

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF ZONING HEARING EXAMINER**

**SPECIAL EXCEPTION
4734**

DECISION

Application:	Department or Variety Store
Applicant:	Wal-Mart Real Estate Business Trust
Opposition:	The Patuxent Riverkeeper, et.al.
Hearing Dates:	February 26, 2014, February 27, 2014 and March 27, 2014
Hearing Examiner:	Joyce B. Nichols
Disposition:	Denial

NATURE OF REQUEST

- (1) Special Exception 4734 is a request to use approximately 24.90 acres of land in the C-S-C (Commercial Shopping Center) Zone, being parts of Parcels 27, 28, 52, 59 and 71, Tax Map 55, Grid E-4, Bowie, Maryland, for a Department/Variety Store in excess of 125,000 square feet (an approximately 186,933 square foot store is being proposed).
- (2) The Technical Staff recommended disapproval, Exhibit 33, and the Planning Board elected not to have a hearing and in lieu thereof adopted the Technical Staff's recommendation of disapproval as its own. (Exhibit 37)
- (3) The subject property has recently been annexed into the municipal boundaries of Bowie. The Bowie Department of Planning and Economic Development recommended Approval with Conditions. (Exhibit 107) The Bowie Planning Board recommended Denial (Exhibit 108) and the Bowie City Council recommended Approval with Conditions.¹ (Exhibit 35)
- (4) At the conclusion of the evidentiary hearing the record was kept open for a variety of documents. Upon receipt of the requested documents, the record was closed on May 2, 2014.

¹ The Annexation Agreement entered into by the City of Bowie and Mill Branch Crossing (the owner of the subject property) on December 2, 2011: (1) recites the City's support of a "mixed-use development consisting of up to 800,000 square feet of rentable space, including retail, office and hotel uses (the "Project")", (2) prohibits the City from directly or indirectly taking any action or position detrimental to the development of the "Project", and (3) exempts the subject property from any municipal taxes for a period of five (5) years after the sale of any lots or the issuance of any use and occupancy permits. (Exhibit 63)

FINDINGS OF FACT

Subject Property

- (1) The subject property is located in the northeast quadrant of the intersection of Robert Crain Highway (US 301) and Mill Branch Road. It is comprised of portions of 6 parcels (27, 28, 52, 58, 59 and 71) of land containing a total of 24.9 acres. It is a part of a larger 74 acre site which was rezoned to the C-S-C Zone in 2006 and uses the appellation Mill Branch Crossing.
- (2) The Special Exception site does not have frontage on or access to a public road. The subject property is partially wooded but is primarily cleared as a result of many decades of agricultural use.
- (3) The subject site is encumbered by a 50-foot access easement (Liber 28018 at Folio 685) to the benefit of the Maryland National Capital Park and Planning Commission (MNCPPC) which extends northeast from Mill Branch Road along the entire southeastern property line of the subject property to provide access to the Green Branch Regional Park abutting the subject property to the east and northeast. (Exhibit 110)
- (4) Mill Branch Road is designated on the 2006 Bowie and Vicinity Master Plan as both a Scenic Road and a Historic Road. MP p. 65

A scenic road is a public or private road, designated by the County Council, which provides scenic views along a substantial part of its length through natural or manmade features, such as forest or extensive woodland, cropland, pasturage, or meadows; distinctive topography, including outcroppings, streambeds or wetlands; traditional building types; historic sites; or roadway features such as curving, rolling roadway alignment and "leaf tunnels." A historic road is a public or private road, designated by the County Council, which has been documented by historic surveys or maps, and which maintains its historic alignment and historic landscape context through views of natural features, historic landscape patterns, historic sites and structures, historic farmstead groupings, or rural villages. MP p. 64

History

- (5) On March 26, 2002, the 2002 Preliminary General Plan proposal showed the Mill Branch Crossing property in the Rural Tier. The Prince George's County District Council proposed amendments to the Preliminary General Plan by County Council Resolution CR-34-2002, including Amendment 2 for the Mill Branch Crossing property to be placed in the Developing Tier.
- (6) On July 16, 2002, a joint public hearing on the amendments proposed by CR-34-2002 was held. The District Council approved the 2002 Prince George's County General Plan (General Plan) by CR-47-2002 on October 7, 2002, with amendments, including Amendment 2 placing the Mill Branch Crossing property in the Developing Tier.

(7) The 2006 Approved Master Plan for Bowie and Vicinity and Sectional Map Amendment for Planning Areas 71A, 71B, 74A, and 74B (Bowie Master Plan and SMA) reclassified the site from the R-A (Residential-Agricultural) Zone to the C-S-C Zone.

(8) On June 12, 2007, the Applicant submitted a Preliminary Plan of Subdivision (4-07043) for the Mill Branch Crossing shopping center. The Application was ultimately withdrawn on November 1, 2007.

(9) On May 28, 2009, the Prince George's County Planning Board approved Preliminary Plan of Subdivision 4-08052 for the Mill Branch Crossing shopping center. The approved Preliminary Plan was for the development of a shopping center and a 150-room hotel on the larger 74-acre property of which the subject property is a portion. Prince George's County Planning Board Resolution No. 09-85 created Parcel A and contains 36 conditions of approval, including the requirement for a Detailed Site Plan prior to final plat. The approved Preliminary Plan is valid until December 31, 2015. No final plat has been filed or recorded for the subject site.

(10) On June 8, 2010, the Applicant submitted a limited Detailed Site Plan (DSP-10018) for an entrance road onto the 74-acre site. That Application is still pending.

(11) On January 6, 2011, the Applicant requested a reconsideration of Conditions 2, 6, 8, 9, 18, 19, 20, 21, 22, 26, and 32 of PGCPB Resolution No. 09-85 relating to the Detailed Site Plan. On February 3, 2011, the Planning Board denied the request for a waiver of the rules and thus the reconsideration.

(12) On March 22, 2012, the Applicant submitted a new Preliminary Plan, 4-11011, to create five parcels for the development of a shopping center and to adjust the previous Detailed Site Plan conditions. This Application was ultimately withdrawn.

(13) The Applicant has submitted a Detailed Site Plan (DSP-13034) for the entire 74-acre site. (Exhibit 104) DSP-13034 is a proposal for the following freestanding structures: a 186,933 square foot big box store 31-34 feet in height (Building A), a 150 room (11,200 square foot) hotel (Building B), a 6,500 square foot retail structure (Building K), a 4,992 square foot retail structure (Building G), a 10,000 square foot restaurant (Building F), a 300 seat 10,958 square foot fast food restaurant (Building E), a 5,268 square foot bank (Building D), and a 45 seat restaurant (Building C).

Neighborhood/Surrounding Uses

(14) Exhibit 111 depicts the three different neighborhoods as proposed by the Applicant, the Technical Staff, and the Opposition. The Applicant's proposed neighborhood is bounded on the north by Governor's Bridge Road, on the east by the western edge of the Patuxent River Stream Valley Park and then an artificial line reaching south to Mill Branch Place (forming the southeast boundary), on the southwest by Mill Branch Road, and on the west by Robert Crain Highway (US 301). (Exhibit 28(a))

The neighborhood proposed by the Technical Staff is bounded on the north by the northern edge of the Green Branch Regional Park (a 319 acre park owned by the M-NCPPC, a 94 acre portion of which is proposed for use as athletic fields), on the east by the Patuxent River (which is the boundary between Prince George's and Anne Arundel Counties), on the south by Central Avenue/Queen Anne Bridge Road/Mill Branch Road, and on the west by Robert Crain Highway (US 301).

The Opposition's proposed neighborhood is bounded on the north by John Hanson Highway (US 50), on the east by the Patuxent River (Anne Arundel – Prince George's County boundary), on the south by Central Avenue (Rt. 214) Queen Anne Bridge Road, and on the west by Robert Crain Highway (US 301).

The neighborhood as proposed by the Applicant is unrealistically restrictive and is dependent on some entirely artificial boundaries which are not readily discernible by the naked eye. The neighborhood as proposed by the Technical Staff is more in keeping with the accepted planning policy of delineating neighborhoods by readily discernible geographic (the Patuxent River) or physical (established roadways) boundaries. However, it is illogical to exclude the triangular area bounded by Mill Branch Road/Queen Anne's Bridge Road/Robert Crain Highway (US 301) as it is clearly connected through uses and transportation infrastructure to the land located to the east of Mill Branch Road. The remaining question is whether the neighborhood is bounded on the north by Governor Bridge Road, leaving a small isolated residential subdivision, or whether the neighborhood includes the residential subdivision and is bounded by John Hanson Highway (US 50). It is your Examiners opinion that the residential subdivision should not be isolated from a planning perspective and therefore accepts the neighborhood as proposed by the Opposition. (Exhibit 111)

(15) The subject property is bounded on the north, northeast, and south by land in the O-S (Open Space) and R-A Zones. (Exhibits 3 and 66)

(16) The site is surrounded by the following uses:

North— The remainder of the 74-acre Mill Branch Crossing site, beyond which is an unnamed tributary to Green Branch, a gas station and Rips motel, restaurant, and package store all in the C-S-C Zone. Further to the north are commercial uses in the C-M (Commercial Miscellaneous) Zone, and developed residential in the M-X-T (Mixed Use-Transportation Oriented) Zone and R-R (Rural Residential) Zones.

Northeast - The Patuxent River Park in the R-O-S (Reserved Open Space) Zone

East— Agricultural land slated for development as the Green Branch Regional Park (M-NCPPC) in the O-S Zone.

South— Undeveloped land and agricultural fields in the R-A and O-S Zones and the Maenner Agricultural Preservation District. (Exhibit 92)

West— The remainder of the Mill Branch Crossing site in the C-S-C Zone. Across Robert Crain Highway (US 301) is the existing Wal-Mart 120,000 square foot store in the C-S-C Zone.

Master Plan/Sectional Map Amendment

(17) The Application conforms to the commercial development land use recommendations of the 2006 Bowie and Vicinity Master Plan and Sectional Map Amendment. However, the Application does not conform to the Master Plan Policies, Strategies, and Guidelines pertaining to the type of commercial building and uses, which specifically discourages “big-box” commercial uses. The Master Plan addresses the subject property on pages 12 and 16:

POLICY 6: Improve site design to maximize the preservation of environmentally sensitive areas, encourage a diversity of housing types, provide a mix of land uses in appropriate locations, and reduce the cost of providing new roads and other public facilities.

Strategies:

1. Recommend development and/or redevelopment in conformance with the following stated land use Concept and development guidelines at the following locations:

b. Property located at the northeast quadrant of the US 301/Mill Branch Road intersection: This property, given its proximity to the Bowie Regional Center, should be developed with high-quality commercial retail uses, including a hotel. Future development should promote the optimum use of the transportation system and public infrastructure, preserve environmentally sensitive areas, and provide for the needs of workers and residents in the area. The property should be rezoned to a suitable zone, such as the C-S-C (Commercial Shopping Center) Zone, to permit development of elements such as an upscale hotel, etc. The development should incorporate the following design guidelines:

(1) The development should include quality department stores but should not include discount or “big-box” commercial activities. No individual retail uses; other than food or beverage stores (grocery store) shall exceed 125,000 square feet in size. Retail sales of alcoholic beverages in a food or beverage store are limited to 5,000 square feet or less.

(2) The existing 22-foot easement that provides access to the Green Branch Regional Park should be vacated and replaced by a new temporary easement, fifty feet in width, located on this property at its eastern most property line on Mill Branch Road. The new temporary easement should be vacated when it is replaced by permanent access via a right-of-way to be constructed at the time this property is

developed. The new temporary easement on the easternmost property line should form the boundary between the Developing Tier and the Rural Tier.

(3) The development should include a pedestrian hiker/biker system that is comprehensively designed to encourage pedestrian and biking activity within the development and with connections to the Green Branch Regional Park and Prince George's Stadium

(18) The Master Plan's vision and desire for the ultimate development of this site is for something more than what is being proposed by the Applicant. A Wal-Mart Super Center, albeit one more aesthetically pleasing than the older model directly across Robert Crain Highway (US 301) to the west, would seem to be the quintessential example of the big-box discount store being discouraged by the District Council. The Applicant is proposing a building that far exceeds the square footage recommendation for a single-use. The Applicant explains "The proposed building which is 186,933 square feet is not a typical retail use, and does not impair this Master Plan suggestion. The proposed building and department store contains a number of retail uses. The store has three main entrances: one for general merchandise, one for grocery component, and one for the outdoor garden center. In addition, interior space is provided for tenants. Wal-Mart stores of this size typically include tenant space for additional uses such as fast food, banks florists, beauty and health related operators." Notwithstanding the Applicant's explanations to the contrary, the Staff found this proposal to be a big-box discount development irrespective of the upgraded façade, multiple entrances, and other retail uses proposed within the building footprint and your Examiner agrees.

(19) The proposed Site Plan (Exhibit 29(b)) shows the existing 50-foot-wide easement along the southeastern property line and, in fact, proposes an additional 62-foot easement to M-NCPPC, all of which is in an area not included in the Special Exception.² This easement from Mill Branch Road will provide for additional access to the proposed development and will be the primary access for trucks and customers travelling south on Robert Crain Highway (US 301). The Applicant has not explained how they intend to meet the second development guideline of Policy 6 or when this temporary easement will be replaced by a permanent right-of-way.

(20) The Applicant has provided for sidewalks along internal driveways and within the parking lot, but otherwise does not address or incorporate pedestrian and hiker/biker connectivity

² The proposed Green Branch Regional Park, to be located on Parcel 21, Tax Map 55, has had an access easement through Parcel 57, Tax Map 55, to Robert Crain Highway (US 301) since 1994. The property owner anticipates the construction of a hotel and 6,500 square feet of retail on Parcel 57 which could not be built if the 1994 access easement continues in force and effect. In 2007 the property owner and M-NCPPC (the current owner of Parcel 21) entered into a new access easement agreement, extinguishing the easement through Parcel 57 and providing an access easement along the edge of Parcel 58, adjacent to the Terry Farm, Parcel 29. (Exhibit 110) Access will thus be provided to the proposed Green Branch Regional Park via Mill Branch Road to Robert Crain Highway (US 301) along the western boundary of the Terry Farm. Alternately, since the entire development of Mill Branch Crossing is dependent on the State's construction of new access lanes and an interchange into the subject property, park access could also be via that new proposed interchange.

between the proposed shopping center and the adjacent Green Branch Regional Park. These presumably would be further analyzed through the Detailed Site Plan process.

(21) The General Plan locates the subject property in the Developing Tier. The vision for the Developing Tier is to maintain a pattern of low- to moderate-density, suburban, residential communities, distinct commercial centers, and employment areas that are increasingly transit-serviceable.

Effects of Previous Approvals

(22) When the Planning Board approved Preliminary Plan of Subdivision 4-08052, it did so subject to 36 conditions including the requirement for a Detailed Site Plan (DSP) prior to final plat. A DSP was submitted three months after the subject Application and has not yet been finally accepted. The Special Exception Site Plan is essentially the “Detailed Site Plan” for that portion of the 74 acre site, since a Special Exception Site Plan takes precedence over any other Plan approval (§27-319(a)). This is not to say, however, that a DSP is not required, just that it will have to be identical to any approved Site Plan for the portion of the site covered by a Special Exception. Many of the conditions of approval in the Preliminary Plan required specific tests and findings be made at the time of the DSP. Logically, many of the conditions related to the DSP approval should also be applied to the Special Exception Site Plan to avoid the need for revisions. It is therefore recommended by the Technical Staff that the Special Exception Site Plan address these elements at this time, with the caveat that a final plat cannot be recorded until an overall DSP is approved.

In light of this, the Technical Staff has made an effort to assess the relevant Conditions from Preliminary Plan 4-08052 and Type I Tree Conservation Plan TCPI/022/07 that have an impact on the Special Exception. They are divided into areas of interest according to the referring agencies. The numbers correspond to the condition numbers contained in the Resolution for 4-08052. (Exhibit 6(b))

Environmental

2. In conjunction with the Detailed Site Plan, a Type II Tree Conservation Plan shall be approved.

A revised Type I Tree Conservation Plan (TCPI) was originally submitted with the instant Application; however, a Type II Tree Conservation Plan (TCPII) is required to be submitted with a Special Exception site Plan. A TCPII was previously submitted with Detailed Site Plan DSP-10018, but did not move forward to approval; however, the same TCPII number is retained for the site and will be applied. A TCPII (Exhibit 118) has been submitted for review with the instant revised Application, and will be addressed.

3. Development of this site shall be in conformance with the Stormwater Management Concept Plan 14712-2007-00 and any subsequent revisions.

A Stormwater Management Concept Approval Letter (12844-2010-01), valid until October 28, 2014, has been issued. (Exhibit 7) An unapproved Phase I Stormwater Management Concept Plan was submitted with the instant Application, which shows

Stormwater Management being handled in an underground storage facility as well as numerous small bio retention facilities scattered around the site. The Stormwater Management Concept Plan does not match the layout within the area of the Special Exception Application. It is unclear whether all elements shown on the approved Stormwater Management Concept Plan are reflected on the TCP II. After the Stormwater Management Concept Approval Plan is confirmed by the City of Bowie, all proposed Stormwater Management elements shall be added to the TCPII.

The subject property was annexed into the City of Bowie in 2012, which has local Stormwater Management authority. Subsequently, a revised Stormwater Management Concept Approval Letter, 12844-2010-2, was issued by the Prince George's County Department of Permits, Inspection and Enforcement (DPIE) on September 13, 2013, but confirmation has not been received from the City of Bowie that they endorse the revised Concept approval.

- 18. The detailed site Plan shall show the use of low-impact development Stormwater Management techniques such as bio retention, French drains, depressed parking lot islands and the use of native Plants throughout the site. Low-impact development techniques shall be applied on this site to the greatest extent possible.**

This Condition must be evaluated in conjunction with the review of the Special Exception, because the Special Exception Site Plan will govern within the limits of the Special Exception. The Stormwater Management Concept Plans show the use of some of these techniques, but confirmation from the City of Bowie is necessary concerning the Application of the approved Concept Plan going forward.

The Environmental Planning Section, M-NCPPC, will be requesting a revision to the TCPII to show the location of all Stormwater Management features approved with the Stormwater Management Concept Approval, subject to confirmation by the City of Bowie, to assess any conflicts with Woodland Conservation or impacts to the Primary Management Area which are inconsistent with the impacts approved at the time of Preliminary Plan or the TCPI. The TCPII Plan currently shows numerous bio retention areas scattered throughout the site, which are currently obscured by graphic landscape elements which must be removed from the TCPII Plan if they are not credited as Woodland Conservation.

- 19. At time of detailed site Plan review, the applicant shall demonstrate the use of alternative parking methods and paving materials to reduce the area of impervious surfaces to the greatest extent possible; insert additional green areas and Tree canopy to cover to break up the areas of impervious surfaces; provide large islands of shade; and demonstrate the use of low-impact development techniques.**

This Condition must be addressed within the limits of the Special Exception with the instant Application. Paving materials, landscape materials, green space, and Tree canopy coverage area are all elements which fall under the review authority of the Urban Design Section. Review for the use of low-impact development techniques lies with the City of Bowie, Department of Public Works. The parking areas shown on the Site Plan are broken up into smaller sections by landscape islands. The parking has been reduced to the minimum required, had the Application been part of an integrated shopping center which it is not.

- 20. The landscape Plan submitted at time of detailed site Plan shall demonstrate the following:**
- a. A minimum of twenty percent Tree canopy coverage, after ten years of growth, to provide shading and reduce the heat-island effect within the parking lot area.**
 - b. Planting strips designed to promote long-term growth of Trees and increase Tree canopy coverage. These strips should be considered for bio retention.**
 - c. Distribution of Tree Planting throughout the site to provide shade to the maximum amount of impervious area.**
 - d. The use of Conservation landscaping techniques that reduce water consumption to the greatest extent possible.**
 - e. Incorporate environmentally sensitive Stormwater Management techniques throughout.**
 - f. Provide bufferyard along Parcel 29 to create a transition between the Developing Tier and Rural Tier.**

These Conditions for DSP approval should be addressed within the limits of the Special Exception with the current Application by the Urban Design Section. This will assure that the Special Exception Site Plan and the DSP are consistent at the time of final plat. These landscape elements should not be shown on the TCPII, unless they are proposed to be credited as Woodland Conservation and meet the Woodland Conservation methodology for on-site landscaping found in Section 25-122(c)(K) of the Prince George's County Code. Twenty percent Tree canopy coverage is provided and the Plans show numerous bio retention areas, mostly within the landscape islands within the parking lot.

- 26. Prior to submittal of the detailed site Plan, a Conceptual design for the environmentally sensitive restoration of the problem areas identified in the Stream Corridor Assessment Report shall be prepared and submitted for approval as part of that Application. The restoration Plan shall include a "Coastal Plain Outfall" type system, or its equivalent, to slow the velocity of the Stormwater running through the stream bed, and stabilize the stream banks to prevent sedimentation into the Patuxent River. The final design shall show integration of the Stormwater Management and stream restoration.**

This Condition is not applicable to the current Special Exception Application which includes no regulated streams, but will be applied with the DSP for the remainder of the site which includes regulated environmental features and areas requiring stream restoration.

- 28. Prior to the issuance of any permits which impact wetlands, wetland buffers, streams or Waters of the U.S., the applicant shall submit copies of all federal and state wetland permits, evidence that approval conditions have been complied with, and associated mitigation Plans.**

The limits of the Special Exception, as currently delineated, do not include any wetlands or wetland buffer, and does not propose impacts to any wetland features regulated by state or federal agencies. This condition may be applicable with the future DSP Application.

- 30. Prior to signature approval of the preliminary Plan, the preliminary Plan and TCPI shall be revised to show a 40-foot-wide scenic easement, free of parallel public utility easements, adjacent to the ultimate right-of-way of Mill Branch Road.**

This Condition was met prior to signature approval of the Preliminary Plan. It is not applicable within the currently delineated limits of the Special Exception Application, and will be applied with the DSP for the remainder of the site.

- 32. The Detailed Site Plan shall address: protection of significant visual features; preservation of existing woodlands; Planting of the scenic easement; limiting of access points; supplemental landscaping appropriate to conserve and enhance the viewshed of the historic road; and the relationship between the Developing Tier and Rural Tier.**

The above Condition should be applied to the current Application as applicable, specifically the relationship between the proposed Special Exception in the Developing Tier and the adjacent Rural Tier. The Rural Tier is located 147 to 213 feet from the proposed structure and 50 feet from proposed circulation elements (including the drive aisle used by trucks for loading purposes and waste removal). There are no woodlands to be retained within the area of interface between the tiers, although a large 3.2-acre woodland reforestation/afforestation area is proposed. A 30-foot-wide landscape strip, is provided along the property line.

Although the intersection of the two tiers is partially off the Special Exception Site Plan, more information is needed to ensure that this Condition is addressed.

Subdivision

- 4. At the time of final plat, the applicant shall dedicate a ten-foot public utility easement along the public rights-of-way as delineated on the approved preliminary Plan of subdivision.**

The area under review with this Special Exception contains frontage on an area to be dedicated, which reflects the ten-foot-wide public utility easement.

- 5. At the time of final plat, the applicant shall dedicate rights-of-way along the property's street frontage consistent with the approved preliminary Plan of subdivision, and subsequent detailed site Plan if modified by SHA along the frontage of Mill Branch Road.**

The Site Plan delineates the right-of-way dedication along the frontage of Mill Branch Road and Robert Crain Highway (US 301) as reflected on the approved Preliminary Plan. The property frontage along Mill Branch Road is not within the limit of this Special Exception. However, prior to building permits, dedication should be required for Master Plan and Preliminary Plan conformance to ensure adequate access.

- 6. Prior to the approval of final plats, a detailed site Plan shall be approved by the Planning Board in accordance with Part 3, Division 9, of the Zoning Ordinance. The detailed site Plan shall include, but not be limited to the following:**
- a. A final determination shall be made by SHA for the ultimate right-of-way dedication along the southern property line at Mill Branch Road,**
 - b. Conformance to the *Prince George's County Landscape Manual*,**
 - c. Establishing an appropriate relationship between the Developing and Rural Tiers while taking into account the impact of the proposed commercial development on the rural character of the area and the regional park facility currently under construction to the east,**
 - d. The placement and orientation of buildings, landscaping, and driveways,**
 - e. The architectural elevations, massing and scale of the improvements,**
 - f. Evaluate appropriate pedestrian connections and circulation including a connection to the Green Branch Regional Park,**
 - g. The use of LID and green building techniques,**
 - h. Conformance to the master Plan guidelines,**
 - i. Viewshed analysis from US 301 corridor.**

A DSP is required for the site prior to approval of final plats. A DSP was submitted subsequent to the Special Exception Application, and is not yet finally accepted or scheduled for review. The current proposed layout, placement, and orientation of the store with the rear of building closest to the Rural Tier and regional park do not clearly address the issues raised by the Planning Board in the conditions and findings of the Preliminary Plan, which required an analysis of the relationship of the buildings on this site as it relates to the Rural Tier boundary to the south and east. In addition, the Special Exception does not propose any pedestrian connection to the regional park and only peripherally addresses any green building techniques, and does not propose any mixed use on the site, which may not be consistent with the Master Plan Guidelines. The Special Exception must better address Condition 6, which was a result of the Master Plan and General Plan tier designations and the relationship and impact on abutting properties.

- 7. An automatic fire suppression system shall be provided in all new buildings proposed in this subdivision, unless the Prince George's County Fire/EMS Department determines that an alternative method of fire suppression is appropriate.**

Condition 7 should be added to a general note on the Special Exception.

- 12. Prior to the issuance of building permits, the applicant, his heirs, successors and/or assignees shall provide a financial contribution of \$210.00 to the DPW&T for the placement of a bikeway sign(s) along Mill Branch Road, designated a Class III Bikeway. A note shall be placed on the final plat for payment to be received prior to**

the issuance of the first building permit. If DPW&T declines the signage, this condition shall be void.

Conformance to Condition 12 will be determined at the time of building permits.

- 13. The applicant and the applicant's heirs, successors and/or assignees shall provide, unless modified by the DPW&T and the SHA:**
- a. Multiuse sidepath for pedestrians and bicyclists on Mill Branch Road connecting to the intersection of US 301 and Excalibur Road.**
 - b. Provide a wide crosswalk with pedestrian islands on US 301 to create a safe road crossing and accommodate both pedestrians and bicyclists using the recommended sidepath.**
 - c. Raised crosswalks on roads approaching Mill Branch Road to create safe road crossings for pedestrians and bicyclists.**
 - d. Install "bikeway narrows" signage on the approach to Mill Branch Road and the site entrance.**

The site frontage along Robert Crain Highway (US 301) and Mill Branch Road are not within the limit of this Special Exception. Conformance to Condition 13 will be reviewed and determined at the time of the building permits. In fact, the Special Exception boundary does not front on any public right-of-way. Prior to building permits, adequate dedication will be required in accordance with the approved Preliminary Plan.

- 25. The following note shall be placed on the Final Plat of Subdivision:**

"Development is subject to restrictions shown on the approved Type I Tree Conservation Plan (TCPI/022/07), or as modified by the Type II Tree Conservation Plan, and precludes any disturbance or installation of any structure within specific areas. Failure to comply will mean a violation of an approved Tree Conservation Plan and will make the owner subject to mitigation under the Woodland Conservation Ordinance. This property is subject to the notification provisions of CB-60-2005. Copies of all approved Tree Conservation Plans for the subject property are available in the offices of the Maryland-National Capital Park and Planning Commission, Prince George's County Planning Department."

Conformance to Condition 25 should be reviewed and determined at the time of final plat.

- 31. At time of final plat, a scenic easement shall be established adjacent to Mill Branch Road as delineated on the preliminary Plan, and a note shall be placed on the final plat as follows:**

"Mill Branch Road is a county designated Historic Road. The scenic easement described on this plat is an area where the installation of structures and roads and/or the removal of vegetation are prohibited without prior written consent from the M-NCPPC Planning Director or

designee. The removal of hazardous Trees, limbs, branches or trunks is allowed.”

The scenic easement adjacent to Mill Branch Road is not within the limit of this Special Exception. Conformance to Condition 31 should be reviewed and determined at the time of final plat.

Historic Preservation

The Planning Board determined that a Phase III recovery is appropriate for a Historic Site (Site 18PR857) contained within the Special Exception area. However, the Applicant will be required to return some of the artifacts recovered for display and interpretation back to this site. Prior to the approval of the DSP, the Applicant should submit a Phase III mitigation and data recovery Plan for review and approval by the Historic Preservation staff and the Historic Preservation Commission. The Applicant should provide a final report detailing the Phase III investigations and ensure that all artifacts are curated and some of them then brought back to the site for interpretative exhibits to be determined by the Planning Board at the time of review of the DSP.

As stated in PGCPB Resolution No. 09-85, “to ensure that an appropriate context is established, and to provide for the greatest benefit for an accurate interpretation of the site, the applicant should submit a proposal for the interpretation of the artifacts recovered which includes detailing the location and type of appropriate displays. The Planning Board will expect a creative and innovative approach to reach a wide audience and be easily accessible, all while ensuring that an appropriate context is established for the artifacts. The locations of the display and interpretation may include a structure(s), a park like setting or may be located in one of the buildings proposed on the site (i.e. the hotel). It is the desire of the Planning Board that the Applicant presents a proposal that is inspiring and one which recognizes the importance of this site and the cultural significance it has to the County.”

- 8. Prior to the approval of the detailed site Plan, the applicant shall submit a Phase III mitigation and data recovery Plan for review and approval by the Historic Preservation staff and the Historic Preservation Commission for 18PR857. The applicant shall provide a final report detailing the Phase III investigations and ensure that all artifacts are curated in a proper manor and brought back to the site for interpretative exhibits to be determined by the Planning Board at the time of review of the Detailed Site Plan.**

A Phase III mitigation and data recovery Plan was submitted to Historic Preservation staff on September 12, 2009. The Historic Preservation Commission reviewed and approved the Phase III mitigation and data recovery Plan at its September 15, 2009 meeting. Phase III mitigation and data recovery cannot precede until the U.S. Army Corps of Engineers and the Maryland Historical Trust (MHT) completes their Section 106 review of potential impacts to Site 18PR857.

- 9. The applicant shall provide interpretive signage detailing the results of the archeological investigations at site 18PR857. The location, wording and timing for its installation shall be reviewed at the time of detailed site Plan and be reviewed by the staff archeologist.**

The Phase III archeological investigation has not been completed and, therefore, Condition 9 above cannot be addressed at this time. In addition, the US Army Corps of Engineers and the Maryland Historical Trust have not completed their Section 106 review of potential impacts to Archeological Site 18PR857.

10. **If Archeological Site 18PR859, located in the northern portion of the property, will be impacted by the proposed development, the applicant shall provide a Plan for:**
 - a. **Evaluating the resource at the Phase II level, or**
 - b. **Avoiding and preserving the resource in place.**

Archeological Site 18PR859 will not be impacted by this proposal.

11. **If state or federal monies or federal permits are required for this project, Section 106 review may require archeological survey for state or federal agencies. Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of their undertakings on historic properties, to include archeological sites. The applicant shall provide proof to Historic Preservation staff that they have forwarded all necessary materials to the Maryland Historical Trust for their review of potential effects on historical resources on the subject property prior to approval of final plat.**

The subject Application clearly illustrates that the proposed commercial development would result in the destruction of Site 18PR857. In a letter dated June 4, 2013 (Beth Cole, Administrator, Project Review and Compliance, Maryland Historical Trust to Kathy Anderson, Chief, Maryland Section Southern, Regulatory Branch, Baltimore District, U.S. Army Corps of Engineers), MHT acknowledged the receipt of updated site Plans for the Mill Branch Crossing project dated March 2013. MHT noted that the redesigned commercial development will still result in the complete destruction of Site 18PR857 and will still constitute an adverse effect on the eighteenth century site.

The letter states: "If site 18PR857 is located within the Corps' area of jurisdiction, the Corps and Mill Branch Crossing LLC will need to continue to coordinate with MHT on specific construction Plans and on ways to reduce and/or mitigate the adverse effect on the historic property. If it is determined that site avoidance is not feasible, then Mill Branch Crossing LLC must provide MHT and the Corps with documentation detailing the constraints and providing justification as to why site 18PR857 cannot be avoided during construction. (Please note that both the Corps and MHT were provided with documentation on September 30, 2010 detailing why site avoidance would not be feasible in the case of the originally proposed development. As the proposed site development Plans have been significantly altered, the possibility of site avoidance and/or the reduction of impacts must be revisited). If site avoidance is not possible, Phase III data recovery investigations will be warranted to mitigate the undertaking's adverse effects on the archeological resource."

Transportation

- 14. Total development within the subject property shall be limited to a mix of commercial/retail development or equivalent development which generates no more than 606 AM peak-hour trips and 1,017 PM peak-hour (weekdays) vehicle trips, and 1,431 peak trips on Saturdays. Any development generating a traffic impact greater than that identified herein above shall require a new preliminary Plan of subdivision with a new determination of the adequacy of transportation facilities.**

Based on trip generation rates obtained from the Institute of Transportation Engineers (ITE) Trip Generation Manual 9th Edition, 2012, the proposed Wal-Mart Supercenter is expected to generate 282 AM net peak-hour vehicle trips and 582 net PM peak-hour (weekdays) vehicle trips, and 860 net peak trips on Saturdays. This is within the cap set by this condition.

- 15. At the time of final plat approval, the applicant and the applicant's heirs, successors or assignees shall either:**
- a. Dedicate of right-of-way along Mill Branch Road to facilitate the construction of the master Plan interchange and associated improvements on Mill Branch Road as shown on the approved preliminary Plan OR**
 - b. Dedicate the amount of land on Mill Branch Road to be determined by SHA redesign of the interchange and associated improvements on Mill Branch Road.**
- 6. At the time of final plat approval, the applicant and the applicant's heirs, successors or assignees, shall dedicate right-of-way along US 301 (including the right-in right-out) as shown on the approved preliminary Plan and shall show dedication within MD 197 master Plan alignment necessary for the right-in right-out.**
- 17. Prior to the issuance of any building permits within the subject property, the following road improvements shall (a) have full financial assurances through either private money or full funding in the Maryland Department of Transportation "Consolidated Transportation Program (CTP)" or the Prince George's County "Capital Improvement Program (CIP);" (b) have been permitted for construction through the operating agency's permitting process; and (c) have an agreed-upon timetable for construction with the appropriate operating agency:**
- a. US 301 at Governors Bridge Road-Harbor Way**
 - Modify eastbound Harbor Way from a two lane approach to a three lane approach that would include an eastbound double left turn lane, and a combined left, through and right-turn lane
 - b. US 301 at MD 197-Rip's Restaurant Access**

- **Modify the westbound exit from the Rips restaurant to a three (3) lane exit to provide an exclusive left lane, a through lane and a right-turn lane**
 - **Provide an additional left turn lane along the northbound approach to provide a total of three left-turn lanes**
 - **Provide three receiving lanes on the western leg (MD 197) of the intersection subject to SHA requirement**
- c. US 301 at Mill Branch Road-Excalibur Road**
- **Construct a double southbound left turn along US 301 at Mill Branch Road**
 - **Widen Mill Branch Road to a four lane westbound approach providing two left-turn lanes, one through lane and a free right-turn lane**
 - **Provide two receiving lanes on the eastern leg of the intersection (Mill Branch Road) subject to the requirements of SHA and DPW&T**
 - **Provide a third northbound through lane along US 301 beginning at a point south of Mill Branch Road, and ending at a point north of Mill Branch Road. The beginning and end point of this third lane shall be determined by SHA**
- d. US 301 at Heritage Boulevard**
- **Re-stripe the southbound right-turn lane along US 301 to a shared through/right lane**
- e. Mill Branch Road at Site Access**
- **Provide a double left-turn and a separate through lane on the eastbound approach**
 - **Provide two receiving lanes on the site access leg**
 - **On the site access approach leg, provide a channelized free right-turn lane and a separate left-turn lane**
 - **Install a traffic signal**
- f. US 301 at Site Access**
- Provide a right-in right-out access point on US 301 at the northernmost point of the site, subject to SHA's approval. This**

access point shall be designed so that left turns from this access point to MD 197 are prohibited.

The Applicant recognizes and acknowledges their responsibility to provide these dedications and improvements. (Exhibit 33 p. 8-13)

Parks and Recreation Concerns

(23) The Department of Parks and Recreation (DPR) (MNCPPC) has reviewed the instant Application for conformance with the requirements and recommendations of approved Preliminary Plan 4-08052, the existing Joint Access Easement Agreement (Liber 28018 at Folio 685), current zoning, and Subdivision Regulations, as well as the impact of this Special Exception on adjacent parkland.

DPR Staff believes that it should be noted that the access drive from Mill Branch Road shown on the Special Exception Site Plan will serve both Wal-Mart and Green Branch Regional Park from Mill Branch Road, but this access drive was not included in the Special Exception Application. During the Subdivision and Development Review Committee meeting held on August 2, 2013, DPR Staff made a request to revise the boundaries of SE-4734 to include the access drive as part of the Special Exception because the drive will provide an important vehicular access to Wal-Mart from Mill Branch Road and because it is needed to facilitate the development of the Green Branch Regional Park. The September 23, 2013 resubmission of SE-4734 does not include the access drive as part of the Special Exception.

Existing Joint Access Easement

(24) As previously noted, the Subject Property is encumbered by an existing 50-foot-wide joint access easement (Liber 28018 at Folio 685) along the southeastern property line. The submitted Landscape Plan shows a 30-foot landscape buffer within the same area. The access easement was conveyed to M-NCPPC on April 21, 2007 for the installation, construction, reconstruction, maintenance, repair, and operation of a two-lane drive (access drive) for vehicular and pedestrian ingress/egress from Mill Branch Road to the Planned Green Branch Athletic Complex.

The Easement Agreement states that the Grantor (owner of the property) retains the right to use the easement in common with the Grantee (M-NCPPC). In addition, the Easement Agreement states that the Grantor at any time may request the Grantee to relocate all or any portion of the right-of-way to a different easement area at the location designated by the Grantor at the sole cost and expense of the Grantor, and the Grantee shall have the same rights and privileges in the new location.

In 2009, DPR retained a consultant to prepare Plans for the construction of the access drive within the existing easement area as part of the first phase of the Green Branch Athletic Complex development Plan. The access drive was designed within the easement area with minimal alteration to existing topography and with minimal impact to the property owner's property. During the review and approval of Preliminary Plan 4-08052, the property owner

requested that DPR relocate the planned access drive 45 feet from the southeastern property line in order to accommodate the required 40-foot-wide landscaping buffer between the subject property and adjacent property to the southeast, which is located in the Rural Tier. DPR staff agreed to relocate the access drive 45 feet from the property line.

The Easement Agreement also states that the design of the access drive shall be such that it can readily be assimilated into the ultimate four-lane entrance drive design. After approval of Preliminary Plan 4-08052, the property owner also requested that DPR build the access drive at the elevation suitable for the ultimate four-lane drive. The property owner provided proposed elevations for the ultimate four-lane entrance drive to DPR. DPR redesigned the access drive at the elevations proposed by the property owner and agreed to build a 22-foot-wide asphalt cross section (“half-section” of the ultimate four-lane drive) as requested by the property owner. The relocation of the access drive from the existing easement area to a new location, and construction of the access drive at the elevation suitable for the ultimate four-lane access drive, created additional costs associated with design, engineering, and construction. DPR staff has concerns that this Special Exception for the portion of the property, including a new layout of the site, may result in the need for redesign of the ultimate four-lane access drive. This would result in additional costs for engineering and construction of the half-section of access drive to be constructed by DPR.

Joint Access Drive Construction Status

(25) DPR has county-issued permits for construction of the access drive which will serve as “half-section” of the future four-lane drive through this property (at the location suggested by the property owner) and construction of the phase-one recreational facilities in the Green Branch Athletic Complex. The construction drawings for the access drive include: grading, Stormwater Management, soil erosion and sediment control, Tree Conservation Plans, construction details, and horizontal and vertical alignments of the access drive. Since there is no other suitable public access to the Green Branch Athletic Complex available at this time, the development of the access drive through this property (but outside of the boundaries of the instant Special Exception Application) is needed to facilitate construction of the first phase of the Green Branch Athletic Complex and provide public access to the new park.

Applicant’s Request

(26) The Applicant is proposing to build a 186,933-square-foot Wal-Mart Super Center on the subject property. The proposal would incorporate three major uses within one building: a grocery store, a general merchandise store, and a garden center. Additionally, multiple small tenant retail usage is also being proposed to be located within the confines of the Super Center. Access is proposed from both Robert Crain Highway (US 301) and via a 4 lane private driveway from Mill Branch Road. A 748-space parking lot fronts the proposed building. The southern and eastern sides of the proposed building, which border farmland in the Rural Tier and a future regional park, are the proposed location of an automotive center and the loading docks/recycling/organic waste/wood pallet storage area, respectively.

Motion to Dismiss

(27) The Opposition filed a Motion to Dismiss the Application for Special Exception or, in the alternative, to Stay Hearing. (Exhibit 51) Although afforded the opportunity, the Applicant did not file a written response to the Motion. Your Examiner took the Motion under advisement after arguments during the evidentiary hearing. February 26, 2014, T.p. 4-6, March 27, 2014, T.p. 178-179

(28) The crux of the Opposition's Motion is twofold: (1) that the subject property does not have frontage on and³ direct vehicular access to an existing arterial roadway (here US 301) and (2) any construction within the Robert Crain Highway (US 301) right-of-way requires permission from the State Highway Administration (SHA), which has not been obtained, and a non-tidal wetland permit from the Maryland Department of the Environment (MDE) and the Army Corps of Engineers, to impact wetlands associated with a proposed road crossing. The Applicant applied for a wetlands crossing permit on October 29, 2009 and withdrew its Application on February 6, 2014.⁴ (Exhibit 51)

(29) Although the Motion to Dismiss is denied at this time so as to allow a disposition on the merits of the Special Exception Application, the facts alleged and the legal arguments offered on behalf of the Motion form a part of the basis for the final Decision on this Application.

LAW APPLICABLE

(1) A Department/Variety Store is permitted in the C-S-C Zone pursuant to §27-461(b) of the Zoning Ordinance by Special Exception in accordance with §37-317 and §27-348.02.

(2) Section 27-317(a) provides as follows:

- (a) A Special Exception may be approved if:
 - (1) The proposed use and site Plan are in harmony with the purpose of this Subtitle;
 - (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
 - (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
 - (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
 - (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
 - (6) The proposed site Plan is in conformance with an approved Type 2 Tree Conservation Plan; and

³ §27-108.01, Interpretations and rules of construction, states: "Words and phrases are to be interpreted as follows....where a regulation involves two (2) or more items connected by the conjunctions "and"... "And" indicates that all the connected items shall apply..." §27-108.01(a)(13)(A)

⁴ The Opposition orally amended its Motion during the February 27, 2014 hearing to also include "they contemplate access to a local road, Mill Branch, which is categorically prohibited, I believe, by the Ordinance". T.p. 116

(7) The proposed site Plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130 (b)(5).

(3) Section 27-348.02 provides as follows:

(a) Department or Variety Stores and Department or Variety Stores combined with Food and Beverage Stores permitted in the use tables by Special Exception (SE) in the I-3, C-S-C and C-M zones shall be subject to the following requirements:

(1) The site shall have frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets.

(2) The Applicant shall demonstrate that local streets surrounding the site are adequate to accommodate the anticipated increase in traffic.

(3) The site shall contain pedestrian walkways within the parking lot to promote safety.

(4) The design of the parking and loading facilities shall ensure that commercial and customer traffic will be sufficiently separated and shall provide a separate customer loading area at the front of the store.

(5) All buildings, structures, off-street parking compounds, and loading areas shall be located at least:

(A) One hundred (100) feet from any adjoining land in a Residential Zone, or land proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, approved Official Plan for an R-P-C Zone, or any approved Conceptual or Detailed Site Plan; and

(B) Fifty (50) feet from all other adjoining property lines and street lines.

(6) All perimeter areas of the site shall be buffered or screened, as required by the Landscape Manual; however, the Council may require additional buffering and screening if deemed necessary to protect surrounding properties.

(7) The building entrance and nearby sidewalks shall be enhanced with a combination of Special paving, landscaping, raised Planters, benches and Special light fixtures.

(8) The Application shall include a comprehensive sign package and a comprehensive exterior lighting Plan.

(9) The Applicant shall use exterior architectural features to enhance the site's architectural compatibility with surrounding commercial and residential areas.

(10) Not less than thirty percent (30%) of the site shall be devoted to green area.

(4) The 2010 Landscape Manual provides:

(2) Buffering Development from Special Roadways

(A) When a property supporting any use has frontage on a Special roadway, except residential development as described in Section 4.6(c)(1), a buffer area shall be provided adjacent to the entire right-of-way, excluding driveway openings. All Plant material required by this section shall be located outside of public utility easements adjacent to the right-of-way. The width of the buffer area and the Plant material required to be Planted within the buffer area shall be as follows:

(ii) Developing Tier-Designated historic roads, designated scenic roads, the Maryland State-designated scenic byway, and the Suitland and Baltimore-Washington Parkways.

A minimum twenty (20) foot wide buffer to be planted with a minimum of eighty (80) Plant units per one hundred (100) linear feet of frontage, excluding driveway openings.

- (B) When existing noninvasive Trees are located within the buffer, preservation of the Trees is generally preferred to the Planting of new Trees. When existing vegetation is located in only part of the buffer, the number of shade Trees, evergreen Trees, and shrubs required to be planted may be reduced in proportion to the percentage of the area of the buffer occupied by existing vegetation. Any invasive species should be removed from the buffer area.
- (C) The buffering and Planting requirements of Section 4.6(c)(2)(iii) may be reduced if viewshed studies indicate, at the time of a detailed site Plan, specific design Plan, or Special Exception (or if none of these are required, through an Application for alternative compliance), that the alternative landscape design will conserve and enhance the Special roadway with regard to the natural and/or cultural features of the surrounding area.

(5) Mill Branch Road from Mill Branch Place to Robert Crain Highway (US 301) is a local road that has been designated as a Scenic Road and as a Historic Road since the adoptions of the 1991 Bowie-Collington Master Plan and the 1992 Historic Site and Districts Plan and therefore any changes to Mill Branch Road must be in compliance with the Guidelines for the Design of Scenic and Historic Roadways in Prince George's County, Maryland. (Exhibit 136)

(6) Any approved Special Exception is subject to revocation where:

- (1) The provisions in the approval of the Special Exception have not been complied with;
- (2) The approved Special Exception has not been used for⁵ any two (2) year period after the date of the original approval, except where the conditions of nonuse are beyond control of the grantee of the Special Exception. §27-328(e)

Burden of Proof

(7) The burden of proof in any zoning case shall be the Applicant's. (§27-142(a)) Zoning cases are those matters designated to be heard before the Zoning Hearing Examiner by the Zoning Ordinance of Prince George's County. (§27-107.01 (a)(266))

Burden of Production and Persuasion

(8) The Applicant has the burden of providing legally sufficient evidence that is accepted into the record from which findings and conclusions can be either made directly or by reasonable inference. However, the Applicant must also persuade the trier of fact that the evidence produced not only permits the approval of the request but also is of sufficient strength or outweighs other evidence to the effect that the request either should or is required to be granted.

⁵ §27-107.1(a)(244) defines "use" as any activity, occupation, business or operation carried on in or on a building, structure or parcel of land.

B.P. Oil Company v. County Board of Appeals of Montgomery County, 42 Md. App. 576, 401 A.2d 1054 (1979).

Standard of Proof

(9) In reviewing the evidence that has been "produced", to determine if the District Council is "persuaded", the District Council must determine whether the answers, findings, or conclusions required or reached are supported by a "preponderance of the evidence" on each issue. While these magic words are not required to be recited, the "preponderance of the evidence" is that evidence, when fairly considered, makes the stronger impression, has the greater weight and is more convincing as to its truth than the evidence in opposition thereto. Williams v. Supt. Clifton T. Perkins Hospital Center, 43 Md. App. 588, 406 A.2d 1302 (1980).

Credibility of Evidence

(10) It is within the sound discretion of the trier of fact, the Zoning Hearing Examiner, to determine certain evidence lacks credibility and to give no weight to that evidence. Md. State Retirement and Pension System v. Martin, 75 Md. App. 240, 540 A.2d 1188, 1192 (1988). In other words, certain evidence may just be ignored. It is given no weight in the conclusion, hence, found not credible.

Credibility findings of a hearing officer or judge are entitled to considerable deference and should not be reversed, absent an adequate explanation of the grounds for the reviewing body's source of disagreement. Anderson v. Dept. of Pub. Safety and Correctional Services, 330 Md. 187, 623 A.2d 198 (1994).

Adverse Effects

(11) "The Court . . . (of Appeals of Maryland) . . . has frequently expressed the applicable standards for judicial review of the grant or denial of a Special Exception use. The Special Exception use is a part of the comprehensive zoning Plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The Special Exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating this presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the Plan.

Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive Plan of zoning fairly debatable, the matter is one for the Board to

decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive Plan, a denial of an Application for a Special Exception use is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Rockville Fuel & Feed Co. v. Board of Appeals of Gaithersburg, 257 Md. 183, 187-88, 262 A.2d 499, 502 (1970); Montgomery County v. Merlands Club, Inc., 202 Md. 279, 287, 96 A.2d 261, 264 (1953); Anderson v. Sawyer, 23 Md. App. 612, 617, 329 A.2d 716, 720 (1974). These standards dictate that if a requested Special Exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.” Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995)

The appropriate standard to be used in determining whether a requested Special Exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed and the particular location proposed would have any adverse effects above and beyond those inherently associated with such a Special Exception use irrespective of its location within the zone. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Deen v. Baltimore Gas & Electric Co., 240 Md. 317, 330-31; 214 A.2d 146, 153 (1965); Anderson v. Sawyer, 23 Md. App. 612, 617-18, 329 A.2d 716, 720, 724 (1974).” Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1331 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

CONCLUSIONS OF LAW

- (1) Prince George’s County is a Right to Farm jurisdiction. Subtitle 30, Prince George’s County Code. (Exhibit 128)
- (2) In accordance with the procedures established in §30-104, the County Council adopted Council Resolution 63-2007 recommending that the Maryland Agricultural Land Preservation Foundation establish an agricultural preservation district for approximately 57.4277 acres of land owned by B. Leo and Hattie Maenner located at 17710 Mill Branch Place, located within several thousand feet of the subject property. The Maenner property has been established as an Agricultural District pursuant to the Maryland Agricultural Land Preservation Foundation Program.
- (3) The subject property is adjacent to actively utilized farm land along its eastern and southern boundaries. As such, the subject property will be impacted by dust, chemicals, seed, odor and noise inherent in active agricultural practices.⁶ Mr. Wagner Mogenas, an expert in the field of farming, testified at length to the adversities created by the juxtaposition of agricultural uses, including but not limited to farming, with developed uses. February 27, 2014, T.p. 117 (Exhibit 59)

⁶ “...agricultural fields, even those employing best management practices, have impacts on adjoining properties of their own. Tilling and cultivation of dry earth produces dust. Modern sprayers for pesticides/insecticides/fungicides/herbicides, while improvements over their previous incarnations, still have the potential for drift. Runoff from fertilizer application remains a problem, not to mention the malodorous aroma of freshly applied manure”. (Exhibit 33)

- (4) Mill Branch Road is both a Scenic Roadway and a Historic Roadway.
- (5) Mill Branch Road is currently utilized by both commuter traffic and oversize farm vehicles and suffers from adverse impacts from existing traffic during the a.m. and p.m. peak hours. (Exhibits 59(a)-(d), 62(a)-(d), 70, and 71(a)-(h))
- (6) The Applicant is proposing to use Mill Branch Road as its sole method of ingress and egress by all trucks as access to the proposed use. Additionally, access to the subject property for southbound Robert Crain Highway (US 301) traffic is proposed to be from Mill Branch Road. (Exhibit 81) Of course, there is nothing to prevent northbound Robert Crain Highway (US 301) from utilizing Mill Branch Road to access the subject property as well.
- (7) A four lane private right of way is proposed to be constructed from the subject property to access Mill Branch Road. This private right of way will not be constructed in accordance with public road standards, and will not be maintained by a public agency or political subdivision, as it is a private right of way. As such, it is permitted to be constructed at less than public road standards although it is proposed as the sole access for the public to the new ball fields and Green Branch Regional Park, and for the trucks supplying the needs of the Wal-Mart Super Center, and also by Wal-Mart employees or the public wishing to shop at the Super Center. Subtitle 23, Road Code; "General Specifications and Standard for Highway and Street Construction"
- (8) All of the aforementioned facts are unique to the proposed use at the instant location and are violative of the principles set forth in Schultz v. Pritts, supra, and its progeny. Moseman v. County Council, 99 Md. App. 258, 636 A.2d 499 (1984)
- (9) The Applicant has failed to address the requirements of the 2010 Landscape Manual, 4.6(c)(2), Buffering Development From Special Roadways; here Mill Branch Road is designated as both a Scenic and a Historic Roadway.
- (10) At a minimum, the instant Application is not in harmony with the following general purposes of the Zoning Ordinance, §27-102(a):

- (1) *To protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County;*

Although the property in its entirety encompasses 74 acres, the proposed Super Center has been positioned so as to render the most adverse impacts on the Historic and Scenic Mill Branch Road and on the agricultural lands that it is sited adjacent to. Additionally, the use of a private right of way for the truck and citizen traffic to the Super Center all combine to fail to protect and promote the health, safety and welfare of the present and future inhabitants of the County. It should also be noted that Mr. Robert Bathurst, an expert in the field of civil engineering, testified extensively to the inadequacies of the Applicant's current stormwater management proposals, including the Bowman Report (Exhibits 20 and 77) and the Tech Group Report (Exhibit 76) to protect adjacent lands or roadways. (Exhibit 122) The Applicant has conceded that its stormwater management plans are simply a work in progress and will be subject to amendments, which are not ascertainable at this time, prior to any approvals.

(2) To implement the General Plan, Area Master Plans, and Functional Master Plans;

The proposed use and Site Plan do not serve the purpose of implementing the policies, Guidelines, and Strategies of the 2006 Bowie Master Plan and Sectional Map Amendment. In fact, they directly contradict almost every one of the site-specific design Guidelines contained in the Plan. Staff cannot find the use to be the level of quality specified by the Planning Board and District Council, nor does it find the architecture to be a level sufficient to set the tone for future development to follow, and your Examiner concurs.

- (3) To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;***
(4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;

The construction of a 34 foot in height Super Center and loading docks, adjacent to active farm land, waterways, and a Historic and Scenic Road, cannot be found to promote the conservation of the community surrounding the subject property. As set forth infra, the proposed Special Exception at the instant location will neither promote the conservation of the existing community nor does it recognize the needs of agriculture and indeed will actually cause harm to the existing agriculture and community.

(6) To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development:

The District Council, through the 2002 General Plan, made sometimes difficult decisions as to where the line between the Rural Tier and Developing Tier was to be located. This property was one of those instances. The District Council decided that the subject property was appropriate for development. The 2006 Master Plan recommended commercial zoning for the site, and the subsequent Sectional Map Amendment placed the site in the C-S-C Zone. If this was a question of another strip-commercial center along a major roadway in Prince George's County, Staff would have concerns over impacts. But this particular use, located adjoining the Rural Tier and a planned Regional Park facility was correctly singled out for additional and more intensive scrutiny, both through the Master Plan Design Guidelines, as well as the 36 conditions of approval imposed by the Planning Board in its approval of the Preliminary Plan. Automotive center, loading docks, compactors, and recycling areas do not promote the most beneficial relationship between the subject property and the adjacent agricultural lands and the Regional Park and in no way protect these adjacent lands and uses, including the many citizens frequenting the ball fields at the Regional Park, from the adverse impacts of the Applicants proposed development.

(15) To protect and conserve the agricultural industry and natural resources.

The Applicant failed to provide any evidence as to how the proposed development will protect and conserve the agricultural industry but the Opposition included a plethora of evidence that the agricultural industry would actually be harmed by the proposed development. T.passim

The Applicant has failed to meet its burden of proof required by §27-317(a)(1).

(11) Based on the above facts, the Application is also not in harmony with the following general purposes of Commercial Zones, §27-446(a):

- (1) *To implement the general purposes of this Subtitle;*
- (4) *To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;*
- (6) *To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;*

(12) In addition to its failure to adequately address landscape and stormwater issues, the architecture as proposed is subpar, cookie cutter in its similarities to other Wal-Mart's, pedantic, prosaic, pedestrian, and, to quote the Technical Staff, "sets the bar dangerously low and provides an undesirable design precedent for future development". The proposed architectural features do not even attempt to "enhance the site's agricultural compatibility with surrounding commercial and residential areas". (Exhibits 57, 90, 113, 123, and 124) §27-317(a)(2), §27-348.02(a)(9)

(13) In addition to what has previously been discussed regarding the Application's substantial impairment of the Master Plan, Functional Master Plans, and the General Plan, the Technical Staff provided the following:

Staff had difficulty in assessing the true impacts to the environmental guidelines of the master plan, since the special exception area is only a portion of the overall site, which is subject to the requirement for a DSP. An attempt has been made, although some of the guidelines are either not applicable or only partly applicable to the subject property.

POLICY 1: Protect, preserve and enhance the identified green infrastructure network within the master plan area.

Strategies:

1. **Use designated green infrastructure network to identify opportunities for environmental preservation and restoration during the review of land development proposals.**

No portion of the current application falls within the *Approved Countywide Green Infrastructure Plan*, but the special exception boundaries abut evaluation area located on the adjacent parkland to the northeast.

2. **Protect primary corridors (Patuxent River and Collington Branch) during the review of development review process to ensure the highest level of preservation and restoration possible, with limited impacts for essential development elements. Protect secondary corridors to restore and enhance environmental features and habitat. Protect secondary corridors (Horsepen Branch, Northeast Branch, Black Branch, Mill Branch, and District Branch). To restore and enhance environmental features and habitat.**

This site abuts a major regional park site, which provides a large contiguous block of woodlands connecting eastward to the Patuxent River, a plan-designated primary corridor. Protection of sensitive environmental areas related to this primary corridor is a priority, and will be addressed through stormwater management associated with the current application. The current application does not directly impact regulated environmental features of the site.

- 3. Evaluate carefully land development proposals in the vicinity of identified Special Conservation Areas (SCA) to ensure that the SCAs are not impacted and that connections are either maintained or restored.**

This site is located in the vicinity of the Patuxent River Special Conservation Area. Connections and corridors to the Patuxent SCA will be evaluated during the review of the DSP related to this site, but do not fall within the limits of the special exception.

POLICY 2: Restore and enhance water quality in areas that have been degraded and preserve water quality in areas not degraded.

Strategies:

- 1. Implement the strategies contained in the Western Branch Watershed Restoration Action Strategy (WRAS).**
- 2. Add identified mitigation sites from the WRAS to the countywide database of mitigation sites.**
- 3. Encourage the location of necessary off-site mitigation for wetlands, streams and woodland within sites identified in the WRAS and within sensitive areas that are not currently wooded.**

This site is not located in the Western Branch Watershed Restoration Action Strategy area.

- 4. Ensure the use of low impact development techniques to the extent possible during the development process.**

The special exception site plan and subsequent DSP should demonstrate the use of low-impact development stormwater management techniques such as bio retention, French drains, depressed parking lot islands, and the use of native plants, to the fullest extent possible subject to approval by the City of Bowie Department of Public Works during technical stormwater management review. Approval of the stormwater management concept plan by the City of Bowie is still pending.

- 5. During the development review process evaluate streams that are to receive stormwater discharge for water quality and stream stability. Unstable streams and streams with degraded water quality should be restored, and this mitigation should be considered as part of the stormwater management requirements.**

The Green Branch Tributary, which crosses this site along its northern boundary and receives stormwater discharge from this site, has been evaluated for existing water

quality and stream stability, and the impact of the proposed development on stream stability and water quality, specifically related to the proposed stormwater discharge, was analyzed.

A stream corridor assessment was prepared by McCarthy & Associates, Inc. in April 2009 which identified problem areas located on the Green Branch Tributary adjacent to this site, and a subsequent field walk was held to review the areas of concern. Seven specific problem areas were identified, and remediation methodologies were proposed. Subsequently, it has been concluded that disturbance in these areas may be more problematic than previously identified. Staff and the applicant are currently looking at the countywide stream corridor assessments prepared by the Maryland Department of Natural Resources to see if other mitigation opportunities can be identified downstream within the same stream network at time of DSP.

6. Encourage the use of conservation landscaping techniques that reduce water consumption and the need for fertilizers or chemical applications.

The landscape plan submitted with the current application should demonstrate the use of native plant materials and conservation landscaping techniques that reduce water consumption to the fullest extent possible, as determined by the Urban Design Section.

7. Minimize the number of parking spaces and provide for alternative parking methods that reduce the area of impervious surfaces.

8. Reduce the area of impervious surfaces during redevelopment projects.

A large parking lot with expansive areas of impervious areas is proposed for this commercial development, and within the area of the special exception. The design does allow for the micromanagement of stormwater through bio retention and demonstrates the application of tree canopy coverage requirements to reduce the heat island effect directly adjacent to the Patuxent River primary corridor. Staff recommends that the special exception site plan be further revised to the extent possible to break up the areas of impervious surfaces and provide larger islands of shade.

During the review of the DSP, the plan application should include a justification for any parking spaces above the minimum parking requirements, and alternative paving surfaces should be considered for all parking spaces above the minimum requirements. The application of alternative parking materials such as grass block, or reinforced turf, combined with low-impact development techniques, such as bio retention areas, should be used to the greatest extent possible.

POLICY 3: Protect and enhance tree cover within the master plan area.

Strategies

1. Encourage the planting of trees in developed areas and established communities to increase the overall tree cover.

This is a new commercial development, located adjacent to the Rural Tier, on a largely open site that has been in agricultural use up to the present time. The use of trees and landscaping materials to provide a transition between the Developing and the Rural Tiers

is desirable, and will result in an increase in overall tree canopy cover where it is currently lacking. In accordance with the requirements of the Landscape Manual, a minimum of a Type “C” bufferyard (30-foot landscaped strip and 40-foot building setback) is required to be provided. A wider bufferyard may be appropriate to create an appropriate transition between differing development patterns. In this case, the ability to determine the most appropriate transition is hampered by two factors; the area is outside of the special exception boundary, and is encumbered by the easement for the shared drive to serve the proposed park.

2. **Provide a minimum of ten percent tree cover on all development projects. This can be met through the provision of preserved areas or landscape trees.**
3. **Establish street trees in planting strips designed to promote long-term growth and increase tree cover.**
4. **Establish tree planting adjacent to and within areas of impervious surfaces. Ensure an even distribution of tree planting to provide shade to the maximum amount of impervious areas possible.**

With the current application and at the time of DSP review, the landscape plan should be reviewed for conformance with these requirements and those of the Landscape Manual.

POLICY 4: Reduce overall energy consumption and implement more environmentally sensitive building techniques.

Strategies:

1. **Encourage the use of green building techniques that reduce energy consumption. New building designs should strive to incorporate the latest environmental technologies in project buildings and site design. As redevelopment occurs, the existing buildings should be reused and redesigned to incorporate energy and building material efficiencies.**
2. **Encourage the use of alternative energy sources such as solar, wind, and hydrogen power. Provide public examples of uses of alternative energy sources.**

The use of green building and energy conservation techniques should be evaluated with the current application and at the time of DSP review by the Urban Design Section. The statement of justification points out some of Walmart’s corporate green building techniques, which include an impressive array of efficiencies.

Policy 5: Reduce light pollution and intrusion into rural and environmentally sensitive areas.

Strategies:

1. **Encourage the use of alternative lighting technologies for athletic fields, shopping centers, gas stations and car lots so that light intrusion on adjacent properties is minimized. Limit the total amount of light output from these uses.**

2. **Require the use of full cut-off optic light fixtures should be used for all proposed uses.**
3. **Discourage the use of streetlights and entrance lighting except where warranted by safety concerns.**

The minimization of light intrusion from this site, located in the Developing Tier, onto adjacent properties in the Rural Tier is a special concern because the Patuxent River is an inter-continental migratory bird route and high light levels can severely impact these bird populations. With the current application and at time of DSP, the use of alternative lighting technologies and the limiting of total light output should be demonstrated.

The lighting plan submitted for review with the special exception and DSP addresses the use of lighting technologies which minimize light intrusion into the Rural Tier and environmentally sensitive areas. Full cut-off optic light fixtures are proposed throughout this site to reduce light intrusion outside of the Developing Tier. Additional details are needed to ensure more effective directed lighting, and address the best management practices for maintaining a dark sky.

POLICY 6: Reduce adverse noise impacts to meet of State of Maryland noise standards.

Strategies:

1. **Evaluate development proposals using Phase I noise studies and noise models.**
2. **Provide for adequate setbacks for projects located adjacent to existing and proposed noise generators.**
3. **Provide for the use of approved attenuation measures when noise issues are identified.**

Because of the proposed commercial uses on the site, noise impacts are not a major concern with this application. If a hotel, day care center, or similar residential-type uses are proposed on the site, the structural shell should be evaluated to ensure that interior noise standards are met, and that acceptable exterior noise levels are achieved in outdoor activity areas. Using the Environmental Planning Section's noise model, a soft surface range for the 65 dBA Ldn noise contour of approximately 470 feet from the centerline of US 301 was established, which has been shown on the proposed site plan.

From an environmental perspective, the proposed use will not impair the Green Infrastructure Plan or the 2009 *Approved Countywide Master Plan of Transportation* with regard to scenic and historic roads. As discussed previously, the problems presented by the dual-application process (special exception and DSP, of which the special exception site plan will control) make it difficult to distinguish exactly which environmental evaluations are applicable at this time. That is not the fault of the applicant; however, staff fears that development of the use without a full appreciation of environmental infrastructure guidelines will result in a strong possibility of further substantially impairing the integrity of the approved master plan. (Exhibit 83)

(14) These findings are concurred in by Mr. Robert Bathhurst, an expert in the field of civil engineering. February 27, 2014, T.p. 199-268, (Exhibits 78, 79, 80, and 122(a)-(c))

(15) Additionally, Mr. Harry Roth, an expert in the field of land planning, testified at length as to the Applicant's failure to meet its burden of proof on this issue as set forth in Trail vs. Terrapin Run, 403 Md. 523, 943 A2d 1192 (2008). February 27, 2014, T.p. 163-199, §27-317(a)(3)

(16) The lengthy testimony and exhibits provided by Mary Boetner, Charles Schultz, Marie Snow, Frederick Tuchman, Richard Garrett, Jr., CJ Lammers, Thomas Terry, Karen Amadol, David Lamers, Michael Terry and Andrew Butler, all longtime residents of the neighborhood and those persons testifying whom would be most impacted by the proposed use, were persuasive to your Examiner in finding that the proposed use will adversely affect the health, safety and welfare of residents and that it will be detrimental to the use of adjacent properties or the general neighborhood. §27-317(a)(4)&(5), (Exhibits 82, 83, 88(a)-(c), 123(a)-(f), 120, and 126)

(17) A condition precedent of a Special Exception for a Department or Variety Store requires that "the site shall have frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets". (emphasis added) §27-348.02(a)(1)

(18) §27-108.01(a)(19) of the Zoning Ordinance Rules of Construction state "The words "shall", "must", "may only" or "may not" are always mandatory and not discretionary".

(19) The subject property does not have frontage on or access to an arterial roadway which is a mandatory condition precedent.

(20) Access is proposed via a future entrance drive off of Robert Crain Highway (US 301) which would ultimately be dedicated, after all Federal, State and County permits are approved and the interchange is actually constructed, to the State Highway Administration. If this permitting process, construction, and ultimately dedication actually occurs at some future unknown date, the subject property could then be found to have frontage on and direct vehicular access to an existing arterial roadway.⁷ It is a virtual certainty that this interchange and the Super Center cannot be constructed and utilized during the 2 year use it or lose it requirement of §27-328(e).

(21) The Applicant is disingenuous in that the only access currently ascertainable is to the subject property is from Mill Branch Road, a Historic and a Scenic Road, and a private easement, which will not be constructed to public road standards. All truck traffic and possibly employee or patron traffic will be able to use this access, which is not an arterial roadway. The Applicant's Stormwater Management Concept Approval, Exhibit 81, states, as a Condition of Approval, "ACCESS: Site Access is off Mill Branch Road, which is itself off US Route 301 North".

⁷ Since the date that such an exchange is actually constructed and dedicated to public use is impossible to ascertain, such a development scheme may be in violation of the Rule Against perpetuities.

(22) This condition precedent is mandatory, cannot be waived, and presents an absolute legal bar to the approval of the proposed Special Exception. The instant Application at the instant location is simply, at a minimum, premature.

(23) As discussed *infra*, the Application is violative of §27-348.02(a)(9) and the proposed architecture is woefully subpar and is not compatible with the surrounding commercial and residential development. (Exhibits 33, 40, 57, 58, 90, 124(a)-(c), and 125)

DISPOSITION

Special Exception 4734 is DENIED.