alternative** mitigation to  
Council adopted replacement ratios, that will give the Examiner the discretion to ensure  
that constitutional and statutory proportionality is met. Absent such a showing, the  
Examiner’s hands are likely tied. To avoid setting a precedent that effectively  
invalidates the Council’s adopted replacement ratio, the City may find it prudent to  
address the situation via a Council approved judicial appeal settlement as opposed to  
stretching the code to avoid constitutional problems at the Examiner level of review.

Dated this 3<sup>rd</sup> day of December, 2025.



Phil Olbrechts  
Mercer Island Hearing Examiner