BEFORE THE HEARING EXAMINER
FOR THE CITY OF MERCER ISLAND

In the matter of Design Standard Review for 3700 E Mercer Way	City of Mercer Island Design Standard Review file no. DSR25-009 **APPLICANT'S REQUEST FOR RECONSIDERATION OF TREE REPLACEMENT CALCULATION**

I. INTRODUCTION AND RECONSIDERATION REQUESTED

The City of Mercer Island ("***City***"), by and through its Hearing Examiner ("***Examiner***") held an open-record design review hearing ("***Hearing***") on October 31, 2025 to review the design of the Barnabie Point Project ("***Project***") proposed by Herzl-Ner Tamid Conservative Congregation ("***Applicant***"). The Hearing surveyed a wide range of design and development-related topics for the Project, in a complex procedural posture with the Examiner serving as Design Commission *and* City Arborist.[1]

The Applicant respectfully submits that a tree replacement obligation not carefully tailored to the Project's specific tree impacts would be contrary to law and not supported by adequate evidence in the record. It would breach applicable limits on development exactions and put the City at risk of a damages claim under the Religious Land Uses and Institutionalized Persons Act ("***RLUIPA***").

[1] *See* Examiner's Design Review Decision dated November 21, 2025 ("***Decision***") at Conclusions of Law nos. 1 and 10.

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Neither the City's professional staff nor the Project's neighbors have opposed or contested the Project's calculated tree replacement proposal, and in this context, a wholesale rejection of the Applicant's calculations would not comply "with existing laws and regulations applicable thereto" under MICC 3.40.110. It would constitute design review action "in conflict with state or federal requirements" contravening MICC 19.15.220(C)(1)(b).

The Applicant respectfully requests reconsideration under Mercer Island City Code ("***MICC***" or "***Code***") 3.40.110(A)-(B) and City Hearing Examiner Rule ("***HER***") 504.

II. EVIDENCE RELIED UPON

This Request for Reconsideration relies on the Decision itself, on the exhibits entered into evidence ("***Exhibits***"), and on the Hearing transcript provided as the Decision's Appendix A ("***Transcript***"). As contemplated by HER 316(i), this Request for Reconsideration also cites and relies on various applicable and public legal authorities.

III. STATEMENT OF FACTS

The background of this matter is well documented in the record, including the Decision, the Transcript, and the Staff Report entered into evidence as Exhibit 1. This Statement of Facts only summarizes facts that bear most directly on the reconsideration.

The Applicant is a religious congregation that owns and operates a synagogue building on an assemblage of four parcels that have been approved for religious facilities use since 1979.[2] The applicant proposes to construct a new three-story pre-kindergarten through 8th grade school and office building on a parcel of that assemblage (the "***Project Site***") that is currently undeveloped and contains trees and shrubs.[3] The Project Site is very constrained due to existing underground utilities, proposed security fencing, existing buildings, parking areas,

[2] *See* Decision at Finding of Fact no. 3.

[3] *Id.*

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and program areas.[4] In this context, the Applicant has applied to remove to 82 regulated trees from the Project Site as part of the Project.[5] Removal of these trees is allowed by right.[6] The removal triggers a tree replacement obligation (the "***Replacement Obligation***") for all trees other than six trees that have been found dangerous or nonviable.[7] The Replacement Obligation may be fulfilled "in kind," by planting a prescribed number of new trees on the Project Site, or by payment a fee in lieu for each replacement tree that is not planted in kind by the Applicant.[8] The current fee-in-lieu is $1,081 per replacement tree not planted on site.[9]

The Project Site is very constrained, so the Applicant has proposed to plant only 34 replacement trees in kind on the Project Site.[10] The Applicant proposes to satisfy the balance of the Replacement Obligation by paying the fee-in-lieu.[11]

Whether fulfilled in lieu or in kind, the *size* of the Replacement Obligation must also be calculated, and the Code provides two paths for doing so. As a default, the Code provides a prescriptive default calculation.[12] As an alternative, it authorizes the City Arborist to permit a tailored reduction from the prescriptive calculation.[13] In this instance, most of the trees to be removed are viable trees that are deemed to be part of a "grove," and the prescriptive default calculation would trigger a default Replacement Obligation of 441 new trees (the "***Prescriptive Replacement Obligation***"), which equates to about 5.8 replacement trees for

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[4] *Id.* at Finding of Fact no. 9.

[5] Staff Report, entered as Exhibit #1 to DSR 25-009, at p. 6.

[6] *See* MICC 19.10.060(B)(1)., *see also* Decision at Conclusion of Law 10, pp. 12-13.

[7] Staff Report at p. 6.

[8] *See* MICC 19.10.070 ("Trees that are cut pursuant to a tree permit shall be replaced as specified . . . or a fee in lieu shall be paid as specified . . . .").

[9] City of Mercer Island Revised 2025 Fee Schedule at p. 26, adopted by City Ordinance no. 17C-15.

[10] *See* Staff Report at 7; *see also* Exhibit 4 at Sheets L-301, L-302 and L-302.1.

[11] *See* Decision at Conclusion of Law 11, p. 14 ("Applicant's request to pay a fee in lieu of required replacement trees is granted because . . . there is insufficient area on the lot for required on-site tree replacement.").

[12] *See generally* MICC 19.10.070.A.

[13] *See generally* MICC 19.10.070.B.4.

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each regulated tree to be replaced. After subtracting the 34 trees to be planted in kind, the Prescriptive Replacement Obligation would yield an assessed fee-in-lieu of $439,967.

When added to other hard and soft costs of design and construction in our region, a $439,967 additional development fee is a substantial sum for any nonprofit or faith-based organization to shoulder.

Having owned the Project Site for several decades, the Applicant has been aware that the trees are tightly packed and not especially healthy, and as a result are probably not providing especially robust environmental benefits to the vicinity. Accordingly, the Applicant asked Davey Resource Group Inc. (the "***Project Arborist***")[14] to evaluate whether, instead of the default Prescriptive Replacement Obligation, "other measures . . . restoring the tree canopy coverage and its associated benefits" might be considered "effective and consistent" with the purposes of the City's tree rules.[15] The Applicant asked the Project Arborist to evaluate the condition of the existing trees and to perform a professional, quantitative analysis of existing and proposed tree canopy coverage, to determine whether a different replacement number than the prescriptive 441 replacement trees might be more proportional to the actual impacts of the specific tree removal that the Applicant has applied to undertake.

In layperson's terms, the Arborist found that many existing trees on the Project Site are already providing reduced environmental benefits, generally because they are overcrowded, leading to reduced vigor and reduced canopy benefits on a per-tree basis.[16] Using industry standard and uncontested professional analyses that Mercer Island has itself relied on,[17] the Project Arborist's resulting analysis showed that trees slated for removal are

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[14] The Project Arborist's assigned specialist has been an arborist and urban forestry specialist for over 25 years in the Pacific Northwest. Mr. Scott is a board certified master arborist and member of the American Society of Consulting Arborists. His work focuses on tree preservation planning. *See* October 31, 2025 Hearing Transcript, entered as Appendix A to Examiner's Design Review Decision, at p. 7.

[15] MICC 19.10.070.B.4.

[16] Arborist Report, entered as Exhibit #14 to DSR 25-009, at pp. 24-35.

[17] Transcript at p. 7.

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quantitatively equivalent to approximately 145 appropriately spaced and sized maple trees.[18] Accordingly, the Applicant proposed that a reduction under MICC 19.10.070.B.4 to a Replacement Obligation of 145 trees (the "***Tailored Replacement Obligation***"). The Tailored Replacement Obligation would equate to a ratio of approximately 1.9 trees planted per viable tree to be removed.

After subtracting the 34 in-kind replacement trees to be planted, the difference between the Prescriptive Replacement Obligation and the proposed Tailored Replacement Obligation is 262 trees. Multiplied by the current fee per tree, this is a cost difference of $283,222 for the Project.

The Applicant has been unable to confirm whether the City currently employs an in-house or contract City Arborist, so when the Project Arborist's analysis was complete, the Project's Attorney transmitted it to the City's assigned reviewer, writing (among other things):

> **If additional types of information or analysis would be helpful or supportive to your decision about whether or not to approve a reduction [in the Replacement Obligation], we stand ready to prepare such information or analysis at your convenience. Please do let us know what kind of information would be most useful or informative for you.[19]**

The Project's attorney did not receive a response from the City's assigned reviewer, but learned on publication of the Staff Report that the City had delegated the role of City Arborist to the Examiner for purposes of the Project.

To support the Examiner's decision-making while acting as the City Arborist, the Applicant introduced the Project Arborist's analyses into evidence during the Hearing, and provided the Project Arborist's sworn testimony concerning the Project Arborist's expert

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[18] Staff Report at p. 6.

[19] Letter from Josh Friedmann to City Arborist (acting or permanent), care of Molly McGuire, October 16, 2025 (entered into the Hearing record as Exhibit 16).

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qualifications, analyses, and results. The Applicant also offered multiple opportunities to answer any questions from the City about these matters.[20]

The Hearing record has now closed. To the best the Applicant can ascertain, the Hearing record contains no evidence that the Prescriptive Replacement Obligation would be proportional to the actual impacts of the Project's proposed tree removal. It also contains no evidence that the Tailored Replacement Obligation would *not* mitigate the actual impacts of the Project's proposed tree removal. No party has rebutted, questioned or challenged the Project Arborist's analyses and sworn testimony.

IV. STATEMENT OF ISSUE

Under MICC 3.40.110(A)-(B), the Examiner shall reconsider the Decision if "[t]he decision when taken failed to comply with existing laws or regulation applicable thereto." Should the Tailored Replacement Obligation be approved? (YES).

V. AUTHORITY AND ARGUMENT

In this reconsideration, the Examiner need not question the wisdom of the Code's default Prescriptive Replacement Obligation. However, because the Code authorizes the City Arborist to reduce the Prescriptive Replacement Obligation when appropriate, the Examiner should issue a decision that more clearly satisfies the Code <u>*and*</u> state and federal law.

[20] *See, e.g.*, Transcript at p. 2 ("Over the course of the hearing today [do not] hesitate to let the design team to know [of] any questions about the proposal, to specifically include its design, and the applicant's requested approach to tree replacement for that design as authorized by applicable code provisions."); pp. 7 ("Regardless of whether those fees or charges are in kind or in [lieu, under RCW] 82.02.020 and *Nolan-Dollan*, the Project's Arborist has modeled the tree replacement ratio that would be proportional to the number and condition of trees that are actually being removed. Now, I'll give everyone a break from the law [to] let Mr. Scott walk through his analysis, and either of us will be happy to answer any follow-up questions that the Examiner or others may have."); p. 8; p. 12 ("Again, if there are questions or specific items that the Examiner or City Staff would like us to speak to, we're certainly happy to.").

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A. NO EVIDENCE IN THE RECORD SUPPORTS STRICT APPLICATION OF THE PRESCRIPTIVE REPLACEMENT OBLIGATION, NOR DOES ANY EVIDENCE IN THE RECORD WEIGH AGAINST APPROVAL OF THE TAILORED REPLACEMENT OBLIGATION.

First, the Tailored Replacement Obligation should be approved because in Washington, even discretionary land use decisions must be supported by substantial evidence within the record.[21] Here, no evidence in the record undermines the sufficiency of the professionally calculated Tailored Replacement Obligation, and no evidence in the record shows that the Prescriptive Replacement Obligation is proportional to the Project's impacts.

The procedural posture of this case is analogous to this year's case of *Miller v. City of Richland*, where the Court of Appeals for Division 3 found that a municipal Hearing Examiner's wetland categorization failed to rely on substantial evidence in the record.[22]

First, the appeals panel in *Miller* found that an outdated delineation report in the record was not substantial evidence.[23] Here, there is not even any *outdated* evidence in the record that shows the Prescriptive Replacement Obligation to be proportional for the Project, nor is there any outdated evidence showing the Tailored Replacement Obligation insufficient.

Second, the appeals panel in *Miller* found that the City of Richland's examiner did not rely on substantial evidence when he construed a state agency's lack of comment as a lack of objection to the contested delineation. Here, there is not even any state agency who *might* conceivably comment on municipal tree replacement obligations. Those obligations are locally controlled – subject to state and federal statutory and constitutional limits.

The Applicant respectfully asserts that neither the City staff nor any other party has introduced evidence into the hearing record to rebut, question or contest the Project Arborist's expert analysis and testimony. There is also no evidence in the record that shows the Prescriptive Replacement Obligation to be proportional to the Project's impacts, nor any

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[21] RCW 36.70C.130(C)(1); *see also Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn. 2d 169, 176, 4 P.3d 123 (2000) (applying substantial evidence standard to site-specific rezone).

[22] 33 Wn. App. 2d 1067 (2025) (not published), 2025 WL 393056 (declining to address a third issue).

[23] *Id.* at 17.

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showing that the Tailored Replacement Obligation is not proportional to the Project's impacts. Denying the Tailored Replacement Obligation is not supported by evidence.

B. NO EVIDENCE IN THE RECORD SUGGESTS THAT STRICT APPLICATION OF THE PRESCRIPTIVE REPLACEMENT OBLIGATION ON THE PROJECT IS PERMISSIBLE UNDER RCW 82.02.020, BUT SUBSTANTIAL EVIDENCE IN THE RECORD SUGGESTS THAT THE TAILORED REPLACEMENT OBLIGATION IS PERMISSIBLE.

Under RCW 82.02.020, Washington cities (acting through their arborists, design commissions or hearing examiners) are not allowed to impose any direct or indirect tax, fee or charge on the development of land except where they can demonstrate it is "reasonably necessary as a direct result of the development," and that it is "roughly proportional to the impact."[24] In other words, a City can only require new development to mitigate (in kind or in lieu) the problems it creates.

The Applicant does not contest the necessity of a Replacement Obligation generally. However, substantial and unrebutted evidence in the record shows that the Tailored Replacement Obligation would be proportional to the Project's proposed impacts, while *no* evidence in the record shows that the dramatically larger Prescriptive Replacement Obligation is proportional or reasonably necessary to mitigate the Project's proposed impacts. Because the Code provides the Examiner with a clear choice of whether to apply the Prescriptive Replacement Obligation or the Tailored Replacement Obligation, the Examiner should choose the site-specific mitigation option that has been shown to be proportional through unrebutted evidence, not a prescriptive path default backed by no evidence in the record.

If no Tailored Replacement Obligation is allowed even when supported by evidence, the mechanical calculation mandated by the Prescriptive Replacement Obligation, would operate much like the mechanical operation of the 30% set-aside requirement that the City of

[24] *See*, *e.g.*, *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17 (2011) ("We agree with the hearing examiner . . that RCW 82.02.020 contains the same kind of "rough proportionality" analysis embodied in the *Nollan/Dolan standard*, regardless of whether the exacted condition of approval is a mitigation payment or a dedication of land."); *see also Isla Verde v. Camas*, 146 Wn. 2d 740, 758, 49 P.3d 867 (2002) (*citing Vintage Constr. Co v. City of Bothell*, 135 Wn.2d 833, 959 P.2d 1090 (1998) *and Trimen Dev. Co. v King County*, 124 Wn.2d 261, 274 (1994), 877 P.2d 187 (1994).

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Camas tried to impose (in-kind or in-lieu) in *Isla Verde*.[25] In that case, Camas had a codified 30% open space set-aside ratio, much like Mercer Island's codified tree replacement ratios.[26] When analyzing the permissibility of Camas' codified 30% set-aside ratio under RCW 82.02.020, Washington's Supreme Court established that the statute mandates a *site-specific* analysis of the proportionality of the codified development condition. Notably, and foreshadowing the instant matter, the Court in *Isla Verde* concluded:

> **[C]ertainly clearing wooded land to build houses will affect the wooded nature of the site. However, there is no showing that a 30 percent open space set aside is required to address these impacts . . . Instead, the open space condition to obtain plat approval is uniformly applied, in the preset amount, regardless of the specific needs created by a given development. The fees or charges authorized under the exceptions in RCW 82.02.020, whether direct or indirect, *may not be imposed automatically*, but must be tied to a direct impact of the proposed development.[27]**

The Court in *Isla Verde* also found "[n]one of the evidence to which the City refers shows any relation between a 30 percent open space requirement and impacts or effects of Isla Verde's proposed development."[28] The same is true on this record – except that here, the City has not introduced *any* evidence that attempts to show the codified tree replacement ratios are proportional to the impacts or effects of the Project.

RCW 82.02.020 is generally understood to be "a statutory analog to the constitutional clause" against disproportionate governmental exactions on development activity.[29] And now, the doctrine of *Isla Verde* stands stronger than ever, after the U.S. Supreme Court has in rare unanimity echoed *Isla Verde* in the recent *Sheetz* case.[30] In *Isla Verde*, the Washington

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[25] 146 Wn. 2d 740, 746-47 (2002) (*Isla Verde* developer would satisfy only 37% of the open space obligation *in kind*, and satisfy the remainder with a payment in lieu of a set-aside).

[26] *Id*. at 746-47.

[27] *Id*. at 762-63 (emphasis added).

[28] *Id.*at 762.

[29] *Aho Constr. I, Inc. v. City of Moxee*, 6 Wash. App. 2d 441, 468, 430 P.3d 1131, 1145 (2018).

[30] *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024), contravening some Washington cases like *Douglass Properties II v. City of Olympia*, 16 Wn. App. 2d 158 (2021) ("We hold that the *Nollan*/*Dolan* test does not apply [where] fees are legislatively prescribed generally applicable fees outside the scope of *Koontz* . . .").

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Supreme Court observed that Camas did not "satisfy its burden under RCW 82.02.020 merely through a legislative determination of the need [for a replacement obligation] as a measure that will mitigate a consequence of subdivision development."[31] In *Sheetz*, the U.S. Supreme Court reinforced our Court by finding "no basis for affording property rights less protection in the hands of legislators than administrators."[32]

In short, municipalities in Washington certainly have authority to codify prescriptive default standards like Camas' 30% set-aside ratio or Mercer Island's tree replacement ratios. But those standards "may not be imposed automatically" even if they are legislatively adopted.[33] A city must be willing to undertake site-specific analysis to ensure that the standard complies with RCW 82.02.020 when applied to the given development. Put another way, the burden of showing a codified ratio's proportionality to site-specific impacts under RCW 82.02.020 falls on the City.[34] Here, there is no evidence in the record showing that the Prescriptive Replacement Obligation is proportional to the Project's site-specific impacts.

In this context, the Examiner should not strictly apply the default Prescriptive Replacement Obligation. Rather, the Examiner should approve the Tailored Replacement Obligation, based on the clear, cogent and unrebutted evidence in the record that the Tailored Replacement Obligation would mitigate the professionally quantified impacts of the Project's proposed tree removals.

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[31] *Isla Verde* at 761; *see also Citizens' Alliance for Property Rights v. Sims*, 145 Wash. App. 649, 664, 670 187 P.3d 786 ("While local governments have authority to adopt regulations and withhold . . . approval if conditions for development have not been satisfied, Washington courts have allowed such conditions only where the purpose is to mitigate problems caused by particular development . . . . Notwithstanding the County's extensive record, [its code provision fails to satisfy the proportionality requirement of the statute]."

[32] *Sheetz*, 601 U.S. at 279.

[33] *Isla Verde,* 146 Wn.2d at 762-63.

[34] *Isla Verde* at 756-57 ("[U]nder RCW 82.02.020 the burden of establishing that a condition is reasonably necessary as a direct result of the proposed development is on the City.").

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C. NO EVIDENCE IN THE RECORD SUGGESTS THAT STRICT APPLICATION OF THE PRESCRIPTIVE REPLACEMENT OBLIGATION WOULD SATISFY CONSTITUTIONAL PROPORTIONALITY REQUIREMENTS, BUT THE EVIDENCE SUGGESTS THAT THE TAILORED REPLACEMENT OBLIGATION IS PROPORTIONAL.

The Examiner may wish to focus his reconsideration on the evidence and on RCW 82.02.020, because reviewers generally prefer to decide permitting questions on evidentiary or statutory grounds rather on constitutional bases.[35] However, if the Examiner does find substantial evidence in the record to support the default Prescriptive Replacement Obligation, and finds no violation of RCW 82.02.020 in strict application of the Prescriptive Replacement Obligation, then the Examiner will need to consider whether the Prescriptive Replacement Obligation satisfies the rough proportionality analysis of *Dolan* under the state and federal constitutions.[36] The Applicant respectfully submits that there is no evidence of the Prescriptive Replacement Obligation's proportionality in the record. However, there is ample evidence of the Tailored Replacement Obligation's proportionality.

In 2024, the *Sheetz* case clarified that legislatively enacted exactions, like administrative conditions, must be proportional to a development proposal's actual impacts. This means that the mere local enactment of a default Prescriptive Replacement Obligation does not insulate the City from a proportionality analysis under *Nollan-Dolan*.[37]

The Examiner understands the clarified doctrine,[38] but may have not yet applied it to the Replacement Obligation due to the complexity of this procedural posture or the fast turnaround time imposed on this analysis by local ordinance. Fortunately, this reconsideration process allows the Examiner to remedy the possibility of evidentiary, statutory or constitutional infirmity prior to appeal. The Examiner may rely on the undisputed expert

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[35] *See Isla Verde* at 752 ("We adhere to the fundamental principle that if a case can be decided on nonconstitutional grounds [a reviewer] should refrain from deciding constitutional issues.").

[36] *See*, *e.g.*, *Rapczak v. City of Kirkland*, 32 Wn. App. 2d 1042 (unpublished), 2024 WL 4367540 at *7 ("We must interpret municipal codes in a manner that renders them constitutional. So, we read the [Kirkland Municipal Code] in the context of the rough proportionality test under *Dolan*. And here, the City fails to meet that test.") (internal citation omitted) (reversing trial court's dismissal of LUPA petition).

[37] *Sheetz v. County of El Dorado*, 601 U.S. 267, *supra n.* 28.

[38] *See* Decision at Conclusion no. 9 ("Any mitigation required of an Applicant . . . requires that . . . the required mitigation be proportionate to the mitigated impact."), *citing Nollan* and *Dolan*.

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evidence in approving the Tailored Replacement Obligation, rather than saddling the City with risks of legal challenge compounded by the Federal statute discussed in the next section.

D. THIS APPLICANT IS FURTHER PROTECTED AGAINST DISPROPORTIONATE OR UNSUPPORTED EXACTIONS BY FEDERAL CIVIL RIGHTS STATUTE.

Approval of the Tailored Replacement Obligation is also warranted in the context of the Religious Land Use and Institutionalized Persons Act (***"RLUIPA"***), 42 U.S.C. § 2000cc(a)(1). Because religious institutions need not always exhaust appeals before initiating RLUIPA actions,[39] and may recover both monetary damages and attorneys' fees,[40] municipalities risk significant out-of-pocket liability if their exactions are not tailored to a compelling interest and implemented through the least restrictive means under RLUIPA.

The RLUIPA statute was enacted in rare bipartisan and unanimous fashion under President Clinton, and has been championed by administrations of both parties, including the civil rights divisions of their Departments of Justice, since that time.[41] Its applicable section prohibits governments from implementing land use regulations that impose a "substantial burden" on religious exercise, unless the regulation furthers a compelling governmental interest and is the least restrictive means of doing so.[42]

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[39] *See*, *e.g.*, 2018 Guidance at p. 5 ("Some courts have held that, in some circumstances, religious institutions need not make an appeal before filing a RLUIPA lawsuit. These include circumstances where . . . there would be excessive delay, uncertainty, or expense . . . ."

[40] *See*, *e.g.*, *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011) (specifically holding that municipalities are not protected by sovereign immunity and can be liable for monetary damages and attorneys' fees under RLUIPA because the statute authorizes "appropriate relief" that includes both damages and attorneys' fees).

[41] *See, e.g.*, Letter from Kristen Clarke (Assistant U.S. Attorney General, Civil Rights Division) to State, County and Municipal Officials, March 19, 2024 (*2024 D.O.J. Guidance*) (observing that over the decades, the DOJ "has opened over 155 formal investigations and filed nearly 30 lawsuits related to RLUIPA's land use provisions"); Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), June 13, 2018 (*2018 D.O.J. Guidance*); *see also* Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act, U.S. D.O.J., September 22, 2010.

[42] 42 U.S.C. § 2000cc(a)(1).

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Courts interpret "religious exercise" broadly to include "the use, building, or conversion of real property" for religious purposes, which encompasses private day school facilities.[43] Furthermore, excessive fees or charges can constitute a substantial burden if they effectively prevent or significantly delay a religious institution's ability to use its property for core religious functions.[44] When expenses grow substantial enough, RLUIPA suits or DOJ investigations may be allowed even before the plaintiff has exhausted local appeal options.[45]

If a substantial burden within the meaning of RLUIPA is found, the next question will be whether the City can prove that it is using "the least restrictive means" of furthering a compelling governmental interest.[46] The U.S. Supreme Court has emphasized that this least-restrictive means test is "exceptionally demanding" because it requires the *local government* to show "that it lacks other means" of achieving its goal without substantially burdening the objecting party's religious exercise."[47] Here, the proposed Tailored Replacement Obligation would on its face be a less restrictive means of serving the City's overall tree-retention goals.

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[43] *Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338, 347 (2d Cir. 2007) (holding that denial of a permit for school expansion substantially burdened religious exercise).

[44] *See*, *e.g.*, *2018 DOJ Guidance* at 6 ("Examples of actions that some courts have found to constitute a substantial burden on religious exercise under RLUIPA include . . . creating significant delay, uncertainty, or expense in constructing or expanding a place of worship, religious school, or other religious facility."); *2024 D.O.J. Guidance at* 3; *Andon, LLC v. City of Newport News*, 63 F. Supp. 3d 630 (E.D. Va. 2014) (noting that while RLUIPA does not immunize religious institutions against ordinary costs, financial exactions that are disproportionate or lack justification could amount to a substantial burden when they impede religious land use); *Vision Warriors Church v. Cherokee County*, 74 F.4th 1251 (11th Cir. 2023) (clarifying that a burden need not be "insuperable" to be substantial, and significant financial obstacles that coerce modification or abandonment of religious exercise can qualify.)

[45] *See*, *e.g.*, 2018 D.O.J. Guidance at 5 (cited in 2024 D.O.J. Guidance, note v).

[46] 42 U.S.C. § 2000cc(a)(1)(B).

[47] *Holt v. Hobbs*, 574 U.S. 352, 353, 135 S. Ct. 853, 858 (2015); *see also Redeemed Christian Church of God (Victory Temple) Bowie, Maryland v. Prince George's Cnty., Maryland*, 17 F.4th 497, 511–12 (4th Cir. 2021) (County's lack of traffic study or other evidence underscored that it had not sufficiently considered alternatives, undermining County's position that it had adopted the least restrictive means of furthering its interests).

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The Applicant respectfully asserts that the Prescriptive Replacement Obligation's unsupported additional tree fees in the amount of $283,222 above and beyond the Tailored Replacement Obligation would be a substantial burden, but not the least restrictive possible means of serving the governmental interest. These facts could give rise to a RLUIPA claim or even an investigation of the City by the DOJ. Fortunately, the Examiner is not tasked with evaluating RLUIPA risk or adjudicating financial liability thereunder. The Applicant just respectfully flags this issue to the City's attention given the increased legal risk to the City if the tree replacement fees are not tailored to align with the actual impacts of the Project.

VI. CONCLUSION

The Project is nearing its building permit. Neither the City's professional staff nor the City's leadership have contested, challenged, questioned, or otherwise taken issue with the professionally calculated Tailored Replacement Obligation, nor have any of them advocated to the Examiner for strict application of the Prescriptive Replacement Obligation to the Project Site. Therefore, on reconsideration, the Examiner should approve the Tailored Replacement Obligation.

DATED this second day of December, 2025.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ *Joshua E. Friedmann*

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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:

Phil Olbrechts, Hearing Examiner
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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 2nd day of December, 2025.

s/ Debbie Chewning
Debbie Chewning, Legal Assistant

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