

**TUMWATER HEARING EXAMINER  
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**CASE NUMBER:** Wal-Mart DRC #04-0066

**APPELLANTS:** **United Food & Commercial Workers Union Local No. 367**  
6403 Lakewood Drive W.  
Tacoma, WA 98467

**Tumwater Livable Communities**  
855 Littlerock Road SW #108-206  
Tumwater WA 98512

**REQUEST:** An appeal of the adequacy of the Final Supplemental Environmental Impact Statement (FSEIS) for the Tumwater Retail Store (Wal-Mart); an appeal of the administration determination to approve the site plan for the Tumwater Retail Store (Wal-Mart); and an appeal of the transportation concurrency ruling issued for the Tumwater Retail Store (Wal-Mart) by the Tumwater Public Works Director.

**LOCATION:** The property is located at 5900 Littlerock Road SW, Tumwater, WA, 98512.

**APPEARANCE OF COUNSEL:** Claudia M. Newman, Attorney at Law, Bricklin Newman Dold LLP, 1001 Fourth Avenue, Suite 3303, Seattle, WA 98154, for the appellants.

Jeffrey S. Myers, Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S., P.O. Box 11880, Olympia, WA 98508, for the City of Tumwater.

Claudia A. Kaylor, McCullough Hill, PS, 701 Fifth Avenue, Suite 7220, Seattle, WA, 98104, for Wal-Mart.

John C. McCullough, McCullough Hill, PS, 701 Fifth Avenue, Suite 7220, Seattle, WA, 98104, for Wal-Mart.

The following exhibits were entered into the record:

- **Exhibit C-72:** Concurrency Appeal
- **Exhibit A3 - Modified**

**HEARING:** Hearing Examiner Rodney Kerslake convened the hearing at 9:00 a.m.

**Hearing Examiner Kerslake:** I indicated during yesterday's meeting that I would make a ruling at the commencement of these proceedings, make a ruling on the motion to continue the matter for purposes of consolidation. Generally in argument, the parties, as the Examiner understands, agree that the optional consolidation permit processing multiple permit applications is an optional procedure electable by an applicant. In this case, the applicant submitted building permit and short-plat applications in 2004, apparently in conjunction with other types of discretionary land use permit applications.

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These filings arguably triggered election by the applicant of the consolidated permit review procedures set forth in Tumwater Municipal Code (TMC) 14.02.100. However, during the course of permitted environmental review over the course of several years, changes were made, which rendered earlier filed building permit and short-plat applications. In other words, the building was substantially reduced in size for that represented in the building permit application. The automobile service station portion of the permit, which necessitated a boundary line adjustment or short-plat, was eliminated as a result of environmental and permit review. Thus, at the time of these proceedings, the building permit and short-plat applications filed in 2004 were moved and discretionary actions by the City remain for the applicant to finalize certain construction plans, because at this point they don't know if the City is ultimately going to approve alternative 3 or alternative 4. This will be based upon whether the City agrees to vacate Kingswood Drive in this area. These appeal proceedings did consolidate all the current applications including site plan approval, tree retention determination, EIS adequacy, and transportation concurrency determination. In the Examiner's opinion, this satisfies requirements of the Growth Management Act (GMA), State Environmental Policy Act (SEPA), and TMC permit processing procedures. Thus, the motion for continuance, while further consolidation of all remaining potential construction permit applications, is denied. The Examiner believes to rule otherwise would lead to absurd results, and be contrary to the expressed purposes of the consolidated permit processing option provided by statute and the TMC, to streamline and avoid duplicitous permit review. I will set forth the full reasoning and citation to authority in the overall decision that I enter in this matter. It is necessary to orally rule in this matter at this time in order for the parties to be able to continue with their respective cases.

**TESTIMONY:**

**Hearing Examiner Kerslake:** Ms. Newman I understand that you have a final lay witness.

**Ms. Newman:** If the building permit and grading permit is moot, that would necessarily mean that they did not vest on that day and Wal-Mart was required to submit a new application.

**Hearing Examiner Kerslake:** That is a question for another day.

**Ms. Newman:** Well, I am arguing that right now, and I think that's a critical issue and changes everything in this case.

**Hearing Examiner Kerslake:** It may be a critical issue, but I think that's an issue left for another day, because the matter is not an issue that's presented in any pre-hearing order in the matter. It's not one that counsel has briefed. I think that's an issue that must be left to another proceeding here or left to the court to decide. I understand the issue, and I considered it when I made my ruling on this motion.

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**Ms. Newman:** We call Kathy O'Halloran to the stand.

Hearing Examiner Kerslake swore in Ms. O'Halloran to testify.

**Ms. Newman:** Could you please introduce yourself and provide your address?

**Ms. O'Halloran:** I'm Kathy O'Halloran. I live at 6221 Minor Drive SW, Tumwater.

**Ms. Newman:** Is that in the general vicinity shown on Exhibit A9?

**Ms. O'Halloran:** It is it's not too far from the lake; towards the edge of the photograph.

**Ms. Newman:** How did you find out about the Wal-Mart proposal?

**Ms. O'Halloran:** A couple years ago in October my daughter was a student at the middle school. It was a particularly busy day, with a lot of traffic as there often was in that middle school area. My daughter was leaving the school and a truck backed up and hit her. She is okay. It was a minor bump. I called the school, as I was rather concerned about the traffic situation. I called the City and when I talked to the City Engineer I was told that there really wasn't much I could do about the traffic situation, and basically was told you haven't seen anything yet until you see Wal-Mart come into the area. I hadn't heard about Wal-Mart. I didn't know what was going on, and I was rather taken back by the rather flippant response that I got. So, I've become more involved with some of the planning. I've been to a number of the City Council meetings, and I remain very concerned about what's going to happen in my local area. Also, one year later, the next October, another child was hit on his bike in the same parking lot area. The school has done a lot to make some attempts, but the City didn't actually join in any meetings or discussions.

**Ms. Newman:** Today you're going to testify about the consistency of the Wal-Mart proposal with the planning in the area correct?

**Ms. O'Halloran:** Correct.

**Ms. Newman:** Were you involved in planning for the Littlerock Subarea?

**Ms. O'Halloran:** I went to the public meetings when they were held. I don't recall if it was 10, 12, or 13 years ago, but I went to the public hearings when they occurred for the Littlerock Subarea Plan.

**Ms. Newman:** There is one dated December 1997. Is that the one you

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were involved with?

**Ms. O'Halloran:** Yes.

**Ms. Newman:** Okay. Tell me more about what happened at those meetings, and what your involvement was.

**Ms. O'Halloran:** Well, one of the reasons I chose the house that I live in is that I wanted an area where I could be confident that my kids could walk to a store. I wanted to be able to be comfortable that it was a safe environment. So I went to the public meetings and was presented a vision of a very pedestrian friendly community with small shops. The traffic situation was going to be addressed by development of a frontage road and the shops facing out to the frontage road. What appears to be developing to date does not seem consistent with the plan that I understood. We seem to be going further away from that, with the proposal of having a large mega-store like Wal-Mart.

**Ms. Newman:** Where is the frontage road you were discussing?

**Ms. O'Halloran:** Right along parallel to I-5, because at the time in 1997 I was concerned about the traffic down Littlerock there. If there was going to be a lot of growth having that become a major arterial. So, as a community member we were assured that traffic would then be taken up by new frontage road. Part of that is built now, but not all of it.

**Ms. Newman:** What is the understanding of the actual vision as it was expressed in writing and published in the 1997 Littlerock Road Subarea Plan? Did it reflect the understanding of the vision you just described?

**Ms. O'Halloran:** Yeah. I envisioned a very pedestrian friendly place, where you want to go and can actually walk from your home to the stores.

**Ms. Newman:** Are you aware of whether the community members, who worked with you in developing a vision for your community, share your sentiment that the plan hasn't actually been followed by the City?

**Ms. O'Halloran:** From the other community members that I have spoken with; that is what I understand.

**Ms. Newman:** Is a Wal-Mart Supercenter generally consistent with the vision in the Littlerock Road Subarea Plan as you understand it?

**Ms. O'Halloran:** I didn't believe that we'd be having big box stores. I envisioned something more along the lines of essentially like an old-fashioned downtown, where you want to go from you home and walk to the store. It would be pedestrian friendly with small parks and trees.

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**Ms. Newman:** Do you know where Bishop Road is located?

**Ms. O'Halloran:** Yes.

**Ms. Newman:** Did your vision include development north of Bishop Road, south of Bishop Road or the whole area?

**Ms. O'Halloran:** Well, I understood that there was to be some commercial shops up around the area where Fred Meyer is currently located. There would be then mixed use throughout the area, but I envisioned the whole place to be pedestrian friendly, a place that you would want to have in your community that gave you a sense of community. That is one of the issues with Tumwater is that when I-5 went through we lost the heart of the community. I understood that we'd be getting that back.

**Ms. Newman:** What gave you that understanding?

**Ms. O'Halloran:** Participating in the public meetings and what I understood as the visions set forth for this area, that there would be a sense of community in that if there were shops and restaurants that you would be comfortable walking to and gathering and intermixed with some park area. It would foster then a sense of community for that area.

**Ms. Newman:** I have no further questions.

**Hearing Examiner Kerslake:** Cross-examination.

**Mr. Myers:** Ms. O'Halloran what year did you buy your home?

**Ms. O'Halloran:** I believe it was 1992.

**Mr. Myers:** Was that about the time the Costco proposal was going in?

**Ms. O'Halloran:** I don't know.

**Mr. Myers:** Did you become aware shortly after you bought your home that there was a proposal to put a large scale shopping center on the Kingswood property?

**Ms. O'Halloran:** I don't know.

**Mr. Myers:** The entrance to your community, is that to the south of Tumwater Middle School?

**Ms. O'Halloran:** Yes, that is one of the entrances.

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**Mr. Myers:** Are there any other entrances to the north of Tumwater Middle School?

**Ms. O'Halloran:** Yes, there is one that meets off of Trospen Road down Kirsop Road.

**Mr. Myers:** Is that shown on Exhibit A9?

**Ms. O'Halloran:** It's just off the map.

**Hearing Examiner Kerslake:** That would be off of the top left-hand corner of the map?

**Ms. O'Halloran:** Correct.

**Mr. Myers:** That connects from Trospen, but doesn't connect through to Littlerock Road correct?

**Ms. O'Halloran:** It does.

**Mr. Myers:** But it connects through south of Tumwater Middle School on Littlerock.

**Ms. O'Halloran:** Correct.

**Mr. Myers:** One of the concerns you talked about was the safety concern, and I'm glad to hear your daughter is not seriously hurt. One of your concerns is safety of pedestrians. Do you know whether or not the size of the parking lot would help alleviate congestion if the Wal-Mart proposal would be approved?

**Ms. O'Halloran:** I don't think the size of the parking lot would really affect the traffic. I'm not a traffic expert. I don't see how that would play that much in terms of the number of cars and lack of decent sidewalks.

**Mr. Myers:** Have you looked at the proposal to widen Littlerock Road and install traffic circles?

**Ms. O'Halloran:** Yes.

**Mr. Myers:** Do you think that would be helpful in alleviating some of the congestion and safety issues you've described?

**Ms. O'Halloran:** Frankly, personally I'm very concerned about those traffic circles. My children are now out of the middle school, but for me I would leave my neighborhood with the middle school being north I would have to leave my neighborhood go south go around several of the traffic

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circles end up north of the middle school and then have to travel back south. I mean what a convoluted route to get your child to the middle school. So, there is no panacea for me. I don't see any great hope of having the traffic improved in the area by the proposed traffic circles.

**Ms. Kaylor:** First I want to understand your testimony. Was it your testimony that you understood that the Littlerock Road Subarea Plan vision did not include big box stores in the area?

**Ms. O'Halloran:** Basically yes, I understood that there was going to be a commercial district that would be pedestrian friendly, with shops, restaurants, so that people would feel comfortable and essentially encourage a walk to and from stores and to your home. That was something I was looking forward to.

**Ms. Kaylor:** Would you consider Fred Meyer to be a big box store?

**Ms. O'Halloran:** It's certainly larger and I found that I think it's on the edge of the vision that was projected.

**Ms. Kaylor:** And Costco?

**Ms. O'Halloran:** I'd wish that there was a lot more change in terms of how that was developed in order to foster that sense of community.

**Ms. Kaylor:** But would you consider Costco to be a big box store?

**Ms. O'Halloran:** Yes it is.

**Ms. Kaylor:** Would you consider Home Depot to be a big box store?

**Ms. O'Halloran:** It's a large store, yes.

**Ms. Kaylor:** And it's your testimony that you believe that those types of stores are inconsistent with the vision in the Littlerock Community Plan is that correct?

**Ms. O'Halloran:** Correct.

**Ms. Kaylor:** I provided you with Exhibit C58, and the page is open to Exhibit B page 7, with a picture of the existing Costco store. I'm not going to ask you to read it, but the second sentence on that page says, "Seventy-seven percent of the respondents feel that it is appropriate." Are you among that seventy-seven percent that feel that this big box Costco store is appropriate in the Littlerock Subarea Plan?

**Ms. Newman:** Actually, that misinterprets what this evidence is saying.

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Seventy-seven percent did not feel that the Costco was okay. They felt the existing landscape for that store was appropriate.

**Ms. Kaylor:** I will read the first two sentences completely, “The existing landscaped Costco store in the Littlerock Subarea is well-liked. Seventy-seven percent of the respondents feel that it is appropriate.” Are you in that seventy-seven percent that hold the opinion that I just read?

**Ms. O’Halloran:** I’m part of the population that...

**Ms. Kaylor:** Let me rephrase that. Do you agree with that opinion?

**Ms. O’Halloran:** I think Costco did a decent job on the landscaping.

**Ms. Kaylor:** So you believe Costco is appropriate despite the fact that you characterize it as a big box store.

**Ms. O’Halloran:** I think they did a decent job on their landscaping, just as I feel that I was really happy when Fred Meyer retained some of the large trees. I think it is very important that we do retain some large trees. So if one of these stores is going in, even against the wishes of the public, then I hope they retain some of the large trees that are there.

**Ms. Kaylor:** And so it is your testimony that you would feel a big box store is appropriate in this area if it were to retain large trees?

**Ms. O’Halloran:** No, that would be twisting what I said.

**Ms. Kaylor:** Could you clarify then?

**Ms. O’Halloran:** I said if one of these is going in even against the wishes even against some people such as myself feeling as they are inappropriate I would hope that at least they would retain some of the large trees.

**Ms. Kaylor:** Thank you no more questions.

**Hearing Examiner Kerslake:** Any redirect?

**Ms. Newman:** No.

**Hearing Examiner Kerslake:** Thank you very much Ms. O’Halloran.

**Hearing Examiner Kerslake:** Does that complete your witnesses?

**Ms. Newman:** Yes.

**Hearing Examiner Kerslake:** Very good.

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**Mr. Myers:** Your honor I have a motion at this point in time.

**Hearing Examiner Kerslake:** Okay.

**Ms. Newman:** Can we discuss the idea of arguing the motion? I assume this is a motion to dismiss.

**Hearing Examiner Kerslake:** I haven't seen it so...

**Ms. Newman:** I know but we know...This is I object...oh so it's just the concurrency appeal? Will there be any more motions?

**Mr. Myers:** No, I am making a motion to dismiss the concurrency appeal on the grounds that similar to a directed verdict they have failed to utterly prove any concurrency violations with the evidence that they had. Their traffic expert testified that it was concurrent as mitigated and he did not testify to any level of service standard being violated. Therefore, there is no way any reasonable finding of fact could determine that there was a concurrency violation. Therefore, we ask that at the conclusion of their case that issue be dismissed.

**Hearing Examiner Kerslake:** Thank you. Is Wal-Mart joining that motion?

**Mr. McCullough:** Wal-Mart is joining that motion. Thank you Mr. Examiner.

**Ms. Newman:** Assuming it's being submitted in writing, I would have appreciated receiving it a little bit of time before it's being presented Mr. Examiner.

**Hearing Examiner Kerslake:** I understand.

**Mr. Myers:** I could have e-mailed it to you at 11:00 p.m. last night.

**Ms. Newman:** I was in the office at 5:00 a.m. this morning, so I would have read it.

**Mr. Myers:** Of course it depended your resting your case.

**Ms. Newman:** Also, we could have talked about this, because we could have avoided this completely. I acknowledge that we didn't challenge concurrency issues, but there are more issues in my appeal than simply the issue of whether the concurrency decision itself as there were other procedural issues. I just want to note that the only issue that...I haven't read this motion, but from this oral discussion...

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**RECESS/RECONVENE:** **Examiner Kerslake recessed the meeting at 9:25 a.m. for approximately 10 minutes, to allow legal counsel and himself an opportunity to review the motion. He reconvened the meeting at 9:29 a.m.**

**Hearing Examiner Kerslake:** Ms. Newman have you had an opportunity to review the motion presented by the City for dismissal of the concurrency portion of the appeal?

**Ms. Newman:** Yes, I reviewed it very quickly.

**Hearing Examiner Kerslake:** Okay, and do you have any questions?

**Ms. Newman:** We have five issues in our concurrency appeal, and the motion to dismiss relates solely to issue 1. I am willing to voluntarily acknowledge that we did not provide evidence and indeed Mr. Tillman did agree that the concurrency decision itself was valid. With respect to the other issues, issues 2 through 5, there is no motion to dismiss those issues. It's not addressed in here and in fact it would be inappropriate to dismiss any of those, because we haven't had any...I would say that Ms. Kaylor did move to dismiss in a more causal format issue 4, which because it has been cited by the Examiner already, and we have briefed that issue and I wanted to just preserve it for the potential for appeal. So, we don't have to brief or address that again.

**Hearing Examiner Kerslake:** When you are referring to the number of the issues, are you referring to the pre-hearing order?

**Ms. Newman:** I'm sorry no. I'm referring to my appeal. Do you want me to identify the issues?

**Hearing Examiner Kerslake:** Yes.

**Ms. Newman:** Issue number 1 is stating that the decision violates both TMC 15.48 and RCW 36.78.070. We contend that the effected transportation system does have adequate unused or uncommitted capacity. This is essentially saying that the concurrency decision itself was not correct. We are not challenging that. Our traffic expert acknowledged that it was correct. We did request two conditions be applied to the permit. I believe those would be under the EIS that we would request that those be applied. Issue 2 indicated the procedure followed with respect to concurrency decision is inconsistent with the requirements of the TMC and state Law. Actually, you have decided on this issue. This is the consolidation issue. So I am just preserving that. Issue number 3 indicates the application for concurrency was processed in violation of TMC 14.02.070. That provision states, "Applications for all project permits shall not be accepted for processing until the applicant has scheduled and

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attended a preapplication conference. The preapplication review must be completed before project permit application is filed.” We raised that issue, but it was in the context of vesting in the previous brief. That vesting argument was dismissed on the grounds that it was untimely. So, this issue is being raised separate and distinct that the concurrency application should not have been accepted. Issue number 4 is the vesting arguments that we have previously presented. The decision aired because it assumed that the application vested. Issue number 5 indicates the concurrency decision is in error, because it’s based upon an unlawful and inadequate final supplemental level. Frankly, I would rather not address that at this point, but I can discuss this with counsel after I’ve had an opportunity to review some of the materials. We did not address traffic to a great degree even with the final environmental impact statement.

**Hearing Examiner Kerslake:** In summary, tell me which issues you believe are dismissible.

**Ms. Newman:** I have no response to issue number 1, which is essentially what this written motion to dismiss from the City addresses. Issue number 2 I believe the Examiner has decided just this morning already. Issue number 3 is still outstanding to be addressed in legal briefing. Issue number 4 the Examiner has already decided on. Issue number 5 is still outstanding to be addressed in legal briefing.

**Hearing Examiner Kerslake:** Now identify which ones you believe remain.

**Ms. Newman:** The issue with respect to provision TMC 14.02.070 that states, “Applications for projects permits shall not be accepted for processing until the application has attended a preapplication conference.” That is issue 3. Then issue 5 is really any substantive decision is invalid if the environmental review is invalid. So that’s a standard argument, but it really relies entirely on our SEPA appeal being successful. So it’s not necessarily anything we would brief. It’s just a matter of if the SEPA appeal is upheld for any reason that would mean by law that any of the decision made based on that SEPA appeal are invalid.

**Mr. McCullough:** Mr. Examiner it seems as though I think helpfully what we’ve addressed in the post hearing brief. It seems clear to us and we are prepared to address these two remaining issue that counsel has identified.

**Ms. Newman:** I’m happy to talk more off record with counsel to make the pre-hearing brief more straightforward. I don’t want to force them to brief something that I won’t be briefing.

**Mr. Myers:** I think we were at our motion to dismiss, which covered issue number 1, and I don’t think that’s opposed.

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**Ms. Newman:** Right.

**Mr. McCullough:** One notation I would make is with respect to issue number 3 is that the Examiner has ruled on the issue pre-hearing conference raised previously in the motion to dismiss previously filed. So we'll obviously in all responses be pointing that out.

**Ms. Newman:** We'll disagree on that.

**Hearing Examiner Kerslake:** What I'll do, since counsel is not substantially contesting issues 1, 2, and 4, I will grant the City's motion in regard to issues 1, 2, and 4. I think that will help everybody narrow it down. I understand that the City's motion was primarily directed to issue number 1. I will leave issues 3 and 5 in the concurrency appeal remaining so counsel can brief that.

**Mr. Myers:** I agree with that, but also for purposes of the record, one of the things I noted in my exhibit list is we did not include the concurrency appeal that has been filed in this case. I would like to submit that as a separate exhibit if counsel concurs. That way it is all contained in the record on appeal.

**Ms. Newman:** I concur.

**Mr. Myers:** I'll submit that as exhibit C72.

**Hearing Examiner Kerslake:** That is the concurrency appeal. I understand all counsel agree that should be admitted as Exhibit C72 and it will be admitted.

**Ms. Newman:** I'd like to note for the record that the disks that are I believe Exhibit 70 do contain a number of citizen comments on the project both against and for the proposal. We haven't, I believe, printed those out for you, because they are not strictly focused on our issues, but I think it's important to note the involvement of the citizens in this case and potentially take a look at them if you're so inclined.

**Hearing Examiner Kerslake:** Maybe you can direct me to those that you believe to be important rather than me searching through all of them.

**Ms. Newman:** Okay.

**RESPONDANTS CASE:** **Mr. Myers:** The City will go first and call Roger Gellenbeck to the stand.

**Examiner Kerslake placed Roger Gellenbeck, Development Services Director, City of Tumwater under oath.**

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**Mr. Gellenbeck:** My name is Roger Gellenbeck, and I am the Development Services Director for the City of Tumwater. I have acted in that capacity since June 1995.

**Mr. Myers:** What are your job responsibilities as Director of Development Services?

**Mr. Gellenbeck:** We process permit applications. That consists of doing current planning, land division review, building and fire safety applications, and issuance of building permits and inspections. We also review engineering plans associated with new development for appropriate street infrastructure, potable water supplies, sanitary sewer, and storm water.

**Mr. Myers:** How long have you been the Development Services Director?

**Mr. Gellenbeck:** Since June 1995.

**Mr. Myers:** I would note that your resume is in the record at Exhibit 62. There are two areas that I would like your testimony to cover today. The first is the issuance of a tree modification and the second is a parking modification. Did you as Development Services Director decide to grant those two decisions to the Wal-Mart proposal?

**Mr. Gellenbeck:** Yes. Normally, the site plan monitors such as we executed in this case are done and signed by our Senior Planner, who is Chris Carlson. In this case, since due modifications were involved the tree cutting modification and the modification for the number of parking spaces, we cosigned it in this case and I offered a portion of that.

**Mr. Myers:** Did Wal-Mart's original December 2004 application request both of those modifications?

**Mr. Gellenbeck:** Yes it did.

**Mr. Myers:** At that point in time, Wal-Mart was submitting a site plan for a 207,000 square foot store plus garden center is that right?

**Mr. Gellenbeck:** Yes, an approximate 15,000 to 20,000 square foot garden center maybe larger.

**Mr. Myers:** In the course of your consideration of that did you have an opportunity to discuss those items with Mike Beach from Pacland?

**Mr. Gellenbeck:** Actually, we had quite a few conversations with Wal-Mart's consultant, which was Pacland, with Mike Beach and his associates since the application and even prior to the application submittal. Keep in

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mind the application was submitted on December 7, 2004. City Council was engaging in some processes at that time with respect to big box applications. We were starting to scope out the SEPA parameters associated with the application, so we had quite a number of discussions. Also, during these preliminary SEPA scoping sessions, we started to receive a lot of public input. That all started with the application submittal in December 7, 2004, and there was quite a bit of publicity and citizen input at that time. As it proceeded to the SEPA scoping, those concerns started to polarize around certain core issues.

**Mr. Myers:** Did you have an opportunity then to write a letter to Mr. Beach in August 2005?

**Mr. Gellenbeck:** Yes, during the summer prior to August 2005, I had been talking with Pacland. One of my concerns that were really emanating from some of the public comments were the issues regarding the size of the store, number of trees being cut, and the number of parking spaces being requested. One thing I noted quite quickly is that these issues don't stand-alone. You don't make a decision on one, without affecting the other. What I mean by that is as the size of the store increases the more parking is necessary to support that use. The more parking spaces and building footprint you have that diminishes the opportunity to preserve trees on the site, and those were concerns I was having.

**Mr. Myers:** Do you have Exhibit 39 in front of you?

**Mr. Gellenbeck:** This is the August 5, 2005 letter?

**Mr. Myers:** Yes.

**Mr. Gellenbeck:** Yes, I have the original.

Ms. Newman obtained a copy of the letter.

Mr. Myers presented the letter on the overhead projection.

**Mr. Myers:** On page one it describes three different issues that were under consideration. I want to ask you about the last one of those, "Approval of an alternative landscaping plan." Can you describe what that was all about?

**Mr. Gellenbeck:** The initial application that I looked at as I recollect, and keep in mind this was almost three years ago, had a site plan where the required parking lot landscaping wasn't shown on the site plan I had in front of me. That is there are landscaping islands required in parking spaces every so many parking spaces in the parking lot layout. So it looked like they would need a landscaping modification as well. All three of those areas tree cutting, required parking spaces, and landscaping are areas where

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discretionary approvals are where the authority is given to the Development Services Director in the City code.

**Mr. Myers:** In response to your expression of these concerns in Exhibit 39, did Wal-Mart subsequently revise its interior landscaping plan?

**Mr. Gellenbeck:** Yes it did.

**Mr. Myers:** Did that eliminate the need for this alternative landscaping approval?

**Mr. Myers:** Yes it did with one caveat. That is, there are some landscaping enhancement requirements associated with parking modifications and that still is on the table.

**Mr. Myers:** Later on in this letter, at the top of page 2, you have four concerns being expressed. Can you explain what you intended in paragraph number one of Exhibit 39?

**Hearing Examiner Kerlake:** Is that paragraph one page 2?

**Mr. Myers:** Yes.

**Mr. Gellenbeck:** What I was really trying to do there is to demonstrate the importance to the Wal-Mart consultant and to Wal-Mart themselves that I had a concern that there were some discretionary approvals necessary, and approval of one might diminish the ability to get compliance in the other areas. I felt that I needed to drive home the point that they needed to look at their site plan for a number of issues, and perhaps modify it to give a better balance, and demonstrate that they are optimizing their ability to address each of these issues.

**Mr. Myers:** Would you generally describe to the Examiner what concerns you were expressing here in paragraphs 1 through 4?

**Mr. Gellenbeck:** With respect to the tree cutting I wanted to have them look at the proposal and try to develop methods to optimize the preservation of trees. Keep in mind there is a reasonable use of the property standard that is associated with granting modifications to tree-cutting applications. I wanted them either through their tree professional, in concurrence with our tree professional being a contract tree professional, or in submitting subsequent site plan revisions to optimize their and demonstrate their optimization of their efforts to preserve existing trees onsite. In paragraph 2, I was going from some of the public comments we had received from some of our scoping meetings and public correspondence with respect to the kind of trees that are put in with respect to landscaping, there is some concern that some parking and other landscaping efforts are just deciduous

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trees that for a good portion of the year lose their leaves and don't necessarily grow to the size that evergreens might. So, I wanted to ensure their landscaping plan showed a good mix of deciduous and evergreen trees that gave diversity in their landscaping proposal. Since these were discretionary approvals that I was doing, I wanted to demonstrate to them that I wanted something back in terms of getting a good product in terms of their submittal in return for these modifications they were requesting. Paragraph 3 is expressing my concern about public comments from previous months with respect to the visibility of parking from the street and visibility of outdoor storage containers. People sent me photographs of Wal-Mart stores in other states where there was storage in unloading areas that were visible and not aesthetically pleasing. I wanted to ensure that they took efforts to create landscaping or fencing that would address these issues to keep the storage areas away from public visibility, enhance the screening of the parking lot in this case primarily for Littlerock Road. In number 4, I was asking for some information regarding the proposed uses in their parking needs that would demonstrate their need to exceed the required number of parking spaces. I was not aware when I wrote the letter that I already had that information. It was in the original submittal. There was a parking demand study included.

**Mr. Myers:** In response to these concerns how did Wal-Mart initially respond?

**Mr. Gellenbeck:** Keep in mind this has been over a two-and-a-half year process now. At that time we were starting to engage in the preparation of the supplemental EIS, which supplemented the 1993 Kingswood EIS. Discussions with Pacland indicated they agreed to look at these issues. There was some discussion about having, and these were applications of earlier discussion I had with them, with respect to trying to put in some landscaping efforts similar to what Costco had done when they developed their store. There were a number of issues there including having stands of trees that were set off in the parking lot in certain areas, to actually put a berm along the front of the property. Then I also suggested in this letter that they sort of jump start the buffering process by planting some larger than the minimum required trees on the site to put a more effective buffer in earlier in the process. They agreed to that. Pacland also agreed to engage with their client about different parking configurations that would save trees. I was also encouraging them to diminish the size of the footprint of the store.

**Mr. Myers:** By the time of the issuance of the draft supplemental Environmental Impact Statement, had Wal-Mart agreed to diminish the size of the store?

**Mr. Gellenbeck:** Not by that time. In the draft there was the proposed action alternative one, and the no action alternative. Then in the few

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months that followed, as we went from the draft, and keep in mind when the draft was on the table we had some public interactions at that point. More letters were coming in echoing those that had come in before, which were the reasons why I started this communication back in August 2005 with them. And, as a result for the final supplemental EIS, they developed three new alternatives being alternatives two, three, and four.

**Mr. Myers:** I want to go back to exhibit 39. Toward the end of that letter there are three suggestions to consider for planting. The first of those was to consider prohibiting the use of parking areas as short-term rest areas by recreational vehicles. The second was planting more mature evergreens. The third was to consider establishing a natural area. Did Wal-Mart take you up on these suggestions?

**Mr. Gellenbeck:** For the most part. I really couldn't find a prohibition in terms of using the parking lot as a rest area in the city code. There was no way we could tell them not to do it. The main public concern driving this point seemed to be over potential victimization of patrons by the people resting over in the parking lot, and that the people resting over in the parking lot could be potentially victimized. Wal-Mart did respond saying they would put security cameras out there and monitor the use of that to address the safety issue. I think those cameras were mentioned in the EIS document. With respect to more mature evergreens in the jump-start planting, they agreed to do that. I think that and the berming was addressed in the EIS document. It was also included as a condition in my site plan letter to the approval of the modifications. Lastly, consideration of establishing a natural area with retained and planted trees and shrubs in alternatives three and four...

Mr. Myers presented Exhibit 54, alternative three, on the overhead projection.

**Mr. Gellenbeck:** You can see not only the area of preserved trees in the rear of the store, which was a concern that Albany International the neighbor to the south had, but you'll see areas adjacent to Kingswood Drive where there area clumps of trees and one in the upper left hand corner of the diagram that is the southwest corner of the tract. Alternative four is the City's preferred alternative. You can see areas that are more substantial. There is one particular area 31, as you come in the shared driveway with Costco, where there is a clump of preserved trees. There are also the preserved trees to the east of the storm water management area adjacent to Albany International that addresses their concern. There are also some trees in the southwest area just before you get into the BPA easement and the area along Littlerock Road. We identified particularly one tree we wanted saved on the site, which is a large oak tree that is along the frontage of the property approximately where the road bends.

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**Mr. Myers:** Is that approximately where the number 8 appears on Exhibit 55?

**Mr. Gellenbeck:** I believe so.

**Mr. Myers:** Did you prepare Exhibits 54 and 55?

**Mr. Gellenbeck:** These were copies of the site plan that was submitted in the EIS. As I was considering the tree-cutting modification request, I prepared a number of documents. This was essentially a worksheet that I used. I also prepared a spreadsheet that I think I included in the site plan letter, which I started to summarize the various aspects that were now five or six alternatives in proposed action.

**Mr. Myers:** What did the numbers on this site plan represent?

**Mr. Gellenbeck:** The spreadsheet was what I prepared first. That was pulling the data out of the information submitted by the applicant in the EIS. Then I wanted to confirm the numbers that we had been given for the EIS with the trees indicated on the various site plans. I had these in pretty high resolution PDF form. I put them on the computer, went over every segment, and personally counted up the trees. I wanted to verify that the numbers indicated in the EIS were accurate. I found when I counted the trees on the site plan that there were actually more trees being preserved on the site than were indicated in the numbers. I am not sure why, but my objective at that point was to ensure that the retained tree numbers given in the EIS were accurate, and that I had at least that many. These numbers indicated that was the case.

**Mr. Myers:** Is the table you referred to shown on page three of Exhibit 45?

**Mr. Gellenbeck:** Yes, and I have my original on that too. It's represented as Table 2. Actually, I started this spreadsheet earlier back when the draft EIS was going through, and then I expanded it when these new alternatives had to include the additional alternatives.

**Mr. Myers:** On the actual site plan submitted by Wal-Mart for alternative three you counted up 121 trees, and the spreadsheet you were using calls for retention of only 96, is that right?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** When you were determining the tree modification decision which number did you use?

**Mr. Gellenbeck:** I used the number indicated on the spreadsheet.

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**Mr. Myers:** Under TMC 18.70.070(r) is that your authority to grant tree modification?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** When land clearing is performed in conjunction with the development proposal, the proposal is required to retain either 20% or 12 trees per acre is that correct?

**Mr. Gellenbeck:** Yes, whichever is greater.

**Mr. Myers:** Does alternative three meet the 20% standard?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** How about alternative four?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** Without the modification, does alternative three or alternative four meet the 12 trees per acre requirement?

**Mr. Gellenbeck:** No. That is why they need a modification. Keep in mind the 20% or 12 trees per acre, whichever is greater, depends on what lot you're talking about and how many trees are there. In this case, 12 trees per acre controlled. At 12 trees per acre, alternative three required 246 trees and alternative four 251 trees.

**Mr. Myers:** Did they provide adequate mitigation, as required by the Tree Retention Ordinance, if the modification was granted?

**Mr. Gellenbeck:** For the most part. These numbers you have in the chart there indicate what is reflected in the EIS. As you look at alternative three, it showed an onsite planning deficit of two. Now that could be mitigated by them paying to the tree fund, but in this case when I made the final site plan decision and granted the modification for alternative three, I told them we did not want the money we wanted the trees planted on the site. They agreed they could plant two extra trees on site, but in either case the mitigation met the requirements under mitigation for modification.

**Mr. Myers:** If planting those additional two trees cost them a parking space or two or three would they still be required to plant those trees onsite?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** When you were considering the tree modification request in conjunction with the tree retention ordinance in effect at the time, it

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provides that the standard may be waived or modified if in the opinion of the code administrator strict compliance would make reasonable use of the property impractical. Did you consider whether strict compliance would make reasonable use of the Wal-Mart property impractical?

**Mr. Gellenbeck:** Yes I did.

**Mr. Myers:** And what conclusion did you reach on that issue?

**Mr. Gellenbeck:** That strict compliance would not provide for reasonable use of the property.

**Mr. Myers:** What factors did you consider in your analysis of that issue?

**Mr. Gellenbeck:** There it gets really complicated. There are a lot of documents and a lot of things I looked at over two-and-a-half years. The first thing I looked at obviously was the applicant's request including what they were looking for, how much square footage, parking lot layout, what kind of trees were being proposed for retention, and how big and what kind of building they were putting on the property. I considered that in light of the zoning ordinance. In this case, it was a general commercial zoning. General Commercial Use district is one of three commercial use districts that Tumwater has. It is the least restrictive of the three districts. Those three districts are Neighborhood Commercial, Mixed Use, and General Commercial. General Commercial would allow the larger stores, where the other two districts have size limitations on buildings. So, that use district presumes that larger uses will go in the General Commercial district. Then I looked at the Tumwater Comprehensive Plan and the Littlerock Subarea Plan. The land use element of both documents indicate this area north of Bishop Road is an area for General Commercial, which is more automobile oriented infill uses to the existing types of retail uses already in the district. I looked at the Economic Development Plan, which also indicated that this was the core retail area that Tumwater was looking at for the future. Lastly, since we were involved in a supplemental EIS process, I looked at the original EIS document. Keep in mind that an EIS document is something that is supposed to guide decision makers, in terms of subsequent decisions. In that 1993 Kingswood EIS, it proposed and assessed a shopping center and a number of alternatives for that shopping center that would anticipate somewhere between approximately 350,000 to 400,000 square feet of retail in the area. This includes not only the Wal-Mart site but the balance of the Kingswood site, which includes the Home Depot location and some other areas that are to the west of Home Depot and south of the Wal-Mart site.

**Mr. Myers:** For the record, what Mr. Gellenbeck is referring to is Exhibit 32, Figure 2, Alternative A Site Plan, which is part of the Kingswood draft EIS.

**Mr. Myers:** How did the Kingswood proposals affect your consideration?

**Mr. Gellenbeck:** This EIS indicates both alternatives are anticipated at about 400,000 square feet of retail in this area. Under alternatives three and four, a 187,000 square foot store is proposed, with approximately 20,000 square feet of garden area, which equals about 210,000 square feet. The Home Depot store as I recall is about 100,000 square feet of store area and about 15,000 square feet of garden area, which is about 330,000 square feet. There are some remnant undeveloped areas that would exist after Wal-Mart developed. These are primarily the areas I mentioned that were west of Home Depot and south of the Wal-Mart location. The balance of this square footage would fit in there. So, what I was looking at was total square footages in what was developing out there that were consistent with the EIS that was developed and approved back in 1993.

**Mr. Myers:** Was your decision also effected by prior experiences with similar tree modification requests on nearby retail projects?

**Mr. Gellenbeck:** I'm not sure what you mean.

**Mr. Myers:** Did your experiences for example with Fred Meyer, Costco, and Home Depot on tree modification affect your decision?

**Mr. Gellenbeck:** Yes, but not to the point that I would have to approve this one, because others were approved. Each proposal will stand-alone. I know in the case of the Fred Meyer location we were having the same kind of public inputs, probably not as intense of long-standing, but we were getting input concerning trees on the Fred Meyer project as well. In our efforts there we were able to save stands of trees. Mr. Gellenbeck identified the areas of preserved trees on Exhibit A9, including trees on the corner of Trospen Road and Littlerock Road particularly the two oak trees. There were also some trees preserved along the entrance to what is now Tyee Drive and a tree tract area that is part of the Fred Meyer site. When Costco developed they preserved a small grove of trees in their frontage area. When they expanded their store around the year 2002, they also expanded their parking. When looking at the Wal-Mart proposal I tried to find where I could preserve similar groupings of trees to create that natural park-like setting. That is what I found in both alternatives three and four, but again alternative four is the preferred alternative of the City.

**Mr. Myers:** Did you experience with the Fred Meyer project generate concerns about adequacy of parking, congestion, and pedestrian safety?

**Mr. Gellenbeck:** As we were going through the Fred Meyer development the City had a couple of objectives. It was trying to save the trees that I already outlined, and trying to take advantage of a new opportunity that had come up as a result of the closing of the Tyee. In the original City plans for

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the area, the Wal-Mart site area shows the frontage road as Tyee Drive intersecting at the shared drive between the Wal-Mart property and Costco. As a result of the Tyee closing, we had a new opportunity to get a new frontage road extending behind the Fred Meyer and Costco stores, and going down to serve what now is Home Depot, replacing the other road that would have been cumbersome as it intersected at the shared driveway location. Another objective was to try to get Fred Meyer to locate their store sufficiently westward on the site, so it gave room to allow that extension of Tyee Drive to serve the property to the south and relieve some of the traffic on Littlerock Road. Fred Meyer had concerns about the number of parking spaces. Their parking demand studies like those of Costco and Wal-Mart showed they needed more parking, particularly in seasonal times of Thanksgiving and Christmas. We pushed the point home with Fred Meyer and negotiated. We got our road and got the trees saved without additional parking. When that store opened and during the intervening time that it's been open about seven years every seasonal period the parking gets congested. There have been reports of accidents similar to the type of testimony received by Ms. O'Halloran. Consolidating parking to relocate that store and save those trees created parking congestion, where it is difficult to maneuver cars in that parking lot, and we did not want to repeat that in the Wal-Mart case. Wal-Mart's parking demand study that they submitted showed that the mix of uses they were planning to put in this store required more parking than our code would demand. Keep in mind Tumwater's codes have minimum and maximum parking limits, but they're not different. Minimum is maximum. It's one number. Recognizing that all uses are not the same, discretionary language is included.

**Hearing Examiner Kerslake:** Counsel are we moving from trees to parking now?

**Mr. Myers:** We're moving from trees into parking, and the consideration of the two is linked as he has described.

**Mr. Myers:** I'd like to ask you about this Traffic Demand Study. Is this the statistical information that you had requested in your August 2005 letter?

**Mr. Gellenbeck:** I think I already had it, but yes, that's pretty much what I was describing when I wrote that paragraph.

**Mr. Myers:** What does Exhibit 27 identify as being the parking ratio needed for the Wal-Mart project?

**Mr. Gellenbeck:** 4.8 parking ratio, which I presume is 4.8 per thousand square feet.

**Mr. Myers:** What is the City standard?

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**Mr. Gellenbeck:** City standard, for a shopping center of this nature, four parking spaces per thousand square feet.

**Mr. Myers:** Is there any wiggle room in the City standard?

**Mr. Gellenbeck:** Yes, and that's the modification provisions in there either up or down.

**Mr. Myers:** I'd like to now go back to the site plan decision and look at Table 1. Do you have that in front of you?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** Did you prepare Table 1?

**Mr. Gellenbeck:** This is another spreadsheet that I personally prepared.

**Mr. Myers:** What does it show concerning the proposed parking modifications?

**Mr. Gellenbeck:** The left side of the spreadsheet lays out the proposed action and the four alternatives. As you go across the spreadsheet the square footage of the building in each case, the size of the garden center in each case, the total square footages of those two together, and total parking being proposed is shown. The required parking ratio, which is parking spaces per thousand square feet that the proposed parking would represent with each of those square footages, is also shown. As you go further, where it says TMC per thousand that is the requirement of the Tumwater Municipal Code. Then the TMC required is the number of parking spaces that the four spaces per thousand would require. The last column is the percentage of increase associated for each alternative between the number of spaces they're requesting, and the number of spaces required by code.

**Mr. Myers:** In your consideration, did you consider the Tumwater parking ordinance Figure 18.50.080(a)?

**Mr. Gellenbeck:** Yes, I did and actually if you look in the text of the code these things are more explicit, but yes I went over these. The column on the left is the applicable column here, because we're talking about an increase up to 20%. All of these alternatives were increased that were less than 20%.

**Mr. Myers:** Let me ask you about the asterisk by number 4 and the double-asterisk by number 5. Is it your understanding that the single asterisk on number 4 indicates that does not apply to an increase but only applies to a decrease? Down below there's a notation "parking increase

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only and parking decrease only.” I’m asking you to confirm whether or not number 4 applies to the Wal-Mart proposal.

**Mr. Gellenbeck:** Number 4 does not apply to the Wal-Mart proposal, because we’re not talking about a parking decrease.

**Mr. Myers:** But number 5 does, because it’s an increase.

**Mr. Gellenbeck:** Correct.

**Mr. Myers:** Did you consider whether Wal-Mart met the requirements of 1 through 6 in figure 18.50.080(a)?

**Mr. Gellenbeck:** Yes I did.

**Mr. Myers:** Does the report we were referring to in Exhibit 27 meet the requirement of paragraph 6?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** Did Wal-Mart address the requirements of paragraphs 1 through 3?

**Mr. Gellenbeck:** Yes, if you refer to the original parking request submitted with their application dated December 7, 2004. They go over each of the elements associated with it. Although, rather broadly at that point, but as you go into the EIS they are more specifically addressed as we focused in during the EIS studies. Also, with respect to the site plan review where I approved the parking modifications with conditions for alternatives three and four, I actually specified that those items must be complied with.

**Mr. Myers:** With regard to item number 5, it makes a reference to section 080 c-4. So I am going to move back in the document back to that particular section.

**Mr. Gellenbeck:** I have my copy of the zoning ordinance open, and I’m there too.

**Mr. Myers:** That has subsections a through h. Is it your understanding that your site plan decision required them to meet all of section 080 c-4, a through h?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** With respect to subparagraph a, has Wal-Mart met the requirement to design the internal roadway, parking area, and pedestrian paths to ensure access to public transportation?

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**Mr. Gellenbeck:** Yes.

**Mr. Myers:** Yesterday, Mr. Beach showed use Exhibit R18, which is now up on the screen, and is the pedestrian pathway. In your judgment does this exhibit meet the requirement of subparagraph a?

**Mr. Gellenbeck:** Yes. Again, alternative four is our preferred alternative, and I think that probably does it a little better.

**Mr. Myers:** In Exhibit R18 there is a second page with the preferred alternative. How does this accomplish those objectives better than the other one?

**Mr. Gellenbeck:** As you can see there is more extensive pedestrian path connections radiating out from the central store to the south, primarily to the west and to the north. The roadway layout is a little bit more effective and addresses some of the pedestrian safety concerns that we had some of the other alternatives.

**Mr. Myers:** In subparagraph b, do you think Wal-Mart made a good faith effort to meet the requirements to provide barrier free parking, preferential parking for employees, ride-share parking, and high occupancy vehicle parking?

**Mr. Gellenbeck:** Yes. They will have to do that before they get approval to occupy their store.

**Mr. Myers:** You were here when Mr. Beach testified yesterday?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** I believe he testified that Wal-Mart has provided for ADA spaces and ride-sharing spaces for its employees. Is that consistent with their obligation to meet this requirement?

**Mr. Gellenbeck:** It is, but keep in mind in addition to what he says we will require these things to be in place before we grant occupancy for this store.

**Mr. Myers:** Has Wal-Mart met the requirement to explore alternative parking lot designs to reduce impervious surface?

**Mr. Gellenbeck:** Yes in five alternatives.

**Mr. Myers:** Have they met the requirement in subparagraph d to provide double the amount of required interior landscaping within the parking lot?

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**Mr. Gellenbeck:** Yes they have.

**Mr. Myers:** Can you explain how they do that?

**Mr. Gellenbeck:** I think Mike Beach might have testified to this a little bit yesterday. Essentially, with alternative three, landscaping provided is 178,596 square feet for 961 parking stalls. Thirty-five square feet of landscaping for parking stalls required per code calculates out to 33,635 square feet, and 52.5 square feet of parking stall landscaping is required per code for a parking modification, which calculates to 50,453 square feet. The actual square footage of landscaping provided by the proposal is 178,596 square feet, which is more than three-fold the amount of required with the modification.

**Mr. Myers:** How about for alternative four?

**Mr. Gellenbeck:** Alternative four provides 187,308 square feet of landscaping, which is for 988 parking stalls being requested. The 35 square feet for parking stalls is required, which calculates to 34,580 square feet, and 52.5 square feet for parking stall of landscaping is required per the code modification calculating at 51,870 square feet. They are providing 187,308 square feet of landscaping, which is also more than three-fold the amount of landscaping required.

**Mr. Myers:** Do all transit shelters meet I.T.'s operation standards?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** That particular requirement says, "Unless it's already available within a quarter mile." Do you know if there are currently transit shelters within a quarter mile on Littlerock Road?

**Mr. Gellenbeck:** It's my understanding that there is a transit shelter to the north within a quarter mile, and one to the south roughly within a quarter mile. I think there is one just north of Bishop Road on Littlerock Road. I think there is one down by the Costco store. In addition to that, it is my understanding that the Wal-Mart proposal will put a transit shelter on each side of Littlerock Road at the front area of the store.

**Mr. Myers:** Has Wal-Mart met the requirement to put in a transit pullout if this option is used, and if Intercity Transit finds it to be practical?

**Mr. Gellenbeck:** Yes they have, and I think the City is going to require it to be practical in respective of I.T.

**Mr. Myers:** Has Wal-Mart met the requirement to construct a covered bicycle rack with secure bike lockers, and a transit ride-share information

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center?

**Mr. Gellenbeck:** Yes, and I think we heard that testified by Mike Beach.

**Mr. Myers:** Wal-Mart has promised to include that inside their store. What if Wal-Mart doesn't do that?

**Mr. Gellenbeck:** Then we won't grant certificate of occupancy and allow the store to be opened.

**Mr. Gellenbeck:** I'd like to now come back to the tree modification decision, and your conclusion that strict compliance would not allow reasonable use of this property. Yesterday, in I believe Mr. Rother's testimony; he indicated it would be reasonable to have a restaurant use on this property, and that that could strictly comply with the tree retention ordinance. In your judgment, would a restaurant use that Mr. Rother described be a reasonable use for this property?

**Mr. Gellenbeck:** I don't know. If the market demonstrated that such a use could be feasible, but I'm not a market expert. That is why we rely on outside studies by qualified persons. I think a restaurant would fit in there. I think Wal-Mart's proposing to have food service use within their building. But again the zoning, comprehensive plan, and 1993 EIS envisioned more there than 20,000 square feet of office or restaurant use.

**Mr. Myers:** Do you think a 20,000 square-foot office would be a reasonable use of the property?

**Mr. Gellenbeck:** As a component of more square footage with other uses, office would be an allowable use in the General Commercial district.

**Mr. Myers:** But not by itself?

**Mr. Gellenbeck:** But not by itself. I think our plans envision more than that.

**Mr. Myers:** Okay Mr. Gellenbeck, that's all I have. Thank you.

**Mr. Gellenbeck:** Thank you.

**Hearing Examiner Kerslake:** Wal-Mart?

**Ms. Kaylor:** In addition to the other documents that you identified in connection with the parking modification request, did you also rely on the parking study prepared by Transpo that is contained in the draft EIS for the project?

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**Mr. Gellenbeck:** Yes, I looked at that too.

**Hearing Examiner Kerslake:** Cross?

**Ms. Newman:** Good morning Mr. Gellenbeck.

**Mr. Gellenbeck:** Good morning.

**Ms. Newman:** The site review decision that you made was a preapplication site review decision correct? I mean it's considered part of the preapplication process in the code?

**Mr. Gellenbeck:** This is a formal site plan approval letter.

**Ms. Newman:** Right. That letter is part of the preapplication process?

**Mr. Gellenbeck:** It's something that culminates in a whole series of preapplication processes, which are in our municipal code, yes.

**Ms. Newman:** So, the City is telling the developer in the site plan approval letter whether a proposal is realistic or not right?

**Mr. Gellenbeck:** Can you say that one more time?

**Ms. Newman:** The purpose of the letter is to inform a developer whether their development is consistent with the code and is reasonable and something that the City will accept?

**Mr. Gellenbeck:** It is an outline of all the requirements that are applicable to the requests that they're putting in front of us.

**Ms. Newman:** Okay. Did Wal-Mart own the property when it submitted its permit applications?

**Mr. Gellenbeck:** I don't know where the ownership was at that time. I believe Kingswood Ltd., which is a Canadian firm, actually owned the property and may still own it but Wal-Mart had an option on the property. When Wal-Mart started contacting us in roughly late summer early fall of 2004, Kingswood was there with the Wal-Mart people.

**Ms. Newman:** Who is Kingswood?

**Mr. Gellenbeck:** It's the Canadian firm that owns the property.

**Ms. Newman:** Oh okay. What is to now happen to the lease lot that was originally proposed to be a gas service station; now that you've said no gas station is allowed?

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**Mr. Gellenbeck:** We didn't say it wasn't allowed. That was one of the...

**Ms. Newman:** "No gasoline service station lease lot in alternative three and alternative four."

**Mr. Gellenbeck:** Alternatives three and four submitted by the applicant did not include the gasoline lease lot. That square footage that was otherwise taken up by those gasoline lease lot locations would be used for parking, tree preservation, and additional landscaping.

**Ms. Newman:** Okay, so it will no longer be leased out for a different use?

**Mr. Gellenbeck:** Correct.

**Ms. Newman:** And that's a definite, because that's what the plan is for alternative three and alternative four.

**Mr. Gellenbeck:** As for being definite, that's what we are here to figure out today.

**Ms. Newman:** Right, but in your approval there's no gas service station. At the beginning you kind of hedged and so I am now wondering.

**Mr. Gellenbeck:** There's no hedge to it. There is no gasoline service station.

**Ms. Newman:** Okay, thank you.

**Mr. Gellenbeck:** It's not prohibited by code. It's just not included in these site plan approvals.

**Ms. Newman:** Okay.

**Ms. Newman:** Is a tree cutting application called a land clearing application when they're vested in the old tree ordinance?

**Mr. Gellenbeck:** Either of those terms could apply. The tree cutting section of the Tumwater Municipal Code requires a permit to cut trees and remove ground cover.

**Ms. Newman:** With respect to the parking modification, in Table 18.50.070(a) we have essentially two different types of retail described. The first one says "Market Shopping Center and Large Retail Wholesale Outlet." Do you see that under commercial?

**Mr. Gellenbeck:** Yes.

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**Ms. Newman:** It says it allows for buildings that are between 15,000 to 400,000 square feet; 4.0 spaces per thousand square feet of gross floor area applies here, correct?

**Mr. Gellenbeck:** Can you repeat the question?

**Ms. Newman:** There is a section in this table that describes the amount of spaces that are allowed per thousand square feet for different uses. So, I am reading from the "Market Shopping Center and Large Retail Wholesale Outlet" section. The one relevant here is the one that applies here, which is 4.0 spaces per thousand square feet.

**Mr. Gellenbeck:** Yes.

**Ms. Newman:** Okay. Then the next page has a section called retail use. Do you see that?

**Mr. Gellenbeck:** Yes.

**Ms. Newman:** And that's 3.5 spaces per thousand?

**Mr. Gellenbeck:** Yes.

**Ms. Newman:** What is your understanding of "Large Retail Outlet"?

**Mr. Gellenbeck:** We're talking shopping centers here. The retail uses are the stand-alone small retail stores.

**Ms. Newman:** With 3.5 spaces?

**Mr. Gellenbeck:** Yes.

**Ms. Newman:** Then the large retail outlet is what? Can you just describe generally what that means? How do you distinguish between retail use?

**Mr. Gellenbeck:** Simply a shopping center. I don't think you would describe Wal-Mart as a small retail use.

**Ms. Newman:** Okay. So this is essentially recognizing that a big box retail outlet is going to require additional spaces than a smaller retail use correct? Because it's allowing for more spaces in the code.

**Mr. Gellenbeck:** Yes.

**Ms. Newman:** Okay. Who is the Tumwater Tree Professional that worked on this with you?

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**Mr. Gellenbeck:** I don't think we used the Tumwater Tree Professional in this case.

**Ms. Newman:** No, okay so you were the one that acted as the tree professional?

**Mr. Gellenbeck:** I acted as the code administrator.

**Ms. Newman:** Okay, who reviewed the impacts of removing the trees from the site?

**Mr. Myers:** Objection. It exceeds the scope of direct.

**Ms. Newman:** Well, didn't we talk about tree preservation and the modification? I'm talking about impacts of the modification.

**Hearing Examiner Kerslake:** To the extent that the question for this witness is intended to illicit if they used a tree consultant, who that tree consultant was, I will allow the question.

**Mr. Gellenbeck:** I think the tree consultant in this case was Galen Wright, who was the applicant's tree professional. He submitted information that was not only heard in testimony, but some of it was involved in discussions that were in the supplemental EIS. However, it's important to remember that the tree permit has not been approved and issued yet. All we have approved thus far, with respect to the trees, is we've made a determination on the issue of the modification.

**Ms. Newman:** And the mitigation for that?

**Mr. Gellenbeck:** And the mitigation associated with the modification, yes.

**Ms. Newman:** Have you also made a determination for the SEPA mitigation associated with the removal of trees?

**Mr. Myers:** Objection. It exceeds the scope of direct.

**Ms. Newman:** Mr. Examiner is there anyone else I can ask this question to?

**Hearing Examiner Kerslake:** Would you repeat the question?

**Ms. Newman:** Have you made your decision on the mitigation that's appropriate for submit to SEPA for the tree removal?

**Mr. Myers:** That was the question I objected to.

**Hearing Examiner Kerslake:** Okay, the basis for your question is that it exceeds the scope of direct examination?

**Mr. Myers:** Yes.

**Hearing Examiner Kerslake:** I will allow the question to see how far it goes, because I understand your objection. I'm not sure we're quite there yet, but go ahead and ask the question.

**Mr. Gellenbeck:** These are not necessarily mutually exclusive things. With respect to your question on mitigation, and I think I answered that already, with the mitigation that is required by the Tumwater Municipal Code as a result of the tree modification has been assessed. That was specified in the site plan approval letter. With respect to that mitigation, and any other mitigation with respect to trees that are associated with SEPA, the SEPA determination is that bit of information that's going to guide in subsequent decisions. We have not yet issued the tree cutting permit, nor are we prepared to at this time, as we don't even know which site plan alternative will be applicable in this case.

**Ms. Newman:** Okay, but the purpose of the EIS is to disclose the impacts of the tree removal and suggest mitigation for those impacts. So, did you make a decision on the mitigation for SEPA?

**Mr. Gellenbeck:** We have not yet issued the tree-cutting permit. The SEPA document is what will govern our subsequent decision-making.

**Ms. Newman:** Okay. So, I want to narrow down the distinction between what was being reviewed for the tree-cutting permit, and what's reviewed for modification. Did you receive the tree protection plan from the applicant, or have you reviewed a tree protection plan?

**Mr. Gellenbeck:** The tree protection plan is premature at this point.

**Ms. Newman:** So, no is your answer?

**Mr. Gellenbeck:** Yes.

**Ms. Newman:** So, generally all the documents required as part of the land clearing permit, are premature and you haven't reviewed any of that yet? Is that what you are saying?

**Mr. Gellenbeck:** If you look down that list of prerequisites associated with the tree cutting permit you'll see some of those cannot be submitted at this point in time, because the issues associated with them are being resolved here today.

**Ms. Newman:** Okay.

**Mr. Gellenbeck:** For example, the tree removal schedule, we don't know now and we certainly didn't know back on December 7, 2004 when that could be. Also, depending on which site plan is ultimately decided, there are two site plans to choose from and one must go before Council for a street vacation. We may be talking about different trees, different erosion control methods that might be necessary depending on which site plan we're using. So, all of those elements are premature at this point.

**Ms. Newman:** But, that was the job of the EIS to consider all of the impacts and different impacts of these different plans correct?

**Mr. Gellenbeck:** I think it did.

**Mr. Myers:** Objection. It exceeds the scope of direct. He wasn't called to testify about the analysis of the impacts in the EIS.

**Ms. Newman:** Mr. Examiner, I am for the record going to state that these objections are completely inappropriate. To limit me to ask questions within the scope of direct to the Planner, who was responsible for everything that we are appealing, is inappropriate.

**Hearing Examiner Kerslake:** Well, if you can direct me to a civil rule or rule of procedure in administrative proceedings that allows a cross-examination to exceed the scope of direct, please direct me to that and I will change my rulings I have made in the past. I know of no such rule. Civil rules clearly require that the cross examination be limited to direct examination.

**Ms. Newman:** What I'm arguing is their direct in essence includes the submittal of exhibits that are associated with this expert, and I can ask questions about the exhibits that are associated with them.

**Hearing Examiner Kerslake:** Well, if those exhibits were admitted through this witness at such time as those exhibits were being offered, I would certainly allow you to recall this witness, but most of those came in by stipulation. This witness wasn't to provide foundation for any of those. I've allowed you some latitude in your questioning of this witness in order for you to attempt to draw a connection between his decision on waiving the tree standards based on certain mitigation requirements contained in the ordinance, and tying those into the SEPA document. I'm certainly going to sustain objections if you're attempting to jump into a whole new area of discussion with this witness in term of his involvement in preparation of the EIS, and what consideration he had in the EIS. Those are well beyond the scope of direct examination. Again, I don't know a rule that would allow

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me to allow you to go that far beyond the scope of direct examination. This witness could have been named in your witness list as a witness for your own case.

**Ms. Newman:** Well, I didn't realize that the Examiner would be prohibiting me in this manner, because I just want to for the record state that when I stipulated to the introduction of these exhibits, I would not have done so if I had every imagined I'd be limited to asking the Planing Director about them.

**Hearing Examiner Kerslake:** I understand that you are licensed to practice law in the State of Washington, and I presume you know the rules.

**Ms. Newman:** Mr. Gellenbeck, a Forest Practices Permit is required from the Washington State DNR (Department of Natural Resources) prior to issuance of the land-clearing permit is that right?

**Mr. Gellenbeck:** Yes.

**Ms. Newman:** I have heard throughout the testimony that several 25 to 30-foot tall trees were planted on the site. Can you tell me how many exactly are going to be planted?

**Mr. Gellenbeck:** No.

**Ms. Newman:** Why can't you tell me?

**Mr. Gellenbeck:** Because it hasn't been determined yet.

**Ms. Newman:** Oh, okay.

**Mr. Gellenbeck:** We are looking at two site plans here. The conditions in the approval, primarily for the parking lot and number of parking space modification, to provide a berming intermixed with larger than required evergreen trees along Littlerock Road, depending on which site plan ultimately gets built, will determine where those berms, where those trees, and the number of trees necessary to effectively provide buffering to the parking lot will go in. Until that decision is made, it could be any number of trees.

**Ms. Newman:** So, is there a minimum amount of trees that you are going to require of that size.

**Mr. Gellenbeck:** No.

**Ms. Newman:** Okay. As far as the other trees that are being planted, is it fair to say then you don't know really any of the details about exactly

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what's going to be planted on the site in terms of the size and type of trees at this point?

**Mr. Gellenbeck:** No that is not true. The tree preservation ordinance specifies the minimum sizes of replacement trees. That will govern the, in the case of alternative three, the 448 replacement trees that are scheduled to be planted on the site, and in alternative four the 429 replacement trees that will be planted on the site. Both will have to meet the minimum size requirement specified in the Tree Preservation Ordinance. With respect to the other trees, the buffering on Littlerock Road in addition to these minimum requirements, the trees there will have to be of a more substantial size.

**Ms. Newman:** Okay, so there is no landscape plan. Basically, the plan is to follow those requirements that you just stated?

**Mr. Gellenbeck:** There is a landscape plan. I think we looked at it yesterday.

**Ms. Newman:** But you said that landscape plan no longer applies, because...

**Mr. Gellenbeck:** I don't remember saying that, because it may be modified.

**Ms. Newman:** That is what I was getting at, because this plan shows how many large trees, and you said you didn't know.

**Mr. Gellenbeck:** If they want the parking modification like they said they wanted then they will have to modify the existing landscape plan accordingly to meet the requirements of that approval.

**Ms. Newman:** Okay and they haven't done that yet?

**Mr. Gellenbeck:** No.

**Ms. Newman:** Okay. So, in terms of Exhibits C54 and C55, they demonstrated the trees being preserved on the site, and you said you counted them?

**Mr. Gellenbeck:** Yes, in the original files I have these numbers are actually in red. The gray stuff on there is the document that's represented in the FSEIS. The red numbering are numbers I put in as I went through, under high resolution, and counted each tree. If you do that you'll see on these that for the most part the size and species of trees are indicated on these to site plans. I say for the most part, because some of them are general.

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**Ms. Newman:** So, the approval in your site review doesn't require that Wal-Mart retain the number of trees that you counted in C54 and C55 right?

**Mr. Gellenbeck:** No, but if they want to we won't stop them. What they need to preserve is what was specified in the EIS document. These numbers are shown on Figure 2 in the site plan approval letter for alternative three, which indicates preservation of 96 existing trees. Alternative four, which is the City's preferred alternative, indicates 111 retained trees, which is more than twice the original proposed action.

**Ms. Newman:** If it's possible for them to retain additional trees, shouldn't you just change the requirement to require that they retain those additional trees?

**Mr. Gellenbeck:** Not necessarily. I don't know why there are excess trees there. Perhaps some of those trees must be thinned for the health of the trees, to make sure they grow well. Maybe the grading might affect some of them, but the bottom line is for each of those alternatives I want the 96 trees for alternative three, or the 111 trees for alternative four.

**RECESS/RECONVENE:** **Examiner Kerslake recessed the meeting at 11:03 a.m., for approximately 10 minutes, for a break. He reconvened the meeting at 11:13 a.m.**

**Ms. Newman:** Mr. Gellenbeck in your site review decision, I was curious why there are more parking spaces in alternative four than alternative three, when you know that it's feasible for them to build and only have 961 parking spaces. Why would you allow additional parking spaces?

**Mr. Gellenbeck:** It's what they are requesting by that proposed site plan alternative. I can only presume why. One thing I noticed when I figured out the calculation of the parking spaces per thousand that coincidentally I presume that the 988 asked for in alternative four put that 4.8 parking spaces per thousand that their parking demand study said would be necessary for this mix of uses. So, I could imagine by that when they eliminate the gasoline pad site to give them more room to save the trees, it also gave them more room to add a few more parking spaces to get up to that 4.8 that the parking demand study said they would need.

**Ms. Newman:** But, it's evident from alternative three that it's feasible to have 961 parking spaces for a building that is 206,809 square feet correct?

**Mr. Gellenbeck:** Yes, that is what the alternatives represent.

**Ms. Newman:** Okay. I'm curious in your letter, Exhibit C39, you stated that you offered suggestions. Can you clarify why those were simply

suggestions and not requirements on the second page?

**Mr. Gellenbeck:** This is the August 5, 2005 letter?

**Ms. Newman:** Yes, at the end it says, "Lastly I want to offer some suggestions for you to consider."

**Mr. Gellenbeck:** Yes, keep in mind I offered earlier that Bill Dunning and Mike Beach from Pacland and I had been going back and forth about different requirements for a number of months, as we went through the early stages of the SEPA process in getting their site plan applications moving. In this, I started to have these concerns, which I talked with them verbally mostly by telephone about, and in some point in time it became clear to me and Pacland that I needed to draw this line in writing. This was just to draw the line for them and Wal-Mart and express concerns that modification here doesn't stand alone, it affects what you do. More parking equals reduced opportunity to save trees, and smaller footprint of a building. The objective of the letter was to get them to draw more site plans and make a greater effort to save trees.

**Ms. Newman:** I just want to clarify that Wal-Mart did not prohibit the use of parking areas for short-term rest areas by recreational vehicles. Is that right?

**Mr. Gellenbeck:** No they didn't. In fact, I looked through the EIS specifically to refresh myself on that issue. What I found was that I was reminded of discussions we had that I talked about earlier, where the general public was concerned about safety issues. The way they mitigated on that was to put out security cameras. It was really a bridge too far for me to prohibit that issue. Where do you draw the line in terms of how long people can park there? You could put a campground in this same district.

**Ms. Newman:** Okay and they did plant more mature evergreens along their back trace to jump-start the landscape?

**Mr. Gellenbeck:** Yes, and the bermed area along Littlerock Road.

**Ms. Newman:** They are going to establish a natural area with retained and planted trees and shrubs similar to the natural setting done by Costco?

**Mr. Gellenbeck:** Yes, I think you can see that in both site plan alternatives three and four.

**Ms. Newman:** When you say, "consider assumption of natural area" you mean just an area where there is a grouping of trees?

**Mr. Gellenbeck:** Group and retain some existing trees onsite. That is

pretty much what Costco did.

**Ms. Newman:** I have no further questions.

**Hearing Examiner Kerslake:** Thank you. Before going to redirect I just have a couple questions. Mr. Gellenbeck on cross-examination you indicated that the trees along Littlerock Road will be required to be larger than the standard minimum replacement trees. Is your authority for that in the waiver of the tree standard, as opposed to approval of the landscape plan?

**Mr. Gellenbeck:** I don't think it's directly in there. I looked at a discretionary permit, and the objective of trying to lessen the impact of this additional parking. I think if you look through the zoning ordinance you will find provision in there that allows me to do alternative landscaping plans. All the components are there to set the stage to make that requirement. There are also provisions in the parking regulations, which allow me to put requirements such as fencing and berms in there. That's what I was doing. The larger than average trees was sort of a trade off for the additional visual impact that I felt might accompany the additional parking spaces, which were being requested. Again, I also wanted to achieve some continuity with the berming and landscaping that exists along Costco and Fred Meyer. If you go down Littlerock Road you'll see Costco similarly put in some berms. The treed areas preserved on the Fred Meyer site were along Littlerock Road, where the existing retained fir trees were located to provide buffer to Fred Meyer's parking. It's that same kind of condition that I wanted to achieve as mitigation for approving the additional parking spaces that were being requested.

**Hearing Examiner Kerslake:** But, the requirement for the larger trees in your view was supported by your discretionary decisions as a result of parking waiver and tree retention requirement waiver. During cross-examination, you were asked about these replacement trees and what size they were going to be. You said you didn't know, but there are minimum standards set forth in the landscaping requirements for replacement trees, and that's what will be utilized.

**Mr. Gellenbeck:** In a sense it's an apples and oranges situation here. When I was referring to the standards for the replacement trees that was the approximate 400 trees that are plant(ed) back. That dealt with the replacement tree mitigation associated with the tree modification. On the other hand, the larger than normal tree requirement was a requirement of the parking modification not the tree modification, and that again was to provide a jump-start to buffer neighborhood concern of visual impacts.

**Hearing Examiner Kerslake:** In terms of the parking waiver, where you can waive either above or below the standard, do you view that as a

discretionary permit?

**Mr. Gellenbeck:** Yes I do.

**Hearing Examiner Kerslake:** There are standards to guide you are there not which were one of the exhibits that you referred to in your testimony and was displayed on the screen? These are to guide you, and there are pretty specific requirements that must be met in order for you to waive those standards.

**Mr. Gellenbeck:** Yes.

**Hearing Examiner Kerslake:** Is it your view that if those standards are met that the applicant is entitled to a waiver?

**Mr. Gellenbeck:** That would make it less discretionary. No, I don't view it in the way that the applicant is automatically entitled by it. Although, I haven't got the language in front of me, I pretty much run that off of the term "may." The Development Services Director "may," which also implies "may not."

**Hearing Examiner Kerslake:** Thank you. Redirect.

**Mr. Myers:** I have one question. Ms. Newman asked you during cross-examination about the pre-application process. In this particular case, is it your understanding that Wal-Mart had a preliminary site plan approval granted in 2004 by the DRC (Development Review Committee)?

**Mr. Gellenbeck:** Could you ask that again?

**Mr. Myers:** Let me back up. That's the formal site plan approval that's Exhibit 45, yes?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** Is there a difference between a preliminary site plan approval and a formal site plan approval?

**Mr. Gellenbeck:** Generally, when we go into hearing on a case, we go in with a preliminary approval letter. Then, as we come out of a hearing on a case, depending on the requirements we develop the formal letter; final letter so to speak. This is a little bit different, because we're not talking about a hearing on a case. This is an appeal. As we came out of SEPA, we approved the two site plans and the conditions associated with each of those site plans.

**Mr. Myers:** The approval given in Exhibit 45, is that a formal site plan

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approval?

**Mr. Gellenbeck:** Exhibit 45 is the June 18, 2007...

**Mr. Myers:** Actually it's the June 25, 2007.

Mr. Myers displayed Exhibit 45 on an overhead projector.

**Ms. Newman:** There are two different dated letters in the file. One is final and one is draft.

**Mr. Myers:** In the June 25, 2007 letter that says "formal site plan approval," does that refresh your memory?

**Mr. Gellenbeck:** Yes. The June 25, 2007 letter is the final one. That is the one I stamped to indicate that this was the copy sent out to the agencies and persons commenting on the Wal-Mart supplemental EIS. I think this was a requirement of our TMC. That is why there are two of them in there.

**Mr. Myers:** That is the final approval in this case?

**Mr. Gellenbeck:** Yes.

**Mr. Myers:** Thank you. That is all I have.

**Hearing Examiner Kerslake:** Does Wal-Mart have any redirect?

**Ms. Kaylor:** No.

**Hearing Examiner Kerslake:** Ms. Newman, as a result of my questions, is there anything further?

**Ms. Newman:** No.

**Hearing Examiner Kerslake:** Thank you Mr. Gellenbeck. Next witness.

**Mr. Myers:** The City has no further witnesses.

**Ms. Kaylor:** Wal-Mart recalls Mike Beach.

**Hearing Examiner Kerslake:** Okay.

**Ms. Newman:** Can I ask why? You've already had Mike Beach testify.

**Ms. Kaylor:** Well, Mr. Beach testified previously, when A3 and A4 were not in evidence. Now they are, and I would like him to comment on those.

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**Hearing Examiner Kerslake:** Mr. Beach, you remain under oath, as you were previously sworn.

**Ms. Kaylor:** Mr. Beach, I previously provided you copies of the appellants' Exhibits A3 and A4. I believe Exhibit A3 is the site plan diagram and Exhibit A4 is an aerial. Were you here yesterday for the testimony of Mr. Rother, when he testified about the lines that he drew on those plans that are labeled buildable area?

**Mr. Beach:** Yes.

**Ms. Kaylor:** On Exhibit A3, which is the site plan diagram, with those notations, does the area marked buildable area include property that is outside of the Wal-Mart project site?

**Mr. Beach:** The majority of the smaller circle to the left side of the page is outside of the property that Wal-Mart has under contract, yes.

**Ms. Kaylor:** On Exhibit A4, the aerial photograph is the same, true?

**Mr. Beach:** About exactly half is outside of the purchase area, which is the smaller parcel to the south of Kingswood that is circled in blue.

**Ms. Kaylor:** Looking again at A4 and the area has been circled as buildable, would building within that area impact large diameter trees that were identified by the City as significant for retention?

**Mr. Beach:** Yes.

**Ms. Kaylor:** Do alternatives three and four retain those trees that would be removed under diagram A4?

**Mr. Beach:** Yes.

**Ms. Kaylor:** Thank you. That is all.

**Hearing Examiner Kerslake:** Mr. Myers?

**Mr. Myers:** No questions.

**Hearing Examiner Kerslake:** Ms. Newman?

**Ms. Newman:** Is this accurately depicting the project site area in the EIS, with the yellow lines on A3?

**Mr. Beach:** Can you clarify what you mean by project site area?

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**Ms. Newman:** Well, the EIS's definition of the project site area.

**Mr. Beach:** On Exhibit 4, the title that is "Existing Land Uses" basically shows the outline of the entire property. It doesn't really mean that it's the project area.

**Ms. Newman:** Let me clarify; A4 has a line on it that's in black that is actually consistent with the yellow line on A3.

**Ms. Kaylor:** I believe I may have mixed up the exhibits. I had identified the site plan as A3 and the aerial as A4. Sorry about that.

**Ms. Newman:** The yellow lines on A3 show a project site. Is that the project site for this proposal?

**Mr. Beach:** The yellow lines on A3 show the total parcel as it is prior to the project going forward with the new plat line.

**Ms. Newman:** So, the short plat is somehow going to change the project site?

**Mr. Beach:** It doesn't change the project site. When Wal-Mart goes to buy a piece of property they typically do not buy the whole property. They buy a portion of that property. A3 is showing the existing land uses.

**Ms. Newman:** Well, there's a yellow line that shows the site.

**Mr. Beach:** That's just showing the parcel as it is today.

**Ms. Newman:** So, that is not the actual development of the project.

**Mr. Beach:** A portion of this is the project and a portion is not under contract to be purchased.

**Ms. Newman:** Okay, so a portion of it will not be developed by Wal-Mart, that's within the yellow line.

**Mr. Beach:** Correct.

**Ms. Newman:** Can you provide an approximation in pen Exhibit A3, which part will not be developed?

**Mr. Beach:** Yes.

**Hearing Examiner Kerslake:** It might be helpful to also do it on the official exhibit.

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**Ms. Newman:** Yes.

**Hearing Examiner Kerslake:** Counsel, are you going to mark on Exhibit A4 as well?

**Ms. Newman:** No.

**Ms. Newman:** I don't have any more questions.

**Hearing Examiner Kerslake:** Well, we've marked on an exhibit, and I think we need to reoffer the exhibit as remarked. It would also be helpful for the witness to identify what he marked on Exhibit A3.

**Mr. Beach:** On Exhibit A3, which prior to marking it depicts the existing land uses, and shows the property line prior to the contract that Wal-Mart has with Kingswood. I marked the future line that would show the southern most boundary of the purchasing parcel that Wal-Mart would purchase from Kingswood.

**Ms. Newman:** Did you identify that as red pen?

**Mr. Beach:** Correct.

**Ms. Newman:** I'm fine with keeping this as Exhibit A3 if counsel concurs.

**Hearing Examiner Kerslake:** Let me ask if opposing counsel agrees to the modification made to Exhibit A3, to depict a very approximate as I understand boundary along the southerly parcel indicated on that exhibit by red line of the very approximate location of the contract purchase by Wal-Mart of the Kingswood property.

**Ms. Kaylor:** I just wanted to ask Mr. Beach one more question about the approximate nature.

**Hearing Examiner Kerslake:** Certainly.

**Ms. Kaylor:** So Mr. Beach, this line is approximate and you have drawn it today without the benefit of a scaled drawing in front of you or any other site plan documents in front of you correct?

**Mr. Beach:** Correct.

**Ms. Kaylor:** Thank you. No objection.

**Hearing Examiner Kerslake:** The modified exhibit, which we will continue to identify as A3, will be readmitted.

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**Ms. Newman:** I have no further questions.

**Hearing Examiner Kerslake:** Thank you Mr. Beach.

**Hearing Examiner Kerslake:** Is there anything further?

**Ms. Kaylor:** Nothing further.

**Hearing Examiner Kerslake:** Does the Appellant have any rebuttal witnesses?

**Ms. Newman:** No, I don't have any.

**Hearing Examiner Kerslake:** So, that concludes the hearing in the matter. Counsel and I discussed on Monday prior to hearing about closing. I think that there were at least counsel for Appellants and counsel for respondent Wal-Mart that wanted to close in writing.

**Mr. Myers:** I have no problem with that.

**Hearing Examiner Kerslake:** Okay, very good. Does counsel want to do the Appellant response rebuttal brief schedule or simultaneous filings? I always leave this up to counsel. We can do it the standard way or the expedited way. It doesn't make any difference to me.

**Mr. McCullough:** I think we would like to do it the standard way. I think it would help clarify the issues for the Examiner.

**Ms. Newman:** I would like to do just everyone submit a closing brief.

**Hearing Examiner Kerslake:** It seems to me that unless I've got agreement by everybody we are going to do it the standard way. Particularly, since it is the applicant who is most prejudice in terms of time. Let me ask Ms. Newman how much time do you want to file your brief?

**Ms. Newman:** How much time can I have?

**Hearing Examiner Kerslake:** A reasonable amount of time.

**Ms. Newman:** And what is reasonable?

**Hearing Examiner Kerslake:** Is two weeks sufficient?

**Ms. Newman:** Two weeks is sufficient yes.

**Hearing Examiner Kerslake:** And for Respondents responsive brief?

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**Mr. McCullough:** Two weeks takes us out to Wednesday, November 7, 2007. I suppose if we could take two weeks ourselves, which would take us to Wednesday, November 21, 2007. Then may be considering Thanksgiving decide on Friday, November 30, 2007. We could probably get something in earlier than Thanksgiving week.

**Mr. Myers:** We could get it in the Friday before Thanksgiving.

**Mr. McCullough:** Yes. Friday, November 16, 2007.

**Hearing Examiner Kerslake:** And then, Ms. Newman allow you some additional time for your rebuttal brief.

**Ms. Newman:** Well, technically I will be out of town for a lot of that, so technically they shouldn't be concerned that I'm getting too much additional time.

**Hearing Examiner Kerslake:** Thanksgiving week is in there and I am certainly taking that into consideration.

**Ms. Newman:** Thursday, November 29, 2007.

**Mr. McCullough:** I think Thursday, November 29, 2007 would be good.

**Hearing Examiner Kerslake:** I think we also discussed in counsel conference prior to hearing on Monday that the City of Tumwater has a code limitation of 10 days for the Examiner filing his decision in the matter. Given the potential complexity of this case and number of issues that time is a little short.

**Mr. McCullough:** The applicant is prepared to waive that.

**Hearing Examiner Kerslake:** I would expect not to take too much longer than that, but I think I'm going to probably need to take a little bit longer than that in order to accomplish that. I don't anticipate taking much longer than that, but again I appreciate counsel's consideration in that matter. Typically, here in Tumwater we don't have these complicated of cases. Thank you very much and I appreciate counsel's efforts in this matter. The way you've conducted the presentation of witnesses and being flexible in terms of taking them by subject matter and out of order is appreciated, and helps me, I think, better understand the case. I think it expedited the case.

**ADJOURNMENT:** **Examiner Kerslake adjourned the meeting at 11:41 a.m.**