

**BEFORE THE LAND USE HEARINGS OFFICER  
OF THE CITY OF GRESHAM, OREGON**

Regarding an appeal by five associations of an administrative) **FINAL ORDER**  
decision approving an application for Site Design Review ) **ON REMAND**  
for a 121,877 square foot Wal-Mart Supercenter at 3900 ) DR/TR/LL 06-  
26000076/AH  
W Powell Boulevard in the City of Gresham, Oregon ) (Wal-Mart)

**A. SUMMARY**

1. The applicant, PacLand, submitted applications for Site Design Review for a proposed 121,877 square foot Wal-Mart Supercenter at 3900 W Powell Boulevard in the City of Gresham, Oregon (the "site"). The proposed store would replace an existing QFC store on the site. The applicant also requested approval of a Tree Removal permit for 27 regulated trees and a Lot Line adjustment and consolidation of the underlying commercial subdivision.

2. The development planning manager (the "manager") approved the application by written decision dated July 27, 2006. See the manager's decision in DR/TR/LL 06-26000076, Exhibit E of the September 18, 2006 Appeal Staff Report (the "Staff Report"), incorporated herein by reference (the "manager's decision").

3. On August 4, 2006, attorney Karl G. Anuta filed an appeal of the manager's decision (Exhibit A of the Staff Report) on behalf of the Centennial, Southwest and Hollybrook Neighborhood Associations and Gresham First (collectively the "appellants"). The appellants argued that:

The [manager's] decision is based on an inadequate and inaccurate analysis of transportation related impacts. The decision also is based on inadequate mitigation of transportation-related impacts. If the transportation-related impacts have (sic) been analyzed correctly, the decision would have been to deny the application.

4. Gresham Hearings Officer Joe Turner (the "hearings officer") conducted a duly noticed *de novo* public hearing regarding the appeal. Representatives of the applicant, the appellants, City staff, and area residents testified orally and in writing in response to the appeal. The hearings officer granted the appeal in part and denied the application by Final Order dated November 16, 2006.

5. The applicant and the appellants appealed that decision to the Land Use Board of Appeals ("LUBA"). Following a hearing before the Board, an order was entered remanding the November 16, 2006 decision to the hearings officer to make certain additional determinations. See the Final Opinion and Order LUBA No. 2006-225 dated April 4, 2007 (the "LUBA Decision").

6. ORS 227.181(1) requires that the City issue a final decision on remand within 90 days from the date the applicant submits a written request that the city proceed with the application on remand. Greg Hathaway, the applicant's attorney, submitted such a request on May 23, 2007.

7. In its order LUBA stated;

That re-evaluation would not necessarily require an additional evidentiary hearing or even additional opportunity for argument from the parties. The hearings officer may conclude that no such proceedings are necessary, and simply adopt additional findings on remand that re-evaluate the issue based on a correct understanding of Wal-Mart's arguments, as discussed [in the LUBA decision].

LUBA No. 2006-225 slip op. at 13.

8. The hearings officer agrees with LUBA that additional proceedings are not warranted. The hearings officer can resolve the remanded issues based on the evidence in the existing record. It is not necessary to reopen the record or conduct additional hearings in this case. The applicant concurred with that decision. See the May 23, 2007 letter from Mr. Hathaway. The appellants' attorney requested the opportunity to provide additional briefing and analysis of the issues on remand. See the May 25, 2007 emails from Dave Bricklin. The applicant's attorney objected to that request. See the May 25, 2007 email from Mike Connors. The hearings officer denied the appellants' request for additional briefing. See the May 29, 2007 email from the hearings officer to the parties.

9. Based on the additional findings in this Final Order on Remand the hearings officer finds that the applicant failed to sustain the burden of proof that the trip distribution assumptions for vehicles leaving the site are accurate. Therefore the hearings officer cannot find that the applicant's traffic models, which are based on this trip distribution assumption, are sufficiently accurate to demonstrate that the SW Highland Drive/W Powell Boulevard/SE 182<sup>nd</sup> Avenue intersection will comply with the City's intersection operational standards with additional traffic generated by the proposed development. Therefore the hearings officer reaffirms his November 16, 2006 decision and denies DR/TR/LL 06-26000076/AH (Wal-Mart) based on the additional findings in this Final Order on Remand.

## **B. DISCUSSION**

1. The hearings officer denied this application based on his finding that the applicant failed to sustain its burden of proof that the proposed development will comply with CDC A5.000. Specifically that the applicant failed to demonstrate that traffic generated by proposed development will not cause the intersection of 182<sup>nd</sup> Avenue/Highland Drive and Powell Boulevard to exceed the minimum Level Of Service ("LOS") and volume to capacity ("v/c") requirements of the Code.

a. The applicant's traffic analysis is based on the assumption that the majority of drivers who leave the site intending to travel through the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection will choose to exit the site onto West Powell Loop and approach the intersection from westbound Powell Boulevard (the "Eastern Route") rather than exiting the site via the 11<sup>th</sup> Avenue/Highland Drive intersection and approaching the intersection from northbound Highland Drive (the "Western Route"). The analysis assumed that 60-percent of drivers leaving the site to travel northbound on 182<sup>nd</sup> Avenue north of Powell will choose the Eastern Route and 40-percent will choose the Western Route (a 60:40 split). The analysis further assumed that for drivers leaving the site to travel eastbound on Powell, 70-percent will choose the Eastern Route and 30-percent will choose the Western Route (a 70:30 split).

b. However if the trip distribution assumptions in the traffic analysis are incorrect, if more drivers than expected choose to utilize the Western Route, the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection may fail. Based on the applicant's traffic analysis, the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection is projected to operate very close to capacity during the p.m. peak hour (v/c 0.859 per Item 20E of Exhibit 44). Therefore even a minor change in the trip distribution may have a significant impact on the applicant's analysis and cause this intersection to exceed the maximum 0.90 v/c ratio allowed by the Code.

c. The hearings officer concluded that there was insufficient evidence in the record to support the applicant's trip distribution assumptions. Specifically the hearings officer relied on the travel time analysis provided by the appellants' traffic engineer, which demonstrated that drivers exiting the surface parking lot via the Western Route will reach the section of 182<sup>nd</sup> Avenue north of Powell faster than drivers utilizing the Eastern Route. The hearings officer concluded that reasonable drivers will utilize the fastest route to their destination. If the Western Route is faster, more drivers will choose to utilize that route, which will increase the number of vehicles approaching the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection via northbound Highland Drive. Given the limited capacity of this intersection, even a small variation in the route choice assumptions used in the applicant's traffic model could cause the intersection to fail. See pp 32 – 34 of the hearings officer's November 16, 2006 Final Order.

2. However the hearings officer misunderstood the argument by the applicant and the City engineer that the appellants' travel time study failed to take into account the applicant's proposal to coordinate signal timing to improve traffic flow through the affected intersections. Therefore LUBA remanded the decision to the hearings officer:

[t]o evaluate the trip distribution figures and related transportation impact issues based on a correct understanding of Wal-Mart's argument, *i.e.*, that the opponents' travel time analysis that the hearings officer apparently relied upon does not take signal coordination into account.

LUBA No. 2006-225 slip op. at 13.

3. In this decision the hearings officer reanalyzed the evidence in the record without reliance on the appellants' travel time analysis, and reached the same conclusion; there is insufficient evidence in the record to support the 60:40 and 70:30 split between the Eastern and Western Routes that was assumed in the applicant's traffic analysis.

a. The hearings officer understands the applicant's argument that, all other things being equal, drivers will choose the route that provides the most direct access out of the parking lot and onto the public street system. The Eastern Route via West Powell Loop provides the most physically direct access to the surrounding street system for drivers parked in the surface parking lot on the east end of the site. Therefore more drivers may choose to exit the site onto West Powell Loop rather than traveling through the site to exit onto Highland Drive. This would provide some support for the trip distribution assumptions in the applicant's traffic analysis. However there is no substantial evidence that "all other things are equal." The Western Route may provide, or be perceived as providing, a faster or more convenient travel route for some drivers under some conditions, which may encourage more drivers to choose to use that route and potentially cause the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection to fail. Even if the Eastern and Western Routes are equally direct, there is no substantial evidence to support the applicant's assumption that 60- to 70-percent of drivers will choose the Eastern Route.

i. The applicant offered the expert opinion testimony of the applicant's traffic engineer and the City engineer that the trip distribution assumptions in the traffic analysis are reasonable. The opinion testimony of experts can constitute substantial evidence. *Bates v. Josephine County*, 28 Or LUBA 21, 29 (1994). However the expert testimony of the appellants' traffic engineer is also substantial evidence that is entitled to equal weight. The appellants' traffic engineer provided expert testimony in addition to the travel time analysis that disputed the route choice assumptions in the applicant's traffic analysis. Given this conflicting expert testimony, the hearings officer is unable to find sufficient substantial evidence in the record to support the trip distribution assumptions used in the applicant's traffic analysis. See *ODOT v. City of Oregon City*, 34 Or LUBA 57, 64-65 (1998).

b. In addition, the Eastern Route only provides the most direct route to the public street system for trips originating in the surface parking lot on the east end of the site. However the surface lot can only accommodate a portion of the total parking demand on this site. The applicant proposed to provide 193 parking spaces in the surface parking lot and 318 parking spaces in the underground parking structure. The surface parking lot is likely to fill up during periods of peak parking demand, which are likely to coincide with periods of peak traffic volume on the surrounding streets. Drivers will be forced to park in the underground parking structure. The access to the parking structure is located near the center of the site, roughly equidistant between the West Powell Loop and Highland Drive exits from the site. The Western Route appears to provide the most direct route for drivers leaving the parking structure who intend to travel through the intersection of 182<sup>nd</sup> Avenue/Highland Drive and Powell Boulevard. Drivers accessing the Eastern Route from the parking structure would be forced to undertake out of direction travel to access the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard

intersection; traveling east through the site to the West Powell Loop driveway before returning west on Powell Boulevard to the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection. Reasonable drivers will choose the shortest, most direct route to their destination. Therefore a higher percentage of drivers exiting the parking structure who intend to travel through the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection may choose to exit the site onto Highland Drive via the Western Route.

c. There is no substantial evidence that the proposed signal coordination will affect drivers' route choices in any significant way; i.e., that signal coordination will make the Eastern Route any more (or less) attractive than the Western Route for drivers intending to travel north or west through the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection. As LUBA noted:

[u]nless signal coordination affects different traffic movements at different rates, it would seem logical to expect that signal coordination of all nearby signalized intersections would equally improve all intersection movements. In other words, if without signal coordination the western route is faster than the eastern route, and signal coordination equally improves related intersection movements, after signal coordination the western route might still be faster than the eastern route. \*\*\* Wal-Mart does not explain why the failure to take signal coordination into account necessarily makes any difference, with respect to the validity of the trip distribution figures.

LUBA No. 2006-225 slip op. at 12.

d. It could be argued that the Eastern Route will provide a faster, more convenient route for drivers intending to continue west on Powell Boulevard west of Highland/181<sup>st</sup>. Drivers exiting the site via the Western Route must maneuver across two lanes of through traffic to access the northbound left turn lane at the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection. On the other hand, the existing and proposed traffic signals south of this intersection may create gaps in the through traffic that will facilitate this movement. The proposed signal coordination may also affect this maneuver in some way; i.e., by reducing congestion near the intersection, making it easier to access the northbound left turn lane from the site or by reducing the size and frequency of gaps in the through traffic, making it more difficult to access the northbound left turn lane and creating an incentive for drivers to avoid this maneuver by exiting the site via West Powell Loop. However there is no substantial evidence in the record to support any of these assumptions.

e. Based on the above analysis, and disregarding the appellants' travel time analysis, the hearings officer is unable to find any support for the 60:40 and 70:30 trip distribution split used in the applicant's traffic study. As noted in the hearings officer's November 16, 2006 Final Order, an even (50:50) split of vehicle trips between the Eastern and Western Routes may have a significant impact on applicant's transportation analysis. The number of northbound through and left-turn trips on

Highland would increase and the number of eastbound through and right turns on Powell Boulevard would diminish. However, because the 182<sup>nd</sup> Avenue/Highland Drive/Powell Boulevard intersection is operating very near capacity, even a minor change in the trip distribution may have a significant impact and may cause the intersection to fail. In addition, any increase in the number of northbound left turns from northbound Highland Drive to eastbound Powell Boulevard may cause the left-turn queue to exceed the capacity of the turn lane and cause “spillback” into the through travel lanes. Mr. McCoy testified at the hearing “any queues extending into the through travel lanes would be a fatal flaw sufficient to warrant denial of the application.” The hearings officer cannot find that the applicant’s traffic analysis is accurate based on these unsupported trip distribution assumptions. Therefore the hearings officer must affirm his prior decision.

4. LUBA also sustained the appellants’ “Fourth Assignment of Error” regarding the safety of the proposed Duniway Avenue access onto eastbound Powell Boulevard. The hearings officer concluded that it is feasible to ensure that this access will operate safely, provided additional design features (signs, striping or other visual cues) are provided to inform drivers that the access is intended to operate as a two-stage left turn rather than as an acceleration lane. LUBA concluded that this finding was supported by substantial evidence. However LUBA concluded that a condition of approval is necessary to ensure that such design features are actually installed. The hearings officer agrees and would have imposed such a condition if the application were approved. However the hearings officer concluded that such a condition was unnecessary because the application was denied on other grounds. This decision on remand reaffirms that denial. Therefore the hearings officer finds that it is unnecessary to draft such a condition at this time.

### **C. CONCLUSIONS**

Based on the above findings and discussion, the hearings officer concludes that the applicant failed to sustain the burden of proof that the trip distribution assumptions for vehicles leaving the site are accurate. Therefore the hearings officer cannot find that the applicant’s traffic models, which are based on this trip distribution assumption, are sufficiently accurate to demonstrate that the SW Highland Drive/W Powell Boulevard/SE 182<sup>nd</sup> Avenue intersection will operate at acceptable levels of service with additional traffic generated by the proposed development. Therefore the November 16, 2006 Final Order should be affirmed and the application should be denied.

### **D. ORDER**

Based on the findings and conclusions adopted or incorporated herein, the hearings officer hereby affirms the November 16, 2006 Final Order and denies DR/TR/LL 06-26000076/AH (Wal-Mart).

DATED this \_\_ day of June, 2007

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Joe Turner, Esq., AICP  
City of Gresham Land Use Hearings Officer