

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

**SPECIAL EXCEPTION
4738**

**VARIANCE
4738**

DECISION

Application: Department or Variety Store
Applicant: Oxon Hill Associates, LLC. t/a Walmart
Opposition: Karen Egloff, et. al.
Hearing Dates: March 19, 2014, March 20, 2014, April 8, 2014
and May 1, 2014
Hearing Examiner: Maurene Epps McNeil
Disposition: Denial of Variance
Denial of Special Exception

NATURE OF REQUEST

- (1) Special Exception 4738 is a request for permission to use approximately 15.44 acres of land in the I-3 (Planned Industrial/Employment Park) Zone, identified as Lot 6, 7 and 8 of the Potomac Business Park, Oxon Hill, Maryland, for a Department/Variety Store in excess of 85,000 square feet (a 100,310 square foot store is proposed). Variance 4738 is a request to waive the requirement that the site have direct vehicular access to an existing arterial roadway, and allow access via an internal street. The property is partially graded but only developed with a stormwater management pond.
- (2) The Technical Staff recommended approval with conditions. (Exhibit 25) The Planning Board chose not to hold a hearing and adopted Staff's recommendation as its own. (Exhibit 30(b))
- (3) Several individuals appeared in support of and in opposition to the instant request at the hearings held by this Examiner.
- (4) At the conclusion of the final hearing the record was left open for additional submissions. The last of these was received on May 2, 2014, and the record was closed at that time.

FINDINGS OF FACT

Subject Property

(1) The subject property consists of three non-contiguous lots (Lots 6, 7 and 8 of the Potomac Business Park). The Walmart Supercenter is proposed to be located on Lot 6, to the east of Clipper Way, and some of its parking will be located on Lots 7 and 8, to the west of Clipper Way.

(2) The subject property is not exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance and there are two previously approved Tree Conservation Plans. (Exhibits 21(a)-(d)) There will be no impact to any regulated environmental features. (Exhibit 17) There is an approved Stormwater Management Concept Plan for the site. (Exhibit 11) The property does not lie within a Chesapeake Bay Critical Area Overlay Zone.

Neighborhood/Surrounding Uses

(3) The property is surrounded by the following uses:

- North – Across Oxon Hill Road is the Forest Heights Baptist Church in the R-R Zone
- South – Undeveloped land and a stormwater management pond in the I-3 Zone; farther south, at the end of Clipper Way, Oxon Hill High School in the R-55 Zone
- East – John Hanson Montessori School, a pre-K through 8th grade public school in the R-55 Zone
- West – A hotel in the C-S-C Zone and the ramp from northbound MD 210 to the Capital Beltway

(4) The Neighborhood is defined by the following boundaries:

- North - The Capital Beltway (I-95/I-495)
- East and South - Livingston Road
- West - Indian Head Highway (MD 210)

Zoning History

(5) Staff provided a detailed history of the zoning approvals for the subject property. (Exhibit 25, pp. 5-8) Some of the conditions of Conceptual Site Plan (CSP-87116), Preliminary Plan of Subdivision (4-88054) and Planning Board Resolution No.88-250 are still binding upon Applicant.

(6) Some transportation conditions imposed at time of subdivision approval generated a lot of discussion at the hearings held on the instant request. In particular it was noted that Applicant must continue to operate within a vehicular trip cap of 600 A.M. peak hour trips and 555 P.M. peak hour trips. Applicant was also required to

provide the entire cost of signalization for the intersection of MD 414 and Clipper Way when deemed necessary by the Maryland State Highway Administration.

Master Plan/Sectional Map Amendment/General Plan

(7) The subject property lies within an area discussed in the 2006 Master Plan and Sectional Map Amendment (“SMA”) for the Henson Creek-South Potomac Planning Areas 76B and 80. The property lies within the Oxon Hill Regional Center, an area that recommends mixed-use zoning to implement the concepts and guidelines within the Master Plan. Staff noted that the Master Plan “designates this area a transition area and recommends future development at lower scale transit-oriented (TOD) densities and intensities than the core area in order to serve potential future light rail transit station stops.” (Exhibit 25, pp. 4-5)

(8) The SMA retained the property within the I-3 Zone.

(9) The 2002 General Plan placed the property in the Developed Tier. The vision for the Developed Tier is a network of sustainable, transit-supporting, mixed-use pedestrian-oriented, medium-to-high density neighborhoods. The Plan Prince George’s 2035 General Plan places the property in a Local Center.

Applicant’s Proposal

(10) Applicant intends to construct a 100,310 square-foot Walmart Supercenter on Lot 6 of the subject property. The “Supercenter” will consist of a grocery store, a general merchandise store, and a garden center. Applicant also proposes to lease a portion of the site to an additional tenant, as is Walmart’s practice. Applicant did not identify the tenant nor the type of use envisioned.

(11) The Applicant is required to construct a total of 507 parking spaces. It has proposed to construct 289 on the remainder of Lot 6 and 218 on all of Lots 7 and 8 (across Clipper Way). (Exhibit 20(b)). Section 27-573 of the Zoning Ordinance allows this off-site parking arrangement, provided “the entire parking is within five hundred (500) feet of the nearest boundary of the record lot on which the use is located, and ... a legal arrangement assures the permanent availability of the parking lot.” Applicant meets this requirement. There will be a sidewalk on both sides of Clipper Way.

(12) The subject property is part of a larger site (the Potomac Business Park) that has an approved preliminary plan of subdivision. The preliminary plan addressed the adequacy of the local streets surrounding the property. A trip cap was imposed of no more than 600 A.M. peak-hour vehicular trips and 555 P.M. vehicular trips. The Final Plat of Subdivision includes the following Note: “No direct access to Oxon Hill Road is permitted. All access shall be off of Felker Avenue.” (Exhibit 25 p. 6) Applicant prepared a trip cap impact study subsequent to the recording of the Final Plat of Subdivision for the Potomac Business Park to show that a development proposal, such as the instant one, would satisfy the trip cap. (Exhibits 13(a)-(c))

(13) The Walmart store will be approximately 100 feet west of the John Hanson Montessori School ("Montessori School"). (Exhibit 40; March 19, 2014 T. 24-25) Applicant submitted pictures looking from the easternmost portion where the building will be constructed toward the Montessori school. (Exhibits 76 (a)-(g))

(14) The loading dock for deliveries will also be located on that side of the store. Applicant submitted information on the types of trucks generally used for deliveries at Walmart. All of its tractor trailer delivery trucks should "no longer idle anywhere for more than 3 minutes" and will "typically deliver early (around 5 am) and late in the day (around 10 pm) with deliveries ... occurring approximately 3-5 times a day." (Exhibits 75(a) and (b)) Applicant's land use planner stated that as many as six (6) of these delivery vehicles will unload at the site, given the size of the proposed store. (March 20, 2014 T. 15-16) No noise study was prepared to ascertain the effect that these vehicles might have on the adjacent Montessori school. (March 19, 2014 T. 33)

(15) Mr. Valdis Ronis oversaw the design of the proposed Walmart. He prepared an Architectural Compatibility Area exhibit for the development to show how the use will be compatible to its surroundings. (Exhibit 41) In his review of the surrounding area he "found a lot of commercial structures that used masonry, [and] used synthetic stucco or what some people call EIFS for trim." (March 19, 2014 T. 45) The residences in the area are mostly "wood framed with siding and masonry." (March 19, 2014 T.45) As a result, the Walmart is proposed to be designed as follows:

Our building is masonry predominantly, some of it painted, some of it integral color, some of it architectural finish, meaning it's a split-face finish or it's in a module that mimics brick. We're using synthetic stucco for the trim We have glazed entrances. Actually if you look at the design of the [Montessori] school, they're actually quite similar [The school] appears to be in a modernist style, very simple lines, not much adornment. A very functional, utilitarian building. It has some elegance.

What we're proposing is a structure that is fairly, I would say has more adornment. We're providing more detail, which is more consistent with contemporary design.

(March 19, 2014 T. 45-46)

(16) Applicant prepared architectural renderings for the exterior and interior of the proposed store. (Exhibits 43, 49 and 52) The building will have a height ranging from approximately 28 feet to 36 feet, to give the appearance of two stories in the front, facing the public rights-of-way. The Staff, as well as some in opposition, suggested that more could be done to break-up the perceived "blankness" of the southern façade and to "present an aesthetically-pleasing unified whole." (Exhibit 25, p. 10; March 19, 2014 T. 83-86) Mr. Ronis admitted changes could be made to improve the aesthetics that would not be cost prohibitive. (March 19, 2014 T. 85-86)

(17) Dale Coppage, accepted as an expert in the area of transportation planning, testified that the request would not negatively impact the local streets, reasoning as follows:

This site does not have direct access to the arterial, Oxon Hill Road, Maryland 414. In fact, section 24-121 of this County subdivision ordinance provides that when lots are proposed on land adjacent to an existing or planned roadway of arterial or higher classification, they shall ... front on either an interior street or service road. This has been in play for quite some time now....

Additionally, the approved [subdivision plan] contains a condition, number nine, that...also required a note in the final plat, that states no direct access to Oxon Hill Road is permitted, and that all access shall be off Felker Avenue, which is now Clipper Way.

Finding number 11 of the [Planning Board] resolution expresses that the SHA denied access to Oxon Hill Road, Maryland 414.

And this has also gone to final plat at this time with those notes. So essentially we have a County regulation, and the State agency who have the authorization to allow access to Oxon Hill Road, both expressing that access to the site should be via Clipper Way, which is an industrial roadway, not a primary or secondary roadway....

With the approval of the resolution ... and the record plats that occurred later, there were conditions placed. The approval and conditions 15 and 16 allowed for the development of 300,000 square feet of general office space for different uses generating no more than a number of peak hour trips generated by that 300,000 square feet development. And specifically that equates ... to 600 a.m. peak trips and 559 p.m. peak hour trips....

[The] resolution...mandated transportation improvements that were associated with Port America, which is now a National Harbor. It included ramp improvements to and from I-95 and 295, which were constructed with Maryland 210 and 414 projects, as well as the Wilson Bridge and the projects that serve the National Harbor....

We completed in May 2013, in accordance with specifications and the rules by the Transportation Planning Department, a trip cap impact study, and determined that the 100,301 square foot department store would use only a portion of the approved trip capacity. In essence, 124 a.m. peak hour trip and 342 p.m. peak hour trips, equating to 20 percent of the a.m. approved trips and 61.6 percent of the p.m. approved trips at Potomac Business Park....

(March 19, 2014, T. 120-123)

(18) Upon cross-examination some in opposition posited that Mr. Coppage's conclusions were faulty because one of the tools relied upon in completing his traffic analysis – the Institute of Traffic Engineers (“ITE”) Manual and trip generation rates - was generated for “free-standing Discount Superstores” ranging from 120,000 – 230,000 square feet of gross floor area, and the instant request proposes a smaller amount of square footage. (Exhibit 53; March 19, 2014 T. 139-141). The ITE Manual notes that if the use being measured is not compatible, local data should be utilized to examine impact. Mr. Coppage disagreed, noting that Applicant's traffic analysis was also analyzed using the transportation impact guidelines of the MNCPPC and the State of Maryland, in accordance with the parameters set by the Technical Staff. (March 19, 2014 T. 135-136, 142)

(19) Michael Birkland, an engineer who (along with his firm) prepared the plans for the special exception application, testified on behalf of the Applicant. Using an illustrative of the site (Exhibit 39), he explained how the site meets applicable requirements of the Zoning Ordinance:

Okay, the special exception requires pedestrian access through the parking lot. We have two different pedestrian walkways for this project.... A special exception also requires a minimum of 50-foot yards on all sides. We have 50 feet [on three sides], and in the rear we actually have ... about 420 feet.

Another requirement is that the loading area be removed from customer traffic. The loading area for the store is [to the east] of the building [I]t's removed from the parking areas and removed from the main entrance and where the customers will be walking. ...

In addition there's a requirement that we be 100 feet from the nearest residential property. There is no residential immediately adjacent. However, the parcel across the street is zoned residential. There's a church, there currently. We're 170 feet from that property. ...

[The high school is in the R-55 Zone]. ...So we're about 1,500 feet, the building is about 1,500 feet from Oxon Hill High School, about really a quarter mile. The parking lot is 900 feet from the high school.

(March 19, 2014, T. 14-18)

(20) The witness also noted that the site plan satisfies the requirements of the Landscape Manual, with at least a minimum 20 foot landscape buffer along all sides and a 6-foot board-on-board fence as well as buffering on the east property line, adjacent to the Montessori School. (Exhibit 20(c); March 19, 2014, T. 19-20) The fence runs from Oxon Hill Road down to the limited disturbance area. Staff agreed that the proposal satisfies all provisions of the Landscape Manual.

Variance

(21) Section 27-348.02(a)(1) of the Zoning Ordinance mandates that the requested use be located on property having “frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets.” A condition of subdivision denied the business park any access to Oxon Hill Road (an arterial roadway), as noted above. Accordingly, Applicant is requesting a variance to this provision of the Zoning Ordinance.

(22) In support of this, Applicant provided the following justification:

(a) A variance may only be granted when the District Council, Zoning Hearing Examiner, Board of Appeals, or the Planning board as applicable, finds that:

(1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;

RESPONSE: Applicant asserts the latter criterion of “...other extraordinary situations or conditions” is applicable to the Property, which was created by Record Plat PM 233@87 in 2011. The Record Plat includes a note denying access to Oxon Hill Road directly from the Property. Section 24-121(a)(3) requires that sites with frontage on arterial roads be designed so the lots/parcels will front on interior or service roads. This requirement within the Subdivision Regulations is in direct conflict with the Zoning Ordinance requirement noted herein that mandates access to an arterial for the proposed use. Although direct vehicular access to the arterial roadway was proposed, the Maryland State Highway Association (“MSHA) – which has the only statutory authority to permit access – denied the access as evidenced by Finding No. 11 of the Preliminary Plan Approval embodied in Planning Board Resolution No. 88-250, attached hereto. Additionally, Condition No. 9 of Resolution No. 88-250 includes a requirement of a Final Plat Note expressing “No direct access to Oxon Hill Road is permitted. All access shall be off of Felker Avenue” (renamed Clipper Way). The Applicant asserts the MSHA denial of access to the arterial roadway and the Subdivision Regulations prohibition of access to an arterial roadway create extraordinary situation as a result of a conflicting statute and issuance of a controlling decision from a statutory entity from which a Zoning Ordinance regulation cannot supersede circumstances and conditions on the Property. Additionally, the Planning Board approval of Condition No. 9 has the effect of placing the Property in an “extraordinary condition” upon the Property’s usage. None of current situation or condition is of the Applicant’s making. The situation and the condition, individually and collectively forces access to

this Property to be from Clipper Way, which has a right-of-way width of 70 feet.

Section 27-348.02(a)(1) disallows access for the proposed use from primary or secondary streets. Clipper Way is neither. Per Section 27-462(b)(1), Footnote 1, all streets serving commercial uses are deemed to have 70-foot rights-of-way for determining setbacks. These roads are considered "Urban Commercial or Industrial Roads" as defined by the Prince George's County design guidelines, "Specifications and Standards for Roadways and Bridges" 2008 (p.15), and have a right-of-way width of 70 feet, per Development Standard 100.05 (p.79, Table I-1). The Property has frontage on an arterial roadway and is served by Clipper Way, a designated Urban Commercial or Industrial Roadway. The clear intent of this requirement is to keep direct traffic generated from the proposed use off primary and secondary streets, which are generally residential streets. The Property has frontage on both an arterial and a Commercial or Industrial Road, a road specifically designed to accept such traffic.

(2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property;

RESPONSE: Because the Property is denied access to the arterial, the strict application of the requirement to access the arterial would create a practical difficulty for the Property owner in that the Property could not be developed with a permitted use. The Zoning Ordinance recognizes a Department or Variety Store Combined with a Food and Beverage Store as a special exception use in the I-3 Zone, traditionally considered compatible and appropriate in the zone in which it is allowed. While other potential uses might be developed, no other potential development has been able to proceed forward since approval of the Preliminary Plan the proposed development is "ripe" for proceeding and can exist and thrive consistent the applicable regulations, agency decision and Planning Board condition disallowing the arterial access. Mandating the access has the impact of disapproving the use and denying the owner an otherwise appropriate use of its land.

(3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

RESPONSE: The 2002 General Plan placed the Property in the Developing Tier. The vision for the Developing Tier is a "network of sustainable, transit-supporting, mixed-use, pedestrian-oriented, medium-to high-density neighborhoods." (p. 31)

The 2006 Henson Creek-South Potomac Master Plan (“Master Plan”), which further defined land use recommendations for the Property, is generally silent on the subject of access to arterial roadways. However, the Master Plan is the land use recommendation tool, while the Subdivision Regulations and the Zoning Ordinance are the implementation tools, designed to ensure the Master Plan recommendations are brought to fruition. The Master Plan places the Property in the Oxon Hill Regional Center, which among other things, includes the following strategies (p 51):

- **A new arterial roadway to relieve traffic congestion on Oxon Hill Road.**
- **Oxon Hill Road reconfigured as an arterial road with a grand boulevard design from St. Barnabas Road to Indian Head Highway that includes four drive lanes, curbside parking, wide sidewalks and a wide center island designed to accommodate a potential future Light Rail Transit (LRT) alignment and station stops.**

Direct access to Oxon Hill Road from this Property could be at odds with these strategies. However, the Master Plan does express an intent to have buildings “front” along the arterial, Oxon Hill Road, which orientation – notwithstanding the lack of access – is proposed by the application. Allowing development without this access advances the recommendations of the Master Plan for Oxon Hill Road; the approval of the variance will not substantially impair the integrity of the master plan or General Plan.

(Exhibit 25, pp. 63-66)

(23) Joseph Del Balzo, accepted as an expert in the area of land use planning, testified on Applicant’s behalf. Mr. Del Balzo opined that the request satisfied all applicable provisions of the Zoning Ordinance, reasoning as follows:

[F]rom a planning perspective, a great deal of care went into the design of this. This building, this site’s been through a number of different variations, and this design is the culmination of looking at the impacts, some meetings that were had with staff ... and it was all intended ... to both conform to the master plan requirements for an urban setting and to minimize impacts on the adjoining properties....

[W]e’re in ... transitional area E. And one of the things that the master plan, for the entire regional center, one of the things or a couple of things that the master plan is trying to implement is a pedestrian-friendly, transit-oriented boulevard kind of atmosphere along the entire stretch of Oxon Hill Road.

One of the things that we have done with this property is Oxon Hill Road – in order to create that urban setting, you don't want the building set back behind the parking lot. You want the building up on the road. We've placed the building up on the road in accordance with the required setbacks obviously. We had to set it back some but between the building and ... Oxon Hill Road, there is a wide, I believe at some points, it's as much as 70 feet, pedestrian promenade, so we tried to create a very urban pedestrian-friendly frontage on Oxon Hill Road.... If you drive down Oxon Hill Road today, it's not a very pedestrian-friendly, transit-oriented road but this is what the master plan is calling for

So this is ... the first new development ... that is aimed at implementing these strategies of the master plan. Again, we're in area E, which is a transition area, so we're not going to get the kinds of densities or intensities that the core area is calling for but area E,... calls for moderate density to moderate intensities and this is that kind of, of development. And ... we're implementing a lot of the requirements or recommendations of the master plan regarding building heights and urban pedestrian-friendly placement and the primary parking – one of the big ones is putting the parking away from Oxon Hill Road. I think there was a suggestion yesterday about ... structured parking. That's not in the plan. What the plan says is put your parking away from Oxon Hill Road....

I think, ... we've gone on to some length to minimize impacts on adjoining properties and to protect health, safety and welfare for the residents and ... both schools in the area....

[There is a] 90 feet to 100 ... setback, [between the building and the Montessori school]. It's a significant separation between buildings, especially when you're talking about an urban, a planned urban area. When you have urban areas, you have buildings that are close together. You have dense development. So I think given the setbacks, given the landscaping, given the orientation of the activities, I think we have protected landowners from adverse impacts.

(March 20, 2014 T. 17-19, 21-22, 42 and 46)

(24) The expert also provided a detailed written land planning analysis that addressed the Application's comportment with Sections 27-317, 27-348.02 and 27-471(a) of the Zoning Ordinance. (Exhibit 69) In addressing conformance with the general purposes of the Zoning Ordinance found in Section 27-102, Mr. Del Balzo provided the following comment, in pertinent part:

The proposed special exception brings a nationally recognized retailer to this part of the county. The site has been designed to provide a secondary access point on Clipper Way, allowing trucks to travel along a perimeter, significantly minimizing truck and car interface. Access is to an "Urban Commercial or Industrial Road" (as defined by the Prince George's County design guidelines), with easy access to an arterial and then to the interstate highways nearby. The

Property represents a convenient and safe location for a large scale retail operation. Road improvements required by the Preliminary Plan and set as Plat Notes will ensure safety at the site access points. There are no residential uses within the immediate area; safety and welfare of inhabitants of the county are not impaired. Commercial and institutional uses surround the Property, which is an area convenient to the transportation system, including a Metro Bus stop just to the west of the Property on Oxon Hill Road. There is no evidence that the proposed use in its proposed location will have any negative impact [on] health, safety or welfare in the area. In fact, the site design, with the building close to Oxon Hill Road and sufficient ... setbacks and landscaping, ensures the use will be compatible with other uses in the area

The Preliminary Plan (4-88054) and Record Plat (PM 233 @ 87) include conditions that require contributions, prior to building permits, to fund several transportation improvements in the area. The improvements have been completed at this time. The requirement for the applicant to make the required contributions is enforceable by the County. With these improvements, no adverse impacts to the transportation system, either in terms of safety or congestion, were found to be problematic for a development on the Property that has a trip generation of no more 600 AM and 555 PM peak hour trips.... [T]he proposed use generates fewer peak hour trips than allowed by the Preliminary Plan....

The building and site plan provide superior architecture and circulation. A large amount of open space is provided in the southern part of the Property. Significant landscaping and buffering ensures compatibility with surrounding uses. The Property is part of a larger Planned Industrial Park. The proposal, with its enhanced landscaping and open space, coupled with the urban site design and architecture, presents a noteworthy addition to this area and improves the overall quality of the neighborhood....

(Exhibit 69, pp. 7, 10 and 12)

(25) Several residents appeared in support of the Application, citing the possibility of increased tax revenues, employment opportunities – including jobs for contractors, as well as sales positions, and the possibility that the proposal will be a stimulant to bring more businesses to the area.

(March 19, 2014 T. 282-283, 308-309,314-316, 321-322, 351-352)

Oppositions' Concerns

(26) Those opposed to the use include parents of children that attend John Hanson Montessori School and Oxon Hill High School, students from both schools, residents in the neighborhood, and other concerned individuals.

(27) Many of the residents that testified in opposition to the instant request believed that the use, at the specific location, would adversely impact the students and teachers at the Montessori School and Oxon Hill High School. Both schools presently begin between 7:30 A.M. and 9:00 A.M. and end shortly after 4:00 P.M. The High School also provides bus service for after school activities. There was a belief that traffic along Oxon Hill Road is already backed up and if the traffic from Walmart Supercenter is added the backup will be unbearable.

(28) Moreover, there was a belief that the 500 plus students that walk to the High School could be subjected to harm by walking adjacent to the three parking areas for the store since they'll have to dodge the cars turning in, or the pedestrians that have to park to the west of Clipper Way. (March 19, 2014 T. 279-280)

(29) Some objected to the store itself, reciting its alleged past policies of paying lower wages, opposing any increase to the minimum wage, and hiring part time employees to avoid paying benefits. Others were concerned that Wal Mart may drive out existing businesses in the area because it is able to offer its products at a lower price.

(30) Some believed that crime would increase if the request is approved. One witness noted: "There's a sense in parking lots in general, and especially in Wal Mart parking lots, that one feels less safe." (March 19, 2014 T. 113)

(31) Some of those opposed to the request hired an attorney and expert witnesses for assistance. Dr. Lei Zhang, accepted as an expert¹ in traffic engineering, conducted a traffic impact analysis study using a computer generated "tool" developed by him and colleagues at the University of Maryland (Exhibit 80 April 8, 2014 T. 16, 20-21) Dr. Zhang admitted that the tool is not used by Prince George's County in its analysis of traffic. Accordingly, it is not a tool that staff would have required Applicant to utilize.

(32) The tool consists of a travel demand model that was originally developed by the Metropolitan Washington Council of Governments ("COG") to determine what new trips will be generated by new development and a "system-wide" large-scale traffic simulation model "that simulates every single individual vehicle in the system, including the new vehicles, the new trips generated from the Walmart development, which we can identify in the network." (April 8, 2014 T. 26)

(33) The tool differs in one major respect from the traffic analysis tools used by the County – it looks far beyond the intersections closest to the proposed development. In his study Dr. Zhang included "more than 100 intersections in the Oxon Hill neighborhood, also including the freeways and all the freeway entrance[s] and existing ramps in this particular area." (April 8, 2014 p. 27) The "neighborhood" for purposes of the study is far larger than that proposed by the staff and the Applicant, extending into a portion of the District of Columbia. (Exhibit 80, p. 4; April 8, 2014 T. 31-32) The witness did not clearly convey why such a large study area was used, when he also noted that

¹ The Applicant objected to allowing Dr. Zhang to be accepted as an expert witness. (April 8, 2014 T. 21-22)

“this type of development [does] not usually generate traffic impact very far away.”
(April 8, 2014, T. 36)

(34) After reviewing traffic at two periods of time, 2015 and 2030, with or without development of the Walmart, Dr. Zhang concluded that the use would adversely affect the flow of traffic in the area:

[C]urrently even without the development, without the Walmart development, there is a queue during the afternoon peak period ... for westbound traffic that occupies this roadway....

Then for comparison purposes, I also developed a similar queuing graph for this same roadway segment, with the proposed Walmart development. So it shows some, it shows increased queuing in the segment of MD 414 between MD 210 and east of Livingston Road....

Now with development there is some increased queuing near Clipper Way and the ramps of 210, 495, and [MD] 414.... But ... we see much more severe impact on westbound traffic. There is some impact on eastbound traffic as well, but not as severe as thewestbound traffic.

(April 8, 2014 T. 52-54)

(35) Some in opposition also hired Jennifer Cowley, accepted as an expert in the area of land use planning. Ms. Cowley reviewed the instant application, all accompanying documents, and relevant provisions of law, and offered the following comment:

The applicant has not satisfied the requirements for a variance The first requirement is a specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions or other extraordinary situations or conditions

So within the zoning ordinance there are many different uses that are legally permitted by right on this site, and do not require access to an arterial road. The parcel does not have any unique physical conditions that prohibit the reasonable economic use of the property. And the property owner could choose to use the property for any use by right There are many economic uses that could be viable on this parcel, and there are no unique physical conditions to this property....

[There are also no] peculiar and unusual practical difficulties ... or exceptional or undue hardship upon the owner [if the variance is not granted] The basis of [this] opinion is to look at the current configuration of the site, so what is the property area that's available. To look at what could be developed on the site, what are the possibilities of development. There are more than 140 possible uses that could be done by right on the property today

I examined the zoning ordinance, looking at the I-3 planned industrial park zone. I went through the different uses that are permitted, and the various subcriteria or additional criteria that are in place. And the only use in the I-3 district that requires arterial access is a large big box retail area in excess of 85,000 square feet

What I am saying is that ... variances are to be used sparingly and under exceptional circumstances. And so one of the questions to be answered is whether or not there is a hardship that's been created because of this exceptional practical difficulty or unreasonable hardship. And the question is not whether every single use should be permitted on this property. That's not the issue....

The reason that I find it is not peculiar or an undue hardship is because there are nearby properties, including the hotel directly across the street, that are required to take their access from Clipper Way.

[The request substantially impairs the intent, purpose or integrity of the general plan or Master Plan.] [U]pon review of the Henson Creek South Potomac Master Plan, one of the key things that is identified in that Master Plan is the currently underutilized retail within the planning area. They point out that there is an excess of retail square footage, and it identifies the fact that newer centers have resulted in competing locations

So given that the plan identifies that the location of additional retail has ... had the resulting effect of retail decline and vacancies in strip centers ... permitting this particular Wal Mart or other kinds of major retail activities would ... not promote the goal of in-fill development that would improve the function of commercial areas and support revitalization.

(March 19, 2014 T. 170-173, 177-178)²

Agency Comment

(36) The Technical Staff found that the proposed use generally is consistent with the vision of the 2002 General Plan and conforms to the general land use recommendations of the 2006 Master Plan and SMA.

(37) The Countywide Planning Division opined that the request would not burden the police facilities which serve the area:

The proposed development is within the service area of Police District IV, Oxon Hill. There is 267,660 square feet of space in all of the facilities used by the Prince George's County Police Department and the July 1, 2012 (U.S. Census

² Ms. Cowley also prepared a written land planning analysis that expanded upon her testimony at the hearing. (Exhibit 56)

Bureau) county population estimate is 881,138. Using the 141 square feet per 1,000 residents, it calculates to 124,240 square feet of space for police ... [and] is within the guideline....

(Exhibit 25, p. 105)

(38) The Countywide Planning Division similarly noted that the actual travel times for fire and paramedic services to travel to the site are below the guidelines times (which vary from 3.25 to 7.25 minutes), that the County's Capital Improvement Program anticipates replacing and enlarging the Oxon Hill Fire Station, and that the project will not impact school facilities.

(Exhibit 25, pp. 105-106)

(39) The Community Planning Division reviewed the request, and provided the following comment:

The master plan designates this area a transition area and recommends future development at lower scale transit-oriented (TOD) densities and intensities than the core area in order to serve potential future light rail transit station stops....

The master plan recommends the extension of rail transit between Northern Virginia, National Harbor, Oxon Hill and the Green Line. Oxon Hill Road (A-48) is recommended to be widened ... between National Harbor and Livingston Road and to be widened between Livingston Road and St. Barnabas Road to allow for a four-lane divided facility, pedestrian amenities and location of an at-grade light rail transit facility.... This property is within the Joint Base Andrews (JBA) Interim Land Use Control (ILUC) area. The property is within Imaginary Surface F, establishing a height limit of 500 feet above the runway surface. This property is outside of the 65 and above dBA noise contours, so noise attenuation is not required. The property is not in an Accident Potential Zone, so no controls on use or density are required. These categories do not prevent any of the proposed development and should be noted on the Special Exception site plan....

The application as proposed is consistent with the goals of the master plan principles of compact TOD and place-making. The building setback and the parking area are consistent with urban design guidelines for Oxon Hill Road and are consistent with the redevelopment vision for Oxon Hill Regional Center that emphasizes pedestrian and transit-oriented design, a new grid pattern of walkable interconnected streets and blocks, and transit – serviceable development.

(Exhibit 25, pp. 102-104)

(40) The Transportation Planning Section noted that the requested use would not result in an increase of vehicular trips beyond the trip cap imposed at the time of subdivision approval. (Exhibit 25, pp. 93-94)

(41) The Maryland State Highway Administration ("SHA") provided two comments on the proposal. In its June 25, 2013 comment the SHA reviewed the analysis for a proposed traffic signal at the MD 414/Felker Avenue (not Clipper Way) intersection which provided four alternatives:

1. Signalized access at the MD 414 intersection at Felker Avenue. The northbound Felker Avenue approach would have one left-turn lane and one shared left/right-turn lane (thru traffic would be prohibited).
2. Signalized access at the MD 414 intersection with Felker Avenue. The northbound Felker Avenue approach would have two left-turn lanes and one right-turn lane (thru traffic would be prohibited).
3. Signalized access at the MD 414 intersection with Felker Avenue. The northbound Felker Avenue approach would have one left-turn and one shared left/right-turn (thru traffic would be prohibited). Left turns from northbound Felker Avenue would be prohibited during peak hours. The MD 414 intersection with the proposed Walmart Driveway intersection 500-feet to the east would be signalized.
4. MD 414 intersection with Felker Avenue would be unsignalized and limited to right-in/right-out and left-in access. The MD 414 and intersection with the proposed Walmart Driveway intersection would be signalized. ...

It concluded that alternatives 3 and 4 were not available due to parking and frontage requirements, and requested other submissions. (Exhibit 74(b))

(42) In its September 3, 2013 letter, the SHA submitted further suggested amendments to Applicant's traffic plans. (Exhibit 25, pp. 95-98)

LAW APPLICABLE

(1) A Department/Variety Store is permitted as a Special Exception in the I-3 Zone in accordance with Sections 27-317(a) and Section 27-348.02(a) of the Zoning Ordinance.

(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

(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).

(b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:

(1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or

(2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

(3) Section 27-348.02 (a) 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.

Variance

(4) A variance may be granted if the request satisfies the provisions of Section 27-230(a) of the Zoning Ordinance, which provides as follows:

(a) A variance may only be granted when the District Council, Zoning Hearing Examiner, Board of Appeals, or the Planning Board as applicable, finds that:

- (1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;
- (2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and
- (3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

(5) Court cases have held that a variance should not be granted unless the need to justify the request is substantial, and not merely for the applicant's convenience. Belvoir Farms Homeowners Association v. North, 355 Md. 259, 734 A.2d 227 (1999); Mills v. Godlove, 200 Md. App. 213, 26 A. 3d 1034 (2011). Moreover,

As a general rule, [variances] are granted sparingly, and under exceptional circumstances. To do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations, and thus detrimentally affect the marketability of property within zoned areas. On the other hand, the existence of an unnecessary hardship usually justifies the granting of an exception. The criterion for determining unnecessary hardship is whether the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership.

Marino v. City of Baltimore, 215 Md. 206, 216-217, 137 A.2d 198 (1957) See, Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 407 Md. 53, 962 A.2d 404 (2008)

(6) "Practical difficulties" has been defined in Carney v. Baltimore, 201 Md. 130, 137 (1952), as follows:

The expression "practical difficulties or unnecessary hardship" means difficulties or hardships which are peculiar to the situation of the applicant for the permit and are not necessary to carry out the spirit of the ordinance and which are of such a degree of severity that their existence amounts to a substantial and unnecessary injustice to the applicant. Exceptions on the ground of "practical difficulties or unnecessary hardships" should not be made except where the burden of the general rule upon the individual property would not, because of its unique circumstances, serve the essential legislative policy, and so would constitute an entirely unnecessary and unwanted invasion of the basic right of private property.

Special Exception

(7) The Court of Appeals provided the standard to be applied in the review of a special exception application in Schultz v. Pritts, 291 Md 1, 432 A2d 1319, 1325 (1981):

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 [administrative body] 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. . . . 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.

Burden of Proof

(8) Section 27-142 of the Zoning Ordinance places the burden of proof in any zoning case on the Applicant.

CONCLUSIONS OF LAW

(1) I find that the use is in conformance with the traffic requirements imposed upon it by the Maryland-National Capital Park and Planning Commission and the SHA, and that it furthers several purposes of the Zoning Ordinance, in general, and the industrial zones, in particular. I do not believe, however, Applicant has met its burden in its request for a variance, nor in showing that the use would not adversely affect the health, safety, or welfare of residents/workers in the area, nor be detrimental to the use of adjacent properties.

(2) The variance is requested from the requirement that the Department Store have “direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets.” I believe Applicant has shown that the property is subject to an extraordinary situation because a State and preliminary plat requirement precludes it from accessing Oxon Hill Road, but the Ordinance requires that it do so. Therefore the first prong of the variance test is satisfied.³ I also believe that Applicant has satisfied the third prong – the request should not substantially impair the intent, purpose or integrity of the General Plan or Master Plan since both place the property within a Local Center wherein mixed use is encouraged at a lower scale of densities and intensities. However, I do not believe Applicant has satisfied the second prong of the test since it has not shown that if it complied with Section 27 348.02(a)(1) it would not be able to secure a reasonable return from, or make a reasonable use of the property. The cases cited above make it clear that variances should be granted sparingly, and practical difficulty is not shown if the variance would simply be a matter of convenience for the Applicant. In this record it is clear that Applicant may build a smaller Department Store or any other use permitted in the zone, without being hindered by the denial of access provision.

(3) Additionally, I don’t find that Applicant has met its burden of proof as to all of the provisions of Section 27-317 of the Zoning Ordinance. I believe the requested use *at the requested location* will adversely impact residents/workers in the area and be

³ It’s important to note that the provision for which a variance is sought is one that is not impacted by the topography or shape of the property. It only addresses the property’s access to the right-of-way.

detrimental to the use of adjacent properties. Students from Oxon Hill High School may be allowed to exit school property and use the sidewalks on Clipper Way, if not the right-of-way itself. These students will then have to cross two vehicular entrances into the proposed store. One of these entrances is also utilized by trucks entering or exiting the loading dock area. Students from the Montessori School will see a board-on-board fence, some landscaping and the eastern façade of the building. They may also hear the delivery trucks idling or hear the workers unloading, since the loading area is adjacent to that school's property. Applicant chose not to provide a noise assessment/study so the extent of any impact is unknown at this time. It is conceivable that this split parking design could lead to problems between the teenage pedestrians and patrons seeking a parking space or trucks seeking to unload. Moreover the loading area could impact the young students playing outside of the school.

(4) If the request included a smaller building with parking that was not divided by a street and sidewalk which teenagers and school buses have to access; if it were designed in a manner wherein the loading trucks were not located as close to the Montessori school, and if there were a noise study to prove this concern is not justified; and if there were no need for a variance, I would have no hesitation in approving the request. However, I believe the instant request will adversely impact the health, safety and welfare of residents or workers in the area, and would be detrimental to the use of adjacent properties, in a manner unique to this site. Therefore, the request must be denied.

DISPOSITION

Special Exception 4738 and Variance 4738 are DENIED.