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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38241-5-II

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

WAL-MART STORES, INC., and CLC ASSOCIATES,
Respondents

v.

CLARK COUNTY, Appellant,

and

RP NORTHWEST PROPERTIES and FAIRGROUNDS
NEIGHBORHOOD ASSOCIATION, Additional Parties.

OPENING BRIEF OF APPELLANT CLARK COUNTY

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I.
INTRODUCTION

This case presents the court with the issue of reviewing the land use decision of the Clark County Board of Commissioners(hereinafter “BOCC”) based a factual record created by the land use hearings examiner. The application was titled as the “Salmon Creek Commercial Center¹.” The site location was an irregularly shaped parcel south of NE 134th St, east of I-205, and adjoining to the east of NE Rockwell Rd.

Wal-Mart’s location for its newest store raised numerous difficult issues. The fact that Wal-Mart required relief from the road standards is ample evidence that this project could not become constructed in its current location and yet still comply with applicable transportation standards. The extent of those transportation issues will be discussed below.

Moreover, due to the extent of impervious surface and the soil present on site, Wal-Mart opted for stormwater detention and delayed release as opposed to the preferred method of treatment and infiltration. The ability to approve the preliminary stormwater plan hinged upon

¹ Only when the LUPA appeal was filed did the applicants identify the project as a Wal-Mart site.

Wal-Mart's ability to use an admittedly private stormwater line located offsite based on a stormwater easement granted to Clark County.

Notwithstanding the above problems, the Examiner did not deny approval but instead chose to utilize innovative conditions of approval. For example, rather than denying an access point that could not meet site distance standards on an admittedly substandard road, the Examiner authorized the access, but required alternate designs with a potential for driveway relocation when traffic volumes exceed a certain level. Similarly, notwithstanding the Examiner's conclusion that the offsite stormwater line constructed by Waters Edge condominium development was private, the Examiner concluded that Wal-Mart had a right to use the stormwater line. Curiously, however, the Examiner included a condition that prior to final site plan approval, Wal-Mart demonstrate that it has such a legal right. .

Wal-Mart received preliminary site plan approval on January 30, 2007. A timely notice of appeal was filed by the Fairgrounds Neighborhood Association and Bridget Schwarz on February 13, 2007. This appeal alleged that the Examiner erred in finding procedural and substantive SEPA compliance, failure to comply with the Clark County stormwater code, and Wal-Mart's compliance with Chpt. 40.350.

The Board of County Commissioners reviewed this development application on two separate grounds. On April 11, 2007, the Board reviewed the matter and remanded this application to the Examiner to clarify the burden and standard of proof, together with other specific issues. Following remand, issuance of a modified decision², the matter was again appealed to the Board of County Commissioners. In the latter hearing, the Court addressed numerous substantive issues and found that there was no evidence offered by Wal-Mart that it had been granted an easement to use the off-site stormwater line constructed by Waters Edge condominium development. The Board concluded that the preliminary plan to utilize their neighbor's stormwater pipe could not be approved.

Transportation issues also plagued the project. Based on the factual record, the Board concluded that the Examiner erred in applying the code. Road modifications under the Clark County Code are not mandatory but discretionary. The Board concluded that the location of the driveway access onto NE Rockwell Road with limited site distance did not justify a road modification. Based upon this analysis and the Board's conclusions contained in its resolution, the Board of County

² See Final Order on Remand for Salmon Creek Center attached as *Appendix "A"*.

Commissioners granted the appeal and denied preliminary site plan approval in this matter.³

II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that Wal-Mart possessed the right to use a private stormwater line contained within a public easement.

Did the trial court err in substituting its opinion for that of the County Commissioners where no document or evidence gave Wal-Mart a right to use the private conveyance system?

2. The trial court erred in reversing the denial of a road modification by the Clark County Board of Commissioners.
 - A. Was the issue of a road modification properly before the Board of County Commissioners as the final decision maker in Wal-Mart's application?
 - B. Is a landowner required to demonstrate compliance with all the requirements as a prerequisite to issuing a road modification?

³ See Resolution 2007-10-14 attached as *Appendix "B"*.

III.
STATEMENT OF THE CASE

Wal-Mart seeks approval for the development of a Wal-Mart Store on a 12.2 acre parcel in the Salmon Creek area of unincorporated Clark County. Pursuant to RCW 36.70B.120(2), the Clark County Land Use Hearings Examiner conducted the open record hearing and established the factual record under review by this Court.⁴ While general issues ranging from stormwater to SEPA compliance were raised before the land use hearings examiner in the open record hearing, only two primary areas remain for this appeal: stormwater and traffic. Specifically, opponents challenged Wal-Mart's attempt to use a private stormwater line as part of its stormwater facility⁵. In addition, opponents argued that Wal-Mart had failed to demonstrate it was entitled to relief from the Road Standards (by way of a road modification), and that the applicant should be required to comply with the same Road Standards as other developers⁶.

During the land use hearing, residents of Waters Edge Condominium Development individually, and through their attorney, John

⁴ The administrative record (AR) is the record of documents filed and considered by the land use hearings examiner in making its decision. The Final Order of the hearings examiner can be found at AR 2431 - 2487.

⁵ AR 2434.

⁶ *Id.*

Karpinski, testified in opposition to the neighboring property being used as a Wal-Mart site. The Waters Edge Condominium Homeowners Association, through its attorney-of-record, has claimed ownership of the stormwater line. The examiner accepted the opponent's testimony, finding that:

The stormwater conveyance systems downstream of the site proposed to receive stormwater from this development, is a privately owned facility constructed by Waters Edge Condominium Development. The downstream conveyance system consists of a pipe system within a 20-foot easement in a creek within a 35-foot public easement.⁷

The examiner considered numerous exhibits in making this determination, including Exhibits 189, 142, 143, 144, 160 and 161.⁸ Finally, even Wal-Mart accepts the examiner's finding that the downstream conveyance system is privately owned.⁹ No evidence was offered by Wal-Mart regarding an alternative to the use of the private stormwater line.

Transportation issues exist for all large scale developments, but were aggravated in this case due to the unique location of this property in relation to nearby interstate highways and arterials, the number of trips generated, and the irregular shape of Wal-Mart's property. As a result,

⁷ AR 2442.

⁸ AR 2443. (For ease of review, the above-referenced exhibits can be found in the Administrative Record as AR 1679 - 1730 and AR 1826 - 1840.

⁹ See Clerk's Papers (CP) No. 5 at p. 7, lines 1-8.

Wal-Mart found it necessary to apply for relief from the Clark County Road Standards, including a reduction in the corner site distance standards and for increased driveway width for the access onto NE Rockwell Drive from the maximum 40 feet to 73 feet.¹⁰ According to Wal-Mart, the site has obstructed site distance off of NE Rockwell Drive between NE 27th Avenue and NE 129th Street.¹¹ The support for Wal-Mart's proposed modification can be found at AR 408 – 410. The facts as found by the hearings examiner are found at AR 2456-2460.

IV. ARGUMENT

A. Standard of Review.

1. **LUPA.** This court acts in appellate capacity and may only grant relief under LUPA (*RCW 36.70C.130*) if the party seeking relief has carried the burden of establishing error under one of the applicable standards:

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

¹⁰ Ex. 92, AR 879 - 880.

¹¹ AR 408.

- (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).

The decision under review is the decision of the Clark County Board of Commissioners as the body with the highest level of authority to make the determination. *RCW 36.70C.020(1) (definition of a land use decision)*. Review is based on the factual record made by the Hearings Examiner. *North Pacific Union Conference v. Clark County*, 118 Wn.App.22, 28 74 P.3d 140 (2003).

To challenge the county's legal conclusions under LUPA, Wal-Mart must demonstrate that the county's decision is "an erroneous interpretation of the law, after allowing for such deference as is due the construction of the law by a local jurisdiction with expertise." *RCW 36.70C.130(1)(b)*. Issues raised under subsection (b) are questions of law, reviewed *de novo*. *Schofield v. Spokane County*, 96 Wn.App. 581, 586, 980 P.2d 277 (1999). If the statute is unambiguous, construction is not

necessary and the plain meaning controls. *McTavish v. City of Bellevue*, 89 Wn.App. 561, 565, 949 P.2d 837 (1998). Where a statute is ambiguous, the agency's interpretation is accorded the greatest deference in determining legislative intent. *Waste Management of Seattle v. Utilities and Transportation Commission*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994).

Issues regarding application of law to facts under RCW 36.70C.130 (*hereinafter* "LUPA") law are governed by RCW 36.70C.130(1)(d). To be entitled to relief, Wal-Mart must demonstrate that "the land use decision is a clearly erroneous application of the law to the facts." *North Pacific Union Conference v. Clark County*, 118 Wn.App.22, 28 74 P.3d 140 (2003), *City of University Place v. McGuire*, 144 W.2d 640, 652, 30 P.3d 453 (2001). Moreover, the court may only grant relief under RCW 36.70C.130(1)(d) when the court is left with a firm and definite conviction that a mistake has been committed. *Wenatchee Sportsman Assoc. v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Deference is granted to the agency with the highest authority to make the decision; in this case, the Board of County Commissioners. *RCW 36.70C.020(1)*.

To challenge factual findings, Wal-Mart must demonstrate that the finding in question “is not supported by evidence that is substantial when viewed in the light of the whole record before the court.” *RCW 36.70C.130(1)(c)*. “Substantial evidence” is “a sufficient quantity of evidence to persuade a fair minded person of the truth or correctness of the order.” *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). Under this standard, an appellate court is not to substitute its judgment for that of the fact finder. Instead, review under the standard “necessarily entails acceptance of the factfinder’s views regarding the credibility of witnesses and the weight to be given to reasonable but competing inferences.” *Hilltop Terrace Owner’s Assoc. v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). When reviewing issues of fact, deference is due the Hearings Examiner as the factfinder.

2. Site Plan Approval. At the time this application received protection from changes in the code (“vested”), site plan approval was governed by CCC 40.520.040. The responsible official was required to grant approval of applications that demonstrated compliance with the code or applications that could, **with conditions**, comply. *CCC 40520.040(E)(1)(a)*. Therefore, the Hearings Examiner was both

authorized and required to approve a site plan application if it could be brought into compliance by modification or with additional conditions.

3. Stormwater Review. Property owners seeking to develop their property were required to demonstrate that stormwater from their development would not adversely impact their neighbors or the public generally. Applicants for preliminary approval were required to provide a preliminary stormwater plan under CCC 40.380.060(C)(1). Preliminary plans are required to show the approximate location and size of the proposed stormwater facilities. The plan, while only a preliminary plan, must demonstrate that the proposal can meet the requirements of the storm water ordinance, i.e. that the plan is feasible¹².

4. Road Modification.

(1) Modifications to the standards contained within Chpt. 40.350 may be granted in accordance with the procedures set out herein when any one of the following conditions are met:

a. Topography, right of way, existing construction or physical conditions or other geographic conditions impose an unusual hardship on the applicant, and an equivalent alternative which can accomplish the same design purposes available.

b. A minor change to a specification or standard is required to address a specific design or

¹² CCC 40.380.060C(2)(i).

construction problem, which, if not enacted, will result in an unusual hardship.

c. An alternative design is proposed which will provide a plan equal to or superior to these standards.

d. Application of the standards of 40.350 to the development would be grossly disproportional to the impacts created.

(2) In reviewing a modification request, consideration shall be given to **public safety, durability, cost of maintenance, function, appearance and other appropriate factors** such as to advance the goals of the comprehensive plan as a whole. **Any modification shall be the minimum necessary to alleviate the hardship or disproportional impact.** Self-imposed hardship shall not be used as a reason to grant a modification request. **(Emphasis added)**¹³

B. Trial court erred in concluding that Wal-Mart possessed the right to use a private stormwater line contained within a public easement. Preliminary Stormwater Plan as proposed was properly rejected.

The trial court reversed the decision of the County Commissioners, in part, because it concluded that:

The BOCC erred in basing denial on Wal-Mart's failure to establish the right to use an existing stormwater within a downstream public easement. The Court finds as a matter of law that Wal-Mart has the right to use this easement, including the right to send stormwater through an existing pipe within the easement.¹⁴

¹³ See CCC 40.550.010 A

¹⁴ CP No. 32 page 2 ln. 4-7.

This determination is inconsistent with the undisputed finding that the stormwater line is private. Moreover, this court reviews the decision of the BOCC, not the trial court. *North Pacific Union Conference v. Clark County*, 118 Wn.App.22, 28 74 P.3d 140 (2003).

Preliminary stormwater plans are required by CCC 40.380.060 C.

The purpose of this plan is to determine whether a proposal can meet the requirements set forth in Chapter 40.380. The preliminary plan must provide both quantity and quality control. The quantity of water, if it is not infiltrated, must be transferred off-site at the same rate of flow as pre-development. Quality control requires sufficient filtration to comply with substantive standards contained in CCC 40.380.040 B.

At the trial court, Wal-Mart's first challenge was:

Whether the BOCC erred as a matter of law in: (i) determining that the applicant had not sufficiently established legal access to the Waters Edge condominiums stormwater conveyance system via a publicly dedicated utility easement; (ii) requiring the applicant – as part of its preliminary stormwater plan – to conclusively establish the right to use a downstream conveyance; and (iii) basing denial on finding – under the substantial evidence standard – that legal access was not supported by substantial evidence.¹⁵

¹⁵ *Brief of Petitioners*, p. 11, lines 16-19.

In addressing this issue, this Court reviews the decision of the Clark County Board of Commissioners. The legislature defined a land use decision as:

A final determination by a local jurisdictions body or officer with the highest level of authority to make the determination, including those with authority to hear appeals. ...¹⁶

Under LUPA and Clark County Code 40.510.030(I)(3), the Board is charged with consideration of appeals from the Land Use Hearings Examiner under either a Type 2 or Type 3 decision process. Therefore, the Board's application of its code to the facts as found by the Examiner is subject to deference under the clearly erroneous test provided in RCW 36.70C.130 and its interpretation of the law is similarly entitled to deference under LUPA.

As stated above, the key requirement of a preliminary stormwater plan is that it "can work". More specifically, CCC 40.380.060(C)(2)(i) requires a demonstration that the stormwater plan is feasible. Issues of where the system is finally located, how many water filters are required or the final design drawings for the system need not be finalized for a project to obtain preliminary site plan approval. The plan must, however, be able

¹⁶ 36.70C.020 (1).

to work. In this case, if Wal-Mart's preliminary stormwater plan hinges on its use of property owned by a third party, permission to use that line is a necessary prerequisite to show the plan "can work". Use of the offsite system is discretionary with the owner and there can be no assurance that permission will be obtained.

The Commissioners concluded that a private storm water line albeit in a public easement required the permission of the owner of the pipe, here the Waters Edge Condominium Association. No one challenged the Examiner's factual determination in this regard and it is a verity on appeal. *First Pioneer Trading Co. v. Pierce County*, __ Wn.App __, 191 P.3d 928, 943 (2008). Because there can be no infiltration onsite, an offsite conveyance system is critical.

In *Unlimited v. Kitsap County*, 50 Wn.App. 723, 727, 750 P.2d 651 (1988). Kitsap County attempted to require the developer to provide access to a land-locked parcel. This court rejected the attempt as an improper exercise of police power. Requiring Waters Edge Condominium Association to give up a valuable property right is equally unlawful.

Wal-Mart has gone to great pains to point out that the BOCC lacks fact finding authority. This is true. In its appellate role, the Board is required to review the findings of the Examiner and determine whether

those findings are supported by substantial evidence. In this case, the BOCC concluded that there was no evidence, much less substantial evidence, to support a conclusion that Wal-Mart had a right to use a private stormwater line. The evidence presented to the Hearings Examiner fundamentally relied upon stormwater easement conveyed by Waters Edge developers to Clark County.¹⁷ Wal-Mart may possess a right to use the easement; this fact does not give Wal-Mart the right to use the private pipe.

Wal-Mart has been quick to point out that its neighbor, Waters Edge Condominiums, was required to insure safe passage of upstream flows. The obligation to provide for upstream stormwater drainage does not equal a requirement of granting access to a private stormwater line. The Clark County Code authorizes various alternatives for the release of stormwater. First, Waters Edge granted Clark County an easement for the construction of a public storm water line.¹⁸ The easement allows upstream owners to convey water by ditch or line. Second, while the line was designed to accommodate flows, this fact only means that the owners

¹⁷ AR 1509. While the conveyance document is titled as a utility easement, it is clear that the easement was limited to use of the property for a drainage ditch or line for water drainage.

¹⁸ AR 1509.

could have sold access to the line as an alternative to construction. There is simply no evidence in the record that Wal-Mart has any legal right to use this admittedly private line.

Without the private line, there is no evidence in the record demonstrating that Wal-Mart's stormwater system is feasible or what infrastructure is required. Similarly Wal-Mart's own reports recognize that infiltration is not a viable alternative in the event that permission to use the neighboring pipeline is unavailing.

Rather than address the issue of legal access, Wal-Mart has raised three additional issues to support its claim for preliminary site plan approval:

- a. Proof that Wal-Mart has a right to use the Waters Edge stormwater line is inconsistent with preliminary stormwater review;¹⁹
- b. The BOCC applied the wrong standard for determining the right to use the easement; and
- c. The failure to appeal the short plat approval creating the Wal-Mart lot gives Wal-Mart the right to use the property of a non-appealing third party.

¹⁹ *Brief of Petitioner*, p. 18, lines 1-26.

Upon analysis, each of these arguments will be found wanting.

First, Wal-Mart argues that:

The BOCC may not dismiss an application if compliance can be achieved by conditions of approval.²⁰

This statement is true as long as there is otherwise compliance with the Clark County Code. If a preliminary stormwater plan can meet the requirements set forth in CCC 40.380, the fact that there are math errors or minor issues, it is appropriate to approve the plan with conditions of approval. In contrast, proof of the right to use the offsite stormwater line or an alternative is a prerequisite to finding that the preliminary stormwater plan can meet the requirements of CCC 40.380. There must be a demonstration that the preliminary stormwater plan is feasible.

Unlike some site conditions, permission to use the offsite stormwater line is not a condition under the control of Wal-Mart; the authority to grant approval is within the control of Waters Edge Condominium development.

The BOCC concluded that the hearings examiner committed clear error when he approved this preliminary stormwater plan. To reverse this determination, this Court must find under RCW 36.70C.130 (1)(C) that

²⁰ *Brief of Petitioner*, p. 18, lines 3 & 4.

the BOCC committed clear error in its application of the law to the facts.

Wal-Mart has failed to meet its burden of proving error.

Wal-Mart next claims that hearings examiners determination regarding the easement presents a mixed question of fact and law. Wal-Mart makes this claim alleging that the Board of County Commissioners applied the wrong standard. Wal-Mart claims that the issue of using the offsite stormwater line presents a mixed question of law and fact. Clark County agrees that the interpretation of easements may well present mixed questions of law and fact. However, no one has questioned the interpretation of the easement granted to Clark County. The question is simply whether Wal-Mart has demonstrated a right to use a pipe contained within that easement. Wal-Mart does not claim that the pipe was conveyed with the easement; it could not make such a claim based on the easement language. Therefore, the only question is whether Wal-Mart has demonstrated its right to use the stormwater line in question. This issue does not require the interpretation of an easement document but only proof of whether permission has been granted to Wal-Mart or a right of use has been acquired either by adverse possession or other means. Wal-Mart has presented no evidence to support any of these claims. Therefore, this argument does not support their claim to use the off site stormwater line.

Finally, Wal-Mart claims that the stormwater plan supporting the short subdivision of the Wal-Mart property provided for the off site connection to the stormwater line owned by Waters Edge Condominium Development. While our Courts have approved developments that otherwise violate zoning laws for failure to appeal, no Court in the State of Washington has authorized a private takings merely because a neighboring property owner failed to appeal. Wal-Mart essentially claims that it can convert to its own use private property merely because the neighbor failed to challenge a land use determination. Our constitution prohibits the public taking of property for private purposes.²¹ Certainly Wal-Mart has no such right without complying with the law.²²

Absent proof that Wal-Mart had a legal right to use the private stormwater line, it was required to either obtain permission prior to preliminary site plan approval or develop an alternative to its use. As Wal-Mart has made it abundantly clear, the failure to appeal findings of fact renders them verities on appeal. *Wenatchee Sportsman Assoc. v. Chelan County*, 141 Wn. 2d 169, 4 P.3d 123 (2000) and *Chelan County v. Nykreim*, 146 Wn. 2d 904, 933, 52 P.3d p. 1 (2002).

²¹ *In re: Seattle*, 96 Wn. 2d 616, 624-625, 638 P.2d 549 (1981).

²² *See e.g.*, RCW 8.24.010.

In *J.L. Stordahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 180 P.3d 848 (2008), this court required findings and conclusions, based on Clark County code, where the County Commissioners modified or reversed a decision of the Examiner. The BOCC did explain the rationale behind its decision. First and foremost, it should be noted that while acting in its appellate role, the BOCC is not a factfinder. Under the Clark County Code, the Hearings Examiner conducts the open record hearing and acts as factfinder.²³ In an appeal from a decision of the Hearings Examiner, the BOCC is required to enter findings if it seeks to modify, reject or remand the Examiner's decision.²⁴

In compliance with Clark County Code, the BOCC had extensive discussion²⁵ regarding the Hearings Examiner's finding that the stormwater pipe was privately owned and the effects that finding has on the remainder of the Wal-Mart preliminary stormwater plan.²⁶ These conclusions were memorialized in Resolution 2007-10-14. Conclusions 1 and 2 address Wal-Mart's burden of proof and the Board's analysis of the stormwater issue. The Board concluded that:

²³ CCC 40.510.030 D.

²⁴ CCC 2.51.170.

²⁵ The transcript is available as CP No. 15 date October 3, 2007.

²⁶ See transcript of Board of County Commissioners October 3, 2007, p. 5, line 2 thru p. 7, line 11.

The Examiner erred in approving a preliminary stormwater plan which proposed use of an existing stormwater line to which the applicant failed to establish right of use. Although located within a public stormwater easement, the Examiner found that such line was privately owned. Such finding is amply supported by substantial evidence in the record; the Examiner's conflicting finding that the applicant has a right to use such line is not supported by substantial evidence in the record.²⁷

Two important points regarding the Board's conclusions bear mentioning. First, the findings of an appellate body in a land use appeal are generally regarded by appellate courts as surplusage.²⁸ Second, the conclusions contained in the Board's resolution, even if surplusage, serve to explain the Board's decision and are consistent with CCC 2.51.170.²⁹ Therefore, procedurally, the BOCC acted in conformance with County Code in its review of the instant appeal and its preparation of the resolution which memorialized its decision.

C. Trial court erred in concluding that Clark County first raised the issue of compliance with CCC 40.550.010(A)(2) at oral argument.

A review of the *Brief of Clark County* clearly shows that the

²⁷ *Id.*

²⁸ *Storedahl and Sons, Inc. v. Cowlitz Co.*, 125 Wn. App. 1, 8, 103 P.3d 802 (2004).

²⁹ It is acknowledged that the Board entered no findings but only conclusions. Our courts have made it clear that the mixing of findings with conclusions is not error and review in courts will treat them accordingly. *City of Tacoma v. William Rogers Co.*, 148 Wn. 2d 169, 181, 60 P.3d 79 (2002).

County included the road modification requirements in its first responsive brief at page 13.³⁰ Again, however, this Court reviews the decision of the BOCC and not that of the trial court.³¹

1. BOCC did not err in rejecting road modification requests.

a. Procedural standards. Prior to analyzing the allegations of Wal-Mart and the facts supporting or rejecting their arguments, it is first necessary to look at the local condition of the road in question, the standards applicable to this development, and the conditions under which those standards may be modified. The hearings examiner, in reviewing the Wal-Mart application, found and concluded that the roads in issue, NE 27th Avenue /NE Rockwell Road/NE 129th Street, were subject to the standards contained in Clark County Code Table 40.350.030-6. The feasibility standards (sight distance) required for drivers entering a public road from the development are contained in Table 40.350.030-11. Where the posted speed limit is 25 mph, the minimum corner sight distance is 250 feet or 10 feet for every mile per hour.

Under CCC 40.550.010A, a property owner seeking exception from the road standards may request a modification of those standards. In

³⁰ CP No.20 at p. 13 line 22 through page14, line 2.

³¹ *North Pacific Union, supra, at 28.*

this case, the applicant sought a road modification based on CCC 40.550.010(A)(1)(a). That subsection authorizes a modification of standards.

- (1) Modifications to the standards contained within Chpt. 40.350 may be granted in accordance with the procedures set out herein when any one of the following conditions are met:
 - a. Topography, right of way, existing construction or physical conditions or other geographic conditions impose an unusual hardship on the applicant, and an equivalent alternative which can accomplish the same design purposes available.
 - b. A minor change to a specification or standard is required to address a specific design or construction problem, which, if not enacted, will result in an unusual hardship.
 - c. An alternative design is proposed which will provide a plan equal to or superior to these standards.
 - d. Application of the standards of 40.350 to the development would be grossly disproportional to the impacts created.
- (2) In reviewing a modification request, consideration shall be given to **public safety, durability, cost of maintenance, function, appearance and other appropriate factors** such as to advance the goals of the comprehensive plan as a whole. **Any modification shall be the minimum necessary to alleviate the hardship or disproportional impact.** Self-imposed hardship shall not be used as a reason

to grant a modification request. (*Emphasis added*).³²

Procedurally, Wal-Mart bears the burden of proving it has satisfied the minimum standards contained in the code. *Christianson v. Snohomish Health District*, 82 Wn.App. 284, 288, 917 P.2d 1093 (1996) (*burden upon applicant to show entitlement to waiver of standards for septic permit*). If it does not justify a modification to the road standards, the road standards apply. That is, Wal-Mart was required to prove that due to topography, right-of-way or another basis in CCC40.550.010(A)(1)(a) imposed an unusual hardship and that an equivalent alternative is available that can accomplish the same design purpose. In making this analysis, the Examiner is required to consider public safety. Finally a modification must be the minimum necessary to alleviate the hardship. The code specifically recognizes that self-imposed hardships are not a basis for a road modification.

It is Wal-Mart's burden to satisfy these standards if it wanted a road modification. *Christianson, supra*. It is not the burden of the County to prove the opposite. The fact that the Wal-Mart failed to offer evidence the all necessary points is not attributable to Clark County. The applicant

³² CCC 40.550.010(A)(1) and (2).

has the burden of proof to demonstrate its entitlement to a permit especially when the applicant is seeking a variance from the code.

Douglass v. Spokane, 25 Wn.App. 823, 829, 609 P.2d 983 (1980).

Wal-Mart alleged during supplemental briefing that this issue, compliance with the elements of the code justifying a road modification, was not preserved for appeal. Compliance with the statute was preserved as an issue and formed the basis for denying the road modification. The BOCC who issued the land use decision concluded that no road modification was warranted albeit on other grounds. Moreover, the elements for a road modification were included in Clark County's Brief at the trial court level. The fact remains that Wal-Mart is obligated to prove all the elements necessary to issue a road modification.

b. Safety issues supported denial of modification.

Factually, it is clear from the examiner's decision and the testimony presented at the public hearing that there were significant safety issues at the Wal-Mart site. First, while Wal-Mart seeks to disregard citizen testimony because citizens are not experts, this argument is unavailing. Residents who routinely utilize local roads are often in the best position to be aware of near accidents and other traffic safety problems. These individuals are not required to be experts to provide such factual

testimony. Specifically, ER 701 authorizes opinion testimony by lay witnesses where the opinion or inference is “rationally based on the perceptions of the witness if it is helpful to a clear understanding of the witnesses’ testimony or the determination of a fact in issue.” The Examiner erred in applying an expert witness standard under ER 702 to persons testifying based on their personal observations under ER 701.

In fact, the examiner raised issues regarding the access roads surrounding the Wal-Mart site. Specifically, “NE Rockwell Road and NE 129th Street are partially-paved narrow roadways in poor condition.”³³

Moreover, the examiner concluded that:

The minimum half-width improvements along these roads [*NE Rockwell Road and NE 129th Street*] will **not** be adequate for serving the proposed development. See Condition A-3B. In accordance with CCC Table 40.350.030-6, the minimum center line radius for flat primary industrial roads is 575 feet. The center line radius of the existing curved section of NE 27th Avenue/NE Rockwell Road/NE 127th Street does not conform to this requirement.³⁴

Finally, the examiner found that the “site driveway access off of NE Rockwell Drive, between NE 27th Avenue and NE 129th Street, had an obstructed sight distance triangle to the northwest.”³⁵ If the proposed

³³ AR-2456.

³⁴ *Id.*

³⁵ AR-2457-58.

modification does not at least maintain current levels of safety, CCC 40.550.010 does not authorize the road modification.

The examiner was sufficiently concerned that Wal-Mart had not adequately addressed the long-term safety issues, that he imposed specialized conditions as a condition to granting the road modification.

Specifically, the examiner noted that:

Although the road modifications for reduced sight distance and increased width of proposed truck delivery driveway onto NE Rockwell Road are approved below, staff remains unconvinced that the applicant has adequately addressed the long-term safety issues due to the location of the proposed driveway access on NE Rockwell Road. The examiner shares these concerns.³⁶

Therefore, the examiner required Wal-Mart to relocate its driveway when traffic volumes exceeded 600 vehicles per day. While the code does not provide for such a condition, the examiner attempted to find a way to “fit a round peg into a square hole”. The simple answer is that the examiner erred in approving the modification as Wal-Mart has not shown that the modification will achieve the same level of safety as would be achieved under the road standards.

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³⁶ AR-2456-2457.

It is within this context that the Board was required to exercise its appellate authority in reviewing the decision of the lands use hearings examiner. The Board recognized and accepted the findings of the hearings examiner.³⁷ The Board, however, concluded that the examiner committed clear error in approving a road modification to allow placement of a non-conforming driveway in an area lacking adequate sight distance.

Reversal of the Board's lands use decision is subject to the standards contained in RCW 36.70C.130. The land use decision is the Board's decision pursuant to RCW 36.70C.020(1). Thus, Wal-Mart must demonstrate to the Court that the Board's lands use decision represents "a clearly erroneous application of the law to the facts."³⁸ A clear error exists if this Court is "left with a definite and firm conviction" that the County made a mistake.³⁹ This court should affirm the decision of the BOCC and its denial of the road modification.

V. CONCLUSION

Wal-Mart has gone to great lengths to "paint" this case as a neighborhood driving the BOCC to action. It has failed to accept its own

³⁷ See, Resolution 2007-10-14.

³⁸ RCW 36.70C.130(1)(d).

³⁹ *Kettle Range Conservation Group v. Washington Dept. of Natural Resources*, 120 Wn.App. 434, 456, 85 P.3d 894 (2003).

failures to demonstrate compliance with County Code requirements; requirements other developers and property owners must meet. It is undisputed that Wal-Mart lacked any legal document granting it a right to use an offsite stormwater line yet clung to the hope that a private pipe within a public easement would authorize such a connection. Similarly, Wal-Mart failed to review the code requirements for a road modification contained in CCC 40.550.010.

The legislature has assigned burdens and standards of proof in a LUPA appeal. In this case, Wal-Mart bears the burden of proof to satisfy the standards contained in RCW 36.70C.130 (1). Wal-Mart has simply failed to show that the BOCC committed clear error in applying the code to the facts as found by the examiner. While Wal-Mart has claimed that substantial evidence supported the examiner's findings, this conclusion does not justify errors in applying the code to those facts.

Specifically, the BOCC correctly concluded that Wal-Mart's preliminary stormwater plan was not feasible. No evidence has been offered that permission has been granted to Wal-Mart to use this private conveyance system. While Wal-Mart may possess a right to use the easement, this fact does not carry with it right to use a private line contained within the easement absent permission of the owner. Moreover,

no alternatives have been presented as a backup plan to this private conveyance system. This deficiency is not a simple math error; it involves the inability of Wal-Mart to demonstrate a working system to convey its water offsite given that infiltration is not an available option.

Similar issues are presented by the denial of the road modification. Even given the factual findings entered by the hearings examiner, those findings failed to show that the alternative design proposed by Wal-Mart will provide an equally safe street as enforcement of Clark County Code. Using the language contained in the Clark County Code, Wal-Mart was required to show that:

An equivalent alternative which can accomplish the same design purpose is available.”⁴⁰

In addition, Wal-Mart failed to show that the modification was the minimum necessary to alleviate the site hardship. Finally, Wal-Mart was required but failed to demonstrate that the hardship was not self-imposed through its location of its access along NE Rockwell.

Reversal of the Board’s decision requires this Court to conclude that it is left with a definite and firm conviction that a mistake has been committed. Upon a review of the decision of the Board of County

⁴⁰ CCC 40.550.010(A)(1)(a).

Commissioners, Clark County submits that there is not sufficient evidence to show that the Board committed clear error in entering its land use decision.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By



Christopher Horne, WSBA #12557
Senior Deputy Prosecuting Attorney

APPENDIX "A"

**BEFORE THE LAND USE HEARINGS OFFICER
FOR CLARK COUNTY, WASHINGTON**

In the matter of a Type III appeal of the Director's Preliminary Site Plan approval for a 176,672 sf 2-story commercial retail store on 12.2 acres zoned Highway Commercial (CH) in the Salmon Creek area of unincorporated Clark County, Washington.

PSR2005-00065, SEP2005-00152,
EVR2005-00085 & ARC2005-00104.

FINAL ORDER

**Salmon Creek
Commercial Center
Following Remand**

APL2006-00011

I. Summary:

This Order is the decision of the Clark County Land Use Hearings Examiner denying the appeal (APL2006-00011) and approving with conditions this application for preliminary site plan and related approvals for the Salmon Creek Commercial Center (PSR2005-00065, SEP2005-00152, EVR2005-00085 & ARC2005-00104) – a 176,672 sf 2-story discount commercial retail store on a 12.2-acre site zoned Highway Commercial (CH) in the Salmon Creek area of unincorporated Clark County, Washington. This Order also denies the SEPA appeal filed in connection with this matter, and affirms the county's determination of nonsignificance.

II. Introduction to the Parties, Property and Application:

Owner RB Northwest Properties
Attn: Richard Ossey
5437 Rosalia Way, Suite 100
Lake Oswego, OR 97035

Applicant CLC Associates
Attn: Dean Logsdon
12730 East Mirabeau, Suite 100
Spokane Valley, WA 99216

Applicant's Representative John C. McCullough
McCullough Hill PS
701 5th Avenue, Suite 7220
Seattle, WA 98104-7097

Appellant Fairgrounds Neighborhood Association
Attn: Bridget Schwartz, President
2110 NE 179th Street
Ridgefield, WA 98642

Appellant's Representative John S. Karpinski, Esq.
2612 East 20th Street
Vancouver, WA 98661

Property.....Legal Description: Tax Lots 317 (186809), 292 (186783), 319 (866810) and 1 (186829) located in the NE ¼ of Section 26, Township 3 North, Range 1 East of the Willamette Meridian.

Applicable Laws.....RCW 58.17 (state platting laws), CCC chapters 15.12 (Fire Code); 40.230 (CH – Highway Commercial zone); 40.350.020 (Transportation Concurrency); 40.350 (Transportation); 40.520.040 (Site Plan Review); 40.320 (Landscaping and Screening); 40.430 (Parking Standards); 40.360 (Solid Waste); 40.370.010 (Sewer); 40.370.010 (Sanitary Sewer); 40.370.020 (Water Supply); 40.380 (Stormwater and Erosion Control); 40.410 (CARA); 40.570(C)(2)(k) (Archaeology); 40.510.010 (Procedures); 40.510.020 (Appeal Procedure of a Type II decision); 40.570 (SEPA); 40.610 (Impact Fees).

This application seeks preliminary site plan and related approvals for a 176,672 sf, 2-story discount commercial retail store on a 12.2-acre site zoned Highway Commercial (CH) in the Salmon Creek area with a GC (General Commercial) comprehensive plan designation. The preliminary site plan (Ex. 1) shows the existing lotting pattern, street layout and the proposed locations of all buildings, parking areas, internal circulation streets, stormwater system and related improvements. The property consists of four tax lots (parcel nos. 186809, 186783, 866810 & 186829) that were created by a 4-lot short plat approved on April 29, 2004 (PRS2005-00065, SEP2005-00125, EVR2005-00085, ARC2005-00104 & PLD2004-00074). The property is located just south of NE 134th Street, north of NE 129th Street and west of NE 27th Avenue and is within the Salmon Creek Transportation Moratorium Area. At the time of the short-plat approval, the site was vested for 655 net new trips for the site at full build-out under uses allowed at the time of the land division. The site is also within the territory of the Fairgrounds Neighborhood Association.

III. Summary of the Local Proceeding and the Record:

The County approved a 4-lot short plat for this property through a Type II process on April 29, 2004. The decision was appealed, and the Hearings Examiner affirmed the short plat approval on July 14, 2004 (Ex. 122). The short plat decision was not appealed further. A preapplication conference on the preliminary site plan for the commercial development of the property was requested on April 4, 2005 and held April 28, 2005 (Ex. 2, tab 4). An application was submitted on August 29, 2005 (Exs. 1, 2, 3, 4, 5 & 6) and was determined to be fully complete on October 11, 2005 (Exs. 14). From this sequence, the application was vested as of August 29, 2005. Notice of the Type II application and a likely SEPA determination of non-significance (DNS) was mailed to all property owners within 300 feet of the site and to the Fairgrounds Neighborhood Association on October 24, 2005 (Exs. 16 & 17). Notice of the proposal and the DNS were published in The Columbian Newspaper on October 24, 2005 (Ex. 15).

The application consists of the proposed preliminary site plan and related drawings (Ex. 1), Phase I, II and III environmental site assessments for the property (Exs. 3, 4 & 5), an environmental review for the property (Ex. 6), a copy of the 2004 short-plat approval (Ex. 122), notes from the April 28, 2005 preapplication conference (Ex. 2, tab 4), a narrative (Ex. 2, tab 5), existing conditions drawings (Ex. 2, tabs 11, 13

& 14), transportation, architectural, landscaping and outdoor lighting plans (Ex. 2, tabs 14, 15, 16 & 17), soils analysis report (Ex. 2, tab 18), preliminary stormwater design report and plan (Ex. 2, tabs 19 & 20), a traffic study (Ex. 2, tab 22), a road modification request (Ex. 2, tab 23), SEPA checklist (Ex. 2, tab 24), sewer and water utility review letters (Ex. 2, tabs 25 & 26), archeological predetermination report (Ex. 2, tab 27), habitat buffer compensation plan (Ex. 2, tab 28).

The County received comments on the SEPA Determination by the November 7, 2005 submission deadline from several governmental agencies: the Southwest Clean Air Agency (Exs. 19 & 100) the Washington Department of Ecology (Ex. 23) and the Fire Marshal's Office (Ex. 25). The County also received timely written comments on its SEPA determination and land use decision from the public: Thomas Davis (Ex. 7), Mario Gallizioli (Exs. 8 & 18), Susan and Matt Camp (Ex. 13), Marianne Stokes (Ex. 20), Carol Edwards (Ex. 21), Don Golden on behalf of the Water's Edge Condominium Home Owners Association (Ex. 22), the Palmquists (Exs. 24 & 65), Dennis Johnson (Ex. 26), Ann Foster (Ex. 27), Michael Brace (Ex. 28), Francine Ranuio (Ex. 29), Beverly Murray (Ex. 30), Dan and Carol Arthur (Ex. 10), Tom and Barbara Harkins, Ellen Schroeder (Ex. 31), Jim McDermott (Ex. 32), the Shorthouse family (Ex. 33), Kathy and Joel Hauge (Ex. 34), Kenneth and Phyllis Endersen (Ex. 35), Joan Dengerink (Ex. 36), Brian and Jeri Hanneman (Ex. 37), Don and Diane Ankrom (Ex. 38), Virgil and Ella Jackson (Ex. 39), Isaac Stevens (Ex. 40), Jan Truttman (Ex. 41), George Geranics (Ex. 42), Don and Joyce Kraft (Ex. 43), Robert Gibson (Ex. 44), Adam, JB and Sheridan Fahnstock (Exs. 45 & 46), Brenda Gibson (Ex. 47), Marilyn Jared (Ex. 48), Barbara Stinchfield (Ex. 49), Kevin and Patty Ehlers (Ex. 50), Robert Gass (Ex. 51), John LaMadrid (Ex. 52), Den Fusso (Ex. 53), James and Judith Youde (Ex. 54), Lora Caine (Ex. 55), Robert Goodsell (Ex. 56), the Fairgrounds Neighborhood Association (Ex. 57), Candy Starr (Ex. 58), J.C. Buntin (Ex. 60), E.R. and Ida Horne (Ex. 61), Renir Shannon (Ex. 62), Betty Vaughn (Ex. 63), Randy and Gail Magorty (Ex. 66), Bret Bucher (Ex. 67), Robert and Pamla Schmelzer (Ex. 68), Elaine Johnson (Ex. 69), Corianne Rittierodt (Ex. 70), Doug Hoge (Ex. 71), John and Nancy Fritz (Ex. 72), Bridget Schwarz (Ex. 73), Kyle Spencer (Ex. 74), John Tibbels (Ex. 75), Randall Pearl (Ex. 76), Margaret Stapenhorst (Ex. 77), Kareen Messerschmidt (Ex. 78), Sherry Haxby (Ex. 79), Sophia Spencer (Ex. 80), Steve Hall (Ex. 81), Floyd and Helen Walseth (Ex. 82), Gregg Bryant (Ex. 83), Susan Cone (Ex. 84), Mariane Allen (Ex. 85), Gayle Dever (Ex. 86), Carrie and Chad Nelson (Exs. 87 & 89), Dan and Laura Lovett (Ex. 88), and Denis and Jacqueline McNamara (Ex. 90).

Many, in fact most, of these comments asserted that the actual commercial tenant of this proposed development was a Wal-Mart discount department store and expressed opposition for a variety of socio-economic reasons as well as the well-documented traffic circulation and concurrency failure of the Salmon Creek area memorialized by the Salmon Creek Moratorium Area. However, from the beginning and to the end of this proceeding, the applicant has remained uncommitted about the identity of the tenant, and nothing in the county code requires the identity of the tenant of a commercial operation. Nonetheless, the Board of County Commissioners provided written responses to a few of these comments (Ex. 10, 11 & 12). The applicant provided a few additional documents on a variety of technical and design issues (Exs. 64, 94, 95 & 96). County engineering staff provided reviews of the sight distance for the proposed access points (Ex. 91) and the requested road modification (Ex. 92).

Once the record on the Type II site plan application was closed, the Planning Director approved the preliminary site plan with conditions (Ex. 99). The Fairgrounds

Neighborhood Association and Bridget Schwarz timely appealed the land use decision and the County's DNS (Ex. 101) and requested the de novo hearing and review by the Hearings Examiner accorded by CCC 40.510.020(H)(3). Because one of the appellants' objections related to errors in the county's notice and decision, it reissued a corrected version of the decision (Ex. 99). The appeal notice listed the following specific grounds for the appeal:

1. Procedural:
 - The county's SEPA notice included the wrong appeal deadline, failed to name the ultimate user of the proposed commercial center and failed to include a site map or all necessary stormwater system plan information.

2. Stormwater:
 - The applicant had failed to prove basic feasibility of the stormwater system plan;
 - They failed to demonstrate legal access and the right to use the stormwater collection and conveyance system on the adjacent property owned by the Water's Edge Condominium Association;
 - The applicant failed to provide downstream system capacity and flow calculations for the portion of the proposed stormwater collection and conveyance system on the Water's Edge Condominium Association property;
 - The applicant failed to account and plan for uncompacted fill in the northeast corner of the site.

3. Traffic:
 - The county had improperly granted road modifications;
 - The county had improperly recognized 655 vested trips from the short plat;
 - Approval of the project violates the Salmon Creek transportation concurrency moratorium area;
 - The applicant improperly calculated projected trip generation for the proposed development;
 - The applicant submitted and relied upon transportation engineering reports that were not stamped by a licensed professional engineer;
 - The project would, in reality, impose a significant traffic safety hazard that warrants denial;
 - Approval would violate CCC 40.200.010, the purpose statement for the County's land use districts, because approval would not lessen congestion of streets.

4. Development Code:
 - Approval violates CCC 40.230.010(A)(5), which provides the purpose statement for the CH zone and prohibits new commercial areas from contributing to strip development.

5. Fire Code:
 - The applicant failed to demonstrate there was adequate fire flow (water) to serve the proposed development.

6. Geotech Adverse Impacts:
 - The county's approval improperly omits the requirement for retaining walls, when retaining walls should be required;

- Condition A-7b improperly delegates geotechnical mitigation to some uncertain future date with no public review process.
7. Site Plan Review Standards:
- Approval violates CCC 40.520.040(E)(1)(b) & (c), which precludes site plan approval where all of the applicable development and other applicable standards are not met.
8. SEPA:
- WAC 197-11-080 & -335 not met because the application did not include reasonably sufficient and complete information;
 - WAC 197-11-080 & -335 not met because ultimate use (identity of the commercial tenant) is not known and therefore full impacts cannot be known;
 - The applicant improperly failed to provide off-site stormwater capacity information;
 - The applicant provided old (out-dated) trip generation projections and traffic flow data based on an unknown ultimate site user;
 - A full EIS is required because of the significant unmitigated impacts from traffic, stormwater, geotechnical issues, land use and aesthetics, cumulative environmental impacts and collective marginal impacts.

The appeal notice states that the appellants “globally and comprehensively challenge each and every aspect of the approval of the project, including but not limited to” the above-listed issues (emphasis in the original). Based on this statement, the appellants presumably attempt to reserve the ability to challenge additional aspects of the Director’s Type II site plan approval regardless of whether they assign specific error to all aspects of the decision.

The applicant responded with a summary denial of the allegations in the appeal notice (Ex. 112) and several supplemental documents from the applicant’s technical design team (Exs. 110 & 115). Staff issued a comprehensive report on the appeal issues dated July 24, 2006 (Ex. 113) recommending that the appeal be denied and that the Director’s decision (approval) be affirmed. The county duly noticed and scheduled the hearing on the appeal for August 3, 2006 (Exs. 106, 107 & 108). However, due to illness of the appellants’ attorney (Ex. 116), the applicant agreed to postpone the hearing to September 7, 2006.

At the commencement of the September 7, 2006 hearing, the Examiner explained the procedure and disclaimed any ex parte contacts, bias, or conflict of interest. No one objected to the County’s notice or procedure related to the appeal proceeding. No one raised any procedural objections or challenged the Examiner’s ability to decide the matter impartially, or otherwise challenged the Examiner’s jurisdiction. At the hearing, Michael Uduk, County planning staff on the project, provided a verbal summary of the project, the appeal issues and the staff report.

The applicant’s attorney, Jack McCullough, described the proposal and the site’s recent land use and permitting history, including the short plat approval, a post-decision review and this preliminary site plan review for the commercial development on the site. Mr. McCullough presented a series of slides that compared what was approved by the 2004 short plat and what is being proposed in the commercial site plan (Exs. 120 & 127).

Also appearing on behalf of the applicant was Dean Logsdon, PE, Mark Krigbaum, PE, and Kevin Picanco, PE of CLC Associates – the project's civil engineer, Shawn Moore, PE of Hopper Dennis Jellison – the project's stormwater system engineer, Sagar Onta, PE of Kittelson and Associates – the project's transportation engineer. These technical experts provided additional written documentation on stormwater, traffic safety, transportation concurrency, geotechnical, access easements and other issues that were raised by the appeal and opponent testimony along with documentation of their professional qualifications (Exs. 121, 122, 123, 124, 125, 126, 129, 130, 131, 132, 133, 134 & 135). The opponent's attorney, John Karpinski, cross-examined each of these expert witnesses.

Following proponent testimony, the following people testified in opposition to the project and in favor of the appeal: John Karpinski, attorney for Fairgrounds Neighborhood Association, the Water's Edge Condominium Association and Bridget Schwarz. Mr. Karpinski requested a continuance of the hearing and provided a traffic report from Bruce Schaefer, a licensed professional transportation engineer (Ex. 136), and excerpts from the Clark County Comprehensive Plan related to strip developments (Ex. 137). The following individuals testified in opposition to the project and in favor of the appeal, some of whom submitted documents into the record: Bridget Schwarz (Ex. 138), Lora Caine of the Fairgrounds Neighborhood Association Board (Ex. 139), Steve Doty (Ex. 141), Don Golden and Kenneth McGowen of the Water's Edge Condominium Association (Exs. 142, 143 & 144), Mary Ann Stokes, Vern Schreiber, Le-Ann Irwin, Brian Hanneman and Steven Jensen. Additional letters in opposition were received from Margaret Stapenhorst (Ex. 140) and Paul Fischl (Ex. 145). The opponent testimony was not complete when the Examiner declared a recess and continued the hearing and opponent testimony until October 24, 2006, beginning at 7:00 p.m.

In the interval between hearings, staff provided notice of the continuance hearing (Exs. 146 & 147), and the applicant provided a comprehensive hearing brief (Ex. 149). At the October 24th continuance hearing, opponent testimony resumed with: John Karpinski, attorney for Fairgrounds Neighborhood Association, the Water's Edge Condominium Association and Bridget Schwarz (Exs. 151, 152 & 153), Bridget Schwarz (Exs. 154, 155, 156, 157, 158 & 159), Don Golden and Kenneth McGowen of the Water's Edge Condominium Association (Exs. 160 & 161), Susan Peabody (Ex. 162), Eric Trued (Ex. 163), Denyse Fusso, Dr. Michael Brown, Carol Clayberg, Lise Buell, Pat Vichas, Erica Clayberg, Lori Charlton. Additional letters and e-mail messages in opposition to the proposal were also received during this period from Marilyn and Gene LaHusen (Ex. 111), Gayle Dever (Ex. 114), Clyde and Marilyn Jared (Ex. 118), Jim Sevall (Ex. 119), David Herrmann (Ex. 165), Carl Clayberg (Ex. 167), Allan and Maryann Jeska (Exs. 168 & 169), Eric Trued (Ex. 170), Lise's Buell (Ex. 174)

The applicant's attorney Jack McCullough, provided a preliminary rebuttal and reserved the right for subsequent written rebuttal during an open-record period following the hearing. The applicant's rebuttal witnesses included Shawn Moore, PE of Hopper Dennis Jellison (Exs. 124, 125, 126 & 128), Mark Kreigbaum, PE of CLC Associates (Ex. 124), Dan Trisler, PE, of GeoDesign Engineers, the project's geotech engineer (Exs. 121 & 164), and Sagar Onta, PE of Kittelson and Associates (Exs. 131, 132, 133 & 134). The opponent's attorney, John Karpinski, cross-examined each of these expert witnesses.

At the conclusion of the October 24, 2006 hearing, the Examiner ordered the following open-record schedule with the agreement of all those present:

- November 14, 2006Testimony from anyone on any subject –
Opponents: Exs. 172, 173, 174, 175, 177; County
Staff: Exs. 171 & 176.
- November 28, 2006Rebuttal from all parties to material submitted on
November 14th – Applicant: Exs. 179, 180, 181 &
182.
- December 11, 2006Applicant’s final rebuttal (argument only, no new
evidence)

Despite the clarity of this schedule, the opponents assumed they had a rebuttal right at the December 11th deadline, but nonetheless missed that assumed deadline due to their attorney’s illness. To complicate things, the applicant submitted several engineering reports at the November 28th deadline in response to an engineering report (Bob Rogers, Ex. 152), which the applicant had submitted on October 26, 2006. Mr. Karpinski moved to strike the applicant’s expert reports (Ex. 183) and, in the alternative, provided a preliminary response to the reports (Ex. 184). Mr. McCullough opposed the motion to strike (Ex. 185) stating that the engineering reports were rebuttal argument only did not include any new evidence. Mr. Karpinski requested, in the alternative, that the record be left open to allow a full response to the applicant’s November 28th expert reports (Ex. 186). The applicant agreed to another open-record extension (Ex. 187), and the Examiner issued a new order (Ex. 188) denying Mr. Karpinski’s Motion to Strike and granting in part his request for an open-record extension:

- December 22, 2006Opponents rebuttal to the applicant’s Ex. 181 and
final closing argument, argument only, no new
evidence (Exs. 189, 190 & 191)
- January 2, 2007Applicant’s final rebuttal, argument only, no new
evidence (Ex. 192)

The record closed upon the submission of the applicant’s closing brief (Ex. 192) on January 2nd, and the Examiner took the matter under advisement and issued a decision on January 30, 2007 denying the appeal, approving the site plan with conditions, and denying the SEPA appeal. Bridget Schwarz and the Fairgrounds Neighborhood Association, represented by attorney John Karpinski, timely appealed the Examiner’s decision to the Board of County Commissioners (the “Board”). The Board considered the appeal (APL 2006-00011) in its April 11, 2007 regular public meeting and issued a decision on April 17, 2007 remanding the decision back to the Examiner (Resolution No. 2007-04-12) with the following direction:

1. This matter is remanded to the hearing examiner for reconsideration and direction to determine the facts that he finds to be established by utilizing a preponderance of evidence burden of proof.
2. In anticipation of the possibility that the decision of the Hearings Examiner may be appealed to the Board of County Commissioners, the Commissioners would appreciate the Hearing Examiner making specific factual findings as to the feasibility of the stormwater system including but not limited to the off-site

conveyance system; the safety of truck ingress and egress from the site; and the significance, if any, of any failure to submit required traffic data.

On remand, the Examiner received summary briefs on the remand issues from both parties without new evidence, additional hearing, oral testimony or argument, after which the Examiner took the matter under consideration.

IV. Findings:

Only issues and approval criteria raised in the course of the application, during the hearing or before the close of the record are discussed in this section. All approval criteria not raised by staff, the applicant or a party to the proceeding have been waived as contested issues, and no argument with regard to these issues can be raised in any subsequent appeal. The Examiner finds those criteria to be met, even though they are not specifically addressed in these findings. The following issues relate to the mandatory applicable approval criteria for this proposal that were raised by the opponents in their appeal of the Director's decision or their SEPA appeal. These findings begin with procedural issues and then turn to the substantive issues.¹

A. Remand Issues and Structure of the Decision on Remand: The primary issue on remand is the burden of proof applied by the Examiner in deciding whether or not the approval criteria are met. The Examiner recognizes that the original decision was inconsistent in stating and applying the correct burden of proof. In reality, the Examiner, like any finder of fact, must review the entire record and decide whether, on balance, the applicant has demonstrated that all of the mandatory approval criteria are met, or can be met through the imposition of conditions of approval. Quite clearly there must be substantial evidence in the record to support the final decision rendered. However, in deciding the case as the fact-finder, the Examiner must, and in this case does, decide whether the applicant's evidence is more persuasive, probative and credible than the countervailing evidence. Even though inartfully stated and stated in contradictory ways in the original decision, the Examiner applied the preponderance of the evidence standard in determining that the applicant had demonstrated compliance with the approval criteria and that the applicant's evidence was more persuasive, credible and probative than the opponents' evidence on the relevant issues.

In this remand decision, the Examiner readdresses all of the approval criteria and issues raised during the initial hearing process, and this decision is designed to supersede and replace the original decision. The burden of proof standard is discussed in more detail below and wherever the issue arises in the body of the decision. With regard to the additional discussion requested by the Board, those issues are addressed in the corresponding sections in the decision, *i.e.*, feasibility of the stormwater plan (see Stormwater Findings 1d & 1i and Conditions A-6c & A-6d), safety of truck ingress and egress (see Transportation Findings 3d, 3g & 3h and Conditions A-3d & A-3e) and the significance of the traffic data that the opponents demanded but the applicant did not provide (see Traffic and Transportation Concurrency Issues 2b & 2e). Where

¹ The Examiner has already ruled on some procedural issues relating to the schedule of this proceeding, most notably the opponents' Motion to Strike and to extend the open record (Ex. 188). Issues resolved in such interlocutory orders will not be readdressed here.

appropriate, the conditions of approval have been revised to address these issues more specifically.

B. Procedural Issues and Objections:

1. What issues may be contested in this de novo Type III appeal? While somewhat academic, the applicant and opponent disagree as to what issues may be addressed in this Type III appeal proceeding. The opponents focus on CCC 40.510.020(H)(3) which provides that “[t]he hearing examiner shall hear appeals in a de novo hearing.” The applicant focuses on CCC 40.510.020(H)(2)(c), which provides that the notice of appeal “shall contain” a statement of “[t]he specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error.” When asked, the County Prosecutor tended to take the opponents’ view (Ex. 150), but only because it seemed to be the safer course.

Everyone agrees that this hearing proceeding is a de novo review, meaning that any legal issue may be raised, anyone may participate and any type of evidence may be submitted. The critical legal question is whether the de novo hearing is limited to the legal issues specifically listed in the notice of appeal, or whether the appellant or anyone else can raise additional issues during the course of the appeal proceeding. The Examiner finds that the issues addressed in the proceeding are not limited just to those listed in the appeal notice, but are limited to those specifically raised either in the appeal notice or during the course of the appeal proceeding.

In theory, once a threshold land use decision is made, the subsequent appeal proceedings should be an issue narrowing process and not an issue broadening process. However, given the public participation requirements attendant to Washington’s land use system under the Growth Management Act, there cannot be an issue narrowing process until the required evidentiary public hearing is held as a mechanism for refining and defining the application proposal and the set of applicable approval criteria. Once that initial evidentiary hearing is held and everyone has had a full and fair opportunity to understand the fully formed proposal and understand the full set of approval criteria that do or might apply, the issue narrowing process can begin. Thus, appeals to the Board of Commissioners are limited to the record created and the issues raised during that evidentiary hearing process. CCC 40.510.030(H)(3). To impose an issue limitation before the initial evidentiary hearing process is complete would be contrary to this view of the land use system.

By the same token, “kitchen sink” statements included in an appeal notice that suggest that all approval criteria and all issues are implicitly raised are not sufficient to actually raise an issue that is not described with specificity. In this case, the opponents prefaced their appeal notice with the statement: “We hereby globally and comprehensively challenge each and every aspect of the approval of the project, including but not limited to...” (Ex. 101, emphasis in the original). This statement is not sufficient to raise an issue that is not otherwise described with particularity by a written or oral statement of “[t]he specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error.” CCC 40.510.020(H)(2)(c). The Examiner will not allow issues to be raised by inference or implication or by some obscure reference buried in a written submission in this large record. Instead, to be recognized as an

appeal issue, the point must be raised with particularity, describing the applicable code section or legal standard, with an explanation of the specific error.

Consequently, this appeal is limited to the issues raised with particularity, either in the opponents' appeal notice or by a party to the proceeding during the hearing process while the record is open. In identifying these properly framed appeal issues, the Examiner relies primarily upon the opponents' notice of appeal (Ex. 101), closing brief (Ex. 189) and any other document where a specific approval criterion is cited and sufficient facts are asserted to allow the applicant to respond and me to evaluate the allegation. Those are deemed to be the appeal issues in this matter.

2. Related Burden of Proof and Standard of Review issues: To the extent that it is not clear or still subject to dispute, this is a de novo proceeding, of a land use decision, and the Director's Type II approval is to be accorded no weight or deference. The Director's decision is simply another opinion or piece of evidence in the record. In this proceeding, the Examiner must decide whether there is sufficient evidence in the record demonstrating that the application meets, or can meet, the applicable approval standards. Toward that end, the applicant has the burden of proof throughout the local process, initially and on appeal. Even though this is an appeal of a Director's decision, the opponents do not have a burden of proof with regard to the land use criteria or land use decision.

The applicant must prove by a preponderance of evidence that all of the applicable approval criteria are met or can be met through conditions of approval. This means evidence that is more probably true than not true when viewed in light of all the evidence in the record. In land use proceedings, such as this one, however, where truth and falsehood are less of a concern, a more relevant standard is persuasiveness, credibility, probative value and relevance to the approval standards. In that light, the Examiner believes the correct view under the preponderance of evidence standard is that, on balance, when all of the evidence in the record is considered, is the applicant's evidence that the criteria are met more persuasive, more credible, more probative and relevant than the countervailing evidence.²

3. Adequacy of the county's notice: The opponents claim the county's violated CCC 40.510.020(D)(4) by stating an incorrect appeal date and failing to include information about perfecting an appeal of the threshold SEPA determination (Ex. 101). In part, this assignment asserts a violation of the procedure required for land use decisions, and the code provisions cited by the opponents are procedural in nature. To prevail in a procedural objection, a party must demonstrate that the procedural error was prejudicial and not merely harmless. By "prejudicial" I mean that the procedural error prejudiced the party's right to a full and fair hearing. In this case, the omission of the information asserted by the opponents was harmless error, as evidenced by the fact that

² Under RCW 36.70C.130 Superior Court judge reviewing a local land use decision in a LUPA appeal must determine whether the local decision – the decision by the fact finder – is supported by substantial evidence in the whole record. This is in accordance with the doctrine that a reviewing court, sitting strictly in an appellate capacity, does not reweigh the evidence or substitute its opinion for the fact finder as to whether the evidence is sufficiently persuasive, credible or probative, only whether the record contains substantial evidence in support of the decision that was rendered.

aerial photographs show the site to have been in this condition for at least the last 30 years. There is a steep bank near the northeast corner of the site. Two older existing commercial buildings are located on the southern portion of the site, and these areas are covered with large areas of impervious surfaces. Natural Resource Conservation Service mapping shows the site to be underlain by soils not suitable for infiltration. The stormwater report indicates that the land use over the last 30 years, which results in the least amount of runoff, was similar to existing conditions. The corresponding runoff curve number (CN) of 84, 80, and 78 were used for basins 1, 2, and 1A, respectively, to perform the hydrologic analysis for the pre-developed condition.

c) Developed Conditions: The report indicates that the approximate drainage area is 13.4 acres containing 11 acres of new impervious area and 2.4 acres of pervious area. The corresponding weighted runoff curve number (CN) of 97, 95, and 78 were used for basins 1, 2, and 1A, respectively, to perform the hydrologic analysis for the post-developed condition. The computed detention volume is increased by 1.47 to provide the volume correction factor, using Figure III-1.1 of Stormwater Management Manual for the Puget Sound Basin. The project will replace more than 1,000 sf of pollution-generating impervious surface. Therefore, the developer shall install oil/water separators as required by CCC 40.380.040(B)(7). See Condition A-6a.

d) Offsite Conveyance System: The stormwater conveyance system downstream of the site, proposed to receive stormwater from this development, is a privately owned facility constructed by the Water's Edge Condominium's development. The downstream conveyance system consists of a piped system within a 20-foot easement and a creek within a 35-foot wide public easement. According to CCC 40.380.040(C)(1)(g), the proposed Salmon Creek Commercial development shall not be allowed to materially increase or concentrate stormwater runoff onto downstream properties. Also, the downstream property, the Water's Edge Condominiums, shall not be allowed to block existing drainage from the upstream properties.

The applicant's preliminary stormwater report indicates that the drainage report for the Water's Edge Condominiums identifies that the storm system has been designed to accept 11 cfs of onsite flow and 25 cfs of offsite flow from the 100-year storm event, with a total design capacity of 36 cfs (Ex. 125). The stormwater quantity control for Salmon Creek Commercial development is designed to release 3.96 cfs during the 100-year storm event, and with this proposed stormwater detention system, the Water's Edge system flow for the 100-year storm event should be no more than approximately 15 cfs (Ex. 181), which would leave 21 cfs of excess design capacity. The applicant's engineer certifies that the proposed discharge rate to the downstream system will not cause the system's capacity to be exceeded (Ex. 2, tabs 19 & 20 & Ex. 181). This, at least, is the result of the engineer's calculation based on the system design for Water's Edge and this project, and it demonstrates design capacity and basic feasibility.

The provisions of stormwater ordinance allow the Salmon Creek Commercial development to use the existing downstream conveyance system so long as the proposed stormwater facilities are designed to limit the treated runoff leaving the site to the pre-developed allowed rates and the applicant submits evidence to demonstrate that releasing flows in a concentrated form into the private conveyance system will not exceed that designed capacity. However, if the existing downstream facilities are not functioning as they were originally designed, the introduction of additional runoff from this project will have adverse impacts on the proposed development and downstream

the county reissued notice of the original decision (Ex. 99); the opponents perfected a timely appeal, and were provided a de novo appeal process. These procedures cured any possible procedural or technical error that may have occurred. Consequently, this assignment of error is denied.

C. Substantive Land Use Issues and Appeal Issues:

1. **Stormwater issues:** The County's Stormwater and Erosion Control Ordinance (CCC chapter 40.380) applies to development activities that result in 2,000 sf or more of new impervious area within the urban area and all land disturbing activities, except those exempt under CCC 40.380.030(A). This project will create more than 2000 sf of new impervious surface and it is a land disturbing activity not exempt by CCC 40.380.030(A). Therefore, this development is subject to, and shall comply with, the Stormwater and Erosion Control Ordinance (CCC chapter 40.380). Oil/water separators are required when the development result in the addition or replacement of more than 1,000 sf of impervious surface for any of the development activities listed in CCC 40.380.040(B)(7)(a) or (b). The applicant has not identified the specific uses within the site; however, the project will add more than 1,000 sf of pollution-generating impervious surface. The erosion control ordinance is intended to minimize the potential for erosion and a plan is required for all projects meeting the applicability criteria listed in CCC 40.380.050. This project is subject to the erosion control ordinance.

a) **The Stormwater Proposal:** The tributary drainage area is divided into three drainage basins for the purpose of drainage calculations. Basins 1 and 2 make up the drainage area within the site and Basin 1A is the offsite area to the south, which drains toward the site. Runoff from the new pavement, sidewalks, landscaped areas of the site and tributary areas will be collected in inlets and conveyed to detention ponds to the north of the site and to an underground stormwater detention system, consisting of 7.5-foot diameter CMP pipe system, located near the northeast corner of the site. The project, as required, proposes to limit the runoff release rate at peak rates equal to one-half of the pre-developed 2-year, 24-hour storm peak runoff rate; and not to exceed the 10-year and 100-year pre-developed runoff rates.

An 8-foot by 24-foot Stormwater 360 StormFilter™ unit equipped with 46 filter media cartridges is proposed downstream of the detention facilities to provide water quality control. The preliminary stormwater design report indicates that the proposed water quality facility will be designed to treat 70% of the 2-year, 24-hour storms, as required. The project proposes to release allowable flows from the stormwater management facilities into existing piped system across the Water's Edge Condominium's property located near the northeast corner of the site. Any storm beyond the 100-year flow will overflow to the ditch system for NE 134th Street. The stormwater management facilities are proposed to be privately owned and maintained by the owner.

b) **Site Conditions and Stormwater Issues:** The property consisting of three parcels totaling 12.56 acres in area. The site is covered with grass, shrubs, and a storage building. In accordance with the county GIS mapping, 91% of the parcel has slopes ranging from approximately 0-5%; approximately 7% of the site has slopes ranging from 5-15%; and 2% of the site has slopes ranging from 15 to 25%. The northern portion of the site is generally open and covered with pasture grasses, with a small tree-covered area located at the northeast corner of the site. Review of historical

properties in violation of the County's stormwater system requirements. According to the opponents, this is the situation we have in this case.

As described above, the Examiner finds that the applicant has documented adequately that the downstream system (the Water's Edge system) as originally designed, has adequate capacity to handle the flows from this development. However, the opponents assert that the Water's Edge system, in fact, is not functioning properly, is plugged and has not been maintained adequately over the years. Variations on this general theme are discussed in greater detail in the stormwater findings that follow (*see especially* Stormwater Finding 1i), but at the end of the day, the Examiner concludes that the applicant has demonstrated basic feasibility of the stormwater proposal sufficient to proceed to the next step. That next step requires the applicant, among other things, to conduct an investigation of the downstream system, document its current condition and capacity, and confirm that, in fact, it has adequate capacity to handle the additional flows from this development while still complying with the County's stormwater requirements. If the downstream system is plugged or not functioning as originally designed, the applicant shall mitigate the situation so that adequate downstream capacity is achieved. See Conditions A-6c & A-6d.

Although the conveyance system through the Water's Edge Condominiums appears to be within a public easement, the Water's Edge unit owners assert that this developer lacks the legal ability to use pipes within these easements (Exs. 189, 189, 142, 143, 144, 160, 161). As explained below, evidence in the record is sufficient for the Examiner to conclude that legal access, in fact, exists (Exs. 128, 143 & 192) and that the Water's Edge unit owners do not have the legal ability to exclude stormwater flows from this project. However, this issue shall be resolved by the applicant prior to final engineering plan approval. In any event, the runoff release rates at any location may not exceed the allowable runoff rates in the direction of pre-developed flow. See Condition A-6b. The maintenance responsibilities for the privately owned stormwater facilities are governed by CCC 40.380.040(H)(3)(b). Prior to approval of construction plans and placement of any impervious surfaces, the developer shall ensure that the downstream facilities are capable of receiving runoff from this development. See Condition A-6c.

The excess runoff from the development leaving the detention pond will be conveyed offsite. According to CCC 40.380.040(B)(2), all development activities shall prepare a final stormwater control plan, conduct an analysis of off-site water quality impacts resulting from the development activities and mitigate their impacts. This project will be required to perform an offsite analysis extending a minimum of ¼ mile downstream from the development. See Conditions A-6c & A-6d.

The preliminary site plan is required to demonstrate compliance with, or the ability to comply with, the county's stormwater system design standards in CCC chapter 40.380. This showing does not require detailed or final plans nor complete or final engineering calculations, all of which will be required at the time of final site plan. Instead, an applicant is required at this stage of the process to demonstrate basic feasibility of the stormwater collection, treatment and conveyance system and that the system can achieve the county's stormwater system performance standards. CCC 40.380.060(D)(1).

The applicant's stormwater plan includes an on-site collection system, below ground detention and treatment, from which the overflow will be piped into an existing

pipled system across the Water's Edge Condominium property northeast of the site. Any storm event beyond the 100-year flow will overflow from this system to a ditch in the NE 134th Street right-of-way. The stormwater system for this property was originally designed for the short plat (Ex. 124) to collect and treat an impervious surface of 85% of the 12.2-acre site and a discharge rate of approximately 2.92 cfs from the 100-year, 24-hour storm event with a total 6.90 cfs detained discharge from that storm event. The applicant revised that plan to reflect the current development proposal and provided a new stormwater system design report and plan (Ex. 2, tabs 19 & 20), which were revised slightly (Ex. 64). The new plan proposes only 80% impervious coverage, a 0 cfs discharge rate from the 100-year, 24-hour storm event, with a total detained discharge of 3.96 cfs (Exs. 127 & 120). The applicant provided a down-stream analysis of the Water's Edge system (Exs. 115, 125 & 126) and responded to the critique submitted by the opponents (Exs. 180 & 181). The opponents challenged the stormwater proposal from the beginning (Exs. 101 & 189), including two technical engineering reports (Exs. 152 & 190). The Examiner concludes that, for this preliminary stage of the development, the applicant has met its burden of demonstrating basic feasibility.

e) Legal access to the Water's Edge stormwater system: The opponents assert that the applicant does not have legal access to pipe its stormwater overflow from the development site into the downstream conveyance system across and through the Water's Edge Condominium Association's on-site system (Exs. 189, 142, 143, 144, 160, 161). As a general matter, feasibility requires that the applicant either have an easement over the Water's Edge property to convey its stormwater, that there be a public utility easement over the property, or that the Water's Edge stormwater system already be a public system.

The record includes a Utility Easement that appears to be a conveyance of a utility easement, including stormwater lines, from the developer of the Water's Edge Condominiums (Salmon Creek Developers) to Clark County, dated July 29, 1987 (Exs. 128 & 192). The same utility lines and easement, including stormwater lines, appears on the final plat for the Water's Edge Condominiums (Ex. 143). From this, the Examiner concludes that the stormwater pipes to which the applicant plans to connect are within a publicly dedicated utility easement. As such, legal access appears to exist and the Water's Edge unit owners appear to lack the legal ability to prevent this project from discharging stormwater into this publicly dedicated system. To remove all doubt, the applicant will be required to demonstrate that it has legal access for this purpose as part of final engineering. See Condition A-6b.

f) Where is silt-laden temporary site de-watering going: The opponents assert somewhat rhetorically, that a substantial amount of water will have to be managed on site during construction, the site will have to be de-watered, and the water thus removed will contain significant levels of suspended solids and silt. Fairly read, this appears to be a construction phase erosion control issue.

So far as I can tell, the applicant does not directly address this issue (*but see* Ex. 180), but neither is it required to do so at this stage of the development review process. The erosion control ordinance is intended to minimize the potential for erosion, including silt-laden water, and a plan is required for all projects meeting the applicability criteria listed in CCC 40.380.050. The Examiner finds that this project meets the applicability criteria in CCC 40.380.050 and is therefore subject to, and shall comply with, the County's erosion control ordinance. See Condition B-2.

g) The applicant's stormwater report is an improper mix of three reports:

This criticism comes from the opponents' engineer (Ex. 190) who reports that he could not tell which of the applicant's three stormwater plan documents was the right one, *i.e.*, the plan submitted and approved as part of the short plat (Ex. 124), the plan submitted with the site plan (Ex. 2, tabs 19 & 20 & Ex. 64) and the downstream analysis report (Exs. 115 & 125). The opponents simply pass-along these objections without assigning or identifying any legal defect in the applicant's stormwater proposal (Ex. 189). The applicant responds to the opponents' technical objections (Exs. 180 & 181) by stating that the reports speak for themselves and demonstrate compliance with (feasibility) the county's stormwater requirements in CCC chapter 40.380 (Ex. 192). County engineering staff reviewed the plans and determined that the stormwater proposal was feasible (Ex. 171).

While not entirely clear, the Examiner interprets this objection to assert that the applicant has not demonstrated basic feasibility and compliance with CCC chapter 40.380. The Examiner concludes that the applicant's reports (Ex. 2, tabs 19 & 20 & Exs. 64, 115 & 125) adequately demonstrate that the stormwater preliminary plan is feasible. This conclusion is confirmed by county engineering staff (Ex. 171). It is relatively clear what is being proposed, that it is legally permissible (Exs. 128 & 143), and that there is likely to be downstream capacity (Exs. 115 & 125). Again, to remove all doubt, the applicant will be required to perform a down-stream system capacity analysis and provide a final stormwater system design and engineering calculations prior to final plan approval. See Condition A-6.

h) The applicant's stormwater plan improperly relies on pre-1992 standards to calculate the current capacity of the Water's Edge system: Again, this objection appears to come directly from the two engineering reports provided by the opponents (Exs. 152 & 190), to which the applicant provided a specific response (Exs. 181 & 180) and a general rebuttal (Ex. 192).

The issue may boil down to a battle of the experts. The applicant's engineers state the their design and calculations comply with the applicable standards and demonstrate basic feasibility. The opponents' engineer says he cannot figure out exactly what is proposed, but states that the wrong standards and methods are applied. The applicant replies that the opponents' engineer simply misunderstood the proposal and was working from an incomplete set of documents. The legal standard I must apply, however, is to determine whether there, on balance, has the applicant demonstrated by a preponderance of the evidence (51% or better) that the county's stormwater system design standards are or can be met. I find that the applicant's engineering reports are credible, focused and address the correct standards and are more persuasive, credible and probative than those of the opponents. I find that, while Mr. Rogers is a credible expert, he may not have had access to all documents (it is not clear) and, since he was not present at either the September 7th or the October 24th hearing, he did not hear the applicant's testimony on the subject or the applicant's explanation of why and how the proposal meets the approval criteria and why Mr. Roger's conclusions are simply not credible. Therefore, I find that the criticisms contained in the Rogers reports (Exs. 152 & 190) are not sufficient to detract from the weight and credibility of the applicant's engineering reports (Ex. 2, tabs 19 & 20, Exs. 64, 115, 125, 180 & 181). On this basis, I find that the applicant has demonstrated basic feasibility of its stormwater system plan

and that it is more likely than not that it can comply with the county's stormwater design standards in CCC chapter 40.380. See Condition A-6.

i) The Water's Edge system lacks capacity to accommodate stormwater flows from this development: Fairly read, this objection relates to the down-stream capacity analysis and the testimony of those who have observed the Water's Edge stormwater system plug, overflow and flood during recent storm events (Exs. 189, 142, 143, 144, 160, 161) and from their engineer's critiques (Exs. 152 & 190). The applicant provided a general response to these criticisms in the form of a downstream analysis (Exs. 115 & 125) and a specific response to the two Rogers reports (Exs. 180 & 181). County engineering staff appeared to be satisfied with these responses (Ex. 171).

Proof of current/present downstream system capacity is not a requirement for preliminary site plan approval. While the applicant has demonstrated that the Water's Edge system likely has adequate capacity, that may be just a theoretical design exercise in light of observations of actual plugging, overflows and flooding by people who live there (Exs. 189, 142, 143, 144, 160, 161). Consequently, the Examiner views the applicant's downstream analysis in the record (Exs. 115 & 125) to be more persuasive, credible and probative than the opponents' evidence and arguments.

To be clear, the applicant has not demonstrated that the downstream system has capacity to accommodate stormwater flows from this project. The Examiner is convinced by a preponderance of the evidence in the whole record that the downstream was designed with sufficient capacity to accommodate these additional flows, but the system may not have the capacity that was originally designed. To their credit, the opponents have raised serious concerns about the current and apparently dilapidated condition of the downstream system that the applicant shall address in its downstream analysis. See Conditions A-6c & A-6d. However, the applicant's evidence is sufficient to get it past this preliminary site plan stage and on to the part of the design process where it investigates and documents that the downstream system actually has sufficient capacity to handle these additional flows. In other words, the applicant has shown that basic feasibility is likely or possible, and it should be allowed to proceed to the next stage of the development design process and actually demonstrate the adequacy of the downstream system.

No development application is required to prove at this preliminary stage, and few do prove, actual downstream capacity. That is why this is a preliminary plan review, and the applicant is required to demonstrate basic feasibility, not prove actual downstream system capacity. Information learned from the downstream analysis frequently forces changes – sometimes significant changes – in the final stormwater design plan and often compels the developer to implement significant mitigation measures to restore the downstream system's capacity. There is no prohibition against changing the final stormwater plan during final engineering in light of information learned about the downstream system capacity (or lack thereof). If the downstream system turns out to lack the necessary capacity and it cannot be restored, the County's engineering department will not approve the final engineering plans. In any event, the preponderance of the evidence in this record convinces the Examiner that sufficient downstream system capacity either does exist or can be restored to a sufficient level to handle the stormwater flows from this site, and the applicant is entitled to pursue that detailed investigation and move to the next step in the process.

j) The applicant's stormwater plan relies on inappropriate assumptions:
This argument (Ex. 189) appears essentially to be a duplicate of the previous argument and challenges the applicant's assertion that the Water's Edge system has (or at least was designed with) adequate capacity to handle the additional flows that will be contributed from this site. As previously stated, the applicant's evidence is sufficient on this point as a preliminary demonstration (Exs. 115, 125 & 181) that the downstream system has sufficient capacity, or can be repaired to achieve the necessary capacity. That demonstration, however, will have to be confirmed by County engineering staff at the final plan stage. See Conditions A-6c & A-6d. As such, the Examiner incorporates herein his findings from the previous section in response to this allegation.

k) There is no proof of county ownership of the Water's Edge stormwater system: This argument (Ex. 189) appears to be a duplicate of the previous argument in which the opponents assert that the applicant lacks legal access to the Water's Edge system. The Examiner disagrees and finds that the record, in fact, is sufficient to demonstrate that the applicant has the right to use the components of the stormwater system that were conveyed to the county by way of utility easements (Exs. 128 & 134). In any event, the applicant is required to resolve this uncertainty during the final plan stage. See Condition A-6b. As such, the Examiner incorporates herein his findings from the previous section in response to this allegation.

l) The applicant's stormwater plan constitutes an unlawful sub-basin transfer: The opponents assert that the stormwater plan proposes to divert stormwater out of its current and natural sub-basin into another in violation of CCC 40.380.040(C)(1)(b) (Ex. 152, 190 & 189). Despite the code reference, the operative standards appear to include CCC 40.380.040(C)(1)(b) and (c), which provide:

b. Natural drainage flow routes to streams and wetlands shall be maintained, and discharges from the site shall occur at the natural location and elevation, to the maximum extent practicable.

c. Transfer of runoff from one (1) basin to another shall not be allowed.

It is noteworthy that the only absolute requirement in these standards is to prohibit any transfers from one basin to another. There is no comparable prohibition related to subbasins. It also appears that the opponents engineer is focused on a basin map attached to the stormwater plan approved for the short plat (Ex. 124), rather than the current the commercial development stormwater plan (Exs. 64 & 2, tabs 19 & 20). The first quoted standard requires that maintenance of natural drainage flows "to the maximum extent practicable." Consequently, even if a sub-basin were proposed here, which is not clear, it is not prohibited. Instead, the applicant asserts that it will keep the stormwater runoff from this site within its drainage basin and the final flow patterns "will mimic historic conditions by discharging into the Water's Edge system and ultimately into Rockwell Creek" (Ex. 192, citing Ex. 181). The opponents do not appear to dispute the assertion that this is the direction of the historic flows. To the extent the dispute can be cast as what is a basin or sub-basin, the applicant wins because there is no credible evidence that anything more than a sub-basin transfer will occur, if even that. Finally, the applicant's engineers have asserted that the stormwater plan mimics the historic flow patterns of the site and area (Ex. 181). The Examiner takes this testimony as credible expert testimony that is more persuasive and credible than the opponents' and concludes that the two above-quoted stormwater standards will or can be met.

m) Use of an emergency overflow to 134th and Rockwell Creek stormwater lines is not feasible: The opponents assert, based on their engineer's reports (Exs. 152 & 190), that the proposed use of a ditch along 134th Street is not feasible because the applicant has not documented the capacity of that ditch. The applicant responds that the ditch is basically a dry line that only serves to receive overflows from the 100-year, 24-hour storm event. As such, a downstream capacity analysis of the emergency overflow receiving line is not needed. The Examiner finds that this objection is too speculative to serve as grounds to condition or deny this application and relates only to the emergency overflow. The applicant will be required to perform a downstream capacity analysis prior to final plan approval, and that will be sufficient to address this issue. See Conditions A-6c & 6d.

n) Miscellaneous stormwater objections: In this category, the opponents appear to include a diverse assortment of speculative issues, any one of which, could require a change to the applicant's stormwater design (Ex. 189). The applicant's closing brief does not directly address these issues (Ex. 192). The Examiner views all of these miscellaneous stormwater issues as potentially important, but too speculative at this point to result in denial of the preliminary stormwater plan. In the final stormwater plan some of these issues may prove to be important, in which case, they will be addressed. However, the questions raised in this section do not detract from the applicant's basic showing of feasibility and compliance with the county's stormwater requirements – at least at the preliminary plan stage.

2. Traffic and Transportation Concurrency Issues: The site, located on the east side of NE 27th Avenue, south of NE 134th Street, is in the Salmon Creek transportation moratorium area, which prohibits new development that generates vehicle trips not already accounted for through prior approvals granted prior to or under the moratorium (vested trips).

a) Vested Vehicle Trips: The four parcels that make up the development property were created through a short plat approved in PLD 2003-00074 (Ex. 122), which anticipated a 125,000 sf shopping center, 3,500 sf drive-in bank, and gas station/convenient market with 8 fueling positions. The approval was vested with 540 net new weekday pm peak hour trips. A subsequent post-decision review, PST 2004-00038 (Ex. 122), increased building size and added a fast food restaurant with drive through window, which vested an additional 115 net new weekday pm peak hour trips for a total of 655 vested trips for the site.

The applicant prepared an up-dated trip generation memo for the commercial site plan application (Ex. 2, tab 22), dated July 18, 2005, which estimates 470 pm peak hour trips for the proposed 176,672 sf of retail space. Staff reviewed the report and confirmed that the estimated trip generation (470 pm peak hour trips) will be less than the vested trips for the site (655 pm peak hour trips). The validity of these vested trips, however, is subject to this applicant's compliance with all underlying use assumptions and conditions of the short plat and post decision approvals (PLD 2003-00074 & PST 2004-00038). See Condition E-1. Based on that compliance and the applicant's traffic study, county concurrency staff determined that the proposal met the county's concurrency requirements (Exs. 91 & 99).

Many, in fact most, of the opponents to this project objected on traffic safety and transportation concurrency grounds. Anyone familiar with this area, its street segments and intersections is painfully aware of the horrendous traffic congestion and compromised safety of the area. This is precisely why Clark County adopted and imposed a concurrency moratorium on this area. Under that program, however, the county is legally obligated to recognize vested trips, such as the 655 trips vested for this site so long as the developer fulfills all of the underlying assumptions and complies with all related conditions of approval. The opponents provided several engineering reports challenging the traffic and transportation concurrency aspects of the applicant's proposal (Exs. 101, 136, 177, 191 & 189). The applicant responded to these challenges with multiple engineering reports (Exs. 110, 132, 133, 134, 176, 179), plus a copy of the traffic study that was prepared for the short plat (Ex. 131).

b) The applicant failed to provide current vehicle trip generation studies:
The opponents point to the requirement in CCC 40.350.020(D)(4) for a current traffic count (within 12 months of application submission) to support a transportation impact study ("TIA" – Ex. 189). This code section goes on to allow the Public Works Director to waive the requirement for a TIA, but there is no similar waiver for the traffic count requirement. The opponents assert that this site plan application was not supported by a current traffic count or TIA; although, the opponents have repeatedly confused the two items, *i.e.*, the traffic count requirement with the TIA requirement. According to the opponents, any waiver of the TIA requirement must be in writing and must receive written approval from the Public Works Director.

As a preliminary matter, the traffic count and TIA requirements that opponents point to in CCC 40.350.020(D) are submission requirements and do not appear to be site plan approval criteria. As such, unless compliance with these application submission requirements affect compliance with the mandatory site plan approval criteria, the Examiner does not regard them as approval criteria and they are not, in themselves, a basis for denial of the application. Moreover, any party raising a procedural objection and claiming that the proper submission and application process was not followed must also demonstrate that the procedural violation prejudiced their substantial right to a full and fair hearing. In that light, the Examiner is reluctant to find that such a technical objection can result in the denial of the project so long as the applicable approval standards, as opposed to the procedural submission requirements, are met. The opponents have failed to demonstrate how a failure to comply with an application submission requirement for a site plan application prejudiced their substantial right to a full and fair hearing or precluded a showing of compliance with the mandatory criteria for preliminary site plan.

Even if the Examiner finds that this objection amounts to a substantive violation of the applicable approval criteria, the record does not support the opponents' arguments. Contrary to the opponents' assertions, the record shows that a TIA, based on then-current traffic counts, was prepared for the short plat in 2003 (Ex. 131). Based on that documentation, this site was eventually vested for 655 trips. The site plan for this particular commercial development was then submitted and included an up-dated TIA (Ex. 2, tab 22), based on an up-dated traffic count performed by DKS Associates (Ex. 176). The applicant's trip generation estimates were then revised based on the DKS study of three comparable Wal-Mart Superstores (Vancouver, Woodburn and Salem (contained in Ex. 134). Those data and DKS's summary were then evaluated by Kittelson & Associates Transportation Engineers, who provided conclusions based on

those data (Ex. 134). The objective of the DKS study was not necessarily to provide current and reliable trip generation estimates for the proposed store (although, it did provide that) but more to the point its objective was to verify that the proposed store would generate the same or fewer trips than were estimated and vested for the short plat. In that light, the DKS study, despite its possible defects noted by the opponents, was sufficient. More importantly, the revised TIA (Ex. 2, tab 22) and up-dated reports (Exs. 131, 132, 133 & 134), based on the DKS study, was sufficient documentation for this purpose. The document upon which the Examiner relies for this point is the TIA and professional engineering conclusions it contains, plus the up-dated report (Ex. 134 & 176). The opponents' challenge to the DKS data is not sufficient to undermine those professional engineering opinions and conclusions nor do those objections on balance outweigh the applicant's documentation. As such, the preponderance of the evidence support's the applicant's position, and any defects that the DKS report may contain are not sufficient to outweigh or undermine that evidence.

Finally, the record does not show that the applicant ever requested a waiver of the TIA requirement as anticipated by CCC 40.350.020(D)(8) or that the Public Works Director waived the TIA requirement. There is no requirement in the code that a full or partial waiver of the current traffic count requirement must be requested or granted only in writing. While one may (and the opponents certainly do) quibble about the validity of the up-dated traffic counts provided by DKS Associates, the TIA requirement was met for both the short plat and the present preliminary site plan applications, as was the requirement for current traffic counts. Consequently, the applicant provided all of the documentation required by CCC 40.350.020 for a complete site plan application.

c) The proposal exceeds the trips allowed and exceeds concurrency: This argument is based on a point raised by the opponent's traffic engineer (Exs. 136 & 177), in which he reported a journal article critical of the trip estimates for "Free-Standing Discount Stores" in the ITE Trip Generation Manual. The applicant in this case used the ITE Trip Generation Manual as a basis for trip estimates from this development. The gist of this argument is that the applicant should not have relied on the ITE Trip Generation Manual, but instead should have relied on this journal article that found the ITE Trip Generation Manual tended to underestimate vehicle trips for Free-Standing Discount Stores (Ex. 189). According to the opponents, had the journal article been used, it would have predicted approximately 700 pm peak hour trips, which exceeds the 655 vested trips for this site. The applicant disputes the significance of the journal article cited by the opponents' engineer and asserts that it was legally entitled to rely on the final published ITE Trip Generation Manual.

As a threshold matter, the journal article cited by the opponents appears to be of limited or at least doubtful applicability to this project (Ex. 179). More to the point, the Examiner finds that the applicant was entitled to rely on the most current published ITE Trip Generation Manual, which is an industry standard relied upon by local governments throughout the state. If the Clark County Board of Commissioners were inclined to do so, it could amend the code and require development applicants to ignore the published ITE Trip Generation Manual and rely, instead, on any subsequently published journal articles, but it has not done so. Consequently, the Examiner would be imposing an unlawful requirement on this developer by compelling it to rely on this or any number of other journal articles in estimating trip generation for this proposed store. The Examiner declines to do so and finds that the applicant's trip generation estimates are adequate and comply with the requirements of CCC 40.350.020.

Engineers. The cited exhibits (Exs. 139 & 143) provide little assistance in understanding this point. The Examiner infers that the opponents urge him to believe and accept their traffic counts in the area of this project instead of the applicant's traffic counts and engineering analysis. To the extent that is the opponents' point, the Examiner rejects the argument.

The data contained in the DKS traffic study (Ex. 176) were collected under the supervision of transportation engineers. The applicant's up-dated TIA based on that traffic study (Ex. 2, tab 22) was prepared, reviewed and analyzed by professional transportation engineers. Finally, the specific criticisms lodged by the opponents were also reviewed and answered by professional transportation engineers (Exs. 132, 133, 134 & 179). The opponents' traffic counts were planned and conducted by non-professionals, not under the supervision of anyone with professional experience in performing such counts, and the data was never reviewed or analyzed by anyone with professional experience. The applicant has lodged several objections to the opponents' methods, data and conclusions (Ex. 192), and the Examiner shares those concerns. In the final analysis, the applicant's traffic data, analysis and conclusions are more reliable and credible than those of the opponents. Therefore, the Examiner finds the applicant's reports to be more persuasive, credible and relevant than those of the opponents.

f) The vehicle trips that will likely be generated create a significant impact that warrant additional mitigation or denial: The opponents assert that the proposed development will create, or materially aggravate an existing, off-site traffic safety hazard under CCC 12.05.230, now CCC 40.350.030(B)(6)(a), which provides:

Nothing in this section shall be construed to preclude denial of a proposed development where off-site road conditions are inadequate to provide a minimum level of service as specified in Section 40.350.020 or a significant traffic or safety hazard would be caused or materially aggravated by the proposed development; provided, that the applicant may voluntarily agree to mitigate such direct impacts in accordance with the provisions of RCW 82.02.020.

The opponents point to a substantial number of witnesses and their observations of the traffic safety hazards in the area surrounding the proposed development site (*E.g.*, Exs. 12, 21, 34, 37, 51, 53, 54, 55, 57, 61, 62, 67, 69, 71, 77, 78, 86, 139, 141, 157 & 162).

The Examiner takes at face value the traffic safety and congestion problems at all of the intersections and street segments near this development site. The underlying implicit assumption about this testimony, however, is that these conditions rise to the level of being a "traffic safety hazard," which CCC 40.350.030(B)(6)(a) provides as a basis for denial. The determination of what constitutes a "traffic safety hazard" under this code provision is a matter of suitably qualified professional expertise. However, none of the traffic engineers who have testified in this proceeding, on behalf of the applicants (Exs. 110, 132, 133, 134, 176, 179) or the opponents (Exs. 101, 136, 177, 191), express the professional opinion that any of the near-by intersections rise to the level of being a "traffic safety hazard" under this standard. None of the lay witnesses who provided their personal observations of the current traffic situation is qualified to make this expert determination. Moreover, it is not clear whether a project with vested trips in the Salmon Creek Transportation Concurrency Moratorium Area, is subject to this standard. In any event, the record does not support the conclusion that there is an

Finally, the opponents assert that their traffic counts should be relied upon as more believable than the applicant's traffic counts, trip generation analysis and TIA (Ex. 57). The Examiner rejects this suggestion. First, the opponents who collected these data are not qualified professionals, nor were they working under the direction of a qualified professional. While I don't necessarily require the stamp of a professional engineer on such data before it is deemed credible evidence, the people who collect traffic data, analyze and interpret it must have some relevant experience, and the record indicates that these people have none. For example, it appears that the opponents collected their trip generation data on the day before Thanksgiving (a dubious choice, which appears to invalidate any conclusions that might be drawn from those data), and there is no indication of how these data are to be assessed or analyzed. Consequently, the Examiner accords these data no weight, and the preponderance of the evidence is heavily in the applicant's favor on this point.

d) The applicant relies on unstamped engineering reports: The opponents assert that this application depends upon transportation engineering reports that are not stamped by a Washington licensed Professional Engineer (Ex. 189), and therefore violate RCW 18.43.070 and WAC 196-023-020.

As a threshold matter, neither Clark County, nor the Hearings Examiner administer or enforce RCW 18.43.070 or WAC 196-023-020. The fact that there may be a violation of these state law provisions does not affect the Examiner's review of the evidence under the applicable code provisions. At most, the opponents' allegations, if true, would bear on whether the applicant's unstamped engineering reports constituted credible evidence that a reasonable person would rely upon, i.e., that they are more credible than the opponents' engineering reports. The transportation engineering reports upon which the applicant relies (Exs. 110, 132, 133, 134, 179, & Ex. 2, tab 22) were produced by a reputable engineering firm, and the engineer most conversant with this project (Sagar Onta of Kittelson & Associates) actually appeared at the hearing, provided live testimony and was cross-examined by the opponents' attorney twice. Mr. Onta is a suitably educated, trained and experienced professional engineer (Ex. 130) even though he is not licensed in Washington. The Examiner therefore finds that Mr. Onta's testimony and written reports qualify as credible, reliable expert opinion relevant to the transportation concurrency and traffic safety issues they discuss. To the extent that the applicant may have violated RCW 18.43.070 does not detract from the credibility and persuasive value of the applicant's transportation engineering reports.

The record does not support the opponents' assertions. The TIA for this development (Ex. 2, tab 22), the up-date (Ex. 134), and rebuttal to the opponents' criticisms (Ex. 179) were submitted by Mr. Onta and Marc Butorac. Mr. Butorac is a Washington licensed Professional Engineer who supervised, and apparently reviewed, all traffic engineering documents prepared for this project. In response to the opponents' objection, Mr. Butorac provided stamped copies of the previously submitted (unstamped) engineering reports (Ex. 110). On this basis, the Examiner rejects the opponents' technical point about the engineer's stamp and RCW 18.43.070.

e) The Mill Plain Traffic Study was not adequate: The opponents provide little support or explanation for this objection (Ex. 189, citing Exs. 139 & 143), which apparently disputes the validity of the DKS traffic study (Ex. 176), the counts for which were performed by lay traffic counters and not Washington licensed Professional

existing "traffic safety hazard" at any of the near-by intersections sufficient to implicate the denial authority in CCC 40.350.030(B)(6)(a).

g) The applicant's engineer improperly accounted for pass-by trips: This objection is another challenge to the applicant's trip generation estimate that asserts that the applicant incorrectly accounted for so-called "pass-by" trips (Exs. 136, 189). According to the argument, had the applicant assumed 17.2 % figure instead of the 28% figure that was used, the report would have estimated more trips generated by this development.

The dispute apparently stems from the percent of by-pass trips assumed for different use categories. The proposal consists of a discount retail store with a full-service grocery department. Accordingly, the applicant used use code 813 from the ITE Trip Generation Manual, which provides for a 28% by-pass rate (Ex. 179). The opponents' traffic engineer apparently assumed a free-standing discount store without a full-service grocery department (use code 815 in the ITE Trip Generation Manual), which assumes a 17.2% by-pass trip rate (Exs. 101 & 189).

Because this proposed development is not just a free-standing discount store, but in fact, includes a full-service grocery department, use code 813 (free-standing discount superstore) is the appropriate ITE Trip Generation Manual use code. The current ITE Trip Generation Manual assumes a 28% by-pass trip rate for this use category. Consequently, the Examiner rejects the opponents' argument to the contrary.

h) Safety: Where applicable, the applicant's traffic study shall address the following safety issues:

- Traffic signal warrant analysis,
- Turn lane warrant analysis,
- Accident analysis, and
- Any other issues associated with highway safety.

Mitigation for off-site safety deficiencies may only be a condition of approval on development in accordance with CCC 40.350.030(B)(6), which provides that "nothing in this section shall be construed to preclude denial of a proposed development where off-site road conditions are inadequate to provide a minimum level of service as specified in Section 40.350.020 or a significant traffic or safety hazard would be caused or materially aggravated by the proposed development; provided, that the applicant may voluntarily agree to mitigate such direct impacts in accordance with the provisions of RCW 82.02.020."

i) Traffic Safety Problem at NE 179th Street/Union Road Intersection: The applicant's traffic study for the original commercial short plat (Ex. 131) indicated that some traffic from the proposed development would travel through the intersection of 179th Street and Union Road. County engineering staff reached the following conclusions based on reports previously submitted by CTS Engineers in conjunction with the following land use cases: Huntingdon Manor (PLD2003-00080), Peach Springs (PLD2003-00082), Legacy Place (PLD2003-00081) and Park Avenue Place (PLD2003-00083). In addition, intersection analysis previously conducted by Rob Klug, Clark County traffic engineer, in October 2003.

- The intersection of NE 179th Street and Union Road has a history of angle accidents that is specific to a northbound left turn movement from Union to 179th Street.
- The northbound driver turning left onto NE 179th Street is required to evaluate traffic approaching eastbound through traffic and turning from off-ramp, and southbound traffic from SR-502. With additional traffic, it will be increasingly difficult for drivers to judge the adequacy of gaps and the number of acceptable gaps will decrease.
- The 179th Street westbound traffic stopped at the off-ramp/SR502 signal regularly results in queues extending past Union Road. This queue effectively blocks drivers from making a northbound left turn from Union Road to 179th Street. The distance from the off-ramp to Union Road is approximately 50 to 60 feet. Assuming each vehicle requires 25 feet of space, any more than two vehicles queued will result in the blocking of Union Road. The information submitted by CTS indicated that during specific cycles, the maximum length of queue at the signal was longer than the distance between Union Rd and off-ramp/SR502 signal, 72% or 82% of the time (depending on time of day). The work cited in the October memo by Rob Klug was a true queuing analysis, where the actual length of queue was monitored for an extended period of time. This queuing study showed that the queue formed and was discharged, and overall, the average length of queue was longer than the distance between SR-502 and Union Road approximately half the time. With increased traffic, the westbound queues at the intersection will increase.
- CTS estimates that approximately 40% of the northbound traffic from Union road travels to SR-502. In order to travel this path the drivers are required to weave from Union Road to SR-502 over a short stretch of roadway. This movement results in several potential conflict points. The complexity of this movement is increased with longer queues and increased traffic.
- There is only one northbound approach lane on Union Road. If a northbound left turning vehicle is at the front of the queue it effectively blocks the subsequent cars. The existing 85th percentile queue was reported to be approximately 12 vehicles. The existing average delay for northbound approach was 76 seconds per vehicle. With traffic from the proposed development and approved developments, the delay for drivers will likely increase resulting in a failing level of service for this movement. The County's concurrency model indicates the delay could exceed 2 minutes. As the level of service degrades, drivers will find the delay reaching intolerable levels and therefore will make more hurried judgments and take advantage of substandard gaps in traffic.
- The intersection experiences a greater than average amount of large vehicle traffic. Businesses in the vicinity attract traffic comprised long haul truck trailers and recreational vehicles. These vehicles require a greater amount of space for turning and queuing. They are also slower moving and require larger gaps in traffic to accommodate their movements.

- Staff concluded that with the addition of the proposed development's traffic, a "significant traffic or safety hazard would be caused or materially aggravated by the proposed development".

Based on these concerns, the cited developments were conditioned by to install safety mitigation at the NE 179th Street and Union Road intersection. The NE 15th Avenue road project will provide mitigation at the subject intersection but is not scheduled to begin construction until 2006. Since the safety improvements are assumed in the review for the Salmon Creek Commercial Center, the applicant shall commit (and has committed) to ensure that these safety improvements are constructed prior to the occupancy of the building proposed here. See Condition E-2.

3. Transportation: The following findings relate to the adequacy of the transportation system, streets, circulation, intersections and the like.

a) Pedestrian/Bicycle Circulation: CCC 40.350.101 requires pedestrian circulation facilities that comply with the American with Disabilities Act. NE 134th Street is improved with sidewalk along the development's frontage. The project proposes to construct sidewalk along the frontages of NE Rockwell Road and NE 27th Avenue. Bike lanes are not required along local access roads. The project proposes to construct a right-turn lane into the site on NE 134th Street and that includes a bike lane. On this basis, the Examiner finds that the pedestrian/bicycle circulation proposal complies with CCC 40.350.010.

b) Circulation Plan: NE 134th Street, abutting the property on the north, is the primary access and provides for east-west circulation. NE 27th Avenue to the west of the site, in conjunction with NE Rockwell Road and NE 129th Street, abutting the property on the south, will provide additional cross-circulation in the vicinity, and secondary access to the proposed site. The existing block lengths and block perimeters in the vicinity of the project exceed the maximum lengths provided in CCC 40.350.030(B)(2)(c). Interstate I-205 is located southwest of the site, limiting the possibility of providing for cross-circulation to the southwest of the site. The Water's Edge Condominiums located to the east of project limits the possibility of providing for east-west circulation through the site. The Examiner finds that the existing roadways and proposed improvements will serve this development and allow the future developments to meet the cross circulations standards in compliance with CCC 40.350.030(B)(2).

c) Roads: NE 134th Street, which abuts the project on the north, was recently improved as part of a county road project. It is a four lane arterial with a center median and detached sidewalk. The minimum half-width right-of-way dedication and frontage improvements for an "Urban Minor Arterial" road in accordance with CCC Table 40.350.030-2 and Standards Details Manual, Drawing #6, include:

- A minimum half-width right-of-way of 100 feet
- A minimum half-width roadway of 35 feet
- Curb/gutter, minimum detached sidewalk width of 6, feet and landscaping

Right-of-way dedication and frontage improvements were provided with the county road project, and will not be required of the proposed development. The project

proposes to construct a right turn lane into the site from NE 134th Street within the existing right-of-way. The applicant proposes additional improvements for the required turn lanes. The development shall provide landscaping along the frontage on NE 134th Street. The Examiner finds that the existing and proposed improvements along the frontage of this road, except for lack of landscaping, meet the requirement of CCC chapter 40.350. See Condition A-3a

The existing NE Rockwell Road and NE 129th Street are partially paved narrow roadways in poor conditions. NE Rockwell Road, in accordance with survey for a short plat, Book 2, Page 818, has a 60-foot right-of-way with its southwesterly line being the I-205 right-of-way. The proposed site plans shows the right-of-way of NE 129th Street to be 67 feet. During the review process for the previously approved short plat (PLD2003-00074) for this property, these roads inadvertently were classified as "Neighborhood Circulator" roads. Due to the type of the proposed commercial development, staff finds that these roads will serve vehicular traffic consisting of both passenger cars and heavy trucks. Therefore, these roads shall be constructed to industrial road standards. The potential number of movements in and out of the development from these roads warrants a center-turn lane. The Examiner finds that constructing these roads in accordance with the "Primary Industrial I" road standards shown in Standard Details Manual, Drawing #21 would adequately provide for the traffic generated by the development. Therefore, the required half-width right-of-way and frontage improvements to be provided by the applicant shall include:

- A minimum half-width right-of-way of 30 feet
- A minimum half-width roadway of 21 feet
- Curb/gutter and minimum sidewalk width of 6 feet

The Examiner finds that the minimum half-width improvements along these roads will not be adequate for serving the proposed development. See Condition A-3b. In accordance with CCC Table 40.350.030-6, the minimum centerline radius for flat primary industrial roads is 575 feet. The centerline radius of the exiting curved section of NE 27th Avenue/NE Rockwell Road/NE 127th Street does not conform to this requirement. Realigning these exiting roads due to the existing conditions that include location of I-205 and other properties not owned by this development is not feasible.

d) Access Management: The project proposes five driveways onto the public roads abutting the site. A right-in/right-out/left-in driveway proposed for access onto NE 134th Street, was approved through a road modification procedure as part of the 2003 short plat (PLD 2003-00074, EVR2003-00085). A second access intended for delivery trucks only is proposed on NE Rockwell Road in the southwest corner of the site. The last three driveways are proposed to access the site from NE 129th Street; two appear to be for underground parking with the third in the southeast corner of the site. The easterly driveway onto NE 129th Street is located across from, but not aligned with, the NE 129th Avenue to the south of NE 129th Avenue. The Examiner finds that it will be difficult to align the proposed easterly driveway with NE 129th Street due to the property's limited frontage on NE 129th Street. However, the applicant shall propose a plan that provides safety to the extent possible for the ultimate build-out of this intersection. See Condition A-3c.

Although the road modifications for reduced sight distance and increased width of the proposed truck-delivery driveway onto NE Rockwell Road are approved below

staff remains unconvinced that the applicant has adequately addressed the long-term safety issues due to the location of the proposed driveway access onto NE Rockwell Road. The Examiner shares these concerns. Staff's concern appears to stem from the likelihood that the site's trip generation, when added to trips generated by the future development within the currently undeveloped parcels south of NE 127th Street and east of NE 29th Avenue, eventually will exceed thresholds for a low volume road. Engineering staff does not appear to believe that this problem currently exists or will exist on the near-term, but will likely arise before too long. Therefore, the applicant shall plan for and design the relocation of the proposed delivery driveway so as to meet the applicable standards pertinent to traffic safety and traffic operation at the driveway and along NE 27th Avenue/NE Rockwell Road/NE 127th Street. These plans shall be provided to, reviewed and approved by Engineering staff prior to final site plan approval. Actual construction and relocation of the delivery driveway, according to the approved plans, will be required when NE Rockwell Road between NE 27th Avenue and NE 129th Street no longer functions as a low volume street, *i.e.*, when daily vehicle volumes exceed 600 vehicles per day. See Condition A-3d.

e) Sight Distance: The corner sight distance at the driveway to the southeast of the site is limited due to the curved road section where NE 27th Avenue connects to NE Rockwell Road. The corner sight distance shall be corrected and meet the standards in CCC 40.350.030(B)(8) and CCC Table 40.350.030-11. The applicant has submitted a road modification requesting approval of the reduced corner sight distance to the west for the southwestern driveway. The applicant also requests approval of increased width for this driveway.

f) Road Modification Requests: If a development cannot comply with the Transportation Standards, the applicant may request one or more road modifications according to the procedures and standards in CCC 40.550.010(A)(1). To warrant approval, the road modification request must meet at least one of the following four specific criteria:

- a. *Topography, right-of-way, existing construction or physical conditions, or other geographic conditions impose an unusual hardship on the applicant, and an equivalent alternative, which can accomplish the same design purpose, is available; or*
- b. *A minor change to a specification or standard is required to address a specific design or construction problem, which, if not enacted, will result in an unusual hardship; or*
- c. *An alternative design is proposed which will provide a plan equal to or superior to these standards; or*
- d. *Application of the standards of the Transportation Standards to the development would be grossly disproportional to the impacts created.*

The applicant requested the following two modifications (Ex. 2, tab 23):

1. Modification for reduction of corner sight distance standards of CCC 40.350.030(B)(8)(b) at the driveway onto NE Rockwell Road - The applicant asserts the first requested modification is approvable under the first road modification criterion in CCC 40.550.010(A)(1).

2. A road modification for increased width of the proposed driveway onto NE Rockwell Road from the maximum 40 feet to 73-feet. The applicant asserts that the second modification also meets the first road modification criterion in CCC 40.550.010(A)(1).

g) The First Road Modification: According to the applicant, the site driveway access off of NE Rockwell Dr. between NE 27th Avenue and NE 129th Street has an obstructed sight distance triangle to the northwest. The sight distance obstruction is due to the irregular shape and potential development of the parcel to the northwest of the project site. The applicant attempted unsuccessfully to secure a sight distance easement from the parcel in question. The subject driveway serves truck deliveries only and will have a daily exiting volume of only 10 to 12 trucks including vendor deliveries. The sight distance triangle northwest of the driveway impacts the left turn movements leaving the site and the southbound to eastbound through movement on NE 27th Avenue and Rockwell Road. The sight distance triangle southeast of the driveway is adequate. Considering the potential future development of the adjacent site to the northwest of the subject property, the sight distance to the northwest is approximately 191 feet. The required sight distance per CCC table 40.350.030-11 is 250 feet. Given the geometrics of the roadway and adjacent site conditions, the requirement cannot be met.

The applicant states the posted speed limit on NE 27th Avenue and NE Rockwell Road is 25 mph. The existing centerline radius at the corner of NE Rockwell Road and NE 27th Avenue is 149.5. Per exhibit 3-41 of the AASHTO Policy on Geometric Design of Highways and Streets (2001), the minimum centerline radius for a 25 mph design speed is 165 feet. The existing road does not meet the standard. Given the existing geometric characteristics, staff recommended installation of a "Curve Ahead" advance warning sign in addition to a speed advisory sign of 15 or 20 mph at the approach to the curve. With that, County engineering staff assumed that typical travel speeds through the curve would be less than 25 mph. With the proposed project, the traffic volumes on the southbound to eastbound movement on NE 27th Avenue/NE Rockwell Road/NE 129th Street are expected to be approximately 100 to 125 vehicles during the PM peak hour, with a daily volume of approximately 1,500 vehicles. NE 27th Avenue/NE Rockwell Road/NE 129th Street is not a through road. It currently serves an existing home south of the proposed project, and there is a limited amount of future development anticipated along 129th Street. Upon build-out of the area, ADT volumes are expected to be about 2,000 vehicles per day for the southbound to the eastbound movement along NE 27th Avenue/NE Rockwell Road/NE 129th Street.

The applicant proposes to create a right-only (left-turn prohibited) exit from the site access that will eliminate the need for an unobstructed sight triangle to the northwest. The applicant states the proposed design will allow trucks to exit the site by making a right onto NE Rockwell with minimal impacts to traffic flow. A pork chop-style island will prevent trucks from making a left turn out of the driveway. The pork chop island will have a 6-foot wide pedestrian refuge area to allow pedestrians to cross the access safely, and the applicant will install appropriate signage prohibiting left turns exiting the driveway. The applicant provided a layout of the driveway and pork-chop-island as well as proposed signage (attached to Ex. 91). The proposed improvements remove the potential conflict between left turning vehicles exiting the site and southbound to eastbound traffic on NE 27th Avenue, NE Rockwell Road and NE 129th Street thereby eliminating the need for the standard sight distance triangle northwest of the subject driveway (Ex. 2, tab 23, Exs. 64 & 91). On this basis and with these

conditions, the Examiner finds that this road modification meets the first criterion, and it is approved. as discussed above in Transportation Finding 3d, when NE Rockwell Road no longer functions as a low-volume street, the developer shall immediately reconfigure and/or relocate this driveway to meet then-current standards for the street. See Condition A-3d.

h) The Second Road Modification: A narrative submitted with the addendum to the original road modification proposal indicates that the proposed driveway serves only truck deliveries and not general traffic. A 40-foot driveway width will not accommodate the movement of trucks into and out of the site. The applicant, therefore, proposes to increase this driveway width to 73 feet. This width is required due to the location of the access on a curve, which creates wide turning paths from delivery trucks entering and exiting the driveway. The proposed pork chop island provides a driveway entrance width of 39.4 feet and an exit width of 22.6 feet (Ex. 64).

Staff evaluated both road modifications (Ex. 92), and concurred with the applicant that prohibiting the left turn from the truck delivery driveway will eliminate the potential conflict between the southbound to eastbound traffic and traffic out of the driveway limited to right-turn movements. Therefore, the standard corner sight distance requirements in the northwesterly direction are not applicable to this driveway. Public Works Transportation staff reviewed the plan for the proposed driveway and provided the following comments in its report (Ex. 92) relevant to the truck turning movements, width of the driveway, and stopping sight distance:

- The applicant shall submit a certification prepared and stamped by its traffic engineer documenting that the (off-tracking) clearance between a truck turning out of the driveway and the opposing on-coming lane is at least two feet.
- The applicant shall demonstrate that the movement in and out of the proposed driveway will not interfere with the driveway operations of the adjoining properties.
- NE Rockwell Road is a low volume road, and the number of trips using the driveway is fairly small. The applicant's engineer has certified that the intersection sight triangle is 285 feet, which exceeds the sight triangle for 25 MPH and the safe stopping sight distance requirements. Given the low volume operations of the driveway and Rockwell Road, the 285 feet sight distance in lieu of the full intersection sight distance would be acceptable. However, this acceptance is expressly contingent upon Rockwell Road remaining a low volume road in future, *i.e.*, less than 600 vehicles per day.
- A slightly larger driveway opening is recommended to facilitate easier truck movement. The applicant's engineer shall address the longer pedestrian crossing distance in the design of the driveway's pork chop island, and this recommendation is expressly contingent upon this being a delivery truck access only, and not used by general traffic.
- The signing and striping plan shall be reviewed during the final engineering plan review.

Based on engineering staff's favorable review, and the foregoing findings, which the Examiner adopts as his own, the Examiner approves the requested reduction in corner sight distance in the northwestern direction and the increased width of the proposed driveway. However, consistent with staff's recommendation (Ex. 92), the Examiner is not convinced that the applicant has adequately addressed the potential safety issues due to the location of the proposed driveway access onto NE Rockwell Road. The proposed delivery driveway shall be relocated and/or redesigned to comply with the applicable standards. See Conditions A-3d & A-3e.

4. **Development Code issues:** This category of objections relates to the opponents' characterization of this as a "strip commercial development" under CCC 40.230.010(A)(5) – the last of five purpose statements for the CH zone, which provides:

Highway Commercial (CH) District. These commercial areas are intended to serve large areas of the county, the traveling public and also to recognize areas of existing strip development. These areas are generally located at the interchanges and along state highways and interstates. New commercial areas shall not contribute to additional strip development patterns. Uses allowed in this district may involve drive-in, large space users, outdoor sales, wholesale activities, repair services and other heavy commercial users. This district is limited to the general commercial comprehensive plan designation.

The opponents point to various comprehensive plan provisions (Exs. 153 & 189) in support of their argument that the proposed development is a "strip commercial development," violates and is prohibited by CCC 40.230.010(A)(5).

The first problem with the opponents' strip development argument is that it incorrectly assumes that the purpose statement for this or any other zone constitutes a mandatory approval criterion. Absent some specific statement by the Board of County Commissioners reflected (or included) in the development code, the Examiner rejects the opponents' suggestion that the CH zone purpose statement in CCC 40.230.010(A)(5) is an applicable or mandatory approval criterion for this development. Reliance on comprehensive plan provisions related to income levels and employment issues (Exs. 153 & 189) gets the argument no further because there is nothing in particular about this commercial site plan that relates to these comprehensive plan provisions, nor are they approval criteria for this application.

Second, the opponents incorrectly assume that the proposed development is a strip commercial development or something that might contribute to additional strip development patterns. The opponents have repeatedly suggested that the tenant for this commercial space is Wal-Mart. The applicant has remained evasive about the identity of the tenant, but is clear that the commercial use is a free-standing discount superstore with a full-service grocery department, which fits everyone's understanding of a Wal-Mart supercenter. Even if this were a Wal-Mart superstore, which appears likely, that development style is commonly known as a "big box," which does not fit the Examiner's understanding of "strip commercial development." Regardless, Clark County has adopted no definitive definition or description of strip development, nor has it explicitly prohibited such a development style. At the end of the day, there is no evidence to support the opponents' argument that this proposal constitutes or contributes to strip development, and the Examiner is not inclined to find that the

proposed free-standing discount superstore with a full-service grocery department is a strip development. The only redress for these concerns raised by the opponents is a legislative code change, not this quasi-judicial permit, and the appropriate body for those concerns is the Board of Commissioners.

5. Geotechnical issues: The applicant submitted a geotechnical engineering study dated July 15, 2005, prepared by GeoDesign, Inc. (Ex. 2, tab 19, appendix J, also Ex. 166). This report contains important data, analysis and recommendations for grading, erosion, construction of the proposed driveways, parking area, structures, wet weather construction methods, and onsite drainage. All earthwork, grading, and road construction shall be reviewed during the design phase and monitored during construction by a geotechnical engineer. The project also proposes to place underground stormwater facilities and construct driveways and the parking area near an area of steep slopes to the north east of the site. The original submittal did not specifically address the impacts of the development and placement of the stormwater facilities in this location. Due to this deficiency, staff recommended that the applicant's geotechnical engineer review the final design prior to final plan approval to ensure the development does not adversely impact the steep slopes along the easterly boundary of the site. See Condition A-7a.

The plans do not specifically propose to construct retaining walls. However, staff found that due to the site's topography, construction of retaining walls in some locations might be necessary. In that event, staff recommended a condition echoing the building code requirement that retaining walls taller than 4 feet tall are required to obtain a building permit. See Condition A-7b. The condition also required that all retaining walls be shown in sufficient detail on the engineering plans for Engineering Services to assess their impact on adjacent roads, structures, and public and private utilities.

The opponents cite CCC 40.430.020(A)(4), assert that this site contains a geological hazard, and argue that Condition A-7a improperly defers a geologic hazard study as a condition of approval (Ex. 189). CCC 40.430.020(A) provides that:

The following requirements for development activities in geologic hazard areas list prohibited activities, buffer requirements, and setback requirements. The following section describes required buffers and setbacks, and general requirements for development activities in geologic hazard areas.

1. Development on steep slope hazard areas is regulated to prevent potential landslide damage by placing improvements away from steep slopes and leaving steep slopes in natural vegetation.

2. Development in landslide hazard areas is generally not allowed, and requires buffers that keep vegetation in a natural state on and around the landslide hazard area.

3. Seismic hazards due to liquefaction, ground shaking amplification and landslides exist for large areas of the county. Only detailed site analysis can determine how soils and structures will respond at a particular site. Site investigation requirements of the International Building Code are used to ensure that structures are built to minimum safety

standards based on existing knowledge of earthquake hazard. Section 40.430.020(F) provides additional guidelines describing where site investigations should be required for seismic design.

4. If an applicant wishes to perform development activities not allowed by Sections 40.430.020(D) and (E), a geologic hazard area study meeting the requirements of Section 40.430.030(C)(4) must be completed. The development proposal may be approved, approved with conditions, or denied based on the responsible official's evaluation of the suitability of the mitigation measures proposed by the geologic hazard area study to protect life, safety, and slope stability on abutting properties

And Condition A-7a provides that:

The project shall implement all the recommendations of the geotechnical engineering study dated July 15, 2005, prepared by GeoDesign, Inc., unless further studies present new or different facts. The development plans shall be reviewed by a geotechnical engineer during the final design phase and the work shall be monitored during construction by a geotechnical engineer or his/her designee

As a starting point, it does not appear that the requirements of CCC 40.430 necessarily apply, something that is premised on development within 100 feet of a geological hazard area. In particular, CCC 40.430.010 describes the following situations in which CCC chapter 40.430 applies:

Applicability. This chapter applies to all construction, development, earth movement, clearing, or other site disturbance which requires a permit, approval or authorization from the county in or within one hundred (100) feet of a geologic hazard area except for exempt activities listed in Section 40.430.010(B)(2). Regulated geologic hazards include steep slope hazard areas, landslide hazard areas, seismic hazard areas, and volcanic hazard areas.

There is no evidence in the record, and the opponents do not specify which if any of these characteristics that trigger the applicability of CCC chapter 40.430 exist on this site. In other words, there is no evidence documenting the presence of a steep slope hazard area, landslide hazard area, seismic hazard area or volcanic hazard area on this site. The engineering report submitted by the opponents (Ex. 152) discusses uncompacted fills, soils of questionable stability and liquefaction potential, but does not state that any of the regulated geologic hazards or triggers from CCC 40.430.010 exist here.

The opponents suggest that one of the development activities not allowed by CCC 40.430.020(D) or (E) is proposed here and triggers the Geologic Hazard Area study requirement (Ex. 189). When it comes down to it, however, the most the opponents say is that, under the applicant's stormwater plan, "stormwater is directed into the base of the slope" and that CCC 40.430.020(C) requires that stormwater "should be directed through a water-tight pipe beyond the base of the slope or landslide area and discharged to a suitable drainage way" (Ex. 189). However, CCC 40.430.020(C) does not trigger the Geologic Hazard Area report, and the stormwater issue described does

not create any of the regulated geologic hazards. In the original appeal statement (Ex. 101) the opponents speculate "Possible landslide in stormwater area in northeast corner." However, there is no credible evidence in this record to support the opponents' assertion. Consequently, the Examiner finds no basis for the claim that a Geologic Hazard Area report is required or that any of the regulated geologic hazards exists on this site.

Instead, the applicant's geological report and analysis (Ex. 166) raises several geotechnical concerns and complications for the development of this site. Staff noted these issues, as did the applicant's geotechnical engineer (Exs. 121 & 182), and recommended that these issues be investigated and resolved prior to final site plan. See Condition A-7. The Examiner finds that none of the geotechnical issues alleged by the opponents (Exs. 152, 189, 190), or the applicant for that matter, implicate the mandatory site plan approval standards so as to preclude approval of the preliminary site plan. In conclusion, the Examiner concurs with staff's concerns and approach by imposing conditions of approval that require resolution of these geotechnical issues prior to final site plan. See Conditions A-7a & A-7b.

6. Critical Aquifer Recharge Area: Based on the County GIS, the property is within the Critical Aquifer Recharge Areas ordinance (CARA), Category II. The proposal does not identify the potential uses within the development. If any of the uses are listed in CCC 40.410.020(B), a CARA permit in compliance with CCC chapter 40.410 will be required. Once the specific uses within the building become known, stormwater BMPs may be required in order to meet the requirements of the county's Critical Aquifer Recharge Areas ordinance. This review will take place during the County's review of the final stormwater plan. See Condition A-8.

7. Site Clean-up: The Phase I Environmental Site Assessment report prepared for the site (Ex. 3) indicates that the site contains contamination and undesirable debris left from the past activities on the site. The report indicates that the project site is actively under investigation by the Department of Ecology. The report recommends additional review of DOE files prior to developing a scope of work for a Phase II investigation, which at a minimum will include subsurface investigation to locate an underground storage tank and to determine if potential contamination associated with the underground storage tank exists. Much of this work has apparently been completed as described in the Phase II Environmental Site Assessment (Ex. 4) and Phase III Clean-up Report (Ex. 5). Prior to final grading and construction, the applicant shall document that the site clean-up has been performed in conformance with the requirements of the applicable local, state and federal standards and has been approved by the appropriate agencies. See Condition B-1a.

8. Site Plan review standards: The opponents cite CCC 40.520.040(E)(1)(b) & (c) for the proposition that the site plan cannot be approved "if the site plan application does not comply with one or more of the applicable approval or development standards" (Ex. 189). The opponents' argument presupposes, however, that the plan fails to comply with one or more of the approval or development standards. As described in the following sections, the Examiner finds that all of the applicable site plan development and approval standards, in fact, are met. Consequently, this argument provides no basis to condition or deny this proposal.

a) Approval Criteria: CCC 40.320.010 provides landscaping and screening standards for private property. Perimeter landscaping usually requires native trees of a suitable species planted 30 feet on-center together with 3 or 4 shrubs planted between the trees in addition to an appropriate ground cover. Landscaping type and buffer width are determined by the zoning of the property abutting the development site.

b) Landscaping Standards and the proposed Landscape Plan: The proposed development shall provide the following buffers and landscaping schemes (per Table 40.320.010-1):

1. On the north, the required landscaping is L2³ within a 10-foot wide buffer;
2. On the south, the required landscaping is L2⁴ within a 10-foot wide buffer;
3. On the east, the required landscaping is L4 within a 10-foot wide buffer or L5 within a 15-foot wide buffer width; and,
4. On the west, the required landscaping is L1 within a 5-foot wide buffer.
See Condition A-9a.

The Preliminary Landscaping Plan (Ex. 2, Sheet 6A of 9) could provide adequate screening to support this development when implemented. The plan indicates that, in addition to providing the required landscape screening per county code, the applicant is providing a 6 foot-high wall along the eastern property boundary to provide a physical separation between the proposed commercial development and the residents of Water Edge Condominiums to the east. The Examiner finds that the proposed wall, coupled with a landscape scheme that provides year-round evergreen screening, will adequately buffer the proposed shopping center and residential development and mitigate for the potential noise, light and glare impacts in the area. See Condition A-9b. The applicant shall demonstrate that the proposed landscaping is at least 15% of the total area of the site. See Condition A-9c.

c) Off-Street Parking: Table 40.340.010-4(G)(2) calls for one off-street parking space per 350 sf of the floor area for a commercial retail building. The proposed 176,672 sf retail commercial building requires 505 off-street parking spaces. The applicant is proposing 814 off-street parking spaces, which exceeds the requirement by 309 off-street parking spaces (161.2% of the requirement). The Development Code does not impose a maximum allowable number of off-street parking spaces; therefore, the Examiner lacks the authority to limit the number of parking spaces to no more than what is required. Based on the foregoing, the Examiner finds that the applicant is providing an adequate number of off-street parking spaces according to the Development Code.

d) Handicapped Parking: According to CCC 40.340.010(B)(6) and Table 1106-1, International Building Code (2003 ed, IBC), the applicant shall designate 2% of the total off-street parking provided (or 17 stalls) for the physically handicapped. According to IBC Section 1106-5, at least two parking stalls shall be a van-accessible space. See Conditions A-1d & A-1e. The applicant shall provide wheel stops to ensure that vehicles do not overhang and impact pedestrian access. See Condition A-1f.

³ If a building wall is proposed within 10 feet of a public right-of-way, the required landscape buffer shall be L1, 5 feet for that portion of the street.

⁴ See Footnote 1

- e) Pedestrian Circulation: According to CCC 40.320.010(D)(5)(a) the applicant shall provide pedestrian circulation routes connecting the proposed retail commercial center to NE 134th Street. The applicant shall clearly mark pedestrian crossings to advise motorists to be cautious when driving on the parking lot. See Condition A-1g.
- f) Solid Waste Disposal: The Preliminary Site Plan (Ex. 1, Sheet 2A of 9) shows a designated area (16 feet by 36 feet) to be screened per county code standards for solid waste disposal. The Examiner finds that this standard has been met and that no condition of approval is necessary.
- g) Outdoor Lighting: Outdoor lighting shall be shielded downwards to reduce the level of light and glare perceived beyond the property line, especially along the street frontages of NE 134th Street, NE Rockwell Road and NE 129th Street and the backyards of the residential housing abutting the site to the east and northeast. See Condition A-1h.
- h) Loading Berth(s): Loading and off-loading berths shall be provided consistent with Table 40.340.010-1 for each industrial building proposed in this development. See Condition A-1i.
- i) Signs: All signs erected or otherwise displayed at this site shall comply with the applicable sections of the County's sign code (CCC chapter 40.310). See Condition F-1.
- j) Critical Areas – Habitat Protection (CCC chapter 40.440): County GIS mapping indicates there is riparian habitat on the property. The riparian designation exists because a Department of Natural Resources (DNR) type 5 watercourse is present in the northeastern corner of the property. A DNR type 5 watercourse requires a 150-foot riparian Habitat Conservation Zone (HCZ). The riparian HCZ extends horizontally outward from the ordinary high water mark 150 feet, or to the edge of the 100-year floodplain, whichever is greater. In this case, the former of these two measurements defines the jurisdictional boundaries of the riparian HCZ. The proposed development does not extend past a previously approved habitat line established during a 2003 short plat of the property. Therefore, the proposal complies with CCC chapter 40.440, the Habitat Conservation Ordinance, subject to Conditions A-2a through A-2f.
- k) Fire Marshall Review (Fire Protection): This application was reviewed by the Fire Marshal's Office, which provided comments and suggested conditions of approval (Ex. 25). The developer shall fulfill or otherwise comply with all of these conditions. Where there are difficulties in meeting these conditions or if additional information is required, the developer should contact the Fire Marshal's office immediately.
- l) Building Construction: Building construction occurring subsequent to this application shall be in accordance with the provisions of the county's building and fire codes and the conditions suggested by the Fire Marshal's Office (Ex. 25). Additional specific requirements may be imposed at the time of building construction as a result of the permit review and approval process. See Condition A-11a.

m) Fire Flow: Fire flow in the amount of 2,000 gallons per minute (gpm) supplied at 20 pounds per minute (PSI) for 2 hours duration is required for this application. Clark Public Utilities initially stated that adequate water flow was not available, and the opponents argued that deficiency as an appeal issue (Ex. 101). Since then, however, CPU has revised its comments and indicates that, with some improvements, water flow will be sufficient (Ex. 2, tab 26). The Prior to final site plan approval, the applicant shall submit proof from the water purveyor indicating that the required fire flow is available at the site. If the purveyor cannot provide the required fire flow, then the applicant shall contact the Fire Marshal's office to discuss alternate methods to meet fire flow. Water mains supplying fire flow and fire hydrants shall be installed, approved and operational prior to the commencement of combustible building construction. The fire flow requirement is based on the largest sprinkled building, which is a 176,672 sf type V-B constructed building with an approved fire sprinkler system installed. See Condition A-11b.

n) Fire Hydrants: Fire hydrants are required for this application and shall be located no more than 700 feet apart, and no building shall be further than 500 feet from a fire hydrant as measured along approved fire apparatus access roads. See Condition A-11c.

o) Fire Hydrants: Unless waived by the fire district chief fire hydrants shall be provided with appropriate 'storz' adapters for the pumper connection, and the local fire district chief shall review and approve the exact locations of all fire hydrants. The developer should contact Fire District 6 at 360-576-1195 to arrange for location approval. The applicant shall provide and maintain a 6-foot clear space completely around every fire hydrant. See Condition A-11d.

p) Automatic Sprinklers: An automatic fire sprinkler system is required at the time of construction for buildings subject to this application. Such systems require separate reviews permits and approvals issued by the fire marshal's office. See Condition F-5a. Buildings provided with automatic fire sprinkler systems shall be provided with a minimum of two fire hydrants. One fire hydrant shall be within 100 feet of approved fire department connections to the sprinkler systems. See Conditions A-11e & F-5b.

q) Fire Apparatus Access: Fire apparatus access is required for this application. The roadways and maneuvering areas as indicated in the application adequately provide required fire apparatus access. The developer shall ensure that fire apparatus access roads maintain an unobstructed width of not less than 20 feet, an unobstructed vertical clearance of not less than 13.5 feet, with an all weather driving surface and capable of supporting the imposed loads of fire apparatus. See Condition A-11f.

r) Fire Alarm System: An approved fire alarm system is required at the time of construction for buildings subject to this application. Such systems require separate reviews, permits and approvals issued by the fire marshal's office. See Conditions A-11g & F-5g.

s) Fire Apparatus Connection: Fire department connections (FDC) shall be located remote from the building a distance equal to the height of the building. See Conditions A-11h & F-5h.

t) Public Sewer and Water: Clark Public Utilities (CPU) provides public water and Hazel Dell Sewer District provides sewer services in the area, respectively. A utility review from Clark Public Utilities indicates that sufficient water to support the required fire flow is not available at the site (Ex. 2, tab 26). The utility review from Hazel Dell Sewer District indicates that adequate sewer capacity exists to serve this development (Ex. 2, tab 27). Based on the above, the applicant shall:

1. Demonstrate that adequate fire flow exists to serve this development prior to final engineering and site plan approval. See Condition D-2a.
2. Provide all improvements necessary to extend public water and sewer services to serve this development. See Condition D-2b.

u) Health Department Evaluation Letter: Submittal of a "Health Department Evaluation Letter" is required as part of the Final Construction Plan Review application. If the Evaluation Letter specifies that an acceptable "Health Department Final Approval Letter" must be submitted, the Evaluation Letter will specify the timing of when the Final Approval letter must be submitted to the county, e.g., at Final Construction Plan Review, Final Plan Review or prior to occupancy. The Health Department Evaluation Letter will serve as confirmation that the Health Department conducted an evaluation of the site to determine if existing wells or septic systems are on the site, and whether any structures on the site have been/are hooked up to water and/or sewer. The Health Department Final Approval Letter will confirm that all existing wells and/or septic systems have been abandoned, inspected and approved by the Health Department. See Condition A-10.

v) Removal of Existing Buildings: Two buildings existing on the site will be removed. All demolition wastes must be properly disposed consistent with county demolition permit requirements. The applicant shall provide proof of appropriate waste disposal in the form of receipts to the Health Department with requests for confirmation that the conditions for final site plan approval have been satisfied. See Condition D-2c. If underground storage tanks exist on the property, they must be identified and decommissioned in place consistent with the Uniform Fire Code under permit from the Fire Marshal. Any leaks or contamination must be reported to Washington State Department of Ecology, and proof of removal or abandonment (of the tank) must be submitted to the Health Department prior to final plan approval. See Condition D-2d.

w) Outside storage: While not one of the site plan approval standards, the applicant's representative agreed to a condition prohibiting overnight parking of RVs and land-sea cargo containers. This commitment was made in response to objections from the neighbors during the first hearing and their assertion that Wal-Mart's practices nation-wide include a de-facto RV campground and outside shipping container storage area. These practices would be inconsistent with the surrounding commercial and residential areas, and therefore the Examiner finds that the neighbors' objections are legitimate, albeit not based on any of the County's site plan criteria. The Examiner accepts the applicant's commitment on this point and imposes a corresponding condition of approval. See Condition A-1j.

x) Impact Fees: The site is located in Park Impact Fee (PIF) District 6, Vancouver School District Impact Fee (SIF), and Mount Vista Traffic Impact Fee (TIF) district. The two buildings on the site qualify for impact fees credit. A commercial development is exempt from park and school impact fees; therefore, traffic impact fees

for the Mount Vista District will apply. In accordance with CCC chapter 40.610, the traffic impact fees for Mount Vista TIF district for Salmon Creek Discount Commercial Center is as follows:

1. \$1,609,078.75 TIF for the proposed 176,672 sf discount retail store building in Mount Vista TIF district.
2. The applicant is eligible for TIF credits in the total amount of \$73,472.27 for 2 existing buildings as follows:
 - \$41,675.76 for a 22,121 sf building that was used as a trucking company office and facilities building; and,
 - \$31,796.51 for a 4,424 sf building that was used as a counseling center.
3. Therefore, the total amount of TIF due at building permit issuance is \$1,535,606.48.

The impact fees for lots and development on this plan shall be fixed for a period of three years, beginning from the date of preliminary plan approval, dated _____, and expiring on _____. Impact fees for permits applied for following this expiration date shall be recalculated using the then-current regulations and fees schedules. See Conditions D-3d & E-3.

SEPA DETERMINATION

Based on the application materials and agency comments, staff determined there were no probable significant adverse environmental impacts associated with this proposal that could not be avoided or mitigated through the conditions of approval listed below. Accordingly, the County, as the lead agency, determined that an environmental impact statement was not needed, and issued and published its Determination of Nonsignificance (DNS) for this project on October 31, 2005 (Ex. 17). Multiple comments were received by the November 13, 2005 deadline (Exs. 18, 20, 21, 22 & 24), including comments from governmental agencies (Exs. 19, 23 & 25). Additional citizen comments flooded in over the next month (Exs. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62 & 63). The applicant requested several successive holds on the application (Exs. 59, 93 & 97) in order to supplement the application (Ex. 64, 94, 95, 96). Staff finally issued the Director's decision, approving the Type II site plan and new notice of the DNS (Ex. 99). One additional agency comment (Ex. 100) was received along with a timely appeal by the Fairgrounds Neighborhood Association and its President Bridget Schwarz by the May 23, 2006 comment/appeal deadline. The comments from the Southwest Clean Air Agency (Exs. 23 & 100), Washington Department of Ecology (Ex. 19) and Fire Marshal's Office (Ex. 25), respectively, do not warrant a separate response. The opponents' procedural and substantive SEPA objections are addressed separately in the next sections.

1. **SEPA procedure – Standard of Review and Burden of Proof:** With regard to opponents' SEPA appeal, I am required to accord substantial weight to the Director's

threshold SEPA determination of Nonsignificance. RCW 43.21C.090.⁵ This standard has been interpreted to impose the “clearly erroneous” standard to the review of a threshold DNS decision. *Norway Hill Preservation and Protection Assoc. v. King Cy. Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). Accordingly, I am not permitted to substitute my judgment for that of the Director, but may only disturb the Director’s SEPA determination as “clearly erroneous” if I am “left with the definite and firm conviction that a mistake has been committed.” *Evaline Community Association v Good*, ___ Wash.App ___ (August 20, 2003); *Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988), quoting *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978). In performing this task, I am required to examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision. *Id.* To prevail in a substantive SEPA argument, the opponents have the burden of producing evidence that this project will result in significant unmitigated adverse impacts. To meet this burden, the opponents must do more than claim that not enough was done, not enough was analyzed or that other speculative impacts might occur. *Boehm v. City of Vancouver*, 11 Wash.App 711, 719-720, 47 P.3d 137 (2002). Accordingly, in this SEPA appeal, the appellants have a burden of proof.

2. Adequacy of the county’s notice: The opponents claim the county’s notice violated CCC 40.510.020(D)(4) by stating an incorrect appeal date and failing to include information about perfecting an appeal of the threshold SEPA determination (Ex. 101). In part, this assignment asserts a violation of SEPA procedures, and the code provisions cited by the opponents are procedural in nature. To prevail in a procedural objection, a party must demonstrate that the procedural error was prejudicial and not merely harmless. By “prejudicial” I mean that the procedural error prejudiced the party’s substantial right to a full and fair hearing. In this case, the county’s omission of the information asserted by the opponents was harmless error as evidenced by the fact that the county reissued notice of the original decision (Ex. 99), the opponents perfected a timely appeal, and were provided a de novo appeal process. These procedures cured any possible procedural or technical error that may have occurred. Consequently, this assignment of error is denied.

3. Substantive SEPA Objections: It is important to note that, where, as in this case, the project is also subject to substantive land use regulations and development standards, SEPA is not an appropriate avenue for challenging impacts regulated under those substantive regulations. RCW 43.21C.240; WAC 197-11-158. In this regard, the Examiner specifically finds that the requirements for environmental analysis, protection, and mitigation measures have been adequately addressed in the development regulations and comprehensive plan adopted by Clark County under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules. Where the opponents raise a particular issue as a substantive SEPA argument and the issue is addressed by a land use or development regulation, I will not address separately the issue under SEPA or require any additional mitigation measures under SEPA.

Appellants’ SEPA appeal raises issues related to traffic safety and transportation concurrency (CCC chapter 40.350), stormwater management and system design (CCC

⁵ “In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a “detailed statement”, the decision of the governmental agency shall be accorded substantial weight.” RCW 43.21C.090.

chapter 40.380), the CH zoning regulations (CCC chapter 40.200), the fire code (CCC chapter 15.12), geotechnical issues (CCC chapter 40.430), and site plan standards (CCC chapter 40.520). These issues are adequately addressed by the county's land use and other substantive regulations and will not be readdressed under substantive SEPA. RCW 43.21C.240; WAC 197-11-158.

Appellants' SEPA appeal raises two issues that are not covered by the county's substantive regulations, most notably the appeal alleges incomplete and unavailable information (WAC 197-11-080 & 355) that the county should have obtained and that certain significant impacts are not adequately mitigated (Exs. 101 & 189). With regard to additional information, the opponents assert that the county should obtain and the applicant should be required to provide (1) the identity of the tenant of the proposed store, (2) a/the stormwater report for the Water's Edge Condominium and (3) a current traffic study based on actual and current project information. By way of legal support, the opponents cite WAC 197-11-335, which provides:

The lead agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal (WAC 197-11-055(2) and 197-11-060(3)). The lead agency may take one or more of the following actions if, after reviewing the checklist, the agency concludes that there is insufficient information to make its threshold determination:

(1) Require an applicant to submit more information on subjects in the checklist;

(2) Make its own further study, including physical investigations on a proposed site

(3) Consult with other agencies, requesting information on the proposal's potential impacts which lie within the other agencies' jurisdiction or expertise (agencies shall respond in accordance with WAC 197-11-550); or

(4) Decide that all or part of the action or its impacts are not sufficiently definite to allow environmental analysis and commit to timely, subsequent environmental analysis, consistent with WAC 197-11-055 through 197-11-070.

and WAC 197-11-080(1), which provides that: *"If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies shall obtain and include the information in their environmental documents."*

Underlying the opponents' argument is the assumption that the three items of information are necessary to a full and complete environmental analysis and assessment of the project's impacts. The first item, the identity of the store's tenant, is not relevant to the land use or environmental impacts. Even if the tenant is Wal-Mart, that fact does not say anything definitive about the environmental impacts that would be different than any other similar sized big-box retailer. That fact would not affect the impact analysis associated with a retail store of the size and characteristics of this

proposal. The Examiner finds that, in light of the size and type of use on the site and other physical characteristics of the use as discussed throughout this decision, the identity of the store operator is not material to a full assessment of the environmental impacts. Consequently, this information is not necessary for a full evaluation of this project's environmental impacts.

The second item, the stormwater report for the Water's Edge Condominium, may or may not exist. The original designer of the Water's Edge system has provided some background information about the system that is in the record of this proceeding (Exs. 126, 128 & 143). The applicant has provided a substantial volume and detail of information about the stormwater system for this site and the Water's Edge Condominium site (Ex. 2, tab 19 & 20, Exs. 64, 115, 124, 125, 180 & 181). Consequently, a lot is known about the Water's Edge system. More significant than its original design capacity, is the focused testimony that the Water's Edge stormwater system may be plugged, or otherwise suffer from a reduced capacity due to lack of maintenance over the years. In that light, it may not matter what the original Water's Edge stormwater system design shows. What appears to be most relevant to this environmental assessment is a current evaluation of the system's down-stream capacity and its ability to accommodate the stormwater flows from this development. For that reason, the Examiner finds that imposition of a condition requiring that evaluation is more important than a copy of the original Water's Edge stormwater report. This evaluation must be complete and document that downstream capacity is sufficient to handle the additional flows from this property before final plan approval. See Conditions A-6d & A-6c.

Finally, the third item, a current traffic study based on actual and current project information, is already in the record of this proceeding. The file appears to contain a substantial volume and detail on the trip generation for this site, this specific use, updated trip generation estimates, transportation engineering analyses and traffic reports (Ex. 2, tab 22, Exs. 110, 131, 132, 133, 134, 176 & 179). The critical question with regard to transportation concurrency is whether the use, store size, and configuration proposed in this site plan will generate more vehicle trips than was previously estimated and vested by the short plat (Ex. 179). That question, and the attendant analysis, can be performed, and has been performed, adequately based on the current record. The Examiner disagrees with the opponents that additional information or analysis would provide a better understanding of this project's environmental impacts.

With regard to the cumulative and marginal impacts that the opponents suggest should be evaluated and warrant a full EIS (Ex. 189), the Examiner rejects the argument that there are unassessed environmental impacts or that incremental impacts associated with the various substantive impacts have not been adequately assessed. There is no evidence in this record that this project will facilitate future action nor that it will result in additional impacts beyond what is shown in this record. *Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 81-83, 867 P.2d 686 (1994).

With regard to the opponents' specific justification for a cumulative impacts analysis in this case, the Examiner sees no basis for requiring a programmatic EIS or cumulative impacts analysis of all Wal-Mart stores in the region. This store may or may not begin with a Wal-Mart as a tenant, and, even if it does, Wal-Mart may not last long as a tenant. There is no evidence in the record that the particular operational qualities of a Wal-Mart store are different than those of other big-box retailers. While some Wal-

Mart stores around the country may have been pilloried for particularly bad social, labor or environmental practices, there is no evidence that those practices are corporate policies or likely to occur here. If that were not the case, then Wal-Mart stores would be prohibited throughout Clark County's jurisdiction, and the Examiner is reluctant to infer that policy decision by the Board of Commissioners. There is no legal requirement that an applicant disclose a tenant for its retail space at the preliminary plan stage, and even if it has a tentative tenant for the space, that it divulge the tenant's identity. Finally, these issues and objections are, at best, tangential to the land use and site plan criteria upon which the Examiner is required to base his decision, and the Examiner finds that he lacks the authority to condition or deny this proposal based on these speculative assertions.

The Examiner also rejects the opponents' assertion that there has been a "lackadaisical or subversive" threshold SEPA determination in this case. This Examiner has seldom seen a more complete and detailed accounting of stormwater, transportation, geotechnical and other issues associated with a commercial development. This information is comprehensive, detailed and credible evidence of the impacts this retail store will likely have on the surrounding environment. The Examiner is not convinced by the opponents' reliance on *Gardner v. Pierce County Board of Comm'rs*, 27 Wash.App. 241, 617 P.2d 743 (1980), as "the seminal case on the County's prima facia compliance" with SEPA's requirements. To the contrary, this 27-year old case pre-dates regulatory reform and the advent of the "mitigated determination of non-significance" (MDNS), and is no longer seminal. Moreover, the facts of *Gardner* and *Bellevue v. King County BRB*, 90 Wn.2d 856, 586 P.2d 470 (1978), are significantly different than the facts of this case, and are therefore of limited applicability. For example, in *Gardner* the record was entirely devoid of evidence or engineering information to justify the 2-acre subdivision lots at issue in that case. In *Bellevue*, the BRB failed even to make a threshold determination on the annexations challenged in the appeal.

In contrast to the cases relied on by the opponents, the Examiner finds that the record of this application provides a complete picture of the range and nature of environment impacts, to a high degree of technical detail, and is sufficient to determine this project's likely environmental impacts. The record does not reveal any significant environmental impacts for which there is not sufficient information. The impacts about which the opponents complain are either thoroughly addressed in the record and regulated by the county's substantive development standards, e.g., stormwater, traffic, geologic hazards, etc., or are too speculative and tenuous to be regarded as likely impacts, e.g., impacts based on Wal-Mart being the tenant. Given the project's design and the conditions attached to the land use decision, the Examiner finds that impacts identified by the public, county staff and the opponents will be mitigated sufficiently. As such, the county has made a prima facia compliance with SEPA's requirements, and the opponents have not met their burden of demonstrating that the project will result in a significant adverse environmental impact that is not otherwise mitigated. *Boehm v. City of Vancouver, supra*.

Based on the foregoing findings, the Examiner denies the opponents' SEPA appeal (both procedural and substantive objections), and the County's SEPA determination of no significant impact is final.

V. Decision and Conditions:

Based on the foregoing findings and except as conditioned below, this application is approved in general conformance with the applicant's preliminary site plan (Ex. 1) and the related plans, reports and proposal (Ex. 2) as subsequently amended and revised by the applicant (Exs. 64 & 134). The approval is granted subject to the requirements that the applicant, owner or subsequent developer (the "developer") shall comply with all applicable code provisions, laws and standards and the following conditions. These conditions shall be interpreted and implemented consistently with the foregoing findings.

A	Final Construction/Site Plan Review Review & Approval Authority: Development Engineering
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Prior to construction, a Final Construction/Site Plan shall be submitted for review and approved, consistent with the approved preliminary plan and the following conditions of approval:

A-1 Land Use:

- a. When proposed, open-air activities shall comply with the requirements of Table 40.320.010-1(19)(C).
- b. The developer shall demonstrate that outdoor storage and the screening for outdoor storage (if proposed) are appropriately located to minimize potential impacts to traffic flow on the development site and to the surrounding properties.
- c. The developer shall comply with all applicable development standards in the Highway Commercial (CH) District including minimum yard setbacks, minimum yard setbacks adjacent to residential district, maximum building coverage and maximum building height. See CCC 40.230.010-3.
- d. Handicapped Parking: The developer shall mark 2% of the off-street parking spaces provided as handicapped parking.
- e. Handicapped Parking: The developer shall identify and mark two handicapped parking spaces as van accessible (per IBC Section 1106-5).
- f. Handicapped Parking: The developer shall provide wheel stops to ensure that vehicles do not overhang and impact pedestrian access.
- g. Pedestrian Circulation: The developer shall provide pedestrian circulation connecting the development site to NE 134th Street, NE 129th Street and NE Rockwell Road.
- h. Light and glare: Outdoor lighting shall be shielded down to reduce the amount of light and glare perceived beyond the property boundary, especially along the frontage of Rockwell Road and the eastern side yard abutting the residential development.
- i. Loading berth: The developer shall provide loading and off-loading berths consistent with the standards in Table 40.340.010-1 for the proposed discount retail store.

- j. RV and cargo container parking: Outside storage of land/sea cargo containers and overnight parking of recreational vehicles (RVs) are prohibited.

A-2 Critical Areas – Final Plans and Covenants:

- a. The developer shall implement the Habitat Buffer Compensation Plan, submitted by The Resource Company, Inc., dated March 9, 2004, as approved under HAB 2003-00256.
- b. A copy of this mitigation plan shall be available on site during construction, for inspection by Clark County development inspection personnel.
- c. All required mitigation shall be completed prior to Final Site Plan approval, unless otherwise postponed through the establishment of a performance/maintenance bond, escrow account, or other financial guarantee acceptable to the Planning Director.
- d. All other conditions of approval identified in HAB 2003-00256 shall be adhered to.
- e. The developer shall enter all remaining habitat areas into a Habitat Conservation Covenant prior to Final Site Plan approval.
- f. Any further clearing or development activities causing greater impacts than what is approved on the preliminary plans will be subject to additional review and possible mitigation under a new Habitat Permit.

A-3 Final Transportation Plan/On-Site: The developer shall submit and obtain County approval of a final transportation plan designed in conformance with CCC chapter 40.350 and the following additional requirements:

- a. The developer shall install landscaping along the frontage on NE 134th Street in conformance with Section G of the Standard Details Manual.
- b. Right-of-way and frontage improvements along NE Rockwell Road and NE 129th Street shall conform to "Primary Industrial I" road standards as shown in Standard Details Manual, Drawing #21. The developer shall improve the road with a minimum of two travel lanes and a center turn lane to accommodate the volume and type of vehicular traffic generated by the development.
- c. The developer shall make efforts to align the proposed driveway in the southeast corner of the site with NE 29th Avenue to the south of the proposed driveway and propose a plan that provides safety to the extent possible for the ultimate build-out of this intersection.
- d. The proposed delivery driveway onto NE Rockwell Road shall be limited to delivery trucks only (not customer or employee traffic). The developer shall design an alternate location plan and/or configuration for the delivery driveway that meets the applicable standards pertinent to traffic safety and traffic operation at the driveway and along NE 27th Avenue, NE Rockwell Road and NE 127th Street. These plans shall be provided to, reviewed and approved by Engineering staff prior to final site plan approval. The developer shall construct and/relocate

the driveway according to the approved plans, when NE Rockwell Road between NE 27th Avenue and NE 129th Street no longer functions as a low volume street, *i.e.*, when daily vehicle volumes exceed 600 vehicles per day. See Transportation Finding 3d.

- e. Until such time as NE Rockwell Road between NE 27th Avenue and NE 129th Street no longer functions as a low volume street, the delivery truck driveway's current location is acceptable as permitted in the first road modification approved as part of this decision. See Transportation Finding 3g. To use this driveway in its current location pursuant to the road modification approvals, the developer shall provide the following documentation (see Transportation Finding 3h):
- 1) The applicant shall submit a certification prepared and stamped by its traffic engineer documenting that the (off-tracking) clearance between a truck turning out of the driveway and the opposing on-coming lane is at least two feet.
 - 2) The applicant shall demonstrate that the movement in and out of the proposed driveway will not interfere with the driveway operations of the adjoining properties.
 - 3) NE Rockwell Road is a low volume road, and the number of trips using the driveway is fairly small. The applicant's engineer has certified that the intersection sight triangle is 285 feet, which exceeds the sight triangle for 25 MPH and the safe stopping sight distance requirements. Given the low volume operations of the driveway and Rockwell Road, the 285 feet sight distance in lieu of the full intersection sight distance would be acceptable. However, this acceptance is expressly contingent upon Rockwell Road remaining a low volume road in future, *i.e.*, less than 600 vehicles per day.
 - 4) A slightly larger driveway opening is recommended to facilitate easier truck movement. The applicant's engineer shall address the longer pedestrian crossing distance in the design of the driveway's pork chop island, and this recommendation is expressly contingent upon this being a delivery truck access only, and not used by general traffic.
 - 5) The signing and striping plan shall be reviewed during the final engineering plan review.

A-4 Final Transportation Plan/Off Site (Concurrency): The developer shall submit and obtain County approval of a final transportation plan designed in conformance with CCC chapter 40.350 and the above-stated conditions of this preliminary site plan approval.

A-5 Transportation:

- a. Signing and Striping Plan: The developer shall submit a signing and striping plan and a reimbursable work order, authorizing County Road Operations to perform any signing and pavement striping required within the County right-of-way. This plan and work order shall be approved by the Department of Public Works prior to final site plan approval.

- b. **Traffic Control Plan:** Prior to issuance of any building or grading permits for the development site, the developer shall obtain written approval from Clark County Department of Public Works of the developer's Traffic Control Plan (TCP). The TCP shall govern all work within or impacting the public transportation system.

A-6 Final Stormwater Plan: The developer shall submit and obtain County approval of a final stormwater plan for on and off-site facilities (as applicable), designed in conformance with CCC chapter 40.380 and the following additional requirements:

- a. If any of the future activities within any portions of the proposed development site are listed in CCC 40.380.040(B)(7), appropriate type of oil/water separators shall be provided.
- b. Stormwater discharge leaving the site at any location shall not exceed the allowable runoff rates in the direction of the historical drainage paths. The developer shall submit evidence that demonstrates that either:
 - 1) The developer has legal right to use the private downstream conveyance system; or
 - 2) Purchase the right to use this system; or
 - 3) Propose and receive approval of an alternative plan for releasing allowable runoff from the proposed stormwater detention system.
- c. The developer shall investigate the downstream stormwater system and submit documentation demonstrating that the downstream storm facilities are capable of receiving runoff from this development. If the downstream system is plugged to the extent that no longer has its original capacity, the developer shall either correct the deficiency and restore the needed downstream system capacity to accommodate the additional flows from this development. See Stormwater Finding 5.
- d. Analysis of the off-site water quality impacts extending a minimum of one-fourth of a mile downstream from the development site will be required. See Stormwater Finding 5.

A-7 Geotechnical: The construction plans shall conform to the following conditions:

- a. The project shall implement all recommendations of the geotechnical engineering study dated July 15, 2005, prepared by GeoDesign, Inc., unless further studies present new or different facts. The development plans shall be reviewed by a geotechnical engineer during the final design phase, and the work shall be monitored during construction by a geotechnical engineer or his/her designee.
- b. Retaining walls greater than 4 feet tall will require a building permit. All retaining walls shall be shown in sufficient detail on the engineering plans for Engineering Services to assess their impact on adjacent roads, structures, and public and private utilities. See Geotechnical Finding 5.

- A-8 Critical Aquifer Recharge Area (CARA):** If any of the activities listed in CCC 40.410.020(B) are proposed on this site, the developer shall obtain a CARA permit in compliance with CCC chapter 40.410.
- A-9 Final Landscape Plan:** The developer shall submit and obtain county approval of final landscape plan designed in accordance with CCC chapter 40.320, and the following conditions of approval:
- a. Landscaping plan: The developer shall implement the following landscaping plan:
 - On the north, the required landscaping is L2 within a 10-foot buffer;
 - On the south, the required landscaping is L2 within a 10-foot buffer;
 - On the east, the required landscaping is L4 within a 10-foot buffer or L5 within a 15-foot buffer; and
 - On the west, the required landscaping is L1 within a 5-foot buffer.
 - b. The developer shall demonstrate that the proposed landscape plan covers at a minimum, 15% of the site.
 - c. The developer shall construct a 6-foot high wall along the eastern property boundary as proposed to provide additional screening between this development and the abutting residential development.
- A-10 Health Department Review:** Submittal of a "Health Department Project Evaluation Letter" is required as part of the Final Construction Plan Review or early grading application. If the Evaluation Letter specifies that certain actions are required, the Evaluation Letter will specify the timing of when those activities must be completed, *e.g.*, prior to Final Construction Plan Review, construction, Provisional Acceptance, Final Plan Review, building permit issuance, or occupancy, and approved by the Health Department.
- A-11 Fire Marshal Requirements:**
- a. Building construction: Building construction occurring subsequent to this application shall be in accordance with the provisions of the county's building and fire codes and the conditions suggested by the Fire Marshal's Office (Ex. 25). Additional specific requirements may be imposed at the time of building construction as a result of the permit review and approval process.
 - b. Fire Flow: Fire flow in the amount of 2,000 gallons per minute (gpm) supplied at 20 pounds per minute (PSI) for 2 hours duration is required for this application. Prior to final site plan approval, the developer shall submit proof from the water purveyor indicating that the required fire flow is available at the site. If the purveyor cannot provide the required fire flow, then the developer shall contact the Fire Marshal's office to discuss alternate methods to meet fire flow. Water mains supplying fire flow and fire hydrants shall be installed, approved and operational prior to the commencement of combustible building construction.

- c. Fire Hydrants: Fire hydrants are required for this application and shall be located no more than 700 feet apart and no building shall be further than 500 feet from a fire hydrant as measured along approved fire apparatus access roads.
- d. Fire Hydrants: Unless waived by the fire district chief fire hydrants shall be provided with appropriate 'storz' adapters for the pumper connection, and the local fire district chief shall review and approve the exact locations of all fire hydrants. The developer should contact Fire District 6 at 360-576-1195 to arrange for location approval. The developer shall provide and maintain a 6-foot clear space completely around every fire hydrant.
- e. Automatic Sprinklers: An automatic fire sprinkler system is required at the time of construction for buildings subject to this application, which requires a separate review permit and approval issued by the fire marshal's office. Buildings provided with automatic fire sprinkler systems shall be provided with a minimum of two fire hydrants. One fire hydrant shall be within 100 feet of approved fire department connections to the sprinkler systems
- f. Fire Apparatus Access: Fire apparatus access is required for this application. The roadways and maneuvering areas as indicated in the application adequately provide required fire apparatus access. The developer shall ensure that fire apparatus access roads maintain an unobstructed width of not less than 20 feet, an unobstructed vertical clearance of not less than 13.5 feet, with an all weather driving surface and capable of supporting the imposed loads of fire apparatus.
- g. Fire Alarm System: An approved fire alarm system is required at the time of construction for buildings subject to this application, which requires a separate review, permit and approval issued by the fire marshal's office.
- h. Fire Apparatus Connection: Fire department connections (FDC) shall be located remote from the building a distance equal to the height of the building.

A-12 Other Documents Required – Developer's Covenant: With the Final Construction or Site Plan, the developer shall submit for recording a Developer's Covenant that specifies the following Responsibility for Stormwater Facility Maintenance: For stormwater facilities for which the county will not provide long-term maintenance, the developer shall make arrangements with the existing or future (as appropriate) occupants or owners of the subject property for assumption of maintenance to the county's Stormwater Facilities Maintenance Manual as adopted by CCC chapter 13.26A. The responsible official prior to county approval of the final stormwater plan shall approve such arrangements. The county may inspect privately maintained facilities for compliance with the requirements of this chapter. If the parties responsible for long-term maintenance fail to maintain their facilities to acceptable standards, the county shall issue a written notice specifying required actions to be taken in order to bring the facilities into compliance. If these actions are not performed in a timely manner, the county shall take enforcement action and recover from parties responsible for the maintenance in accordance with CCC chapter 32.04.0.

A-13 Excavation and Grading: Excavation/grading shall be performed in compliance with Appendix Chapter J of the 2003 International Building Code (IBC); and,

drainage facilities shall be provided, in order to ensure that building foundations and footing elevations can comply with CCC 14.04.252.

B	Prior to Construction of Development Review & Approval Authority: Development Inspection
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Prior to construction, the following conditions shall be met:

- B-1 Pre-Construction Conference:** Prior to construction or issuance of any grading or building permits, a pre-construction conference shall be held with the County; and,
 - a. Prior to construction, the developer shall provide evidence that the clean-up of the contaminated portion of the site has been completed.
 - b. Prior to construction, fire flow in the amount of 2,000 gallons per minute supplied at 20 psi for 2 hours duration is required for this application. The developer shall install additions to water mains supplying fire flow and fire hydrants, which shall be approved and operational prior to final site approval.
- B-2 Erosion Control:** Prior to construction, erosion/sediment controls shall be in place. Sediment control facilities shall be installed that will prevent any silt from entering infiltration systems. Sediment controls shall be in place during construction and until all disturbed areas are stabilized and any erosion potential no longer exists.
- B-3 Erosion Control:** Erosion control facilities shall not be removed without County approval.

C	Provisional Acceptance of Development Review & Approval Authority: Development Inspection
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Prior to provisional acceptance of development improvements, construction shall be completed consistent with the approved final construction/site plan and the following conditions of approval:

- C-1 Land Use:** See Conditions A-1, A-2 & A-10.
- C-2 Wetlands and Buffers:** The developer shall install permanent physical demarcation, e.g., fencing, hedgerows, berms etc. along the boundaries in a manner approved by the Development Services Manager and shall post approved signs on each lot or every 100 feet of the boundary, whichever is less.
- C-3 Fire Marshal Requirements:** Building construction occurring subsequent to this application shall be in accordance with the provisions of the county's building and fire codes. Additional specific requirements may be imposed at the time of building construction as a result of the permit review and approval process.

D	Final Site Plan Review Review & Approval Authority: Development Engineering
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Prior to final plan approval and recording, the following conditions shall be met:

D-1 Land Use Review: See Conditions A-1, A-2 & A-10.

D-2 Health Department Signature Requirement:

- a. The developer shall provide documentation that adequate fire flow exists to serve this development prior to final engineering and site plans approval.
- b. The developer shall provide all improvements necessary to extend public water and sewer services to serve this development.
- c. All demolition wastes shall be properly disposed consistent with county demolition permit requirements. The developer shall provide proof of appropriate waste disposal in the form of receipts to the Health Department with requests for confirmation that the conditions for final plan approval have been satisfied.
- d. If underground storage tanks exist on the property, the developer shall decommission those tanks consistent with the Uniform Fire Code under permit from the Fire Marshal and identify their location on the final plan. Any leaks or contamination shall be reported to Washington State Department of Ecology, and proof of removal or abandonment (of the tank) shall be submitted to the Health Department prior to final plan recording.

D-3 Developer Covenant: A "Developer Covenant to Clark County" shall be submitted for recording to include the following:

- a. Critical Aquifer Recharge Areas: "The dumping of chemicals into the groundwater and the use of excessive fertilizers and pesticides shall be avoided. Homeowners are encouraged to contact the State Wellhead Protection program at (206) 586-9041 or the Washington State Department of Ecology at 800-RECYCLE for more information on groundwater /drinking supply protection."
- b. Erosion Control: "Building Permits for lots on this site plan shall comply with the approved erosion control plan on file with Clark County Building Department and put in place prior to construction."
- c. Archaeology: "If any cultural resources are discovered in the course of undertaking the development activity, the Office of Archaeology and Historic Preservation in Olympia and Clark County Community Development shall be notified. Failure to comply with these State requirements may constitute a Class C Felony, subject to imprisonment and/or fines."
- d. Impact Fees: "In accordance with CCC chapter 40.610, the Traffic Impact Fee for the proposed 176,672 sf discount retail store building in Mount Vista TIF district is \$1,535,606.48. The impact fee for this development shall be fixed for a period of three years, beginning from the date of preliminary plan approval, dated _____, and expiring on _____. Impact fees for permits applied for following said expiration date shall be recalculated and assessed using the then-current regulations and fees schedule."

D-4 Addressing: At the time of final plan any existing residence(s) that will remain may be subject to an address change. Addressing will be determined based on point of access.

D-5 Site Plan Notes: The following notes shall be placed on the final site plan:

- a. **Wetland Covenants:** "Clark County Wetland Protection Ordinance (Clark County Code Chapter 40.450) requires wetlands and wetland buffers to be maintained in a natural state. Refer to Conservation Covenant (Ref # __) recorded with the Clark County Auditor for limitations on the maintenance and use of the wetland and wetland buffer areas identified on the face of this site plan."
- b. **Wetland Development Envelopes:** "No 'regulated activities' as defined in the Wetland Protection Ordinance (Clark County Code Chapter 40.450) shall occur outside of the development envelopes shown on the face of this site plan without prior approval from the County Planning Director."
- c. **Sidewalks:** "Prior to issuance of occupancy permits, sidewalks shall be constructed along all the respective lot frontages. Sidewalks are attached except along the frontage of (insert street name) which is detached."
- d. **Utilities:** "An easement is hereby reserved under and upon the exterior 6 feet at the front boundary lines of all lots for the installation, construction, renewing, operating and maintaining electric, telephone, TV, cable, water and sanitary sewer services. Also, a sidewalk easement, as necessary to comply with ADA slope requirements, shall be reserved upon the exterior 6 feet along the front boundary lines of all lots adjacent to public streets."
- e. **Driveways:** "All residential driveway approaches entering public roads are required to comply with CCC chapter 40.350."

E	Building Permits Review & Approval Authority: Customer Service
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Prior to issuance of a building permit, the following conditions shall be met:

- E-1 Impact Fees:** In accordance with CCC 40.610, the developer shall pay a Traffic Impact Fee for the proposed 176,672 sf discount retail store building in Mount Vista TIF district in the amount of \$1,535,606.48. If the building permit application is made more than three years following the date of preliminary site plan approval, the impact fees shall be recalculated and assessed according to the then-current rate.

F	Occupancy Permits Review & Approval Authority: Building
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Prior to issuance of an occupancy permit, the following conditions shall be met:

- F-1 Land Use and Critical Areas:** See Conditions A-1, A-2 & A-10
- F-2 Sign Code:** Any sign proposed must comply with the applicable sections of CCC chapter 40.310 (Signs Ordinance).
- F-3 Transportation Concurrency (compliance with prior approvals):** The developer shall comply with the conditions of approval set forth in the decisions for the PLD2003-00074 and PST 2004-00038.

F-4 Transportation Concurrency (assurance of off-site improvements): The developer shall ensure the installation of safety measures with all related features, at the intersection of NE 179th Street/NE Union Road in accordance with approved plans. The improvements shall be operational prior to issuance of occupancy permits, unless directed otherwise by the Director of Public Works.

F-5 Fire Marshal Requirements:

- a. Automatic Sprinkler: An automatic fire sprinkler is required at the time of construction for buildings subject to this application. Such systems require separate reviews permits and approvals issued by the fire marshal's office.
- b. Fire Sprinklers: Buildings provided with automatic fire sprinkler systems shall be provided with a minimum of two fire hydrants. One fire hydrant shall be within 100 feet of approved fire department connections to the sprinkler systems.
- c. Fire Alarm System: An approved fire alarm system is required at the time of construction for buildings subject to this application, which requires a separate review, permit and approval issued by the fire marshal's office.
- d. Fire Apparatus Connection: Fire department connections (FDC) shall be located remote from the building a distance equal to the height of the building.

G	Development Review Timelines
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G-1 Final Site Plan - Within 5 years of the effective date of this decision, the developer shall submit to the Planning Director a fully complete final site plan consistent with CCC 40.540.070 and the requirements of this preliminary site plan approval. Otherwise, this preliminary plan approval shall automatically expire and become null and void.

Date of Decision: July 27, 2007.

By: 

Daniel Kearns,
Land Use Hearings Examiner

NOTE: Only the Decision and Conditions of approval are binding on the applicant, owner or subsequent developer of the subject property as a result of this Order. Other parts of the final order are explanatory, illustrative or descriptive. There may be requirements of local, state or federal law or requirements which reflect the intent of the developer, county staff, or the Hearings Examiner, but they are not binding on the applicant as a result of this final order unless included as a condition of approval.

Notice of Appeal Rights

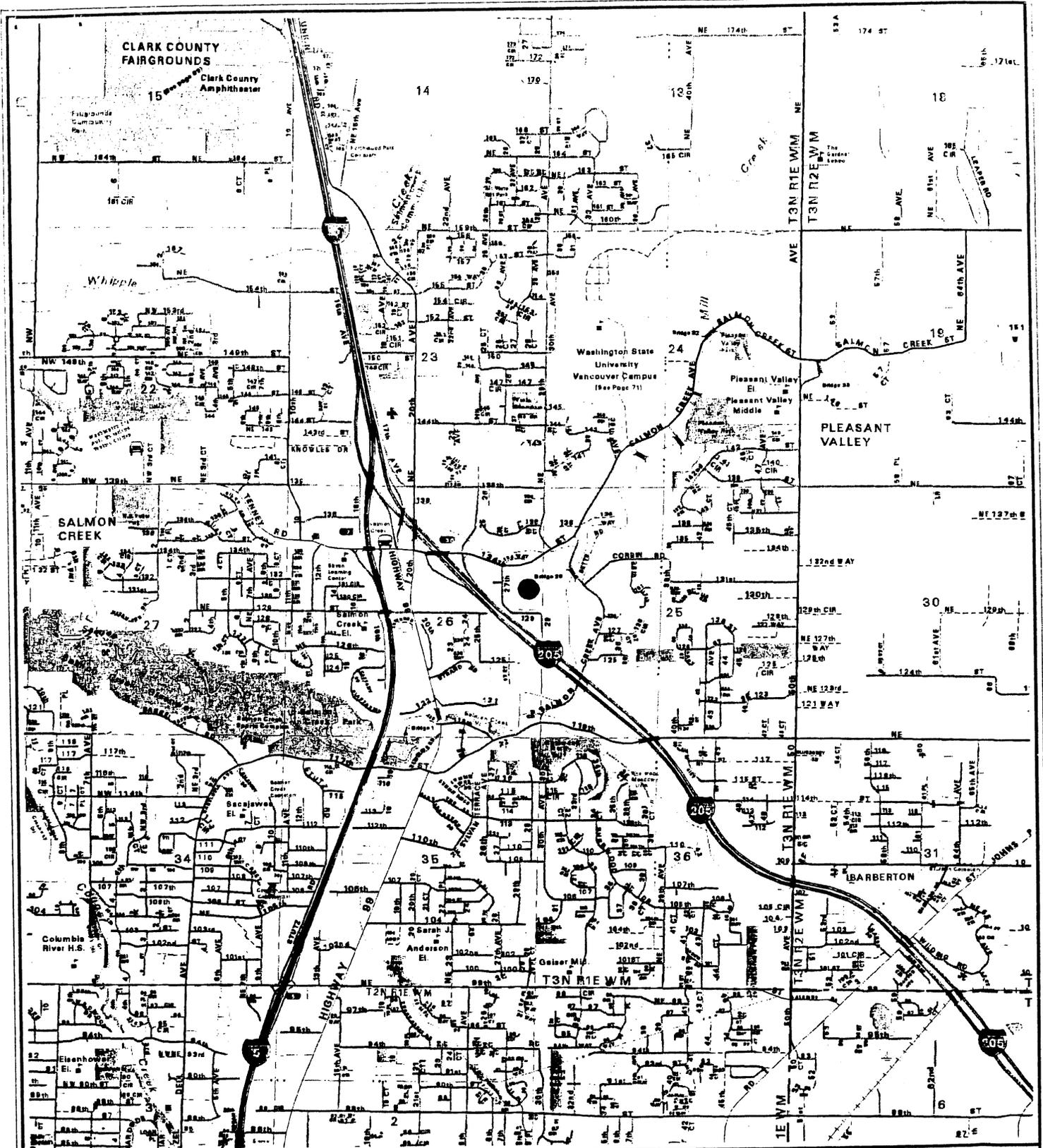
An appeal of any aspect of the Hearings Examiner's decision, except the SEPA determination, may be appealed to the Board of County Commissioners only by a party

of record. A party of record includes the applicant and those individuals who signed the sign-in sheet or presented oral testimony at the public hearing or submitted written testimony prior to or at the public hearing on this matter.

Any appeal of the final land use decisions shall be filed with the Board of County Commissioners, 1300 Franklin Street, Vancouver, Washington, 98668 within 14 calendar days from the date the notice of final land use decision is mailed to parties of record.

Any appeal of the Land Use Hearings Examiner's final land use decision shall be in writing and contain the following:

1. The case number designated by the County and the name of the applicant;
2. The name and signature of each person or group (petitioners) and a statement showing that each petitioner is entitled to file an appeal as described under Section 40.510.030(H) of the Clark County Code. If multiple parties file a single petition for review, the petition shall designate one party as the contact representative with the Development Services Manager. All contact with the Development Services Manager regarding the petition, including notice, shall be with this contact person;
3. The specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error;
4. If the petitioner wants to introduce new evidence in support of the appeal, the written appeal must also explain why such evidence should be considered, based on the criteria in subsection 40.510.030(H)(3)(b); and
5. A check in the amount of \$286.00 (made payable to the Clark County Board of County Commissioners) must accompany an appeal to the Board.



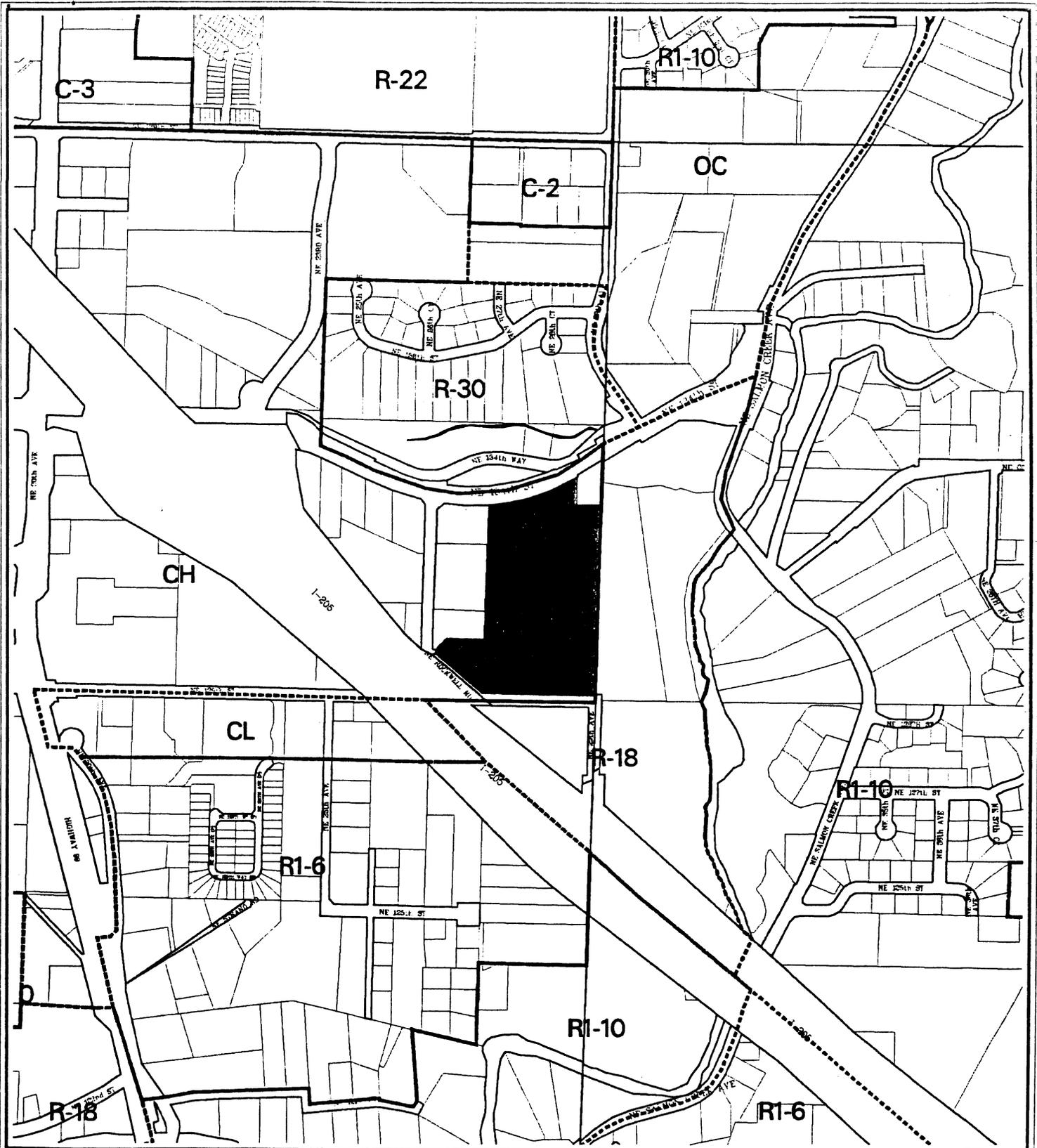
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 Location: T3N R1E SEC 26
 Appeal/Appeal to the Board

● Subject Property Location



Originals - GIS - 11/16/11 1:108

002484



File # APL2006-00011, SN 186783000 186808000 186810000 186829000

Location: T3N R1E SEC 26

Appeal/Appeal to the Board

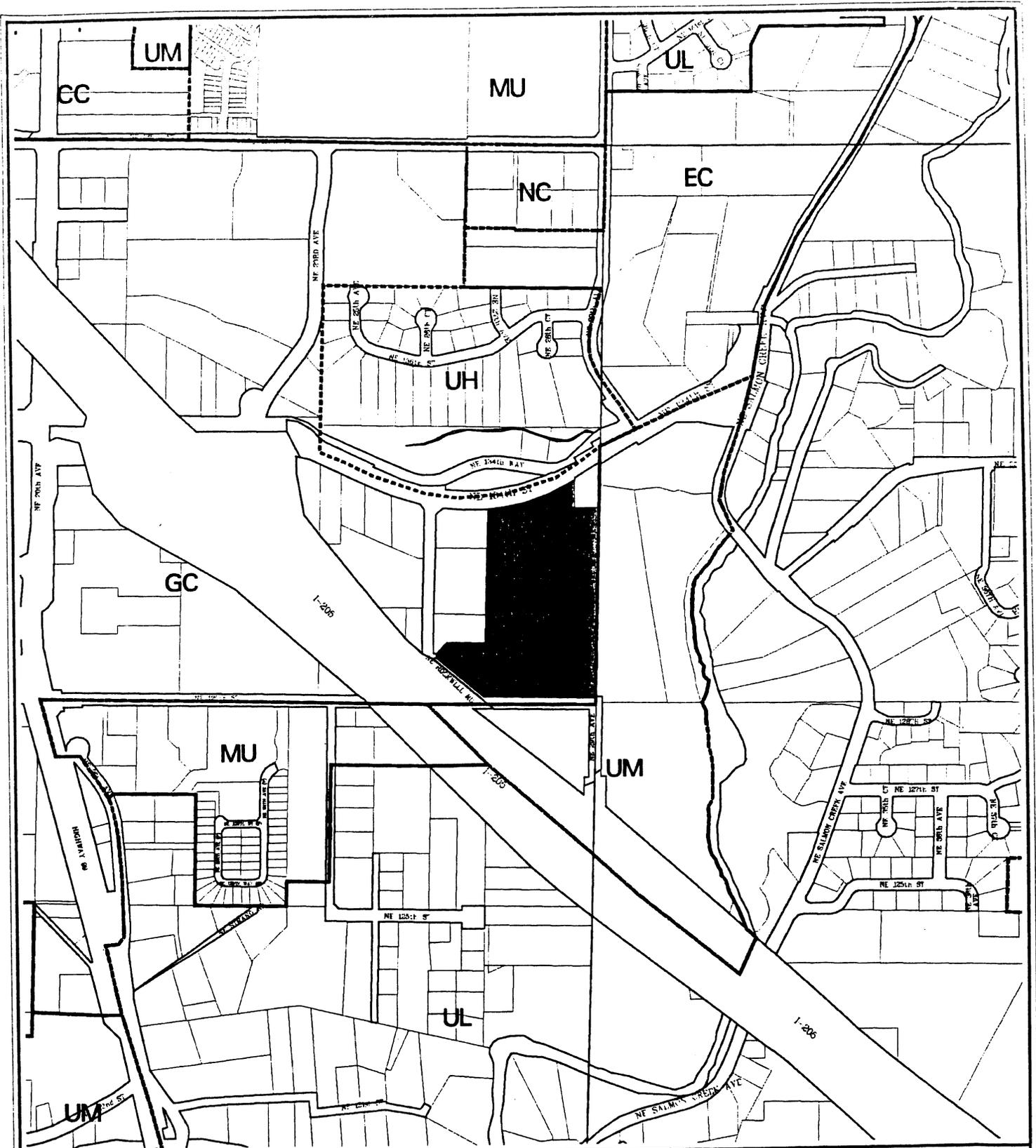


Ordinance 2006-00011, Page 1 of 108



-  Subject Property
-  Zoning Boundary
-  Mining Combining District
-  Contingent Zoning
-  Urban Holding-10
-  Urban Holding-20

002485



File # APL2006-00011, SN 186783000 186808000 186810000 186829000
 Location: T3N R1E SEC 26
 Appeal/Appeal to the Board

-  Subject Property
-  Comp. Plan Boundary
-  Mining
-  Industrial Reserve
-  Open Space/Density Transfer
-  Columbia River Gorge N.S.A.



HEARING EXAMINER EXHIBITS



APPLICATION: SALMON CREEK COMMERCIAL CENTER
 APL2006-00011 for PSR2005-00065; SEP2005-00152; EVR2005-00085;
 ARC2005-00104

HEARING DATE: August 3, 2006 Continued to October 24, 2006

EXHIBIT NO.	DATE	SUBMITTED BY	DESCRIPTION
1	8/29/05	Applicant, CLC Associates	Preliminary Boundary Survey, Existing Conditions Plans, Proposed Site Plans, Landscape Plan
2	8/29/05	Applicant, CLC Associates	Application Submittal Package (Application Form, Fee, Pre-App Conference Report, GIS Packet, Narrative, Legal Lot Determination, Approved Preliminary Plats Abutting the Site, Proposed Development Plan/Sign Plan, Existing Conditions Plan, Land Use Transportation Existing Conditions Plan, Water and Sewer Existing Conditions Plan, Land Use and Transportation Proposed Improvements Plan, Architectural Drawings, Landscape and Environmental Improvements Plan, Outdoor Lighting Plan, Soil Analysis Report, Preliminary Stormwater Report and Project Engineer Statement of Completeness and Feasibility, Traffic Study, Road Modification Request Application, SEPA, Utility Reviews, Archaeological Predetermination, Habitat Buffer Compensation Plan)
3	8/29/05	Applicant, CLC Associates	Environmental Site Assessment Phase I
4	8/29/05	Applicant, CLC Associates	Environmental Site Assessment Phase II
5	8/29/05	Applicant, CLC Associates	Phase III Independent Cleanup Report
6	8/29/05	Applicant, CLC Associates	Letter from MRM Consulting Re: Environmental Review of the Property at 12925 NE Rockwell Dr in Vancouver WA
7	9/7/05	Thomas P Davis	Comment Letter
8	9/12/05	Mario Gallizioli	Comment Letter
9	9/19/05	CC Development Services	Not Fully Complete Determination
10	10/6/05	Board of Clark County	Response Letter to Dan and Carole Arthurs

		Commissioners	
11	10/6/05	Board of Clark County Commissioners	Response Letter to Susan and Matt Camp
12	10/6/05	Board of Clark County Commissioners	Response Letter to Tom and Barbara Harkins
13	10/9/05	Matt Camp	Comment Letter
14	10/11/05	CC Development Services	Fully Complete Determination
15	10/18/05	CC Development Services	Newspaper Notice Type II Review/Optional SEPA & Likely Determination of Nonsignificance
16	10/24/05	CC Development Services	Affidavit of Mailing Public Notice
17	10/24/05	CC Development Services	Coversheet and Type II Review/Optional SEPA and Likely Determination of Non-Significance
18	11/1/05	Mario Gallizioli	Another Comment Letter
19	11/3/05	SW Clean Air Agency	Comment Letter
20	11/7/05	Marianne Stokes	Comment Letter
21	11/8/05	Carol E Edwards	Comment Letter
22	11/9/05	Don Golden	Comment Letter
23	11/9/05	Dept of Ecology	Comment Letter
24	11/14/05	Mr. and Mrs. James Palmquist	Comment Letter
25	11/30/05	FMO	Comment
26	12/11/05	Dennis Johnson	Comment Letter
27	12/11/05	Ann Foster	Comment Letter
28	12/12/05	Michael Brace	Comment Letter
29	12/12/05	Francine Ranuio	Comment Letter
30	12/12/05	Beverly J Murray	Comment Letter
31	12/13/05	Ellen Schroeder	Comment Letter
32	12/13/05	Jim McDermott	Comment Letter
33	12/13/05	The Shorthouse Family	Comment Letter
34	12/13/05	Kathy & Joel Hauge	Comment Letter
35	12/13/05	Kenneth & Phyllis Endersen	Comment Letter
36	12/13/05	Joan E Dengerink	Comment Letter

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37	12/13/05	Brian & Jeri Hanneman	Comment Letter
38	12/13/05	Don & Diane Ankrom	Comment Letter
39	12/14/05	Virgil & Ella Jackson	Comment Letter
40	12/14/05	Isaac Stevens	Comment Letter
41	12/14/05	Jan Truttman	Comment Letter
42	12/14/05	George Geranics	Comment Letter
43	12/14/05	Don & Joyce Kraft	Comment Letter
44	12/14/05	Robert Gibson	Comment Letter
45	12/14/05	Adam Fahnestock	Comment Letter
46	12/14/05	JB and Sheridan Fahnestock	Comment Letter
47	12/14/05	Brenda Gibson	Comment Letter
48	12/14/05	Marilyn Jared	Comment Letter
49	12/14/05	Barbara Stinchfield	Comment Letter
50	12/14/05	Kevin & Patty Ehlers	Comment Letter
51	12/14/05	Robert a Gass	Comment Letter
52	12/15/05	John La Madrid	Comment Letter
53	12/16/05	Den Fusso	Comment Letter
54	12/16/05	James and Judith Youde	Comment Letter
55	12/16/05	Lora Caine	Comment Letter
56	12/16/05	Robert B Goodsell	Comment Letter
57	12/16/05	Fairgrounds Neighborhood Assoc.	Comment Letter with Traffic Counts
58	12/16/05	Candy M Starr	Comment Letter
59	12/28/05	Applicant, CLC Associates	Letter Request for a 30-day Hold
60	1/17/06	J. C. Buntin	Comment Letter
61	1/17/06	E. R and Ida Horne	Comment Letter
62	1/19/06	Renir Shannon	Comment Letter
63	1/19/06	Betty V Vaughn	Comment Letter
64	1/20/06	Applicant, CLC Associates	Revisions to Preliminary Stormwater Design Report, Revised Stormwater Report, Stormwater Easement Documents, Driveway Width Modification, Revised Site Distance Modification 002490

65	1/23/06	Jim Palmquist	Comment Letter
66	1/23/06	Randy & Gail Magorty	Comment Letter
67	1/24/06	Bret Bucher	Comment Letter
68	1/30/06	Robert & Pamla Schmelzer	Comment Letter
69	1/30/06	Elaine Johnson	Comment Letter
70	1/31/06	Rittierodtd	Comment Letter
71	12/16/05	Doug Hoge	Comment Letter
72	12/27/05	John & Nancy Fritz	Comment Letter
73	1/8/06	Bridget Schwarz	Comment Letter
74	1/9/06	Kyle R Spencer	Comment Letter
75	1/9/06	John Tibbels	Comment Letter
76	1/12/06	Randall Pearl	Comment Letter
77	1/12/06	Margaret Stapenhorst	Comment Letter
78	1/17/06	Kareen Messerschmidt	Comment Letter
79	1/18/06	Sherry Haxby	Comment Letter
80	1/18/06	Sophia Spencer	Comment Letter
81	1/18/06	Steve Hall	Comment Letter
82	1/19/06	Floyd & Helen Walseth	Comment Letter
83	1/19/06	Gregg Bryant	Comment Letter
84	1/20/06	Susan Cone	Comment Letter
85	1/22/06	Marnie Allen	Comment Letter
86	1/26/06	Gayle Dever	Comment Letter
87	2/11/06	Carrie & Chad Nelson	Comment Letter
88	2/12/06	Dan & Laura Lovett	Comment Letter
89	2/17/06	Carrie & Chad Nelson	Comment Letter
90	2/17/06	Denis & Jacqueline McNamara	Comment Letter
91	3/10/06	Ejaz Khan, PW	Memo Re: Comments for Driveway Sight Distance
92	3/17/06	Ali Safayi, Dev Eng	Road Modification Memo
93	3/17/06	Applicant, CLC Associates	Applicant Requested on Hold
94	3/17/06	Applicant, CLC Associates	Existing and Proposed Structure Areas

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95	3/22/06	Applicant, CLC Associates	E-mail to County Staffs
96	4/17/06	Applicant, CLC Associates	Email to Ali Safayi Re: Transportation Issue
97	4/19/06	Applicant, CLC Associates	Email to Michael Uduk asking to Continued the "Customer Hold"
98	5/9/06	CC Development Services	Affidavit of Mailing Decision
99	5/9/06	CC Development Services	Type II Development & Environmental Review Staff Report & Decision
100	5/23/06	SW Clean Air Agency	SEPA Comment
101	5/23/06	Appellant, Law Offices of John S Karpinski	Appeal Letter
102		CC Development Services	Aerial map
103		CC Development Services	Vicinity map
104		CC Development Services	Zoning map
105		CC Development Services	Comp. Plan Map
106	6/9/06	CC Development Services	Affidavit of Mailing Public Notice
107	6/9/06	CC Development Services	Notice of Appeal and Public Hearing
108	6/27/06	CC Development Services	Notice of Public Hearing
109	6/28/06	Courtney Flora	Email with Michael
110	6/30/06	Applicant, Kittelson & Associates Inc.	Stamped Copies of Technical Memorandums – Operation of Left-In Access on NE134 th Street and Updated Trip Generation Estimate
111	7/7/06	Marilyn & Gene La Husen	Comment Letter
112	7/24/06	Applicant, Courtney Flora	Applicant's Response to Notice of Appeal
113	7/24/06	CC Development Services	Staff Report & Recommendation
114	7/25/06	Gayle Dever	Comment Letter
115	7/28/06	Applicant, Hopper Dennis Jellison PLLC	Submittal (Letter with Attachments-regarding historic flow from offsite through Water's Edge Condos; Set of calcs and other documents relating to storm system through Water's Edge)
116	8/3/06	Appellant, Law Offices of John S Karpinski	E-mail Re: Karpinski Health Status
117	8/3/06	CC Development Services	Pictures of Power Point Presentation
118	8/4/06	Clyde & Marilyn Jared	Comment Letter

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119	9/6/06	Jim Sevall	Comment Letter
120	9/7/06	Applicant, CLC Associates	Presentation Slides
121	9/7/06	Applicant, Geo Design Inc	Response to Fill Issue
122	9/7/06	Applicant, HDJ Engineers	Salmon Creek Commercial Short Plat & PST & Appeal
123	9/7/06	Applicant, HDJ Engineers	Shawn Mooris Resume
124	9/7/06	Applicant, HDJ Engineers	Salmon Creek SP & Stormwater Report
125	9/7/06	Applicant, HDJ Engineers	Water Edge, Condo, Storm Memo/Package
126	9/7/06	Applicant, HDJ Engineers	Letter Re: Storm Pipe SP vs. Condos
127	9/7/06	Applicant, Jack McColloch	Stormwater Comparison
128	9/7/06	Applicant, Jack McColloch	Utility Easement & Documents
129	9/7/06	Applicant, CLC Associates	Mark Krigbaum Resume
130	9/7/06	Applicant, Jack McColloch	Sagar Onta Resume
131	9/7/06	Applicant, Kittelson & Associates Inc.	Salmon Creek SP Traffic Study
132	9/7/06	Applicant, Kittelson & Associates Inc.	Addendum to Salmon Creek SP Traffic Study
133	9/7/06	Applicant, Kittelson & Associates Inc.	Transportation Assessment for Current Proposal (Stamped)
134	9/7/06	Applicant, Kittelson & Associates Inc.	Updated Trip Generation Est.
135	9/7/06	Applicant, CLC Associates	Kevin Picanso Resume
136	9/7/06	Appellant, John S Karpinski	Trip Generation/Traffic Study
137	9/7/06	Appellant, John S Karpinski	Comp Plan-Strip Commercial CC Code
138	9/7/06	Appellant, Bridget Schwarz	Wal-Mart
139	9/7/06	Appellant, Lora Caine	Error Accepted By County Traffic
140	9/7/06	Margaret Stapenhorst	Comment Letter
141	9/7/06	Steve Doty	Comment Letter-Traffic
142	9/7/06	Ken McGowen	Stormwater Comments
143	9/7/06	Ken McGowen	Water Edge Utility Plan
144	9/7/06	Ken McGowen/Don Golden	Pecket-Cover Letter, Index of Pictures
145	9/7/06	Paul Fischl	Comment Letter
146	9/21/06	CC Development Services	2 nd Affidavit of Mailing Public Notice 002493

			Wal-Mart Trip Generation Survey Results at Three Local Sites in Oregon and Washington
177	11/15/06	Appellant, John S Karpinski	Report of Bruce Schafer with Attachments
178	11/16/06	Michael Uduk, Dev Planning	E-mail to the Hearing Examiner
179	11/28/06	Applicant, Kittelson & Associates Inc.	Additional Responses to the oral and written traffic comments in
180	11/28/06	Applicant, CLC Associates	The first of two responses to stormwater comments
181	11/28/06	Applicant, Hopper, Dennis, Jellison	Final Response with Attachments
182	11/28/06	Applicant, GEO Design Inc.	Response to Geotechnical Comments
183	11/29/06	Appellant, John S Karpinski	Motion to Strike Improper Rebuttal Final
184	11/29/06	Appellant, John S Karpinski	Lack of Comments, Potential Objections by Fairgrounds NA & Waters Edge Condominium Associations
185	12/1/06	Applicant, McCullough Hill, PS	Response to Motion to Strike
186	12/7/06	Appellant, John S Karpinski	E-mail Re: Extended the Rebuttal Date
187	12/7/06	Applicant, McCullough Hill, PS	E-mail Re: Agreement with the Extended Rebuttal Date
188	12/14/06	Dan Kearns, Hearing Examiner	Order on Opponents' Motion to Strike
189	12/22/06	Appellant, John S Karpinski	Re: Salmon Creek Commercial Center
190	12/22/06	Appellant, Rodgers Engineering	Re: Rebuttal to Exhibit 181
191	12/22/06	Appellant, John S Karpinski	Sccc/Walmart Ex A. B
192	1/2/07	Applicant, McCullough Hill, PS	Applicant's Closing Brief
193	1/30/07	CC Development Services	Affidavit of Mailing Decision
194	1/30/07	CC Development Services	Clark County Land Use Hearing Examiner Decision
195	4/20/07	BOCC	Resolution No. 2007-04-12
196	4/30/07	Applicant, McCullough Hill, PS	Applicant's Supplemental Brief on Remand Issues
197	4/30/07	Appellant, John S Karpinski	E-mail Re: Motion to Strike Supplemental Brief on Remand Issues
198	5/2/07	Dan Kearns, Hearing Examiner	Remand Briefing Schedule and Order on Opponents' Motion to Strike

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147	9/21/06	CC Development Services	Revised Hearing Date Notice of Appeal and Public Hearing
148	10/10/06	Sonya Zalubowski	Comment Letter
149	10/18/06	Applicant, McCullough Hill, PS	Applicant's Hearing Brief
150	10/19/06	Rich Lowry, PA	E-mail to Michael Uduk
151	10/24/06	Appellant, John S Karpinski	Preferred Format for Appeal
152	10/24/06	Appellant, John S Karpinski	Preliminary Engineer Evaluation Report
153	10/24/06	Appellant, John S Karpinski	Comprehensive Plan
154	10/24/06	Appellant, Bridge Schwarz	Wal Mart Environmental Impacts
155	10/24/06	Appellant, Bridge Schwarz	Wal Mart Crime Statistics
156	10/24/06	Appellant, Bridge Schwarz	Wal Mart Parking Lots
157	10/24/06	Appellant, Bridge Schwarz	Salmon Creek Interchange Project
158	10/24/06	Appellant, Bridge Schwarz	Engineering Stamps
159	10/24/06	Appellant, Bridge Schwarz	SEPA Land Use Impact
160	10/24/06	Appellant, Ken McGowen	Stormwater Requirements
161	10/24/06	Appellant, Don Gorden	Pictures
162	10/24/06	Susan Peabody	Comments Re: Evening Rush Hour
163	10/24/06	Eric Trued	Comments with Pictures and Disk
164	10/24/06	Applicant, CLC Associates	Daniel Trisler Resume
165	10/25/06	David Herrmann	Comments
166	10/30/06	Applicant, GEO Design Inc.	Report of Geotechnical Engineering Services
167	10/31/06	Carl D Clayberg	Comments
168	11/6/06	Allan E Jeska	Comments
169	11/6/06	Allan E and Maryann Jeska	Another Comment Letter
170	11/9/06	Eric Trued	Comments with Tape
171	11/14/06	Ali Safayi, Dev Eng	Engineering Comments
172	11/14/06	Appellant, Bridge Schwarz	Wal Mart ITE
173	11/14/06	Appellant, Bridge Schwarz	Wal Mart Traffic Study Dates
174	11/14/06	Lise's D Buell	Comments
175	11/14/06	Appellant, John S Karpinski	Memo Re: County Exhibit 150 002494
176	11/13/06	Richard Gamble, PW	DKS Associates To Richard Gamble Re:

199	5/7/07	Appellant, John S Karpinski	E-mail Re: Extension
200	5/9/07	Dan Kearns, Hearing Examiner	Order on Opponents' Motion for More Time
201	5/10/07	Bronson Potter, PA	E-mail
202	5/18/07	Appellant, John S Karpinski	Supplemental Brief to HE
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Copies of these exhibits can be viewed at:

Department of Community Development / Planning Division
1300 Franklin Street
Vancouver, WA 98666-9810

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APPENDIX “B”

RESOLUTION No: 2007-10-14

1
2
3 A RESOLUTION relating to an appeal of the Clark County Land Use Hearing Examiner's
4 decision regarding an application for site plan review approval to construct a 176,672
5 square foot commercial discount retail store and support facilities on approximately 12.2
6 acres zoned Highway Commercial (CH) zoning district. [See Case File #'s PSR2005-
7 00065, SEP2005-00152, EVR2005-00085, ARC2005-00104 and APL2006-00011,
8 APL2007-00003, APL2007-00015 (Salmon Creek Commercial Center) files for details]
9 The property is located on the south side of NE 134th Street, north of NE 129th Street and
10 west of NE 27th Avenue.

11 WHEREAS, the applicant requests a site plan approval to construct a 176,672
12 square foot commercial retail store and supporting facilities in the Salmon Creek area;
13 and,

14 WHEREAS, Clark County staff issued a State Environmental Act Policy (SEPA)
15 determination of non-significance (DNS) and, after reviewing the application for
16 consistency with the applicable sections of Clark County Code, approved the development
17 proposal with conditions; and,

18 WHEREAS, John Karpinski, Attorney at Law, representing Bridget Schwarz and
19 the Clark County Fairgrounds Neighborhood Association ("Appellants"), appealed the
20 SEPA determination of non-significance and the administrative approval decision to the
21 Clark County Land Use Hearings Examiner ("the Examiner"); and,

22 WHEREAS, the Examiner conducted a public hearing on the matter, and in a final
23 order dated January 30, 2007, denied the SEPA and development appeals filed by the
24 Appellants; and,

25 WHEREAS, the Appellants appealed the examiner's final order to the Board of
26 Clark County Commissioners ("the Board") which held a public meeting to discuss the
27 appeal on April 11, 2007, and, after attesting to having read the pertinent sections of the
28 record, remanded the case to the Examiner to reconsider his decision by (1)
29 appropriately applying a preponderance of evidence burden of proof and (2) giving
30 additional consideration to issues raised by Appellants regarding the applicant's right to
31 use the existing stormwater pipe, the propriety of a road modification for the proposed
32 delivery truck driveway on Rockwell Road given transportation safety considerations,



33 and whether the applicant's engineering submittals satisfied technical code
34 requirements; and

35 WHEREAS, the Examiner issued his final order on remand dated July 27, 2007,
36 which order addressed the remand issues and approved the development proposal with
37 conditions; and,

38 WHEREAS, Appellants appealed the examiner's final order on remand of July 27,
39 2007, to the board; and

40 WHEREAS, the Board held a public meeting to discuss this second appeal on
41 October 3, 2007; now, therefore,

42 BE IT ORDERED BY THE BOARD OF COUNTY COMMISSIONERS OF CLARK
43 COUNTY, STATE OF WASHINGTON as follows:

44 Section 1: CONCLUSIONS: After having considered the record on appeal and the
45 arguments presented, the Board concludes as follows:

46 1. The Examiner in his final order on remand appropriately recognized that
47 the Applicant has the burden of proving by the weight of the evidence
48 compliance with applicable approval criteria.

49 2. The Examiner in his final order on remand nevertheless erred in approving
50 the application in the following particulars (the Board's conclusion not being
51 unanimous on two of the three grounds for reversal):

52 • Stormwater. The Examiner erred in approving a preliminary
53 stormwater plan which proposed use of an existing stormwater line to
54 which the Applicant failed to establish right of use. Although located within
55 a public stormwater easement the Examiner found that such line was
56 privately owned. Such finding is amply supported by substantial evidence
57 in the record; the Examiner's conflicting finding that the Applicant has a
58 right to use such line is not supported by substantial evidence in the record.
59 Nor can this issue be remedied by an alternative conveyance system
60 being substituted in a final stormwater plan given code limitations
61 prohibiting substantial changes to a stormwater plan. See CCC
62 40.380.060(C)(2)(h)(2); 40.380.060(F)(2). (Commissioners Morris and
63 Stuart concur.)

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• Road Modification: Given his findings regarding the unsafe traffic conditions along Rockwell Road, which findings are amply supported by substantial evidence in the record, the Examiner committed clear error in approving a road modification allowing placement of a nonconforming delivery-only driveway on such street which will exasperate already unsafe conditions. Such error is not cured by the condition imposed by the examiner requiring potential relocation of the driveway when traffic levels on Rockwell Road increase. (Commissioners Boldt, Morris and Stuart concur.)

• Submittal requirements: The Examiner committed error of law in waiving a code requirement that certain engineering submittals be stamped by an engineer. (Commissioners Boldt and Stuart concur.)

Section 2: DISPOSITION: Based upon the forgoing conclusions, the Board overturns the hearings examiner's final order on remand dated July 27, 2007, in the matter of PSR2005-00065, SEP2005-00152, EVR2005- 00152 and ARC2005-00104 Salmon Creek Commercial Center), and denies the development proposal..

ADOPTED this 30 day of October, 2007

Attest: BOARD OF COUNTY COMMISSIONERS
FOR CLARK COUNTY, WASHINGTON

By: [Signature]
Clerk to the Board

By: [Signature]
Steve Stuart, Chair

Approved as to Form Only
ARTHUR D. CURTIS
Prosecuting Attorney
By: [Signature]
Richard S. Lowry
Chief Civil Deputy Prosecuting Attorney

By: _____
Betty Sue Morris, Commissioner

By: _____
Marc Boldt, Commissioner

APL2007-00015 (Salmon Creek Commercial Center)

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

COURT OF APPEALS
DIVISION II

NOV 10 10 51 AM '08

STATE OF WASHINGTON
BY _____
DEPUTY

WAL-MART STORES, INC., and CLC
ASSOCIATES,

Respondents,

v.

CLARK COUNTY,

Appellant,

And

RP NORTHWEST PROPERTIES and
FAIRGROUNDS NEIGHBORHOOD
ASSOCIATION,

Additional Parties.

No. 38241-5-II

AFFIDAVIT OF SERVICE

The undersigned, being first duly sworn, upon oath, deposes and says:

That I am a citizen of the United States of America and of the State of Washington, living and residing in Clark County, in said state; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that by service indicated below on this 7th day of November, 2008, affiant caused a true and correct copy of *Opening Brief and Affidavit of Service* to be directed to the attorney-of-record for the above-named appellant at the following address:

Charles E. Maduell
Davis Wright Tremaine LLP
1201 Third Avenue #2200
Seattle WA 98101-3045

U.S. Mail
Facsimile
Federal Express
Hand Delivered

John S. Karpinski
2612 E 20th Street
Vancouver WA 98661

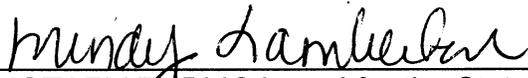
- U.S. Mail
- Facsimile
- Federal Express
- Hand Delivered

Further your affiant saith not.



Thelma Kremer
Clark County Prosecutor's Office
Civil Division
PO Box 5000
Vancouver WA 98666-5000

SUBSCRIBED and SWORN to before me this 7th day of
November, 2008.



NOTARY PUBLIC in and for the State of
Washington, residing in Vancouver.
My commission expires: 4-1-2012