FINDINGS AND DECISION OF THE HEARING EXAMINER FOR THE CITY OF KIRKLAND

In the Matter of the Appeals of

File Nos.: APL12-0001 & APL12-00002

CONCERNED NEIGHBORS OF BIG FINN HILL PARK and RAINER KIRSCHNER

from a SEPA determination issued by the Director of the Planning and Community Development Department

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Introduction

The Director of the Planning and Community Development Department, acting as the Responsible Official under the State Environmental Policy Act, Chapter 43.21C RCW, issued a Determination of Non-significance (DNS) for a field conversion project at Big Finn Hill Park. Concerned Neighbors of Big Finn Hill Park and Rainer Kirschner each filed appeals of the DNS.

The appeals were consolidated for hearing on February 15, 2012 before the Hearing Examiner (Examiner). Appellant Concerned Neighbors of Big Finn Hill Park (Concerned Neighbors) was represented by Bryan Allen; Appellant Rainer Kirschner represented himself; the Applicant, King County Parks Department, was represented by T. J. Davis, Project Manager; and the Director of the Department of Planning and Community Development (Department) was represented by Jon Regala, Senior Planner. The Examiner visited the site on February 17, 2012.

For purposes of this decision, all section numbers refer to the Kirkland Municipal Code (KMC or Code) unless otherwise indicated. After considering the evidence in the record and inspecting the site, the Examiner enters the following findings of fact, conclusions and decision on the appeals.

Findings of Fact

1. The proposal site, which is owned by King County, is addressed as 8106 NE 138th Street and is located in the Finn Hill neighborhood. It is 220 acres in size, zoned for park use and presently developed with four baseball/softball fields, a picnic/play area, a grass soccer field, and surface parking.

2. Denny Creek is located approximately 500 feet southeast of the soccer field and flows generally southwest, approximately 2.5 miles, into Lake Washington. It is a fish bearing stream, and its 115 foot-wide buffer encompasses parts of the Park. Northeast 138th Street bisects the Park between Juanita Drive NE and 84th Avenue, but the section

of it that crosses Denny Creek is closed to vehicular traffic most of the time. An unclassified wetland that is part of existing storm water facilities is located south of the existing soccer field.

3. The overall slope in the area of the Park is from northwest to southeast. Residential development is located to the north of the Park, and pockets of residential development, including the residences of the Appellants, are located to the south.

4. Kirkland Youth Lacrosse and King County Parks propose to convert the existing grass soccer field in the Park to a synthetic turf field to accommodate both soccer and lacrosse. The project also includes construction of paved field access pathways and the addition of 8 parking stalls; construction of field curbing, fencing, bleachers and netting; installation of field lighting to allow for night use; identification of a future location for a scorekeeper's hut and field house; and stabilization of construction areas.

5. The proposal would not increase lot coverage, but impervious surface would increase approximately 10.5 percent, from 4,792 square feet to 11,761 square feet.

6. The proposed turf field would be fenced around the perimeter, with four gated field entrances/exits at the north end. Field users would arrive by car or by foot.

7. The Applicant proposes to use cryogenically produced crumb rubber. The artificial turf field would be cleaned with pressurized water directed internally to the field, and primary maintenance would be grooming/sweeping the field. Blowers would be used only to remove large amounts of debris typically associated with large storm events.

8. Kirkland Youth Lacrosse submitted the grading permit application and SEPA documents for the project to King County for review, and King County issued a SEPA determination of non-significance.

9. On June 1, 2011, the unincorporated area north of Kirkland, including Big Finn Hill Park, was annexed into the City. Pursuant to an Annexation Interlocal Agreement and subsequent Memorandum of Understanding between the County and City, King County conducted review of the grading permit application, and the Department assumed SEPA lead agency status and was responsible for completing environmental review. County regulations to which the project vested continue to apply. For operational regulations, such as noise limitations, the City's ordinances apply.

10. The Applicant submitted seven studies and two informational brochures with background information on environmental concerns related to synthetic turf fields, including *Assessment of Environmental, Health, and Human Safety Concerns Related to the Synthetic Turf Surface at Maple Park in Ridgewood, NJ*, Ridgewood Environmental Advisory Committee, January-October, 2009 (Ridgewood Study); and *An Assessment of Chemical Leaching, Releases to Air and Temperature at Crumb-Rubber Infilled Synthetic*

Turf Fields, New York State Department of Environmental Conservation, New York State Department Of Health, May, 2009 (New York Study).

11. The New York Study included laboratory evaluation of four types of tire-derived crumb rubber, including car, truck, a mixture of car and truck, and a mixture that is cryogenically produced, to evaluate the release of chemicals. One concern is that the crumb rubber fibers break down over time and release toxins into the water table or nearby water bodies. The New York Study included a risk assessment of impacts on aquatic life, based on one sample, and found aquatic toxicity unlikely from all except truck tires. When the study methodology was revised to be more representative of field conditions, the study found no adverse impacts from any of the crumb rubber types evaluated. New York Study at 2, 29-30.

12. The Ridgewood Study notes that new "FieldTurf" crumb rubber surfaces are "lead-free and virtually all heavy metals are removed from the crumb rubber during the cryogenic grinding processing," but raises the question that if traces of heavy metals remain, are they released in levels that pose a danger? Ridgewood Study at 12. The Ridgewood Study cites other studies, including one by Johns and Goodlin conducted for King County, which concluded that runoff from synthetic turf "had no effect on test organisms and met all state and federal water quality standards," and that "organic compounds generally do not seem to be released in detectable concentrations." Ridgewood Study at 12.

13. The Ridgewood Study also found that synthetic field surfaces are hotter than natural grass fields by as much as 30 degrees Fahrenheit on average. However, at 12 inches above the surfaces and 39 inches above the surfaces, the differences in temperature between the two types of fields were virtually undetectable. Ridgewood Study at 7.

14. The project is required to comply with the 2009 King County Surface Water Design Manual - Appendix D, "Erosion and Sediment Control Standards".

15. The Applicant has proposed a storm drainage system that includes a water quality sand filter. *See* Exhibit 5; Exhibit 1, Enclosure 3 at 43-44. The system would provide enhanced water quality treatment, meeting the most stringent standards for flow control. The system would be designed to create flow rates approximately 72 percent below those expected for the site if it were completely undeveloped. The system would remove 80 percent of suspended solids and also remove metals, including a 50 percent reduction in total zinc. Runoff from the parking lot would pass through a vegetated bioswale south of the field that includes several check dams designed to filter any crumb rubber washed in from the parking lot.

16. The lighting system for the project would include 70-foot tall light standards that use the Musco "Light-Structure Green" lighting system. This system includes a "spill and glare light control visor" and "die-cast aluminum reflector housing" to help reduce light impacts to adjoining properties. Exhibit 1, Enclosure 3 at 105-117.

17. Light from light standards at the north edge of the sports fields would be oriented to the south, and would be approximately 690 to 800 feet away from homes to the south. Light standards at the south edge of the field would be oriented to the north and would be approximately 460 to 630 feet away from homes to the south. Due to fixture orientation, light from the northern light standards would be most visible to the homes south of the field.

18. The Applicant submitted revised photometric information showing lighting levels that extend to the south property line. The levels range from 0.95 foot candles approximately 58 feet south of the field, which is equivalent to a lighting level of "twilight," to approximately 0.007 foot candles at the south property line approximately 338 feet from the field, which is equivalent to a lighting level slightly brighter than a quarter moon. Exhibit 1, Enclosure 15. The photometric information does not account for factors that could reduce lighting levels further, such as the change in topography or the existing trees, which are primarily deciduous but include conifers that surround the west and most of the south sides of the field.

19. King County interprets King County Code 21A.18.110(G) as prohibiting light levels from on-site lighting systems from exceeding one foot candle, as measured at the property line. According to a table from "Engineering Tool Box" supplied by the Department, one foot candle is approximately equal to lighting conditions at twilight. *See* Exhibit 1, Enclosure 3 at 31.

20. Although the Applicant allows amplified sound in other areas of the Park, it proposes to prohibit it and the use of air horns at the sports field through adoption of facility use rules that would be incorporated into rental agreements for use of the field.

21. In KZC 115.95.1.a, the City has adopted by reference state regulations on maximum environmental noise levels, Chapter 173-60 WAC. Those regulations provide that noise from a park use cannot exceed 55 dBA when entering residential property between 7:00 a.m. and 10:00 p.m. or exceed 45 dBA between the hours of 10:00 p.m. and 7:00 a.m. The WAC provides that these noise limitations may be exceeded for a receiving property by no more than 5 dBA for a total of 15 minutes in any one-hour period, 10 dBA for a total of five minutes in any one-hour period, or 15 dBA for a total of 1.5 minutes in any one-hour period. Further, unamplified human voices are exempt from maximum noise levels.

22. King County did not provide a noise study for the proposal. The Department reviewed noise impacts by extrapolating from noise impacts studied at Magnuson Park in Seattle, as discussed in the 2002 Final Supplemental Environmental Impact Statement (FSEIS) for Magnuson Park. The noise readings discussed in the FSEIS were taken at 100 feet from a soccer game during a peak 7:00 p.m. use time.

23. Using the information from the Magnuson Park FSEIS, the Department calculated the likely noise levels for youth soccer and adult soccer at residential property lines 354

feet to the southwest, 486 feet to the southeast, and 772 feet to the north. The Department's approach did not take into account factors that might reduce sound levels, such as lower crowd attendance at late night games, topography, vegetation, and sound absorbed by the atmosphere or the field. Under that Department's calculations only youth soccer would exceed the maximum noise limits after 10:00 p.m. However, youth soccer would not be scheduled on the field after 10:00 p.m. Exhibit 1 at 9.

24. The Department also noted that vehicular traffic along Juanita Drive creates existing noise impacts in the area south of the field. Measuring noise from a single vehicle on Juanita Drive, the Department calculated noise levels for vehicle traffic 375 feet and 750 feet east of Juanita Drive. Exhibit 1 at 10. The Department concluded that at most times, noise from adult and youth soccer activities on the field would be comparable to or below the estimated noise from vehicle traffic on Juanita Drive. For the same reason, the Department concluded that noise impacts from the proposal would not create a significant adverse impact to wildlife habitat south of the field.

25. The Department issued a SEPA DNS on December 7, 2011. During the comment and appeal period that followed, the Department received three comment letters and two appeals. The Department's responses to the SEPA comments are included in Exhibit 1.

26. The appeals were consolidated for hearing and raise issues concerning the proposal's lighting impacts, noise impacts, impacts on water runoff, the impacts of artificial turf crumb rubber on fish and wildlife, and the project's consistency with the King County Master Plan for Big Finn Hill Park (Master Plan).

27. In light of the noise issues raised in the appeal, the Department recommended that the Applicant obtain a peer review of the Department's evaluation of the proposal's noise impacts. The consultant's peer review report (Exhibit 2) concluded that the Department's analysis constituted a reasonable assessment of environmental noise from the proposal but that there were some problems with the analysis.

28. The noise consultant concluded that there was a lack of specific information "related to the geometry of the source/receiver distances during measurements for the Magnuson Park" FSEIS. Exhibit 2 at 6. The consultant calculated that in a worst case scenario, adult soccer would not comply with noise limits after 10:00 p.m. As a result, the Department stated at hearing that it could not allow field use after 10:00 p.m. without further noise studies.

29. The noise consultant concluded that, contrary to the Department's assumption, traffic within the parking lot is not exempt from noise regulations. However, because the lot is 320 feet away from the closest residence, the consultant agreed that noise in the parking lot was unlikely to exceed established noise limits.

30. With respect to ambient noise levels, the consultant concluded that a valid comparison between background noise and traffic on Juanita Drive and the anticipated

noise from field use would require additional modeling to obtain more accurate information on traffic and background noise levels. However, the Department concluded that because its study had used such conservative numbers in calculating ambient noise, any additional study was likely to result in a higher, rather than a lower ambient noise level and thus, demonstrate less of a noise impact from the proposal.

Conclusions

1. The Hearing Examiner is to consider all information and material "within the scope of the appeal submitted by persons entitled to participate in the appeal." KMC 24.02.230(h)(1). The issues before the Examiner are limited to those stated in the Appellants' appeal letters. KMC 24.02.230(i)(1).

2. In accordance with WAC 197-11-680(3)(a)(viii), KMC 24.02.230(i)(2) provides that the Examiner must accord substantial weight to the Department's DNS. An agency's SEPA determination is reviewed under the "clearly erroneous" standard. A decision is clearly erroneous if the Examiner is "left with a definite and firm conviction that a mistake has been committed." *Moss Bellingham*, 109 Wn. App 6, 13, 31 P.3d 703 (2001)(citations omitted). The reviewing body may not substitute its judgment for the decisionmaker, but instead, examines the record and all the evidence in light of the public policy underlying SEPA. *Association of Rural Residents v. Kitsap Cy.*, 141 Wn. 2d 185, 196-195, 4 P.3d 115 (2000)(citations omitted). 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 the DNS was based on "information sufficient to evaluate the proposal's environmental impact." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997).

3. The courts have held that the policy underlying SEPA is "to promote the policy of fully informed decision making by government bodies" to ensure that environmental values are given appropriate consideration. *Moss Bellingham supra* at 14, *quoting Norway Hill Preservation and Protection Assoc. v. King Cy. Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976).

4. Concerned Neighbors argues that the proposal violates the 1994 Master Plan because the Master Plan prohibits lighted sports fields and artificial turf fields. Exhibit 1, Enclosure 1; Exhibit 6. The Applicant asserts that the Master Plan was adopted as a planning document, not as a regulation, and Concerned Neighbors did not present evidence to the contrary. Further, this issue is not within the scope of SEPA, which addresses review of *environmental* impacts. *See* WAC 197-11-752 and -444, adopted by reference in KMC 24.02.040 and .130, respectively. WAC 197-11-444 includes land use and recreation as elements of the "built environment," but there is no evidence in the record that the Master Plan is land use plan or recreational planning document adopted by the City, which is the lead agency for purposes of SEPA.

5. Appellant Kirschner asserts that an environmental impact statement (EIS) is required for the proposal. WAC 197-11-360(1), adopted by KMC 24.02.100, provides

that "[i]f the responsible official determines that a proposal may have a *probable significant adverse environmental impact*, the responsible official shall prepare and issue a determination of significance," the precursor to an EIS. (Emphasis added.) "Probable" is defined as "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, adopted by KMC 24.02.040. "'Significant' as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1), adopted by KMC 24.02.040.

6. At hearing, Appellant Kirschner presented his findings about discovering crumb rubber 425 feet from an artificial turf field in Redmond. Exhibit 4. He argues that an EIS is required because crumb rubber tracked away from the field on tires and shoes, and from field maintenance, "could have a significant impact on the salmon and amphibians of Denny Creek." Exhibit 1, Enclosure 2. He cites a 2008 Connecticut study which found that 25 different chemicals and four metals could be released into water from crumb rubber infill. Exhibit 4. However, the study was not offered as an exhibit, and there is no information in the record about the source of the crumb rubber used in it. It is clear from the New York Study and Ridgewood Study that the source of the rubber can be an important factor in toxicity. Further, information in the Ridgewood Study indicates that the cryogenic crumb rubber proposed by the Applicant is lead free and does not release organic compounds in detectable concentrations. Additional information in the record about the product indicates that it is also less prone to dispersion than other crumb rubber products. *Turf Talk, Cryogenic Versus Ambient Rubber, Volume 2.* On this record, it has not been shown that the Department was clearly erroneous in determining that the use of crumb rubber in the project would not create a significant adverse environmental impact.

7. Appellant Kirschner argues that an EIS is required because crumb rubber could increase the temperature of surrounding areas in the summer months, Exhibit 1, Enclosure 2, but he offered no evidence in support of this assertion. The evidence in the record indicates that temperatures on the surface of artificial turf decrease rapidly as one moves away from it. There is no clear error here.

8. Appellant Kirschner claims that material could erode into Finn Creek during field construction, and runoff could increase flooding on his property due to the 10 percent increase in impervious surface on the site and loss of natural turf. Exhibit 1, Enclosure 2. However, the evidence shows that the proposal is required to comply with the 2009 King County Surface Water Design Manual - Appendix D, "Erosion and Sediment Control Standards" and that the Applicant has proposed a storm drainage system designed to the most stringent flow control standards. The record does not show that the proposal would result in probable significant adverse drainage or erosion impacts.

9. Appellant Kirschner claims that an EIS is required because the proposal could disrupt wildlife (specifically referring to beaver) due to human activity (noise and lighting) after dusk, but he presented no evidence in support of the claim. The record indicates that lighting levels around the field would vary from "twilight" to a "half-

moon". Further, there is significant background noise and vehicular traffic on Juanita Drive that would likely exceed projected noise levels from the field. There is no evidence of clear error here.

10. Appellant Kirschner also argues that light from the field would decrease his family's quality of life. The evidence shows a likelihood that the field lights will be more or less visible from Appellant Kirschner's property depending upon the time of year and foliage on the intervening trees. However, the lights would be a significant distance from the property, and the evidence shows that their orientation and design would result in a lighting level equivalent to a "half-moon" at the property line. This complies with King County regulations, and there is no evidence of a City-adopted SEPA policy that would require additional mitigation. *See* KMC 24.02.038.

11. Appellant Kirschner and Concerned Neighbors assert that the presence of field noise at night and during winter evenings constitutes a probable significant adverse impact of the proposal that requires further study. Exhibit 1, Enclosures 1 and 2. Concerned Neighbors claims that the Magnuson Park noise study was not relevant to the proposal in terms of park characteristics and event use. The noise consultant hired to review the Department's noise analysis agreed that there were some problems with using the Magnuson Park noise study, but in calculating a worst case scenario, he concluded that only adult soccer games after 10:00 p.m. would violate City noise regulations. Therefore, with the addition of a mitigating measure limiting field use to 10:00 p.m., the proposal will comply with all noise regulations. The Appellants have not cited any SEPA policy that would allow the Department to impose additional restrictions on noise.

12. The Appellants live close to the Park and are very familiar with it, so their concern about the possibility of the impacts listed in their appeals is understandable. But SEPA requires more. The record demonstrates that the Department gave sufficient consideration to environmental factors based on information that was adequate to evaluate the proposal's environmental impacts. Under SEPA, a challenge to the Department's threshold determination must demonstrate through objective, substantive, factual evidence that the proposal will have a probable significant adverse environmental impact. The Appellants did not meet this burden.

13. The Department's DNS should be modified to include a mitigating condition prohibiting field use after 10:00 p.m.

Decision

The Determination of Non-significance issued by the Department is **MODIFIED** to add the following condition:

> Use of the sports field shall cease at 10:00 p.m. each evening. This condition will be reconsidered if King County provides to the Department a professional noise study which demonstrates that use of the field after 10:00 p.m. would comply with all Kirkland noise regulations.

As modified, the Determination of Non-significance is **AFFIRMED.**

Entered this 23rd day of February, 2012.

Sue A. Tanner
Hearing Examiner

Exhibits

The following exhibits were entered into the record:

Exhibit 1	Department's Report with 16 attachments
Exhibit 2	Noise Study Peer Review
Exhibit 3	Appellant's "SEPA Verbal Appeal" dated 7/22/08
Exhibit 4	Department's PowerPoint presentation
Exhibit 5	Appellant Kirschner's PowerPoint presentation
Exhibit 6	PowerPoint presentation on storm drainage design for Big Finn Hill Park

PARTIES OF RECORD:

Concerned Neighbors of Big Finn Hill Park, c/o Bryan Allen - 14007 81st Place NE, Kirkland, WA 98034
Rainer Kirtschner – 13433 78th Place NE, Kirkland, WA 98034
T.J. Davis, King County Parks Department – 201 South Jackson Street, Rm. 700, MS KSC-NR-0700, Seattle, WA 98104
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Department of Planning and Community Development

Concerning Further Review

KMC 24.02.110 states that: "Judicial review of SEPA determinations are by RCW 43.21C.075 required to be heard only at the time of judicial review of the underlying action, i.e., approval or disapproval of the proposal for which SEPA review is required. For rules on perfecting and timing of the SEPA determination and judicial review, see RCW 43.21C.075 and WAC 197-11-680(4). The notice required by WAC 197-11-680(5) shall be appended to the permit or "notice of appeal at the time of final city action."