OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

COPPER RIDGE, LLC., a Washington limited liability company, **Appellant,** **v.** **CITY OF TACOMA,** a Washington Municipal corporation, through its Planning and Development Services Dept., **Respondent.**	**HEX2024-018** **(LU22-0244)** **DECISION AND ORDER ON APPEAL OF MITIGATED DETERMINATION OF NONSIGNIFICANCE**

THIS MATTER came on for hearing before JEFF H. CAPELL, the Hearing Examiner for the City of Tacoma, Washington, (the "City"), on October 17, 2024 (the "Appeal Hearing"). Appellant Copper Ridge, LLC ("Appellant" or "Copper Ridge") was represented at the hearing by attorney Heather Burgess, of Dickson Frolich Phillips Burgess PLLC. The City's Planning and Development Services Department ("PDS") was represented by Chief Deputy City Attorney Steve Victor.

PROCEDURAL BACKGROUND

On September 24, 2024, the City issued a Mitigated Determination of Nonsignificance ("MDNS") threshold environmental determination for a full subdivision Plat permit (the "Plat") that was accompanied by a Planned Residential Development ("PRD") Major Modification (collectively "PRDMM"), and a Critical Area Minor Development

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

Permit ("CAMDP"). Copper Ridge was the applicant for all of the foregoing. During the 14-day appeal period for the MDNS, Copper Ridge filed a Notice of Appeal of the MDNS on October 8, 2024 (the "MDNS Appeal"). The MDNS Appeal challenged certain conditions the City imposed on the project intended for development if the Plat, PRDMM and CAMDP are approved (the "Project").

The MDNS Appeal hearing was held on October 17, 2024, continued one week from the public hearing conducted on the Plat and the PRDMM on October 10, 2024. The continuance was requested by the City, due to the unavailability of City legal counsel, and granted over the objection of the Applicant. The continuance allowed the Applicant to also retain legal representation for the MDNS Appeal. The MDNS Appeal hearing was then held on October 17, 2024. In its appeal, Copper Ridge challenged the MDNS's mitigation measures 1 and 2 under the headings "Historic & Cultural Preservation," and "Traffic" respectively. In the interim week between the Plat hearing and MDNS appeal hearing, the parties held discussions in an attempt to resolve the MDNS Appeal short of a hearing and decision from the Hearing Examiner.

At the appeal hearing, the parties informed the Hearing Examiner that the City was rescinding MDNS mitigation condition Number 1, which required a cultural resources assessment, while acknowledging that the requirement for an inadvertent discovery plan will still be required by law. Thereafter, Copper Ridge clarified that its appeal was now narrowed to challenging only MDNS Traffic mitigation condition Number 2, at Bullet #3, that requires

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

the construction of 460 linear feet of sidewalk from the northeast corner of the Project boundary to connect with an improved entrance to Charlotte's Blueberry Park.[1]

At the close of the hearing, the parties proposed to submit written closing arguments. The Hearing Examiner granted the parties' request and set the deadline for filing written closing arguments via email on October 24, 2024, by the close of business (5:00 p.m.). The parties' written arguments were received and considered.

FINDINGS OF FACT

The Findings of Fact[2] presented here offer contextual background to the Decision herein and borrow heavily from both the PRDMM Decision and the Plat/CAMDP Decision that were issued contemporaneously with this MDNS Appeal Decision, as well as from the more concise factual statements presented in the parties' written closing arguments. Facts are also taken obviously from testimony and submissions at the Appeal Hearing and is so indicated by citation.

1. Environmental review of the Plat was required under the State Environmental Policy Act (SEPA) because Copper Ridge proposes subdividing the existing eight parcels that make up the Site into more than 20 new single-family residential buildable lots, and Site grading is anticipated to exceed 500 cubic yards. The City's Planning and Development Services ("PDS") staff and the City's SEPA official conducted an environmental review of Copper Ridge's package of permits (primarily the Plat, but also accounting for the PRDMM

[1] Relative to the MDNS's Traffic condition bullet #3, the City's Staff Report (Ex. C-1) recommends imposing Condition of Approval I.31. If Copper Ridge were to prevail in this MDNS Appeal and the MDNS Traffic, bullet #3 mitigation measure were removed, the Applicant requests that Condition of Approval I.31. also be eliminated in the concurrent land use permit decisions. The City has conceded that if Copper Ridge's MDNS Appeal is successful, Condition of Approval I.31. need not be imposed.

[2] "Findings of Fact" may be abbreviated herein as "FoF."

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

and CAMDP), and the PDS Director issued the MDNS appealed here. *Harala Testimony, Deaver Testimony, Mann Testimony; Ex. C-1, Ex. C-2, Ex. C-4, Ex. C-5, Ex. C-6.*

2. Copper Ridge applied to the City for approval of a 119-Lot[3] full Plat Subdivision called the "Preserve" (again the "Plat") and PRDMM on the approximately 28.21-acre Site,[4] together with the above referenced CAMDP. The Project includes the improvement of a trail running through the Subject Property more or less in line with an existing storm line easement. The proposed trail would connect from East 80th Street on the south all the way to Charlotte's Blueberry Park[5] on the north. The trail is not proposed to be hard surfaced or ADA compliant for traversal. At the point the trail will connect with the Park, there is a gravel/dirt path, also not ADA compliant for traversal, that leads into the Park. *Hanson Testimony; Ex. A-2, Ex. C-1, Ex. C-6*.

3. As presently proposed, the Project will provide street improvements fronting the Project along the west side of East D Street that will include ADA compliant sidewalk connecting to the southeast corner of the Park. Copper Ridge witnesses testified that there is an entrance to the Park at this southeast corner that would provide access to the Park for denizens of the Preserve. This southeast corner access point into the Park itself is not ADA

//

//

//

[3] Previous iterations of the Plat had 127 lots proposed. The parties clarified at the hearing that the Plat under consideration for approval of all reviews and permits is the version with 119 proposed lots/residential dwelling units.

[4] The Site currently consists of eight, individual tax parcels as follows: 0320284097,0320284064, 0320284096, 0320284098, 0320284228, 0320284227, 0320284226, 0320284225. The Site is also referred to herein, as in the accompanying Plat and PRDMM decisions, interchangeably as the Subject Property.

[5] Charlotte's Blueberry Park may be referred to herein with the capitalized term the "Park" for brevity.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

compliant.[6] *Van Aken Testimony, Deaver testimony, Mann Testimony, Hanson Testimony; Ex. A-2, Ex. C-1.*

4. In order to obtain approval, the Plat has to make "appropriate provisions" for a laundry list of items set forth in both state law at Revised Code of Washington 58.17.110(2) and Tacoma Municipal Code 13.04.100.E.[7] Among this laundry list of provisions are included in part, "[o]ther public ways;,,,parks and recreation; playgrounds;…and all other relevant facilities,[8] including sidewalks…" *Harala Testimony, Deaver Testimony, Mann Testimony; Ex. C-1; see also the Plat/CAMDP Decision*.[9]

5. Similarly, for the PRDMM to be approved, there are numerous criteria that the proposed Project must meet. Among these are the following that the Examiner finds relevant to this MDNS Appeal:

> (a) Due consideration shall be given by the developer or subdivider to the allocation of suitable areas for schools, parks, playgrounds, and other necessary facilities to be dedicated for public use or purposes.[10]
>
> (b) Pedestrian-friendly design. The proposal must provide direct and convenient pedestrian access from each dwelling to abutting sidewalks and public pathways, and must emphasize pedestrian connectivity and the high quality of the pedestrian experience within the site and in the abutting public right-of-way.[11]
>
> (c) Create usable outdoor (or yard) spaces. The proposal must provide usable and functional outdoor or yard space that will be an amenity to its residents. These

---

[6] It is questionable whether it is truly even an access point. At least in part because the evidence of the southeast corner access point was not completely clear, and also to see the Subject Property and the Park better, the Examiner conducted a site visit on October 18, 2024. Per Hearing Examiner Rule of Procedure 1.15, site visits are not evidence, but rather are intended "to assist the Examiner in understanding the evidence presented at hearing." The site visit filled its purpose of enhancing the Examiner's understanding in regard to many things, including the southeast corner "access point" to the Park. A picture of the southeast corner access point is attached hereto as Attachment 2.

[7] These sources are abbreviated herein respectively as "RCW" and "TMC" as is commonly done.

[8] The RCW version reads "facts" instead of the TMC's "facilities."

[9] Citations are made to the admitted record for the MDNS Appeal portion of the hearing unless there is a specific reference to overall hearing record specifically called out.

[10] TMC 13.06.070.C.4.n.

[11] TMC 13.06.070.C.5.b.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

outdoor spaces shall be provided per the open space requirements of this section.[12]

(d) Connectivity. Proposed PRD Districts shall connect with and continue the abutting street network, to provide for a continuous connection with the neighborhood pedestrian, bicycle and vehicular pathways, to the maximum extent feasible.[13]

(e) Preliminary plats within PRD Districts shall connect with and continue the abutting street network, to provide for a continuous connection with the neighborhood pedestrian, bicycle and vehicular pathways, unless specifically exempted by the City Engineer.[14]

(f) And finally, the decision maker may consider factors such as the design, configuration and layout of infrastructure and community amenities.[15]

6. The Subject Property is heavily constrained by Critical Areas and therefore Copper Ridge proposes developing only an approximately 10-acre area in the southeast corner of the Site. Although limiting the developed area in this manner leaves ample Open Space areas on the Subject Property, most of the Open Space areas in the Plat will not be accessible to the denizens of the Preserve for any park, playground or recreational uses because of the use restrictions that attach to the Critical Areas. *Ex. A-2, Ex. C-1, Ex. C-2, Ex. C-6, Ex. C-4 and also Ex. C-4 of the Plat hearing, specifically the City's Tech Memo*.

7. Because of the Critical Areas constraints, the Plat/Project does not propose any playground, park or recreational facilities within the confines of the Subject Property. As a result, Copper Ridge relies heavily on the presence of Charlotte's Blueberry Park

//

//

[12] TMC 13.06.070.C.5.e.
[13] TMC 13.06.070.C.5.g.
[14] TMC 13.06.070.C.6.c.
[15] TMC 13.05.130.F.2.a.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

immediately to the north of the Site to meet the parks, playgrounds and recreation provision requirements for approval of the Plat and the PRDMM. This reliance will create a not insignificant amount of pedestrian traffic from the Project to the Park. *Hanson Testimony, Ex. A-2, Ex. C-1, Ex. C-3, Ex. C-4, Ex. C-8, as well as the overall hearing record from the Plat portion of the hearing*.

8. At Finding of Fact 37 of the MDNS, in the subsection titled "Transportation," the PDS Director in his role as the SEPA Responsible Official found as follows:

> 37. A review by the Public Works Engineering Division indicates that the traffic volumes generated by the project would not result in significant adverse impacts on the City's street system. After consideration of the applicant's Traffic Impact Analysis (TIA) dated July 22, 2022, by Heath & Associates, the City has determined that the applicant and representative have conducted a reasonable analysis of the probable traffic conditions. Mitigation is required for consistency with the Transportation Master Plan goals and policies to "prioritize the movement of people and goods via modes that have the least environmental impact and greatest contribution to livability in order to build a balanced transportation network that provides mobility options, accessibility, and economic vitality for all across all neighborhoods." Based on the impacts identified in the TIA, mitigation has been identified below. *Ex. C-2.*

The mitigation identified in the last sentence immediately above came in paragraph 2, at the third bullet of section 2 of the Conclusions of the Responsible Official, which reads:

> • In concurrence with Traffic Engineering, Site Review requires that cement concrete sidewalk shall be additionally constructed abutting the site along the west edge of East D Street from the north end of the project site up to and connecting with the paved path into Charlotte's Blueberry Park near East 75th Street. New sidewalk shall be five feet wide, meet Public Right-of-Way Accessibility Guidelines and requirements set forth by the Americans with Disabilities Act (the "Challenged Condition"). *Ex. C-2.*

9. Copper Ridge argued that,

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

(a) because the Project will construct a new trail connection through the Subject Property connecting to Charlotte's Blueberry Park, and

(b) because the Project will improve the frontage of the Subject Property along the west side of East D Street with ADA compliant sidewalk "terminating at the Charlotte's Blueberry Park property line in close proximity to an existing unimproved park access,"[16] and

(c) because there is an existing sidewalk on the opposite side of East D Street over which pedestrian travel can be had from the Project, once East D Street is crossed, to the entrance into Charlotte's Blueberry Park across from East 75th Street, but after crossing back from east to west over East D Street, and because of the availability of existing sidewalk access to reach the Park located on the opposite side of East D Street,

the Challenged Condition is unnecessary, and because of this lack of necessity, coupled with the cost of the Challenged Condition, the City's imposing it was clearly erroneous under SEPA, and therefore the Challenged Condition should be removed from the MDNS. Copper Ridge argued further that the Challenged Condition violated RCW 82.02.020's prohibition against indirect taxes, fees, or charges "[o]n the construction or reconstruction of residential buildings,…or on the development, subdivision, classification, or reclassification of land." *Deaver Testimony, Mann Testimony; Appellant's Closing Argument*.

10. Charlotte's Blueberry Park is somewhat divided north and south with the southern (roughly) half being heavily forested and not developed with any particular public amenities, except possibly soft-surface trails.[17] The northern half is developed with the Park's namesake blueberry bushes in great number, a community garden and a playground. There appears to be no automobile parking interior to the Park, which further necessitates

//

[16] Appellant's Closing Argument, p. 2 of 12.
[17] See Attachment 1.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

pedestrian travel to the Park from the Project. *Hanson Testimony; see also City Dart Map*[18] *capture attached as Attachment 1 hereto; https://www.metroparkstacoma.org/ place/ charlottes-blueberry-park/.*

11. Once completed, the Project may house as many as 357 residents in the 119 single-family townhomes. Undoubtedly, many will want to frequent the Park for park, playground and recreational purposes, as well as specifically for things like blueberry picking and participating in the community gardens. Statistics provided by the City show that somewhere in the range of 10 to 20% of those new residents of, and presumed Park users from the Preserve will have disabilities.[19] Hanson's testimony focused generally on a 12% figure. *Hanson Testimony; Ex, C-4*.

12. Hanson testified that the sidewalk on the east side of East D Street (the "East Side Sidewalk") is likely not ADA compliant. He offered his opinion that the East Side Sidewalk is not adequate access to the Park from the Project because it is likely not ADA compliant, it creates the need to cross East D Street twice with the likelihood of increased traffic incidents as a result, and future residents of the Preserve will likely not cross East D Street to use the East Side Sidewalk, but rather will take the more direct path of least resistance and walk in the street on the west side. *Hanson Testimony*.

[18] "Courts routinely take judicial notice of maps." *State v. Nichols*, 161 Wn.2d 1, 5 n.1, 162 P.3d 1122, 1123 (2007) *internal cites omitted*. Maps, distances, and directions may be subject to judicial notice under ER 201. *Concerned Friends of Ferry County v. Ferry County*, 191 Wn. App. 803, 825, 365 P.3d 207 (2015). Hearing Examiner Rule of Procedure 1.11(d) allows for taking notice of commonly understood facts.

[19] During Copper Ridge's cross-examination of Hanson on this point (and again in its Closing Argument), it appeared that Copper Ridge was indicating (through counsel rather than a witness) that none of the proposed 119 townhouse units will have ADA facilities, and further implying that no persons with disabilities would take up residence in the Preserve as a result. The Examiner finds these inferences to be a flawed. People with disabilities have had to find housing where it is available since well before ADA standards were in place and the same is true now. People with disabilities certainly are not restricted to living only in housing with features that accommodate them. Certainly, Copper Ridge is not suggesting that persons with disabilities will not be welcome at the Preserve.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

13. Hanson was asked on cross-examination whether crosswalks from the west to the East Side Sidewalk would sufficiently mitigate the City's indicated impact/concern. Hanson testified that crosswalks would still not address the direct route concern.

14. Copper Ridge's witnesses testified that complying with the Challenged Condition would possibly require removal or relocation of an existing fence fronting along this stretch of the Park, possibly require relocation of utilities, possibly require removing trees and other vegetation, and possibly require additional provision of stormwater treatment. Mann estimated that if all these factors become reality, the Challenged Condition could add approximately $100,000.00 in cost to the Project, and that such cost would add to the cost of the townhomes to be developed. *Deaver Testimony, Mann Testimony*.

15. Any conclusion of law[20] herein which may be more properly deemed a finding of fact[21] is hereby adopted as such.

AUTHORITY, ANALYSIS AND CONCLUSIONS OF LAW

1. As an appeal of the City's issuance of a Mitigated Determination of Nonsignificance, the Hearing Examiner has jurisdiction over the parties and subject matter in this proceeding. *TMC 1.23.050.B.2, 10, and 24; TMC 13.12.820.*

2. The hearing is a *de novo* proceeding under TMC 1.23.060.[22] In conjunction with the foregoing, the TMC, SEPA and controlling case law clearly provide the more granular standard of review that governs an MDNS appeal proceeding, as set forth below.

3. TMC 1.23.070, "Burden of proof" established that, "For the adjudicatory

[20] Conclusions of Law may be abbreviated as "CoL" hereafter.
[21] Finding of Fact may be abbreviated hereafter as "FoF."
[22] TMC 13.12.820.B.4.d. states that "The public hearing shall be conducted in accordance with the provisions of Chapter 1.23 of the Tacoma Municipal Code."

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

matters set forth in subsection B of Section 1.23.050 [of which this MDNS Appeal is one], unless otherwise provided by law, the party seeking review has the burden to establish, by a preponderance of the evidence, that the matter is consistent or inconsistent with applicable legal standards and the lower decision should be reversed or otherwise modified.

4. TMC 13.12.820, of the City's Environmental Code (TMC Chapter 13.12), specifically governs appeals of SEPA threshold determinations such as the one on appeal here. TMC 13.12.820.B.4.f, titled "Evidence – Burden of Proof" states that in each proceeding: "[t]he appellant shall have the burden of proof, and the determination of the responsible official shall be presumed *prima facie* correct and shall be afforded substantial weight."

5. The above comports with RCW 43.21C.090 which states: "In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a 'detailed statement,' the decision of the governmental agency shall be accorded substantial weight."

6. In the context of appealing an MDNS, our state courts have been succinct in stating "We accord substantial weight to an agency's decision to issue an MDNS and not require an Environmental Impact Statement (EIS)."[23] Here, the MDNS is the agency's (the City) decision and the inclusion of the Challenged Condition is an integral part of that decision. It is the "M" in the MDNS.

7. The foregoing weight/deference notwithstanding, in a more typical case where third parties are challenging the issuance of an MDNS, "If an MDNS is issued and an

[23] *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 141 (2002).

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

appealing party proves that the project will still produce significant adverse environmental impacts, then the MDNS decision must be held to be 'clearly erroneous' and an EIS must be promulgated."[24] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[25] Here, there is no third-party challenge. Rather the Applicant is contesting the City's imposition of the Challenged Condition. Nonetheless, Copper Ridge still must show that the Challenged Condition is clearly erroneous for its removal to be warranted.

8. Given the requirements to "afford substantial weight" to the City's determination to include the Challenged Condition, and only overturn that decision if it is shown to be clearly erroneous, the Examiner's review on appeal does not allow him to substitute his own judgment wholesale for that of the Planning Director/City SEPA Official. To the contrary, as just explained, the Examiner is required to give the Director's decision substantial weight. In the appeal process, the Examiner must weigh the evidence of what transpired in the environmental review process that led to the MDNS (and inclusion of the Challenged Condition), together with the evidence from the hearing, and he then must determine whether the City, as the SEPA agency having issued the MDNS, can make a prima facie case for having followed the requirements of SEPA and its accompanying regulations in WAC 197-11 in its review of the permit. If a *prima facie* showing is made, the Appellant's evidence must then overcome that prima facie showing to prove that the issuance of the

//

[24] *Anderson*, 86 Wn. App. at 304.
[25] *Brown,* 30 Wn. App. at 764.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

MDNS was clearly erroneous, or as stated above, after weighing the entirety of the evidence, the Examiner must be left with the definite and firm conviction that the inclusion of the Challenged Condition was a mistake.

9. Perhaps the most complete and most current statement of the MDNS appeal review standard(s) comes from a recent environmental decision of our state Supreme Court in *Wild Fish Conservancy v. Dep't of Fish & Wildlife*, 198 Wn.2d 846, 866-67, 502 P.3d 359, 370 (2022) which reads:

> We apply the "clearly erroneous" standard of review when reviewing an agency's decision to issue an MDNS and not require an EIS. We look beyond whether substantial evidence exists to support the agency's decision. Rather, we review the entire record and determine whether, based on the entirety of the evidence, we are "left with the definite and firm conviction that a mistake has been committed." *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 926, 319 P.3d 23 (2014) (internal quotation marks omitted) (quoting *Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969)). When reviewing a SEPA action, "the court is required to consider the public policy and environmental values of SEPA as well." *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977). A review of the record must show that "'environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.'" *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 286-87, 232 P.3d 1154 (2010) (quoting *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973)).

10. In reviewing a SEPA action, a reviewing agency, such as the City here, can make essentially one of three types of threshold determinations: (a) a determination of significance which will then require an EIS, (b) a determination of non-significance ("DNS") which requires nothing additional, or (c) a mitigated determination of non-significance (MDNS), as the City determined here. An MDNS is a determination that the Project being reviewed has some impacts that are significant, but that they can be successfully mitigated

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

below levels of significance.

11. Appeals brought under SEPA must generally be linked to a specific governmental action.[26] SEPA goes on to state that "Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations."[27] TMC 13.12.820 incorporates RCW 43.21C.075 and with certain exceptions that do not apply here, requires that "[a]ppeals on Environmental Determinations shall be heard at the same time as appeals on the underlying governmental action…"[28] This MDNS Appeal was conjoined with the Plat hearing, and the PRDMM and CAMDP were conjoined with the Plat proceeding. This MDNS Appeal is not tied to any other appeal of an "underlying governmental action," however, because the decision issued on the Plat/PRDMM/CAMDP are first instance approvals, not appeals of an already final decision. Nonetheless, the MDNS Appeal was combined with these other permitting actions and the decisions on all are issued concurrently. The MDNS Appeal portion of the overall hearing mass was continued, but for only one week in order to keep things more or less contemporaneously conjoined. Copper Ridge made no showing of prejudice in regard to its objection to the one-week continuance. TMC 13.12.820.B.4.g. does allow for hearings to be continued.[29]

12. WAC 197-11-310(1) requires that the City perform "A threshold determination… for any proposal which meets the definition of action and is not

---

[26] *RCW 43.21C.075(1)*.
[27] *RCW 43.21C.075 (4)(c)*.
[28] *TMC 13.12.820.A*.
[29] The Examiner acknowledges that the circumstances here do not square entirely with TMC 13.12.820.B.4.g. in that the Applicant did not concur in the continuance. It seems odd that this subsection has the subtitle "Cause," but then seems to require the concurrence of the Applicant. The Examiner found cause to continue the MDNS Appeal portion of the hearing one week due to the City's legal counsel being unavailable. TMC 13.12.820.B.4.g(2)'s notice requirements were complied with in granting the continuance.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

categorically exempt…" The Project is such a proposal and it is not categorically exempt because of the number of lots/units Copper Ridge intends to develop and because of the amount of clearing/grading that will be involved with development of the Project.[30] The City's main task in making the threshold determination is to determine whether the action/project will result in "probable significant adverse environmental" impacts.[31] The City reviewed the Project through Copper Ridge's submitted SEPA Checklist and accompanying submissions and the City made its threshold determination in issuing the MDNS after significant review that included cooperative and coordinated review over all affected/ interested City and state agencies and departments. The City's review shows that "[e]nvironmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA."[32] The Applicant does not claim that prima facie compliance with SEPA's procedural requirements is absent in its appeal.[33]

13. Regarding SEPA appeal hearings, TMC 13.12.820.B.4.e. provides the following framework as bases for reviewing a SEPA challenge and determining whether (a) to affirm the "responsible official," (b) to remand the decision, or, as Copper Ridge requests here, (c) to reverse the decision to require the Challenged Condition:

> The Hearing Examiner may affirm the decision of the responsible official or the adequacy of the environmental impact statement, or remand the case for further information; or the Examiner may reverse the decision if the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions as applied; or

---

[30] FoF 1, 2.
[31] WAC 197-11-330(1)(b); RCW 43.21C.031.
[32] *Wild Fish Conservancy,* 198 Wn.2d at 866-67.
[33] Copper Ridge does use the words "prima facie" in its claim that the City failed to identify any adverse impacts in the MDNS that would support the Challenged Condition, but that contention differs from whether the City prima facie procedurally complied with SEPA in its review leading to the MDNS.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

> (2) The decision is outside the statutory authority or jurisdiction of the City; or
> (3) The responsible official has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; or
> (4) In regard to challenges to the appropriateness of the issuance of a DNS clearly erroneous in view of the public policy of SEPA; or
> (5) In regard to challenges to the adequacy of an EIS shown to be inadequate employing the "rule of reason."

Subsection (5) will not be considered in this Decision because the adequacy of an EIS is not at issue here. All other subsections will now be considered, but not in the order presented in the TMC.[34]

14. **TMC 13.12.820.B.3.e.(3)—"The responsible official has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure…"** The Appellant argues that "The required sidewalk extension is not based on any specific, identified adverse impacts of The Preserve which are not adequately mitigated by other proposed pedestrian improvements."[35] As regards any specific, identified impact(s) and the Challenged Condition, the City's traffic engineers reviewed the Plat/Project for adverse impacts and determined in their updated traffic comments memo dated September 18, 2024, that as a result of "Additional pedestrian trips [ ] expected to travel north of the site on E D Street as a result of the new residences proposed," that the sidewalk connection now challenged should be constructed "To mitigate the impacts of existing and new pedestrian trips and to promote pedestrian safety by separating pedestrians from increased vehicle traffic and

[34] It is possible to read *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 39, 252 P.3d 382 (2011) as holding that only subsection (4) here applies to the review of an MDNS. Nonetheless, the Examiner looks beyond for the sake of completeness and because the other areas of review tie in to the issues presented.
[35] Appellant's Closing Argument, p. 5 of 12.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

on-street parking."[36] This analysis identifies the impact "in an environmental document on the proposal"[37] and clearly ties it to the added neighborhood population that the Project will bring, and then lays out the required mitigation measure. The MDNS itself could certainly have made a more detailed reference to this analysis, but the MDNS's brevity does not mean that the City failed to consider environmental factors "in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA," nor does it support Copper Ridge's contention that adverse impacts have not been adequately identified. Finding of Fact 37 in the MDNS does call out the City's Transportation Master Plan goals and policies that "prioritize the movement of people" in order to "provide[ ] mobility options, accessibility, and economic vitality for all across all neighborhoods."[38]

15. Finding of Fact 32 of the MDNS, titled "Recreation," also sets forth facts that directly support the Challenged Condition. This finding points out that there will be no adverse impacts to recreation, so long as mitigation is provided "to ensure that pedestrian connectivity is maintained and enhanced to the adjacent Charlotte's Blueberry Park." This is a clear identification of what would otherwise be an impact of the Project (lack of recreational opportunities) if not for imposition of the Challenged Condition, and it clearly ties to requirements of the Plat and PRDMM as well.

16. Finding of Fact 38 of the MDNS, identifies multiple City goals and policies toward enhancing neighborhood connectivity, environmental health and pedestrian safety. These all tie to the Challenged Condition as do all the factors from the TMC listed above at Findings of Fact 4 and 5 of this Decision that are material to the Examiner's approval of the

[36] Ex. C-3.
[37] TMC 13.12.810.A.2.
[38] Ex. C-2, the MDNS at FoF 37.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

Plat and the PRDMM. Copper Ridge's argument that it has provided enough in the way of street improvements without that Challenged Condition is not enough to convince the Examiner that the Challenged Condition is clearly erroneous. The soft surface trail through the Project that leads to the southern edge of the Park and the frontage sidewalk that leads to the southeast corner of the Park are fine, but they do not do much for appropriately providing safe access to the areas of the Park that provide park, playground and recreational opportunities to the Applicant's future home buyers. Access only to the southern border of the Park does not provide much that is materially different than the limited access to the Critical Areas present on the Subject Property. You can meet up with a nice, forested area, but for the real recreation, you still have a good distance to go, and that distance has to be traversed over what appears from the record to be an unpaved, non-ADA-compliant path from the Project's internal trail termination point at the southern border of the Park. For the East D Street Project-fronting sidewalk, it is dubious whether getting only to this southeast corner of the Park over the uncontested sidewalk improvements really gets you to an access point to the Park at all. At present, this "access" point is chained off and the path behind the chain is, at best, simply a semi-cleared foot path. While it may provide Park access for adventurous types who ignore chain blockages, it certainly will not provide meaningful Park access for less adventurous pedestrians with limitations that would benefit from (at least) a paved path, much less an ADA-complaint pathway.

17. The City did perform its prima facie consideration/review process and did identify specific impacts tied to City environmental goals and policies both in the MDNS and

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

in the related Traffic Engineering Memo. Copper Ridge has failed to show by a preponderance that "The responsible official has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure."

18. "An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant."[39] The same is true in the MDNS context. An action or project significantly affects the environment "whenever more than a moderate effect on the quality of the environment is a reasonable probability."[40] Here, it is a reasonable probability that, having as many as 357 new residents in this neighborhood who will rely heavily on the Park for their recreational opportunities, will create significant additional pedestrian trips to and from the Project and the Park.[41] Without reasonable, safe access to the Park, the lack of recreational opportunities has significant impacts on the denizens of the Preserve.

19. "[A] proposal must degrade the existing condition of the environment to have significant adverse impact. Mere failure to restore or improve environmental quality is not a significant adverse impact under SEPA."[42] The East Side Sidewalk is not ADA compliant, nor is it in particularly good condition.[43] Requiring denizens of the Preserve to cross East D Street twice in order to use the East Side Sidewalk to reach the Park will cause further degradation of the sidewalk. There are potential adverse impacts that come from having to cross East D Street twice to reach the Park as well, including the potential for pedestrian-

---

[39] RCW 43.21C.031(2).
[40] *Brown v. Tacoma,* 30 Wn. App. 762, 768, 637 P.2d 1005 (1981).
[41] FoF 7, 10, 11.
[42] *Wild Fish Conservancy v. Dep't of Fish & Wildlife*, 198 Wn.2d 846, 871, 502 P.3d 359 (2022), citing *Richard L. Settle, The Washington State Environmental Policy Act*: A Legal and Policy Analysis, at § 13.01[1]. Additional internal cites omitted.
[43] Hanson Testimony; Ex, A-3.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

motorist accidents that occur from street crossings. Copper Ridge's contentions regarding the internal trail, the sidewalk that terminates at the southeast corner, and the availability of the East Side Sidewalk being enough to mitigate the Project's added pedestrian traffic and provide access to the Park for park, playground and recreational needs of the Preserve is a bit like being tasked with taking your kids to the movie at the mall movie theater, but rather than driving them to the theater entrance at the mall, you drop them off across the street with no money for tickets. They might make it to the show, but it will take some added effort.

20. **TMC 13.12.820.B.4.e.(4)— "In regard to challenges to the appropriateness of the issuance of a DNS clearly erroneous in view of the public policy of SEPA."** As quoted above, "When reviewing a SEPA action, 'the court is required to consider the public policy and environmental values of SEPA…'"[44] The environmental values of SEPA are well represented in RCW 43.21C.010's purpose statement that reads:

> The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and [to] stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

The City was considering the stimulation of the health and welfare of human beings when it required the mitigating condition of providing meaningful access to the Park for the future denizens of the Preserve rather than boundary-edge, drop-off access, or leaving more meaningful sidewalk access to two street crossings leading to and from a non-ADA-compliant, aging sidewalk. Leaving potentially 357 new neighborhood residents without

[44] *Wild Fish Conservancy*, 198 Wn.2d at 866~867, citing *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977).

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

meaningful, safe, direct access to the recreational areas of the adjacent park upon which the Applicant relies for appropriate provision of park, playground and recreational opportunities certainly has an adverse impact on their health and welfare. Requiring this condition was not clearly erroneous in light of the record as a whole and the Examiner was not left with a definite and firm conviction that its inclusion was a mistake.[45] It appears from the Appellant's Closing Argument, that it may not be challenging this factor in any event by stating, "[t]he Applicant does not dispute that the challenged condition is based on the City's properly designated SEPA policies, which are enumerated in the MDNS."[46]

21. The Applicant disputed much of the City's testimony from the hearing as speculative.[47] When the task in SEPA review is to address potential adverse impacts of a Project yet to be built, it is difficult to not deal in speculation at least to a certain degree.[48] What is beyond dispute is "that the Project will generate additional pedestrian trips, [ ] [and] that some [and likely even a good] portion of those trips will be destined for Charlotte's Blueberry Park."[49] Copper Ridge's contention that the sidewalk extension required under the Challenged Condition (the "Sidewalk Extension") will only be used by a few of the homes directly adjacent to the sidewalk is unlikely. The Sidewalk Extension would provide the most direct, safest route to the main entrance to the Park off of East D Street without the need to cross East D Street or walk in the street or over unimproved grassy area. The City's speculation that without the Sidewalk Extension some people will walk in East D Street on

[45] *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 302, 936 P.2d 432, 439 (1997).
[46] At p. 5 of 12.
[47] See e.g., Appellant's Closing Argument, p. 7 of 12.
[48] Many of Copper Ridge's attacks on the City's justifications for the Challenged Condition were themselves speculative such as the insinuation that no disabled individuals will live in the Preserve if the townhomes offer no ADA features. Copper Ridge's testimony regarding the difficulty and cost of complying with the Challenged Condition is also largely speculative.
[49] *Id*.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

the west side rather than cross over is not that farfetched. Hanson's testimony in that regard, and in all regards really, was offered against his background as a traffic engineer.

22. **TMC 13.12.820.B.4.e.(2)—"The decision is outside the statutory authority or jurisdiction of the City."** The Challenged Condition must still withstand the scrutiny of RCW 82.02.020 and the constitutional constraints of nexus and proportionality. The Examiner looks first at Copper Ridge's contention that "[t]he required sidewalk improvement condition violates RCW 82.02.020's mandate that condition[s] on development be 'reasonably necessary as a direct result of the proposed development,'" because "if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues.[50] Our courts have held that where a statutory and constitutional issue both present, if the issue can be resolved on the statutory basis, the constitutional issue can remain untouched. This has occurred most often where a court has invalidated a land use permitting condition under RCW 82.02.020 and therefore did not go further to decide strictly whether the permitting condition violated the nexus and proportionality limitations of *Nollan* and *Dolan*.[51]

23. Copper Ridge's contention that the Challenged Condition violates RCW 82.02.020 is based on the "reasonably necessary" language of the statute. Copper Ridge has not made any showing that the Challenged Condition is not a "direct result of the proposed development or plat." To the contrary, in its Closing Argument, Copper Ridge stated that, "The Applicant does not dispute that the Project will generate additional pedestrian trips, or

[50] *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860, 864 (2002); s*ee also, State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992); *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000).
[51] *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 835 n.4, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)*; Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

that some portion of those trips will be destined for Charlotte's Blueberry Park."[52] This admission is entirely unsurprising given the Project's heavy reliance on the Park to meet its Plat and PRDMM approval criteria of having to provide park, playground and recreational facilities/opportunities, and neighborhood connectivity for the future occupants of the Preserve.[53]

24. The remaining question then is whether the Challenged Condition is reasonably necessary under RCW 82.02.020. The Examiner notes here that the standard is "reasonably necessary" not one of absolute necessity. In other words, access to the Park does not have to be entirely unavailable to denizens of the Preserve without the Sidewalk Extension for the Challenged Condition to be reasonably necessary. The Sidewalk Extension ***is reasonably necessary*** on the hearing record because without it denizens of the Preserve only have access to the Park at areas significantly removed from the actual park, playground and recreation areas, and to get to them, Preservists[54] would have to either travel across soft-surface, non-ADA-complaint paths, or go through the circuitous route that requires two crossings of East D Street using a non-ADA-compliant sidewalk on the opposite side of the street from the Project and the Park. Hanson outlined the City's concerns with leaving access to the Park in the condition that Copper Ridge proposes is sufficient, i.e., without the Sidewalk Extension. Is it possible to reach all areas of the Park without the Sidewalk Extension? Yes, but probably not for all Preservists because of the condition of the Parks interior trails, especially the trails at the southern border of the Park. Does the Challenged Condition solve this problematic aspect of access? Yes.

[52] Appellant's Closing Argument, p. 7 of 12.
[53] FoF 4, 5, 7.
[54] Short form reference for future denizens of the Preserve henceforth.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

25. Copper Ridge looks to *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998) for support that the City has violated RCW 82.02.020. This reliance is misplaced. In *Burton*, the county conditioned approval of a three-lot short plat on the property owner's dedication of a right-of-way and further requiring the owner to shoulder responsibility of building a road, curbs and sidewalks on that right-of-way. The court found that, even though the new road would serve the new short plat, the county was exacting the road essentially to create an extension of public right-of-way to further the county's overall right-of-way extension plans for the future as opposed to simply addressing a problem created by the short plat. The county had no concrete plans for when the required street extension would actually connect to the future point the county intended. Here, Preservists' use of the Sidewalk Extension is very likely to be immediate, and the connection is direct to its ultimate intended destination. As such, Burton's facts are different from the present appeal. Where the county overreached in *Burton* to have the owner provide something the county wanted that did not have much to do with the owner's plat, the problem of access to the Park here arises squarely from the approximately 357 new residents in the Preserve who will be heavily dependent on the existing Park for their recreation. The "public problem" addressed is ensuring appropriate safe access for Preservists to parks, playground and recreational facilities. The need to address this public problem is essentially codified in 58.17.110(2) and Tacoma Municipal Code 13.04.100.E. The need is intended to be addressed by requiring the appropriate provision of parks, playground and recreational facilities of the owner in order to approve plats. Copper Ridge is providing no park, playground or recreational facilities itself within

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

the Plat, but is being required to provide reasonably necessary safe and direct access thereto instead.

26. The Challenged Condition does solve or alleviate the problem by giving safe, direct access to the closest hard surface entrance to the Park within reasonable distance of the actual recreational facilities.

27. Not running afoul of RCW 82.02.020 also requires that the Challenged Condition be "[r]oughly proportional to that part of the problem that is created or exacerbated by the landowner's development." The Challenged Condition substantially advances a state/city interest that denizens of new development (in subdivided property) have appropriate access to park, playground and recreational facilities.[55] Developers must also make appropriate provision for "[o]ther public ways;,,,; and all other relevant facilities, including sidewalks…"[56] Here, the Sidewalk Extension is the way for Preservists to have safe, direct access to parks, playgrounds and recreation. If not for the Project, the Challenged Condition's access route to the Park is not necessary. With approximately 357 Preservists in 119 new townhomes, better, safer, direct access to the Park is reasonably necessary.

28. Copper Ridge testified that the Sidewalk Extension might be complicated and could cost as much as $100,000 to complete. Showing rough proportionality does not require exact mathematical figures. The *Burton* court summed up the path to determining proportionality as follows:

> [t]he government must show that its proposed solution to the identified public problem is "roughly proportional" to that part of the problem that is created or exacerbated by the landowner's development. Thus, as already seen, the *Dolan* Court posed the question, "W]hat is the required degree of connection between [1] the exactions imposed by the city and [2] the projected impacts of the

[55] FoF 4, 5.
[56] TMC 13.04.100.E.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

> proposed development." It answered by saying that the required connection was a "reasonable relationship" best described by the term "'rough proportionality," and that the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." The Washington Supreme Court ruled similarly in *Sparks v. Douglas County,*[57] where it noted that a regulatory exaction must be "reasonably calculated to prevent, or compensate for, *adverse public impacts of the proposed development.*"[58]

A 119-lot/unit residential development creates the need for parks, playgrounds and recreational facilities. The nature or nexus comes from the requirement for such a new development to make appropriate provision for these facilities. When the development relies entirely on off-site facilities to satisfy these required provisions, there is a sufficient nexus with requiring the developer to provide safe access to those off-site facilities, not just bare minimum access. Besides the Plat provision requirements in the RCW and TMC, this kind of connection is represented in the TMC 13.06.070.C.5.g. PRD requirement above (*FoF 5*) "[t]o provide for a continuous connection with the neighborhood pedestrian, bicycle and vehicular pathways, to the maximum extent feasible.

29. In its Closing Argument, Copper Ridge stated that "[a]lthough…the sidewalk improvement may prove complicated to construct, and will certainly be expensive, the 460-foot sidewalk extension is likely 'reasonable and capable of being accomplished' as that standard has been interpreted by the courts."[59] The Examiner does not disagree with any of the forgoing statement. The Sidewalk Extension (Challenged Condition) is a reasonable way to provide meaningful, safe access to the Park in order for Preservists to enjoy an appropriate provision of park, playground and recreational opportunities/facilities to their occupancy in

---

[57] *Sparks v. Douglas County,* 127 Wn.2d 901, 907, 904 P.2d 738 (1995).
[58] *Burton*, 91 Wn. App. at 523-24.
[59] At p. 5 of 12, citing *Town & Country*, 161 Wn. App. at 56–57; and *Kiewet Constr. Group Inc. v. Clark Cnty.*, 83 Wn. App. 133, 920 P.2d 1207 (1996).

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

the neighborhood. A cost of $100,000 seems expensive, but for a new development of 119 new lots/units having a potential occupancy of 357 people, it is not disproportionate. The $100,000 cost of the Sidewalk Extension spread over the 119 proposed lots/units comes to a per lot/unit cost of approximately $840.35. This cost is roughly proportionate to the impact here.

30. The Challenged Condition does not violate RCW 82.02.020 because the Sidewalk Extension is directly connected to the neighborhood transportation, connectivity and recreational impacts created by the Project, and because the cost is roughly proportional to the magnitude of the development and the impact it creates in these areas.

31. **TMC 13.12.820.B.4.e.(1)—"In violation of constitutional provisions as applied."** In many instances, Hearing Examiners do not have the authority to determine constitutional issues.[60] Several court opinions have held that the extent of a Hearing Examiner's jurisdiction is only as extensive as what its creating body can, and does expressly grant.[61] Here, TMC 13.12.820.B.4.e.(1) does give the Examiner the authority to examine whether a SEPA condition is "In violation of constitutional provisions as applied."

32. An "on its face" or "facial" constitutional challenge is one that claims the statute or ordinance in question is constitutionally infirm, usually in the way it is written/enacted, and should therefore be invalidated. Conversely, an "as applied" constitutional challenge takes no issue with the way a statute or ordinance is written necessarily, but rather challenges

[60] *See e.g., Miller v. City of Sammamish*, 9 Wn. App. 2d 861, 447 P.3d 593 (2019)*; Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-587, 113 P.3d 494, 500-501 (2005); *Prisk v. Poulsbo*, 46 Wn. App. 793, 732 P.2d 1013 (1987).

[61] Again, *Miller v. City of Sammamish*, 9 Wn. App. 2d 861, 447 P.3d 593 (2019)*; Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-587, 113 P.3d 494, 500-501 (2005); *Prisk v. Poulsbo*, 46 Wn. App. 793, 732 P.2d 1013 (1987). The Examiner notes here that the foregoing cases all seemed to deal with facial constitutional challenges and not as-applied challenges as expressly referenced in TMC 13.12.820.B.4.e.(1).

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

the way that statute or ordinance is applied to the particular set of facts presented. If successful, an as applied challenge could narrow or even nullify that statute or ordinance's effect on the challenging party.[62] Copper Ridge asks for such a nullification of the Challenged Condition.

33. Copper Ridge raised the constitutional issues of nexus and proportionality which were already addressed in some detail above in the context of the RCW 82.02.020 analysis. The rules and analysis outside the RCW 82.02.020 context are the same.[63] The "nexus" and "rough proportionality" tests in a constitutional analysis are referred to commonly as the *Nollan/Dolan* tests, as already referenced above, after the United States Supreme Court's decisions in *Nollan v. California Coastal Comm'n* and *Dolan v. City of Tigard.*

34. Nexus exists between the Project and the Challenged Condition because the Project creates the transportation/traffic impact of several hundred people (the future Preservists) needing appropriate, safe access to recreational facilities, all in order to not incur the negative recreational impact of not having appropriate recreational facilities/ opportunities. There is a relationship between the problem of needing park, playground and recreational facilities for the Project and providing appropriate safe access to those facilities, and there is a relationship between that problem/impact and the Challenged Condition in that compliance with the Challenged Condition will solve the problem of appropriate, safe access

[62] It is worth noting that the distinction between facial and as applied challenges is not always clear even for our country's greatest legal minds. *See e.g., L.A. Police Dep't v. United Reporting Publ'g Corp.,* 528 U.S. 32, 120 S. Ct. 483, 145 L.Ed.2d 451 (1999). The U.S. Supreme Court has also stated that "the distinction between facial and as-applied challenges" does not necessarily have an "automatic effect" on a case. *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010).

[63] The Washington State Supreme Court has applied the *Dolan* "rough proportionality" test when analyzing the legality of mitigation conditions under RCW 82.02.020. RCW 82.02.020's "reasonably necessary" requirement follows from the *Nollan/Dolan* nexus test. *Town & Country Real Estate, LLC*, 161 Wn. App. at 38~39.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

to the Park.[64] While the absence of sidewalk at the location here exists prior to the existence of the Project, the Washington Supreme Court has held that a mitigation measure may be lawful under RCW 82.02.020 even if it is mitigating a condition that existed before the new development.[65]

35. The Challenged Condition is roughly proportional to the Project and the impact addressed. The Appellant argues that the extent of the relationship between the Challenged Condition and the access issue is not sufficient to justify imposing the Challenged Condition. The Examiner disagrees. The limited and tenuous, particularly from the aspect of safety, access that Copper Ridge is willing to provide is not the kind of access that will actually facilitate the use of the Park especially by children from the Preserve. Parents are not going to want their children to have to access the recreational areas of the Park through soft trails passing through heavily forested areas, or by having to cross East D Street twice to get there. The Sidewalk Extension solves for safety and directness of access at an estimated cost of $840.35 per unit of the Project.

36. The City did determine that the Challenged Condition is necessary to mitigate an impact of the Project otherwise creates by having no on-site park, playground or recreational facilities. This was stated in Findings of Fact 32, 37 and 38. The Challenged Condition is not disproportionate to the impact caused by the Project. The Project needs the safe link that the Sidewalk Extension will provide in order for the Preservists of all ages to have appropriate, safe access to the Park. Based on the totality of the record, the Examiner

[64] *See Town & Country Real Estate, LLC*, 161 Wn. App. at 38; *Burton*, 91 Wn. App. at 522-524.
[65] *Town & Country Real Estate, LLC*, 161 Wn. App. at 39~40, citing *Isla Verde Int'l Holdings*, Inc. *v. City of Camas*, 146 Wn.2d 740, 760, 49 P.3d 867 (2002), abrogated on other grounds by *Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

cannot conclude that requiring the Challenged condition as mitigation in the MDNS was clearly erroneous or otherwise mistaken.

DECISION AND ORDER

1. Based on all the foregoing, Copper Ridge's appeal of the MDNS is denied. The Challenged Condition remains as a mitigation condition of the MDNS.

2. As the City points out in its Closing Argument, however, "[m]itigation cannot lawfully be used to stop a project." The City is hereby directed to find maximum flexibility in its review and permitting of the Sidewalk Extension (1) to use the right-of-way area available presently without relocating the existing fence if possible,[66] and (2) to keep the cost of the Sidewalk Extension down as much as possible.

3. If at any point in the development process, Copper Ridge believes complying with the Challenged Condition will make the Project financially infeasible, Copper Ridge may request a hearing before the Examiner to show such financial infeasibility and request modification, or propose functional equivalent alternatives.[67]

4. Except as modified above, the MDNS will otherwise remain in full force and effect, and this Decision shall be considered a part thereof.

DATED this 26th day of November, 2024.

JEFF H. CAPELL, Hearing Examiner

[66] This may also mean not requiring a planting/mowing strip between the curb and the sidewalk.
[67] The Examiner does, however, reject Copper Ridge's proposal for an asphalt path rather than a concrete sidewalk. *Appellant's Closing Argument,* fn. 43.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within l4 calendar days of the issuance of the Hearing Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Hearing Examiner. It shall be within the sole discretion of the Hearing Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Hearing Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

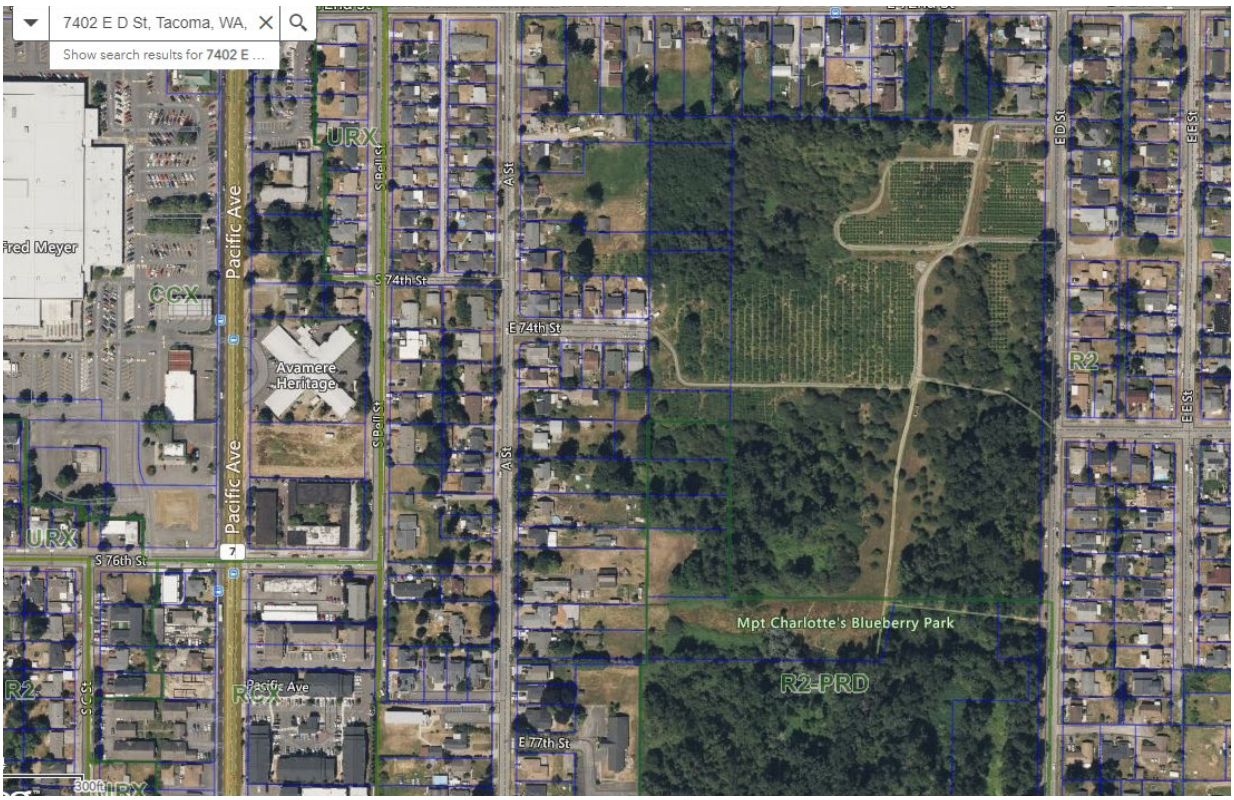
N O T I C E

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision is appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be commenced within 21 days of the entering of the decision by the Hearing Examiner, unless otherwise provided by statute.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

Attachment 1 – City Dart Map Aerial Photo of

Charlotte's Blueberry Park



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org

Attachment 2– Southeast Corner "Entrance"
to Charlotte's Blueberry Park

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
Ph: (253) 591-5195
hearing.examiner@cityoftacoma.org