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BEFORE THE CLARK COUNTY COMMISSIONERS

In Re: Salmon Creek Commercial Center )  
a.k.a. Wal-Mart, PSR2005-00065; )  
SEP2005-00152 EVR2005-00085; )  
ARC2005-00104, )  
\_\_\_\_\_ )

APPEAL OF FAIRGROUNDS  
NEIGHBORHOOD ASSOCIATION  
AND BRIDGET SCHWARZ

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

Appellants Bridget Schwarz and Fairgrounds Neighborhood Association is entitled to file this appeal pursuant to CCC 40.510.030H(1) as the members of Fairgrounds Neighborhood Association include adjacent and/or nearby property owners who commented and/or testified at the hearing on this project. Their designated representative is John S. Karpinski, attorney at law, at the following address: 2612 E. 20<sup>th</sup> Street, Vancouver, WA 98661. Applicant is: CLC Associates, Attn: Dean Logsdon, 12730 East Mirabeau, Suite 100, Spokane Valley, WA 99216. Applicant’s Representative is John S. McCullough, McCullough Hill PS, 701 5<sup>th</sup> Avenue, Suite 7220, Seattle,

1 WA 98104-7097. Owner is: RB Northwest Properties, Attn: Richard Ossey, 5437 Rosalia Way,  
2 Suite 100, Lake Oswego, OR 97035.

3  
4 We request oral argument pursuant to CCC 40.510.030H3(a) on all below listed errors.

5  
6 **I. INTRODUCTION/SUMMARY OF KEY POINTS.**

7 The Salmon Creek Commercial Center a.k.a. WalMart<sup>1</sup> has been an exceptionally contested  
8 project. The Fairgrounds Neighborhood Association and others appealed the Type II approval of  
9 this project to extensive testimony in opposition to the project because of unsafe traffic conditions,  
10 a hearing before the Clark County Hearing Examiner, which generated expert witnesses for the  
11 neighborhoods on water and traffic issues, 192 exhibits, and a wide range of testimony, including,  
12 from a sitting District Court judge and others. Despite Hearing Examiner's Kearns telling WalMart  
13 during the middle of the proceeding that they had not yet met their burden of proof, he issued a  
14 Decision denying the neighbors appeals and approving the Site Plan and related approvals for this  
15 project.  
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17

18 In the Examiner's Decision, there was a variety of legal flaws and "interesting" excerpts.  
19 **First** and most importantly, in his Decision at page 9, the **Examiner ruled that the Applicant had**  
20 **the Burden of Proof, but it did not need to show a majority (preponderance) of the evidence**  
21 **was on its side, only "substantial evidence"**, a much lesser amount, was needed. This led to a  
22 situation where the opponents of the project could have a preponderance/majority of the evidence  
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<sup>1</sup>See, the Record that has the WalMart Real Estate Business Trust as the purchaser of the  
28 property according to Clark County real estate records)

1 in their favor... and still lose. This is a fatal flaw which permeates every Hearing Examiner factual  
2 determination here.

3  
4 On the key issue of **traffic**, the Hearing Examiner ruled that the Neighborhood Association's  
5 claims that the traffic studies were fatally flawed because there was **no current traffic counts** from  
6 the site within 12 months as required by County Code **was a "submittal requirement" that is not**  
7 **proper to deny a project over**. "As such, unless compliance with these application submission  
8 requirements effect compliance with the mandatory site plan approval criteria, they are not, in  
9 themselves, a basis for denial of the application". Decision at 16. When we pointed out the original  
10 traffic counts for the Mill Plain WalMart included a sketch of the exits from the Mill Plain WalMart  
11 that were not even remotely close to the exits that exist for that structure, the Examiner did not  
12 respond at all in his Decision. He just relied on the fact that they were "professionals" doing the  
13 report. When WalMart flew up a Florida engineer to review the project, he testified that he  
14 supported the original traffic count because it was done by "licensed Washington engineers" and he  
15 was "entirely relying on the stamped engineering report" in cross-examination. The subsequent  
16 testimony of County engineers indicates the original traffic count was not done by licensed  
17 engineers. And despite the magnitude of the testimony regarding safety issues at this intersection  
18 and his noting that "anyone familiar with this area, its street segments and intersections is painfully  
19 aware of the horrendous traffic congestion and compromised safety of the area", because the  
20 engineers did not say the magic words "traffic safety hazard" he did not consider it to be a traffic  
21 safety hazard, and that the Examiner opined that it was not clear whether a vested project could be  
22 ever considered a traffic safety hazard. "Moreover, it is not clear whether a project with vested trips  
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1 in the Salmon Creek Transportation Concurrency Moratorium area is subject to this standard.”  
2 Decision at 19. The Vested Rights Doctrine does not apply to public health, safety and welfare  
3 issues. *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 570 P.2d. 1309 (1978). *Eastlake Community*  
4 *Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 496, 513 P.2d 36 (1973). Therefore, the  
5 Examiner found the area safe despite adverse testimony in Exhibits (E.g., Exs. 12, 21, 34, 51, 53,  
6 54, 55, 57, 61, 62, 71, 77, 78, 86, 139, 141, 157 & 162). Decision at 19. This is error.  
7  
8

9 In regard to stormwater, the Examiner’s Decision was equally curious. The Examiner let  
10 stand the calculations of the capacity of the Water’s Edge system based on 1987 standards (pre-Puget  
11 Sound Manual), when the County for a fee, allowed the developers to dump stormwater into the  
12 creeks with no regulation. Although there was unrefuted testimony that the Water’s Edge system  
13 was almost entirely plugged at the inlet, and was experiencing capacity overloads now, (*See Exhibits*  
14 *142, 143, 144, 160, 161, and the Engineering Report of Bob Rodgers, Exhibit 152, 190*), the  
15 Examiner approved the use of that system, concluding that “proof of current/present downstream  
16 system capacity is not a requirement for a preliminary site plan approval”. Decision at 14, emphasis  
17 added. The Examiner confused the capacity of the piping system through the Water’s Edge site with  
18 the requirements of a downstream analysis for flooding and scouring impacts under County Code.  
19 Id. While we noted that the site had an exceptionally high water table and would require piping an  
20 extensive amount of silt-laden stormwater off for the construction of the stormwater system, and that  
21 there were no plans for where that pre-stormwater system construction silt-laden stormwater would  
22 be dumped. The Examiner concluded “so far as I can tell, the applicant does not directly address this  
23 issue (but see Exhibit 180), but neither is it required to do so at this stage of the development review  
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1 process". The Examiner goes on to refer to this as an erosion issue, when it is actually a temporary  
2 stormwater issue. Of course, no additional mitigation was required. Apparently, having a  
3 stormwater system that actually works is not considered part of the "feasibility" analysis under  
4 County Code. In addition, the Examiner clearly used the "substantial evidence" test in determining  
5 the adequacy of the evidence on this issue. *See* Examiner Decision at 14.  
6

7  
8 Our appeal included a number of other issues, including the failure of the application to  
9 clearly disclose that it is a WalMart interfering with environmental reviews and other issues as  
10 included in our Brief on this case. *See, e.g.*, Exhibit 189 at 36 as attached hereto and incorporated  
11 herein by reference in our Appeal. Even though we submitted a Clean Water Act settlement between  
12 the Bush Administration and WalMart for its corporate practices involving stormwater violations  
13 Exhibit 189, attachment C, the Hearing Examiner's final Decision made no reference to this and said:  
14

15 There is no evidence in the record that the particular operational qualities of a Wal-  
16 Mart store are different than those of other big-box retailers. While some Wal-Mart  
17 stores around the country may have been pilloried for particularly bad social or  
18 environmental practices, there is no evidence that those practices are corporate  
19 policies. Decision at 38.

20 The Examiner's unique approach to the law and to the facts stated in his Decision is not the  
21 law and the facts of Clark County and the State of Washington and will not be accepted by the  
22 Commission. These interesting law and factual quotes include:

23 **The objective of the DKS study was not necessarily to provide current and**  
24 **reliable trip generation estimates of the proposed store...** Decision at 17.  
25 (Emphasis added.)

26 **Proof of current/present downstream system capacity is not a requirement for**  
27 **preliminary site plan approval.** Decision at 14. (Emphasis added.)  
28

1 **...the identity of the store operator is not material to a full assessment of the**  
2 **environmental impacts.** Decision at 18. (Emphasis added.)

3 *Do the facts count?*

4 As a threshold matter, neither Clark County, nor the Hearings Examiner administer  
5 or enforce RCW 18.43.070 or WAC 196-023-020. **The fact that there may be a**  
6 **violation of these state law provisions does not affect the Examiner's review of**  
7 **the evidence** under the applicable code provisions. **...To the extent that the**  
8 **applicant may have violated RCW 18.43.070 does not detract from the**  
9 **credibility of the applicant's transportation engineering reports.** Decision at 18.  
(Emphasis added.)

10 Finally, **the record does not show that the applicant ever requested a waiver of**  
11 **the TIA requirement as anticipated by CCC 40.350.020(D)(8) or that the Public**  
12 **Works Director waived the TIA requirement. There is no requirement in the**  
13 **code that a full or partial waiver of the current traffic count requirement must**  
14 **be requested or granted only in writing.** Decision at 17. (Emphasis added.)

15 *Does the law count?*

16 Yes, admittedly, the Examiner has in other parts of his Decision watered down the harshness  
17 of some of the impacts of some of these statements. But why include strong but erroneous  
18 statements like these in one's Decision unless one really intends them to be an integral part of the  
19 Decision?

20 The combination of the fatally flawed factual review standards together with the Examiner's  
21 unique views on the necessity of key facts and key legal compliances we hope will open the door  
22 for the Commissioners to take a detailed review at all of the allegations contained below, as spelled  
23 out in our Memorandum of 12/22/06 which is attached hereto as Exhibit "A". We incorporate the  
24 Examiner's errors into our Briefing as much as possible, while trying to summarize the huge course  
25 of a lengthy proceeding as succinctly as possible. We apologize for the length, but there are many  
26 issues, new and old for your review. Thank you for your consideration.  
27  
28

APPEAL OF BRIDGET SCHWARZ AND  
FAIRGROUNDS NEIGHBORHOOD ASSOCIATION - 6

Law Offices of John S. Karpinski  
2612 E. 20<sup>th</sup> Street  
Vancouver, WA 98661  
360/690-4500  
FAX 360/695-6016



1 Since there are no formal Findings of Fact, we appeal the factual determinations related to  
2 these issues. We have added some specific Hearing Examiner errors here, but where no new  
3 material is present, we rely on the issues as contained in our Brief attached hereto and incorporated  
4 hereinafter by reference.  
5

6 **C. BRIDGET SCHWARZ ISSUES.**  
7

8 Bridget Schwarz has submitted written comments that appear to be addressed in the  
9 comments herein. But to the extent that these could raise additional issues, please consider these as  
10 additional issues herein. See Attachment "D".  
11

12 **III. PROJECT FAILS TO MEET COUNTY STORMWATER**  
13 **CODE, CCC 40.380.**

14 **A. COUNTY CODE REQUIRES PROOF OF INHERENT ABILITY TO MEET CODE**  
15 **COMPLIANCE AT PRELIMINARY STORMWATER PLAN PHASE.**

16 See attached Brief at 7.

17 **B. STORMWATER PLAN NOT FEASIBLE.**  
18

19 **1. Current Water's Edge System Has Inadequate Capacity. Rodgers Report of**  
20 **December 21, 2006.**

21 Proof of current/present downstream system capacity is not a requirement for  
22 preliminary site plan approval. Decision at 14.

23 Consequently, the Examiner views the downstream analysis of the record (Exs. 115  
24 & 125) as substantial evidence sufficient to get the application past this preliminary  
25 site plan stage. Decision at 14.

26 **2. Where Is All of the Silt Laden Temporary Site De-watering Doing/going?**

27 So far as I can tell, the applicant does not directly address this issue (*but see* Ex. 180),  
28 but neither is it required to do so at this stage of the development review process.  
Decision at 12. (Emphasis added.)



1 **B. CONCURRENCY TRIPS EXCEEDED.** (*See also* attached Brief at 18)

2 Finally, the record does not show that the applicant ever requested a waiver of the  
3 TIA requirement as anticipated by CCC 40.350.020(D)(8) or that the Public Works  
4 Director waived the TIA requirement. There is no requirement in the code that a full  
5 or partial waiver of the current traffic count requirement must be requested or granted  
only in writing. Decision at 17.

6 **C. UNSTAMPED ENGINEERING REPORTS IMPROPERLY UTILIZED.**  
7 (*See also* attached Brief at 19)

8 **1. Violation of RCW 18.43.070.**

9 **2. Violation of WAC 196-23-020**

10 **3. Violation of WAC 196-23-030**

11  
12 As a threshold matter, neither Clark County, nor the Hearings Examiner administer  
13 or enforce RCW 18.43.070 or WAC 196-023-020. The fact that there may be a  
14 violation of these state law provisions does not affect the Examiner's review of the  
15 evidence under the applicable code provisions. ...To the extent that the applicant may  
16 have violated RCW 18.43.070 does not detract from the credibility of the applicant's  
17 transportation engineering reports. Decision at 18.

18 **4. Violation of CCC 40.350.020.D.3.**

- 19
- 20 ● Hearing Examiner: No discussion of County Code requirements of signed engineering  
21 reports in his Decision.
  - 22 ● We believe no post hoc signatures are allowed (signing weeks, months or years after the  
23 fact).

24 **5. Analysis.**

- 25 ● Florida engineer, Mr. Onta, states he relies on original 2003 traffic counts "because they have  
26 an engineer stamp" and for no other reason in cross-examination. County engineer points  
27 out 2003 traffic counts not done by engineers.

1 **D. MILLPLAIN TRAFFIC “STUDY” NOT ADEQUATE.**

- 2 • Original traffic count inaccurately depicts Mill Plain WalMart (See Exhibits 139, 143 and  
3 189).  
4  
5 • Hearing Examiner ignores the mislabeling of the entrances and exits that affect the credibility  
6 of the study.

7 **E. TRIPS GENERATED SIGNIFICANT IMPACT - WARRANTS**  
8 **MITIGATION/DENIAL UNDER 12.050.230.**

9  
10 Nothing in this section shall be construed to preclude denial of a  
11 proposed development where off-site road conditions are inadequate  
12 to provide a minimum level of service as specified in Section  
13 40.3560.020 or a significant traffic or safety hazard would be caused  
14 or materially aggravated by the proposed development; provided, that  
15 the applicant may voluntarily agree to mitigate such direct impacts in  
16 accordance with the provisions of RCW 82.02.020. ...

17 Moreover, it is not clear whether a project with vested trips in the Salmon Creek  
18 Transportation Concurrency Moratorium Area, is subject to this standard. Decision  
19 at 19.

20 It is according to SEPA. *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 570 P.2d.  
21 1309 (1978).

22 **F. PASS BY TRIPS/FACTORING.** (See attached Brief at 27)

23 **V. PROJECT IS ILLEGAL “STRIP DEVELOPMENT”**  
24 **UNDER CCC 40.230.010A5.**

25 (See attached Brief at 27)

26 **A. DESIGN STANDARD.** (See attached Brief at 27)

27 **B. PERFORMANCE STANDARDS.** (See attached Brief at 29)

28 //

1 **VI. GEOTECH ADVERSE IMPACTS.**

2 (*See attached Brief at 31*)

3  
4 **VII. VIOLATES SITE PLAN REVIEW STANDARDS 40.520.040(1)(b) &( c).**

5 (*See attached Brief at 32*)

6  
7 **VIII. PROCEDURAL SEPA.**

8 (Pursuant to CCC 40.510.030H(2)(f), the Hearing Examiner’s procedural SEPA decision is  
9 not subject to further administrative review. For the record we do not agree with the Hearing  
10 Examiner’s Procedural SEPA ruling. We preserve our right to appeal to Superior Court pursuant  
11 to LUPA, RCW 36.70A.)

12  
13  
14 **IX. SEPA’S SUBSTANTIVE PROVISIONS REQUIRE PROTECTION**  
15 **OF THE ENVIRONMENT.**

16 **A. GENERAL SUBSTANTIVE SEPA - REVIEW AUTHORITY UNDER COUNTY**  
17 **CODE.**

18 (*See attached Brief at 47*)

19 **B. WAC 197-11-158 INAPPLICABLE.**

20 The Examiner wrongly relies on WAC 197-11-158 to rule substantive SEPA inapplicable  
21 here. He said:

22  
23 It is important to note that, where, as in this case, the project is also subject to  
24 substantive land use regulations and development standards, SEPA is not an  
25 appropriate avenue for challenging impacts regulated under those substantive  
26 regulations. RCW 43.21C.240; **WAC 197-11-158. In this regard, the Examiner**  
27 **specifically finds that the requirements for environmental analysis, protection,**  
28 **and mitigation measures have been adequately addressed in the development**  
**regulations and comprehensive plan adopted by Clark County under chapter**

1 **36.70A RCW, and in other applicable local, state, or federal laws or rules.**  
2 Decision at 35. (Emphasis added.)

3 WAC 197-11-158 says:  
4 GMA project review — Reliance on existing plans, laws, and regulations.

5 (1) In reviewing the environmental impacts of a project and making a threshold  
6 determination, a **GMA county/city may**, at its option, determine that the  
7 requirements for environmental analysis, protection, and mitigation measures in the  
8 GMA county/city's development regulations and comprehensive plan adopted under  
9 chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules,  
provide adequate analysis of and mitigation for some or all of the specific adverse  
environmental impacts of the project.

10 **(2) In making the determination** under subsection (1) of this section, the **GMA**  
11 **county/city shall:...**

12 (d) **Place the following statement in the threshold determination if all of a**  
13 **project's impacts are addressed by other applicable laws and no conditions will**  
14 **be required under SEPA:** "The lead agency has determined that the requirements  
15 for environmental analysis, protection, and mitigation measures have been  
16 adequately addressed in the development regulations and comprehensive plan  
17 adopted under chapter 36.70A RCW, and in other applicable local, state, or federal  
18 laws or rules, as provided by RCW 43.21C.240 and WAC 197-11-158. Our agency  
19 will not require any additional mitigation measures under SEPA." (Emphasis added.)

20 The County made no such notice or Finding here. Therefore, the use of WAC 197-11-158 is  
21 inappropriate.

22 **C. IMPACTS SIGNIFICANT WARRANTING SEPA MITIGATION.**

23 **1. SEPA Supports Mitigation Here.**

24 **2. Traffic.**

- 25
- 26 ● Severe safety issues; not mitigated.

27 ////

28 ////



1 WalMart’s experts, the comments of the public and the admissions against interest contained in  
2 WalMart/County documents.  
3

4 **XI. CONCLUSION.**

5  
6 Unfortunately, for the Applicant, the Examiner’s Decision contains a myriad of errors that  
7 require reversal. First, the Examiner imposes the “substantial evidence” burden of proof instead of  
8 the “preponderance of the evidence”, thus tainting every factual ruling he made; a slam dunk legal  
9 error.  
10

11 Second, in regard stormwater, the Examiner erred by not requiring actual proof of the  
12 capacity of the Water’s Edge system, and confusing this actual capacity issue with the issue of a  
13 downstream analysis. Those are two separate issues. Also in regard to stormwater, further errors  
14 include his conceding that silt-laden de-watering had no plan for treatment but indicated that was  
15 okay, because code didn’t require treatment (Examiner’s Decision at 12). This, and other problems,  
16 leads us to conclude the stormwater plan must be rejected.  
17

18  
19 Third, the transportation planning must be rejected for the lack of a current trip generation  
20 study as required by Code and the Examiner’s cavalier statements regarding the ability to waive  
21 County Code requirements orally and ex post facto are inconsistent with County law. Equally  
22 inconsistent is the Examiner’s condoning the use of unstamped engineering reports and reliance on  
23 Florida engineers who testified that they support the original study because it was done by engineers  
24 and he was relying on the original traffic counts engineering stamp... only to have the County correct  
25 him and point out the original traffic study was not done by a traffic engineer. Testimony of Mr.  
26  
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1 Onta during cross examination by John S. Karpinski. For these and other reasons, we respectfully  
2 request the Commissioners reverse the Decision of the Hearing Examiner.  
3

4 DATED this 13<sup>th</sup> day of February, 2007.  
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8

9 John S. Karpinski, WSBA #13142  
10 Attorney for Appellants

11 **DECLARATION OF BRIDGET SCHWARZ FOR**  
12 **FAIRGROUNDS NEIGHBORHOOD ASSOCIATION**  
13

14 Bridget Schwarz, for Fairgrounds Neighborhood Association, being first duly sworn on oath,  
15 deposes and states as follows:  
16

17 1. I am the a member and the representative for Appellant Fairgrounds Neighborhood  
18 Association in the above entitled action. Members of Fairgrounds Neighborhood Association are  
19 adjacent and/or nearby property owners.  
20

21 2. I verify that I have read the above and foregoing Appeal and believe the same to be true  
22 to the best of my knowledge.  
23

24 3. I am beneficially interested in the aforementioned matter. I have standing in the case by  
25 being a Party of Record. I vigorously participating in the proceedings before the Clark County staff,  
26 and by appealing the SEPA/Type II permit, and participating in that hearing process. I and the  
27 members of my Association will be prejudiced/affected by the increased traffic volume and safety  
28

1 impacts of this proposal, as well as the project's stormwater quality and quantity impacts, geological  
2 stability impacts, land use impacts, and aesthetics, cumulative, collective and marginal impacts.  
3  
4 These interests are among those that the County is legally required to consider. A Judgment in our  
5 favor will substantially eliminate or re-dress those impacts/prejudice of the Decision.  
6  
7  
8

9 Vancouver, Washington  
10 February 13, 2007

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Bridget Schwarz for Appellant  
Fairgrounds Neighborhood Association

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

17 FGNA Appeal to Co Comms FnL.021307.doc  
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