

RECEIVED  
DEC 19 2007

CITY OF TUMWATER  
DEVELOPMENT SERVICES

BEFORE THE HEARING EXAMINER FOR  
CITY OF TUMWATER

In The Matter of: )

Tumwater Livable Community, )  
and United Food and Commercial )  
Workers Union Local No. 367, )

Appellants. )

v, )

Wal-Mart and City of Tumwater, )

Respondents. )

DRC NO. 04-0066

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
DECISIONS

**THESE MATTERS**, the appeal of various land use permit decisions and the adequacy of the *Supplemental Environmental Impact Statement (SEIS)* came before Rodney M. Kerslake, the Hearing Examiner for the City of Tumwater, for hearing on October 22, 23<sup>rd</sup> and 24<sup>th</sup>, 2007 in Tumwater. Appellants Tumwater Livable Community and United Food and Commercial Workers Union Local No. 367 were represented by Claudia M. Newman, Attorney at Law, of Bricklin Newman Dold, LLP. Respondent City of Tumwater was represented by Jeffrey S. Myers, Attorney at Law, of Law, Lyman, Daniel, Kamerrer & Bodganovich, P.S. Respondent Wal-Mart was represented by John C. McCullough and Courtney A. Kaylor, Attorneys at Law of McCullough Hill, PS.

Witnesses were sworn and testified. Exhibits were admitted and reviewed. Argument was presented by legal counsel and considered.

1 From the evidence in the hearing record, the Hearing Examiner enters the  
2 following:

3 **FINDINGS OF FACT:**

4  
5 1. These appeals have been brought pursuant to *Tumwater Municipal*  
6 *Code (TMC) 14.08.010C.*

7 2. On December 7, 2004, Wal-Mart submitted to the City of Tumwater  
8 (City) a number of permit applications, including short plat applications, a *State*  
9 *Environmental Impact Statement (SEPA)* review application, a site plan review  
10 application, a tree cutting permit application, a transportation concurrency  
11 application, a building permit application, and a grading permit application. The  
12 foregoing permit applications concerned a proposal by Wal-Mart to develop a  
13 207,752 square-foot retail center, including a grocery store, plus a 20,602  
14 square-foot garden center and a gasoline service station to be built on a separate  
15 lease parcel on approximately a 21-acre site located on the east side of Littlerock  
16 Road and generally north of Kingswood Drive.

17  
18  
19 3. In its initial review of the various applications, the City determined  
20 that additional environmental analyses of the project was required and ordered  
21 preparation of a *SEIS*.<sup>1</sup> A *Draft Supplemental Environmental Impact Statement*  
22 (*DSEIS*) was issued on May 17, 2006. The *DSEIS* considered the proposal  
23 generally described in Finding 2 above, along with two alternatives. Alternative 1  
24 was the same as the preferred project proposal except it depicted Kingswood  
25

---

<sup>1</sup> In 1993, the City issued an *EIS* for development of the Wal-Mart site and adjoining properties. That development referred to as the "Tumwater Town Center" envisioned a shopping center with between 366,000 and 432,000 square feet of commercial space and 1,900 to 2,300 parking spaces. However, the Tumwater Town Center development never came to fruition.

1 Drive running through the south portion of the 21-acre site being relocated, and  
2 alternative 2 was the “no action” alternative.

3 4. Following the required comment period, a *Final SEIS (FSEIS)* was  
4 issued by the City on June 15, 2007. The *FSEIS*, in addition to responding to  
5 comments submitted in regard to the *DSEIS*, evaluated five alternative  
6 development configurations.  
7

8 Alternative 1 – a 207,752 square-foot retail store, 20,602 square-foot garden  
9 center, a future lease lot, a realignment of Kingswood Drive;  
10

11 Alternative 2 – a 207,752 square-foot retail store and 20,602 square-foot  
12 garden center with realignment of Kingswood Drive and no future lease lot;

13 Alternative 3 – a 187,054 square-foot retail store and 19,755 square-foot  
14 garden center with no realignment of Kingswood Drive and no lease lot;

15 Alternative 4 – a 187,054 square-foot retail store and 19,755 square-foot  
16 garden center with realignment of Kingswood Drive and no lease lot; and  
17

18 Alternative 5 – no development of the site.

19 The City selected Alternative 4 as its preferred alternative and Alternative 3 as its  
20 second preferred alternative.<sup>2</sup>

21 5. Tumwater Livable Community and United Food and Commercial  
22 Workers Union Local No. 367 (appellants) duly and timely filed appeals of  
23 various land use permit approvals issued by the City, including site plan  
24  
25

---

<sup>2</sup> Alternative 4 would require the vacation, pursuant to *RCW 35.79*, of the Kingswood Drive right-of-way in order to realign the street and allow Wal-Mart to consolidate its property. The vacation of a street right-of-way is a discretionary action of the Tumwater City Council, one which has not yet been taken.

1 approval, determinations by the Director of Development Services (Director)  
2 pursuant to the City's tree protection ordinances, including waiver of tree  
3 retention standards, waiver of parking standards, and adequacy of the *SEIS*.  
4 Also, by agreement of the parties, a subsequent appeal filed by appellants of the  
5 City's Transportation Concurrency decision was joined with the earlier-filed  
6 appeals.  
7

8           6.       The Littlerock Road Sub-Area Plan (LRSA Plan), which is an  
9 element of the City's Comprehensive Plan and is the sub-area plan applicable to  
10 the Wal-Mart site, clearly identifies the area north of Bishop Road and adjacent to  
11 I-5/Air Industrial Interchange as appropriate for commercial zoning and, due to  
12 larger parcel sizes, being conducive to larger commercial developments. Exhibit  
13 58, Littlerock Road Sub-Area Plan at 66. It is within this area that the Wal-Mart  
14 site is situated. The area south of Bishop Road is the area which the LRSA Plan  
15 recommends for mixed-used development in a pedestrian friendly environment.  
16 Exhibit 58 at 65. The Wal-Mart proposal, the Hearing Examiner finds, is not  
17 inconsistent with the LRSA Plan since it is located within an area that the plan  
18 designates as being suitable for larger commercial auto-oriented retail  
19 development.  
20  
21

22           7.       Consistent with the LRSA Plan, the City applies a General  
23 Commercial (GC) zoning classification to the area lying north of Bishop Road, east  
24 of Littlerock Road, and along I-5. This is the area in which the Wal-Mart site is  
25

1 situated. The GC zone permits large format stores such as the one proposed by  
2 Wal-Mart. In fact, three other large format stores already exist in this area – Fred  
3 Meyer, Costco and Home Depot.  
4

5 8. Approximately one-half of the 21-acre Wal-Mart site (approximately  
6 the north one-half) is forested with trees, including Douglas Fir, black  
7 cottonwood, Oregon white oak, and maple. While a detailed tree inventory has  
8 been conducted on the property, the precise number of trees subject to  
9 protection under the City's Tree Protection Ordinance<sup>3</sup> has not been established,  
10 but is somewhat over 400 trees<sup>4</sup>. It has not been established in this record that  
11 there are any trees which are unusual due to their size or rarity; there are any  
12 environmental sensitive areas on the property; there are stands of trees which  
13 provide a buffer to separate incompatible land uses; trees that shelter off-site  
14 trees from winds; and trees that provide significant habitat value as identified by  
15 a qualified wildlife biologist or the Code Administrator.  
16  
17

18 9. In Wal-Mart's initial plan submittals, which the *DSEIS* analyzed,  
19 would have resulted in retention of 54 trees out of the 434 identified trees on site.  
20 *DSEIS* at 3.3-3. This amount of tree retention fell below the 20% tree retention  
21 standard (87 trees) or the 12 trees per acre standard (258) trees. *Id.*  
22  
23  
24

25 <sup>3</sup> The City has determined that Wal-Mart's applications submitted pursuant to the City's Tree Protection Ordinance vested in a 2004 version of the Code that was in effect when the permit applications were filed.

<sup>4</sup> In testimony presented at hearing, Forester Gayland Wright indicated that he had, prior to hearing, again surveyed the Wal-Mart site using the tree map that he had prepared for the *DSEIS* which showed 434 trees, and in the latest survey found about 9 fewer trees which he believes were probably toppled in last winter's windstorms. Also, the Director testified that, in reviewing Wright's tree map, he counted a few more trees than the tree survey indicated.

1           10.     The Director raised concerns with Wal-Mart in regard to the lack of  
2 compliance with the City's tree retention standards, and numerous discussions  
3 occurred between City staff and Wal-Mart regarding tree retention. Wal-Mart's  
4 tree consultant also met with Wal-Mart's design team in order to develop revised  
5 development plans that would address the concerns expressed by City staff  
6 regarding tree retention on the site. These discussions, including further  
7 discussions with City staff, resulted in Alternative Plans 3 and 4 presented in the  
8 *FSEIS*, which are the preferred alternatives of the City. See Finding 4.

9  
10  
11         Alternative 3 would retain at least 96 trees on the Wal-Mart site, while Alternative  
12 4 would retain 111 trees. These retention numbers compare to the 54 trees  
13 proposed to be retained under Wal-Mart's initial submittal. Also under Alternative  
14 3, 448 trees are proposed to be replaced on site to mitigate the loss of  
15 approximately 338 trees, and under Alternative 4, 429 trees would be planted on  
16 site to mitigate the loss of 323 trees. *FSEIS* at 1-17. The tree retention plan for  
17 both Alternatives 3 and 4 provide for retention of some of the most significant  
18 stands of trees which are located on the east and northeast portions of the  
19 property and some of the larger trees, including a large white oak tree which is  
20 located near Littlerock Road.  
21

22  
23           11.     Under both Alternatives 3 and 4, the number of trees retained  
24 satisfies the 20% tree retention standards set forth in the applicable tree retention  
25 ordinance, but does not satisfy the greater 12 tree per acre standard. See

1 Finding 9. Thus, Wal-Mart sought a waiver of the retention standards provided at  
2 *TMC 16.08*.

3 12. In reviewing Wal-Mart's request for waiver of the tree retention  
4 standards, the Director considered the following:  
5

6 a. The efforts made by Wal-Mart to retain more trees on  
7 the property by reducing the size of its store and other design  
8 changes which allow greater tree retention;

9 b. The mitigation proposed by Wal-Mart to replant trees  
10 cleared from the site at a 3:1 ratio;

11 c. Whether a proper diversity of trees was proposed to  
12 be retained;

13 d. Whether the tree retention/mitigation plan provided  
14 appropriate vegetative screening from adjacent properties and  
15 streets;

16 e. Parking data concerning the parking demand for large  
17 format retail stores, such as the one proposed by Wal-Mart; and

18 f. Extensive discussion of both the *DSEIS* and *FSEIS* of  
19 tree retention issues.

20 13. In granting the waiver of the tree retention standards, the Director  
21 formed an opinion that a reasonable use of the property could not be made  
22 without the grant of the requested waiver. In forming this opinion, the Director  
23 considered the factors set forth below:

24 a. Wal-Mart made significant changes to its plans in an  
25 attempt to increase tree retention, including a reduction in the size  
of its store and garden center and elimination of the gasoline  
service station;

1           b.     The fact that Wal-Mart was proposing to provide  
2 mitigation for loss of trees consistent with the tree protection  
3 ordinance requirements;

4           c.     Provisions of the City's Comprehensive Plan, including  
5 the LRSA Plan that calls for large auto-oriented retail uses in the area  
6 in which the Wal-Mart store would be situated;

7           d.     The GC zone applied to the Wal-Mart site is the City's  
8 most intense commercial zone which expressly permits large retail  
9 uses;

10          e.     The fact that the Wal-Mart proposal would constitute an  
11 in-fill development in an area that is predominated by large format  
12 stores such as Fred Meyer and Costco to the north and Home Depot  
13 directly to the south of the Wal-Mart site, and that each of these  
14 developments required a waiver of the tree retention standards in  
15 order to permit their development; and

16          f.     The Wal-Mart proposal was consistent in terms of size  
17 of development with the Kingswood Town Center proposal.

18          14.    The City Code at *TMC* 18.50.070 requires 4.0 parking spaces for  
19 1,000 square feet of floor area for a shopping center or large retail/wholesale  
20 outlet. Wal-Mart submitted a parking plan analysis that established a need for a  
21 parking ratio of 4.8 spaces per 1,000 square feet of floor area for its proposed  
22 store. Exhibit C-27.

23          15.    In order to allow a parking ratio less than or greater than required  
24 by *TMC* 18.50.070, the Director must find that the criteria set forth at *TMC*  
25 18.50.080.4(a through h) are satisfied. These criteria are as follows:

1 a. Design internal roadway, parking area, and  
2 pedestrian paths to insure access to public transportation;

3 b. Barrier free parking in preferential parking for  
4 employees who ride share and for high-occupancy vehicles  
(HOV's) shall be located near primary building entrances;

5 c. Explore alternative parking lot designs to reduce  
6 impervious surfaces;

7 d. Double the amount of required interior landscape  
8 within the parking lot (50% of this requirement, if proven to be  
9 maintained, may be grass treated, turf block or other driveable  
10 pervious surface within areas receiving sporadic use; usually the  
furtherest from the building entrance);

11 e. Purchase and install a transit shelter and Intercity  
12 Transit operation needs unless already available within 1/4<sup>th</sup> mile  
(1,320 feet), the primary entry area to the building. This distance  
13 may be increased by Intercity Transit if located in lower-density  
zones.

14 f. Construct a transit pullout if letter e above is used and  
15 if Intercity Transit finds it practical. Credit may be given for other  
16 Intercity Transit demand management strategies if a transit shelter  
and pullout are infeasible;

17 g. Construct a covered bicycle rack with secured  
18 lockers; and

19 h. Create a transit ride/share information center and  
20 place it in a conspicuous place.

21 The Director, in approving an increase in the parking ratio for Wal-Mart's  
22 proposed development from 4.0 spaces per 1,000 square feet of floor area to  
23 4.8, required connections to public transit stops on Littlerock Road; preferential  
24 parking for ride share vehicles; implementation of a trip reduction plan for  
25

1 employees; additional landscaping; placement of two transit shelters adjacent to  
2 the site on Littlerock Road; construction of a transit pull out; provision for bicycle  
3 racks and the creation of a transit/ride share center in the Wal-Mart store. These  
4 requirements satisfy the criteria for administrative modifications to the parking  
5 requirements. Thus, the provisions for granting of a parking modification have  
6 been addressed in the Director's approval of such modification.  
7

8 16. On June 25, 2007, the City issued a site plan approval letter for  
9 Wal-Mart's proposed development setting forth development requirements for the  
10 proposal and conditions/mitigating measures, including those associated with  
11 tree retention standards and parking standard waivers. Exhibit C- 45. The site  
12 plan approval granted approved Alternatives 3 and 4 and rejected all other  
13 development alternatives. C-45 at 4.  
14

15 17. The *DSEIS* sets forth descriptions, environmental analyses,  
16 mitigation measures, and identifies significant unavoidable adverse impacts for  
17 earth, water resources, trees and vegetation, hazardous material and explosive  
18 risks; land use, including the relationship to existing land use plans and policies;  
19 economic impacts<sup>5</sup>; aesthetics/light and glare; transportation; air quality; noise;  
20 and public services and utilities. Exhibit C-42. The *DSEIS* was sent to a number  
21 of federal, state, regional, and local agencies and to the Squaxin Indian Tribe.  
22 Exhibit C-42 at Chapter 4.  
23  
24  
25

---

<sup>5</sup> The City's environmental code, Chapter 16.04.110, provides "economy" as an additional element for purposes of *EIS* content.

1           18.    The *FSEIS* dated June 15, 2007 sets forth additional alternative  
2 development proposals, including Alternatives 3 and 4, which became the City's  
3 preferred alternatives; provided updated descriptions and updated analyses of  
4 the alternatives and provided responses to comments submitted concerning the  
5 *DSEIS*, as well as comments presented at a public meeting held on the *DSEIS*  
6 and development proposal.

8           19.    One of the comment letters submitted to the *DSEIS* was from  
9 counsel for appellants in these proceedings. *FSEIS*, Chapter 2, letter 4.  
10 Appended to counsel's letter was a document entitled "Economic Analyses of a  
11 Proposed Wal-Mart Supercenter in Tumwater, Washington" prepared by Phillip  
12 G. King, former Chair, Economics Department, San Francisco State University.  
13 *Id.* Dr. King, in his analysis, raised issues with the economic analyses set forth in  
14 the *DSEIS* prepared by Gardener Johnson. In response to Dr. King's analysis,  
15 Gardener Johnson, among other changes, modified its economic analyses by  
16 increasing the trade area used for analyses purposes, and further breaking down  
17 the retail components of the Wal-Mart store as suggested by Dr. King.  
18 Testimony of Bill Reed of Gardener Johnson and *FSEIS* at Appendix A. The  
19 analyses in the *DSEIS* and *FSEIS* is thorough and, with the inclusion of Dr.  
20 King's economic analysis, presents both the positive and negative economic  
21 effects that might result from Wal-Mart's proposed development.  
22  
23  
24  
25

1           20. Appellants presented the testimony of its traffic expert, Ross  
2 Tilghman, who in his testimony, acknowledged that with the traffic mitigation  
3 measures imposed by the City, the proposed Wal-Mart development would not  
4 result in any intersection, to which traffic would be contributed by the proposed  
5 development, falling below the level of service (LOS) standards adopted by the  
6 City. Mr. Tilghman did note two transportation facilities that would require  
7 improvement as a result of traffic impacts resulting from the Wal-Mart  
8 development – the need for an additional southbound lane on Littlerock Road  
9 south of Trospen Road and widening of the southbound ramp at the Trospen  
10 Road/I-5 interchange.  
11

12           21. The testimony of Jay Eaton, the City's Public Works Director,  
13 established that the City has a planned and funded project that will go out for bid  
14 in the spring of 2008 for Littlerock Road south of Trospen Road that will provide  
15 the second southbound lane testified to by Mr. Tilghman, and that the Trospen  
16 Road/I-5 interchange is a transportation facility of state wide significance and,  
17 thus, by statute (*RCW 36.70A.070(6)(a)(iii)(C)*), the City is barred from using its  
18 transportation concurrency authority to impose requirements for improvement of  
19 such facilities. On this basis, Mr. Eaton issued his concurrency determination  
20 finding the proposed project to be concurrent with City transportation  
21 requirements with the mitigation measures imposed.  
22  
23  
24  
25



1           2.     The *FSEIS* incorporates an arbitrary and unlawful interpretation of  
2 the provision in the City of Tumwater code that requires consideration of  
3 economic impacts as part of the *SEPA* process.  
4

5           3.     The *FSEIS* does not adequately address, disclose, or mitigate the  
6 impacts of the proposal on land use such as urban decay and physical  
7 deterioration in the City of Tumwater.

8           4.     The *FSEIS* fails to adequately address, disclose, or mitigate the  
9 impacts concerning tree removal anticipated by the proposal and alternatives.  
10 The *FSEIS* incorrectly concludes that the proposed removal of trees would not  
11 have significant adverse environmental impacts. Such removal will cause  
12 significant adverse impact to the City's physical and aesthetic character and the  
13 wildlife habitat provided by those existing trees. It will cause other significant  
14 adverse impacts, such as erosion and increase risk of landslides, an increase of  
15 surface water runoff and diversion, as well as siltation and other pollution  
16 entering water resources. It will remove important existing abatement of noise,  
17 wind damage, and will adversely impact air quality. Removal of these trees also  
18 undermines energy conservation efforts. It is also quite clearly inconsistent with  
19 the City's tree and vegetation protection ordinance. Very slight reduction in size  
20 proposed in site plan Alternatives 3 and 4 do not adequately address, disclose,  
21 or mitigate the adverse impacts to trees and vegetation on the site as well as  
22 associated impacts listed above caused by the removal of the trees on the site.  
23  
24  
25

1           5.     The *FSEIS* incorrectly concludes “it is not the purpose of an *EIS* to  
2 determine if the tree retention waiver requirements have been met or warranted.”  
3 *FSEIS* at 2-52. In determining the significance of an impact, the responsible  
4 official must take into consideration consistency of the proposal with the  
5 Tumwater code requirements for protection of the environment.  
6

7           6.     The substantive authority under *SEPA* calls for an outright denial of  
8 this project based on its adverse impacts related to trees and vegetation.  
9

10          7.     The *FSEIS* contains inaccurate information in respect to the  
11 number of trees on the site, which trees are healthy or unhealthy, and contains  
12 insufficient information to support the conclusion with respect to the condition of  
13 trees and vegetation on site, the impacts of removing those trees, and the  
14 adequacy of the mitigation proposed for removal of those trees. The studies  
15 accompanying the *FSEIS* with respect to the tree issue are inadequate with  
16 regards to analyzing all of the environmental impacts associated with removal of  
17 trees.  
18

19          8.     The *FSEIS* does not adequately disclose and address the  
20 relationship of the proposal and alternatives to the City of Tumwater  
21 Comprehensive Plan, LRSA Plan, and other plans and policies relevant to the  
22 site. The proposal is not consistent with these plans.  
23

24          9.     The *FSEIS* does not adequately address, disclose or mitigate the  
25 probably significant adverse impacts that this proposal will have on the

1 surrounding land use and community. The project will significantly and adversely  
2 affect the livability of residential areas to the south and to the northwest across  
3 Littlerock Road. It will significantly and adversely affect the quite rural character,  
4 small town feeling that is family oriented with not a lot of traffic or crime and good  
5 schools. It will significantly and adversely impact the rural character of the area.  
6 Recessed entryways, awnings, varying roof lines, pilasters, changes in the  
7 chosen colors and recesses will not mitigate these adverse impacts.  
8

9  
10 10. The *FSEIS* does not adequately address, disclose or mitigate the  
11 proposal's inconsistencies with the intent and requirements of the GC zone as  
12 stated in *TMC* 18.22.

13 11. The *FSEIS* does not adequately address, disclose or mitigate  
14 impacts of the proposal to water resources, both surface and groundwater. The  
15 proposal will have significant adverse impacts relating to water quantity and  
16 quality.  
17

18 12. The *FSEIS* does not adequately address, disclose or mitigate  
19 impacts of the proposal with respect to transportation and transit impacts.

20 13. The *FSEIS* does not adequately address, disclose or mitigate noise  
21 impacts that will be caused by the proposal and its alternatives. This site is  
22 within hearing distance of residential neighborhoods and the noises caused by  
23 trucks, being HVAC and the like, will cause probable significant adverse noise  
24  
25

1 impacts to the residents in the area. Those impacts have not been adequately  
2 mitigated.

3 14. The *FSEIS* does not adequately address, disclose or mitigate the  
4 light impacts that will be caused from the proposal. The proposal will have  
5 significant adverse light impacts to residents in the area. Those impacts have  
6 not been adequately mitigated.

7  
8 **LAND USE PERMIT(S) APPEAL:**

9 Issue 1: The Director erred when it granted a parking modification in  
10 accordance with *TMC* 18.50.080 for the increased number of off-street parking  
11 spaces requested in each site plan. The Director should not have approved a  
12 site plan that requires a parking modification on the site. The number of parking  
13 spaces required by *TMC* for this retail use appears to be stated in error and the  
14 percentage increase is higher than represented. In addition, the requirements of  
15 *TMC* 18.50.080 and Figure 18.50.080(a) have not been met by the applicant.

16  
17  
18 Issue 2: The Director erred when he approved the modification of tree  
19 retention standards. The Director also erred by requiring inadequate mitigation  
20 and by incorrectly applying the code provisions requiring mitigation. The  
21 requirements in Chapter 16.08 *TMC* were not met. The applicant did not meet its  
22 burden of demonstrating that strict compliance would make reasonably use of the  
23 property impractical. The Director did not have complete, accurate, or adequate  
24 information in respect to the number of trees on the site, which trees were  
25

1 healthy or unhealthy, the condition of the trees and vegetation on the site, the  
2 impacts of removing those trees, and the adequacy of the mitigation proposed for  
3 removal of those trees. The assumptions and conclusions made by the Director  
4 in approving the modification were supported by inadequate, incomplete and  
5 inaccurate information.  
6

7 Issue 3: The proposal is inconsistent with the intent of the GC zone  
8 district as expressed in *TMC 18.22.010*. An enormous big box retail store that  
9 covers the entire site with parking spaces (indeed requesting more parking than  
10 allowed by code) is certainly not development that will entice pedestrian  
11 shoppers to frequent the area. It will not encourage pedestrian traffic and will not  
12 facilitate sufficient mass transit. This proposal increases reliance on automobiles  
13 within the area. It does not balance the needs of motorists and the businesses  
14 serving a region or community-wide market with the needs of pedestrians and  
15 neighborhood residents. This proposal does not integrate new development with  
16 existing uses to achieve a better environment for pedestrians, nor does it  
17 maintain or enhance the livability of adjacent residential neighborhoods.  
18

19  
20 Issue 4: Tumwater Retail Store proposal is inconsistent with the City of  
21 Tumwater Comprehensive Plan, LRSA Plan and other plans and policies  
22 relevant to this site. The plans and policies relevant to this area envision a quite  
23 and rural character, small town feeling that is family-oriented with not a lot of  
24 traffic or crime, and with emphasis on promoting pedestrian traffic and mass  
25

1 transit. The project does not meet that vision.

2 Issue 5: The Director erred when he approved the site plan without  
3 having a transportation concurrency ruling prior to that approval. The Director  
4 cannot approve a specific size of a facility without confirmation that the traffic will  
5 meet transportation concurrency requirements and other requirements of the  
6 Tumwater code with respect to traffic impacts.

7  
8 Issue 6: The site plan approval is in error because it is based on an  
9 unlawful and inadequate *FSEIS*. Appellants incorporate herein the claims made  
10 in their appeal of the *FSEIS* for the Tumwater retail center dated June 28, 2007.

11  
12 Issue 7: The application for concurrency was processed in violation of  
13 *TMC 14.02.70*. That provision states that several stages that must be completed  
14 before a project permit application is filed. At the time that the concurrency  
15 application had been filed, the applicant had not scheduled and attended the pre-  
16 application conference nor had the pre-application review been completed.

17  
18 **APPEAL OF SEIS ADEQUACY:**

19 Issue 8: The concurrency decision is in error because it is based upon an  
20 unlawful and inadequate *FSEIS*. Appellants incorporate herein the claims made  
21 in their appeal of the *FSEIS* for the Tumwater retail center dated June 28, 2007.

22  
23 15. The adequacy of an *EIS* is a question of law and is reviewed de  
24 novo. *Weyerhauser v. Pierce County*, 124 Wn.2d 26, 37-38, 873 P.2d 498  
25 (1994); *Pres. Our Islands v. Hearings Bd*, 133 Wn.App 503, 538, 137 P.3d 31

1 (2006). The sufficiency of an *EIS* is measured under the rule of reason and is  
2 adequate if it presents a reasonably thorough discussion of the significant aspects of  
3 the probable environmental consequences of the proposed development. *Pres. Our*  
4 *Islands* at 539. Moreover, an *EIS* need only include information sufficiently  
5 beneficial to the decision-making process to warrant its inclusion and an *EIS* is not  
6 intended to be a compendium of every conceivable environmental effect, and  
7 speculative impacts are reasonably excluded from an *EIS*. *Pres. Our Islands*, 539;  
8 *citing Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122  
9 *Wn.2d* 619, 641, 866 P.2d 390 (1993). Substantial weight is afforded the agency's  
10 determination that an *EIS* is adequate. *SWAP v. Okanogan County*, 66 *Wn.App*  
11 439, 442, 832 P.2d 503 (1992).

14 16. In its first challenge to the adequacy of the *SEIS*, appellants  
15 contend that Wal-Mart's proposed store would have substantial adverse impacts  
16 on local businesses and the economic impact analysis contained in the *SEIS* did  
17 not adequately disclose or discuss such impacts. The Hearing Examiner  
18 concludes to the contrary. The *DSEIS* sets forth a reasonably thorough analysis  
19 of the likely economic effects of the proposal. Appellants' expert Dr. King  
20 provided a critique of the economic analysis in the *DSEIS* which was not only  
21 included in the *FSEIS*, but was responded to at length by Wal-Mart's economic  
22 expert who made changes to its analysis as a result of Dr. King's comments.  
23 Thus, the *SEIS* sets forth two somewhat differing economic impact analyses  
24  
25

1 which affords the decision makers a reasonably thorough analysis of the likely  
2 economic impacts that could result from implementation of the proposal. Further,  
3 appellants failed to show that the discussion was inadequate or so flawed as to  
4 not present a reasonable discussion of the issue.  
5

6 17. Next, appellants assert that the *FSEIS* sets forth an unlawful  
7 interpretation of the provision of the city code that requires consideration of  
8 economic impacts as a part of the *SEPA* review process. *SEPA* rules at *WAC*  
9 197-11-44 set out the elements of the environment which are to be discussed in  
10 an *EIS*, and *WAC* 197-11-906(2)(f) indicates that such elements are exclusive  
11 and are not to be added to or changed by agency *SEPA* procedures. *WAC* 197-  
12 11-444 does not include “economics” as an element of the environment to be  
13 discussed in an *EIS*. The City, however, at *TMC* 16.04.110 has elected to  
14 include “economics” as an element of the environment to be included in an *EIS*.  
15 The Hearing Examiner does not need to resolve this legal issue here, since the  
16 Examiner has concluded that, under the rule of reason, the *SEIS* sets forth a  
17 reasonable discussion of the likely economic effects of the proposal, and  
18 appellants have failed to establish in this record to the contrary.  
19  
20

21 18. Appellants challenge the *SEIS*'s adequacy in regard to lack of  
22 disclosure and discussion of the proposals effects on urban decay and  
23 deterioration. However, appellants have failed to demonstrate that such effects  
24 would be likely if the proposal was implemented and the weight of the evidence is  
25

1 to the contrary. Speculative outcomes need not be addressed in an *EIS*. *Pres.*  
2 *Our Islands* at 539; *Wells v. Water District 10*, 105 Wn.App 143, 19 P.3<sup>rd</sup> 453  
3 (2007).  
4

5 19. Also, appellants argue that the *SEIS* fails to adequately address,  
6 disclose, or mitigate the significant adverse effects of removal of trees from the  
7 property. Again, this argument fails for lack of evidence that such significant  
8 adverse effects can reasonably be expected. The Wal-Mart site is located in a  
9 heavily-urbanized portion of the City and in an area where adjacent and nearby  
10 properties have been developed with large, automobile-oriented retail stores; the  
11 preferred development alternatives (Alternatives 3 and 4) would retain between  
12 96 to 111 of the 434 trees on the site and, as mitigation, between 429 and 448  
13 new trees would be planted within the proposed development. Moreover,  
14 appellants have not demonstrated that there are trees on the site which are  
15 unusual due to their size or rarity; that there are any environmentally sensitive  
16 areas present on the site that would be impacted by tree removal; or that the  
17 trees on the site provide significant habitat value.  
18  
19

20 20. Appellants further argue that the *SEIS* incorrectly concludes that “it  
21 is not the purpose of an *EIS* to determine if the tree retention requirements have  
22 been met or warranted.” Appellants have failed to adequately brief this issue and  
23 have failed to establish that, even if such statement was erroneous; how it would  
24 support a conclusion as to the adequacy of the *SEIS* under the rule of reason.  
25

1           21. Appellants call for denial of Wal-Mart's proposal under *SEPA*'s  
2 substantive authority (*RCW 43.21C.060*) based on adverse impacts related to  
3 trees and vegetation. Such adverse impacts were not proven by evidence and  
4 appellants have failed to brief this issue in closing and, thus, it must be rejected.  
5

6           22. Next, in regard to tree impacts, appellants contend that the *SEIS*  
7 does not set forth accurate information on the number of healthy or unhealthy  
8 trees and, thus, the *SEIS* discussion is inadequate. Again, appellants have failed  
9 to establish by any credible evidence how the information in the *SEIS* was  
10 inaccurate and further fail to demonstrate its relevance, since the City's tree  
11 protection ordinance does not distinguish between healthy and unhealthy trees  
12 for the purposes of tree retention and mitigation for loss of trees.  
13

14           23. Appellants allege that the *SEIS* does not adequately discuss the  
15 relationship between the Wal-Mart proposal and the City's Comprehensive Plan,  
16 including the LRSA Plan, and opines that the proposal is not consistent with the  
17 plan. To the contrary, the *DSEIS* sets forth a reasonably thorough discussion of  
18 land use and zoning and project relationships to comprehensive plan provisions  
19 and zoning. *SEIS* at 3.5-2-8; 3.6-1-11. The substantial weight of the evidence in  
20 these proceedings, rather than demonstrating the *SEIS* discussion to be  
21 inadequate, supports the appropriateness of the discussion and its accuracy.  
22  
23 The Hearing Examiner has entered a finding, based on substantial evidence in  
24 the hearing record, that the Wal-Mart proposal is consistent with the LRSA Plan.  
25

1 Finding of Fact 6.

2 24. Appellants also assert that the *SEIS* does not adequately address,  
3 disclose, or mitigate the probable significant adverse impacts the Wal-Mart  
4 proposal would have on the surrounding land use and community. Once again,  
5 appellants have failed to adduce any credible evidence demonstrating that the  
6 *SEIS* is inadequate in this regard and that there would be such significant  
7 unmitigated adverse impacts.  
8

9 25. Finally, appellants raised various challenges to adequacy of the  
10 *SEIS* in regard to the consistency of Wal-Mart's proposal with the GC zone;  
11 impacts on water resources and quality; impacts in respect to transportation and  
12 transit; and in respect to noise and light. Appellants have failed to support these  
13 challenges by any credible evidence. The only expert testimony presented by  
14 appellants on these claims was a traffic expert (Tilghman) who acknowledges  
15 that traffic impacts expected to result from the project were adequately  
16 addressed by the City.  
17  
18

19 26. Based on the foregoing, the Hearing Examiner concludes that the  
20 appellants have failed to establish that the *SEIS* prepared for the Wal-Mart  
21 proposal was inadequate under the Rule of Reason. Thus, the appeal of the  
22 *SEIS* should be denied and the adequacy of the *SEIS* affirmed.  
23

24 **Land use permit(s) appeal:**

25 27. In regard to appellants' challenges to the issuance of land use

1 permits, appellants contend that the Director improperly granted a parking  
2 modification to Wal-Mart allowing it to provide a greater number of parking  
3 spaces than allowed under the City's parking regulations. In that challenge,  
4 appellants assert that the City applied an incorrect parking standard. This latter  
5 issue was resolved at hearing by the testimony of the Director (establishing that  
6 the City did in fact apply the correct parking ratio) and this determination has not  
7 been further challenged. The Hearing Examiner has entered a finding, based on  
8 substantial evidence, that the Director's approval of Wal-Mart's requested  
9 parking modification satisfies the code standards for the granting of such  
10 modification. Finding of Fact 15.

13 28. The principal dispute presented in regard to tree protection is  
14 whether the Director's grant of the waiver of the tree retention standards set forth  
15 in the applicable tree retention ordinance satisfies the following provision of the  
16 tree protection ordinance for waiver of the retention standards:  
17

18 . . . This standard may be waived or modified if, in the  
19 opinion of the Code Administrator, strict compliance would  
20 make reasonable use of the property impracticable. . .

21 Exhibit C-61, Ordinance Number 02002-012, Sec. 16.08.070.R (2004) Tree  
22 Protection Ordinance.

23 29. Appellants contend that, if any use allowed in the GC zone can be  
24 developed on a portion of the property, after retaining the requisite number of  
25 trees, the foregoing standard is not met and the Director erred in granting the

1 waiver. On the other hand, respondents argue that the term “reasonable” must  
2 be applied not only within the context of uses permitted in the GC zone but also  
3 within the context of the size of the property, the nature of surrounding  
4 development, Comprehensive Plan provisions applicable to the site, and steps  
5 taken by Wal-Mart to retain more trees on the site than planned under the initial  
6 submittal.  
7

8           30. In resolving this issue, the Hearing Examiner first notes that the  
9 rules applicable to the construction of statutes also apply to the construction of  
10 local enactments. *HJS Dev., Inc. v. Pierce County*, 148, Wn.2d 451, 471, 61  
11 P.3<sup>rd</sup> 1141 (2003). The primary goal in interpreting a statute is to ascertain and  
12 give effect to the legislative body’s intent and begins with applying the statute’s  
13 plain language and ordinary meaning and reading the statute as a whole.  
14 *Quadrant Corp. v. Hearings Bd*, 154 Wn.2d 224, 238-39, 110 P.3<sup>rd</sup> 1132 (2005).  
15 Words in a statute that are undefined are given their common meaning as may  
16 be determined by referring to a dictionary. *Quadrant Corp* at 239. The terms  
17 “reasonable” and “impracticable” are not defined in the ordinance. Accordingly,  
18 the Hearing Examiner will look to a dictionary to determine their common and  
19 ordinary meaning. “Reasonable” means “not extreme or excessive . . .  
20 moderate, fair.” *Websters Collegiate Dictionary, 11<sup>th</sup> Ed*, at 1037. The word  
21 “impracticable” is defined as “. . . incapable of being performed or accomplished  
22 by the means employed or at command.” *Websters* at 625. Thus, a fair use  
23  
24  
25

1 that is not excessive or extreme which cannot be developed on the property  
2 while complying with tree retention standards satisfies the requirements for a  
3 waiver of the standard under the afore-mentioned ordinance provisions.  
4

5 31. In this case, the Director considered, in applying the waiver  
6 provision of the ordinance in determining whether strict application of the tree  
7 protection standards prevented a fair use of the property which was not  
8 excessive or extreme, a number of factors, including the size of the property;  
9 other neighboring large format retail stores, City Comprehensive Plan provisions  
10 related to the type of development envisioned for the area, the type of  
11 development permitted in the GC zone, the changes in development plans made  
12 by Wal-Mart to accommodate retention of trees on the site, the quality and  
13 location of trees located on the property, the extensive discussion set forth in the  
14 *DSEIS* and *FSEIS* concerning environmental effects of tree removal, mitigation  
15 proposed to provide additional newly planted trees on the site, and other waivers  
16 of tree retention standards granted for nearby large commercial developments.  
17 Findings of Fact 12 and 13. These considerations are relevant in providing  
18 context to what is a fair use of the property that would not be permitted under the  
19 plain language of the ordinance, given its common meaning. Moreover, such  
20 interpretation furthers the legislative intent of the tree protection ordinance which  
21 is to protect existing trees without preventing the reasonable development and  
22 maintenance of property when considering the effects of important environmental  
23  
24  
25

1 values. Exhibit C-61 at Sec. 16.08.020.

2 32. Accordingly, the Director's decision granting the conditional waiver  
3 of tree retention standards should be affirmed.  
4

5 33. Further, appellants contend that Wal-Mart's proposed development  
6 is inconsistent with the intent of the GC zone and should be disapproved on that  
7 basis. The GC zone's intent section sets forth a number of things that the GC  
8 zone is intended to achieve. *TMC 18.22.010*. In regard to a number of these  
9 items, the Wal-Mart store directly implements, such as providing a large format  
10 store that is dependent on convenient vehicular access (*TMC 18.22.010.A*) and  
11 discouraging "strip" commercial development by developing a site in an area  
12 where there is already substantial auto-oriented development, i.e., Fred Meyer,  
13 Costco and Home Depot. *TMC 18.22.010.B*. The intent section also sets forth a  
14 number of provisions concerning pedestrian and transit-oriented development,  
15 provisions for access to transit and balancing the needs of businesses serving a  
16 regional market with the needs of neighborhood residents. *TMC 18.22.010.C-G*.  
17 Site plan approval granted by the City would require transit shelters and other  
18 transit improvements adjacent to the Wal-Mart site as well as internal pedestrian  
19 access ways allowing transit riders and pedestrians to gain access to the  
20 proposed store from transit stops and adjacent streets. The measures, to some  
21 extent, address the subject matter C-G intent provisions. However, in the end,  
22 as respondent Wal-Mart correctly points out, general statements of purpose  
23  
24  
25

1 and intent do not have regulatory effect. It is the regulationS, such as use  
2 regulations and standards of development that have regulatory effect. *Indian*  
3 *Trail Property Owners Assn. v. City of Spokane*, 76. Wn.App 430, 433-439, 886  
4 P.2d 209 (1994). The project proposed by Wal-Mart complies with the use  
5 regulations and other regulatory requirements of the GC zone. Therefore,  
6 appellants do not prevail on this issue.  
7

8 34. Next, appellants assert that Wal-Mart's proposal is inconsistent with  
9 the City's Comprehensive Plan, including the LRSA Plan and should be  
10 disapproved on that basis. The Hearing Examiner has found that the Wal-Mart  
11 proposal is not inconsistent with the LRSA Plan (See Finding of Fact 6) and the  
12 appellants have not established that the proposal is inconsistent with any other  
13 provision of the City's Comprehensive Plan. Moreover, a local comprehensive  
14 plan is a guide to developing land use regulations and is not designed or  
15 intended to regulate a specific use of land when there are zoning regulations in  
16 place. *Citizens of Mount Vernon v. Mount Vernon*, 133 Wn.2d 861, 873, 947  
17 P.2d 1208 (1997); *See, also, Viking Props., Inc., v. Holm*, 155 Wn.2d 112, 126,  
18 118 P.3<sup>rd</sup> 322 (2005). Therefore, the relevant inquiry is whether the project  
19 conforms to applicable zoning regulations, and the Hearing Examiner has  
20 concluded that it does. Conclusion of Law 33.  
21  
22

23 35. Finally, in regard to the City's transportation concurrency  
24 determination, appellants contend that the City erred in issuing the determination  
25

1 because neither a pre-application conference nor a pre-application review  
2 occurred as provided for at *TMC 14.02.072* and the concurrency determination  
3 was based upon an unlawful and inadequate *SEIS*.<sup>7</sup> *TMC 14.02.070* sets forth  
4 requirements for pre-application conferences and includes a provision that  
5 provides:  
6

7       The Director may waive the requirement for either or both stages of  
8 pre-application conference in individual cases where the  
9 department and development proponent agree that the proposal is  
ready for application submittal.

10 *TMC 14.02.070.A.4*. Findings have been entered, based on substantial evidence  
11 in the hearing record, that extensive permit and environmental review of the  
12 proposal submitted by Wal-Mart by the City occurred over the past three years,  
13 and nothing in the record establishes that the concurrency application was not  
14 ready for submittal at the time it was filed with the City. Even if technically some  
15 step or steps in the City's permit process were omitted, appellants have not  
16 demonstrated any prejudice to them. Appellants received the City's concurrency  
17 determination, they timely appealed the determination, and appellants' evidence  
18 presented at hearing substantially confirmed the appropriateness of the City's  
19 determination. Findings of Fact 20 and 21. The Hearing Examiner has  
20 concluded that appellants have failed to establish that the *SEIS* for the Wal-Mart  
21 proposal was unlawful or inadequate. Accordingly, appellants do not prevail on  
22 their challenge to the City's transportation concurrency determination.  
23  
24  
25

---

<sup>7</sup> The Hearing Examiner on motion of the City, joined in by Wal-Mart, at the close of appellants' case and with appellants' agreement, dismissed the other issues raised by appellants in their appeal of the City's transportation concurrency determination. See Footnote 6.

1                    **SUMMARY**

2

3                    36.     In summary, the Hearing Examiner concludes that appellants have

4 not prevailed on their challenge to the adequacy of the *SEIS* and the adequacy of

5 the *SEIS* should be affirmed. Likewise, appellants have also failed in regard to

6 their challenge as to the various land use permits issued by the City to Wal-Mart

7 and, therefore, appellants' appeal in regard to the issuance of such permits

8 should be dismissed and the decisions of the City affirmed.

9

10                   37.     Any finding hereinbefore stated which might be deemed a

11 conclusion herein is hereby adopted as such.

12                   From these Conclusions is made the following:

13

14                   **DECISIONS:**

15                   The appeal of the adequacy of the *SEIS* is denied and the adequacy of

16 the *SEIS* is affirmed. Also, the appeal of the various land use permits issued by

17 the City for the Wal-Mart proposal are affirmed and the appeal of those decisions

18 is denied.

19

20                   DATED this 19<sup>TH</sup> day of December 2007.

21

22                     
\_\_\_\_\_

23                   **RODNEY M. KERSLAKE**  
24                   **Hearing Examiner**

## POST-DECISION PROCEDURES

Reconsideration: A party may request reconsideration by filing a written request with the Department of Development Services within five working days of the Examiner's written decision. The request must state the grounds therefore. The Examiner has ten working days to render a final decision. TMC 2.58.135.

Appeals: The Examiner's decision will become final and conclusive in fourteen days unless appealed to the Tumwater City Council. The appeal must be in writing and contain all grounds on which error is claimed. TMC 2.58.150. TMC 2.58.150 provides in part:

In cases where the examiner's jurisdictional authority is to render a decision (following an open record pre-decision hearing), the decision of the examiner shall be final and conclusive unless within fourteen days following rendering of such decision an appeal there from is filed with the Director of Development Services by the applicant, a department of the city, county, or other agency or a party of record defined in Section 2.58.140. Person not in attendance at the hearing but who submit written information prior to the hearing that becomes a part of the record of the hearing shall also have appeal rights. Such appeal shall be in writing, shall contain all grounds on which error is assigned to the examiner's decision and shall be accompanied by a fee as established by resolution of the city council; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant.

The Examiner's decision that is timely appealed comes before the City Council within thirty days after the final day upon which an appeal may be filed. TMC 2.58.160 and 2.58.180 describe the time limits for appeals.