WEST VALLEY SCHOOL DISTRICT / APPLE VALLEY ELEMENTARY
APP#008-21
(MOD#021-21, APP#001-21)

EXHIBIT LIST

CHAPTER CC
Appeal Responses & Appellant Rebuttal

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BEFORE THE CITY OF YAKIMA CITY COUNCIL

In the matter of the Appeal of: WEST VALLEY SCHOOL DISTRICT NO. 208, a political subdivision of the State of Washington, Appellant, v. CITY OF YAKIMA, a political subdivision of the State of Washington, Respondent.	APP#001-21, MOD#021-21 APPELLANT'S REBUTTAL

West Valley School District No. 208 (the "School District") submits the following Rebuttal in support of its above-captioned Administrative Appeal to the Yakima City Council ("City Council"). The Hearing Examiner erred in allowing the City to deny the School District's as-built elevations by applying a modification standard pertaining to gross floor area to an elevation change. Neither the Hearing Examiner nor the Administrative Official in this case considered elevation changes to be an increase in structure height. Nor does the record support the contention that the school buildings impermissibly exceed height limits—the City's staff report found the opposite. Finally, the City Council does not have

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the authority to require the School District to pay money to John and Candace Manfredi. The School District requests that the City Council reverse the Hearing Examiner's Decision with respect to grading.

I. ADDITIONAL FACTUAL BACKGROUND

As Matt Whitish, the lead architect on the Apple Valley Elementary School project, testified before the Hearing Examiner, grades at Apple Valley Elementary were originally designed in the permit drawings with the anticipation that all soil would be retained onsite. Quantifying the amount of material that will need to be moved on a large site is difficult to predict at the beginning of a project as multiple factors can affect the actual amount of material generated on a project. While CAD programming can provide close approximations of generated material, it is not uncommon for more or less material to be generated than expected. At Apple Valley, unsuitable soils for foundations were encountered when excavating for the school building. While unsuitable for structural reasons, these soils were acceptable for use in the playfields and resulted in an increased amount of material generated on the site. With the understanding that determining the exact quantity of material onsite is difficult to predict during design, it is common to have a contingency plan available to deal with unexpected material overruns or shortages. Typically, the most flexible space on a site to accommodate material discrepancies is in the playfields where grades can easily be adjusted without having negative impacts to the use of the fields by the students.

Revising grades during construction to keep excess soil onsite is common practice in the construction industry and accepted by many jurisdictions. This is because moving soil is costly. Whether moving soil around a site, exporting soil offsite, or importing soil to the site, significant costs are incurred to the project. It is always the goal of the design team to

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balance a site to avoid unnecessary importing or exporting of soil. When working on large sites of 10 acres or more, tens of thousands of cubic yards of material are often moved. At a typical cost of around $12 per cubic yard to export soil, removing 10,000 cubic yards from a site comes with a $120,000 price tag.

The unique contaminated soil conditions at Apple Valley further enforced the need to avoid exporting material. Exporting contaminated soil is more costly than exporting clean soil, and at this site, the Washington State Department of Ecology determined that keeping contaminated soil on-site with a clean cap is the solution that is most protective of human health and the environment. As earthwork progressed at Apple Valley, it was discovered that more material was generated than anticipated. With the goal being to maximize usable space for soccer and baseball playfields for the students while also being responsible with taxpayer's dollars, the design team and District recommended a cost-effective solution to the contractor that allowed much of the excess material to be utilized onsite by raising the south playfield. Approximately 6,000 cubic yards of excess material present after grades were revised were still exported offsite for a cost of approximately $74,000.

II. ARGUMENT

A. Grading Increases During the Course of Construction Do Not Fall Within the Definition of a Structure for the Purposes of YMC 15.17.020.D.

The Hearing Examiner's decision did not find that a change in elevation is equivalent to an increase in structure height that would require the City to deny the School District's Modification Application. Instead, the City partially denied the School District's modification request on the basis that it was a more than 50% increase over the elevations shown on the approved site plan. City's Decision at 5; Hearing Examiner's Decision at 6-7.

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As fully discussed in our Appellant's Memorandum of Points and Authorities In Support of Appeal, the uncontroverted evidence in the record demonstrates that the average increase in grade is only 32% across the entire site from the permit set to the as-built conditions. In their opposition to the School District's appeal, the Manfredis, who have not filed an appeal of either the Administrative Official's decision or the Hearing Examiner's decision in this matter, argue that the Hearing Examiner should have found that "grade raises are within the definition of structures" within the City's code and that because the grade raises increased the height of a structure per YMC 15.17.020.D, the City was correct in denying the modification application. Neither of these arguments are supported by the City Code or the record.

The City Code does not define grade to include a structure. Instead, YMC 15.02.020 defines "grade" as "the lowest point of elevation of the finished surface of the ground, paving, or sidewalk within the area between the building and the property line or, when the property line is more than five feet from the building, between the building and a line five feet from the building." Although from this definition an increase in grade could result in an increase in a structure's height, the Administrative Official's Decision indicated that the school building did not exceed the height approved by the variance. *Id.* at 6. Furthermore, the Administrative Official's Decision was based on a finding that the grading represented a more than 50% increase of the gross floor area per YMC 15.17.020.C. Neither the City nor the Hearing Examiner equated grading increases with structure height in partially denying the School District's modification application. As discussed fully in Appellant's Memorandum of Points and Authorities In Support of Appeal, the Hearing Examiner's Decision to partially deny the School District's modification application is clearly

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erroneous, inconsistent with applicable law, not supported by substantial evidence, and exceeded the Hearing Examiner's authority.

B. City Council's Authority to Rule on This Appeal

The City Council reviews appeals of a Hearing Examiner's decision as a closed record appeal based upon the material in the record before the Hearing Examiner; no new evidence is presented. YMC 16.08.030.D. The City Council may "affirm the decision of the examiner, remand the matter back to the hearing examiner with appropriate directions, or may reverse or modify the hearing examiner's decision." YMC 16.08.030.F. The City Council does not have the authority to award monetary payments to the adjacent neighbors in this appeal, as John and Candice Manfredi suggest. The Manfredis have not filed an appeal in this case. They are not a named party in this appeal. Therefore, the City Council has no authority to require the School District to pay money to the Manfredis to resolve this appeal. Even if the Manfredis had appealed, per YMC 16.08.030.D, City Council may only affirm, remand, or reverse the Hearing Examiner's decision.

III. CONCLUSION

The City Council should reverse the Hearing Examiner's Decision with respect to grading and approve the as-built site elevations for Apple Valley Elementary School.

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DATED: November 2, 2021

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date indicated below, I caused a true and correct copy of the foregoing **APPELLANT'S REBUTTAL** to be served on the following persons via the methods indicated below:

Joan Davenport, AICP, Community Development Director
City of Yakima, Department of Community Development
129 N. 2nd Street
Yakima, WA 98901

- ☐ Via U.S. Mail, 1st class, postage prepaid
- ☒ Via Legal Messenger
- ☐ Via Facsimile
- ☐ Via Overnight Mail
- ☐ Via email

DATED this 2nd day of November, 2021 at Seattle, Washington.

Cheryl Robertson

Cheryl Robertson, Legal Practice Assistant

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Date: November 2, 2021

To: Yakima City Council
c/o Joan Davenport, AICP, Community Development Director

From: Julia Ericson, whose property abuts Apple Valley Elementary School property

Subject: Rebuttal to Appellant's Memorandum of Points and Authorities in Support of Appeal APP#008-21 to the Hearing Examiner's Decision on Appeal APP#001-21 to Modification Decision MOD#021-21.

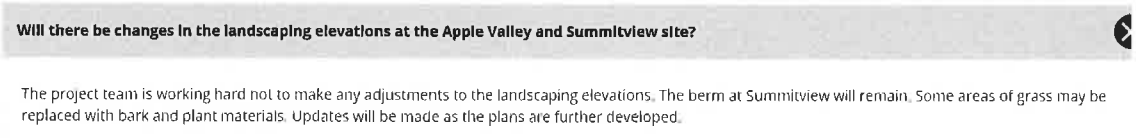
Dear City Council Members,

Per Yakima Municipal Code Title 16.08.025, as a party named in the appeal of the hearing examiner's decision, I submit this rebuttal. I am one of the "handful of neighbors" the appellant refers to and am named in the hearing examiner's decision.

YMC 16.08.025: "Upon completion of the thirty-day submittal period for submission of any written argument and memorandum, the parties named in the appeal of the hearing examiner's decision, at their expense, may obtain copies of any such submissions, and shall be provided a fifteen-day rebuttal period which starts on the thirty-first day from the date of mailing of the notice of the filed appeal."

Like the two appeal documents, this Memorandum has the same theme. They falsely claim that it's just a **"handful of neighbors"** who are affected, that the only effect is to **visual and aesthetic impacts** and the **SEPA and Land Use application** justify their actions. They also fail to be clear that the walking path, not just the ground elevations, was already built when they submitted their modification application. In addition, the request to add view obscuring material and increase fence height would have no beneficial impact on the East side, as homeowners already have 6 foot fencing in place.

Before the project started, Spring of 2019, WVSD stated this in a Q&A:
Q: Will there be changes in the landscaping elevation at the Apple Valley and Summitview site?
A: The project team is working hard not to make any adjustments to the landscaping elevations. The berm at Summitview will remain. Some areas of grass may be replaced with bark and plant materials. Updates will be made as the plans are further developed.



These significant landscape changes were developed Fall of 2020 and were not communicated to neighbors and were not properly vetted.

SEPA and Land Use application

The reason the record shows that grading would not have adverse effects based on the City's environmental review is because it was based on flat land. There is more to consider than slope stability or erosion concerns when looking at adverse effects. The 6 foot sight obscuring fence requirement is there to mitigate those adverse effects. They were granted relief from sight-screening (based on flat land) and then abused this granted adjustment by acting as if they had the right to make any changes they wanted, ignoring the law and without regard to those it would affect the most. They are violating YMC.15.07.010

Here is what they presented to obtain the adjustment (with the "retained grass" mentioned multiple times in other co-occurring documents).

PART IV - WRITTEN NARRATIVE: (Please submit a written response to the following questions)
1. How would the strict enforcement of the current standard affect your project? Existing fencing is installed around the entire property at all R-1 parcels. Each fence belongs to the residential homeowner and each fence varies in type from chain link to wood construction. Replacing all fences would be a difficult challenge as each home owner would have to agree to have their fence removed and open for a period of time while new fencing is constructed. Removing existing fencing around the entire site and installing 6-ft site obscuring fencing would have a significant cost impact to the project.

Visual and aesthetic concerns

The WVSD's continual only focus of neighbors "**visual and aesthetic concerns"** just brings more attention to the fact they refuse to realize or address the many other and more pressing concerns that neighbors have brought to their attention on multiple occasions over the past five months. Even after the hearing examiner found there to be "substantial evidence" to support these adverse effects to "adjacent residents' privacy, security, personal safety, property damage and/or property values" they continue their refusal to acknowledge them.

The handful of neighbors

This reference to the **"handful of neighbors"** highlights the exact reason the Yakima Municipal Code (YMC 15.07.010), concerning uses of different intensities, exists - so those with more money and more power can not develop their land in a way that adversely affects the individual property owner. It has been really upsetting that we have been left to fend for ourselves, spending time and energy fighting for a protection that is already built into the law.

Community Problem

In recent weeks, there have been many realizations that shows this landscape design has the potential to adversely affect those other than just the neighbors that abut/adjoin the AV property. The combination of the walking path location, raised terrain and new fencing create unsafe space for the kids and adults attending school and the immediate neighbors and surrounding community.

Recently, I discovered **Yakima's "murder map"** and found that there were two drug related murders at West Valley Park in 2018. I have not smelled Marijuana once since Apple Valley closed two years ago, but did often before that, especially in the summer months. When I moved into this neighborhood, my then 15 year old daughter told me not to let my then 12 year old son walk the dog or go over to the school during the last hour of daylight because of "what goes on over there with the teenagers." and she said "I don't even feel safe at that time." I personally witnessed, many times, teens in their cars meeting each other in the parking lot while I was walking in the evening hours and it was uncomfortable. I saw and heard them on school grounds. **One of the murders at West Valley Community Park was a 16 year old boy who was there to buy pot. Our neighborhood is not immune.**

Once the WVSD laid a "community walking path" they essentially built a park on Apple Valley grounds. It does not matter that "technically" it is not a park, it will be treated that way and that was the intent in creating the space. Because the West Valley area does not have any decent walking paths, people will come from all over to use it. It is the WVSD's duty and responsibility to create it in the **SAFEST WAY POSSIBLE!**

Having a walking path is not a bad idea (the location of it is), but combining it with such high elevations **takes away clear sightlines and creates hiding places.** This is frowned upon by the Washington Office of Superintendent of Public Instruction (OSPI) and The National Recreation and Park Association. Also, there is a National Organization called Crime Protection Through Environmental Design (CPTED) which specifically deals with **SAFE LANDSCAPING in public places** and many of these nationwide groups **partner with schools to create safe outdoor spaces.**

Every year the Bond Levy was put to a vote, school safety was cited as a BIG reason new construction was needed, especially the design at Apple Valley. **When it comes to public schools, safety should be considered in every possible way, not just the building. They have built this safe school for the kids then created hiding spaces while elevating them 4 to 6 FEET!**

I have generally felt safe in this neighborhood despite what I mentioned above and I now realize that is because of **neighbors looking out for each other and them keeping an eye on the school grounds and that law enforcement had a clear line of sight** from the West parking lot to the East properties and from the North to the South properties.

For twenty years the southside neighbors have had a clear site to the grounds and would call the police when people were over there banging trash cans, up on the roof or whatever else seemed suspicious or unsafe. **Neighbors were instrumental in keeping the school grounds safe which also kept our neighborhood safe!! This is encouraged by law enforcement - neighbors working together for safety - and they are creating an environment which is the exact opposite.** Apple Valley school is not immune to crime. **This doesn't just affect those directly next to the school, it affects the whole Apple Valley neighborhood.**

School districts should be held to a high standard because of the special relationship they have with their community. School districts and residents have a partnership that extends in many directions.

Neighbors are not happy at the thought of the money spent to fix this mistake - we are property tax payers too. We are not happy that anyone would be inconvenienced. We are not happy at the thought of having to endure contaminated dust again, after the multitude of times it was unnecessarily moved during the project. We also don't feel safe and secure in our homes anymore and worry about the future safety of our community.

WVSD has not given a viable reason why the grounds should stay as is. Whereas, neighbors have brought up many valid concerns and pointed to the violation of the YMC.

Respectfully I ask, at a minimum, you uphold the HE's decision of APP#001-21 on MOD#021-21. I also ask that you consider holding the WVSD accountable to what they submitted to public review in the original documents. I believe had they submitted their modification plans for public review there would have been much neighborhood opposition. I believe had they submitted their plan as a modification request for current elevations and a walking path at our property lines, PRIOR to performing the work, The City would have denied both. I also ask that you have the WVSD have a law enforcement and CPTED assess the landscape for safety and security.

Thank you for reading this and my prior testimonies and considering what is just and equitable.

Sincerely,

Julia Ericson

BEFORE THE CITY COUNCIL
OF THE CITY OF YAKIMA

In the matter of the Appeal of: WEST VALLEY SCHOOL DISTRICT NO. 208, a political subdivision of the State of Washington, Appellant, vs. CITY OF YAKIMA, a Washington state municipal corporation, Respondent.	APP#001-21, MOD#021-21 CITY OF YAKIMA'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO APPELLANT'S APPEAL

I. INTRODUCTION AND RELIEF REQUESTED

This appeal arises because the West Valley School District (hereinafter referred to as "WVSD") chose to disregard the grading plan it submitted for the site of Apple Valley Elementary School (hereinafter "Apple Valley"). The City of Yakima (hereinafter "City") investigated a complaint regarding site conditions and found that WVSD did not grade the site as outlined in the grading plan. WVSD then requested a minor modification under Yakima Municipal Code (hereinafter "YMC") 15.17, which was reviewed by the Administrative

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Official. The Administrative Official determined that the request to approve the change in finished grade was not consistent with the standards and requirements for a Minor Modification under YMC 15.17, and denied the application for modified site grading proposed by WVSD.[1] The Hearing Examiner upheld the decision of the Administrative Official. The City now asks the Council to uphold the Hearing Examiner's decision that the request for a grading change under the minor modification procedures of YMC 15.17 should be denied.

II. STATEMENT OF FACTS

On October 23, 2019, WVSD submitted a Class 3 review application to the City to build a new Apple Valley Elementary School off of North 88th Avenue in Yakima. The Class 3 review application included various requests for adjustments to the development code, which were approved by the Hearing Examiner. Once the use was approved by the Hearing Examiner, WVSD applied for its building permit to start construction. With that building permit, WVSD included a plan regarding grading for the school site.

WVSD constructed the school and made improvements to the playfields. WVSD admits that "certain portions of the southern playfield were graded at an elevation 1 to 3 feet higher than approved by the City in 2020." *Appellant's Memorandum of Points and Authorities in Support of Appeal,* page 5, lines 7-8.

Due to complaints regarding other improvements made by WVSD but are not at issue in this appeal, the City investigated the site and found that it was not in compliance with the grading plan it submitted. *Declaration of Joan Davenport,* ¶ 2. WVSD filed a Modification Application in May of 2021 under YMC 15.17, the procedure for minor modifications.

[1] The Administrative Official approved WVSD's requested minor modification with regards to the walking path, playground area, and ballfield layout. Those matters are not at issue in this appeal.

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After WVSD filed the modification application, the City and WVSD met via zoom regarding the application. *Declaration of Joan Davenport,* ¶ 5. At that meeting the City recommended that WVSD meet with concerned neighbors, but did not require such meeting for processing the modification of the application or determining the application was complete for processing. *Declaration of Joan Davenport,* ¶ 5. The initial modification application was deemed incomplete because it only addressed one aspect of the changes made to the plans, not all of them. *Declaration of Joan Davenport,* ¶ 6. WVSD chose to hold a neighborhood meeting on June 14, 2021, where neighbors expressed, in part, concerns regarding the grading of the playfields. *Declaration of Joan Davenport,* ¶ 7.

On the same day as the neighborhood meeting, Randy Meloy, a surface water engineer for the City, went to the site. Mr. Meloy was sent to evaluate the site by Ms. Davenport who asked him to evaluate whether the asphalt pathway subject to the modification application created drainage problems. In response to her specific request, Mr. Meloy wrote an email to Ms. Davenport that stated, in full, as follows:

> Per your request I went out to Apple Valley Elementary and walked around the entirety of the path to assess the possibility of drainage impacts. The asphalt path is about five feet wide and is located close to the school's fence along the perimeter of their parcel. The cross slope of the path is generally flat, with some areas gently sloped towards the grass and other areas gently sloped towards the fence. It is my opinion that there would be no drainage impact on the surrounding parcels due to this paved path being close to the fence. The only possible scenario where I could see there being any kind of drainage issue would be on the south side if the school overwatered with the sprinklers, and because the main grassy area is elevated, you could get runoff from the sloped grassy areas making its way towards the perimeter. If that happened there is still a ten foot separation between the school's fence and the neighbor's fences. Much of the runoff would infiltrate into the ground in this area. This is assuming there would be some problem with the school irrigation and that is unlikely. Along the east side of the school there is a small gravel berm between the path and the fence which would help to contain any runoff that might get there. Again, I would not anticipate any issues there.

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> Last night and this morning there was a decent amount of rainfall at the school, and while walking the path I looked for signs of erosion and did not find any. This path is only five feet wide and it is my opinion that it will not cause any drainage problems.

Email from Randy Meloy to Joan Davenport, dated June 14, 2021.

Mr. Meloy's email provides his opinion on drainage associated with the asphalt pathway. Although mentioned in the email as "a possible scenario," Mr. Meloy did not evaluate the drainage specific to the increased grade height of the property, and made no conclusions or opinions about how the grading might affect drainage at the site.

WVSD amended its minor modification application on June 21, 2021 which addressed all of the discrepancies between the building plans and the as built status of the site. *Declaration of Joan Davenport,* ¶ 6. The Administrative Official, Joan Davenport, reviewed the completed minor modification application, took into account the neighborhood concerns she heard at the neighborhood meetings (which she attended) and through emails and telephone calls from adjacent property owners, and denied the requested minor modification to allow the as built grading to remain, concluding: "The proposed site grading is not consistent with the standards and requirements for a Modification under YMC Ch. 15.17." *Findings of Fact, Conclusions and Decision for Request for Modification File Number MOD#021-21,* page 7.

The Administrative Official's decision was timely appealed to the Hearing Examiner. After a hearing, the Hearing Examiner upheld the City's decision to deny the minor modification for the as built grading changes.

III. STANDARD OF REVIEW

WVSD asks the City Council to overturn the Hearing Examiner's decision. Pursuant to YMC 16.08.014, to be successful, WVSD has to demonstrate at least one of the following:

1. The decision-maker exceeded their jurisdiction or authority;
2. The decision-maker failed to follow applicable procedures in reaching the decision;

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3. The decision-maker committed an error of law; and/or
4. The findings, conclusions or decision prepared by the decision-maker are not supported by substantial evidence.

YMC 16.08.014.

WVSD argues that:

1. The hearing examiner committed an error of law in affirming the denial of the modification application;
2. The hearing examiner's findings of fact were not supported by substantial evidence; and
3. The hearing examiner exceeded his authority when he determined that the WVSD may be required to regrade the site.

See Appellant's Memorandum of Points and Authorities in Support of Appeal.

WVSD has the burden of proof to provide evidence and argument that the hearing examiner's decision should be overturned. An error of law is generally determined if there is an erroneous interpretation of the law. *See generally* RCW 36.70C.130. To prevail in arguing that there is not substantial evidence to support the hearing examiner's decision, WVSD has the burden to prove that there was not enough evidence in the record to persuade a reasonable person that the findings made by the hearing examiner were not true. *See Phoenix Development, Inc. v. City of Woodinville,* 171 Wn.2d 820, 831, 256 P.3d 1150 (2011).

IV. LEGAL ARGUMENT

A. The minor modification procedure under the Yakima Municipal Code allows developers to request a modification in limited circumstances.

Chapter 15.17 of the Yakima Municipal Code "establishes provisions for the review of proposed modifications to existing or approved uses." YMC 15.17.010. YMC 15.17.020

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outlines when modifications to permitted development and uses may qualify for the procedure under YMC 15.17:

> Minor changes to existing or approved Class (1), (2) or (3) uses or development may qualify for abbreviated review under the provisions of this chapter if they meet the criteria listed below. … Modifications not meeting the criteria below must apply directly for review as a Class (1), (2), or (3) use or development.
>
> a. The modification will not increase residential density that would require an additional level of review;
> b. The modification will not increase the amount of parking by more than ten percent or twenty spaces (whichever is least), except that the amount of parking for controlled atmosphere and cold storage warehouses may be increased by up to twenty spaces. This limit shall be calculated cumulatively for all previous modifications since the last normal review;
> c. Any expansion of use area or structure will not exceed fifty percent of the gross floor area. The expansion of an existing single-family home may exceed the fifty percent limit when all applicable setback and lot coverage standards are met. This limit shall be calculated cumulatively for all previous modifications since the last normal review;
> d. The modification will not increase the height of any structure;
> e. This limit shall be calculated cumulatively for all previous modifications since the last normal review;
> f. The modification will not add a drive-thru facility; and
> g. The modification does not include hazardous materials.

YMC 15.17.030. YMC 15.17.040 provides that applications for minor modifications are reviewed under Type (1) review, which is a review by the Administrative Official. This review does not require notice to nearby property owners, or other enhanced review requirements found in Type (2) and Type (3) reviews.[2]

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[2] Under Type (1) reviews, the administrative official reviews the submission and makes a determination. YMC 15.13.040. Under Type (2) review, the administrative official makes a determination after notification to all property owners within 300 feet of the proposal and the administrative official then makes a decision after property owners have an opportunity to provide comments. YMC 15.14.040. Type (3) review requires notice as well as a public hearing for the application. YMC 15.15.040. As can be seen, Type (1) review is reserved for administrative matters. Higher levels of review are utilized when the proposal may have higher impacts, and gives property owners an opportunity to learn of the application and submit comments, or, in the case of a Type (3)

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When the administrative official reviews an application for a minor modification under YMC 15.17, it is reviewed as a Type (1) review where the proposal complies with the zoning code, building code, and other established standards. YMC 15.13.050. In addition to evaluating whether request complies with laws and standards, to approve a minor modification under YMC 15.17, the administrative official also has to evaluate whether the proposal meets the following criteria:

1. The proposed change in the site design or arrangement will not change or modify any special condition previously imposed under a Class (1), (2), or (3) review;
2. The proposed change in the site design or arrangement will not adversely reduce the amount of existing landscaping or the amount or location of required sitescreening; and
3. The proposed change in the site design or arrangement, in the determination of the planning division, will not create or materially increase any adverse impacts or undesirable effects of the project.

YMC 15.17.040(B)(1) (emphasis added). Only if the administrative official finds that the application for a minor modification meets the requirements of the code, and that the proposed change will not create or materially increase any adverse impacts of the project may a minor modification under YMC 15.17 be approved. If a project does not meet these requirements, then it can apply for a modification under the more stringent Type (2) or Type (3) review procedures outlined in the zoning code.

B. The Administrative Official's decision did not violate the minor modification provisions, was based on evidence, and was properly upheld by the Hearing Examiner.

WVSD puts forth three specific issues with regards to the Administrative Official's determination to deny the minor modification: that the grading was not more than a 50%

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review, attend a public hearing and submit testimony, before a decision is made. Type (3) reviews are heard by the Hearing Examiner. YMC 15.15.040.

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increase in the gross floor area; that the grading did not cause an adverse impact under the requirements of the building code; and that evaluating and citing the impacts to the neighbors of the change in grading from the approved site plan to the grading actually completed on site was not appropriate.

1. *The Hearing Examiner did not commit an error of law when he found that the Administrative Official's analogous application of the 50% gross floor area application found in YMC 15.17.020(C) was at most harmless error.*

YMC 15.17.020(C) allows the administrative official to approve a minor modification if the "expansion or use area or structure will not exceed fifty percent of the gross floor area." Here, there was no application specifically related to gross floor area of the school. Instead, the issue was with the expansion upward of grading on the play fields. The Administrative Official used the 50% concept analogously when evaluating the application.

> Grading is included in the definition of "Use" and is therefore subject to review under the Modification criteria. On-site grading has changed significantly from the grading contours submitted with the Building Permit (B200126). The new contour lines shown on the revised Modification Site Plan and narrative submitted with this application are in excess of a 50% increase in elevation from what was shown with the B200126 submittal in several locations, not meeting the standard for a modification.

Findings of Fact, Conclusions and Decision for Request for Modification File Number MOD#021-21, page 5.

The Administrative Official looked at the areas of the play fields wherein the grading was higher than the contours listed in the provided grading plan, using the provided grading plan as the base contours as the grading plan was part of the building permit plan packet. She did not average the entire site, which is what would be done in the event the City were evaluating a minor modification for an increase in gross floor area per the ordinance (in that case the City would look at the entire building floor area). *See* YMC 15.17.020(C). However, grading is not specifically mentioned in the ordinance, and therefore, arguably, isn't listed as a minor modification that can be approved under the YMC 15.17 procedure. The

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Administrative Official only evaluated the areas where grading increased because that is what makes the most logical sense when analogizing the two situations. If WVSD's argument is correct—that the City should have evaluated the grading of the site as a whole--it leads to situations where grading could be manipulated to result in net zero change (for example an increase in grading of 10 feet on one end of a parcel and decreases in 10 feet on the other would be a net zero grade increase but could likely adversely affect property owners adjacent to the 10 foot increase). The Apple Valley site is over 10 acres. Evaluating grading across the site as a whole would not provide appropriate results, as what occurs with grading in one area may not be relevant to the impacts to an increase in grading in another.

However, as the Hearing Examiner correctly pointed out, there is no reference to changes in grading in the minor modification section of the code, YMC 15.17. *Hearing Examiner's Decision*, page 7. Although that criteria was considered, it was done analogously because the code itself does not contemplate allowing grading changes to be done under the minor modification provisions. The Administrative Official's conclusion was not based solely on the analogy. The Administrative Official also found that the increase in site grading elevation created "an adverse impact of the project" because it was "significantly higher in elevation than what was previously shown" on the submitted grading plan. *Findings of Fact, Conclusions and Decision for Request for Modification File Number MOD#021-21*, page 6. In making that finding, the Administrative Official cites to complaints from adjacent property owners regarding the negative impacts the site grading. *Id.*

To approve a minor modification under YMC 15.17, the Administrative Official must utilize the criteria in YMC 15.17.020, but must also ensure that there is no creation or material increase in adverse effects of the project under YMC 15.17.040. Since there was a finding that there were adverse effects as a result of the modification to the grading plan, even if the Administrative Official improperly analogized to YMC 15.17.030, it is harmless error. The Hearing Examiner did not commit an error of law.

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2. *There was substantial evidence supporting the Hearing Examiner's findings of fact regarding both the use of the 50% gross floor space analogy and the finding that the increase in grading elevation caused an adverse effect.*

WVSD argues that there was not substantial evidence to support the Hearing Examiner's findings that the as-built grade would be more than a 50% increase in elevation and that the as-built grading would cause an adverse effect.

a. There was substantial evidence to for the 50% gross floor space analogy.

As stated above, the Apple Valley site is over 10 acres in size. WVSD admitted that there was an increase of one to three feet in grading in portions of the southern playfield. The submitted grading plan outlines the grading contours for the entire site, but at issue is only the portion adjacent to neighboring single-family residential homes—the playfield where contours were elevated. The Administrative Official looked only at the relevant contour lines on the grading plan that were exceeded by more than 50% of the grading plan submitted to the City. When doing so, there are contours and grading that exceed the 50% limit near the adjacent single-family neighborhood. There is an acknowledged increase in one particular area of the site, so the entire 10-acre parcel is not at issue. And again, this was done by analogy, meaning that the situations are similarly comparable, but are not necessarily exactly the same.

The Hearing Examiner correctly pointed out that it is difficult to apply YMC 15.17.020(C) by analogy in this case due, in part, to the size of the entire parcel, and the fact that an increase in gross floor area is significantly different than an increase in height of grade. *See Hearing Examiner's Decision*, page 8. The evidence in the record regarding the grading plan, the as-built drawings of the grading contours, WVSD's admission that "certain portions *of the southern playfield* were graded at an elevation 1 to 3 feet higher than approved by the

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City in 2020"[3], and the comments from the neighbors provided substantial evidence for the Hearing Examiner to make his decision.

b. There was substantial evidence of adverse effects due to the increase in height of the grading.

WVSD also contends that there was not substantial evidence to support the finding that the increase in grade would cause an adverse effect. YMC 15.17.040(B)(1)(c) requires that adverse effects be evaluated by the Administrative Official when determining if a minor modification under YMC 15.17 is appropriate. Specifically, the code states: "Applications for modifications may be administratively and summarily reviewed using the Type (1) review process. In addition to the following criteria: … In the determination of the planning division, it will not create or materially increase any adverse impacts or undesirable effects of the project." YMC 15.17.040(B)(1)(c).

WVSD argues that had it simply provided a correct grading plan at the beginning that it would have been approved regardless of any adverse aesthetic and visual effects experienced by the neighbors. *Appellant's Memorandum of Points and Authorities in Support of Appeal,* page 13. Post-permitting, minor modifications to uses of property, which includes by definition grading under YMC 15.02.020, require the Administrative Official to evaluate adverse effects. The language in YMC 15.17.040 does not limit the evaluation of adverse effects to what may have been considered an adverse effect at the time the building permit was issued.

WVSD also references the City's SEPA approvals as support for its claim that there is not substantial evidence to support the determination that the increase in grade height created

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[3] *Appellant's Memorandum of Points and Authorities in Support of Appeal,* page 5, lines 7-8 (emphasis added).

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an adverse impact. The SEPA documents, however, did not include the actual grading plan. SEPA documents referenced that the "site is anticipated to be a net balance and no significant amounts of imported or exported soils are expected." *See Environmental Checklist, Apple Valley Elementary School Project,* page 6. The SEPA also stated: "The proposed project would not obstruct any existing views in the site vicinity." *Id.* at page 20. The grading plan was not submitted as part of the SEPA review and WVSD acknowledged that grading information would need to be submitted at a later time. *Id.* at page 2.

3. *The Hearing Examiner did not commit errors of law.*

a. The Hearing Examiner did not commit an error of law by evaluating adverse effects of the grade change other than those that would have been applied to the initial grading permit review.

To utilize the benefits of the minor modification procedure in YMC 15.17, a developer must meet all of the requirements of that section, including that the modification does not create or materially increase any adverse impacts. YMC 15.17.040(B)(1)(c). Developers are not required to go through the minor modification process, and, instead, can choose to modify their projects through a review at the same level and type as the original project. YMC 15.17.040(B)(1)(c) requires that the Administrative Official review a minor modification proposal to evaluate whether it creates or materially increases adverse impacts or undesirable effects. As such, the Hearing Examiner did not commit an error of law in affirming the Administrative Official's evaluation of adverse impacts to the neighboring property owners.

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b. The Hearing Examiner did not commit an error in law when he held that WVSD must obtain a modification through the standard modification procedures or successfully appeal his decision to keep the grading as built.

WVSD also argues that the Hearing Examiner committed an error of law and exceeded his authority when he found that to maintain the as-built grading contours, WVSD would need to go through a standard modification procedure, which requires in this case a Type (3) review, or successfully appeal his denial. To support this WVSD opines that it shouldn't need to go through a Type (3) review for an increase in site elevation because approval of grading permits is done through the building codes department and is a ministerial act that should simply be approved if it complies with the zoning code. *Appellant's Memorandum of Points and Authorities in Support of Appeal,* page 15. This project did not require a grading permit, so no evaluation was done to originally permit the grading. *See* Appendix J (Grading) to the Washington State Building Code, J103.2. Modifications to uses, as defined in the code, are made through the procedures outlined in Title 15.

c. The Hearing Examiner did not commit an error of law when he determined that WVSD may have to return the grade to the approved plan heights.

WVSD argues that it should not have to regrade the site consistent with the approved grading plan because it would be too expensive. *Appellant's Memorandum of Points and Authorities in Support of Appeal,* page 17. This argument is rooted in laws regarding takings and extraction—wherein the City when issuing development permits can only impose requirements on that permit which are related to the permit and proportionate to the impacts caused by the development. *See generally, Citizens' Alliance for Property Rights v. Sims,* 145

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Wn.App. 649, 187 P.3d 786 (2008). "Conditions of development [must] be necessary to mitigate a specific adverse impact of the proposal . . . [and] the extent of required mitigation measures to those that are roughly proportional to the impact they are designed to mitigate." *Douglass Properties II, LLC v. City of Olympia,* 16 Wn.App.2d 158, 169, 479 P.3d 1200 (2021). The City is not conditioning a permit in the present case, rather, the City is denying a request for a minor modification of the grading at the site.

Although there may be a cost to WVSD associated with the denial of their minor modification application[4], that cost is solely due to the fact that WVSD moved forward and graded the site contrary to the submitted grading plan without first seeking a modification. Had they sought a modification before they graded the property outside of the scope of the grading plan, they could have avoided costs of returning the property to the approved grading contours. Contrary to the assertion by WVSD, the denial of WVSD's application for a mnor modification to its grading plan is not a demand from the City to regrade the site. The City is denying a request under the minor modification procedure for the grading at Apple Valley that differs from the grading plan. WVSD still has the option to go through a normal modification process under Type (3) review.

WVSD's actions are solely responsible for grading the site not to the contours it provided to the City. The purpose of the takings clause "is *not* to bar government from requiring a developer to deal with problems of the developer's own making, but which *is* to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 669, *quoting Burton v. Clark County,* 91 Wn.App. 505, 521-22, 958 P.2d 343 (1998)(internal quotations omitted). The City

[4] WVSD could still go through the regular modification procedure and a Type (3) review to seek permission to regrade the site. It is unknown what the result of that process might be.

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is not asking WVSD to do anything extra in this case. To the contrary, the City is requesting that the property be graded according to the grading plan WVSD submitted to the City, which WVSD admits was not followed.

V. CONCLUSION

The Hearing Examiner's decision upholding the Administrative Official's denial of WVSD's request to modify its grading plan under the minor modification process found in YMC 15.17 should be affirmed by the City Council.

DATED this 1st day of November, 2021.

SARA WATKINS
City Attorney

By: _____
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BEFORE THE CITY OF YAKIMA CITY COUNCIL

In the matter of the Appeal of: WEST VALLEY SCHOOL DISTRICT NO. 208, a political subdivision of the State of Washington, Appellant, v. CITY OF YAKIMA, a political subdivision of the State of Washington, Respondent.	APP#001-21, MOD#021-21 APPELLANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPEAL

West Valley School District No. 208 (the "School District") submits the following Memorandum of Points and Authorities in support of its above-captioned Administrative Appeal to the Yakima City Council ("City Council"). The School District challenges the City of Yakima Hearing Examiner's Decision, APP#001-21 ("Hearing Examiner's Decision" or "Decision") to uphold the Administrative Official's denial of the School District's Application for Modification, MOD#21-021 ("City Decision"), which requested approval of as-built elevations for the replacement of Apple Valley Elementary School that are a 32% increase over the elevations the City of Yakima ("City") approved as part of the

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School District's building permit. The Decision is clearly erroneous, inconsistent with applicable law, not supported by substantial evidence, and exceeded the Hearing Examiner's authority. The Hearing Examiner erred in upholding the City's application by analogy of a modification standard pertaining to gross floor area to an elevation change to find that the School District's request did not meet the criteria for a modification. Furthermore, the Hearing Examiner's findings that the elevation changes constitute a more than 50% increase over the previously approved plans and that the grading change would cause an adverse effect to adjacent property owners are not supported by substantial evidence. The Hearing Examiner also committed an error of law by affirming the City's misapplication of the law by holding the modification request to a higher standard than the initial grading permit. Finally, the Hearing Examiner committed an error of law and exceeded his authority in holding that the School District must regrade the site unless the School District either successfully appeals the Administrative Minor Modification Decision or successfully obtains approval of the grading increase through a Type (3) review process. The School District requests that the City Council reverse the Hearing Examiner's Decision with respect to grading.

I. EVIDENCE RELIED UPON

In support of its appeal, the District relies upon all the documents filed with the City of Yakima in the records for File Nos. APP#001-21 and MOD#021-21.

II. RELIEF REQUESTED

Consistent with YMC 16.08.014 and 16.08.030.F, the School District requests that the Hearing Examiner's Decision with respect to grading be reversed because the Decision is clearly erroneous, inconsistent with applicable law, not supported by substantial evidence, and exceeded the Hearing Examiner's authority.

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III. STANDARD OF REVIEW

The City Council reviews appeals of a Hearing Examiner's decision as a closed record appeal based upon the material in the record before the Hearing Examiner; no new evidence is presented. YMC 16.08.030.D. The City Council may "affirm the decision of the examiner, remand the matter back to the hearing examiner with appropriate directions, or may reverse or modify the hearing examiner's decision." YMC 16.08.030.F. To meet its burden of proof, the Appellant must demonstrate at least one of the following:

> 1. The decision-maker . . . exceeded his or her jurisdiction or authority;
>
> 2. The decision-maker failed to follow applicable procedures in reaching the decision;
>
> 3. The decision-maker committed an error of law; and/or
>
> 4. The findings, conclusions or decision prepared by the decision-maker are not supported by substantial evidence.

YMC 16.08.014.

IV. FACTUAL BACKGROUND

A. The Project

In February 2019, voters in the School District's boundaries approved a $59 million bond to replace Apple Valley and Summitview Elementary Schools to provide more capacity to reduce overcrowding. Declaration of Dr. Peter Finch, filed on July 14, 2021 (hereinafter "Finch Decl."), ¶ 3. On October 23, 2019, the School District submitted a Class 3 Review application (CL3#010-19, VAR#004-19, ADJ#027-19, and CAO#027-19) to the City to completely replace the Apple Valley Elementary School on the same site.[1] *Id.* at ¶ 8,

[1] The permitting and SEPA process for the school replacement project was completed in two phases. In 2019, the City conducted an environmental review under the State Environmental Policy Act, Chapter 43.21C RCW ("SEPA") for the demolition of the existing school building and issued a

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Ex. A at 3. The School District proposed the construction of a new 60,000-square-foot elementary school building in the R-1 zoning district with 147 parking spaces, a playground, and two playfields. *Id.* The application included requests for a variance to exceed the building height limitation in this zoning district; a critical areas review due to the site being in a wellhead protection area; and an administrative adjustment to waive the site-screening requirement that would impose a 6-foot view-obscuring fence, installation of a digital sign and wall signs that are not otherwise allowed in residential zoning districts, and to adjust the maximum height for signs set back more than 15 feet from the right-of-way. *Id.* at 3-4. The City completed SEPA review for the school construction and issued a Determination of Non-Significance on January 22, 2020. *Id.* at 4. The SEPA checklist submitted for the project did not identify any environmental impacts associated with site grading. *Id.* at ¶ 10, Ex. C at Attachment 1. The Hearing Examiner approved this application with conditions on February 28, 2020. *Id.* at ¶ 8, Ex. A at 23-25.

B. The Permits and Permit Process

On April 7, 2020, the City approved Building Permit B200126 and the associated plan set, which included an overall grading plan for the entire site. Finch Decl., ¶ 4. The 2020 approved grading plan included proposed elevations for the southeastern corner of the site that ranged from 1266 feet above sea level (ASL) near the southern fenceline to 1276 feet ASL at the playfield at the northeastern corner of the site. Finch Decl., ¶ 11, Ex. D. Throughout the course of the project, the School District worked with the Washington State Department of Ecology on contamination issues at the site and to implement a clean cap

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Mitigated Determination of Non-Significance, which included mitigation measures related to removing contaminated building materials, conducting work under the Model Toxics Control Act to address contamination on the site prior to development, and compliance with Yakima Regional Clean Air Agency requirements. Finch Decl., ¶ 9, Ex. B at 6.

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over contaminated soil that would be protective of human health and the environment. City Decision at 3-4. When construction at the site was completed, the finished elevations at the site ranged from 1266 feet ASL near the southeastern fenceline to 1276 feet ASL at the northeastern corner of the site, but certain portions of the southern playfield were graded at an elevation 1 to 3 feet higher than approved by the City in 2020. Finch Decl., ¶¶ 11-12, Exs. D-E. However, the finished elevation in other areas of the site is 1 foot lower than shown in the approved plans. *Id.*

In late May 2021, the School District submitted a Modification Application to the City in accordance with Chapter YMC 15.17 to add a 5-foot walking path around the perimeter of the playfields, to change the backstop and goal locations, to reduce the amount of asphalt in the playground, to approve the as-built increased site elevations that were a 32% increase in elevation from the plan sets approved as part of the building permit, and to install site-screening in certain locations. City Decision at 1. The City would not deem the School District's application complete until the School District held a public meeting to obtain public comment on June 14, 2021. Finch Decl., ¶ 6. At the public meeting, neighbors expressed concerns about the height of the southern playfield and concerns that people using the playfields would be able to see into their backyards. Finch Decl., ¶ 7. In response to public comments, the School District included as part of its Modification Application the installation of view-obscuring material to a portion of the fencing along the east and southern property lines adjacent to the neighboring residences. City Decision at 6.

C. The City Decision

On June 30, 2021, the City issued its decision on the School District's Request for Modification. City Decision at 1. The City approved the walking path, revised backstop and goalpost locations, the reduction of asphalt for the playground, and the installation of

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site screening. City Decision at 1. However, the City denied the School District's request to approve the as-built grading on the basis that the final site grading shown in the modification application is in "excess of a 50% increase in elevation from what was shown with the B200126 submittal in several locations, not meeting the standard for a modification." City Decision at 1. Additionally, the City found that the increase in site grading "does create an adverse impact" because "the City received numerous phone calls and emails from adjacent property owners" about "its negative impact on adjacent property owners." City Decision at 6.

The City's surface water engineer conducted a site visit at Apple Valley Elementary School while the City reviewed the Modification Application, after the final grading was in place, and following a period of rain. City Decision at 7. The surface water engineer noted no signs of erosion. City Decision at 7. The City's engineer also concluded that there would be no drainage impact on the surrounding properties from the paved path. *Id.* Indeed, the engineer noted that the

> only possible scenario I could see there being any kind of drainage issue would be on the south side if the school overwatered with the sprinklers, and because the main grassy area is elevated, you could get runoff from the sloped grassy areas making its way to the perimeter. If that happened there is still a ten foot separation between the school's fence and the neighbor's fences. Much of the runoff would infiltrate into the ground in this area. This is assuming there would be some problem with the school irrigation and that is unlikely. Along the east side of the school there is a small gravel berm between the path and the fence which would help to contain any runoff that might get there. Again, I would not anticipate any issues there.

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Id. Despite the engineer's analysis, the City denied the School District's grading request and required the School District to "regrade the site consistent with grading contours as shown in the building plan submittal (B200126)." City Decision at 7.

D. The Hearing Examiner's Decision

The School District appealed the City Decision to the Hearing Examiner. An open record public hearing of the appeal was held on August 12, 2021. Hearing Examiner's Decision at 3. On August 26, 2021, the Hearing Examiner issued his Decision, which upheld the City Decision. *Id.* at 15. Specifically, the Hearing Examiner affirmed the Administrative Official's determination "that the increase in site grading elevation shown on the site plan for the modification application does not satisfy all of the criteria for approval of a Minor Modification" because drawing an analogy between the minor modification provisions in the code applicable to increases in gross floor area of an entire building to elevation changes in one particular area of a site constituted at most harmless error. *Id.* at 7-9, 15. The Hearing Examiner also upheld the Administrative Official's finding that the increased grading at the playfields would result in adverse impacts to the neighbors because people on the playfields could look down into the neighbors' yards and windows. *Id.* at 11. The Hearing Examiner also affirmed the Administrative Official's determination that the School District would be required to "regrade the site consistent with grading contours as shown in the [original] building site plan" subject to the School District's right to apply for a Type (3) Major Modification and/or to appeal the decision to the City Council. *Id.* at 15.

E. School District's Cost to Comply

As Matt Whitish testified at the hearing, re-grading the elevated portion of the site as the City is now requiring will result in a significant amount of re-work and additional costs. To re-grade the site, clean topsoil will have to be removed and stockpiled. New irrigation

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piping will have to be removed and replaced entirely. A layer of marker fabric is installed under the clean topsoil to mark the separation between clean and contaminated soils. This marker fabric will have to be removed and replaced entirely. Contaminated soil will then need to be excavated and exported to a landfill. Completing this work with contaminated soils cannot occur while children are occupying the school. Once the new subgrade is established, new marker fabric and new irrigation will have to be installed. Finally, the clean topsoil will need to be placed, as well as new sod. The School District's contractor estimates that this work will cost the School District upwards of $1 million.

V. LEGAL ARGUMENT

A. The Hearing Examiner Committed an Error of Law in Affirming the Administrative Official's Denial of the Modification Application

The Hearing Examiner committed an error of law by finding that the Administrative Official correctly applied by analogy YMC 15.17.020.C's criteria to the School District's request that the City approve the as-built site grading and that at most, the Administrative Official's application of the law was harmless error. *See* Hearing Examiner's Decision at 7. YMC 15.17.020.C allows the City to approve as a Minor Modification any expansion of use area or a structure not exceeding 50% of the gross floor area. YMC 15.17.020.C does not speak to changes in site elevation.

Under the City's process for modification applications, "minor changes to existing or approved Class (1), (2) or (3) uses or development may qualify for abbreviated review" under Chapter 15.17 YMC. YMC 15.17.020. A change may be approved through a modification if, among other things,

> C. Any expansion of use area or structure will not exceed fifty percent of the gross floor area. The expansion of an existing single-family home may exceed the fifty percent limit when all applicable setback and lot coverage standards are

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> met. This limit shall be calculated cumulatively for all previous modifications since the last normal review[.]

YMC 15.17.020.C. YMC 15.02.020 defines "use" to include "the construction, erection, placement, movement or demolition of any structure or site improvement and any physical alteration to land itself, including any grading, leveling, paving or excavation." Although grading is covered in the definition of a "use" under the code, YMC 15.17.020 focuses on "an expansion of use area" and whether that expansion exceeds 50% of the gross floor area.

In finding that the Administrative Official correctly applied YMC 15.17.020.C to deny the grading modification, the Hearing Examiner committed two errors of law. First, the Hearing Examiner concluded that YMC 15.17.020.C applied by analogy to the School District's "requested increase in the site grading elevation of the site." Hearing Examiner's Decision at 7. However, this finding assumes that an increase in finished elevation is an "expansion of use area." A minor change in grading elevation does not constitute an expansion of the grading area. The area re-graded as part of the project did not change and therefore was not expanded. And even if an increase in elevation were to fall within an "expansion of use area," such an expansion is limited to no more than 50% of the gross floor area. Per YMC 15.02.020 and 15.06.040.A,

> "gross floor area" means the total square footage of all floors in a structure as measured from the interior surface of each exterior wall of the structure and including halls, lobbies, enclosed porches and fully enclosed recreation areas and balconies, but excluding stairways, elevator shafts, attic space, mechanical rooms, restrooms, uncovered steps and fire escapes, private garages, carports and off-street parking and loading spaces. Storage areas are included in gross floor area.

Grading elevations do not fall within the definition of gross floor area. Yet, in upholding the City's denial of the grading modification, the Hearing Examiner reasoned that the City

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correctly applied the 50% threshold in YMC 15.17.020.C to an increase in grading elevation, and as discussed in more detail below, correctly calculated the increase in grading elevation by focusing only on specific areas of the site that were the subject of the neighbors' complaints.

Second, the Hearing Examiner committed an error of law in upholding the Administrative Official's application by analogy of YMC 15.17.020.C to only those areas of the site that pertained to the adverse impacts reported by neighbors. Hearing Examiner's Decision at 9. The City reviewed individual elevation increases within new contour lines submitted with the Modification Application rather than the average percentage increase in grading over the entire site. Hearing Examiner's Decision at 7. Based on these individual elevation increases within the contours, the City concluded that those new contours "are in excess of a 50% increase in elevation from what was shown with the B200126 submittal in several locations, not meeting the standard for a modification." City Decision at 5. The Hearing Examiner held that the City's finding was justified because the neighbors' concerns regarding the increased elevation only applied to the portion of the school adjacent to their property, and in any event, even if the City had erred, such error was harmless. *Id.* at 7-9. However, as Mr. Whitish testified at the hearing, the City's errors in this case are not harmless—the School District will likely incur $1 million in costs to regrade the playfields. Moreover, the City Code provides no support for the calculations the City completed here. Even if the gross floor area criteria could be applied to an elevation change, the Code does not allow the City to calculate a percentage increase by focusing on one area of the site. If anything, the City should have followed the guidance of the gross floor area criteria and looked at grading increases across the site as a whole, instead of impermissibly focusing on one part of the site. If the City had completed the calculation correctly, the City would have

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found that the elevation changes across the entirety of the Apple Valley Elementary School site only constitute a 32% increase over the elevations approved in the building permit—a percentage well under the 50% threshold for denying a modification application. The Hearing Examiner's Decision should be reversed and the modification granted.

B. The Findings of Fact Are Not Supported by Substantial Evidence

The Hearing Examiner's finding that the Administrative Official was justified in her site-elevation-increase calculations and that site grading would have an adverse effect are not supported by substantial evidence. The Hearing Examiner's Decision must be supported by substantial evidence that the Administrative Official was justified in how she decided to calculate the site elevation increase. "Substantial evidence" is evidence of a "sufficient quantity to persuade a reasonable person that the declared premise is true." *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002). As demonstrated below, the record does not support a finding that grading elevations are 50% higher than the approved plans. Further, the City's record consistently demonstrates that the site grading would not have an adverse effect and that the grading met code requirements.

1. The finding that the Administrative Official was justified in calculating that as-built grading would be more than a 50% increase in elevation is not supported by substantial evidence.

The Hearing Examiner's finding that the Administrative Official was justified in her site elevation increase calculations—wherein the Administrative Official considered only the increased elevations at the playfields rather than the average increase in elevation across the site as a whole—is not supported by substantial evidence. Hearing Examiner's Decision at 8-9. The Hearing Examiner specifically found that the uncontroverted evidence in the record demonstrates that the average increase in grade is only 32% across the entire site from the permit set to the as-built conditions. *Id.* at 8. And the Hearing Examiner concedes

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that were this application looking at an increase in gross floor area, the City would have looked to an increase in the total square footage of a building as a whole and not particular areas of a building. *Id.* However, the Hearing Examiner discounts this evidence, saying that while "it is difficult to apply YMC § 15.17.020(c) by an analogy to site grading elevation," such an application by analogy was appropriate because looking at the site as a whole "would result in consideration of areas away from the adjacent neighbors that would not be relevant to their concerns." *Id.* The City's calculation and the Hearing Examiner's decision impermissibly cherry pick the elevation increases that are the subject of the adjacent neighbors' concerns. Calculating site elevation increases in this way is not allowed under the City's Code, is not supported by substantial evidence, and does not constitute harmless error. The School District will incur $1 million to re-grade the site because, as described below, the City has chosen to hold the School District to a higher standard for approving changes in elevation than if the District had applied for a grading permit in the first instance.

2. The Hearing Examiner's finding to uphold the Administrative Official's determination that the as-built grading would cause an adverse effect is not supported by substantial evidence.

The City's record consistently demonstrates that the site grading would not have an adverse effect and that the grading met code requirements. For the City to approve a modification request, the "proposed change in the site design or arrangement" must not "in the determination of the planning division . . . create or materially increase any adverse impacts or undesirable effects of the project." YMC 15.17.040.B.1.c. However, this provision of the code imposes a greater burden on an applicant seeking an approval of a grading modification by incorporating more stringent standards than those required by the City's grading code.

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The Yakima Code incorporates the 2018 Washington Building Code, which addresses what constitutes an adverse impact to adjacent properties from grading. YMC 11.04.010, 11.04.J103.2. Sections J108.3 and J109.4 of the 2018 Washington Building Code indicate that "adverse effects" to adjacent properties from the grading include only slope stability, drainage, and potential erosion problems. Yet, the City's only stated basis for denying the School District's modification request—and the Hearing Examiner's basis for affirming the Administrative Official's finding—was neighbors' concerns regarding the aesthetic and visual impacts of the higher playfield elevation on their adjacent properties. *See* Hearing Examiner's Decision at 10. But impacts to aesthetics and visual quality are an improper basis to support an "adverse effects" finding pursuant to the Washington State Building Code. By upholding the Administrative Official's finding on the basis of the neighbor's aesthetics and visual concerns, the Hearing Examiner improperly applied a higher standard to the School District's modification request than would have been applied to a grading permit for the same work.

The record shows that grading would not have adverse effects based on the City's environmental review. Rather, the City's own engineer determined that the as-built conditions at the school would not cause site stability, erosion, or drainage problems. City Decision at 6-7. And neither of the City's SEPA approvals for the Apple Valley Elementary School project identify any impacts associated with grading. Neither does the SEPA checklist for the school construction, which indicates that 15,000 cubic yards of grading and excavation would occur and that "the site is anticipated to be a net balance and no significant amounts of imported or exported soils are expected." Finch Decl. ¶ 8, Ex. A, Attach. 1 at 6. Because there are no slope stability or erosion concerns resulting from the

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increased playfield elevation, the Hearing Examiner's determination that the grading would result in adverse effects is not supported by substantial evidence.

C. The Hearing Examiner Committed an Error of Law in Affirming the Administrative Official's Application of a Higher Standard to the Denial of the Grading Modification than Would Have Been Applied to the Initial Grading Permit Review

In the underlying City Decision, the Administrative Official exceeded her authority in applying a higher standard to the denial of the grading modification than would have been applied to the initial grading permit review. The Hearing Examiner committed an error of law and exceeded his authority in affirming this application of a higher standard. Reading YMC 15.17.040.B.1.c's provision allowing denial of a modification upon the finding of any new negative impact to aesthetics or visual quality, as the City and Hearing Examiner have done here, is too expansive of a reading of the City's authority. Because the site design or arrangement changes that are reviewed in the modification application process will by their nature involve visual changes, it cannot be the case that any visual changes disliked by the community is a sufficient reason to deny a modification application.

A modification application for grading should not be held to a higher standard of review than the initial grading review. No significant adverse environmental effects were identified in the SEPA review, and the 2018 Washington State Building Code does not identify visual changes as an adverse impact to adjacent properties. Yet, the City denied the School District's modification application on the basis that it would create a new visual impact. This is not the standard under SEPA, nor the 2018 Washington State Building Code. *See* RCW 43.21C.060; Sections J108.3 and J109.4 of the 2018 Washington Building Code.

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The Hearing Examiner also committed an error of law and exceeded his authority in holding that the School District must either successfully appeal the Administrative Minor Modification decision, or successfully obtain approval of the grading increase through a Type (3) review process. Hearing Examiner's Decision at 12. The School District went through the Type (3) review process for the demolition and elementary school rebuilding project, as this proposed use triggers a Type (3) review process. *See* YMC 15.15.020. Mere changes in site elevation should not require a whole new Type (3) review process and a separate approval on the same scale as the entire school rebuilding project.

As the Hearing Examiner himself noted, the grading for Apple Valley Elementary School was approved via Building Permit No. B200126. "Actions on building permits have been characterized by [the State Supreme Court] as ministerial determinations." *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002); *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960, 954 P.2d 250 (1998) (quoting, among others, *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 27, 385 P.2d 372 (1963) ("[T]he acts called upon by relators to be done when they asked for a building permit under the city zoning regulations and building code were not discretionary but ministerial ... Once [the proposed structure complies with zoning regulations] and the appropriate fee tendered by the applicant, the building department must issue the building permit.")). "In the eyes of the law the applicant for a grading permit, like a building permit, is entitled to its immediate issuance [of the grading permit] upon satisfaction of relevant ordinance criteria and the State Environmental Policy Act of 1971." *Mission Springs, Inc.*, 134 Wn.2d at 960.

Here, the School District submitted its building permit application, the application was deemed complete, the SEPA review identified no adverse effects as a result of the elevation changes at the site, and the building permit issued. The City had no discretion to

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deny the grading shown in the plan sets based on the concerns of neighbors. Denial of a grading permit or building permit based on the neighbors' aesthetics and visual concerns would not have been warranted through the City's building permit process. In other words, the City could not have denied the School District's building permit if the District had proposed the current elevations at the site at the time the building permit was issued. The modification criteria as applied here turn a ministerial act by the City into a discretionary act by taking into account aesthetic and visual concerns pertaining to the increased elevation at the site. Similarly, the Hearing Examiner's Decision turns the ministerial act of approving a building permit into a discretionary Type (3) approval that allows for public notice and comment and a public hearing. *See* YMC 15.15.040. Public notice and comment are not aspects of the building permit process. The City should not be allowed to hold a change in elevation to a higher standard than would have applied to the original building permit. The Hearing Examiner and Administrative Official exceeded their jurisdiction in denying the modification permit and requiring the School District to apply for a Type (3) permit.

D. The Hearing Examiner Committed an Error of Law and Exceeded His Authority in Affirming the Administrative Official's Determination That the School District May Be Required to Regrade the Site

Requiring the School District to incur $1 million in expenses to regrade the site to address the concerns of a handful of neighbors is not proportionate to the aesthetic and visual impacts claimed by the neighbors. Yet, the Hearing Examiner rejected this argument. The Hearing Examiner held that the "nexus and proportionality test" does not apply here because the Administrative Official's decision "leaves unaffected the grading contour requirements of the approved 2020 building permit which was not appealed and which will remain as the grading contour requirements for the site." Hearing Examiner's Decision at 13. However, the Hearing Examiner failed to consider the significant adverse effect on the

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School District, the taxpayers, and the elementary school students by requiring the School District to regrade the site consistent with the approved 2020 building permit grading plans. By so holding, the Hearing Examiner (and the Administrative Official) deemed that aesthetic concerns of a handful of neighbors trump the exorbitant cost of regrading the site that both the School District and the City taxpayers will incur. Accordingly, the imposition of a requirement to regrade the site is contrary to the nexus and proportionality test, which requires that City may only impose requirements that are proportionate to the impacts of the proposed action.

To impose a requirement that the School District regrade the site, the City and Hearing Examiner must comply with state limitations on project regulations and exactions found under the Washington State Constitution. *See Isla Verde Int'l Holdings*, 146 Wn.2d at 759 (mitigation for all land use regulatory exactions must be reasonably necessary as a direct result of the proposed development); *Honesty in Envtl. Analysis and Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 534, 979 P.2d 864 (1999) (rough proportionality requirements limit local governments to imposing mitigation measures that are roughly proportionate to the impact they are trying to mitigate). The City and Hearing Examiner have failed to so comply. The School District should not be asked to regrade the site to an elevation that is 1 to 3 feet less in certain places to address concerns from neighboring property owners over aesthetic and visual quality issues. Such a requirement is not proportionate to the alleged impact created by the increased elevation. The Hearing Examiner and Administrative Official lack authority to require the School District to regrade the site.

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VI. CONCLUSION

For the aforementioned reasons, the City Council should reverse the Hearing Examiner's Decision with respect to grading and approve the as-built site elevations for Apple Valley Elementary School.

DATED: October 15, 2021

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Attorneys for Appellants West Valley School District No. 208

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date indicated below, I caused a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NOTICE OF ADMINISTRATIVE APPEAL** to be served on the following persons via the methods indicated below:

Joan Davenport, AICP, Community Development Director
City of Yakima, Department of Community Development
129 N. 2nd Street
Yakima, WA 98901

- ☐ Via U.S. Mail, 1st class, postage prepaid
- ☒ Via Legal Messenger
- ☐ Via Facsimile
- ☐ Via Overnight Mail
- ☐ Via email

DATED this 15th day of October, 2021 at Seattle, Washington.

Cheryl Robertson

Cheryl Robertson, Legal Practice Assistant

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October 13, 2021

To: Yakima City Council
c/o Joan Davenport AICP, Community Development Director
City of Yakima, Department of Community Development
129 N. 2nd Street
Yakima, WA 98901

From: John and Candace Manfredi

Subject: Testimony opposing APP#008-21, West Valley School District #208

Dear Council,

Who we are: We are a neighbor, living immediately south of the Apple Valley School south playground. We built our home here in 2005. We have been adversely impacted by the 4' playground grade raise. We are submitting testimony opposing this appeal, APP#008-21. We would like the Council to know that we voted "yes", for three Apple Valley School replacement bond issues. Our "yes" votes were consistent with our lifelong support of public schools. In fact, we have voted "yes" for every school levee and every school bond for our 52 year voting history, in Denver, Billings, Klamath Falls, and in Yakima since 1984.

West Valley School District illegal violations: In their 2020 and 2021 Apple Valley School construction, the District intentionally built large grade raises on the south and east playgrounds. These grade raises violated legal commitments of their own December 30, 2019 Public Review Document and the March 2, 2020 Hearing Examiner's Decision. The District also violated their own building permit drawing B200126, approved April 7, 2020. Throughout the playground construction, and since, the District has refused to admit their violations. City Administrative Officer and Hearing Examiner have both recognized these grade raises are violations, and decided against the District in MOD#021-21 and APP#001-21.

Adverse impacts from violations: We have been adversely impacted by the District's 4' playground grade raise built immediately north of our residential property. Other neighbors south and east of the playground have also been adversely impacted by the District's grade raise. The adverse impacts include: lost view, lost privacy, personal safety, nuisance and reduced property value. Throughout their work, and since, the District has refused to recognize these adverse impacts. The City Administrative Officer and the Hearing Examiner have both recognized the adverse impacts, and decided against the District in MOD#021-21 and APP#001-21.

Our proposed resolution: Considering all issues relevant to this current appeal, we believe the City Council will decide against the District. However, we propose a better resolution. In our previous testimony for APP#001-21, and in our additional testimony, below, we propose that adverse impacts of the District's grade raises be mitigated. Please see our Summary statement on page 5 below.

We thank the Council members for considering our testimony, and our proposed resolution.

Sincerely,

John and Candace Manfredi

Previous Testimony

For Council reference, below is a list of our previous testimony. The City told us they will forward our previous testimony on MOD#021-21 and APP#001-21 to the Council.

Testimony supporting the school replacement project:

December 30, 2019	Notice of Application, Environmental Review, & Public Hearing	
March 2, 2020	Notification of Hearing Examiner's Decision	

Testimony opposing the illegal grade raise:

June 30, 2021	Findings of Fact, Conclusions, & Decision,	MOD#021-21
Aug 26, 2021	Hearing Examiner's Decision,	APP#001-21

Additional Testimony on Specific Articles of the District's Appeal, APP#008-21:

Our additional testimony on APP#008-21 follows on pages 3 – 5 below.

Additional Testimony on Specific Articles of the District's Appeal, APP#008-21:

Appellant articles 6.a. and parts of 6.b. state: "YMC 15.17.020.C does not speak to changes in site elevation. We agree. Our previous written testimony under APP#001-21 stated the subject YMC does not apply to grade raises; it only applies to "gross floor area". Under that same appeal, the Hearing Examiner also found no analogy between gross floor area and grade raise; his Decision found that the YMC 15.17.010.C only applies to "gross floor area" and not to grade raises. His decision also explained that the Appellant's 32% average grade raise considers areas away from the neighbors, and is therefore irrelevant to neighbor's concerns. He also stated that grade raises much larger than 132%, located near neighbor's lots do cause impact. 150% and 132% grade raise issues are both irrelevant to the current Appeal APP#008-21.

Appellant article 6.b. states: "the average increase in grade of 32% across the entire site . . . as a whole is consistent with YMC 15.17.020". This statement is wrong. Below is a list of YMC subparts and what they cover. The term "grade raise" is not used in any subpart. In engineering and construction, grade raises are earth embankment and are within a reasonable definition of a structure. There are many examples of embankments as structures, or part of structures, typically designed by engineers. For example earth dams, dikes and levees, elevated roads, bridge and overpass abutments, buildings built into sloped terrain or built on engineered earth fills. In Mod#021-21 and APP#001-21 the Administrative Officer and Hearing Examiner should have considered that earth grade raises are within the definition of structures. If grade raises are considered a structure, then subpart D applies.

YMC 15.17.020A	"residential density"
YMC 15.17.020B	"parking"
YMC 15.17.020C	"gross floor area"
YMC 15.17.020D	"height of structure"
YMC 15.17.020E	"cumulative effects"
YMC 15.17.020F	"drive-thru facilities"
YMC 15.147.020	"hazardous materials"

By the grade / structure analogy, YMC 15.17.020D says: "The modification will not increase the height of any structure", i.e. "will not increase the height of any grade". Therefore the District's grade increases specifically violate article YMC 15.17.020D. The District's arguments in their Article 6.a. and b. of their current appeal, APP#008-21, are either wrong, irrelevant or self-defeating.

Appellant article 6.c. says "adverse effect is not supported by substantial evidence." We strongly disagree with this statement. In our written testimony for APP#001-21 we stated adverse impacts include lost view, lost security, lost privacy, nuisance, and reduced property values. The City's Administrative Official and the Hearing Examiner both recognized adverse impacts, and the Hearing Examiner added "personal safety" as an adverse impact (see HE Decision, 08/26/21, page 11). The appellant says that adverse effects are limited to slope stability, drainage, and potential erosion problems. That is a ridiculous limitation. Adverse effects can include hundreds of categories and issues. This is why projects undergo Type (3) public review including many categories and issues that can cause adverse impacts. Grade raises violated the 2019/2020 Public Review Document, HE Decision of Feb 2020, and permit drawing B200126, and those violations have caused adverse impacts on neighbors.

First, may we address the issue of drainage which the District says is not in violation. Refer to our previous written testimony for APP#001-21, where we explained that along the east side of the playground the contractor did not correctly build a drainage swale. We also explained that the City's Surface Water Engineer

was wrong, and why he was wrong. The HE's site visit and Decision APP#001-21 did not understand our explanation of the drainage violation, and he did not see that the drainage violation, an incorrectly built drainage swale, still exists.

Second, may we address violations and adverse impacts from the grade raise itself. Our previous testimony for APP#001-21 explained that adverse effects (or adverse impacts) on neighbors come from the District intentionally violating their own 2019/20 Public Review Document and HE Decision of Feb 2020. There is no question that the District violated provisions in those 2019 and 2020 Documents by raising the grade and blocking views across the S and E playgrounds. There is no question that those District violations caused adverse impacts on the neighbors. There is also no question that the District has purposely refused to look at or acknowledge the adverse impacts. Our previous written testimony on APP#001-21, explains the step-by-step grade raise work and chronology, in laborious detail. We also explained the adverse impacts on neighbors; please take time to read this previous testimony. The City in MOD#021-21, and the HE Decision in APP#001-21, also clearly understood that neighbors have adverse impacts, as both documents affirm and refer to them multiple times. It is worth restating here that grade raises violated the District's own 2019/20 Public Review Document and 2020 HE Decision (written by Gary Cuillier), and also violated the District's own permit drawing B200126. All the violations were deliberately done by the District in step-by-step fashion over a period of months, and are now disclaimed by the District.

We would like to elaborate on the adverse impact of "personal safety" which the HE recognized in his 08/26/21 decision, page 11. In our view this safety impact applies to neighbors because people standing on the grade raises can more easily see into our back yards and homes. Neighbors are less safe in our own back yards and homes because of this. Some of us are now considering installing security cameras. Personal safety can also apply to school children playing on the downslope of grade raises, because school staff standing on the flat portion of the playgrounds, can no longer see children playing on the downslopes. It can also apply to criminals who can hide on the downslopes, out of school yard view and out of neighbor's view. The grade raise downslopes around the playgrounds outer perimeter, together with the school's chain link property fence with slats, create a hiding area for criminal mischief. In past years, when the playground was flat, anyone on the playground could see anyone else. No one could hide on the playground. In the past we could see across the playground, and often called Yakima Police to report suspicious evening activity in the schoolyard, and even on the school roof. In the past 15 years, after calling Yakima Police, we sometimes observed police cars driving and spotlighting across the schoolyard, all of which could be easily seen. The grade raise has created hiding areas along the South and East perimeter of the school yard. Hiding areas are contrary to new design recommendations for schools, parks, and public grounds; designs now discourage hiding areas.

In summary, grade raises have caused definite adverse impacts to the residents, possible adverse impacts to the school building and to school children's safety, and may facilitate criminal activity.

Appellant article 6.e. objects to the HE proposal of a Type (3) review for the grade raises, because the original project went through a Type (3) review in 2019/2020. The HE proposed a Type (3) review for the grade raises because he actually presided over the 2019/2020 public Type (3) review, and he knows that review did not address grade raises for the S and E playgrounds. Actually the 2019/2020 public review clearly portrayed that the S and E playgrounds would "remain" and "be maintained"; those terms were used nine times in the District's public review document. Neighbors clearly understood from the 2019/2020 public review and 2020 HE decision that the S and E playgrounds would remain the same as they had been for decades; that meant no grade raises. In APP#001-21, the HE also explains that a Type (3) review is needed for the grade raises because grade raises have caused adverse impacts. Refer to our previous written testimony for APP#001-21 which explains that grade raises were not in the 2019/2020 Type(3) public review.

Appellant article 6.f. reargues "nexus and proportionality. In his Decision on APP#001-21, the HE contradicted the District's previous testimony on nexus and proportionality. Our previous written testimony on APP#001-21 recognized the practical reasons for considering the cost to lower the grade vs the cost to pay neighbors for damages. We suggested that the District estimate the cost to lower the grade. In their oral testimony for APP#001-21 the District did so, presenting an estimate of $1 million. We believe that is a reasonable estimate, and agree with the District, objecting to such a high expenditure. That is why our previous testimony, on APP#001-21, proposed damage settlements for each neighbor based on their individual adverse impacts. Please refer to our previous written testimony. There are two additional reasons that we prefer damage settlements to lowering the grade. First, we, and all the neighborhoods adjacent and downwind of the school yard, suffered blowing dust from the schoolyard work almost daily for the spring, summer and fall months of construction, 2020 and 2021. Hundreds of days and mornings we found layers of dust on our patio, autos, garage, siding and windows, and inside our homes. In those two years, we spent dozens of hours cleaning up this dust and are tired of doing so. We cannot bear another summer of dust, for the grade to be lowered. Second, the District has been prejudicing parents, neighbors and district citizens against us "handful of neighbors" as their appeal calls us. This prejudice is totally unfair. We "handful of neighbors" are also district taxpayers and we personally voted "yes" three times, for three school replacement bond issues. We "handful of neighbors" also cringe at spending $1 million dollars to lower the grade. We like school children, and hate that the District is trying to blame us for defending ourselves against adverse impacts caused by their illegal grade raises. This is misplaced blame, blame shifting and bullying. We "handful of neighbors" have done nothing wrong. We did not author, and then violate, the public review documents and building permit. We did not deliberately raise the grade, step by step over months. We did not cause adverse impacts on ourselves. We know the District's strategy of shifting blame is working, because several neighbors have asked us not to oppose the appeal. Other neighbors no longer wave to us, or greet us in the friendly way they had for the past 15 years. So we don't want to force $1 million dollars to be spent, we don't want to suffer more dust, and don't want to be blamed for both. We would prefer mitigation.

Summary

In summary, the District's grade raise work violated their own public hearing documents and Hearing Examiner's Decision that enabled the school replacement project, and they violated their own building permit. These violations caused adverse impacts. The Administrative Official and Hearing Examiner, both denied the Districts request to approve grade raises, because of the violations, and because there were adverse impacts on neighbors. We believe there is a better solution to grade raise violations than to spend $1 million to lower the grade. The District could settle their adverse impacts on those neighbors, who are "party of record" in this appeal, by paying damages for adverse impacts. This would require a case by case determination of impacts and damages, and for some neighbors may include the cost of selling and moving. We ask the City Council to allow the District time and opportunity to negotiate damage settlements with those neighbors who are "parties of record" to this appeal. If settlements can be made, those neighbors could disclaim their adverse impacts. Without adverse impacts, the City Council could approve the District's appeal. This would be much cheaper, easier and cleaner than forcing a $1 million expenditure of District tax money to lower playground grades. It would also avoid wasting more time and money by the District, City, and neighbors, in another appeal to Yakima County Superior Court.