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BEFORE THE CLARK COUNTY COMMISSIONERS

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In Re: Salmon Creek Commercial Center)	
a.k.a. Wal-Mart, PSR2005-00065;)	
SEP2005-00152 EVR2005-00085;)	SECOND APPEAL OF
)	FAIRGROUNDS
ARC2005-00104,)	NEIGHBORHOOD ASSOCIATION
APL2006-00011,)	AND BRIDGET SCHWARZ
_____)		

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16 Appellants Bridget Schwarz and Fairgrounds Neighborhood Association, hereby appeals the
17 Hearing Examiner's approval of this project and denial of our Type II/SEPA Appeal on Remand.

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19 Appellants Bridget Schwarz and Fairgrounds Neighborhood Association is entitled to file
20 this appeal pursuant to CCC 40.510.030H(1) as the members of Fairgrounds Neighborhood

21 Association include adjacent and/or nearby property owners who commented and/or testified at the
22 hearing on this project. Their designated representative is John S. Karpinski, attorney at law, at the

23

24 following address: 2612 E. 20th Street, Vancouver, WA 98661. Applicant is: CLC Associates, Attn:

25 Dean Logsdon, 12730 East Mirabeau, Suite 100, Spokane Valley, WA 99216. Applicant's

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SECOND APPEAL OF BRIDGET SCHWARZ AND
FAIRGROUNDS NEIGHBORHOOD ASSOCIATION - 1

Law Offices of John S. Karpinski
2612 E. 20th Street
Vancouver, WA 98661
360/690-4500
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Representative is John S. McCullough, McCullough Hill PS, 701 5th Avenue, Suite 7220, Seattle, WA 98104-7097. Owner is: RB Northwest Properties, Attn: Richard Ossey, 5437 Rosalia Way, Suite 100, Lake Oswego, OR 97035.

We request oral argument pursuant to CCC 40.510.030H3(a) on all below listed errors.

I. INTRODUCTION.

To us, **the Examiner did not fulfill the terms of the Remand.**

First, in regard to the stormwater issue, the Examiner does not think the stormwater system had to work now. He acknowledges: **“To be clear, the applicant has not demonstrated that the downstream system has capacity to accommodate stormwater flows from this project.”**

Remand Decision at 16.” But he still approved the project. Why? Although we believe the Commissioners were quite clear that a fix-it-later approach was not acceptable for stormwater, he says: **“there is no prohibition against changing the final stormwater plan during final engineering** in light of the information learned during the downstream system capacity or lack thereof...”. Remand Decision at 16.

Second, in regard to road safety, new alternative plans are required. A good first step. But, are they feasible for this not safe but merely “as safe as possible” intersection? We do not know, and will not know, because the project is approved, deferring that study to final site plan. What happens if the alternative plans don’t work?

Third, in regard to the traffic data, the Examiner still asserts application errors are not deniable issues despite being directly overruled by the Commissioners on that issue. See Remand

Decision at 19. Did he not see the tape of the hearing? Or does he not care what the Commissioners say?

3 **Finally**, in regard to the Standard of Review, while the Examiner pays lip service to using
4 the “preponderance of the evidence” standard, but he redefines it. We understand the
5 Commissioners may have changed their positions on this issue so this may no longer be a concern.
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7 We thus ask the Commissioners to reverse the Examiner and deny the project for the errors
8 contained herein.
9

10 We also re-allege and attach to this appeal all of our original appeal issues, by which we fully
11 incorporate by reference.

12 **II. REMAND ERRORS.**

13 **A. STORMWATER.**

14 **1. Does Not Require Proof of Capacity for Feasibility.**

15 The Examiner was clear he did not care if the system did not work now. “To be clear, **the**
16 **applicant has not demonstrated that the downstream system has capacity to accommodate**
17 **stormwater flows from this project.**” Remand Decision at 16, emphasis added. In fact, he clearly
18 found that the system did not work. **That finding was not appealed by the Applicant.** That should
19 be enough to deny the project.
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22 **2. Re-Design at Final Approval Approach Rejected by Board.**

23 Why did the Examiner approve the project despite the capacity problem? The fix-it-later
24 approach this Board expressly rejected at the hearing. As the Examiner says:
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1 “No development application is required to prove at this preliminary stage, and few
2 do prove, actual downstream capacity. That is why this is a preliminary plan review,
3 and the applicant is required to demonstrate basic feasibility, not prove actual
4 downstream system capacity. Information learned from the downstream analysis
5 frequently forces changes - sometimes significant changes - in the final stormwater
6 design plan and often compels the developer to implement significant mitigation
7 measures to restore the downstream system’s capacity. There is no prohibition
8 against changing the final stormwater plan during final engineering in light of
9 information learned about the downstream system capacity (or lack thereof).
10 Remand Decision at 16, emphasis in the original.

3. Ownership of Systems vs. Easement Issue of Law.

11 Here, the Examiner remains confused between an easement for use of the property and the
12 ownership of the pipes. While the developer has an easement for use of the strip of WalMart
13 property, has no legal basis to connect to a system the County has NEVER claimed it owned, or
14 maintained.

15 As usual, the Hearing Examiner put in a condition to sort this out later. But if there is no
16 legal way to hook up to Waters Edge, where will the water go? Remember, when we asked for a
17 fully engineered backup system, the Examiner said that was “too speculative”. Remand Decision at
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B. ROAD SAFETY: STUDY RESULTS LATER?

22 At the hearing, Commissioner Morris expressed some justifiable concerns about the road
23 modifications. There are areas where the Hearing Examiner originally had noted the traffic was:
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26 “As anyone familiar with this area, its street segments and intersections is painfully aware of the

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1 horrendous traffic congestion and compromised safety of the area.” Original Decision at 16. Yet,
2 the Hearing Examiner granted the road modification, not concluding the modification was safe, but
3 “safe as possible”. Original Decision at 23. Those concerns continue. See Remand Decision at 19
4
5 and 26.

6 Laudably, the Examiner calls for more study in new condition A-3(e). Remand Decision at
7 45.

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9 These include “demonstrations” of no interference with neighbors and certification of safe
10 access. But, shouldn’t this be done now as part of a public process so the public can comment on
11 the effectiveness of these “demonstrations” and “certifications”? Or is that only proper after the
12 approval is given and public review is over?
13

14 **C4 SUBMISSION MATERIAL: STILL OKAY TO BE ILLEGAL.**

15 Again, the Board clearly said all elements, whether submission or approval, were deniable.
16 Again, the Examiner *seems* to thumb his nose at the Commissioners.
17

18 “As a preliminary matter, the traffic count and the TIA requirements that opponents
19 point to in CCC 40.350.020(D) are submission requirements and do not appear to be
20 site plan approval criteria. As such, unless compliance with these application
21 submission requirements affect compliance with the mandatory site plan approval
22 criteria, the Examiner does not regard them as approval criteria and they are not, in
23 themselves, a basis for denial of the application.” Remand Decision at 19.

24 How can the 2003 TIA be "based on" the quality traffic counts which happened later? CCC
25 40.350.020D(4). How can it be "based upon" those counts if they were determined by the Examiner

26 to be "not necessary to provide current and reliable trip estimation of the proposed store"? Examiner
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Decision at 17. When WalMart flew up a Florida engineer to review the project, that engineer testified that he supported the DKS traffic count because it was done by “licensed Washington engineers” and he was “entirely relying on the stamped engineering report” in cross-examination.

Testimony of Mr. Onta of October 24, 2006 at about 4:11:523. The subsequent testimony of County engineers indicates the DKS traffic count was not done by licensed engineers, likely college student on summer break. Testimony of County Engineer Mr. Gamble of October 24, 2006 at about 4:26:30

4. We believe the Commissioners must concede the DKS/Quality Counting study was fatally flawed and did not meet Code standards. Quality Counts was not an engineering firm. Because the Code required the TIA to be based on "current (previous 12 months) counts, the TIA must also be current...and it was not, thus Code requirement was not satisfied.

14 Yet, despite this, the Hearing Examiner says everything is fine.

15 More importantly, the revised TIA (Ex. 2, tab 22) and up-dated reports (Exs., 131, 132m 133 & 134), based on the DKS study, was sufficient documentation for this purpose. The document upon which the Examiner relies for this point is the TIA and professional engineering conclusions it contains, plus the up-dated report (Ex, 134 & 176). Remand Decision at 20.

19 We guess it is “if you add it all together, it’s close enough?”

20 **D. EVIDENCE - REDEFINES “SUBSTANTIAL EVIDENCE” TEST.**

22 We understand the Board may be flip-flopping on the evidence standard, despite it being inherent in *de novo* review, and a fundamental principle of Washington law. Washington Pattern

24 Jury Instruction #9, *Connor v. Skagit Corp.*, 30 Wn.App. 725, 638 P.2d 115 (1981). This was

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upheld as the basic Law of State in *Connor v. Skagit Corp.*, 30 Wn. App.; 725, 638 P.2d 115
(1981)

3 Thus, this case is akin to the PCHB's review of Shoreline decisions; a new *de novo* hearing,
4 with the preponderance of the evidence standard. See *Port of Seattle v. PCHB*, 151 Wn.2d 568,
5 906 P.3d 659 (2004). (Note: the Shoreline statute does have some additional specific shoreline
6 procedural rules by State law.) Here, the Hearing Examiner gives lip service to "preponderance",
7 but then redefines it to something other than what Washington law says. He said:
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10 "Quite clearly there must be substantial evidence in the record to support the final
11 decision rendered. However, in deciding the case as the fact-finder, the Examiner
12 must, and in this case does, decide whether the applicant's evidence is more
13 persuasive, probative and credible than the countervailing evidence." Remand
14 Decision at 8.

14 **INCORPORATION OF PRIOR APPEAL ERROR CLAIMS.**

15 We hereby incorporate all of our arguments in our first appeal in full to preserve our
16 administrative remedies. Our appeal, and its exhibits, are attached and incorporated herein by
17 reference.
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19 **III. CONCLUSION.**

20 We hereby respectfully request you reverse the Hearing Examiner on stormwater and other
21 issues, and deny this project.
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23 DATED this 9th day of August, 2007.
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28 **SECOND APPEAL OF BRIDGET SCHWARZ AND
FAIRGROUNDS NEIGHBORHOOD ASSOCIATION - 7**

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John S. Karpinski, WSBA #13142
Attorney for Appellants

**DECLARATION OF BRIDGET SCHWARZ FOR
FAIRGROUNDS NEIGHBORHOOD ASSOCIATION**

Bridget Schwarz, for Fairgrounds Neighborhood Association, being first duly sworn
on oath, deposes and states as follows:

1. I am the a member and the representative for Appellant Fairgrounds
Neighborhood Association in the above entitled action. Members of Fairgrounds
Neighborhood Association are adjacent and/or nearby property owners.

2. I verify that I have read the above and foregoing Appeal and believe the same to
be true to the best of my knowledge.

3. I am beneficially interested in the aforementioned matter. I have standing in the
case by being a Party of Record. I vigorously participating in the proceedings before the
Clark County staff, and by appealing the SEPA/Type II permit, and participating in that
hearing process, the Appeal to the County Commissioners, and the Remand to the Hearing
Examiner. I and the members of my Association will be prejudiced/affected by the
increased traffic volume and safety impacts of this proposal, as well as the project's stormwater
quality and quantity impacts, geological stability impacts, land use impacts, and aesthetics,
cumulative, collective and marginal impacts. These interests are among those that the County is

legally required to consider. A Judgment in our favor will substantially eliminate or re-dress those impacts/prejudice of the Decision.

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Vancouver, Washington
August 9, 2007

Bridget Schwarz for Appellant
Fairgrounds Neighborhood Association

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Enclosures - Check for \$266.00 Appeal Fee
- Original Appeal w/ attachments
- Hearing Brief w/ attachments "A", "B" & "C"
- Attachment "D" - Bridget Schwarz Issues

FGNA 2nd Appeal to Co Comms d5.080907.wpd

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