

1 **BEFORE THE HEARING EXAMINER FOR**
2 **CITY OF TUMWATER**

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CITY OF TUMWATER
DEVELOPMENT SERVICES

3 **In The Matter of:**)
4)
5 **Tumwater Livable Community,**) **DRC NO. 04-0066**
6 **and United Food and Commercial**)
7 **Workers Union Local No. 367,**) **ORDER DENYING APPELLANTS'**
8 **Appellants.**) **MOTION TO CONTINUE**
9 **v,**) **HEARING AND ORDER GRANTING**
10 **Wal-Mart and City of Tumwater,**) **IN PART AND DENYING IN PART**
11 **Respondents.**) **RESPONDENTS' MOTION FOR**
12) **DISMISSAL OF CONCURRENCY**
13) **DETERMINATION**
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13 **THESE MATTERS** came before Rodney M. Kerslake, the Hearing
14 Examiner for the City of Tumwater, Washington on a motion brought by
15 appellants Tumwater Livable Community and United Food and Commercial
16 Workers Union Local No. 367 (appellants) to continue the hearing in the above-
17 captioned matter until all land use and building permits filed by respondent Wal-
18 Mart (Wal-Mart) with the City of Tumwater (City) could be consolidated with the
19 permit and SEPA¹ appeals scheduled for hearing on October 22-24th, 2007 and
20 on a motion brought by the City, and joined in by Wal-Mart, at the conclusion of
21 appellants' case for dismissal of appellants' appeal of the City's Transportation
22 Concurrency Determination.² Respondents Wal-Mart and the City opposed

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26 ¹ RCW 43.21C, *State Environmental Policy Act (SEPA)*

² By agreement of the parties, appellants' appeal of the City's Concurrency Determination was added as an issue to be considered by the Hearing Examiner at the scheduled hearing.

1 appellants' motion, briefs were filed by the parties, and oral argument was
2 presented. In regard to respondents' motion, counsel presented oral argument
3 but stipulated that Issues 1, 2 and 4 as set forth in appellants' appeal of the
4 Concurrency Determination, should be granted, but appellants opposed the
5 dismissal of Issues 3 and 5.³
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9 ³ Issue 1. The decision violates both *TMC* 15.48 and *RCW* 36.70A.070. The affected
10 transportation system does not have adequate unused or uncommitted capacity and will not have
11 adequate capacity to accommodate traffic generated by the proposed development without
12 causing the level of service standards to decline below the adopted standards at the time of
development or within six years. Furthermore, to the extent that the Tumwater Retail Project was
shown to degrade the level of service below the standard required. Wal-Mart did not provide
appropriate mitigation to raise the level of service to the designated standard.

13 Issue 2. The procedure followed with respect to the concurrency decision is inconsistent with the
14 requirements of the City of Tumwater Code and State law. State law states that "if a local
15 government elects to provide an appeal of its threshold determinations or project permit
16 decisions, the local government shall provide for no more than one consolidated open record
17 hearing on such appeal." *RCW* 36.70B.060(6). The City of Tumwater Code implements this law
18 and requires that "all appeals of project permit application decisions, other than an appeal of
determination of significance (DS), shall be considered together in a consolidated appeal." *TMC*
2.58.100. The concurrency decision stated that an appeal is due within 14 days and apparently
the hearing that is currently scheduled for October 22, 2007 will serve as the open record hearing
for the Appeal of the concurrency determination. This is error because there are still several
project permit application decisions for this project that have not yet been made and the hearings
on those appeals must be consolidated with the hearing on the concurrency determination.

19 Issue 3. The application for concurrency was processed in violation of *TMC* 14.02.070. That
20 provision states that applications for all project permits shall not be accepted for processing until
the applicant has scheduled and attended a pre-application conference. Pre-application review
21 consists of several states that must be completed before a project permit application is filed. At
the time that the concurrency application had been filed, the applicant had not scheduled and
22 attended the complete pre-application conference nor had the pre-application review been
completed.

23 Issue 4. The decision errs to the extent that it bases its conclusions on an assumption that the
24 application vested under the laws n effect on December 7, 2004. The application was not
sufficiently complete and did not comply with existing regulations and building codes for the
25 reasons that were brief in detail by appellants in the site plan approval appeal.

Issue 5. The concurrency decision is in error because it is based upon an unlawful and
inadequate Final Supplemental Environmental Impact Statement. Appellants incorporate herein
the claims made in their appeal of the Final Supplemental Environmental Impact Statement for
the Tumwater Retail Center, dated June 28, 2007.

ORDER DENYING APPELLANTS' MOTION TO
CONTINUE HEARING AND ORDER GRANTING IN
PART AN DENYING IN PART RESPONDENTS' MOTION
FOR DISMISSAL OF CONCURRENCY DETERMINATION - 2

1 The Hearing Examiner, at hearing, entered oral rulings denying appellants'
2 motion for continuance, granting respondents' motion to dismiss Issues 1, 2 and
3 4 set forth in appellants' concurrency appeal, and denying respondents' motion to
4 dismiss Issues 3 and 5 set forth in the referred-to appeal, reserving those issues
5 for decision. This formal Order now follows:
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7 **APPELLANTS' MOTION FOR CONTINUANCE:**

8 **FACTS:**

9 The following relevant facts have been gleaned from the parties' briefs
10 and oral argument presented and are largely not in dispute:
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12 1. In December of 2004, Wal-Mart submitted to the City a series of
13 applications, including building permits and a short plat (or boundary line
14 adjustment) applications for development of a Wal-Mart store on a large tract of
15 land located on the east side of Little Rock Road in the vicinity of Kingswood
16 Drive.
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18 2. Subsequent to filing of those applications, the City undertook
19 environmental permit review for the proposed development.
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21 3. During this review process, the proposed development underwent a
22 number of substantial changes including the following:

- 23 A. A reduction in size of the proposed Wal-Mart retail center
24 from 207,752 square feet plus a 20,602 square feet garden
25 center to a 187,054 square foot retail center and slightly
 reduced in size garden center;

1 B. A separate lease lot for a gasoline service station was
2 eliminated from the proposal;

3 C. Possible relocation of Kingswood Drive requiring vacation of
4 a portion of the existing right-of-way, which is pending before
5 the Tumwater City Council. The City Council's determination
6 regarding the vacation petition would allow a final decision
7 on the layout of the proposed development.

8 4. The reduction in the square footage of the Wal-Mart store would
9 require revisions to the building permit application submitted in 2004, and the
10 elimination of the separate leased lot and the proposed gasoline service station
11 would likely eliminate the need for a short plat or boundary line adjustment.

12 5. The remaining project applications, i.e., site approval, tree protection
13 determination and transportation currency rulings have been appealed along with
14 the challenge to the EIS, all of which are the subject of these proceedings.

15 **ANALYSES:**

16 1. RCW 36.70B.120(1) provides:

17 Each local government planning under RCW 36.70A.040
18 shall establish a permit review process that provides for the
19 integrated and consolidated review and decision on two or
20 more project permits relating to a proposed project action,
21 including a single application review and approval process
22 covering all project permits requested by an applicant for all
23 or part of a project action and a designated permit
24 coordinator. If an applicant elects the consolidated permit
25 review process, the determination of completeness, notice of
application, and notice of final decision must include all
project permits being reviewed through the consolidated
permit review process.

1 Thus, a project applicant may elect to utilize the consolidated permit process
2 provided by statute, but is not required to do so.

3 2. RCW 36.70B.140, however, expressly authorizes local governments to
4 exempt certain administrative actions, such as boundary line adjustments, building
5 and other construction permits from the permit review process.

6 3. Also, RCW 43.21C.075 expressly provides that SEPA does not
7 provide a separate stand-alone cause of action. Thus, any appeal of a SEPA
8 determination must be linked to an underlying governmental action, and both the
9 SEPA appeal and underlying action must be considered in one consolidated
10 SEPA appeal and underlying action must be considered in one consolidated
11 hearing. RCW 43.21C.075(1),(2)(a), and (3)(b).

12 4. The City has, in order to comply with the foregoing statutory
13 mandates enacted *Tumwater Municipal Code (TMC) 14.02*, which, at Section
14 010, explains:
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16 The purpose of this title is to combine and consolidate the
17 application review, and approval processes for land development in the
18 City of Tumwater in a manner that is clear, concise, and
19 understandable. It is further intended to comply with state guidelines
20 for combining and expediting development review and integrating
21 environmental review and lan use development plans. Final decision
22 on development proposal shall be made within 120 days of the date o
23 the Determination of Completeness except as provided in Section
24 14.02.050. The provisions apply to all land use permits under Titles
25 15, 16, 17 and 18, and to the related regulation implementing these
provisions or any other ordinance or law. Unless another department is
the primary agency in a permit process, the Department of
Development Services shall adminisrer the provisions hereof and may
adopt such rules as will assist in admnistering these provisions.

1 Notwithstanding the City's authority to issue development permits
2 within a one hundred twenty (12) day period, staff should strive to process
3 such permits as soon as possible. Provided, however, permit processing
4 should not be conducted so as to adversely effect the public's right to
provide appropriate input to the process and exercise appeal rights.

5 It also, pursuant to *RCW 36.70B.140*, has exempted certain project actions
6 such as street vacations, building permits, boundary line adjustments and other
7 construction permits from its permit review process. *TMC 14.02.050*.

8 At *TMC 2.58.100.B*, the City has implemented the mandate that appeals of an
9 environmental determination, except determination of significance, must be
10 consolidated with the appeal of the underlying action.
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12 Finally, *TMC 14.02.100* provides:

13 An applicant may submit complete construction permit
14 applications (building and/or engineering) simultaneously with or
15 during the period of review of a required land use approval
16 application. When an applicant elects to submit a land use
17 approval application together with construction applications, such
18 applications shall be reviewed and processed as one application
and subject to all notices, review and appeals as if one
consolidated and integrated application.

19 5. It is this last provision of the City's Code which appellants focus on to
20 support their contention that the hearing in the matter needs to be continued in order
21 that all permits for the project already filed with the City or that will be prospectively
22 filed, must be consolidated in the current appeal proceedings.

23 6. Appellants argue that Wal-Mart in 2004 submitted various building
24 and construction permit applications, along with discretionary land use permit
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1 applications; thus, triggering the optional consolidated permit processing
2 provided for at *TMC 14.02.100*.

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4 7. The parties agree that the consolidated permit review process, as
5 provided by statute and implemented by the City Code provisions set forth above, is
6 an optional process electable by an applicant. While Wal-Mart did submit to the City
7 certain building and construction permit applications at the time it submitted
8 discretionary land use applications three years ago, its actions and position taken in
9 these proceedings make it clear that the applicant did not elect to have its building
10 and construction permit applications considered in a consolidated review process.
11 Moreover, the permit and environmental review processes that have continued over
12 the past three years have resulted in the earlier filed building and construction
13 applications to no longer be current and requiring at least future amendment,
14 depending on future decisions by the City (i.e., street vacation) or possible
15 elimination (boundary line adjustment or short plat).
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18 8. Furthermore, the City, by an express code provision, has exempted
19 building and construction permits, as well as street vacations, from its permit review
20 process. *TMC 14.02.050*.

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22 9. In these proceedings, the appeals of all remaining and currently
23 relevant project applications, i.e., site approval, tree retention determination, and
24 transportation concurrency, have been consolidated with the appeal of the
25 adequacy of the Environmental Impact Statement (EIS).

1 The Hearing Examiner must construe the project permit process created
2 by various statutory and code provisions to not only give effect to the legislative
3 intent but to harmonize the enactments so that no provision is rendered
4 meaningless or superfluous. *In Re Recall of Lakewood City Council*, 144 Wn.2d
5 583, 591, 30 P.3d 474 (2001); *Seto v. Am. Elevator, Inc.*, 159 Wn.2d 767, 774,
6 154 P.3d 189 (2007); *Gen. Tel. Co of the NW v. Wash. Utils. and Transp. and*
7 *Comm'n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985).

9 10. The Hearing Examiner concludes that the consolidation of the
10 permit appeals in these proceedings with the appeal of the adequacy of the EIS
11 not only gives effect to, but also satisfies, the statutory and city code provisions
12 concerning the optional permit consolidation review process electable by an
13 applicant, exemptions of various governmental permit actions from the permit
14 review process, and consolidation of environmental appeals. To rule otherwise
15 would lead to absurd results, i.e., considerations of applications which are no
16 longer relevant and of future applications which may or may not be filed and
17 would not effectuate the express purposes of the statute and city code provisions
18 to streamline and avoid duplication in the permit review process.

19 **DETERMINATION:**

20 Based on the foregoing, the Hearing Examiner concludes that the current
21 proceedings in the captioned matter are not inconsistent with statutory and city code
22 provisions relating to consolidated processing project permits and *SEPA* appeals,
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1 and accordingly, a continuance in the matter, as sought by appellants, is
2 unnecessary and appellants' motion seeking such continuance should be, and is
3 hereby denied.
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5 **RESPONDENTS' MOTION TO DISSMISS APPEAL OF CITY'S**
6 **TRANSPORTATION CONCURRENCY DETERMINATION:**

7 By agreement of the parties, Issues 1, 2 and 4 as set forth in appellants' Notice
8 of Appeal of Concurrency Determination are dismissed. Issues 3 and 5 are reserved
9 for decision.

10 **SO ORDERED** this 19th day of December 2007.

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14 **RODNEY M. KERSLAKE**
15 **Hearing Examiner**
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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.