

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

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NO. 68463-9-I

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FRIENDS OF NORTH KELSEY,

Appellant,

v.

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

Respondents

and

DIANE and EDWARD ELLIOTT,

Third-Party Respondents.

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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REPLY BRIEF OF APPELLANT FRIENDS OF NORTH KELSEY

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## I. INTRODUCTION

In their responses, the City of Monroe and Wal-Mart formulated a theme to try to convince the court that FONK's position is simply a subjective, aesthetic disagreement with the Monroe City Council. To the contrary, the objective examination of the Plan and Wal-Mart's proposal presented by FONK leaves no room for debate: the Wal-Mart proposal is inconsistent with the central principles and objectives that are articulated over and over throughout Plan. That review would leave any reasonable person with a definite and firm conviction that a mistake was committed by the City Council when it concluded that the Wal-Mart proposal is consistent with the Design Guidelines and Goals of that Plan.

Another theme propounded by respondents is that the Design Guidelines vest the Monroe City Council with complete and unlimited discretion to disregard the Design Guidelines in the Plan if they so chose. The City of Monroe and Wal-Mart's arguments leave one to wonder why the City has a development plan for the North Kelsey Area at all.

Granting the City Council this complete, unfettered authority would not only be unfair to the citizens of Monroe, but it is also not an accurate description of the law. Contrary to the suggestions of respondents, there are

boundaries to the City Council's discretion in both this Court's review of its decision and in the plain language of the Plan itself. The Council members acted as judges on this matter and they had a duty to enforce the laws of the City. The Plan provided a specific legal framework within which the Council was required to conduct itself in its quasi-judicial duty to apply and enforce the law as it was written.

FONK is, by no means, "demanding" a "level of precision that is impractical, if not unattainable" for any land use decision as Wal-Mart contends. The configuration and design called for by the Plan on the north site is certainly attainable and requiring a developer to adhere to at least the intent of that design is not, by any means, a demanding request. It is Wal-Mart who is demanding an inappropriate level of disregard for the goals, objectives, and intent of the North Kelsey Plan.

This Court is the last step for the citizens of Monroe to obtain enforcement of local land use laws when their City Council has sidestepped those laws due to financial pressure. Friends of North Kelsey respectfully requests that this Court require that the provisions of the North Kelsey Development Plan be enforced.

## II. STANDARD OF REVIEW

### A. The Standard of Review Under the Land Use Petition Act is Defined by the Character of the Issue Presented

In their briefs, respondents City of Monroe and Wal-Mart blur and misapply the standards of review. It is important, therefore, to clarify that the character of the issue presented defines the standard of review that applies.

*De novo* review is for review of questions of law. *McTavish v. City of Bellevue*, 89 Wn. App. 561, 564, 949 P.2d 837 (1998). For example, the issue of how to interpret the language in Chapter 1, Section D of the Design Guidelines (CP 324) (which defines how to interpret the word “should”) is a question of law reviewed under the *de novo* standard.

The “clearly erroneous” standard applies when a court is reviewing the application of facts to the law. RCW 36.70C.130(1)(d); *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 128 P.3d 300 (2006). For example, the issue of whether the Wal-Mart proposal is consistent with a specific Design Guideline in the Plan is reviewed under the clearly erroneous standard.<sup>1</sup>

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<sup>1</sup> The City’s general description of the standard of review under LUPA inappropriately blends clearly erroneous and *de novo* review together. See Brief of Respondent City of Monroe at 10 (Jul. 30, 2012) (hereinafter “City Brief”) (“under [the *de novo*] standard, a court will not reverse a local government’s land use decision unless it finds that the decision was clearly erroneous”).

The “substantial evidence” standard applies to challenges to findings of fact. For example, a question of whether the evidence supports a finding that there is one linear foot of seating at least 16 inches deep per 60 square feet of plaza area is a factual question. These issues do not involve law – just facts. Factual findings will be upheld if there is “substantial evidence” to support the finding.

In addition, the level of deference due to the City Council is different with each type of review. For example, the Court is allowed to substitute its judgment for that of the City Council when reviewing a question of law under *de novo* review. *See infra* at 9. The clearly erroneous standard calls for deference, but this standard allows the Court broader discretion than the often-used “arbitrary and capricious” standard. *Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976).

Throughout its response brief, Wal-Mart’s repeated references to the substantial evidence standard when it is discussing the issue of whether the Wal-Mart proposal is consistent with specific Design Guidelines in the Plan may cause some confusion. *See, e.g.*, Brief of Intervenor-Respondent Wal-Mart Stores, Inc. (Jul. 30, 2012) (hereinafter “Wal-Mart Brief”) at 20, 29, and

33. As explained above, that issue is reviewed under the clearly erroneous standard because it is an application of facts to the law, not under the substantial evidence standard.

B. FONK Has Challenged All of the Relevant Findings in this Matter

Wal-Mart and the City incorrectly claim that FONK has not challenged specific findings in its appeal. Wal-Mart makes several blatantly incorrect statements in this regard throughout its brief. *See, e.g.*, Wal-Mart Brief at 10-11, 19, 20, 26, and 37. There can be no question that FONK challenged all of the specific Monroe City Council's findings that are quoted throughout its Opening Brief and all other findings relevant to the issues in this appeal. FONK specifically assigned error to the findings in CP 719-738, CP 2700, CP 2579, and CP 2609-2611. *See* Appellant's Brief at 3-4. FONK also quoted the specific findings that it is challenging on pages 19, 21, 23, 25, 26, 29, 34, 35, 38, 39, 41, 42, 45, and 47 of its brief. FONK explicitly assigned error to these quoted findings and conclusions in its Assignments of Error. *See id.* ("Appellant assigns error to the findings and conclusions . . . that are quoted in this brief in Section IV.C").

Furthermore, Wal-Mart repeatedly states that FONK ignores the City's findings and conclusions on different issues. Wal-Mart Brief at 27, 31,

and 34. This is an odd statement because the entire purpose of FONK's appeal is to challenge those very findings and conclusions.

### III. ARGUMENT

#### A. FONK's Construction of the Provisions in the North Kelsey Plan is the Correct Construction

##### 1. The plain language of Section D in Chapter 1 of the Design Guidelines instructs that the word "should" is mandatory

The responses in this matter revealed a fundamental disagreement over how the word "should" must be interpreted in the Design Guidelines and, therefore, the amount of discretion that the City Council has to disregard the Design Guidelines that use the word "should." *See* City Brief at 13-15; Wal-Mart Brief at 23. There can be no question that a Design Guideline that contains the word "should" is mandatory unless the City Council finds that the listed exceptions have been met in each instance. *See* Appellant's Brief at 13-15. The Monroe City Council committed error as a matter of law when it concluded that the word "should" in a Design Guideline means that the Design Guideline is entirely optional and can be disregarded by the City Council if it so chooses. *See* CP 2700.

Interpretation of a statute is a question of law that the court reviews *de novo* under the error of law standard. *McTavish v. City of Bellevue*, 89 Wn.

App. at 564.<sup>2</sup> The court's fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature. *State Department of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 275 P.3d 367 (2012). The court determines the intent of the legislature primarily from the statutory language. *Id.* If a regulation's meaning is plain and unambiguous on its face, the court will give effect to that plain meaning. *Green v. State, Dept. of Social and Health Services*, 163 Wn. App. 494, 507, 260 P.3d 254 (2011). When a statute or ordinance is unambiguous, construction is not necessary as the plain meaning controls. *Id.* at 508.

The Land Use Petition Act (LUPA) requires courts to allow the proper level of deference due the construction of a law by a local jurisdiction with expertise in deciding whether the land use decision is based on an erroneous interpretation of the law. RCW 36.70C.130(1)(b). However, absent an ambiguity in the statute, no deference to the local jurisdiction's expertise in construing the statute is required under this provision. *McTavish v. City of Bellevue*, 89 Wn. App. at 564. The Court will accord deference to an agency's interpretation of its own regulations *only* when the regulation is

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<sup>2</sup> Municipal ordinances are the local equivalent of a statute and are, therefore, evaluated using the same rules of construction. *McTavish v. City of Bellevue*, 89 Wn. App. at 565.

ambiguous. *Id.* See also *Green v. State Dept. of Social and Health Services*, 163 Wn. App. at 508. Ultimately, the court may substitute its interpretation of the law over the City of Monroe's interpretation. *Id.*

FONK's interpretation of the language in Chapter 1, Section D is the correct (and only possible) construction of that provision. See CP 323-324. Because this language is unambiguous, construction is not necessary and there is no deference to the City of Monroe's interpretation of the statute. Section D, which is quoted in full in FONK's Opening Brief, defines specifically how the words "must" and "should" in the Design Guidelines must be interpreted and applied by the City Council. CP 324. While typically the word "should" means that something is optional, that is not so in these Design Guidelines. In the guidelines, the word "should" is defined as being mandatory with limited exceptions. See CP 324-325. The City Council's discretion in approving a proposal in its quasi-judicial capacity, therefore, is limited as defined by this codified language in section D.

The City and Wal-Mart focus on the first sentence in Section D, which states that "the City retains full authority to determine whether or not a proposal meets these guidelines." City Brief at 13-14; Wal-Mart Brief at 22-23. CP 324. But this provision simply speaks to the jurisdiction and

authority of the City to make the decision. It does not provide a blanket authorization to the City Council to disregard the guidelines that contain the word “should” if it so chooses. If it were interpreted that way, that would make the definition of “should” in that same section superfluous. Courts are obliged to interpret a statute so that no portion of it is superfluous, void, or insignificant. *Snow’s Mobile Homes v. Morgan*, 80 Wn.2d 283, 288, 494 P.2d 216 (1972).

2. The illustrative diagrams in the Design Guidelines play an important role in the interpretation of the design requirements

Numerous figures are incorporated into the North Kelsey Development Plan. *See* CP 308-360. With no support for their position, the City and Wal-Mart claim that the figures in the Design Guidelines should be disregarded entirely and play no “binding” role. City Brief at 18; Wal-Mart Brief at 14. The issue of how the figures in the Plan should be interpreted is an issue of law that is reviewed by this Court *de novo*.

FONK refers to and relies on figures in the Plan because the figures illustrate the requirements in the Plan. Different figures are provided for different purposes, but many are incorporated into the Design Guidelines that they accompany. Visuals that show concepts can be more instructive than

words when describing what is required for a design. There is no reason to conclude that these figures have less weight than the text in the guidelines – they are given equal weight in the Plan.

The significance and meaning of Figure 4 at CP 314 in particular should not be understated or misunderstood. Figure 4 is not a “hypothetical plan,” rather it is the very definition of what the North Kelsey Development Plan prescribes for development of the North Kelsey Development Area. (In contrast, Figure 8 at CP 317 *does* provide a hypothetical development plan.) As the Plan itself states, Figure 4 visually depicts the eight Development Concept principles set forth in the text. *See* CP 317 (“Figure 4 diagrams these ideas”). It is an illustration of the concept that the guidelines are meant to implement in order to meet the goals of the North Kelsey Development Plan. There may be more than one way to develop the property, but the property must be developed according to the Development Concept that is set forth in Figure 4 at CP 314.

What is perhaps most telling is the fact that the layout and configuration for the Wal-Mart proposal *could not possibly* be used as a figure to show what the Plan requires developers do on the north site. The

Wal-Mart site plan itself could be a “figure” to show an example of what the Plan does not envision for that property.

B. Wal-Mart’s Proposal Is Inconsistent With Numerous Goals and Guidelines in the North Kelsey Development Plan

1. Wal-Mart’s preliminary site plan and building elevations constitute the sole central evidence that speaks to the issues presented in this appeal

The responses of Wal-Mart and the City confirm that Wal-Mart’s preliminary site plan and building elevations at CP 2787-2789 (also located at CP 63-65) constitute the central evidence that speaks to the issues presented in FONK’s appeal.<sup>3</sup> A careful review of the City and Wal-Mart’s response briefs reveals that the central evidence from the administrative record that they rely on for their arguments are Wal-Mart’s revised preliminary site plan, CP 2787, and Wal-Mart’s elevations at CP 2788-2789. In addition, with

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<sup>3</sup> There may be some confusion caused by the fact that respondents cited to different CP numbers to identify the site plan and elevations than those cited by appellant for the same documents. The administrative record in this matter contains multiple repeats of the same documents and, therefore, the same documents have been assigned different CP numbers in different locations of the record. Appellant’s Appendix B contained a copy of the Preliminary Site Plan and Elevations for the Wal-Mart proposal and those were labeled CP 63-CP 67. Wal-Mart attached to its Response Brief the same Preliminary Site Plan but with a different number assigned: CP 2787. Both the City and Wal-Mart also refer to the Elevations at CP 2788-2789, which are the same Elevations that are in Appellant’s Appendix B at CP 64-65.

respect to the lighting issue and pedestrian oriented spaces, Wal-Mart referred to CP 2731, which is a visual of the entrance to the Wal-Mart store.<sup>4</sup>

Wal-Mart and the City also refer to a memorandum from John Owen of Makers to Brad Feilberg for the proposition that Makers concluded that the proposal was consistent with the Design Guidelines. City Brief at 20; Wal-Mart Brief at 39. The significance of this memo to the issues on appeal has been significantly overstated by respondents. It is a terse, cryptic memo from John Owens of Makers Architecture to Brad Feilberg that contains no analysis and only a few comments relative to Mr. Owens' review of the plans and discussions with City staff. *See* CP 2111-2112.

The majority of citations provided by Wal-Mart to support its arguments were not to evidence in the record, but were instead to the City Council's decision approving the project and to the Community Development Director's findings and conclusions that were adopted by the Council. *See* CP 2698-2702, CP 2609-2611; CP 2752-2771; and CP 2781-2783. *See* Wal-Mart's Brief at 13-43. The City Council's decision and the adopted findings

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<sup>4</sup> Respondents also cite to small bits of testimony from the hearing and a memorandum from the Wal-Mart project manager, Katherine Jerkovich, to Russ Wright at CP 2119-2140, but these items mostly constitute legal argument meant to convince the City of Wal-Mart's position. These essentially describe what is presented in Wal-Mart's preliminary site plan and elevations and arguing why those documents show consistency with the Design Guidelines. *See* CP 2119-2140.

and conclusions are not “evidence.” Obviously, those findings and conclusions must be based on the “evidence” presented below. FONK has explicitly challenged those findings and conclusions in this appeal because the “evidence” in the record does not support those finding and conclusions.

2. The City Council’s catch-all conclusion that every single Design Guideline was either inapplicable or inappropriate to the Wal-Mart proposal and/or that the Wal-Mart proposal met the intent of every single Design Guideline was clearly erroneous

The City Council’s blanket statement in Resolution No. 2011/009 that every single Design Guideline in the North Kelsey Plan was either inapplicable or inappropriate to the Wal-Mart proposal and/or that the Wal-Mart proposal met the intent of each and every one of the Design Guidelines in the Plan was clearly erroneous.

It is important first to understand the context of this statement. Resolution No. 2011/009, in which the Council approved the Wal-Mart proposal, contained a conclusion that the Wal-Mart proposal had met all of the Design Guidelines in the North Kelsey Plan. CP 2700. However, that conclusion was followed by the sweeping, catch-all, statement that even if the applicant’s proposal did not satisfy these guidelines, application of these guidelines 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. *Id.*

As was explained in appellant's Opening Brief, even if some evidence supports a City Council decision, a decision is clearly erroneous when the reviewing Court is left with a definite and firm conviction that a mistake has been committed. *Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d at 274. Here, a mistake has been committed.

A decision is mistakenly made if there is no evidence to support it and there is no evidence in the record to support this blanket conclusion. In fact, the evidence that is in the record shows the opposite conclusion. *See* Appellant's Opening Brief at 17-47; *see also infra* at 20-34.

The City Council's adopted findings do not support this sweeping conclusion either. A thorough reading of every single finding and conclusion relevant to the issues in this appeal reveals that outside of one single guideline in the configuration section, nowhere was there a single finding or conclusion or any analysis whatsoever of any evidence in the record to support the sweeping conclusion that the exceptions to the Design Guidelines requirements had been met.

This conclusion -- devoid of any evidence, analysis, or findings to support it – it is an empty statement made in the hopes that a court would consider this rubber stamp as enough on judicial review. It is plainly evident, however, from the evidence that the Design Guidelines raised in this appeal are applicable to the Wal-Mart proposal, are appropriate to the Wal-Mart proposal, and the Wal-Mart proposal does not, by any means, meet the intent of the Design Guidelines, the Development Concept, or the Goals and Objectives of the Plan. *See infra* at 20-34. The City’s conclusion on this point may have been “clearly expressed” as the City contends, but it was also clearly erroneous and reversal of that decision is appropriate for that reason.

3. Goals and objectives of the Development Plan

The City of Monroe and Wal-Mart’s arguments with respect to the Goals of the North Kelsey Plan reveal a fundamental misunderstanding of the relationship of the Goals and Objectives of the Plan to the Development Concept and Design Guidelines in the Plan. This confusion is especially evident from the City’s claim that FONK is “forced” to “selectively borrow” references from the Design Guidelines to demonstrate inconsistency with the goals. *See City Brief* at 21. The confusion is also evident from Wal-Mart’s claim that the goals do “not incorporate or reference any of” the Design

Guidelines. *See* Wal-Mart Brief at 17. Wal-Mart also reveals a fundamental misunderstanding of the Plan when it states “the Development Concept is a wholly separate Plan chapter which shows one hypothetical development scenario.” *Id.*

The Design Guidelines are a “critical regulatory tool in implementing the community’s design-related goals and objectives for the North Kelsey [Plan].” CP 323.<sup>5</sup> The Design Guidelines that FONK “borrows” to demonstrate inconsistency with each goal are the very regulatory tools that implement those Goals. CP 323. Because the Wal-Mart proposal is inconsistent with the Design Guidelines that implement the Goals, the proposal undermines and is inconsistent with the Goals.

As was explained earlier in this brief, the Design Guidelines are also meant to implement the Development Concept that is described and illustrated in Chapter 3 at CP 314. It is bizarre to say (as Wal-Mart does) that because the Development Concept is in a separate chapter from the Design Guidelines, they are unrelated. To the contrary, Figure 4 at CP 314 is the very definition of what the North Kelsey Development Plan prescribes for

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<sup>5</sup> There may be confusion caused by the fact that respondent cited to different CP numbers to identify the North Kelsey Development Plan than those cited by appellant for the same document. Appellant’s Appendix A contained a full copy of the North

development of the North Kelsey Development Area. It visually depicts the eight development concept principles set forth in the text and the Design Guidelines are clearly meant to implement that concept. The Goals and Objectives, the Development Concept, and the Design Guidelines are all inextricably connected and together they define the vision for development of the North Kelsey Development Area.

a. Goal 2

When looking at the North Kelsey Development Plan as a whole, there can be no question that the Council committed a mistake in concluding that Goal 2 had been met by the Wal-Mart proposal. The intent and objective of Goal 2 is defined further by the implementing regulatory Design Guidelines and the principles of the Development Concept. *See* Appellant's Brief at 17-20, *citing* CP 314-316; CP 326-335; CP 342-344. The store entrance, the paths throughout the Wal-Mart parking lot and stormwater detention facility, and the line of trees separating the north site from the south site simply do not implement the Goal expressed in the Plan. *See* CP 63-65; Appellant's Opening Brief at 17-20.

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Kelsey Development Plan and it was labeled CP 305-375. Respondents refer to the same Plan but with different CP numbers: CP 1964-2035.

The attempt to declare the entrance to the store as a “plaza area” is dubious at best. The entrance to the Wal-Mart is completely isolated from and far away from the key pedestrian connection at North Kelsey. AR 1887. It is not oriented toward the open space on the south lot and there is no semblance of a spatially unifying concept connecting the store entrance to the south lot in a manner that creates a campus-like character. *Id.* The somewhat bizarre isolated “pedestrian corner feature” on the corner of a road intersection is completely separated from the central open space. CP 63. It is not spatially unified in a manner to create a campus-like character between the north and south lots. *Id.*

b. Goal 4

Like with Goal 2, when looking at the North Kelsey Development Plan as a whole, there can be no question that the Council committed a mistake in concluding that Goal 4 had been met by the Wal-Mart proposal. The intent and objective of Goal 4 is defined further by the implementing regulatory Design Guidelines and the principles of the Development Concept. *See Appellant’s Brief at 20-21. See also CP 312; CP 314-316; CP 318; CP 327; CP 330; CP 350-356.* The façade modulation, variation of materials, and variation in color shown on the elevations simply do not create a strong

identity for the development or an assemblage of buildings with an intimately scaled and informal architectural character. *See* CP 64-65. The landscaping along the site's perimeter, throughout the parking area, around the stormwater detention area, and the stamped and colored concrete do not create an identity unique within the region which reflects Monroe's small town character. *Id.* The Wal-Mart will dominate the area's identity with a formulaic, typical superstore Wal-Mart aesthetic. *See* CP 63-65.

This is not a "subjective" or "lay opinion" – it is an objective description of the facts of Wal-Mart's proposal as shown on its plan (CP 63-67) as compared with the requirements of the North Kelsey Development Plan.

c. Goal 5

Like Goals 2 and 4, when looking at the North Kelsey Development Plan as a whole, there can be no question that the Council committed a mistake in concluding that Goal 5 had been met by the Wal-Mart proposal. The intent and objective of Goal 5 is defined further by the implementing regulatory Design Guidelines and the principles of the Development Concept. *See* Appellant's Brief at 21-23. *See also* CP 313; CP 316; CP 326-338; CP 341-344; CP 350-352.

The pedestrian connections that are proposed throughout the Wal-Mart site as well as connections to the southern site; the stamped and colored concrete that defines entries and connections to the site; and the perimeter landscaping that provides screening for parking areas do not constitute the pedestrian-friendly development that is called for in the Plan. CP 63-65. As is evident from looking at the Development Concept in Figure 4, the principles listed in Chapter 3, and the Design Guidelines, the intent is for a focal open space that functions as a community gathering space without any traffic in that central space. Providing sidewalks and paths through a parking lot and a stormwater detention facility is not meeting the intent or the requirement of the Plan for this community focused area.

#### 4. Site configuration

The City Council clearly erred when it concluded that the Wal-Mart proposal was consistent with the Design Guideline that requires that uses north of North Kelsey Street “should be configured around a central open space or plaza to create a campus like setting.” CP 327. *See* Appellant’s Opening Brief at 23-26.

FONK has never suggested that the “Village Green” or “Focal Plaza” must be located on the Wal-Mart site, rather the issue presented concerns the

connection between the North Kelsey south area and the North Kelsey north area. The connection between the two is a key pedestrian connection and open space on the Wal-Mart site must be aligned in a spatially unifying manner with the Village Green and Focal Plaza on the south site. CP 314, CP 315, CP 327, CP 335. FONK's argument in this regard is based not only on this single principle, but also on the Development Concept in "Figure 4" at CP 314, the principles at CP 315, and numerous other implementing guidelines, such as those in Chapter 3 concerning site planning (CP 328, CP 335), those concerning Highly Visible Locations at those key pedestrian crossings (CP 344, 335).

Wal-Mart and the City both respond to this argument with distractions from the issue. FONK is not challenging whether the retail *use* is allowed, FONK is not challenging whether the public road creates a loop system around the south parcel, and FONK does not dispute that the proposal includes sidewalks for pedestrians. FONK is stating that a mistake was committed when the Council concluded that the Wal-Mart proposal was configured around a central open space or plaza to create a campus-like setting with the site south of North Kelsey Street.

As FONK stated in its Opening Brief, the City Council also erred when it concluded that if this requirement has not been met, then it was inapplicable to the Wal-Mart proposal. The City and Wal-Mart argue that this determination was objectively reasonable given that a large big box retail facility would necessarily prevent the simultaneous preservation of a large centrally located open space on this site. City Brief at 31-32; Wal-Mart Brief at 28. That is not objectively reasonable and is a false statement. A big box retail facility does not by any means “necessarily” prevent the preservation of a large centrally located open space on the site. The building’s footprint covers only roughly one-third of the entire property. CP 63. The building could have been and should have been located and configured with its front entrance facing south and a central open space connecting to the south lot as is required by the Design Guidelines. The requirement is not “inapplicable” to the Wal-Mart proposal – it clearly applies to the north site. This is not a “subjective” disagreement as Wal-Mart characterizes it, rather it is an objective and obvious observation from the evidence presented and the requirements of the Plan.

Another of the listed principles is that parking for the facility not intrude into the center of the site or detract from the activities or qualities of

the development. CP 327. The City's claim that this requirement only applies to parking for a facility in the southern part of the North Kelsey area has no basis. City Brief at 32, *citing* CP 1993. Figure 5, the Vehicle Access and Parking Concept, clearly shows that the parking is planned to be outside of the contemplated open space, campus-like area on the north site as well as on the south site. CP 327. Contrary to the City's claim, Figure 5 does carry weight regarding the location of a parking area on the north site.

The intent is to provide convenient parking areas that encourage people to leave their cars and walk through the planning area. CP 341. The intent is to provide parking areas that do not diminish pedestrian visual qualities of the site. *Id.* When you look at the Plan as a whole, the intent, the figures, the Design Guidelines, the Goals and Objectives, and the Development Concept, there is, without question, a theme of development north of North Kelsey Street being organized around a central open space or according to a spatially unifying concept that connects it to the south parcel with the parking lot located *outside of* this area so as not to intrude on the pedestrian-friendly concept and configuration. *See* CP 314; CP 316; CP 326-327; CP 336; CP 341; CP 344.

Regarding the pedestrian crosswalk, any objective observer of the evidence can see from looking at Wal-Mart's preliminary site plan that the crosswalk is secondary to the traffic heavy North Kelsey Street. *See* CP 67. North Kelsey Street is designed with a focus on traffic and the pedestrians must contend with that traffic as it navigates across that road on the crosswalk. *See* CP 67.

A final principle at issue here requires that the site plan locate and treat large buildings to reduce their perceived scale to fit with neighboring structures and present an inviting, human scale, pedestrian oriented character to the site. CP 327.

Respondents yet again repeat a list of the design elements proposed by Wal-Mart in response to this requirement. Again, however, the question here is the massing and orientation of the building, not the window dressing with vestibules and multiple paned windows. Wal-Mart has not been combined in any way with smaller buildings, nor has it been oriented in such a way that it would present an inviting, human-scaled, pedestrian oriented character to the public. CP 63. It is surrounded by a parking lot and oriented and designed to invite traffic over pedestrians. *Id.*

These realities are not the “subjective” opinions of FONK as respondents contend. These are the facts of Wal-Mart’s proposal shown on its plan (CP 63-67) as compared with the requirements of the North Kelsey Development Plan. It is an objective description that is evident by reviewing this proposal and comparing it with the Design Guidelines, the Development Concept, and the Goals and Objective of that Plan.

5. Site planning

a. Public open space

The Monroe City Council’s conclusions that the Wal-Mart proposal was consistent with specific guidelines concerning pedestrian-oriented spaces was clearly erroneous. There is no evidence in the record to support a conclusion that these guidelines have been met, nor were there any findings by the City Council related to these guidelines. *See* Appellant’s Brief at 31-33.

In response, the City argues that the City’s review and approval of these lighting requirements was specifically reserved for a separate, future permitting process. City Brief at 34, *citing* CP 2782. It is unclear what this so-called separate, future permitting process would be. The citation for this

claim, CP 2782, is a City finding that addresses supplemental public atrium provisions and parking provisions that are not relevant to this issue.

The City also contends that the record contains evidence that the proposal will ultimately incorporate appropriate pedestrian scale lighting fixtures in accordance with the guidelines. City Brief at 34, *citing* CP 2768. CP 2768 is a citation to City Council findings that concern the requirements in Chapter 7, Signage and Lighting. FONK is not challenging any of the guidelines in Chapter 7. The evidence and findings do not speak to the specific requirements outlined in Chapter 3 at CP 334 and as presented in appellant's Opening Brief. *See* Appellant's Brief at 31-33.

Contrary to Wal-Mart's implication otherwise, the Site Plan Elevation drawings do not show lighting details, much less specifics concerning the height of the lighting fixtures in the pedestrian oriented spaces or whether the overall lighting in the plaza is at least two foot candles without dark spots. Wal-Mart Brief at 31, *citing* CP 2768; CP 2787-89 (Site Plan Elevation Drawings); CP 2731 (Proposed Location of Illuminated Ballards in the Plaza Entry Area). CP 2731, which is a very basic depiction of the entrance to the Wal-Mart, shows a total of eight illuminated bollards. There are no details as to height of these lights or the impact in this area. Moreover, this hardly

addresses all of the other pedestrian-oriented areas – it is simply eight lights located at the primary entrance of the store. *See* CP 2731.

It is Wal-Mart who has confused the burden of proof in this matter. *See* Wal-Mart Brief at 31. FONK has the burden of proving that the City Council’s decision was clearly erroneous. When there is no evidence in the record to support the conclusion that the Wal-Mart proposal met this guideline, then FONK has met its burden of showing that the City Council made a clear mistake in concluding that the Guideline had been met.

Wal-Mart states “these claims should be rejected outright because FONK cannot meet its burden of clear error by assuming that the City will not apply its own Code requirements at some point in the future. Wal-Mart Brief at 32. This bizarre argument forgets that this is the time when the City Council must review the project for consistency with the Design Guidelines. This is the time when FONK is legally obligated under LUPA to raise a challenge to the City Council’s conclusions and approvals under the Design Guidelines. It would make a mockery of the whole process if the City Council were allowed to approve the proposal while reserving review for consistency with the Design Guidelines for sometime in the future.

With respect to the seating to plaza/open space ratio, the City argues that the project as originally proposed included “ample” seating for pedestrians, and the City Council’s approval motions specifically require the installation of an additional eight benches in the plaza area alone. City Brief at 34, *citing* CP 2764-65, 2699. “Ample” seating for pedestrians and the installation of eight benches in the plaza area does not meet the requirement in the Design Guidelines. The Guidelines are very specific: they require at least one linear foot of seating (at least 16 inches deep) or individual seat per 60 square feet of plaza area or open space to be included. CP 335. A conclusion that this guideline has been met is clearly erroneous because there is no evidence in the record to support that this guideline has been met. In addition, there is no finding of fact concluding that the proposal includes one linear foot of seating of an area (at least 16 inches deep) or one individual seat per 60 square feet of plaza area or open space – and there is not substantial evidence in the record to support such a factual finding even if it had been made.

The City Council also committed a clear mistake when it concluded that the Wal-Mart proposal is consistent with the North Building Site Guidelines. Those guidelines require, among other things, that the north site

include a focal open space that fronts on North Kelsey Street and is aligned with the Village Green. *Id.* This open space must be developed consistent with the pedestrian-oriented spaces guidelines. *Id.*

Wal-Mart and the City claim that the Wal-Mart project complies with the North Building Site Guidelines because 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. City Brief at 35; Wal-Mart Brief at 33. Their arguments ignore the requirement that development of the Wal-Mart site include a focal open space that fronts on North Kelsey Street and is aligned with the Village Green. CP 335. The landscaped stormwater retention area is just that -- a stormwater retention area -- and it is by no means an open space aligned with the Village Green for use by pedestrians. Not only that, but this enormous stormwater retention area is set aside and separated entirely from the central key pedestrian Location E. *See* CP 344. Trees planted in the parking lot do not meet the intent nor the written requirement of the guidelines. The "heavy landscaping" along the southern property line is a visual and physical barrier from the south to the north site.

CP 63. The “plaza area” adjacent to the retail store is not “focal open space,” within the meaning of the guidelines, but is a store entrance. CP 63.

b. Parking area

The City Council’s decision that the Wal-Mart proposal was consistent with the parking area guidelines, which require that the design and layout of parking areas minimize negative impacts on the pedestrian environment and visual quality of the development, was clearly erroneous. CP 341-342.

The City claims that the requirement that parking areas should minimize negative impacts on the pedestrian environment and the visual quality of the development is somehow not required because it is a “side note” to an illustrative figure. City Brief at 36, *citing* CP 2007. There is no reasonable basis to support an argument that the language in Figure 16 can be disregarded simply because it is incorporated into a figure. That language carries equal weight to any other requirement in the Plan.

Furthermore, that language is directly in sync with the central principles of the Development Concept for North Kelsey. The entire focus of this plan is to focus development (including development on the north site) on a town square or green open space; the development is to be organized

around a central open space that enhances the pedestrian environment and minimizes negative impacts on the pedestrian environment and visual quality of the development. CP 314-316; CP 326-327; CP 328-338. FONK's statements on this issue are by no means a "subjective aesthetic judgment," or a "lay opinion," rather they are objective descriptions of the evidence and the Plan.

c. Street corners/highly visible locations

The Street Corner/Highly Visible Locations guidelines set forth three specific design treatment methods for the Highly Visible Locations. They speak specifically to the key pedestrian crossing of North Kelsey Street, which is "Location E" on Figure 19 at CP 344. The guidelines state that "method A is preferred" for all four corners. CP 344. Wal-Mart is not treating Location E as a Highly Visible Location and has not adopted any of the design treatments for this key pedestrian crossing.

Respondents incorrectly argue that this guideline is entirely optional. Wal-Mart Brief at 35; City Brief at 38. The guidelines state that "all proposals for sites should include at least one of the design treatments described below." CP 342. As was pointed out above, the word "should" means that a Design Guideline is mandatory unless the specific exceptions

listed in Chapter 1, Section D apply. There is another exception specific to this requirement that allows applicants to propose other design treatments for these sites if they can demonstrate successfully that the proposed treatment meets the intent of the guidelines. CP 342. The guideline is not entirely optional – it is mandatory unless these exceptions are met. In this case, the exceptions were not met.

The interconnected landscaped open spaces along North Kelsey Street and different types of open space including landscaping along the site's perimeter, throughout the parking area, and around the stormwater detention area are obviously not treatments that are proposed by this guideline for Location E. *See* CP 63; CP 342. Therefore, the question is whether the proposed treatments meet the intent of the Guidelines. *See* CP 342. As was established in appellant's Opening Brief and above in this reply, the intent for treatment of Location E must be considered with the overall intent of the entire Plan. The central open space called for in the Plan is "Location E." CP 314-316; CP 326-327; CP 328-338. An objective look at the site plan for the Wal-Mart proposal demonstrates that Location E has instead been landscaped with a line of trees that create a wall between a parking lot and North Kelsey Street. CP 63.

6. Architectural/building design

a. Architectural concept

Wal-Mart has not met the guidelines with respect to architectural concept in the Plan. *See* Appellant’s Opening Brief at 43-46. Wal-Mart argues that FONK’s complaints essentially boil down to its opinion that a large retail use can never meet the Plan’s guidelines. Wal-Mart Brief at 37; City Brief at 40. That is not true. The City and Wal-Mart both overlook the critical language concerning big box retail in the North Kelsey Development Plan. The Plan states that an objective is to “allow for a variety of commercial uses, including ‘big box’ retail stores, ***as long as they are sited and designed to meet other Plan objectives . . .***” CP 312 (emphasis supplied). CP 340. The Plan allows large scale retail uses, “***as long as they are designed consistent with the Plan and Guidelines.***” CP 340 (emphasis supplied).

A large retail use can certainly meet the Design Guidelines – they can add smaller buildings in conjunction with the large one to create a more intimate feel, they can orient the front door of the building towards the south with an open space area for pedestrians in front of the building, and they can move their parking lots outside of the open space at Location E. That is what

the Plan required. The City Council was obligated, in its quasi-judicial capacity and duty to enforce the laws of the City, to deny the proposal unless this big box retail store was developed in a manner consistent with the Design Guidelines, the Goals and Objectives, and the Development Concept for the North Kelsey Area.

b. Human pedestrian scale

The Wal-Mart building is not vertically articulated into sections averaging not more than 50 feet along the façade at regular intervals. *See* Appellant's Opening Brief at 46-47.

Wal-Mart and the City respond by claiming that the provision allows articulation to be accomplished in several ways and as approved by the Monroe City Council, the Wal-Mart building incorporates these design features in satisfaction of the guideline. City Brief at 40-41; Wal-Mart Brief at 40. No matter how it is done, the articulation must be in sections averaging not more than 50 feet along the façade at regular intervals. There is not substantial evidence showing that this has been accomplished and the City erred in concluding it had been. *See* CP 64-65.

C. The Wal-Mart Proposal Does Not Qualify as a Planned Action

The Wal-Mart proposal did not undergo any environmental review because the City of Monroe deemed it a “planned action,” which meant that the City of Monroe decided that the environmental impacts of the Wal-Mart proposal had been adequately addressed when the City conducted environmental review of the North Kelsey Plan. For the reasons explained above and in Appellant’s Opening Brief at 47-50, the Wal-Mart proposal does not meet the description as set forth in the original North Kelsey Planned Action SEIS and is inconsistent with the North Kelsey Development Plan and Design Guidelines. The proposal is, therefore, not properly characterized as a planned action for the North Kelsey planned action.

IV. CONCLUSION

The Land Use Petition Act states that the Court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. RCW 36.70C.140. If the decision is remanded for modification or further proceedings, the Court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction. *Id.*

Petitioner Friends of North Kelsey respectfully requests that the Court reverse the decision of the Monroe City Council on the grounds that the proposal is inconsistent with the North Kelsey Development Plan Goals and Design Guidelines.

As an alternative, FONK requests that the Court remand the decision to the Monroe City Council with an order declaring that the City of Monroe erroneously interpreted the word “should,” that the Wal-Mart proposal is inconsistent with the specific Goals and Design Guidelines set forth and analyzed above herein, and a remand to the City Council to collect evidence on and determine whether the exceptions listed in Chapter 1, Section D have been met in each circumstance for each guideline.

Dated this 30<sup>th</sup> day of August, 2012.

Respectfully submitted,

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