

# Superior Court of the State of Washington For Thurston County

**Paula Casey, Judge**  
Department No. 1  
**Richard A. Strophy, Judge**  
Department No. 2  
**Wm. Thomas McPhee, Judge**  
Department No. 3  
**Richard D. Hicks, Judge**  
Department No. 4  
**Christine A. Pomeroy, Judge**  
Department No. 5  
**Gary R. Tabor, Judge**  
Department No. 6  
**Chris Wickham, Judge**  
Department No. 7  
**Anne Hirsch, Judge**  
Department No. 8



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September 26, 2008

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## LETTER OPINION

Re: *Tumwater Livable Community et al v. Walmart Stores Inc. et al*  
Thurston County Cause No. 08-2-00444-6

Dear Counsel:

This matter came before the court under the Land Use Petition Act. The Court finds that the permit applications filed by Walmart vested on December 7, 2004 and it was not subject to a



moratorium adopted by the City Council later that evening. Due to this finding, the Court will not discuss the lifting of the moratorium, as the Court believes the issue is moot.

In this review the City of Tumwater issued its site plan approval for a Walmart store, approving “Alternative 4” which was a smaller store than submitted and eliminated the gas station and requires the relocation of Kingswood Drive. The City of Tumwater also approved “Alternative 3” which was the same as “Alternative 4” except it does not require the relocation of Kingswood Drive. The site approval included the Tumwater Development Service Director’s finding that a modification of the Tumwater Code’s tree retention standard was necessary to achieve reasonable use of the property.

At issue is the following provision of the Tumwater Code:

When land clearing is performed in conjunction with a specific development proposal not less than twenty percent of the trees, or not less than twelve trees per acre (whichever is greater), shall be retained. This standard may be waived or modified if, in the opinion of the [Director], strict compliance would make reasonable use of the property impracticable.

TMC 06.08.070(R)

The Director found that modification of the tree retention standard was “necessary to achieve reasonable use of the property.” The Director used the location of the project, the size of the project and existing surrounding developments, among other factors, to support his modification. The Court finds that the Director’s decision to allow a modification of the City tree retention requirement was supported by substantial evidence as to the practical use of the project and that the hearings examiner was correct in upholding it.

The Director also granted a parking modification for the approved site plan.

This Court finds the Director’s decision to grant a parking modification was supported by substantial evidence and the hearings examiner was correct in upholding it. The Director testified that he based his decision on public transit ride share and bike-friendly design. This testimony is sufficient to uphold the modification.

This Court finds the major land use permits and environmental review permits were filed by Walmart and the other various permits not issued by the City of Tumwater are ministerial in nature and there is no prejudice from the non-issuance of ministerial permits, if the major land use permits are upheld.

The Court finds that Walmart did not elect the consolidated review process and as such are exempt from those provisions. This Court finds the denial of the motion for continuance by the

Hearing Examiner until all project permits can be consolidated was within his discretion and will be upheld.

The Environmental Impact Statement for this project met the SEPA requirements and the Growth Management Act. The Environmental Impact Statement did discuss the tree retention impact and noted that the requirement to plant more trees would meet the Code's landscaping requirements and exceed the number of trees required. The Environmental Impact Statement discusses the size and type of the tree replacement trees and conditions imposed on the removal of trees, along with the impact of the tree removal.

The Draft Environmental Impact Statement contains fourteen pages of discussion of the Project's consistency with the Growth Management Act, Thurston County-wide Planning Policies, the City's Comprehensive Plan (including the Land Use Plan's Land Use Designations and Goals, Policies, and Objectives), the Tumwater Economic Development Plan, the Littlerock Road Subarea Plan, and the Tumwater Code, including uses allowed in the General Commercial Zone, design review guidelines, protection of trees and shrubs, aquifer protection, wellhead protection, the aquifer protection overlay zone, and landscaping.

This discussion was updated in the Final Environmental Impact Statement after the original proposal was revised, and three additional alternatives were analyzed. The Final Environmental Impact Statement concluded that the revisions to the original proposal would not affect the Project's consistency with the aforementioned plans and policies.

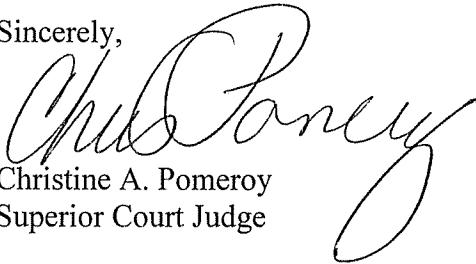
The Draft Environmental Impact Statement contains an analysis of the Project's consistency with the applicable zoning regulations, the conditions on the Project site, and the surrounding area, the Comprehensive Plan and zoning requirements applicable to the Site, the direct, indirect, and cumulative impacts on the surrounding community, and the Site's consistency with the already-intense development surrounding it. The Final Environmental Impact Statement updates this discussion in light of the revisions to the original proposal and alternative, as well as the three new alternatives, and includes an analysis of the differences between the proposals regarding the presence and location of various buildings, levels of traffic, and the need to vacate Kingswood Drive. It notes that the mitigation measures identified in the Draft Environmental Impact Statement are still appropriate for the new proposals and concludes that no significant unavoidable adverse impacts to the land use would occur.

This Court finds the Environmental Impact Statement is adequate. This Court finds the project is consistent with the Littlerock Road Subarea Plan and the General Commercial Zone.

The Petitioner challenged the fact that the Hearing Examiner did not allow them to call Mr. Gellenback (although he was present and available) as their witness because he was not on their witness list. The Hearing Examiner's limiting of Petitioner's examination of Mr. Gellenback to that of direct examination is upheld. The Court believes it is within the Hearing Examiner's discretion to adhere to the Civil Rules and he did not abuse his discretion.

The Petition is denied and the Hearing Examiner's and the City Council's actions are approved. I will sign Findings of Fact, Conclusions of Law, and Order in conformity with this opinion upon proper presentation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christine A. Pomeroy".

Christine A. Pomeroy  
Superior Court Judge

CAP/dkr

cc: Court File