Before Hearing Examiner
Gary N. McLean

BEFORE THE HEARING EXAMINER
FOR SEATTLE PUBLIC SCHOOLS

In the Matter of the Appeal filed by **CHRIS JACKINS, ET AL,** Appellants, of a SEPA Determination of Nonsignificance (DNS) for the John Muir Elementary School Early Learning Addition Project issued on November 14, 2023, by the **SEATTLE PUBLIC SCHOOLS' SEPA RESPONSIBLE OFFICIAL,** Respondent	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION**

I. SUMMARY OF RECOMMENDATION.

Based on the record taken as a whole, the appeal should be denied. The appellants failed to offer sufficient evidence to establish that any probable, significant, adverse environmental impact will result from the project, even after requiring the project to meet existing laws, regulations, and measures noted in the environmental information included in the record. The record includes substantial evidence verifying that the District's SEPA official made the challenged threshold determination based upon information reasonably sufficient to evaluate the environmental impacts of the John Muir Elementary School Early Learning Addition proposal. The Examiner is not left with a definite and firm conviction that a mistake has been committed. The challenged DNS should be affirmed.

II. APPLICABLE LAW.

Jurisdiction.

The appellants challenge a SEPA Determination of Non-Significance (DNS) issued by the Seattle Public Schools SEPA Responsible Official for the John Muir Elementary School Early Learning Addition Project. Through the course of the appeal hearing process,

the school district representatives did not question the timeliness or assert other potential procedural defects, like standing issues, that might prevent this appeal from going forward.

The Hearing Examiner has jurisdiction to review and issue recommendations to the Superintendent regarding appeals of SEPA threshold determinations, like the challenged DNS, under Board Policy No. 6890, at Sec. 8(c).

Burden of Proof on Appellants, Standard of Review.

To satisfy their burden challenging the DNS, an appellant must present actual evidence of probable significant adverse impacts of the Project. *Boehm v. City of Vancouver*, 111 Wn.App. 711, 718-719, 47 P.3d 137 (2002).

A "clearly erroneous" standard applies when reviewing SEPA threshold determinations made by local and state governmental entities, such as the MDNS challenged in this matter. *King Cty. v. Washington State Boundary Review Bd. for King Cty.,* 122 Wn. 2d 648, 661, 860 P.2d 1024 (1993). A challenged DNS may be reversed if, although there is evidence to support it, the reviewing authority is left with the definite and firm conviction that a mistake has been committed. *See Norway Hill Pres. & Prot. Ass 'n v. King County Council,* 87 Wn.2d 267, 274, 552 P.2d 674 (1976). In reviewing a SEPA threshold determination, the Hearing Examiner must first determine whether "environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Sisley v. San Juan County,* 89 Wn.2d 78, 84, 569 P.2d 712 (1977) (quoting *Juanita Bay Valley Com. v. Kirkland,* 9 Wn. App. 59, 73, 510 P.2d 1140 (1973)). An agency must make SEPA threshold determinations based upon information reasonably sufficient to evaluate the environmental impact of a proposal. *WAC 197-11-335* Again, the appellants bear the burden of proof.

Evidence needed and the standard of proof needed to prevail in an appeal of a SEPA threshold determination is different than approval criteria that might apply to permits or other approvals that could be required for aspects of a particular project. For instance, approval criteria to obtain a departure, a building/development permit, a right-of-way use permit, or other regulatory approval from the City of Seattle are not the same. Arguments to the effect that a SEPA determination should be based on subsequent development permit approval criteria are without merit.

Conclusory statements alleging adverse impacts, standing alone, do not support reversal of a SEPA DNS. A party that bears the evidentiary burden cannot rely on bare conclusory assertions in an attempt to meet its burden. *Am. Family Mut. Ins. Co., SI v. Wood Stoves Etc., Inc.*, 24 Wn. App. 2d 26, at ¶ 9, 518 P.3d 666 (Div. I, 2022).

Challenged DNS is entitled to substantial weight.

Procedural determinations by the school district's SEPA responsible official shall be entitled to substantial weight in the administrative appeal and any subsequent proceedings. *Board Policy No. 6890, at Sec. 8(f); H.Ex. Rule 2.24.* Such deference is further mandated by Washington caselaw, including *Anderson v. Pierce County,* 86 Wn. App. 290 (1997) (holding that substantial weight is accorded to agency threshold determinations), and is consistent with *WAC 197-11-680(3)(a)(viii)("Agencies shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.").* However, substantial weight, like judicial deference to agency decisions, is neither unlimited nor does it approximate a rubber stamp. See *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007); and *Concerned Friends of Ferry County v. Ferry County,* 191 Wn. App. 803, 365 P.3d 207 (Div. II, 2015). If an environmental impact statement is required by the weight of evidence and if a government agency's SEPA official does not require an environmental impact statement (as it did not here), then the decision is clearly erroneous. *King County*, 122 Wn.2d at 667; *Norway Hill,* 87 Wn.2d at 274.

III. RECORD.

The Record for the matter includes all exhibits marked and numbered during the course of the appeal hearing. Copies of all materials in the record and a digital recording of the appeal hearing are maintained by the District. The challenged DNS and SEPA Checklist issued for the John Muir Elementary School Early Learning Addition Project, as issued on or about November 14, 2023, and the single written appeal, filed in a timely manner on or about November 28, 2023, are all part of the Record. Lists of exhibits admitted into the record during the appeal hearing for Appellants and the District are provided below:

APPELLANTS' EXHIBIT LIST:

1. John Muir Elementary School Early Learning project DNS and Final Checklist
2. Appeal filing by Chris Jackins, et al, of John Muir Elementary School Early Learning project DNS
3. Newspaper article "Boston bans artificial turf in parks due to toxic 'forever chemicals'", September 30, 2022, The Guardian British daily
4. Newspaper article "How did PFAS get into well water on San Juan Island", May 8, 2023, Seattle Times
5. Article "Military testing reveals hundreds of PFAS-tainted drinking water wells", Seattle Times, December 12, 2023.
6. Article "State proposes ban on toxic 'forever chemicals' found in everyday items", Seattle Times, December 9, 2023.
7. (*Document Not admitted; District objection sustained; Document is irrelevant, as City of Seattle decisions and appeals of such decisions to the City's hearing examiner are not based on the*

same decision criteria as that applied to an appeal of a SEPA threshold determination heard by the District's hearing examiner).

8. Article "N.J. federal judge OK's class action suit against top field turf company", NJ.com, August 16, 2023
9. Technical Memorandum on PFAS in Artificial Turf, State of New Jersey Department of Environmental Protection, February 8, 2023
10. News Release, "Synthetic Fields for Sports May Pose Increased Risk of Concussion in Youth", American Academy of Pediatrics, October 7, 2022
11. Position Paper, "The Children's Environmental Health Center Recommendations ... against the installation of artificial turf playing surfaces", Icahn School of Medicine at Mount Sinai, Institute for Climate Change, Environmental Health, and Exposomics, November 2023
12. Guide, "Artificial Turf: A Health-Based Consumer Guide", Icahn School of Medicine at Mount Sinai, Children's Environmental Health Center, May 2017
13. Article "Per-and Polyfluoroalkyl Substances (PFAS) and Your Health", ATSDR Agency for Toxic Substances and Disease Registry(www.atsdr.cc.gov/pfas)
14. Article "Athletic Playing Fields and Artificial Turf: Considerations for Municipalities and Institutions", TURI Toxics Use Reduction Institute, University of Massachusetts Lowell
15. Article "No to PFAS –forever chemicals", (www.gorealgograss.com/pfas)
16. Article "Artificial Turf Concerns –Safer Alternative? Natural grass managed organically", TURI Toxics Use Reduction Institute, University of Massachusetts Lowell
17. Fact Sheet "Q&A:PFAS Information for Families", Northwest PEHSU Pediatric Environmental Health Specialty Units, Environmental & Occupational Health Sciences, School of Public Health, University of Washington
18. Consensus Study Report "Guidance on PFAS Exposure, Testing, and Clinical Follow-Up", National Academies Sciences Engineering Medicine, July 2022
19. "NCHR Letter to Members of the Board of the Los Gatos Union School District on Artificial Turf and Playgrounds", Diana Zuckerman, PhD, President, National Center for Health Research, April 18, 2022
20. Synthetic Turf and Heat Islands, Article, National Parks and Recreation Magazine
21. Testimony of Mr. Jackins, typewritten notes (10 pages), read by Mr. Jackins during most of hearing presentation
22. Testimony of Ms. Dickeman, about 4 typewritten notes, read by Ms. Dickeman during most of her hearing presentation
23. Seattle Times article, "What is 'frost heaving'? It's happening at Seattle playfields", dated Jan. 17, 2024
24. POST-HEARING submittal, Appellants' response to District's Declaration of Conrad Plyler, two pages, a copy of which is also included in the record as District Ex. 11.

DISTRICT'S EXHIBIT LIST.

1. Final SEPA Checklist and DNS with Appendices
2. Anjali Grant Resume
3. Sean Dugan Resume
4. Emily Peterson Resume
5. Anjali Grant Testimony Presentation
6. Maple Elementary Hearing Examiner Recommendation
7. Updated Arborist Report

8. Redacted Cultural Resources Assessment
9. Synthetic Turf PFAS Analysis – provides chart using test level identified as nanograms per gram [*Note: "Nano" means one-billionth of a unit]; confirms that "As shown in Table 1, PFAS were not detected above the laboratory reporting limit in any of the tested synthetic turf carpets."
10. PFAS Study One-Page
11. POST-HEARING submittal: Declaration of Conrad Plyler, dated Jan. 22, 2024, providing Bid solicitation information for the Maple Elementary Project, with certain provisions to address concerns about the potential presence of PFAS in synthetic turf for the Maple project, 3 pages, with 11-page bid specifications for Synthetic Turf Surfacing information.

During the appeal hearing, the appellants appeared pro se, with Mr. Jackins' serving as the designated representative for the group of appellants named in his appeal statement, with his fellow-appellant, Ms. Dickeman, conducting cross-examinations of some District witnesses. The District was represented by counsel, Isaac Patterson and Katie Kendall, from the McCullough Hill law firm. The appellants' hearing representatives and the District's attorneys were given wide latitude to call witnesses, submit exhibits, and cross-examine witnesses called by the other side, all as they saw fit, to focus attention on topics or issues they deemed relevant to their respective positions in this appeal. Washington courts hold pro se litigants, including appellants, to the same standard as attorneys. *State v. Irby,* 3 Wn.App. 2d 247 (Div. I, 2018), citing *State v. Bebb,* 108 Wn.2d 515, 524 (1987); *Audit & Adjustment Co. v. Earl,* 165 Wn. App. 497 (Div. II, 2011), citing *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997).

Below is a list of individuals called to present testimony under oath at the duly noticed appeal hearing for this matter, with the Examiner, all party representatives, and witnesses appearing in-person in a District conference room on January 19, 2024:

1. Chris Jackins, the named appellant, served as the designated hearing representative for the appeal he filed on his own behalf and several other individuals and as a witness called by appellants to address several issues raised in their appeal. Mr. Jackins prepared detailed written notes, which he distributed throughout the hearing at various points during his presentation, including an opening statement, testimony about specific issues raised in his written appeal, and a closing statement, comprised of 10 numbered pages, included in the record as Appellant Ex. 21. Mr. Jackins testimony focused on two main areas: 1) challenging the proposed use of artificial turf, based on his concerns about possible health impacts from plastic grass; and 2) alleged impacts to trees. He is not a health professional or scientist in any health field. Mr. Jackins testified that he prefers the use of natural grass instead of artificial turf; relied on articles and media stories that tend to generalize information about artificial turf products; noted that Cultural Resources concerns are no longer a part of this appeal, observing that a Duwamish Tribe representative was present during a field survey for this project; and that he had no evidence that the project would violate any applicable parking regulations.

2. Nancy Dickeman, listed as an appellant, called as an appellant witness, submitted written comments included in the record as Appellant Ex. 22, with 4 typed pages, focused on her health concerns associated with artificial turf. The Examiner takes official notice of Ms. Dickeman's testimony in the Maple Elementary School appeal hearing earlier in 2023, where she explained that she is not a doctor, or scientist; that she holds an MA in English from the University of

Washington; and described herself as having about 10-years of 'experience working with health professionals regarding toxic chemicals, health studies, and safer alternatives'. Like Mr. Jackins, Ms. Dickeman expressed a strong preference for a natural grass surface under children's play equipment and relied upon media reports and general studies included in Appellants' exhibits. She described her personal observations of her grandchildren playing on an artificial turf sports field who had strands of 'fake grass' on their clothes after playing on such surface; expressed concerns about impacts that could result from children's exposure to lead, PFAS, and other chemicals; expressed concerns and observations of how artificial turf surfaces can be hot during warm weather and may be subject to problems in cold weather as well. She expressed general concerns about physical injuries that occur on artificial turf fields, and briefly noted her strong hope that the large Sequoia trees on the site should be retained (which will be retained, as noted in the Arborist's report).

3. Anjali Grant, the District's lead architect for the John Muir project, resume included in the record as District Ex. 2, explained that the current play area is 100% asphalt surrounded by a chain link fence; that bicycle parking space will increase by 14 total, adding spaces to the back area of the school, which is viewed as a safer area by parents; noted that the City's "departures" process is a separate process, not conducted by Seattle Schools; explained that applicable state regulations for climbing equipment used by children, i.e. early learning age, provide that natural grass is not allowed under such play equipment; noted that play equipment used for early learning often uses artificial turf with cushioning, to satisfy applicable requirements; summarized maintenance problems associated with using bark or chips for cushioning, because it would need to be at least 9-inches thick; provided credible responses to Ms. Dickeman's questions regarding alternative materials that could satisfy cushioning requirements, like pea gravel, wood chips, rubber tiles, and the like. Ms. Grant confirmed that the District could follow recommendations provided by the Examiner for the Maple Elementary project in bid documents; and noted that a "Health Product Declaration" from vendors/suppliers of materials would be appropriate, and would be consistent with the Maple Elementary recommendation (Finding No. 30 of such recommendation).

4. Sean Dugan, Tree Solutions, Incl, the District's arborist, consultant on tree related issues involved with this project. Mr. Dugan confirmed that the project should not adversely impact the Sequoia trees planted near the current project site at some point in 1991 (Ms. Grant verified the date the trees were planted); confirmed that the updated arborist report, Dist. Ex. 7, did not need changes in order to satisfy the City's recent updates to its tree codes; and explained that the number of replacement trees to be planted on site will exceed City requirements. Mr. Dugan provided a detailed and credible explanation for how trees (particularly the Sequoias on the school property) will be protected during the construction process so as to prevent and avoid adverse impacts.

5. Vincent Ralph Gonzales, Senior Project Manager for Seattle Public Schools, called by the District for good cause/rebuttal, to clarify prior testimony from a District consultant about Health Product Declarations, noting that he holds authority over what consultants are asked to include in bid documents, that he can request the project architect to include Health Product Declaration(s) in bidder solicitation documents they generate in connection with this project, and that he generally agrees it could be requested of bidders for this project.

After the hearing, the Examiner visited the school site and surrounding area. The District submitted a post-hearing declaration with attached bid documents for the Maple Elementary project, in response to a question posed by the Examiner at the end of the hearing, a copy of which is now included in the record as District Ex. 11. Appellants submitted a written response to the District's new exhibit, now included in the record as Appellants'

Exhibit 24. Upon consideration of all the evidence, testimony, codes, policies, regulations, and other information contained in the record, and site visit observations, the undersigned Examiner issues the following Findings, Conclusions, and Recommendation.

IV. FINDINGS OF FACT.

1. Any statements of fact found in any other section of this Recommendation that are deemed to be findings of fact are hereby adopted as Findings of Fact by the undersigned Examiner and incorporated into this section by this reference. The use of captions is for convenience of the reader and should not be construed to limit or modify the application of a particular fact to some other topic or issue addressed elsewhere in this or any other portion of this Recommendation.

Background Information, Project Description.

2. John Muir Elementary School is located at 3301 S Horton St., in the City of Seattle's Mount Baker neighborhood, generally within the southwest corner of S Horton Street to the north and 34th Avenue S to the east. York Playground – a Seattle Parks facility – is to the south, and residential properties are located to the west.

3. Seattle Public Schools (SPS or the District) proposes to construct a one-story building addition at the northeast corner of the existing school building, known as the John Muir Elementary School Early Learning Addition Project.

4. The project would increase the overall building space by approximately 5,178 square feet (SF). In total, the school would have approximately 64,120 sq.ft. of building space with the proposed project. The proposed addition would include three new classrooms for the school's early learning program with before-and after-school childcare support spaces. Interior renovations in the existing building will convert existing open-floor-plan classrooms into three separate classrooms; window replacements, fire alarm and system upgrades, lighting and electrical upgrades and modernization of the loading dock. The existing small, covered play area and hard surface area in the northeast corner of the site will be replaced with new facilities near the western portion of the proposed addition. Other improvements include changes to the existing onsite parking area to meet accessibility requirements (resulting in a loss of two spaces), as well as site frontage, accessibility, and curb ramp improvements. School capacity will increase from 342 students to 382 students. *(Dist. Ex. 1, Description of Proposal, on .pdf page 5; additional details within responses provided in SEPA Checklist, on .pdf pages 12-14).*

SEPA Threshold Determination issued for the project – a DNS; Appeal.

5. At issue in this appeal is the SEPA Determination of Non-Significance (DNS) issued

for the John Muir Elementary School Early Learning Addition Project, issued on or about November 7, 2023. A single written appeal of the DNS was submitted by Chris Jackins and several other individuals. There is no dispute that Mr. Jackins appeal was timely, and the District did not contest it going forward to hearing. As explained in this recommendation, the appeal should be denied, because it was not supported by a preponderance of evidence.

6. The District prepared and issued a Draft SEPA Environmental Checklist for the John Muir Elementary School Project on or about August 7, 2023, inviting public comments in the following weeks. *(See DNS on appeal, Mr. Podesta's Nov. 7, 2023 cover memo explaining SEPA comment process, part of District Ex. 1, on .pdf page 4).*

7. The District considered all written comment letters, emails, or post-cards received during the SEPA comment period and included them with specific responses from the District as Appendix H to the final SEPA Checklist. *(See DNS, SEPA Checklist, Appendix H, labeled "Public Comments and Responses", a 9-page document, responding to 21 comments, some of which overlap and repeat similar themes, repeat statements from the Checklist, from just two different people, including one of the appellants (Mr. Jackins), who is shown to have provided about 19 of the comments).*

8. Based on the Final SEPA Checklist, public comments, an arborist report, site plans and design materials, a Greenhouse Gas Emissions Worksheet, and other environmental information, the District's designated SEPA Environmental Official formally issued a Determination of Non-Significance (DNS) for the Project on or about November 7, 2023. *(Ex. 1, with signature of SEPA Responsible Official dated Nov. 7, 2023, but the "Date of Issuance" provided on the notice reads Nov. 14, 2023, which is of no consequence in this matter, because there is no dispute that the pending appeal was timely).*

9. As noted above, there is no dispute that the pending appeal process was commenced upon the District's receipt of Mr. Jackins' timely written notice of appeal on or about November 28, 2023. A copy of the Jackins appeal is on file with the District.

10. Following proper notices issued to all parties of record, a prehearing motion process resulting in a Prehearing Scheduling Order by the Examiner addressing witness and exhibit disclosures to provide a fair and efficient process for all participants, the appeal hearing for this matter took place in person in a District conference room, during the workday on January 19, 2023.

11. The specific "errors" and/or aspects of the challenged SEPA threshold determination that are at issue in any appeal are as set forth – and are limited to those raised – in the appellants' written appeal statement. In this appeal, the appellants narrowed the focus of their appeal during the hearing to focus upon 1) alleged health impacts from plastic grass (aka artificial turf); and 2) alleged impacts on Trees. *(Ex. 21, page 1, Mr. Jackins' detailed notes*

used during his testimony at the appeal hearing; Testimony of Mr. Jackins).

12. While the appellants noted that their written appeal also "references" four other issues (concerns about no SEPA public meeting; noise; cultural resources; and Departures/exceptions that will be pursued with the City from otherwise applicable provisions of the City's zoning code), during the appeal hearing, neither appellant witness provided any preponderance of evidence or controlling legal authority to demonstrate that any of the four other issues would serve as a basis to grant this appeal and reject the SEPA DNS at issue. In fact, they appeared to fully withdraw their challenge based on cultural resource issues, indicating satisfaction that a Duwamish Tribe representative was present during a field survey for this project. *(Testimony of Mr. Jackins).* In any event, Washington courts do not consider assignments of error unsupported by argument or authority. (See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

13. While Mr. Jackins mentioned general concerns that parking may be a concern, *(see page 8 of his hearing notes, in Appellant's Ex. 21)*, he offered no evidence or legal authority to establish that any parking related issues would serve as a basis to reject the challenged DNS. Further, the SEPA Checklist includes a Transportation Technical Report prepared by *Heffron Transportation, Inc.,* included as Appendix G to the District's SEPA Checklist, which credibly addresses all transportation related issues associated with this project, including vehicle parking and bicycle parking.

14. More significantly, the Checklist summarizes changes in state SEPA statutes and regulations, which took effect on January 20, 2023, removing parking as an element of the environment in WAC 197-11-444(2)(c)(iv), as well as the removal of parking-related questions from the environmental checklist in WAC 197-11-960(B)(14)(c). Pursuant to these amendments and consistent with guidance from the City of Seattle, Seattle Public Schools will no longer identify and analyze parking impacts in its SEPA analysis. *(District Ex. 1, on .pdf page 40).*

15. As explained in HEx Rule 2.24: (a) The Hearing Examiner accords deference or other presumption to the decision being appealed as directed by applicable law; (b) Where the applicable law provides that the appellant has the burden of proof – as is the case for appeals of SEPA threshold determinations – the appellant must show by the applicable standard of proof that the Responsible Official's decision or action does not comply with the law authorizing the decision or action; and (c) Unless otherwise provided by applicable law, the standard of proof is a preponderance of the evidence.

Summary of main issues raised in the appeal.

16. Mr. Jackins' written appeal speaks for itself, and his testimony at the appeal hearing focused on just two main issues: 1) challenging the proposed use of artificial turf; and 2)

alleged impacts to trees. *(Appeal statement; Testimony of Mr. Jackins; Ex. 21, Mr. Jackins' written hearing notes).*

17. Ms. Dickeman's evidence and testimony focused on her concerns about using artificial turf in a play area that will be used by young children, the need to use a safer alternative, preferably natural grass, as her suggested safest alternative. *(Testimony of Ms. Dickeman; Ex. 22, Ms. Dickeman's written hearing notes; Appellants Ex. 11).* Ms. Dickeman briefly expressed her support for retaining the two Sequoia trees near the project site, which the District plans to do. *(Testimony of Ms. Dickeman).*

18. In the end, this appeal should be denied, because the appellants failed to meet their burden of proof, and the record includes more than a preponderance of credible evidence to support the challenged DNS. The captions provided below are restatements of the primary appeal issues presented during the appeal presentation. Whether specifically discussed in this recommendation, the full language and substance of each issue mentioned in the written appeal statement has been fully considered and evaluated before issuing this Recommendation.

State regulations do not allow early learning providers to use grass alone under outdoor play equipment, as requested by the appellants.

19. There is no dispute that the pending Project is intended to serve young students, i.e. "early learning" age children, mostly children younger than 5 years old. *(Testimony of Ms. Grant).*

20. As noted during the Project architect's testimony, the school's play area is now 100% asphalt, surrounded by a chain link fence. *(Testimony of Ms. Grant; See Dist. Ex. 5, existing conditions).*

21. A small portion of this project includes creation of a new outdoor play area for early learning age children, and applicable state regulations mandate that appropriate cushioning must be used beneath climbing equipment to be used by children. Those regulations do not allow grass under climbing equipment. *(Testimony of Ms. Grant).*

22. The Examiner takes official notice of Washington State regulations that provide standards for outdoor play equipment and surfacing used by early learning providers, currently found in WAC 110-300-0146. While neither party cited to this specific regulation, and the Examiner does not know if these standards are mandated for Seattle Public Schools, the regulations are consistent with standards and requirements for early learning play equipment and options for surfaces, aka "fall zone" materials, generally summarized in Ms. Grant's testimony, and read as follows:

WAC 110-300-0146 – Equipment and surfaces in outdoor early learning space.

(1) Playground equipment and surfacing used by an early learning provider must comply with applicable CPSC [Consumer Product Safety Commission] guidelines including, but not limited to, installing, arranging, designing, constructing, and maintaining outdoor play equipment and surfacing.

(a) Climbing play equipment must not be placed on or above concrete, asphalt, packed soil, lumber, or similar hard surfaces;
(b) The ground under swings and play equipment must be covered by a shock absorbing material (grass alone is not acceptable) such as (*emphasis added*):
(i) Pea gravel at least nine inches deep;
(ii) Playground wood chips at least nine inches deep;
(iii) Shredded recycled rubber at least six inches deep; or
(iv) Any material that has a certificate of compliance, label, or documentation stating it meets ASTM standards F1292.

(2) Permanently anchored outdoor play equipment must not be placed over septic tank areas or drain fields and must be installed according to the manufacturer's directions.

(3) Handmade playground equipment must be maintained for safety or removed when no longer safe. Prior to construction of new handmade playground equipment, the provider must notify the department and have plans and a materials list available upon request.

(4) Bouncing equipment including, but not limited to, trampolines, rebounders, and inflatable equipment must be inaccessible and locked. This requirement does not apply to bounce balls designed to be used by individual children.

23. Both appellant witnesses expressed a strong preference for natural grass under play equipment in the proposed small outdoor play area. As shown above, ground under swings and play equipment must be covered by a shock absorbing material, and grass alone is not an acceptable cushioning surface.

24. The appellants asked for other options, besides artificial turf materials with cushioning below, perhaps wood chips, or some other material. The Examiner defers to determinations of District officials tasked with weighing various options and finds that the appellants failed to provide a preponderance of evidence showing that the proposed ground surface for the outdoor play area is a mistake, and that some other option must be used.

25. The Examiner finds that while there are different types of playground surface materials that could be shock absorbing, the practical use and maintenance of some options, like wood chips, shredded rubber, sand, and pea gravel might also be considered shock absorbing but they may not be appropriate to use on playgrounds because they may not be accessible in compliance with the Americans with Disabilities Act and Washington codes and regulations mandating access for children with limitations or special needs.

Concerns about use of artificial turf.

26. Appellants concerns about use of rubber crumb materials in the project are fully addressed by the fact that the synthetic turf materials will not use any crumb rubber materials. Instead, the synthetic turf surface will use an eco-friendly infill material known as Envirofill for the proposed synthetic turf areas. *(Ex. 1, Appendix H, Response to comments, on .pdf page 280).* Appellants failed to establish that the type of infill will somehow result in any significant, adverse impacts on students using the play areas.

27. The District notes that "The manufacturer of the synthetic turf that has been utilized by Seattle Public Schools on previous projects, Sprinturf, maintains that no PFAS chemicals are utilized in the manufacturing of its products. A PFAS-free synthetic turf such as Sprinturf or a comparable product would be utilized for the John Muir Elementary Early Learning Addition Project. In addition, Seattle Public School's practice of regularly inspecting the performance of its synthetic turf areas lowers the risk of wear to the turf." *(Dist. Ex. 1, SEPA Checklist, Appendix H, response to written comments on .pdf page 280).*

28. General concerns about safety associated with synthetic turf were not adequately supported by a preponderance of evidence. Appellants media stories and reports noting general concerns about the potential presence of PFAS materials in artificial turf materials were largely focused on problems associated with rubber tire crumb used as infill between artificial grass blades. Again, there is no dispute that this project will not include use of crumb rubber materials.

29. One memo from the New Jersey Department of Environmental Protection explains that "*...it is not appropriate to generalize about all AT [artificial turf], as variability in manufacturing processes and materials would likely impact PFAS content and leachability." (Appellants' Ex. 9, New Jersey Dept. of Enviro. Protection Technical Memo. Re: PFAS in Artificial Turf, dated Feb. 8, 2023, on pg. 1)(emphasis added).*

30. District witnesses fully endorsed the use of bid documents and specifications for the artificial turf surface materials and cushioning for the play area included in this project similar to those used for the Maple Elementary School project. As noted in the Maple project recommendation, and for this project as well, in light of the growing public awareness and legitimate concerns about the health effects of Per- and Polyfluoroalkyl Substances (PFAS) [aka PFAS chemicals, or 'Forever' chemicals] – as reflected in witness testimony and hearing exhibits from both the appellants and the District – the Examiner finds and concludes that the bid documents for this project should be crystal clear and transparent on this topic, and the presence of PFAS substances in any turf materials should be fully disclosed, but preferably the absence of detectable levels of such substances should be confirmed.

31. The bid documents included in the District's post-hearing Ex. 11 do not fully seek the information and details suggested in the Maple recommendation. The bid documents for this project should be supplemented to seek confirmation and disclosure of the compositional chemistry of products used for the artificial turf system used in this project.

32. District witnesses indicated a willingness to implement the same recommendations found in the Maple recommendation in this matter. They also indicated that Health Product Declarations, or HPDs, could be requested from bidders, to provide a reporting format that allows manufacturers to transparently disclose the compositional chemistry of their products.

33. The bid documents should address certification regarding the presence or absence of PFAS substances, performance data, testing protocols, cushioning testing, and sustainability considerations.

34. Bidders should submit appropriate and verifiable certification disclosing the presence of any PFAS chemicals in their turf products, the testing methods/protocols used, and the thresholds applied to provide such certification. Bidders should be encouraged to provide testing of samples from turf systems of the same kind/series as included in any bid proposal, and samples taken of stormwater at drains on or near the synthetic turf system, if any such testing has been conducted by local governments or customers in other parts of the country.

35. Until or unless the State of Washington adopts specific regulations regulating the use of PFAS chemicals to manufacture components of synthetic turf systems, bidders should be asked to certify that their proposed turf field system does not involve any PFAS chemicals (currently listed on California's Proposition 65 regulations or identified as target analytes in USEPA Methods for analysis of PFAS, or some other commonly recognized listing of PFAS substances) to manufacture the components of its sports turf field products, or a similar standard prepared by the District's environmental health consultants based on best available reports and studies from credible federal or state agencies, research think tanks, medical journals, or the like.

36. Given the level of public interest in artificial turf materials, and the potential for PFAS chemicals in such systems, there may be a standard Health Product Declaration that includes information sufficient for bidders and/or manufacturers to satisfy the disclosures addressed in this recommendation.

37. As in the Maple project, bid documents for this project should include a clear explanation of "cushioning testing" (with frequency and duration of such testing) that will be required to assure ongoing performance of the turf system with Envirofill or other approved infill product, and include proposed corrective action measures in the event the turf is not providing sufficient levels of cushioning needed to reduce injuries and provide a safe play

surface for early learning age school children.

38. The appellants failed to present a preponderance of evidence to establish that the proposed synthetic turf system, using Envirofill instead of rubber tire crumbs, with appropriate certifications from bidders addressing the presence or absence of PFAS substances, will result in significant adverse impacts serving as a basis to reject the challenged DNS. Their appeal and testimony elevated awareness on the subject, and findings in this recommendation are provided to assist District personnel in protecting student health and safety to the fullest extent practicable.

Trees.

37. The written appeal challenges the DNS, generally alleging impacts on trees, without any credible evidence to support such claim. The updated Arborist Report, which is included in the record as District Ex. 7, explains that the Sequoia trees on the school property will be retained and protected, through measures and practices summarized in such report. The trees to be removed are either within the building envelope itself, or they stand too close to the new building project, meaning they should be removed (like the white pine).

38. The appellants failed to rebut the Arborist report, which concludes that following replacement/replanting and tree protection measures, there will be no significant adverse impacts regarding trees. In fact, replanting proposed for this project will exceed City codes on the subject. *(Testimony of Mr. Dugan).*

39. The white pine is not within the project footprint, but the proposed building is just a few feet from the base of the tree, meaning that excavation work will likely have a significant adverse impact on the tree's root system, which will destabilize the tree and lead to long-term health issues, because at minimum, eight feet of the root system needs be retained on the east side of the tree to reasonably assure its stability. *(Arborist initial report, included as part of Ex. 1, at .pdf page 116).* Removal of the white pine will require replanting to satisfy applicable city codes, as summarized in the final Arborist report. *(Ex. 7).* The appellants failed to submit a preponderance of evidence that the building itself could be redesigned to satisfy project needs and still retain the white pine tree. City codes do not require such a result and the record for this SEPA appeal is insufficient to require such result.

40. The project will not have any adverse impact on trees. There is no evidence to support such claim, so alleged tree impacts provide no basis in fact or law to reject the challenged DNS.

Noise.

41. As noted in the SEPA Checklist Section B.7.b *(Ex. 1)*, the City's Noise Ordinance

(SMC 25.08) and based on the Neighborhood Residential 3 (NR3) zoning for the site, construction activities are allowed to exceed the otherwise applicable maximum noise levels between 7 AM and 10 PM on weekdays and 9 AM to 10 PM on weekends. The City's Noise Ordinance regulations are applicable city-wide and are not unique to this project. Any homeowner is subject to the same standards and allowances for construction activities on their property.

42. The challenged SEPA DNS and checklist also includes best management practices and measures to minimize potential construction related noise associated with this project, including compliance with all local and state noise regulations. Contractors may also implement the following measures to further reduce or control noise during construction:

- Construction would generally occur between 7 AM and 5 PM on weekdays, although, per SMC 25.08, construction is allowed to occur between 7 AM and 10 PM on weekdays and 9 AM to 10 PM on weekends and holidays.
- Minimize idling □me of equipment and vehicle operation.
- Operate equipment only during hours approved by the City of Seattle.
- Use well-maintained and properly functioning equipment and vehicles.
- Locate stationary equipment away from receiving properties.

(Dist. Ex. 1, Appdx. H, on .pdf pages 279-280).

43. The appellants offered no preponderance of evidence to show that potential noise impacts associated with this project would serve as basis to reject the challenged DNS.

Discussion.

44. The appellants failed to show the existence of any material errors in the Final SEPA Checklist or DNS issued for this project, failed to show how the DNS failed to assess potential impacts, and they failed to show that the proposal will cause any adverse impacts necessitating an EIS.

45. The appeal hearing provided the appellants an open record hearing opportunity to fully explain and present evidence supporting their assignments of alleged errors in the DNS. They failed to meet their burden. Appellants failed to establish the existence of any potential, significant impact that is not already considered, addressed, and/or mitigated in the challenged DNS.

46. A party is entitled to present evidence and set forth facts based on personal knowledge but cannot merely state ultimate facts or make conclusory assertions and have them accepted at face value. *Jones v. State, Department of Health,* 170 Wash.2d 338, at 365 (2010). The appellants' evidence and testimony in this appeal was mostly a recitation of personal beliefs, opinions, reliance on media publications, and conclusory assertions. A party that bears the

evidentiary burden cannot rely on bare conclusory assertions in an attempt to meet its burden. *Am. Family Mut. Ins. Co., SI v. Wood Stoves Etc., Inc.*, 24 Wn. App. 2d 26, at ¶ 9, 518 P.3d 666 (Div. I, 2022). Neither of the appellant witnesses presented testimony or evidence sufficient to grant relief under this appeal. They failed to present evidence from qualified professionals or specific facts that would rebut evidence and information relied upon in the challenged SEPA determination.

47. Paraphrasing the action words contained in the definition given for the word "mitigation" in the state SEPA regulations, the term "mitigation" does not mean zero impacts, but means "avoiding", "minimizing", "rectifying", "reducing", "compensating", or "monitoring" an impact. WAC 197-11-768. The Examiner finds and concludes that the challenged DNS should be upheld, because substantial evidence in the record establishes how it includes design considerations, and will include appropriate bid specifications for turf vendors, to appropriately avoid and/or mitigate potential impacts.

V. CONCLUSIONS OF LAW.

1. "SEPA does not demand a particular substantive result in government decision making; rather it ensures that environmental values are given appropriate consideration." *Glasser v. City of Seattle,* 139 Wn. App. 728, 742 (2007).

2. In this appeal, the Examiner is delegated authority to prepare a recommendation to the Superintendent as to whether the pending appeal should be granted.

3. Based on findings provided above, and other evidence in the record for this matter, the Examiner concludes that Appellants have not shown by a preponderance of the evidence that the challenged DNS was not properly issued. They failed to establish that there will be any significant impact that cannot be addressed through applicable of existing codes, policies, development regulations, or measures identified in the DNS materials.

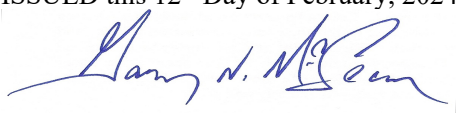
4. For reasons set forth in the Findings of Fact, all of the appellants specific issues on appeal must fail, because the District successfully presented credible testimony and documentary evidence, including unrebutted expert reports, to prove that the DNS is supported by a preponderance of evidence in the Record. This is of particular importance in an appeal such as this, where the challenged threshold determination is accorded substantial weight.

5. Any finding or other statement contained in this Recommendation that is deemed to be a Conclusion of Law is hereby adopted as such and incorporated by reference.

VI. RECOMMENDATION.

The above-captioned appeal should be denied. The Determination of Non-Significance (DNS) for the John Muir Elementary School Early Learning Addition Project should be affirmed. Bid documents should be carefully prepared and include specific language to obtain the information and certifications addressed in this Recommendation.

ISSUED this 12th Day of February, 2024



Gary N. McLean, Hearing Examiner