



TRANSCRIPTS

from HEX hearing

Case Number: DCI2003-00058

Case Name: Estero Golf Resort (WALMART)

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LEE COUNTY HEARING EXAMINER
PUBLIC HEARING

RE: Case No. DCI2003-00058

Applicant: WAL-MART STORES EAST, LP

Transcript of proceedings before Diana M. Parker,
Lee County Hearing Examiner, 1500 Monroe Street,
Fort Myers, Florida, on August 27, 2004,
commencing at 9:00 a.m.

APPEARANCES:

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representing the Applicant

JOAN C. HENRY, Assistant County Attorney;
representing Lee County

CHIP BLOCK, Lee County Staff

ANDY GETCH, Lee County Staff

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1 THE HEARING EXAMINER: Folks, let me have your
2 attention, please. Good morning. I'm Diana Parker.
3 I'm Chief Hearing Examiner for Lee County.

4 This is -- what is today? Friday?

5 MS. MONTGOMERY: It is.

6 THE HEARING EXAMINER: Friday the 27th, August
7 the 27th.

8 This is Case Number DCI2003-00058, Wal-Mart
9 Stores, Inc. -- I'm sorry, East LP.

10 Before we get started this morning I need to
11 explain to you folks the procedures that we follow in
12 these hearings.

13 These are public hearings, which means that I
14 will be taking input from the public at the
15 appropriate time. Normally what we do, we have the
16 applicant make their presentation to me, explaining
17 what they want, why they -- you know, what they want
18 to develop, what's around the property, what the
19 impacts they think are going to happen or occur to the
20 properties that are surrounding their property and why
21 they think their request should be approved.

22 After they've made their presentation with all
23 the number of witnesses that they're going to bring up
24 and I have asked the questions that I need to ask to
25 thoroughly understand what their request is, then

1 staff will make a presentation to me explaining their
2 position, their review, what they think the impacts
3 are going to be, the conditions that they have
4 recommended if they're recommending approval, and if
5 they're recommending denial, they'll give me an
6 explanation of why they're recommending denial. All
7 right.

8 After I have questioned staff and gotten all the
9 information that I need to help me understand the
10 staff's position, then I will open the proceeding up
11 for public input.

12 We have a white form, and I see I already have a
13 stack of them. You guys are so efficient. If you
14 intend to speak in this hearing and you have not
15 filled one of these white forms out, please do so
16 before you come up, all right? If you want to speak,
17 I will let you speak at the end of the hearing. I
18 need the white form so my secretaries can get your
19 name and address and get you down as a party of
20 record.

21 If you are not listed as speaking in this
22 hearing, you cannot speak before the Board of County
23 Commissioners. I must be given the opportunity to
24 consider your concerns and see if there's some way to
25 address those concerns before -- in my recommendation

1 before it goes to the Board of County Commissioners.
2 So if you're thinking about not speaking but you think
3 you may want to speak in front of the Board if you
4 don't like my decision, then you need to speak here to
5 preserve your right to speak in front of the Board.
6 Okay?

7 This hearing will probably last a little longer
8 than -- will definitely last longer than two hours,
9 I'm sure, but if it lasts longer than two hours, we
10 will be taking a break for the court reporter to allow
11 her a chance to stand up and stretch and unfocus and
12 everybody get up and get a drink of water.

13 Please bring only water into this room. Sodas
14 and coffee get spilled and they mark, they stain the
15 floor and cause problems with bugs, so please bring
16 only water in this room.

17 If at any time you need to leave, please leave by
18 the door over here. You can come back in. If you
19 need to talk to your neighbor, please do so outside
20 the hearing room. We audiotape these proceedings.
21 Noise in the back of the room actually overrides
22 what's coming in on these microphones and it
23 obliterates what's coming in on my tape and it also
24 interferes with the court reporter's concentration, so
25 the very information that you want me to hear while

1 you're busy back there clapping, I'm not going to hear
2 anymore because it's no longer part of the record. It
3 will be obliterated and I will not be able to
4 reconstruct it. So I do need you to maintain silence.

5 Do I have questions from anyone on the
6 procedures?

7 Okay. If you intend to speak at this morning's
8 hearing, if you're an attorney and testifying to
9 facts, all of you need to be sworn in at this time.
10 So if you intend to speak, please raise your right
11 hand.

12 (Whereupon, all prospective witnesses were duly
13 sworn.)

14 THE HEARING EXAMINER: Now, if after hearing
15 staff and applicant's presentation you have a burning
16 desire to speak, let me know when you come up if you
17 have not been sworn in. I can swear you in at that
18 time. Okay?

19 All right. Applicants ready to go forward?

20 MS. MONTGOMERY: Yes, ma'am.

21 THE HEARING EXAMINER: Okay, let's do it.

22 MS. MONTGOMERY: Before the applicant begins let
23 me just say despite the fact that there's a lot of
24 people here, this really is pretty simple and I think
25 the staff attached to your staff report a Resolution

1 Z-01-012A, which was a rezoning that Paul Davis and
2 Keystones Home did. And if you look at that
3 resolution you will realize that this property is
4 already zoned for 320,000 square feet of retail and
5 20,000 square feet of office and give or take eight
6 hundred and some forty residential units.

7 The portion of that property that we're here to
8 talk about today is the commercial portion and really
9 what we're here to do is talk about providing an
10 option that reduces the square footage. And there
11 were some additional use conditions in that resolution
12 that limited hours of operation on a portion of the
13 property. A portion of the property is already
14 permitted 24-hour use and a portion is not. We're
15 here to ask to change that so the entire site can be
16 24 hours. And there was some limitations on the hours
17 of delivery and we're here to ask to change that.

18 We have been in the process for a very, very long
19 time, but -- and I think, you know, it's easy to lose
20 sight of the fact that basically, you know, there's
21 some other factors, but that is the primary request.
22 The applicant has worked with the public for a very
23 long time, had very many meetings. And actually if
24 the applicant had taken my advice they could have gone
25 out and built the store two years ago and then come in

1 and asked for 24-hour use, but they're
2 community-minded and they didn't take my advice, so --
3 because they wanted to work with the community.

4 And I guess what I would like to ask, just for
5 your benefit, for all those people that have been at
6 meetings with Wal-Mart to work on the issues, if you
7 would just stand so the Hearing Examiner knows how
8 many people have been involved.

9 THE HEARING EXAMINER: Okay. Thank you.

10 MS. MONTGOMERY: Thanks.

11 And the public has given a lot of their time to
12 come to the meetings to work on the issues and we
13 believe that with the -- that we have reached an
14 agreement on the issues with the public that the
15 county has asked us to work with, both the design
16 review committee and the planning committee and the
17 leadership committee. And with that I would like to
18 introduce Peter Klein.

19 Thereupon,

20 PETER KLEIN,
21 a witness, produced by the Applicant, having been
22 previously duly sworn, was examined and testified as
23 follows:

24 MR. KLEIN: Thank you, Neale.

25 Madam Examiner, staff, my name is Peter Klein.

1 I'm the president of Melandco Real Estate Services.
2 We're a real estate brokerage company based in
3 Atlanta, Georgia. We specialize in retail acquisition
4 for a number of clients throughout the Southeast
5 United States.

6 In early 2003 Wal-Mart approached us, asked us if
7 we would review the Estero market for development of a
8 Wal-Mart Super Center. They identified for us the
9 target area basically being from Alico Road down to
10 Corkscrew Road, from the coast out to I-75. And I
11 just kind of want to give you a real brief overview of
12 how we came to this particular site and how we ended
13 up where we are today.

14 After a very comprehensive review of the market
15 and analysis of multiple sites within the target area,
16 this 33 plus or minus acres at the northeast corner of
17 Koreshan Road and U.S. 41 was identified as the best
18 opportunity for Wal-Mart to develop a Super Center.

19 There were a number of reasons for this
20 conclusion. One of the most important, of course, is
21 it was centrally located within the target area.
22 Wal-Mart felt that it logistically was the best place
23 to serve the market and the base population. In
24 addition, the property is served by adequate
25 utilities; it's a relatively level piece of property;

1 we had relatively speaking minimal impact on wetlands;
2 it's served by two major arterial roads; and last but
3 not least, it's zoned for 320,000 square feet of
4 retail use.

5 We subsequently contracted with Keystone
6 Communities and we began a series of discussions and
7 negotiations with the Estero community leaders and
8 with The Vines to try to determine how we could
9 mutually move forward on agreed upon development plan
10 that would serve both the community and Wal-Mart.

11 We had, I think we determined something along the
12 order of 15 to 16 different separate meetings.

13 We believe, Wal-Mart believes that we've reached
14 an accord with the communities and have implemented a
15 vast array of amenities that would be beneficial to
16 the community and to Wal-Mart and all of which will be
17 described in much more detail here later on today.

18 Lastly, on behalf of Wal-Mart and the consultants
19 and representatives, I would like to give a special
20 thank you to The Vines and the community of Estero for
21 its spirit of cooperation and allowing us to
22 investigate a mutual acceptable development plan that
23 we believe Lee County and the community of Estero can
24 be very proud of.

25 Thank you.

1 THE HEARING EXAMINER: Okay. Hang on just a
2 second. Peter, don't leave.

3 All right. Questions of your witness?

4 MS. MONTGOMERY: No.

5 THE HEARING EXAMINER: Questions of this witness
6 by the county staff?

7 MR. BLOCK: No questions.

8 THE HEARING EXAMINER: County Attorney?

9 MS. HENRY: No questions.

10 THE HEARING EXAMINER: I actually don't have any
11 questions either, Peter. Thank you very much.

12 MS. MONTGOMERY: There's something I neglected to
13 mention earlier, and that is it will probably become
14 clear later if it isn't now, but the original staff
15 report was done by Jerry Murphy, it wasn't done by
16 Chip. And Chip came to this late in the process, very
17 late in the process, and Chip has put in a lot of time
18 to try to get up to speed and we appreciate his
19 efforts. And so just wanted to explain why you have
20 one staff report that Chip had nothing to do with and
21 claims no responsibility for, I don't think. And he
22 was gracious enough to work on trying to eliminate
23 some of the confusion because of all the
24 administrative amendments and things that had happened
25 before, so that's really why you have two documents.

1 THE HEARING EXAMINER: Right. Okay.

2 MS. MONTGOMERY: And actually I just want to say
3 we agree with the staff on 95 percent of the things
4 that they've said. We just -- the primary thing we
5 don't agree with is obviously how they've dealt with
6 concurrency, so that will be --

7 THE HEARING EXAMINER: That's an issue, yes.

8 MS. MONTGOMERY: -- the big issue for discussion
9 from a legal standpoint, from a technical standpoint.
10 And with that, Judson Pankey.

11 Judson is a registered professional engineer in
12 the State of Florida. I don't believe he has -- he
13 has testified before you before?

14 THE HEARING EXAMINER: Uh-huh.

15 MS. MONTGOMERY: But he has not testified before
16 you in this context. He did it in an administrative
17 appeal where he was really a fact witness, so he
18 wasn't testifying as an expert. We would like to have
19 him qualified as an expert here today.

20 THE HEARING EXAMINER: In land use planning and
21 zoning?

22 MS. MONTGOMERY: No, as a registered professional
23 engineer. He may be an expert in land use planning
24 and zoning, too, but primarily --

25 THE HEARING EXAMINER: All right. What's the

1 basis of his testimony, Neale? What specifically is
2 he testifying --

3 MS. MONTGOMERY: Well --

4 THE HEARING EXAMINER: -- about in his
5 engineering capacity? Site design or --

6 MS. MONTGOMERY: He is going to talk about the
7 site design because he's been involved in every aspect
8 of the site design and actually Judson has probably
9 been the one person who's gone to every meeting. Some
10 of us had to go to some of them, but Judson's had to
11 go to every meeting, so he's intimately familiar with
12 all the changes that have been made to the original
13 proposal to address the concerns of the community.
14 And what I would like for him to do is to really go
15 through those because, you know, you see where we are
16 now and we want you to have the benefit of knowing all
17 the things that have transpired and we want the
18 community to know that we haven't changed anything.
19 We really still have all the things in there we told
20 them we were going to do.

21 THE HEARING EXAMINER: All right. So you want
22 him accepted as an expert in engineering dealing with
23 the application process and site design?

24 MS. MONTGOMERY: Yes.

25 THE HEARING EXAMINER: And, you know, all of the

1 parameters, whatever those happen to be that go into
2 the --

3 MS. MONTGOMERY: He has pointed out to me that
4 he's a registered PE in the two hardest states in the
5 union, both California and Florida.

6 THE HEARING EXAMINER: Smart.

7 Any objections from staff on him being accepted
8 as an expert in engineering, on site design and the
9 site planning and the application process?

10 MR. BLOCK: No objections.

11 THE HEARING EXAMINER: Okay. Accepted, then.

12 Thereupon,

13 JUDSON PANKEY,
14 a witness, produced by the Applicant, having been
15 previously duly sworn, was examined and testified as
16 follows:

17 MR. PANKEY: Thank you, Neale.

18 Madam Hearing Examiner, can you see the exhibit?

19 THE HEARING EXAMINER: Yes. Thank you.

20 MR. PANKEY: There are some small labels here.

21 THE HEARING EXAMINER: Those I can't see. That's
22 all right. You can just tell me what it says.

23 Oh, now I can read them, yeah.

24 MR. PANKEY: You can see them now?

25 THE HEARING EXAMINER: Yeah. They were in the

1 green, so it was difficult to see from that distance
2 back there. Okay.

3 MR. PANKEY: What I would like to do first, Madam
4 Hearing Examiner, is go over the existing master
5 concept plan and then recap the changes that we're
6 requesting to the master concept plan, the plan
7 itself, and we'll discuss the resolution later on.

8 But the existing master concept plan -- let me
9 back up. As Peter Klein indicated, the site is
10 located in the northeast quadrant of U.S. 41 and
11 Estero Parkway, formerly known as Koreshan Boulevard.
12 The commercial portion, which is what we're discussing
13 in large part today, but we are also including within
14 our MPD rezone application the residential portion
15 located west of the Seaboard Coastline Railroad.

16 THE HEARING EXAMINER: Okay.

17 MR. PANKEY: The existing MPD, as Neale noted,
18 has four tracts, three commercial and one office, and
19 two access points. Actually two access points and one
20 shared one on Estero Parkway. The commercial tract --
21 I'm having a hard time reading it, too.

22 THE HEARING EXAMINER: Do you want to wear my
23 glasses?

24 MR. PANKEY: MPD-1, which is the one closest to
25 the existing Vines development, is the tract that has

1 the prohibition against 24-hour operation. The other
2 two commercial tracts do allow for 24-hour operation.

3 There is a cross access between the access road
4 from U.S. 41 and Estero Parkway. There is a
5 conservation area located -- it's a peanut-shaped
6 conservation area located adjacent to the residential
7 portion of the MPD and the commercial tract. There
8 are also storm water lakes shown on the plan. We note
9 that they're extremely small for this type of
10 development.

11 Now I would like, I would like to go over the
12 changes that we're proposing to the master concept
13 plan and I'm going to bring up a different exhibit.

14 THE HEARING EXAMINER: Okay.

15 MR. PANKEY: Madam Hearing Examiner, it's not as
16 colorful, but I think it will get the point across.

17 THE HEARING EXAMINER: Okay.

18 MR. PANKEY: The changes that we are requesting
19 for the master concept plan, I'm just going to go over
20 them very quickly, is, the first one is the proposed
21 access connection to U.S. 41.

22 We met with FDOT representatives some time ago
23 and they specifically requested that we relocate the
24 access on U.S. 41 further to the north on 41 in order
25 to avoid any conflict with the future lengthening of

1 the left turn lane going east on Estero Parkway, and
2 we obliged them in the request. It was a reasonable
3 request and we agreed with them.

4 The interior circulation is consistent. We still
5 maintain a cross connection between the driveway on
6 Estero Parkway and a cross connection between the
7 driveway on U.S. 41. In addition to that, and we will
8 get into more detail about this, there is also a
9 connection, a gated connection, to The Vines community
10 that runs between the residential MPD Tract 5 and the
11 commercial tracts, MPD-1 and 3.

12 We have proposed that MPD Tracts 2 and 4 be
13 deleted from the master plan.

14 We are requesting the removal of the 24-hour
15 restriction on the MPD Tract 1 and on the MPD Tract 3,
16 the only two tracts on the commercial portion. MPD
17 Tract 3 serves as an out parcel.

18 As I indicated, we will be going over the changes
19 to the resolution. The majority of the changes also,
20 as Neale stated, are supported by the community, and
21 that's evident in the addendum to the staff report
22 prepared by Chip.

23 We are requesting three deviations from the land
24 development code as part of this site plan, very minor
25 deviations, in my opinion. One, in lieu of wheel

1 stops, the bumps that prevent cars from encroaching
2 into another space, we're proposing a four-foot-wide
3 concrete median instead. The reason for that request
4 is to avoid a tripping hazard. We find and Wal-Mart
5 has found that wheel stops are a tripping hazard and
6 if you have a four-foot-wide concrete island, it's
7 much more apparent to people, so it's less of a
8 tripping hazard. It's much more easy to see.

9 THE HEARING EXAMINER: All right. Judson, on
10 that tripping -- on the four-foot-wide concrete
11 median, are you going to have any kind of landscaping?
12 Is it going to be, you know, like a curb and then
13 landscaping in the middle?

14 MR. PANKEY: Yes, yes, ma'am. I have a plan for
15 you.

16 THE HEARING EXAMINER: Okay. So it's not just
17 going to be a concrete walkway that everybody can get
18 up and walk on?

19 MR. PANKEY: I'm sure children will get up and
20 walk on it just for fun, but it's not intended as a
21 walkway.

22 We do have what we call linear landscape islands.
23 We have three of them going through the parking lot
24 with sidewalks that connect to all the parking in the
25 parking lot, but between those landscape islands, the

1 linear landscape islands that have sidewalks, we do
2 just have rows of parking that utilize a
3 four-foot-wide concrete median, if you will.

4 THE HEARING EXAMINER: Okay.

5 MS. MONTGOMERY: The linear landscape islands
6 with the plantings, those were put in at the request
7 of the community.

8 MR. PANKEY: Yes. They were specifically
9 requested by the community. I'm going to go over this
10 in more depth.

11 THE HEARING EXAMINER: All right. That will be
12 fine.

13 MR. PANKEY: The second two deviations is the
14 reduction in the required setback for retention ponds.
15 The land development code requires a 50-foot setback,
16 which is routinely requested of most developments in
17 Lee County. We have located the pond in position
18 specifically requested by the community and I think
19 one of the setbacks was reducing it by three feet and
20 then the other one we're reducing it by about 22 feet.
21 But the roadway and the parking lot drive aisles are
22 safe for drivers. They're designed so they are not a
23 hazard.

24 Madam, I'm going to try to speed it up, but if
25 you have any questions, please stop me.

1 THE HEARING EXAMINER: Okay.

2 MR. PANKEY: What I would like to do now is just
3 go through a quick list of all the coordination that
4 we have done with the community.

5 We actually had our first meeting with the
6 community back in January of 2003 and our last meeting
7 was this month, so we have been working on this
8 project for almost two years. And as Neale indicated,
9 working with the Estero community has been wonderful.
10 Very cooperative. They give you the input that we so
11 much desire and it's organized, focused input.

12 I did a quick calculation last night. We did
13 approximately \$2 million in upgrades at the request of
14 the community, the architectural elevation, the
15 landscape upgrades, the roadway that goes to, the
16 gated roadway that goes to The Vines community, and as
17 a result of all that we actually had to lose one out
18 parcel.

19 In the previous site plan - this is the one we
20 started off with - we actually showed two out parcels.
21 And an out parcel is worth a lot of money and it was
22 lost to benefit the improvements requested by the
23 community. These were the two out parcels before,
24 ma'am.

25 The architectural upgrade, basically this store

1 mimics Coral Springs. Several members of the Estero
2 community went to Coral Springs, saw the existing
3 Wal-Mart store and said they like it. They came back,
4 they said they liked it, and we are basically
5 providing that elevation to them.

6 Just a quick recap of what that includes. It's a
7 Mediterranean style with bell tower roof accents. It
8 has an arcade along the entire front of the store and
9 the arcade does wrap around the side on the, what we
10 call the grocery side, the north side of the store.
11 It includes parapet walls along the roof, the entire
12 perimeter of the roof, to hide rooftop mechanical
13 equipment. And it includes screening walls around
14 just about everything, trash compactors,
15 air-conditioning, refrigeration compressors, the rear
16 service area. I'm going to get into that in more
17 detail. There are walls everywhere, so there won't be
18 any visibility concerns and the noise is greatly
19 reduced. And we do have a noise expert that can speak
20 on those items.

21 In general, some of the things we have done to
22 the site plan and one of the most important, we
23 believe, is we provided a cross access to The Vines
24 community.

25 One of the major concerns of The Vines community

1 is their existing entrance on U.S. 41 has an accident
2 history. They view it as a dangerous intersection.
3 It's not signalized, and they wanted a way to get to
4 the future signalized intersection of Estero Parkway
5 and U.S. 41. So we came up with several options and
6 they gave us their input and eventually we arrived at
7 the option where the road bisects the residential
8 tract, commercial tract, enters The Vines after a
9 gate, and then in order to shield the existing homes
10 from headlights, traffic is -- has an option of going
11 either way, but keeps the headlights off of the homes.
12 Heavily landscaped. We do have --

13 THE HEARING EXAMINER: Now, the landscape that
14 you show here, that's on The Vines property. Is that
15 where the road takes the V, it splits, and you've got
16 those trees? And I'm assuming there's shrubs probably
17 involved in that, too.

18 MR. PANKEY: Yes.

19 THE HEARING EXAMINER: That is on The Vines
20 property.

21 MR. PANKEY: Yes, ma'am, it is.

22 THE HEARING EXAMINER: So you all have a separate
23 agreement with The Vines, then, on that?

24 MR. PANKEY: Yes, we do.

25 THE HEARING EXAMINER: Because the county can't

1 enforce that.

2 MR. PANKEY: Yes, we do. We have a separate
3 agreement. And there is a Vines representative, Mr.
4 Bob Perry, that can speak to that agreement.

5 THE HEARING EXAMINER: Okay, good. Just so you
6 understand the county can't enforce that.

7 MS. MONTGOMERY: The county has been pretty clear
8 in telling us that that was the case and we
9 understand, but we do have an agreement that is
10 enforceable by The Vines.

11 THE HEARING EXAMINER: Okay. All right. Good.
12 Okay.

13 MR. PANKEY: And just a blowup of the cross
14 access. Heavy landscaping along the six-foot-high
15 wall that surrounds the Wal-Mart site, a nice little
16 traffic turnaround circle before you get to the gate.
17 If there is an errant driver, they can turn around.
18 Gated access to be used by The Vines only and then a
19 heavily raised landscape island, sort of a very nice
20 entry feature into The Vines community. And there is
21 also a security camera. A security camera is being
22 provided for this gate that will be under The Vines'
23 control.

24 THE HEARING EXAMINER: Okay. Good.

25 MR. PANKEY: This is a perspective of the cross

1 access as you look towards the traffic circle towards
2 the gate. As you can see, ma'am, it's quite
3 impressive.

4 As Neale indicated, we are reducing the proposed
5 square footage from what is allowed, which is 320,000
6 retail, 20,000 office. We're reducing that to 248,000
7 of retail, 228 being allocated for the Wal-Mart and
8 20,000 being allocated for the one out parcel.

9 As part of the work that we did with the public,
10 we did orient the store so the active side of the
11 store, which is the side of the garden center and the
12 TLE - TLE stands for tire lube express - we oriented
13 that away from the residential area, as far away from
14 The Vines as we could make it, and any future
15 multifamily residential community to the east of us,
16 it will be shielded by the wetland conservation area.

17 THE HEARING EXAMINER: Okay.

18 MR. PANKEY: And, again, the building, we moved
19 it as far as possible to the south and to the east,
20 still maintaining a parking lot and, most critically,
21 still maintaining adequate throat depth on the
22 driveway so you have a stacking for cars. We don't
23 want to shift it too far to create a problem on Estero
24 Parkway.

25 THE HEARING EXAMINER: You don't ever anticipate

1 a light at the access point onto Koreshan or the
2 access point onto 41? You don't ever anticipate
3 having a light at either one of those locations?

4 MR. PANKEY: I don't, ma'am, but Andy will
5 probably be able to speak to that better than I can.

6 THE HEARING EXAMINER: All right.

7 MR. PANKEY: Some other things we did agree to,
8 restrictions on the usage of the out parcel. In the
9 original resolution there were quite a few uses
10 allowed on the out parcel. In the addendum, what we
11 call Chip's addendum, the uses are severely restricted
12 to that that the community requested. And in addition
13 we are going to provide an easement in the southwest
14 corner of the out parcel for a sign to be constructed
15 by Florida Gulf Coast University. It would be like a
16 welcome sign, welcome to Florida Gulf Coast
17 University. They have to do the design and
18 permitting, but we're giving them the -- we're
19 allocating the area so they can accomplish that.

20 THE HEARING EXAMINER: Let me do ask one question
21 here.

22 Chip.

23 MR. BLOCK: Yes, ma'am.

24 THE HEARING EXAMINER: Are they going to be able
25 to do that? That's an off-site sign. Is that

1 permittable under county regulations, do you know, off
2 the top of your head?

3 MR. BLOCK: What will end up having to happen if
4 this procedure goes through, let's say the project is
5 approved by the Board of County Commissioners as
6 proposed with this option, they will have to go
7 through an administrative amendment. They will have
8 to add a deviation from the sign regulations in order
9 to achieve it. All we're doing is, if it's approved,
10 acknowledging the fact that at least from the master
11 concept plan showing it, that it is -- that it's been
12 accommodated in there. And I think our condition in
13 here that talks about this says that it has to go
14 through the process. It can be done, it can be
15 achieved, but it would have to be done through, as
16 we're putting it, an administrative amendment process.
17 We're recognizing it, acknowledging it on this plan
18 and then saying it can only -- only has to be done
19 through the administrative process.

20 THE HEARING EXAMINER: Okay. Thank you.

21 MR. PANKEY: We have -- through the assistance of
22 our noise expert we're proposing quite a few screening
23 walls on this project.

24 The refrigeration compressors, they cool -- keep
25 the freezers inside the grocery section of the store

1 cold. We are putting 18-foot-high walls around the
2 refrigeration compressors to screen them and to reduce
3 the noise. We are also putting walls around the two
4 trash compactors. Wal-Mart does not use open
5 dumpsters. They use completely enclosed trash
6 compactors. We're putting walls around those trash
7 compactors.

8 THE HEARING EXAMINER: Those are located on both
9 the north and south sides of the building, east side.

10 MR. PANKEY: Yes, ma'am. There's one for the
11 grocery side and there's one for the general
12 merchandise side.

13 We're also proposing a wall around the pallet
14 storage area. Wal-Mart receives the bulk of its
15 merchandise on pallets. Once they off-load it, they
16 have pallets left over and they stack them up. This
17 will be in a completely enclosed -- not a roof, but
18 have a wall around it with a gate to allow pallet
19 storage out of sight and out of view.

20 We are also providing at the recommendation of
21 our sound expert a 10-foot-high screening wall from
22 this location, which is directly opposite the at-grade
23 door, at-grade meaning you can roll merchandise right
24 up into the store. There's no step. That ten-foot
25 wall is going to wrap from this point all the way

1 around the back of the store and the main purpose for
2 that is to reduce the noise so that it's not any
3 greater than ambient. Again, our noise expert will
4 speak to that issue.

5 And then in addition to that ten-foot wall, we
6 are doing a six-foot-high wall, screening wall, on top
7 of a four-foot berm around the perimeter of the site
8 adjacent to the residential areas.

9 THE HEARING EXAMINER: Okay.

10 MS. MONTGOMERY: Again, that was at the request
11 of the community.

12 MR. PANKEY: All of these are requests of the
13 community that we've obliged. We want to be as least
14 intrusive as possible.

15 We have agreed to eliminate outdoor storage,
16 trailer and pod storage, if you will. There will not
17 be any outdoor sales. For example, sales during the
18 summer from the garden center, they put pallets of
19 mulch, that is not proposed. And we'd also eliminate
20 outdoor display. During the summer months, displaying
21 various tropical foliage along the front of the store,
22 that is not proposed.

23 Again, those were specific requests by the
24 community and they have been eliminated.

25 We have provided an additional ten feet for the

1 landscape buffer along U.S. 41 and Estero Parkway. I
2 believe only 15 feet is required and we're providing
3 25. And within that landscape buffer there's going to
4 be a berm where the landscape is not going to be flat.
5 It's going to be planted on a berm up to the parking
6 lot so we maximize the shielding from the adjacent
7 roadway of the building and the parking lot area.

8 THE HEARING EXAMINER: Okay.

9 MR. PANKEY: We increased the open space
10 significantly. The current existing zoning requires
11 14.7 percent open space and we are providing 29
12 percent open space.

13 Now landscaping. We are very fortunate in that
14 the Estero community through the Estero Development
15 Review Committee has a registered landscape architect
16 that greatly assisted us in beefing up the landscaping
17 for the project.

18 We increased the size of the landscape islands.
19 We added pedestrian corridors, the sidewalks that
20 Neale mentioned, through the linear landscaped island.
21 We added sidewalks along Estero Parkway. And that's a
22 requirement of Lee County. We did not provide one
23 along 41 because FDOT had told us they will not permit
24 it. They are not going to have sidewalks along this
25 portion of 41.

1 We increased the number of trees along Estero
2 Parkway and U.S. 41 and again to provide that
3 shielding affect by 50 percent. We doubled the number
4 of trees required on the site. We went from
5 approximately 450 to 900 trees. We doubled the number
6 of trees on site and we made all the trees a minimum
7 of two inches in size. County code only requires 50
8 percent be greater than two inches. All of our trees
9 are going to be greater than two inches, two inches or
10 greater.

11 Around the building we increased the size, the
12 number and the height variation of the trees to break
13 up the vertical mass of the building. Again, this was
14 a specific recommendation and request of the Estero
15 community.

16 The number of trees along The Vines, as you can
17 tell, Madam Hearing Examiner, it's like a forest in
18 there. We actually transplanted trees. We're
19 proposing to plant trees on both sides of the six-foot
20 screening wall. Code requires 90, we're proposing
21 290, so we're doing 300 percent more than what is
22 required.

23 The dry ponds required by the South Florida Water
24 Management District are not going to be typical grass
25 ponds. They're going to have a special spartina

1 grass. And I believe I'm pronouncing that correctly,
2 but we can have a landscape architect confirm that.
3 We're planting spartina grass in the bottom of the
4 pond and putting perimeter landscaping on the slope of
5 both dry ponds so they're a feature, sort of like a
6 landscaped picnic area, if you will. We're not
7 proposing picnic tables, but it would be a nice
8 aesthetic view.

9 The issue -- the community also had concerns
10 about noise, lighting and security, and we worked with
11 the Estero community at length on those issues and we
12 have an ongoing commitment with the community on many
13 operational matters. Security, trash collection,
14 maintenance of the grounds, maintenance of the
15 landscaping, all of that type of -- all those types of
16 issues we have a commitment with the community on
17 them.

18 We have agreed to limit delivery hours between
19 4:00 a.m. and 9:00 p.m., with a maximum of two local
20 deliveries, such as bread, milk, the people that get
21 up early and need to deliver stuff to the site early.
22 It may not be just bread and milk, but those types of
23 uses. Only two before 6:00 a.m. Those are the
24 smaller trucks, not the large semi trailers. The semi
25 trailers are limited between 7:00 a.m. to 9:00 p.m.

1 THE HEARING EXAMINER: I'm sorry. 7:00 a.m. to
2 9:00 p.m.?

3 MR. P ANKEY: 7:00 a.m. to 9:00 p.m. for semi
4 trailer trucks, but all deliveries from 4:00 a.m. to
5 9:00 p.m.

6 THE HEARING EXAMINER: Okay.

7 MR. PANKEY: Only two deliveries before 6:00 a.m.

8 THE HEARING EXAMINER: Before 6:00. Got those.
9 Okay.

10 MR. PANKEY: And, ma'am, we do have an e-mail
11 from the community - in this case it's Bob Perry,
12 representative of The Vines - in which they agree to
13 the language that we are proposing in our, for lack of
14 a better word, 24-hour letter. And I would like to
15 present that --

16 THE HEARING EXAMINER: Okay.

17 MR. PANKEY: -- into evidence.

18 THE HEARING EXAMINER: That's going to be Exhibit
19 Number 7 for the applicant.

20 MR. PANKEY: To further address the noise,
21 Wal-Mart trucks currently do not have backup alarms,
22 the rapid, very loud, beeping that you hear. Wal-Mart
23 trucks do not have backup alarms. The local vendor
24 trucks, bread truck, Pepsi truck, they may have backup
25 alarms, but we have designed the site so they don't

1 have to back up. They come in off of Estero Parkway,
2 come in. They're at the at-grade door. They deliver
3 their merchandise and they leave. They never have to
4 back up.

5 THE HEARING EXAMINER: They just go straight,
6 come in on Koreshan and go around behind the building
7 and then come out onto 41?

8 MR. PANKEY: You got it.

9 THE HEARING EXAMINER: If they need to go south
10 on 41, then they just have to go up and make a U-turn?

11 MR. PANKEY: They can go up, make a U-turn.

12 THE HEARING EXAMINER: That looks like a right-in
13 only. I'm sorry, a left-in only access.

14 MR. PANKEY: Yes, ma'am, it is.

15 THE HEARING EXAMINER: From 41. Okay.

16 MR. PANKEY: And most vendors - I'm sure you're
17 aware of this, ma'am - they have micro routing. They
18 design their delivery schedules so they don't have to
19 make a lot of U-turns.

20 THE HEARING EXAMINER: Okay.

21 MR. PANKEY: We have agreed to use mechanical
22 equipment in the refrigeration compressors, which is
23 lower in the amount of noise they produce. The fan
24 motors are actually going to be of a type which is
25 variable speed and they're lower in noise.

1 The site lighting has been designed in strict
2 accordance with Lee County requirements. We're not
3 going to have any sky glow, any spillage off site.
4 All the lamps are fully shielded, of the cutoff type.
5 They don't exceed the maximum height allowed by Lee
6 County. And in addition those poles located within
7 200 feet of The Vines community as required by the
8 resolution, the existing resolution, can't be any
9 higher than 18 feet.

10 THE HEARING EXAMINER: Okay.

11 MR. PANKEY: And then for security Wal-Mart --
12 security is paramount to Wal-Mart, and we'll get into
13 that a little bit later, but we've actually located
14 the wet pond and the wall to address security
15 concerns. And in addition there are security
16 cameras - and you can find this at any existing
17 Wal-Mart - there are security cameras around the
18 entire building. They canvass their site with
19 security cameras.

20 Madam Hearing Examiner, do you have any questions
21 on these exhibits?

22 THE HEARING EXAMINER: Not right at the moment.

23 MR. PANKEY: Okay. We are also providing litter
24 receptacles, garbage cans in the parking lot at the
25 request of the community.

1 What I would like to do now is review the changes
2 that we are requesting to the resolution.

3 Madam Hearing Examiner, if you are acceptable to
4 this, I'm going to refer to the staff report written
5 by Jerry Murphy as Jerry's report. This is the
6 original one that was issued prior to his leaving the
7 county. And then the revised one in more of an
8 addendum format that Chip wrote I'm going to refer to
9 as Chip's staff report.

10 THE HEARING EXAMINER: All right. Now, my
11 understanding of what I've got from Chip is strictly a
12 compilation of the conditions. There's no actual
13 analysis or anything else included, Chip; is that
14 correct? Did you do a separate analysis or just sort
15 of compile all the conditions in the administrative
16 amendments and the original approval?

17 MR. BLOCK: The latter. All we did was -- all I
18 have done in paperwork supplied to the Hearing
19 Examiner is to supply a compilation of those
20 conditions that exist today and which were recommended
21 in the staff recommendation that had been previously
22 given to the Hearing Examiner in an attempt to have
23 one document that we can refer to now and into the
24 future so that if the project is approved we'll have
25 one resolution with all the compiled conditions

1 without having to trace down all these other
2 administrative amendments and actions.

3 THE HEARING EXAMINER: Okay.

4 MS. MONTGOMERY: Which really was a lot of work.
5 I thought the initial report was somewhat confusing as
6 to what conditions applied when, so I think what Chip
7 did really helped make it much clearer.

8 THE HEARING EXAMINER: Okay.

9 MR. PANKEY: Ma'am, I would like to make one
10 correction for the record. I did misspeak when I
11 talked about the buffers along U.S. 41 and Estero
12 Parkway. I said I thought the county required 15.
13 The county requires 20 feet. We are providing an
14 additional ten, to make it 30 feet.

15 THE HEARING EXAMINER: Okay.

16 MR. PANKEY: The requested changes to the staff
17 report, and this is included in our 24-hour letter, on
18 Paragraph 2 of Page 2 of Jerry's staff report, we
19 disagree with Jerry's denial recommendation because we
20 are reducing the square footage allowed for the site
21 from 340,000 square feet to 248,000 square feet,
22 almost a 90,000-square-foot reduction. We further
23 understand that the concurrency issue is more of a
24 development order issue and we fully intend to comply
25 with the concurrency requirement at the development

1 order stage.

2 On Item 2, Number 3 of the environmental
3 condition in Jerry's staff report, we requested a
4 statement be added that the environmental condition
5 can be addressed at the development order stage. It's
6 unclear in the existing resolution that they can be
7 addressed at that stage rather than through a formal
8 rezoning hearing. More of a clarification item,
9 ma'am.

10 THE HEARING EXAMINER: Okay.

11 MR. PANKEY: Item 3, Condition Number 11 of
12 Jerry's staff report, and this was also included in
13 the original resolution, we're requesting that the
14 nondisturbing construction activity, for example, an
15 electrician that works inside the building or a
16 plumber that's doing work inside the building, be
17 allowed to work as early as 7:00 a.m. and as late as
18 6:00 p.m. Any disturbing activity outside, earth
19 moving, concrete type trucks, anything that will
20 disturb a neighbor, we agree to maintain the existing
21 restriction in the resolution, which is from 8:00
22 a.m., only allow that construction from 8:00 a.m. to
23 6:00 p.m. We're requesting that the trades be able to
24 do nondisturbing work one hour earlier.

25 THE HEARING EXAMINER: All right. Now, there's,

1 I mean there's a lot, in construction there's a lot of
2 interior work that still gets pretty cotton-picking
3 noisy. You've got these power nail guns and all this
4 stuff. I mean that can get pretty cotton-picking loud
5 outside.

6 MR. PANKEY: Agreed, ma'am.

7 THE HEARING EXAMINER: And some of the saws that
8 they use.

9 MR. PANKEY: Again, the way we have it worded, if
10 it's disturbing, they can't start until eight o'clock.

11 THE HEARING EXAMINER: But that requires, that
12 language specifically requires somebody to call and
13 report you. I mean, you know, that actually requires
14 an action by someone other than -- I'm not real sure I
15 like the term nondisturbing. I think that's -- I mean
16 Andy could have real sensitive ears and a guy
17 tightening a wrench might be disturbing to him,
18 whereas somebody else, you know, could not hear, you
19 know, the pneumatic drills or whatever they have, you
20 know, so I'm not sure that that's a real good
21 descriptive term and I'm not sure how the county could
22 enforce something that subjective, so you may need to
23 think about another terminology for your recommended
24 condition there.

25 MR. PANKEY: Okay. We will, ma'am.

1 THE HEARING EXAMINER: All right.

2 MR. PANKEY: Item Number 4, which is Condition
3 Number 20 of Jerry's staff report, per previous
4 meetings that we've had with FDOT, they have indicated
5 to us that they are not going to permit a sidewalk
6 along U.S. 41. U.S. 41 is apparently not going to
7 have sidewalks in that area.

8 And then there's a request about --

9 THE HEARING EXAMINER: Judson, do you have
10 something in writing on that?

11 MR. PANKEY: No, ma'am. I have notes that I took
12 in a meeting, but I don't have anything from
13 writing -- in writing from DOT.

14 Ma'am, Madam Hearing Examiner, if there's a
15 concern, we would be acceptable to a condition such as
16 unless allowed by DOT, applicant would not be expected
17 to construct a sidewalk within the U.S. 41
18 right-of-way. If DOT allows us to do it, we will be
19 more than happy to do it.

20 THE HEARING EXAMINER: Okay. All right.

21 MR. PANKEY: We just don't want to construct a
22 sidewalk to nowhere.

23 THE HEARING EXAMINER: Let me ask Chip a question
24 here for a second.

25 Chip, if the condition goes in requiring them to

1 do a sidewalk on 41 and FDOT says not on your life, do
2 they have to come back through the public hearing
3 process to remove that sidewalk condition for U.S. 41
4 or can they get that done administratively or will the
5 county just totally ignore it since we don't have the
6 authority to grant accesses or use the right-of-way
7 for U.S. 41? Do you know off the top of your head how
8 that would be handled?

9 MR. BLOCK: Madam Hearing Examiner, first of
10 all - for the record, Chip Block - the applicant is
11 saying it disagrees with Condition Number 20. And
12 when I look at my August 24th memorandum from staff,
13 20 is actually deliveries, so, first of all, we got
14 the wrong number on the condition.

15 THE HEARING EXAMINER: Yeah, I know. I had to go
16 through and do that. It's Number 16 on Page 22.

17 MR. PANKEY: We're referring to Jerry's report.

18 MS. MONTGOMERY: Jerry's report it is 20.

19 MR. BLOCK: I'm trying to stay within one
20 document, but we'll work with that and say then in
21 this case going to that condition, whichever number
22 we're talking about in the documents, if you read it,
23 it says the five-foot sidewalks must be constructed on
24 the interior side of the buffer along U.S. 41. That's
25 on site.

1 THE HEARING EXAMINER: It's on Wal-Mart property?

2 MR. BLOCK: Yes, ma'am.

3 THE HEARING EXAMINER: It's not in the

4 right-of-way, then, of U.S. 41?

5 MR. BLOCK: That is correct if I read that

6 condition correctly. I'm reading it that it's on the

7 inside part of the buffer, which is inside the site.

8 MS. MONTGOMERY: I think I have two concerns.

9 One, the county has a bikeways/sidewalks map
10 about where they're required. This isn't, as I
11 understand, one of those places, so I don't know what
12 the legal basis is. Secondly, it doesn't seem prudent
13 to ask us to do a sidewalk to nowhere; and, three,
14 there's a liability factor with sidewalks. I mean
15 that's where most of the slip and falls come from and
16 people love to sue big companies. We don't want to
17 have an invitation to lawsuits by putting that on our
18 property.

19 So if you want it, we would put it in the
20 right-of-way, but we do not want to have that
21 liability on site.

22 THE HEARING EXAMINER: Let me follow up on this,
23 then.

24 I know you didn't write the staff report so you
25 probably did not come up with this, you didn't craft

1 this condition, but do you know why Jerry was thinking
2 about a sidewalk inside the buffer? I mean we're
3 talking about a sidewalk around their property,
4 essentially. Do you know why he was thinking about
5 this? Do you know where this requirement came from or
6 the basis for it?

7 MR. BLOCK: My interpretation of what has been
8 written in this condition, if you refer to the
9 applicant's master concept plan, which is behind
10 Judson in this case -- we'll just use that one,
11 Judson, and I'll sit here so that I can speak up so
12 that the public can hear me and use my laser
13 pointer -- when you put the sidewalk -- certainly.
14 Thanks, Judson.

15 When you put the sidewalk on the interior portion
16 of the project here along the buffer and along this
17 area in the buffer, you have the opportunity now so
18 that these customers that are parking, say, for
19 example, along Tamiami Trail, U.S. 41, who want to go
20 to this out parcel will not have to walk in the
21 parking lot to get down to the out parcel, nor do you
22 have the situation where in this area along
23 Koreshan -- Estero Parkway area, if you have a
24 customer that's gone into Wal-Mart from the, what
25 would be, I would best term because of the angle of

1 north arrow on this one, the southern part of the
2 Wal-Mart building as you come out close to the Estero
3 Parkway area, you have an instance where if these
4 people are in the Wal-Mart and are parked in this
5 area, they don't have to walk down if they -- and they
6 want to walk down to the out parcel, they don't --
7 they'll have to walk all through the parking lot again
8 where traveling vehicles are at. If you put a
9 sidewalk on the outside edge here, it gives them the
10 opportunity to get out of the traveled areas of the
11 parking lot for safety's sake, and that's what staff
12 was looking at.

13 THE HEARING EXAMINER: All right. So you
14 actually want or staff actually wants the sidewalk to
15 border the parking lot, not run along the roadway
16 landscape buffer, you know, south and then east up
17 Estero Parkway, because that was what I thought we
18 were asking the way this seems to be written, is that
19 it's actually going to follow the landscape buffer
20 that runs south along 41 and then east along Koreshan,
21 which didn't make a whole lot of sense. I had to
22 agree with the applicant's attorney. It didn't make a
23 whole lot of sense. But I see what you're doing now.

24 I'll get to you in a minute, Neale.

25 Okay, I have to think about that one.

1 All right. Now, let me do ask this, then. Are
2 you asking for a sidewalk anywhere else along the
3 exterior of the parking lot anywhere else or just in
4 this one particular corner by the out parcel?

5 MR. BLOCK: Again, reading the condition, it's
6 only in this particular area, which appears to be
7 trying to serve, by the awarding of this condition,
8 appearing to serve customers who then are walking
9 through the parking lot and trying to get to these two
10 areas. They can utilize an off-parking lot sidewalk,
11 whether it be between the buffer and the parking lot,
12 whether it's immediately adjoining the buffer.
13 Somewhere in there it gives them the opportunity to
14 take that walk through there.

15 Now, the sidewalks as required along the road,
16 whether it be U.S. 41 or Estero Parkway, are still
17 required by the land development code. No deviation
18 to my knowledge has been sought for those and they are
19 going to have to comply with that.

20 THE HEARING EXAMINER: So if they come back in
21 and ask for a deviation from U.S. 41 -- I mean if FDOT
22 says ain't no way, Jose, are you going to get a
23 sidewalk on our -- along 41, we're not going to permit
24 it, if they come back in and ask for a deviation, then
25 you don't have any problem with that if the staff can

1 give an administrative deviation on that one?

2 MR. BLOCK: I think Andy is part -- Andy Getch is
3 part of the bikeway.

4 Do you have the opportunity to review for -- I'm
5 sorry. I'm having to ask you a second question here
6 to get it to Andy.

7 Andy, do you have knowledge of how this works in
8 the case of a local development order in the case that
9 maybe the State does not want the sidewalk along that
10 particular roadway and can you answer that question,
11 because I can't?

12 MR. GETCH: I can answer it now if you like.

13 It's a question of maintenance for a sidewalk
14 that's in the right of way. FDOT does not have any
15 regulatory authority beyond their right-of-way, just
16 as Lee County does not have any regulatory authority
17 outside our right-of-way for what somebody goes on --
18 or I should say Lee County DOT doesn't have that
19 regulatory authority on private property, so I think
20 that's where FDOT was coming from. And I have not
21 reviewed the design plans for U.S. 41. I would be
22 very surprised if they did not include pedestrian
23 facilities because that's in FDOT's --

24 THE HEARING EXAMINER: Automatically, okay.

25 MR. GETCH: -- statewide and they may be

1 including that in their project and that may be a
2 reason why at the meeting Judson was at someone said
3 we don't want you building a sidewalk. It may have
4 been because we're going to build one. But that's
5 just speculation on my part at this time.

6 THE HEARING EXAMINER: All right. So, I mean,
7 but if the requirement goes through that they have to
8 provide the sidewalk on 41 and they can't provide it
9 unless -- I mean would the county make them provide it
10 on their property at that point? I mean would they
11 say okay, fine, you've got to back up your buffers and
12 everything and put this sidewalk in?

13 That's what I'm trying to get at is if we make
14 them -- if we require this in the approval, how far is
15 the county going to go to make them provide this
16 sidewalk?

17 MR. GETCH: To answer your question, if the
18 sidewalk were intended to be for -- to provide a
19 facility along U.S. 41 for the public, then it would
20 need to be accepted for maintenance either by the
21 State Department of Transportation or by the county.
22 But the condition that I believe Mr. Block is driving
23 at, an interior sidewalk, that would be maintained by
24 the site just like the sidewalks between the parking
25 aisles that Mr. Pankey described.

1 THE HEARING EXAMINER: Okay. Now I understand.
2 Okay.

3 MR. PANKEY: Madam Hearing Examiner, we have no
4 problem. All of this discussion is fairly new. We
5 didn't have this detailed discussion with Mr. Murphy.
6 There's no problem providing sidewalks to serve
7 customers to reach the out parcel. We would be more
8 than happy to do that. We'd include it in the buffer
9 and make it more of an amenity. We have no problem.

10 The only thing I do request is there is an
11 existing ditch over here with a cross drain, a culvert
12 that goes under 41. I prefer not to extend the
13 sidewalk past the driveway because if somebody walks
14 along there at night, they're going to walk into the
15 ditch.

16 MR. BLOCK: And that option offered by the
17 applicant, not taking it past the driveway entryway
18 onto U.S. 41, we have no objection to that.

19 THE HEARING EXAMINER: From driveway 41 south.
20 Okay. Neale, did you want to add anything else?

21 MS. MONTGOMERY: No. I guess my question is once
22 you get to the out parcel, do you still need it along
23 41?

24 THE HEARING EXAMINER: No, no. I think he's
25 talking about just taking it up and just, you know,

1 flanking the out parcel, not going all the way through
2 41, not going all the way through the out parcel.

3 MR. BLOCK: We are not addressing anything as to
4 how it's addressed on the interior portion of the out
5 parcel because we do not know what the design within
6 that out parcel is. If Wal-Mart's approved, if
7 Wal-Mart goes in there and builds and they put in a
8 sidewalk facility, I would hope that our development
9 review staff in the review of that development order
10 for the out parcel will recognize a sidewalk entryway
11 coming into both locations -- from both locations and
12 will help and ask the developer to design it so that
13 those pedestrians will have a safe trip from that
14 location to the building and facilities on that site.

15 THE HEARING EXAMINER: Okay. All right.

16 MR. PANKEY: Item 5 -- oh, related to Item 4,
17 there was a condition in Jerry's staff report about
18 pedestrian signage meeting architectural harmonious
19 requirements. We request that the pedestrian signage
20 be in accordance with the MUTCD requirement, the
21 Manual on Uniform Traffic Control Devices. That's
22 what the public is used to seeing and in my opinion
23 it's a safer way to guide drivers around pedestrians.

24 THE HEARING EXAMINER: Okay.

25 MR. PANKEY: Item 5, which is Condition Number 22

1 of Jerry's staff report, it's a very detailed listing
2 of delivery times and types, and the way this came
3 about, Madam Hearing Examiner --

4 THE HEARING EXAMINER: That's 20, Chip, in your
5 memo.

6 MR. BLOCK: I understand. I'm following along
7 now in the staff report just to stay consistent.
8 Thank you.

9 THE HEARING EXAMINER: All right. Go ahead.

10 MR. PANKEY: How that came about, Madam Hearing
11 Examiner, is the question was asked from the Estero
12 community what are your typical delivery times and
13 types, and we coordinated with Wal-Mart to say what
14 are you doing at the Colonial and Six Mile Cypress
15 store. They sent us that list. It was by no means a
16 standard by which all stores operate.

17 And what we are requesting is that there not be a
18 limitation on the number of deliveries. For example,
19 during hurricane season if they need two shipments of
20 water, they can send two truckloads of water, you
21 know, more toys during Christmas, that type of thing.

22 We would like to see it change to no delivery
23 between 9:00 p.m. and 4:00 a.m., all semi trailers
24 will occur -- I'm sorry. All local deliveries will be
25 restricted from 4 a.m. to 9:00 p.m. as well as smaller

1 trucks, but only two before 6:00 a.m.

2 THE HEARING EXAMINER: Okay.

3 MR. PANKEY: And the community again supports us
4 in that regard. It's just one that slipped through.

5 We previously spoke about the backup beeps.
6 That's in the same condition. Wal-Mart trucks
7 currently do not use backup alarms. The vendor
8 trucks, Pepsi, bread, dairy, they may, but they don't
9 have to back up. We are requesting that if the Code
10 of Federal Regulations in the future requires all
11 trucks have backup alarms or if Wal-Mart's liability
12 insurance carrier says you will have backup alarms
13 that that condition will be allowed.

14 Item 6, Condition 27-B of Jerry's staff report,
15 what we call the super concurrency requirement, this
16 is a challenging one for us. We would like to be
17 treated like everybody else. We only know of one
18 other instance where the county has placed a super
19 concurrency requirement on a project and --

20 MS. MONTGOMERY: And it wasn't really the county.

21 MR. PANKEY: Right, it wasn't located in the
22 county.

23 MS. MONTGOMERY: It was the City of Bonita.

24 MR. PANKEY: It was in the City of Bonita, but
25 through the permitting arrangement the county placed

1 that requirement and my understanding is that it was
2 not enforced.

3 MS. MONTGOMERY: Right.

4 THE HEARING EXAMINER: Okay.

5 MR. PANKEY: Just to give you a history, Madam
6 Hearing Examiner, very early on in the project - this
7 was back in 2003 - we worked closely with the Estero
8 community representative, SWFTI, the Southwest Florida
9 Transportation Initiative, FDOT and Lee County to find
10 ways to get the widening of U.S. 41 accelerated, get
11 it moved up from July 1st, 2008, which is where it's
12 programmed now, to July 1st, 2006. That's the fastest
13 that FDOT could move it up.

14 But we were told as we got deep into the
15 discussion that, by county staff that they were
16 concerned about the appearance of conflict of
17 interest, that we were going through a rezoning for
18 the Wal-Mart and at the same time we -- Wal-Mart was
19 willing to do its part to get the 41 widening advanced
20 and they were very concerned about the appearance of
21 the conflict of interest, so we significantly toned
22 down our efforts in that regard.

23 Wal-Mart's commitment remains. They want to do
24 their part to see U.S. 41 widening accelerated, but we
25 would appreciate the removal of the super concurrency

1 requirement.

2 Item 7, which is recommendation of denial of
3 Deviation 1 within Jerry's staff report, that goes
4 back to the concrete wheel stops. We would prefer to
5 do the four-foot-wide concrete median in order to
6 minimize the tripping hazard. It is purely a safety
7 issue. Wal-Mart doesn't gain anything from that
8 request. It costs them more money to put in a
9 four-foot concrete median.

10 Item 8, the recommendation of denial of
11 Deviations 2 and 3 of Jerry's staff report, again, we
12 previously mentioned that. That's the 50-foot setback
13 of the ponds. We request that the ponds be allowed
14 where they're shown on the master concept plan,
15 Wal-Mart option, because that's where the community
16 would like to see them. There are no safety hazards
17 introduced by those ponds being closer to the
18 right-of-way easement or property line.

19 And then the only thing we would like to see
20 changed in Chip's staff report, the one with the
21 addendum, which he did an outstanding job on, it was a
22 pleasure working with him, is I think one that
23 everyone overlooked. This is the condition that says
24 that employees or the public cannot install auto
25 parts. As we discussed, there is a TLE out part of

1 the Wal-Mart store, a tire lube express, which
2 includes the changing of tires, the repair of tires,
3 the changing of fluids and fluid filters and the
4 changing of windshield wipers, batteries; no major
5 repair. Customers are not allowed in the TLE to make
6 any repairs.

7 THE HEARING EXAMINER: Okay. Now, you do realize
8 that that condition is also reflected in the original
9 approval --

10 MR. PANKEY: Yes, ma'am.

11 THE HEARING EXAMINER: -- which is Condition 16
12 in Chip's memo, Page 13. It's essentially the same
13 condition --

14 MR. PANKEY: Yes, ma'am.

15 THE HEARING EXAMINER: -- that's followed
16 through. So are you specifically --

17 MS. MONTGOMERY: Changes that we asked for to the
18 resolution so that they could do the TLE as part of
19 the Wal-Mart.

20 THE HEARING EXAMINER: You actually want both of
21 those conditions revised or removed?

22 MS. MONTGOMERY: We don't really need -- the way
23 Chip organized it, we don't need the original one
24 removed because that applies -- it's broken down into
25 the original option and Wal-Mart option, and the

1 Wal-Mart conditions will apply to Wal-Mart, so we just
2 need to fix the ones, the Wal-Mart option.

3 THE HEARING EXAMINER: So then this should stay.

4 MS. MONTGOMERY: Yeah. So that if something
5 happened, Wal-Mart decided not to close and the
6 original owner develops it, that restriction would
7 still apply to them.

8 THE HEARING EXAMINER: I see what you're doing.
9 Okay.

10 MR. PANKEY: Madam Hearing Examiner, we have
11 agreed to put signs within the store at the exit
12 telling customers you can't install auto parts in the
13 parking lot.

14 THE HEARING EXAMINER: Okay.

15 MR. PANKEY: And that completes my presentation.

16 THE HEARING EXAMINER: Okay. Questions of your
17 witness, Neale?

18 MS. MONTGOMERY: Yeah. I just really have one
19 question.

20 EXAMINATION

21 BY MS. MONTGOMERY:

22 Q. Judson, you went through a lot of items that
23 you've done for the community. Are all those items
24 addressed in the recommendations for approval and on the
25 master concept plan so that the community and the Hearing

1 Examiner can be assured that all those things you talked
2 about would be required?

3 A. Yes, ma'am. And in addition they're addressed on
4 the exhibits, which are made a part of the resolution.
5 Yes.

6 THE HEARING EXAMINER: Okay. All right. Staff,
7 questions of this witness?

8 MR. BLOCK: Yes, Madam Hearing Examiner, a couple
9 questions if I may. These are directly related to
10 their letter dated August 26th to you concerning their
11 items and I'll specifically go to their items.

12 EXAMINATION

13 BY MR. BLOCK:

14 Q. First of all, Mr. Pankey, Item Number 7, where
15 you talk about the denial of the deviation for the
16 landscape over -- or the vehicle overhanging the landscape
17 area by a maximum of two feet, you're providing linear
18 concrete islands or curbed landscape islands versus wheel
19 stops; is that correct?

20 A. Yes, sir.

21 Q. Okay. So your deviation, using the language of
22 the land development code, and I'll paraphrase the
23 statement, it says the front of a vehicle may overhang a
24 landscaped area by a maximum of two feet, provided that
25 area is protected by wheel stops or curbing. So the first

1 part of it then is, in the areas where you have
2 landscaping and the curbing provided, you don't need that
3 as part of the deviation.

4 A. Correct.

5 Q. The only thing that you're asking for is where
6 you have the concrete island --

7 A. Correct.

8 Q. -- with no landscaping over it?

9 A. Yes, sir. And those islands are four feet wide
10 to still allow for the two-foot overhang.

11 Q. Okay. And to Item Number 8, this is the denial
12 of the deviations for Deviations 2 and 3 regarding the
13 excavation setback from, let's see, I believe you're
14 talking about the collector road and the private property
15 line.

16 Let me ask you this question. When you say that
17 you're asking that deviation, and I've heard your
18 description of these areas, are these areas going to
19 actually be bodies of water by definition or an excavation
20 by definition in our code or are these going to be dry
21 retention areas?

22 A. I can answer that question. Along the east
23 property limit, the access road to The Vines, that will be
24 an excavation because it is a lake. We will be digging
25 down below existing grade. For the dry pond along Estero

1 Parkway, that would not be an excavation. It will be
2 filling a berm to create the pond.

3 Q. So your deviation request then is in reality only
4 for the roadway entering into The Vines?

5 A. Yes, sir. We only requested the one along Estero
6 Parkway out of an abundance of caution.

7 Q. Okay. Because of the way the land development
8 code is written, that deviation would now only be
9 effective for that lake water body that adjoins the
10 entryway into The Vines and its separation there.

11 A. Yes, sir. And I believe that one is only -- oh,
12 I'm sorry. Let me back up.

13 We also have excavation in this wet pond. We
14 have two ponds in which there's excavation and it's closer
15 than 50 feet.

16 Q. Has the applicant provided in that case in these
17 two instances where the two lakes are and their
18 relationship to the roadway systems there, what have you
19 offered in your deviation request toward the protection of
20 the public health, safety and welfare for wayward
21 vehicles?

22 A. For wayward vehicles, the existing clear zone on
23 Estero Parkway is met. And if you consider the clear zone
24 encroaching onto the Wal-Mart property, which typically
25 you don't do, you have no control over what happens on

1 private property as far as frangibility of any
2 improvements. Madam Hearing Examiner, clear zone means
3 that you can't have anything over six inches which would
4 impede or strike a vehicle. And we have no improvements
5 located within the clear zone of the right-of-way for
6 Estero Parkway, and that is a rural section. There is no
7 curb along the north side of Estero Parkway, where the
8 cross access road, which is a curbed facility, the clear
9 zone is four feet from the curb and it is met. There is
10 no impedance or nonfrangible item included within that
11 four feet.

12 MS. MONTGOMERY: Judson, how about for the --
13 I think what maybe Chip is worried about is he's
14 worried about the guy who falls asleep on the way home
15 and drives into the pond. So with all that
16 landscaping, how readily possible is it for someone to
17 drive off the road into the lake?

18 MR. PANKEY: Let me explain that.

19 First, to this road, if they were on this section
20 and they fell asleep and they ran off the road they're
21 going to hit the curb first. Then they're going to
22 hit landscaping, then they're going to hit the
23 six-foot screening wall, so it would be very difficult
24 for them to get into this wet pond.

25 In this location they are going to hit the curb

1 and they're going to hit a chain link fence before
2 they could enter into the wet detention pond.

3 Along Estero Parkway, they would go down into the
4 existing swale on Estero Parkway, have to go back up
5 about eight vertical feet on a slope, and that slope
6 would extend onto the Wal-Mart property, hitting trees
7 all the while, hit a six-foot chain link fence before
8 they could get into the lake.

9 So the slope, the landscaping and the fence all
10 provide impedance for wayward vehicles.

11 THE HEARING EXAMINER: What's the depth on those
12 two lakes? Do you know off the top of your head,
13 Judson?

14 MR. PANKEY: Twelve feet from the water level.

15 THE HEARING EXAMINER: Okay.

16 MR. PANKEY: And that's a requirement of the
17 water management district, ma'am.

18 THE HEARING EXAMINER: Okay.

19 MR. BLOCK: Thank you. No other questions.

20 THE HEARING EXAMINER: Andy, questions of this
21 witness?

22 MR. GETCH: No, ma'am.

23 MR. PANKEY: If I may add one item. This is a
24 very routine request in Lee County. You consistently
25 see wet ponds located closer than 50 feet.

1 THE HEARING EXAMINER: Yeah.

2 County Attorney, questions of this witness?

3 MS. HENRY: No, thank you.

4 THE HEARING EXAMINER: I don't think I have any.
5 I think I have asked you as you went through the
6 questions that I had.

7 MR. PANKEY: Thank you.

8 THE HEARING EXAMINER: Thank you.

9 All right. Neale, do you have any other
10 witnesses?

11 MS. MONTGOMERY: Yes, ma'am. Bernard Kinney.

12 THE HEARING EXAMINER: Okay.

13 MS. MONTGOMERY: Mr. Kinney is an acoustics
14 expert. He has not testified here either. We would
15 ask that he be accepted as an expert.

16 THE HEARING EXAMINER: Spell his last name.

17 K-I-N-N-E-Y.

18 Thereupon,

19 BERNARD KINNEY, JR.,

20 a witness, produced by the Applicant, having been
21 previously duly sworn, was examined and testified as
22 follows:

23 MR. KINNEY: Good morning.

24 THE HEARING EXAMINER: State your name, please,
25 for the record.

1 MR. KINNEY: Bernard Kinney, Jr., Bernard Kinney
2 Associates.

3 THE HEARING EXAMINER: Okay. And you are being
4 offered by the applicant as an expert in acoustical
5 engineering or noise abatement. Just for the record
6 go through a quick synopsis of your education and
7 experience and similar types of projects that you
8 might have been involved with.

9 MR. KINNEY: I have 13 years of experience in the
10 field of environmental acoustics, a Bachelor of
11 Science degree from Florida Institute of Technology in
12 oceanographic technology. I'm a full member of the
13 Institute of Noise Control Engineering. I'm a member
14 appointed to the State of Florida Department of
15 Transportation noise task team and I have conducted
16 with specifically Wal-Mart probably, this is probably
17 my sixth big box Super Center that I have analyzed and
18 I have done approximately four smaller projects, which
19 I call postconstruction, where the store was built and
20 noise became a problem after the fact. So this is
21 probably number ten for Wal-Mart.

22 In my 13 years of experience I have at least five
23 years specifically related to site development
24 projects where an applicant would want to put some
25 type of, potentially some type of structure that would

1 possibly generate noise to the surrounding community
2 and I have been able to provide abatement measures to
3 allow them to construct their project within
4 compliance to the local jurisdiction noise ordinance.

5 And DOT, I have done numerous state highway
6 transportation projects for the Florida Department of
7 Transportation.

8 THE HEARING EXAMINER: Okay. Any objections to
9 Mr. Kinney being accepted as an expert in acoustical
10 engineering?

11 MR. BLOCK: I don't think we have any objections.
12 No, ma'am.

13 THE HEARING EXAMINER: County Attorney?

14 MS. HENRY: No, ma'am.

15 THE HEARING EXAMINER: All right. Accepted.

16 MR. KINNEY: I guess I would like to just
17 basically touch on our sound control plan for the
18 proposed Wal-Mart Super Center. I know Judson had
19 spoke briefly about this earlier. If I make an error
20 where the walls are, I'll let him correct me.

21 Basically we went to the original site and we
22 conducted a series of field noise measurements over a
23 multiple day period during daytime and nighttime to
24 ascertain what the existing ambient noise levels were
25 so we could determine what our potential noise levels

1 would be to determine if we would have an impact, and
2 if we did, we provided the appropriate noise abatement
3 measures to not only meet the criteria contained
4 within the Lee County noise ordinance, but to further
5 reduce the noise levels so they would ultimately be
6 similar in character and nature to the surrounding
7 ambient noise levels within the community. And there
8 are four specific sound control plans I would like to
9 talk about.

10 The first one addresses the back side of the
11 facility where we have the truck turning circle, and
12 that will be a ten-foot-high precast wall. It's
13 probably going to start approximately somewhere over
14 in here. It's going to travel along the whole back
15 side of the truck turning circle and it will come
16 around, I guess almost to the Hill Phoenix chillers
17 and it is going to stop. And the purpose of that wall
18 is to shield local vendor delivery trucks to the
19 closest residences, which will be 340 feet to the east
20 and, most importantly, to shield any type of
21 short-term noise impact from the Wal-Mart 18-wheeler
22 trucks that are going to -- they're going to come into
23 this turning circle, make a turn and go into the
24 loading bay. We'll talk about that mitigation measure
25 next.

1 So that wall in our field analysis we have done
2 at similar comparative Wal-Mart super centers, we were
3 able to achieve the local noise ordinance for Lee
4 County at distances of 60 feet. We have 340 feet, so
5 we're quite confident that once you reach the 340 foot
6 mark we're going to be probably not even audible at
7 that distance. And that basically serves just for the
8 trucks outside of these shielded loading bays.

9 Now, the second sound control plan, Sound Control
10 Plan B, addresses what are these trucks doing when
11 they pull into these loading bays. There's one for
12 the merchandise and one for the groceries. That's a
13 16-foot-high precast wall. What that allows us to do
14 is break line of sight of the top of the trucks, the
15 stacks, the exhaust and the noise from the engines.

16 Now, based on my experience of Wal-Mart in the
17 past year, when those trucks come in, 99 percent of
18 the time they turn the engines off. I had to actually
19 go out and tell them to turn them on so I could get
20 measurements.

21 We were concerned with refrigerated trucks
22 because they're about seven decibels louder than
23 merchandise trucks because of the air-conditioning
24 units. That wall provided a substantial noise
25 reduction which allowed us to be well within

1 compliance of Lee County noise ordinance to the point
2 where we didn't need to claim the ten decibel increase
3 for what we call a short-term impact, a turning circle
4 impact, an air brake release, if they drop a flap on
5 the truck or some type of short-term impact. We
6 didn't even need to claim the additional ten that we
7 were allowed to have. So both of these walls work
8 together. I mean this wall, ultimately the
9 ten-foot-high wall will also provide further
10 mitigation, so you have a dual barrier system back
11 there and again the closest home 340 feet away.

12 Sound Control Plan C, and I'm going to start to
13 move to The Vines community next. We've had a lot of
14 meetings with them and we didn't want to leave them
15 out either.

16 We have calculated distance of approximately 665
17 feet from the closest loading bay to The Vines
18 community. Based on measurements in the field at 300
19 feet from an unshielded 18-wheeler refrigerated
20 trailer truck running, I was back down to
21 approximately, I think close to 53 decibels. It was a
22 very low number. So at 665 feet I anticipate no noise
23 impact at all.

24 However, we wrapped this wall around, the
25 ten-foot-high wall, we have continued it in that

1 fashion to just -- as an additional safety measure for
2 The Vines community and not only eliminate any
3 potential noise from that activity, but also to
4 provide a shielding effect.

5 That wall will also catch the trash compactor.
6 We have an additional wall for that, too. We're
7 looking at -- we originally proposed ten-foot-high
8 precast walls around the trash compactors. They're a
9 sealed unit, like Judson said. They load the material
10 from the inside of the store and basically it's just
11 a, like a hum noise when it runs. At 665 feet you
12 couldn't hear it. I have a hard time hearing it at a
13 hundred feet.

14 Our final sound control plan and one of the, one
15 of the biggest concerns I had was the Hill Phoenix
16 chillers, the big refrigeration units that provides
17 the coolant for the frozen foods. We're going to have
18 an 18-foot-high precast wall around those chillers.
19 And we recognize the fact that you're going to get
20 some diffraction across the top of the wall. We're
21 going to go ahead and install low-speed fans and
22 equipment which will, one, reduce any potential tonal
23 quality so that there wouldn't be an adverse tone from
24 that, which would, if there was, we'd have to be five
25 decibels lower for the code. But we tested

1 measurements with medium-speed fans. There's no tonal
2 qualities. I believe based upon staff's report we're
3 going to further go to a low speed fan, the lowest
4 possible that Hill Phoenix offers. At a distance of
5 278 feet, given that situation, we anticipate a
6 resultant noise level of probably 49 decibels. That
7 would be within Wal-Mart's property line. Once you
8 move back to The Vines -- I should have said the
9 closest homes to The Vines are 340 and 350 feet, are
10 those two closest homes.

11 So for The Vines community we basically have the
12 ten-foot-high wall shielding all truck activity. The
13 vendor trucks, like Judson said, will pull in here.
14 I've measured noise from the vendor trucks in Coral
15 Springs. They pull in, there's no backup alarms, they
16 turn their trucks off. Again, I had to go back out
17 and ask them to turn them on to try to get some
18 measurements on what type of noise they would create.

19 So for The Vines community, the vendor trucks
20 come in, they turn their engines off, they usually
21 have little hand trucks or dollies that they use to
22 take their bread and milk. It's not a big operation.
23 And I have never witnessed backup alarms from them.
24 And, like Judson said, Wal-Mart trucks, their
25 corporate trucks, don't have backup alarms. The only

1 backup alarms I've witnessed is like an 18-wheeler
2 Coca-Cola truck or a contract vendor truck, 18
3 wheeler, could have that. And, again, once he's
4 behind that 16-foot-high wall, you're not going to,
5 probably not going to be able to get a potential
6 impact, and then the homes are 340 feet away.

7 So back to The Vines, the ten-foot-high wall is
8 going to wrap around here to provide all shielding
9 from the truck activity along the back side of the
10 store and the north side of the store. Ten-foot-high
11 wall around the compactors will totally shield the
12 compactor and the wall around the Hill Phoenix
13 chiller -- that's our only constant noise source out
14 there, would be the chiller.

15 A lot of the trucks are what I call short-term in
16 the turning circle, short-term impacts. Over time
17 it's negligible, but still you have to consider what
18 it does during that short time period. And given
19 these four specific noise abatement measures, which we
20 have implemented on numerous Wal-Mart super centers of
21 this nature, we're very confident that, one, we'll
22 have no problem at all meeting the Lee County noise
23 ordinance; and, number two, we will not adversely
24 impact the existing ambient noise levels for the
25 surrounding communities.

1 I guess that's all I have. If there's any
2 questions --

3 THE HEARING EXAMINER: Questions of your witness?

4 EXAMINATION

5 BY MS. MONTGOMERY:

6 Q. Did you prepare a report when you did your
7 preliminary analysis of this site?

8 A. Yeah. That report is a preliminary analysis of
9 the site.

10 THE HEARING EXAMINER: Holy moly.

11 MR. KINNEY: There's a lot of data in the back.
12 It's a nine-page report. A lot of it's data. The
13 report itself is eight or nine pages.

14 THE HEARING EXAMINER: I can do eight or nine
15 pages.

16 MR. KINNEY: It's data, just backup data if
17 someone wants to go back and look. I always provide
18 the data so people can see that we went out there and
19 took measurements.

20 BY MS. MONTGOMERY:

21 Q. Let's make it clear. The wall for the compactor
22 is ten feet and the wall for the compressor is 18 feet, is
23 that correct?

24 A. The original sound control planned wall for the
25 compactor, ten feet was sufficient.

1 Q. Okay. I just wanted to make sure I was clear on
2 what you said.

3 A. Right. Now, staff's report, for some reason they
4 have the 18 foot. I don't I don't think --

5 Q. Well, actually, I think that's probably my fault
6 because I'm pretty sure I wrote that draft condition, so
7 I'm the one that messed that up.

8 A. Ten is more than sufficient. I mean I have never
9 imagined an 18-foot-high wall around a sealed compactor
10 unit.

11 Q. No, I think this is just me. So I would ask the
12 Hearing Examiner if you could on Chip's report, 17-A, that
13 surrounding every trash compactor is a ten-foot-high
14 masonry or preconcrete cast --

15 A. Masonry precast wall.

16 Q. Yeah. And 18 feet around the compressor.

17 THE HEARING EXAMINER: Okay, so this is ten feet.

18 MR. KINNEY: Yeah. The compressors will require
19 the 18. My sound control plan reflects that.

20 MR. BLOCK: Eighteen to what again, ma'am?

21 THE HEARING EXAMINER: 17-A should be ten feet.

22 MR. KINNEY: Just for the compactor.

23 THE HEARING EXAMINER: Yeah, for the compactor
24 and compressor.

25 MR. PANKEY: And 18 feet for the compressors.

1 THE HEARING EXAMINER: Oh, the compressor is the
2 chiller?

3 MR. KINNEY: The chiller.

4 THE HEARING EXAMINER: Okay. So we got ten foot
5 for the trash compactor and 18 feet for the
6 compressor. Okay. I should know that. That's air
7 conditioning.

8 MR. KINNEY: Yeah. You're going to have to have
9 the 18 for that.

10 THE HEARING EXAMINER: Okay, got it. Got it.

11 MS. MONTGOMERY: I don't have any other
12 questions.

13 MR. KINNEY: There's also an attached sound
14 control plan for everyone to look at. It's
15 independent of the report. It addresses short-term
16 specific impacts, 18-wheeler trailer trucks and
17 turning circles and loading bays, Hill Phoenix chiller
18 analyses. It's a more detailed -- the report gives
19 just the basic preliminary analysis of what we found
20 at the site and what we found at a normal --

21 MS. MONTGOMERY: They're actually in those
22 reports.

23 MR. KINNEY: It's attached in the front.

24 MR. PANKEY: Right there.

25 MR. KINNEY: The one that's dated February 23rd,

1 2004.

2 THE HEARING EXAMINER: Oh, I see. Okay.

3 MR. KINNEY: That's your separate sound control
4 plan.

5 THE HEARING EXAMINER: I'll do a two-part on the
6 noise study, then. Two-part study in sound control.

7 Okay. Questions of this witness by staff?

8 MR. BLOCK: No questions.

9 THE HEARING EXAMINER: Andy, no questions?

10 MR. GETCH: No.

11 THE HEARING EXAMINER: County Attorney?

12 MS. HENRY: No questions.

13 THE HEARING EXAMINER: Okay. Actually, I don't
14 have any questions either, so thank you very much.

15 MR. KINNEY: Thanks.

16 THE HEARING EXAMINER: Any other witnesses?

17 MS. MONTGOMERY: Yes, ma'am.

18 THE HEARING EXAMINER: Should I have asked?

19 MS. MONTGOMERY: I think we're being very
20 efficient.

21 THE HEARING EXAMINER: How many more witnesses do
22 you actually have?

23 MS. MONTGOMERY: Two.

24 THE HEARING EXAMINER: Two more? Okay. The next
25 witness is?

1 MS. MONTGOMERY: Karl Lotspeich. He said he was
2 going to be five minutes or less.

3 MR. LOTSPEICH: I'll talk fast.

4 THE HEARING EXAMINER: No, no, don't talk fast.

5 MR. LOTSPEICH: For her sake I won't talk fast.

6 THE HEARING EXAMINER: Don't talk fast. The
7 court reporter will kill us all.

8 Spell your last name.

9 MS. MONTGOMERY: He'll give his qualifications.
10 He's the environmental expert.

11 THE HEARING EXAMINER: Oh, okay. And after we
12 finish with your two witnesses, then we'll take a
13 quick break so everybody can stand up and find out if
14 they still have feet, see if they've got any
15 circulation.

16 Thereupon,

17 KARL LOTSPEICH,
18 a witness, produced by the Applicant, having been
19 previously duly sworn, was examined and testified as
20 follows:

21 THE HEARING EXAMINER: State your name, please,
22 for the record.

23 MR. LOTSPEICH: Good morning. My name is Karl
24 Lotspeich. I'm with Lotspeich and Associates.

25 THE HEARING EXAMINER: Okay. And you are an

1 environmental consultant?

2 MR. LOTSPEICH: Correct.

3 THE HEARING EXAMINER: I don't think I have seen
4 you before.

5 Have I seen him before?

6 MS. MONTGOMERY: No.

7 THE HEARING EXAMINER: Karl, do me a favor,
8 please.

9 Are you going to offer him as an expert?

10 MS. MONTGOMERY: Yes, ma'am.

11 THE HEARING EXAMINER: All right. Go through
12 some of your training and background and any similar
13 type projects that you have worked on.

14 MR. LOTSPEICH: Yes, ma'am. I've got a
15 Bachelor's of Science from the University of Florida
16 and I have been a full-time environmental consultant
17 for 16 years, doing a wide range of ecological studies
18 for both private and public type projects, roads,
19 private developments, worked on a number of Wal-Marts
20 throughout the state. So I have, I've got a broad
21 diversity of experience of different habitat types,
22 different types of endangered species and compliance
23 with local and state and federal development codes.

24 THE HEARING EXAMINER: Okay. Any -- have you
25 done any projects here in Lee County?

1 MR. LOTSPEICH: Yes, we have.

2 THE HEARING EXAMINER: Okay. Which ones
3 specifically? I know you said Wal-Marts. Are you --
4 did you do any of the Wal-Marts here in Lee County?

5 MR. LOTSPEICH: I would have to defer that
6 question. I personally have not done any but I know
7 my company has. My business partner handles most of
8 the Wal-Marts in this area.

9 THE HEARING EXAMINER: Okay. Have you done --

10 MR. LOTSPEICH: We do have experience in Lee
11 County, in this part of the state.

12 THE HEARING EXAMINER: So you're familiar with
13 the Lee County regulations and stuff --

14 MR. LOTSPEICH: Yes, we are.

15 THE HEARING EXAMINER: -- essentially?

16 Okay. Any objections to this witness being
17 accepted as an expert in environmental planning?

18 MR. BLOCK: I don't have my expert here who knows
19 what's going on. That's Miss Kim Trebatoski. We
20 didn't expect that there would be any environmental
21 issues today, so we didn't ask Kim to stay.

22 MS. MONTGOMERY: Chip, I don't think you need to
23 worry. I don't think there's any issues. My concern
24 is that, my concern is that there's always at least
25 one Commissioner who tends to ask those kind of

1 questions, so we need to make it clear for the record
2 that there aren't any issues so that they hopefully
3 don't ask those questions.

4 MR. BLOCK: That's fine.

5 Without Kim slapping me around, I'll go ahead and
6 accept him at this instance for the purposes of his
7 explaining how the project is working, you know, and
8 how landscaping has been done on the project and
9 things like that.

10 THE HEARING EXAMINER: Okay. Environmental
11 aspects of the property?

12 MR. BLOCK: Yeah. The only thing is I see a
13 Bachelor of Science with agricultural and normally you
14 see biological sciences or something else and I'm a
15 little bit concerned without my expert here explaining
16 that she feels more comfortable.

17 THE HEARING EXAMINER: Is she in the building?

18 MR. BLOCK: I don't think she is. If you want me
19 to check real quick --

20 THE HEARING EXAMINER: We can do a five-minute
21 break now.

22 MR. LOTSPEICH: Could I offer a clarification of
23 that? They just didn't have an environmental program.
24 Most of the universities at the time did not have
25 strictly environmental. I deviated drastically from

1 the program. Instead of taking turf grass management
2 I was taking soils and I have taken numerous other
3 classes, courses, study materials in native
4 communities of Florida, species identification. I'm a
5 certified wetland delineator. I'm a member of the
6 National Association of Environmental Professionals,
7 so --

8 THE HEARING EXAMINER: Okay.

9 MR. BLOCK: If you would like me to ask real
10 quickly to see if Kim or Rick are over there, if they
11 can possibly take a look at this and see if they can
12 react real quick.

13 THE HEARING EXAMINER: Let's go ahead and take a
14 five-minute break right now, folks, and please be back
15 here by a quarter of 11:00. Water only in this room,
16 please.

17 (Whereupon, the proceedings were recessed.)

18 THE HEARING EXAMINER: Okay. What's going to
19 happen here, because I know all of you do not want to
20 sit here all day, and as soon as the applicant
21 finishes their presentation, if I have anybody that
22 would like to speak, I will let you speak at that
23 time. Then we will take up staff's presentation.

24 The staff and the applicant and I have discussed
25 this and we really think that we will be out of here

1 by two or three o'clock at the absolute latest today,
2 okay. So if you don't, if you don't speak, if you can
3 wait and speak after staff's presentation, I would
4 appreciate it, but if you need to get out of here
5 before 12:30 or so, you know, I'll let you speak after
6 the applicant's presentation.

7 All right. Do I have anybody with any questions
8 on the process of what we're going to do?

9 Yes, sir.

10 UNIDENTIFIED SPEAKER: Will there be a lunch
11 break?

12 THE HEARING EXAMINER: If it goes to three
13 o'clock, you can guarantee there's going to be a lunch
14 break.

15 UNIDENTIFIED SPEAKER: There's not going to be
16 one before --

17 THE HEARING EXAMINER: No, there will be one. If
18 it looks like it's going to go that much longer, we'll
19 probably stop somewhere between 1:00 and 1:30 if it's
20 going to go that much longer. They're assuring me
21 that staff has a ten-minute presentation or whatnot, a
22 very short presentation, so we may be out of here
23 before we have to stop for a lunch break. But, yes,
24 by 1:30 we will be stopping for a lunch break. I
25 don't work well on no food.

1 All right. So we are ready now for the
2 environmental?

3 MR. BLOCK: Yes, ma'am.

4 In answer to the question of whether or not staff
5 will accept Mr. Lotspeich as an expert, I have talked
6 with the director of the environmental sciences
7 division, Mr. Rick Joyce. He advises me that Mr.
8 Lotspeich is an acceptable witness and is one that we
9 can accept as an expert witness in the realm that he
10 is being accepted as today.

11 THE HEARING EXAMINER: Okay. All right. I will
12 accept Mr. Lotspeich then as an environmental
13 consultant, as an expert in the environmental matters
14 relating to this particular site.

15 MR. LOTSPEICH: Thank you. I'll be brief. I
16 just want to give a brief overview and then address
17 one of the items that Judson went over earlier as far
18 as what we would like modified slightly.

19 Real quick, the site is approximately 75 acres,
20 which we studied. It's largely undeveloped. You can
21 tell by the aerial it's mostly -- it's got trees and
22 only one portion of it's been cleared for pasture. If
23 anybody has been there, it's heavily infested with
24 melaleuca over the entire site. We had originally
25 identified just under nine acres of wetlands,

1 primarily cypress, but, again, heavily dominated with
2 melaleuca.

3 The water management district elected to exert
4 jurisdiction over about 33 more acres of wetlands, but
5 subsequently they have issued us a permit to impact
6 all but -- they have give us a permit to impact 36
7 acres of wetlands. That permit was issued in June.
8 So although they exerted jurisdiction, they recognized
9 the extremely low value of those wetlands, and so we
10 already have our water management district permit for
11 this project.

12 The Army Corps of Engineers, we've also received
13 a letter from them exerting their SWANK evaluation,
14 that they do not have jurisdiction over this site, and
15 no federal permits were required for the wetlands
16 impacts on this project.

17 Again, as I said, we've got our permits to impact
18 36 some odd acres of wetlands. We've developed a
19 detailed mitigation plan to offset those impacts. It
20 includes about eight and a half acres of on-site
21 wetlands restoration, another 3.7 acres of upland
22 restoration. And, again, that's going to detail an
23 extensive melaleuca removal. We've got several other
24 species we're going to be removing. And then planting
25 back over 4,000 trees, 500 shrubs and 6,000 herbaceous

1 species. So we're undertaking a fairly extensive
2 on-site wetlands restoration and habitat restoration
3 in general. In addition we're also buying 5.8 credits
4 from the Big Cypress mitigation bank.

5 So we've gone through a pretty good effort to
6 offset any environmental impacts.

7 Regarding endangered species, we have gone
8 through the development service division's
9 requirements for endangered species surveys and
10 reviews and identified only two species as having
11 potential, gopher tortoise and Big Cypress fox
12 squirrel. We have already completed quantitative
13 population surveys for those following Lee County's
14 requirements, which are fairly extensive, and came
15 back with no presence of either species. We did have
16 some abandoned and somewhat inactive gopher tortoise
17 burrows, but most of those appeared to be occupied by
18 armadillo.

19 We do have part of the upland restoration site,
20 if you can look on the exhibit in this quadrant down
21 here is to be -- if we do in the future when we go to
22 clear, if we do find any gopher tortoise, we will
23 secure an on-site relocation permit to move any
24 animals up to that location.

25 Other than that, again, we're in general

1 agreement and have already complied with all of
2 staff's conditions regarding environmental issues.

3 As far as the amount of indigenous vegetation
4 retained on site, the required wildlife surveys,
5 again, we would like to recognize that those have
6 already been submitted to staff for their review. And
7 the only issue that we would like to address is that
8 Item 2 on the letter to staff, or to I guess you is
9 that it calls for required compliance with the
10 environmental conditions prior to the development
11 review process and we would like that modified to say
12 as part of the development review process because
13 sometimes that is an ongoing process and we recognize
14 we can't turn dirt until we've got everybody and we
15 have satisfied those conditions and we would like to
16 allow that to go through the development review
17 process.

18 THE HEARING EXAMINER: Okay.

19 MR. LOTSPEICH: That's all I have.

20 THE HEARING EXAMINER: Questions of your witness?

21 MS. MONTGOMERY: No.

22 THE HEARING EXAMINER: Questions by the county?

23 MR. BLOCK: No questions.

24 THE HEARING EXAMINER: County Attorney,
25 questions?

1 MS. HENRY: No questions.

2 THE HEARING EXAMINER: No questions by the County
3 Attorney.

4 All right. Let me do ask this, Karl.

5 Now, the whole content of your presentation
6 doesn't deal just with the Wal-Mart parcel. It
7 actually deals with the entire acreage, the entire
8 site, because I noticed that the wetland that you were
9 pointing out and the -- an upland area, those are
10 actually in the Tract 5 or whatnot, that residential
11 area that's actually sort of east of the Wal-Mart
12 parcel?

13 MR. LOTSPEICH: Uh-huh.

14 THE HEARING EXAMINER: So your comments were not
15 actually just addressing the Wal-Mart option, it was
16 actually addressing what's on the whole site?

17 MR. LOTSPEICH: Yes, that is correct. We
18 addressed that plus the adjacent multifamily. That's
19 what we secured our permits on.

20 THE HEARING EXAMINER: I just wanted to make sure
21 that that was clear because when the Board reads the
22 transcript on this, you know, I mean they won't know.
23 And as Neale pointed out, we do have a Commissioner
24 that does get, you know, very involved in
25 environmental matters.

1 MR. LOTSPEICH: Thanks for the clarification.

2 THE HEARING EXAMINER: All right. That's the
3 only question that I had then. Thank you.

4 MR. LOTSPEICH: Thank you.

5 THE HEARING EXAMINER: And applicant's last
6 witness is?

7 MS. MONTGOMERY: Mr. Ted Treesh, who has
8 testified here before in transportation planning and
9 we would ask that he be accepted as an expert on this
10 occasion.

11 THE HEARING EXAMINER: Any objection from staff?

12 MR. GETCH: No, ma'am.

13 THE HEARING EXAMINER: County Attorney?

14 MS. HENRY: No.

15 THE HEARING EXAMINER: Accepted.

16 Thereupon,

17 TED TREESH,
18 a witness, produced by the Applicant, having been
19 previously duly sworn, was examined and testified as
20 follows:

21 MR. TREESH: Good morning. For the record, Ted
22 Treesh with Metro Transportation Group.

23 We conducted the transportation analysis for this
24 proposed amendment. I have been involved with this
25 project since the original zoning back in early 2000,

1 so I have quite a bit of history with the project.

2 The proposed amendment, as was discussed
3 previously, is actually reducing the floor area
4 permitted in the commercial parcel fronting on U.S.
5 41, so our TIS was based on the Wal-Mart option of the
6 proposed reduction.

7 I would just like to pass out --

8 THE HEARING EXAMINER: Not here. Don't pass out
9 here.

10 MR. TREESH: No, I don't want to pass out.

11 THE HEARING EXAMINER: The way you stopped, I
12 just wondered.

13 MS. MONTGOMERY: You're really quick today.

14 THE HEARING EXAMINER: Hurricanes do that to me,
15 you know. They sort of energize me.

16 MR. TREESH: What I just passed out, this is two
17 tables just summarizing the trip generation
18 comparisons from what's currently approved, which is
19 shown on the top table, on MPD Tracts 1 through 4,
20 which includes 320,000 square feet of retail
21 commercial area and 20,000 square feet of office. And
22 then what we're requesting with this amendment, again
23 removing Tracts 2 and 4, so now it's just MPD 1 and 3,
24 which would include 228,000 square feet of a Wal-Mart
25 store and 20,000 square feet of retail. So you can

1 see the p.m. peak hour trips are reduced with this
2 amendment. Now, the daily trips do increase slightly,
3 but mainly that's due to Wal-Mart is a 24-hour
4 operation, so whereas the retail out of ITE is
5 typically not a 24-hour operation. But those trips
6 are outside the peak hour and all our analysis is done
7 typically during the peak hour.

8 So what I would like really to focus my comments
9 on is the conditions in the first staff report and
10 then Mr. Block's additional memorandum regarding the
11 concurrency, the super concurrency condition.

12 THE HEARING EXAMINER: Okay.

13 MR. TREESH: Based on again, as Judson put it so
14 eloquently, we just want to be treated like everyone
15 else. The Florida Administrative Code, Rule 9-J, and
16 the Florida Statutes in Chapter 163, as well as in the
17 Lee Plan, Policy 22.3.2, both allow for projects that
18 are funded within an adopted work program within three
19 years to be considered. Every development order
20 application that I have done since I have been working
21 in Lee County, we have been able to take into account
22 future improvements that are funded within three
23 years. In fact, the projects on Alico Road, I think I
24 did that for about six years, so -- with that delay in
25 that project, but as long as it's funded as a roadway

1 project within three years on an adopted work program,
2 that improvement is allowed to be taken into account
3 and the capacity of that improvement is allowed to be
4 taken into account.

5 THE HEARING EXAMINER: And that's for --

6 MR. TREESH: Excuse me?

7 THE HEARING EXAMINER: That's for concurrency
8 purposes.

9 MR. TREESH: For concurrency, right.

10 We have filed for a development order for this
11 site for a Wal-Mart store. We know we cannot receive
12 a development order at this time because the current
13 FDOT work program has construction funded for this
14 segment of U.S. 41 as adopted on July 1st, 2004, for
15 FDOT's fiscal year beginning July 1st, 2008, so right
16 now we cannot receive a development order until July
17 1st of 2005. We understand that.

18 And we also -- as Judson indicated, there's been
19 much happening in the community with Wal-Mart's
20 involvement initially in trying to get that funding
21 advanced because this will basically be the last
22 segment of U.S. 41 between the Caloosahatchee River
23 and South Naples that will be a four-lane section.
24 Everything right now is either under construction or
25 currently completed as a six-lane roadway on U.S. 41

1 through Lee and most of Collier Counties.

2 And, again, it's in everyone's best interest to
3 try and get this roadway advanced in terms of the
4 construction funding. There's many different options
5 that's been discussed.

6 But we understand we have to wait. We're not
7 asking to be treated any differently than anybody
8 else. We're not asking to circumvent the concurrency
9 rules. We're just asking to be allowed to be subject
10 to the concurrency rules which allow funding if it's
11 within three years.

12 I would point out that the segment of roadway --
13 concurrency is a -- it's an interesting subject and I
14 could spend hours going on on concurrency. I'm not
15 going to. But it is in Mike Carroll's sufficiency
16 letter. He did make a statement, I believe it's
17 Attachment E of the staff report, that right now U.S.
18 41 is shown to operate at a level of service C based
19 on the most recent concurrency report, so most people
20 think well, level of service C, why do we need to
21 widen this road. But the way the concurrency report
22 issues -- as we all know, there's different grades of
23 level of service, A through F. Literally the
24 difference between level of service C and level of
25 service F is 50 vehicles. So 50 more vehicles in a

1 peak hour in the peak direction, all of a sudden we
2 went from a C to an F, when in reality adding 50
3 vehicles to a roadway like U.S. 41, you or I standing
4 out there probably wouldn't notice in terms of an
5 additional 50 vehicles.

6 This segment of U.S. 41 is also kind of unique
7 because there's not a lot of signals along this
8 section. Basically, the segment of -- that's measured
9 in terms of concurrency for this segment is from
10 Corkscrew Road to the north I believe to either
11 Sanibel or San Carlos Boulevard, which is just to the
12 north of our project, so that's a pretty long segment
13 of roadway. The only signal in that segment right now
14 is at Broadway. That's the only signal currently on
15 the section. It's just to the south, just around --
16 there's a curve on U.S. 41 and then you've got the
17 signal at Broadway. So that the software used to
18 develop the level of service thresholds is based on
19 the number of signalized intersections and the amount
20 of traffic you can put through those signalized
21 intersections, and when you don't have a lot of
22 signalized intersections, you know, the program can
23 sometimes give you some results that may or may not
24 make sense.

25 We are proposing to pay our proportionate share

1 of the signal at Estero Parkway and U.S. 41. If we're
2 issued a development order and allowed to construct
3 the site before U.S. 41 is widened, we intend to
4 hopefully have that signal operational when the store
5 opens. We'll work with FDOT to make sure it's
6 designed so we're not taking the signal down, you
7 know, when, when they widen the road, but it's our
8 intention to have that signal up when the store opens,
9 regardless of the construction schedule of U.S. 41.

10 And I attended several of the neighborhood
11 meetings with The Vine residents, residents of The
12 Vines community. Their access is just to our north.
13 That's their only access to their community and they
14 expressed a lot of concern about the difficulty in
15 getting out onto U.S. 41 and one of the reasons is
16 because of that lack of signals on U.S. 41. It is a
17 high-speed travel section. If you go out there during
18 many times of the day, I mean it is a high-travel
19 speed section of roadway. In fact, during peak hours
20 if you're out there it doesn't appear to be a level of
21 service F condition because it is such a higher speed
22 traveled roadway.

23 By providing this additional access road adjacent
24 to the Wal-Mart site to get out to Koreshan and with
25 the light at this intersection, the residents then

1 have an alternative to be able to turn out and head
2 south on 41 and use the traffic signal to do that.

3 Also, the traffic signal will create gaps. Right
4 now, because of the large spacing between signals,
5 there's not a lot of gaps in traffic on 41. The
6 traffic gets spaced out when it travels at the higher
7 speeds, so having a signal at that location will also
8 create some gaps, at least in the northbound direction
9 on U.S. 41, allowing some movements to occur a little
10 more easily than they do today.

11 Another reason we would like the condition
12 eliminated is there are things happening in the area
13 that may reduce the trips on 41. I mean this is
14 particularly evident a little further south where the
15 recent opening of Three Oaks Parkway between Corkscrew
16 Road and Coconut Road, that segment of roadway on
17 Three Oaks has taken some trips off of U.S. 41. Now,
18 with the additional development there is some
19 additional traffic on 41. We don't anticipate it to
20 go down, but still the growth rate may not be as large
21 as it's been in the past because we literally only
22 have two north-south roadways in this area of the
23 county, U.S. 41 and I-75.

24 Three Oaks Parkway is currently under design to
25 be widened from the existing two lanes to four lanes

1 between Alico and Corkscrew Road. The county plans on
2 beginning that project next year. I-75, as we all
3 know, has been moved up to a six-lane, to be widened
4 to a six-lane roadway. So both of those improvements
5 will hopefully provide some relief to U.S. 41.

6 So the way the condition reads right now, that
7 we're not able to start construction until the
8 construction of U.S. 41 has commenced, we don't know
9 exactly when that will be. Contracts can -- as I just
10 mentioned previously, Alico Road. But the
11 improvements on Three Oaks, the improvements on I-75
12 could occur and perhaps there may be some trips
13 available on U.S. 41. I don't know. I don't know
14 that answer for sure. But putting that condition in
15 there really stymies what -- the timing of our project
16 and when we can get it done.

17 And I would add our analysis -- we did an
18 analysis at the signalized intersection, assuming the
19 signal was in with the build out of the project, and
20 the level of service at the signalized intersection
21 was a level of service D. So, again, a more, a more
22 detailed operational analysis of the traffic on U.S.
23 41 and on Estero Parkway with the traffic signal shows
24 that that intersection will operate at a level of
25 service D, which is within the acceptable standards in

1 terms of intersection operations. But, again, it's
2 that concurrency threshold that we know is exceeded
3 right now, but we're just asking to be treated like
4 everyone else and ask that once the improvement is
5 funded, within three years, that we're allowed to
6 apply for and receive the development order.

7 That really concludes my comments and I will be
8 more than happy to answer any questions.

9 THE HEARING EXAMINER: All right. Questions of
10 this witness?

11 MS. MONTGOMERY: I do have a couple.

12 EXAMINATION

13 BY MS. MONTGOMERY:

14 Q. Ted, have you had an occasion to drive on the
15 segment of U.S. 41 to the south that's under construction?

16 A. Yes. Quite often. Just yesterday.

17 Q. And the way they're doing it, does it create some
18 challenges for the traveling public in terms of constantly
19 moving the barriers to where they are?

20 A. It can. I mean the section south of Highland
21 Woods Boulevard, right now there's a lot of shifting of
22 lanes right now because of the bridge that they've got
23 going under construction. Yes, during construction
24 there's going to be --

25 Q. So if you lived in The Vines, would it be

1 advantageous to have an alternate way in and out? I mean
2 we have been in numerous meetings there because they have
3 the community -- the design review committee meets there,
4 and, I mean, it does present some challenges getting out
5 of there presently because of the traffic moving so
6 quickly. Would it be better for them, the residents, to
7 be able to have an alternate way in and out when that --

8 A. Absolutely.

9 Q. -- construction starts?

10 A. Absolutely. Not only to get to U.S. 41, but also
11 the county's plan is to extend Estero Parkway over the
12 interstate and so you can access the outlet mall or
13 anything without even having to travel on U.S. 41 with
14 that additional access. Yes, providing that would
15 definitely be a benefit.

16 Q. And I know this may be outside of your realm, but
17 does it make sense to have to create a condition where you
18 force both the road and the site to be under construction
19 at the same time so you essentially double the
20 construction traffic? In other words, if you keep the
21 staff's condition, it's saying you can't commence your
22 construction until the road's under construction, so
23 you're inviting both projects to be under construction at
24 the same time. Does that make sense, to double
25 construction traffic?

1 A. Well, it may in some respects, but our
2 construction traffic is really limited to our -- I mean
3 besides the additional trucks that will be coming in and
4 out of the project, our construction activities are
5 limited to basically our site, again with the exception of
6 the trucks.

7 Q. You indicated that there's a lot of people
8 involved in expediting 41. Does that include SWFTI?

9 A. Yes. SWFTI is the Southwest Florida
10 Transportation Initiative.

11 Q. And is that one of their priorities, as you
12 understand it?

13 A. Yes.

14 Q. And has SWFTI been successful in the past when
15 items are a priority in getting --

16 A. Absolutely, yeah. They were very -- they were
17 one of the main reasons why the funding of I-75 was moved
18 up to its current 2008. Without SWFTI I think it was -
19 Andy, correct me if I'm wrong - 15 years out, I believe,
20 ten, 15 years out. So they were very instrumental in
21 getting that funding advanced on I-75.

22 Q. And the reason I understand that the staff has
23 included Condition 27, the super concurrency condition, is
24 because it was done in the Home Depot case in the City of
25 Bonita. Were you involved in that case?

1 A. Yes, I was.

2 Q. Is that case different in the sense that it only
3 has one access point and that's on Bonita Beach Road?

4 A. In terms of the site, yeah. The Home Depot only
5 had one access that was directly to Bonita Beach Road.
6 They had no access to any other collectors or arterials.

7 Q. And in that instance did the city move away from
8 and not adopt a super concurrency condition and in fact
9 gave them a time frame within which they would be
10 permitted to start?

11 A. Correct. There was a date attached that if the
12 roadway had not started by a certain date that they were
13 allowed -- and it ended up just being the out parcels that
14 were subject to, not the main Home Depot store, but I
15 believe they had five out parcels; that they weren't
16 allowed to start the construction of the out parcels until
17 the road was either under construction or the date
18 certain, and the date certain arrived before they began
19 construction.

20 Q. And, obviously, the Home Depot is open and it's
21 working quite well?

22 A. And three out parcels.

23 Q. But the Home Depot itself is open?

24 A. Yeah. Still have an issue of a signal.

25 Q. That's a whole other issue. You have some

1 neighbors that disagree with you.

2 A. Right.

3 Q. And this is just a layman's kind of question, but
4 if you assume that the people in the Estero community shop
5 at Wal-Mart now, they have to go some considerable
6 distances to get to either the Six Mile store or south to
7 Collier County. Would you actually reduce trip lengths if
8 you allowed the people in the community to shop in a
9 location closer to home?

10 A. Absolutely. When you get a shopping plaza like
11 this with a Wal-Mart that's a destination use, around the
12 project you will actually reduce the trip lengths because,
13 again, I mean I shop at Wal-Mart and I shopped at the Six
14 Mile store until the site opened on Colonial and Six Mile.
15 So before I was driving Daniels to Six Mile, now I have a
16 much shorter trip to the store at Colonial and Six Mile.
17 So, absolutely, that occurs and it occurs more closely in
18 a radius around the site than it would as you go further
19 away, but definitely around the site it would definitely
20 have that impact.

21 MS. MONTGOMERY: I don't have any other
22 questions.

23 THE HEARING EXAMINER: Okay. Questions by the
24 county?

25 MR. BLOCK: I've got one, Andy.

1 MR. GETCH: Go ahead.

2 MR. BLOCK: I do have one question, Madam Hearing
3 Examiner.

4 For the record, Chip Block.

5 EXAMINATION

6 BY MR. BLOCK:

7 Q. Mr. Treesh, your statement about Home Depot in
8 Bonita Springs, let's go back to that.

9 You indicated that Home Depot had no other
10 connections to adjoining properties and/or to Bonita Beach
11 Road, just the one?

12 A. Their master concept plan showed connections, but
13 when they built the store, those connections were not
14 provided and they're still not provided to this day.

15 Q. Was the design of the Home Depot store, as you
16 just said, requiring or showing an access with the
17 Albertson's development to the west of the site?

18 A. Yes.

19 Q. Does Albertson's have access to both Bonita Beach
20 Road and to, quote, unquote, Imperial Livingston?

21 A. Yes, that's correct. But I would also note that
22 Albertson's was in for zoning several months before Home
23 Depot and they did not have that condition attached to
24 their zoning.

25 Q. But Home Depot was approved with an

1 interconnection between --

2 A. That's correct.

3 Q. -- a proposed interconnection between Albertson's
4 and Home Depot, where the traffic would have access to
5 another arterial slash collector road?

6 A. That's correct. Yeah.

7 MR. BLOCK: Thank you.

8 THE HEARING EXAMINER: Andy?

9 MR. GETCH: For the record, Andy Getch with Lee
10 County DOT.

11 EXAMINATION

12 BY MR. GETCH:

13 Q. Ted, my first question actually is a question the
14 Hearing Examiner asked Mr. Pankey and Mr. Pankey referred
15 to me, and since you did the analysis, I'm going to refer
16 to you.

17 The Hearing Examiner question I believe was will
18 the project entrances onto U.S. 41 and onto Estero Parkway
19 require signals, so I'm asking you that.

20 A. At this time, no, we don't anticipate that, that
21 meaning the necessary warrants for a signal, but the U.S.
22 41 access is just simply a left in, so there's no left out
23 permitted and it doesn't meet the spacing requirements.
24 The Vines folks have been pushing FDOT for years for a
25 signal here and FDOT's continually told them it doesn't

1 meet the spacing requirements, so any signal closer would
2 most certainly not. And, again, spacing to our access on
3 Estero Parkway again would not meet spacing requirements,
4 but even from a volume standpoint I don't anticipate that
5 ever needing a signal.

6 Q. You had talked about the super concurrency
7 condition and that the applicant wanted to be treated like
8 everybody else. How many zoning cases have you worked on
9 where the adjacent roadway the project was going to
10 access, probably the main roadway the project was going to
11 access, had a projected level of service F?

12 A. Exact amount I don't know. I know there's been
13 several, the most recent being on Alico Road east of I-75
14 where we showed at build out -- it was for an industrial
15 IPD zoning at Airport Haul Road. I can't remember the
16 exact name of the case, but at build out of that project
17 Alico Road was shown to fail. There was a condition that
18 was removed, but ultimately we're subject to the rules of
19 concurrency. We can only build until the concurrency
20 report says we can. Then we have two options: Widen the
21 road ourselves or wait until the funding is within three
22 years.

23 Q. Okay. Different question. You had referred to
24 that -- or you stated that Wal-Mart's proposing to pay a
25 proportionate share of the traffic signal at U.S. 41 and

1 Estero Parkway?

2 A. Correct.

3 Q. Is that a separate agreement with FDOT at this
4 time?

5 A. Mr. Pankey would be better able to answer that
6 than I would.

7 MR. GETCH: Okay. Those are the only questions I
8 have.

9 THE HEARING EXAMINER: County Attorney,
10 questions?

11 MS. HENRY: No questions.

12 THE HEARING EXAMINER: All right, Ted, I have a
13 couple.

14 Now, you just indicated to Andy that you can
15 recall one case in which the level of service was
16 going to go to F at build out of the project. Can you
17 think of any other cases in the county that are
18 allowing what you're asking for? I mean you're asking
19 not to have the super concurrency, but have you had
20 any other cases in which you all have been
21 specifically allowed to obtain the permits and do the
22 construction even though the concurrency wasn't there
23 at the time?

24 MS. MONTGOMERY: We need to make a distinction,
25 because the land development code does, between

1 development permits, which are building permits, and
2 DOs and zoning, because the LDC specifically exempts
3 zoning from that terminology and specifically provides
4 that concurrency only applies to DO and building
5 permits. So if you're asking Ted does concurrency
6 apply to building permits and DOs, his answer has to
7 be yes, always yes, but does it apply to zoning, I
8 think the answer is under the rules no, always no.

9 THE HEARING EXAMINER: Under that, though, Neale,
10 if you guys go in and you make the argument that,
11 okay, concurrency doesn't apply to zoning and so you
12 can go ahead and approve the zoning and now you've got
13 an application in for your development order right now
14 and you start pulling your development permits, you
15 know, then all of a sudden you've got development on
16 the ground, you've got the store being constructed and
17 you still don't have the roadway and now you've got a
18 finished product. And, you know, I mean I'm not
19 saying you, but, you know, most developers are going
20 to use that as leverage and say look, we got this and
21 now you've got to let us open, you've got to let us
22 open even though we don't have a road.

23 MS. MONTGOMERY: That's exactly the concern that
24 Mr. Murphy raised. It's like somehow or other we're
25 going to screw up and we're going to give you the

1 permit and then you're going to say you get to open
2 the store. Well, that might be a true statement.
3 However, under the rules -- and I'm going to go
4 through this at the conclusion --

5 THE HEARING EXAMINER: Okay. That will be good.

6 MS. MONTGOMERY: -- and I'm going to show you why
7 that can't happen, that won't happen and why what the
8 staff is suggesting violates their own comp plan and
9 their own LDC, so we'll talk about that later.

10 THE HEARING EXAMINER: You'll do the legal aspect
11 of that, then?

12 MR. TREESH: And I will add our development order
13 application has not been approved. It's been denied
14 because we cannot receive a certificate of
15 concurrency. We can address all the other issues,
16 engineering, storm water, but Mike Carroll, who is the
17 Lee County holder of concurrency --

18 THE HEARING EXAMINER: The grantor, huh?

19 MR. TREESH: -- issued a statement that this site
20 will not be issued a development order until such time
21 it meets the requirements.

22 THE HEARING EXAMINER: In your experience has a
23 finding of meeting the concurrency requirement or will
24 meet the concurrency requirement in a zoning situation
25 been used by the development review staff as

1 sufficient basis for them to ignore the land
2 development code and go ahead and issue permits? In
3 other words, if we were to make a finding in this
4 hearing that you all will abide by the concurrency and
5 that, yes, you will meet concurrency and whatnot, is
6 that going to be sufficient for Mike to change his
7 mind and say okay, fine, you can have the permits?

8 MR. TREESH: Not in my experience.

9 MS. MONTGOMERY: Mike is a bulldog. Nothing will
10 change Mike's mind. I think Chip will agree with
11 that.

12 MR. TREESH: The only way I would think -- and
13 I'm not an attorney. I will leave that to Neale. The
14 only thing, unless you specifically condition that as
15 part of the zoning that we don't have to follow
16 concurrency. I mean there are, there are conditions
17 in the state statutes that let you get around
18 concurrency, infill development and so forth.

19 THE HEARING EXAMINER: Right, right. I
20 understand that.

21 MR. TREESH: This doesn't follow.

22 THE HEARING EXAMINER: Doesn't meet those.

23 MR. TREESH: This doesn't adhere to those
24 requirements.

25 Not to my knowledge. I've never in a zoning

1 action experienced that.

2 THE HEARING EXAMINER: All right, I'll let Neale
3 cover the legal aspects of it.

4 MS. MONTGOMERY: I was going to wait until the
5 conclusion so we could walk through that. And when we
6 do that, if you want to get your comp plan and Section
7 2 of the LDC so we can -- that way we can all follow
8 it together.

9 THE HEARING EXAMINER: Okay. All right. I don't
10 have any other questions.

11 Anything else from this witness based on anything
12 I have asked, any questions I have asked, statements
13 I've made?

14 Okay. All right. Thank you.

15 Okay. That is the end of your presentation?

16 MS. MONTGOMERY: Our case in chief. We obviously
17 reserve the right to rebuttal.

18 THE HEARING EXAMINER: Right. And legal argument
19 at the end.

20 MS. MONTGOMERY: Yes, ma'am.

21 THE HEARING EXAMINER: All right, folks, at this
22 point in time I want to open the floor up then for
23 public comment.

24 Let me -- I've got all the little white forms up
25 here, so let me call your names, if that would be all

1 right.

2 And do you want to go first? Is that why you
3 jumped up?

4 UNIDENTIFIED SPEAKER: No, no.

5 THE HEARING EXAMINER: All right. If you all
6 will hand me all your forms. Let me just go through
7 the names here. It's easier than me trying to flip
8 through all these 4,000 forms and find out where you
9 are.

10 Okay. Chris Smith. We'll start right at the
11 top. Do you wish to speak?

12 MR. SMITH: Good morning. I'm a latecomer, but
13 first speaker.

14 THE HEARING EXAMINER: Come up to the front,
15 please.

16 Have you been sworn in, sir?

17 MR. SMITH: No, I have not.

18 THE HEARING EXAMINER: Okay. Come up to the
19 front and raise your right hand.

20 (Whereupon, the witness was duly sworn.)

21 THE HEARING EXAMINER: Okay. State your name,
22 please, for the record.

23 MR. SMITH: Thank you.

24 My name is Chris Smith. I'm the president of the
25 Estero Country Club, which is at The Vines, adjacent

1 to the property in question. And I would like to say
2 that if we had our druthers, we would rather have the
3 cattle roaming over there forever and not have anybody
4 in there.

5 But we have worked extensively with Wal-Mart and
6 negotiated with them and we believe that somebody will
7 be coming in there and we believe that the Wal-Mart
8 proposal is the proposal that more clearly meets the
9 needs of our community and I personally endorse the
10 Wal-Mart proposal and would support moving it up and
11 the -- I'm not sure I understand all of the road
12 implications, but anything to improve the highway out
13 there, the sooner the better.

14 THE HEARING EXAMINER: Okay.

15 MR. SMITH: Thank you.

16 THE HEARING EXAMINER: Thank you, sir.

17 Frances Wagner.

18 Remember, folks, let me know if you are not sworn
19 in as you came in.

20 MS. WAGNER: I am not.

21 THE HEARING EXAMINER: You are not. Okay. If
22 you came in late and didn't get sworn in, let me know.

23 All right. Raise your right hand, please, ma'am.

24 (Whereupon, the witness was duly sworn.)

25 THE HEARING EXAMINER: State your name for the

1 record.

2 MS. WAGNER: Frances R. Wagner, and I live in
3 Estero. And I'm going to read what I have written out
4 this morning because --

5 MS. MONTGOMERY: Can I interrupt you just a
6 second? Just for all our benefit, can you tell us
7 where in Estero you live?

8 MS. WAGNER: I live in Corkscrew Woodlands, 10712
9 Red Cardinal Circle.

10 MS. MONTGOMERY: Is that the RV park?

11 MS. WAGNER: It's the one in back. It's a small
12 mobile home park.

13 THE HEARING EXAMINER: Okay.

14 MS. WAGNER: As a member of the Estero Council of
15 Community Leaders, I volunteered to be on the
16 committee that would be negotiating with Wal-Mart.

17 Since this corner at U.S. 41 and Estero Parkway
18 would be an important commercial corner in Estero, I
19 felt that it was important that this site be
20 attractive and blend in with the surroundings and the
21 neighborhood.

22 For over a year and a half we met many times with
23 Wal-Mart, providing them guidelines that we felt were
24 beneficial to the site and to the neighboring
25 community, The Vines, and the surrounding area. They

1 were agreeable to the changes and each time this area
2 received improvements with architectural design,
3 landscape design, parking lot design, ponds, walls,
4 fencing, berms, hours of delivery at nighttime and
5 more. These changes have created a beautiful store
6 and landscaping of the surrounding area. If you have
7 not seen the designs, you would be very surprised at
8 what was accomplished. For Wal-Mart, I'm sure it will
9 prove to be one of the most attractive stores in the
10 country.

11 We know that this corner will be commercial, so
12 we have tried and I feel we have succeeded in having
13 Wal-Mart create the best possible commercial product.

14 We plan to continue our commitment to work with
15 Wal-Mart to get U.S. 41 widened before the store
16 opens.

17 And the individuals who comprise the Estero
18 Council of Community Leaders takes their desires
19 seriously to help make Estero a place all residents
20 can be proud of and enjoy. They donate their time and
21 talents every day in one way or another. We are
22 fortunate to have such talented and dedicated people
23 who choose to participate in their community even
24 though they may be retired.

25 THE HEARING EXAMINER: Thank you, ma'am, very

1 much.

2 I think it's Gregory Toth.

3 Are you sworn in?

4 (Whereupon, the witness was duly sworn.)

5 THE HEARING EXAMINER: State your name, please,
6 for the record.

7 MR. TOTH: Greg Toth from Select Real Estate,
8 also a member of the Estero Community Planning Panel.

9 I don't have a canned presentation, but I would
10 just like to say that going back five or six years to
11 when the community got drawn together, it was mainly
12 because of issues that surrounding property owners
13 felt that in an unincorporated area of Lee County they
14 didn't have much say as far as what kind of
15 developments went around them. And I think that both
16 the county staff can testify over those five or six
17 years that projects that have come before the Hearing
18 Examiner and the county I think have been helped a lot
19 by a consensus building so when it comes to the county
20 or this Hearing Examiner people aren't fighting back
21 and forth. It's made it a little easier for the
22 county, I think. I think it's made it very appealing
23 to the community because now they do have a say-so.

24 And I can tell you that sitting on the Estero
25 Planning Panel that the day that Mr. Pankey and

1 Wal-Mart came in about this, most of the people that
2 are testifying in favor of this project now were
3 avidly against it. I think that they -- after a
4 little bit of education they were aware of the
5 possibilities that could go on that corner without
6 rezoning, i.e., a Publix center or standardized
7 development where their loading docks could be 15 or
8 20 feet away from their homes. In looking at the pros
9 and cons I think they took a position of compromise
10 with Wal-Mart and I think that in the year -- over a
11 year that this has been going on I think that both the
12 community and Wal-Mart have given and taken a little
13 bit and come to a consensus.

14 And I feel it odd that although the community
15 planning panel always came together mainly for
16 surrounding residents, I think that it's also raised
17 the bar of development throughout the community. But
18 the surrounding residents of this parcel that will be
19 impacted the most by it I think will be here
20 testifying that they feel that they have made a good
21 agreement with the Wal-Mart people and I think the
22 Wal-Mart people are here saying that they feel that
23 they've made a good agreement. And I think that
24 that's really the deciding matter of a good deal, when
25 both sides feel as though they've been taken care of.

1 So I am testifying in favor of this Wal-Mart.
2 Naturally, the concurrency issues are separate. I
3 think you have dealt with those. But that's what I
4 would like to say.

5 THE HEARING EXAMINER: Okay. Thank you, sir.

6 MS. MONTGOMERY: Could I ask one quick question?

7 THE HEARING EXAMINER: Yes.

8 MS. MONTGOMERY: Greg, I know you have been
9 involved in the Estero community and I have heard some
10 rumblings that perhaps Wal-Mart really didn't meet
11 with the right groups. In your opinion is the Estero
12 Planning Panel and Design Review Committee and like
13 the community leaders group, did we meet with the
14 right people?

15 MR. TOTH: Well, I think that certainly Wal-Mart
16 representatives met privately with the surrounding
17 neighborhoods and their legal representatives and I
18 can think of at least ten public meetings that were
19 published in the paper with agendas that printed out
20 that we were dealing with this issue and I just think
21 that it's really not fair either to people or to
22 developers, which I happen to be one, to go through a
23 year plus in negotiations only to come up to the last
24 minute and have a few people oppose it when they
25 certainly had the opportunity for the last 12, 14

1 months to come to any one of these meetings and bring
2 up their concerns.

3 THE HEARING EXAMINER: Okay. Thank you.

4 Sam Levy.

5 Remember, folks, if you don't need to leave
6 before lunch, if you want to stay and hear the
7 applicant's legal arguments, you don't need to
8 testify. You can pass. You can pass and we'll bring
9 you back later.

10 MS. MONTGOMERY: I'm sure they want to stay and
11 hear that.

12 (Whereupon, the witness was duly sworn.)

13 THE HEARING EXAMINER: Step in front of the
14 microphone, please. State your name.

15 MR. LEVY: My name is Sam Levy. I am a resident
16 of Estero and have been a full-time resident for the
17 past three years. I reside in The Brooks.

18 Let me state first that I do not own any Wal-Mart
19 stock, I don't believe I ever have, I do not shop at
20 Wal-Mart, but I'm here today to support this project.

21 And to tell you why, first of all, I realize and
22 recognize that Lee County cannot guarantee that I will
23 have nonthreatening, noncriminal melaleuca trees on
24 that site in the coming years.

25 I have attended every meeting, I believe, of the

1 Estero Concerned Citizens Organization, Council or
2 Leaders, whatever name you choose to give to it. I
3 recognize that that organization perhaps does not have
4 a legal standing. You do. We are concerned citizens.
5 We have met. We have discussed this issue according
6 to my notes 12 different times, it has been on our
7 agenda, meaning 12 different months over the course of
8 the last year and a half. There have been open public
9 meetings conducted on this project by Wal-Mart, by Mr.
10 Pankey and others that are in this room. I have
11 attended some, not all of those meetings.

12 In my opinion, the community concurred with the
13 position taken by The Vines and the counsel that The
14 Vines chose to use, Mr. Uhle, who is here in this
15 room. And over the period of time our community and I
16 know others have contacted not Mr. Uhle necessarily,
17 but Mr. Perry to find the course of action that was
18 being taken and in open meetings, at least 12 meetings
19 that I attended over a period of 18 months. The vote
20 was taken on this issue several times, and it was
21 never perhaps unanimous, but it was overwhelmingly
22 positive to support the negotiations that were being
23 taken place between Wal-Mart and Estero Country Club
24 at The Vines, as it's now called.

25 So I can only stand before you today and tell you

1 that in my humble opinion, being just one resident of
2 a wonderful community, that the position of Wal-Mart
3 and The Vines on this issue should go forward. I
4 think that the community has spoken, not unanimously,
5 but in the majority.

6 All of the meetings of the Estero Council have
7 been open to the public and I think conform to what's
8 known I think as the Florida Sunshine Law. I'm not a
9 legal expert. I'm just a resident and just an
10 activist in our community.

11 But I would ask the committee, the council, Lee
12 County to go forward.

13 I am not a road expert, don't pretend to be. The
14 road does need to be widened. However that can be
15 accomplished with or without Wal-Mart's help is
16 certainly needed.

17 But I ask you to go forward with this. I think
18 that there's been enough debate and enough time has
19 gone by that the community has spoken, although there
20 are always and always will be dissenters.

21 Again, I prefer melaleuca trees, but the Wal-Mart
22 that's been proposed for this site is in the best
23 keeping I think for the community of Estero.

24 Thank you very much.

25 THE HEARING EXAMINER: Thank you, sir.

1 Tom Williams.

2 Mr. Williams, were you under oath?

3 MR. WILLIAMS: No, I'm not.

4 (Whereupon, the witness was duly sworn.)

5 THE HEARING EXAMINER: All right. Step in front
6 of the microphone. Please state your name.

7 MR. WILLIAMS: Thank you. I'm Tom Williams and
8 I'm an attorney, but I am not here representing anyone
9 but myself.

10 THE HEARING EXAMINER: Okay.

11 MR. WILLIAMS: I'm also a resident of Silver Oaks
12 community within The Vines, 19354 Silver Oak, and I'm
13 here basically to speak against the proposal.

14 Basically two issues, the first relating to the
15 24-hour operation which is part of the rezoning
16 application, and I don't approve of that primarily
17 because of a safety issue, being adjacent to The
18 Vines, having a 24-hour operation. Commercial zoning
19 is fine, but having a 24-hour operation and the
20 previous discussion relating to security cameras on
21 the Wal-Mart store doesn't give me any encouragement
22 because I live in The Vines. I'm sure they're
23 providing security for their operation by necessity,
24 but we're adjacent to it. It's going to attract
25 activity into our area that normally wouldn't be there

1 from the normal store closing hours of, say, even
2 eight, nine o'clock until whenever, and I am
3 concerned.

4 It will cost us more as residents to deal with
5 our own internal security issues no one really has
6 talked about. We have a gate, a new entrance and a
7 gate. We'll have to maintain that, I assume.

8 Without belaboring it anymore, that is one of the
9 issues I'm concerned about, the 24-hour operation.

10 The second is the traffic. I listened all
11 morning to the positive features of the physical store
12 and the compromises and the landscaping and I can't
13 disagree that that's very positive. A lot of effort
14 went into it. But the threshold issue is the traffic
15 issue.

16 We have a problem with the four-lane road right
17 now, anyway, and we're talking about - previous
18 speakers - about the super concurrency issue. And I
19 think it really is a super concurrency issue because
20 we have a Wal-Mart super store. I haven't heard of
21 anyone talk about maybe traffic going from The Vines
22 and other communities to another Wal-Mart. The real
23 issue is how many destinations -- this is a
24 destination retail activity coming from all over our
25 area to this spot. This is traffic that wasn't on the

1 road before coming to our area. And that's the key
2 issue that we need to be concerned about, not where
3 our residents are going to go and how convenient it is
4 and so forth. This is a super store, 24-hour
5 operation, that is going to generate more traffic than
6 what was on the traffic count to begin with.

7 I don't have those studies. Perhaps Wal-Mart
8 does. But I think that's an important issue for us to
9 be aware of. They have stores all over the country.
10 They've got to know how many trips it takes for so
11 many customers to come to their store to make it
12 profitable and so forth.

13 It's not just a place to be. People are coming
14 and going all the time. So I do think the super
15 concurrency issue is very important for us, especially
16 when we have that gap between 2008 and the current
17 time which we're now in, 2004, when they have applied
18 for their development order.

19 I don't want to belabor any other issues because
20 I think those are the two primary issues we have to
21 deal with.

22 THE HEARING EXAMINER: Okay. Thank you, sir.

23 Tona Jiesa.

24 If I mispronounce your name, you need to tell me
25 that.

1 MR. JIESA: You did very well. Thank you.

2 THE HEARING EXAMINER: Are you sworn in, sir?

3 MR. JIESA: Yes, I am.

4 THE HEARING EXAMINER: State your name, please,
5 for the record.

6 MR. JIESA: I'm Tony Jiesa. I live in The Vines
7 community.

8 I've followed the negotiations for the last year
9 and a half and I personally think that our Estero
10 leaders and planning panel have done a fantastic job
11 and continue to do in other areas.

12 I was -- I would prefer to have melaleucas and
13 cattle also, but, again, I also know that that piece
14 of property, it's going to be developed somewhere and
15 I think over a year and a half that we have negotiated
16 a very fair plan and I think this Wal-Mart might very
17 well be -- the final product might very well be the
18 best neighborhood Wal-Mart they ever built because of
19 all the concessions and so forth that have come along.

20 I recently heard rumors that there's a number of
21 communities in the area that are coming up in arms
22 against this project and I would like to know where
23 they were for a year and a half. I know that either
24 we or Estero leaders have contacted various
25 communities, Breckenridge, Cascades, Rookery, Belle

1 Lago, Country Creek, others, asked them for support to
2 put this project down. At that time we got basically
3 little response. Consequently, I think the people in
4 The Vines, since this project is so close to us and
5 closer to us than anyone, and the biggest impact I
6 feel would be the traffic problem, but I think in our
7 best interest we needed to go out and get some help,
8 which we did from the Estero leaders and Mr. Uhle, and
9 we negotiated what we truly believe is the best
10 product that we can get and I think we will be proud
11 of it when it gets done.

12 I don't have particular concerns about security.

13 I'm in favor of the project. I would agree that
14 concurrency should be met first because I do believe
15 that the traffic problem is significant and most
16 significant for us, so give us widened 41 and give us
17 a Wal-Mart and away we go.

18 THE HEARING EXAMINER: All right. Thank you,
19 sir.

20 Robert Trewhella.

21 MR. TREWHELLA: Close enough.

22 THE HEARING EXAMINER: I do real well with Smith.
23 I'm great with Smith, but some of the others -- are
24 you sworn in, sir?

25 MR. TREWHELLA: Yes, ma'am.

1 THE HEARING EXAMINER: State your name for the
2 record.

3 MR. TREWHELLA: My name is Bob Trehwella. I live
4 in The Vines and I'm also vice president of The Vines
5 community association.

6 I will only take a second. I just wanted to be
7 on the record as saying that folks have worked real
8 hard and real long to come to this point.

9 And I know that the concurrency issue is the
10 biggest issue of all. I also know that reasonable
11 people can get this done.

12 It will be a great store. It will be a big
13 advantage to The Vines to be able to get in and out
14 other than on Route 41. And I know that you folks
15 will do what's right and we'll have the best Wal-Mart
16 this side of Coral Springs.

17 Thank you.

18 THE HEARING EXAMINER: Thank you, sir.

19 George Bradley.

20 MR. BRADLEY: It's good to have an easy name,
21 right?

22 THE HEARING EXAMINER: Yes. Thank you.

23 MR. BRADLEY: I also am a resident of The Vines.
24 I am a board member of The Vines Community Association
25 and also a board member of the Estero Country Club.

1 I'm here to speak in favor of the Wal-Mart
2 project.

3 I like others would prefer to have melaleucas or
4 whatever else might be on that corner other than
5 commercial, but knowing that commercial is going to
6 come, we believe that we have been able to negotiate
7 effectively a good product for both Wal-Mart and for
8 the community.

9 Traffic is still a major issue. Traffic will
10 have to be dealt with. I believe traffic can be dealt
11 with as we go forward.

12 I am in favor of the project.

13 THE HEARING EXAMINER: Okay. Thank you, sir.
14 Ronald Greenlee.

15 (Whereupon, the witness was duly sworn.)

16 THE HEARING EXAMINER: State your name, please,
17 for the record.

18 MR. GREENLEE: Ronald Greenlee. I'm the
19 president of The Vines Community Association. I live
20 at 19482 Lost Creek Drive.

21 I am in favor of the project.

22 I have been involved in almost all of the public
23 meetings. We had quite a few of them at The Vines
24 clubhouse. In the beginning I'll have to say that
25 most of our residents and the people who attended

1 those meetings were not in favor of this project. I
2 was kind of, you know, personally in the middle, not
3 really against, but not for. But as many people have
4 said here, it's going to come, something is going to
5 come, and so we worked hard with Wal-Mart and the
6 community leaders. Wonderful organization. I think
7 we're in an incorporated area. We should be proud to
8 have a group that looks out for everybody as well as
9 they have.

10 So we had a lot of information, a lot of give and
11 take. And Bob Perry and I put together some town
12 meetings, if you call it that, where we brought
13 everybody into the clubhouse, discussed the pros and
14 cons, not as taking a position as organizing these
15 meetings, but to say here are the facts, this is what
16 we can have, this is what we might get, and put it up
17 for a vote to the community. And Bob will relate to
18 you those facts later. I don't have them with me.
19 But it was clearly a majority in favor of the project.

20 And so then we relayed that to the community
21 panel and they -- in support.

22 The two issues that I personally am concerned
23 with, one would be security, but I'll tell you that as
24 the president of The Vines community, security has
25 always been a problem for us. You might not be aware,

1 but there's a railroad track that goes right through
2 the middle of our property and we can't secure that
3 railroad track. Anybody that wants to come into The
4 Vines can come right in through the railroad track and
5 we wouldn't know that.

6 So the issue of security is that the Wal-Mart
7 will bring a lot of people to the property that
8 wouldn't be there. But we have the big wall, the
9 fences, the lakes. And Wal-Mart we believe will do a
10 good job of policing the problems that they'll have on
11 their property. The fact is that if somebody wanted
12 to break into my home or anybody in The Vines, they
13 don't need to come to Wal-Mart to do that. They're
14 going to do that on their own. So I really don't
15 think that the Wal-Mart's going to present us with any
16 more security problems than we already have.

17 The other issue that I'm really concerned with is
18 the traffic, and anything we can do to get the road
19 widened as soon as possible is going to be to our
20 benefit. Obviously, the access road that we're going
21 to be provided at this project is a big plus for us,
22 one that's sorely needed. And without Wal-Mart that
23 opportunity will never present itself again.

24 So I'm in favor of the project.

25 THE HEARING EXAMINER: Okay. Thank you, sir.

1 Joel Shapiro. Mr. Shapiro? Is he gone? Okay.

2 For the record, Mr. Shapiro has indicated on his
3 participation form that he was.

4 Meg Judge.

5 (Whereupon, the witness was duly sworn.)

6 MS. JUDGE: Good afternoon, Madam Hearing
7 Examiner.

8 THE HEARING EXAMINER: Pull the microphone down
9 just a little bit. There you go.

10 MS. JUDGE: I'm Meg Judge. I'm chairman of the
11 Board of Estero Chamber of Commerce, and I would like
12 to state first that we welcome Wal-Mart in Estero.

13 We are advocates of Wal-Mart, but we respectfully
14 must state that the county staff's recommendation on
15 concurrency standards required for Lee County's comp
16 plan and land development code must be held. If
17 concurrency is not met, U.S. 41 will be classified as
18 a failed road, Class F, causing a very dangerous
19 traffic situation, especially for emergency vehicles.

20 Wal-Mart has done an excellent job in upgrading
21 their plan and we look forward to working with them,
22 but we do not support the scare tactics in the
23 community, telling people that something else would be
24 there if Wal-Mart was not supported. Any other
25 project would have to go before the Estero Design

1 Review Committee and be required to meet the specific
2 high standards in Estero. We have a village concept
3 and compatibility and sidewalks are very important.

4 Let me state that the chamber recognizes Wal-Mart
5 as an outstanding company and anything we can do to
6 help make your welcome in Estero better, we will be
7 happy to do, but we cannot disregard the county
8 professional recommendation.

9 Thank you very much.

10 THE HEARING EXAMINER: Thank you, ma'am.

11 Sandy Geoffroy. I hope that --

12 MS. GEOFFROY: Geoffroy.

13 THE HEARING EXAMINER: You'll have to state it on
14 the record up here. Is that a Y on the end of it?

15 MS. GEOFFROY: Yeah.

16 THE HEARING EXAMINER: It's a Y, okay.

17 (Whereupon, the witness was duly sworn.)

18 THE HEARING EXAMINER: Now, you need to pull the
19 microphone up. You're considerably taller than she
20 was.

21 MS. GEOFFROY: My name is Sandy Geoffroy. I
22 recently moved from Naples to the Cascades in Estero.

23 Today you will be hearing not only from myself,
24 but from a lot of other people why the 24-hour super
25 Wal-Mart should not be allowed to be built on the

1 corner of 41 and Estero Parkway.

2 This petition to build has been denied by the
3 planning and zoning boards because of major traffic
4 congestion. I'm here today to support these boards,
5 but to speak on another matter.

6 Last Monday, August 23rd, I attended a meeting at
7 Marsh Landing called together by the ECCO, which many
8 other community issues were discussed. One in
9 particular was the acceptance of the super Wal-Mart
10 project on 41 and Estero Parkway.

11 This isn't an ordinary project. It's a mega
12 structure.

13 Mr. Don Eslick chaired this meeting.

14 To me, being new to the area, the group, whether
15 they be elected, to me it was self-appointed people on
16 the best interest of Estero residents, but they're not
17 incorporated, they didn't have bylaws, and up until
18 that day, August 23rd, had no officers. They may mean
19 well, but I don't -- and I don't want them
20 representing me.

21 THE HEARING EXAMINER: Okay.

22 MS. GEOFFROY: Okay. The Cascades community is a
23 new community. They have -- of 600 units I think
24 probably there are only about 200 people -- it's built
25 out to about 200 right now. As far as I know, on this

1 ECCO, the Cascades are not represented. There's no
2 one there speaking on behalf of the Cascades.

3 The Cascades are where all these 18-wheelers are
4 going to go by. They go right by our entrance.

5 I feel that I would rather put my trust in the
6 Commissioners and the county planners who are credible
7 and elected by the people to make these decisions for
8 me.

9 I mean you really have to ask yourself why does
10 an ECCO who supposedly represents the people want a
11 super Wal-Mart on 41. For the life of me, I can't
12 understand why, any good reason -- if you could give
13 me one good reason why they would want this. We're
14 just saturated with traffic. You can't get out on 41,
15 I mean. And this is not in season. This is out of
16 season and it's bad now. I mean to have that at the
17 end of our road would be like suicide. I mean it's
18 like ground zero to me, to the Estero residents or
19 anyone who lives near that area.

20 I just feel like you're being put up for sale,
21 like Estero is being put up for sale. I don't think
22 that in good conscience you can really -- there's got
23 to be a better place. Everyone likes progress, but do
24 you want, do you want that kind of progress on 41?
25 You can't put this mega structure before the road.

1 And even with the, even with the road, do you really
2 want Wal-Mart at the end of your street? I mean with
3 41 and without Wal-Mart you would say all right, the
4 congestion may be eliminated a little, but with
5 Wal-Mart it's just -- it's not going to make it. It's
6 just -- for the people that live there, it is not
7 going to make it.

8 THE HEARING EXAMINER: Now, when you're talking
9 about the end of your street, do me a favor. Can one
10 of you guys pick up one of those aerial photographs
11 that shows pretty much the area? Can you show me,
12 Sandy, where your community is?

13 MS. GEOFFROY: I don't have my glasses, but --

14 MS. MONTGOMERY: I don't think she's on there.
15 They're about two miles to the east, I think.

16 MS. GEOFFROY: This is Estero Parkway here?
17 We're on Estero Parkway. And to come down to Estero
18 Parkway where 41 would meet Estero Parkway, there's
19 communities in here, Belle Lago. I went around Belle
20 Lago. You're not going to get anyone from the
21 developers to speak out against Wal-Mart. I found one
22 person in a home there who was from The Vines and
23 insinuated they were strong-armed into going with
24 Wal-Mart because of the fear of what else. That's
25 what they said.

1 There's no one representing Belle Lago in this
2 because they're not built out. There's one person in
3 a home that I could find. And we're in the Cascades.
4 The Preserves is right next to it.

5 All these 18-wheelers are going to be coming down
6 Estero Parkway to get to the entrance of Wal-Mart. It
7 just doesn't make sense.

8 We bought into a quiet community. I didn't buy
9 into this.

10 And we have a petition from -- representing the
11 people of the Cascades. There's 190 against and nine
12 for, and we are about one-third built out now. And
13 there's also a few letters here I would like to submit
14 to you, as well as yesterday the people of
15 Breckenridge -- I mean it's like the twelfth hour, but
16 you have to speak up sometime. The people from
17 Breckenridge in one day have compiled five pages of
18 petitions against Wal-Mart.

19 So I just hope that in our best interest you
20 would consider all these issues. I mean we live
21 there. We didn't buy into this.

22 And I would like to submit to you these
23 petitions.

24 THE HEARING EXAMINER: So you have the two
25 petitions. You have one from the Cascades, and the

1 other is from who?

2 MS. GEOFFROY: Breckenridge. People just got
3 into it yesterday and in one day they collected five
4 pages of petitions.

5 Ours, on the other hand, we have known about this
6 for a week. We're a new community. Did anyone ask
7 us? No.

8 UNIDENTIFIED SPEAKERS: Yes, yes.

9 THE HEARING EXAMINER: All right, folks, folks,
10 folks. Don't respond to her now. I don't want to
11 have any fistfights in here.

12 MS. GEOFFROY: Maybe I shouldn't be saying this,
13 but I feel strongly about it and in the Cascades
14 there's 190 against and nine for.

15 THE HEARING EXAMINER: Okay. All right. I'll
16 take the petitions. Thank you, ma'am.

17 MS. GEOFFROY: Thank you.

18 MS. MONTGOMERY: For the record, I'm going to
19 lodge an objection to those two letters. Obviously,
20 we can't cross-examine. We have no idea what these
21 people were told.

22 MS. GEOFFROY: We weren't told anything.

23 MS. MONTGOMERY: And they haven't been part of
24 the process, obviously, so --

25 MS. GEOFFROY: We have no representation by the

1 people you have been speaking to.

2 MS. MONTGOMERY: Ma'am, I'm just making an
3 objection for the record.

4 MS. GEOFFROY: Can I answer the --

5 THE HEARING EXAMINER: Well, no. Actually, It's
6 a legal objection she's making.

7 I understand what you're saying, Neale. And as
8 usual any written documentation without the ability of
9 cross-examination will not receive exactly the same,
10 you know, the same amount of weight in my
11 deliberations as would someone who had come in and
12 testified, but I will accept them for the record, so I
13 will take the petitions and whatnot.

14 All right. Joan Stanford.

15 (Whereupon, the witness was duly sworn.)

16 THE HEARING EXAMINER: And pull the microphone
17 down.

18 MS. STANFORD: I had some things I wanted to say.
19 I'm Joannie Stanford and I do live in the Cascades and
20 I second everything that Sandy Geoffroy just said.

21 THE HEARING EXAMINER: You're against this, then?

22 MS. STANFORD: I am against the Wal-Mart.

23 We have just moved here and we moved also from
24 Naples, where it was very quiet there but getting very
25 hustly-bustly. And we live right on the wall.

1 Cascades has a wall and we're on a lake and we hear
2 the traffic now even with the air conditioning going.
3 And I guess we moved here to have a quiet neighborhood
4 and I just can't envision these big trucks going down
5 the parkway. That's my concern.

6 And also the -- what happens if it's, if it's 24
7 hours? I'm very concerned about -- well, the
8 gentleman said the railroad track goes down through
9 The Vines. Well, we don't have that, but what about
10 just the people coming in, I mean, if it's 24 hours?

11 THE HEARING EXAMINER: So you're concerned about
12 the security of your home and property in your
13 neighborhood?

14 MS. STANFORD: The security and the noise and the
15 noise. Very much so.

16 THE HEARING EXAMINER: Okay. All right. All
17 right. That's good. Thank you, ma'am.

18 Don Eslick.

19 MR. ESLICK: Madam Hearing Examiner, I'm Don
20 Eslick from Estero and I'm the chairman of the Estero
21 Council of Community Leaders and I'm a member of the
22 Estero Community Planning Panel and I just want to put
23 a few things on the record if I could - give you a
24 copy - and to talk a little bit about how Estero is
25 organized to try to deal with zoning matters and other

1 issues of very substantial importance.

2 We really have -- what has transpired here over
3 the last two years from a community perspective
4 involves three entities.

5 First of all, the Estero Community Planning
6 Panel - and I have given you a list of the membership
7 of that body - they're the ones that deal with zoning
8 matters and you have seen us up here on many occasions
9 in the past. And they played a significant role in
10 this project by, at the very outset, early in 2003,
11 holding public meetings with Wal-Mart. They did one
12 on a voluntary basis and another one later on that
13 they were required to do. I think there were over a
14 hundred people at each of those meetings and out of
15 that we ended up with a list of about 30 concerns that
16 people in the community expressed.

17 Later on in the process, the Estero Design Review
18 Committee had two or three hearings where they dealt
19 with the appearance issues relative to this project.
20 And other members here in the audience who will speak
21 to that, those meetings, members of that panel will
22 also speak to that panel -- speak to those meetings.
23 And you have here a list of the members of that body.

24 The third group is the Estero Council of
25 Community Leaders, and that group has been around now

1 for almost three years, about two, two and a half
2 years, and it started out as an ad hoc civic
3 organization dealing with the Coconut Point Mall. And
4 we had negotiations over a period of about six months
5 and at that point in time all we did was to organize
6 the leaders or people who wanted to represent the
7 surrounding communities, anybody that wanted to come
8 in and meet to talk about that and express their
9 concerns. We then put that together in a position
10 paper and continued to refine it and use that for
11 purposes of negotiation.

12 After Coconut Point was zoned in September of
13 2002, we had ongoing responsibilities with those
14 developers because they had to honor a lot of
15 commitments to us and so we decided that we would stay
16 as a body and would expand and invite in people from
17 all the other residential communities in Estero, and
18 we have about 30 to 35 of them, where they have been
19 turned over to the residents. And we had the boards
20 of those communities designate members to the Council
21 of Community Leaders where they're not turned over.
22 We accept anybody. And if there's a dispute between
23 different groups within a community, then the board
24 itself or the council itself makes determinations
25 about how that should operate.

1 I have given you a list of the membership of that
2 body as well.

3 All these groups have been involved with this
4 project for now 17 months, and, as has been indicated
5 by the developer, we've had innumerable meetings on
6 this and I would judge that in the course of that time
7 that there have been thousands of people who attended
8 those meetings. And in addition to that then we had
9 all of these different negotiating sessions, and all
10 of them we had a special committee of representatives
11 of each of the surrounding communities where we could
12 find them would meet with Wal-Mart and then they would
13 report back on the negotiations to the full Council of
14 Community Leaders. And that happened. There were
15 four rounds of negotiations. And in each case Jerry
16 Murphy attended those sessions and he was the
17 bookkeeper to enumerate all of the changes that were
18 agreed to by the parties and that's how they got into
19 the documents that we have here today, whether they be
20 as conditions or whether they be in the landscape
21 plans. And I doubt that you see this kind of detailed
22 landscape plans on many projects, we have five or six
23 different sheets, or whether they be in the renderings
24 that are a part of the zoning. All of those types of
25 things have been incorporated, but in each case those

1 things were publicly debated and deliberated and the
2 public was -- they were always open meetings. The
3 press covered them. You know, how anybody could not
4 know what was going on and what the community was
5 doing if they're around would be very difficult to
6 avoid.

7 I have given you one last document which is a
8 copy of the articles that have been written and have
9 appeared in the Estero development report over the
10 last year and a half, and it runs 15 pages. This
11 document is transmitted on a monthly basis to about
12 2,000 e-mail addresses. About 1,400 of them are homes
13 in the Estero area. The other ones are professionals
14 and public officials, et cetera. They are also
15 published in the Bonita Banner and other news sources
16 use them repeatedly to report what's going on in
17 Estero.

18 I would just note for you on Page 2 and 3, at the
19 bottom of Page 2 and the top of Page 3 is the
20 beginning of a list and on 3 the completion of the
21 list of 30 concerns that were raised by the residents
22 of Estero at those original meetings. This is
23 published in June 2003. And it's the same issues that
24 you're hearing about today and most of them have been
25 resolved in the documents that are before us and for

1 which we encourage you to recommend approval.

2 The rest of the pages there as you go through
3 then represent a description of a blow by probably
4 excessive blow in detail of all of the negotiations
5 that went on between the parties which were approved
6 at all of these public meetings.

7 So we're, we're here basically to support the
8 project but in a way that deals with the traffic
9 issue. There's no question but that 41 and all of the
10 road structure in our area is the greatest problem
11 that we have with the dynamic growth that's occurring
12 in the area.

13 Before Wal-Mart came on the scene, and I've told
14 you this when we've had other zoning matters here
15 before, we had been working with the county and FDOT
16 to get U.S. 41 accelerated. And it was partially
17 through our efforts, working with Andy and Lee DOT,
18 that they came up with \$2.4 million to loan to the
19 state to begin the design work on this segment of U.S.
20 41. That was a year and a half ago.

21 THE HEARING EXAMINER: Now, who's the "they" in
22 your statement?

23 MR. ESLICK: Lee DOT.

24 THE HEARING EXAMINER: Lee DOT.

25 MR. ESLICK: Lee DOT loaned the state \$2.4

1 million in early 2003 in order to start the design
2 work on this phase, on this segment between San Carlos
3 Park and Corkscrew Road. If they hadn't done that,
4 we'd still be sitting here with the clock not running
5 on typically the six-year cycle that it takes the
6 state to build a road. We're well into the design
7 phase at this point in time because we were working
8 with the county to get that done.

9 Immediately, once that got under way, we started
10 to meet with the DOT and with FDOT and we met with
11 Commissioner Judah and out of that we developed a
12 program whereby we would organize developers in our
13 area to pay the interest on a loan in order to
14 accelerate the right-of-way and the permitting phase
15 which costs \$7 million. As a result of those efforts,
16 FDOT made an application under a new program or a
17 program that had just been funded in order to get an
18 SIB loan, a state infrastructure bank loan, for \$7
19 million, and that occurred late last year, in the fall
20 of 2003. And if we hadn't been pushing for this
21 money, that wouldn't have happened. No question about
22 it.

23 And so we now have the seven million for the
24 right-of-way and for the permitting and that is going
25 to be -- it's in this fiscal year. The money's

1 available right now and as soon as the design gets to
2 the 60 percent stage, the right-of-way and the
3 permitting will commence, and that's expected to be
4 completed in the middle of 2006.

5 And so our goal has been, and we have been
6 working on it ever since we got the SIB loan, to get
7 that road under construction in July 2006.

8 And so that's why we're here in support of the
9 project with the condition, with the condition that no
10 certificate of occupancy be issued until that road is
11 under construction.

12 Now, I say that with -- and I've got to add one
13 more thing that's very important to that that
14 underlies that.

15 Going back six months or early this year, we had
16 a meeting with Lee DOT, FDOT and the community and
17 Wal-Mart to talk about Wal-Mart participating with
18 other, with other organizations to pay the interest on
19 a two-year loan that would be made through the county
20 to the state. It had to be that way at that point in
21 time in order to accelerate the funding by two years,
22 at 2008, as Mr. Treesh has indicated. We want to
23 bring it up to 2006.

24 Well, how can you do that? You can do that if
25 the private sector will pay the interest on the loan

1 in order to do that. And we have been working on that
2 for two years.

3 And Wal-Mart came along and we said well, all
4 right, Wal-Mart, are you ready to step up to the plate
5 and pay the interest on this loan? All right. And
6 they admitted that they would and we had discussions.

7 Well, that got a little dicey because the zoning
8 had not been approved and so we had to back off of
9 that at that point in time. And so what we did was we
10 pushed Wal-Mart to give us a commitment for the --
11 this same funding so that we could use that in
12 conjunction with other developers in the area to pay
13 that interest, and they have done that. And so -- but
14 in order for us to have confidence that Wal-Mart will
15 perform - and, frankly, I have a good deal of
16 confidence based upon our 18 months of negotiations -
17 if you would write the approval with an additional
18 condition that says you can't get a CO until the road
19 is under construction, then you know their money and
20 anybody else's money has got to be out there and it's
21 got to be available and it's got to be programmed in
22 order for that to happen. And so that makes it a
23 win-win for everybody in my judgment. We get a good
24 store, we get a safe store. Bob Perry's going to talk
25 a little bit about some of the security and other kind

1 of operational agreements that are in a contract
2 between The Vines, et cetera. But we also get a store
3 where we have a participant who's going to provide a
4 substantial amount of funding in order to make that
5 road available two years sooner.

6 With that, I would be happy to answer any
7 questions.

8 THE HEARING EXAMINER: Okay. Questions?

9 MS. MONTGOMERY: Yes, I do have a couple
10 questions.

11 Don, since you're a member of the Estero
12 Community Planning Panel, I guess I would ask you the
13 same question I asked Greg.

14 There's been some rumors of rumblings that we
15 didn't meet with the right group, and I sure thought
16 we had, so since you're involved with many of the
17 groups in Estero, did we meet with the right people?

18 MR. ESLICK: Well, I would hope so. The only
19 organized opposition we've heard from today has been
20 the chamber of commerce and the chamber of commerce is
21 one of the groups, as you will see on the list, that
22 are members of the Council of Community Leaders. In
23 addition to all the residential communities, we also
24 have the fire district, we have the historical
25 society, the civic association and the chamber who are

1 represented in that body, so I don't know who else you
2 could possibly deal with.

3 The Estero Community Planning Panel is designated
4 by the county to perform the kind of role that we do.
5 We're the designated planning entity for the county
6 and we have received a thirty thousand dollar grant to
7 do that kind of work. The Lee statutes provide for
8 the design review committee. So, you know, we're the
9 recognized representatives of the community as it
10 relates to these kinds of matters.

11 MS. MONTGOMERY: And, Don, every meeting I went
12 to, you were there, and there's been some suggestions
13 that, you know, Wal-Mart was strong-arming people. In
14 all the meetings you attended, did you ever hear
15 Judson or Jeff or any of us strong-arm anybody?

16 MR. ESLICK: No. You probably feel it's the
17 other way around.

18 MS. MONTGOMERY: I do, actually.

19 You know, if I was under oath, I would swear I
20 felt that way.

21 MR. ESLICK: I heard your two million dollar
22 comment earlier.

23 No, it was always arm's length, typical
24 negotiation, right. We had our list of concerns and
25 we wanted you to address them and if we didn't think

1 you addressed them satisfactorily, we kept them on a
2 list and we kept badgering you to try to do something
3 about it. So, no, I don't think we were strong-armed.

4 MS. MONTGOMERY: And we were part of the --
5 Wal-Mart was part of the meetings with the Lee County
6 DOT and FDOT in regards to trying to accelerate --

7 MR. ESLICK: Absolutely.

8 MS. MONTGOMERY: -- the widening?

9 MR. ESLICK: No question.

10 MS. MONTGOMERY: No more questions.

11 THE HEARING EXAMINER: Any questions, staff, of
12 this witness?

13 MR. BLOCK: No.

14 THE HEARING EXAMINER: Thank you, Don.

15 Okay, Denise Scott.

16 MS. SCOTT: No, I'm not here to speak. I just
17 want to get a copy of the report at the end.

18 THE HEARING EXAMINER: Okay. Oh, I see down
19 here. Okay.

20 MS. MONTGOMERY: I would like to know what you're
21 going to say in the article before you write it.

22 THE HEARING EXAMINER: James and Natalie
23 Andreucci.

24 MS. ANDREUCCI: Andreucci.

25 THE HEARING EXAMINER: Andreucci. All right.

1 And would you spell your last name?

2 MS. ANDREUCCI: I was going to.

3 THE HEARING EXAMINER: Thank you.

4 MS. ANDREUCCI: A-N-D-R-E-U-C-C-I.

5 I am also a member of The Vines, we have a home
6 there, and I guess I am one of the people that do not
7 like having the store there.

8 Nothing against Wal-Mart. It's a beautiful
9 store. You and the planning commissioners and the
10 Estero Committee worked hard. It has nothing to do
11 with Wal-Mart. It has to do with three things.

12 I don't like the 24/7 store. I do not like the
13 scare tactics, the letters that we get from the
14 committee telling us if we do not support this we're
15 not doing our job and we should be afraid of what
16 might come in that area instead of Wal-Mart. Has
17 nothing to do with what goes in there. It has to do
18 with the traffic.

19 I personally saw two of the three deaths that
20 were out in front of our community, one woman coming
21 out of Breckenridge and a woman and her daughter going
22 north on 41.

23 I want you to think of the worst scenario you
24 could get: 41, Three Oaks Parkway, Estero Road
25 overpass, 75 and Wal-Mart could all be building at the

1 same time. What kind of construction problems would
2 we have?

3 I'm on the petition that one of the ladies has
4 here signed against Wal-Mart project, not because of
5 the store, but because of the traffic, so if you want
6 to ask me any questions like you said you had to ask
7 the other petitioners, go ahead.

8 MS. MONTGOMERY: No. You explained your
9 position. I don't need to ask you any questions.

10 MS. ANDREUCCI: Thank you.

11 THE HEARING EXAMINER: Thank you, ma'am, very
12 much.

13 Did James wish to speak?

14 MS. ANDREUCCI: He's not here.

15 THE HEARING EXAMINER: So you're, okay, Natalie.

16 All right. Bonnie Brandt. It looks like Brandt,
17 B-R-A-N-D-T.

18 MS. BRANDT: Right.

19 THE HEARING EXAMINER: I think I've had you in
20 some other hearings.

21 MS. BRANDT: Yes, I have been here with other
22 ones.

23 THE HEARING EXAMINER: You are sworn in?

24 MS. BRANDT: Yes, I am.

25 THE HEARING EXAMINER: State your name, please.

1 MS. BRANDT: My name is Bonnie Brandt. I live in
2 Estero. I live in a community that will be at the
3 southern end of the widening of 41, just north of
4 Corkscrew. I have been involved with the Council of
5 Community Leaders and several of their subcommittees
6 over the last two years.

7 I am in favor of the Wal-Mart being built where
8 it is, and I have to say that Highway 41 is a big
9 issue. I have said all along I can't believe the
10 powers that be widened a road except for a small
11 section, which creates a bottleneck, especially with
12 all the building going on. So this is one of the big
13 issues.

14 I want to also comment on the -- something that
15 was said earlier about the strong-arm tactics of
16 Wal-Mart. I have to agree with Don that maybe our
17 committee was a little stronger on some things, and I
18 was also in on the committee that met with them.

19 I want to also state for some of the people that
20 keep talking about coming in at the twelfth hour.
21 These things have been going on, as everyone continues
22 to say, for at least a year and a half, and they were
23 open to the public. They were publicized. They were
24 announced. We try to get as many people involved as
25 we can in all of these different proceedings that go

1 on.

2 All of the people that come to these things are
3 strictly volunteers. They're residents of Estero.
4 They're people that care about a new community that's
5 been emerging over the past few years, and it's grown
6 from a country place to a bustling, almost a little
7 metropolis. And hours and hours go into all these
8 things and by many, many people, who are not all here.
9 Thousands, as Don referred to. A lot of time and a
10 lot of talent from all walks of people. We have
11 housewives, we have developers, we have lawyers,
12 professional, we have teachers. We have anyone you
13 can think of, blue collar, white collar. It doesn't
14 matter. Everyone has a say and it's always worked
15 this way and it's worked very well. And I do -- I am
16 aware that some of the things that have been adopted
17 by the county are things that have come out of some of
18 our Estero proceedings, so obviously we're doing
19 something right. And I just want to say everyone in
20 our community is fully in favor of this project and so
21 am I personally.

22 Thank you.

23 THE HEARING EXAMINER: Now, your community is
24 what?

25 MS. BRANDT: I live in Sunnygrove.

1 THE HEARING EXAMINER: Sunnygrove. Okay.

2 MS. BRANDT: Which is right on Highway 41 next to
3 the Koreshan Park.

4 THE HEARING EXAMINER: Okay. All right. Gladys
5 Beron, Beron.

6 MS. BERON: Beron.

7 THE HEARING EXAMINER: Beron? If I keep going,
8 I'll get it.

9 MS. BERON: It's a different name to pronounce.

10 THE HEARING EXAMINER: Are you sworn?

11 MS. BERON: Yes.

12 THE HEARING EXAMINER: Okay, thank you.

13 MS. BERON: My name is Gladys Beron and I live in
14 The Vines and I'm here to oppose the Wal-Mart.

15 THE HEARING EXAMINER: Gladys, hang on two
16 seconds.

17 Folks, let me do say something. I notice that
18 we're getting into a trend here and I don't want to do
19 this.

20 I understand that your meetings were public and
21 that everybody could attend, but nobody is required to
22 attend those meetings, so, you know, let's not make
23 this gee, it's your fault because you didn't come and
24 so now you can't come up here and say you don't like
25 it. Everybody is entitled to their own opinion. You

1 know, whether they participated or not, they're still
2 entitled to their own opinion, so let's not, you know,
3 heap grief on the people that didn't attend because
4 you all spent thousands of hours working on this and
5 you feel that they should have attended. They still
6 are entitled to their opinion, whether it, you know,
7 coincides with yours or not.

8 So I notice that, you know, that Gladys is
9 against this, but I wanted to stop at this point
10 because I know there's some of the others of you out
11 here that were for and that probably attended those
12 meetings. So let's not go into the recriminations
13 that you didn't attend so you can't speak, okay? I
14 mean I will listen to everybody fairly and equally.
15 Everybody is entitled to their own opinion for
16 whatever reason, you know. I mean whatever they think
17 is important to them is important to them. Okay?

18 So, I'm sorry, go ahead.

19 MS. BERON: I want to thank you for that comment,
20 although I did attend a lot of meetings at The Vines
21 and concerns of this issue.

22 I kind of felt like saying to everybody welcome
23 to the Wal-Mart love fest. It seems as if, you know,
24 the right people were made to be here, and I can
25 respect that. A lot of time and a lot of effort and I

1 know a lot of the people who are involved in this
2 process and I respect them, and, you know, I consider
3 them my friends, but I still am entitled to my
4 opinion.

5 In regards to these people who are being told
6 that they've come in at the last minute, I notice that
7 Mr. Eslick -- and you'll have to excuse me. I'm one
8 of the few people that takes their glasses off to
9 read.

10 I noted that Mr. Eslick noted that he contacted
11 those who he could find from the other communities.
12 And I know for a fact that I was at those meetings,
13 the original first meeting with Wal-Mart and Mr.
14 Eslick and the Estero community leaders and the
15 leaders from our community as well. And I asked the
16 question about the other communities surrounding us
17 and we were told no one else was interested, that we
18 were in it alone. And we were also told that it would
19 be -- if we wanted to fight Wal-Mart, it would be done
20 solely at our own expense. And then we were told how
21 much money, which made a lot of people basically just
22 about drop their teeth. They didn't want to spend the
23 kind of money that we were told it was going to take
24 to fight Wal-Mart.

25 I agreed with the -- our community association

1 and the committee that was set up to try to hammer out
2 the best deal that they possibly could with Wal-Mart,
3 because I'm a realist. This commercial property is
4 going to be developed. On the other hand, I look at
5 the fact that the highway that has not been widened as
6 a godsend. It helps us to give us a little bit of
7 breathing space in regards to how long it will take to
8 get anything done in there. And perhaps six years
9 ago, and which is the completion date of this highway,
10 six years ago nobody in their right mind imagined that
11 this stuff was going to be going on in Estero.

12 Now, what's going to happen six years down the
13 line? A lot of people's attitudes are going to
14 change. They have been living with a lot more
15 development in the area. They may decide we don't
16 want a big box store on that corner, we want something
17 else. And we don't know. We don't know what the
18 future is.

19 I have here a copy that I want to give you of an
20 e-mail that is basically sent out by our community
21 association and in it is an e-mail from Mr. Eslick.
22 And it goes out to everyone that lives in The Vines.

23 And I resent the fact that Mr. Eslick has access
24 to my community association. He doesn't live in The
25 Vines, he doesn't live by The Vines. He's nowhere in

1 the area. And I wonder how he feels about the
2 Wal-Mart that's basically on the planning board for
3 the area that he's living in now.

4 The people in The Vines basically sold their
5 souls to Wal-Mart for a road. They said that, you
6 know, we have a difficult time getting in and out of
7 the front entrance. There have been, at least what I
8 know, three deaths. And we couldn't find out for
9 years -- we tried to get a traffic light there and
10 found out that the reason it was - and we would go
11 before the Florida Department of Transportation - was
12 that the police would report it to the nearest cross
13 road, so it was always coming up as Koreschan Boulevard
14 and not The Vines entrance. So thus we've had three
15 traffic fatalities right there in the front. And
16 anybody who sits there in season knows they're there
17 for at least 15 minutes prior to being able to get
18 maybe a right-hand turn. Forget about the left.

19 Wal-Mart is going to dump another 10,000 cars a
20 day out on that highway. And even if this is gone and
21 told that they can go ahead, during the
22 construction -- now, just as an example, the other
23 night I was down in Bonita Springs. It's a zoo down
24 there. Your own -- Wal-Mart's own traffic advisory
25 mentions that it's very difficult for people to follow

1 which way the roads are being turned and which way the
2 lanes are being changed to. My husband is a very good
3 driver, ended up in the middle of these barricades. I
4 mean we live there and we were just -- we just stopped
5 because we didn't know which way to go.

6 In having that store under construction at the
7 same time that this highway may be being widened is
8 like asking for disaster. I ask all of you people on
9 this planning commission could you live with
10 yourselves if somebody else was killed out there
11 because your decision was to let Wal-Mart have their
12 building? And even if they don't get their
13 certificate of occupancy, the construction going on at
14 the same time that the roadway is being widened or the
15 store being opened while the roadway is under
16 construction is like looking at basically going out
17 there and deciding you're going to commit suicide. I
18 mean it's going to be beyond everything else.

19 Also, the road that The Vines people have said
20 that they want coming out onto Koreshan, has anybody
21 given any thought to the fact of how many outlets are
22 going to be out on - well, now Estero Parkway, excuse
23 me - how many other roads are going to be coming into
24 Estero Parkway?

25 You have sold -- we have sold ourselves down the

1 road for this roadway. We'll probably be faced with
2 almost the same kind of traffic that we now have on
3 41. You're not going to be able to make a left-hand
4 turn there. And Wal-Mart's own traffic expert says
5 there would be no light, so all we can do is go out of
6 that road and go right. We can go out of the front
7 entrance and go right. If you want to go to Naples or
8 you want to go south, you're screwed. You're not
9 going anywhere. You're going to be sitting there in
10 traffic.

11 And I'm highly opposed to the issue of the store,
12 but I think that God has given us one little tiny,
13 little speck of hope here, and that's the concurrency.

14 You have your own laws. The State of Florida has
15 already been -- brilliantly thought about this issue
16 where you cannot put something in there until the
17 roadways are up to snuff. And let me tell you I'm in
18 no big hurry to widen that highway if it can keep
19 Wal-Mart and other large stores out of there.

20 Thank you very much.

21 THE HEARING EXAMINER: Thank you, ma'am.

22 Joseph Beausoleil?

23 MR. BEAUSOLEIL: Close enough.

24 THE HEARING EXAMINER: Okay. Hang on two
25 seconds.

1 Ms. Beron, you were going to give me an e-mail?

2 MS. BERON: Oh, yes. I'm sorry. This is my
3 evidence.

4 THE HEARING EXAMINER: Okay.

5 MS. BERON: I already gave one to Chip. It was
6 on his desk.

7 THE HEARING EXAMINER: While I've got this, let
8 me mark this for you.

9 Beausoleil?

10 MR. BEAUSOLEIL: Beausoleil.

11 THE HEARING EXAMINER: Beausoleil. Okay. And
12 you're sworn?

13 MR. BEAUSOLEIL: Yes, I am sworn in.

14 THE HEARING EXAMINER: Okay. Very good.

15 State your name, please, for the record.

16 MR. BEAUSOLEIL: Joseph Beausoleil. I live in
17 the Cascades, which is across the street from the
18 proposed Wal-Mart.

19 I'm speaking against it, but I'm not speaking
20 against it because -- and I'm very impressed with all
21 the concessions that Wal-Mart has made. I'm very
22 impressed with the design. It's first class. All the
23 environmental issues. I'm against it because of the
24 recommendation. The staff report recommends denial of
25 this store because it will strangle traffic at this

1 location and make it a failing road.

2 The Hearing Examiner should agree with the staff
3 recommendation because of the adverse effects on all
4 the residents of the surrounding area and because it
5 is not in the best interest of the community.

6 Now, the Estero Community Planning Panel argues
7 that Wal-Mart is likely to be, quote, a thriving
8 Estero business, unquote, and is, quote, not like it's
9 something new and untested. Wal-Mart is not something
10 new and untested. The results are out and it has
11 failed the test.

12 According to a study by the University of
13 California at Berkeley Labor Center, hidden costs of
14 Wal-Mart jobs, because Wal-Mart workers receive lower
15 wages than other retail workers and are less likely to
16 have health benefits, Wal-Mart workers rely on public
17 safety net programs to the tune of \$2,103 per employee
18 per year. The Berkeley study estimates that Wal-Mart
19 workers earn an average of 31 percent less than
20 workers employed in large retail as a whole, receiving
21 an average wage of \$9.70 per hour, compared with
22 \$14.01 average hour earning for employees in large
23 retail firms of 1,000 employees or more.

24 Simply stated, when workers do not earn enough to
25 support themselves and their families through their

1 own jobs, they rely on taxpayer supported programs
2 such as food stamps, Medicaid and subsidized housing
3 to make ends meet. This amounts to a subsidy to the
4 company.

5 Yes, Wal-Mart will be a thriving Estero business
6 because taxpayers will be subsidizing part of the
7 labor force.

8 Estero is a community of mostly retired people.
9 According to the estimates I have, 37 percent of the
10 residents are 65 years and older, as compared - 37
11 percent, almost 37 percent - as compared to 17 percent
12 in Florida as a whole.

13 Wal-Mart -- these people -- we don't need, the
14 Estero community doesn't need a Wal-Mart Super Center
15 operating 24 hours a day, seven days a week. Estero
16 doesn't need the added traffic on its roads. And,
17 finally, Lee County taxpayers should not have to
18 subsidize the richest retailers in the world.

19 Thank you.

20 THE HEARING EXAMINER: Thank you, sir.

21 Okay. Marilyn Setum.

22 MS. SETUM: Setum.

23 THE HEARING EXAMINER: Setum. Setum. Okay.

24 MS. SETUM: And I have been sworn in, Madam
25 Examiner.

1 My name is Marilyn Setum and I reside in the
2 Cascades development in Estero.

3 I want to state that I am absolutely, positively
4 against Wal-Mart.

5 I understand that in the future there are several
6 major projects planned for our area, the expansion of
7 41, which you have discussed, Three Oaks Parkway, the
8 overpass, and the possibility of a Sandy Lane
9 extension, which dissects our community. And,
10 finally, we're asked to accept two 24-hour super
11 Wal-Mart stores within just a few miles of one
12 another. Now, really, 24 hours. Who needs to go
13 shopping at two o'clock in the morning? The majority
14 of the people in the area are not going to do it. You
15 are going to have people from various distances coming
16 down to shop in our area.

17 I know some of these points have been reiterated,
18 but I want to mention them again.

19 The planning and zoning boards have recommended
20 that the Wal-Mart petition be denied, and the reason
21 for that, of course, is, we know, the traffic
22 congestion and 41 will be classified as a failed road.

23 And I also want to think about the fact of
24 Wal-Mart being built and the 41 construction, people
25 coming out of Estero Parkway, it will be an absolute

1 hell.

2 The need for a 24-hour Wal-Mart at 41 and Estero
3 is in the very least questionable with the number of
4 stores that we already have in the area. We have the
5 Miromar Outlets, we have Naples, Fort Myers and all
6 the stores in between. And not even to mention that
7 we're building the largest mall in the country in our
8 own back yard, Coconut Point.

9 The amount of traffic that Wal-Mart will produce
10 is obvious. We know that. The noise pollution will
11 be absolutely abhorrent, with 18-wheelers coming down
12 Estero Boulevard.

13 We're trying to ease these traffic conditions,
14 especially in season. Picture this in season, which
15 is already a horror, not add to it.

16 Also, I want to bring up the criminal element
17 that it will bring, which is a very crucial issue.

18 I have some information to relate to you that is
19 from the Lee County Sheriff's Department, the records
20 department, and this information is public knowledge.

21 From August 2001 to the current, a total of three
22 years, there have been 1,000 police responses to the
23 24-hour Wal-Mart on Six Mile Cypress. In comparison,
24 from 1999 to the current of five years, Home Depot,
25 which is located right across the street from

1 Wal-Mart, this particular Home Depot had only 358
2 police responses. That can show you right there we
3 are going to have a lot of problems in the community.

4 The Super Center is diametrically opposed to our
5 village concept and the quality of life that we wish
6 to sustain. We bought into this quiet residential
7 area and that's the way we want it to stay.

8 Now, in response to Don's statement about well,
9 we've had so many meetings and, well, people knew that
10 we were going to have these meetings, why didn't they
11 come, well, let me answer this. First of all, Estero
12 is a very young community. I think you can agree with
13 that. There were many people that were not in this
14 area, myself as one, for the last year and a half.
15 And, frankly, when I did read the article in the paper
16 and they were talking about a Wal-Mart on 41 in Estero
17 and I thought well, nobody with any common sense would
18 want that, but evidently there are many people that
19 do. And I respect that, I respect that. But in the
20 same token, I want to just mention one personal
21 experience that I've had.

22 I lived in the Waunakee, Wisconsin, area for 26
23 years, and for many years the city fathers that we
24 called them did not want the Wal-Mart store built.
25 They approached them many times. They're very,

1 they're very persistent. And they kept them out for
2 many, many years. But eventually the city father
3 changes and you have different ideas, different
4 people, and this is what our country's all about, and
5 they permitted Wal-Mart to come in. And unfortunately
6 what happened is they drove out many small businesses
7 and changed the whole concept of that town. And,
8 frankly, that I think is not really what should
9 happen.

10 So we need, we need the County Commissioners and
11 the county staff to support the laws of Lee County,
12 but, most of all, we need you to protect the rights
13 and the wishes of the residents of Estero. So
14 please -- I know you're going to weigh these issues
15 very carefully and especially weigh the concerns and
16 the wishes of the people.

17 I thank you and my fellow Cascade neighbors thank
18 you, as all Estero residents do.

19 THE HEARING EXAMINER: Thank you, ma'am.

20 Frank Pecka.

21 MR. PECKA: I have already raised my hand this
22 morning and I have raised it many times before, so I
23 don't think I'll need it this time.

24 I'm in favor of Wal-Mart a hundred percent.

25 I'm going to tackle this in a different way

1 because a lot of things -- it's been repetition,
2 repetition.

3 One, Charley just came through. The tax base in
4 Lee County has deteriorated. We're going to need
5 additional tax base. That land with the cows on it
6 does not derive any tax benefits. We need a building
7 there. This Taj Mahal that Wal-Mart's going to build
8 fits the bill.

9 Secondly, jobs. I see that this survey was from
10 Berkeley. Berkeley's in California. University of
11 Berkeley is a strange bunch. They're comparing income
12 in California to income in Florida, where every worker
13 here in the State of Florida, five dollars is paid in
14 sunshine, not in dollar bills.

15 And, lastly, I'm a little selfish. The prices in
16 Wal-Mart are cheaper. My wife loves it. I'm looking
17 forward to it. If I have a sore throat at two o'clock
18 in the morning, I want to go over there and pick up an
19 elixir off the shelf.

20 Thank you.

21 THE HEARING EXAMINER: Mary Beal.

22 MS. BEAL: Hi. I was sworn in earlier.

23 THE HEARING EXAMINER: Okay. Thank you, ma'am.

24 MS. BEAL: My name is Mary Beal and I live on
25 Vintage Trace Circle in The Vines and I recently moved

1 here on a full-time basis. I have been a homeowner in
2 The Vines for three and a half years, so I'm able
3 to --

4 THE HEARING EXAMINER: Hold on, hold on, hold on,
5 hold on. The battery's gone.

6 Chip, grab that little sucker out of there, would
7 you, and turn it off.

8 Thank you.

9 MS. MONTGOMERY: What just happened there?

10 THE HEARING EXAMINER: The battery goes. After a
11 period of time the battery dies and then it starts
12 doing all kinds of strange things in the back of the
13 room and people's hair starts levitating off the top
14 of their heads and, you know, I mean all these neat,
15 nifty things are going on and it drives me nuts.
16 He'll have to put a new battery in it. I'm sorry. I
17 do apologize.

18 MS. BEAL: That's okay. I can speak without it.

19 THE HEARING EXAMINER: Let's go off the record
20 here for a second until he gets back with that
21 microphone.

22 I'm sorry.

23 MS. BEAL: Do I need to reiterate what I said
24 earlier?

25 THE HEARING EXAMINER: No. I think we got most

1 of it. The court reporter got all of it, didn't you
2 Janet, what she said earlier?

3 Go ahead and -- you have lived in the house or
4 you have owned the house for three and a half years?

5 MS. BEAL: Three and a half years. And just
6 recently, within the last four weeks, moved here on a
7 permanent basis, so unable to attend the meetings but
8 have been aware of via e-mail communications.

9 Basically, I am here today. I want it placed on
10 record that I am opposed to the 24/7 Wal-Mart.

11 I come from a real estate marketing background
12 and have been in that industry for the past 24 years.

13 Real estate is one of the largest investments
14 that an individual will make in a lifetime and I'm
15 concerned about the -- as the others here today have
16 many concerns about the traffic and the security, et
17 cetera, but my point is and my concern is that I have
18 an investment in my home in The Vines. And it's my
19 understanding through other professionals that I have
20 worked with throughout the years that deal with
21 developers and new construction sites, et cetera, that
22 when this type of a building comes into a community,
23 what typically will happen is the value of the real
24 estate property in adjacent communities will stay
25 flat. Communities in other areas, the value of the

1 real estate will escalate. This is my concern and
2 this is why I am opposed to having the Wal-Mart store
3 in our area.

4 Thank you very much for your time.

5 THE HEARING EXAMINER: Thank you, ma'am.

6 Okay. Mr. Noethlich, I understand that you need
7 to leave.

8 MR. NOETHLICH: Yes. I apologize for going out
9 of order.

10 I haven't been sworn in.

11 THE HEARING EXAMINER: Raise your right hand,
12 please.

13 (Whereupon, the witness was duly sworn.)

14 THE HEARING EXAMINER: Pull the microphone up,
15 please.

16 Thank you.

17 MR. NOETHLICH: My name is Neal Noethlich and I
18 am a resident of Estero and I serve as chairman of the
19 Estero Planning Panel and I am here today just to,
20 just to make sure that everyone understands that
21 during this process Wal-Mart has met the obligations
22 that they have to meet, our community plan
23 requirements as well as the land development code
24 requirements.

25 Excuse me. I'll put my glasses on.

1 They first came before the planning panel on June
2 9th of 2003, and there were about a hundred or more
3 attendees at that. We don't always get -- we had at
4 least a hundred. We don't always get everyone to sign
5 the attendance sheets.

6 And then the following month they came as a
7 required meeting and appeared before the community at
8 a panel meeting where there were 83 or more attendees.
9 Just facts. I'm not trying to take that anywhere.

10 Now, if you really wanted to be truthful and if I
11 wanted to be truthful, I would tell you that on that
12 site I probably would prefer a park, okay, but that's
13 just not going to happen. And so what we are faced
14 with is a situation in which because, because they
15 need to do 24/7 and a few other minor details, they do
16 have to come before the community, the Hearing
17 Examiner and the Commissioners for a rezoning. If
18 they didn't have to, they could put anything up there
19 they wanted to. Not anything, but within the
20 parameters.

21 The second point I would like to make is I don't
22 want anyone, particularly those who are new, to
23 believe that the Estero Community Planning panel is a
24 decision making body. It is not. We have not been
25 vested by the county with that authority. We are a

1 reviewing body and a planning body and the requirement
2 is for the developers to come to the community and we
3 just simply ask them to come to the community at a
4 panel meeting or at a design review committee meeting
5 because we have structure there and because we have a
6 lot of regular attendees.

7 We've had 54 meetings of the Estero Community
8 Planning Panel and over 3,000 people have attended and
9 they have all been public and they have all been
10 noticed and advertised, so it's important to recognize
11 that we have influence and that's what we were after,
12 but we do not have any decision making authority. The
13 decision making authority lies in the hands of the
14 County Commissioners and they will rest upon the
15 advice of the staff as well as the Hearing Examiner
16 and to some extent will be influenced by the
17 community.

18 Just as if you were to look at this process that
19 we have established and put one project in there as a
20 test of the process, this one meets that test.
21 Whether you favor it or not, it meets the test, okay,
22 because it has -- no other single project that we have
23 reviewed or has been presented to the community has
24 received this level of scrutiny, so we all should just
25 recognize that. So citizens have had the opportunity,

1 they continue to have the opportunity, and if they're
2 here today, they're going to continue to have the
3 opportunity to be heard before the Commissioners.

4 Our philosophy from the very beginning was to
5 yield to the weight of the demands and the
6 negotiations to the communities that were most nearby
7 and would be most nearby affected, most significantly
8 affected. That community -- those communities at the
9 time this began were, those that were populated were
10 Breckenridge and The Vines.

11 So The Vines began their discussions. In fact,
12 they held meetings with Wal-Mart that I was invited to
13 attend before the Wal-Mart even came to the community
14 formally at a panel meeting. So there is a heavily --
15 heavy weight due because they are right there. Yes,
16 the Cascades folks, you are new and you are entitled
17 to the same consideration and nobody is going to argue
18 with your right to say you don't think it's a good
19 place to have a store, but I will say that as a
20 process it has yielded in my opinion the best that we
21 could have asked for in terms of accommodations on the
22 part of the developer. And I would suggest - this is
23 not a scare tactic and it's not strong-arming
24 anybody - that it might be very difficult to replicate
25 that for another interested party on that parcel.

1 So it is up to you to decide whether or not that
2 is of importance to you and the weight you want to
3 give it.

4 The current zoning does allow for more intense
5 use, okay, and as far as I'm concerned, after weighing
6 all the evidence, after listening to many, many
7 inputs, after participating in many meetings, I think
8 that we have about the best that we can get for that
9 parcel and I therefore am recommending that we, that
10 we approve it.

11 Traffic is an issue. I'm not going to walk away
12 from the traffic issue. And it's got to be dealt with
13 and our esteemed colleagues here in staff have been
14 working to do that, as has the community. I think
15 that this is a situation in which that's going to have
16 to be continued to work and certain things are going
17 to have to be taken on faith.

18 Thank you very much.

19 Any questions?

20 THE HEARING EXAMINER: All right. No, sir.

21 MR. NOETHLICH: Thank you for allowing me to go.

22 THE HEARING EXAMINER: Okay. Larry Hickman.

23 MR. HICKMAN: Good afternoon. I'm Larry Hickman.
24 I'm from -- I was sworn in earlier.

25 THE HEARING EXAMINER: Thank you.

1 MR. HICKMAN: I'm from The Vines, 1595 -- what is
2 it? 19591. I'm not usually at The Vines. I'm
3 usually working in Minneapolis, but -- so I'm not here
4 for the town meetings all the time.

5 And I went to the first meeting back in 2003, and
6 the whole Vines, I would say 95 percent, was really
7 just totally against it. But in a year and a half
8 later I come back and here we are, we've sold
9 ourselves to Wal-Mart.

10 As you can see, I'm a little bit against
11 Wal-Mart, just not Wal-Mart in total. They could
12 build their beautiful box store there, but they really
13 haven't addressed crime to me whatsoever. Crime in
14 their own parking lot, crime in their store maybe,
15 with cameras, but can you picture -- Gladys Beron just
16 said 10,000 cars, trips a day. Is she right or is she
17 way off the ballpark? Ten thousand? Times that by
18 seven. That's 70,000 cars per week, 280,000 cars per
19 month, a million six per six months, three hundred --
20 3 million cars per month -- or per year that will be
21 coming in that little stretch that could be not
22 totally done by the time Wal-Mart opens. Three
23 million two hundred thousand cars.

24 Now, do you know what the average state in the
25 United States, how many crimes, how many people are in

1 prison out of every hundred thousand people? There's
2 roughly 700. So three million, you could be thinking
3 about 21,000 more people in your Estero that could be
4 related to crime, to crime, 21,000.

5 So this U.S. 41 got to me a little bit. It
6 wasn't really part of my notes here, but -- and then
7 all the people that Gladys said, and I know how many
8 people per hundred thousand are in prison, so it's a
9 lot of, a lot of people that could come to Estero now,
10 21,000 people additional.

11 So crime is really the message. What about
12 crime? I don't think Wal-Mart addressed crime at all.
13 With the Wal-Mart in my front yard, all I can see is
14 additional new crime. 24/7 will bring tons of
15 undesirables. With the new road out of our community
16 and to the Wal-Mart parking lot, it becomes a new
17 entrance for crime and a fast getaway by car by
18 undesirables. 24/7 only makes it worse.

19 A crime study shows year 2001 from January
20 through August, January through August, just in San
21 Carlos alone, 6,167 crimes, 6,167 crimes to the edge
22 of Estero. That's what it covered. The crime hours
23 were between seven o'clock to eleven o'clock.

24 THE HEARING EXAMINER: A.m. or p.m., sir?

25 MR. HICKMAN: It would be in the evening.

1 THE HEARING EXAMINER: P.m. Okay.

2 MR. HICKMAN: P.m. The total crimes in those
3 five hours over the six-month period was 1,754 crimes.
4 In the five hours it was 28.44 percent of their crime
5 in total. We don't need to expand crime hours in our
6 community. You expand that 24/7 to twelve, one, two,
7 three, four o'clock in the morning and you will bring
8 more crime to your marketplace or to your city.

9 Twice I have been robbed in The Vines. In 1995,
10 early in the morning, by knife point. Cut the
11 screens, came in the house and robbed us. Lucky I had
12 everything laid out in the kitchen, in the living
13 room, so they could just get everything and go on
14 their way. There was no need to come in the bedroom.
15 2002, just recent, I was robbed in the afternoon while
16 golfing on a golf course. Broken into the house.

17 Would any of us, any of us let our wives or any
18 member of our families walk alone in a Wal-Mart
19 parking lot at one o'clock in the morning? Serious.
20 One o'clock. I wouldn't chance it.

21 The highest crime months for our community is
22 April, May, June and July. That's when the snowbirds
23 go back.

24 The Vines members need -- as Vines members we
25 need to go back to square one and say no to Wal-Mart's

1 24/7. They want to put a store there. Nine o'clock
2 is a sensible time to shop. 24/7 will just bring more
3 crime to our market and to -- I'll go on here.

4 We have been sold out by some of our members
5 because I think they were lied to. I don't want to
6 divide us like the Republicans and Democrats because
7 we all have to live in our community, but I really
8 think we have been sold out because of the lies we
9 have been told.

10 I believe we must protect our home values. With
11 new crimes, our home values could decline along with
12 our golf community.

13 In total, please keep U.S. 41 the way it is to
14 keep crime out of The Vines.

15 Thank you.

16 THE HEARING EXAMINER: Thank you, sir.

17 Adrienna Miller.

18 MS. MILLER: No longer wish to speak.

19 THE HEARING EXAMINER: Thank you, ma'am.

20 Byron Hallam.

21 MR. HALLAM: I have already been sworn.

22 THE HEARING EXAMINER: Okay. Thank you, sir.

23 Neale, we're going to have to quit at 1:30, as
24 soon as we do this.

25 MS. MONTGOMERY: I'm hungry now. I understand.

1 THE HEARING EXAMINER: As soon as we finish the
2 public, we will quit because I'm getting lightheaded.
3 We'll stop for 45 minutes or an hour for lunch at 1:30

4 State your name, please, sir.

5 MR. HALLAM: My name is Byron Hallam and I live
6 in the Cascades.

7 I have been involved with the Wal-Mart project
8 since its first inception back in 2003. I have
9 attended all the meetings, I have listened to all the
10 arguments, weighed all the evidence, and I rise today
11 to speak in favor of the Wal-Mart store.

12 When I first got involved with the Cascades --
13 with the Wal-Mart project, I was living someplace
14 else. I was living a mile south in Sunnygrove Park
15 and I just moved into the Cascades just three weeks
16 ago.

17 All during the time that I was attending meetings
18 I was very concerned about the message getting out to
19 the people in the Cascades. I knew they were not
20 attending meetings. I didn't know what they was
21 reading in the papers and I had no way to communicate
22 with them. It was February of this year before I met
23 the first person in the Cascades and I think that was
24 Joe Beausoleil back here. And it was in February when
25 Don Eslick and myself and Joe and a few other people

1 in the Cascades finally met with our developer.

2 One of the things we asked for was a name and
3 address list, some way we could communicate with the
4 people in the Cascades to keep them informed to what's
5 going on. It wasn't until I guess in 'March or April,
6 I guess more like April, before I ever got any name
7 and address list. And I never even got an e-mail
8 address list. Today I have about 140 people on my
9 e-mail address list so I can try and keep people
10 informed, but at the time most of these negotiations
11 were going on I didn't know anybody. I was attending
12 the meetings. I was hoping that I could somehow
13 communicate with the people. I had no way of doing
14 it. So most of the people in the Cascades really
15 don't have too much knowledge about what's going on
16 except for what they have read in the paper.

17 In my estimation, the biggest issue is traffic,
18 the traffic on 41, a stoplight at U.S. 41 and the
19 traffic coming down Estero Parkway. From everything I
20 can gather, that traffic on Estero Parkway and U.S. 41
21 is going to be there one day no matter what. That
22 corner is going to be developed and the traffic
23 generated by Wal-Mart is not going to be a whole lot
24 different than some other development that is composed
25 of 330,000 square feet of commercial space, so that

1 traffic is going to be there.

2 I think the Wal-Mart proposal and what we have
3 negotiated with Wal-Mart is probably about the best we
4 can possibly ever do. And even though I may not like
5 the traffic and may wish it would go someplace else, I
6 just don't see any alternative and I'm here to support
7 the building of Wal-Mart.

8 THE HEARING EXAMINER: Thank you, sir.

9 Matt Uhle.

10 MR. UHLE: For the record, Matt Uhle,
11 representing The Vines Community Association, and
12 we're here to support the Wal-Mart application with
13 the addition of the change to Condition 27-B that was
14 identified by Mr. Eslick in his presentation.

15 Technically, the only thing you need to do with
16 that is to take out local development order and
17 replace it with certificate of occupancy.

18 THE HEARING EXAMINER: Let me find 27-B in here.
19 Hang on just a second, Matt.

20 MR. UHLE: That's from Mr. Block's August 2nd
21 memo.

22 THE HEARING EXAMINER: Mr. Block's on the 2nd.
23 Is it 27-B from -- 27. Okay. I don't have a 27-B for
24 Chip's. Wait. I know where it is. I can find it. I
25 can find it in here. 27-B is Page 24 in Chip's.

1 Oh, I see. Okay, I got it. I got it. I got it.

2 So instead of saying issuance of a local
3 development order is prohibited until construction,
4 you guys want this to say that no CO may be issued
5 until --

6 MR. UHLE: The rest of the language remains the
7 same.

8 THE HEARING EXAMINER: Okay.

9 MR. UHLE: And there's another condition that's
10 much more minor relating to one of the private
11 agreements that we've reached that I would like to add
12 as part of my presentation but I'll discuss that in
13 the context of the agreement.

14 Given that there is a lot of public interest in
15 this case and the public sentiment swings in multiple
16 ways, I think it would be useful for me to spend a few
17 minutes explaining why it is that my clients came to
18 the conclusion that they did.

19 To begin with, I think it's important to put this
20 in the correct regulatory framework, and I think Neale
21 has done that, but I will elaborate on it a little
22 bit.

23 THE HEARING EXAMINER: All right.

24 MR. UHLE: The fact of the matter is that this
25 property has zoning entitlements today of 320,000

1 square feet of retail and 20,000 square feet of
2 office. If you look at that zoning resolution, and I
3 believe it's included in the staff report so I don't
4 need to put it in the record, you will find that it
5 was approved in 2001. And, to be blunt about it, the
6 standards for approvals of commercial projects in
7 Estero in 2001 are different than they are now.
8 They're more stringent today. I don't think it was a
9 bad job at the time, but if you compare it to the
10 proposal that's being made today, you will find that
11 the list of uses that was approved was much more
12 extensive than what's being proposed today.

13 The buffering and setback requirements were not
14 particularly enhanced. There were no architectural
15 requirements of any kind. There were no operational
16 agreements reached or standards required within that
17 document. There were some things that were included
18 in there, but by and large it's a relatively generous
19 resolution. And it's not strong-arming and it's not
20 threatening anybody to say that as a matter of fact,
21 if Wal-Mart isn't approved, that something can in fact
22 be built on that parcel that's consistent with that
23 zoning resolution. That is a fact. That's the
24 baseline.

25 And so from the perspective of The Vines'

1 residents, what they needed to do is look at the
2 proposal in front of them and determine is it better
3 or is it worse than what's permitted there today, and
4 the bottom line conclusion was that the Wal-Mart
5 proposal with the conditions that have been proposed
6 is better than what's out there, what can be approved
7 today.

8 There are basically two issues that we looked at
9 in the process of reviewing this application. One of
10 them is compatibility and all the various aspects of
11 it and the second is traffic, and I'll address those
12 in that order.

13 With regard to compatibility there was obviously
14 a lot of concern about a number of different issues,
15 some of which you heard about today, throughout the
16 process. Those were discussed at a variety of
17 meetings, some involving just Vines people, some
18 involving larger Estero community groups.

19 Frankly, at the beginning of the process there
20 was a lot of sentiment against Wal-Mart in any aspect
21 altogether and in the first meetings I, perfectly
22 honestly, was not optimistic that an agreement could
23 be reached with Wal-Mart, but the fact of the matter
24 is the negotiations took place over a long period of
25 time and Wal-Mart negotiated in good faith. As a

1 result of that, we have a series of conditions and a
2 series of agreements that have addressed my clients'
3 concerns. Those are manifested in three different
4 ways.

5 One of them, obviously, we have changes to the
6 plan itself and a long list of conditions that were
7 worked out with the community and with the staff.
8 Those are in front of you today and don't really
9 require much additional comment on my part except to
10 say they were all important. They all took a lot of
11 time to work out and we think that everybody did a
12 very good job, and that if you look at those
13 conditions you will find that they are considerably in
14 excess both of what was required in the previous
15 approval and what's required by the land development
16 code.

17 The second manifestation is an agreement that was
18 reached between my clients and Wal-Mart which I would
19 like to put in the record simply as information for
20 the Hearing Examiner.

21 THE HEARING EXAMINER: Okay.

22 MR. UHLE: This is an agreement entitled
23 Agreement for Maintenance Access which provides for
24 the second access for the people of The Vines onto
25 Estero Parkway, provides that it be gated and provides

1 for landscaping and signage and allocates the cost of
2 maintenance to the various parties.

3 I'm giving this to you purely for information
4 because it's not something that in my opinion has
5 sufficient public interest attached to it that it
6 needs in any way to be attached as a condition to this
7 particular approval, but it is of significance and I
8 will tell you that the Wal-Mart master concept plan to
9 the extent that it needs to show physical features of
10 the plan that are consistent with this agreement, it
11 does so, so that is not a problem.

12 In addition to that my clients also reached an
13 agreement on certain operational features of the
14 project that I would also like to put in. This
15 agreement addresses a number of aesthetic and security
16 features such as security cameras, as having a
17 security guard on the premises 24 hours a day, having
18 carts and litter picked up on a regular basis and so
19 on.

20 This agreement obviously has implications for
21 residents of The Vines, but it also has certain
22 compatibility aspects of it that I think have a public
23 interest attached to it, so it will be our request
24 that you include another condition in the zoning
25 approval that incorporates this document and

1 compliance with it as a condition of approval.

2 I will tell you that there are dispute resolution
3 mechanisms that are written into this document that
4 are intended to be used prior to the county being
5 involved and it's intended to be a very informal
6 process. One of the more important features of it is
7 the creation of frequent meetings with the general
8 manager with a committee of residents and so on and
9 it's our expectation that those will take care of the
10 problem, but if for whatever reason they didn't, we
11 don't want litigation to be a solution to any problems
12 between the clients and the county and I think code
13 enforcement is a better approach to those kind of
14 problems than litigation, so we would like to have
15 that available as a fallback mechanism to the other
16 more informal dispute mechanisms that are in the
17 document.

18 THE HEARING EXAMINER: I need to read the
19 document, Matt. I'm not sure that I will include this
20 as a condition of approval since this is an agreement
21 between the applicant and a third party and the only
22 way that the county is involved would be if we were to
23 do a condition and require the county then to enforce
24 a, really a condition or a contract that the county is
25 not actually a party to. So I will need to read this

1 before I make a decision on whether or not to include
2 this as a condition of approval, but my inclination
3 right at the moment is probably not to. I won't say
4 for sure one way or the other until I've had a chance
5 to look it over.

6 MR. UHLE: I will tell you that the county was
7 aware that this agreement was being drafted. There is
8 a -- there is language in the agreement that indicates
9 the agreement will survive legally if the county does
10 not agree to include it as a condition, but the fact
11 of the matter is that I wasn't involved in all these
12 meetings, but it's my understanding that Mr. Murphy
13 encouraged this activity to take place and that in
14 fact in some ways the parties were kind of doing the
15 county's dirty work for them. So I wouldn't encourage
16 you to do this but for the fact that there is public
17 interest attached to it, but I think that there were
18 issues negotiated that do affect the public interest
19 and on that basis we would encourage you to.

20 THE HEARING EXAMINER: I'll read it over and, you
21 know, see if -- see where my thoughts lie once I've
22 gone through the agreement.

23 County Attorney?

24 MS. HENRY: Do you want my comment at this time
25 or would you like me to wait until Mr. Uhle's

1 completed?

2 THE HEARING EXAMINER: Let's let him finish and
3 then you can make the comment.

4 MR. UHLE: The bottom line as to compatibility,
5 as I said, is that we think that Wal-Mart has done an
6 excellent job of addressing the issues. It's been a
7 long, long and difficult process, but this is in fact
8 a product that is attractive and well in excess of
9 what the previous approval stated and what the code
10 required.

11 The other major issue in this case from our
12 perspective is traffic, and traffic is a difficult
13 issue. In this particular instance we and the Council
14 of Community Leaders are taking an intermediate
15 position between what the staff proposed and what some
16 residents would like and what Wal-Mart would like,
17 which would be simply to comply with the county's
18 standard concurrency requirements. We agree with both
19 parties in some respects.

20 The factual background to this is I think beyond
21 dispute that there is a level of service problem on
22 U.S. 41 that's not going to be addressed until U.S. 41
23 is widened and that will be sometime in the future.
24 Exactly when is to some extent the point of the
25 discussion about the condition. It is also a fact

1 that regardless of whether anything gets built on this
2 particular parcel, the traffic will continue to get
3 worse until the widening is done. And certainly it is
4 possible that under the current zoning approval that
5 somebody could come in other than Wal-Mart and pull a
6 DO for a project as of July 1st of 2005 and just be
7 subject to the regular concurrency provisions. In
8 that case they'd get their DO and so that would make
9 the traffic even that much worse.

10 So those are the underlying facts that I think we
11 all have to consider in deciding what we need to do
12 with this.

13 We support the staff notion of having a super
14 concurrency condition in this resolution. We do that
15 for, obviously, for public policy reasons. There was
16 concern about an interim period in which there will be
17 traffic that will be too much for the road to handle.
18 We think it's justified for a couple of reasons.

19 One of them is notwithstanding the fact that on
20 paper it would appear that this project is being
21 scaled down, we think that based on what the Hearing
22 Examiner and I think the planning staff and everybody
23 in the business knows, it would not be possible to
24 actually build a 340,000-square-foot project with
25 primarily retail on this particular parcel, so we're

1 not as impressed by the reduction in square footage as
2 Wal-Mart would like us to be.

3 It's also true that Mr. Treesh has testified here
4 today that on a daily basis as opposed to a peak hour
5 basis his analysis showed that the traffic is actually
6 being increased. And it's also, I believe, true, and
7 Mr. Getch, I think, could verify this, that if you
8 look in ITE, it creates a category for super stores
9 that has a higher trip generation rate than just one
10 for an average shopping center.

11 And so for those reasons I think there is a
12 factual and legal basis for requiring some degree of
13 quote, unquote, super concurrency for this project.

14 And I would note in furtherance of that that this
15 particular issue has been discussed in other cases
16 before. The Home Depot case in Bonita Springs is a
17 good example of that. In that case the staff took a
18 fairly strong position initially. An agreement was
19 reached that required super concurrency but was a
20 compromise. In the Coconut Point case in which I was
21 the attorney, a similar experience took place. There
22 was a strong staff position taken initially that got
23 worked out and watered down, but there still was super
24 concurrency required in the final development order in
25 that case. And so there is precedent for requiring

1 super concurrency, but as a practical matter the
2 experience has been that those dates and the timing of
3 them has been adjusted throughout the process to try
4 to be equitable to the applicant. And that's really
5 what we're trying to do here.

6 Our objective in tying this to the CO stage
7 rather than the development order stage is to try to
8 keep Wal-Mart on something like its original plan for
9 development on the parcel rather than deferring them
10 for several years, which we think would be unfair to
11 them. We think that that's a better approach, a more
12 reasonable approach and one that they're more likely
13 to accept in the real world.

14 It's also, as we understand it, consistent with
15 the representations that they've made in the past
16 about helping to front the money for the improvement
17 of U.S. 41.

18 Part of the problem that we have to deal with is
19 that the Wal-Mart has made these public statements
20 about helping out, but we need to find a legal
21 mechanism to make that work. We can't simply write a
22 condition saying that Wal-Mart will do X because
23 there's a legitimate legal concern about contract
24 zoning under those circumstances, so to try to put
25 some teeth in that particular promise while still

1 complying with the law is a bit of challenge. We
2 think that this is a perfectly legitimate way to do
3 it.

4 And with regard to the use of the CO as the point
5 at which this particular condition becomes effective,
6 we're aware, obviously, that the county in the past
7 has been opposed to using COs for that particular
8 purpose. I am personally familiar with a case back in
9 the mid-eighties where some -- the Board of County
10 Commissioners was bombarded with a lot of people
11 complaining about the inability to open up a
12 particular restaurant, whose name I will not mention,
13 and I think that's the root of this particular concern
14 throughout the years. But we would point out, first
15 of all, that this case has gotten so much more
16 publicity than that one and I don't think that
17 particular condition was a result of a public hearing
18 process, although I'm not sure. But in any event,
19 everybody would know up front what the rules were in
20 this case and so there would be no misunderstanding
21 about that down the line.

22 Using certificates of occupancy is also clearly
23 an enforceable standard, it's an objective standard,
24 it's one that is not difficult for the county to
25 enforce. There are no legal problems with it. It's

1 just practical concern about whether it's the
2 appropriate stage or not.

3 But the fact of the matter is that if you
4 postpone it to the extent that the staff is
5 suggesting - it will be up to Wal-Mart to tell you
6 whether this is or is not true - but my suspicion is
7 it may make their project infeasible, and if that's
8 the case, that's not what we're looking for.

9 What we're looking for is a mechanism that will
10 get the road improvement done as quickly as possible
11 so that Wal-Mart can stay on schedule and the road
12 gets done as fast as possible and everybody wins.
13 That's all we're looking for.

14 THE HEARING EXAMINER: Okay.

15 MR. UHLE: If you have any questions of me, I
16 will be happy to answer them.

17 Bob Perry needs to follow me. He needs to give
18 you a discussion about the process The Vines used to
19 tell you how this position got to where it is.

20 THE HEARING EXAMINER: Okay. I have Bob Perry
21 and Wayne Robinson left.

22 Matt, do you have any idea how long Mr. Perry's
23 presentation is going to be?

24 MR. UHLE: I don't think it will be more than
25 five minutes.

1 THE HEARING EXAMINER: Because I'm getting a
2 little spacey here. I'm going to have to eat here
3 shortly.

4 So we can go ahead and do Mr. Perry and Mr.
5 Robinson if we can keep both of them rather short.

6 We have another one?

7 UNIDENTIFIED SPEAKER: I'll keep it short, too.

8 THE HEARING EXAMINER: Folks, I tell you what.
9 Let's do -- let's take a ten-minute break. The court
10 reporter's been at this for three hours. Let's take a
11 ten-minute break. I'll grab a cracker. I'll grab a
12 cracker, we'll come back in and finish up public input
13 and then we'll take lunch.

14 (Whereupon, the proceedings were recessed.)

15 THE HEARING EXAMINER: All right. Let's go back
16 on the record.

17 All right. Mr. Perry, I believe, wanted to speak
18 next. And then I have Robinson, Prysi and -- or Prysi
19 and Rosenthal.

20 Okay. State your name, please, for the record.

21 MR. PERRY: I have been sworn. My name is Bob
22 Perry and I live at The Vines and I'm also The Vines
23 representative to the Estero Community Council of
24 Leaders.

25 Matt said I would cover the process on how The

1 Vines community reached their decision and how that
2 affected, if it did, the council itself.

3 Being as close as we are to the site, we, of
4 course, had a much more jealous interest in what went
5 on there and how it got done, so our people or The
6 Vines people were involved in a couple of individual
7 meetings with Wal-Mart where Wal-Mart made continuing
8 successfully improved presentations to The Vines until
9 we got to the point where we felt that the concessions
10 or the negotiations was to a point where they were
11 worth the trade-off for 24/7. It was at that point,
12 which happened to be March 2nd and March 3rd of 2004,
13 some 14 months after we started, that we called a
14 meeting, a series of meetings, with Vines residents,
15 two each day, one in the afternoon and one in the
16 evening, and we presented the background,, we presented
17 the alternatives, we presented the status of the
18 negotiations to date. We did -- also presented the
19 facts of the negotiations. And then in addition to
20 that, we asked the members who attended - and I'll
21 give you some data on that - to vote on the issue.

22 I have a copy of that presentation which I would
23 like to show you, give it to you.

24 THE HEARING EXAMINER: Thank you, sir.

25 MR. PERRY: The reason I do that, I think you

1 will see that it was very comprehensive and that it
2 covered the pertinent information and gave the basis
3 for a reasonable decision to be made.

4 Now, the options that were given to The Vines
5 people were three. If I may, I'll read them.

6 Support the application for rezoning and support
7 immediate commencement of construction once a DO and
8 concurrency certificate have been issued.

9 Option B was to support the application for
10 rezoning but to attempt to get a super concurrency.

11 Option C was resist approval of rezoning based on
12 24/7 and attempt to get a super concurrency.

13 Of those members that attended, 83 percent voted
14 for Option A, 83 percent; six percent for Option B;
15 and 11 percent for Option C. Now, approximately 175
16 residents came to those four meetings, but as we only
17 allowed one vote per resident, we counted 133 votes,
18 so 110 people voted for Option A, eight people for
19 Option B and 15 people for Option C.

20 Now, from the beginning this issue was always one
21 of 24/7 and all the stuff that that drug with it, like
22 security, like noise, like pollution, like theft and
23 traffic. I'm not going to go back through all the
24 things that we looked at to change and to concede on
25 the 24/7 issue.

1 Traffic is bad. It's getting worse every year
2 since I've been here. There's no reason to expect it
3 won't get any worse with or without Wal-Mart. At
4 present the only entrance that The Vines people have,
5 the only entrance and exit for the 440 residents is
6 directly onto U.S. 41, and this has become ever
7 increasingly difficult and dangerous. The situation
8 is only going to get worse given the increase in
9 traffic.

10 The staff, as I understand it, is recommending no
11 DO until the road work on 41 has been completed and
12 further projects that this could be as late as 2011.
13 This approach would force the residents of The Vines
14 to face the increasing traffic with or without
15 Wal-Mart at our only entrance to 41 for six years, the
16 last two of which the road would be under
17 construction.

18 It is not unreasonable to forecast that this will
19 become a very serious safety and quality of life issue
20 and one that could result in traffic fatalities and
21 declining property values.

22 It's clear that the site's going to be developed.
23 It's not clear that another developer would provide
24 the secondary access roads to The Vines residents.
25 And without that road, The Vines community will be, in

1 my opinion, severely impacted. Therefore, the best
2 interest of The Vines is to have the Wal-Mart rezoning
3 application and DO approved, and now we've changed
4 that to concurrency occupancy at the time the road
5 starts construction; and to advance the construction
6 of U.S. 41 to 2006 rather than the current 2008.

7 Following this approach, the secondary access
8 road to The Vines could be available in 2006 and the
9 construction of U.S. 41 would be completed -- I'm
10 sorry, would be started in 2008.

11 It also appears to me that the staff really is in
12 agreement with the rezoning application. The denial
13 is based on traffic. So I urge you to recommend
14 approval of the rezoning to the BOCC so that we can
15 get on with the widening of U.S. 41 as soon as
16 possible, which just has to benefit everybody.

17 Thank you.

18 THE HEARING EXAMINER: Thank you, sir.

19 Wayne Robinson.

20 MR. ROBINSON: I have not been sworn.

21 THE HEARING EXAMINER: Raise your right hand,
22 please.

23 (Whereupon, the witness was duly sworn.)

24 THE HEARING EXAMINER: Okay. Pull the microphone
25 up, please.

1 Thank you, sir.

2 MR. ROBINSON: My name is Wayne Robinson. I'm a
3 registered landscape architect and I am the chairman
4 of the Estero Design Review Committee.

5 I'm here just to speak to the issues that we
6 reviewed within the development order application for
7 this project.

8 I think I can speak for the entire committee in
9 saying that Wal-Mart has done a very good job in
10 responding to all of the committee's suggestions and
11 comments that we made at the first meeting, and I just
12 wanted to open up any questions that you might have
13 about our review of the project.

14 THE HEARING EXAMINER: Okay. Anybody at the
15 table have questions of this witness?

16 MS. MONTGOMERY: Just in case anybody doesn't
17 know, Wayne, would you kind of for the record indicate
18 those items you do review?

19 MR. ROBINSON: Okay. We mainly look at an
20 aesthetic review of the site itself. We look at the
21 site plan or site design of the parcel. We look at
22 the architectural design, landscape design. And we
23 also look at colors and materials, building colors and
24 materials, to make sure that they are consistent with
25 both the Estero community plan and with adjacent

1 developments around the particular site that they're
2 proposing to build on.

3 MS. MONTGOMERY: And in this case you had
4 comments or suggestions about the types of plants and
5 the sizes of plants and the staggering of plants? I
6 mean you had considerable input?

7 MR. ROBINSON: We commented a great deal on
8 landscape because we felt that in many cases landscape
9 was our best option for screening and buffering many
10 of the areas of the development and we spoke a lot to
11 architecture because the original -- I know we have
12 seen two different Wal-Mart developments through the
13 committee. Both times they had come in with somewhat
14 upgraded stores from their, I guess, corporate
15 standard. But we have pushed that architectural --
16 the level of architectural detail and design to, I
17 think, a new standard.

18 MS. MONTGOMERY: I don't have any other
19 questions.

20 THE HEARING EXAMINER: All right. Thank you,
21 sir.

22 Bill Prysi, Prysi, Prysi.

23 MS. MONTGOMERY: Prysi.

24 THE HEARING EXAMINER: Prysi.

25 MR. PRYSI: I haven't been sworn in.

1 (Whereupon, the witness was duly sworn.)

2 THE HEARING EXAMINER: State your name, please,
3 for the record.

4 MR. PRYSI: My name is Bill Prysi. I'm also a
5 registered landscape architect here in the State of
6 Florida and also a member of the Estero Design Review
7 Committee, and pretty much anything I say is going to
8 echo -- be pretty redundant to what Wayne has already
9 put on record. And I would just like to add to that
10 basically that Wal-Mart has come to the table. We
11 were pretty hard on them in terms of what it was we
12 wanted them to add in terms of landscaping and
13 architecture and site planning and pedestrian function
14 through the project. And what I'm aware of, they have
15 agreed to do everything our committee has recommended,
16 and in doing so I think they, as Wayne had said, this
17 building will set a standard.

18 I can't speak to the traffic issues and some of
19 those other detriments that go into the community, but
20 this building will be set apart from anything else
21 that would otherwise be built on that site as it's
22 zoned. And to some degree you have to be careful for
23 what you wish for, it might come true. In this case,
24 at least this building and this project is going to be
25 better than anything else that would normally be

1 put -- or certainly be better than the other two
2 buildings that are on Six Mile Cypress Parkway. And
3 in that respect I think they have met everything we
4 have asked them from the Estero Design Committee's
5 standpoint and what they were supposed to do.

6 That's about all I can add.

7 THE HEARING EXAMINER: Thank you, sir.

8 Arnie Rosenthal.

9 (Whereupon, the witness was duly sworn.)

10 THE HEARING EXAMINER: State your name.

11 MR. ROSENTHAL: My name is Arnold Rosenthal and I
12 live in Estero in the Villages at Country Creek, to be
13 exact, and I serve Country Creek on the Council of
14 Community Leaders.

15 Actually, our master association president, Bob
16 Nelson, is our representative and he appointed me as
17 his alternate while he summers in Maine.

18 Now we're here to discuss the proposed Wal-Mart
19 store at 41 and Estero Parkway abutting The Vines, and
20 I strongly recommend approval of the proposal before
21 you.

22 I just got back from a flying vacation and I
23 think I've got a sore throat, so bear with me.

24 In a perfect world we would have the best
25 designed Wal-Mart, the best operated Wal-Mart and

1 erected on roads that are ready and waiting. That
2 would solve the two basic issues that, that we have
3 here, compatibility and traffic. But that didn't
4 happen.

5 What is proposed here is the best Wal-Mart
6 imaginable, but we do not yet have all the roads in
7 place that we would like to have. Unfortunately, the
8 county and the MPO chose to ignore our pleas when four
9 or five years ago we asked that 41 north of Corkscrew
10 be six-laned, but now we are where we are. Simply
11 put, we are faced with two alternatives.

12 The first is to reject the Wal-Mart proposal
13 until the road is widened. The result of that would
14 be a disaster for Estero. All the good things that we
15 negotiated with Wal-Mart, all their concessions would
16 disappear, and several years from now we'll get that
17 big ugly box, perhaps Home Depot, along with a gaping,
18 asphalt-covered parking lot. We'd get outside storage
19 of products and garbage and tent sales and all that
20 other stuff that makes for a bad neighbor and a bad
21 neighborhood. In other words, rejection of the
22 Wal-Mart abutting The Vines would be a terrible loss
23 to the Estero community. On the other hand,
24 acceptance of Wal-Mart's proposal would guarantee an
25 upscale store and a compatible neighbor.

1 Who better to determine that than its most
2 immediate neighbor, and that's The Vines, where, with
3 full knowledge of the details, they overwhelmingly
4 voted to support the Wal-Mart store with all the
5 conditions they imposed.

6 In short, in short, we have a choice between a
7 good, compatible neighbor now, albeit with some
8 relatively short-term traffic issues, or we could take
9 potluck several years from now and with no leverage to
10 negotiate away detrimental installations and
11 conditions that would bring down our neighborhood.

12 Therefore, I request the staff and the county to
13 exert its efforts into accelerating the six-laning of
14 41, clearly a constructive measure, rather than spend
15 its energy obstructing progress.

16 Before closing, I would like to present 129
17 e-mails in support of the current Wal-Mart proposal.
18 And with that I will close, Madam Hearing Examiner,
19 and submit to any questions.

20 THE HEARING EXAMINER: Questions of this witness?

21 MR. BLOCK: Yes, I have one question.

22 THE HEARING EXAMINER: Okay, Chip.

23 Is that more than one copy or is this --

24 MR. ROSENTHAL: That's one copy, 129 e-mails.

25 MR. BLOCK: Mr. Rosenthal, during your

1 presentation you mentioned that maybe in a few years
2 if this is not approved you might have some other type
3 of development that would be less compatible.

4 A simple question. Under today's rules, if they
5 don't change, would any development of this site have
6 to go through the Estero Design Review Committee?

7 MR. ROSENTHAL: I believe they would have to go
8 through, but they've already been approved. The
9 rezoning has been issued. If they change that zoning,
10 then they would have to go through.

11 MR. BLOCK: Okay. So I presume that you -- your
12 answer to the question is yes, any development of this
13 site still has to go through the Estero Design Review
14 Committee?

15 MR. ROSENTHAL: Yes.

16 MR. BLOCK: Thank you.

17 THE HEARING EXAMINER: Okay.

18 MR. ROSENTHAL: I guess that's it.

19 THE HEARING EXAMINER: That's it, sir. Thank you
20 very much.

21 MR. ROSENTHAL: Thank you.

22 THE HEARING EXAMINER: And I have one last white
23 sheet for Nancy Cohen.

24 Mrs. Cohen, are you sworn in?

25 MS. COHEN: No, I'm not.

1 THE HEARING EXAMINER: Raise your right hand,
2 please.

3 (Whereupon, the witness was duly sworn.)

4 THE HEARING EXAMINER: State your name, please,
5 for the record.

6 MS. COHEN: Nancy Cohen. I'm a resident of
7 Estero and have been involved in going to the various
8 meetings that we've had on this project as an
9 interested citizen.

10 And I won't reiterate what everybody else has
11 said. I agree with the project and I especially want
12 to say that the process that has gone through, which
13 started out where the people of the Cascades were,
14 were against the Wal-Mart initially coming in as the
15 initial reaction to it, over time, through thoughtful
16 negotiations and give and take, I think we've come up
17 with the best project possible for this corner and I
18 applaud all the people who have put in countless hours
19 to -- without their own self-interest to make this
20 happen as well.

21 THE HEARING EXAMINER: Thank you, ma'am.

22 All right. Do I have anybody in the room who has
23 not testified in this hearing that wishes to do so?
24 Because we're going to close for lunch.

25 When we come back after staff and applicant's

1 presentation, anyone who has not spoken will be
2 allowed to speak then. Okay?

3 All right. Let's, let's be back here at, let's
4 be back here at three o'clock from lunch.

5 MR. BLOCK: Madam Hearing Examiner, before we
6 break, is it necessary for me --

7 MS. MONTGOMERY: Are you going to lock the room?

8 THE HEARING EXAMINER: Yeah.

9 MR. BLOCK: Is it necessary for me to have Mike
10 Carroll come in? Will you have questions about
11 concurrency management?

12 THE HEARING EXAMINER: You might bring him down.

13 MS. MONTGOMERY: Wait, wait. The noise guy and
14 the environmental guy have a plane, and if anybody
15 doesn't have any questions, can they go?

16 THE HEARING EXAMINER: I don't have any questions
17 of them and the public doesn't, so, yeah, I think
18 they're free.

19 MR. BLOCK: I'll tell Mike he can come back in
20 and least sit down here.

21 (Discussion off the record.)

22 THE HEARING EXAMINER: All right. Three o'clock,
23 folks, we'll start this back up.

24 (Whereupon, the proceedings were recessed at 2:03
25 p.m. and resumed at 3:00 p.m.)

1 THE HEARING EXAMINER: Let's go back on the
2 record so we can get this little fellow done before
3 too terribly late. We can all go home or whatever.

4 Okay. We are back from lunch and I'm going to
5 make the same offer. Anybody in the public who has
6 not spoken who wishes to speak before staff's
7 presentation?

8 Okay. Let's do staff's presentation.

9 Thereupon,

10 CHIP BLOCK,
11 a witness, having been previously duly sworn, was examined
12 and testified as follows:

13 MR. BLOCK: Good afternoon. For the record, my
14 name is Chip Block. I'm with the Lee County
15 Department of Community Development. And before I get
16 started during my presentation, Madam Hearing
17 Examiner, I would like for the record to be accepted
18 as an expert witness in planning and zoning, how
19 planning rules relate to the Lee County Land
20 Development Code, Lee County Comprehensive Plan for
21 this particular case.

22 THE HEARING EXAMINER: Okay. Any objections from
23 the applicant?

24 MS. MONTGOMERY: No.

25 THE HEARING EXAMINER: No? Okay. Accepted.

1 MR. BLOCK: Thank you very much.

2 I'm going to try to provide a very short, concise
3 presentation, Madam Hearing Examiner. I think we're
4 to a very good point here of knowing all the different
5 issues that have been raised on this case, and in this
6 instance I think we're down to the point of where the
7 staff recommendation is and we have gone from there.

8 Before I really do get started, though, going
9 back through my memorandum at lunchtime I happened to
10 notice one thing that I talk about in there, that I
11 have an attached landscaping plan, master concept
12 plan, and I know for a fact when I hand-delivered it
13 to your office there wasn't anything attached to it,
14 so with that I would like to hand you the plan that
15 was intended to go in to the Hearing Examiner which
16 was stamped received July 30, 2004, from zoning from
17 the applicant. It's reduced copies of those.

18 THE HEARING EXAMINER: Because I think I've got,
19 I've got some big copies over here.

20 MR. BLOCK: Probably have the bigger copies. You
21 may not have the July 4th copy or the July 30th copy
22 that I just handed to you because that was a revision
23 since I have come on board on this case that I
24 received from the applicant. It contains all their
25 master concept plan elements, their landscaping

1 elements and their property development regulations,
2 and that should be a clear, concise and final document
3 that you can refer to.

4 As has been mentioned, this case is a request for
5 an amendment of an existing mixed-use planned
6 development zoning. The property is at the corner of
7 what is now known as Estero Parkway and U.S. 41,
8 previously known as Koreshan Boulevard and U.S. 41.
9 It is for a proposal to allow an option of development
10 within this mixed-use planned development for a
11 Wal-Mart center, Super Center on the site, within the
12 commercial portion of this site.

13 The staff report has been prepared and submitted
14 to the Hearing Examiner previously. That staff report
15 is a staff report dated July 7th, 2004. I know the
16 applicant was kind enough to say Chip's report and
17 Jerry's report. Well, I always like to place on the
18 record when we start a hearing that it's an individual
19 planner's report. Just this one thing I have to say.
20 This is a staff recommendation. It's not an
21 individual, personal, professional planner
22 recommendation. This is a staff recommendation. And
23 although it may have been -- the case may have been
24 led by Jerry Murphy previous to my taking it over and
25 Jerry leaving, this is a staff recommendation

1 entirely, and that is inclusive of the set of
2 conditions that I have given to you since that staff
3 report.

4 The staff report that is before you contains a
5 recommendation of denial. Now, that recommendation of
6 denial -- we have heard what the applicant has placed
7 on the record today. Based upon all of the
8 applicant's agents, their professionals that have come
9 on board and presented today, plus also hearing the
10 public having already spoke coming into the staff
11 presentation, and our staff recommendation must remain
12 a denial at this time in accordance with what our
13 staff recommendation, review and analysis was.

14 I apologize. I'll try to slow down. I know I'm
15 talking a little fast. I apologize.

16 The analysis in this case for review and approval
17 of this project, staff has looked at this and finds an
18 approval of this zoning and approval of the
19 development activity on this site would in staff's
20 opinion cause the level of service for U.S. 41 to
21 fail. At this time staff does understand that the
22 Florida Department of Transportation has not begun any
23 construction in this particular area and does not plan
24 to begin construction of the road improvements in this
25 area to U.S. 41 to enhance the development activity --

1 or road capacity. I apologize. Should be enhancing
2 the road capacity, until what we understood was the
3 year 2009 as part of our report, but Mr. Treesh has
4 placed on the record today that it could be 2008.

5 And with that, we still do understand that, but
6 we have to stick with our recommendation.

7 In staff's opinion, to approve the zoning case at
8 this time would be inconsistent with the numerous
9 policies contained within the Lee Plan as contained
10 within the staff report, and they have been outlined
11 as such in the report.

12 Also because of the reduced level of service
13 which would be happening on U.S. 41 if we just go
14 ahead and allow the project to be developed, we
15 believe also that it would have some compatibility
16 issues and affecting the neighborhood in this area.

17 But knowing that there could be the possibility
18 that this project from a zoning standpoint could be
19 recommended for approval by the Hearing Examiner and
20 also could be approved by the Board of County
21 Commissioners, staff in the original report provided
22 the Hearing Examiner a series of conditions that we
23 could live with. Since that time staff and the
24 applicant have gotten together. We have gone over
25 these conditions and we felt that it was very

1 appropriate to provide the Hearing Examiner with a
2 more complete compilation of all the conditions that
3 currently exist within the mixed-use planned
4 development and which could be included as part of the
5 Wal-Mart option. And with that we provided to the
6 Hearing Examiner dated August 24th, 2004, a memorandum
7 that sets that out, with the first -- Pages 1 through
8 most of 18, Page 18, as being the conditions, the
9 cumulative conditions and actions for deviations
10 within the mixed-use planned development as they exist
11 today, whether they be part of the original zoning of
12 the property as established under the resolution
13 placed in the record today or by those administrative
14 amendments that have been granted by county staff for
15 changes within portions of the project.

16 As you go through the conditions, as you get
17 later on in the series of conditions of the current
18 ones, you will see at the end of each condition a
19 parenthetical statement that includes an ADD,
20 administrative amendment approval, and that is just
21 setting out so we can find it in the future where that
22 came from. So we can find it through this process or
23 through future processes of where that condition had
24 come from and been established by.

25 Beginning at the bottom of Page 18 we have a

1 change that is now called Wal-Mart option. That
2 Wal-Mart option is if this project is going to be
3 approved or recommended for approval by the Hearing
4 Examiner, these are the conditions that we suggest
5 should be applied to any approval of this project for
6 a Wal-Mart Super Center, which is why we have stated,
7 for example, in the first line of Condition 1, that
8 is, under A, Condition Number 1, the first line, and
9 we state that the development of the commercial
10 portion of this project as a Wal-Mart store must be
11 consistent with the master concept plan. By placing
12 it in that fashion, if another user would want to come
13 in that is not a Wal-Mart store Super Center coming in
14 on the site, then we would have to apply back to the
15 original commercial zoning, commercial approval in
16 there. Without that statement in there, then anybody
17 could come back in and use it. We wanted it to be
18 specific. That's what we are hearing from the
19 residents that have come in in support of this case.
20 If it's going to be approved, let's approve this
21 development plan, let's approve this architecturally,
22 let's approve this landscaping, and so that's why
23 staff has written that condition that way and all the
24 rest of the conditions.

25 Let me take you on to Page 19 of the memorandum.

1 I also noticed during some break period that we have
2 had today that I think I need to change some
3 references to conditions in here, and I think I've
4 caught them all but maybe the Hearing Examiner may
5 catch another one, and I apologize if we did. We're
6 trying to catch them all.

7 If you go to the bottom of Page 19 under the
8 words, the use Signs, in compliance with the land
9 development code, and then it references some
10 conditions, I think those conditions have been
11 renumbered now and I think those conditions should now
12 be Conditions 6 and 16 below.

13 The same language should be applied on the
14 following page under Page 20 in the commercial portion
15 out parcel, signs. We have the same reference, old
16 condition numbers, and now they should be referencing
17 6 and 16 again.

18 Elsewhere in this there was some discussion
19 during the applicant's presentation during their noise
20 expert on Condition 17, beginning on Page 22. If you
21 can go to the staff memorandum, Page 22, it talks
22 about walls, and you were talking about compressor
23 systems and the like. I think the language in there
24 should now read under Subletter A, surrounding every
25 trash compactor and a ten-foot-high masonry precast,

1 and then the compressor would be the 18 foot. I think
2 we were talking about ten foot on that. That was
3 acceptable and the staff presented that we would have
4 no objection to it being changed to ten feet.

5 THE HEARING EXAMINER: Okay.

6 MR. BLOCK: If I may now turn the Hearing
7 Examiner to the applicant's August 26th letter from
8 CPH Engineering that talks about different items, I'll
9 try to touch on each one of these individual items
10 just to let you know where staff stands on this so
11 that you can get an understanding of our position.

12 On Item 1 effectively they're asking staff to
13 approve the project, and, unfortunately, our staff
14 recommendation is for denial, so I don't see how we
15 can entirely agree with the change in the staff
16 recommendation.

17 I'm sorry, Neale. I know you're saddened by
18 that, but unfortunately I'm still going to have to
19 stick with the position that staff recommendation is
20 denial on the project.

21 MS. MONTGOMERY: You don't have to.

22 MR. BLOCK: I know I don't have to, but in this
23 instance it's the staff recommendation of denial and
24 we do not see a reason to make the change.

25 In Item Number 2 they've offered a condition.

1 It's not that we have any objection to the condition,
2 but there is the word "may" in there and I know
3 sometimes from a legal perspective certain words don't
4 like to fit in there and "may" kind of to me sounds a
5 little -- you know, I don't know if that's acceptable
6 language or not. Maybe the county attorney's office
7 can explain if they agree with the word "may". I kind
8 of hesitate on the word "may". Maybe along the lines
9 "the above conditions will be addressed" could be a
10 better term. You have a better understanding of how
11 those work and I just thought I would suggest that.

12 MS. MONTGOMERY: Or you could always say above
13 issues may already be addressed in the development
14 order submittal currently. That's really what we're
15 trying to say.

16 MR. BLOCK: That's a possibility, yes. May
17 already be another way of determining it, yes.

18 In Item Number 3 on the second page, applicant
19 disagrees with the conditioning of Number 11 regarding
20 construction and excavation hours. We do not agree
21 with those changes. We would suggest that the Hearing
22 Examiner keep the staff recommendation of those hours
23 as contained.

24 We understand where the applicant is coming from,
25 but as you correctly pointed out, "that creates a

1 disturbing noise," that phrase that they have in
2 there, I don't know how we can apply that. What is
3 disturbing noise? It's not defined anywhere in our
4 codes. So I'm concerned about that particular portion
5 of the language.

6 We talked about Item Number 4 and the sidewalks
7 during the applicant's presentation and I think we
8 have discussed where that is. Staff is saying that's
9 inside to the project; it's not along U.S. 41 or along
10 the Estero Parkway.

11 The delivery hour limitations, I know those have
12 been worked out between the applicant and The Vines
13 and the residents. They have their agreement. We
14 included that language in our original recommendation
15 because that's what was given to us as to what the
16 potential delivery hours are. It's not that we have
17 any disagreement with them. We provided what the
18 applicant has provided to us. We're learning today
19 through the public hearing process that those hours
20 have been worked out with The Vines, which are the
21 major residential people that would be impacted by
22 that. If you want to change those hours, we have no
23 objection to that.

24 THE HEARING EXAMINER: What about the additional
25 language that the applicant has offered with regard to

1 the backup alarms?

2 MR. BLOCK: The backup alarms, I have heard the
3 noise experts -- noise expert talk today about how
4 some federal guidelines require that the backup
5 beepers be on trucks. Their design on the site is
6 such that trucks should not be backing up anyhow
7 because of the way the site has been designed and
8 there are no backup beepers on the Wal-Mart trucks.

9 I don't know if we really need to get into that
10 particular element. I think the noise levels in the
11 design if Wal-Mart -- if the project is approved and
12 Wal-Mart's developed the way it is, if they tell their
13 drivers and future delivery people that no backup,
14 maybe signage, no backing, everything has to be in a
15 forward -- all movement, truck movement, has to be in
16 a forward motion, I think that will satisfy all those
17 requirements.

18 THE HEARING EXAMINER: Okay.

19 MR. BLOCK: The applicant talks about
20 disagreement in Item 6 with Condition 27-B, which is
21 the concurrency condition. And in this one I believe
22 this is where they offered the condition that it says
23 that it would be in accordance with the -- through a
24 certificate of occupancy.

25 Staff is concerned about certificate of occupancy

1 for a couple of reasons for that term. One reason in
2 no positive -- not necessarily positive. One's not
3 heavier than the other, it doesn't weigh heavier,
4 number one and number two I'm going to give you.

5 The first reason is that under a certificate of
6 occupancy, if we do that, then you're -- we could be
7 allowing the developer to go in there and do the
8 entire development, lay it entirely out, put the
9 building in there, multimillion dollar facility and
10 ultimately down the line they may not be able to open
11 that building for another couple years and they're
12 going to be pressing, pressing the county to allow
13 them to open up in a different fashion. Let us be
14 able to open, we got a multimillion dollar facility
15 there and we're losing money quickly, we need to have
16 this thing opened up. And I believe they will put
17 pressure on the county. We've had that done before.
18 It's been opened and we had the problems with the one
19 particular one down, the restaurant down in South Fort
20 Myers off of San Carlos Boulevard where they were
21 allowed to open with a conditional statement
22 associated to it but they never complied with the
23 conditional statement and then it became a legal issue
24 associated to that.

25 The second portion of that is, again, if you do a

1 certificate of occupancy, we have the situation where
2 again all the project and activity has been going on
3 there on that site, when it's better if we're going to
4 approve it, then let's approve it somewhat being
5 consistent with the land development code, wherein we
6 cannot issue the local development order approval
7 until it complies with the concurrency issues. I
8 think that's generally closer to where we're going
9 with the original condition.

10 But there again, in staff's opinion we cannot go
11 ahead and recommend approval of this because of the
12 issues related to the policies of the comprehensive
13 plan and the fact that we do not have any commitment
14 at this time within the State of Florida in which they
15 / are within their three-year time frame which we can
16 issue the zoning approval, or at least in this case
17 the development permits, I believe Neale will point
18 out more clearly later on. It says development
19 permits, but we don't want to go further than that.
20 We don't think it's going to happen that soon.

21 The concern about that is if the state -- I'm not
22 saying the state will -- this will happen. I know the
23 Estero community has been pressing their influence
24 forward - I presume the tape clicked over fine
25 enough - that the Estero community has been pressing

1 the state to bring everything forward. Well, we don't
2 know what's going to happen in the future. The monies
3 may not be there, monies may disappear and we may not
4 be able to develop it for a few years. And one of the
5 possible situation scenarios on this is we may grant
6 this zoning approval here and they -- you might have a
7 vacated master concept plan because they cannot
8 develop it within five -- they haven't come in for
9 their local development order for five years. And if
10 that happens, we've gone ahead and approved a project
11 that we knew full well may not be able to be approved
12 for even a local development order within that
13 five-year period and thus it may vacate in and of
14 itself, and we're concerned about that.

15 Going down to Item 7, which is the denial of
16 Deviation Number 1 and the vehicle overhang, staff did
17 not believe -- has believed in this instance that the
18 approval of this particular deviation is going to
19 allow the applicant to have a more condensed project
20 because of the wheel blocks not being there. They're
21 utilizing concrete medians. But in rereviewing the
22 land development code both during this public hearing
23 and at lunch, I do see that we can do landscaped
24 medians, I do see that we can have the overhang go
25 into the landscaped medians. I don't know if there's

1 any real difference between a landscaped median and a
2 concrete median. So in this instance if the Hearing
3 Examiner is going to recommend approval of this
4 request, I recommend that you include the condition in
5 that deviation and we recognize that it could be -- we
6 can go ahead and recommend approval of this deviation
7 if the project is going to be approved.

8 For the other two deviations, these are both
9 related to, as I talked with Mr. Pankey during his
10 question and answer session, I asked about where this
11 deviation would be applicable and we have found that
12 it's going to be applicable in two locations, that
13 being with the lake system that is along Estero
14 Parkway and, second of all, the lake system that's
15 along the roadway leading into The Vines. And
16 although this is going to put a crimp in their
17 development activity in making sure that they maintain
18 the setbacks from the appropriate roadways, staff
19 still cannot recommend approval of this particular --
20 either one of these two particular deviations,
21 although if the Hearing Examiner is going to recommend
22 approval of it to the Board of County Commissioners,
23 we certainly recommend that you include the conditions
24 as outlined as an option if you're going to approve
25 those deviations.

1 And let me make a -- point out two particular
2 examples that I'm familiar with with wayward vehicles
3 and what happens when they go off roadways. You
4 probably have seen it before, but I've got two that
5 immediately come to mind. They're both in the
6 Iona-McGregor area. One was along Gladiolus Drive
7 near Pine Ridge Road. There was a westbound-traveling
8 car on Gladiolus Drive that the person fell asleep on
9 and got out of control and went through -- over a
10 raised curb, through the landscaping, through a chain
11 link fence and into the retention lake near the Publix
12 shopping center. That person was saved. A nearby
13 sheriff happened to see the accident happen, happened
14 to be at the right place at the right time and was
15 able to pull the person out. That's on a four-lane
16 divided roadway right after a traffic light and yet
17 this person was still able to go through these
18 particular areas. There was no guardrail, nothing
19 else, no other protective barrier there. They were
20 able to go up over that.

21 The other one is on what I would term, best term
22 would be a northbound direction along McGregor
23 Boulevard near Iona Road. A person was traveling - I
24 believe they were in an SUV. I could be wrong about
25 the size of the vehicle, but they were traveling

1 northbound from Iona Road toward Pine Ridge Road
2 intersection. The person had either a medical problem
3 or something else. I'm not really sure what exactly
4 happened. But that person crossed over the median
5 northbound, crossed the southbound lanes of traffic
6 and crashed through an iron fence at Gulf Harbor and
7 ended up in the lake at Gulf Harbor and drowned and
8 died. Again, no guardrails, no provisions. And these
9 both of these places were, the retention areas were
10 placed in accordance with the rules and regulations of
11 Lee County.

12 And to place this in an instance on Estero
13 Parkway where you have no traffic control devices
14 between Three Oaks Parkway and U.S. 41 on an outside
15 part of the turn, you're on the outside part of the
16 turn making your left-hand turn, if a person loses
17 control of their vehicle they're going toward that
18 particular lake when you look at it on the master
19 concept plan, so anything can happen and will happen.

20 Staff believes it's very appropriate in this
21 instance if it's going to be approved that protection,
22 some type of protection for wayward vehicles be
23 provided beyond what has already been offered as part
24 of this application.

25 Last but not least is Item 1. I apologize for

1 taking 15 minutes, but Item 1 is a simple one here.

2 Item 1 is actually the Item 1 of the staff
3 memorandum, and that is the condition concerning
4 whether or not they can do automotive repair services
5 in the parking lot, and they wanted to make sure it
6 was understood that they could still do it in the
7 tire/lube express area. We have no objection to that
8 language change being included. It was entirely
9 intended to be that way, staff still reads the
10 condition that way, but the applicant is very
11 concerned through the overabundance of caution on this
12 one to have the exact language in there. We have no
13 objection to that.

14 With that, that completes my presentation. With
15 me today is Andy Getch from Lee County DOT and also
16 Mike Carroll from our development services division
17 who is knowledgeable of the concurrency requirements,
18 and we're here to answer any questions. Neither, to
19 my knowledge, neither one of the two have a
20 presentation to make.

21 THE HEARING EXAMINER: All right. Andy, you have
22 no presentation?

23 MR. GETCH: No, ma'am.

24 THE HEARING EXAMINER: Can you add anything to
25 what Ted Treesh has told us about the FDOT

1 construction date on 41 or the funding date on 41?

2 MR. GETCH: Yeah. Yes, I can expound on that and
3 some of Mr. Block's comments.

4 For the record, Andy Getch with Lee County DOT,
5 Department of Transportation. I'm in the planning
6 section. I'm a registered professional engineer in
7 the State of Florida and have appeared in front of the
8 Hearing Examiner on dozens of occasions and have been
9 accepted as an expert in transportation engineering.
10 I would like to be so today.

11 THE HEARING EXAMINER: Any objections from the
12 applicant?

13 All right. Accepted.

14 MR. GETCH: In terms of FDOT and the way they
15 implement their work program, Mr. Treesh is correct
16 that their 2009 fiscal year actually starts on July
17 1st, 2008.

18 Now, one clarification that I would add which
19 goes towards Mr. Block's comments is that -- and we
20 have the same issue with our projects, too. Just
21 because a project is funded on the first day of the
22 fiscal year on paper, that doesn't mean the money's
23 there on the first day of the year. FDOT does have
24 production constraints and, you know, they like to
25 stagger their bids out and how they do that is up to

1 them. So if the project is designed, the right-of-way
2 is completed and no snags or hiccups are hit with
3 environmental permitting or any other things that we
4 sometimes run into in implementing road projects, they
5 may still not put it out, put it out on the street for
6 a construction bid on July 1st, 2008. It could be
7 later that fiscal year. It could be early 2009.
8 That's up to the state.

9 THE HEARING EXAMINER: Would anybody know in
10 advance of July 1, 2008, if the state wasn't going to
11 have the money, if FDOT wasn't going to have the money
12 or wasn't going to be able to actually address the
13 issue until later in that fiscal year, is there some
14 way that anybody could know that?

15 MR. GETCH: The five-year work program that the
16 Florida Department of Transportation has similar to
17 ours is updated every year and they go through a
18 process where candidate projects to be added to the
19 fifth year are evaluated by the county's MPO, and FDOT
20 begins publishing, I forget exactly when during the
21 year, but based on the MPO's recommendations they
22 begin publishing what they call a draft tentative work
23 program and that in fact is what's referenced in my
24 memo in Exhibit F of Jerry's staff report dated --

25 THE HEARING EXAMINER: July 7th.

1 MR. GETCH: -- July 21st.

2 THE HEARING EXAMINER: 21st?

3 MR. GETCH: Yeah, that's the one I have to work
4 from. I don't actually have a copy of the more
5 current staff report which has been referred to
6 earlier as Chip's staff report. And I agree with Chip
7 that they are staff reports. It doesn't have
8 anybody's name on them.

9 MS. MONTGOMERY: They have initials at the bottom
10 so we can tell.

11 MR. BLOCK: Sometimes.

12 MR. GETCH: But in any case, that draft tentative
13 work program goes through the years, it's evaluated by
14 the local, the MPO and its advisory committees, and
15 that's usually the first indicator because that's
16 where the revenue forecasts are plugged in and we find
17 out, oh, okay, there's not as much money in there as
18 we thought there would be or, oh, look, we found all
19 this money. And it's happened both ways in the past,
20 so there's no reason to expect that it wouldn't
21 continue to happen in the future.

22 THE HEARING EXAMINER: Okay. All right.
23 Questions of this witness? Staff?

24 MR. BLOCK: No questions.

25 THE HEARING EXAMINER: County Attorney?

1 MS. HENRY: No.

2 MS. MONTGOMERY: Mr. Treesh.

3 MR. TREESH: I had a question. First just a
4 comment. I would concur with Mr. Getch, FDOT does put
5 out a draft tentative work program I believe in
6 January or February that's under review before the
7 Governor adopts it July 1st.

8 Andy, and maybe you're not the right one to
9 answer this question, but development orders, once
10 that adopted work program is adopted by the Governor
11 July 1st, from a concurrency standpoint does that
12 allow the concurrency certificates to be issued then
13 for that improvement?

14 MR. GETCH: I'd have to defer to Mr. Carroll
15 since he's actually the person that issues those, so
16 when he gets up here he will probably be able to
17 answer that question better.

18 MR. TREESH: That's all I have.

19 THE HEARING EXAMINER: Let me ask Chip one
20 question.

21 Chip, now, we've got the language that the
22 applicant's referring to as the super concurrency.
23 What is the typical language? I mean is there
24 standardized concurrency language or does that just
25 fall under, if you look at Resolution Z-01-012A, does

1 that just fall under Number 15, which is on Page 11 of
2 14 of that resolution which says approval of the
3 rezoning does not guarantee local development order
4 approval or vest present or future development rights
5 for Lee Plan consistency? Is that broad enough to
6 cover the concurrency issue or does staff put in a
7 separate concurrency?

8 MR. BLOCK: We don't necessarily put in something
9 that's called concurrency. You don't see the
10 condition that reads concurrency.

11 THE HEARING EXAMINER: That's what I'm looking
12 for.

13 MR. BLOCK: If I could refer you to -- in going
14 back to the memorandum of August 24th, 2004, if you go
15 to Page 23 at the bottom, Condition Number 24-A,
16 that's the condition that you are now finding in most
17 of the planned developments. It talks about that you
18 cannot -- you may have other impacts that are related
19 to that and that's about as close as we can get to the
20 concurrency condition that you're talking about.

21 We've only had, to my knowledge, only two
22 projects where this was really a major issue on it and
23 they have been both related today by both the
24 applicant and/or Mr. Uhle during his presentation and
25 those two were the Home Depot store in Bonita Springs

1 and the Coconut Point Mall, which was a DRI. To my
2 knowledge, I think those were really the two main ones
3 that came up with a level of service F problem.

4 THE HEARING EXAMINER: But doesn't Coconut Point
5 DRI, isn't that handled differently as far as
6 concurrency is concerned? I mean if my tenure at the
7 state brings to mind all of this, you know, once you
8 get the -- go through the entire DRI process, you're
9 essentially vested because you're paying for your
10 impacts, so that's an automatic mitigation situation
11 right there in the DRI.

12 MR. BLOCK: Exactly. That's why I used the term
13 DRI at the end of Coconut Point. I think during Mr.
14 Uhle's presentation he just said Coconut Point.

15 THE HEARING EXAMINER: Okay.

16 MR. BLOCK: That's why I finished up my statement
17 by saying development of regional impact, DRI. That's
18 how they were able to address that as part of the
19 Coconut Point project, unless Andy and somebody else
20 have got some other --

21 MS. MONTGOMERY: I thought you were recommending
22 super concurrency conditions, but then you worked
23 through those and made revisions and it didn't end up
24 that way.

25 MR. GETCH: I will credit Mr. Uhle for coining

1 the term "super concurrency." There was actually a
2 staff recommendation of project staging, which, Madam
3 Hearing Examiner, you may recall that the DRI rules do
4 allow for that --

5 THE HEARING EXAMINER: Right.

6 MR. GETCH: -- project staging or phasing, where
7 the recommendation from staff was that the entire
8 retail component be staged by square footage as
9 certain road improvements came on line.

10 And early on we had discussions not exactly along
11 those lines, but similar to the folks with Wal-Mart.
12 But here we have one big box and how do you stage
13 that? Unlike a 1.8-square-foot commercial regional
14 mall where it could be broken down to 400,000 square
15 foot --

16 THE HEARING EXAMINER: I'll look at the Coconut
17 Point development -- not development order, but the
18 Hearing Examiner's recommendation.

19 And that was a transcript situation, wasn't it?
20 That wasn't a summary. That was a multiple day
21 hearing.

22 MS. MONTGOMERY: That was a three-day hearing as
23 I recall.

24 THE HEARING EXAMINER: I'll have to see if I can
25 find the transcript, see if we've got a copy of the

1 transcript and go back and look at some of the
2 discussion that was had during that.

3 MR. BLOCK: And I do recognize that Home Depot
4 was in a different legislative body. They handled it
5 their particular way. I would only point out for the
6 record that the Lee Plan - that was the city's
7 comprehensive plan at that time - was in effect and
8 it's substantially the same as we have within our
9 current Lee Plan.

10 The only other thing, Madam Hearing Examiner,
11 before I get to any other questions from you or the
12 applicant on this, there was a statement -- or
13 actually Mr. Uhle presented an agreement with The
14 Vines concerning operational feature agreement and
15 asked that that be included and you commented during
16 your response to Mr. Uhle that you weren't inclined to
17 possibly include that but that you would take it under
18 advisement, consideration, and if you could, you
19 would. And Mr. Uhle during his presentation indicated
20 that staff was aware that Mr. Murphy was, the lead
21 planner on the case previously was aware that this
22 agreement was being worked out. Unfortunately, I was
23 not aware of it, so I have not seen that document
24 before.

25 I believe that with it being a private agreement,

1 I would not -- not knowing some of the elements of it,
2 I would only ask the Hearing Examiner to look at it
3 from the standpoint of how it can be implemented and
4 enforced by Lee County staff through the code
5 enforcement end when some of the issues could be just
6 private situations. And I'm very concerned about
7 that, from establishing it that way and then having a
8 code enforcement problem being brought before you on
9 how we go about implementing it.

10 THE HEARING EXAMINER: Yeah.

11 MR. BLOCK: Beyond that, I'm finished with my
12 presentation. And if you have other questions about
13 the zoning recommendation, I'm certainly able to
14 answer your questions. If they're concurrency issues,
15 Mr. Carroll is here and we'll try our best to answer
16 them.

17 THE HEARING EXAMINER: Questions of this witness?

18 MS. MONTGOMERY: I do.

19 EXAMINATION

20 BY MS. MONTGOMERY:

21 Q. Chip, I have a couple questions and I guess my
22 concern is that there's some provisions in the staff
23 report, the staff report that you didn't write, that I'm
24 not sure are still valid issues and I just want to kind of
25 tick through those if I could.

1 A. Certainly. Let's talk about those.

2 Where are we at?

3 Q. How about Page 13 at the bottom?

4 A. Thirteen at the bottom.

5 Q. The second line says, "Given the near failing
6 nature of U.S. 41, which actually is at level of service
7 C, this additional access to U.S. 41 initially troubled
8 the residents."

9 It's my understanding that we're not adding an
10 access point. What we're doing is shifting one in
11 accordance with FDOT directives. Is that your
12 understanding?

13 A. That was my understanding, yes. There was an
14 approved access point I think just a little bit to the
15 north of this particular project and it has been shifted
16 onto the nearest edge of this property so that it provides
17 not only access to this project, but could also provide
18 access to the adjoining property to the north and before
19 you reach The Vines entrance, if I remember it correctly.

20 MR. PANKEY: I don't believe that's correct. I
21 believe you're talking about the main entrance.

22 This is Judson Pankey for the record.

23 The main entrance to The Vines community, they
24 have a full access opening. The entrance -- proposed
25 entrance to the Wal-Mart store can be directional.

1 There's still enough room in between per DOT standards
2 to have a right-in, right-out.

3 MR. BLOCK: That may be true, but I'm saying that
4 I also understood that there was a possibility for a
5 future interconnection. That's what I'm saying.

6 MR. PANKEY: Oh, yes, sir.

7 MR. BLOCK: There could be an interconnection of
8 this project. I'm not saying that that road -- that
9 parcel would be entirely prohibited from having its
10 own access if FDOT would permit it. It's entirely up
11 to FDOT to make that call.

12 BY MS. MONTGOMERY:

13 Q. And then the last line on this paragraph,
14 amazingly to me, says, "Other than the lack of specificity
15 in the master concept plan for the proposed large retail
16 alternative," which seems to indicate that staff at that
17 point in time thought there wasn't any specificity. I'm
18 hoping that in light of all the documentation we submitted
19 if you would agree we have been very specific.

20 A. Yes, you have.

21 Q. And then on Page 14, the second paragraph, it
22 starts off, "Permitted uses". It talks about the fact
23 that this is a unique use that the current LDC use doesn't
24 specifically describe.

25 You and I have talked about that and we agreed

1 that that's not true. This is a use that's provided for
2 in the regulations and we have the appropriate uses
3 identified on the master concept plan and list of uses.

4 A. That is correct. And, in fact, having been the
5 lead planner on a previous Wal-Mart case that got
6 withdrawn that was going to be considered down off of
7 Summerlin Road, we were working with the same retailer to
8 be able to have those schedule of uses. The uses that are
9 contained on your master concept plan and your schedule of
10 uses today addresses all of the uses.

11 We have looked in the past also to use the term
12 "department store" as a possibility of another term for
13 that use to be allowed to go in, to allow a Wal-Mart to go
14 in because it has different departments contained within
15 it. But in either event, the way your schedule of uses is
16 written, it's not necessarily unique. It is called out
17 for in the land development code. You have just specified
18 those in the schedule of uses.

19 Q. And on Page 16 on the conclusion it says that,
20 "Staff recommends denial unless some type of arrangement
21 can be reached to advance the planned improvements of U.S.
22 41." Did staff have any recommendations, I mean for the
23 advancement or anything they wanted Wal-Mart to do? I
24 mean that suggests that there's something we should have
25 done that we didn't do.

1 A. Unfortunately, I think this terminology in here
2 is one that says -- it's probably not the most artfully
3 worded language.

4 In this case staff is recommending denial. We
5 know that the improvements have not been advanced to the
6 point to be consistent with the concurrency rules. We
7 have not -- we don't have any suggestions, as you have
8 asked. We don't have any suggestions on how that
9 advancement of the improvements could occur.

10 Q. Let me ask you a question, if you know. Does the
11 county ever review zoning and issue a concurrency
12 certificate?

13 A. I'm not a hundred percent sure because I don't do
14 the certificates. It's possible Mr. Carroll can answer
15 that question, but I can't answer that question.

16 Q. Okay. Let me ask it this way. If you know,
17 isn't a concurrency certificate normally required before
18 you get a DO and you must still have a valid one before
19 you get a building permit?

20 A. Certainly it's my understanding about the
21 development order you cannot have -- you have to have a
22 valid certificate before you can get the development
23 order, yes. As to the building permit, I'm not a hundred
24 percent sure about that.

25 Q. And let me ask you about the -- I appreciated

1 your examples on Iona of what happened, but, you know, in
2 this instance, you know, it's so much over code minimums
3 in terms of vegetation and you have the differing
4 elevations, the berms, the swales and the fences and the
5 walls. I mean in your mind is that still not enough to be
6 an impediment to a wayward vehicle?

7 I guess if somebody was really determined to
8 drive in that lake, you can't stop them, but most
9 vehicles, it would seem, would have a hard time
10 negotiating that.

11 A. You would also think that the vehicle crossed
12 over McGregor, having crossed through the median, the
13 landscaping in the median, the landscaping before you
14 reach an iron fence and the landscape on the opposite side
15 of the iron fence would have had enough to stop it before
16 going into a lake. Would a guardrail have prevented it?
17 I'm not exactly sure how that would have --

18 Q. Is that what you're looking for? You want some
19 form of guardrail?

20 A. I think county staff, as we stated in our
21 condition, we did not have it in you all's offer of the
22 approval of the deviation. It just says we want the
23 deviation if we do this and it's because of this, but we
24 didn't have any other protection for the wayward vehicles.
25 We have written that into the condition, and if the

1 Hearing Examiner is inclined to recommend approval of it
2 or the Board of County Commissioners are, we definitely
3 want some form of protection for wayward vehicles being
4 added into the design of the project rather than just what
5 we've got right now. We just do not feel comfortable with
6 it.

7 MS. MONTGOMERY: Did you have a question?

8 MR. PANKEY: Yes, I have a question, but it's for
9 Mr. Getch.

10 THE HEARING EXAMINER: Okay.

11 MR. BLOCK: With no other questions, I'll turn it
12 over to Andy and answer his questions and then if
13 we've got questions of Mike, he can answer those.

14 Thereupon,

15 ANDY GETCH,

16 a witness, having been previously duly sworn, was examined
17 and testified as follows:

18 BY MR. PANKEY:

19 Q. Thank you, Mr. Getch. Just one question.

20 When Lee County does roadway improvements under
21 its jurisdiction, do you typically design the lane edge
22 lines at 50 feet away from water bodies?

23 A. We comply with the clear zone requirements that
24 are in the manual, the uniform minimum size standards and
25 AASHTO guidelines.

1 Q. What would be the typical clear zone of
2 50-mile-an-hour design speed such as Estero Parkway?

3 A. I believe it's currently 24 feet, but I'm not a
4 hundred percent certain of that. I haven't checked that
5 standard in a while. It was 30 feet at one time and I
6 believe it was reduced to 24 feet, but I'm not sure.

7 Q. Okay. Does Lee County typically condemn
8 right-of-way out to the limits of the clear zone for
9 roadway improvements?

10 A. One way to deal with that is placement of
11 guardrail if there is an obstruction or a hazard.
12 Typically, we design what we can within the right-of-way
13 we're going to apply for the roadway.

14 MR. PANKEY: No further questions. Thanks.

15 THE HEARING EXAMINER: All right. Mike, can we
16 get you up here, please, sir.

17 I need to swear you in.

18 Thereupon,

19 CHARLES MICHAEL CARROLL, JR.,
20 a witness, having been first duly sworn, was examined and
21 testified as follows:

22 THE HEARING EXAMINER: State your name, please.

23 MR. CARROLL: Charles Michael Carroll, Jr.

24 THE HEARING EXAMINER: State your position with
25 the county.

1 MR. CARROLL: I'm a development services manager
2 with Lee County Development Services.

3 THE HEARING EXAMINER: Okay. And your duties and
4 responsibilities entail?

5 MR. CARROLL: I review traffic impact statements
6 for development orders, I do the concurrency review
7 for development orders and I write up the description
8 of what's being approved that's contained in the
9 approval letter and concurrency certificate.

10 THE HEARING EXAMINER: Okay. Anybody want to ask
11 questions of Mike before --

12 MS. MONTGOMERY: Well, sure. As long as you're
13 there, I'll go ahead and ask.

14 EXAMINATION

15 BY MS. MONTGOMERY:

16 Q. Mike, how long have you been involved in
17 concurrency reviews?

18 A. About 14 years.

19 Q. And in those 14 years have you ever issued a
20 concurrency certificate for a rezoning?

21 A. No, we have not.

22 Q. And in fact is that not permitted under the
23 regulations?

24 A. That's correct. The concurrency certificate goes
25 with the development order.

1 Q. And will you issue a concurrency certificate if
2 that road does not meet the concurrency standards set
3 forth in the plan and the LDC?

4 A. No.

5 Q. And if you do not issue a concurrency certificate
6 will the DO get issued?

7 A. No.

8 Q. And if the DO is not issued, can the building
9 permit get issued?

10 A. No.

11 Q. And so can the development occur if the
12 concurrency certificate doesn't happen?

13 A. No, it cannot.

14 Q. Okay. Whether we put a condition in here or not,
15 is that a true statement?

16 A. Yes.

17 THE HEARING EXAMINER: Okay.

18 MR. BLOCK: No questions. Just since Mike has
19 already placed himself on the record as to his
20 background and all, I know Mike has been accepted as
21 an expert witness before the Hearing Examiner before.
22 I don't know if it's entirely on concurrency and its
23 relationship to things. I wanted to have Mike
24 accepted as an expert witness so that the answers that
25 he just gave to Neale are coming from an expert

1 witness if we have no objection to that.

2 THE HEARING EXAMINER: All right. Are you
3 offering him as an expert in concurrency review and
4 certificate issuance or are you offering him as an
5 expert in development order issuance? How do we want
6 to do this?

7 MR. BLOCK: Let's go with the issuance of
8 development orders and the review of transportation
9 impacts related to those, including concurrency.

10 THE HEARING EXAMINER: Okay. All right. Any
11 objections from the applicant?

12 MS. MONTGOMERY: (Shook head negatively.)

13 THE HEARING EXAMINER: Okay. All right. Andy,
14 any questions of this witness?

15 MR. GETCH: No, ma'am.

16 THE HEARING EXAMINER: County Attorney?

17 MS. HENRY: No, ma'am.

18 THE HEARING EXAMINER: Mike, let me ask just a
19 couple of questions now.

20 I understand everything that you have just said
21 to Neale. If -- well, let's see. In the 14 years
22 that you have been doing your job, have you ever had a
23 situation like this where you've got a development
24 wanting to come in, wanting to get zoning approval,
25 but can't get their DO because of concurrency issues?

1 Have you ever been involved in a case like that?

2 MR. CARROLL: Not at the zoning level. I've been
3 involved in cases where an application for development
4 order has been received, reviewed and concurrency
5 requirements have not been met and we have either
6 recommended that the project not be approved or that
7 it be scaled back so it can be approved.

8 THE HEARING EXAMINER: And in this instance,
9 since this is a, you know, big box situation, would
10 there be any way to scale this back in your mind that
11 would allow it to go forward with development and get
12 a development order with a concurrency certificate?

13 MR. CARROLL: Well, for this type of development
14 the trip generation is based on the square footage of
15 the building. If they had a smaller building which
16 would generate fewer trips, it would generate a lower
17 number of trips that would affect 41 to where it would
18 not fail with the development, then it could be
19 approved.

20 THE HEARING EXAMINER: Okay. Now, I don't know
21 if you've heard the testimony that the improvements to
22 U.S. 41 are anticipated to be in the Florida DOT's
23 fiscal year of 2009, which starts on July 1, 2008. If
24 that were the situation --

25 MR. TREESH: It is.

1 THE HEARING EXAMINER: Okay, okay. I'm doing a
2 hypothetical right at the moment.

3 If that were the situation, if we knew for
4 positive sure it was coming in on 7-1-2008, how soon
5 could they come in to get a concurrency certificate
6 from you?

7 MR. CARROLL: At a minimum it would be the middle
8 of 2005.

9 THE HEARING EXAMINER: Okay. So it would be July
10 2005?

11 MR. CARROLL: If FDOT places the project in the
12 first three years of their five-year work program, and
13 that's in a document that comes out in January,
14 probably not approved until sometime in June, we would
15 take the information from that and incorporate it into
16 the concurrency report that is being prepared at that
17 time and when that report is accepted by the Board of
18 County Commissioners, that project would then be
19 available --

20 THE HEARING EXAMINER: Eligible?

21 MR. CARROLL: The capacity, the increased
22 capacity would be taken into consideration for
23 projects that submitted after that date.

24 THE HEARING EXAMINER: Okay. Now, in the same
25 scenario now, okay, you've got this, you know that

1 this is a definite date, the Board's already accepted
2 the list of improvements or the -- whatever it is that
3 they're doing, okay, when you do the review on this
4 for their certificate of concurrency, do you also do
5 the review of all of the other projects that are
6 waiting at the same time for this same concurrency
7 problem or, I mean, how do you do that? Do you do
8 them as they came in initially, the oldest first and
9 then to the newest or do you sort of say okay, fine,
10 you get ten percent, you get ten percent, you get ten
11 percent?

12 MR. CARROLL: We would look at the projects
13 individually as they are submitted, and if a project
14 has come in today and it's been denied, they would
15 have to resubmit after the new concurrency report had
16 been accepted by the Board and would then be reviewed
17 in sequence with the projects -- other projects,
18 either new or resubmitted.

19 THE HEARING EXAMINER: Okay. So it's not like a
20 tickler system? You don't have all these little
21 suckers filed away in a file cabinet somewhere and
22 when the concurrency thing comes out you say okay, now
23 let's go back in and see which ones are the --

24 MR. CARROLL: No, ma'am, I do not.

25 THE HEARING EXAMINER: Okay, that's interesting.

1 I had not thought about that. Okay.

2 MS. MONTGOMERY: I have a question when you're
3 done.

4 THE HEARING EXAMINER: Go ahead.

5 BY MS. MONTGOMERY:

6 Q. Mike, I just want to ask you a question.

7 When you allow -- when you issue a concurrency
8 certificate because the road is on for the first three
9 years of a five-year work program for a state road, is
10 that consistent with the rules that are adopted in the
11 plan and in the land development code?

12 A. Yes.

13 Q. And is it your understanding that's also
14 consistent with state statute?

15 A. Yes, it is.

16 THE HEARING EXAMINER: Okay. All right. What
17 happens if you issue a concurrency certificate based
18 on that concurrency report, the draft report or
19 whatever, and at some point in time this little sucker
20 falls back to the year 2010? What happens to that
21 concurrency certificate?

22 MR. CARROLL: Once it's issued, it's valid.

23 We had that situation on Alico Road in which
24 Alico was in the county's capital improvement program
25 to be widened to six lanes. It was within three years

1 of a number of projects and we took that extra
2 capacity into consideration, approved development
3 orders with concurrency certificates, and then the
4 project was delayed because of permitting. The
5 projects were allowed to continue because they had a
6 valid development order. And as it turned out, that
7 project was delayed about two years, so we were -- we
8 kept pushing back the three-year period.

9 Once it's issued, people are allowed to develop.

10 THE HEARING EXAMINER: Okay. All right.

11 Can you recall, Mike, can you recall any cases
12 that you have heard of or been involved with in which
13 a concurrency requirement, specific concurrency
14 requirement has been inserted at the zoning level?

15 MR. CARROLL: I'm not aware of any.

16 THE HEARING EXAMINER: Okay. Any other questions
17 of this witness?

18 County Attorney, any questions from you?

19 MS. HENRY: No, no questions.

20 THE HEARING EXAMINER: All right. Mike, I think
21 that does it. Thank you.

22 MR. BLOCK: Can Mike go on back to his duties?

23 THE HEARING EXAMINER: Yeah, I think he can.

24 MR. CARROLL: Thank you.

25 MR. BLOCK: Thank you, Mike.

1 THE HEARING EXAMINER: Okay.

2 MR. BLOCK: That concludes the staff presentation
3 on this case unless you have other questions of us.
4 We'll try to answer them as best we can.

5 THE HEARING EXAMINER: All right. I'm glad we
6 brought Mike down. That has clarified some
7 information for me. I don't know all the ins and outs
8 of everybody's, you know, workload and processes and
9 whatnot, you know. I'm just not that familiar with
10 some of the things happening.

11 MS. MONTGOMERY: Mike is very diligent. He does
12 not let you loose, I can assure you.

13 Do you agree with that?

14 MR. TREESH: I agree.

15 THE HEARING EXAMINER: Are you ready to do a --

16 MS. MONTGOMERY: I just want to ask Judson, if I
17 could, a couple questions. Can he just stay here,
18 because they're really pretty simple?

19 THE HEARING EXAMINER: Yeah. If you all can hear
20 in the back of the room. If you can't hear, you need
21 to wave at me.

22 Thereupon,

23 JUDSON PANKEY,

24 a witness, having been previously duly sworn, was examined
25 and testified as follows:

EXAMINATION

1
2 BY MS. MONTGOMERY:

3 Q. There was a lot of people on the anti side who
4 raised concerns about crime and said somehow or other the
5 crime rate goes up when Wal-Mart comes in because just
6 look at the police reports. It's kind of like Mike
7 Scott's brochure he sent out that says look how much more
8 crime there's been over the last four years because, you
9 know, the arrest rate's gone up. Well, is that because
10 crime has gone up or is that because they're just being
11 more diligent? So I would like Judson to address
12 Wal-Mart's stance on shoplifting and why it is there might
13 be more police called when there's a Wal-Mart --

14 A. It won't take me long to explain. Wal-Mart has
15 very stringent requirements. They prosecute any and all
16 shoplifters and they prosecute them vigorously. If you
17 are caught shoplifting in Wal-Mart, you will be arrested,
18 period.

19 THE HEARING EXAMINER: So those thousand police
20 responses to Wal-Mart, then, just assume all of them
21 dealt with a shoplifting situation or it could be an
22 accident in the parking lot, you know, I mean -- okay.
23 Yeah.

24 MS. MONTGOMERY: It's not like we're having rapes
25 and murders in the parking lot. It's just -- and I

1 can tell you from my public defender days that
2 Penney's, I don't know if they still do, but they used
3 to be very vigilant because at least half the people I
4 dealt with were drunk and the other half were arrested
5 in J. C. Penney.

6 BY MS. MONTGOMERY:

7 Q. I would also like Judson to just briefly
8 reiterate why the wayward vehicles really aren't at risk
9 for the lakes.

10 A. Or why they're located where they are?

11 Q. Why they really won't -- there's so many
12 impediments that they won't --

13 A. Yeah, I would like to discuss that.

14 If there was something I could draw on.

15 THE HEARING EXAMINER: The back of your hand.

16 I don't know if we even have one of those little
17 pad thingies back there. We had one for a while and
18 it never got used and it got so limp you couldn't get
19 it to stand up anymore.

20 MS. MONTGOMERY: We need to get those -- they
21 have big Post-It notes that are big size. You stick
22 them up on the wall.

23 MR. PANKEY: What I'm going to do, I'm going to
24 draw two views. I'm going to draw a view if you were
25 standing on the road looking back this way toward the

1 wall and if you could walk through the wall what would
2 you see as you walked through the wall.

3 THE HEARING EXAMINER: Okay.

4 MR. PANKEY: Here's what you would see. You have
5 the road here going down to a curve and then you're
6 going to have trees, shrubs.

7 THE HEARING EXAMINER: And he's doing this
8 freehand.

9 MR. PANKEY: Then you're going to have a
10 six-foot-high masonry screening wall and you come over
11 and then you will go down to your wet pond.

12 When we design roadways - I'm a registered
13 professional engineer, do have some knowledge of
14 roadway design - we do not design for every
15 eventuality. We don't design for the severely
16 impaired driver, severely drunk driver, the
17 unconscious driver. We design for those drivers that
18 still have an opportunity to maintain control. And
19 it's been a DOT standard for as long as I can remember
20 that clear zone, which is the area adjacent to the
21 roadway, that must have no obstructions so that
22 somebody, if they leave the roadway, they can recover.
23 For a curbed facility it's four feet.

24 We have that four feet before you ever get to the
25 wall and we also have landscaping, so if someone did

1 leave the roadway, they would hit the bushes, the
2 trees and the screening wall before they had the
3 opportunity of entering this lake.

4 THE HEARING EXAMINER: Let me ask you a question
5 now. On the wall, because I don't have quite the same
6 concerns that staff does as far as the wall around the
7 north lake -- the east lake, the one that's over by
8 The Vines, the big one behind the store. Are we
9 talking about one layer of concrete blocks on this
10 six-foot wall or are we talking -- and if it's one
11 layer, don't you have rebar in those things for
12 hurricane resistance, wind resistance?

13 MR. PANKEY: That is correct. This wall has to
14 be designed to meet Florida building code wind loading
15 requirements, which I believe are 110 miles per hour.

16 THE HEARING EXAMINER: I think they're 130 now.

17 MR. PANKEY: Is it? It may be in this location.
18 You're more of an expert than I am.

19 THE HEARING EXAMINER: I think it's 130 now but
20 I'm not going to guarantee that.

21 Go ahead. Sorry.

22 MR. PANKEY: It's steel reinforcement in the
23 wall, yes, ma'am.

24 THE HEARING EXAMINER: Okay, okay.

25 MR. PANKEY: Now I would like to draw a section

1 through the Estero Parkway. If you were standing --
2 I'm going to draw it in this direction. If you were
3 standing here coming down the road and, again, you
4 were able to walk directly perpendicular to the
5 right-of-way, what would you see?

6 One thing that Chip did point out is that portion
7 of Estero Parkway is a super-elevated road, meaning
8 it's at a slant. You come around a curve, roadway
9 design requires it to be a slant for a whole host of
10 physics reasons. It's just a safe way to design the
11 road.

12 THE HEARING EXAMINER: Centrifugal force and all
13 that, keep you on the road instead of in the ditch.

14 MR. PANKEY: That's right. You have the roadway.

15 MS. MONTGOMERY: The pink is still here.

16 THE HEARING EXAMINER: Hold it down, hold it down
17 because it's just dried out and --

18 MS. MONTGOMERY: Go ahead, try the pink.

19 MR. PANKEY: Super-elevated road and then you
20 have the shoulder and then it breaks back down and
21 then you have a four-to-one. And I have been out onto
22 the site many times, I'm aware of the slope. And then
23 Wal-Mart will be creating a four-to-one slope back to
24 its property line and you're going to have a retention
25 berm and then you go back down to the lake.

1 And what we're proposing on top of this berm,
2 you're going to have a fence, you're going to have
3 trees on top of the berm, all along the berm,
4 understory trees like this. So if a car was able to
5 make it off the super elevation, and Mr. Block is
6 correct, that this is more of a critical design area,
7 they would have to somehow get out of this swale.
8 They would come down this swale, they'd have to keep
9 going up to the slope, go through the landscaping,
10 through the fence, over the berm and then into this
11 lake.

12 THE HEARING EXAMINER: The trees, the type of
13 trees that you're planning to put on those landscapes,
14 are we talking palms or are we talking, you know,
15 big-bodied, canopied types?

16 MR. PANKEY: If I could review the landscape
17 plans, we are talking --

18 UNIDENTIFIED SPEAKER: Judson, here you go.

19 MR. PANKEY: That doesn't have much detail.

20 THE HEARING EXAMINER: Judson, let me do ask a
21 question. If somebody goes haywire on this curve and
22 they run off the road, aren't they going to be kind of
23 airborne to start with? I mean if they're coming
24 around this curve and they lose it, aren't they still
25 going to be sort of airborne? Not just like you drive

1 over a curb and then bump, bump, bump and down the
2 ditch.

3 MR. PANKEY: If they're going 80 or 90 miles an
4 hour, yes, they would be airborne. But we're
5 proposing live oaks and Dahoon hollies.

6 THE HEARING EXAMINER: So we're talking about
7 some trees with some substantial girth to them?

8 MR. PANKEY: Uh-huh.

9 And trying to find the other symbol. Satin leaf.

10 THE HEARING EXAMINER: Is that a tree or is that
11 a shrub?

12 MR. PANKEY: It's a tree. It's called satin
13 leaf.

14 THE HEARING EXAMINER: I'll have to go find that
15 one and look at it. Okay. All right.

16 MR. PANKEY: Going back to the question that I
17 asked Mr. Getch, there is adequate clear zone within
18 the existing Estero Parkway right-of-way from the lane
19 edge line to the right-of-way. And, again, that goes
20 back to roadway design standards. They're designed to
21 ensure that you have that amount of recoverable area
22 available.

23 THE HEARING EXAMINER: So that's about 24 feet,
24 then, you think?

25 MR. PANKEY: Yes, ma'am.

1 THE HEARING EXAMINER: He thought. Okay.

2 MR. PANKEY: Yes.

3 THE HEARING EXAMINER: All right. Chip, do you
4 have any questions or --

5 MR. BLOCK: No further questions, no, ma'am.

6 THE HEARING EXAMINER: -- on that?

7 All right. Neale, any other questions on --

8 MS. MONTGOMERY: No.

9 THE HEARING EXAMINER: Any other witnesses,
10 Neale?

11 MS. MONTGOMERY: No.

12 MR. GETCH: I did have one question for Mr.
13 Pankey --

14 THE HEARING EXAMINER: I'm sorry.

15 MR. GETCH: -- that Mr. Treesh actually deferred
16 to him on the question I asked about the traffic
17 signal at -- excuse me, Estero Parkway - I still want
18 to call it Koreshan - Estero Parkway and U.S. 41.

19 EXAMINATION

20 BY MR. GETCH:

21 Q. Mr. Treesh testified that Wal-Mart was willing to
22 pay a proportionate share, but that's not actually a
23 condition of this zoning. That's an FDOT regulation.
24 Does Wal-Mart have an agreement with FDOT to pay for a
25 portion of the signal installation?

1 A. Wal-Mart does not have any agreement with FDOT to
2 pay for a portion of the signal installation. In my past
3 experience I have not run across a situation where DOT has
4 participated in the cost of a signal installation in this
5 type of situation, whether it was a nearby major
6 development or on a corridor with a lot of development
7 taking place.

8 THE HEARING EXAMINER: So am I hearing you say
9 that the DOT, you know, shoulders the cost completely
10 or they shift it off on the developer so they don't
11 share it?

12 MR. PANKEY: It's been my experience in an
13 existing improved area DOT would shoulder the cost
14 completely. In an area where development is coming
15 in, they typically can get a lot of developers to
16 participate in the cost.

17 Wal-Mart is willing to pay its pro rata share for
18 the installation of the signal. We put that in
19 writing in response to county comments on our
20 development order application.

21 THE HEARING EXAMINER: Okay. Andy, did that
22 answer your question?

23 MR. GETCH: Yes.

24 MS. MONTGOMERY: I do have one more question
25 since we're talking about money.

EXAMINATION

1
2 BY MS. MONTGOMERY:

3 Q. And nobody really has mentioned it today, but,
4 Judson, were you involved in many, if not all of the
5 discussions with FDOT, with the Estero community on
6 advancing the funding?

7 A. Yes, ma'am.

8 Q. And is it your understanding that we were advised
9 by the county attorney's office that we were to cease
10 involvement in those discussions?

11 A. I was specifically advised by the county
12 transportation staff that we needed to eliminate the
13 appearance of conflict of interest.

14 Q. But during the last discussion that you were in
15 on that issue, had those discussions progressed to the
16 point where the county and the Estero community were
17 looking at a low-cost county loan to the state and that
18 the outstanding question was who would pay the interest?

19 A. Yes. Correct.

20 Q. And at that time still did Wal-Mart submit they
21 were not subject to super concurrency or regular
22 concurrency but they would up front, up to a million
23 dollars, which most likely would not come back and not be
24 creditable through impact fees, up to a million dollars?

25 A. Yes, they did.

1 THE HEARING EXAMINER: All right. Joan, I need
2 you to talk about Matt's submittal.

3 And then I think you want to do your closing?

4 MS. MONTGOMERY: I did want to talk about
5 concurrency, yes.

6 THE HEARING EXAMINER: Let me have Joan discuss
7 Matt's request to attach the agreement.

8 MS. MONTGOMERY: I do have to agree with Matt,
9 though. We were encouraged to do that, both sides, by
10 the former staff reviewer. And the reason why he did
11 that was because we had another case where, you know,
12 the developer entered into an agreement. He just
13 thought that was a fabulous idea. So, I mean, Matt is
14 right, we all were encouraged to do that.

15 THE HEARING EXAMINER: Okay. All right. Joan.

16 MS. HENRY: I have a few things I would like to
17 comment on, but first I'll address the submittals that
18 Matt Uhle gave to you, Madam Hearing Examiner.

19 Joan Henry, Assistant County Attorney.

20 County attorney's staff's position is to object
21 to that inclusion. It has nothing pertaining to do
22 with -- pertaining to the zoning that's before you
23 with the application, with the sufficiency
24 requirements or any considerations whether to approve
25 or deny the project. It's a private agreement.

1 County has no business getting involved in the
2 enforcement of such agreements.

3 THE HEARING EXAMINER: As far as the
4 encouragement by county staff, was that done with
5 county attorney's knowledge and acquiescence or
6 encouragement?

7 MS. HENRY: No.

8 MS. MONTGOMERY: I guess not.

9 THE HEARING EXAMINER: I would guess not, too,
10 Neale, to be honest with you.

11 MS. HENRY: Not at all.

12 But through the discussions today I just want to
13 clarify one item. There has been talk and a lot of
14 discussion about committees and different review
15 panels. I just want to state that the Board adopted a
16 geographical location for the Estero Planning
17 Community and they have adopted different Lee Plan
18 provisions for that community as well as there have
19 been some land development code enhanced provisions
20 pertaining to zoning and development of property
21 within that Estero Planning Community. But I just
22 want to make it known, Policy 19.5.3 requires that an
23 applicant for rezoning conduct one public
24 informational meeting where the agent will provide a
25 general overview of the project for any interested

1 citizens. So from the perspective of a rezoning
2 coming into the county, that's what's required.

3 THE HEARING EXAMINER: Okay.

4 MS. HENRY: The third point I have to make, final
5 point, with respect to a rezoning application, part of
6 that application process is a TIS must be submitted.
7 As well there's design standards that must be looked
8 at at zoning review. Division 2 of Chapter 34 is
9 called application and procedure for approval and
10 Division 3 is the design standards. Section 34.411
11 provides general standards. And I would just ask that
12 you take a look at Section D(2) and it states that the
13 tract or parcel shall have access to existing or
14 proposed roads, colon, then Sub 2, that have either
15 sufficient existing capacity or the potential for
16 expanded capacity to accommodate both the traffic
17 generated by the proposed land use and that traffic
18 expected from the background, and then parentheses,
19 through traffic, plus that generated by surrounding
20 land uses, end parentheses, at a level of service D or
21 better on an annual average basis and level of service
22 E or better during the peak season except where higher
23 levels of service on specific roads have been
24 established in the Lee Plan.

25 I just wanted to bring that to your attention.

1 Thank you.

2 THE HEARING EXAMINER: Andy, it is your
3 understanding that that section of U.S. 41 is not
4 designated as a constrained road and could the county
5 designate it as a constrained road?

6 MR. GETCH: It's not designated as constrained
7 right now. Could the county designate it? Yes, that
8 would be possible.

9 THE HEARING EXAMINER: Okay, okay. In
10 recognition of all the development that's going on out
11 there and the fact that this little fellow keeps
12 getting narrower and narrower --

13 MR. GETCH: Actually, to further the answer, we
14 have another tag we put on some roads called
15 backlogged roads, which is for a roadway that can be
16 improved but can't be improved for various reasons in
17 time to meet the concurrency requirements.

18 THE HEARING EXAMINER: Now --

19 MS. MONTGOMERY: Can I ask something? But if
20 you're a backlogged road, then you have this formula
21 that you use to decide whether or not you can proceed
22 or not. In other words, this formula as to how much
23 additional traffic you can put on a backlogged road.

24 MR. GETCH: That I don't know, but those are the
25 two, two tags that we have in one of the tables in the

1 back of the Lee Plan that roadways get complied with.

2 THE HEARING EXAMINER: Has this section of the
3 roadway been looked at as a backlogged road?

4 MR. GETCH: Not to my knowledge.

5 THE HEARING EXAMINER: Was it considered by
6 anybody to be a backlogged road as far as the analysis
7 for the transportation, the transportation analysis
8 that was done here?

9 Ted, did you look at it?

10 MR. TREESH: No, because, as I stated, it's
11 still -- today it's a level of service C, but, again,
12 because the threshold from C to F is only --

13 THE HEARING EXAMINER: Fifty cars, yeah. Fifty
14 vehicles, yeah, yeah. Interesting. Looks like they'd
15 put a bigger spread there, you know.

16 Okay. Are you ready or do you want a couple
17 minutes to -- are you ready?

18 MS. MONTGOMERY: I'm ready if you're ready.

19 THE HEARING EXAMINER: All right, let's do it.

20 MS. MONTGOMERY: Okay. When you look at
21 concurrency, obviously, the first place you start is
22 the Florida Statutes, and that's 163.3180, which
23 indicates that local governments are obligated to
24 adopt concurrency management systems that are
25 consistent with that provision of the statute.

1 If you look at Paren 4(A) -- Paren 4, Paren A,
2 those concurrency management system standards also
3 apply to state roads. So, in other words, a local
4 government's concurrency management system is going to
5 apply to a state road.

6 The first place you have to look for Lee County
7 is at obviously their comp plan because that's what
8 the statute in 9J-5 requires, that it first has to be
9 addressed in the comp plan.

10 That particular section starts under Goal 22.

11 Goal 22 requires the county to establish and
12 maintain specified levels of service. It also, I
13 might add, obligates the county to provide new
14 facilities at a rate equal to the growth demands, so
15 we can question whether they've actually been
16 consistent there, but we'll save that debate for
17 another day.

18 Objective 22.3 obligates the county to use the
19 transportation concurrency management system that's
20 consistent with the state statute I just referenced.

21 Policy 22.3.1 tells the county how they're going
22 to do that and they do it on a link-by-link analysis.
23 They didn't used to, but they do now. So, in other
24 words, if you went back to the existing approval
25 that's on the property and you look at it you can see

1 that it would allow you to convert retail to office.

2 So this site could build out as an office park
3 and funnel most of its traffic on Estero Parkway or
4 even decide not to necessarily build those links on
5 U.S. 41 and it could build out right now if they
6 didn't connect to 41 because the link that would be
7 measured would be the Estero Parkway link.

8 I'm not suggesting anybody is going to do that.
9 I'm not suggesting we'd want to do that, but I think
10 it's important to know that how that gets measured.
11 So when you look at it link by link it ignores the
12 fact that we have another way in or out; it just looks
13 at that particular link. And as Mike says, under the
14 comp plan it requires them on an annual basis to do
15 their report. 22.3.3 talks about it, that they have
16 to review the available capacity and they have to do a
17 concurrency report. And then when you come in for a
18 DO you're reviewed in a manner that's consistent with
19 that concurrency report. And if you look at Policy
20 22.3.3, it says all proposed development activity, and
21 has in parentheses local development order requests,
22 will be reviewed against the available capacity
23 identified in the annual concurrency report based on
24 existing conditions. That's very specific in
25 excluding from the term development activity, zoning

1 approval. That particular policy expressly references
2 local development order requests. And that's
3 important because then when you switch over from the
4 comp plan to the LDC, you see that reiterated. If you
5 switch over to the land development code you have your
6 intent provision in Section 2-43, and, again, it
7 reiterates that this particular provision of the land
8 development code implements 9J-5, 163 and it
9 reiterates the various comp plan policies that are
10 implemented.

11 What I think is even more interesting is if you
12 look at the purpose of the article in Section 2-44,
13 and what it says is that the purpose is to implement
14 the state statute and the comp plan while protecting
15 the rights of property owners basically under the
16 Statutes, the Constitution of the State and the
17 Constitution of the United States.

18 And there's a reason for that. What the
19 legislature is trying to do is balance private
20 property rights and try to stay out of really a quasi
21 moratorium, so they have this system set up that has
22 set time frames so you don't start pushing those time
23 frames out. Because the goal isn't to stop
24 development. The goal of all this concurrency
25 management really is to get the infrastructure in

1 place. So there's an equal obligation on both the
2 private sector and the public sector to perform.

3 If you look at the definitional section, it
4 defines development permits, and development permits
5 under the land development code means a building
6 permit, subdivision approval, certification or
7 variance or other official action of local government
8 having the effect of permitting the development of
9 land. However, it specifically does not include
10 zoning permits, zoning variances, rezonings, special
11 exceptions and preliminary plan approvals which by
12 themselves do not permit the development of land. In
13 this instance we fall under that exception, which
14 means this whole concurrency management provision
15 doesn't apply to us. It does not apply to rezonings.
16 And that is actually reinforced when you look at it
17 later if you look at Section 2-46(A), it says all
18 applications for a final development order and a
19 building permit must be reviewed for concurrency.
20 Again, it doesn't mention zonings.

21 If you look at Section 2-46(C), it says if the
22 director determines that a development permit - again
23 remembering that it's not rezoning - is not exempt
24 from concurrency, then the director considers the
25 impact on roadway facilities.

1 If you then slip down to 2-46(I), it says in
2 determining the capacity of a roadway, the director
3 will, which is mandatory language, include existing
4 roadways and committed improvements as provided for in
5 the Lee Plan. So what Mike Carroll reiterated is
6 provided for in the statute and is provided for in the
7 comp plan.

8 And what Mike said is also confirmed, I think, in
9 Section J, and that is what happens if there is -- if
10 you're looking for DO or you're looking for a building
11 permit and there is no roadway capacity, what happens.
12 What the statute, or what the LDC provides is you can
13 stop or you can pay. You know, you can fix it or you
14 can wait and -- or you can, as he said, reduce your
15 square footage. So all those alternatives he outlined
16 are all outlined as options in the ordinance.

17 The most interesting portion is if you flip over
18 to Section 2-47(E), and it does have a section on the
19 review of planned development rezoning applications,
20 which you might say eureka, there you go, see, we are
21 allowed to do it. Well, not really, because it says
22 in addition to the mandatory provisions of this
23 article, the director is authorized at the request of
24 the applicant to review planned development rezoning
25 applications. We didn't ask for any review. And if

1 you want somebody to testify to that, I bet I can
2 probably find five to verify the fact that we didn't
3 ask for that and I bet Chip would confirm that fact.

4 In those cases where the director has determined
5 that an approval could lead to excessive impact on
6 public facilities and services needed to support the
7 development, the director can issue an advisory
8 opinion. And if the director does that, he's supposed
9 to set forth an opinion as to what would need to be
10 done to mitigate the impacts.

11 So, one, we didn't ask for it; and, two, if
12 they're going to do it even though we didn't ask for
13 it and not exactly follow their own ordinance, they're
14 supposed to say okay, what can you do to mitigate your
15 impacts, and they didn't do that. But even though
16 they didn't ask us to do that, we have offered. We
17 have offered to pay the interest on the loan that will
18 accelerate the road. And we would have probably
19 finalized that had we not been told we couldn't talk
20 about it. So I feel a little bit whip sawed by the
21 fact that we were being diligent and trying to solve
22 the problem and we were told we couldn't until we
23 finished our rezoning and then we're told oh, but you
24 can't get your rezoning because you didn't fix the
25 problem. It's a little bit of a Catch-22 there, which

1 makes us feel a little scrunchy about how that
2 happens. And I recognize that the guys sitting across
3 the table weren't necessarily the guys that put us
4 into that position, but regardless of that, that's
5 where we are.

6 So I think that we are consistent with
7 concurrency in that we won't get a development order
8 until concurrency is met. Our zoning, if it's
9 approved by the Board, will probably be, you know, a
10 couple months from now, that zoning will be valid for
11 a period of five years. Within that five-year time
12 frame concurrency will be met so that this project can
13 proceed. To tell us no and to deny the project would
14 mean we'd have to go back all the way through another
15 two years of negotiating with the community. I don't
16 know that they have the energy to do it, but I'm sure
17 I don't. Judson, maybe he does.

18 I think it would be wrong to do that after all
19 this effort because basically we were sort of directed
20 to go work it out and we did work it out.

21 I mean is there another issue that needs to be
22 resolved? Sure. But the county's regulations already
23 provide an answer for that. We're not asking to be
24 exempt from the county's regulations. We're happy to
25 be subject to them, but we submit that we should be

1 subject to them as they're written. And as they're
2 written is at DO and building permit stage and there's
3 really no basis to treat this project differently.

4 And I would note that it takes six months to
5 eight months now to get a DO approved and it takes --
6 it would take Wal-Mart nine months to bring the store
7 on line. So to say, you know, wait until 2008, you
8 know, until the road actually starts seems a trifle
9 unfair, because I guess at the most ambitious time,
10 2006, we could maybe get a DO in 2005, but, I mean,
11 the road would be very close to being under
12 construction or under construction by the time the
13 store actually opened. But we recognize the
14 Ballengers' situation that makes everybody nervous.
15 So I think we ought to just rely on the rules as
16 written. And if you want to include as a mitigating
17 condition in the zoning, which I think you can do,
18 this says Wal-Mart's commitment to provide up to the
19 million dollars to pay the interest on the loan. I
20 guess I won't say we're happy with that, but we have
21 agreed to that.

22 THE HEARING EXAMINER: No, I would not include
23 that as a condition. You could offer it to the Board
24 if you like, but I would not include that as a
25 condition.

1 Okay. After listening to you, after listening to
2 Mike Carroll, I think I have to agree with the
3 applicant on this situation. We have development
4 order processes, review processes adopted and in place
5 and I think that at the zoning level we need to trust
6 the regulations that we have in place, and if we know
7 those regulations are not going to protect us from a
8 situation, then we need to be properly adopting the
9 regulations that will. So I think in this instance if
10 concurrency - as Mike has indicated - if concurrency
11 is really a development order review process and
12 requirement, that I don't know that at the zoning
13 level that we can deny a development based on lack of
14 concurrency or the supposition of lack of concurrency.
15 I think that that's not within the realm of my scope
16 of authority here, so I have to agree with the
17 applicant on that one.

18 Now, I know you guys have got this all worked out
19 with The Vines and I don't want to queer your deal or
20 whatnot, but I'm a little concerned. Some of the
21 residents brought up the business with the development
22 or the improvements to 41, the improvements to Estero
23 Parkway, the improvements to Three Oaks Parkway and
24 the development of the Wal-Mart. I don't know, I
25 don't know that I even know what to do about it. I

1 understand their concerns. I foresee that that might
2 be a just absolute horrendous nightmare in that one
3 section down there. I don't know how long it would
4 last. I mean I don't know, I don't know the timing of
5 any of these roads. They didn't bring it up. It's
6 not been brought up here. I don't think it's
7 sufficient for me to raise it literally at the Board
8 level as far as using it as a reason to recommend
9 denial of this. So I think right now, based on
10 everything I've heard, and I need to go back in and do
11 additional review, but based on everything I have
12 heard I don't particularly have a problem with the
13 request as the conditions are set out with the
14 exception of the concurrency condition and staff's
15 recommendation of denial.

16 I need to do a site visit.

17 Now, I told Neale when we continued this after
18 the hurricane that I would try to get this expedited.
19 I have asked the court reporter to have the transcript
20 on this for me by next Friday. So give me two weeks
21 after that to work on this and see if I can't get you
22 a decision out in three weeks. That's barring, you
23 know, somebody opening the floodgates again and us
24 having 14,000 cases, which we already have quite a
25 few.

1 MS. MONTGOMERY: They haven't been accepting any
2 for at least a week.

3 THE HEARING EXAMINER: At least a week. Yeah, I
4 know. But I'm afraid we're catching the ones that got
5 accepted back in January.

6 MR. GETCH: That's just the DO stuff. The zoning
7 applications --

8 THE HEARING EXAMINER: Still been flowing in?
9 Okay.

10 MS. MONTGOMERY: I got an e-mail that said you
11 weren't accepting anything.

12 THE HEARING EXAMINER: They must have put your
13 name on a list.

14 MS. MONTGOMERY: Yeah, I'm on the list.

15 THE HEARING EXAMINER: All right. Okay.
16 Anything else from anybody at the table?

17 All right. This hearing is closed then.
18 Thank you.

19 (Whereupon, the proceedings were concluded at
20 4:30 p.m.)

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1 STATE OF FLORIDA)

2 COUNTY OF LEE)

3 I, Janet K. North, RPR, do certify that I was
4 authorized to and did stenographically report the
5 foregoing proceedings and that the typewritten transcript,
6 consisting of pages numbered 1 through 274, is a true
7 record.

8 Dated this 7th day of September, 2004.

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Janet K. North, RPR
and Notary Public

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