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No. 68463-9-I

COURT OF APPEALS,  
DIVISION I,  
OF THE STATE OF WASHINGTON

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FRIENDS OF NORTH KELSEY,

Appellant,

v.

CITY OF MONROE, a Washington municipal corporation;  
PACLAND; NORTH KELSEY, LLC, a Washington  
limited liability corporation,

Respondents

and

DIANE and EDWARD ELLIOTT,  
Third-Party Respondents

and

WAL-MART STORES, INC.

Intervenor-Respondent

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COURT OF APPEALS  
DIVISION I  
CLERK  
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BRIEF OF RESPONDENT CITY OF MONROE

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## **I. INTRODUCTION**

This land use appeal continues the attempt of Appellant Friends of North Kelsey (FONK) to substitute its own subjective aesthetic judgment for that of the Monroe City Council. In challenging the City Council's approval of a new Wal-Mart retail facility, FONK relies upon a selective and untenably rigid interpretation of the City's design guidelines while disregarding the flexibility and discretion inherent in those standards. FONK's proffered construction of the City's regulations has been rejected by every relevant decision-maker throughout the administrative and judicial process to date, and it should meet the same fate at the appellate level. Because FONK is unable to demonstrate that the City's approval of the challenged project was clearly erroneous or unsupported by substantial evidence as required by the applicable standard of review, the Court of Appeals should affirm the City Council's decision.

## **II. STATEMENT OF THE CASE<sup>1</sup>**

### **2.1 The North Kelsey Development Proposal.**

The local land use decision at issue in this appeal is the Monroe City Council's approval of a development agreement, binding site plan

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<sup>1</sup> The City also incorporates by reference the Statement of the Case contained in the brief of Intervenor Wal-Mart Stores, Inc.

and grading permit authorizing a new Wal-Mart retail store. The 17 acre project site is located within the North Kelsey Planning Area of Monroe, is designated "General Commercial" under both the City's zoning ordinance and comprehensive plan, and is variously bordered by other commercial and industrial parcels and public rights-of-way. *CP 719-20*. The property is currently owned by the City of Monroe. *CP 719-20*.

In December 2010 the City executed a Purchase & Sale Agreement with North Kelsey, LLC to sell the property and provide for its future development. *CP 2674-2697*. The following month PACLAND, acting on behalf of North Kelsey LLC and Intervenor Wal-Mart, submitted applications for a binding site plan and grading permit to develop a lot on the upper (northerly) portion of the North Kelsey Planning Area as a 151,719 square foot retail store together with seasonal and outdoor garden centers. *CP 719*. The remaining lots of the binding site plan include a one-acre parcel intended for future retail or service use in the southwestern corner of the property and a six-acre lot located in the northern portion. *CP 719*.

In accordance with the Purchase & Sale Agreement, City staff and North Kelsey, LLC negotiated a proposed development agreement<sup>2</sup> to govern future development of the project site. *CP 2703-2779*. The agreement sets forth numerous standards, conditions and mitigation requirements for the project, including impact fees, permitting standards, local zoning and building code compliance, environmental review, site improvements, land dedications and various other matters. *CP 2706-2713*. The development agreement was consolidated with the applicant's binding site plan and grading permit applications for processing purposes, and was presented to the Monroe City Council for a public hearing and final action. *CP 724*.

In advance of the City Council hearing, the City's Community Development Director and State Environmental Policy Act (SEPA) responsible official prepared a detailed staff report analyzing the development proposal under the City's land use regulations, building code and design guidelines. *CP 719-37*. The report concluded that the project satisfied all applicable development standards and recommended approval by the City Council. *CP 737*. The City's SEPA responsible official also

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<sup>2</sup> A development agreement is a statutorily-authorized contract between a local government and a person having control or ownership of a real property setting forth the development standards, conditions and mitigation measures that will govern future development on the property. *See RCW 36.70B.170 -.210*.

determined that the project was a “planned action” pursuant to WAC 197-11-172 and City of Monroe Ordinance No. 0003/2004, which had previously adopted a Planned Action Final Supplemental Environmental Impact Statement (FSEIS) for the North Kelsey Planning Area. *CP 735-37, 818.* The FSEIS was the culmination of a comprehensive review process that had identified and addressed the probable significant environmental impacts of future development within the North Kelsey Planning Area. *CP 1468-1643.* By issuing the City’s “Notice of Planned Action”, the responsible official determined that: (i) the proposed North Kelsey, LLC development proposal met the description in, and would satisfy any applicable conditions and mitigation measures set forth in the FSEIS, and (ii) the probable significant impacts of the project had been adequately addressed in the FSEIS. *CP 818.*

**2.2. Public Hearing, Approval and Reconsideration.**

As required by RCW 36.70B.200, the Monroe City Council conducted a duly noticed public hearing regarding the development agreement and associated permit applications on March 15, 2011. *CP 2698.* Following the hearing procedures proscribed by the Monroe Municipal Code (MMC), the City Council first heard presentations by City staff and the applicant and then accepted oral testimony from the

public. MMC 21.50.060; *CP 2698*. The public testimony portion of the hearing was closed on March 15 and the remainder of the hearing was continued to March 29, 2011. *CP 2698*. At the request of certain members of the public, the City Council agreed to keep the record open for the submittal of additional written comments until March 18, 2011. *CP 2698, CP 456-57, 512-13*.

The public hearing was reconvened on March 29, 2011. *CP 2698*. The City's Community Development Director provided a supplemental staff report addressing the project's compliance with various local design standards. *CP 2609-11*. The applicant also submitted a revised conceptual site plan in response to concerns raised by the public regarding the original proposal. *CP 2115-2142; CP 532-536*. The revised conceptual site plan provides for additional pedestrian amenities and landscaping features, as well as numerous enhancements to the structural materials, roof configurations, signage, and other aesthetic and architectural components of the proposed retail building. *CP 2115-2145; CP 532-536*.

After rebuttal presentations by City staff and the applicant, the City Council closed the evidentiary portion of the hearing, entered the deliberative phase of its proceedings and ultimately voted 6-1 to approve

the development agreement inclusive of the revised conceptual site plan. *CP 2699; CP 609-10.* The City Council's approval motion was amended to impose several additional conditions on the proposed development, including the incorporation of new pedestrian and mixed-use pathways, landscape buffers, design and safety amenities, open space enhancements, and a restrictive covenant limiting the future use of Lot 3. *CP 2699.*

The City Council formalized its approval by adopting Resolution No. 2011/009 on April 12, 2011. *CP 2698-2702.* In support of the Council's determination that the Wal-Mart proposal satisfied all applicable requirements for approval, the resolution set forth numerous findings and conclusions and formally adopted by reference the original and supplemental staff reports. *CP 2698-2702.* After the City Council denied two separate motions for reconsideration on April 26, 2011, *CP 2909-12,* the City issued a final Notice of Decision on April 28, 2011. *CP 2916-17.*

### **2.3. Judicial Appeal.**

FONK commenced the instant appeal by timely filing a petition under Chapter 36.70C RCW, the Land Use Petition Act (LUPA), on May 17, 2011. *CP 2919-41.* Co-Respondent Wal-Mart subsequently intervened into the case. After briefing and a hearing on the merits, the Superior Court issued an oral ruling on January 4, 2012, affirming the City

Council's decision in all respects and rejecting each of the arguments asserted by FONK. *CP 4-24*. The Superior Court subsequently entered its final order on February 13, 2012, reiterating the substance of its oral ruling. *CP 1-24*.

FONK timely appealed to this Court.

### **III. SUMMARY OF ARGUMENT**

Apart from a half-hearted SEPA claim, FONK does not challenge the Wal-Mart proposal on any substantive basis relating to the project's external impacts—e.g., stormwater runoff, traffic, noise, zoning compliance, etc. FONK likewise does not identify any alleged errors in the City's review and hearing process, an extraordinary concession for a project with such a lengthy and procedurally complex history. Instead, FONK's only arguments relate to the City's adopted design standards for the North Kelsey Planning Area. These inherently flexible guidelines are almost purely aesthetic, and—by design—they vest the Monroe City Council with broad latitude to determine the compliance of a particular development proposal. FONK's appellate arguments essentially invite the Court of Appeals to substitute FONK's own subjective aesthetic judgment for that of the Monroe City Council Members. The Court should decline this invitation. Because FONK cannot establish that the City Council's

interpretation of the guidelines was clearly erroneous or unsupported by substantial record evidence, the Council's decision should be affirmed.

#### IV. ARGUMENT

##### 4.1. Standard of Review.

Judicial review in a LUPA appeal is confined to the record created during the administrative proceedings below. RCW 36.70C.120(1); *CROP v. Chelan County*, 105 Wn. App. 753, 758, 21 P.3d 304 (2001).<sup>3</sup> The Court of Appeals limits its review to the underlying City Council action without reference to the trial court's decision. *Rosema v. City of Seattle*, 166 Wn. App. 293, 297, 269 P.3d 393 (2012). "Under LUPA, a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of the six standards listed in RCW 36.70C.130(1) has been met." *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). The six LUPA standards are as follows:

- (a) The body or officer that made the land use decision engaged in unlawful

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<sup>3</sup> Because the North Kelsey development agreement incorporated by reference the applicant's binding site plan and grading permit applications, FONK's judicial appeal of the agreement is properly formatted as a LUPA proceeding pursuant to Chapter 36.70C RCW. See RCW 36.70B.200 ("If [a] development agreement relates to a project permit application, the provisions of chapter 36.70C shall apply to the appeal of the decision on the development agreement"); RCW 36.70B.020(4) (defining binding site plans as project permits); *CP 2701, 2594, 2916*.

procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). As the petitioner in this matter, FONK bears the exclusive burden of proving that one or more of these standards for relief has been satisfied. RCW 36.70C.130(1).

A court's review under LUPA is highly deferential. "RCW 36.70C.130(1) reflects a clear legislative intention that. . . court[s] give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation." *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004) (internal

punctuation omitted). Although the construction of a local ordinance, (including the City's North Kelsey Development Plan and Design Guidelines), presents a question of law which is subject to *de novo* review, the Court must afford appropriate deference to the Monroe City Council. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006); *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007). Under this standard, a court will not reverse a local government's land use decision unless it finds that the decision was clearly erroneous. *Mason v. King County*, 134 Wn. App. 806, 810, 142 P.3d 637 (2006). "A decision is clearly erroneous only when the court is left with the definite and firm conviction that a mistake has been made." *City of Medina*, 123 Wn. App. at 24. The same test applies to whether the challenged land use decision was a clearly erroneous application of the law to the facts pursuant to RCW 36.70C.130(1)(d). *See, e.g., Citizens to Preserve Pioneer Park L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001).

The Monroe City Council's factual findings are reviewed for substantial evidence. *Cingular*, 131 Wn. App. at 768. "Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared

premise is true.” *Nagle v. Snohomish County*, 129 Wn. App. 703, 709, 119 P.3d 914 (2005). “A reviewing court must be deferential to factual determinations made by the highest forum below that exercised fact-finding authority.” *Citizens*, 106 Wn. App. at 474. The court must also “review the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority.” *Nagle*, 129 Wn. App. at 709. Accordingly, all reasonable inferences must be drawn in favor of the City as the prevailing party below.

Finally, any unchallenged findings of a local land use decision-making body are considered verities on appeal in a LUPA proceeding. *See e.g., Rosema*, 166 Wn. App. at 298 n. 6; *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn. App. 606, 617 n.5, 191 P.3d 928 (2008); *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001). Accordingly, to the extent that FONK has not specifically challenged any of the Monroe City Council’s findings in support of the North Kelsey development agreement (including any findings that the Council incorporated by reference), the substance of these determinations must be accepted without question for purposes of the instant appeal.

**4.2. FONK's Arguments Rely Upon an Untenable Construction of the City's Design Guidelines.**

FONK's various arguments regarding the City's Design Guidelines suffer from three fatal defects. First, FONK disregards the inherent flexibility and discretion with which these standards are intended to be applied. Second, FONK mischaracterizes a few selectively-cited illustrations and statements in the guidelines as binding "requirements" for future development. Finally, FONK ignores the deference properly owed to the Monroe City Council in interpreting its own ordinances.

**4.2.1. The North Kelsey Design Guidelines are Flexible and Preserve the City's Discretion.** The North Kelsey Design Guidelines are a component of the North Kelsey Development Plan, a policy blueprint intended to guide future development within the North Kelsey Planning Area. *CP 1986-2035*. The Design Guidelines are prefaced by an unambiguous interpretive provision stating in relevant part:

**D. INTERPRETING THE DESIGN GUIDELINES**

*The City retains full authority to determine whether or not a proposal meets these guidelines. Within the guidelines, certain words are used to indicate the relative importance and priority the City places upon the particular guideline.*

....

The word “should” means that the development proposal will comply with the guideline *unless* the City finds that:

- The guideline or requirement is not applicable or appropriate in the particular instance.
- The development proposal meets the intent of the guidelines in some other manner, or
- There is a compelling reason to the contrary.

....

The project proponent may submit proposals that he/she feels meet the intent of the guidelines but not necessarily the specifics of one or more guidelines. In this case, *the City will determine if the intent of the guideline has been met.*

*CP 1990-91 (emphasis added).*

In repeatedly construing the term “should” as a mandatory requirement of the Design Guidelines, FONK ignores the plain import of the above text. *Brief of Appellant at 14-15.* Contrary to FONK’s assertion, the discretion reserved for the City Council under these provisions is not defeated by any “obvious inferences” from the underlying ordinance. *Brief of Appellant at 14-15.* The interpretative

standards are clear on their face: Wherever the Design Guidelines state that a particular feature “should” apply, the City Council may simply waive it by finding that the feature is inapplicable or inappropriate, or that the development proposal meets the intent of the Guidelines in some other way. *CP 1990-91*. Significantly, the Design Guidelines impose *no* criteria for constraining the Monroe City Council’s discretion in this regard.

FONK’s attempt to minimize the City Council’s discretion in this context is without merit. The primary objective in interpreting a land use ordinance is to determine and effectuate the local legislative body’s intent. *Jones v. King County*, 74 Wn. App. 467, 475, 874 P.2d 853 (1994); *Choi v. City of Fife*, 60 Wn. App. 458, 461, 803 P.2d 1330 (1991). With respect to the North Kelsey Design Guidelines, the Monroe City Council’s intent could hardly be clearer: The City expressly reserved for itself the latitude to determine whether or not a particular development proposal meets the intent of these standards. *CP 1990*. By their unambiguous terms, the guidelines were intended to be applied flexibly—not rigidly—to development proposals within the North Kelsey Planning Area. *Id.* Equally clear is the Monroe City Council’s authority to conclude that the

application of the guidelines is inapplicable, inappropriate or otherwise unnecessary. *Id.*

The Monroe City Council properly exercised this latitude in approving the North Kelsey LLC development agreement. The Council concluded that the project satisfied all relevant requirements of the North Kelsey Development Plan, including the Design Guidelines:

[T]he City Council concludes that the applicant's development proposal, including the revised conceptual site plan submitted by the applicant, as conditioned by the Development Agreement, complies with all applicable provisions of the North Kelsey Development Plan, the North Kelsey Design Guidelines, and the Supplemental Development Agreement Provisions previously adopted by the City. The City Council concludes that the original conceptual site plan submitted by the applicant also complies with the above-referenced standards and that the applicant's revised conceptual site plan further enhances and elevates the proposal's compliance with these standards.

*CP 2700.* The City Council incorporated by reference numerous findings contained in the Community Development Director's staff reports to support this determination. *CP 2698, 719-37, 2609-11.*

Without prejudice to this conclusion, however, the Council alternatively determined that waiving the Design Guidelines *would* be appropriate for this particular project:

The City Council specifically notes that the North Kelsey Design Guidelines were intended to be interpreted and applied with flexibility. Where the term “should” is used in the Design Guidelines as a compliance standard with respect to particular guidelines or requirements, the City Council concludes that the applicant’s proposal satisfies these guidelines and requirements. *The City Council further concludes that even if the applicant’s proposal did not satisfy these guidelines and requirements, application of these guidelines and requirements is either inapplicable or inappropriate in this instance or on this portion of the North Kelsey Planning Area and/or that the applicant’s proposal meets the intent of the Design Guidelines in some other manner.*

*CP 725, 2700.*

This conclusion is fatal to FONK’s appeal. Even assuming *arguendo* that the City had in fact misinterpreted or misapplied the North Kelsey Design Guidelines in some manner, the City Council’s alternative determination that the guidelines would be inapplicable or inappropriate under these circumstances in any event remains undisputed. In light of the plain, unambiguous text of the interpretive provisions above, FONK cannot credibly contend that the City Council lacked the legal authority to

make this determination. This factor conclusively undermines FONK's challenge to the underlying development proposal. Irrespective of the content and application of the Design Guidelines to particular aspects of the Wal-Mart project, the Monroe City Council clearly retained the authority to waive these standards in its sole discretion as a matter of law.

FONK's suggestion that additional administrative findings were necessary is likewise erroneous. *Brief of Appellant at 16 n.1*. The City Council's land use decision was supported by several pages of detailed findings documenting the Wal-Mart project's compliance with local regulations, including the North Kelsey Design Guidelines. *CP 2698-2702, 719-37, 2609-11*. Nothing in Guidelines requires the Council to enter further findings in order to justify its alternative determination that waiver of these standards would also be appropriate under the circumstances of this particular development proposal. *CP 1990-91*. Because the City Council's conclusion on this point was so clearly expressed, remanding the matter back to Council on that basis would be wasteful and unnecessary. *See, e.g., Tugwell v. Kittitas County*, 90 Wn. App. 1, 14, 951 P.2d 272 (1997) (land use decisions will not be remanded for more complete findings where "[n]othing would be accomplished, other than further delay").

**4.2.2. The Illustrative Diagrams In The Design Guidelines Are Not Binding.** In challenging the Wal-Mart project's compliance with the North Kelsey Design Guidelines, FONK repeatedly cites to various conceptual site figures. *Brief of Appellant at 12-13, 19, 28, 31, 45.* FONK's reliance upon these drawings is misplaced. By both their plain terms and the surrounding context, these figures are provided for illustrative purposes only; they serve to depict *one* possible "example" or "concept" of a permissible development option, but do not purport to have any binding regulatory effect. *See, e.g., CP 1996, 1998, 2001-02, 2007-08, 2009-10.* A basic rule of statutory interpretation is that the substantive components of an ordinance will control over prefatory and other, less mandatory provisions. *See, e.g., Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 898, 83 P.3d 433 (2004); *Martel v. City of Vancouver*, 35 Wn. App. 250, 255, 666 P.2d 916 (1983). FONK's attempt to elevate the non-binding illustrations over the actual substance of the Design Guidelines violates this well-established rule of construction.

**4.2.3. The Monroe City Council's Interpretation And Application Of Its Own Regulations Is Entitled To Substantial Deference.** The Monroe City Council resolution approving the North

Kelsey, LLC development agreement specifically concluded that the Wal-Mart project satisfied all relevant requirements of the North Kelsey Development Plan, including the Design Guidelines. CP 2700. The City Council incorporated by reference numerous findings contained in the Community Development Director's staff reports to support this determination. CP 2698, 719-37, 2609-11.

As the enacting body of the North Kelsey Design Guidelines and the ultimate arbiter of the City's land use regulations, the Monroe City Council's interpretation and application of these standards is entitled to significant deference on appeal. See, e.g., *Pinecrest Homeowners' Ass'n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). This principle is also codified for purposes of judicial review under LUPA. See RCW 36.70C.130(1)(b); *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 128, 186 P.3d 357 (2008) (reviewing court must "allow[] for such deference as is due the construction of a law by a local jurisdiction with expertise"). And its application is particularly appropriate in the instant case, where Monroe's Community Development Director—the administrative official charged with construing and applying the City's land use ordinances—has independently concluded that the Wal-Mart project satisfies the North Kelsey Development Plan

and Design Guidelines. *See, e.g., General Motors Corp. v. City of Seattle*, 107 Wn. App. 42, 57, 25 P.3d 1022 (2007). Also noteworthy is that the City took the extraordinary additional step of submitting the proposed Wal-Mart site plan for review by the consulting firm that originally prepared the North Kelsey Development Plan. *CP 1966, 2111-12*. The consultant's unequivocal conclusion was that the proposal reflected the consultant's own recommendations and is "in conformance with the guidelines". *CP 2111-12*.

The collective weight of these determinations should be afforded substantial consideration in this appeal. Even if the City's Design Guidelines were in fact ultimately ambiguous or otherwise susceptible to differing interpretations, it is clear from the record that FONK's proffered interpretation of these standards reflects the minority view. At best, FONK can demonstrate that one or more guidelines is capable of varying construction; this, however, is significantly less than a "definite and firm conviction that a mistake has been made" as required for reversal under LUPA. *City of Medina*, 123 Wn. App. at 24.

#### **4.3. The Wal-Mart Project Complies with the Goals of the North Kelsey Development Plan.**

**4.3.1. Goal 2.** Goal 2 of the North Kelsey Development Plan seeks to “[c]reate a focal point as a community gathering spot”, with the objective of establishing a large plaza open space. *CP 1971*. As FONK acknowledges, and as the City Council concluded below, the plaza contemplated by this goal will ultimately be located on the *southern* site of North Kelsey Planning Area. *CP 2758, 1978, 1981, 2119; Brief of Appellant at 18*. FONK nevertheless contends that the orientation of the proposed Wal-Mart development slated for the *northern* parcel violates Goal 2 because it allegedly lacks sufficient connectivity with the southern lot and does not foster a spatially-unifying, “campus-like character”. *Brief of Appellant at 18-20*.

This argument is without merit, and FONK cannot cite any binding requirement imposed by Goal 2 that is actually violated by the approved site plan. Preliminary, Goal 2 itself mentions neither pedestrian connections nor a “campus-like character”, and FONK is forced to selectively borrow these references from other provisions of the Development Plan. *CP 1971*. Goal 2 likewise dictates no specific location for a pedestrian crossing between the north and south parcels of the North Kelsey Planning Area or otherwise mandates a particular orientation of the proposed Wal-Mart retail building. *Id.* While FONK

relies upon the illustrative site diagrams contained in the Development Plan to this effect, these drawings, as noted *supra*, carry no binding regulatory effect and each serves to depict only one possible “development concept”. CP 1978 (*emphasis added*).

Contrary to FONK’s suggestion, the Wal-Mart proposal does indeed contain an extensive network of trails, pedestrian amenities and open spaces. These include, *inter alia*, (i) a plaza area immediately adjacent to the main store entrance with specialty paving, seating and other landscaping amenities; (ii) a 12 foot wide bicycle and pedestrian path from North Kelsey Street to the garden center area of the retail facility; (iii) a separate path from the southeast corner of the site to south parking lot and around the stormwater detention facility; and (iv) a heavily landscape-bordered connection with the south lot. CP 2699, 2758-59, 2787. Belying FONK’s connectivity argument, the approved site plan also clearly depicts a “pedestrian access point” connecting the northern and southern lots at the North Kelsey Street divide. CP 2787. In conditioning the proposal, the City Council specifically required an off-set crosswalk design for the pedestrian crossing, together with associated safety amenities such as lighting and flagging. CP 2699. These features

collectively establish a “spatially unified concept” connecting the project site to the south lot within the meaning of the Development Plan.

**4.3.2. Goal 4.** FONK next argues that the Wal-Mart proposal violates Goal 4 of the North Kelsey Development Plan, which aims to “[c]reate a strong identity for the development.” *CP 1971*. Although FONK claims that the proposed retail facility would “dominate the area’s identity with a formulaic, typical superstore Wal-Mart aesthetic”, *see Brief of Appellant at 20-21*, FONK is unable to demonstrate that the project would actually violate the Development Plan. Goal 4 is inherently subjective and flexible, and it imposes no requirements beyond what is already proposed for the Wal-Mart project:

*Objectives: Encourage site and architectural design that combines traditional and modern elements; Emphasize landscaping and greenery throughout the development to create a park-like setting; Encourage architectural design that is understated and subtle. . . .*

*CP 1971-72 (emphasis added).*

Each of the relevant objectives set forth in this goal is by its terms merely an “encouragement” rather than a binding regulatory standard. FONK decries the alleged visual effect of a “big box, massive building”, but the North Kelsey Development Plan specifically contemplates and

2120, 2788-89, CP 535-36. Contrary to FONK's assertion, the proposed Wal-Mart building is unique to Monroe and is not merely duplicative of other Wal-Mart stores. CP 2120.

**4.3.3. Goal 5.** Goal 5 of the North Kelsey Development

Plan encourages pedestrian-friendly development:

*Objectives:* Provide safe, efficient, and attractive pedestrian connections between uses throughout the development area and to uses surrounding the site; Encourage small-scale businesses such as cafés and specialty shops; Encourage building design that orients to public open space, pathways, and streets; Develop streets with pedestrian amenities such as wide sidewalks, awnings, street trees and landscaping, and buildings with display windows; Provide separation of vehicles and pedestrians, where possible, along arterials; Hide and screen parking areas; Incorporate safe bicycle access to and throughout site; Encourage large-scale retail uses to provide multiple entries and minimize blank walls; Provide pedestrian-oriented plazas and open spaces throughout the development.

CP 1972.

FONK's contention that the Wal-Mart proposal disregards these objectives is erroneous. *Brief of Appellant at 21-23.* The west and south building fronts of the retail building will include public-oriented elevations and will incorporate various pedestrian-scaled elements. CP

2121, 2788-89. The approved site plan for the project includes multiple pedestrian connections throughout the project site as well as connections to the south parcels. *CP 2759, 2787.* The proposal also includes various pathways, sidewalks and bike racks to facilitate and encourage pedestrian and non-motorized circulation. *CP 2121, 2759, 2787.* The City Council's approval motion further enhanced these elements by requiring a pedestrian path from the northwest corner of North Kelsey Street/Chain Lake Road around the stormwater detention area to the south parking area, and an additional mixed-use path from North Kelsey Street to the garden center portion of the retail building. *CP 2699.* The design likewise contains informal open spaces between North Kelsey Street and Lot 1 of the project site, a plaza area adjacent to the main entrance featuring specialty paving, public seating and landscaping, and a pedestrian feature for public use at Galaxy Way and North Kelsey Street. *CP 2759.* Parking areas on the property have also been screened from view through landscaping. *CP 2121, 2759, 2787.*

Although FONK dismisses these features as “afterthoughts”, it does not—and cannot—deny their incorporation into the challenged proposal. *Brief of Appellant at 22-23.* FONK likewise disparages the “enormous asphalt parking lot” included in the Wal-Mart site plan and

attacks the project because it allegedly encourages cars rather than pedestrians. *Brief of Appellant at 22-23*. However, nothing in Goal 5 (or any other provision of the North Kelsey Development Plan) purports to prohibit parking areas as a site characteristic. Indeed, Figure 4 and Figure 8 of the Plan clearly depict several large parking areas on the subject property. *CP 1978, 1981*.

**4.4. The Wal-Mart Project Complies with the Design Guidelines of North Kelsey Development Plan.**

**4.4.1. Site Configuration.** Chapter 2 of the Design Guidelines governs site configuration within the North Kelsey Planning Area. *CP 1992-93*. The chapter requires that future development within the Planning Area be based upon one or more binding site plans which “address” the following principles:

- Connect specified areas with an integrated pedestrian network that includes gateway features and safe walking connections. *CP 1992*
- Create a focus of retail, recreational and civic uses at the core of the south lot. Uses in the northern areas of the site “should be compatible and mutually supportive”. *CP 1992*.

- Provide a set of open spaces along the pedestrian network that includes a civic plaza, a village green and other smaller open spaces to enhance the retail environment. “Uses North of North Kelsey Street should be configured around a central open space or plaza to create campus-like setting.” *CP 1993*.
- Include a public road to the south of the lot that, in conjunction with other streets, creates a loop system around the south parcel. *CP 1993*.
- Locate and treat large buildings to reduce their perceived scale to fit with neighboring structures and present an “inviting, human scaled, pedestrian oriented character”. *CP 1993*.

The Wal-Mart development is consistent with the applicable provisions of Chapter 2. Retail uses are specifically allowed in the northern portion of the North Kelsey Planning Area, *see CP 2762, 2005*, and the wide range of products and services offered by the proposed Wal-Mart store are compatible with and mutually supportive of the existing retail uses located on the south parcel. *CP 2762, 2125*. The previously-constructed Tjerne Street right-of-way already provides the “loop” road system contemplated by this chapter. *CP 2126*. With respect to pedestrian network connectivity, the proposal includes numerous internal

pedestrian pathways as well as connections to and from the development site along Galaxy Way, North Kelsey Street and along the public sidewalk to the east of Chain Lake Road. *CP 2762, 2125, 2787*. The approved site plan likewise includes numerous open spaces along the pedestrian network that will enhance the retail environment. *CP 2762, 2125-26, 2787*. FONK again deprecates these amenities as “afterthoughts”, but cannot deny their incorporation into the approved Wal-Mart project or otherwise demonstrate that they are legally inadequate. *Brief of Appellant at 27*.

FONK also cites no record evidence supporting its subjective assertion that the pedestrian crosswalk on North Kelsey Street is “poorly located”. *Brief of Appellant at 28*. Indeed, the Monroe City Council specifically conditioned its approval of the project upon a realignment of the North Kelsey Street crossing to improve pedestrian safety. *CP 587-94, 2699*.) FONK’s argument again relies solely upon a site diagram (Figure 5), a nonbinding illustrative example that does not purport to dictate the location of any pedestrian connection. *CP 1993*.

FONK’s arguments concerning the size, location and treatment of the proposed Wal-Mart retail building are likewise without merit. *Brief of Appellant at 29-30*. Large retail buildings are specifically authorized by various provisions the North Kelsey Plan, including Chapter 2. *CP 1971*,

1993. The exterior of the Wal-Mart building will incorporate numerous design elements, including entry vestibules of lowered height, sloping metal roofs, multiple-paned windows, awnings, canopies, window-like features, pedestrian-scale accent lighting and landscaping; these features collectively reduce the perceived scale of the structure and soften its visual impact. *CP 2120, 2787-89, 535-36.* The project will also feature a plaza area between the two main entrances of the store adorned with multiple planters, tables, benches, hanging baskets and similar pedestrian-friendly, human-scaled amenities. *CP 2699, 2787-89.*

Nothing in the Design Guidelines supports FONK's contention that the location of the retail building is impermissible, and in attacking the "massing" and "orientation" of the structure FONK attempts to enforce requirements that are simply absent from the design principle it purports to enforce. (Chapter 2 omits any reference to the term "massing".) *Brief of Appellant at 30; CP 1992-93.* FONK likewise cannot credibly argue that Wal-Mart's large retail facility does not "fit" with the neighboring structure on the southern North Kelsey parcel—another large retail store. *Brief of Appellant at 29; CP 2762.* Finally, FONK's factually unsupported characterization of the retail building as "a typical, formulaic Wal-Mart", *Brief of Appellant at 29*, is contradicted by the only record

evidence addressing this issue; the retail facility approved by the City Council is in fact aesthetically unique to Monroe. *CP 2120*. The City Council's findings on these points are supported by substantial evidence, and the Council's interpretation of the Design Guidelines was not clearly erroneous.

FONK argues at length that the Wal-Mart project violates the statement in Chapter 2 that “[u]ses north of North Kelsey street *should* be configured around a central open space or plaza to create a campus-like setting.” *Brief of Appellant at 24-26; CP 1993 (emphasis added)*. As explained *supra*, this theory disregards the City Council's expressly reserved discretion under the Guidelines and mischaracterizes the term “should” as mandatory rather than permissive. In accordance with the interpretative section of the Guidelines, the City Council specifically concluded that the “campus-like setting” principle was inapplicable to the Wal-Mart proposal. *CP 2762*. This determination was objectively reasonable given that the proposal involved the installation of a large, “big box” retail facility (itself an expressly authorized use of the property) that would necessarily prevent the simultaneous preservation of a large

centrally located open space on the site. CP 2762.<sup>4</sup> The City Council ultimately concluded that “the proposal as a whole” complies with the Guidelines “when the totality of all proposed features are considered.” CP 2763. Chapter 2 concludes with an express acknowledgment of the City’s latitude to make precisely this type of judgment, providing that a project proponent must demonstrate “the overall site layout” of the proposal accomplishes the goals set forth in the chapter “*to the City’s satisfaction.*” CP 1993 (*emphasis added*).

Other features contemplated by Chapter 2 are, as the City correctly noted, simply inapplicable to the Wal-Mart proposal. Several references within the North Kelsey Development Plan indicate that the civic plaza and “village green” will be located *south* of North Kelsey Street rather than within the north area. CP 2758, 2762, 1978, 1981. Likewise, although FONK contends that the parking area for the store violates the Design Guidelines by impermissibly “intruding” into the center of the project site, the text FONK refers to is also specific to parking for a facility in the southern part of the North Kelsey area. *Brief of Appellant at*

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<sup>4</sup> The term “campus” is commonly defined as meaning “a large, usually suburban, landscaped business or industrial site.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY 302 (1996 ed.). As approved by the Monroe City Council, the heavily landscaped Wal-Mart site plan arguably satisfies this standard in any event. See CP 2787.

27-28; *CP 1993*. As with its other arguments, FONK's reliance upon Figure 5 of the Design Guidelines is misplaced; the figure is an illustration which by terms is merely a "[v]ehicle access and parking *concept*" and does not purport to impose a binding directive regarding the precise location of any parking area. *CP 1993 (emphasis added)*.

**4.4.2. Site Planning.** Chapter 3 of the Design Guidelines contains provisions addressing pedestrian-oriented spaces, building site standards for the upper North Kelsey area, parking areas and street corners/highly visible locations. *CP 1994-2010*. Contrary to FONK's assertions, the Wal-Mart project satisfies these standards.

**4.4.2.1. Pedestrian-oriented Spaces.**

Section A(4) of the Design Guidelines contains standards for pedestrian-oriented space, a term that is expansively defined under the North Kelsey Development Plan to include "small to large widening of walking spaces, landscaped areas, areas for outdoor dining, or small play areas[.]" *CP 2000-01, 2035*. Although this Guideline contains numerous standards, FONK's only arguments concern the height of lighting fixtures and the number of linear feet allocated for certain seating areas. *Appellant's Opening Brief at 31-33*.

Both arguments are without merit. The City's review and approval of lighting fixtures was specifically reserved for a separate, future permitting process. *CP 2782*. Contrary to FONK's assertion, the record does indeed contain evidence that the project will ultimately incorporate appropriate pedestrian-scale lighting fixtures in accordance with the Guidelines. *CP 2768*. FONK's contention that the (discretionary) seating-to-plaza/open-space ratio is violated by the Wal-Mart proposal is also unsupported. The project as originally proposed included ample seating for pedestrians, and the City Council's approval motion specifically required the installation of an additional eight benches in the plaza area alone. *CP 2764-65, 2699*.

**4.4.2.2. North Building Site Guidelines.**

FONK next contends that the Wal-Mart project violates the Design Guidelines addressing building site layout on the northern portion of the North Kelsey Planned Development Area. *Brief of Appellant at 33-36*. These provisions state in relevant part that “[d]evelopment of the site north of North Kelsey Street *should* be organized around an interconnected set of heavily landscaped open spaces” and that [t]he north site *should* include a focal open space that fronts on North Kelsey Street and is aligned with the Village Green.” *CP 2001 (emphasis added)*.

Although each of these standards contains the permissive term “should” and is thus discretionary rather than mandatory, the Wal-Mart project nevertheless complies with both. The proposal contains heavily landscaped open spaces within the stormwater retention area, along the site’s perimeter, throughout the parking area and in the southern portion of the property adjacent to North Kelsey Street. *CP 2128, 2763-64, 2787.* These landscape features are pervasive throughout the property and are clearly “interconnected” as contemplated by the Design Guidelines. *CP 2787.* And the plaza area adjacent to the retail store is by function and design a “focal open space” within the meaning of the Guidelines, notwithstanding FONK’s subjective characterization of this feature as “just the store entrance”. *Brief of Appellant at 36; CP 427, 2787.* FONK is unable to demonstrate that the City Council’s detailed findings regarding these points are unsupported by substantial evidence.

**4.4.2.3. Parking Areas.** The Design Guidelines contain several standards related to parking areas, the intent of which is to provide convenient parking areas that encourage people to leave their cars and walk throughout the North Kelsey Planning Area, to provide design flexibility for future development, to ensure that parking areas do not diminish pedestrian and visual qualities of the site, and to

maintain the built street edge through effective screening of all parking lots. *CP 2007-08*. FONK identifies two provisions of this Guideline that are allegedly violated by the Wal-Mart project. *Brief of Appellant at 37-38*.

The first of these (which is not actually one of the enumerated standards but rather a side note to an illustrative figure) provides that parking areas “*should* minimize negative impacts on the pedestrian environment and the visual quality of development”. *CP 2007 (emphasis added)*. Although FONK contends that the Wal-Mart parking area actually “maximizes” these impacts, its various arguments to this effect are legally and factually unsupported. *Brief of Appellant at 37-38*. The assertion that the parking area improperly serves as the central focus of the project site merely reflects FONK’s own subjective, aesthetic judgment and does not demonstrate that the City Council’s contrary conclusion was clearly erroneous as required under LUPA. Likewise, FONK’s characterization of the parking lot as a traffic-oriented, rather than a pedestrian-oriented, facility ignores the obvious purpose of this feature (i.e., a storage area for *vehicles*) and disregards the numerous pathways, trails, open spaces and other pedestrian amenities on the site. *CP 2787*. FONK’s contention that the Wal-Mart parking lot encroaches upon areas reserved for open space

under the North Kelsey Development Plan also finds no support in the Plan itself.<sup>5</sup> Finally, while FONK decries that Wal-Mart has not utilized a relaxed parking space *option* authorized by the Guidelines, it is unable to demonstrate the project's violation of any binding requirement.

The second parking standard cited by FONK's provides that "[p]athways and crosswalks should be provided along every fourth parking aisle or at intervals of less than 150 feet", and that contrasting surface materials should be used to separate such pathways from vehicle parking and travel lane. *Brief of Appellant at 38; CP 2008*. Contrary to FONK's assertion, the Wal-Mart project satisfies these provisions. The approved site plan clearly depicts pathways along every fourth parking aisle throughout the lot as well as the contrasting surface materials contemplated by the parking Guidelines. *CP 2787*. The record also demonstrates that all pathway widths will be ADA compliant and be between five and 12 feet. *CP 2766*. FONK's unsupported arguments disregard this evidence.<sup>6</sup>

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<sup>5</sup> The lone record citation provided by FONK for this proposition (CP 63) is simply the approved Wal-Mart site plan. *Brief of Appellant at 38*. Nothing in this document—or within the Design Guidelines themselves—purports to require the Wal-Mart parking area to be used for open space.

<sup>6</sup> The use of the permissive term "should" clarifies that both of these Guideline provisions are discretionary in any event. *CP 1990-91*. The City's exercise of such discretion is particularly appropriate in the context of parking, where the clear intent

#### 4.4.2.4. Street Corners/Highly Visible

**Locations.** Section E in Chapter 3 of the Design Guidelines addresses street corners and highly visible locations. *CP 2008-10*. The intent of these provisions is to enhance the appearance of such locations as well as the pedestrian environment, and to establish an identity for the North Kelsey Planning Area. *CP 2008*. The actual standards established by this section are, by their plain terms, highly flexible. The operative text provides that “[a]ll proposals. . . *should include at least one*” of various design treatments identified in the Guideline. *CP 2008-09 (emphasis added)*. The use of the term “should” clarifies that the provisions are ultimately discretionary in any event. *CP 1990-91*. And development applicants can avoid even the minimal standards established by the Guideline by proposing alternative design treatments that meet the intent of the Guideline in some other way. *CP 2008*.

As the Monroe City Council ultimately determined, the Wal-Mart proposal satisfies the intent of these standards by incorporating several desirable design elements, including various landscaping features (particularly the large landscaped area at Location D and the pedestrian

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of these guidelines is “[t]o provide *more flexibility* in the design of development by *relaxing* existing City parking standards.” *CP 2007 (emphasis added)*.

path at Location E) and architectural enhancements of the retail building façade. *CP 2765, 2698, 2130*. The City likewise concluded, correctly, that the secondary façade of the building orients in part toward a landscaped buffer area. *CP 2764, 2787*. FONK's arguments disregard the flexibility inherent in the street corners/highly visible location standards and—again—essentially ask this Court to substitute FONK's own subjective aesthetic preferences for those of the City Council. *Brief of Appellant at 39-42*. FONK is unable to demonstrate that the City's determination was erroneous or otherwise that its approval of the Wal-Mart project should be reversed on this basis.

**4.4.3. Architectural/Building Design.** Chapter 5 of the Design Guidelines addresses architectural concepts, human/pedestrian scale concerns and building exterior details for structures within the North Kelsey Planning Area. *CP 2016-22*. FONK challenges the Wal-Mart project's compliance with these provisions based upon the size, height and exterior facade of the proposed Wal-Mart store. *Opening Brief of Appellant at 43-47*.

FONK's repeated complaints regarding the "massing" of the Wal-Mart building suggest that its true quarrel is with the sheer size of the Wal-Mart facility. *Opening Brief of Appellant at 43-47*. The North Kelsey

Development Plan, however, specifically contemplates and authorizes “‘big-box’ retail stores” and other “large buildings”. *CP 1971, 1993*. The record also demonstrates the project’s satisfaction of the intent and guidelines of Chapter 5. The Wal-Mart retail building will include significant articulation, roofline modulation and façade variation and will incorporate numerous exterior treatments and design features. *CP 2766-67, 2132-33, 2787-89*. FONK’s subjective criticisms of the building’s exterior appearance lack any factual or legal basis; FONK again simply seeks to impose its own subjective preferences upon the project. FONK’s reliance upon Figure 6 of the North Kelsey Plan is similarly unpersuasive. *Brief of Appellant at 45*. That figure, which is not even codified within Chapter 5, illustrates only one possible development approach and is not binding in any event. *CP 1993*.

FONK also incorrectly asserts that the Wal-Mart building is not “vertically articulated into sections averaging not more than 50 feet along the façade at regular intervals” as allegedly required by Guideline provisions addressing Human/Pedestrian Scale. *Brief of Appellant at 46-47*. The relevant provision clarifies that “[a]rticulation may be accomplished in several ways” specifically including modulation of the building, altering the roofline, breaking up the building façade and/or

through landscaping. *CP 2018 (emphasis provided)*. As approved by the Monroe City Council, the Wal-Mart building incorporates these design features in satisfaction of the guideline. *CP 2787-89*.

The architectural and aesthetic aspects of the Wal-Mart building were extensively addressed by the project applicant, City staff and the City Council during the administrative proceedings below. *CP 2766-67, 2132-33; CP 530-32*. A court's review of any claimed error of law in the City Council's interpretation of city ordinances "must accord deference to the City Council's expertise." *Pinecrest*, 151 Wn.2d at 290. FONK cannot demonstrate that the City's approval of the project was clearly erroneous or otherwise constitutes reversible error under this standard. Its arguments should be rejected accordingly.

#### **4.5 The City's Planned Action Determination Was Correct.**

FONK's final argument contends the City erred by determining that the Wal-Mart project was a planned action under SEPA. *Appellant's Opening Brief at 46-49*. A planned action is an alternative SEPA mechanism providing for preemptive, streamlined environmental review of particular projects. *See RCW 43.21C.031; WAC 197-11-164 -172*. By identifying the probable impacts of such development through a planned action ordinance, the planned action process "allows subsequent projects

within the parameters of the ordinance to avoid further environmental review.” *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 632, 246 P.3d 822 (2011).

Pursuant to this authority, the City of Monroe adopted a planned action ordinance in 2004 (Ordinance No. 0003/2004) addressing the future development of the North Kelsey Planning Area. The ordinance incorporated the City’s Planned Action Final Supplemental Environmental Impact Statement (FSEIS), which extensively identified and addressed the probable significant environmental impacts of future development on the site. *CP 1468-1643*.

In accordance with WAC 197-11-172, the City’s SEPA responsible issued a formal determination and notice that the Wal-Mart project was a planned action within the scope of Ordinance No. 0003/2004. *CP 818*. By issuing the City’s “Notice of Planned Action”, the responsible official determined that: (i) The project met the description in, and would satisfy any applicable conditions and mitigation measures set forth in the FSEIS, and (ii) the probable significant impacts of the project had been adequately addressed in the FSEIS. *CP 818*. The City’s pre-hearing staff report explained the basis for this determination in detail, setting forth 20 separate findings to this effect. *CP 2768-70*. These

findings were subsequently incorporated by reference in the City Council resolution approving the Wal-Mart proposal. *CP 2698*.

FONK's sole SEPA argument contends that the Wal-Mart project is inconsistent with the North Kelsey Development Plan and Design Guidelines and is thus not properly characterized as a planned action for this area. *Petitioner's Opening Brief at 46-49*. This assertion attempts to recycle FONK's arguments addressed *supra*, and it fails on its merits for the same reason: FONK is unable to demonstrate that the Wal-Mart proposal violates the North Kelsey Development Plan and Design Standards. More fundamentally, FONK does not—and cannot—identify *any* specific environmental impacts of the project that were improperly ignored by the City's SEPA's analysis.

Determinations rendered by the City's SEPA responsible official are entitled to substantial weight on appeal and may only be reversed for clear error. *See RCW 43.21C.090; Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 224-25, 151 P.3d 1079 (2007); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 57-58, 52 P.3d 522 (2002). FONK cannot meet this demanding standard, and its SEPA argument should be rejected.

**V. ATTORNEYS' FEES PURSUANT TO RCW 4.84.370.**

If the Court of Appeals concurs with the arguments above and rejects FONK's appeal, the City respectfully requests an award of its attorneys' fees and costs incurred in defending this appellate proceeding. RCW 4.84.370 entitles the prevailing party in a land use appeal to its appellate legal expenses if the party also prevailed at the administrative and trial court levels:

(1) [R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals. . . . of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town. . . . ; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, *the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.*

(Emphasis added.)

The present matter clearly involves a local decision to issue a “land use approval”—i.e., the binding site plan, grading permit and development agreement authorizing the construction and operation of the proposed Wal-Mart facility. It is likewise undisputed that the City’s administrative decision was upheld in all respects by the Superior Court. *CPI-3*. The City is accordingly the “prevailing party” for purposes of RCW 4.84.370 and is entitled to its attorneys’ fees and costs if the Court of Appeals ultimately denies the instant appeal.

## VI. CONCLUSION

For the reasons explained above, FONK cannot demonstrate that the approved Wal-Mart project was clearly erroneous or unsupported by substantial evidence as required by the LUPA standard of review. The Court of Appeals is accordingly requested to dismiss FONK’s land use petition and to affirm the decision of the Monroe City Council.

RESPECTFULLY SUBMITTED this 30th day of July, 2012.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By   
\_\_\_\_\_  
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**DECLARATION OF SERVICE**

I, Gloria J. Zak, make the following declaration:

On the 30th day of July, 2012, I provided the Brief of Respondent City of Monroe in the following manner:

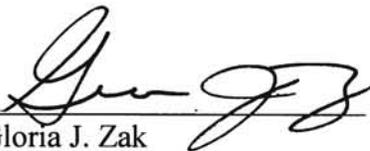
**Legal Messenger - Original and one copy:**  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 30th day of July, 2012.

  
Gloria J. Zak

2012 JUL 30 PM 4:38  
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STATE OF WASHINGTON  
DIVISION I