

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 RESPONDENTS

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TABLE OF CONTENTS

I. Introduction..... 1

II. Assignments of Error 5

 A. Assignments of Error.5

 B. Issues Pertaining to Assignments of Error.5

III. Statement of the Case 6

 A. County Approval of Wal-Mart’s Project.6

 B. Appeal to Hearing Examiner.7

 C. The Hearing Examiner’s Final Decision on Remand.8

 1. Feasibility of Stormwater System.8

 a. Stormwater Proposal.8

 b. History of Downstream Stormwater Conveyance System.9

 c. Capacity to Handle Stormwater Flows.10

 d. Access to Conveyance System.12

 2. Traffic and Transportation Issues.13

 a. Traffic Safety Hazard.13

 b. Road Modification Requests.15

 3. Engineering Submittal Requirement.18

 D. Appeal to Board of County Commissioners.18

 E. Trial Court Reverses Board of County Commissioners.20

IV. Standard of Review..... 21

V. Argument 25

 A. The BOCC’s Stated Grounds Do Not Justify or Support Its Denial of Wal-Mart’s Site Plan Application.25

 1. Wal-Mart Sufficiently Established Its Right to Use Water’s Edge Stormwater Conveyance System26

a.	Wal-Mart Has Legal Access to the Stormwater Conveyance System Through a Publicly Dedicated Easement	28
b.	Clark County Is Collaterally Estopped From Claiming that Access to Stormwater System Is Not Feasible.	33
c.	Condition A-6b Requiring Applicant to Conclusively Demonstrate or Procure Legal Access Effectively “Removes All Doubt” as to Access.	35
2.	The Examiner Properly Approved Wal-Mart’s Requests for Road Modifications And the BOCC Erred in Concluding that Traffic Conditions Near the Project Site Warranted Denial.	36
a.	The Examiner Properly Approved Wal-Mart’s Road Modification Requests.	37
b.	Traffic Conditions Must Rise to the Level of Being a “Significant Traffic or Safety Hazard” to Implicate Denial Authority.	41
3.	The BOCC Erred in Basing Denial on Unstamped Engineering Submittals.	43
B.	BOCC’s Failure to Issue Adequate Findings Under CCC 2.51.170 and State Law Violates RCW 30.70C.130(1)(a) and Entitles Wal-Mart to Relief From the Decision.....	44
C.	The County’s Decision Violates Wal-Mart’s Vested Rights and Due Process.	48
VI.	Conclusion	50
	Appendix A - Hearing Examiner Final Order	
	Appendix B - BOCC Resolution No. 2007-10-14	
	Appendix C - Final Order and Judgment	
	Appendix D - Memorandum Decision	
	Appendix E - Clark County Code excerpts	

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Anderson v. City of Issaquah</i> , 70 Wn. App. 64, 851 P.2d 744 (1993).....	50
<i>Beach v. Bd. of Adjustment of Snohomish County</i> , 73 Wn.2d 343, 438 P.2d 617 (1968).....	49
<i>Citizens to Preserve Pioneer Park LLC v. City of Mercer Island</i> , 106 Wn. App. 461, 24 P.3d 1079 (2001).....	21, 23
<i>Currens v. Sleek</i> , 138 Wn.2d 858, 983 P.2d 626 (1999).....	31
<i>East Forks Hills Rural Ass'n v. Clark County</i> , 92 Wn. App. 838, 965 P.2d 650 (1998).....	24, 38, 42
<i>Erickson & Assocs., Inc. v. McLerran</i> , 123 Wn.2d 864, 872 P.2d 1090 (1994).....	49
<i>Freeburg v. City of Seattle</i> , 71 Wn. App. 367, 859 P.2d 610 (1993).....	22, 23
<i>Friends of the Law v. King County</i> , 123 Wn.2d 518, 869 P.2d 1056 (1994).....	48
<i>HJS Dev., Inc. v. Pierce County, Dep't of Planning & Land Servs.</i> , 148 Wn.2d 451, 61 P.3d 1141 (2003).....	21, 22
<i>Isla Verde Int'l Holdings v. City of Camas</i> , 146 Wn.2d 740, 49 P.3d 867 (2002).....	32, 34
<i>Lakeside Industries v. Thurston County</i> , 119 Wn. App. 886, 83 P.3d 433 (2004).....	21
<i>Maranatha Mining, Inc. v. Pierce County</i> , 59 Wn. App. 795, 801 P.2d 985 (1990).....	23, 24, 46
<i>Messer v. Snohomish County Bd. of Adjustment</i> , 19 Wn. App. 780, 575 P.2d 50 (1978).....	23

<i>Peter Schroeder Architects v. City of Bellevue</i> , 83 Wn. App. 188, 920 P.2d 1216 (1996), <i>rev. denied</i> , 131 Wn.2d 1011 (1997).....	49
<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 745 P.2d 858 (1987).....	34
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	24
<i>Storedahl & Sons v Clark County</i> , 143 Wn. App. 920, 180 P.3d 848 (2008).....	5, 24, 46
<i>Strickland v. City of Seattle</i> , 62 Wn.2d 912, 385 P.2d 33 (1963).....	31
<i>Thurston County Rental Owners Ass’n v. Thurston County</i> , 85 Wn. App. 171, 931 P.2d 208 (1997).....	48
<i>Tugwell v. Kittitas County</i> , 90 Wn. App. 1, 951 P.2d 272 (1997).....	40
<i>Wenatchee Sportsmen Ass’n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	34
<i>West Main Assocs. v. Bellevue</i> , 106 Wn.2d 47, 720 P.2d 782 (1986).....	48
<i>Weyerhaeuser v. Pierce County</i> , 124 Wn.2d 26, 873 P.2d 498 (1994).....	40, 47

STATE STATUTES

RCW 30.70C.130(1)(a).....	44, 45
RCW 36.70C.020(1).....	21
RCW 36.70C.130(1).....	22
RCW 36.70C.130(1)(a).....	44

RCW 36.70C.130(1)(a) and (e)	6, 43
RCW 36.70C.130(1)(b) and (c)	33
RCW 36.70C.130(1)(b)-(d)	26
RCW 36.70C.130(1)(b) and (d).....	37, 44
RCW 36.70C.130(1)(c).....	37, 43
RCW 36.70C.130(1)(a)-(f)	5
RCW 58.17.110	34

LOCAL ORDINANCES

CCC 2.51.160.....	23
CCC 2.51.170.....	44, 45, 47
CCC 40.350.030(B)(6)(a)	13
CCC 40.350.030(B)(8)(b).....	15
CCC 40.380.040(C)(1)(g).....	31
CCC 40.380.060(C)(1).....	26
CCC 40.380.060(D)(3)(d).....	36
CCC 40.510.020.....	23
CCC 40.510.030(I)(3).....	23
CCC 40.510.030(I)(3)(b)(3).....	45
CCC 40.520.040(E)(1)(b)	25, 26, 35, 48
CCC 40.540.040(D)(2)(c).....	34
CCC 40.550.010(A)(1)	37, 40

CCC 40.550.010(A)(1)(a).....	15
CCC 40.550.010(A)(2)	18, 20, 40
CCC Chapter 40.380.....	26, 27
CCC table 40.350.030-11	15
Clark County Code Chapter 2.51.....	44

OTHER AUTHORITIES

17 William B. Stoebuck, <i>Washington Practice: Real Estate § 2.1</i> (2d. ed.)	29
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I. INTRODUCTION

This appeal marks appellant Clark County's third attempt to overturn a Hearing Examiner's decision approving Wal-Mart's application for development of a retail store in the Salmon Creek area of unincorporated Clark County.

Wal-Mart's application for development of a retail store has undergone extensive review. The review, among other things, has involved: (1) detailed studies of the project's environmental impacts through the SEPA process, preliminary stormwater design and plan, traffic impact statement and road modification requests; (2) careful examination by Clark County engineers and public works staff of the current traffic situation at the project site and short- and long-term traffic impacts of the development; (3) extensive public participation and appeals and dozens of hours of public hearings before a Hearing Examiner; and (4) detailed consideration of the project opponents' "kitchen sink" objections in their appeal to the Hearing Examiner.

Based on this extensive record, the Examiner issued a 53-page Final Order approving the application, with extensive and detailed findings of fact and conclusions based on substantial evidence in the voluminous record that show compliance with all applicable approval and development standards. In those instances where there was the slightest

doubt about whether the application fully complied with approval standards and criteria, the Examiner imposed conditions to ensure full compliance.

Notwithstanding these conditions, the rigorous application process, and the careful and extensive review by the County's own experts and the Hearing Examiner, the Clark County's Board of County Commissioners ("BOCC") summarily denied the application based on three "particulars" as follows: (1) in **four short sentences**, the BOCC concluded that the Examiner erred in approving a stormwater plan which proposes the use of existing stormwater lines for which Wal-Mart failed to establish the right to use; (2) in **two sentences**, the BOCC concluded that the Examiner erred in approving a road modification allowing a nonconforming delivery-only driveway on Rockwell Road that will "exasperate [sic] already unsafe conditions" which cannot be cured by the Examiner's conditions; and (3) in **a single sentence**, the BOCC concluded that the Examiner erred in waiving a Code requirement that requires that engineering plans be stamped by a Washington licensed professional engineer.

As established below, none of these grounds, individually or cumulatively, justify denial.

First, as to the stormwater bases for denial and the BOCC's conclusion that Wal-Mart failed to establish a right to use the downstream

stormwater lines and conveyance system, substantial and undisputed evidence in the record establishes that: Wal-Mart has an express right to use the stormwater lines *via* a publicly dedicated easement; this right has historically existed and was contemplated in the granting of the easement; this right is contemplated by stormwater regulations which do not allow downstream owners to block flows from upstream properties; and this right is confirmed by a binding short plat that provides for discharge of flows into the conveyance system. The evidence further establishes that conditions imposed by the Examiner removed all doubts as to Wal-Mart's access to the conveyance system. The BOCC's decision does not dispute, assign error to, or even address these substantial-evidence findings, which are thus binding on the BOCC and verities on appeal.

Second, as to the road modification bases for the denial and the BOCC's conclusion that the road modification requests were erroneously approved, substantial and undisputed evidence in the record establishes that the Hearing Examiner approved the requests in accordance with applicable road modification criteria and after finding that there were no "significant traffic or safety hazards" implicating his denial authority. As with the stormwater issue, these substantial-evidence findings and the critical road modification criteria were not discussed, much less

challenged by the BOCC. They are also binding on the BOCC and verities on appeal.

As to the BOCC's denial on the basis of unstamped engineering reports—a denial ground that Wal-Mart argued was a plainly pretextual basis to oppose its application—to the extent Clark County intends to assert this ground on appeal, there is simply no factual or legal basis to support it.

Significantly, in reversing the Hearing Examiner and denying the application, the BOCC did not address or even assign error to the Examiner's numerous, substantial-evidence findings, even where its conclusions were in direct conflict with those findings; it failed to address critical site plan approval criteria and standards on which the Examiner's conclusions were plainly based; and it pointed to no authority showing that any of the alleged errors, in fact, implicate its denial authority. Nor did it even make any findings of fact to support its decision, as it was required to do when reversing a decision of its hearing examiner.

The trial court below recognized these plain errors, and accordingly ordered both reversal of the BOCC on each of the grounds on which it based its denial of Wal-Mart's site plan application, and reinstatement of the Hearing Examiner's decision on remand. This decision should be affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The Board of County Commissioners (“BOCC”) erred in denying Wal-Mart’s site plan application based on the grounds stated in Conclusion No: 2 in Section 2 of Resolution No. 2007-10-14, entitling Wal-Mart to relief under RCW 36.70C130(1)(a)-(f).
2. The BOCC erred in concluding that Wal-Mart failed to establish a right to use Water’s Edge Condominium’s stormwater conveyance system, and in basing denial on such conclusion.
3. The BOCC erred in concluding that the Examiner erred in: (i) “approving a road modification allowing placement of a nonconforming delivery-only driveway on such street which will exasperate [sic] already unsafe conditions;” and (ii) determining that “[s]uch error is not cured by the condition imposed by the examiner requiring potential relocation of the driveway when traffic levels on Rockwell Road increase,” and in basing denial on such conclusion.
4. The BOCC erred in concluding that the Examiner “committed error of law in waiving a code requirement that certain engineering submittals be stamped by an engineer,” and in basing denial on such conclusion.
5. The BOCC erred in failing to issue adequate findings, and such error entitles Wal-Mart to relief from the BOCC’s decision pursuant to this Court’s decision in *Storedahl & Sons v Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008).
6. The BOCC erred issuing a decision that violates Wal-Mart’s vested rights and due process.

B. Issues Pertaining to Assignments of Error.

1. Whether the BOCC’s denial based on Wal-Mart’s right to use Water’s Edge Condominium’s stormwater conveyance system is supported by substantial evidence, is an erroneous interpretation of the law, or a clearly erroneous application of the law to the facts. [Assignments of Error 1, 2]

2. Whether the BOCC's denial based on the Examiner's approval of Wal-Mart's requests for road modifications is supported by substantial evidence, is an erroneous interpretation of the law, or a clearly erroneous application of the law to the facts. [Assignments of Error 1, 3]
3. Whether the BOCC's denial based on unstamped engineering plans is supported by substantial evidence, is an erroneous interpretation of the law, or a clearly erroneous application of the law to the facts. [Assignments of Error 1, 4]
4. Whether the BOCC's failure to issue adequate findings or to assign error to the Examiner's findings entitles Wal-Mart to relief under RCW 36.70C.130(1)(a) and (e). [Assignments of Error 1, 5]
5. Whether the BOCC's denial of Wal-Mart's preliminary site plan application violated Wal-Mart's constitutional due process rights and vested rights. [Assignments of Error 1, 6]

III. STATEMENT OF THE CASE

A. County Approval of Wal-Mart's Project.

In August 2005, Wal-Mart sought approval from Clark County for the development of a Wal-Mart retail store at the 12.2-acre Salmon Creek Commercial Center site in the Salmon Creek area of unincorporated Clark County ("Project"). AR 2432.¹ Wal-Mart's application for preliminary site plan approval was accompanied by a completed State Environmental Policy Act ("SEPA") checklist and various supporting materials, including a preliminary stormwater design and plan, a traffic study, and a road modification request. AR 2432-33. The County reviewed the application

¹ References to the written record are as follows: CP ___ (Clerk's Papers by page number); and AR ___ (the Administrative Record (Exhibits 1-6), by page number). References to the transcript of the hearings before the Hearing Examiner and BOCC are, respectively, as follows: TR ___ (HE); TR ___ (BOCC).

and SEPA checklist, and on May 9, 2006, approved Wal-Mart's preliminary site plan application. AR 936.

B. Appeal to Hearing Examiner.

On May 23, 2006, Fairgrounds Neighborhood Association (“FNA”) and its President Bridget Schwartz appealed the preliminary site plan approval and the SEPA determination of nonsignificance. AR 2434. The appeal, among other things, raised issues regarding potential stormwater and traffic impacts of the project, but stated that FNA “globally and comprehensively challenge each and every aspect of the approval of the project...” AR 2435 (emphasis in original). After two days of hearings, the Hearing Examiner (or “Examiner”), on January 30, 2007, issued a 48-page decision approving with conditions Wal-Mart's preliminary site plan, and denying FNA's SEPA appeal. AR 2437.

FNA appealed the decision to the Board of County Commissioners (“BOCC”) on February 13, 2007, raising primarily stormwater adequacy and traffic safety issues. AR 2437. On April 17, 2007, the BOCC, in Resolution No. 2007-04-12, remanded the matter back to the Hearing Examiner for reconsideration of the burden of proof applied by the Examiner—“preponderance of the evidence” instead of “substantial evidence” applied by the Examiner—and for additional “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.” AR 2437-38.

C. The Hearing Examiner’s Final Decision on Remand.

On July 27, 2007, after considering additional briefing from the parties on remand, the Hearing Examiner issued a second decision (“Final Order”) approving the site plan with conditions. AR 2431-87 (attached hereto as Appendix A). The 53-page Final Order provided a detailed analysis and extensive findings of fact and conclusions of law on all “issues and approval criteria raised in the course of the application, before the hearing or before the close of the record,” including those at issue in this appeal. AR 2438.

1. Feasibility of Stormwater System.

One of the issues raised by the Project opponents and addressed by the Hearing Examiner in his decision is the feasibility of the downstream stormwater system to handle stormwater flows from the Project. AR 2442-48. On this issue, the Hearing Examiner made the following findings relevant to the issues on appeal:

a. Stormwater Proposal.

The Project’s stormwater plan includes an on-site collection system, and a below-ground detention and treatment system from which

the overflow will be piped into an existing pipe system across the Water's Edge Condominium property (or "Water's Edge") located near the northeast corner of the site. AR 2441, 2443-44. Any stormwater beyond the 100-year flow will overflow to a ditch system for NE 134th Street. AR 2441.

b. History of Downstream Stormwater Conveyance System.

Stormwater runoff from the upstream Salmon Creek Commercial Center property has historically flowed onto and through the downstream Water's Edge Condominium property. AR 2447. As part of the development of the Water's Edge Condominium project in 1986 and 1987, Clark County required Water's Edge Condominium to design its stormwater system to accommodate the stormwater flows from upstream properties, including the Salmon Creek Commercial Center site on which the proposed Wal-Mart store is to be located. AR 2443-44. The Water's Edge Condominium stormwater system was designed and constructed to accept 25 cubic feet per second ("cfs") of flow from any future development of upstream properties, including the Salmon Creek Commercial Center property. AR 1489-50; TR 45, 56, (HE 9/7/06); TR 90 (HE 10/24/06). It consists of a piped system within a 20-foot easement and a creek within a 35-foot-wide public easement. *Id.*

According to the Hearing Examiner, the stormwater facilities constructed by the Water's Edge Condominium are privately owned. AR 2442.

Clark County also required that the Water's Edge Condominium developer dedicate a public drainage easement to the County for such stormwater facilities—specifically, to dedicate a 20-foot stormwater easement “for public use and maintenance of the stormwater drainage main.” AR 1530, 1683. The developer did so, conveying a perpetual easement to Clark County “to construct, install, reconstruct, repair, operate and maintain a drainage ditch and/or line and all necessary related facilities, over, under, upon and across” the Water's Edge property within a 20-foot easement area. AR 1509-11. These same utility lines and easement, including stormwater lines, appear on the final plat for the Water's Edge Condominiums. AR 1537, 1681, 2444.

Stormwater runoff from the Salmon Creek Commercial Center property has been discharging into the existing Water's Edge Condominium stormwater system since its installation. AR 2091. Neither Clark County nor the Water's Edge Condominium owners have maintained the stormwater line. TR 102 (HE 10/24/06).

c. Capacity to Handle Stormwater Flows.

The Examiner found that Wal-Mart had adequately documented that the downstream stormwater system, as originally designed, had

adequate capacity to handle flows from the proposed development.

AR 2443. As to capacity specifically, the Examiner noted that the downstream stormwater system had been designed to accept 11 cfs of onsite flow and 25 cfs of offsite flow from the 100-year storm event, for a total design capacity of 36 cfs. AR 2442. Where it was estimated that Water's Edge Condominium's system flow for the 100-year storm would be no more than 15 cfs, and the flow from the proposed project, approximately 3.96 cfs, the Examiner found that the discharge rate to the downstream system—a rate that had been certified by engineers' calculations—would not cause the system's designed capacity to be exceeded. AR 2442.

In responding to concerns that the stormwater system had not been adequately maintained over the years and may not be functioning as originally designed, the Examiner concluded that Wal-Mart had demonstrated basic feasibility for preliminary site plan approval sufficient to proceed to the next step. AR 2443. The next step for final approval, as noted by the Examiner, is where Wal-Mart is required to “conduct an investigation of the downstream system, document its current condition and capacity, and confirm that ... it has the capacity to handle the additional flows from the development while still complying with the County's stormwater requirements.” AR 2443. Accordingly, the

Examiner set Conditions A-6c and A-6d to ensure that exactly this happened. AR 2443.²

d. Access to Conveyance System.

According to the Examiner, for access to the conveyance system to be feasible, Wal-Mart must have either an easement over the Water's Edge Condominium property, a public utility easement over the property, or else the Water's Edge stormwater system must already be a public system.

AR 2444. Here, the Examiner concluded that Wal-Mart had legal access via a publicly dedicated utility easement to the conveyance system, and that Water's Edge Condominium owners did not have the legal ability to exclude stormwater flows from this Project. AR 2444. The Examiner found proof of this easement in "a conveyance of a utility easement, including stormwater lines, from the developer of Water's Edge condominiums to Clark County, dated July 29, 1987," and in a final plat for Water's Edge Condominiums, which included the same utility lines and easement (including the stormwater lines). AR 2444. To the extent that any questions as to access remained, the Examiner noted that Wal-Mart only needed to show that access was feasible at this preliminary

² Condition A-6c provides: "The developer shall submit documents to show that the downstream storm facilities are capable of receiving runoff from this development." Condition A-6d provides: "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." AR 2476.

stage, and that any uncertainty on access should be resolved during the final plan stage. AR 2447. In fact, “[t]o remove all doubt,” the Examiner stated, “[under Condition A-6b] the Applicant will be required to demonstrate that it has legal access for this purpose as part of final engineering.” AR 2444.³

2. Traffic and Transportation Issues.

a. Traffic Safety Hazard.

Project opponents asserted that the proposed development would create, or materially aggravate, existing, off-site traffic safety hazards under CCC 40.350.030(B)(6)(a).⁴ On this issue, the Examiner heard lay witness testimony regarding their personal observations of the traffic safety hazards. AR 2451. As well, the Examiner noted specific traffic safety and congestion problems at the N.E. 179th/Union Road intersection identified by County staff. These include: history of angle accidents at that intersection; likelihood of increasing difficulty for drivers to evaluate

³ Condition A-6b provides:

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.

AR 2476.

⁴ Clark County Code provisions cited in this brief are attached hereto as Appendix E.

traffic gaps as number of acceptable gaps decrease; likelihood of increasing westbound queues at the intersection, and increasing complexity of movement through the intersections; and likelihood that delays from long queues will push drivers to make hurried judgments and risk taking substandard gaps in traffic. AR 1451-52.

While the Examiner, for the purposes of his review, accepted at face value that there were traffic safety and congestion issues at intersections and street segments near the project site, he concluded that Wal-Mart had adequately demonstrated that the condition did not rise to the level of being a traffic or safety hazard under CCC 40.350.030(B)(6)(a), and thus was insufficient to invoke denial authority under that provision. AR 2453-54.

The Examiner's decision took into consideration the expertise of traffic engineers—testifying on behalf of both Wal-Mart and opponents—none of whom had concluded that the development presented a traffic safety hazard. AR 2452. On the other hand, the Examiner was not persuaded by lay witness observations that a traffic safety hazard in fact existed, noting that whether such a hazard existed is a matter for suitably qualified experts. AR 2452.

Responding to staff “concerns” that there is the possibility that the proposed development would cause a traffic or safety hazard, the

Examiner imposed Condition E-2 requiring Wal-Mart to commit to ensuring that hazards are mitigated through safety improvements constructed prior to occupancy of the building. AR 2455.

b. Road Modification Requests.

The Examiner approved two road modifications under CCC 40.550.010(A)(1)(a): first, for reduction of corner sight distance standards of CCC 40.350.030(B)(8)(b) at the driveway onto N.E. Rockwell Road; and second, for increased width of the proposed driveway onto N.E. Rockwell Road from the maximum 40 feet to 73 feet. AR 2457-60.

The site driveway access off N.E. Rockwell Drive between N.E. 27th Avenue and N.E. 129th Street has an obstructed sight distance triangle to the northwest. AR 2458. The obstruction is due to an irregular shape and the potential development of the parcel to the northwest of the project site which results in a sight distance of 191 feet where CCC table 40.350.030-11 requires 250 feet. Wal-Mart has not been able to secure a sight distance easement from the parcel, and given the geometrics of the roadway, the Code's requirement cannot be met. AR 2458.

As an alternative under CCC 40.550.010(A)(1)(a), Wal-Mart proposed, as its first modification request, a right-only exit from the site to eliminate the need for an unobstructed sight distance triangle to the northwest. The design, which features a pork-chop style island, will

prevent trucks from making a left turn out of the driveway, thereby:

(1) removing conflict between left-turning vehicles exiting the site and southbound to eastbound traffic on N.E. 27th Avenue, N.E. Rockwell Road and N.E. 129th Street; and (2) eliminating the need for a sight distance triangle northwest of the driveway. AR 2459. Considering Wal-Mart's proposed design, the Examiner determined that the modification satisfied CCC 40.550.010(A)(1)(a) and thus approved it. AR 2458-59.

County staff engineers did not believe that the proposed design presented any current safety issues or even issues in the near-term. They expressed concern, however, that Wal-Mart's design did not adequately address "long-term safety issues" due to the location of the proposed driveway access. AR 2457. The Examiner addressed this concern with Condition A-3d, requiring Wal-Mart to "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 N.E. 27th Avenue/N.E. Rockwell Road/NE 127th Street," and to provide these plans for review and approval by Engineering staff prior to final site plan approval. AR 2457. The condition, to be clear, was **not** predicated on any problem that currently existed, or any in the near term, but was in anticipation of long-term safety issues "when N.E. Rockwell Road no longer functions as a low-volume street." AR 2459.

Under its second road modification request, Wal-Mart proposed that the width of the truck delivery driveway be increased from 40 feet—which will not accommodate movement of trucks into and out of the site—to 73 feet. AR 2459. This width is required due to the location of the access on the curve and the wide turning paths required by delivery trucks. AR 2459.

Both the County Engineering staff and Public Works Transportation staff evaluated the proposed modifications, and gave a favorable review of the proposal. AR 2459-60. Public Works Transportation staff further made its approval contingent on: Wal-Mart submitting certification documenting that the clearance between trucks turning out of the driveway and the opposing oncoming lane is at least two feet; Wal-Mart demonstrating that the proposed driveway will not interfere with driveway operations of adjoining properties; N.E. Rockwell Road remaining a low-volume road for delivery truck access only; and a signing and striping plan being reviewed during final engineering plan review. AR 2459. The Examiner concurred with the findings, and with the County Engineering staff's recommendations. AR 2459-60.

Compliance with CCC 40.550.010(A)(2)—requiring that road modification “be the minimum necessary to alleviate the hardship or disproportional impact”—was never at issue.⁵

3. Engineering Submittal Requirement.

Addressing the effect of Wal-Mart’s submission of unstamped engineering reports during the application process, the Examiner found that such deficiency—which Wal-Mart had cured by resubmitting the reports with proper stamps—is an insufficient basis to disregard Wal-Mart’s expert Mr. Sager Onta’s credible and reliable evidence. AR 2451.

D. Appeal to Board of County Commissioners.

On August 10, 2007, FNA appealed the second Final Order to the BOCC. On August 20, 2007, the three-member BOCC adopted Resolution No. 2007-10-14 summarily reversing the Examiner on three “particulars”:

⁵ In their appeal to the Hearing Examiner, Project opponents challenged the road modification approvals, alleging only that “the delivery driveway distance deficiency” is in violation of the Manual on Uniform Traffic Control Devices. AR 1025, 1050. No other issue or evidence regarding the County’s road modification findings and decisions was raised. In their appeal to the BOCC, Project opponents did not even mention the road modifications, let alone allege any errors in connection with them. While the BOCC remanded the case to the Hearing Examiner to make factual findings as to “the safety of truck ingress and egress from the site,” in neither the BOCC’s resolution nor deliberations was there any mention of the minimum necessary requirement in CCC 40.550.010(A)(2), nor any direction to the Examiner to make additional findings in this regard.

Stormwater: 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. Nor can this issue be remedied by an alternative conveyance system being substituted in a final stormwater plan given code limitations prohibiting substantial changes to a stormwater plan.

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 [sic] 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.

Submittal requirements: The Examiner committed error of law in waiving a Code requirement that certain engineering submittals be stamped by an engineer.

CP 51-53 (attached hereto as Appendix B). Only the second ground was agreed to by all three BOCC members. *Id.*

E. Trial Court Reverses Board of County Commissioners.

Wal-Mart timely filed its petition for review under the Land Use Petition Act in Cowlitz County Superior Court seeking reversal of the BOCC's resolution, and reinstatement of the Hearing Examiner's final order. CP 1-16. On July 28, 2008, the trial court reversed the BOCC and ordered that the Hearing Examiner's July 27, 2007 decision be reinstated, concluding that the BOCC's land use decision is based on erroneous interpretations of the law, clearly erroneous applications of the law to the facts, and is not supported by substantial evidence. CP 238-42 (Final Order and Judgment, attached hereto as Appendix C). The decision states:

1. Regarding the first ground for reversal, 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.
2. Regarding the second ground for reversal, the BOCC erred in basing denial on the Hearing Examiner's approval of the road modification for the delivery-only driveway on Rockwell Road. The issue that the Hearing Examiner failed to make findings that comply with Clark County Code 40.550.010(A)(2) does not support the BOCC's second ground for reversal, as set forth in the court's May 22, 2008 letter

ruling on this issue attached hereto and incorporated herein.

3. Regarding the third ground for reversal, the BOCC erred in basing denial on the Hearing Examiner's waiver of a code requirement that certain engineering submittals be stamped by an engineer. In this regard, there was no issue raised that the traffic analysis did not meet professional standards.

CP 239. Only Clark County has appealed the trial court's reversal of the BOCC's decision.

IV. STANDARD OF REVIEW

LUPA governs judicial review of land use decisions. *HJS Dev., Inc. v. Pierce County, Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003) (en banc). When reviewing a superior court's decision on a land use petition, the appellate court stands in the same position as the superior court. *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 893, 83 P.3d 433 (2004). Under LUPA, the court reviews the decision of the local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, in this case, the BOCC. RCW 36.70C.020(1); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 474, 24 P.3d 1079 (2001).

Wal-Mart has the burden of establishing that at least one of the following standards for granting relief under LUPA have been met:

- 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;
- 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).

In this case, Wal-Mart met its burden. While the trial court reversed the BOCC's decision on three of the six standards contained in RCW 36.70C.130(1), standards (b), (c) and (d), Wal-Mart is also entitled to relief under standards (a), (e) and (f).

Standards (a), (b), (e) and (f) present questions of law that the court reviews de novo. *HJS Dev., Inc.*, 148 Wn.2d at 468, 61 P.3d 1141.

Standard (c) concerns a factual determination that the court reviews for substantial evidence supporting it. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993).

Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. *Freeburg*, 71 Wn. App. at 371. The court's deferential review requires it to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Freeburg*, 71 Wn. App. at 371-72. Here, that was the Hearing Examiner.⁶

The clearly erroneous standard (d) test involves applying the law to the facts. *Citizens to Preserve*, 106 Wn. App. at 473, 24 P.3d 1079. Under that test, the court determines whether it is left with a definite and firm conviction that a mistake has been committed. *Id.* Again, the court defers to factual determinations made by the highest forum below that exercised fact-finding authority. *Citizens to Preserve*, 106 Wn. App. at 473. Again, that was the Hearing Examiner.

Where, as here, the BOCC acts only as an appellate body with its determination based solely on the original record, it is not empowered to substitute its judgment for that of the Examiner, and it must sustain the Examiner's findings of fact if they are supported by substantial evidence. *See Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 802, 801 P.2d 985 (1990); *see also Messer v. Snohomish County Bd. of Adjustment*,

⁶ Under the County Zoning Code, Hearing Examiner decisions are appealable to the BOCC. CCC 40.510.020. The BOCC limits its review to the evidence presented to the Hearing Examiner. CCC 2.51.160; CCC 40.510.030(I)(3).

19 Wn. App. 780, 787, 575 P.2d 50 (1978) (The appellate body is not empowered to substitute its judgment for that of the original fact finder.). Where findings are based on substantial evidence in the record, they are binding on the BOCC. *See East Forks Hills Rural Ass'n v. Clark County*, 92 Wn. App. 838, 843, 965 P.2d 650 (1998) (“[T]he Board must base its review ‘solely on the original record’ and ‘must sustain the examiner’s findings of fact if they are supported by substantial evidence.’”). Further, findings of fact that are not challenged are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *see also Maranatha Mining*, 59 Wn. App. at 802 (if local appellate authority and has a duty under a specific code to make findings if it disagreed with the Examiner, then the Board’s failure to make such findings is to be construed as agreement with the examiner’s findings, and the board is therefore bound by those findings); *Storedahl & Sons v. Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008) (applying *Maranatha* rule).

In this case, the BOCC did not make any findings of its own, nor did it challenge, object to or otherwise disagree with the findings of the Examiner. They were thus binding on the BOCC and are verities in this appeal.

V. ARGUMENT

A. The BOCC's Stated Grounds Do Not Justify or Support Its Denial of Wal-Mart's Site Plan Application.

The BOCC apparently denied the site plan application under authority of the following site plan approval criteria in Clark County Code (“CCC) 40.520.040(E)(1)(b):

If the responsible official finds that a site plan application does not comply with one (1) or more of the applicable approval or development standards, and that such compliance cannot be achieved by imposing a condition or conditions of approval, the responsible official shall deny the site plan application.

The Hearing Examiner's Final Order addressed these criteria in extensive findings and conclusions. The BOCC decision does not, instead summarily basing denial on the following three grounds, without citation or reference to any approval criteria or standards: (1) that the Examiner erred in approving a stormwater plan which proposes the use of existing stormwater lines for which the Applicant failed to establish the right to use; (2) that the Examiner erred in approving a road modification allowing a nonconforming delivery-only driveway on Rockwell Road that will “exasperate [sic] already unsafe conditions” which cannot be cured by the Examiner's conditions; and (3) that the Examiner committed error of law

in waiving a Code requirement that requires that engineering plans be stamped by a Washington licensed professional engineer.

As the trial court properly held, none of these stated grounds in the BOCC decision, as discussed in detail below, can support denial under CCC 40.520.040(E)(1)(b), entitling Wal-Mart to relief under RCW 36.70C.130(1)(b), (c) and (d).

1. Wal-Mart Sufficiently Established Its Right to Use Water's Edge Stormwater Conveyance System.

Under CCC 40.380.060(C)(1), “[t]he purpose of the [preliminary stormwater] plan is to determine whether a proposal can meet requirements set forth in Chapter 40.380.” Accordingly, as the Hearing Examiner found and concluded, without dispute, “an applicant is [only] 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.” AR 2443. Wal-Mart did this, leading the Examiner to conclude Wal-Mart “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 standards in CCC chapter 40.380.” AR 2445-46. This conclusion in turn is based on the Examiner’s findings that (1) “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;” and (2) “evidence in the record is sufficient for the Examiner to conclude that legal access, in fact exists...and that the Water’s Edge unit owners do not have the legal ability to exclude stormwater flows from this project.” AR 2443.

The BOCC does not dispute these findings and conclusions regarding the basic feasibility of the stormwater system plan or the capacity of the downstream stormwater system to adequately handle flows from the system, or the findings upon which they are based. Nor does the BOCC allege that these findings and conclusions are not based on substantial evidence. Instead, in its first ground for denial, the BOCC concluded that the Hearing 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.” CP 52. In support of this conclusion, the BOCC concluded as follows: (1) that the Examiner’s “finding that the Applicant has a right to use such line is not supported by substantial evidence in the record;” and (2) that this issue cannot be remedied “by an alternative conveyance system being substituted in a final stormwater plan given code limitations prohibiting substantial changes to a stormwater plan.” *Id.* The BOCC’s conclusions cannot be supported factually or legally.

a. Wal-Mart Has Legal Access to the Stormwater Conveyance System Through a Publicly Dedicated Easement.

Neither the BOCC nor Clark County dispute that Wal-Mart has an express legal right to use the publicly dedicated easement. The Examiner found proof of this easement in: (1) “a conveyance of a utility easement, including stormwater lines, from the developer of Water’s Edge condominiums to Clark County, dated July 29, 1987”; and (2) a final plat for Water’s Edge Condominiums, which included the same utility lines and easement (including the stormwater lines). AR 2444. Instead, they attempt to concoct a conflict between Water’s Edge ownership of the stormwater facility and the scope of the publicly dedicated utility easement, suggesting the conveyed easement somehow excluded use of the stormwater lines. CP 52. Such attempt is unavailing.

First, even assuming that Water’s Edge’s owners own the stormwater line,⁷ an issue that Wal-Mart has never conceded, there is no conflict between Water’s Edge’s ownership of the conveyance system and

⁷ Although the Hearing Examiner found that the stormwater system was privately owned, the source of that finding is not evident but appears to be drawn from a statement in the Staff Report. AR 955. The only evidence related to maintenance of the system is that neither Clark County nor the Water’s Edge owners have maintained the stormwater line. TR 102 (HE 10/24/06). While Wal-Mart does not agree that the system is privately owned, given the Utility Easement, County and State law regarding rights of upstream property owners to convey stormwater downstream, and the Examiner’s findings regarding Wal-Mart’s right to use the downstream stormwater system, private ownership is irrelevant to Wal-Mart’s right to use the system, as the Hearing Examiner’s findings and conclusions make clear.

Wal-Mart's right to use that system via a publicly dedicated easement. Indeed, basic easement law makes plain that one party's right to use property under an easement is entirely consistent with another party's underlying ownership interest. See 17 William B. Stoebuck, *Washington Practice: Real Estate* § 2.1 (2d. ed.) (easements give their holder limited rights to use owner's land).

Second, as to Wal-Mart's right to use the stormwater lines, the BOCC's finding of an inconsistency is itself inconsistent with and misconstrues the Examiner's substantial-evidence findings. In its findings, the Examiner made a point to emphasize that the public utility easement included stormwater lines, and that these lines are within that easement:

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...The same utility lines and easement, **including stormwater lines**, appears on the final plat for the Water's Edge Condominiums...[citation omitted]. From this, the Examiner concludes that the **stormwater pipes** to which the applicant plans to connect are within the publicly dedicated utility easement.

AR 2444 (emphasis added). Thus, in addition to erroneously finding conflict between ownership and easement, the BOCC erred in finding that

the public utility easement excluded use of the stormwater lines. Any contrary conclusion is unsupportable as a matter of law, as the trial court held, regardless of who owns the stormwater lines.

As the Hearing Examiner found and the record establishes, stormwater runoff from Salmon Creek Commercial Center property has historically and lawfully flowed onto and through the downstream Water's Edge property. AR 2447. As part of the development of Water's Edge Condominium project in 1986 and 1987, the County required the developer to design and construct a stormwater system to accommodate approximately 23 acres of undeveloped flow from the upstream properties, including the Salmon Creek Commercial Center property, to and through the Water's Edge property. AR 1530. Indeed, the Water's Edge stormwater system was designed and constructed to accept 25 cfs of flow from any future development of upstream properties, including the Salmon Creek Commercial Center property. AR 1489-50; TR 45, 56, (HE 9/7/06); TR 90 (HE 10/24/06). The County also required the Water's Edge developer to dedicate a 20-foot stormwater easement "for public use and maintenance of the stormwater drainage main." AR 1530. In accordance with the County's requirement, the Water's Edge developer conveyed a perpetual easement to Clark County "to construct, install, reconstruct, repair, operate and maintain a drainage ditch and/or line and all necessary

related facilities, over, under, upon and across” the Water’s Edge property within a 20 foot easement area. AR 1509-11. These same utility lines and easement, including stormwater lines, appear on the final plat for the Water’s Edge Condominiums. AR 1537, 1681, 2444. And since development of the Water’s Edge Condominium project, stormwater runoff from the Salmon Creek Center property has been discharging into the existing Water’s Edge stormwater system. AR 2447.

Further, as the Hearing Examiner found and the record establishes, the stormwater regulations in the County Code and Washington law do not allow downstream properties to block existing drainage from upstream properties. AR 2443. Under CCC 40.380.040(C)(1)(g), “no development within an urban growth area shall be allowed to materially increase or concentrate stormwater runoff onto an adjacent property or **block existing drainage** from adjacent lots.” This is consistent with Washington water rights law recognizing that a downstream property owner may not legally prevent an upstream property owner from discharging surface water where the upstream owner “does not inhibit the flow of a watercourse or natural drainway or collect and discharge water onto the neighboring property in quantities greater than, or in a manner different from, its natural flow.” *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 626 (1999) (en banc); *see also Strickland v. City of Seattle*, 62 Wn.2d 912, 916, 385 P.2d 33 (1963) (“It

is well settled that the flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another”). Thus, as the Examiner found, water flow regulations prevent Water’s Edge owners from blocking discharges into existing drainage from upstream properties.

This evidence in the record, as the trial court concluded, is of a sufficient quantity to persuade a reasonable person that Wal-Mart has legal access to the Water’s Edge stormwater system and that the Water’s Edge unit owners do not have the legal ability to exclude stormwater flows from the project. Indeed, if not, for what purpose did the County require the Water’s Edge developer to size the pipe to accommodate upstream stormwater flows and then to convey a public easement for these purposes?⁸ Clearly, the Hearing Examiner’s findings and conclusions in this regard are based on substantial evidence and the BOCC erred in holding otherwise. *See Isla Verde Int’l Holdings v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002) (To conclude that “substantial evidence” supports factual findings, “there must be a sufficient quantity of

⁸ In a letter from the project engineer for the Water’s Edge Condominium development, the purpose of requiring the developer to design and extend the storm pipe to the Wal-Mart property to the west was to accommodate stormwater flows from this property and other upstream properties and that the easement required by the County over this storm drainage main was for its public use and maintenance. AR 1580.

evidence in the record to persuade a reasonable person that the declared premise is true.”). Thus, the BOCC’s first ground for denial of the site plan approval is not supported by substantial evidence under RCW 36.70C.130(1)(c) and involves an erroneous interpretation and clearly erroneous application of the law under RCW 36.70C.130(1)(b) and (d).

b. Clark County Is Collaterally Estopped From Claiming that Access to Stormwater System Is Not Feasible.

In 2004, Clark County approved, and the Hearing Examiner on appeal upheld the approval of, a 4-lot short plat for the Salmon Creek Commercial Center property on which the Project is proposed to be located. AR 1305. The approved preliminary stormwater plan for the short plat provides for discharge of flows from the Project site through the Water’s Edge Condominium stormwater conveyance system. AR 1290. In its short plat approval, Clark County concluded that this preliminary stormwater plan, subject to conditions of approval, is “feasible.” AR 1291. No party, including Clark County and the Water’s Edge Condominium owners, objected to the use of the Water’s Edge conveyance system or the stormwater plan for the Commercial Center based on use of this system, even though the stormwater system approved for the short plat was designed to release more stormwater for the 100-year storm into the stormwater system that crosses the Water’s Edge

Condominium property than the proposed stormwater plan for the Wal-Mart store.⁹ AR 2444. Nor was the short plat approval, which was based on a stormwater plan deemed feasible, appealed.¹⁰ It is thus binding on Clark County and the County cannot collaterally attack the feasibility of the Project's use of the Water's Edge stormwater conveyance system. *See, e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000) (Failure to appeal land use decision under Land Use Petition Act bars collateral attack of that decision.); *Chelan County v. Nykreim*, 146 Wn.2d at 933-38 (County's failure to appeal erroneous interpretation by Planning Director in connection with boundary line adjustment precluded subsequent challenge by County). For the same reason, Clark County is collaterally estopped from now claiming that the proposed preliminary stormwater plan for the Project is not feasible based on lack of legal access to the downstream stormwater system. *See, e.g., Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987) (claims and issues actually litigated and necessarily decided in an agency forum are given preclusive effect in subsequent proceedings). The

⁹ FNA was also a party to the short plat proceedings and also did not object. AR 1315.

¹⁰ In order to approve a short plat, the County must make written findings that appropriate provision has been made for drainage. RCW 58.17.110; CCC 40.540.040(D)(2)(c) ("The review authority shall approve a preliminary plat if he or she finds the applicant has sustained the burden of proving that the application complies with the following approval criteria or that the application can comply with those criteria by complying with conditions of approval... 2. The following facilities are adequate to serve the proposed subdivision before or concurrent with development of the preliminary plat:... (c) drainage....")

BOCC thus erred in denying the preliminary plat approval based on its conclusion that the stormwater plan was not feasible because no right to use the downstream conveyance system was established by Wal-Mart.

c. Condition A-6b Requiring Applicant to Conclusively Demonstrate or Procure Legal Access Effectively “Removes All Doubt” as to Access.

Even if Wal-Mart’s site plan application did not fully comply with approval standards, under CCC 40.520.040(E)(1)(b), the BOCC may not deny an application if compliance can be achieved by conditions of approval. Here, if there was any uncertainty as to Wal-Mart’s access, the Examiner effectively “remove[d] all doubt” on this issue by conditioning approval on Wal-Mart, as part of the final stormwater plan approval, either: (1) demonstrating that it has the legal right to use the private downstream conveyance system; (2) purchasing the right, or (3) proposing and receiving approval of an alternative plan for releasing allowable runoff from the proposed stormwater detention system. AR 2444, 2476. The BOCC fails to address this critical denial criterion, or to challenge or assign error to the Examiner’s conditions, and on this basis alone, its decision should be reversed.

Instead, the BOCC rejects the Examiner’s condition out of hand based on its presumption that “code limitations prohibiting substantial

changes to a stormwater plan” prevent an applicant from substituting—in a final stormwater plan—an alternative plan for releasing allowable runoff. CP 52. The presumption is plainly erroneous. There are no such limitations. The applicable county stormwater regulation provides:

A final stormwater plan which differs from the approved preliminary stormwater plan in a manner that, in the opinion of the responsible official, raises material water quality or quantity control issues, shall, if subject to SEPA, require another SEPA determination, and a post-decision review in accordance with Section 40.520.060.

CCC 40.380.060(D)(3)(d). By its terms, then, where changes to a stormwater plan are determined too substantial, the Code requires only additional SEPA and post-decision review. Thus, the BOCC failed to demonstrate access was infeasible or that the Examiner’s conditions failed to bring the plan into compliance. Accordingly, under CCC 40.520.040(E)(1)(b), denial of the application was improper.

2. The Examiner Properly Approved Wal-Mart’s Requests for Road Modifications And the BOCC Erred in Concluding that Traffic Conditions Near the Project Site Warranted Denial.

The BOCC appears to conclude that Wal-Mart’s road modifications should have been denied on the basis that: (1) the requested road modifications would “exasperate already unsafe conditions”; and (2) that the Examiner’s condition—that the driveway be relocated when

the traffic levels on Rockwell Road increase—would not adequately address any long-term safety issues. CP 53. These conclusions are unsupported by and inconsistent with the Examiner’s findings and substantial evidence in the record in violation of RCW 36.70C.130(1)(c). Further, they ignore critical road modification criteria and are unsupportable as a matter of law under RCW 36.70C.130(1)(b) and (d).

a. The Examiner Properly Approved Wal-Mart’s Road Modification Requests.

Under CCC 40.550.010(A)(1), if a development cannot comply with transportation standards, an applicant may request one or more modifications provided that they meet one of four specific criteria. Here, Wal-Mart requested two modifications: first, for the reduction of corner sight distance standards at the driveway onto N.E. Rockwell Road; and second, for an increase in the width of the proposed driveway onto N.E. Rockwell Road from the maximum 40 feet to 73 feet. AR 2457-60.

The Examiner found that both modifications complied with criterion (a) of CCC 40.550.010(A)(1) allowing such modifications where “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.” AR 2458-60. The first modification was necessary to eliminate a site distance obstruction due to

an irregular shape and potential development of the parcel to the northwest of the project site. AR 2458. Wal-Mart has not been able to secure a sight distance easement from the parcel, and given the geometrics of the roadway, the Code's requirement cannot otherwise be met. AR 2458.

The second was necessary since the 40-foot width would not accommodate movement of trucks into and out of the site due to the location of the access on the curve and wide turning paths required by delivery trucks. AR 2459. The record shows the Examiner's determination—in consultation with County Engineering and Public Works Transportation Staff—was based on consideration of the physical conditions at the site, hardships to Wal-Mart, the effect of the modifications in eliminating/ameliorating the hardship, and existing and future safety issues. AR 2459-60. Further, no one concluded that the hardship was self-imposed.

Where there was the concern that increases in traffic volume could present long-term safety issues, the Examiner in accordance with CCC 40.520.040(E)(1)(b) imposed Condition A-3d—i.e., recommendations of the County's Engineering and Public Works Transportation staff—which all agreed adequately addressed any of these long-term issues. *Id.* These findings are supported by substantial evidence in the record and are binding since the BOCC does not address or assign error to them. *East*

Forks Hills Rural Ass'n, 92 Wn. App. at 843. On this ground alone, there was no legal basis for the BOCC to conclude that the Examiner committed clear error in approving the road modification requests.

Clark County argued **for the first time on appeal**—and at oral argument, no less—that the Examiner erred in failing to make a finding that the road modification is the minimum necessary under CCC 40.550.010 (A)(2). As the trial court found, this argument is both untimely and without merit. CP 236-37 (Judge James E. Warne’s May 22, 2008 Supplemental Decision, attached hereto as Appendix D).

First, both the County Staff and Hearing Examiner approved the road modifications after finding that they complied with applicable code criteria. County staff stated in its Report & Decision: “Staff concludes that the proposed preliminary plan, subject to conditions identified above, meets the transportation requirements of the Clark County Code.” AR 994.

Then, in the prelude to his findings, the Examiner declared:

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.

AR 2438.

Second, while the Examiner did not make express findings that the approved modifications were the “minimum necessary” under CCC 40.550.010(A)(2), he was not required to do so where, as here, no one disputed compliance with this requirement. Under state law, a quasi-judicial decision-maker is only required to make findings and conclusions on matters “which establish the existence or nonexistence of *determinative* factual matters.” *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994) (emphasis added). That is, they are only required to “address and resolve the *factual disputes* raised in the hearing.” *Tugwell v. Kittitas County*, 90 Wn. App. 1, 14-15, 951 P.2d 272 (1997) (emphasis added). Here, there was no issue raised by anyone regarding whether the road modifications approved were the “minimum necessary” under CCC 40.550.010(A)(2). It was thus not a determinative or disputed factual matter upon which the Hearing Examiner was required to make findings.¹¹

Nor does it justify remand to the BOCC. Regardless of whether explicit findings were made regarding compliance with the “minimum

¹¹ Nothing in the County Code requires such findings either. While the requirements of subsection (A)(2) may have a bearing on and limit the conditions under which a road modification can be granted, only subsection (A)(1) contains the criteria under which a modification can be granted in the first place—i.e., regardless of whether the minimum necessary, there can be no modification granted unless one of the four criteria in subsection (A)(1) is met. Thus, while findings on whether any one of the (A)(1) criteria are met were required to be made by the County staff and Hearing Examiner (and in fact were), findings on whether the requirements of subsection (A)(2) were properly considered were not, especially where, as here, there was no issue as to whether these latter requirements were met.

necessary” requirement of subsection (A)(2), here there is no question about whether this requirement has been met. The road modification approved by the Examiner (and also by the County Engineer and Public Works staff) is severely limited, both by the conditions imposed, as discussed above, and the temporal nature of the modification granted (the modification ceases as soon as the road ceases to be a low volume road and safety issues become a concern). AR 2458-60. Neither Clark County nor BOCC has provided any findings or evidence that suggest anything other than that the road modifications approved by the County and Examiner comply with the “minimum necessary” requirement of CCC 40.550.010(A)(2).

b. Traffic Conditions Must Rise to the Level of Being a “Significant Traffic or Safety Hazard” to Implicate Denial Authority.

The BOCC further erred to the extent that it based denial on unsafe traffic conditions near the development site. Clark County Code makes clear that for a traffic condition to be a basis for denial, such condition must rise to the level being a “significant traffic or safety hazard.” CCC 40.350.030(B)(6)(a) 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.

(emphasis added.)

Here, while the Examiner noted that there were traffic and safety concerns near the site, he found that “the record does not support the conclusion that there is an 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).” AR 2452-53. This finding was supported by substantial evidence including expert testimony of **both** Wal-Mart’s and opponents’ traffic engineers, “none of [whom]...express the professional opinion that any of the near-by intersections rise to level of being a ‘traffic safety hazard’ under this standard.” AR 2452.¹² These substantial-evidence findings are binding since the BOCC does not address or assign error to them. *East Forks*, 92 Wn. App. at 843. There is thus no legal basis for the BOCC to conclude that the Examiner committed clear error in approving road modifications that allow a delivery-only driveway on

¹² Regarding traffic conditions on Rockwell Road, specifically, the BOCC misconstrues the Examiner’s findings as to traffic conditions. The Examiner agreed with Engineering staff that there were no safety issues that currently existed, or that would exist in the near-term. AR 2457. Any safety concerns “were long-term safety issues” stemming from “the likelihood that the site’s trip generation, when added to trips generated by future development...eventually will exceed thresholds for a low volume road [i.e., daily vehicle volumes of fewer than 600 vehicles per day].” AR 2457.

Rockwell Road, and such conclusion is not supported by substantial evidence. Further, by disregarding and failing to give deference to undisputed and binding Examiner findings of fact in favor of its own conflicting and unsupported conclusions, the BOCC acted outside its appellate authority and engaged in unlawful procedure in violation of RCW 36.70C.130(1)(a) and (e).

3. The BOCC Erred in Basing Denial on Unstamped Engineering Submittals.

The BOCC's third basis for denial provides simply: "The Examiner committed error of law in waiving a code requirement that certain engineering submittals be stamped by an engineer." CP 35 (BOCC Res. II at 3). As a matter of fact and law, this basis does not support denial.

First, the Hearing Examiner did not waive any Code requirements regarding submittal of unstamped engineering plans and the BOCC does not point to any language in the Examiner's Final Order that suggests as much. Thus, the BOCC's third basis for denial is not supported by substantial evidence in violation of RCW 36.70C.130(1)(c).

Second, if there were any unstamped engineering plans relied upon by Wal-Mart, any such error was cured by Wal-Mart, which provided stamped copies of the previously submitted, unstamped engineering plans.

AR 2451. Thus, if there was any error, it was harmless, as the Hearing Examiner correctly determined. *See* RCW 36.70C.130(1)(a) (a court may not grant relief for failure to follow prescribed process where such error was harmless).

Third, while the BOCC cited unstamped submittals as a basis for its denial, it pointed to no code authority or criteria supporting such denial. In fact, there is none. Thus, the BOCC erred as a matter of law in basing denial on such ground pursuant to RCW 36.70C.130(1)(b) and (d).

Finally, and significantly, the Hearing Examiner found that the traffic impact analysis was supported by credible, reliable expert opinion, including review by a licensed Washington professional engineer, who provided stamped copies of the previously submitted unstamped copies in response to FNA's objections. AR 2451. These findings and conclusions, which are based on substantial evidence in the record, are undisputed. There is thus no lawful basis for BOCC's denial of the site plan application based on reliance on unstamped engineering plans.

B. BOCC's Failure to Issue Adequate Findings Under CCC 2.51.170 and State Law Violates RCW 30.70C:130(1)(a) and Entitles Wal-Mart to Relief From the Decision.

Clark County Code chapter 2.51 specifies procedures for BOCC consideration of appeals of hearing examiner decisions. Under CCC

2.51.170, after consideration of the appeal, “[t]he board by resolution may accept, modify or reject the hearing examiner’s decision, or any finding or conclusions therein, or may remand the decision to the examiner for further hearing.” However, “[a] *decision by the board to modify, reject or remand the examiner’s decision shall be supported by findings and conclusions.*” *Id.* (emphasis added).¹³ Failure to support a decision with written findings is not a mere technical deficiency or harmless error.

Rather such failure is sufficient basis in a LUPA appeal for a court to grant relief from an examiner’s decision. *See* RCW 30.70C.130(1)(a) (appellate

¹³ To the extent that Type III appeal procedures apply to the BOCC’s decision—which is likely the case since the Hearing Examiner heard the case as a Type III Appeal of the Director’s Preliminary Site Plan Approval [AR 2431]—an even stricter findings requirement applies. Under CCC 40.510.030(I)(3)(b)(3), if a board reverses or modifies an appealed decision, then the board shall adopt a final order that contains:

- (a) A statement of the applicable criteria and standards in this code and other applicable law relevant to the appeal;
- (b) A statement of the facts that the board finds show the appealed decision does not comply with applicable approval criteria or development standards;
- (c) The reasons for a conclusion to modify or reverse the decision; and
- (d) The decision to modify or reverse the decision and, if approved, any conditions of approval necessary to ensure the proposed development will comply with applicable criteria and standards.

Here, as discussed above, the BOCC’s summary decision fails to mention applicable criteria, much less show how the Examiner’s decision does not comply with such criteria; fails to list the facts it found which show the appealed decision did not comply with applicable approval criteria; and fails to provide any or adequate reasons for its reversal of the Examiner’s decision. Such failures are a sufficient basis in a LUPA appeal for a court to grant relief from an examiner’s decision. *See* RCW 30.70C.130(1)(a) (appellate body’s failure to follow prescribed process is reversible error);

body's failure to follow prescribed process is reversible error); *see also* *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 802, 801 P.2d 985 (1990); *Storedahl & Sons v. Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008), *review denied*, 164 Wn.2d 1018, 195 P.3d 88 (2008) (reversing Clark County Board of County Commissioners for failing to follow procedure requiring it to list facts supporting its decision).

In *Storedahl & Sons v. Clark County*, decided by this Court and involving this very BOCC, a hearing examiner in an 81-page order approved a rezone with detailed findings of fact on how the applicant satisfied each of the four criteria for rezone. 143 Wn. App. at 930. On appeal, the Clark County BOCC—the exact board members in this case—reversed the rezone, but failed to issue findings of fact, as required by CCC 40.510.030(I)(3)(b)(3), showing why the appealed decision did not comply with applicable approval criteria. *Id.* at 931. Because the BOCC failed to issue findings in accordance with the County's prescribed process and did not reverse or challenge the examiner's findings (which thus remained as verities on appeal), the Court reversed the BOCC and remanded the decision with instructions to grant the rezone and reinstate the examiner's decision. *Id.* The same result, for the same reasons, should be reached here.

Here, the BOCC via its summary conclusions of law rejected the Examiner's findings and conclusions relating to Wal-Mart's right to use downstream stormwater lines and system, Wal-Mart's road modification requests' compliance with applicable criteria, and the various conditions imposed by the Examiner, and plan submittals. As it did in *Storedahl*, the BOCC failed to issue findings in accordance with the County's prescribed process under CCC 2.51.170. Further, as detailed above, it failed to challenge critical findings. As in *Storedahl*, these failures not only violate the County's prescribed process, thus entitling Wal-Mart to relief under 30.70C.130(1)(a) and (d), but they rendered the Examiner's findings verities on appeal. Accordingly, the BOCC's decision must be reversed.

Even if a court were to find that the BOCC's decision could be classified as findings, such findings are not adequate to ensure that the decision maker "has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved" and the appellate court "may be fully informed as to the bases of his [or her] decision when it is made." *Weyerhauser*, 124 Wn.2d at 35-36 (Adding: "Findings **must** be made on matters 'which establish the existence or nonexistence of determinative factual matters ...'").

Here the BOCC's summary conclusions ignore the numerous findings in the Hearing Examiner's Final Order that address the existence

or nonexistence of determinative factual matters, including the Examiner's extensive findings regarding the feasibility of the stormwater system and its compliance with stormwater regulations, the traffic modification's compliance with code criteria, and the adequacy of the engineering submittals. *See* AR 2441-47, 2451, 2456-60. In fact, the BOCC decision does not even address the criteria in the Code authorizing denial of a site plan application: CCC 40.520.040(E)(1)(b).

Based on these circumstances, the Court should reverse the decision of the BOCC for failure to make adequate findings to support its denial of the preliminary site plan application.

C. The County's Decision Violates Wal-Mart's Vested Rights and Due Process.

Under Washington law, a land use development application is protected by the vested rights doctrine. *See, e.g., Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 182, 931 P.2d 208 (1997). In general, "vesting" refers to the principle that, under the proper conditions, a land use application will be considered only under the land use statutes and ordinances in effect at the time of an application's submission. *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986).¹⁴

¹⁴ The vested rights doctrine provides a measure of certainty to applicants, protecting their expectations against fluctuating land use policies. *Friends of the Law v. King*

Under the vested rights doctrine, Wal-Mart had a vested right to have its preliminary site plan application reviewed under the requirements in effect when it submitted its application to the County. While the BOCC did not legislatively adopt new requirements that apply to Wal-Mart's application, the BOCC's stated reasons for overturning the Examiner's decisions—*e.g.*, requiring that access to the downstream conveyance system be conclusively established, or determining that mere traffic congestion justifies exercise of its denial authority—constitute *de facto* adoption and application of new site plan application requirements. Such requirements are in violation of Wal-Mart's vested rights, and should be deemed unconstitutional.

These actions also violate due process. Due process standards require the BOCC to interpret and enforce development codes as written, without adding new criteria on a case-by-case basis. *Peter Schroeder Architects v. City of Bellevue*, 83 Wn. App. 188, 920 P.2d 1216 (1996), *rev. denied*, 131 Wn.2d 1011 (1997). Enforcement of later enacted laws, which disregard an applicant's expectations, impinges on the applicant's due process interests in certainty and fairness. *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994). It is unreasonable

County, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994). Thus, an applicant's right to have a particular land use application reviewed under the land use regulations then in effect vests at the time he files a completed application. *Beach v. Bd. of Adjustment of Snohomish County*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968).

to expect applicants and the professionals assisting them to comply with unarticulated standards. *Anderson v. City of Issaquah*, 70 Wn. App. 64, 77, 851 P.2d 744 (1993). Yet, this is precisely what the BOCC has done. Through its arbitrary, discretionary and shifting interpretation of requirements for Wal-Mart's application, the BOCC has created a mutable code, uncertain in meaning and variable in its application. Such action "violates the first essential of due process of law" and should be deemed unconstitutional. *Anderson*, 70 Wn. App. at 75.

VI. CONCLUSION

For the reasons set forth herein, Wal-Mart respectfully requests that the Court affirm the trial court.

RESPECTFULLY SUBMITTED this 24th day of August, 2009.

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By



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APPENDIX A:

Hearing Examiner Final Order

**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 to 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 patters 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 supports 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). 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 decommissioned 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.

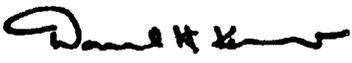
F-5 Fire Marshal Requirements:

- 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
----------	-------------------------------------

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

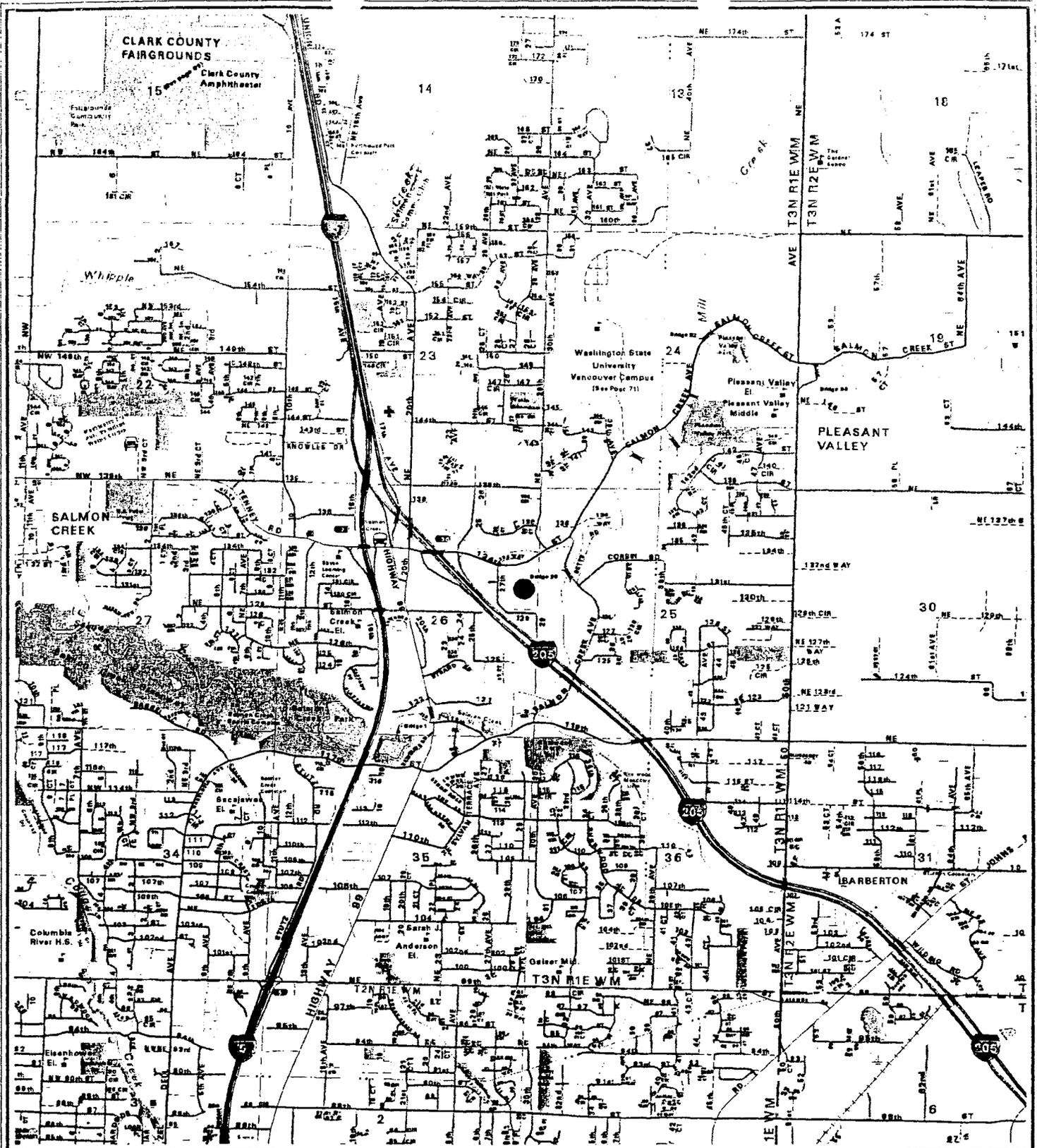
of record. A party of record includes the applicant and those individuals who signed the sign-in sheet or presented oral testimony at the public hearing or submitted written testimony prior to or at the public hearing on this matter.

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.





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

● Subject Property Location



O.D. 2004-015746 d 1_106

002484

HEARING EXAMINER EXHIBITS



APPLICATION: SALMON CREEK COMMERCIAL CENTER
 \PL2006-00011 for PSR2005-00065; SEP2005-00152; EVR2005-00085;
 \RC2005-00104

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

002489

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

002491

Page 4 of 9

Form DS1600A-Revised 5/30/02

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

002492

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/Packet
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 02498

			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

002495

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

002496

APPENDIX B:

BOCC Resolution

NO. 2007-10-14

RESOLUTION No: 2007-10-14

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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: _____
Betty Sue Morris, Commissioner

By: [Signature]
Richard S. Lowry
Chief Civil Deputy Prosecuting Attorney

By: _____
Marc Boldt, Commissioner

APL2007-00015 (Salmon Creek Commercial Center)

APPENDIX C:

Final Order and Judgment

**ENDORSED
FILED
SUPERIOR COURT**

The Honorable James E. Warne

JUL 28 2008

**COWLITZ COUNTY
RONI A. BOOTH, Clerk**

**CONFIRMATION
COPY**

SUPERIOR COURT OF THE STATE OF WASHINGTON
COWLITZ COUNTY

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

Petitioners,

v.

CLARK COUNTY,

Respondent,

and

FAIRGROUNDS NEIGHBORHOOD
ASSOCIATION

Additional Party.

No. 07-2-02104-4

FINAL ORDER AND
JUDGMENT

[Clerk's Action Required]

This matter came before the Court on May 2, 2008, on the Petition for Review filed by Wal-Mart Stores, Inc. (Wal-Mart) and CLC Associates pursuant to the Land Use Petition Act ("LUPA"), Chapter 36.70C.RCW, seeking reversal of the land use decision of the Clark County Board of County Commissioners ("BOCC") in Resolution No. 2007-10-14 overturning the Hearing Examiner's final decision on remand and denying Wal-Mart's retail project located in unincorporated Clark County. The Court heard the arguments of counsel, read the pleadings filed in these matters, reviewed the administrative record of proceedings prepared and certified to the Court by the Clark County, and reviewed the land use decision.

1 The Court hereby concludes that the BOCC's land use decision is based on erroneous
2 interpretations of the law, clearly erroneous applications of the law to the facts, and is not
3 supported by substantial evidence, as follows:

4 1. Regarding the first ground for reversal, the BOCC erred in basing denial on Wal-
5 Mart's failure to establish the right to use an existing stormwater within a downstream public
6 easement. The Court finds as a matter of law that Wal-Mart has the right to use this easement,
7 including the right to send stormwater through an existing pipe within the easement.

8 2. Regarding the second ground for reversal, the BOCC erred in basing denial on the
9 Hearing Examiner's approval of the road modification for the delivery-only driveway on
10 Rockwell Road. The issue that the Hearing Examiner failed to make findings that comply with
11 Clark County Code 40.550.010(A)(2) does not support the BOCC's second ground for reversal,
12 as set forth in the court's May 22, 2008 letter ruling on this issue attached hereto and
13 incorporated herein.

14 3. Regarding the third ground for reversal, the BOCC erred in basing denial on the
15 Hearing Examiner's waiver of a code requirement that certain engineering submittals be stamped
16 by an engineer. In this regard, there was no issue raised that the traffic analysis did not meet
17 professional standards.

18 Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Wal-Mart's
19 Petition for Review is granted, the Board of County Commissioners' decision overturning the
20 Hearing Examiner's decision and denying the project is reversed, and the Hearing Examiner
21 decision on remand dated July 27, 2007 is reinstated.

22 Statutory costs and fees are awarded against the County Respondent in favor of Petitioner
23 Wal-Mart in the amount of \$3,976.50.

24 DONE IN OPEN COURT this 28 day of July, 2008.

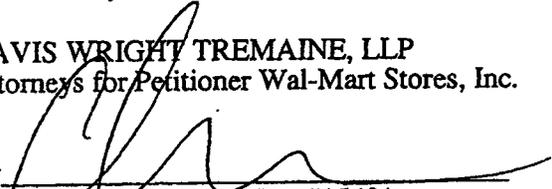
25 **JAMES E. WARME**

26

The Honorable James E. Warne

1 *Presented by:*

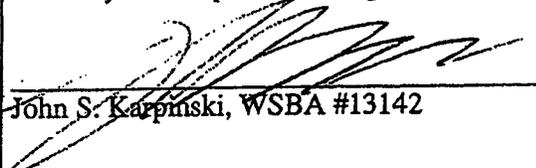
2 DAVIS WRIGHT TREMAINE, LLP
3 Attorneys for Petitioner Wal-Mart Stores, Inc.

4 By 
5 Charles E. Maduell, WSBA #15491
6 Nigel P. Avilez, WSBA #36699

7 True copy received
8 CLARK COUNTY PROSECUTING ATTORNEY
9 Attorneys for Respondent Clark County

10 
11 Christopher Horne, WSBA #12557
12 Deputy Prosecuting Attorney

13 LAW OFFICES OF JOHN S. KARPINSKI
14 Attorney for Respondent Fairgrounds Neighborhood Association

15 
16 John S. Karpinski, WSBA #13142

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APPENDIX D:

Memorandum Decision

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

RECEIVED

MAY 27 2008

CHARLES MADUELL

Judges' Chambers

James E. Warne
Department No. 1

Stephen M. Warning
Department No. 2

Jill Johanson
Department No. 3

James J. Stonier
Department No. 4

Nancy Williamson
Court Administrator
(360) 577.3085

Gayle Engkraf / Alice Millward
Administrative Deputies
(360)577.3070 / 577.3155

May 22, 2008

Charles E. Maduell
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-7700

ENDORSED FILED
SUPERIOR COURT

MAY 22 2008

COWLITZ COUNTY
RONI A. BOOTH, Clerk

Christopher Horne
Clark County Deputy Prosecuting Attorney
Clark County Courthouse
PO Box 5000
Vancouver, WA 98666-5000

John S. Karpinski
Attorney at Law
2612 E 20th Street
Vancouver, WA 98661

Re: Wal-Mart Stores, Inc., et al., vs. Clark County, et al.
Cowlitz County Cause No. 07-2-02101-4

Gentlemen:

The issue raised by the County, of the failure of the hearing officer to make findings that comply with Clark County Code 40.550.010(A)(2), is raised for the first time in oral argument. At no time prior to this argument did any party assign this "failure to make findings" as necessary to determine any issue or as the basis for any decision made by the Board of County Commissioners.

The CCC requirement of 40.550.010 is simply a policy statement that seeks to require uniformity in any deviation from the road standards of CCC 40.35.030. It does not, of itself, require anything except that any deviation be reasonably related to

Charles E. Maduell
Christopher Horne
John S. Karpinski
May 22, 2008
Page 2 of 2

necessity. It is not jurisdictional. Nor has anyone suggested that the proposed deviation is not "the minimum necessary."

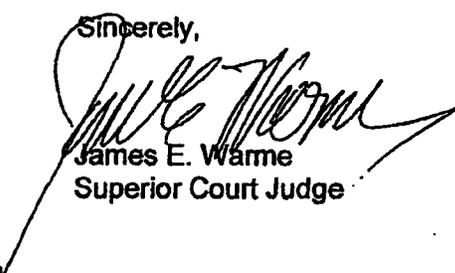
In the absence of any evidence that some other remedy might more closely follow the requirements of CCC 40.35.030, and in the absence of any evidence that the Board relied upon this issue in making its determination, deference is given to the decision of the hearing officer as quoted in the Supplemental Brief of the Petitioner at page 3:

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. [AR 2438]

Any failure to make specific findings about a non-issue is harmless where the complete decision addresses all controverted issues. *Tugwell v. Kittitas County*, 90 Wn. App. 1 (1997).

The decision of the Board is reversed. The petitioner shall draft an appropriate order.

Sincerely,



James E. Warne
Superior Court Judge

JEW:nww

xc:Cowlitz County Clerk

APPENDIX E:

Clark County Code Excerpts

CCC 2.51.160

**2.51.160 Board consideration.**

It is the intent of the board to manage appeals in a timely and predictable manner.

An examiner decision which has been timely appealed pursuant to Section 2.51.150 shall come to the board for consideration in open public meeting no longer than sixty (60) days from the date an appeal was filed. Unless otherwise determined by the board for a specific appeal, the board shall consider appeals once a month, on a reoccurring day of each month. The day of the month on which appeals are considered shall be consistent from month to month as determined by board administrative procedures.

The full administrative record, including the appeal and all timely submitted written comments thereon, shall be delivered to the board no later than one week prior to the date set for the appeal meeting.

The board shall consider the matter based upon the written record before the examiner, the examiner's decision and any written comments thereon received in the office of the board within the following deadlines measured from the date of the appeal: fourteen (14) calendar days for the appellant's initial comments; twenty-eight (28) calendar days for all responding comments; and thirty-five (35) calendar days for appellant reply comments which comments shall be limited to the issues raised in the respondent's comments. Written comments shall be limited to arguments asserting error in or support of the examiner decision based upon the evidence presented to the examiner. (Sec. 16 of Res. 1979-04-56; amended by Sec. 2 of Ord. 1982-08-60; amended by Sec. 4 of Ord. 1983-05-43; amended by Sec. 1 of Ord. 1995-01-26; amended by Sec. 1 of Ord. 2005-10-04)

Compile Chapter

CCC 2.51.170

TOC	<	>
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2.51.170 Board action.

The board by resolution may accept, modify or reject the examiner's decision, or any findings or conclusion therein, or may remand the decision to the examiner for further hearing. A decision by the board to modify, reject or remand shall be supported by findings and conclusions.

The action of the board in approving or rejecting a decision of the examiner shall be final and conclusive unless a land use petition is timely filed in superior court pursuant to RCW 36.70C.040 (Section 705 of Chapter 347, Laws of 1995); provided, that no person having actual prior notice of the proceedings of the examiner or board shall have standing to challenge the board's action unless such person was a party of record at the examiner's hearing. (Sec. 17 of Res. 1979-04-56; amended by Sec. 3 of Ord. 1982-08-60; amended by Sec. 2 of Ord. 1996-04-28; amended by Sec. 16 of Ord. 1997-04-19)

Compile Chapter

CCC 40.350.030

40.350.030 Street and Road Standards

A. Overview.

1. Purpose. It is the purpose of this section to establish minimum standards for public and private transportation facilities for vehicles, public transit, pedestrians, and bicycles, hereinafter constructed or improved as a condition of county approval of a development, or a transportation project constructed by the county. These standards are intended to preserve the community's quality of life and to minimize total costs over the life of the transportation facility.
2. Applicability. This section applies to any subdivision, short plat, site plan application, or conditional use permit; provided, that for the purposes of Sections 40.350.030(B)(4) and (B)(8), it shall also apply to applications for building permit or other applications for access to a public road, or to projects within the public right-of-way. Unoccupied utility and wireless communication facilities shall only be subject to the provisions of Section 40.350.030(B)(4)(c), (d) and (e); and Section 40.350.030(B)(8).
3. Relationship to Comprehensive Plan.
 - a. Clark County is required by RCW 36.70A.040(3) to ensure that any development regulations adopted subsequent to the comprehensive plan "...are consistent with and implement the comprehensive plan..."
 - b. This section is consistent with and implements the goals and policies listed in the comprehensive plan. Particular attention has been paid to Chapter 5, Transportation Element.
 - c. Interpretations of this section shall be consistent with the effective Arterial Atlas. The Arterial Atlas identifies all arterials and collectors and specifies the design of these facilities in general terms.
 - d. This section implements the pedestrian and bikeways system plan and the Arterial Atlas. The atlas requires pedestrian and/or bicycle facilities to be included as part of certain arterial and collector road cross-sections where the pedestrian and bikeways system plan indicates such facilities are to be located. This section requires the inclusion of pedestrian and bikeway facilities in frontage improvements based on the functional classification adopted in the Arterial Atlas.
4. Functional Classifications – Purpose. The purpose of a functional classification system for county roads is to define varying levels and types of transportation infrastructure and to provide for the safe and efficient movement of people and goods, while preserving residential areas and maintaining the economic vitality of commercial and industrial areas. The system classifies transportation facilities as either urban or rural roads. Within urban roads, they are further divided into arterials, collectors, and access roads; within rural roads, they are divided into arterials, collectors and access roads.

Existing and proposed arterials and collectors are shown on the current Arterial Atlas. The county's functional classification system for arterials is intended to be in compliance with the federal classification system.
5. Functional Classifications – Urban Roads. Urban roads are classified as outlined below:

2009-06-01)

B. Standards for Development Review.

1. Transportation Impact Study. The requirements for a transportation impact study are stated in Section 40.350.020(D).
2. Circulation Plan.

- a. Purpose and Applicability. The purpose of this section is to ensure adequate cross-circulation in a manner which allows subsequent developments to meet these standards, and to provide a mechanism for integrating various streets into an efficient and safe transportation network.

Developments that are required to conduct a transportation impact study or construct frontage improvements shall meet the requirements of this section.

- b. Information Requirements for a Circulation Plan. Applicants shall submit a circulation plan which includes the subject site and all adjacent parcels. Proposed streets must be shown to the point of connection with the existing street system within six hundred (600) feet. The circulation plan shall demonstrate feasibility with development of adjacent properties, or may revise the off-site portion of prior approved plans. Circulation plans shall also be consistent with the Arterial Atlas, as amended. A circulation plan shall be submitted at application. Draft circulation plans may be submitted at pre-application.

- (1) Information Requirements for Developments in Urban Area. Urban circulation plans shall be schematic in nature and to an engineering scale (e.g., 1" = 100', 1" = 200', 1" = 400'). The plan should include sufficient off-site and on-site conditions to evaluate it against the review criteria. It shall include:

- (a) Proposed project boundary;
- (b) Existing and proposed streets, transit routes and facilities, and other pedestrian/bicycle destinations within six hundred (600) feet of the project boundary;
- (c) Site access points for vehicles, pedestrians, bicycles, and transit; and
- (d) Sensitive lands (wetlands, shoreline, geologic hazard, floodplain, etc.), if they are contained in the county's information package.

The circulation plan should be prepared on eight and one-half (8 1/2) inch by eleven (11) inch (8 1/2" x 11") or eleven (11) inch by seventeen (17) inch (11" x 17") or twenty-four (24) inch by thirty-six (36) inch (24" x 36") format, and can be superimposed on the "arterials, C-Tran routes, parks and trails" and "elevation contours" page provided with the developer's GIS packet. Additional explanation or an additional legend may be required to adequately show proposed on-site facilities.

- (2) Information Requirements for Developments in Rural Area. Rural circulation plans shall be schematic in nature and based on the appropriate quarter-section map. The plan should include sufficient on-site and off-site conditions to evaluate it against the review criteria. Rural circulation plans shall include:

- (a) Proposed project boundary;
- (b) How the project site connects to the existing street system;
- (c) Any arterials identified in the Arterial Atlas, as amended, within eight hundred (800) feet of the site.

generations during the p.m. peak hour of more than ten percent (10%); provided, that such otherwise exempt developments shall be required to make intersection and sight distance improvements in accordance with Sections 40.350.030(B)(7) and (B)(8) and such frontage road improvements as are necessary in order to provide minimally safe access to the development.

c. Deferral.

- (1) In the event that required frontage road improvements are included as a portion of a county road project on the county's six (6) year transportation improvement program scheduled to be undertaken within three (3) years, the developer, in lieu of constructing or guaranteeing the construction pursuant to Section 40.350.030(C)(4)(i) of such frontage improvements may be permitted to contribute a proportionate share towards the cost of such county road project by an agreement consistent with the requirements of RCW 82.02.020.
- (2) The development approval authority may defer frontage road improvements, in whole or in part, where the current development proposal is for lots in the R1-5, R1-6, R1-7.5, R1-10 or R1-20 zoning districts larger than one (1) acre and a covenant running with the land is recorded requiring such improvements to be undertaken when redivision is proposed at an urban density.

6. Off-Site Road Improvement.

- a. General. 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.
- b. Requirements for Off-Site Access Road Improvements. All roads providing access to parcels being developed, whether such roads are to be public or private, shall at a minimum:
 - (1) Within the urban area have an unobstructed and paved roadway width of twenty (20) feet, except in those cases where the pre-existing road is eighteen (18) feet wide with one (1) foot wide shoulders, additional widening to the twenty (20) foot standard is not necessary. Any pre-existing roadway narrower than eighteen (18) feet with one (1) foot shoulders shall be widened to the full twenty (20) foot standard.
 - (2) Within the rural area, off-site public access roads shall meet the same standards as Section 40.350.030(B)(6)(b)(1). Off-site private access roads are not required to be paved but shall have an all weather driving surface, unobstructed roadway width of twenty (20) feet; except in those cases where the pre-existing road is eighteen (18) feet wide, additional widening to twenty (20) feet is not necessary. Any pre-existing roadway narrower than eighteen (18) feet shall be widened to the full twenty (20) feet standard.
 - (3) Have an unobstructed vertical clearance of not less than thirteen (13) feet six (6) inches (13' 6").
 - (4) Notwithstanding the foregoing, roads providing access to legal lots

created prior to July 9, 1996, being developed with a Group R-Division 3 structure or residential mobile home, may be constructed with a minimum twelve (12) feet wide unobstructed all weather driving surface.

- (5) Off-site private roads providing access to lots being developed shall have a minimum easement partial width of twenty-five (25) feet, from such lot to a public road.
 - c. Requirements for Off-Site Intersection Improvement. The owners of a parcel being developed shall enter into a signal participation agreement to contribute a proportionate share towards the cost of a traffic signal when:
 - (1) An intersection impacted by the proposed development is designated by the county for installation of a traffic signal; and
 - (2) The parcel being developed is not located within a traffic impact fee (TIF) service area; and
 - (3) During the peak hour, the development generates a minimum of three (3) percent increase of traffic on the intersection approach leg impacted by the development, or five (5) trips on a minor leg (those legs of the intersection that have the smaller approach volume) or twenty (20) trips on a major leg (those legs of the intersection that have the larger approach volumes); and
 - (4) The peak hour level of service at the leg of the intersection impacted by the site-generated traffic is at or will fall below the minimum level of service standard for that intersection as defined in Section 40.350.020.
7. Intersection Design.
- a. Intersection Geometry. Private and public roads shall be laid out so as to intersect at an angle as near to a right angle as practicable, but in no case less than seventy-five (75) degrees for roads intersecting collectors and arterials and no less than sixty (60) degrees for access roads, unless modified pursuant to Section 40.550.010. Opposing roads accessing an intersection shall either be aligned or will be separated by a minimum intersection spacing, as specified in Tables 40.350.030-2 through Table 40.350.030-6. Depending on the width of the intersection opening, an off-set greater than ten (10) feet for access roads or five (5) feet for collectors and arterials is not allowed.
 - b. Intersection Right-of-Way.

Intersections shall have a minimum corner radius of ten (10) feet along the right-of-way lines for access roads and a minimum corner radius of twenty-five (25) feet along the right-of-way lines for collectors and arterials, unless road improvements require a greater radius.

On collectors and arterials, the dedication of right-of-way on corners shall include the chord of the radius. The county will accept an easement for this chord instead of dedication of right-of-way. For arterials intersecting with other arterials, an additional six (6) feet right-of-way may be required on both sides of the roadway if a future turning lane is required, based on transportation impact study, within twenty (20) years from the time an application is submitted. The length of the additional right-of-way shall be determined based on the transportation impact study.
 - c. Paving of Intersecting Area.

Where connecting to a paved street, whether public or private, the connecting road or driveway (excluding driveways in rural area) shall be paved twenty-five (25) feet back from the nearest edge of the traveled lane, or shall be equal to

the minimum intersection radii as specified in Tables 40.350.030-2 through Table 40.350.030-6, whichever is greater.

Driveways in rural areas connecting with paved public roads shall be paved from the edge of the public road to the right-of-way or to twenty (20) feet from the edge, whichever is greater.

Rural paving shall be done in accordance with the equivalent base structural requirements of the gravel road section as noted in the Standard Details Manual.

8. Sight Distances. As noted in Section 40.350.030(A)(2), this subsection also applies to applications for building permits and applications for access to public roads. Unless modified pursuant to Section 40.550.010, public and private roads shall comply with the following sight distance requirements:

a. Stopping Sight Distance.

Public roads shall have minimum stopping sight distance, as measured from a height of 3.5 feet to a target on the roadway nominally six (6) inches in height, in accordance with Table 40.350.030-10.

“Posted speed,” which is statutory (fifty (50) MPH as per RCW 46.61.415) or recommended through a speed zone study and adopted by resolution by the board, shall be the legal speed limit generally applicable to such roadway. The advisory speed shown on a yellow advisory speed plate is not a legal speed limit. The county, or the applicant, should conduct a speed study if the actual traffic speeds are significantly different than the posted speed limit.

Table 40.350.030-10. Stopping Sight Distance

Posted Speed (mph)	Minimum Stopping Distance (feet)
25	150
30	200
35	250
40	325
45	400
50	475

b) Controlled Intersection and Driveway Sight Distance Triangle.

Traffic entering an uncontrolled public road from stop sign controlled public roads, or from private roads or private driveways, shall have minimum corner sight distances, as shown in the following table, except as allowed in Section 40.350.030(B)(8)(c). They are measured from an eye height of three and one-half (3.5) feet above the controlled road at least fifteen (15) feet from the edge of the vehicle travel lane of the uncontrolled public road to an object height of four and one quarter (4.25) feet on the uncontrolled public road in accordance with Table 40.350.030-11. Landscaping or fences within sight distance triangles shall not interfere with sight distance requirements.

Table 40.350.030-11. Controlled Intersection, Public Road and Driveway Sight Distance

Posted Speed, Uncontrolled Road (mph)	Minimum Corner Sight Distance (feet)

20	200
25	250
30	300
35	350
40	400
45	450
50	500

c. **Uncontrolled Intersections.**

Uncontrolled intersections for access roads in urban and rural areas shall have an unobstructed sight distance triangle of one hundred (100) feet on both approaches. This requirement may be reduced to eighty (80) feet for intersections abutting corner lots in an urban residential subdivision. The sight distance is measured along the lines four (4) feet from the center line, in drivers' direction, for both approaches.

- d. **Driveways in Urban Residential Areas.** Except for corner lot driveways, urban residential driveways shall have an unobstructed sight distance of one hundred (100) feet in both directions. The sight distance is measured along the lines four (4) feet from the center line, in the drivers' direction, for both directions.
- e. **Driveways in rural areas** are subject to Table 40.350.030-11.
- f. **Effect of Grades.** The effect of grades on the above stopping and intersection sight distances shall be governed by the criteria stated in the American Association of State Highway and Transportation Officials' (AASHTO) reference "A Policy on Geometric Design of Rural Highways" (1990).

9. **Street Extensions.**

- a. **General Requirements.** Where a public or private road has been constructed, created or stubbed in such a manner as to be able to be extended or widened in accordance with adopted road plans, prior approved development or this section, including but not limited to maximum length requirements for cul-de-sacs as established in Table 40.350.030-4, design criteria for urban access roads, then:

(1) **Connection With Adjacent Areas.** All residences, buildings or structures shall be constructed in such a position on the property that they will not interfere with the extension or widening of the roadway to adjacent areas and shall be so situated that such extension will make orderly and planned development for additional road installations to meet the reasonable minimum requirements of good and safe traffic circulation, consistent with applicable zoning setbacks.

(2) **Right-of-Way for Street Extensions.** Right-of-way or private easements necessary to such extension or widening and falling within parcels being developed shall be granted or created as a condition of development approval.

b. **Urban Developments.**

(1) **Provisions for Future Extensions.** Any street within the urban area for which an extension in the future is planned shall be extended to the edge of the property being developed through the plat, short plat or site plan

CCC 40.380.040

40.380.040 Stormwater Control

A. Design Standards.

1. Stormwater facilities shall be designed and constructed in accordance with 1998 Standard Specifications for Road, Bridge, and Municipal Construction, and updates as prepared by Washington Department of Transportation (WSDOT); and the BMP manual.

B. Water Quality Treatment.

1. General Standards.

- a. All development activities and redevelopment, unless exempted in Sections 40.380.020 and 40.380.030, shall provide treatment of stormwater runoff through the use of BMPs specified in this section and in accordance with the BMP manual.
- b. Treatment BMPs shall be sized to capture, hold and treat the water quality design storm, defined as seventy percent (70%) of the two (2) year recurrence interval twenty-four (24) hour storm runoff event.
- c. If site conditions are appropriate and groundwater quality will not be impaired, infiltration is the preferred BMP. Direct discharge of untreated stormwater to groundwater is prohibited. All discharges to groundwater shall comply with the following state laws: the Water Pollution Control Act (Chapter 90.48 RCW), the Water Resources Act (Chapter 90.54 RCW), and Water Quality Standards for Ground Waters of the State of Washington (Chapter 173-200 WAC). Infiltration may be limited near public water supply wells.
- d. The BMPs cited in this section shall be sited, designed and constructed in accordance with the requirements detailed in the BMP manual for each BMP, with the following exceptions:
 - (1) For biofiltration swales (RB.05) and vegetative filter strips (RB.10) alternative design criteria from the publication Biofiltration Swale Performance, Recommendations, and Design Considerations – Appendix G by the Municipality of Metropolitan Seattle, water pollution control department, dated October 5, 1992, shall be used;
 - (2) Where provisions of this section conflict with the BMP manual or other cited design guidance, this chapter shall take precedence.

2. Off-Site Analysis.

- a. All development activities and redevelopment required to prepare a final stormwater control plan shall conduct an analysis of off-site water quality impacts resulting from the development activity or redevelopment and shall mitigate these impacts. The analysis shall extend a minimum of one-fourth (1/4) of a mile downstream from the development site. The applicant shall use best efforts to obtain this data while respecting private property. The existing conditions and potential impacts to be evaluated shall include, at a minimum, but not be limited to:
 - (1) Excessive sedimentation;
 - (2) Streambank erosion;

- (1) The experimental BMP usage is part of a Washington Department of Ecology or Clark County research project;
 - (2) Monitoring of the effluent quality produced by the BMP, as well as influent quality, will be conducted for at least two (2) years;
 - (3) Results of the research will be published;
 - (4) Financing is available to construct the BMP, conduct the testing and publish the results.
- c. The responsible official may approve use of alternative water quantity and/or water quality treatment devices that are acceptable for projects meeting the eligibility requirements of Section 40.260.110 with evidence from the applicant that water quality, water quantity control, and maintainability are not affected.
10. Drainage Structure Labeling and Signage.
- a. All catch-basins and manholes capable of accepting stormwater shall be stenciled. For infiltration systems stenciling shall read: "Please protect – Drains to Drinking Water."
 - b. For facilities draining to surface waters the stenciling shall read: "Please protect – Drains to (name of water body)."
 - c. Signs shall be installed along water quality biofiltration systems that read: "Water Quality Filter – Please Leave Vegetated."
 - d. Fenced detention and retention basins shall be marked with a sign that reads "[Public/Private] Stormwater Control Facility."

(Amended: Ord. 2006-11-07)

C. Quantity Control.

1. General Standards.

- a. All development activities and redevelopment, unless exempted in Section 40.380.030, shall provide quantity control of stormwater runoff in accordance with the requirements of this section.
- 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.
- d. Surface water exiting a parcel shall be discharged with adequate energy dissipaters within the development site to prevent downstream damage.
- e. In addition to the requirements of Chapter 40.420, no reduction of existing conveyance capacity and no net loss of existing storage capacity for the one hundred (100) year storm is permitted in special flood hazard areas as defined in Section 40.420.010(C). This requirement shall also apply to all areas within the limits of the existing one hundred (100) year floodplain, as determined by hydrologic/hydraulic computations in accordance with this section, for all streams and manmade channels within Clark County.
- f. Where provisions of this section conflict with the BMP manual or other cited design guidance, this section shall take precedence.
- g.** No development within an urban growth area shall be allowed to materially increase or concentrate stormwater runoff onto an adjacent property or block existing drainage from adjacent lots. This requirement shall not apply to existing drainageways. This shall apply to all new residential lots less than twenty thousand (20,000) square feet in size and all nonresidential developments within the urban growth area created after September 10, 1996. Alterations or

- remodels that increase the building footprint by less than fifty percent (50%) are exempt from this provision.
- h. All lots within the urban growth area must be designed to provide positive drainage from bottom of footings to an approved stormwater system. Positive drainage may be accomplished by swales, drywells, french drains, laterals to the street, laterals behind the curb or within a public utility easement, an approved system in the side or rear setback, or some other method acceptable to the responsible official.
2. Hydrologic and Hydraulic Analysis.
 - a. Hydrologic and hydraulic analysis shall be in accordance with Chapters III-1 and III-2 of the BMP Manual, with the following exceptions:
 - (1) Table III-1.6, Hydrologic Soil Groups for Soils in the Puget Sound Basin, is replaced by Hydrologic Soil Groups for Soils in Clark County. (Source: SCS TR-55, Second Edition, June 1986, Exhibit A-1. Revisions made from SCS, Soils Interpretation Record, Form #5, September 1988.) Alternatively, hydrological soil groups can be developed by registered soil scientist using criteria set in the USDA, SCS National Soils Handbook.
 - (2) Appendix AIII-1.1, Isopluvial Maps for Design Storms, is replaced by Isopluvial Maps for Design Storms in Clark County. (Source: NOAA Atlas 2, Precipitation – Frequency Atlas for the Western United States, Volume IX – Washington.)
 - (3) The HEC-1 Flood Hydrograph Package computer program, developed by the Hydrologic Engineering Center, U.S. Army Corps of Engineers is an acceptable hydrologic computation program for use in Clark County.
 - (4) Design of stormwater collection systems shall be in accordance with Hydraulic Engineering Circular #12, Drainage of Highway Pavements, 1984 Edition, published by the United States Department of Transportation, Federal Highway Administration (FHWA).
 - b. Table III-1.3, SCS Western Washington Runoff Curve Numbers of the BMP Manual shall be used to calculate predevelopment and post-development runoff with the following constraints:
 - (1) Predevelopment land use shall be established as the use over the last thirty (30) years which results in the least amount of site runoff, as demonstrated by evidence acceptable to the responsible official. Acceptable evidence may include, but not be limited to thirty (30) year old aerial photos, crop history or tax assessor records.
 - (2) Redevelopment of existing sites less than ten thousand (10,000) square feet in area can assume predevelopment land use equivalent to the facility being redeveloped.
 3. Design Methodology for Quantity Control Facilities.
 - a. Except as limited by Section 40.380.040(B)(8) for commercial and industrial sites, infiltration of the one hundred (100) year storm is the preferred method for all stormwater disposal from development sites where local soil types and groundwater conditions are suitable (in general, soils classified as A-1-a, A-1-b, A-3, A-2-4, and A-2-5 as defined in AASHTO Specification M145); provided, that water quality treatment as detailed in Section 40.380.040 is provided prior to infiltration. Soil suitability for infiltration shall be determined by a qualified geotechnical engineer through both approved field testing and laboratory testing.

CCC 40.380.060

40.380.060 Submittal Requirements for Stormwater, Erosion Control and Development Plans

A. General.

1. All applicants proposing development activities and redevelopment governed by this chapter shall submit the plans, studies, and information as provided herein.
2. Signatures. All plans, studies, and reports shall be stamped, signed and dated by the professional civil engineer(s), registered in the state of Washington, and registered soil scientist, if appropriate, responsible for their preparation, and by the project engineer responsible for preparation of the preliminary stormwater plan.

B. Abbreviated Preliminary Stormwater Plan Submittals. An abbreviated preliminary stormwater plan is allowed for certain projects specified in Section 40.380.030. All maps shall contain a scale and north arrow. Ensuring the accuracy of all the information is the applicant's responsibility. Abbreviated preliminary stormwater plan submittals shall include:

1. Vicinity Maps. All vicinity maps shall clearly show the site of the development activity or drainage project.
2. Site Location Map. Minimum USGS (one to twenty-four thousand (1:24,000)) quadrangle topographic map showing natural and manmade drainage features adjacent to site including existing and proposed (if known) stormwater facilities.
3. Other Maps. The following additional vicinity maps shall be required in the situations noted below:
 - a. Floodplains. If a floodplain mapped by FEMA exists on or adjacent to the site;
 - b. Shoreline Management Area. If the site contains or is adjacent to a stream or lake regulated under the Washington Shorelines Management Act.
4. A preliminary development plan meeting the requirements of Section 40.380.060 (F), additional site and vicinity information.
 - a. If wetlands exist on the site and will be impacted by the proposal, a wetland delineation report (Section 40.450.030(D)(4)) may be required.
 - b. If unstable or complex soil conditions exist which may significantly impact the design of the stormwater facilities, the responsible official may require a preliminary soils report to be completed that addresses stormwater design considerations arising from soil conditions.
 - c. The responsible official may require additional site or vicinity information if needed to determine the feasibility of the stormwater proposal.
5. Preliminary Stormwater Design Report. A written narrative shall be required to accompany the preliminary stormwater plan. The narrative shall describe the methods for meeting the requirements of this chapter and include the following information:
 - a. Listing of approximate volumes of runoff storage required;
 - b. Listing of tested percolation rates at sites to be used for infiltration, if required;
 - c. Listing of proposed BMPs which will meet the treatment requirements of this chapter and are appropriate for the site;
 - d. Description of the approximate size and location of stormwater facilities on the

site;

- e. Discussion of who will maintain the facility(ies) after completion and proposed method of funding if the facility(ies) will be privately maintained; and
- f. Listing of additional permits (e.g., wetland, floodplain, and shoreline management permits) that may be required in connection with the stormwater facilities.

C. Preliminary Stormwater Plan Submittals.

1. Purpose. The purpose of this plan is to determine whether a proposal can meet the requirements set forth in Chapter 40.380. The preliminary stormwater plan shall identify how stormwater runoff originating on the site or flowing through the site is presently controlled and how this will change due to the proposed development activity, redevelopment, or drainage project. If the site is within the region covered by a basin plan pursuant to this chapter, then the information needed in the preliminary plan is reduced. All maps shall contain a scale and north arrow.
2. Types of Development Activity and Redevelopment. A preliminary stormwater plan is required for all development activities not exempted by Section 40.380.020 and Section 40.380.030 and the following activities:
 - a. Short plats;
 - b. Subdivisions;
 - c. Site plan reviews;
 - d. Planned unit developments;
 - e. Conditional uses meeting the applicability requirements of Section 40.380.020; and
 - f. Master plan developments;
 - g. Timing.
 - h. A preliminary stormwater plan shall be submitted with the land use application.
 - (1) A land use application shall be considered "fully complete" from the standpoint of stormwater information when a preliminary stormwater plan meeting the submittal requirements of this section is provided;
 - (2) To ensure adequate public review and avoid multiple reviews of preliminary plans by county staff, the preliminary stormwater plan shall not be significantly modified after public notice of the final SEPA determination without issuance of a new SEPA determination;
 - i. Contents. The preliminary stormwater plan submittal shall be prepared in the standardized format described below. The purpose of this standardized format is to promote a quick and efficient review of required information. The project engineer shall include a statement that all information required by this section is included in the preliminary stormwater plan and that the proposed stormwater facilities are feasible. All maps shall contain a scale and north arrow. Ensuring the accuracy of all the information is the applicant's responsibility.
 - (1) Vicinity Maps. All vicinity maps shall clearly show the site of the development activity, redevelopment, or drainage project;
 - (2) Site Location Map. Minimum USGS (one to twenty-four thousand (1:24,000)) quadrangle topographic map showing (and labeling where appropriate):
 - (a) Contributing drainage areas and acreage both on-site and off-site, and
 - (b) Natural and manmade drainage features adjacent to the site including

- (e) Listing of approximate volumes of runoff storage required,
 - (f) Listing of tested percolation rates at sites to be used for infiltration, if required,
 - (g) Listing of proposed BMPs which will meet the treatment requirements of this chapter and are appropriate for the site,
 - (h) Description of the approximate size and location of stormwater facilities on the site,
 - (i) For agricultural sites with drain tiles, a discussion of the impact of construction on the drain tiles and site drainage and the impact of the drainage tiles on proposed stormwater facilities,
 - (j) Discussion of who will maintain the facility(ies) after completion and the proposed method of funding for maintenance, if the facility(ies) will be privately maintained, and
 - (k) Listing of additional permits (e.g., wetland, floodplain, and shoreline management permits) that may be required in connection with the stormwater facilities;
- j. Modification of Content Requirements. The responsible official may waive in writing some or all of the content requirements in the preliminary stormwater plan if:
- (1) The development activity or drainage project is included in an approved final stormwater plan which meets the requirements of this chapter; or
 - (2) A basin plan exists that makes some of the information irrelevant.
- The waiver of some or all of the preliminary stormwater control plan does not relieve the applicant of a final stormwater control plan;
- k. Review and Approval. For proposals connected with a land use application requiring a public hearing, the preliminary stormwater plan shall be heard and decided in accordance with the procedures applicable to the land use application. All other preliminary stormwater plans shall be acted on by the responsible official concurrent with the timeline for the preliminary land use decision;
- l. Appeals. Preliminary stormwater plan decisions may be appealed in conjunction with the associated land use application.

(Amended: Ord. 2006-11-07)

D

Final Stormwater Plan Submittals.

- 1. Purpose. The final stormwater plan provides final engineering design and construction drawings for the stormwater aspects of a proposed development activity, redevelopment, or drainage project.
- 2. Timing. The final stormwater plan is required and must be approved by the responsible official prior to beginning construction related to a development activity, redevelopment, or drainage project.

3

Contents. The final stormwater plan shall include the following:

- a. An engineer's estimate of the cost for surveying and engineering to complete the record drawing(s) is required prior to site plan approval;
- b. An escrow, letter of credit, cashier's check, or other acceptable form of guarantee is required from the applicant or applicant's representative for one hundred ten percent (110%) of the engineer's estimate identified in Section 40.380.060(D)(1). Bonds are not acceptable instruments;
- c. Any easements, covenants or agreements that are necessary to permit

- construction must be included;
- d. The approved preliminary stormwater plan with an explanation of any differences between the design concepts included in the preliminary stormwater plan and the final engineering plans. A final stormwater plan which differs from the approved preliminary stormwater plan in a manner that, in the opinion of the responsible official, raises material water quality or quantity control issues, shall, if subject to SEPA, require another SEPA determination, and a post-decision review in accordance with Section 40.520.060;
 - e. Final engineering plans that provide sufficient detail to allow construction of the stormwater facilities. These plans shall be stamped, signed and dated by the engineer(s) registered in the state of Washington, responsible for hydrologic, hydraulic, geotechnical, structural and general civil engineering design and by the project engineer responsible for the preparation of the final stormwater plan. Additionally, the final engineering plan shall show all utilities to ensure conflicts between proposed utility lines do not exist;
 - f. The off-site analysis required under Section 40.380.040(B)(2);
 - g. A final development plan meeting the requirements of Section 40.380.060(F); and
 - h. A technical information report.
4. Technical Information Report (TIR). The TIR shall be a comprehensive report, supplemental to the final engineering plans, containing all technical information and analysis necessary to complete final water quality and quantity engineering plans based on sound engineering practices and appropriate geotechnical, hydrologic, hydraulic and water quality design. The TIR shall be stamped, signed and dated by the professional engineer(s), registered in the state of Washington, responsible for hydrologic, hydraulic, geotechnical, structural and general civil engineering design. The level of detail in the TIR is dependent on the complexity and size of the development activity. The TIR, which is part of the final stormwater plan, shall contain the following information:
- a. Table of Contents.
 - (1) List section headings and their respective page numbers,
 - (2) List of tables with page numbers,
 - (3) List of figures with page numbers,
 - (4) List of attachments, numbered,
 - (5) List of references;
 - b. Site Location Map. The site location map (minimum USGS one to twenty-four thousand (1:24,000) quadrangle topographic map) shall be as required for the preliminary stormwater plan, updated to reflect additional data or revisions to concepts established in preliminary stormwater plan;
 - c. Soils Map. A soils map as required for the preliminary stormwater plan;
 - d. Section A – Project Overview.
 - (1) Identify and discuss existing stormwater system functions,
 - (2) Identify and discuss site parameters influencing stormwater system design,
 - (3) Describe drainage to and from adjacent properties, and
 - (4) Generally describe proposed site construction, size of improvements, and proposed methods of mitigating stormwater runoff quantity and quality impacts;
 - e. Section B – Approval Conditions Summary. List each preliminary approval

CCC 40.510.020

40.510.020 Type II Process – Administrative Decisions

A. Pre-Application Review.

1. The purposes of pre-application review are:
 - a. To acquaint county staff with a sufficient level of detail about the proposed development to enable staff to advise the applicant accordingly;
 - b. To acquaint the applicant with the applicable requirements of this code and other law. However, the conference is not intended to provide an exhaustive review of all the potential issues that a given application could raise. The pre-application review does not prevent the county from applying all relevant laws to the application; and
 - c. To provide an opportunity for other agency staff and the public to be acquainted with the proposed application and applicable law. Although members of the public can attend a pre-application conference, it is not a public hearing, and there is no obligation to receive public testimony or evidence.
2. Pre-application review is required for applications, with the following exceptions:
 - a. The application is for one (1) of the following use classifications:
 - (1) Section 40.210.010, Forest and Agriculture districts;
 - (2) Section 40.520.020, Planning Director reviews and similar use determinations;
 - (3) Chapter 40.260, special uses (unless specified as a Type III review);
 - (4) Section 40.260.220, temporary permits;
 - (5) Section 40.530.050, change in nonconforming use;
 - (6) Section 40.260.210, temporary dwelling permit;
 - (7) Section 40.520.060, post-decision reviews;
 - (8) Section 40.450.040, preliminary (stand-alone) wetland permit;
 - (9) SEPA review for projects that are not otherwise Type II reviews (e.g., grading);
 - (10) Section 40.500.010, interpretations;
 - (11) Section 40.550.020, administrative variances; or
 - b. The applicant applies for and is granted a pre-application waiver from the responsible official. The form shall state that waiver of pre-application review increases the risk the application will be rejected or processing will be delayed. Pre-application review generally should be waived by the responsible official only if the application is relatively simple. The decision regarding a pre-application waiver can be appealed as a Type I decision.
3. To initiate pre-application review, an applicant shall submit a completed form provided by the responsible official for that purpose, the required fee, and all information required by the relevant section(s) of this code. The applicant shall provide the required number of copies of all information as determined by the responsible official.
4. Information not provided on the form shall be provided on the face of the preliminary plat, in an environmental checklist or on other attachments. The responsible official may modify requirements for pre-application materials and may conduct a pre-application review with less than all of the required information. However, failure to provide all of the required information may prevent the

being submitted in writing and submitted as part of the full application package.

3. Special rules apply to certain nonconforming uses under Section 40.530.050.

4. For concurrency approval requirements, see Section 40.350.020.

(Amended: Ord. 2007-06-05)

H. Appeals.

1. **Applicability.** A final decision may be appealed only by a party of record. Final decisions may be appealed if, within fourteen (14) calendar days after written notice of the decision is mailed, a written appeal is filed with the responsible official.

2. **Submittal Requirements.** The appeal shall contain the following information:

a. The case number designated by the county and the name of the applicant;

b. The name of each petitioner, the signature of each petitioner or his or her duly authorized representative, and a statement showing that each petitioner is entitled to file the appeal under Section 40.510.020(H)(1). If multiple parties file a single petition for review, the petition shall designate one (1) party as the contact representative for all contact with the responsible official. All contact with the responsible official regarding the petition, including notice, shall be with this contact representative;

c. 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; and

d. The appeal fee adopted by the board; provided, the scheduled fee shall be refunded if the applicant files with the responsible official at least fifteen (15) calendar days before the appeal hearing a written statement withdrawing the appeal.

3. **Appeal Procedures.**

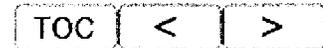
a. The hearing examiner shall hear appeals in a de novo hearing. Notice of an appeal hearing shall be mailed to parties of record, but shall not be posted or published. A staff report shall be prepared, a hearing shall be conducted, and a decision shall be made and noticed. The decision can be appealed under a Type III process.

b. Except for SEPA appeals which are governed by RCW 43.21C.075, the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence.

(Amended: Ord. 2005-10-04; Ord. 2007-11-13)

Compile Chapter

CCC 40.510.030



40.510.030 Type III Process – Quasi-Judicial Decisions

A. Pre-Application Review.

1. The purposes of pre-application review are:
 - a. To acquaint county staff with a sufficient level of detail about the proposed development to enable staff to advise the applicant accordingly;
 - b. To acquaint the applicant with the applicable requirements of this code and other law. However, the conference is not intended to provide an exhaustive review of all the potential issues that a given application could raise. The pre-application review does not prevent the county from applying all relevant laws to the application; and
 - c. To provide an opportunity for other agency staff and the public to be acquainted with the proposed application and applicable law. Although members of the public can attend a pre-application conference, it is not a public hearing, and there is no obligation to receive public testimony or evidence.
2. Pre-application review is required for applications, with the following exceptions:
 - a. The application is for a post-decision review, as described in Section 40.520.060; or
 - b. The applicant applies for and is granted a pre-application waiver from the responsible official. The form shall state that waiver of pre-application review increases the risk the application will be rejected or processing will be delayed. Pre-application review generally should be waived by the responsible official only if the application is relatively simple. The decision to waive a pre-application can be appealed as a Type I decision.
3. To initiate pre-application review, an applicant shall submit a completed form provided by the responsible official for that purpose, the required fee, and all information required by the relevant section(s) of this code. The applicant shall provide the required number of copies of all information as determined by the responsible official.
4. Information not provided on the form shall be provided on the face of the preliminary plat, in an environmental checklist or on other attachments. The responsible official may modify requirements for pre-application materials and may conduct a pre-application review with less than all of the required information. However, failure to provide all of the required information may prevent the responsible official from identifying all applicable issues or providing the most effective pre-application review and will preclude contingent vesting under Section 40.510.030(G). Review for completeness will not be conducted by staff at the time of submittal and it is the responsibility of the applicant.
5. Within fifteen (15) calendar days after receipt of an application for pre-application review, the responsible official shall mail written notice to the applicant and to other interested agencies and parties, including the neighborhood association in whose area the property in question is situated. The notice shall state the date, time and location of the pre-application conference, the purposes of pre-application review, and the nature of the conference.
6. The responsible official shall coordinate the involvement of agency staff

due to factors beyond the control of the applicant.

G. Vesting.

1. Type III applications (other than zone change proposals) shall be considered under the land development regulations in effect at the time a fully complete application for preliminary approval is filed.
2. Contingent Vesting. An application which is subject to pre-application review shall earlier contingently vest on the date a complete pre-application is submitted. Contingent vesting shall become final if a fully complete application for substantially the same proposal is submitted within one hundred eighty (180) calendar days of the date the responsible official issues its written summary of pre-application review subject to the limitations of Section 40.510.030(A)(4). Requests to waive contingent vesting rights by the applicant shall be approved, subject to the request being submitted in writing and submitted as part of the full application package.
3. Special rules apply to approved planned unit developments under Section 40.520.080 and certain nonconforming uses under Section 40.530.050.
4. For concurrency approval requirements, see Section 40.350.020.

(Amended: Ord. 2007-06-05)

- H. Burden of Proof. Except for SEPA appeals which are governed by RCW 43.21C.075, the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence.

(Amended: Ord. 2007-11-13)

I. Appeals.

1. Applicability. A final decision may be appealed only by a party of record. Final decisions may be appealed only if, within fourteen (14) calendar days after written notice of the decision is mailed, a written appeal is filed with the board.
2. Submittal Requirements. The appeal shall contain the following information:
 - a. The project name;
 - b. The case number designated by the county and the name of the applicant;
 - c. The name and signature of each petitioner and a statement showing that each petitioner is entitled to file the appeal under Section 40.510.020(E), 40.510.020(H) or 40.510.030(H). If multiple parties file a single petition for review, the petition shall designate one (1) party as the contact representative for all contact with the responsible official. All contact with the responsible official regarding the petition, including notice, shall be with this contact representative;
 - d. Introduction. This should include a brief history of the case, a chronology of dates of related applications, including case numbers, and a description of the proposal as it relates to the decision being appealed and a brief summary of the standards of review and alleged errors;
 - e. Standard of Review. Describe in more detail what standard of review (i.e., board's discretion to reverse the examiner's decision) you believe applies to board's review of the alleged errors;
 - f. Alleged Errors/Response to Alleged Errors. Identify 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

(i.e., reference the relevant exhibits and passages, court cases, etc.). A hearing examiner's procedural SEPA decision is final and not subject to further administrative appeal;

g. The appeal fee adopted by the board; provided, the fee shall be refunded if the appellant files with the responsible official at least fifteen (15) calendar days before the appeal hearing a written statement withdrawing the appeal.

3. Board Consideration. The board shall hear appeals of Type III decisions on the record, including all materials received in evidence at any previous stage of the review, an electronic recording of the prior hearing(s) or transcript of the hearing (s) certified as accurate and complete, the final order being appealed, and argument by the parties.

a. The board's consideration of an appeal shall be scheduled as provided for in Chapter 2.51. The board may either decide the appeal at the designated meeting or continue the matter to a limited hearing for receipt of oral argument. If so continued, the board shall:

(1) Designate the parties or their representatives to present argument, and the permissible length thereof, in a manner calculated to afford a fair hearing of the issues specified by the board; and

(2) At least fifteen (15) calendar days before such hearing, provide mailed notice thereof to parties entitled to notice of the decision being appealed under Section 40.510.030(D)(6), which notice shall indicate that only legal argument from designated parties will be heard.

b. At the conclusion of its public meeting or limited hearing for receipt of oral legal argument, the board may affirm, reverse, modify or remand an appealed decision.

(1) A decision to remand a matter is not appealable. Appeal from a decision on remand shall be treated as any other decision.

(2) If the board affirms an appealed decision, then the board shall adopt a final order that contains the conclusions the board reached regarding the specific grounds for appeal and the reasons for those conclusions. The board may adopt the decision of the hearing examiner as its decision to the extent that decision addresses the merits of the appeal or may alter that decision.

(3) If the board reverses or modifies an appealed decision, then the board shall adopt a final order that contains:

(a) A statement of the applicable criteria and standards in this code and other applicable law relevant to the appeal;

(b) A statement of the facts that the board finds show the appealed decision does not comply with applicable approval criteria or development standards;

(c) The reasons for a conclusion to modify or reverse the decision; and

(d) The decision to modify or reverse the decision and, if approved, any conditions of approval necessary to ensure the proposed development will comply with applicable criteria and standards.

c. The board office shall mail notice of a board's decision on the merits of an appeal to parties entitled to notice under Section 40.510.030(D)(6) and other parties who appeared orally or in writing before the board regarding the appeal. The notice shall consist of the board decision or of a statement identifying the case by number and applicant's name and summarizing the board's decision.

The notice shall include a statement that the decision can be appealed to superior court within twenty-one (21) calendar days and, where applicable, shall comply with the official notice provisions of RCW 43.21C.075 .

4. Appeal of Board's Decision. The action of the board in approving or rejecting a decision of the hearing examiner shall be final and conclusive unless a land use petition is timely filed in Superior Court pursuant to RCW 36.70C.040 (Section 705 of Chapter 347, Laws of 1995); provided, that no person having actual prior notice of the proceedings of the hearing examiner or the board's hearings shall have standing to challenge the board's action unless such person was a party of record at the hearing examiner hearing.

(Amended: Ord. 2005-04-12; Ord. 2005-10-04; Ord. 2006-09-13; Ord. 2007-11-13)

J. Special appeal procedure applicable to uses licensed or certified by the Department of Social and Health Services or the Department of Corrections.

1. In accordance with RCW 35.63.260 (Section 1, Chapter 119, Laws of 1998), prior to the filing of an appeal of a final decision by a hearing examiner involving a conditional use permit application requested by a party that is licensed or certified by the Department of Social and Health Services or the Department of Corrections, the aggrieved party must, within five (5) days after the final decision, initiate formal mediation procedures in an attempt to resolve the parties' differences. If, after initial evaluation of the dispute, the parties agree to proceed with mediation, the mediation shall be conducted by a trained mediator selected by agreement of the parties. The agreement to mediate shall be in writing and subject to RCW 5.60.707 . If the parties are unable to agree on a mediator, each party shall nominate a mediator and the mediator shall be selected by lot from among the nominees. The mediator must be selected within five (5) days after formal mediation procedures are initiated. The mediation process must be completed within fourteen (14) days from the time the mediator is selected except that the mediation process may extend beyond fourteen (14) days by agreement of the parties. The mediator shall, within the fourteen (14) day period or within the extension if an extension is agreed to provide the parties with a written summary of the issues and any agreements reached. If the parties agree, the mediation report shall be made available to the county. The cost of the mediation shall be shared by the parties.
2. Any time limits for filing of appeals are tolled during the pendency of the mediation process.
3. As used in this section, "party" does not include county, city or town.

(Amended: Ord. 2007-11-13)

Compile Chapter

CCC 40.520.040

40.520.040 Site Plan Review

A. Applicability and Review Process.

1. Site plan review is required for all new development and modifications to existing permitted development, unless expressly exempted by this title.
2. A site plan is subject to a Type II review process as provided in Section 40.510.020 if it is subject to one (1) or more of the following:
 - a. Conditional use;
 - b. Planned unit development;
 - c. New development in all urban holding, contingent zone, urban residential, office residential, business park, office campus, mixed use, university, commercial, industrial, surface mining and airport zones, unless expressly exempted by this title;
 - d. A modification to existing permitted development or a permitted modification to an existing nonconforming use if it will cause any of the following:
 - (1) An increase in density or lot coverage by more than ten percent (10%) for residential development;
 - (2) A significant change in the type of dwelling units proposed in a residential development (e.g., a change from detached to attached structures or a change from single-family to multifamily);
 - (3) An increase of more than ten percent (10%) in on-site parking required by this chapter or an increase of more than forty (40) on-site parking spaces;
 - (4) An increase in the height of a structure(s) by more than ten percent (10%);
 - (5) A change in the location of accessways to frontage roads where off-site traffic would be affected, or a change in the location of parking where the parking is closer to land zoned or used for residential or mixed residential/other purposes;
 - (6) An increase in vehicular traffic to and from the site of more than twenty (20) average daily trips, based on the latest edition of the International Transportation Engineer's (ITE) Trip Generation Manual or substantial evidence by a professional engineer licensed in the state of Washington with expertise in traffic engineering;
 - (7) An increase in the floor area of a structure used for nonresidential purposes by more than ten percent (10%) and at least five thousand (5,000) square feet;
 - (8) A SEPA determination is required by Chapter 40.570;
 - (9) A reduction in the area used for recreational facilities, screening, buffering, landscaping and/or open space by more than ten percent (10%); and
 - (10) A modification other than one listed in this section if subject to Type II review based on the post-decision procedures in Section 40.520.060 or based on other sections of this title;
 - e. Aboveground storage tanks over two thousand (2,000) gallons and underground tanks larger than ten thousand (10,000) gallons in size. SEPA review is required for underground tanks over ten thousand (10,000) gallons. CARA provisions in Sections 40.410.010(B) and 40.410.020(A) may also apply.

manufactured homes or travel trailers are permitted to be placed upon the land; provided, that the land use is in accordance with the requirements of this title; and

2. In addition to the requirements of a standard site plan, a binding site plan shall contain:
 - a. Inscriptions or attachments setting forth such appropriate limitations and conditions for the use of the land; and
 - b. Provisions making any development conform to the site plan.
3. In addition to the requirements of a standard final site plan, a final binding site plan application shall contain:
 - a. Survey prepared by a licensed land surveyor in the state of Washington showing the project boundary with mathematical closures and any land division lines created through the binding site plan process; and
 - b. Parcel area of lots expressed in square footage for developments in the urban area and acreage for developments in the rural area.

(Amended: Ord. 2004-11-04)

C. Pre-Application Submittal Requirements.

1. A site plan subject to a Type I review is not subject to pre-application review unless requested by the applicant.
2. A site plan subject to a Type II review is subject to pre-application review unless waived. See Section 40.510.020(A) regarding pre-application review.
3. An applicant for a pre-application review of a site plan shall comply with the submittal requirements in Section 40.510.050.

D. Application Submittal Requirements for Site Plan Review.

An application for a review of a site plan shall comply with the submittal requirements in Section 40.510.050.

E. Approval Criteria.

1. Generally.

- a. If the responsible official finds that a site plan application does or can comply with the applicable approval and development standards, the responsible official shall approve the site plan, or approve the site plan subject to conditions of approval that ensure the proposed development will comply with the applicable standards.
- b. If the responsible official finds that a site plan application does not comply with one (1) or more of the applicable approval or development standards, and that such compliance cannot be achieved by imposing a condition or conditions of approval, the responsible official shall deny the site plan application.
- c. If a site plan is subject to a standard(s) over which the responsible official does not have sole jurisdiction, then the responsible official shall not make a final decision regarding the site plan until the related decision(s) regarding the applicable standard(s) has been received.
- d. The responsible official may modify or waive any of the site plan review standards for specific development within the commercial districts if the responsible official finds that a specific design guideline(s) within Section 40.230.010(E) cannot be implemented in the proposed development without granting the modification.

CCC 40.540.040

40.540.040 Subdivisions**A. Pre-Application Submittal Requirements.**

1. An application for a preliminary plat for a subdivision shall be subject to pre-application review as provided in Section 40.510.030(A) unless waived as permitted by that section.
2. An applicant for a pre-application review of a preliminary plat for a subdivision shall comply with the submittal requirements in Section 40.510.050 of this code.
3. Site-specific information should be provided if it is available or if the condition is significant. Where known by the applicant, the boundaries of these conditions should be shown on the preliminary plat. The level of detail provided in the pre-application materials may be less than in an application for preliminary plat review. For instance, a wetland reconnaissance that does not involve detailed on-site investigation may be appropriate for a pre-application review. If the reconnaissance shows wetlands are reasonably likely to exist on a site, a more detailed wetlands delineation and assessment may be needed for the preliminary plat. Failure of the applicant to provide site-specific information for pre-application review may prevent the review authority from identifying relevant issues or providing the most effective review early in the process.
4. Information not provided on the form shall be provided on the face of the preliminary plat, in an environmental checklist or on other attachments. The responsible official may modify or waive requirements for pre-application materials and may conduct a pre-application review with less than all of the required information. However, failure to provide all of the required information may prevent the responsible official from identifying all applicable issues or providing the most effective pre-application review will preclude the application from contingent vesting pursuant to Section 40.510.030(G).

(Amended: Ord. 2006-09-13)

B. Application Submittal Requirements for Review of a Preliminary Subdivision Plat.

1. Counter complete and fully complete review of an application for approval of a preliminary plat for a subdivision shall be conducted as a Type I process.
2. Review of a fully complete application of a subdivision shall use a Type III process. Appeal and post-decision review are permitted as provided in Chapter 40.510 and Section 40.520.060.
3. An applicant for a review of a preliminary plat for a subdivision shall comply with the submittal requirements in Section 40.510.050 of this code.

C. Subdivisions of Properties Zoned Commercial and Industrial.

Preliminary plats for commercial and industrial properties shall comply with all of the requirements of this chapter, except that only blocks and street layout need be shown.

D. Approval Criteria for a Preliminary Plat Application.

The review authority shall approve a preliminary plat if he or she finds the applicant has sustained the burden of proving that the application complies with the following approval

criteria or that the application can comply with those criteria by complying with conditions of approval:

1. The preliminary plat is in the public interest;
2. The following facilities are adequate to serve the proposed subdivision before or concurrent with development of the preliminary plat:
 - a. Public and private streets and roads,
 - b. Open spaces, parks and recreation,
 - c. Drainage,
 - d. Access to mass transit where there is or will be such transit,
 - e. Potable water supplies,
 - f. Sanitary waste collection and treatment,
 - g. Schools and educational services (if residential),
 - h. Pedestrian facilities (if residential), particularly for students who only walk to and from school, and
 - i. Fire prevention services;
3. The proposal complies with all applicable standards in this code or variations therefrom permitted by law, including:
 - a. Subtitle 40.1, Introduction and Administration;
 - b. Subtitle 40.2, Land Use Districts;
 - c. Subtitle 40.3, Design Standards;
 - d. Subtitle 40.4, Critical Areas;
 - e. Subtitle 40.5, Procedures;
 - f. Subtitle 40.6, Impact Fees; and
 - g. Title 15, Fire Prevention.
4. If a phasing plan is proposed, then the applicant also shall show:
 - a. The phasing plan includes all land within the preliminary plat;
 - b. Each phase is an independent planning unit with safe and convenient circulation and with facilities and utilities coordinated with requirements established for the entire subdivision; and
 - c. All road improvement requirements are assured.

(Amended: Ord. 2005-04-12)

E. Expiration and Extensions of Preliminary Plat Approval.

The expiration and extension of preliminary plat approvals are determined pursuant to Section 40.500.010(B).

Compile Chapter

CCC 40.550.010

40.550.010 Road Modifications

A. Criteria.

1. Modifications to the standards contained within Chapter 40.350 may be granted in accordance with the procedures set out herein when any one (1) 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 purpose is 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 Chapter 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 hardships shall not be used as a reason to grant a modification request.
3. To address issues associated with rapid growth, the legislature enacted the Growth Management Act which requires that urban growth areas be sized to accommodate growth and prevent urban sprawl by focusing development in underdeveloped portions of an urban area. The board therefore finds and concludes, consistent with that legislation, that right-of-way dedicated, frontage improvements and crossroads constructed in urban growth areas in Clark County will be substantially completed within the twenty (20) year period provided in RCW 36.70A.110 in the absence of geographic or development constraints.

(Amended: Ord. 2006-11-07)

B. Categories.

For the purpose of processing, modification requests fall within the following two (2) categories:

1. Administrative Modification. Administrative modification requests deal with the construction of facilities, rather than their general design, and are limited to the following when deviating from the standard specifications:
 - a. Surfacing materials for roads or pedestrian facilities;
 - b. Asphalt and/or base rock thickness less than required;
 - c. Pavement marking layout;
 - d. Exceeding the maximum street grade;
 - e. Type and/or location of signage;
 - f. Channelization;
 - g. Intersection interior angles and curb radii less than required;

- h. Utilizing the current set of standards in lieu of the standards that were in place when the applicant's proposed project was vested;
 - i. Access-related modifications onto collectors and arterials; provided, other substantive criteria such as sight distance and limited access points are met; and provided further, that access to a lesser classification of road is not available;
 - j. Field changes during construction; and
 - k. Similar revisions to the standards;
 - l. Shed section or inverted crown.
2. Design Modifications. Design modifications deal with the vertical and horizontal geometrics and safety related issues and include the following when deviating from the standard specifications:
- a. Reduced sight distances;
 - b. Intersection spacing;
 - c. Vertical alignment;
 - d. Horizontal alignment;
 - e. Geometric design (length, width, bulb radius, etc.);
 - f. Design speed;
 - g. Crossroads;
 - h. Access policy;
 - i. A proposed alternative design which will provide a plan superior to these standards; and
 - j. All other standards.

(Amended: Ord. 2004-06-11)

C. Procedures.

A modification request shall be classified as administrative or design by the County Engineer.

1. Administrative Modification. Administrative modifications may be requested at any time by filing a written application with the County Engineer. The application shall include sufficient technical analysis to enable a reasoned decision. The County Engineer shall provide a written decision on the application. No fee is applicable to the administrative modification, except for minor road modification applications under Section 40.550.010(D).
2. Design Modification. Design modifications shall be proposed in conjunction with the application for the underlying development proposal in accordance with Chapter 40.500. Design modification requests shall be processed in conjunction with the underlying development proposal; provided, that where the modification request is filed subsequent to the decision on the development proposal, such request shall be processed in accordance with the post-decision review procedures of Section 40.520.060 and subject to the fees listed in Title 6. The design modification application, to be filed with the responsible official, shall:
 - a. Include a written request stating the reasons for the request and the factors which would make approval of the request reasonable;
 - b. Be accompanied by a map showing the applicable existing conditions and proposed construction such as contours, wetlands, significant trees, lakes, streams and rivers, utilities, property lines, existing and proposed roads and driveways, existing and projected traffic patterns, and any unusual or unique conditions not generally found in other developments;

- c. In the case of modification requests based upon alleged disproportionality, include an engineering analysis of the standard sought to be modified which contrasts relevant traffic impacts from the development with the cost of complying with the standard; and
- d. For crossroad and frontage construction and right-of-way dedication, shall include information indicating whether there are geographic or other factors which render connection/completion of the road unlikely.

D. Minor Road Modifications. Administrative and design modifications intended to provide relief, through a Type I process, for development conditions which clearly lack nexus or fail to meet the rough proportionality test. Engineering analysis for these modification requests may not be required. The applicant may request waiver of specific transportation standards by means of a minor road modification under one of the following circumstances:

1. The existing road frontage is not constructed to the current transportation standards but determined to meet operational and safety criteria.
2. Improvements to roads that abut a development site may not be required if the development cannot access the road due to topographic constraints and the development sends no trips through these roads. A traffic study including trip distribution analysis may be required.
3. For residential developments which generate no more than twenty (20) new ADT, the cost of the required improvements per average daily trip generated by the development is shown to be disproportional to the requirements imposed by the county for other approved projects.
4. For frontage improvements along roads abutting small residential developments, if the street block face (including the subject parcel) has no frontage improvements or is unlikely to subdivide, the subject development may not be required to provide full frontage improvements. For purposes of exempting frontage improvements, the predominant condition of the street block face shall be defined by considering the existing frontage condition for all parcels fronting the half-street. If less than fifty percent (50%) of the street block face (including the subject parcel) have frontage improvements, or are unlikely to subdivide, the subject development shall not be required to provide full frontage improvements. Where fifty percent (50%) or more have full street frontage improvements, or are likely to subdivide, half-street frontage improvements shall be required.
5. Minor road modifications shall not be granted if found to be inconsistent with the requirement to provide safe walking conditions to schools as required by RCW 58.17.110.

E Road Modification for County Projects.

County public road improvements, when varying from the standards of this chapter, are required to meet the road modification procedures for changes in design; provided, that a county project may include less than the full planned improvement or allow for staged construction. The submission of construction plan should be considered as development application.

(Amended: Ord. 2004-06-11; Ord. 2009-03-02; Ord. 2009-06-01)

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