

# Bricklin ♦ Newman ♦ Dold, LLP

DAVID A. BRICKLIN  
CLAUDIA M. NEWMAN  
JENNIFER A. DOLD  
DEVON N. SHANNON

ATTORNEYS-AT-LAW  
1001 FOURTH AVENUE  
SUITE 3303  
SEATTLE, WA 98154  
TEL. (206) 264-8600  
FAX (206) 264-9300  
<http://www.bnd-law.com>



October 11, 2006

VIA E-MAIL AND U.S. MAIL

Joe Turner  
City of Gresham Hearings Officer  
1333 NW Eastman Parkway  
Gresham, OR 97030

Re: Wal-Mart Design Review DR/TR/LL 06-2600076/AH

Dear Mr. Turner:

This letter represents the closing argument of the appellants, Gresham First, the Southwest Neighborhood Association, the Hollybrook Neighborhood Association, and the Centennial Neighborhood Association. We appreciate your accommodating members of the appellant groups during the hearing on September 27, 2006 and the amount of time you obviously had spent preparing for the hearing. Your diligence is appreciated by one and all.

Our arguments regarding the transportation and land use issues are primarily addressed in the accompanying documents from Greenlight Engineering (Rick Nys) and Winterbrook Planning (Ben Schonberger). To the extent necessary, I incorporate into this letter the argument sections of those documents. Instead of repeating those arguments at length, this letter will address the following matters:

- Burden of proof.
- Applicability of the Comprehensive Plan.
- “Non-issues raised by Wal-Mart.
- Reasons for denying the application.

## I. BURDEN OF PROOF

No one disputes that even though Gresham First, et al. are the appellants, the burden of proof remains on the applicant (Wal-Mart). GDC 11.0346. The burden of proof means, of course, that the burden is on Wal-Mart to demonstrate that its proposal complies with Gresham’s requirements. That means, for instance, that if Wal-Mart has not prepared an adequate analysis of traffic impacts,

it has not met its burden of proof and its application must be denied. Gresham First is not required to do its own traffic study or to demonstrate what the traffic impacts would be if a competent traffic study had been undertaken. It is sufficient for Gresham First to demonstrate that Wal-Mart's traffic study is flawed.

## II. NON-ISSUES

In Wal-Mart's closing oral argument on September 27, 2006, Wal-Mart raised a number of matters which are wholly irrelevant to your resolution of this appeal. Wal-Mart mentioned the antipathy many members of the public feel towards the Wal-Mart Corporation. Similarly, one member of the public attempted to speak to Wal-Mart's virtues. As you clearly indicated during the hearing, your only job is to determine whether this project complies with Gresham's requirements. Wal-Mart's "character" is not at issue.

Wal-Mart also mentioned in its closing that the current project is smaller than the one previously reviewed by the City. That, too, is irrelevant. The issue is not whether this proposal is smaller than some other proposal. The issue is whether the current proposal complies with City requirements.

Similarly, Wal-Mart argued that if it shrunk the proposal even more, there still would be opposition to it. That argument is doubly irrelevant. There is no "smaller yet" project before you. And, again, whether a smaller project would draw opposition is irrelevant.

## III. APPLICABILITY OF THE COMPREHENSIVE PLAN

Wal-Mart and City staff have asserted that the Comprehensive Plan is largely irrelevant; that the project must be tested only against the provisions of the Gresham Development Code. See, e.g., Staff Report (Sep. 18, 2006) at 10 (if a project complies with the code, "it is considered to be in compliance with the Goals and Policies of the Comprehensive Plan"). This effort to avoid consideration of the Comprehensive Plan is wrong on two counts.

First, at minimum, the Comprehensive Plan is useful in construing ambiguous provisions of the Gresham Development Code. The Development Code is intended to implement the policies of the Comprehensive Plan. To the extent the Code provisions are ambiguous, they should be construed consistently with the relevant Comprehensive Plan policies. Thus, reference to the Comprehensive Plan policies can be useful in the properly construing the Code provisions.

Second, contrary to staff's claims, the Comprehensive Plan policies are directly applicable to this application. Staff's claims ignore the following sections of the Comprehensive Plan:

If conflict exists between the Comprehensive Plan and the Zoning Ordinance regarding a parcel of land, the Comprehensive Plan is the overriding document to be followed.

Comprehensive Plan, Vol. I at 5 (finding 5.200).

There are two main parts to the Comprehensive Plan -- a text that includes goals, policies, and action measures; and the Comprehensive Plan maps. The goals, policies, and maps are regulatory and intended to guide land use decisions.

Comprehensive Plan, Vol. II at 6 (emphasis supplied).

Applicants shall bear the burden of proof to demonstrate that proposed land use actions are consistent with the Community Development Code regulations and standards, Comprehensive Plan criteria, and when necessary, the requirements of the state and other agencies.

Comprehensive Plan, Vol. II at 11 (Policy 19) (emphasis supplied).

That the Comprehensive Plan has regulatory effect is also specified in the Gresham Development Code. The City's Code provides:

A parcel of land or a structure may be used, developed, and occupied only as this Code permits. In addition to complying with the requirements of this Code, each development shall comply with:

- (1) Volumes I and II [Policies] of the Community Development Plan . . .

GDC 11.0003(A).

These Gresham Comprehensive Plan and development regulation provisions are consistent with, and mandated by, State law which provides that a city's development ordinances "shall relate approval or denial of a discretionary permit application to the development ordinance and to the Comprehensive Plan for the area in which the development would occur, and to the development ordinance and Comprehensive Plan for the City as a whole." ORS § 227.173(1) (emphasis supplied). Use of Comprehensive Plan policies and even less formal "strategy" documents when

making land use decisions has been approved by LUBA and the courts. See Davenport v. City of Tigard, 121 Or. App. at 135 (1993) (approving City's use of a Comprehensive Plan policy when rendering a discretionary land use decision); BCT Partnership v. City of Portland, 130 Or. App. 271 (1994) (approving discretionary land use decision based on a downtown parking "policy" that required consistency with the City's "parking strategy" even though there was no document labeled "parking strategy" and reference was made instead to a number of separate legislative enactments).

Thus, it is abundantly clear that Wal-Mart had the burden of demonstrating that its project is consistent with the Comprehensive Plan. Wal-Mart has made no effort to meet this burden. There has been no discussion or analysis of the proposal's consistency with the Comprehensive Plan in Wal-Mart's application or in any of its supplemental submissions. City staff also has neglected to address these issues. The application must be denied for this reason alone.

#### IV. TRANSPORTATION ISSUES

Greenlight Engineering provided the Hearing Officer with a thorough assessment of Wal-Mart's traffic analysis and the failure of that traffic analysis to comply with applicable provisions of the Gresham Development Code (and Comprehensive Plan). We will not repeat that critique in detail here, instead emphasizing a couple of key points and adding a few new insights.

Calibration. Given Kittelson's admission that it did not calibrate its model and that calibration is critical to the responsible and reasonable use of a traffic model, the Hearing Officer can decide on this basis alone that Wal-Mart has not met its burden of proof and that its application must be denied. The FHWA calibration guidelines state: "It is critical that the analyst calibrate any micro-simulation model to local conditions." (Quoted in Greenlight Engineering Sep. 27, 2006 letter at 6.) Similarly, the Oregon Department of Transportation *Analysis Procedures Manual* states: "Before any simulation model is used to represent existing or future conditions, the existing conditions model created must be calibrated by adjusting operational parameters until the model provides a reasonable representation of existing conditions measured in the field." *Id.* at 11 (emphasis supplied). Virtually every claim Wal-Mart makes about its project's traffic impacts is based on projections from the traffic model which Wal-Mart's consultants failed to calibrate. While Gresham First's appeal raises many other interesting issues, the Hearing Officer need not reach any of them given this fatal flaw in Wal-Mart's application.

Inadequate Queue Capacity. The application also can be denied solely because of the inadequate storage for queuing on northbound Highland for left-turning vehicles as they approach Powell. Even without correcting the identified errors in the model, the Synchro model utilized by Wal-Mart's consultants demonstrates that there is inadequate space for queuing on northbound Highland approaching Powell. City staff acknowledged during the hearing that this was a "fatal flaw." The

applicant did not address this issue further in its submission on October 4, 2006. It is too late for the applicant to address it now. The application must be denied for this reason alone, too.

Omitted Mandatory Elements of the Traffic Impact Analysis. Wal-Mart's traffic study omitted analysis of the following intersections and street segments:

- Intersections where project traffic is greater than five percent of existing capacity.
- Street segments where project traffic is more than five percent of current capacity.
- Intersections and street segments where current volume to capacity ratio is greater than 0.90 or where the level of service is E or F.

Analysis of each of these intersections and segments is clearly required by the Public Works Standards. See, e.g., Greenlight Engineering Sep. 27, 2006 letter at 31. The applicant's failure to submit all the required elements of the traffic impact analysis requires, by itself, denial of the application.

Late Information. We are concerned that the applicant will utilize its submission on October 11, 2006 or its closing argument on October 18, 2006 as the opportunity to present new evidence to address the various flaws identified by the appellants. The Hearing Officer should be careful to assure that these last submissions by the applicant comply with the rules for this hearing process. It would be manifestly unfair for the applicant to present new analysis in these documents because the appellants will have no opportunity to respond to it.

Moreover, any late submissions would run counter to the public involvement policies of the City's Comprehensive Plan:

The City shall ensure that the public has complete and timely access to all public information concerning land use projects and issues. This includes private development proposals once they are in the formal application process.

Comprehensive Plan, Vol. II at 22 (Policy 11) (emphasis supplied).

Provide citizens timely access to public information related to land use matters under consideration by:

...

(b) Making available copies of technical information . .

Comprehensive Plan, Vol. II at 23 (Action Measure 5).

Information presented for the first time in submittals on October 11, 2006 (or thereafter) clearly would not allow for effective citizen participation. “Timely” access requires that the citizens, including these appellants, have access to the applicant’s information in time to analyze it and respond to it. We are hopeful that the applicant will not present new information at this juncture that raises this problem but we are mystified by the applicant’s failure to meaningfully respond to many of these issues in any of their prior submissions or testimony.<sup>1</sup>

## V. LAND USE ISSUES

Ben Schonberger from Winterbrook Planning has done an excellent job of demonstrating the fatal flaws in Wal-Mart’s application from a land use perspective. As with the transportation issues, the land use issues present the Hearing Officer with several clearcut fatal legal flaws that require no exercise of judgment and no resolution of disputed facts. Locating part of this project in the Community Mixed Use district is illegal and requires denial of the application. Utilizing part of a public right-of-way for the project, without obtaining a street vacation as required by the Code, is illegal and requires denial of the application, too.

The issues regarding transit- and pedestrian-friendly design and pedestrian connections to the Springwater Trail involve a greater degree of judgment, but ultimately also mandate denial of the application. Winterbrook Planning has presented a compelling case that the application runs afoul of the City’s requirements in these areas. Moreover, approving a major, big box retailer on this site is inconsistent with the Comprehensive Plan policy that “downtown will be the focus of retail . . . development.” Comprehensive Plan, Vol. II at 61 (Policy 1.5). It also contravenes the policy to prevent “lateral expansion of commercial strips along major streets.” *Id.* at 60 (Policy 1). Developing this major, auto-oriented retail establishment also conflicts with the City’s policies for its transit corridors. The project does not “improve pedestrian access to transit,”<sup>2</sup> nor does it “develop safe pedestrian environments,”<sup>3</sup> but rather makes pedestrian movement more difficult and unsafe.

---

<sup>1</sup> While we raise this issue in the context of the transportation issues, it applies equally to the land use issues.

<sup>2</sup> Comprehensive Plan, Vol. II at 110 (Policy II).

<sup>3</sup> *Id.* at 111 (Policy III).

Joe Turner  
October 11, 2006  
Page 7

## VI. CONCLUSION

For the foregoing reasons and those expressed in the testimony submitted by the appellants, their members, and witnesses, the Hearing Officer should reverse the staff decision and deny the application.

Very truly yours,

BRICKLIN NEWMAN DOLD, LLP

A handwritten signature in black ink, appearing to read "David A. Bricklin", written in a cursive style.

David A. Bricklin

DAB:psc

cc: Greg Hathaway (via e-mail)  
Jim Wheeler (via e-mail)  
David Ris (via e-mail)  
Tammy Richardson (via e-mail)  
Clients

TL\Turner Joe-101106