

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2000 DEC 15 PM 4:47

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
03 DEC 17 PM 12:00
BY *[Signature]*
STATE OF WASHINGTON
CLARK COUNTY

BRIEF OF RESPONDENTS

Charles E. Maduell, WSBA #15491
Nigel P. Avilez, WSBA #36699
Davis Wright Tremaine LLP
Attorneys for WAL-MART STORES,
INC., and CLC ASSOCIATES,
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

ORIGINAL

TABLE OF CONTENTS

I. Introduction.....	1
II. statement of issues	5
III. Statement of The case	5
A. County Approval of Wal-Mart’s Project.	5
B. Appeal to Hearing Examiner	6
C. The Hearing Examiner’s Final Decision on Remand.	7
1. Feasibility of Stormwater System.	7
a. Stormwater Proposal.....	8
b. History of Downstream Stormwater Conveyance System.....	8
c. Capacity to Handle Stormwater Flows.	10
d. Access to Conveyance System.....	11
2. Traffic and Transportation Issues.....	12
a. Traffic Safety Hazard.....	12
b. Road Modification Requests.....	14
3. Engineering Submittal Requirement.	17
D. Appeal to Board of County Commissioners.	17
E. Trial Court Reverses Board of County Commissioners.	19
IV. standard of review.....	20
V. Argument	24
A. The BOCC’s Stated Grounds Do Not Justify or Support Its Denial of Wal-Mart’s Site Plan Application.....	24

1.	Wal-Mart Sufficiently Established Its Right to Use Water’s Edge Stormwater Conveyance System	25	
	a.	Wal-Mart Has Legal Access to the Stormwater Conveyance System Through a Publicly Dedicated Easement	27
	b.	Clark County Is Collaterally Estopped From Claiming that Access to Stormwater System Is Not Feasible.	32
	c.	Condition A-6b Requiring Applicant to Conclusively Demonstrate or Procure Legal Access Effectively “Removes All Doubt” as to Access.	34
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.	37	
	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
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	

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Anderson v. City of Issaquah</i> , 70 Wn. App. 64, 851 P.2d 744 (1993).....	49, 50
<i>Beach v. Bd. of Adjustment of Snohomish County</i> , 73 Wn.2d 343, 438 P.2d 617 (1968).....	48
<i>Citizens to Preserve Pioneer Park LLC v. City of Mercer Island</i> , 106 Wn. App. 461, 24 P.3d 1079 (2001).....	20, 22
<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).....	23, 39, 43
<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).....	21, 22
<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).....	20, 21
<i>Isla Verde Int'l Holdings v. City of Camas</i> , 146 Wn.2d 740, 49 P.3d 867 (2002).....	32, 33
<i>Lakeside Industries v. Thurston County</i> , 119 Wn. App. 886, 83 P.3d 433 (2004).....	20
<i>Maranatha Mining, Inc. v. Pierce County</i> , 59 Wn. App. 795, 801 P.2d 985 (1990).....	22, 23, 45, 46

<i>Messer v. Snohomish County Bd. of Adjustment</i> , 19 Wn. App. 780, 575 P.2d 50 (1978).....	22
<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).....	23
<i>State v. Stumpf</i> , 64 Wn. App. 522, 827 P.2d 294 (1992).....	43
<i>Storedahl & Sons v Clark County</i> , 143 Wn. App. 920, 180 P.3d 848 (2008).....	5, 23, 45, 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).....	33
<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).....	45
RCW 36.70C.020(1).....	20

RCW 36.70C.130(1).....	21
RCW 36.70C.130(1)(b) and (c)	32
RCW 58.17.110	33
OTHER AUTHORITIES	
17 William B. Stoebuck, <i>Washington Practice: Real Estate § 2.1</i> (2d. ed.)	28

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 report—a denial ground that Wal-Mart argued was a plainly pretextual basis to oppose its application—Clark County does not appeal the Trial Court's determination that this ground was without merit.

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. STATEMENT OF ISSUES

- A. Whether the trial court properly determined that Wal-Mart has a right to use Water's Edge Condominium's stormwater conveyance system and that the BOCC erred in basing denial on its contrary conclusion that Wal-Mart failed to establish such right.
- B. Whether the trial court properly determined that BOCC erred as a matter of law in itself concluding that the Examiner erred in approving Wal-Mart's requests for road modifications.
- C. Whether the BOCC's failure to issue adequate findings 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).
- D. Whether the BOCC's denial of Wal-Mart's preliminary site plan application violated Wal-Mart's constitutional due process rights and vested rights.

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"). Hearing Examiner's Second Final Order, July 27, 2006 ("Final Order II"), 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

¹ References to the written record are as follows: AR _____. References to the transcript of the hearings before the Hearing Examiner and BOCC are, respectively, as follows: TR ____ (HE); TR ____ (BOCC).

materials, including a preliminary stormwater design and plan, a traffic study, and a road modification request. AR 2432-33. The County reviewed the application 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 DNS. 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 (“Final Order”) approving with conditions Wal-Mart's preliminary site plan, and denying FNA's SEPA appeal. AR 2437.

FNA appealed the Final Order 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 Final Order (i.e., “Final Order II”) approving the site plan with conditions. AR 2431. The 53-page Decision 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 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 the 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 a final plat for Water's Edge Condominiums, which included the same utility lines and

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.

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 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). 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

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.

identified by County staff. These include: history of angle accidents at that intersection; likelihood of increasing difficulty for drivers to evaluate traffic gaps as number of acceptable gaps decrease; likelihood of increasing westbound queues at 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. 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.⁴

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”:

⁴ 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.

BOCC Resolution No. 2007-10-14 (“BOCC Res. II”) 2-3, attached hereto as Exhibit A. 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. 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. 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.

Final Order and Judgment, attached hereto as Exhibit B. In this appeal, Clark County challenges only the trial court's reversal of the BOCC's first two grounds for denial.

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). 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).

The standards for granting relief under LUPA are the following:

- 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, 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. v. Pierce County*, 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.⁵

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*,

⁵ 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) (“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 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 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.

The trial court properly held that none of these grounds justified the BOCC's denial of Wal-Mart's site plan application. In this appeal, the County abandons the third stated ground for denial and challenges the trial court's decision only on the first two grounds. Opening Brief of Appellant at 4. Neither of these stated grounds in the BOCC decision, as discussed in detail below, can support denial under CCC 40.520.040(E)(1)(b).

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

Under CCC 40.380.060(d)(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." BOCC Res. II at 2. 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. BOCC Res. II at 2; App. Br. at 16. Such attempt is unavailing.

First, even assuming that Water’s Edge’s owners own the stormwater line,⁶ an issue that Wal-Mart has never conceded, there is no

⁶ 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

conflict between Water's Edge's ownership of the conveyance system and 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

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.

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. 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 since its construction. 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); *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.

Thus, as the trial court concluded, this evidence in the record 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?⁷ Clearly, the Hearing Examiner’s findings and conclusions in

⁷ 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

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 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 (c).

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. FNA was a party to the short plat proceedings. AR 1315. No

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.

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. AR 2444. Nor was the short plat approval, which was based on a stormwater plan deemed feasible, appealed.⁸ 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

⁸ 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....")

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).⁹ The 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

⁹ Clark County seeks to escape the preclusive effect of failing to appeal a land use decision by suggesting that a takings has occurred, offering a couple of general cites as support. App. Br. at 20. The argument is makes no sense and should be accordingly dismissed.

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. BOCC Res. II at 2. 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.

Clark County Code ("CCC") 40.520.060(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.

In its brief, Clark County ignores the clear error of the BOCC's decision, and argues instead that: (1) site plan approvals with conditions under CCC 40.520.040(E)(1)(b) should be limited to situations involving "math errors or minor issues"; and (2) the Examiner's condition is flawed since "permission to use the offsite stormwater line is not a condition under the control of Wal-Mart." App. Br. at 18. First, Clark County offers no legal authority for any of these arguments, for none exists. Thus it urges this Court to read baseless restrictions into the County's code. Second, as it did at the trial court, Clark County continues to offer new justifications for the BOCC's decision. Clearly, if the BOCC had wanted to rule as Clark County now suggests, it could have done so. The BOCC, however, did not consider these theories, nor are they relevant. Thus Clark County's arguments on appeal are inapposite and should accordingly be dismissed.

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. BOCC Res. II at 3. These conclusions are unsupported by and inconsistent with the Examiner's findings and substantial evidence in the record. Further, they ignore critical road modification criteria and are unsupportable as a matter of law.

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.

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.” 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. 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. 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. 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. 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. *See* Judge James E. Wharme’s May 22, 2008 Supplemental Decision, attached hereto as Exhibit C.

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 decisionmaker 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.¹⁰

¹⁰ 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

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

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.

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 2452.¹¹ These substantial-

¹¹ 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. 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

evidence findings are binding since the BOCC does not address or assign error to them. *East Forks Hills Rural Ass'n*, 92 Wn. App. at 843.

The BOCC's only apparent challenge to the Examiner's finding—that concerns did not rise to the level of being significant traffic or safety hazards under the Code—is testimony by lay witnesses who provided personal observations on the traffic situation at the site. Clark County agrees, urging that “[r]esidents who routinely utilize local road are in the best position to be aware of near accidents and other traffic safety problems.” App. Br. at 26. These arguments miss the point. The question under CCC 40.350.030(B)(6)(a) is not whether there were traffic concerns. No one has disputed this. Rather, the critical inquiry was whether these concerns amounted to a “significant traffic or safety” hazard implicating the Examiner's denial authority under CCC 40.350.030(B)(6)(a). This was an issue best suited for expert determination, as the Examiner found, particularly where—as here—such determination required, at a minimum, extensive traffic study as well as expertise in determining whether and how any anticipated impacts can be mitigated. *See State v. Stumpf*, 64 Wn. App. 522, 526-27, 827 P.2d 294 (1992) (quoting 5A K. Tegland, Wash. Prac., *Evidence* §300, at 435 (3d ed. 1989) (“Expert testimony is required

development...eventually will exceed thresholds for a low volume road [i.e., daily vehicle volumes of fewer than 600 vehicles per day].” AR 2457.

‘when an essential element in a case is best established by opinion but the subject matter is beyond the expertise of a lay witness.’”).

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).¹² Failure to support a decision with

¹² 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

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 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

necessary to ensure the proposed development will comply with applicable criteria and standards.

Here, as discussed above, the BOCC's summary decision: does not mention applicable criteria, much less show how the Examiner's decision does not comply with such criteria; it fails to list the facts it found which show the appealed decision did not comply with applicable approval criteria; and failed to provide any or adequate reasons for its reversal of the Examiner's decision. 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 body's failure to follow prescribed process is reversible error);

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. As it did in *Storedahl*, the BOCC failed to issue findings in accordance with the County's prescribed process under CCC 2.51.170.¹³ 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

¹³ Clark County attempts to downplay this crippling deficiency in the BOCC's decision by stating the general proposition that "findings of an appellate body in a land use appeal are generally regarded by appellate courts as surplusage." App. Br. at 22. While Clark County properly states the general proposition, this general rule is inapplicable where, as here, a specific county code requires that findings be issued. *See Maranatha*, 59 Wn. App. at 80 (recognizing general rule but requiring compliance with specific county code requiring findings); *Storedahl*, 143 Wn. App. at 930-933 (requiring compliance with Clark County Code findings provision).

30.70C.130(1)(a), 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, and the traffic modification's compliance with code criteria. *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(D)(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. *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

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*

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 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).

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.

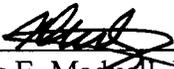
These actions also violate due process. Due process standards require the BOCC to interpret and enforce development codes as written, without adding new criteria on a case-by-case basis. *Peter Schroeder Architects v. City of Bellevue*, 83 Wn. App. 188, 920 P.2d 1216 (1996), *rev. denied*, 131 Wn.2d 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 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 15th day of December, 2008.

Davis Wright Tremaine LLP
Attorneys for Respondents
WAL MART STORES, INC.,
and CLC ASSOCIATES,

By 
Charles E. Maduell, WSBA #15491
Nigel P. Avilez, WSBA #36699
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: charlesmaduell@dwt.com,
nigelavilez@dwt.com

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 DEC 15 PM 4:47

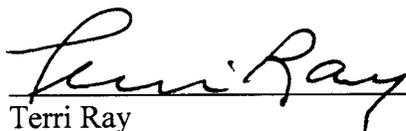
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2008, I caused the document to which this certificate is attached to be delivered to the following via first class mail postage pre-paid:

Christopher Horne
Clark County Prosecuting Attorney
Civil Division
P.O. Box 5000
Vancouver, WA 98666-5000

John Karpinski
Attorney at Law for the
Fairgrounds Neighborhood Assoc.
2612 East 20th Street
Vancouver, WA 98661-4641

Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 15th day of December, 2008.



Terri Ray

FILED
COURT OF APPEALS
STATE OF WASHINGTON
BY _____
00 DEC 17 PM 12:00

EXHIBIT A

RESOLUTION No: 2007-10-14

1
2
3 A RESOLUTION relating to an appeal of the Clark County Land Use Hearing Examiner's
4 decision regarding an application for site plan review approval to construct a 176,672
5 square foot commercial discount retail store and support facilities on approximately 12.2
6 acres zoned Highway Commercial (CH) zoning district. [See Case File #'s PSR2005-
7 00085, 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.)

64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101

- 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: *Kevin Richards*
Clerk to the Board

By: *Steve Stuart*
Steve Stuart, Chair

Approved as to Form Only
ARTHUR D. CURTIS
Prosecuting Attorney

By: _____
Betty Sue Morris, Commissioner

By: *Richard S. Lowry*
Richard S. Lowry
Chief Civil Deputy Prosecuting Attorney

By: _____
Marc Boldt, Commissioner

APL2007-00015 (Salmon Creek Commercial Center)

EXHIBIT B

**ENDORSED
FILED
SUPERIOR COURT**

The Honorable James E. Warne

JUL 28 2008

**COWLITZ COUNTY
RONIA. 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.

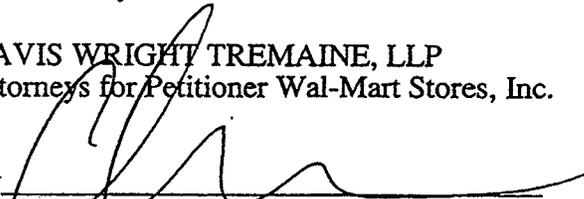
24 DONE IN OPEN COURT this 28 day of July, 2008.

25 **JAMES E. WARME**

26 The Honorable James E. Warne

1 Presented by:

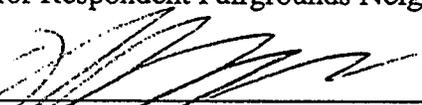
2 DAVIS WRIGHT TREMAINE, LLP
3 Attorneys for Petitioner Wal-Mart Stores, Inc.

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

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

8 
9 Christopher Horne, WSBA #12557
10 Deputy Prosecuting Attorney

10 LAW OFFICES OF JOHN S. KARPINSKI
11 Attorney for Respondent Fairgrounds Neighborhood Association

12 
13 John S. Karpinski, WSBA #13142

14
15
16
17
18
19
20
21
22
23
24
25
26
27

EXHIBIT C

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

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

COWLITZ COUNTY
RONI A. BOOTH, Clerk

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."

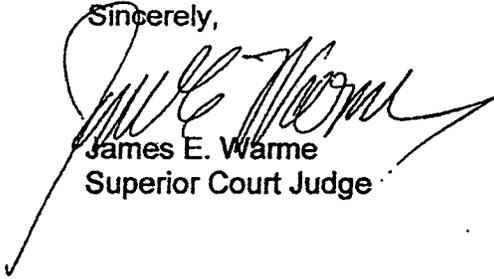
In the absence of any evidence that some other remedy might more closely follow the requirements of CCC 40.35.030, and in the absence of any evidence that the Board relied upon this issue in making its determination, deference is given to the decision of the hearing officer as quoted in the Supplemental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