

Case Nos. S.E. 4733
V.S.E. 4733
AC-99026-01

Applicant: Walmart Real Estate
Business Trust

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ZONING ORDINANCE NO. 11-2016

AN ORDINANCE, approving Special Exception 4733, Variance 4733, and Alternative Compliance 99026-01, to expand and renovate an existing Walmart department store into a Walmart Supercenter, located at the Northwest quadrant of the intersection of Branch Avenue and Woodyard Road in Clinton, Maryland, in Councilmanic District 9.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

A. Procedural Background

In 2000, the Applicant ("Walmart") constructed a 134,241 square foot department store in the Woodyard Crossing Shopping Center, formerly known as Clinton Plaza ("Shopping Center"). The Shopping Center is in the C-S-C (Commercial Shopping Center) Zone. At the time of

¹ The District Council has jurisdiction to issue the final decision in this contested application for a special exception and variance. *See* Md. Code Ann., Land Use Article ("LU") (2012, Supp. 2015), §§ 22-206, 22-301, 22-305, 22-310, 25-204; Prince George's County Code, Subtitle 27, (2015 Ed.) ("PGCC") §§ 27-131-35, 27-312-13, 27-314-16, 27-230, 27-235; *See also* *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 524-26, 120 A.3d 677, 697-99 (2015) (Pursuant to the Regional District Act, the District Council may delegate certain zoning action, such as special exceptions, to a hearing examiner, whose decision *may* be final unless appealed to the District Council or taken for decision by the council on its initiative); *County Council v. Curtis Regency Serv. Corp.*, 121 Md. App. 123, 131-33, 708 A.2d 1058, 1062-63 (1998) (Explaining the process through which a special exception passes before reaching the District Council. First, the Technical Staff makes a report and recommendation and forwards it to the Planning Board. The Planning Board decides whether to accept the Staff's recommendation and forwards its own recommendation to the District Council. Before the District Council decides the case, however, the ZHE, an employee of the District Council, files a written decision, with specific *recommended findings of facts, conclusions of law, and a disposition recommendation*. Finally, the District Council decides whether to grant the exception. Although the ZHE has authority under § 27-312(a)(C) of the Prince George's County Code to approve or deny a special exception or variance, *the Zoning Ordinance specifically retained in the District Council the authority, "upon its own motion," to elect "to make the final decision on the case itself."*) (Emphasis added).

construction, Walmart's 134,241 square foot department store use was permitted as a matter of right in the C-S-C Zone.

In July 2014, Walmart filed an application for special exception, seeking approval to renovate and expand (by 139 feet to the north) the existing department store use and convert it to a 171,634 square foot Walmart Supercenter.² The proposed Supercenter will incorporate three major uses within one building, while eliminating an existing vehicle tire and lubrication facility. The three major uses of the Supercenter will be a grocery store, a general merchandise store, and an outdoor garden center, which are all permitted uses in the C-S-C Zone, but when combined (as is the case here), the County Code requires special exception approval.³ *See* Ex. 2, 3, 22, 25, 71, PGCC §§ 27-461, 27-317, 27-348.

On July 26, 2015, the Development Review Division of the Prince George's County Planning Department issued its Technical Staff Report. Technical Staff recommended disapproval of Special Exception 4733 (S.E. 4733) because it was unable to recommend approval of Walmart's companion variance application for a 100 foot setback from adjoining residential property. Technical Staff however, concurred with the recommendation of the Planning Director's approval of Walmart's amendment to the previously approved Alternative Compliance Application No. 99026-01 (AC-99026-01).⁴ *See* Ex. 22, 73. Upon receipt of the Report from its Technical Staff,

² The proposed expansion is intended to add 37,393 square feet of interior space to the existing 134,241 square foot Walmart department store. Within the 37,393 square feet is a proposed 2,699 square foot outdoor garden center (134,241 sq. ft. + 37,393 sq. ft. = 171,634 sq. ft.). *See* Ex. 3, 22, 25, 71.

³ In conjunction with the application for special exception, Walmart filed a variance application to the 100-foot setback requirement from an adjoining residentially-zoned property line and an amendment to a previously approved Alternative Compliance application. Both applications will be approved in accordance with applicable provisions of the PGCC. *See* discussion *infra*.

⁴ The ZHE did not address the Planning Director's approval of Walmart's AC-99026-01. *See* ZHE's Decision, p. 18. This site has been the subject of several previous Alternative Compliance applications (AC-93061 and its five revisions, AC-93064 and AC-99026) and Departure from Design Standards (DDS-433 and DDS-504)

Planning Board elected not to hold a hearing and adopted Staff's recommendation as its own. *See* Ex. 24(b).

Subsequently, the Zoning Hearing Examiner ("ZHE") held hearings on July 29, 2015, September 30, 2015, November 10, 2015, January 13, 2016, and February 10, 2016, to consider Walmart's requests. *See* (7/29/2015, Tr.); (9/30/2015, Tr.); (11/10/2015, Tr.); (1/13/2016, Tr.); and (2/10/2016, Tr.).

On May 13, 2016, the ZHE filed a written disposition recommendation with the District Council. The ZHE recommended denial of Walmart's Special Exception 4733, Variance 4733, and Alternative Compliance 99026-01. Parties were notified that the ZHE's decision would become final unless an appeal was timely filed to the District Council or the District Council elected to make the final disposition. *See* ZHE's Decision, 5/13/2016.

On June 13, 2016, the District Council, by unanimous vote, elected to make the final decision in Special Exception 4733, Variance 4733, and Alternative Compliance 99026-01. *See* Zoning Agenda, 6/13/2016. That same day, Walmart also filed exceptions to the ZHE's decision. *See* Walmart's Exception to ZHE's Decision, 6/13/2016.

On June 15, 2016, the Clerk of the County Council sent notice to all persons of record that oral argument would be held on July 18, 2016. *See* Notice of Oral Argument, 6/15/2016.

applications for landscaping requirements. The site is subject to Section 4.2, Requirements for Landscape Strips along Streets; Section 4.3, Parking Lot Requirements; Section 4.4, Screening Requirements; Section 4.7, Buffering Incompatible Uses; and Section 4.9, Sustainable Landscaping Requirements, of the Landscape Manual because it involves an increase of more than 5,000 square feet of gross floor area on the subject property. Walmart now requests Alternative Compliance from Section 4.3, Parking Lot Requirements, for the reduction of interior landscaped area and tree planting requirements and Section 4.7, Buffering Incompatible Uses, along the western and northern property lines for a reduction of the width of the required landscape strip and for the location of a ten-foot-high fence beyond the building setback. *See* Ex. 22, p. 11.

On July 6, 2016, counsel for Citizen Opposition filed a response to Walmart's exceptions. *See* Citizen Opposition Response to Walmart's Exceptions, 7/6/2016.

Oral argument was held on July 18, 2016. *See* Zoning Agenda, 7/18/2016. At the conclusion of oral argument, the District Council, by vote of 7-2, referred this matter to staff to prepare an order of approval. *See* Zoning Agenda, 7/18/2016.

B. The Shopping Center

The site is the subject of Preliminary Plan of Subdivision 4-78275 for Clinton Plaza.⁵ Parcel D-2 was approved by the Prince George's County Planning Board on July 26, 1979. The record plat for the subject property contains a note which restricts the amount of development to 180,000 square feet. However, a memo dated June 1, 1989 (Feddis to Bond) indicates that the applicant submitted a traffic study for staff review for the purpose of expanding the development cap for the subject site to 800,000 square feet. In 1994, the shopping center was renovated and expanded to 280,000 square feet. There have been two Departure from Design Standards applications approved for the property, both for reductions in the 50-foot setback for loading areas from residentially-zoned land. Portions of the shopping center were the subject of two Alternative Compliance applications to reduce the width of the landscape yard to the rear of the building (AC-93061 and AC-93064). In 1999, the Planning Director approved Alternative Compliance AC-99026 to provide an alternative buffering scheme to the residentially-zoned properties to the west.

⁵ The District Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision. *See* PGCC § 27-141. The District Council may also take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. *See* District Council Rules of Procedure Rule 6(f).

As noted, Walmart seeks an amendment to previously approved AC-99026. *See* Footnote 4, Ex. 22, p. 4.

(i) Neighborhood and Surrounding Uses

The subject property is located in the Clinton community. The neighborhood is defined by the following boundaries:

North—Coventry Way

East—Branch Avenue (MD 5)

South—Woodyard Road (MD 223)

West—Old Branch Avenue

The subject neighborhood has a dual character. Along the major roadways making up the neighborhood boundaries, is a mix of strip commercial and institutional uses. The northern extreme along Coventry Way has a more industrial and heavy-commercial character. The interior of the neighborhood is made up of single-family detached residences. The neighborhood is bisected from the northeast to the southwest by the Pea Hill Branch Stream Valley.

The site is surrounded by the following uses:

North—Undeveloped land in the One-Family Detached Residential (R-80) Zone.

East—A stormwater management pond and Branch Avenue (MD 5), beyond which is a retail shopping center in the Commercial Shopping Center (C-S-C) Zone.

South—The remainder of the shopping center including numerous pad sites, beyond which is Woodyard Road (MD 223) and retail, office, and residential uses in the C-S-C, Commercial Office (C-O), and R-80 Zones.

West—Single-family detached residences in the Clinton Estates Subdivision in the R-80 Zone. *See* Ex. 22, p. 5.

The Shopping Center has frontage on and direct vehicular access to Woodyard Road, which is an arterial roadway. Walmart is located at the northernmost part of the Shopping Center. The proposed Supercenter will occupy approximately 23.9 acres of the larger 64 acres of the Shopping Center. *See* Ex. 3, 22, 25, 71, 72(e).

Other facts in the administrative record will be reviewed below.

C. Special Exception

A special exception, sometimes called a “conditional use,” is a zoning device that provides a middle ground between permitted and prohibited uses. It allows the local legislature to set some uses as *prima facie* compatible for a given zone, subject to a case-by-case evaluation to determine whether the use would result in an adverse effect on the neighborhood (other than any adverse effect inherent in that use within the zone), such that would make the use actually incompatible. Because special exceptions are created legislatively, they are presumed to be correct and an appropriate exercise of the police power.⁶ *Zimmer Dev. Co.*, 444 Md. 490, 514–515; 120 A.3d 677, 690–691 (2015) (citations and footnotes omitted).

In *Schultz v. Pritts*, 291 Md. 1, 15, 432 A.2d 1319, 1327 (1981), the Court of Appeals described the required analysis for special exceptions as follows:

These cases establish that a special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone. Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an

⁶ The Land Use Article defines a special exception as a specific use that 1) would not be appropriate generally or without restriction; and 2) shall be based on a finding that i) the requirements of the zoning law governing the special exception on the subject property are satisfied; and ii) the use on the subject property is consistent with the plan and is compatible with the existing neighborhood. *See* Md. Ann. Code, Land Use Article, § 1-101(p) (2012, Supp. 2015).

adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

In subsequent cases, the Court of Appeals has explained that the *Schultz* comparison for special exception does not entail a comparative geographical analysis which weighs the impact at the proposed site against the impact the proposed use would have at all other sites within the zone. *People's Counsel for Balt. Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 100, 956 A.2d 166, 194 (2008). Rather, this comparison "is focused entirely on the neighborhood involved in each case." *Id.* at 102. Accordingly, even though a special exception use may have some adverse effects on the surrounding area, "the legislative determination necessarily is that the use conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at a given location, adduced evidence does not convince the [zoning agency] that actual incompatibility would occur." *Id.* at 106.

In *Loyola*, the Court of Appeals concluded its analysis of the *Schultz* test as follows:

With this understanding of the legislative process (the "presumptive finding") in mind, the otherwise problematic language in *Schultz* makes perfect sense. The language is a backwards-looking reference to the legislative "presumptive finding" in the first instance made when the particular use was made a special exception use in the zoning ordinance. It is not a part of the required analysis to be made in the review process for each special exception application. It is a point of reference explication only.

Id. at 106-07.

As the Court of Appeals explained in *Montgomery County v. Butler*, 417 Md. 271, 305 (2010), (quoting *Schultz*, supra, 291 Md. at 11), "[i]f [the applicant] shows...that the proposed use would be conducted without real detriment to the neighborhood...[the applicant] has met his burden." Once the applicant meets this threshold, the local zoning board will "ascertain in each

case the adverse effects that the proposed use would have on the specific, actual surrounding area.” *Id.* (citing *Schultz, supra*, 291 Md. at 11). The Court of Appeals has noted that, “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 functioning of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious and illegal.” *Loyola, supra*, 406 Md. at 83 (quoting *Turner v. Hammond*, 270 Md. 41, 55, 310 A.2d 543, 551 (1973)).

After Walmart constructed its 134,241 square foot department store in 2000, the County Code was amended in June 2002, through the legislative enactment of Council Bill 2-2002 (“CB-2-2002”). CB-2-2002 limited the construction and expansion of certain large retail and grocery stores as a matter of right and “permitted the use” of such stores by special exception. Absent certain exceptions (none applicable here), Walmart’s proposed expansion and renovation to construct its existing department store into a Supercenter—the “use” being “department or variety stores combined with food and beverage stores in excess of 125,000 square feet”—became a “permitted use in the C-S-C Zone by special exception.” The District Council through the enactment of CB-2-2002 made the necessary legislative determination that Walmart’s proposed Supercenter was *prima facie* compatible in the C-S-C Zone, with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at the Shopping Center site, adduced evidence does not convince the Council that actual incompatibility would occur. *Loyola*, 406 Md. 54, at 106. *See also* CB-2-2002,⁷ PGCC §§ 27-348.02, 27-461.

⁷ After the enactment of CB-2-2002, the County Code was further amended by the enactment of Council Bills 13 and 64 of 2012. CB-13-2012 clarified certain technical amendments and amended the maximum gross floor area for Department or Variety stores and set a limitation on gross floor area for Department or Variety Stores with a certain percentage grocery component permitted without a Special Exception in the Commercial Zones. *See* CB-13-2012, Agenda Item Summary. CB-64-2012 extended the prescriptions for Department and Variety Store in the C-S-C and C-M Zones to the I-3 Zone by setting a limitation on gross floor area for Department of Variety Stores with a certain percent grocery component permitted without a Special Exception. *See* CB-64-2012, Agenda Item Summary.

Based on the record, Walmart has cited to evidence which has demonstrated that its proposed Supercenter meets the standards and requirements of Subtitle 27. Walmart has also satisfactorily shown that the proposed Supercenter will be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest. The District Council is not convinced that the Supercenter would result in an adverse effect on the neighborhood (other than any adverse effect inherent in that use within the C-S-C zone), such that actual incompatibility would occur in the C-S-C Zone.⁸ For the reasons that follow, the District Council shall approve Walmart's Special Exception 4733, Variance 4733, and Alternative Compliance 99026-01.

In Prince George's County, a special exception may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this Subtitle;

The purposes of Subtitle 27 (known as the Zoning Ordinance) are:⁹

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

The Walmart department store (without the proposed expansion) has existed and conveniently served the County since 2000. Ex. 71. p. 3. Subsequently, the District Council

Walmart's proposed Supercenter includes a grocery component that will exceed 10 percent of its merchandise area. See CB-13-2012, Ex. 71, p. 3.

⁸ The final decision in any zoning case shall be based only on the evidence in the record, and shall be supported by specific written findings of basic facts and conclusions. The burden of proof in any zoning case shall be the applicants'. The District Council shall not be precluded from considering any factual or empirical evidence contained in any staff studies. See PGCC § 27-141, 27-142, 27-140, respectively.

⁹ See PGCC § 27-102(a)(1-15). See also Ex. 71, 66, 86, (11/10/2015, Tr.) and (1/13/2016, Tr.), concerning Walmart's submissions and testimony pertaining to the purposes of Subtitle 27 and special exception requirements. The District Council notes that neither Technical Staff nor the ZHE made specific findings of fact and conclusions concerning the fifteen (15) purposes of Subtitle 27. The ZHE summarily concludes that Walmart's application fails to meet the requirements of § 27-102(a)(2), (6), (11) and (13). See ZHE's Decision, 5/13/2016. See also Ex. 22, 73.

made a presumptive determination, for all County inhabitants, that the proposed Supercenter would be *prima facie* compatible in the C-S-C Zone, and that the “use” is desirable and necessary.¹⁰ See CB-2-2002, CB-13-2013, CB-64-2013. There is also a presumption that zoning regulations in the County Code “promote the public safety, health, moral, welfare and prosperity.”¹¹ Therefore, as a matter of law, the proposed renovation and expansion of the existing Walmart department store into a Walmart Supercenter, which includes a grocery component and outdoor garden, is in harmony with the purpose of Subtitle 27 because it will protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County. Moreover, the site plan, among other things, for the proposed special exception use depicts adequate setbacks and landscaped buffers are provided to soften the views from adjoining properties. Ex. 72(a-i).

- **2. To implement the General Plan, Area Master Plans, and Functional Master Plans;**

Walmart’s proposed use and site plan will implement the applicable Plans of the County. The Walmart is located in a Shopping Center identified within the *Approved 2013 Central Branch Avenue Corridor Revitalization Sector Plan*, pp. 74–75 (“Sector Plan”). The Sector Plan lays out a strategic plan for revitalization and redevelopment to address, among other things, the need for improved or better retail options. An overall goal of the Sector Plan is to concentrate neighborhood-serving retail in appropriate locations and repurpose obsolete commercial centers

¹⁰ See *Mossburg v. Montgomery County*, 107 Md. App. 1, 7–8, 666 A.2d 1253, 1257 (1995) (A special exception use in a zoning ordinance recognizes that the legislative body of a representative government has made a policy decision for all of the inhabitants of the particular government jurisdiction, and that the exception or use is desirable and necessary in its zoning planning).

¹¹ See *Rockville Fuel & Feed Co., Inc. v. Bd. of Appeals of the City of Gaithersburg*, 257 Md. 183, 187, 262 A.2d 499, 501–02 (1970).

to better serve the community needs. *Id.* at 50. *See* 2013 Plan, p. 50. The Shopping Center is in the Downtown Clinton Focus Area. *Id.* at 74. For each Focus Area, the Sector Plan presents a Vision and recommendations on Land Use, Zoning, a Development Program, Connectivity and Circulation, Open Space, and Building and Site Design. The Land Use recommendation for the Shopping Center is to

- Designate the Clinton Shopping Center and Woodyard Crossing Shopping Center as commercial mixed-use to promote a mix of land uses dominated by commercial and office uses with residential, hotel, institutional, and civic uses. *Id.* at 74–75.

The proposed expansion and renovation of the existing Walmart department store will not inhibit the future redevelopment of the shopping center into the mixed-use development envisioned in the Sector Plan. In fact, the Supercenter can be the first step in bringing this mixed use development into reality. This building is shown on the Illustrative Development Concept and is recommended for Commercial Renovation/Adaptive Reuse. *Id.* 75, Map 36. The Illustrative Development Concept includes this renovated building fitting easily into the mixed-use program for the existing shopping center.

The Sector Plan generally addresses mixed-use zoning as follows:

- Rezone properties proposed as Commercial Mixed Use to the appropriate zoning category.

Therefore, any rezoning of the subject property to the appropriate zoning category will allow development in accordance with the Sector Plan recommendations; and the proposed Supercenter will not prevent future mixed-use development. The Sector Plan includes the following recommendations on the development plan for the Clinton Focus Area:

- The redevelopment program and concept reduces the amount of retail in the focus area by 216,400 square feet and adds 1,250,300 square feet of office, 181-room hotel, 1,000 plus multi-family units and 350 townhomes, and 125,400 square feet of civic uses. *Id.* at 75.

The Development Program further recommends that:

- This shopping center be transformed into a mixed-use, transit supported development capitalizing on the new transit stop. The concept integrates new uses and reconfigures the existing building form and function into a cohesive pedestrian environment marked by modified street grid with sidewalks on both sides. *Id.* at 76.

A vibrant center of mixed office and retail uses is recommended for the larger shopping center site. The goal of these recommendations is to provide walkable, transit oriented mixed-use development in the area. Walmart's proposed use and site plan demonstrates one component of that vision because it is in substantial conformance with the Illustrative Development Concept shown in the Sector Plan. Areas for pedestrian movement and a modified street grid are possible as future users elect to occupy the space available onsite.

Turning to connectivity and circulation, the Sector Plan recommends the following:

- Explore the possibility of a southbound exit ramp into Woodyard Crossing. This allows the existing ramp to direct traffic east and west on Woodyard Road.
- Connect Woodyard Crossing with Clinton Park Shopping Center by a pedestrian bridge over Branch Avenue located close to the future transit stop. Seek opportunities for a street overpass in the long-term. *Id.* at 77.

These recommendations will increase pedestrian accessibility and safety, and provide direct access to the Woodyard Crossing Shopping Center. Walmart's proposed use and site plan occupies a part of the Shopping Center. These recommendations are intended to be carried out if and when the shopping center site redevelops as a mixed-use center or by the County.

Focusing on open space is an important consideration, even in commercial areas. To increase the open space in the area, the Sector Plan makes the following two recommendations for the Shopping Center:

- Provide a significant public open space/plaza oriented to the transit stop and framed by streets and retail on the ground level.
- Provide two interior public open spaces/plazas during the redevelopment plan for the Woodyard Crossing, with each centrally located to serve street blocks surrounding it. Private open spaces are encouraged within each building block when possible. Connect open space vista to the pedestrian bridge plaza and stairs. *Id.* at 78.

The Illustrative Development Concept includes these open spaces. As it is only a small part of the overall shopping center, Walmart's proposed use and site plan will not interfere with the ultimate location or development of these open spaces.

The Sector Plan also addresses recommendations for building and site design. The key design principles for the Shopping Center are:

- Orient building frontages to face the street, courtyard, or plaza. In mixed-use areas, the street facing buildings should establish a street wall deep enough from the street curb to provide wide pedestrian walkways in front of the buildings. This will create and define public spaces and encourage an active street frontage.
- Utilize garage parking to serve the parking needs within the centers. Surface parking should not be viewed from the street and should be located in the rear.
- Ensure that parking garages are designed and articulated to promote visual interest and avoid long, traditional, horizontal openings. Ensure that the ground floors of parking garages fronting public streets are developed with uses that animate the street such as retail uses, restaurants with outdoor seating.

- Provide architectural elements and proportion that relate to a pedestrian scale in building façades. Large expanses of identical building walls should be avoided. Façades that provide a regular and frequent pattern of architectural variety through modulation of wall plane, detailing, color, texture, material, and the incorporation of art and ornament are encouraged.
- Provide vertical mixed-use with ground floor retail where appropriate, especially where street level activities are desired.
- Use high quality building material during construction such as brick, stone or masonry. Define the two- to four-story building bases in a mixed-use building by a change in materials, textures, or color. Use masonry or stone at the lower floor levels to improve the comfort and interest of the pedestrian.
- Design ground floor retail, retail and restaurant storefronts with a significant amount of transparency, 60 to 70 percent, to promote business and activate the street.
- Place utility cables and wires underground.
- Bus shelters should be designed to complement building style and material.
- Encourage the use of environmental friendly building materials and practices such as habitable roofs (rooftops that occupants of a building can use for gardening, socializing, and sunning) with appropriate paved surfaces and shade elements on commercial, office and institutional buildings.
- Limit building height to four-stories except signature buildings that should not exceed 15 stories. *Id.* at 79–81.

Most of the recommendations are for new development and do not easily apply to expansions or renovations. Therefore, Walmart’s proposed use, site plan, and architecture address these recommendations in context of the overall development of the Shopping Center. Ex. 77, 72(a-i). *See also* Ex. 41(a)(b).

The District Council concludes that Walmart's proposed use and site plan implements the Sector Plan's ultimate goal to create a vibrant, walkable center that includes large scale retail as well as smaller shops, offices and lodging. Walmart's Supercenter will represent the beginning of the transformative process.¹²

Moreover, in 2014, the County approved a new General Plan, *Plan Prince George's 2035* ("Plan 2035"). Plan 2035 sets forth a vision for Prince George's County and general land use goals, policies and strategies for achieving that vision.

The overriding Vision of Plan 2035 is:

- In 2035, Prince George's County is the community of choice for families, businesses, and workers in the region. It is distinguished by strong, green, and healthy communities; a competitive, innovative, and adaptive economy; vibrant and walkable mixed-use centers; restored ecosystems; and iconic destinations. It meets the diverse needs of all Prince Georgians and embraces and builds on the momentum generated by new residents, technology, and business opportunities. *Id.* at 9.

The overriding Goal of Plan 2035 is:

- Prince George's County develops sustainably and equitably. It directs new development to existing transit-oriented centers; focuses public investment on its economic engines; capitalizes on and maintains its infrastructure; strengthens its established communities; and proactively preserves its natural, historic, and cultural resources. *Id.* at 12.

Plan 2035 placed the subject property in the Established Community area. Commercial policies for this area are to:

- Limit future mixed-use land uses outside of the Regional Transit Districts and Local Centers.

¹² See Ex. 22, pp. 4-5 (Technical Staff found that since the site has not yet been rezoned, it is reasonable to conclude that an addition to the Walmart, or any retail aspect of the Shopping Center, is a sensible short-term decision that will not impede the realization of the Sector Plan's long-term vision for the area).

- Limit the expansion of new commercial zoning outside of the Regional Transit Districts and Local Centers to encourage reinvestment and growth in designated centers and in existing commercial areas.
- Retain future Water and Sewer Service Areas in water and sewer categories S5 and W5 until additional residential development capacity is needed to meet growth projections.

Plan 2035 recognizes that 9% of future commercial growth will be in Established Communities.¹³ But Plan 2035 reverses the Sector Plan policy to locate mixed use development on this site. While the Sector Plan encouraged mixed use here, Plan 2035 provides strong guidance to limit mixed-use development to the Regional Transit Districts and Local Centers. The subject property is not in either of these Policy Areas. It is, in fact, in an Established Community. It provides a modest expansion of an existing commercial activity that will provide a small growth in employment in Established Communities in accordance with Plan 2035 recommendations. It will not require the expansion of Water and Sewer into areas not recommended for that expansion. Walmart's proposed use and site plan will implement the Plan, therefore, the District Council finds that Walmart's proposal will not substantially impair the integrity of the Plan.

- **3. To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;**

Walmart's proposed use and site plan of an existing department/retail store constitutes infill development, within an established commercial Shopping Center. It is served by public water and sewer; the traffic study shows that it will have no tangible impact on public streets; and other

¹³ See Memorandum from Environmental Planning Section, 5/1/2015 (Site is now located in the Established Communities area of the Growth Policy Map and Environmental Strategy Area 2).

public facilities and services are close by. Ex. 15, 16. *See* also Memorandum from Transportation Planning Section, 10/8/2014.

- **4. To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;**

Beginning in 2002, the District Council created this special exception use in the C-S-C Zone, and made a policy decision, for all inhabitants of the County, that the use is desirable and necessary for planning and zoning in the County. Therefore, as a matter of law, the special exception use was intended to guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business. *See* CB-2-2002, CB-13-2012, CB-64-2012. Walmart's proposed use and site plan also fulfills this purpose of Subtitle 27 because it conforms with the Sector Plan's strategy for revitalization and redevelopment to address, among other things, the need for improved or better retail options since an overall goal of the Sector Plan is to concentrate neighborhood-serving retail in appropriate locations and repurpose obsolete commercial centers to better serve the community needs. *See* 2013 Plan, p. 50.

- **5. To provide adequate light, air, and privacy;**

Walmart's proposed use and site plan provides adequate light, air and privacy. The proposed building, with the renovated façade and addition, is a one story building that will be located on the north side of the existing building. Ex. 71, 72(a-i), Ex. 41(a)(b). Although the existing building and proposed expansion is located near residences, the record contains evidence of adequate setbacks and buffers to ensure adequate light, air, and privacy. In accordance with County setback requirements, the proposed expansion (as opposed to the existing building—also constructed in 2000 in accordance with County setback requirements) complies with the required 100 feet from the adjoining residential lots. The loading aisle is screened from the adjoining

residences by a 10-foot high solid fence and 19 to 22 feet of existing dense vegetation. Departure from Design Standards 504 and Alternative Compliance 93061-05 and 99026 recognized this landscaping and screening as appropriate buffers for the existing building and were approved. *See* also Ex. 22. pp. 11–14.

- **6. To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;**

Because the allowance of a special exception use is part of a comprehensive zoning regulatory scheme that is itself accompanied by the presumption that it promotes public safety, health, and morals, it stands to reason that this broader presumption of compatibility itself generates the specific presumption of compatibility in the Zoning Ordinance.¹⁴ Walmart's proposed use and site plan will promote the most beneficial relationship between uses of land and buildings because it expands and renovates an existing department store, which has served the County since 2000, in a Shopping Center of more than 450,000 square feet. This special exception use is subject to certain additional requirements, which must be satisfied, before it may be approved, in order to promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development. *See* PGCC § 27-348.02.

- **7. To protect the County from fire, flood, panic, and other dangers;**

Walmart's application has been reviewed by appropriate County agencies and there has been no finding that the special exception use will cause fire, flood, panic, and other dangers. Ex. 22, 73. *See also* Ex. 71, 71(a–i). Moreover, the development and use of an approved special

¹⁴ *See Montgomery County v. Butler*, 417 Md. 271, 297–98, 9 A.3d 824, (2010).

exception shall be in accordance with the approved site plan, and when a special exception use is approved, any requirements or conditions deemed necessary to protect adjacent properties and the general neighborhood may be added to those of Subtitle 27. The Director of the Department of Permitting, Inspections, and Enforcement may petition the District Council to revoke, modify, suspend, or impose additional conditions on an approved special exception. The District Council may revoke, modify, suspend, or impose additional conditions on a special exception when it finds that (1) the provisions in the approval of the special exception have not been complied with; or (2) the approved special exception has not been used for 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. The District Council may (in conjunction with the revocation or modification) order any use and occupancy permit issued for the special exception use to be revoked or modified. Revocation of a special exception shall constitute revocation of any variances granted for the use by the Council. *See* PGCC §§ 27-318, 27-319, 27-328. Therefore, the Zoning Ordinance provides for adequate mechanisms to satisfy this purpose of Subtitle 27 after Walmart's special exception use and site plan is approved by the District Council.

- **8. To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;**

Notwithstanding that this purpose of Subtitle 27 is applicable to housing rather than commercial applications, Walmart's proposed use and site plan provides for an orderly expansion and renovation of an existing department store, which has operated lawfully and served the inhabitants of the County since 2000. Walmart's proposal will further satisfy this purpose of Subtitle 27 because it provides better retail options to better serve the community needs, and in turn, the proposal will provide a sound, suitable and healthy living environment of all County

residents. *See* 2013 Plan, p. 50.

- **9. To encourage economic development activities that provide desirable employment and a broad, protected tax base;**

Walmart's proposed renovation and expansion of its existing 134,241 square foot department store into a Walmart Supercenter, which includes a grocery component (exceeding 10% of its merchandise area) and outdoor garden, will provide desirable employment and a broad, protected tax base. Consistent with the Sector Plan, the Supercenter can be the first step in bringing mixed use development into reality because the site is recommended for Commercial Renovation/Adaptive Reuse. *See* Sector Plan, p. 75, Map 36. The Illustrative Development Concept includes this renovated building fitting easily into the mixed-use program for the existing shopping center to encourage economic development activities. *See* Ex. 22, pp. 4-5 (Technical Staff found that the Sector Plan recognized that the Shopping Center is experiencing some success in recent years. Therefore, it is reasonable to conclude that an addition to the existing Walmart, or any retail aspect of the shopping center, is a sensible short-term decision that will not impede the realization of the Plan's long-term vision for the area).

- **10. To prevent the overcrowding of land;**

Walmart's proposed use and site plan is approximately 23.90± acres. After expansion and renovation, the Supercenter will be approximately 171,634 square feet. The building will occupy approximately 30 percent of the special exception land area. In 2002, the District Council contemplated special exception uses (such as the one proposed by Walmart), in excess of 125,000 square feet as *prima facie* compatible in the C-S-C Zone. Moreover, pursuant to CB-2-2002, CB-13-2012, and CB-64-2012, the District Council legislatively determined that buildings less than 125,000 square feet were permitted by right (*i.e.*, no special exception required) in the C-S-C Zone.

Therefore, Walmart's proposed expansion of its existing footprint by an additional 37,393 square feet, which amounts to approximately 30 percent of the special exception land area, does not constitute overcrowding of land in the C-S-C Zone.

- **11. To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;**

Walmart's proposed use and site plan satisfies this purpose of Subtitle 27. The Transportation Planning Section of the Planning Department found that that the subject property is located within Transportation Service Area 2 (TSA 2), as defined in Plan Prince George's 2035. Areas within TSA 2 are subject to Level-of-Service D (LOS D), unless it is defined as a town center. As stated in the Transportation Review Guidelines, Part 1, in cases (special exceptions) where the new traffic impact would exceed 100 peak-hour trips, applicants are encouraged to prepare a traffic impact study. Walmart submitted a traffic impact study dated April 10, 2014 and a supplemental traffic impact study was submitted July 24, 2014. *See* Ex. 15, 16. Transportation Planning did a comparison of estimated trip generation and found that nearby intersections will continue to operate at acceptable levels of service during the AM and PM peak hours even with the increase of 180 AM and 70 PM peak hour trips. Updated traffic counts from April 2014 were used in the study. An annual growth rate of two percent was applied to through traffic for two years. In addition, nearby background developments were included in the study. The proposed use is within a large existing shopping center of approximately 522,000 square feet. The traffic impact study presented a worst case scenario in terms of singling out the proposed super discount store with food service. The proposed expansion will generate approximately 180 AM and 70 PM additional peak hour trips and 1,200 additional daily trips. All three nearby intersections will continue to operate at acceptable levels of service, LOS C or better. *See* Ex. 22, pp. 6-7,

Transportation Planning Section Memorandum, 10/8/2014. *See also* (9/30/15, Tr., pp. 3–58). Furthermore, Walmart’s site plan will eliminate its Tire and Lube Facility and—thus eliminating any inherent adverse effects associated with “An establishment that specializes in, and performs the sole service of, motor vehicle greasing, oil changing (including filters), fluids replacement (excluding gasoline and diesel fuels), or tune-ups; and which may include the retail sale of vehicle parts, products, or accessories associated with such specialized service,” or “A facility where the primary “use” is the retail sale of vehicle parts, products, tires, or accessories.” *See* PGCC § 27-107.01(a) 167, 247.1, 249, respectively. The District Council finds that Walmart’s elimination of its Tire and Lube Facility will serve to reduce traffic congestion because this “use” is a year-round-service as opposed to an outdoor garden, which is seasonal in nature.

- **12. To insure the social and economic stability of all parts of the County;**

Walmart’s proposed renovation and expansion of its existing 134,241 square foot department store into a Walmart Supercenter, which includes a grocery component (exceeding 10% of its merchandise area) and outdoor garden, will insure the social and economic stability of the County. Consistent with the Sector Plan’s vision, the Supercenter can be the first step in bringing mixed use development into reality because the site is recommended for Commercial Renovation/Adaptive Reuse. *See* Sector Plan, p. 75, Map 36. The Illustrative Development Concept includes this renovated building fitting easily into the mixed-use program for the existing shopping center to encourage economic development activities. *See* Ex. 22, pp. 4–5 (Technical Staff found that the Sector Plan recognized that the Shopping Center is experiencing some success in recent years. Therefore, it is reasonable to conclude that an addition to the existing Walmart, or any retail aspect of the shopping center, is a sensible short-term decision that will not impede the

realization of the Plan's long-term vision for the area).

- **13. To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;**

Walmart's proposed use and site plan has been carefully analyzed by the Environmental Planning Section of the Planning Department. The Environmental Section found that Walmart's proposed use and site plan was in conformance with the required environmental findings for a special exception and recommends approval. The Environmental Section also found, among other things concerning this purpose of Subtitle 27, that the site does not contain regulated environmental features and woodland areas and there is an existing woodland/landscape buffer strip located between the commercial and residential uses, which will reduce new noise impacts from the proposed use and site plan. *See* Ex. 22, Environmental Planning Section Memorandum, 5/1/2015, Ex. 19(a-e), Ex. 11, Ex. 27(a), Ex. 22, pp. 15-17, Ex. 60(a-e). Moreover, the approved Departure from Design Standards 504, limits the hours of operation of trash pickup to 7 AM to 7 PM, further reducing the impact of noise on adjacent residential land. Furthermore, Walmart's site plan will eliminate its Tire and Lube Facility—thus eliminating any inherent adverse effects associated with “An establishment that specializes in, and performs the sole service of, motor vehicle greasing, oil changing (including filters), fluids replacement (excluding gasoline and diesel fuels), or tune-ups; and which may include the retail sale of vehicle parts, products, or accessories associated with such specialized service,” or “A facility where the primary “use” is the retail sale of vehicle parts, products, tires, or accessories.” *See* PGCC § 27-107.01(a) 167, 247.1, 249, respectively.

- **14. To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and**

There are no adjacent areas for which the proposed expansion would negatively impact that property's scenic beauty or natural features or otherwise hinder protection of such a site. The property and proximate areas are intensely developed commercial sites. *See* Ex. 72(a-i). Moreover, Walmart's proposed use and site plan will not interfere with the Sector Plan's location or development of recommended open spaces. *See* Sector Plan, p. 78.

- **15. To protect and conserve the agricultural industry and natural resources.**

Walmart's proposed use and site plan will have no impact on the agricultural industry or natural resources of the County. The property is neither used for agricultural purposes, nor has any protected natural features. Furthermore, the property does not contain areas within or near the designated network of the Approved Countywide Green Infrastructure Plan. *See* Ex. 22, Environmental Planning Section Memorandum, 5/1/2015.

- (2) **The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;**

For the reasons stated above, and to be discussed *infra*, the District Council finds that Walmart's proposed use and site plan is in conformance with all applicable requirements and regulations of this Subtitle 27.

- (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;**

See response above to purpose (2) of Subtitle 27, which is adopted and incorporated by reference as if fully restated herein. Additionally, Community Planning Division of the Planning

Department, reviewed Walmart's proposed use (found no planning issues and recommended no conditions of approval), and made the following determinations:

- General Plan: The application is consistent with the Plan Prince George's.
- Master Plan: The application is consistent with the 2013 Approved Subregion 5 Master Plan, which recommends commercial development.
- Sector Plan: The application is consistent with the 2013 Approved Central Branch Avenue Corridor Revitalization Sector Plan, which recommends commercial mixed use development. *See* Community Planning Division Memorandum, 8/1/2014.

The District Council concludes that Walmart's proposed use will not substantially impair the validity of any approved Plans. *See* also Ex. 71, 66, 86, (11/10/2015, Tr.) and (1/13/2016, Tr.), concerning Walmart's submissions and testimony pertaining to, among other things, this requirement for a special exception.

- (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;¹⁵ and**

Under Maryland case law, an applicant seeking approval of a special exception use has the burden of adducing testimony which will show that the proposed use meets the prescribed standards and requirements of the Zoning Ordinance. An applicant does not have the burden of establishing affirmatively that the proposed use would be a benefit to the community. If an applicant satisfactorily shows that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, the applicant has met

¹⁵ In accordance with Maryland case law, the District Council will address PGCC § 27-317 (a)(4) and (5) together, because these required findings overlap for purposes of determining whether to grant or deny a special exception use.

its 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 the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the District Council to decide, and should not be second-guessed by an appellate court. 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 special exception use is arbitrary, capricious, and illegal. *See Hammond*, 270 Md. 41, 54–55, 310 A.2d 543, 550–51 (1973), *Alvani v. Dixon*, 365 Md. 95, 113–14, 775 A.2d 1234, 1244–45 (2001).

In the final analysis, the question is whether the special exception “use” of a department or variety store combined with a food and a beverage store in excess of 125,000 square feet, would have any adverse effect above and beyond those inherently associated with the “use” irrespective of its location in the C-S-C Zone. The County Code defines a “use” as either (i) the purpose for which a “Building,” “Structure,” or land is designed, arranged, intended, maintained, or occupied; or (ii) any activity, occupation, business, or operation carried on in, or on, a “Building,” “Structure,” or parcel of land. *See* PGCC § 27-107.01(a)(244).

Since 2000, Walmart, as a matter of right in the C-S-C Zone, has lawfully operated store 2799 in the Shopping Center. The County Code does not define a “department store” but Walmart has occupied its 134,241 square foot building for its intended purpose. Store 2799 has the following departments: electronics & office, movies, music, & books, home, furniture & patio, home improvement, clothing, shoes, jewelry, baby & toddler, toys & video games, food, household & pets, health, beauty & pharmacy, sports, fitness & outdoors, auto & tires, photo, gifts &

personalized shop, sewing, crafts, & party supplies.¹⁶ Merriam-Webster dictionary defines a department store as a large store that has separate areas in which different kinds of products are sold.¹⁷ Part of the existing 134,241 square foot department store (to be eliminated and replaced with an outdoor garden center), is a Walmart Tire & Lube Express, which offers tires for sale, tire repair, and auto services. The County Code defines a Vehicle Lubrication or Tune-up Facility as “An establishment that specializes in, and performs the sole service of, motor vehicle greasing, oil changing (including filters), fluids replacement (excluding gasoline and diesel fuels), or tune-ups; and which may include the retail sale of vehicle parts, products, or accessories associated with such specialized service.” A Vehicle Parts or Tire Store is defined as “A facility where the primary “use” is the retail sale of vehicle parts, products, tires, or accessories.” *See* PGCC § 27-107.01(a) 247.1, 249, respectively.

Walmart’s proposed use and site plan will expand, renovate and combine its 134,241 square foot department store with a food or beverage store, along with a 2,699 square foot outdoor garden center. The County Code defines a food or beverage store as “A use providing the retail sales of food, beverages, and sundries primarily for home consumption, and may include food or beverage preparation. Does not include a Department or Variety Store that provides incidental sales of candy, gum and similar non-refrigerated items at a check-out counter, or in a standard vending machine.” The Code defines retail as the sale of commodities or goods, usually in small quantities, directly to ultimate consumers. The Code defines a nursery and garden center as

¹⁶ *See* <http://www.walmart.com/store/2799/whats-new> (last visited July 18, 2016).

¹⁷ *See* <http://www.merriam-webster.com/dictionary/department%20store> (last visited July 18, 2016).

“Buildings,” “Structures,” or an area of land used for the display and sale of nursery stock or garden supplies. *See* PGCC § 27-107.01(a) (91.1), (202), (167), respectively.

The ZHE summary concluded that the application failed to meet the requirements of PGCC § 27-317(a)(4) and (5) based on testimony in the record concerning stormwater runoff, crime, and traffic congestion. Nothing in the record supports the ZHE’s decision that Opposition’s evidence would have any adverse effect above and beyond those inherently associated with a department or variety store “use” combined with a food or beverage store “use” in excess of 125,000 square feet, irrespective of its location in the C-S-C Zone. *See Moseman v. County Council of Prince George’s County*, 99 Md. App. 258, 265, 636 A.2d 499, 501 (1994)(District council has the right to draw reasonable inferences from conflicting facts and circumstances presented.). The District Council finds that the testimony concerning stormwater runoff, crime, and traffic congestion was not probative evidence of harm or disturbance in light of the nature of the C-S-C Zone or of factors causing disharmony to the operation of the comprehensive plan in the County.

A permitted use does not consider “potential or actual adverse effect” that its “use” may have on a neighboring property. *Loyola*, 406 Md. at 71, 956 A.2d 176. The ZHE misapplied special exception law on adverse effects by conflating Opposition testimony about what effects currently exists in the C-S-C Zone as “potential or actual adverse effect” above and beyond those inherently associated with the “use” irrespective of its location in the C-S-C Zone. *See* ZHE’s Decision.

Therefore, the ZHE’s recommendation of denial of Walmart’s special exception use and site plan was arbitrary, capricious, and illegal.

Stormwater Runoff

The ZHE cited testimony from five (5) persons of record concerning ongoing flooding in their community. *See* ZHE’s Decision, pp. 4–5. Walmart is not a stand-alone department store in

the C-S-C Zone. Walmart is located in an integrated Shopping Center that is more than 450,000 square feet. Other existing stores within the Shopping Center include but are not limited to: CVS, Lowe's Home Improvement, Safeway, Staples, Arby's, Ruby Tuesday, Petco, IHOP, T-Mobile, Bank of America, Blockbuster's, Wendy's and Exxon. *See* Ex. 3, 22, 25, 71, 72(e). There is no probative evidence in the record that Walmart's 139 foot expansion to the north end of its existing store will produce stormwater runoff above and beyond that which is inherently associated with the "use" of a department or variety store combined with a food or beverage store. The exact opposite testimony is in the record.

On the issue of stormwater runoff:

Citizen Opposition expert witness testified that he was unable to opine what part of the Shopping Center is the result of flooding at the two bridges in the community.

*

When asked whether Walmart's proposed expansion will add to the existing flooding testified to by the persons of record, he stated that "with a half an acre increase in impervious there's going to be an increased volume of runoff downstream. But given the characteristics of the watershed, it may not affect the peak runoff and the peak runoff is usually what causes flooding."

*

When asked specifically whether Walmart's proposed development would increase peak volume, he stated "no, I can't." *See* (9/30/2015, Tr., pp. 147-48). *See also* Walmart's expert testimony (7/29/2015, Tr., pp. 47-125); (1/13/2016, Tr., pp. 4-48).

Stormwater Management is the use of Environmental Site Design for the collection, conveyance, storage, treatment and disposal of stormwater runoff in a manner to prevent accelerated channel erosion, increased flood damage and/or degradation of water quality. The administration of stormwater management plans in the County, including the duties and power to regulate and approve, is vested in the Director of the Department of Permitting, Inspections, and Enforcement. *See* PGCC Subtitle 32. *See also* §§ 32-171(a) (27), (63). Some of the stated purposes

of Subtitle 32 or Divisions within it, are to prevent property damage, protect living resources and prevent environmental degradation to safeguard the public's health, safety, welfare and economic well-being by establishing minimum requirements for grading, reforestation, woodland conservation, drainage, erosion control and pollution discharge and control on land and to watercourses within Prince George's County, and to establish procedures by which these requirements are to be administered and enforced. Subtitle 32 also implements the provisions of the Code of Maryland Regulations (COMAR) 26.17.01, the 2011 Maryland Standards and Specifications (Standards and Specifications) and the Stormwater Act of 2007 (Act). *See* § 32-174. A Concept Plan is the first of three required Plan approvals that includes the information necessary to allow an initial evaluation of a proposed project. A Site Development Plan is the second of three required plan approvals that includes the information necessary to allow a detailed evaluation of a proposed project. A Final Stormwater Management Plan is the last of the three required plan approvals that includes the information necessary to allow all approvals and permits to be issued by the Department. *See* PGCC § 32-171 (a) (14), (33), (60). A Concept Plan shall be submitted for approval to the Director of the Department of Permitting, Inspections, and Enforcement. All preliminary plans of subdivisions shall be consistent with any County approved Concept Plan. Finally, this Concept Plan shall serve as the basis for all subsequent construction. *See* PGCC §§ 32-104(a), 32-177(a) (b) (d).

Walmart proposed special exception use and site plan has an Approved Stormwater Management Concept Plan approved by the County, Ex. 27(b), which is subject to the following conditions:

1. Downstream Adequacy Analysis Required At Technical Review.
2. Fee in Lieu May Be Adjusted At Time Of Technical Review.

3. Geotechnical Report Required For Proposed ESD Device During Technical Review.
4. Pretreatment Required For Submerged Gravel Wetlands.
5. Pretreatment Required For ESD Device And Maintenance Agreements Required For Private Systems.
6. SHA Approval Required.
7. This Project Involves Redevelopment Of An Existing Developed Site. Site Shall Be Designed To Treat For 50% WQv Of The Impervious Area Within Proposed Disturbed Area And 100% WQv And CPV For New Impervious Area Using ESD Practices And Techniques.
8. Landscape Plans Are Required At Technical Review.
9. High Water Table Or Low Infiltration Rate Presence On The Submerged Gravel Wetland Shall Be Verified During Technical Approval. *See Ex. 27(b).*

There is no question that stormwater runoff is inherently associated with the development of an existing 134,241 square foot department store. There is also no question that stormwater runoff will be inherently associated with the expanded development to combine a department store with a food or beverage store, coupled with an outdoor garden center. The Approved Stormwater Plan is intended to and will address stormwater runoff inherently associated with Walmart's proposed special exception use and site plan. The District Council finds that the purpose of an Approved Stormwater Plan is to prevent property damage, protect living resources and prevent environmental degradation to safeguard the public's health, safety, welfare and economic well-being by establishing minimum requirements for grading, reforestation, woodland conservation, drainage, erosion control and pollution discharge and control on land and to watercourses within Prince George's County, and to establish procedures by which these requirements are to be administered and enforced.

Therefore, the District Council finds that there is no probative evidence in the record that Walmart's proposed special exception use and site plan would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would

otherwise result from a department store that has separate areas in which different kinds of products are sold combined with a food or beverage store providing the retail sales of food, beverages, and sundries primarily for home consumption, which may also include food or beverage preparation.¹⁸ *Schultz*, 291 Md. at 15.

Traffic Congestion

The ZHE recommended denial of Walmart's special exception use and site plan because of existing congested traffic at Woodyard Road. *See* ZHE's Decision, p. 5.

The Transportation Planning Section of the Planning Department found that the subject property is located within Transportation Service Area 2 (TSA 2), as defined in Plan Prince George's 2035. Areas within TSA 2 are subject to Level-of-Service D (LOS D), unless it is defined as a town center. As stated in the Transportation Review Guidelines, Part 1, in cases (special exceptions) where the new traffic impact would exceed 100 peak-hour trips, applicants are encouraged to prepare a traffic impact study. Walmart submitted a traffic impact study dated April 10, 2014 and a supplemental traffic impact study was submitted July 24, 2014. *See* Ex. 15, 16.

A comparison of estimated trip generation is shown in the table below:

¹⁸ The District Council also finds that Walmart's proposed special exception site plan will eliminate its Tire and Lube Facility—thus eliminating any inherent adverse effects associated with “An establishment that specializes in, and performs the sole service of, motor vehicle greasing, oil changing (including filters), fluids replacement (excluding gasoline and diesel fuels), or tune-ups; and which may include the retail sale of vehicle parts, products, or accessories associated with such specialized service,” or “A facility where the primary “use” is the retail sale of vehicle parts, products, tires, or accessories.” *See* PGCC § 27-107.01(a) 167, 247.1, 249, respectively.

Comparison of Estimated Trip Generation, SE-4733, 20.44 acres								
Zoning or Use	Units or Square Feet	AM Peak-Hour Trips			PM Peak-Hour Trips			Daily Trips
		In	Out	Total	In	Out	Total	
Existing Zoning								
C-S-C (discount store)	134,241 square feet	97	45	142	334	335	669	7,684
Proposed Use								
C-S-C (super discount store)	175,000 square feet	181	143	324	373	388	761	8,881
	Net increase trips	84	98	182	39	53	92	1,197
Less Pass-by	-26% pass-by (PM)	0	0	0	10	14	24	
Difference		+84	+98	+182	+29	+39	+68	

Based on the above comparison, Transportation Planning found that nearby intersections will continue to operate at acceptable levels of service during the AM and PM peak hours even with the increase of 180 AM and 70 PM peak hour trips. Updated traffic counts from April 2014 were used in the study. An annual growth rate of two percent was applied to through traffic for two years. In addition, nearby background developments were included in the study. The proposed use is within a large existing shopping center of approximately 522,000 square feet. The traffic impact study presented a worst case scenario in terms of singling out the proposed super discount store with food service. The proposed expansion will generate approximately 180 AM and 70 PM additional peak hour trips and 1,200 additional daily trips. All three nearby intersections will continue to operate at acceptable levels of service, LOS C or better. *See Ex. 22, pp. 6–7, Transportation Planning Section Memorandum, 10/8/2014. See also (9/30/15, Tr., pp. 3–58).*

Walmart is not a stand-alone department store in the C-S-C Zone. Walmart is located in an integrated Shopping Center that is more than 450,000 square feet. Other existing stores within the Shopping Center include but are not limited to: CVS, Lowe’s Home Improvement, Safeway, Staples, Arby’s, Ruby Tuesday, Petco, IHOP, T-Mobile, Bank of America, Blockbuster’s, Wendy’s and Exxon. *See Ex. 3, 22, 25, 71, 72(e).* The District Council finds that because all three nearby intersections at the Shopping Center will continue to operate at acceptable levels of service,

LOS C or better, which is based on a traffic impact study that presented a worst case scenario in terms of singling out the proposed Supercenter combined with a food or beverage store, there is no probative evidence in the record that Walmart's proposed special exception use and site plan would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from a department store that has separate areas in which different kinds of products are sold combined with a food or beverage store providing the retail sales of food, beverages, and sundries primarily for home consumption, which may also include food or beverage preparation—especially given that Walmart's proposed special exception site plan will eliminate its Tire and Lube Facility—thus eliminating any inherent adverse effects associated with “An establishment that specializes in, and performs the sole service of, motor vehicle greasing, oil changing (including filters), fluids replacement (excluding gasoline and diesel fuels), or tune-ups; and which may include the retail sale of vehicle parts, products, or accessories associated with such specialized service,” or “A facility where the primary “use” is the retail sale of vehicle parts, products, tires, or accessories.” *See* PGCC § 27-107.01(a) 167, 247.1, 249, respectively. Furthermore, the District Council further finds that Walmart's elimination of its Tire and Lube Facility will serve to reduce traffic congestion because this “use” is a year-round-service as opposed to an outdoor garden, which is seasonal in nature. *See Gotach v. Board of County Comm'rs for Frederick County*, 60 Md. App. 477, 485, 483 A.2d 786, 790 (1984) (applying current rule in reversing denial of special exception where “the potential volume of traffic under the requested use would appear to be no greater than that which would arise from permitted uses, we believe it arbitrary, capricious and illegal to deny the application for special exception on vehicular traffic grounds”).

Crime

The ZHE recommended denial of Walmart's special exception use and site plan because of some testimony concerning crime in the adjoining residential community. *See* ZHE's Decision, pp. 5–6. Specifically, George Leftwood, Jr. testified about an increase in foot traffic in his community. Mr. Leftwood testified that the fence behind the Shopping Center has holes under it and that people go through the holes into the neighborhood. In response to Opposition testimony, Walmart entered into the record photographs of the fence. *See* Ex. 102(d–f). A review of the photographic evidence of the fence showed there were no holes in the fence to support Mr. Leftwood's testimony (or others) that there is a "relationship" between the presence of people on his (or others) streets and the "fence people." Walmart is located in an integrated Shopping Center that is more than 450,000 square feet. Other existing stores within the Shopping Center include but are not limited to: CVS, Lowe's Home Improvement, Safeway, Staples, Arby's, Ruby Tuesday, Petco, IHOP, T-Mobile, Bank of America, Blockbuster's, Wendy's and Exxon. *See* Ex. 3, 22, 25, 71, 72(e). There is also no probative evidence in the record, other than Mr. Leftwood's thoughts, that the people on his street are the "fence people" responsible for house break-ins or that the "fence people" come to the Shopping Center because of the existence of the Walmart department store, so that a correlation could be made to the proposed Walmart expansion. Walmart is not a stand-alone department store in the C-S-C Zone.

The District Council finds that there is no probative evidence in the record that the "fence people" are a result of Walmart's existing 134,241 square-foot department store. And there is no probative evidence in the record that Walmart's proposed expansion will increase the population of the "fence people." The District Council further finds that Walmart's proposed special exception use will be conducted without any real detriment to the neighborhood and the proposed use will

not actually adversely affect the public interest. *See* CB-2-2002, CB-3-2012, CB-64-2012, PGCC §§ 27-348.02, 27-461. *See also* Sector Plan and Plan 2035.

(6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and

Walmart's proposed site plan is in conformance with, among other things, an approved/revised Type 2 Tree Conservation Plan. *See* Ex. 22, Environmental Planning Section Memorandum, 5/1/2015, Ex. 19(a-e), Ex. 11, Ex. 27(a), Ex. 22, pp. 15-17, Ex. 60(a-e).

(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). *See* PGCC § 27-317(a)(1-7).

According to Technical Staff, the site contains regulated environmental features within the PMA that are required to be preserved and/or restored to the fullest extent possible. Technical Staff found that according to the revised TCP2, the proposed design will not result in any additional impacts to the PMA; however, the stormwater concept and proposed special exception plans still show impacts to the PMA for the submerged gravel wetland. Staff recommended that the special exception and stormwater management plans must be revised in order to find conformance with this requirement. *See* Ex. 22, p. 17. Walmart has since revised its site plan and stormwater management plan. *See* Ex. 11, Ex. 26(a-i), Ex. 27(a-f), Ex. 71, Ex. 72(a-i).

Because Walmart's proposed Supercenter will combine its existing department store use with a food or beverage store use (with a grocery component exceeding 10% of its merchandise area), Walmart must also satisfy additional special exception requirements in PGCC § 27-348.02, which are as follows:

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

Walmart's proposed site plan depicts a 1,535 foot long drive aisle through the Shopping Center with direct access to Woodyard Road. *See* Ex. 29 (11/10/2015, Tr.) Although Technical Staff found that Walmart's proposed special exception use and site plan demonstrated frontage and direct vehicular access to Woodyard Road (MD 223), which is an arterial road, Ex. 22, Transportation Planning Memorandum, 10/8/2014, the ZHE found that Walmart did not satisfy the frontage and direct access requirement of PGCC § 27-348.02(a)(1). The ZHE opines that the site lacks "frontage" on an existing arterial roadway because Walmart's proposed 1,535 foot long drive aisle that connects the proposed special exception to Woodyard Road is not "direct vehicular access" since Walmart failed to provide any evidence, such as an easement, that would give Walmart a legal right from the property owner to occupy or utilize the frontage and drive aisle in perpetuity. *See* ZHE's Decision, pp. 9-13. The ZHE erred as a matter of law that Walmart's proposed use and site plan did not have frontage and direct access to an existing arterial roadway.

A lot is a designated area of land to be used, developed, or built upon as a unit (in accordance with this Subtitle), and having the minimum contiguous area required for a "Lot" in the applicable zone and frontage on a public "Street," or private road, right-of-way, or easement approved in accordance with Subtitle 24. A "Lot" shall be made up of one (1) or more entire "Record Lots." *See* PGCC § 27-107.01(a) (129). A recorded lot is an area of land designated as a separate parcel of land on a "Record Plat," or on a legally recorded deed (to land for which no "Subdivision" plat is required pursuant to the provisions of Subtitle 24) filed among the Land Records of Prince George's County, Maryland. *Id.* (142). The percentage of a "Lot" which is covered by "Buildings" (including covered porches) and areas for vehicular access and parking of

vehicles. *Id.* (132). Lot Frontage (Width), Minimum, at Front “Building Line” is the minimum permitted width of a “Lot,” measured along the front “Building Line.” *Id.* (135). Lot Frontage (Width), Minimum, at “Front Street Line” is the minimum permitted width of a “Lot,” measured along the “Front Street Line.” *Id.* (136)

An integrated shopping center is a group of (three (3) or more) retail stores planned and developed under a uniform development scheme and served by common and immediate off-street parking and loading facilities. *See* PGCC § 27-107.01(a) (208). Walmart is one of many recorded lots developed in the Woodyard Crossing Shopping Center. *See* Ex. 3, 22, 25, 71, 72(a-i).

Therefore, as a matter of law, the District Council finds that Walmart’s proposed use and site plan has frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets. The District Council also finds that PGCC § 27-348.02(a)(1) does not require evidence of a legal right from the property owner to occupy or utilize the frontage and drive aisle in perpetuity. *See* Ex. 22, p. 6 (No access to primary or secondary streets proposed by Walmart). *See also* Ex. 71, p. 5, 72(a-i).

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

Walmart’s proposed use and site plan satisfies this purpose of Subtitle 27. The Transportation Planning Section of the Planning Department found that the subject property is located within Transportation Service Area 2 (TSA 2), as defined in Plan Prince George’s 2035. Areas within TSA 2 are subject to Level-of-Service D (LOS D), unless it is defined as a town center. As stated in the Transportation Review Guidelines, Part 1, in cases (special exceptions) where the new traffic impact would exceed 100 peak-hour trips, applicants are encouraged to prepare a traffic impact study. Walmart submitted a traffic impact study dated April 10, 2014 and

a supplemental traffic impact study was submitted July 24, 2014. *See* Ex. 15, 16. Transportation Planning did a comparison of estimated trip generation and found that nearby intersections will continue to operate at acceptable levels of service during the AM and PM peak hours even with the increase of 180 AM and 70 PM peak hour trips. Updated traffic counts from April 2014 were used in the study. An annual growth rate of two percent was applied to through traffic for two years. In addition, nearby background developments were included in the study. The proposed use is within a large existing shopping center of approximately 522,000 square feet. The traffic impact study presented a worst case scenario in terms of singling out the proposed super discount store with food service. The proposed expansion will generate approximately 180 AM and 70 PM additional peak hour trips and 1,200 additional daily trips. All three nearby intersections will continue to operate at acceptable levels of service, LOS C or better. *See* Ex. 22, pp. 6–7, Transportation Planning Section Memorandum, 10/8/2014, Ex. 71, pp. 5–6. *See also* (9/30/15, Tr., pp. 3–58).

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

Walmart’s site plan provides pedestrian walkways within the parking lot in order to promote safety. *See* Ex. 71, p. 6, Ex. 72(a–i).

(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.

The commercial loading area for the proposed Walmart is located behind the proposed addition, and the pedestrian entrances and pedestrian loading areas are exclusively located along the front facade of the existing and proposed structures. *See* Ex. 71, p. 6, 72(a–i).

(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**

Walmart petitions for an area variance to the one hundred (100) foot setback from adjoining residentially zoned land because the existing 134,241 square foot department store building—as opposed to the proposed 37,393 square foot expansion—is not located 100 feet from the adjoining residential land to the west. The reason for the variance request is because Walmart’s special exception use and site plan must include the existing department store and the proposed 139 foot expansion building to the north. As a result, the proposed 171,634 square foot Supercenter is viewed as one building (not merely the expansion), which is not located at least 100 feet from the adjoining residential land to the west. To be clear however, Walmart’s proposed 37,393 square foot expansion is at least 100 feet from the adjoining residential land to the west and is in conformance with PGCC § 27-348.02(a)(5). *See Ex. 71, 25.*

A special exception is legislatively permitted whereas a variance is legislatively prohibited, but may be allowed for special reasons. *Cromwell v. Ward*, 102 Md. App. 691, 702, 651 A2d. 424, 430 (1995) (internal citations omitted). A variance refers to administrative relief which may be granted from the strict application of a particular development limitation in the zoning ordinance (*i.e.*, setback, area and height limitations, etc.). *See Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 537, 814 A.2d 469, 482 (2002). The Land Use Article defines “variance” as modification only of density, bulk, dimensional, or area requirements in the zoning

law that is not contrary to the public interest, and where, owing to conditions peculiar to the property and not because of any action taken by the applicant, a literal enforcement of the zoning law would result in unnecessary hardship or practical difficulty, as specified in the zoning law. *See* Md. Ann. Code, Land Use Article, § 1-101(s) (2012).

Technical Staff and the ZHE recommended disapproval of Walmart's variance request. *See* Ex. 25, Ex. 73, ZHE's Decision. Walmart took exceptions to the ZHE's decision and appealed to the District Council. The District Council may grant appeals involving variances from the strict application of this Subtitle (known as variances) in conjunction with its approval of a special exception or subsequent site plan amendment. The Council shall be governed by the provisions of PGCC § 27-230 when it grants the variances. *See* PGCC § 27-235. A variance may only be granted when the District Council 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. *See* PGCC § 27-230.

I. Introduction

In certain circumstances, a zoning body may grant a special exception together with area variances to what otherwise would be specific standards or requirements applicable to such special exception. The special exception, however, must be in a section of the local code for which variances are not excluded. Moreover, the granting of the variances may not so substantially alter the criteria for the granting of the special exception so that the criteria of the special exception would be swallowed by the variance to the extent that the special exception would not be a use

that was contemplated in the comprehensive zoning scheme in respect to any particular special exception. *See Alvani*, 365 Md. 95, 121, 775 A.2d 1234, 1249 (2001). *See also* PGCC § 27-235.

After reviewing Walmart's submissions in support of its request for a variance, including expert testimony, the District Council finds that Walmart has met its burden to obtain an area variance to the one hundred (100) foot setback from adjoining residentially zoned land; and shall grant Walmart's appeal. The District Council adopts and incorporates by reference, as if fully restated herein, Walmart's submissions in support of its request for an area variance. *See* Ex. 71, Ex. 66, Ex. 86, (11/10/2015, Tr.) and (1/13/2016, Tr.).

The District Council also makes the following additional findings of fact and conclusions of law. The District Council takes notice of the fact that CB-2-2002, CB-3-2012, and CB-64-2012, expressly incorporated vested rights of existing landowners in the C-S-C Zone. The legislative intent and history expressly permits for a store approved before January 15, 2002 (such as Walmart) to continue in effect and be revised or amended and such a store shall not be considered a nonconforming use. *See* PGCC § 27-461 (Uses Permitted). *See Washington Suburban Sanitary Comm'n v. TKU Assocs.*, 281 Md. 1, 376 A.2d 505 (1977)(to obtain vested zoning status, there must be construction on the ground pursuant to a valid building permit); *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1,994 A.2d 842 (2010)(noting that in order to obtain a vested right in an existing zoning use, a property owner must initially obtain a valid permit); *Marzullo v. Kahl*, 366 Md. 158, 191, 783 A.2d 169, 188 (2001)(stating that the first requirement to obtain a vested right is that the claimant has a valid permit); *Rockville Fuel & Feed Co. v. Gaithersburg*, 266 Md. 117, 127, 291 A.2d 672, 677 (1972) (stating that "a 'vested right' could only result when a lawful permit was obtained and the owner, in good faith, has proceeded with such construction under it . . ."). The doctrine of vested rights has a constitutional foundation, and "rests upon the legal theory

that when a property owner obtains a lawful building permit, commences to build in good faith, and completes substantial construction on the property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations.” *Prince George’s Cnty. v. Sunrise Dev. Ltd. P’ship*, 330 Md. 297, 312, 623 A.2d 1296, 1304 (1996); *Town of Sykesville v. West Shore Communs.*, 110 Md. App. 300, 316, 677 A.2d 102, 111 (1996); *Prince George’s Cnty. v. Equitable Trust Co., Inc.*, 44 Md. App. 272, 278, 408 A.2d 737, 741 (1979).

II. Area Variance

The standards applied to area variances are more relaxed than those applied to use variances because “the impact of an area variance is viewed as being much less drastic than that of a use variance.” *Anderson v. Board of Appeals*, 22 Md. App. 28, 39, 322 A.2d 220 (1974); *See also McLean v. Soley*, 270 Md. 208, 215, 310 A.2d 783 (1973); *Cromwell*, 102 Md. App. 691 at 695 n.1, 651 A.2d 424.

- Uniqueness

“Uniqueness” of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other property in the area, and that uniqueness results in an extraordinary impact upon it by virtue of the operation of the statute. *See Cromwell*, 102 Md. App. 691, 651 A.2d 424 (1995) (citations omitted).

When Walmart constructed its 134,241 square foot department store in 2000 as a matter of right, the building met the then 50 foot setback from adjoining residential property. Shortly thereafter, the County Code was amended in June 2002, through the legislative enactment of Council Bill 2-2002 (“CB-2-2002”). CB-2-2002 limited the construction and expansion of certain large retail and grocery stores as a matter of right and permitted such stores by special exception.

Absent certain exceptions (none applicable here), Walmart’s proposed expansion and renovation to construct its existing department store into a Supercenter is a permitted use in the C-S-C Zone by special exception—the “use” being “department or variety stores combined with food and beverage stores in excess of 125,000 square feet.” The District Council through the enactment of CB-2-2002 made the necessary legislative determination that Walmart’s proposed Supercenter is *prima facie* compatible in the C-S-C Zone, with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at the Shopping Center site, adduced evidence does not convince the Council that actual incompatibility would occur. *Loyola*, 406 Md. 54, at 106. *See also* CB-2-2002, PGCC §§ 27-348.02, 27-461.

Subsequent to the enactment of CB-2-2002, the County Code was further amended by the enactment of Council Bills 13 and 64 of 2012. CB-13-2012 clarified certain technical amendments and amended the maximum gross floor area for Department or Variety stores and sets a limitation on gross floor area for Department or Variety Stores with a certain percentage grocery component permitted without a Special Exception in the Commercial Zones. *See* CB-13-2012, Agenda Item Summary. CB-64-2012 extended the prescriptions for Department and Variety Stores in the C-S-C and C-M Zones to the I-3 Zone by setting a limitation on gross floor area for Department of Variety Stores with a certain percent grocery component permitted without a Special Exception. *See* CB-64-2012, Agenda Item Summary. Walmart’s proposed Supercenter includes a grocery component that will exceed 10 percent of its merchandise area. *See* CB-13-2012, Ex. 71, p. 3.

“A property owner has a *prima facie* right to enjoy the benefits of the special exception if he brings himself within the specific requirements of the ordinance. To deny him this right the Board must have had before it evidence that the proposed use will substantially affect adversely

the uses of adjacent and neighboring property permitted by this ordinance.”¹⁹ *See Hammond*, 270 Md. 41, 60, 310 A.2d 543, 553 (1973). Based on County legislation, enacted after Walmart obtained vested rights in a permitted use in the C-S-C Zone, Walmart would need an area variance for the proposed special exception use and site plan with or without an expansion to enjoy the benefits of the County’s special exception use. That is, even without the 37,393 square foot expansion, if Walmart wanted to combine its existing department store with a food or beverage store 1) in excess of 125,000 square feet (which the existing building exceeds) or 2) a grocery component in excess of 10 percent of its merchandise area, Walmart would still (after satisfying all other requirements of the ordinance) need an area variance. To further illustrate this point, another example is that if Walmart constructed its entire proposed expansion underground, it would still need an area variance because the existing 134,241 square foot department store is not within the 100 foot residential setback, even though the expansion would never see the light of day. *See also* CB-2-2002, CB-3-2012, CB-64-2012, PGCC §§ 27-348.02, 27-461.

The District Council finds that Walmart’s existing 134,241 square foot building has an inherent characteristic not shared by other property in the area, and that uniqueness results in an extraordinary impact upon it by virtue of the operation of CB-2-2002, CB-3-2012, CB-64-2012, PGCC §§ 27-348.02, 27-461—especially given the undisputed fact that Walmart’s proposed 37,393 square foot expansion satisfies the 100 foot setback from the adjoining residential land to

¹⁹ The District Council disagrees with the ZHE and Technical Staff that Walmart failed to meet its burden for an area variance because Walmart could use its property (without a variance) for multiple other uses permitted as a matter of *right* in the C-S-C Zone. *See* ZHE’s Decision, Ex. 22, Ex. 73. This argument is legally flawed because Walmart seeks approval for a *permitted use in the C-S-C Zone by special exception*, which in 2002, the District Council made a presumptive determination, for all County inhabitants, that the proposed Supercenter would be *prima facie* compatible in the C-S-C Zone, and that the use is desirable and necessary. Whether a property owner would not be deprived of all economically viable use of its property is relevant to the change/mistake rule for piecemeal zoning applications involving Euclidian zones as opposed to *permitted uses by special exception*. *See Cnty. Council of Prince George’s Cnty. V. Zimmer Dev. Co.*, 444 Md. 490, 512–515; 120 A.3d 677, 689–691 (2015) (Emphasis added).

the west and in conformance with PGCC § 27-348.02(a)(5). *See* Ex. 71, 25.

- Practical Difficulty or Unreasonable Hardship

When a property owner does that which is permitted or required under a zoning code, that property owner is not necessarily creating a self-created hardship preventing the granting of a variance. Where a property owner desired to build on an undersized but lawfully created parcel, compliance with local antiquated lot laws through resubdivision was not a self-created hardship. *See Stansbury v. Jones*, 372 Md. 172, 812 A.2d 312 (2002). Self-created or self-inflicted hardship arises through a property owner's actions, such as the owner's construction that did not conform to zoning set back restrictions, and not through zoning development restrictions that pertain to the site. The types of hardship that are considered self-created do not arise from purchase or knowledge of zoning restrictions which the landowner himself or herself took that create the hardship. *See Richard Roeser Professional Builder, Inc. v. Anne Arundel County*, 368 Md. 294, 793 A.2d 545 (2002). Under Maryland case law, the critical issue in determining whether a hardship is self-created is in determining whether the property owner could have avoided the need for a variance, more precisely, "whether a property owner 'had a hand' in creating the peculiar circumstances that cause his need for a variance." *See Chesapeake Bay Foundation v. DCW Dutchship Island, LLC*, 439 Md. 588, 625, 97 A.3d 135, 157 (2014).

Based on the enactment of CB-2-2002, CB-3-2012, CB-64-2012, PGCC §§ 27-348.02, 27-461, the proposed 171,634 square foot Supercenter is viewed as one building (not merely the expansion). As a result, the existing 134,241 square foot department store which lawfully conformed to the applicable residential setback in 2000, is not today located at least 100 feet from the adjoining residential land to the west. Yet the actual proposed 37,393 square foot expansion

has fully conformed with the 100 foot setback from the adjoining residential land to the west.²⁰
See Ex. 71, 25.

The District Council finds that a strict application of CB-2-2002, CB-3-2012, CB-64-2012, PGCC §§ 27-348.02, 27-461, will result in a practical difficulty or undue hardship on Walmart because Walmart's special exception use and site plan was contemplated in the comprehensive zoning scheme of CB-2-2002, CB-3-2012, CB-64-2012, PGCC §§ 27-348.02, 27-461. *See also* 2013 Sector Plan, Plan Prince George's 2035.

- General Plan or Master Plan

Granting Walmart's area variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan. See response above to purpose (2) of Subtitle 27, which is adopted and incorporated by reference as if fully restated herein. Additionally, Community Planning Division of the Planning Department, reviewed Walmart's proposed use (found no planning issues and recommended no conditions of approval), and made the following determinations:

- General Plan: The application is consistent with the Plan Prince George's.
- Master Plan: The application is consistent with the 2013 Approved Subregion 5 Master Plan, which recommends commercial development.
- Sector Plan: The application is consistent with the 2013 Approved Central Branch Avenue Corridor Revitalization Sector Plan, which recommends commercial mixed use development. *See* Community Planning Division Memorandum, 8/1/2014.

²⁰ Structured parking (for the purpose of a smaller footprint and less interference with wetlands), is factually and legally irrelevant to the analysis of whether to grant or deny Walmart's request for a variance. The proposed special exception *use to combine* a department or variety store with a food or beverage store, even if contained within the existing 134,241 square feet building, would be in excess of 125,000 square feet. Therefore, regardless of structured parking, Walmart's special exception use will still require a variance to satisfy the 100 foot setback requirement in PGCC § 27-348.02(a)(5). Moreover, Walmart seeks approval of a permitted use by special exception *in conjunction with a variance*.

The District Council finds that the area variance will not substantially impair the validity of any approved Plans. *See* also Ex. 71, 66, 86, (11/10/2015, Tr.) and (1/13/2016, Tr.),

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

The existing 134,241 department store is less than 100 feet from existing residential land in the Clinton Estates Subdivision to the west. Departure from Design Standards 504 (DDS-504) was approved in 1994 allowing the setback for the loading access to be less than 20 feet at the northwest corner of the building. The special exception proposes an addition to the building that is 100 feet from the property line, satisfying the 100-foot setback requirement. All new parking proposed satisfies the required 100-foot setback. DDS-504, which approved loading areas to be closer to the property line will remain in the same location. *See* Ex. 71, p. 6, Ex. 72(a-i).

(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.

The Planning Director of the Planning Department granted Alternative Compliance 99026-01, which will provide compliance with both the Landscape Manual and §27-348.02(a)(6). The District Council adopts and incorporates, as if fully restated herein, the findings and conclusions of the Planning Director in AC-99026-01). *See* Ex. 22, pp. 11-14. *See also* Ex. 71, p. 7.

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

The building entrance and nearby sidewalks will provide a combination of special paving, landscaping, raised planters, benches and light fixtures. *See* Ex. 71, p. 7, Ex. 72(a-i).

(8) The application shall include a comprehensive sign package and a comprehensive exterior lighting plan.

Walmart's application provides a sign and exterior lighting plan. *See* Ex. 71, p. 7, 72(a-i).

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

The District Council has reviewed the architectural renderings submitted by Walmart. The architecture is primarily a range of masonry materials with accents of metal, glass and composite panel materials, with clearly defined, well-articulated entrances. With few exceptions, the shopping center is mostly brick and masonry facade. The proposed one-story, building, with metal and glass articulation at the entrances, builds on and enhances the architecture of the existing building and shopping center. The building façade is not in view of any residential areas. The building will continue to be screened from residential areas to the west. *See* Ex. 41(a)(b), which has been reproduced and incorporated below.

The District Council finds that the architecture features will 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. See PGCC § 27-348.02(a).

Thirty-nine percent (39%) of Walmart's proposed use and site plan area is devoted to green area (408,170 square feet) of which approximately 9% is surface water. See Ex. 71, p. 8, Ex. 72(a-i), Note 4(g).

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1: As expressly authorized by the Regional District Act within Titles 22 and 25 of the Land Use Article of the Annotated Code of Maryland, and Subtitle 27 of the Prince George's County Code, Special Exception 4733, Variance 4733, and Alternative Compliance 99026-01, to expand and renovate an existing Walmart department store into a Walmart Supercenter, located at the Northwest quadrant of the intersection of Branch Avenue and Woodyard Road in Clinton, Maryland, in Councilmanic District 9, is hereby, APPROVED.

SECTION 2: This Ordinance shall take effect on the date of its enactment.

ENACTED this 19th day of July, 2016, by the following vote:

In Favor: Council Members Davis, Franklin, Glaros, Harrison, Patterson, Toles and Turner.

Opposed: Council Members Lehman and Taveras.

Abstained:

Absent:

Case Nos. S.E. 4733
V.S.E. 4733
AC-99026-01

Vote: 7-2

COUNTY COUNCIL OF PRINCE GEORGE'S
COUNTY, MARYLAND, SITTING AS THE
DISTRICT COUNCIL FOR THAT PART OF THE
MARYLAND-WASHINGTON REGIONAL
DISTRICT IN PRINCE GEORGE'S COUNTY,
MARYLAND

By: _____
Derrick L. Davis, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council