

**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF DES MOINES**

In the Matter of the Appeal of	)	No. LUA2022-0044
	)	
<b>Jennifer Russo</b>	)	Des Moines Creek
	)	Business Park West
	)	
Of a SEPA Mitigated Determination	)	FINDINGS, CONCLUSIONS, AND
<u>Of Nonsignificance</u>	)	DECISION

**SUMMARY OF DECISION**

This appeal involves a challenge to a Mitigated Determination of Nonsignificance (MDNS) issued under the State Environmental Policy Act (SEPA) related to a request from Barghausen Consulting Engineers, Inc. (Applicant) for master plan approval and a variance to allow for the construction of an approximately 402,380 square foot light industrial building, with associated site improvements, on an approximately 30-acre vacant property within the Business Park zoning district, located to the northwest of the intersection at South 216th Street and 20th Avenue South.<sup>1</sup> Jennifer Russo (Appellant) alleges that the City of Des Moines (City) failed to comply with SEPA when conducting environmental review of the proposed project and that further environmental review is necessary. Because substantial evidence in the record supports the City’s decision to issue the MDNS, the appeal is **DENIED**.

**SUMMARY OF PROCEEDINGS**

Hearing Date:

The Hearing Examiner convened an open record hearing on the appeal of the MDNS on October 18, 2024. The record was left open until November 1, 2024, to allow for the submission of closing briefs.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

*Appellant Witnesses*

Barbara McMichael

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<sup>1</sup> The Hearing Examiner also held an open record hearing on the master plan and variance applications following the MDNS appeal. The Hearing Examiner’s findings, conclusions, and decision on the master plan and variance application is provided in a separate decision issued concurrently with this appeal decision, following a consolidated hearing as required by Washington Administrative Code 197-11-680(3)(v). *Hearing Examiner’s Findings, Conclusions, and Decision, Des Moines Creek Business Park West Master Plan and Variance, No. LUA2022-0044 (Permit Decision), dated November 21, 2024.*

Kathy McDonald  
Lloyd Lytle  
Sandra Hunt

Neither the City nor the Applicant elected to present any witnesses at the open record appeal hearing.

City Attorney and Interim City Manager Tim George represented the City at the appeal hearing. Attorney Nancy Bainbridge Rogers represented the Applicant at the hearing.

Exhibits:

The exhibits in Attachment A were admitted into the record. Attachment A also includes a list of pleadings, orders, and briefs related to the appeal.

**FINDINGS**

Application

1. On September 14, 2022, Dan Balmelli, of Barghausen Consulting Engineers, Inc. (Applicant), on behalf of Panattoni Development Company, Inc., submitted an application for master plan approval to allow for the development of an approximately 402,380 square foot light industrial building on an approximately 30-acre vacant property within the Business Park (BP) zoning district. Associated site improvements would include the installation of access driveways connecting to South 216th Street to the south and 20th Avenue South to the east, 381 off-street parking stalls, and improvements to an existing gravel trail that would be placed within an easement and dedicated to the City for public use. The City determined that the master plan application was complete on October 13, 2022. On August 25, 2023, the Applicant submitted an application for a variance from certain provisions of the City's critical areas ordinance, chapter 16.10 Des Moines Municipal Code (DMMC), to allow for the removal of ravine sidewalls that would remain on the property following the proposed realignment of a stream that would occur as part of the overall development project. The City determined that the variance application was complete on September 12, 2023. *Exhibit C-1, Staff Report, pages 1, 2, 12, and 30; Exhibit C-2; Exhibit C-4; Exhibit C-7; Exhibit C-8; Exhibit C-21; Exhibit C-22; Exhibit C-29; Exhibit C-30.*

SEPA Review

2. The City acted as lead agency and analyzed the environmental impacts of the proposal under the State Environmental Policy Act (SEPA), chapter 43.21C Revised Code of Washington (RCW). The City reviewed the Applicant's environmental checklist and other information on file and determined that, with mitigation measures, the project would not have a probable significant adverse impact on the environment. Accordingly, the City issued a Mitigated Determination of Nonsignificance (MDNS) on July 8, 2024, with a comment deadline of July 23, 2024, and an appeal deadline of August 2, 2014. On

*Findings, Conclusions, and Decision  
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No. LUA2022-0044 (SEPA Appeal)*

August 2, 2024, Jennifer Russo filed a timely appeal of the MDNS, as discussed in further detail below. *Exhibit C-20; Exhibit C-27; SEPA MDNS Appeal.*

3. The MDNS contains the following mitigation measures:
- The project shall comply with all required state and federal permits.
  - The project shall comply with the City-approved Terra Associates *Geotechnical Report*, revised February 24, 2023.
  - The project shall comply with the City-approved Soundview Consultants *Conceptual Mitigation Plan*, revised March 2024, and *Arborist Report and Tree Retention Plan*, dated March 7, 2024.
    - The mitigation actions will require continued monitoring and maintenance to ensure the mitigation actions are successful. The wetland creation area and stream relocation shall be monitored for a period of 10 years, and the buffer enhancement, restoration, and creation actions shall be monitored for a period of 5 years with formal inspections by a qualified Project Scientist. Monitoring events shall be scheduled late in the first through final year's growing seasons (Years 1, 2, 3, 5, 7, and 10). Wetland delineation shall be conducted in Year 5 to assess adequate wetland creation areas and determine if any adaptive management of contingency measures are necessary in order to meet final mitigation goals, and a close-out wetland delineation shall also be conducted in Year 10. The maintenance/monitoring period shall begin upon completion of an as-built plan and certification from the Project Scientist certifying the mitigation was installed per the mitigation plan.
    - Per DMMC 16.10.330(1), a performance security is required to assure that all actions approved under this mitigation plan are satisfactorily completed in accordance with the mitigation plan, performance standards, and regulatory conditions of approval. The Applicant will provide a performance bond (prior to the issuance of any grading and building permits) and monitoring and maintenance bond following completion and inspection of the mitigation installation. A bond quantity worksheet shall be completed.
    - Per DMMC 16.10.320 and 17.35.190(2), the wetlands, streams, and required buffers shall be included in a separate easement or tract. The new environmentally critical areas easement or tract will impose upon all present and future owners and occupiers of the property to leave the areas permanently undisturbed. Signage and fencing shall be installed to ensure limited entry.
  - Per the Interlocal Agreement between the City of Des Moines and Port of Seattle that was executed in 2018 for the "Des Moines Creek – West"

property, Section 3.3 of the Agreement states, “The Parties anticipate that the Port will dedicate an easement for the area of the trail to the City by the Port after the construction of the trail has been completed”. The City will assume all maintenance and other ownership responsibilities of the trail only.

- Ensure that the proposed detention pond will meet the standards in FAA Advisory Circular 150/5200-33C, 2.3.2 New Stormwater Management Facilities:

The FAA enforces that storm water management systems located within the separations identified in Paragraphs 1.2 through 1.4 be designed and operated so as not to create above-ground standing water. Stormwater detention ponds should be designed, engineered, constructed, and maintained for a maximum 48-hour detention period after the design storm and to remain completely dry between storms. To facilitate the control of hazardous wildlife, the FAA recommends the use of steep-sided, rip-rap or concrete-lined, narrow, linear-shaped water detention basins. When it is not possible to place these ponds away from an airport’s aircraft operations area (but still on airport property), airport operators may use physical barriers, such as bird balls, wire grids, floating covers, vegetation barriers (bottom liners), or netting, to prevent access of hazardous wildlife to open water and minimize aircraft wildlife interactions. Caution is advised when nets or wire grids are used for deterring birds from attractants. Mesh size should be < 5 cm (2") to avoid entangling and killing birds and should not be made of a monofilament material. Grids installed above and across water to deter hazardous birds (e.g., waterfowl, cormorants, etc.) are different than using a small mesh covering but also provides an effective deterrent. Grid material, size, pattern, and height above water may differ on a case-by-case basis. When physical barriers are used, airport operators must evaluate their use and ensure they will not adversely affect water rescue. Before installing any physical barriers over detention ponds on Part 139 airports, a review by a Qualified Airport Wildlife Biologist should be conducted, prior to approval from the appropriate FAA Regional Airports Division Office. All vegetation in or around detention basins that provide food or cover for hazardous wildlife should be eliminated. If soil conditions and other requirements allow, the FAA encourages the use of underground storm water infiltration systems because they are less attractive to wildlife.

- Per DMMC 18.35.070(8), in granting the Title 16 DMMC variance, the Hearing Examiner may prescribe appropriate conditions and safeguards in conformity with the provisions of the zoning ordinance or other land use regulatory ordinances as the City may adopt.

*Exhibit C-20.*

4. The City provided notice of the application and the MDNS by mailing notice to property owners and residents within 300 feet of the property; posting notice on-site and at designated City locations; publishing notice in *The Seattle Times*; and emailing notice to various City departments, local jurisdictions, special purpose districts, state agencies, utility providers, tribes, and other interested parties. As discussed in further detail later in this decision, the City received comments on the MDNS from the Washington State Department of Ecology (DOE), King County Water District 54 (KCWD 54), and numerous members of the public in response to its notice materials. *Exhibits A-6 through A-22; Exhibit C-1, Staff Report, page 34; Exhibit C-26; Exhibit C-31.*
5. On October 1, 2024, the City provided notice of the consolidated SEPA appeal hearing and open record hearing associated with the application. The City provided notice of the consolidated hearing by mailing notice to property owners and residents within 300 feet of the property; posting notice on-site and at designated City locations; publishing notice in *The Seattle Times*; and emailing notice to various City departments, local jurisdictions, special purpose districts, state agencies, utility providers, tribes, and other interested parties. *Exhibit C-1, Staff Report, pages 34 and 35; Exhibit C-28.*

#### Property Background

6. City staff provided a detailed overview of the history of the subject property, noting in part:

The subject site was a single-family residential neighborhood until the early 1990s. From 1989 to 1993, the Port of Seattle (Port) acquired approximately 77 acres of residential property within the City of Des Moines (City) as part of Sea-Tac Airport's noise mitigation program. Subsequently, the Port removed all existing homes from the site leaving only a few foundations and the asphalt roadways which had served the neighborhood. The Port later purchased approximately 12 acres of abandoned streets in 2011 from the City, King County, and the Washington State Department of Transportation (WSDOT).

In 2004, the Port in partnership with the Cities of Burien, Des Moines, SeaTac, Seattle and the Puget Sound Regional Council commissioned the New Economic Strategic Triangle (NEST) Study: A Study of Development Properties Around Seattle Tacoma International Airport. The report provided an overview and discussion of the potential benefits that development of the NEST properties would bring to the region, focusing on the economic environment, identifying the target industries that offer the greatest benefits, providing strategic recommendations, and outlining an implementation plan for each property.

As part of the Port's Century Agenda vision to grow the economic benefits of Sea Tac Airport by tripling the volume of air cargo and expand opportunities for local businesses, in 2005 the City and the Port began working together to bring economic development to the City and the region through the development of the [Des Moines Creek Business Park (DMCBP)]. In July 2005, the City and the Port entered into the First Development Agreement which outlined the jurisdictional authority of each party and established the development process for the DMCBP including the creation of a conceptual master plan, environmental review, and approval of a conceptual master plan.

In November 2006, the City and the Port acting together issued the Des Moines Creek Business Park Draft Environmental Impact Statement (DEIS) which analyzed and identified the probable significant environmental impacts that could occur as a result of development of the DMCBP. In March 2007, the Des Moines Creek Business Park Final Environmental Impact Statement (FEIS) was issued to provide additional information and responses based on comments received during the comment period for the DEIS. Together, the FEIS and DEIS comprise the Environmental Impact Statement (EIS) for the DMCBP project.

The Port and City amended the First Development Agreement with a First and Second Addenda in May 2008 and November 2010 respectively. Both addenda ultimately led to the passage of Ordinance 1489 and 1490 which transferred ownership of all of the existing roadways within the DMCBP to the Port and resulted in the City's acquisition of the additional right-of-way along 24th Avenue South and South 216th Street needed for roadway widening and redevelopment under the Transportation Gateway Project.

In June 2013, the Port announced that they had selected a developer for the DMCBP project, Panattoni Development Company, Inc. . . .

In 2018, the City and Port entered into an interlocal agreement (Exhibit C-5) for street improvements to South 216th Street fronting the property referred to as Des Moines Creek – West (DMC-W). The interlocal agreement defined the plan for the subject property including the following:

1. The DMC-W is envisioned as a thriving center for diverse light industrial and commercial activities developed in phases in accordance with a Des Moines City Council-

approved master plan developed consistent with DMMC 18.105.050.

2. Solicitation of a developer and development of a DMC-W Master Plan consistent with DMMC 18.105.050.

In 2023, the City passed Ordinance No. 1776 vacating the unimproved public road easements known as 18th Avenue South, between South 212th Street and South 216th Street.

*Exhibit C-1, Staff Report, pages 10 and 11.*

7. The subject property is designated “Business Park” under the City Comprehensive Plan and is located in the “Business Park” (B-P) zoning district, which allows outright light manufacturing and warehouse distribution uses north of South 216th Street, subject to master plan approval.<sup>2</sup> *DMMC 18.52.010B; DMMC 18.105.050.* The primary purpose of the B-P zone is to “provide areas of the City for development of compatible business, professional office, light industrial, research and development, service uses, wholesale trade, and limited retail uses. Such uses shall be developed within master planned sites in park-like settings pursuant to development standards.” *Des Moines Municipal Code (DMMC) 18.105.030(1).*

The code section states, as well:

It is also the purpose of this zone to ensure compatibility between business parks and adjacent uses in terms of height, bulk, scale, and design; to mitigate potential adverse environmental impacts and nuisance effects on-site and off-site through careful planning, the use of buffering and screening, and the imposition of environmental performance standards and appropriate off-site mitigation requirements; to provide for the planned economic development of the City; to ensure that business park development is coordinated with the provision of adequate infrastructure by private applicants and the City, such as roads, drainage, and other utility systems; to require that business park developments pay their fair share of the costs of needed services and facilities; and to ensure that development occurs consistent with the goals and policies of the City of Des Moines Comprehensive Plan.

*DMMC 18.105.030(2).*

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<sup>2</sup> The proposal’s consistency with the requirements for master plan approval are addressed in the companion decision issued concurrently with this decision. *Hearing Examiner’s Findings, Conclusions, and Decision, Des Moines Creek Business Park West Master Plan and Variance, No. LUA2022-0044 (Permit Decision), dated November 21, 2024.*

“Further, it is the purpose of this zone to establish standards to ensure that development occurs in a manner that is compatible with the Des Moines Creek Park, Des Moines Creek Trail, Steven J. Underwood Memorial Park, City of Des Moines Activity Center and adjacent residential-designated properties.” *DMMC 18.105.030(3)*. Adjacent properties to the north are zoned Residential: Suburban Estate (R-SE) and contain Des Moines Creek and an associated trail system. Adjacent properties to the east are zoned B-P and are developed with stormwater management features associated with existing industrial development to the east of 20th Avenue South. Properties to the south, across South 216th Street, are zoned BP and R-SE and consist of undeveloped land containing a trail system and property developed with an apartment complex. Adjacent properties to the west are zoned Residential: Single Family (RS-7200) and are developed with residential units. *Exhibit C-1, Staff Report, pages 2, 8, 12, and 25 through 30; Exhibit C-2; Exhibit C-4; Exhibit C-8; Exhibit C-9; Exhibit C-12; Exhibit C-16.*

Technical Reports  
*Geotechnical Report*

8. Terra Associates, Inc., prepared a geotechnical report for the Applicant, dated December 21, 2022, and revised February 24, 2023. The report noted that the site was previously developed with several single-family residences, small outbuildings, and other associated structures until at least 1974, all of which had been cleared by 1998, with some remnants of the former development still evident, such as the old 18th Avenue South roadway bisecting the site north to south. The report stated that existing vegetation on the site consists predominantly of brush and weeds, with scattered mature trees. According to the report, the site topography consists of a gentle to moderate slope that descends from the east to the west/northwest, with an overall relief of approximately 60 feet, and a ravine or drainage feature in the west-central portion of the site.

The report determined that the site does not contain any erosion hazard areas or seismic hazard areas, but noted that the Applicant would be required to comply with applicable erosion protection measures during grading activities, which would include perimeter silt fencing to contain erosion on-site and cover measures to prevent or reduce soil erosion during and following construction. The report also determined that the only landslide hazard area on-site consists of an existing drainage feature at the center of the property, which would be removed through proposed filling: and, therefore, that the site would not contain any landslide hazard areas post construction. The report further determined that the project, as proposed, would meet applicable requirements for hillside disturbance and would not result in any significant adverse impacts to the public water supply.

The report ultimately determined that there are no geotechnical conditions that would preclude the proposed development, and it provided detailed recommendations for site preparation and grading, excavations, retaining walls, foundations, slab-on-grade floors, below-grade wall design, stormwater facilities, drainage, utilities, and pavements. In



issuing the MDNS for the project, the City required as a mitigation measure that the Applicant adhere to the recommendations of the geotechnical report. *Exhibit C-1, Staff Report, pages 12 and 13; Exhibit C-13; Exhibit C-20.*

*Habitat Reports and Conceptual Mitigation Plan*

9. Soundview Consultants, LLC (SVC), prepared on behalf of the Applicant a biological evaluation, dated August 2022; a wetland and fish and wildlife habitat report (Habitat Report), dated July 26, 2022, and revised July 26, 2023; and a conceptual mitigation plan (Mitigation Plan), dated September 1, 2022, and revised March 6, 2024. As discussed further in the findings below, the Habitat Report and Mitigation Plan underwent revisions in response to several technical memoranda prepared by the City's third-party environmental review consultant, Grette Associates, LLC (Grette), following its independent site assessment. *Exhibit C-1, Staff Report, pages 12 and 13; Exhibit C-15 through C-17; Exhibit C-23.*
10. The Applicant's biological evaluation determined that the proposed development would not have any effect on ESA-listed species potentially present within the action area, which is the area that encompasses locations where project activities would occur, as well as areas that could be directly or indirectly affected by the project through physical, chemical, or biological mechanisms. This action area includes offsite portions of the adjacent property to the north in which Des Moines Creek is located. The biological evaluation further determined that the proposal would not have an adverse impact on salmon essential fish habitat. *Exhibit C-23.*
11. The Applicant's revised Habitat Report, which Grette ultimately agreed contained a proper analysis of the environmentally critical areas on and within 300 feet of the subject property, identified four regulated wetlands and two regulated streams on-site, as well as a Type F stream offsite to the north (Des Moines Creek), which has a 115-foot buffer that does not extend onto the subject property. Wetland A is approximately 626 square feet and is located on the southern portion of the site. Wetland B is approximately 1,226 square feet and is located in the eastern portion of the site. Wetland C is approximately 21,595 square feet and is located in the eastern portion of the site, with a small portion of the wetland extending offsite to the east. Wetland D is approximately 23,263 square feet and is located in the northeastern portion of the property.

The Habitat Report classified Wetlands A, B, and C as Category IV wetlands that generally require standard 50-foot protective buffers. The Wetland Report notes, however, that Wetland A is exempt from City regulations under DMMC 16.10.140(3) because it is under 1,000 square feet, not part of riparian corridor, not part of a mosaic, and does not contain priority habitat. The Habitat Report classified Wetland D as a Category III wetland with a standard 150-foot buffer. Although the Habitat Report noted that it had determined Wetland D to have a low habitat score necessitating only a

standard 80-foot buffer under DOE's updated buffer guidance, it stated that the Applicant would accommodate a 150-foot buffer for Wetland D to expedite the permitting process. Stream Y is located on the western-central portion of the site and originates from a failing culvert at the top of a steep ravine, which conveys flows from an upgradient unregulated and poorly defined drainage swale that receives hydrology from a combination of surface sheet flow from adjacent uplands and stormwater discharges from the adjacent property to the east as it flows through Wetland C. Stream Z is located on the northeastern portion of the site and originates from surface sheet flow within Wetland D. The Habitat Report classified both Stream Y and Stream Z as Type Ns streams subject to 65-foot protective buffers. *Exhibit C-15; Exhibit C-16.*

12. As described in the Applicant's revised Mitigation Plan, which was ultimately approved by Grette following revisions, the Applicant proposes to entirely fill Wetland A, partially fill portions of Wetlands C and D, and relocate Stream Y to facilitate the proposed development. The proposed filling activity would result in 626 square feet of direct impacts to Wetland A, 7,373 square feet of direct impacts and 5,819 square feet of indirect impacts to wetland C, and 3,939 square feet of direct impacts to Wetland D. The Applicant also proposes 32,918 square feet of temporary impacts to buffer areas for Wetlands B, C, and D from slope grading within the buffers, which would be fully restored. As mitigation for the direct and indirect impacts to Wetlands A, C, and D, the Applicant would create additional wetland area on-site. The Applicant would be required to compensate for the 626 square feet of direct impacts to Wetland A and the 7,373 square feet of direct impacts to Wetland C, at a 1.5-to-1 ratio; the 5,819 square feet of indirect impacts to Wetland C at a 0.75-to-1 ratio; and the 3,939 square feet of direct impacts to Wetland D, at a 2-to-1 ratio, resulting in 24,241 square feet of additional wetland that would be required to be created on-site. *DMMC 16.10.150.* The Applicant proposes to exceed this requirement by creating 25,553 square feet of wetland on-site.

The Applicant also proposes to exceed applicable requirements to mitigate for the permanent and temporary impacts to wetland buffer areas through such measures as restoring temporarily disturbed wetland buffer, creating additional wetland buffer, and enhancing existing buffer areas by removing non-native invasive species and replanting with native trees, shrubs, and ground cover. The proposed relocation of Stream Y would provide 281 linear feet of new stream to compensate for the 270 linear feet that would be filled. The remaining and additional critical areas on site would be permanently protected within a Native Growth Protection Easement that would be identified with signage to prevent intrusion into the critical areas. *DMMC 16.10.320.* SVC determined, and Grette ultimately agreed, that the proposed mitigation strategy would fully compensate for the project's impacts to critical areas, enhance wetland functions, increase habitat functions, and provide greater screening and protection for the on-site wetland area. *Exhibit C-15; Exhibit C-17.*

13. As noted above, the Applicant’s Habitat Report and Mitigation Plan underwent revisions in response to comments from Grette in its third-party environmental review memoranda. For example, in reviewing an earlier iteration of the Habitat Report, Grette noted in a March 3, 2023, memorandum that, although it agreed with the Habitat Report in other respects, the following should be further addressed:

- Based on Grette Associates’ site assessment, two areas of the site should be further investigated for the presence of regulated wetlands. Those areas . . . include the area south of Wetland D as well as the benched area in the northwest corner of the site. Wetland data plots should be performed in representative locations in those areas, and formal datasheets submitted to the City for review. If wetland conditions are present, the areas should be delineated in accordance with federal state, and local requirements.
- A portion of the “non-regulated drainage” described by SVC leading west from Wetland C should be reevaluated for classification as a stream. The portion of the drainageway that drops down into the ravine, generally north and west of SVC’s plot DP-3U, contains characteristics that meet the definition of a stream under DMMC 16.01.050 and WAC 222-16-030. This seasonal stream eventually flows into Des Moines Creek in an above-ground channel.

Regarding its review of an earlier iteration of the Applicant’s Mitigation Plan, Grette determined that the following should be further addressed:

- The Plan should provide an analysis for the hydrologic impacts to Wetland C from filling the lower half of the wetland. The Plan does not discuss where the water from the wetland, which currently exits the wetland to the west, will go post-construction, or how the existing flows to Des Moines Creek from Wetland C will be maintained. While a detailed hydrologic analysis is not necessarily required at the conceptual phase of mitigation development, the applicant should provide a conceptual-level discussion of how maintaining the hydrology from Wetland C to Des Moines Creek would be addressed. For the detailed mitigation plan, a comprehensive analysis should be provided.
- The Plan does not discuss the pedestrian trail crossing Wetland C near the east property line. This impact must be assessed, and mitigation provided. Furthermore, water within Wetland C surface flows from east to west in this location. The Plan should be revised to address how this water will be conveyed beneath the trail.
- The Plan should be revised to include a discussion of how the pedestrian trail within the wetland buffers complies with DMMC

16.10.300(3), including proposed composition and construction methods.

- For the detailed mitigation plan, the applicant should provide a hydrologic analysis of seasonal groundwater elevations, both existing and proposed, for the wetland creation area. This should also include a discussion of the effects, if any, of the sloped buffer area along the west half of the proposed creation area.
- It is recommended that Performance Standard 1.1.1 include an interim standard for Year 5. If at the Year 5 monitoring a shortfall in wetland acreage is discovered, adaptive management actions can be discussed and addressed, potentially resulting in achievement of the final standard at Year 10 and preventing additional monitoring.
- Performance Standard 1.2.1 should clarify the timing at which it is monitored. If the intent is an investigation of the groundwater elevation during the growing season, the standard should specify the time of year during which the groundwater is measured. The standard should also specify if it is monitored annually or during specific monitoring years.

*Exhibit C-15.*

14. In response to Grette's March 3, 2023, memorandum, a site meeting was conducted with DOE, Washington State Department of Fish and Wildlife (WDFW), the City, SVC, and Grette. Following the site meeting, Grette determined in a May 23, 2023, memorandum that the area south of Wetland D and the benched area in the northwest corner of the site did not contain regulated wetlands but noted its continued disagreement with the earlier Habitat Report's determination that a portion of a water feature leading west from Wetland C did not meet the definition for a regulated stream. SVC submitted a July 18, 2023, revised Habitat Report in response to Grette's May 23, 2023, review memorandum, which determined that the portion of the water feature leading west from Wetland C (Stream Y) was a Type Ns stream with a 65-foot protective buffer. Grette indicated its agreement with the Applicant's revised Habitat Report in an October 3, 2023, memorandum. Grette also indicated in its October 3, 2023, memorandum that it largely agreed with revisions to the Applicant's Mitigation Plan in response to its earlier comments, but noted that the following should also be further addressed:
- Per DMMC 16.10.300, trails shall be constructed to minimize disturbance to wetland/stream functions. While the Revised Plan describes that wetland crossing will utilize a bridge or bottomless culvert to avoid direct impacts to the wetland, no additional information is crossing information is provided. The Revised Plan should be updated to include, at a minimum, details regarding the type of crossing and construction methods;
  - Per DMMC 16.10.190, detailed baseline and construction information should be included in a mitigation plan. The Revised Plan should be

updated to demonstrate how hydrology will support the existing drainage way and the wetland and stream creation area.

Grette reviewed revisions to the Applicant's Mitigation Plan in response to these comments and, in a December 18, 2023, memorandum indicated that SVC had addressed all comments and concerns raised by Grette, recommending only that the Applicant revise its project site plans to include a construction detail of a pedestrian trail bridge crossing to clearly show that the construction and crossing structure would not temporarily or permanently impact Wetland C. Grette reviewed the Applicant's most recent Mitigation Plan, revised March 6, 2024, and in an April 17, 2024, memorandum, indicated that the Mitigation Plan adequately addressed the impacts and mitigation requirements for compliance with the City's environmentally critical areas ordinance. In issuing the MDNS for the project, the City required as a mitigation measure that the Applicant adhere to the Mitigation Plan. *Exhibit C-15; Exhibit C-20.*

#### *Arborist Report and Tree Retention Plan*

15. The City's trees ordinance, chapter 16.25 DMMC, does not contain any limitations on the removal, cutting, or pruning of trees on privately-owned developed, partially developed, or undeveloped lots, except for the requirement for a tree permit when the total area to be cleared is 2,000 square feet or greater. *DMMC 16.25.050.* The removal, cutting, or pruning of trees located within environmentally critical areas or their associated buffers are reviewed in accordance with the City's environmentally critical areas ordinance, chapter 16.10 DMMC. *DMMC 16.25.050(4)(a).* Under 16.25.080, any tree identified to be retained that is removed, destroyed, or damaged must be replaced on-site at a ratio of 3-to-1 and must be maintained in a healthy condition.

SVC prepared an arborist report and tree retention plan on behalf of the Applicant, which identified a total of 582 significant trees on the property, of which 474 were identified as being in a healthy condition (122 Evergreen and 352 Deciduous), with 108 significant trees in an unhealthy condition (27 Evergreen and 81 Deciduous). The report identified a total of 191 significant trees within critical areas on the property that would be required to be retained (22 within Wetlands B, C, and D and their associated buffers, and 169 within areas of the property with 15 percent or greater hillslopes and ravine sidewalls). The Applicant proposes to retain 73 significant trees, and 6 trees in poor condition, that are within critical areas or their associated buffers, and to modify 6 trees in good or fair condition as wildlife snags because they cannot be safely retained.

The report recommended a total of 497 trees be removed from the site to accommodate the proposed development footprint, 398 of which SVC determined would be required to be replaced on-site at a 3-to-1 ratio, for a total of 1,194 replacement trees. The Applicant's tree retention plan demonstrates that this would be achieved by planting 339 Evergreen trees on-site with a minimum height of 8 feet (236 within the mitigation area and 103 within interior landscape areas) and 855 Deciduous trees with a minimum 2-inch

caliper (832 within the mitigation area and 23 within interior landscape areas). Although the report determined that there would be an initial net loss of canopy cover from the proposed tree retention plan, it noted that the restoration and enhancement plantings would restore the third of the site located on the eastern portion of the property to a vertically and horizontally diverse canopy structure within 10 to 20 years, in alignment with the Green Des Moines Partnership Urban Forest Enhancement Plan. In issuing the MDNS for the project, the City required as a mitigation measure that the Applicant adhere to the arborist report and tree retention plan. *Exhibit C-1, Staff Report, page 13; Exhibit C-14; Exhibit C-20.*

#### Agency and Public Comments

16. As noted above, the City received agency comments from KCWD 54 and DOE during the SEPA MDNS comment period. KCWD 54 noted that the proposed development would be within delineated Wellhead Protection areas and uphill from KCWD 54's sole wellfield. Although KCWD 54 stated that it was not opposed to the development, it raised concerns about potential adverse impacts from groundwater contamination or a reduction in recharge due to changes in drainage from the current condition. DOE noted that it would have final permitting authority regarding the project's wetland impacts and that its approval of a wetland mitigation plan could differ in potentially substantive ways from the conceptual mitigation plan approved by the City. DOE also noted that the project area is located in an area that has been contaminated with heavy metal due to air emissions from the old Asarco Smelter and that a Cleanup Report would need to be submitted prior to DOE issuing a No Further Action determination. In addition, DOE provided general comments noting the requirement for a dam safety construction permit for dams or ponds that can impound a volume of 10 acre-feet or more of water above ground level, including retention/detention ponds. *Exhibit C-31.*
17. In response to KCWD 54's comments, the City notes that the proposed development would comply with all sections of the 2021 King County Surface Water Design Manual that apply to groundwater protection. The City also notes that the Applicant's geotechnical report determined that the proposed development would not result in any significant adverse impacts to the public water supply in light of site conditions, proposed stormwater management features, and the use of best management practices. In response to DOE's comments, the Applicant submitted an April 10, 2023, letter opinion from DOE in which DOE notes that it reviewed the Applicant's Cleanup Action Plan (CAP) for the property and determined that, upon its completion, no further remedial action would likely be necessary. *Exhibit B-1; Exhibit C-1, Staff Report, pages 27 and 28.*
18. The City also received numerous comments on the proposal from members of the public during the SEPA comment period, a vast majority of which expressed opposition to the proposed development. These comments generally expressed concerns about: impacts to the on-site wetlands and stream and the resulting loss of the benefits they provide, such as

water quality, flood control, wildlife habitat, and erosion protection; impacts to the offsite Des Moines Creek; impacts to the existing tree canopy; aesthetic and recreational impacts to a trail on the property; the lack of economic benefits to city residents and businesses; airport noise and air pollution impacts resulting from the loss of existing trees and vegetation on-site; the loss of natural open space; impacts to traffic; and stormwater impacts. These comments also generally expressed concerns about the public notice provided for the project and MDNS and expressed that the subject property is not a suitable location for the proposed industrial development. In addition to the comments received by the City during the SEPA comment period, the Appellant submitted several additional comments, which largely echoed the concerns described above. *Exhibit A-6 through A-22; Exhibit C-31.*

#### SEPA Appeal, Motions, and Orders

19. On August 2, 2024, the City received a timely appeal of the MDNS from Jennifer Russo. The appeal generally contends that the SEPA MDNS decision was made absent adequate analysis of the environmental impacts that would result from the “destruction of existing wetlands and greenspaces.” The appeal specifically asserts:
- The scale and magnitude of the proposed 402,380 square foot building exceeds what could be considered an accessory use or structure under the municipal code.
  - The proposed development would likely contravene various federal and state environmental regulations, including those protecting wetlands under the Clean Water Act.
  - The proposed industrial wetland development would result in the complete destruction of an existing, natural wetland. Wetlands are crucial for maintaining biodiversity, regulating water flow, and providing natural flood control.
  - Converting a critical tree canopy, protected wetlands, and city park space to industrial use destroys the positive ecological benefits provided by a diverse ecosystem.
  - The MDNS failed to address a steep slope under the current trail on 15th Avenue South.
  - The Applicant’s environmental checklist erroneously states that there are no known unstable soil issues.
  - Removing a whole section of mature forest cannot easily be replaced with new plantings, and the space will have limited areas to plant. The development plans must offset the significant impact of the loss of this greenspace, which are not in the current plan.
  - The removal of 836,000 square feet of vegetation will result in negative impacts to both residents who recreate in this greenspace and local wildlife.
  - The MDNS does not address impacts to wildlife. The MDNS notes that Des Moines Creek is already contaminated and impacting salmon habitat but finds no reason not to move forward with this action that would further contaminate the creek.

- The proposed development should require a full environmental impact statement (EIS).
- The MDNS was issued absent a sufficient public review process.
- The proposed removal of wetlands and forests would contribute to an increase in noise from airport operations.
- The proposed removal of wetlands and forests would result in degraded air quality.
- The MDNS incorrectly concluded that no recreational uses would be displaced from the proposed development.

*Exhibit C-27; SEPA MDNS Appeal.*

20. After receiving the appeal, the Hearing Examiner held an informal pre-hearing conference with the parties on August 29, 2024. Following the pre-hearing conference, the Hearing Examiner issued a pre-hearing order on September 3, 2024, which set the open record SEPA MDNS appeal hearing for October 18, 2024, and set forth deadlines for the filing of motions, witness and document lists, and hearing briefs. *Hearing Examiner's Pre-Hearing Order, dated September 3, 2024.*
21. Consistent with the pre-hearing order, the Appellant filed a hearing brief on October 11, 2024, in which the Appellant provided background information on the subject property, surrounding area, and proposed development; provided an overview of SEPA; and asserted that evidence presented at the hearing would demonstrate that the City failed to adequately consider the following in issuing the MDNS:
- Cumulative impacts to Des Moines Creek from the proposed development, earlier development to the east of the subject property, and a recently failing unmaintained stormwater system installed directly to the north of the project site.
  - The proposed development's impacts to rainwater capture, surface water storage, and stormwater flow control provided by the existing trees, wetlands, and streams on-site.
  - Impacts that could occur from any errors in design or construction.
  - Impacts of the proposed tree removal, wetland filling, and stream rerouting on water quality, air quality, and noise levels.
  - Requirements of the Healthy Environment for All (HEAL) Act.
  - Impacts to recreational users of the subject property, including users of two official city park trails on the property and other informal trails throughout the site.

In addition, the Appellant's hearing brief asserts that the City failed to provide adequate public notice of its environmental review of the proposal and that the proposal would be inconsistent with the City's Parks, Recreation, and Senior Services Master Plan, and with the Parks, Recreation, and Open Space element of the Comprehensive Plan. *Appellant Hearing Brief, dated October 11, 2024.*



22. The City provided a hearing brief, dated October 11, 2024, in which it asserts:
- The proposed 402,380 square foot building is not and has never been considered an accessory use of structure. It is considered a main building, as defined under DMMC 18.01.050. The Appellant's reference to accessory uses and structures is unfounded.
  - The Growth Management Act requires that the City's critical areas code be consistent with federal and state environmental regulations. In addition to required City permits, the Applicant must apply for and comply with any required federal and state permits from the respective federal and state agencies. The Appellant's claims on this issue are unsubstantiated and are not reflective of the permitting process.
  - The Appellant refers to a steep slope under the current trail on 15th Avenue South. This trail section is not located in the project area and would not be affected by the proposed development. Regarding erosion generally, the City's Surface Water Management Division reviewed and approved the erosion control measures and proposed drainage of the site.
  - Whether an environmental impact statement is required is determined through the threshold determination process. WAC 197-11-330. Lack of an EIS cannot therefore invalidate the threshold determination.
  - The City is required to provide public notice upon the issuance of an MDNS as provided in chapter 16.05 DMMC. *DMMC 16.05.190*. When an open record hearing is required and chapter 16.05 DMMC requires public notice of a threshold determination, the Planning, Building and Public Works Director shall issue the threshold determination at least 25 days prior to the open record hearing to allow for expiration of the 15-day comment period provided by DMMC 16.05.240(1) and the 10-day appeal period related to the SEPA determination prior to the public hearing. *DMMC 16.05.230(2)*. The City provided notice of the MDNS determination and project applications on July 8, 2024. The notice followed the noticing requirements of chapter 16.05 DMMC. A public comment period of 15 days was provided, and a comprehensive list of stakeholders was given notice, including state and federal agencies. There is no legal authority supporting the position that the English language notice materials were insufficient as a matter of law. Moreover, notice of the MDNS was posted to the City website, which has a translation feature offering over 50 languages.
  - Notice of the MDNS and applications was posted on-site and provided to all property owners and tenants within a 300-foot radius of the exterior boundaries of the subject property as required under DMMC 16.05.190 and in the form required under DMMC 16.05.220.
  - The proposed project would result in a net addition of wetlands and enhancement of wetland buffers. The project proposes to fill a total of approximately 12,000 square feet of wetlands, indirectly impacting approximately 5,800 square feet of wetlands and impacting approximately 74,000 square feet of wetland buffers. As

mitigation, the project proposes to create approximately 26,000 square feet of new wetlands and to enhance and restore approximately 170,000 square feet of wetland buffers. The wetland mitigation proposal was reviewed by the City's expert consultants to ensure compliance with requirements of the municipal code.

- The proposed project would result in an increase in the number of trees on the site. Close to 100 significant trees are proposed to be retained on-site and approximately 400 significant trees in fair to good health are proposed to be removed. Trees identified to be removed, such as trees in environmentally critical areas, will be replaced at a 3-to-1 ratio pursuant to municipal code requirements. The City reviewed the project for consistency with the City's trees ordinance and the Green Des Moines Partnership Urban Enhancement Plan. Approximately 1,200 trees are proposed to be planted, and restoration efforts would focus on increasing canopy cover in areas currently dominated by invasive species. Previous loss of tree canopy due to other projects is outside the scope of SEPA review.
- Given the increased wetland area, wetland buffer area, and tree canopy that will result from the mitigation required for the project, the City's finding that there is not significant environmental impact is reasonable and was not clearly erroneous.
- The City's expert environmental consultant, Grette, reviewed the proposed mitigation and determined, "The site does not appear to provide habitat for state- or federally-listed species or priority habitats. While riparian habitats do exist on site . . . those areas are regulated within the buffers of those features." *Exhibit C-15*. Grette also concurred with the finding that no biodiversity area/corridor exists on the subject property.
- Even assuming that the Appellant is correct that the loss of wetland and tree canopy would increase noise and would degrade air quality, the project would result in a net increase in wetland and tree canopy.
- The primary trail running south-north through the site will be improved and placed within an easement to secure it for future use. The disruption due to construction would be temporary. Because the trail would be improved and because the public would receive a permanent dedication of an easement for trail use, the City's finding that there is not significant environmental impact is reasonable and was not clearly erroneous.
- Parking is currently located across South 216th Street from the primary trailhead, and a crosswalk provides for a safe crossing of South 216th Street. The proposed project would not affect these conditions.
- The primary trail running south-north through the site would be improved and placed within an easement to secure it for future use. It would meander around a new stream and restored wetlands. The majority of the replacement trees would be planted in the area that the trail will go through. The new trees would be in addition to a number of existing trees that would be preserved. Impacts to views from the existing Des Moines Creek Trail are speculative at best. Given the

improvements to the trail, the City's finding that there is not significant environmental impact is reasonable and was not clearly erroneous.

*City Hearing Brief, dated October 11, 2024.*

23. The Applicant provided a hearing brief, dated October 11, 2024, in which it incorporated several of the arguments provided by the City in its hearing brief and additionally asserts:
- The record includes an extensive wetland and fish and habitat wildlife assessment report and detailed conceptual mitigation plan prepared by the Applicant's expert consultant, as well as review memoranda prepared by the City's third-party expert environmental review consultant. The Appellant's evidence fails to include any expert report rebutting the Applicant and City's reports and studies. To prove the MDNS was clearly erroneous, the Appellant must present evidence showing that the project, as mitigated, would cause probable significant adverse environmental impacts, and may not rely on speculation about impacts. The City's thorough consideration of potential impacts and imposition of substantial mitigation measures is supported by expert analysis and complies with relevant code provisions. The Appellant cannot meet her burden, and the SEPA appeal must be dismissed.
  - The Applicant's arborist report and tree retention plan explains that, although there would be a net loss of canopy cover initially, the significant restoration and enhancement planting efforts would restore one third of the site to a vertically and horizontally diverse canopy structure within 10 to 20 years, and that restoration efforts would focus on increasing canopy cover in areas currently dominated by invasive species. The Appellant's general evidence and even the specific allegation that a mitigation ratio of 3-to-1 is insufficient due to speculative mortality rates is not enough to prove the MDNS was clearly erroneous.
  - The Appellant's assertion that the project will eliminate wildlife habitat is contrary to the expert conclusions before the Hearing Examiner. Speculation does not amount to substantial evidence of significant adverse impacts. As stated in WAC 197-11-060(4)(a) and WAC 197-11 782, speculation about impacts is not sufficient to overturn the substantial weight the Hearing Examiner must grant to the City's MDNS.
  - The City's thorough review process, which included consideration of multiple technical studies and expert analyses, satisfies the requirements for environmental impact assessment under SEPA. The Appellant's assertion that a more comprehensive assessment is needed does not meet the burden of proving that the City's determination was clearly erroneous.
  - The net increase in wetlands and trees on the project site moots the Appellant's arguments about natural sound absorption and noise reduction due to loss of wetlands. In addition, the Appellant presents no expert reports demonstrating any noise impacts, let alone adverse significant noise impacts resulting from the project. The Appellant's concerns about noise are speculative and do not provide

concrete evidence of significant adverse impacts that would require an EIS. The City's determination that these impacts are not significant is entitled to substantial weight and the MDNS must be affirmed.

- The net increase in wetlands and trees on the project site moots the Appellant's arguments that the alleged loss of forests and wetlands would result in degraded air quality. The Appellant has not provided specific evidence that the project will result in significant adverse impacts to air quality.
- The Appellant's concern about loss of a trail is misplaced. The north-south trail currently on the project site is not a formal trail, and it is not protected in any way. The Applicant would build a formal trail, and pursuant to a mitigation measure of the MDNS, the Port would grant the City an easement for the area of the completed trail, and the City would assume all maintenance and other ownership responsibility of the trail. The City adequately considered potential impacts to recreational resources and has required measures to maintain and improve trail access.
- The City has complied with all required notice procedures under chapter 16.05 DMMC. The Appellant has not demonstrated that the City's process was in error or that it failed to comply with SEPA's procedural requirements. Therefore, these concerns do not meet the burden of proving that the MDNS was clearly erroneous.
- The HEAL Act does not apply to local government entities like the City of Des Moines. The HEAL Act applies only to specific state agencies, including the Departments of Ecology, Agriculture, Commerce, Health, Natural Resources, Transportation, and the Puget Sound Partnership.

*Applicant Hearing Brief, dated October 11, 2024*

24. The Applicant also provided a response to the Appellant's hearing brief, dated October 16, 2024, in which it asserts:
- The Hearing Examiner should not consider arguments raised by the Appellant for the first time in her hearing brief, including arguments related to: (1) impacts to recreational use of the site, such as changes to parking, trail access during construction, and post-construction trail experience; (2) cumulative impacts; (3) the project's inconsistency with City planning documents; (4) applicability of the HEAL Act; and (5) the notice provided for the MDNS. Even if the Hearing Examiner considers these issues, the Appellant's lack of evidence in support cannot meet her burden to overcome the substantial weight that must be accorded to the MDNS, and the MDNS must be affirmed.
  - The Appellant concedes that the project site has never been part of a formal park but is instead what she views as a de facto park. The subject property is owned by the Port of Seattle, not designated as a public park, and is zoned for industrial development. Even if the existing north-south trail across the site was deemed a formal or City-sanctioned trail, it would be significantly improved and protected

for long-term public use through placement in an easement that would be conveyed to the City.

- The City's Comprehensive Plan and zoning provisions designate and zone the property for industrial development. The Comprehensive Plan's designation of the property for industrial uses renders irrelevant the Appellant's request to review the project in light of the Parks, Recreation, and Senior Services Master Plan because the site is not designated for park use in the Comprehensive Plan.
- The Appellant's speculative concerns about complex interactions among rainwater, surface water, and stormwater are not supported by any evidence. Stormwater drainage and potential impacts to wetlands have been thoroughly studied and addressed in the project design. The City's Surface Water Management Division has reviewed and approved the erosion control measures and proposed drainage of the site.
- The Appellant's concerns about potential failures in mitigation design and installation are speculative and are not supported by any evidence. The Conceptual Mitigation Plan provides detailed measures for wetland creation, stream relocation, and habitat enhancement. These measures have been reviewed and approved by the City's expert consultants. Geotechnical analysis has confirmed that the project will not increase landslide risk. The Appellant's speculative concerns about potential failures do not provide a basis for overturning the MDNS.
- Contrary to Appellant's assertions, the project would result in a net environmental benefit. Although approximately 400 significant trees in fair to good health are proposed to be removed, the project proposes planting approximately 1,200 trees, which meets the 3-to-1 requirement required by code. The project would also enhance existing wetland buffers, and the relocated stream would provide improved habitat compared to existing conditions.
- The HEAL Act does not apply to the City of Des Moines.
- The Applicant relies on the City having provided all legally required notice.

*Applicant Response to Appellant Hearing Brief, dated October 16, 2024.*

#### MDNS Open Record Appeal Hearing

25. Appellant Jennifer Russo presented a brief opening statement in which she noted that she is a concerned citizen attempting to save this greenspace within the city. *Statements of Jennifer Russo.*
26. City Attorney and Interim City Manager Tim George presented a brief opening statement in which he acknowledged the concerns about the proposed development expressed by members of the public but asserting that the Appellant could not meet her burden of proving that the City clearly erred in issuing the MDNS. He stated that the City had diligently reviewed the proposal to ensure that it would be consistent with the City Comprehensive Plan and would comply with all applicable requirements under the

municipal code and state law and that the City issued the MDNS in accordance with all legal requirements. *Statements of Attorney George.*

27. Attorney Nancy Rogers adopted the opening statement of the City and additionally noted that the City's MDNS decision is entitled to substantial weight. *Statements of Attorney Rogers.*

*Appellant Witnesses*

28. Kathy McDonald testified that her expertise comes from being a hiker and walker in the area. She stated her concerns about the proposed development and about the environmental impacts of the proposal that she asserts the City did not adequately consider in issuing the MDNS, including impacts on the historical and current recreational use of the property by the community. Ms. McDonald noted in this regard that the community has come to understand that the subject property operates as a City park and argued that the City failed to consider the loss of trail access during construction, the noise impacts and impacts on the trail experience from the loss of forested areas, and the loss of parking for recreational users of the trail. She further asserted that there have been inconsistencies in references to existing trails on the property, that the Applicant's previous project plans failed to denote the trail accessed from 15th Avenue, and that the proposal would be inconsistent with the long range planning goals of the City, noting that a survey conducted by the City as part of updating its Comprehensive Plan showed that the top priority of the survey respondents was preserving natural spaces in the city.

In response to questions on cross examination, Ms. McDonald stated that the City had given away the land and reiterated her assertion that City park signs suggest to the community that the subject property is a City park. She acknowledged, however, that the City Master Park Plan does not include a park on these parcels. In response to a question about whether she knew that the Port would provide a permanent easement for public use of a trail on the property for which none currently exists, Ms. McDonald reiterated her concerns that the existing trail that is accessed on 15th Avenue was only noted on updated plans and that she was unsure whether there would be sufficient documentation and interagency agreements related to this trail. In response to a question raised about whether she knew that the Comprehensive Plan update survey results were not statistically significant, she said she was not aware.

In response to questions on redirect, Ms. McDonald stated that the proposed trail plan would not improve the existing trail and reiterated the value of the current tree cover for protection from the elements. *Testimony of Kathy McDonald.*

29. Barbara McMichael stated that her expertise comes from living in the area and from twice serving on the Des Moines Parks, Recreation, and Senior Services Master Planning

Committee. She testified about how the environmental impacts of the airport and of nearby developments have already impacted the neighborhood and suggested that, although the SEPA checklist completed for the proposed development may have provided acceptable evidence leading to an MDNS in other parts of the state, the impacts of being in the flight path of SeaTac Airport required additional review of the environmental considerations. Ms. McMichael testified about anecdotal evidence of increased incidences of cancer in the area and noted that the Washington Environmental Health Disparities Map shows that the City of Des Moines is rated Level 10 for air quality, which is the highest impact level. She further testified about the purposes of the Health Disparities Map and SEPA and questioned whether air quality was adequately considered in the SEPA determination. Ms. McMichael testified about the health effects of tree canopy, noting a study by Forterra that points to the utility of trees on noise abatement and suggested that further study was required to evaluate the way noise would travel from SR 509 and from the proposed warehouse. *Testimony of Barbara McMichael.*

30. Lloyd Lytle stated that his expertise comes from living in Des Moines for 20 years, his biochemistry degree from the University of Washington, his experience as a science educator for Federal Way public schools, and his work in salmon and orca research. He testified about the risks of landslides and land erosion, noting the risk that a major rain event could destroy Des Moines Creek, which is salmon bearing. Mr. Lytle further testified that erosion could fill in the river, which would leave salmon without habitat for spawning. Mr. Lytle argued that, if the development takes place right on the edge of the creek, the resulting erosion will have impacts on streams on neighboring properties. He testified about the Washington State Riparian Task Force recommendations and how the proposed development would not meet these recommendations. *Testimony of Lloyd Lytle.*
31. Sandy Hunt stated that her expertise comes from being a member of the Defenders of Highline Forest. She testified about how the specific location of the proposed development should require a more thorough environmental review, noting that the impacts occurring over time in this area should lead to SEPA rules applying in a different way than they do in other jurisdictions. Ms. Hunt specifically mentioned that the property functioned as a buffer for the residential area, which is under the flight path, by reducing the noise, air quality, and heat of the location. Ms. Hunt asserted that the City's environmental analysis was deficient because it did not consider or mitigate for the unquantified environmental amenity of having this property function as a park for decades, explaining that the park use of the property provides benefits for the area by providing a place for people to escape noise, air quality, and heat. She further testified that the SEPA analysis did not include adequate consideration of additional stormwater that could create a flood risk through the proposed stream realignment. Ms. Hunt stated that the same proposal can have a significant adverse impact in one location but not in

another and argued that information provided in a full Environmental Impact Statement would provide a necessary assessment regarding eight specific locations in the vicinity of the project location, including the Port of Seattle’s flight path, residential neighborhoods, a priority habitat and species area, an erosion and landslide hazard area, stormwater systems management systems for previous developments, a wellhead protection area, Des Moines Creek, and the Barnes Creek connector trail. *Testimony of Sandy Hunt.*

32. At the close of the MDNS appeal portion of the consolidated hearing, the Hearing Examiner ruled that the record would be left open until November 1, 2024, to allow the parties to submit written closing briefs. *Oral Ruling of Hearing Examiner.*

#### *Closing Briefs*

33. The Appellant’s closing brief asserts:
- The MDNS inadequately evaluates how construction would disrupt local trail users connecting from the south and east.
  - The elimination of parking at the South 216th and 18th Avenue South trailhead has not been adequately evaluated.
  - The SEPA Environmental Checklist and MDNS fail to consider how the trail experience would change during and after construction.
  - The health impacts of the post-construction trail experience resulting from the removal of tree canopy and the introduction of industrial activities have been inadequately evaluated.
  - The City failed to adequately inform recreational users of the proposed changes to the trail system
  - The MDNS inadequately evaluates the project’s impacts on recreational functions due to the failure to reference existing city trails that are on the development site and informal trail use, the inaccurate representation of the trail to the west on 15th Avenue, the inconsistent references to the trail system as a whole, the elimination of parking at 18th Avenue South and the need for additional parking at 15th Avenue South, the loss of trail access during construction, the failure to address how the trail experience would change with the new routing through a business park, and failure to evaluate noise impacts from the loss of tree canopy.
  - The MDNS did not adequately consider that the location of the project is in close proximity to the Port of Seattle flight path, existing single- and multi-family residential development, Des Moines Creek, Barnes Creek Trail, wetland and stormwater mitigation areas associated with adjacent development, and a wellhead protection area.
  - The MDNS inadequately evaluates impacts from the loss of tree canopy, including heat impacts, air quality impacts, and noise impacts.
  - The MDNS fails to evaluate cumulative impacts from other development projects in the area.

*Appellant Closing Brief, dated November 1, 2024.*



34. The City's closing brief asserts:

- The City does not, and has never, owned the property that is the subject of potential development. Because of this, there has never been a City park on the site, and the City's Parks Master Plan does not apply to these parcels. There are also no easements on the subject properties to allow public use for trail purposes or any other use. Although there is a sliver of an existing City trail that crosses over the northwestern most portion of the property, the City does not currently have an easement for public use. Additionally, the proposed project plans do not propose to alter or impact that sliver in any way.
- Several comments were provided at the hearing from concerned residents and trail users about the project's impact to the makeshift trail as it exists today. While this input is valid and well-intentioned, the relocation, upgrade, and public dedication of a new trail is not a significant adverse environmental impact that would justify a determination that the City's MDNS was clearly erroneous.
- Upon completion of the project, a new upgraded trail would be dedicated in perpetuity for public use that would not only extend the Barnes Creek Trail, but would also connect the Des Moines Creek Trail with the Barnes Creek Trail, as has been contemplated for many years in the City's Comprehensive Plan. Temporary construction impacts are also not significant adverse environmental impacts.
- Regarding other issues raised at the hearing, and explained in the City staff report and referenced documents, the Appellant provided no expert witness testimony to controvert the City's rationale to support the MDNS. The City's mitigation requirements are detailed and comprehensive, and adequately address the concerns raised by the citizens called to testify by the Appellant.
- The MDNS mitigation measures include compliance with the City-approved geotechnical report, Conceptual Mitigation Plan, and Arborist Report and Tree Retention Plan. Testimony regarding wetlands, vegetation, water quality, salmon, and other alleged impacts were all addressed in these reports, and there was little to no testimony related to these reports and no expert testimony contradicting any finding or requirement contained within the reports.
- The City does not have the authority to completely halt development on property not owned by the City. But the City can require that the existing codes, laws, and policies that ensure responsible development and environmental protections are strictly followed, and that mitigation measures are imposed that provide the greatest safeguards possible within the framework of the law. The City has done that, through the issuance of the MDNS.

*City Closing Brief, dated November 1, 2024.*

35. The Applicant's closing brief asserts:

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- The record conclusively demonstrates that no significant adverse recreational impacts would occur. The Appellant's argument relies on the incorrect premise that the project is either a City park or should be treated as one. The project site is Port of Seattle property, not City parkland. The project plans state that the existing trail entrance and gravel path associated with existing City-controlled trail signage at the northwest corner of the site would remain unchanged. Regarding the north-south trail planned for the site, the Applicant's request and the City's conditions of approval for the site plan require improvements and an easement to secure the new trail for future use. Although the Appellant is likely correct that access across the project site would not be available during construction, construction impacts are temporary, and pedestrian access would be available on nearly new sidewalks along 20th and 216th Streets. Regarding post-construction trail conditions, Ms. McDonald acknowledged in her testimony that the trail experience though replanted areas would be beneficial within 20 years, and the Biological Evaluation confirms this.
- Noise impacts are governed by Washington State law and City code. The Appellant presented no expert evidence demonstrating potential adverse significant environmental impacts regarding noise. Under well-established SEPA case law, speculation and requests for additional studies are insufficient to overturn an MDNS. The record demonstrates that any potential noise impacts would be fully mitigated. The project would create a net increase in wetlands and trees and would include a landscape strip along the west and south property lines. These improvements effectively moot the Appellant's speculative concerns about loss of natural sound barriers.
- The Appellant presented no expert evidence regarding air quality impacts. Ms. McMichael's testimony about the project's proximity to SeaTac Airport raised concerns about existing conditions unrelated to the project itself. Such testimony fails to meet Appellant's burden to demonstrate that this specific project would cause significant adverse impacts.
- Through Mr. Lytle's testimony, Appellant alleged landslide hazard and erosion risks to Des Moines Creek. Mr. Lytle acknowledged on cross-examination, however, that his concerns focused on off-site areas. His speculation is thoroughly rebutted by expert evidence. Comprehensive landslide and hillside disturbance analysis was prepared for the project. A detailed drainage report and stormwater system design also was prepared. The Conceptual Mitigation Plan explains how all impacts to critical areas will be mitigated. The City's expert review by Grette Associates confirms the mitigation plan would comply with chapter 16.10 DMMC and would provide net environmental benefits.
- The Appellant's concerns regarding earth and water impacts, presented through Mr. Lytle's testimony, fail to meet the burden required under SEPA. At the hearing, Mr. Lytle expressed concerns about erosion and soil stability, particularly regarding the steep slope under the current trail on 15th Ave. When questioned

by the Hearing Examiner, however, Mr. Lytle acknowledged that his observations related to areas outside the project site. Moreover, Mr. Lytle admitted he has no expertise in geological or hydrological analysis. In contrast, the City's Surface Water Management Division confirmed the project's compliance with erosion control measures meeting current Best Management Practices, and the Division analyzed the proposed drainage systems' compliance with current standards, and assessment of potential downstream impacts.

- Ms. Hunt testified that the project site lies partially within a State-designated Priority Habitat and Species (PHS) area and alleged significant wildlife impacts. However, her testimony revealed no expertise in wildlife biology or habitat assessment. Under questioning, Ms. Hunt acknowledged that her conclusions were based on general PHS mapping rather than site-specific analysis. A detailed Wetland and Fish and Wildlife Habitat Assessment Report provides site-specific analysis. The report demonstrates that while WDFW PHS mapping identifies Des Moines Creek to the north as habitat for resident coastal cutthroat trout, the project site itself contains no designated critical habitat.
- Ms. Hunt raised concerns about wellhead protection and aquifer impacts but admitted during cross-examination that she has no expertise in hydrogeology or aquifer protection. Her testimony about potential groundwater impacts was based on general environmental concerns. The geotechnical report demonstrates detailed subsurface exploration, site specific hydrogeological assessment, analysis of potential groundwater impacts, and recommendations for aquifer protection. The record is clear that development of the site would not result in any significant adverse impacts to the public water supply because the thickness and permeability of the glacial till that mantles the project site significantly reduces direct recharge to the regional aquifer, and the project design would assure protection of the portion of critical aquifer recharge area that underlies the site.
- The City's environmental review exemplifies the thorough analysis required under SEPA. While Appellant's witnesses repeatedly requested more studies, they identified no specific deficiencies in the extensive technical analysis already completed. The record includes in-depth studies and evidence supporting the City's decision, including a Wetland and Fish and Wildlife Habitat Assessment Report, Conceptual Mitigation Plan, Technical Information Report, Geotechnical Analysis, Arborist Report, and third-party expert review by Grette Associates.
- The City complied with all applicable notice requirements.
- The HEAL Act does not apply to this proceeding.

*Applicant Closing Brief, dated November 1, 2024.*

## **CONCLUSIONS**

### Jurisdiction

The City of Des Moines municipal code provides the Hearing Examiner with authority to hear and decide appeals of a DNS or MDNS issued by the City's SEPA responsible official. *DMMC*

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16.05.300; DMMC 16.05.320; DMMC 18.20.080, DMMC 18.20.170. Where, as here, the underlying governmental action (i.e., review of the master plan and variances applications) is taken by the Hearing Examiner, the SEPA appeal “is heard by the Hearing Examiner and is consolidated with the consideration of the underlying governmental action.” DMMC 16.05.320(5)(b). DMMC 16.05.320(7) provides that “[p]rocedural determinations made by the responsible SEPA Official shall be entitled to substantial weight.”

#### Appeal Issues to Be Decided

The Hearing Examiner must carefully consider the scope of the appeal when making findings and conclusions to support any decision made in response to an appeal. Those issues identified in an appeal statement that are not pursued during the course of an appeal will be deemed abandoned by the Appellant and not considered further by the Hearing Examiner. *See, e.g., Seattle First-Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978). A “party abandons an issue by failing to pursue it on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument.” *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). Moreover, the Hearing Examiner does not consider issues that are inadequately argued or given only passing treatment on appeal. *See, e.g., State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990).

In this appeal, the Appellant raised the following issues in her initial appeal letter, as characterized here by the Hearing Examiner, and pursued arguments as to these issues at the appeal hearing:

- (1) The City failed to adequately consider the proposal’s impacts to wetlands on the property, which are crucial for maintaining biodiversity, regulating water flow, and providing natural flood control. The proposed removal of wetlands would result in an increase in noise from airport operations and degraded air quality.
- (2) The City failed to adequately consider the proposal’s impacts to tree canopy. Removing a whole section of mature forest cannot easily be replaced with new plantings and the space will have limited areas to plant. The development plans must offset the significant impact of the loss of this greenspace, which are not in the current plan. The proposed removal of trees would impact wildlife and would result in an increase in noise from airport operations and degraded air quality.
- (3) The MDNS incorrectly concluded that no recreational uses would be displaced from the proposed development.
- (4) The Applicant’s environmental checklist erroneously states that there are no known unstable soil issues, and the MDNS failed to address a steep slope under the current trail on 15th Avenue.
- (5) The MDNS does not address impacts to wildlife. The MDNS notes that Des Moines Creek is already contaminated and impacting salmon habitat but finds no reason not to move forward with this action that would further contaminate the creek.
- (6) The MDNS was issued absent a sufficient public review process.

The Hearing Examiner considered these appeal issues, as characterized above, in making his decision. The Hearing Examiner did not consider issues raised for the first time in the Appellant’s prehearing brief or that were not adequately pursued at the appeal hearing, including issues related to the Clean Water Act, the applicability of the accessory use or structure provisions of DMMC 16.05.310, cumulative impacts of previous development projects in the vicinity, applicability of the HEAL Act, and the proposal’s consistency with the City’s Parks, Recreation, and Senior Services Master Plan and the Parks, Recreation, and Open Space element of the Comprehensive Plan.

#### Criteria for Review

The State Environmental Policy Act (SEPA), Chapter 43.21C RCW, specifies the environmental review procedures the City must follow for proposals that may have an impact on the environment. “The legislature enacted SEPA in 1971 to inject environmental consciousness into governmental decision-making.” *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80, 91, 392 P.3d 1025 (2017). The primary purpose of SEPA is to ensure “that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.” *RCW 43.21C.030(b)*. Every proposal that may impact the environment (unless it is explicitly exempt from SEPA) must undergo some level of environmental review. *RCW 43.21C.030(b)*.

A SEPA threshold determination is a determination of whether a proposal is “likely to have a probable<sup>3</sup> significant<sup>4</sup> adverse environmental impact.” *WAC 197-11-330*. If the City determines that a proposal will not have a probable, significant adverse environmental impact, then a Determination of Nonsignificance (DNS) is issued. If the City determines that a proposal *will* have a probable, significant adverse environmental impact, then a Determination of Significance (DS) is issued and an Environmental Impact Statement (EIS) must be prepared. A Mitigated Determination of Nonsignificance (MDNS) may be issued to mitigate identified probable significant adverse environmental impacts so that an EIS need not be prepared. *WAC 197-11-350*.

The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal,” and if such information is lacking, the lead agency may require additional information from the Applicant, conduct its own study,

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<sup>3</sup> *Probable*, as used in SEPA, means likely or reasonably likely to occur. Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. *WAC 197-11-782*.

<sup>4</sup> *Significant*, as used in SEPA, means a reasonable likelihood of more than a moderate adverse impact on environmental policy. Significance involves context and intensity, and does not lend itself to a formula or a quantifiable test. *WAC 197-11-794*. Several marginal impacts when considered together may result in a significant adverse impact. *WAC 197-11-330(3)(c)*.

consult with other agencies, or commit to future environmental review when the project becomes more definite. *WAC 197-11-335*.

In deciding whether to require an EIS, the lead agency must consider mitigation measures that the agency or Applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws. *WAC 197-11-330(1)(c); WAC 197-11-350*.

“SEPA’s primary focus is on the decision-making process” and, as such, “SEPA seeks to ensure that environmental impacts are considered and that decisions to proceed, even those completed with the knowledge of likely adverse environmental impacts, be ‘rational and well-documented.’” *Columbia Riverkeeper*, 188 Wn.2d at 92 (quoting *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983)).

The Hearing Examiner may consider environmental information presented after issuance of the threshold determination in deciding the appeal. The purposes of SEPA are accomplished if the environmental impacts of the proposed development are mitigated below the threshold of significance, even if the mitigation is not identified in the SEPA document. *See Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001). For the MDNS to survive scrutiny by the Hearing Examiner, the record must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal’s environmental impact. *Sportsmen v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

#### Conclusions Based on Findings

**Substantial evidence in the record supports the City’s decision to issue a Mitigated Determination of Nonsignificance for the proposal.** The Hearing Examiner may not stand in the shoes of the City’s Responsible Official to make a new, independent SEPA determination. Rather, the Hearing Examiner must give the City’s SEPA determination substantial weight. *RCW 43.21C.090; DMMC 16.05.320*. Here, the City issued the MDNS only after reviewing several expert technical reports evaluating the existing environmental conditions of the site, analyzing the proposed development’s impacts to these environmental conditions, and determining the mitigation that would be required to fully compensate for the proposal’s impacts. As pertinent to the issues raised in this appeal, these technical reports include a geotechnical report prepared by Terra Associates, and an arborist report and tree retention plan, a biological evaluation, a wetland and fish and wildlife habitat report, and a conceptual mitigation plan prepared by Soundview Consultants, as well as several technical memoranda prepared by the City’s third-party environmental review consultant, Grette Associates. Notably, Grette’s third-party review of the Applicant’s habitat report and conceptual mitigation plan ultimately led to

revisions of the habitat report and mitigation plan following a site meeting with staff members of DOE, WDFW, the City, Soundview Consultants, and Grette.

The Applicant's biological evaluation determined that the proposed development would not have any effect on protected wildlife species, including salmon essential fish habitat associated with Des Moines Creek. As detailed in the findings above, the Applicant's revised wetland and fish and wildlife habitat report approved by the City identified four regulated wetlands and two regulated streams on-site, as well as the Des Moines Creek Type F stream located offsite to the north, which the report determined has a 115-foot buffer that does not extend onto the subject property and would not be impacted by the proposed development. As also detailed in the findings above, the Applicant's revised conceptual mitigation plan approved by the City identified impacts to the on-site critical areas from the proposed development; calculated the on-site mitigation that would be required to compensate for these impacts in compliance with applicable regulatory requirements; and determined, in agreement with the City's third-party review consultant, that the proposed mitigation strategy would fully compensate for the project's impacts to critical areas, would enhance wetland functions, would increase habitat functions, and would provide greater screening and protection for the on-site wetland area. This was sufficient information from which the City could assess the project's potential wetland, stream, and wildlife habitat impacts and determine that, with measures requiring adherence to the recommendations contained in the technical reports, impacts from the development would not be "significant," as that term is defined under SEPA, meaning that the proposal would not create more than a moderate, adverse impact on the environment.

The evidence presented at the hearing by the Appellant does not directly address, let alone contradict, the analysis and conclusions provided in these technical reports, upon which the City relied in issuing the MDNS, and for which the Applicant would be required to adhere as a mitigation measure of the MDNS. Rather, the Appellant's evidence regarding the project's impacts to on-site wetlands and streams consisted of generalized statements about the value of these environmental features, such as for noise abatement and air quality controls, and opinions that the proposal would not adequately mitigate for the project's impacts below the "significant" threshold. This is insufficient to overcome the substantial weight that must be afforded to the City's threshold determination, and it fails to demonstrate that the City clearly erred in issuing the MDNS on this basis.

As detailed in the above findings, the Applicant's arborist report and tree retention plan identified significant trees on the property, which of the trees would be retained, which trees would need to be removed to facilitate the proposed development, and the replacement trees that would be required to be planted on-site at a 3-to-1 ration in compliance with the City's trees ordinance. Although the report determined that there would be an initial net loss of canopy cover from the proposed tree retention plan, it noted that the restoration and enhancement plantings would restore the third of the site located on the eastern portion to a vertically and horizontally diverse canopy structure within 10 to 20 years. Again, the Appellant's evidence

presented at the hearing does not contradict the conclusions provided in the arborist report and tree retention plan relied upon by the City in issuing the MDNS but, rather, includes generalized statements and opinions of the benefits of mature tree canopy, such as noise abatement, preventing air quality degradation, and decreasing heat. Again, this is insufficient to overcome the substantial weight that must be afforded to the City's threshold determination, and it fails to demonstrate that the City clearly erred in issuing the MDNS on this basis.

The Applicant's geotechnical report determined that the project site does not contain any erosion or seismic hazard areas and that the only landslide hazard area on-site consists of an existing drainage feature at the center of the property that would be removed through proposed filling. The report further determined that the proposed development would meet all applicable requirements for hillside disturbance, would not have any significant adverse impact on the public water supply, and would be feasible from a geotechnical perspective. The Appellant's evidence presented at the hearing does not contradict these determinations. Again, the Appellant's evidence presented only speculative statements and opinions about how development on the property could potentially exacerbate erosion areas associated with Des Moines Creek offsite to the north. In addition, the Appellant's evidence regarding a potential steep slope under the current trail on 15th Avenue cannot overcome the City's threshold determination because the Applicant's proposed master plan indicates that no development would occur in this area and that the existing trail and stairs would remain. Accordingly, the evidence presented by the Appellant on this issue is insufficient to overcome the substantial weight that must be afforded to the City's threshold determination, and it fails to demonstrate that the City clearly erred in issuing the MDNS on this basis.

Although the evidence presented at the hearing clearly establishes that members of the public have utilized trails on the property for several years, the portion of the property containing the trails is not owned by the City, is not designated as park land, and does not contain any easement preserving the trail for public use. In accordance with an interlocal agreement between the Port of Seattle and the City, the Applicant would, however, provide an improved north-south trail through the site, which would provide connections to the Des Moines Creek trail system to the north and the Barnes Creek trail system to the south and would be dedicated within an easement preserving it for public use. The Appellant presented evidence at the hearing related to how the experience of trail users would change with the proposed development, as would be expected with any development on the non-City-owned property, but this is insufficient to demonstrate that the City clearly erred in determining that the change in trail experience would not constitute a probable significant adverse impact, particularly since the improved trail would be dedicated to public use, unlike the existing informal trails on the property.

Finally, the Appellant has not demonstrated that the City failed to adequately provide notice of the MDNS. The record clearly establishes that the City provided notice of the MDNS in accordance with all legal requirements by mailing notice to property owners and residents within 300 feet of the property; posting notice on-site and at designated City locations; publishing



notice in *The Seattle Times*; and emailing notice to various City departments, local jurisdictions, special purpose districts, state agencies, utility providers, tribes, and other interested parties. To the extent that the Appellant argues that additional requirements should be in place to ensure that non-English speakers are provided notice in a different language or that residents outside of a 300-foot radius receive notice by mail, these are issues that should be directed to and addressed by the City's legislative body. In short, the Appellant cannot demonstrate that the City's notice provisions contravened legal requirements for such notice and, accordingly, cannot demonstrate that the City clearly erred in issuing the MDNS on this basis.

Although the Appellant's concerns with the proposed development on currently vacant property that is currently utilized for outdoor recreational activities by members of the public are understandable, the relevant issue that must be resolved in this appeal is whether the responsible SEPA official had sufficient information to determine that, with mitigation measures, the project would not have a probable significant adverse impact on the environment. In light of the City's extensive review of the Applicant's and the third-party consultant's materials regarding the environmental impacts of the proposed development, and the lack of evidence contradicting the analysis provided in these materials, the Hearing Examiner concludes that substantial evidence supports the City's decision and shows that the City did not commit clear error when issuing the MDNS. *Findings 1 – 35.*

### DECISION

Because substantial evidence supports the City's decision to issue an MDNS for the proposal, the SEPA appeal is **DENIED**.

DECIDED this 21<sup>st</sup> day of November 2024.



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PEREGRIN K. SORTER  
Hearing Examiner  
Laminar Law, PLLC

## ATTACHMENT A

The following exhibits were admitted in the SEPA appeal record:

### Appellant Documents:

- A-1. Exhibit Cover Page
- A-2. History and Timeline
- A-3. DMMC 16.05.190
- A-4. Master Site Plan and Preliminary Cover Sheet
- A-5. Des Moines 2024 Comprehensive Plan Update Survey Results Memorandum, AHBL, dated December 29, 2023
- A-6. Email from Jason Woycke to Tim George re: Des Moines Creek Business Park West public comments, dated July 25, 2024, with public comments
- A-7. Comment from Tim Irwin, dated September 28, 2024
- A-8. Comment from Renee Swindall, undated
- A-9. Comment from Nan Magnuson, dated October 2, 2024
- A-10. Comment from J. Granstand, undated
- A-11. Comment from William Hicks, undated
- A-12. Comment from Edd Brown, dated October 3, 2024
- A-13. Comment from Aubrey Halverson, dated October 3, 2024
- A-14. Comment from Michael Mullert, dated October 1, 2024
- A-15. Comment from Mimi, dated October 2, 2024
- A-16. Comment from Mistie Mathieson, undated
- A-17. Comment from Molly Cha, dated September 30, 2024
- A-18. Comment from Alex Forderer, dated October 1, 2024
- A-19. Comment from James Leavitt, dated September 30, 2024
- A-20. Comment from Brennan Baumann, undated
- A-21. Comment from Nicole Malik, dated October 2, 2024
- A-22. Comment from Lloyd Lytle, undated
- A-23. Vicinity Map with Markup regarding Public Notice
- A-24. Public Notice Mailing List
- A-25. Save Our Wetland and Forest Petition additional signatories
- A-26. Excerpts from *Community Health and Airport Operations Related Noise and Air Pollution: Report to the Legislature in Response to Washington State HOUSE BILL 1109*.
- A-27. Geotechnical Report Cover Letter, Terra Associates, Inc., dated December 21, 2022
- A-28. DOE Wetland Avoidance and Minimization Checklists
- A-29. Washington's Environmental Justice Law (HEAL Act)
- A-30. Washington Environmental Health Disparities Map
- A-31. Stormwater Action Monitoring - Bioretention reduction of toxicity to Coho salmon from urban stormwater
- A-32. Stormwater Action Monitoring – Business Inspection Stormwater Source Control Effectiveness Study

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- A-33. Original communication from the Port of Seattle outlining the original environmental policy in 1976 and Excerpt from the Defenders of Highline Forest website
- A-34. DMMC 16.05.310
- A-35. Biological Evaluation, Soundview Consultants, dated August 26, 2022
- A-36. Variance Report, Terra Associates, Inc., dated June 16, 2023
- A-37. Response to February 7, 2024, City Comment Letter, Barghausen Consulting Engineers, Inc., dated March 6, 2024
- A-38. Response to City Comment Letter, Soundview Consultants, LLC, revised July 26, 2023
- A-39. Applicant Joint Aquatic Resources Permit Application (JARPA), dated September 1, 2022
- A-40. Master Development Application, dated August 25, 2023
- A-41. Applicant Master Plan Narrative
- A-42. Technical Memorandum, Grette Associates, LLC, dated March 3, 2023
- A-43. Technical Memorandum, Grette Associates, LLC, dated April 17, 2024
- A-44. Notice of Applications and SEPA MDNS, with public notice distribution list
- A-45. Mitigated Determination of Nonsignificance (MDNS), dated July 8, 2024
- A-46. Additional City of Des Moines SEPA Checklist Comments
- A-47. Email from WDFW Habitat Biologist Julian Douglas to Kathy McDonald, dated July 23, 2024; WDFW Letter re: Stream Classification of an unnamed tributary to Des Moines Creek, dated May 18, 2023
- A-48. Excerpt from WSDOT Blog, dated January 18, 2023
- A-49. Visual Presentation of Trail Experience Today
- A-50. Visual Presentation of Current Parking at 216th Trail Entrance and New Trail Entrance Location
- A-51. Comment from Laura Hartema, dated October 2, 2024
- A-52. Presentation of Eileen Lambert
- A-53. Des Moines Creek 2012 Pre-spawn Mortality Survey, Laura Hartema – King County Water and Land Resources Division Ecological Restoration and Engineering Service Unit, dated March 2013
- A-54. Excerpts from the Green Des Moines Partnership Urban Forest Enhancement Plan
- A-55. King County Parcel Maps
- A-56. Comment from Patrice Thorell, dated October 3, 2024

Applicant Documents:

- B-1. DOE Opinion Letter re: Opinion on the Proposed Cleanup of a Property associated with the Asarco Tacoma Smelter Site, dated April 10, 2023

City Documents:

- C-1. Staff Report, dated October 3, 2024
- C-2. Reference Maps
- C-3. Washington Administrative Code (WAC) 197-11-330
- C-4. Master Site Plan

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- C-5. Interlocal Agreement Between the City of Des Moines and the Port of Seattle
- C-6. City Council Remand Agenda Item
- C-7. Notice of Complete Application (Master Plan), dated October 13, 2022; Notice of Complete Application (Variance), dated September 12, 2023
- C-8. Conceptual Design Plans (4 Sheets), dated
- C-9. Applicant Master Plan Narrative
- C-10. Traffic Impact Analysis, Kimley Horn, dated December 2022
- C-11. Technical Information Report, Barghausen Consulting Engineers, Inc., dated October 27, 2023
- C-12. July 7, 2024, Civil Plans (22 Sheets)
- C-13. Geotechnical Report, Terra Associates, Inc., revised February 24, 2023
- C-14. Arborist Report and Tree Retention Plan, Soundview Consultants, LLC, revised January 26, 2024
- C-15. Review Memoranda, Grette Associates, LLC, various dates
- C-16. Wetland and Fish and Wildlife Assessment Report, Soundview Consultants, LLC, revised July 18, 2023
- C-17. Conceptual Mitigation Plan, Soundview Consultants, LLC, revised March 6, 2024
- C-18. Short Plat Alteration (6 Sheets), dated April 2016
- C-19. SEPA Environmental Checklist, revised August 2, 2023
- C-20. SEPA Mitigated Determination of Nonsignificance, dated July 8, 2024
- C-21. March 1, 2024, Civil Plans (22 Sheets)
- C-22. March 6, 2024, Conceptual Design Plans
- C-23. Biological Evaluation, Soundview Consultants, LLC, dated August 26, 2022
- C-24. Cultural Resources Assessment, Cultural Resource Consultants, dated August 26, 2022
- C-25. Variance Report, Terra Associates, Inc., dated June 16, 2023
- C-26. Notice of Applications and SEPA MDNS, with mailing list, public notice distribution list, affidavit of adjacent property public notice information, affidavit of public notice sign installation, and affidavit of publication
- C-27. SEPA MDNS Appeal, received August 2, 2024, with attachments
- C-28. Notice of Public Hearing, with mailing list, public notice distribution list, affidavit of adjacent property public notice information, and affidavit of public notice sign installation
- C-29. Variance Application, dated August 25, 2023
- C-30. Four (4) Variance Application Photographs
- C-31. Public Comments

Pleadings, Orders, and Briefs:

- SEPA MDNS Appeal, received August 2, 2024
- Hearing Examiner's Pre-Hearing Order, dated September 3, 2024
- Appellant Witness List, submitted October 4, 2024
- Appellant Documents List, submitted October 4, 2024
- City Witness List, dated October 4, 2024

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- City Documents List, dated October 3, 2024
- Applicant Witness List, dated October 4, 2024
- Applicant Documents List, dated October 4, 2024
- Appellant Hearing Brief, dated October 11, 2024
- City Hearing Brief, dated October 11, 2024
- Applicant Hearing Brief, dated October 11, 2024
- Applicant Response to Appellant Hearing Brief, dated October 16, 2024
- Appellant Closing Brief, dated November 1, 2024
- City Closing Brief, dated November 1, 2024
- Applicant Closing Brief, dated November 1, 2024