

**TUMWATER HEARING EXAMINER
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CASE # 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 Ms. Newman Dold LLP, 1001 Fourth Avenue, Suite 3303, Seattle, WA 98154, for the Appellants.

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

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

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

The following exhibits were entered into the record:

- **Exhibit C-1 – C70** - City's Exhibits on Computer Disk of entire Concurrency Appeal
- **Exhibits** - Respondent's Exhibits R-1 through R-11 and R-15, R-16, R-17, R-18, and R-19
- **Exhibit R21** – Ordinance No. 094-0209
- **Exhibits A-1, A-2, A-5, A-6, and A-9** – Appellant's Exhibits
- **Exhibit R-14** – Respondent's Home Depot Document Relating to Trees
- **Exhibit R-12** – Respondent's Fred Meyer Document Relating to Trees
- **Exhibit R-13** – Respondent's Costco Document Relating to Trees
- **Exhibit R- 20** – Respondent's Galen Wright 2007 Tree Inventory
- **Exhibit A-7.1** – Appellants' Panoramic Photograph of Yelm Wal-Mart
- **Exhibit A-7.2** – Appellants' Photograph of Home Depot Site taken in July 2007
- **Exhibit A-7.3** – Appellants' Photograph f Garden Center at Yelm Wal-Mart before

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- Store's opening
- **Exhibit A-7.4** – Appellants' Photograph of Yelm Wal-Mart Parking Lot
 - **Exhibit A-7.5** – Appellants' Photograph of Dead and Dying Trees along Kingswood Drive, Tumwater, WA
 - **Exhibit A-7.6** – Appellants' Photograph of Frontage along Home Depot Site in Tumwater showing trees
 - **Exhibit A-7.7** - Appellants' Photograph of a Tree along Tyee Drive on the Corner of Tyee Drive and Kingswood in Tumwater
 - **Exhibit A-7.8** - Appellants' Photograph of a Tree along Tyee Drive on the Corner of Tyee Drive and Kingswood in Tumwater
 - **Exhibit A-7.9** - Appellants' Photograph of Dead Trees along Tyee Drive, Tumwater
 - **Exhibit A-7.10** – Appellants' Photograph of Home Depot Frontage of Diseased Trees
 - **Exhibit A-7.11** - Appellants' Photograph of Home Depot Frontage of Diseased Trees
 - **Exhibits A-7.12 & A-7.13** – Photographs of Dead Vegetation Along the Parking Strip along Kingswood Drive, Tumwater
 - **Exhibit A-7.14** – Appellants' Photograph Along Littlerock Road

HEARING:

Hearing Examiner Rodney Kerslake called the public hearing to order at 9:10 a.m. on the matter of Tumwater Livable Communities and United Food & Commercial Workers Union Local No. 367, Appellants v. the City of Tumwater and Wal-Mart, Respondents.

Hearing Examiner Kerslake: At the conclusion of the hearing yesterday, counsel and I talked about exhibits and my understanding is that counsel have stipulated to the admission of various exhibits. I understand those to include Respondents' Exhibits R-1 through R-20, which includes Exhibit 19, which consists of multiple, separate pages, and the City's exhibits are C-1 through C-70 were agreed to be admitted to by stipulation with the understanding that C-70 would be altered as described in the City's Exhibit descriptions that it would include all of the administrative record from below as opposed to merely excerpts from that record.

Mr. Myers: It will be a series of computer disks with the entire official file.

Hearing Examiner Kerslake: That also at the conclusion, Appellants indicated that they have yet to put together the hard copies of the exhibits which they had offered and so I don't have a listing of those exhibits at that point. Is there any objection by counsel to the admission of Wal-Mart/City's Respondent exhibits so that they are referred to in today's proceedings we will already have an admitted exhibit that we can refer too?

Ms. Newman: I must have misunderstood yesterday when we were talking. I thought that we were going to object. There were a few exhibits that I might object to as their submitted, and I think the same is true for Wal-Mart with respect to some of my exhibits. But, I'm not sure but we can address that now or we can address them when they are submitted either way you prefer.

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Hearing Examiner Kerlake: It would be helpful if you could identify the exhibits at issue so we can admit the ones where there are no issue because again that makes it easier for when you have a witness and you are showing them an exhibit that we know has been admitted already and we can refer to you and if it is not admitted, then I am in a better position to rule on its admissibility at such time it is offered and there's a witness to lay a foundation or whatever is necessary for admission. It would be helpful though to...and I don't necessarily mean to do it now counsel if you don't have it at hand, the exact ones that you wish to object to we can do later today, but I don't want to spend too much time on it. So do you want to do it later today?

Ms. Newman: What do you guys want to do?

Ms. Kaylor: I think we can identify the exhibits from a response that we had reserved the right to object to.

Hearing Examiner Kerlake: Okay.

Ms. Newman: I think by saying "reserve the right" I would agree that I may not object to them. Depending on when they are submitted, the reason that they are being submitted

Hearing Examiner Kerlake: So, since I don't have the Appellants' exhibits...but let me ask Appellant Ms. Newman, have you identified which City's exhibits that you have not stipulated too that are in admission?

Ms. Newman: I have identified those, and they are exhibits R-12, R-13, R-14, R-20, I believe. I actually have not gotten an updated list, but is R-20 the inventory?

Respondent: Yes.

Ms. Newman: Okay and I believe potentially, did I say R-18?

Hearing Examiner Kerlake: No, you did not.

Ms. Newman: Well, okay.

Hearing Examiner Kerlake: Is R-18 one you are reserving?

Ms. Newman: It's a pedestrian movement plan, actually I...no, just R-20, R-12, R-13, R-14, and R-20 are the only ones.

Hearing Examiner Kerlake: The City's respondents City's exhibits 1 through 71, 71 was already admitted yesterday as it was an additional exhibit. But, C-1 through 70, do you have any objection to the admission of those?

Ms. Newman: I don't believe I had any objections to any of the City's exhibits.

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Hearing Examiner Kerslake: Alright, then what I'm going to do is I'm going to admit by stipulation Respondents' exhibits R-1 through R-11 and R-15, R-16, R-17, R-18, and R-19, and again I am going to admit by stipulation the City's exhibits C1 through C70, and I am going to wait...

Ms. Newman: If I could approach, I do have a list of our exhibits that I can...

Hearing Examiner Kerslake: Okay.

Ms. Newman provided the Examiner with her list of exhibits.

Hearing Examiner Kerslake: Then let me ask Respondent Wal-Mart, it's been identified as the exhibits the Appellants have 10 exhibits listed A-1 through A-10.

Ms. Kaylor: Do you have a list of those exhibits or do you want me to run through them to make sure that they are all...

Ms. Newman: I think 8, 9, and 10 you might need to have identified.

Ms. Kaylor: Right, I have 1 through 7 but not 8, 9, and 10.

Hearing Examiner Kerslake: As I recollect from yesterday, my exhibit list indicates that exhibits A-8 and A-10 were already admitted. At this point, I need to know if Wal-Mart has any objections to the exhibits that have not been admitted that they wish to reserve.

Ms. Kaylor: We want to reserve the right to object to Exhibit 4 subject to information on how the markup of that exhibit had occurred. Exhibit 7, where it was a large number of photographs and Ms. Newman indicated that she would not be offering all those but would let the parties know at hearing which ones she was interested in offering. Again, reserve that subject to exactly what is going to be offered. And, what was that Exhibit A9?

Hearing Examiner Kerslake: A-9 was Thurston County West Tumwater Map.

Ms. Kaylor: No objection to that.

Hearing Examiner Kerslake: Okay, so A-4 and A-7 so ah...Mr. Myers was it A-3 as well that was another marked up version?

Ms. Kaylor: No, it's just 4.

Hearing Examiner Kerslake: Mr. Myers for the City....

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Ms. Kaylor: I'm sorry you are right, it is 3 and 4.

Hearing Examiner Kerlake: 3 and 4?

Ms. Kaylor: Yes.

Hearing Examiner Kerlake: Mr. Myers do you have any additional or do you wish to reserve...

Mr. Myers: Is Exhibit 1 the Littlerock Subarea Plan?

Hearing Examiner Kerlake: Yes, it is.

Mr. Myers: I would note that that's City Exhibit 58 and, just in case people want to...

Ms. Newman: That does raise an issue for me that I will explore with the City but I want to make sure I want to look at the hard copies of what were actually provided and whether the Littlerock Subarea Plan... you know what I mean...there are a lot of pieces to you and I don't know if the whole thing is submitted or pieces are submitted.

Mr. Myers: It's the entire 1997 Littlerock Subarea Plan.

Ms. Newman: Okay, with the appendices and the EIS?

Mr. Myers: Yes.

Ms. Newman: Okay, but I may not provide you with a copy of that since we already have a hard copy of the entire plan.

Mr. Myers: Okay.

Hearing Examiner Kerlake: Very good, then the Examiner will admit, and I understand A-1 may be a duplicate, but A-1, A-2, A-5, A-6, and A-8 and A-9 have already been admitted and A-10 noting that those are yet to be provided to the Examiner in hard copy.

Mr. Myers: You should have a copy of A-10.

Hearing Examiner Kerlake: Which is the Schils report.

Ms. Newman: And A-8.

Hearing Examiner Kerlake: Oh, I am sorry yes, A-8 and A-10, you are correct have been previously admitted.

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Ms. Kaylor: Mr. Examiner, we actually did have one other exhibit that we wanted to offer which is Ordinance 94-0209, which is the original adoption of the tree ordinance.

Ms. Newman: So, what's the difference between this ordinance and what was in the code effective on the day Wal-Mart vested? I guess I will wait until you uh...

Ms. Kaylor: This ordinance just shows when the language that is of issue in this case was adopted.

Ms. Newman: Then is it the same language that applies to the Wal-Mart case in this ordinance?

Ms. Kaylor: Yes, some of this ordinance has been changed but the language that applies to the Wal-Mart case has not been changed.

Ms. Newman: And so, some of the ordinance had been changed before Wal-Mart vested from what this...

Ms. Kaylor: That's correct, so we would have both the date of the original adoption of the language that is of issue in this case via this ordinance and then before the ordinance existed at the time Wal-Mart vested via the City's exhibit.

Ms. Newman: I have no objection just with a caveat that we can't use this as the legal basis for looking at the case rather simply for the date certain language was adopted since this doesn't technically apply to the Wal-Mart proposal.

Ms. Kaylor: That will be R-21.

Hearing Examiner Kerslake: R-21 will be the ordinance 094-0209, which was enacted by the City of Tumwater on September 20, 2009, and that it is being offered for the limited purpose of demonstrating when certain language I understand, which is in dispute and I don't know what it is at this point, but that it is in dispute in these proceedings, was initially adopted but that it does not constitute the entire tree ordinance, which may be applicable in this case. And that will be admitted for the purpose indicated. Okay, any other exhibit issues at this point?

Ms. Newman: Let's check something here...anything else I will address with the City, and if there are any issues I will bring them up later.

Hearing Examiner Kerslake: Okay. Very good. Are we ready to proceed with the Appellants' first witness, which I understand is going to be a traffic...?

Ms. Newman: Yes, I have a quick aside with him, but other than that.

RECESS:

Hearing Examiner Kerslake: Recessed the meeting from 9:24 a.m. to 9:27 a.m.

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Hearing Examiner Kerslake swore in Ross Tillman.

Ms. Newman: Mr. Examiner, we have very few traffic issues as it has turned out and so we are going to really focus on confirming that certain things will occur because it wasn't very clear in the record that they will indeed occur. And I imagine that the responses, I would hope would be yes, we promise that this will be a condition to the project. So, could you introduce yourself and give your name and address for the record.

Mr. Tillman: I'm Ross Tillman. Address is 1776 NE 62nd Street, Seattle, 98115. I'm a Transportation Planner,

Ms. Newman: Okay and I understand, and you may or may not be familiar with this, but have you reviewed the final EIS and are you aware that your resume is actually in that document?

Mr. Tillman: I have reviewed the final EIS and I am glad to hear the resume is there.

Ms. Newman: Okay, so we won't go into details of that. And, what did you review with respect to this Wal-Mart proposal?

Mr. Tillman: Well, I reviewed a series of traffic analyses as they have evolved leading up to the FSEIS.

Ms. Newman: Okay, and over the time you have ultimately come to a conclusion with respect to just two issues, I understand. Could you... I just want to go through each of those one a time. Could you start with the first one?

Mr. Tillman: Correct, these have to do with the concurrency recommendation and it has to do with two locations. One is Trospen Road I-5 southbound ramp intersection. The issue there is mitigation proposal has been made and evaluated it would appear to be adequate but the City's concurrency ruling indicates the City should require that the state DOT has approved the plans for this. I would like to point out that obviously the ethicalness of that mitigation hinges depends entirely upon DOT's approval. So I think that would need to be a mandatory item if for some reason that plan were not approved, then the project would not be meeting the City's concurrency requirements as proposed.

Ms. Newman: And so, you are suggesting that as a condition to approval, the WSDOT approval shall be a condition prior to issuing any permits in the case?

Mr. Tillman: Yes, because without that agreement, again the project wouldn't be concurrent.

Ms. Newman: Okay, I understand you had another issue with the mitigation with respect to Trospen Road and Littlerock Road?

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Mr. Tillman: Right and this may be as much a point of clarification. There's a particular set of lane improvements identified for Trosper and Littlerock Road, though I believe the level of service worksheet that actually documents the effect of the mitigation includes an additional southbound lane and just want to make sure the level of service analysis and the concurrency recommendation are in fact consistent with one another.

Ms. Newman: And what about the concurrency recommendation, it doesn't include any mention of the southbound lane?

Mr. Tillman: No, it doesn't.

Ms. Newman: Okay, and so it appears the City is not requiring certain mitigation that was suggested must be done by the Wal-Mart traffic expert?

Mr. Tillman: Yah, it turns out that the worksheet valley weighting that shows a different lane configuration than they would be inconsistent.

Ms. Newman: Okay, and if that additional southbound through lane is not required of the project, would that create a potential for significant impacts?

Mr. Tillman: Yes, possibly.

Ms. Newman: Okay, I have no further questions.

Hearing Examiner Kerlake: Cross examination Mr. McCullough?

Mr. McCullough: No, I have no questions for Mr. Tillman.

Hearing Examiner Kerlake: Mr. Myers?

Mr. Myers: A couple of questions. First of all, regarding the questions that you had regarding Interstate 5 and the southbound ramp, is it your understanding that Interstate 5 is a facility of statewide significance?

Mr. Tillman: Yes.

Mr. Myers: And, is it your understanding under the Growth Management Act, local concurrency ordinances do not apply to facilities of statewide significance?

Mr. Tillman: Yes. I also understand that you do list those intersections in your concurrency recommendations and that there is a standard lower for other city intersection, but a different standard.

Mr. Myers: And, that is a mitigation that was required pursuant to the City's SEPA

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authority?

Mr. Tillman: Yes.

Mr. Myers: With regard to the Trosper and Littlerock Road of concern that you had, have you reviewed any information concerning the City's project to widen Littlerock Road independent of the Wal-Mart proposal?

Mr. Tillman: To the extent that it is part of the corridor improvements. I had reviewed some information on that.

Mr. Myers: And, is it your understanding that the additional lane, ah southbound lane on Littlerock is part of that already approved City project?

Mr. Tillman: I'm not clear about that matter of detail, that's why I raised the question.

Mr. Myers: That's all I have, thank you.

Hearing Examiner Kerslake: Any redirect?

Ms. Newman: No.

Hearing Examiner Kerslake: Thank you very much Mr. Tillman.

Mr. McCullough: May I inquire ah...Ms. Newman one of the issues that has been raised in your appeal has to do with the parking modification. Are you intending to recall Mr. Tillman or any other to address that?

Ms. Newman: I am planning on addressing that in a different manner, not through direct testimony.

Mr. McCullough: Okay, that's fine. I'm just trying to figure out scheduling witnesses.

Ms. Newman: Yes, I understand and, oh by the way Brent Chapman will not be testifying at all, so we don't have the scheduling issue with trees.

Hearing Examiner Kerslake: So, that completes your traffic?

Ms. Newman: Right, that was everything for traffic.

Hearing Examiner Kerslake: I understand that as we discussed yesterday that Wal-Mart and the City will put on their traffic people at this point in time.

Mr. McCullough: Yes, if the City...I think we have to arm wrestle about who goes first. Hold on.

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Mr. Myers: The City is going to call Jay Eaton, Public Works Director.

Hearing Examiner Kerslake swore in Mr. Eaton.

Mr. Myers: Mr. Eaton, would you state your job title and describe your responsibilities with regard to reviewing traffic.

Mr. Eaton: My name is Jay Eaton; I am the Public Works Director for the City of Tumwater. And, as a Public Works Director I am responsible for the operation and administration of the public works infrastructure including transportation, storm water, sanitary sewer, and potable water supply. In regards specifically to review of traffic as it pertains to this case, I also review all the transportation impact analysis (TIAs) that come in for the various development proposals through the City.

Mr. Myers: Mr. Tillman just testified concerning two mitigation projects. I want to first of all start with the concern he expressed on the Trosper/Littlerock Road that it needed to include a southbound lane in order to meet level of service. Can you describe what projects are currently going on in regard to improvement of Littlerock Road?

Mr. Eaton: The City of Tumwater has a planned project on Littlerock Road that extends from the Trosper Road vicinity down through the south of City limits south of 73rd Avenue. That project includes various improvements throughout that corridor. But one component of that is the addition of a southbound lane on 2nd Avenue at that side of the intersection at Trosper.

Mr. Myers: When is that project planned to be constructed?

Mr. Eaton: The project is set to go to bid this spring.

Mr. Myers: Okay. And, will that proceed whether or not Wal-Mart is approved?

Mr. Eaton: Yes.

Mr. Myers: And did the TIAs analyze for how Wal-Mart will impact concurrency or level of service with regard to Trosper and Littlerock by considering that project?

Mr. Eaton: Yes they did. Not in the original TIA, that was actually added in one of the subsequent revisions or updates.

Mr. Myers: Why was that added?

Mr. Eaton: I believe as I go through and analyze the TIA, I look at the lane configuration that are shown in the model and they were not showing that added lane through there and because that is a planned and funded project it was appropriate to add that.

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Mr. Myers: So that was one of your comments in one of the draft TIAs?

Mr. Eaton: Correct.

Mr. Myers: With regard to the Trosper and I-5 southbound, Mr. Tillman stated that is a facility of statewide significance. Under the concurrency requirements, how does the City apply concurrency to facilities of statewide significance?

Mr. Eaton: We don't.

Mr. Myers: And can you describe why it is that the City doesn't apply that to facilities of statewide significance?

Mr. Eaton: It's a specific GMA requirement. It was actually a House Bill that was passed that basically specified that local jurisdictions cannot specify concurrency or make a finding of concurrency for those facilities. Similarly, we cannot specify level of service or standards for those facilities.

Mr. Myers: Has the City received any legal direction from the courts regarding application of concurrency for facilities of statewide significance?

Mr. Eaton: Yes, we have. We had a recent project concerning the Pilot Travel Center that's located near the interchange of Interstate 5 and 93rd Avenue, actually it is also known as State Route 121 – 93rd Avenue is, and through the review process on that it was actually appealed and a Thurston County Superior Court Judge reinforced the notion that we cannot do concurrency on facilities of statewide significance.

Mr. Myers: Mr. Tillman testified that it was necessary to have Washington State Department of Transportation approve the plans that are called for mitigation. Have they already approved those plans?

Mr. Eaton: No, those plans will need to be submitted through WSDOT, Washington State Department of Transportation, for review and approval.

Mr. Myers: Okay. What happens if Washington State Department of Transportation doesn't approve those plans?

Mr. Eaton: Well, because that is a highway of statewide significance we looked at that under our SEPA (through SEPA) um... so as far as WSDOT's approval, I'm not really sure to tell you the truth.

Mr. Myers: But that's a state decision and not a City decision?

Mr. Eaton: That's a state decision as far as whether they approve the recommended

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mitigation.

Mr. Myers: Did the City add any additional mitigation from what Wal-Mart had originally proposed when they sought approval of the project in 2004?

Mr. Eaton: Yes.

Mr. Myers: Can you describe what the City added?

Mr. Eaton: I believe that the original TIA that was submitted in 2004, the only mitigations that were proposed in that were SEPA mitigation fees or pro rata shares for improvements at the Tumwater Boulevard/Interstate 5 interchange and a reference to a similar SEPA mitigation fee for the Troser Road corridor. Through the process of back and forth reviews and analysis of the transportation impact submittals that were done, there were several of them added. If I may, I am going to refer to the actual concurrency determination.

Hearing Examiner Kerslake: Does that have an exhibit number by chance?

Mr. Myers: It does.

Ms. Newman: C-56. The ruling is that what we are referring too?

Mr. Meyers: Yah.

Ms. Newman: C-56.

Mr. Eaton: Added mitigations were improvements at the Troser Road/I-5 southbound ramp intersection and that was to add exclusive through lanes for north and southbound approaches, also the addition of a northbound right turn overlap phase and signal optimization at that location. Also added were reconfiguration of existing lanes at the Troser Road/Littlerock intersection and that would also include signal modifications as necessary to incorporate those reconfigurations. The addition of a traffic signal at the Littlerock Road/Costco road shared access that is basically what's now Costco's south driveway. It will be a shared access with Wal-Mart. It also includes the Tumwater Boulevard/I-5 SEPA mitigation fees that was in the original and it includes SEPA mitigation fees for the intersection of Troser Road and Lake Park Drive. That would be for a future signalization and channelization at that location. The applicant has also volunteered to make improvements at the Troser Road/Capitol Boulevard interchange. This is kind of a, I guess it's not necessarily a requirement under the concurrency ruling for Wal-Mart to make this improvement, again these were voluntarily agreed to by Wal-Mart really to help the entire situation through this corridor. Without the improvements, Wal-Mart's impact is still within the standards the City has and so again, that's a improvement that they volunteered to make, but there may be conditions, such as right-of-way acquisition and things like that that are beyond Wal-Mart's control that may prohibit

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their ability to actually implement those improvements.

Mr. Myers: And, would the mitigation that is identified in the concurrency determination, will any intersection fail at the level of service standard that's been adopted by the City?

Mr. Eaton: With the mitigations, the level of service standards on the intersections will not fall below the City's standards.

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

Hearing Examiner Kerslake: Mr. McCullough do you have any questions?

Mr. McCullough: No questions.

Ms. Newman: I do, but can I grab my box of...Mr. Eaton when do you expect to obtain WSDOT approval of the mitigation at Trosper Road and I-5?

Mr. Eaton: That would really be up to project proponent to prepare the plans and submit those to WSDOT for review and approval.

Ms. Newman: And do you have any idea when the project proponent plans to do that?

Mr. Eaton: No, I do not.

Ms. Newman: And isn't it true that you can't implement the mitigation that has been proposed for that ramp if WSDOT doesn't approve it?

Mr. Eaton: That's correct.

Ms. Newman: And, would you find it reasonable to have it be a condition as Ross Tillman suggests a condition to the permit, the projects, that WSDOT approval be obtained before any building permits are issued?

Mr. Eaton: I believe that's basically what I suggested in my concurrency finding.

Ms. Newman: Okay, there's a nuance with the word "should" as it said they should obtain WSDOT approval and we are requesting the Examiner say they must obtain WSDOT approval.

Mr. Eaton: My responsibility does not include the issuance of building permits.

Ms. Newman: I understand that, but you are addressing impacts, traffic impacts of the proposal and this mitigation cannot be addressed, I mean implemented if WSDOT doesn't approve it, and so wouldn't it be reasonable to require that WSDOT approve it before any

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project permits are issued?

Mr. Eaton: Again, I think that would be reasonable but we have many offsite improvements that are not approved prior to issuance of building permits.

Ms. Newman: Okay. But, this is mitigation that you believe should be implemented for the project?

Mr. Eaton: Yes

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

Hearing Examiner Kerslake: Mr. Eaton, in terms of the I-5/Trosper Road ramp improvement, is that solely the obligation under your concurrency determination of this applicant or are there other funds that have been contributed to that ramp improvement, which come into play?

Mr. Eaton: We have collected through SEPA mitigation fees in proportionate shares for that improvement.

Hearing Examiner Kerslake: So that improvement – let me back up. Wal-Mart's contribution to that improvement would allow that project to proceed, and it hasn't proceeded so far as I presume you haven't collected enough money to make it proceed, but does Wal-Mart then, ah contribution, then allow that ramp improvement to take place?

Mr. Eaton: That would be correct. Typically, the way that these occur under this situation would be Wal-Mart would actually really be responsible for the implementation of that project, working together through the City and the Department of Transportation and whatever mitigation fees have been collected by the City would be used to offset costs incurred.

Hearing Examiner Kerslake: Okay. In terms of the concurrency process employed by the City of Tumwater, I understand that your testimony to believe to be that in your role in terms of making a concurrency determination that first you evaluate the impacts of the project on the City's transportation system and compare that with level of service standards that are LOS adopted by the City of Tumwater, and that then it is determined if any of those fall below the standards adopted by the City, then there is mitigation that you identify that would be necessary in order to meet the concurrency requirements.

Mr. Eaton: With one slight variation. Typically, the project proponent, I will ask them to identify mitigations to raise the LOS to meet the standard and then I will review those mitigations.

Hearing Examiner Kerslake: To determine whether you agree that they will in fact in your professional opinion allow the LOS to be met?

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Mr. Eaton: Correct.

Hearing Examiner Kerslake: And, then the concurrency determination goes where in terms of implementation of – well that’s really not a concurrency recommendation, it’s a concurrency determination – where does that go under the City’s process in terms of implementation of those mitigating measures? Do they become part of site plan approval/review, and if you don’t know, tell me you don’t know, but I presume you know?

Mr. Eaton: I’m going to say I’m not the best person to be answering that question. I believe the concurrency determination for the most part, is wrapped into our SEPA determination.

Hearing Examiner Kerslake: So it becomes a mitigation measure of the mitigating determination of non-significance or whatever environmental determination is made?

Mr. Eaton: Correct.

Hearing Examiner Kerslake: Alright, thank you. As a result of my questions Mr. Myers do you have additional questions?

Mr. Myers: I have just a couple. With regard to concurrency when do you normally make a concurrency determination?

Mr. Eaton: I usually make a determination at the request of the Development Services Department and typically that request is made as a project proponent is coming in for permits, so that is part of the approvals that goes out with the permit package.

Mr. Myers: Is it your understanding in this case, that Development Services requested the concurrency determination before its actually going to issue the building permits so that it could be considered as part of this hearing?

Mr. Eaton: Yes.

Mr. Myers: That’s all I have.

Mr. McCullough: Mr. Kerslake one of your comments if you don’t mind...just for clarification that I think that at least for myself to clear up – this Troser Road/I-5 southbound ramp intersection condition Mr. Eaton that you testified about, it’s listed here in the concurrency determination, and as I read this it is listed as one of the mitigations identified in the EIS.

Mr. Eaton: Correct.

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Mr. McCullough: And you already testified about the City's authority under concurrency or lack of authority to impose concurrency conditions on facilities of statewide significance, right?

Mr. Eaton: Correct.

Mr. McCullough: So, is this condition a concurrency condition or is it an EIS condition?

Mr. Eaton: It would be a SEPA condition.

Mr. McCullough: Good, that was my understanding. That's all, thanks.

Hearing Examiner Kerlake: As a result of my questions Ms. Newman do you have questions.

Ms. Newman: Well that was the answer I was looking from Jack's questions. I don't know why we are both looking for the same answer.

Mr. McCullough: I'm not sure that it matters, but ah, it's for the record.

Ms. Newman: That's it.

Hearing Examiner Kerlake: Okay, thank you Mr. Eaton. Any more on traffic?

Mr. McCullough: We believe this issue has been sufficiently ventilated and so we will not be calling our traffic witness.

Hearing Examiner Kerlake: Okay, very good. Now also, as I understand from yesterday's post hearing discussions with counsel that we are going to talk about trees next.

Ms. Newman: Yes.

Hearing Examiner Kerlake: Okay.

Ms. Newman: I'm looking for my tree expert. I don't think he's here yet. Actually, you know as I realize the discussion that we had with the City was relevant to my tree direct with exhibits. I need to discuss as I need to know what exhibit numbers they are.

RECESS: Hearing Examiner Kerlake recessed the meeting from 9:52 a.m. to 10:04 a.m.

Hearing Examiner Kerlake: Ms. Newman do you have the documents from the City you need to proceed?

Ms. Newman: Yes, thank you. I call Bill Derkland to the stand please.

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Hearing Examiner Kerslake swore in Bill Derkland to testify.

Ms. Newman: Could you please introduce yourself and give your address for the record.

Mr. Derkland: I'm Bill Derkland and I live in Boston Harbor at 403 73rd Avenue NE, Olympia 98506.

Ms. Newman: What documents have you reviewed relevant to the Tumwater Wal-Mart proposal?

Mr. Derkland: Just the part related to groundcover and the consultant's inventory of the property, the trees on the property.

Ms. Newman: Okay. And are you aware there's a landscape plan for the property?

Mr. Derkland: Yes.

Ms. Newman: And, did you conduct a site visit of the property?

Mr. Derkland: I did.

Ms. Newman: And you actually went on the property itself?

Mr. Derkland: Yes I did.

Ms. Newman: And so, can you give us an overall picture of this site as it currently exists with respect to the trees on the site.

Mr. Myers: Your honor, before we go into that, I would like to ask some questions concerning the witness' expertise.

Ms. Newman: Oh, I forgot, actually I can go ahead and ask those. Can you give us a little bit.... I apologize for missing that... your experience and expertise? We also do have a resume in the record.

Mr. Derkland: I graduated from Washington State University in Forest Management in 1965 and I worked 30-35 years career in forestry and numerous jobs and capacities, maybe the most pertinent to this, I spent the last five years in the Department of Revenue in forest taxation and I was advisor to county assessors statewide or to the forested counties statewide on forest management plans. And this involved small landowner where owners can apply to have their property taxed as forest land, but in order to do this they have to submit a forest management plan, and I developed the guidelines for that and I advised all forest county assessors and their staff on properly managed forestland.

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Ms. Newman: And so what about your expertise gives you the ability to testify about the quality of trees and the functions trees provide?

Mr. Derkland: Well, a lot of it is general knowledge of forester works within the capacity of their job that I guess on forest management plans in order to develop them you have to understand everything.

Ms. Newman: Okay, and can you give us a raw picture of the site as it currently exists with respect to the trees?

Mr. Meyers: Your honor even before we go...

Hearing Examiner Kerlake: Let me ask if counsel wishes to have further voir dire on the witness.

Mr. Myers: I do have some additional questions that I'd like to ask.

Hearing Examiner Kerlake: Okay.

Mr. Myers: Mr. Derkland, in your capacity working for the State of Washington you worked for the Department of Revenue, is that right?

Mr. Derkland: I worked for the Department of Natural Resources for years and then I worked for the Department of Revenue.

Mr. Myers: Okay, you worked for the Department of Natural Resource from 1967 to 1972, is that right?

Mr. Derkland: Correct.

Mr. Myers: Okay, and after that your experiences with the Department of Revenue up through 1995?

Mr. Derkland: Correct.

Mr. Myers: And in assessing the values of timberlands did that primarily involve commercial timberlands that are taxed at a different rate?

Mr. Derkland: That's true.

Mr. Myers: Okay. You know and were those primarily located in rural areas of counties as opposed to within cities?

Mr. Derkland: No.

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Ms. Newman: Mr. Examiner, this is sounding a little like cross examination, not necessarily...I mean we...are you challenging whether he's...?

Mr. Myers: I'm asking whether he has experience of with dealing with forestry issues in urban environments.

Ms. Newman: Can we offer the testimony and then decide whether the testimony is something...

Mr. Myers: What I'm ...

Hearing Examiner Kerlake: Move on, but I'm going to allow the voir dire to continue.

Mr. Myers: Have you had any continuing education programs in forestry since you retired in 1995?

Mr. Derkland: No.

Mr. Myers: Are you a certified arborist?

Mr. Derkland: No.

Mr. Myers: Have you conducted hazard tree evaluations?

Mr. Derkland: Yes.

Mr. Myers: About how many have you done?

Mr. Derkland: How many trees?

Mr. Myers: How many hazard tree evaluations, how many times have you been asked to do... how many projects?

Mr. Derkland: I can't say that I ever worked on projects dealing with hazard trees. I have been asked over the years to give my professional opinion on.

Mr. Myers: Have you prepared forest management plans?

Mr. Derkland: Yes.

Mr. Myers: Have you drafted tree protection ordinances?

Mr. Derkland: No.

Mr. Myers: Have you provided advice concerning landscaping plans for new

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development?

Mr. Derkland: No.

Ms. Newman: Mr. Examiner, I am not even planning on asking questions that are relevant to half the questions the City's asks. It's really... This is probably a 10-minute direct examination that we are going to have here, it's not going to be... I think...

Hearing Examiner Kerslake: I will allow you to proceed with your questions, but if you have Mr. Myers...if we go into an area that you think that this witness does not have sufficient expertise and respond to the question posed, certainly interject and I will then rule based on what comes out of that. You may proceed Ms. Newman.

Ms. Newman: Thank you, and I promise you we are not going to go into an area that he doesn't have expertise in.

Ms. Newman: Could you give us the overall picture of the site as it currently exists with respect to the trees?

Mr. Derkland: Well, I think I'm looking for a word that describes the property, I suppose it would be undulating, I mean it's basically level but it has all kinds of hills and little dips and holes and so on. And, it has patches of trees and it has scattered trees, mostly Douglas fir and some cottonwood and some oak trees. Now it's heavily covered with scotch broom and blackberries because it been allowed to grow up under the trees.

Ms. Newman: What is the quality in general of the trees on the site?

Mr. Derkland: In general I'd say they are healthy and they range in size from well say 6 inches in diameter up to a couple of feet in diameter. There's damaged trees. There's probably an ice storm or a wind storm sometime in the past, so there's broken tops and you can see damage in the trees, but all in all they are healthy.

Ms. Newman: And is it a park quality stand of trees or altogether ascetically can you describe the view of the trees?

Mr. Derkland: There's patches of trees that I would say your term "park quality" I mean they are stable and healthy and...

Ms. Newman: And what is the average age of the trees on the site do you think?

Mr. Derkland: Ah, estimating you know, 60 to 80 years, maybe more.

Ms. Newman: Maybe more? And, what types of trees in general are those 60 to 80 or more aged trees?

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Mr. Derkland: Douglas Fir and probably the oaks or some of the oaks.

Ms. Newman: Do you know what the biggest diameter tree on site is?

Mr. Derkland: I think there is one big Douglas fir tree that might be 40 inches.

Ms. Newman: Is it just one or are there others that are comparable?

Mr. Derkland: No, that's the biggest one that I saw.

Ms. Newman: Are there any that are 30-inch smaller but still large?

Mr. Derkland: Yeh.

Ms. Newman: And about what diameter is an 80-year Douglas fir tree approximately on a site like this?

Mr. Derkland: You know just off hand, 24 inches maybe.

Ms. Newman: Okay. What are the contributions that all these trees on the site (are) ...what benefits do they provide and what functions are they, do they have...?

Mr. Derkland: Well, typical forest, they benefit air quality, carbon dioxide removal from a standpoint, they store it and this particular stand has a benefit of noise absorption since the freeway is on the side there and forests moderate rainfall hitting the floor.

Ms. Newman: And aesthetics?

Mr. Derkland: Yah, a lot of people like the way they look.

Ms. Newman: And, does the replacement of the tree...are you familiar generally with the mitigation plan for this project, what type of trees are being replaced and what will they replace the old trees with after they cut them down?

Mr. Derkland: I can't say that I really understand the, you know, the species and everything, I know there's quite a plan.

Ms. Newman: Okay, does the replacement of trees adequately mirror the benefits of existing trees if you cut down trees and replace them with smaller trees?

Mr. Derkland: I think it's just a standard rule of thumb that a tree has to be 15 to 20-25 years before it really starts doing its job again as a tree.

Ms. Newman: Okay. And then, just a few more questions on the healthy and unhealthy trees. Are you aware of the inventory report that was submitted by the applicant that

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concluded a number of trees on the site were unhealthy?

Mr. Derkland: Yes.

Ms. Newman: And, what's your understanding of the term "unhealthy" in general? If someone described the tree as unhealthy, what would that mean to you?

Mr. Derkland: I think it depends a lot on whatever their definition is of unhealthy.

Ms. Newman: When you first read that before you saw the trees on the site what did you expect?

Mr. Derkland: I expected to find trees dying with root rot or some kind of disease that are their way out. I really didn't see that, I saw damaged trees like I mentioned earlier.

Ms. Newman: So they weren't necessarily diseased trees?

Mr. Derkland: That's the way it looked to me.

Ms. Newman: They were diseased?

Mr. Derkland: They weren't.

Ms. Newman: They were not diseased. Okay.

Mr. Derkland: They were damaged from the standpoint of desirable saw logs.

Ms. Newman: Desirable what?

Mr. Derkland: Saw logs, you know marketing for timber to make products out of them.

Ms. Newman: Are they going to die soon because of the damage?

Mr. Derkland: I don't think so most of them.

Ms. Kaylor: So, they were healthy in terms of they weren't dying.

Mr. Derkland: Right.

Ms. Newman: I have no further questions.

Hearing Examiner Kerslake: Any cross examination Mr. McCullough?

Ms. Kaylor: Ah, Ms. Kaylor, yes just briefly. Mr. Derkland hello, I'm Courtney Kaylor. I have just a few questions for you. What was the date of your site visit?

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Mr. Derkland: I don't know, it was a couple of weeks ago.

Ms. Kaylor: Approximately how long did you spend on the site?

Mr. Derkland: Hours.

Ms. Kaylor: Did you walk the entire site?

Mr. Derkland: Enough to see the entire site. Much of it you can see from the perimeter and I walked inside to see what else I couldn't see from the outside.

Ms. Kaylor: Did you conduct an individual assessment of the trees on the site?

Mr. Derkland: No.

Ms. Kaylor: And so, did you conduct an individual assessment of the trees with regard to whether they were healthy or unhealthy?

Mr. Derkland: No.

Ms. Kaylor: Did you conduct an assessment of the trees with regard to their size?

Mr. Derkland: Just observation. No, I didn't measure all the trees on the property.

Ms. Kaylor: And with regard to their age, did you conduct an individual assessment?

Mr. Derkland: No.

Ms. Kaylor: Mr. Derkland you are not a qualified noise engineer. You don't have qualifications to conduct a noise impact analysis, do you?

Mr. Derkland: No.

Ms. Kaylor: And with regard to air quality, you are not qualified to conduct a ...?

Mr. Derkland: No.

Ms. Kaylor: Those were all my questions. Thank you.

Hearing Examiner Kerslake: Mr. Myers?

Mr. Myers: There is just one question, have you reviewed the site plan approval that the City issued for this project?

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Mr. Derkland: I looked at it.

Mr. Myers: And, have you reviewed Table 2.0, which is part of in Exhibit 45?

Ms. Newman: If there are any questions about this I would rather the witness have it in front of him.

Hearing Examiner Kerlake Oh, certainly!

Mr. Myers: What we've got on the screen is Table 2.0.

Ms. Newman: If I could I might...

Mr. Myers: Can you see that?

Mr. Derkland: No.

Mr. Myers: Okay, well let me...

Hearing Examiner Kerlake She has it.

Mr. Myers: Thank you.

Ms. Newman provided a copy of Table 2.0 to Mr. Derkland.

Mr. Myers: First of all, do you have an opinion as to whether or not the amount of trees that are to be retained on site meets the replacement requirements of the City's tree retention ordinance?

Mr. Derkland: I have no idea.

Ms. Newman: Mr. Examiner that's outside of direct. I don't know if you're going to get in the details of this but I didn't ask any questions about...

Hearing Examiner Kerlake The direct examination was fairly limited and I don't think it delved into any compliance with City regulations except for tree disease or damage, I don't think it got into any area that even disputed the...

Mr. Myers: What I wanted to get into was the replacement trees and the types of those trees and the _____ of those trees.

Hearing Examiner Kerlake Okay, fair enough that was a question under...

Mr. Myers: In considering the adequacy of the mitigation did you consider whether or not there would be more trees planted after the project is implemented than there are

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currently on site?

Mr. Derkland: I think I'm aware that there's more trees planted than planned to be removed. I didn't look into any really deeper than that.

Mr. Myers: Okay, were you aware of the site plan requirement that was imposed by the City of Tumwater that requires planting of large diameter evergreen trees along the frontage of Littlerock Road?

Mr. Derkland: I read that, yes.

Mr. Myers: Okay, and were you aware that those are 25 to 30 feet tall?

Mr. Derkland: Yes.

Mr. Myers: Would you characterize those types of trees as mature enough to "do their job?"

Mr. Derkland: Yah, if they live and if they...

Mr. Myers: That's all I have. Thank you.

Hearing Examiner Kerslake Thank you. Any redirect?

Ms. Newman: No.

Hearing Examiner Kerslake: Thank you sir. And, does that conclude your tree testimony Ms. Newman? Respondents?

Ms. Kaylor: We call Galen Wright.

Hearing Examiner Kerslake swore in Galen Wright to testify.

Ms. Kaylor: Mr. Examiner, before I start, there is some testimony from Mr. Wright that will be rebuttal testimony and additional testimony that we will put on for our case. And Mr. Wright is only available today. It seems to make sense to me that he talk about everything at once.

Hearing Examiner Kerslake Okay, very good.

Ms. Kaylor: And Mr. Wright's resume is Exhibit R-19.4. Mr. Wright can you state your name and address for the record.

Mr. Wright: My name is Galen M. Wright, my address of my office is 1919 Yelm Highway SE Olympia, WA.

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Ms. Kaylor: And, can you summarize your education and professional experience?

Mr. Wright: Yes, I have a bachelors degree in Forest Management from the University of Missouri in 1976 and I received my masters in silviculture and poor soils from the University of Missouri in 1979. I'm a certified forester, certified by the Society of American Foresters since that program began in 1995. I'm a certified arborist certified by the International Society of Arboriculture since 1990 when that program began and most recently we have a new certification by the International Society of Arboriculture called Board Certified Master Arborist, again that is a new certification that I achieved in June 2007.

Ms. Kaylor: Thank you. And, can you briefly discuss your experience in the Tumwater area and the City of Tumwater?

Mr. Wright: I've lived in the Olympia area since 1987 and at that point in time I was a Division Forester for Puget Sound Power and Light Company, which was their name at that time. In 1994, I broke away from Puget Sound Power and Light Company and started my company, Washington Forestry Consultants, of which I am the owner.

Ms. Kaylor: And, do you serve on the City's Tree Board?

Mr. Wright: Yes, I have served on the City of Tumwater's Tree Board since its inception in 1996.

Ms. Kaylor: Can you describe your work on the Wal-Mart project?

Mr. Wright: I first set foot on the property – I was retained by Kingswood Capita LLC to do an evaluation of the trees on what was both the Home Depot site and the Wal-Mart site in 2002. At that time, I performed a preliminary assessment of all the trees across the entire parcel (and) wrote Kingswood what I call a preliminary tree protection plan. Again, we had no site plan to work with at that time; it was simply a preliminary what's out there, what's the quality of it, what's the potential for tree protection.

Ms. Kaylor: And, specifically with regard to the Wal-Mart proposal what work have you done?

Mr. Wright: In March 2005, we were asked to do a more detailed assessment of the trees on the proposed Wal-Mart site. That included the area north and south of what's currently the Kingswood Drive. At that time, I did some additional reconnaissance of the site myself and then I had one of my associates, Joshua Sharps, who is also a certified arborist and has a degree in natural resources. Josh went and numbered all the trees on the site and collected information on the species of the tree, the diameter of the tree measured at breast height, the condition of the tree, the crown position of the tree, and kind of what its long-term potential was. And from that then we compiled a list and developed a letter that we

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produced, I believe it was in mid-2006, that gave a simple summary of the number of the trees on the site, the number unhealthy on the site, and the number of healthy trees on the site.

Ms. Kaylor: Can you describe the methods you used for determining whether a tree is healthy or unhealthy?

Mr. Wright: That kind of goes back to my academic and my continuing education and field experience. But, there is three publications in particular that we rely on. One is called the *Plant Appraisal Manual* that is published by the International Society of Arboriculture. The most recent edition was published in 2000. The second publication was published by the US Forest Service in 1992. It dealt with the context of valuating trees in developed areas, again a very good publication on tree assessment and hazard tree evaluation. A third publication that we use a great deal and rely upon was published by Methany & Clark in 1998 it's a second edition and its title is *Evaluating Hazard Trees in Urban Areas*. So, those are the three that we rely on in addition to all of our publications on both pathology insects and all types of hazard tree publications that I've read for continuing education courses I have taken over the years.

Ms. Kaylor: How does the City of Tumwater's code treat healthy versus unhealthy trees?

Mr. Wright: It doesn't, we use the gross number of trees on the site as long as they are alive.

Ms. Kaylor: And so just to clarify – that means that even an unhealthy tree – if a tree is removed even if it is unhealthy, mitigation is still required, is that correct?

Mr. Wright: Yes.

Ms. Kaylor: Have you visited the site again since 2006?

Mr. Wright: Yes.

Ms. Kaylor: And can you describe your site visit and your conclusions from that visit, and Mr. Examiner, this is Exhibit R-20.

Mr. Wright: I visited the site in early October 2007 after which, I had my associate, Joshua Sharps, the same guy that did the 2005 evaluation, Josh went back through all the trees on the site and looked at the numbers and looked at the condition of the trees and we updated the table, the tree list basically that we prepared in 2005 to reflect any changing conditions from 2005 to 2007. After Josh did that and we prepared and updated the list, I went back to the site to just look over the trees again to get my own general feel on what some of the changes had been.

Ms. Kaylor: And can you summarize the changes?

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Mr. Wright: Yes, we had a small change. We initially had reported that there were 434 trees on the site in 2005. In 2007, we found we lost 9 trees, either they died or they blew over. It appeared that most of the trees that blew over in the December 15 storm of 2006.

Ms. Kaylor: Can you discuss the work you did with regard to the Wal-Mart project mitigation plan?

Mr. Wright: I don't have the dates; my memory is a little fussy as to when we did this as it was several visits to the Pacland office. After we had done our assessment in 2005, again we looked at where we thought the best trees were that were on the site. At that time then Pacland came up with some different site plans. I met with Mike Beach and some of his associates in their office on a couple of different occasions to recommend to them where the better trees were on the site and try to incorporate them into the site plan. There was some cases of where their current iteration of the site plan that we were looking at didn't accommodate some of the better trees, and in many cases we were able to adjust the parking lot design, move the road a little bit, and do some things like that to accommodate what I considered to be some of the higher priority trees on the site.

Ms. Kaylor: And how did you identify the higher priority trees?

Mr. Wright: It was based on my site visits. Mostly, I went out in the field and looked at where the best trees were and collaborated them on the map and then went back to Pacland and said what can we do these trees – these are the best ones out there, and that's how we did it, it was kind of a trial and error kind of approach.

Ms. Kaylor: You mentioned that you also previously done some work on the Home Depot site. Can you describe that work?

Mr. Wright: Yes, I did the initial reconnaissance report for Kingswood but later on then I was retained by Home Depot to do a tree protection plan for that site, which I believe was prepared in 2002 as well.

Ms. Kaylor: For the record, this is Exhibit R-14, documents relating to the Home Depot tree permit.

Ms. Newman: Mr. Examiner, this is one of the exhibits that I reserved for an opportunity to object to and I don't understand why any description of tree plans on other sites is relevant to this site. And, I just want to understand that.

Hearing Examiner Kerslake At this point the exhibit hasn't been offered and she has referred to the exhibit with this witness, though maybe we should see where that might go with the questions. And, at such time that it is offered you've heard his testimony and then you raise whatever objections you want.

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Ms. Newman: We just haven't been informally offered and if you make a formal offer, then I will object.

Ms. Kaylor: And referring to Exhibit R-14, can you describe...

Ms. Newman: Do you want me to grab that exhibit?

Ms. Kaylor: Yes. Ms. Newman referred to Exhibit R-14 and asked Mr. Wright to describe the trees on the Home Depot site that existed prior to development of that site?

Mr. Wright: Do you want the tree counts or just the condition of the trees?

Ms. Kaylor: The tree counts and a general description of the condition.

Mr. Wright: The trees on the Home Depot were a lot different then what we are dealing with on the Wal-Mart site. There was one small stand of Douglas fir on the Home Depot site along what would be the westerly edge, just west of where the current building sits. The remainder of the Home Depot site where the parking lot and the building occur, had some scattered Douglas fir trees, smaller trees 10 to 12 inches diameter, kind of rough trees and so a totally different stand than what we were dealing with over on the Wal-Mart site. I found that there were 83 trees on the site in my tree plan of which they proposed to remove 82 of those trees. That's makes the tree retention about one percent.

Ms. Kaylor: Did Home Depot require a tree retention standard modification or waiver in order to accomplish that?

Mr. Wright: Yes, that would have had to have happened.

Ms. Newman: Mr. Examiner, I object to this line of testimony and I don't understand the relevance of what happened on Home Depot site to this proposal.

Ms. Kaylor: It is relevant for two reasons. The Appellants have asserted that the tree standard modification or waiver that was granted for this property shouldn't have been granted. The standard in the ordinance is whether a reasonable use of the site is impactible without the modification. The term reasonable is obviously very flexible and it is our legal position that the City properly considered its historic practice and the practice in the immediate vicinity of the project when it made its determination on what is reasonable use of the site. In addition, as I mentioned before, that language in the tree ordinance was adopted in 1994 and as a matter of statutory interpretation a legislative body is presumed to be aware of the interpretation of its enactments and the City has consistently interpreted that language to permit tree standard modifications in cases such as this. The three most applicable cases being Costco, Home Depot, and Fred Meyer, and so we are offering the information for that reason.

Hearing Examiner Kerslake I am going to overrule the objection but make the

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following comment. I am certainly aware that a whole series of wrong decisions doesn't make but it appears relevant enough to overrule the objection of the line of questions being asked and answered.

Ms. Kaylor: And, so at that point I will offer R-14.

Hearing Examiner Kerslake Any objections?

Ms. Newman: I'm sorry what was, you were asking me a question?

Hearing Examiner Kerslake Yes, she is offering R-14.

Ms. Newman: Well, I suppose I would make the same objection and the same response and the same so for formality's sake.

Hearing Examiner Kerslake: Okay, thank you and it will be admitted.

Ms. Kaylor: In looking at exhibit R-12, did you work on the Fred Meyer site as well.

Mr. Wright: Yes.

Ms. Kaylor: Can you describe the number and general condition of trees on the Fred Meyer site?

Mr. Wright: The Fred Meyer site was constructed on the site of the old Tyee Motel so there was a mosaic of retained native clusters of trees on the perimeter of the site and a large number of older planted landscape trees. In that particular case, there were several larger clusters of the native residual trees that were retained on that project. Primarily along the north edge of the project and the west edge of the project. These were predominantly Douglas fir and a couple of large Oregon White oaks.

Ms. Kaylor: And how many trees existed on the site prior to development?

Mr. Wright: On the Fred Meyer site there were 287 healthy trees to start with. They retained 49 of those healthy trees which amounts to about 17 percent of the healthy trees retained.

Ms. Kaylor: And did the Fred Meyer project require a tree standard modification as well?

Mr. Wright: Yes it did.

Ms. Kaylor: Did you also work on the Costco project?

Mr. Wright: Yes, I worked on the Costco expansion in the year 2000.

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Ms. Kaylor: Going back a moment, I'm going to offer R-12.

Hearing Examiner Kerslake: Any objection?

Ms. Newman: Same objections.

Hearing Examiner Kerslake: To be admitted.

Ms. Kaylor: Can you describe the number of trees and their general condition on the Costco site prior to the expansion in 2000?

Mr. Wright: The Costco site was predominantly planted trees and then there was a large stand in the parking lot west of the building. There were several smaller clusters of Douglas fir out along Littlerock Road and about three or four Douglas fir trees that had been retained to the northeast of the Costco building. Again, the rest of the trees at the time of expansion were planted landscape trees planted with the original building construction. I found that there were 351 trees on the Costco site at the time of the building expansion.

Ms. Kaylor: And how many trees were removed?

Mr. Wright: They saved 136 trees. I didn't do that calculation.

Ms. Kaylor: And what percentage of trees were retained?

Mr. Wright: That's 39 percent of the trees that were retained and again a very large number of these were of the planted landscape trees that were already there.

Ms. Kaylor: This is exhibit R-13, which I will offer now.

Ms. Newman: Same objection.

Hearing Examiner Kerslake: To be admitted.

Ms. Kaylor: You have indicated a percentage for retained trees for the Home Depot, Fred Myers and Costco extension project. How does that compare to the Wal-Mart project?

Mr. Wright: The alternative 3 and 4 retained 22 to 26 percent of the trees on the Wal-Mart site.

Ms. Kaylor: Just one moment. Those are all my questions, thank you.

Hearing Examiner Kerslake: Mr. Myers?

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Mr. Myers: No questions.

Hearing Examiner Kerslake: Cross examination Ms. Newman?

Ms. Newman: Okay. Good morning Mr. Wright. I would like to start by asking you a little bit about the distinction between unhealthy and healthy trees. During your direct testimony you indicated you relied on three publications to make a determination of whether trees were unhealthy or healthy. Is that accurate?

Mr. Wright: Yes.

Ms. Newman: Okay, and those three publications provide some sort of indication of how to determine what a healthy tree is versus an unhealthy tree?

Mr. Wright: In the *Plant Appraisal Manual* there is a table in there that describes the evaluation process. In other words, we break the trees out in very simple terms of good condition, good, fair, poor, very poor, dead, and hazardous. And, we have descriptions of what characteristics put trees in those categories in the *Plant Appraisal Manual*. The *Plant Appraisal Manual* is heavily geared toward deciduous trees; shade trees like we have in our yard. I have taken that description in the *Plant Appraisal Manual* and I beefed it up to make it more adaptable to use with Douglas fir and Western hemlock and some of the natives species that we have out here, so it's more specific.

Ms. Newman: Before we go on, let me just clarify by the term -- when you described unhealthy trees in your original letter you submitted saying there were 65 unhealthy trees on the site, were they diseased trees?

Mr. Wright: They were trees we rated in poor condition or worse and that may include diseased, insect damage, structural defects, such as decay, decay in the stems, root problems and a whole host of things that cause a tree to be unhealthy.

Ms. Newman: Were any of them diseased?

Mr. Wright: Yes.

Ms. Newman: How many?

Mr. Wright: I don't have that information compiled.

Ms. Newman: Do you have a rough idea of how many were diseased?

Mr. Wright: We described in our report or our letter that there were 58 unhealthy trees as of 10-11-07.

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Ms. Newman: And so there were 58 diseased trees?

Mr. Wright: Fifty-eight unhealthy trees.

Ms. Newman: Unhealthy does not mean diseased necessarily. Unhealthy may mean not appropriate for timber cutting or ...

Mr. Wright: No, it doesn't have anything to do with timber. It has to do with the long-term

Ms. Newman: Let me clarify -- so unhealthy does not necessarily mean they are dying?

Mr. Wright: They are in decline and would be considered to be short-term trees.

Ms. Newman: So 58 trees on the site are dying?

Mr. Wright: Yes.

Ms. Newman: Okay.

Mr. Wright: They are dying or are structurally defective.

Ms. Newman: Okay that's a big difference.

Mr. Wright: Not in my mind.

Ms. Newman: Some of them are structurally defective okay, that's fine, you've answered my question. Do you know the expertise required to speak about the adverse impacts of removing trees.

Mr. Wright: With respect to the impacts of surrounding trees, yes.

Ms. Newman: What do you mean surrounding trees?

Mr. Wright: The impacts of removing some trees and the impacts of that removal on surrounding trees.

Ms. Newman: Okay. What about... do you have the expertise...there are a lot of different functions that trees have themselves other than being protective of other trees. Do you have the expertise to speak about the adverse impacts of removing trees based on their different functions that they provide?

Mr. Wright: I don't understand your question, if you could be more specific or restate it please.

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Ms. Newman: For what functions do trees provide?

Mr. Wright: Trees provide a whole host of functions. The best way analogy to is when we appraise the value of landscape trees we look at their functional, aesthetic contribution to the site when we appraise them. So, we do evaluate the appearance of the tree and its function in the landscape.

Ms. Newman: Okay, and what functions do trees provide?

Mr. Wright: Trees provide aesthetic beauty, they provide habitat for wildlife, they intercept precipitation and translocate it back into the atmosphere, they take up moisture from the soil and translocate it back into the atmosphere, they help to clean the air, and there is probably a lot more things we can talk about.

Ms. Newman: Any additional ones?

Mr. Wright: Those are the key items.

Ms. Newman: How about stormwater control?

Mr. Wright: That's what I was referring to when I said they take up water and translocate it back into the atmosphere.

Ms. Newman: Okay, what about... you're talking about water from the soil?

Mr. Wright: Yes.

Ms. Newman: How about historical significance of old trees, would you say that's a valuable function?

Mr. Wright: I did not find any. There are no heritage trees on the site and I'm unaware of any historical significance of any trees on this site.

Ms. Newman: So Douglas firs that are 80 to 100 years old, are there any of those on the site?

Mr. Wright: Yes.

Ms. Newman: Okay, none of those have historical significance?

Mr. Wright: Not unless somebody has attached historical significance to that tree through some activity in the past.

Ms. Newman: So you did say they are a benefit because they minimize surface water and erosion, is that correct?

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Mr. Wright: I said they translocate water back into the atmosphere after they intercept it during rainfall and they also translocate it back into the atmosphere by uptake.

Ms. Newman: And does that then minimize surface water runoff?

Mr. Wright: It reduces the amount of water that would potentially run off or have to infiltrate.

Ms. Newman: Okay, and do trees assist in the abatement of noise impacts?

Mr. Wright: A study by the DOT found that trees aren't very good noise abettors and it takes a very wide buffer of vegetation to provide much knockdown of noise, especially road noise.

Ms. Newman: So, do you agree..

Ms. Kaylor: I'm going to object now because this line is outside the scope of direct.

Ms. Newman: Well, this is being presented as inclusive of Wal-Mart's case and their getting the application and the City's approving the application. This is the entire proposal, and so I am challenging the EIS as an Appellant and I am doing on cross part of my case to challenge the EIS. The EIS is in the record and this is leading up to the EIS.

Hearing Examiner Kerlake: But it is still outside of direct and I understand that she presented this witness, and her direct questions of this witness were intended to cover both in response to your witness as well as if they would have called her in the responsive case. But I understand that she has concluded all her questions using this witness in both capacities and so I think we are confined by the scope of the direct examination.

Ms. Newman: I have an enormous record from the City; the index and I an EIS and I have a final EIS and I need somehow to respond to those documents. I consider those documents as part of the case being presented.

Hearing Examiner Kerlake: Maybe, but not through this witness.

Ms. Newman: Okay, let Mr. Wright, did you...Are you saying I cannot continue to ask any questions about any of this?

Hearing Examiner Kerlake: You can ask questions within the scope of his direct examination, but I don't know of any rule that will allow you to basically present this witness at this time as your witness.

Ms. Newman: Were you involved in any way with the EIS?

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Ms. Kaylor: I object. It is not within the scope of the ...

Ms. Newman: This is impossible. I have to ask these questions to make my case. Can I call him as a witness then, because I reserve the right to call witnesses of the other side?

Hearing Examiner Kerlake: Well you can do that at the appropriate time, but right now we are cross examining the witness.

Ms. Newman: Okay, then I'm going to call Mr. Wright as a witness when we conclude this.

Ms. Newman: Okay, so you conducted an inventory you stated during your direct in 2005 or actually your associate conducted an inventory in 2005 of the trees on this site. Was that inventory meant to analyze the impacts of removing the trees from the site?

Mr. Wright: No, that was a preliminary assessment of the trees.

Ms. Newman: Okay, so you were counting the trees on the site?

Mr. Wright: We did a 100% inventory of the trees and evaluated their condition.

Ms. Newman: And, I understand when you did it in 2005 this initial evaluation, you evaluated the species, the diameter, and the condition of the tree, and the crown position of the tree, correct, in 2005?

Mr. Wright: Yes.

Ms. Newman: And did you summarize that in writing in a written report?

Mr. Wright: The initial report that we provided to Pacland only was a one-page letter that gave a summary of how many trees were on the site and how many unhealthy trees and how many healthy trees. We did not provide them with a tree list at that time. The October 11, 2007 report we provided a copy of the tree list with an additional description of our condition rating system and that sort of thing.

Ms. Newman: So that was after the EIS was prepared, correct?

Mr. Wright: Yes.

Ms. Newman: And so the City did not have that list describing the species, condition of the tree or crown position of the tree before the EIS was completed, correct?

Mr. Wright: No.

Ms. Newman: Did you conduct any assessment of the trees with respect to age and how

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old each tree was?

Mr. Wright: We simply used our experience to look at the trees and estimate what the age might be. We haven't found any cut trees out there to actually count rings on. So again, it was simply based on our experience and knowledge of the soil type and conditions.

Ms. Newman: Did you provide in writing anywhere what your professional estimate of the age was of each tree?

Mr. Wright: No.

Ms. Newman: Where it is recorded what your determination was for the age of each tree?

Mr. Wright: It's not recorded at this time

Ms. Newman: Okay. In your analysis, this is R-20, which is your October 2007 report, in that analysis you describe the trees as in fair condition or good condition. Can you describe to me what you mean by a tree that is in good condition?

Mr. Wright: I provided on page 4 of that letter an individual tree ratings key for condition. You will see for a tree in good condition I've listed eight or nine different factors that impact whether we will rate that tree in good condition or not. And I have done the same thing on that list for all the other condition classes.

Ms. Newman: And are any of these... would very poor mean that's it a severe decline, so it's on its way it's dying. When you say severe decline under very poor does that mean its dying?

Mr. Wright: Yes.

Ms. Newman: Okay, so anything that's rated as poor is not in severe decline?

Mr. Wright: If it's poor or worse we don't consider it to be a long-term tree and we wouldn't recommend that tree be retained in a project.

Ms. Newman: Okay. Is there any identification in writing showing where the trees are located on the site in correspondence to your tree number listed on the tree inventory and evaluation in R-20?

Mr. Wright: I don't believe we have a map at this time.

Ms. Newman: Okay. The City does not have any documentation demonstrating where these trees are located?

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Mr. Wright: I don't believe so.

Ms. Newman: In your description, you say potential to save as high, low, or medium, can you describe what you or elaborate how you determine how a tree has high, medium, or low potential to say.

Mr. Wright: That system is something that I developed and it's simply like a note to me and to the engineers or the client that I am working with to let them know whether this is a really good tree to save or whether it's Okay or whether it really shouldn't be saving. It is a very gross analysis.

Ms. Newman: And so does that coincide with its condition?

Mr. Wright: Yes, not directly in all cases because it kind of depends on the defect or the reason we rated the tree down as to whether or not it has potential to be saved. So if the tree lost a top, it might not be rated very high but if it had lots of foliage on it, it might be an Okay tree to save, so it might have a higher potential to save, but a lower condition rating.

Ms. Newman: So what are the factors that go into determining that a tree has a potential to save?

Mr. Wright: Basically, that it has long term potential as a healthy tree that won't be hazardous to the proposed development next to it...

Ms. Newman: Okay, the proposed development, Okay. So having a site plan is relevant for you to determine the potential to save category?

Mr. Wright: No, this category that we developed here is relevant to the tree condition only. We often times will develop a second column called "potential to save" with regard to the project site plan. We didn't have a site plan when we did this evaluation. This only relates to the trees for the potential to save with regard to the condition of the tree. Ultimately, we will develop that information with regard to the site plan element and create a similar column with respect to the site plan.

Ms. Newman: Do trees that have a suppressed crown system in a healthy forest play a role in the forest?

Mr. Wright: Yes, it depends on the species.

Ms. Newman: Would a Douglas fir play a role?

Mr. Wright: Douglas fir that is in a suppressed condition assuming it's under the crown is what the definition of a suppressed tree as it gets no light from above and no light

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besides. They are classified as intermediate and shade tolerant. So over time, a suppressed Douglas fir usually will die. So it has less value perhaps than a red cedar or a big leaf maple or Grand fir that is taller in shade that will continue to grow in the understory and will respond to release if those overstory trees are taken down.

Ms. Newman: Okay. During your direct you discussed the methodology that you went through to come up with the mitigation plan, actually, let me just clarify because I think the question was the mitigation plan but it sounds like you were describing the decision on which trees to retain and so the method that you went through to make a decision on which trees to retain – is that the method you were describing when you went to Pacland and you looked at where the trees were on the site and you met with them and provided recommendation on which trees should be saved and worked with them. Was that deciding which tree should be retained?

Mr. Wright: That's how we made our recommendations based on our preliminary site visit. It was simply went to the Pacland office and pointed out where the better trees were. Again, they worked with the site plan to try to accommodate more of those trees that I recommended that we try to save.

Ms. Newman: Okay, they didn't accommodate all the best trees, correct?

Mr. Wright: No.

Ms. Newman: Was the City involved in that process at all?

Mr. Wright: I don't believe so.

Ms. Newman: It's my understanding that the City Council was not aware that the tree retention code was being applied in the manner that it was... was there anything about your Tree Board experience inform you as to the City Council's knowledge about this tree ordinance was being applied.

Mr. Myers: I'm going to object because it calls for speculation about what the City Council knew or didn't know.

Ms. Newman: Okay, I will strike that and I'll provide my own witness on that.

Ms. Newman: Were you involved in preparing the land clearing permit application that was filed on December 7, 2004?

Mr. Wright: No.

Ms. Newman: Okay, I have no further questions within cross.

Ms. Kaylor: I have a couple of questions. In determining healthy versus unhealthy trees

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you testified that you rely on three particular publications and you also rely on your professional experience.

Mr. Wright: Oh absolutely, and in continuing education and all the other publications that we read.

Ms. Kaylor: And ah, you are an expert on trees but you are not a biologist nor an expert on noise, nor air quality, nor stormwater impacts, is that correct?

Mr. Wright: That's correct.

Ms. Kaylor: In your experience under the tree ordinance to which this project is vested, which is the tree ordinance in effect on December 7, 2004, what level of detail is typically required in terms of information at initial submittal of a tree permit application?

Mr. Wright: The ordinance details the information required for a tree plan and as far as the initial submittal, I'm not sure exactly what the City was requiring at that time. Generally, later on in the process is when the tree protection plan was developed and presented to the client.

Ms. Kaylor: And by later in the process do you mean concurrent with the building permit?

Mr. Wright: It would be prior to the issuance of a tree removal permit they are required to have a tree protection plan.

Ms. Kaylor: Thank you. You testified that you are not aware of plan showing the location of the trees on site. Is it possible that another consultant, such as Pacland would have submitted such a plan to the City?

Mr. Wright: Pacland has provided us with a map of the trees on the site. What I'm not sure that has been provided or created is a map that has the tree numbers on it.

Ms. Kaylor: And, with regard to the City's participation in the discussion of which trees are the most appropriate to retain, you testified that you haven't had any direct discussions with the City. Is it possible another Wal-Mart consultant has had those discussions?

Mr. Wright: I don't know.

Ms. Kaylor: I believe I forgot to offer Exhibit R-20, which is Mr. Wright's 2007 tree inventory. I would like to offer that at this point.

Hearing Examiner Kerslake: Are there any objections to the admission of R-20.

Ms. Newman: I just want to note that it wasn't prepared before the EIS and this is an

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appeal of the EIS and so it's somewhat irrelevant. But, I don't object to it.

Hearing Examiner Kerslake: Maybe for that purpose it might be, but I understand there is an issue that is separate from EIS that deal with the determination of the Development Services Director in terms of tree retention. R-20 will be admitted.

Ms. Newman: We don't object.

Ms. Kaylor: I have no more questions, thank you.

Hearing Examiner Kerslake: Mr. Myers do you have any...

Mr. Myers: No.

Hearing Examiner Kerslake: Thank you..

RECESS: **Hearing Examiner Kerslake recessed the hearing for a break from 11:10 a.m. to 11:21 a.m.**

Hearing Examiner Kerslake: I understand that the Appellants wish to call Mr. Wright as their own witness in the matter. Are there any objections to calling him as a witness?

Mr. McCullough: Yes sir, Mr. Examiner, this is Mr. McCullough. We are in one respect, flattered that the Appellants would like to call our witness. But, on the other hand we think it's inappropriate in this case – this witness, for a whole variety of reasons. This witness was not listed on the Appellants' witness list. Appellants reserve the right to call witness in rebuttal as we did as it was understood the parties could, but this witness appears to be – Appellants appear to want to use this witness to make their case and chief apparently on the issues related to the EIS. And since this witness was not listed first, we would object and secondly, we think that if the Hearing Examiner has subpoena power and we recognize that if the Appellants want to subpoena this witness, the Appellants are able to, and we suggest that would be as a fact witness. If the Appellants desire to use this witness as an expert witness and the Examiner says it is otherwise okay despite the fact that he was not listed under the witness list, then we would suggest that an arrangement should be made by the Appellants to pay for the cost of his testimony if they intend to offer any of his testimony as an expert. So, but first and foremost Mr. Examiner, he was not listed and there's been full opportunity to conduct cross examination on any of these issues.

Hearing Examiner Kerslake: Mr. Myers do you want to weigh in on this?

Mr. Myers: It does seem to me to be inappropriate for one side to try to make their case through the other side's experts without any compensation. It seems to me to be inappropriate and normally wouldn't be allowed under the civil rules in a court proceeding. I join Mr. McCullough's position.

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Hearing Examiner Kerslake: Thank you. Ms. Newman.

Ms. Newman: First of all I'm not quite sure what they are trying to hide that's not – it's simply addressing issues that are out there already. Second of all, the reason for a witness list ahead of time is to avoid surprise, so I don't suddenly provide some witness that they weren't aware would occur, and that clearly is not the case here. I think it was more than reasonable for me to expect that I could ask questions on cross examination related to the impacts of the removal of trees from their tree expert and related to different issues associated with the tree cutting permit application, which was what these questions were regarding. And, with respect to the EIS analysis of the tree removal, there is a whole chapter on tree removal and I thought reasonably that I could ask cross examination questions of their witness. I know – the City says it is inappropriate for me to make my case and chief based on their expert witness. Quite often it is the case and every case that I do that a great deal of my case and chief is based the evidence and experts that are being presented to support the EIS. I'm proving that there are missing links and I have got to be able to use the EIS. The EIS is a key document that I am relying on and didn't prepare that, that's the City's document. And sometimes experts are key for me to rely on to make my case and frankly that I think it's a violation of due process to not allow me to provide the evidence I need to make and I'm not sure if it is wise to create this large issue of forbidding me to say what I need to say when I have my day in court. And, forcing the Appellants to pay for the witness when he is already sitting here - I find that exceedingly insulting. The difference in cost available to Wal-Mart and available to my client is obvious and I just think that's an unfortunate request.

Mr. McCullough: Mr. Examiner if we may offer – just two more thoughts. One is the concept that there will be some infringement of due processes is fairly ridiculous. This proceeding has been going on for nearly three years now and if the Appellants have been unable to find a witness in that period of time to address the issues it's their problem, they have the burden, not us. But, secondly, I think it is ironic here that the argument that counsel makes is that they often to be able to wander far and wide on cross examination when it was the Appellants themselves who were careful to note in the testimony offered for example by Mr. Tillman, that the very limited scope of his testimony really precluded any cross examination beyond the scope of...

Ms. Newman: Mr. Tillman did not provide any studies, did not work on the application, did not help prepare the EIS, there's nothing. If he had prepared a report and that was submitted in the record I would have allowed cross examination on anything in writing that he had submitted.

Hearing Examiner Kerslake: I think I have heard all that I really need to hear. I am not going to allow him to be called as a witness. He is not on the witness list. Counsel, you had every opportunity to name all the witnesses that you needed that you felt you needed to put on your case and chief and you have reserved as had the other parties, which is typical in these proceedings, the right to submit additional witnesses on rebuttal. I

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understand this witness is not being called on rebuttal but is being called to put on your case and chief and I understand he was called by the other side for a very limited purpose and it appears to be his only role in this matter was to identify trees on the site, he didn't prepare the EIS, he didn't have any involvement in that process.

Ms. Newman: I wasn't able to ask any questions about whether he did prepare the EIS so we don't have that in the record. That was my...

Hearing Examiner Kerslake: I understand that this witness was called for a very limited purpose by Wal-Mart.

Ms. Newman: Can I just offer for the record the reason I wanted to ask him questions were unique solely for him and no other person could have possibly answered the questions that I wanted to ask him, so it wasn't a failure of me to provide a witness it was questions only appropriate for Mr. Wright.

Hearing Examiner Kerslake: And, what would those questions have been, I've reviewed the issues that you've presented and are set forth in the prehearing order relative to adverse impacts related to the removal of trees on the property and I heard Mr. Wright respond in terms of his expertise in most of the areas is that he doesn't have any expertise in those areas and I don't know where you would be going counsel with questions that somehow can only be answered by this witness because if you are asserting that in fact there are adverse impacts that were not addressed in the EIS relative to tree removal on the property, that there are certainly experts that can testify a great length on those subjects and I don't see this witness being the only person being able to testify on those issues... Am I missing something counsel?

Ms. Newman: Well as long as we establish -- I guess I don't feel like it has been established that Mr. Wright had no input to addressing - input into preparing the EIS and doing any analysis of impacts of removing trees.

Hearing Examiner Kerslake: Even if he did, he was not presented by the people who called him for the purpose to substantiate anything in the EIS. He was called for a very limited purpose and that was to explain his tree identification on the site and how it got there and what techniques, processes he used to get there. I don't see his testimony in anyway going to the EIS and the issues you have raised in your appeal in regard to the adequacy of the Environmental Impact Statement issued in the manner.

Ms. Newman: Well, I won't continue to battle with you Mr. Examiner.

Hearing Examiner Kerslake: And I appreciate that Ms. Newman, thank you. Ms. Newman, I understand that from your witness list that you have presented all the witnesses that you intend to call "expert" witnesses but you have a number of lay witnesses that you wish to call.

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Ms. Newman: I do. And, so what I want to do before I begin is I'm going to call Nancy Partlow to the stand, but I do have a number of exhibits that I need to provide to everybody so that we can go through them.

Hearing Examiner Kerslake: Okay, very good.

Hearing Examiner Kerslake swore in Nancy Partlow to testify.

Ms. Newman: *Ms. Newman is distributing exhibits.*

Ms. Newman: Mr. Examiner, at one point Ms. Partlow had hoped that she could read from something that she has written because it was a more comfortable way to do that if that's acceptable.

Hearing Examiner Kerslake: Are there any objections. *There were no objections.*

Ms. Newman: Before we get into that could you please introduce yourself and provide your address for the record?

Ms. Partlow: My name is Nancy Partlow, 1841 Trosper Road SW #13, Tumwater.

Ms. Newman: And now you have in front of you an aerial photo that says "Thurston County West Tumwater." Actually, I think I'm going to do one more thing, if you could hold on. Can you identify generally how close you live to the project site explaining kind of in relation to the lake on there and in relation to the project site itself.

Hearing Examiner Kerslake: You are referring to what exhibit?

Ms. Newman: Oh, A-9.

Hearing Examiner Kerslake: A-9, okay.

Ms. Partlow: I live right here on this map and here's the proposed site.

Hearing Examiner Kerslake: "Right here" is where. Do you live in that subdivision?

Ms. Partlow: It's a mobile home park.

Hearing Examiner Kerslake: Mobile home park?

Ms. Partlow: And I live on the eastside of the mobile home park at the southern end.

Hearing Examiner Kerslake: Okay.

Ms. Newman: And, I understand you have as far as some of the overall impacts to you,

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you have submitted a comment on the Draft EIS, correct?

Ms. Partlow: Correct.

Ms. Newman: Okay, and did you want to elaborate now that the Final EIS has come out on some of the impacts that you will have from this project?

Ms. Partlow: Yes, can I read it?

Ms. Newman: Yes.

Ms. Partlow: My concerns are in my letter so I'm not going to go into all of them because they are in the record. But, I would like to say I am an expert resident of my neighborhood, town, and county. I have lived at my current residence for 16 years this week. I was born and raised in Olympia two blocks from the Tumwater City line and I grew up shopping in Tumwater and drinking Tumwater City water. Here are my concerns about the adequacy of the EIS. I am a tree person. One year I received Tumwater's Tree Friendly Award from the Tumwater City Council. I feel that the EIS was not adequate in that Wal-Mart didn't include the species of trees and shrubs in the landscape plan in the Environmental Impact Statement. Because of this I couldn't tell what they were proposing was adequate or not. I have been let down very badly before by proposed tree plans in the subareas specifically, the Home Depot development. That parking has very few trees in relation to the amount of asphalt. In the summer there's basically no shade there. I know this because I take care of my 89-year old father and I try to take him out for a drive every day. We do errands and since he can't walk very well he spends a lot of time in the car in parking lots and because of this I now where the best parking lot shade trees in Tumwater are, and Home Depot doesn't have any shade. At this point I would like to point that as part of my letter in the EIS at the end it says that there is some supporting documents – it says attachments to this letter have been placed on file at the City of Tumwater, Development Services Department, and I would ask that those attachments be submitted into the record. Would that be allowed?

Ms. Newman: Can you clarify where you are reading from.

Ms. Partlow: I am reading from letter that I submitted to...

Ms. Newman: So that's from the Final Environmental Impact Statement?

Ms. Partlow: Yes, these are my comments.

Ms. Newman: Were your letters was published in the FEIS?

Ms. Partlow: Yes.

Ms. Newman: It said the attachments to your letter are on file at the City and so you

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want those to be included in the Hearing Examiner record, is that correct?

Ms. Partlow: Yes, I would like that.

Hearing Examiner Kerslake: Let me inquire, are those a part of any of the disks, as I understand the disks will contain everything that's in the City files in regard to that matter, and it's not necessarily that I need to see it now, I just need to know that they are in fact in the record?

Ms. Newman: I can check that tonight and I'll mark them as Appellants' exhibits for tomorrow's exhibits for tomorrow's submittal. If they are not on there then we...

Hearing Examiner Kerslake: Any objections to proceeding in that manner?

Ms. Kaylor: No objection.

Hearing Examiner Kerslake: Okay. I presume that they are available in the quantity of information, but we will find out for sure.

Ms. Partlow: I think there is just a couple of documents.

Hearing Examiner Kerslake: Okay. Continue.

Ms. Partlow: In my opinion what happened at Home Depot was not consistent with the vision of the Littlerock Road Subarea Plan. I feel that the issue of pedestrian access to the Wal-Mart site was minimally addressed and could have been addressed better. I feel that even though the Littlerock Road Subarea Plan calls for bikes paths leading into the subarea, there will be no bike paths on Kingswood Drive or much of Tyee Drive and there are no bike paths on Trospen Road and Wal-Mart doesn't propose to build any either. So, I'm wondering how people are supposed to safely access this site by bicycle. I feel that the reflection off the asphalt from 17 plus acres of outdoor lighting will cause the already very bad light pollution in my neighborhood to become much worse and that this is not adequately addressed in the EIS. I'm very concerned that I and my neighbors will have difficulty getting a decent night's sleep when a 20 acre piece of land that is currently covered with trees and other vegetation is replaced with nearly 20 acres of impervious surface for the traffic noise generated by this development and the traffic noise from Interstate 5 to bounce off of and amplify. I feel that the vision of the Littlerock Road Subarea Plan is being poorly implemented. For example, the visioning process of that plan showed a photo of a beautifully landscaped boulevard lined with canopy trees. Anybody reading the plan would be led to believe that this is what would happen in the subarea. Instead what we get (and I will show pictures of what is actually happening in the subarea in terms of the tree-lined boulevard) what we are getting are dead and dying trees with tiny canopies. The parking strip is weedy and much of the landscape material is dead or dying. The Littlerock Road Subarea Plan, the Tumwater Zoning Code, and the Land Use Plan had hearings before the Tumwater City Council. They went through the

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SEPA process and they were adopted in their entirety, not just the implementing language, but the intent and visioning language as well. I don't understand why the proponent is not being held accountable on these scores. I'm disappointed that Wal-Mart coming to my small town will reduce competition and my grocery shopping options since I believe Mega Foods and probably Albertsons could close as a result of Wal-Mart coming to town. I'm disappointed that people I've come to know as friends at Mega Foods would lose their union wage jobs. I'm concerned that Tumwater is like a small pond and this Wal-Mart development will be like a huge boulder dropped into that pond. Many people will be swamped in the process and the ripples will spread out over the community impacting so many livelihoods and our quality of life. Thank you.

Ms. Newman: Thank you. Now, Ms. Partlow I'm now going to refer you to a number of photo exhibits. These are just for the record A-7. And, what we'll do as we go through them is give them subnumbers. The first is A-7a or however you think it would be best. I was going to do lowercase A.

Hearing Examiner Kerlake: it looks like there is a number of them, why don't we do point 1, point 2, point 3.

Ms. Newman: Okay. So, the first one is a panoramic view of an existing Wal-Mart that is A-7.1 and if you could tell me what this is a picture of.

Ms. Partlow: This is the Yelm Wal-Mart taken probably three weeks to a month before it opened.

Ms. Newman: So when approximately was that?

Ms. Partlow: July

Ms. Newman: So you took the picture in July?

Ms. Partlow: I think that it was July.

Ms. Newman: July of 2007?

Ms. Partlow: Yes

Ms. Newman: Okay. And then on to the next, I am going to be using these later in the hearing.

Hearing Examiner Kerlake: Okay.

Ms. Newman: So, the next photo is A7.2. Can you describe what that photo looks like for us?

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Ms. Kaylor We may be objecting to some of these photos, but as with your objections, we will hold them until they are offered.

Hearing Examiner Kerslake: I appreciate that.

Ms. Partlow: You wanted a description of what this is?

Ms. Newman: Yes. Describe what the photo looks like first. Well actually, what it is, what you were taking a picture of and where.

Ms. Partlow: These were trees that the Home Depot development. This was probably – I was over there the other day and this tree was probably six feet tall to the top of the cut and then with the branches sticking up it was probably eight feet tall.

Ms. Newman: Okay, and when did you take this picture?

Ms. Partlow: This was probably taken in July as well.

Ms. Newman: And so, is it true that every picture in this stack you took in July?

Ms. Partlow: Yes.

Ms. Newman: Alright. And then the next is A7.3 and can you describe what it is a picture of?

Ms. Partlow: That's the garden center at the Yelm Wal-Mart?

Ms. Newman: Before it opened?

Ms. Partlow: Before it opened.

Ms. Newman: Alright, then A – the next one is A7.4.

Ms. Partlow: That's the parking lot of the Yelm Wal-Mart.

Ms. Newman: Okay. Then the next picture is A7.5, and what's that a picture of?

Ms. Partlow: These are trees along Kingswood Drive, dead and dying – the trees –of which there were many.

Ms. Newman: And those were trees planted by home depot as mitigation for their plan. Is that what you understand?

Ms. Partlow: I believe so.

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Ms. Newman: Do you know – you know don't for sure whether they were?

Ms. Partlow: I know that Kingswood Drive was put in as part of the Home Depot development.

Ms. Newman: Do you know when the home depot development was built?

Ms. Partlow: I think someone just said that I think of Galen referred to the Home development going in as 2002.

Ms. Newman: Then the next is A7.6.

Ms. Partlow: These are trees on the Home Depot frontage. They are actually on the Home Depot land but along Kingswood Drive. There were several of these.

Ms. Newman: And did you provide me with more photos that I'm actually presenting today?

Ms. Partlow: Yes.

Ms. Newman: So, did you take additional photos that showed other trees on this sight that looked dead like this?

Ms. Partlow: Yes.

Ms. Newman: About many trees approximately did you see on the site that looked like this?

Ms. Partlow: On the Home Depot site there were probably 10 on the frontage.

Ms. Newman: Okay. And, then any more on the whole site or was it just on the frontage?

Ms. Partlow: It was just on the frontage that looked like this. There were many other trees. There might have been more. There were many other trees along Kingswood Drive that were also dead and dying and also along Tyee Drive.

Ms. Newman: So how many total in the whole area?

Ms. Partlow: That were dead and dying?

Ms. Newman: Yes.

Ms. Partlow: Probably about 24.

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Ms. Newman: Okay. So then the next photo is A7.7. Where is that tree?

Ms. Partlow: That's along the – it looks to be along the Tyee Drive probably on the corner, Tyee Drive and Kingswood..

Ms. Newman: And, the next is A7.8.

Ms. Partlow: Same thing.

Ms. Newman: Same thing?

Ms. Partlow: Yes.

Ms. Newman: Yes, that's the same – Is that the same tree, even?

Ms. Partlow: I don't think so.

Ms. Newman: Okay. And, then A7.9. Can you describe what that is?

Ms. Partlow: That's along Tyee Drive and that's a picture of several – there's some couple of – well actually you can see four dead trees in that picture.

Ms. Newman: Okay, and is that City owned property or Home Depot owned property?

Ms. Partlow: That's probably City-owned property. It probably is in the...

Ms. Newman: And the next is A7.(10).

Ms. Partlow: That's the Home Depot frontage and that is showing these diseased trees.

Ms. Newman: Are any of these pictures showing the same tree more than once or are they all different trees that we have pictures of?

Ms. Partlow: There might be like the picture in the front here might have been – another picture previous, but most of them are different.

Ms. Newman: Okay, so the next is A7.11. Are these different from the last trees?

Ms. Partlow: They are just the trees that are farther down – they're the trees that are down here –that's what these are I believe. Actually, no there not, they are same trees.

Ms. Newman: As in A7.10?

Ms. Partlow: The previous picture, yes.

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Ms. Newman: Oh, Okay. So A7.12 and A7.13 look like...Can you describe those.

Ms. Partlow: This is an example of the dead vegetation that is growing along the parking strip along Kingswood Drive.

Ms. Newman: And is this City-owned property or Home Depot?

Ms. Partlow: I think Home Depot bought it and then deeded it to the City.

Ms. Newman: Was that – do you understand – oh never mind. And this last one is a7.14.

Ms. Partlow: I took this picture because in the Littlerock Road Subarea Plan in the visioning process there was a picture of a tree-lined boulevard with trees with big canopies, just a very beautiful boulevard and I wanted to illustrate what we got. Our beautiful tree-lined boulevard in Tumwater, its weedy and the vegetation is dead and dying and it has small canopy trees as opposed to what's in that picture, some of these trees farther down are in the Bonneville Power easement and Bonneville doesn't allow trees taller than 10 feet underneath their wires and the Bonneville Power easement is like, 250 feet wide and goes through the Wal-Mart site.

Ms. Newman: Okay. And I believe that was it. Was there anything else that you...

Ms. Partlow: No.

Ms. Newman: Okay, I have no further questions and I want to offer all of these as exhibits and I plan to use them, this was basically to lay a foundation of who took them and when they were taken and where they are, and I plan to use them to basically ask the City some questions about the comparison of these pictures to the existing proposal.

Hearing Examiner Kerslake: Okay, and I understand the exhibit A9, which is the aerial photograph has been stipulated to.

Ms. Kaylor: Yes correct.

Hearing Examiner Kerslake: However, exhibits A7.1 through A7.14 have not been and are there any objections to the admission of A7?

Ms. Kaylor We object to the admission of A7 on the grounds of relevance. The Home Depot photos are of a different site and a different proponent and we can't see how they are relevant in this case. The Wal-Mart photo is of a different site that has different approval requirements so far as I know. I haven't seen any information about the comparison of approval requirements between this site and that site. In addition, testimony was that this was several months before the store opened so it's probably not in the complete, final state so I would object on the ground of relevance to all of A7.

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Hearing Examiner Kerslake: Thank you. I'm going to, at this point, admit Exhibits A7.1 through 14 for a very limited purpose. And that purpose is to reflect this lay witness' concerns and if they are going to be offered later for other purposes I will reserve ruling on that at such time that they may be offered for other purposes. But I'm going to admit them again for the limited purpose of reflecting this lay witness's concerns regarding the Wal-Mart development turning out like this particular development or these particular developments that turned out. I recognize Wal-Marts objections to them in that one is in a different jurisdiction and who knows what the rules may be and Home Depot may not have the same requirements or may not do the same thing Wal-Mart does, and I recognize all those concerns, but we have a lay witness here who's got some concerns, and I'm going to allow the admission at this point for the limited purpose of reflecting those concerns. Cross Examination of ...

Mr. Myers: I have a couple of questions for Ms. Partlow. Ms. Partlow in your comment letter on the Environmental Impact Statement you raised the issue of tree retention and specifically raised the concern about trees primarily being behind the store rather than along Littlerock Road.

Ms. Partlow: Correct.

Mr. Myers: Have you reviewed the City's site conditions and the conditions that are attached to tree retention on that?

Ms. Partlow: It is my understanding that happened after the EIS and so I couldn't read that in the EIS.

Mr. Myers: In the EIS, did the Final EIS discuss in response to your comments that the plan to keep evergreen trees along Littlerock Road?

Ms. Partlow: I don't know.

Mr. Myers: Do you have the final EIS there?

Ms. Partlow: No, I don't have it in front of me. I do have a copy of my letter and a copy of your responses to it, however.

Mr. Myers: Copy of the responses to it?

Ms. Partlow: Yes.

Mr. Myers: Do you see...

Ms. Newman: Can you give us the page number if you are going to...

Mr. Myers: Page 2-87 of the EIS in response to comment 53, that talks about evergreen

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trees to be retained and planted along Littlerock Road.

Ms. Partlow: Yes.

Mr. Myers: Does that respond adequately to your comment?

Ms. Partlow: If I recall correctly, from what I saw is that the evergreen trees weren't going to be planted right along Littlerock Road but near Littlerock Road.

Mr. Myers: Let me give you a copy of the whole EIS. First of all let me ask you, did you read Chapter 1, the section which updates the descriptions of the proposed action and updates the analysis of the draft?

Ms. Partlow: I'm not sure that I did.

Mr. Myers: Would you agree that your concerns regarding the aesthetics of this site are somewhat subjective?

Ms. Partlow: I suppose I can only testify to – I can only testify as a long-time resident of Tumwater.

Mr. Myers: But would you agree that beauty is in the eye of beholder and that other people might have a different opinion of different types of trees?

Ms. Partlow: Yes, I'll agree to that.

Mr. Myers: Did you participate in the public process for the adoption of the 1997 Littlerock Subarea Plan?

Ms. Partlow: I actually participated for a little while and then I dropped out.

Mr. Myers: When that was adopted was it your understanding that there was going to be an area of general commercial development between Littlerock Road and Interstate 5?

Ms. Partlow: Yes

Mr. Myers: And that would include the Wal-Mart site?

Ms. Partlow: Yes.

Mr. Myers: One of the concerns which you expressed in your letter was that you hoped that the store would be set back to (the) extent possible.

Ms. Partlow: Correct.

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Mr. Myers: The property immediately next to Interstate 5 is owned by Albany International, is that right?

Ms. Partlow: Yes.

Mr. Myers: Are you aware of any alternate site plan which could push the Wal-Mart store back any further than the alternatives that the Final Environmental Impact Statement considered?

Ms. Partlow: No.

Mr. Myers: And, are you aware that the City has placed a condition that requires them to plant the evergreen trees and all the trees that are on site to mitigate fully on site rather than pay into the tree fund?

Ms. Partlow: There was some confusion in my mind about, not confusion, but I was not certain about how that would occur. That's not my area of expertise.

Mr. Myers: Yes, but one of your comments in the Environmental Impact Statement was that Wal-Mart should be required to do all the mitigation on site rather than mitigating trees off site.

Ms. Partlow: Yes, Yes.

Mr. Myers: I was just wondering if you are aware that the City had actually required that?

Ms. Partlow: I felt like there was a point of dispute about that.

Mr. Myers: In your comments concerning the Wal-Mart proposal in the Draft Environmental Impact Statement, at that point in time you commented about the scale of the store being too large.

Ms. Partlow: Yes.

Mr. Myers: In response to those comments are you aware that the City required analysis of three additional alternatives that reduced the size of the store?

Ms. Partlow: Yes.

Mr. Myers: And the store is being reduced to 207,000 to 187,000 off the..

Ms. Partlow: Yes.

Mr. Myers: And that's roughly 10 percent?

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Ms. Partlow: Yes.

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

Hearing Examiner Kerslake: Mr. McCullough any...

Ms. Kaylor: We have no questions.

Hearing Examiner Kerslake: And, your redirect?

Ms. Newman: No.

Hearing Examiner Kerslake: Thank you Ms. Partlow. We are now at noon for the noon break, we will return at 1:00 p.m. and Ms. Newman you have some additional lay witnesses to call?

Ms. Newman: Yes.

Hearing Examiner Kerslake: Okay, very good. Thank you

RECESS: **Hearing Examiner Kerslake recessed the meeting for lunch at 12:02 p.m.**

