

Case No.: DSP-89063-07
Duvall Village
Shopping Center, Walmart

Applicant: Wal-Mart Real Estate
Business Trust

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

FINAL DECISION — DISAPPROVAL OF DETAILED SITE PLAN

Pursuant to Section 25-210 of the Land Use Article ("LU"), Md. Ann. Code (2012 & Supp. 2014) and Section 27-290 of the Prince George's County Code (2011 Ed. & Supp. 2014, or as amended) ("PGCC"), we have jurisdiction to issue the final decision in this Detailed Site Plan Application Number 89063-07, ("DSP-89063-07").¹ For the reasons that follow, Planning Board's approval of DSP-89063-07, to construct a 77,916 square foot Walmart in the Duvall Village Shopping Center, is REVERSED.

FACTUAL AND PROCEDURAL BACKGROUND

The Duvall Village Shopping Center consists of a 4,835 square foot bank building, a 26,591 square foot inline retail center, a vacant 56,238 square foot former grocery store, and parking. Several Detailed Site Plan applications were previously approved for the subject site. Of relevance here is Detailed Site Plan 89063-05 (DSP-89063-05).² In 2003, Applicant Educational Systems

¹ See also *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 2015 Md. LEXIS 565, *109 (Md. Aug. 20, 2015) (The District Council is expressly authorized to review a final decision of the county planning board to approve or disapprove a detailed site plan and the District Council's review results in a final decision).

² According to Planning Board's resolution, the initial Detailed Site Plan 89063 was approved in 1989, which was subsequently revised six (6) times. If the six (6) revisions to DSP-89063 were sequential, the resolution only provides explanation for two other revisions. DSP-89063-01 was approved at staff level in 1990 for minor changes to architecture, parking, and landscaping, and DSP-89063-03 was also approved at staff level in 1995 for modification of a historic setting. See PGCPB No. 14-16(A).

Employees filed DSP-89063-05 to construct an Educational Systems Federal Credit Union. Planning Board approved DSP-89063-05 for a total of 12,519 square feet to construct the Credit Union. The Credit Union was never constructed and pursuant to County Code, DSP- 89063-05 expired. *See* PGCPB No. 14-16(A). In 2013, this Applicant, Wal-Mart Real Estate Business Trust, (“Walmart”), filed an application for a Detailed Site Plan to expand the existing 56,238 square foot former grocery store by 21,678, for a total of 77,916 square feet. *See* Application Form, 4/5/13. The proposed development is for a Walmart within an Integrated Shopping Center. *See* PGCPB No. 14-16(A), Statement of Justification, 2/4/14, p. 3.

In December 2013, the Development Review Division of the County’s Planning Department (“Technical Staff”) accepted Walmart’s application for review as a revision to expired DSP-89063-05. The number assigned to the application was DSP-89063-**07**. *See* Application Form, 4/5/13. In February 2014, Technical Staff conditionally recommended approval of DSP-89063-07. Subsequently, Technical Staff transmitted its conditional recommendation to Planning Board for its consideration. *See* Technical Staff Report, 2/20/14. Planning Board held a hearing on March 6, 2014. At the conclusion of the hearing, Planning Board voted to approve DSP-89063-07, subject to conditions and certain considerations. *See* 3/6/14, Tr. On March 26, 2014, Planning Board adopted a resolution that embodied its vote and approval of DSP-89063-07 from March 6, 2014. The resolution was sent to all persons of record and to the Clerk of the County Council. *See* PGCPB No. 14-16, Notification of Planning Board Action, 4/1/14.

On April 14, 2014, we elected to review DSP-89063-07. Subsequently, on May 1, 2014, an appeal was filed by persons of record. *See* Notice of Appeal Letter. A hearing was held on June 30, 2014. At the conclusion of the hearing, we took this matter under advisement. *See* 6/30/14, Tr. On September 22, 2014, we remanded DSP-89063-07 to Planning Board for several reasons,

including for it to direct its Technical Staff to prepare and process the existing application as if it was a new application in accordance with the prescriptions of Part 3, Division 9 of the Zoning Ordinance. *See* Order of Remand De Novo, 9/23/2014, pp. 15–17.

On March 19, 2015, Planning Board held a hearing pursuant to our Order of Remand De Novo. *See* 3/19/2015, Tr. At the conclusion of the hearing, Planning Board voted to re-approve DSP-89063-07, subject to conditions and certain considerations. *See* 3/6/14, Tr. On April 2, 2015, Planning Board adopted an amended resolution that embodied its re-vote and re-approval of DSP-89063-07 from March 19, 2015. The resolution was sent to all persons of record and to the Clerk of the County Council. *See* PGCPB No. 14-16(A), Notification of Planning Board Action, 4/7/15.

On April 13, 2015, we elected to review Planning Board’s re-approval of DSP-89063-07 as embodied in its April 2, 2015, amended resolution. *See* PGCPB No. 14-16(A). Persons of record also filed appeals. *See* Appeal from Glenn Dale Citizens Association, Inc., 5/7/15, and Appeal from Jennifer Dwyer, *et al.*, 5/7/15. A hearing was held on June 22, 2015. At the conclusion of the hearing, we took this matter under advisement. *See* 6/22/15, Tr.

FINDINGS AND CONCLUSIONS

A. Detailed Site Plan Process

Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27 of the Prince George’s County Code governs the requirements for a Detailed Site Plan. Accordingly, Planning Board “shall review the Detailed Site Plan for compliance with Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27 of the Prince George’s County Code. *See* PGCC § 27-285(a)(2). Among other things, before Planning Board or the District Council may approve a Detailed Site Plan, the Plan is required to demonstrate that its design “represents a reasonable alternative for satisfying the **site design guidelines**, without requiring unreasonable costs and without distracting substantially from the utility of the proposed

development for its intended use.” See PGCC §27-285(b)(1). It is a method of moderating design guidelines so as to allow for greater variety of development, while still achieving the goals of the guidelines. See *Zimmer Dev. Co.*, 2015 Md. LEXIS 565, *109 (Md. Aug. 20, 2015) (Emphasis added). A Detailed Site Plan shall³ be designed in accordance with the same guidelines as required for a Conceptual Site Plan set forth in PGCC § 27-274. See Statement of Justification, 2/4/14, pp. 4–13.

I. DSP-89063-05 and DSP-89063-07

There is no provision in Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27 of the County Code that allows for a *revision* of an *expired* Detailed Site Plan. Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27 of the County Code allows for the *resubmittal* and *re-approval* of an *expired* Detailed Site Plan and an *amendment* of a Detailed Site Plan. (Emphasis added). A Detailed Site Plan submitted under either process requires Planning Board to review and approve the application in accordance with the provisions of Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27, of the County Code. See PGCC §§ 27-287 (an expired plan which is resubmitted must be re-approved in accordance with the provisions of this Division), 27-289 (All requirements for filing and review of an original Detailed Site Plan shall apply to an amendment. The Planning Board shall follow the same procedures and make the same findings), respectively.

As a matter of law, an approved Detailed Site Plan, absent certain exceptions, none applicable here, is valid for three (3) years and upon expiration, shall have no effect, unless the

³ The words “shall,” “must,” “may only” or “may not” are always mandatory and not discretionary. The word “may” is permissive. See § PGCC § 27-108.01(19). Maryland cases consistently interpret ‘may’ as permissive; by contrast, ‘shall’, is consistently interpreted as mandatory under Maryland case law. See *Board of Physician Quality v. Mullan*, 381 Md. 157, 166, 848 A.2d 642, 648 (2004); *State v. Green*, 367 Md. 61, 82, 785 A.2d 1275, 1287 (2001); *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990).

Plan is resubmitted and re-approved in accordance with the provisions of Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27, of the County Code. *See* PGCC § 27-287 (Emphasis added). In 2003, Applicant Educational Systems Employees filed DSP-89063-05 to construct an Educational Systems Federal Credit Union, which after approval was never constructed, and subsequently expired. *See* PGCPB No. 14-16(A). Seven (7) years after the expiration of the Plan to construct the Credit Union, Walmart filed an application in 2013 for a *Detailed Site Plan to expand the existing 56,238 square foot former grocery store by 21,678, for a total of 77,916 square feet*. Walmart’s Detailed Site Plan application was not a resubmittal for re-approval of the expired *12,519 square foot Credit Union Plan*. *See* Application Form, 4/5/13, PGCPB No. 14-16, PGCPB No. 14-16(A), Statement of Justification, 2/4/14, p. 3. (Emphasis added). Our interpretation of the Plan in PGCC § 27-287 means the *expired* Plan, not an *entirely new* Plan because a new Plan could not have been previously submitted and thus it could not be the subject of a re-approval. *See Lussier v. Md. Racing Comm’n*, 343 Md. 681, 696–97, 684 A.2d 804 (1996) (An agency’s interpretation of the statute that it administers will be given considerable weight). Likewise, with respect to an amendment of a Detailed Site Plan, Subtitle 27 of the County Code provides that “All requirements for the filing and review of an original Detailed Site Plan shall apply to an amendment. The Planning Board shall follow the same procedures and make the same findings.” *See* PGCC § 27-289.

When Planning Board heard Walmart’s Detailed Site Plan, it only reviewed the Plan for compliance with certain conditions of Preliminary Plans of Subdivision from 1987 and 2003. *See* PGCPB No. 14-16, PGCPB No. 14-16(A). Yet, Planning Board inexplicably—without making required findings and conclusions necessary to determine whether Walmart’s Plan was designed in accordance with the eleven (11) evaluation criteria of the site design guidelines set forth in

PGCC § 27-274—concluded that Walmart’s Detailed Site Plan represents a reasonable alternative for satisfying the **site design guidelines** of Subtitle 27, Part 3, Division 9 of the Prince George’s County Code. *See* PGCPB No. 14-16 (Emphasis added).⁴ Planning Board’s action to approve Walmart’s Detailed Site Plan as a *revision* to an expired Plan was predicated on an error of law because when it heard Walmart’s Detailed Site Plan application it was required to apply the law as it was set forth in Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27 of the County Code, which included but was not limited to making required findings and conclusions necessary to determine whether Walmart’s Plan was designed in accordance with the eleven (11) evaluation criteria of the site design guidelines set forth in PGCC § 27-274. *See* PGCC §§ 27-274, 27-281, 27-283, 27-285, PGCPB No. 14-16.⁵

On remand *de novo*, Planning Board was ordered, in part, to direct Technical Staff to prepare Walmart’s application over again as if it were a new one in accordance with Part 3, Division 9 of Subtitle 27 of the County Code. On remand *de novo*, Planning Board was also ordered to process Walmart’s application as a new application in accordance with the prescriptions of Part 3, Division 9 of Subtitle 27 of the County Code. *See* Order of Remand De Novo, 9/23/2014.

⁴ *See* PGCC § 27-285(a)(5) (When it approves a Detailed Site Plan, Planning Board shall state its reasons for the action). *See also* *Harford County v. Preston*, 322 Md. 493, 505, 588 A.2d 772, 778 (1991) (The requirement of findings of fact “is in recognition of the fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision and to permit meaningful judicial review of those findings”); *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 221, 630 A.2d 753, 764 (1993) (“Without findings of fact on all material issues, . . . a reviewing court cannot properly perform its function.”).

⁵ *See* *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503, 823 A.2d 626, 650 (2003) (An agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded. This rule is consistent with Maryland’s body of administrative law, which generally holds that an agency should not violate its own rules and regulations).

Planning Board declined to comply with our Order of Remand De Novo. Relying on a memorandum from its legal department, Planning Board found that 1) it could not direct Technical Staff to prepare a new application because staff does not prepare applications on behalf of applicants, and 2) in accordance with PGCC § 27-282(a), only the property owner or his authorized representative may prepare and submit a Detailed Site Plan application, which staff would then review in the normal course. *See* PGCPB No. 14-16(A), p. 22. Planning Board's findings were legally incorrect. Our Order of Remand De Novo did not direct Technical Staff to prepare an application in accordance with PGCC § 27-282(a). *See* Order of Remand De Novo, 9/23/2014, p. 15. In Subtitle 27 of the County Code, we define Remand De Novo as "A remand of a "Zoning Case" back to the Planning Board for the purpose of processing the application over again as if it were a new one." *See* PGCC § 27-107.01(198). In our Order of Remand De Novo, we expressly stated that "However, nothing in this Order of Remand De Novo shall require the Applicant to submit a new application for the proposed development." Consistent with our Code's definition of a Remand De Novo, we lawfully ordered Planning Board to direct its Technical Staff to prepare the application over again as if it were a new one; and as such, we lawfully ordered Planning Board to consider and incorporate all findings and conclusions set forth in our Order of Remand De Novo, to conduct all necessary referrals, and to issue all specified reports set forth in Part 3, Division 9 of Subtitle 27 of the County Code. *See* Order of Remand De Novo, 9/23/2014, p. 15.

In 2013, Walmart filed a new application for a *Detailed Site Plan to expand the existing 56,238 square foot former grocery store by 21,678, for a total of 77,916 square feet*. Walmart's Detailed Site Plan application was not a resubmittal for re-approval of the expired *12,519 square*

foot Credit Union Plan nor was Walmart's application an amendment of a Detailed Site Plan.⁶ See Application Form, 4/5/13, p. 1, PGCPB No. 14-16, PGCPB No. 14-16(A), Statement of Justification, 2/4/14, p. 3. (Emphasis added). Almost a year later, Walmart expressly acknowledged that approval of its Detailed Site Plan—to construct a 77,916 square foot Walmart in the Duvall Village Shopping Center—was subject to eleven (11) legally required evaluation criteria of the site design guidelines set forth in PGCC § 27-274. See Statement of Justification, 2/4/14, pp. 4–13. In *Powell v. Calvert Co.*, 368 Md. 400, 795 A.2d 96 (2002), the Court of Appeals of Maryland held that in the absence of a vested right, a board must apply the law in effect at the time the case is heard. As a matter of law, Planning Board was required when it heard Walmart's Detailed Site Plan application to apply the law as it was set forth in Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27 of the County Code, which included required findings and conclusions necessary to determine whether Walmart's Plan was designed in accordance with the eleven (11) evaluation criteria of the site design guidelines set forth in PGCC § 27-274. Based on the record before us,⁷ Planning Board failed to do so. See PGCC §§ 27-274, 27-281, 27-283, 27-285, PGCPB No. 14-16, PGCPB No. 14-16(A).

By statute, the District Council is expressly authorized to review a final decision of the Planning Board to approve or disapprove a Detailed Site Plan and the District Council's review results in a final decision. See LU § 25-210, PGCC § 27-290. See also *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 2015 Md. LEXIS 565, *109 (Md. Aug. 20, 2015). Because

⁶ Even if we construed Walmart's application as a resubmittal for re-approval of the expired Credit Union Plan or an amendment of another Plan, we would reach the same legal conclusion because Planning Board was required, as a matter of law, to follow the same procedures and make the same findings of an original Detailed Site Plan. See PGCC §§ 27-287, 27-289.

⁷ 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. See PGCC § 27-141.

Planning Board failed to apply the law as set forth in Part 3, Division 9 (Subdivisions 1–3) of Subtitle 27 of the County Code, we reverse the action of the Planning Board because its decision to approve Walmart’s Detailed Site Plan was predicated on an error of law, arbitrary and capricious, and not supported by substantial evidence.

II. Compatibility with Comprehensive Land Use Plans

On May 6, 2014, by adoption of County Resolution 26-2014, we approved *Plan Prince George’s 2035*, a comprehensive update to the general plan for that portion of the Maryland-Washington District within Prince George’s County, pursuant to the provisions of Md. Code Ann., Land Use, §§ 21-103(a, b), 21-104 (2012 & Supp. 2014). As a result, *Plan Prince George’s 2035* superseded the previous approval as to the 2002 *Prince George’s County General Plan*.

In June 2014, at the time we reviewed Walmart’s Detailed Site Plan, *Plan Prince George’s 2035* was the law. We remanded the application to Planning Board for further review because Planning Board creates the record and holds the evidentiary hearing. On remand *de novo*, we ordered as follows:

- On remand, the Planning Board shall review the project application based on a new administrative record, incorporating the findings and conclusions of the updated County policies embodied in the 2014 *Plan Prince George’s 2035 General Plan Amendment*, including analysis as to pertinent changes in growth policies, transportation priorities, the elimination of tier designations previously designated under the 2002 *Prince George’s County General Plan*, and other pertinent policy changes affecting development in the area of the subject proposal.
- On remand, the Planning Board shall review all applicable master plans and area master plans for the area that includes the site proposed for this project. To this end, Planning Board is instructed to create a new administrative record incorporating specific analysis as to the recommendations within all applicable master plans. The District Council also instructs the Planning Board to conduct a new public hearing where County staff, the Applicant, and all Persons of Record will be permitted to present evidence regarding compatibility with applicable master plan recommendations, and to present evidence regarding

whether the proposed retail use will create economic benefits for the County and surrounding communities.

See Order of Remand De Novo, 9/23/2014, p. 16. Planning Board declined to comply with the directives of our Order of Remand De Novo. Relying on a memorandum from its Legal Department, Planning Board found that 1) there is no requirement of master plan conformance before approval of a Detailed Site Plan, 2) there is no requirement or standard to determine economic benefit of a Detailed Site Plan, and 3) the retail use is permitted by right in the zone. PGCPB No. 14-16(A), p. 23. We disagree.^{8,9} When statutory provisions are entirely clear, with no ambiguity whatsoever, administrative constructions, no matter how well entrenched, are not given weight. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 381 (1999) (quoting *Macke Co. v. Comptroller*, 302 Md. 18, 22-23, 485 A.2d 254, 257 (1984)).

The general purposes of Detailed Site Plans are:

- (A) To provide for development in accordance with the principles for the orderly, planned, efficient and economical development contained in the General Plan, Master Plan, or other approved plan;
- (B) To help fulfill the purposes of the zone in which the land is located;
- (C) To provide for development in accordance with the site design guidelines established in this Division; and
- (D) To provide approval procedures that are easy to understand and consistent for all types of Detailed Site Plans.

⁸ We find it paradoxical that Planning Board, relying on a memorandum from its legal department, would find, as a basis not to comply with our Order of Remand De Novo, that there is no requirement of master plan conformance or economic benefit at the time of a Detailed Site Plan approval, when its Technical Staff devoted over two (2) pages of its findings and conclusions on Walmart's Detailed Site Plan master plan conformance and substantial economic benefit, which Planning Board duly adopted as a basis to approve Walmart's Detailed Site Plan. See PGCPB No. 14-16(A), pp. 11-14.

⁹ A use permitted by right in a zone does not warrant automatic approval of a zoning application. See *Coffey v. Maryland-National Capital Park and Planning Commission*, 293 Md. 24, 441 A.2d 1041(1982) (If planning boards had no alternative but to rubber-stamp every subdivision plat which conformed with the zoning ordinance, there would be little or no reason for their existence. An applicant must also comply with state and other county regulations).

See PGCC § 27-281(b)(1). (Emphasis added). These are planning considerations. *See Zimmer Dev. Co.*, 2015 Md. LEXIS 565, *109 (Md. Aug. 20, 2015). The Duvall Shopping Center is located in the General Commercial, Existing (C-G) Zone. *See* PGCPB No. 14-16(A), p.1. The purposes of the C-G Zone are the same as the purposes of the Commercial Shopping Center (C-S-C) Zone, which, in relevant part, are to provide locations for predominantly retail commercial shopping facilities; to provide locations for compatible institutional, recreational, and service uses; to exclude uses incompatible with general retail shopping centers and institutions. *See* PGCC §§ 27-457, 27-454. For Commercial Zones, other general purpose provisions are

- (1) To implement the general purposes of this Subtitle;
- (2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;
- (3) To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;
- (4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;
- (5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;
- (6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;
- (7) To increase the stability of commercial areas;
- (8) To protect the character of desirable development in each area;
- (9) To conserve the aggregate value of land and improvements in the County; and
- (10) To enhance the economic base of the County.

See PGCC § 27-446 (Emphasis added).

It is clear from the statutory provisions above that planning considerations include, but are not limited to, determining plan conformance and economic benefit of the proposed Detailed Site Plan. *See* PGCC §§ 27-281, 27-457, 27-454, and 27-446. Statutes dealing with the same subject matter should, when possible, be read together and harmonized. *Scott v. State*, 297 Md. 235,

245–46, 465 A.2d 1126 (1983); *Commission on Medical Discipline v. Bendler*, 280 Md. 326, 330, 373 A.2d 1232 (1977); *Dept. of Natural Resources v. France*, 277 Md. 432, 461–62, 357 A.2d 78 (1976). In this pursuit, results that are unreasonable, illogical or inconsistent with common sense should be avoided and an interpretation should be given which will not lead to absurd or anomalous results. *Comptroller v. John C. Louis Co.*, 285 Md. 527, 538–39, 404 A.2d 1045 (1979). On remand *de novo*, Planning Board was required, as a matter of law, to review Walmart’s Detailed Site Plan application in light of *Plan Prince George’s* 2035 because it *superseded* the 2002 *Prince George’s County General Plan*. See *Powell*, 368 Md. 400, 795 A.2d 96 (2002) (In the absence of a vested right, a board must apply the law in effect at the time the case is heard). As such, Planning Board was also required, as a matter of law, to make findings and conclusions based on certain statutory provisions within Subtitle 27 of the County Code. Planning Board failed to do so. See PGCPB No. 14-16(A), pp. 11–14, 23.

We reverse the action of Planning Board because its decision was predicated on an error of law, arbitrary and capricious and not supported by substantial evidence.

B. Traffic

According to our County Code, before *any preliminary plan may be approved*, the Planning Board shall find that there will be adequate access roads available to serve traffic which would be generated by the *proposed subdivision*. See PGCC § 24-124. (Emphasis added). Our Code defines a preliminary plan (or plan) of subdivision as the preliminary detailed drawing (to scale) of a tract of land, depicting its proposed division into “Lots,” “Blocks,” “Streets,” “Alleys,” or other designated areas within a proposed “Subdivision.” And a subdivision is defined as the division by plat or deed of a piece of property into two (2) or more “Lots,” plots, sites, tracts, parcels, or other land divisions. See PGCC § 27-101.01(184)(229), respectively. Section 24-124 does not prohibit,

after approval of a proposed preliminary plan, a separate finding of adequate access roads available to serve traffic which would be generated by the type of uses of a *proposed Detailed Site Plan after a proposed subdivision approval*. Because transportation adequacy was assessed in 1987 for a *proposed subdivision*, as opposed to the uses of a *proposed Detailed Site Plan* to construct a Walmart within an Integrated Shopping Center in 2014, we remanded the application to Planning Board for further consideration concerning traffic.

On remand *de novo*, we ordered Planning Board to assess transportation adequacy in accordance with Walmart's proposed Detailed Site Plan as follows:

- On remand, Planning Board shall process this matter anew in accordance with the prescriptions of Part 3, Division 9 of the Zoning Ordinance. In conducting de novo proceedings, the District Council instructs the Planning Board to evaluate the adequacy of transportation facilities, including relevant roads and intersections in the vicinity of the property that is the subject of this application, and to make specific findings and determinations as to the adequacy of those transportation facilities. In so doing, Planning Board is additionally instructed to conduct a new public hearing where County staff, the Applicant, and all Persons of Record will be permitted to present evidence regarding adequacy of transportation facilities, including relevant roads and intersections in the vicinity of the subject application.
- On remand, the Planning Board shall review the project application based on a new administrative record, incorporating the findings and conclusions in the updated County policies embodied in the 2014 *Plan Prince George's 2035 General Plan Amendment*, including analysis as to pertinent changes in growth policies, transportation priorities, the elimination of tier designations previously designated under the 2002 Prince George's County General Plan, and other pertinent policy changes affecting development in the area of the subject proposal.

See Order of Remand De Novo, 9/23/2014, pp. 15–16. (Emphasis added). In response to our Order of Remand De Novo, Planning Board found that evidence on the adequacy of transportation facilities was not relevant for the hearing on Walmart's Detailed Site Plan and confined its

determination on transportation adequacy findings made as part of a preliminary plan approval in 1987. We disagree. The general purposes of Detailed Site Plans are:

- (A) To provide for development in accordance with the principles for the orderly, planned, efficient and economical development contained in the General Plan, Master Plan, or other approved plan;
- (B) To help fulfill the purposes of the zone in which the land is located;
- (C) To provide for development in accordance with the site design guidelines established in this Division; and
- (D) To provide approval procedures that are easy to understand and consistent for all types of Detailed Site Plans.

See PGCC § 27-281(b)(1). (Emphasis added). These are planning considerations to be made by Planning Board. See *Zimmer Dev. Co.*, 2015 Md. LEXIS 565, *109 (Md. Aug. 20, 2015). The Duval Shopping Center is located in the General Commercial, Exiting (C-G) Zone. See PGCPB No. 14-16(A), p.1. The purposes of the G-G Zone are the same as the purposes of the Commercial Shopping Center (C-S-C) Zone, which, in relevant part, are to provide locations for predominantly retail commercial shopping facilities; to provide locations for compatible institutional, recreational, and service uses; to exclude uses incompatible with general retail shopping centers and institutions. See PGCC §§ 27-457, 27-454. For Commercial Zones, other general purpose provisions are:

- (1) To implement the general purposes of this Subtitle;
- (2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;
- (3) To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;
- (4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;
- (5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;
- (6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;

- (7) To increase the stability of commercial areas;
- (8) To protect the character of desirable development in each area;
- (9) To conserve the aggregate value of land and improvements in the County; and
- (10) To enhance the economic base of the County.

See PGCC § 27-446 (Emphasis added). Site design guidelines required for a proposed Detailed Site Plan include, but are not limited to:

Parking, loading, and circulation.

(A) Surface parking lots should be located and designed to provide safe and efficient vehicular and pedestrian circulation within the site, while minimizing the visual impact of cars. Parking spaces should be located to provide convenient access to major destination points on the site. As a means of achieving these objectives, the following guidelines should be observed:

- (i) Parking lots should generally be provided to the rear or sides of structures;
- (ii) Parking spaces should be located as near as possible to the uses they serve;
- (iii) Parking aisles should be oriented to minimize the number of parking lanes crossed by pedestrians;
- (iv) Large, uninterrupted expanses of pavement should be avoided or substantially mitigated by the location of green space and plant materials within the parking lot, in accordance with the Landscape Manual, particularly in parking areas serving townhouses; and
- (v) Special areas for van pool, car pool, and visitor parking should be located with convenient pedestrian access to buildings.

(B) Loading areas should be visually unobtrusive and located to minimize conflicts with vehicles or pedestrians. To fulfill this goal, the following guidelines should be observed:

- (i) Loading docks should be oriented toward service roads and away from major streets or public view; and
- (ii) Loading areas should be clearly marked and should be separated from parking areas to the extent possible.

(C) Vehicular and pedestrian circulation on a site should be safe, efficient, and convenient for both pedestrians and drivers. To fulfill this goal, the following guidelines should be observed:

- (i) The location, number and design of driveway entrances to the site should minimize conflict with off-site traffic, should provide a safe transition into the parking lot, and should provide adequate acceleration and deceleration lanes, if necessary;
- (ii) Entrance drives should provide adequate space for queuing;

- (iii) Circulation patterns should be designed so that vehicular traffic may flow freely through the parking lot without encouraging higher speeds than can be safely accommodated;
- (iv) Parking areas should be designed to discourage their use as through-access drives;
- (v) Internal signs such as directional arrows, lane markings, and other roadway commands should be used to facilitate safe driving through the parking lot;
- (vi) Drive-through establishments should be designed with adequate space for queuing lanes that do not conflict with circulation traffic patterns or pedestrian access;
- (vii) Parcel pick-up areas should be coordinated with other on-site traffic flows;
- (viii) Pedestrian access should be provided into the site and through parking lots to the major destinations on the site;
- (ix) Pedestrian and vehicular circulation routes should generally be separated and clearly marked;
- (x) Crosswalks for pedestrians that span vehicular lanes should be identified by the use of signs, stripes on the pavement, change of paving material, or similar techniques; and
- (xi) Barrier-free pathways to accommodate the handicapped should be provided.

See PGCC 27-274(a)(2). Our Code also requires that a Detailed Site Plan application shall include: street names, right-of-way and pavement widths of existing streets and interchanges within and adjacent to the site; existing rights-of-way and easements (such as railroad, utility, water, sewer, access, and storm drainage); proposed system of internal streets including right-of-way widths; any other pertinent information. *See* PGCC § 27-282 (e)(6)(7)(12)(21). It is clear from the statutory provisions above that planning considerations required to be made by Planning Board when it reviews a Detailed Site Plan for approval include, but are not limited to, findings of transportation adequacy. When statutory provisions are entirely clear, with no ambiguity whatsoever, administrative constructions, no matter how well entrenched, are not given weight. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 381 (1999) (*quoting Macke Co. v. Comptroller*, 302 Md. 18, 22-23, 485 A.2d 254, 257 (1984)).

Section 24-111 of the County Code did not prohibit Planning Board in 2014 from making a finding of transportation adequacy for the proposed Walmart within an Integrated Shopping Center because the evidence of transportation adequacy from 1987 was destroyed. Planning Board's subsequent reliance on the 1987 traffic study is based on speculation and the document itself, even if it existed, is outdated. Section 24-111 of the County Code states, with certain exceptions, a Preliminary Plan dated prior to October 27, 1970, does not authorize the issuance of a building permit. The Planning Board erred when it interpreted PGCC § 24-111 to mean that any Preliminary Plan approved after October 27, 1970 is automatically entitled to a Detailed Site Plan without any consideration of, for example, the adequacy of the roads. Section 24-111 is silent with respect to a Preliminary Plan that was approved subsequent to October 27, 1970. Section 24-111 of our Code does not authorize Planning Board to ignore or bypass required findings and conclusions of transportation adequacy concerning a Detailed Site Plan set forth in Part 3, Division 9 (Subdivision 1–3) of Subtitle 27 of the Prince George's County Code.

Upon review of the record before us, we find evidence that disputes calculations used to find there will be less traffic resulting from this project than in 1987, specifically: (1) that erroneous failure to consider revisions to the standardized methodology for calculating the floor area approval to distinguish between commercial and office space; and (2) through erroneous inclusion of the bank pad in the calculations transport the bank pad site in the total square footage calculations between the calculations for traffic, and the apportionment of square footage calculations applicable in 1987, and the standard calculations used for calculation of square footage used in 2014. *See* 03/06/14 Tr., at 32-34. We disagree with Planning Board's conclusion that it has no jurisdiction over transportation adequacy, despite the compelling evidence in the record to dispute the adequacy of the road system, because: (1) we find the record clearly shows

fundamental changes in development patterns and traffic in this portion of Prince George's County since 1987; (2) the 1987 traffic study has been destroyed and is no longer part of the Preliminary Plan file, thwarting meaningful consultation or evaluation as to traffic; and (3) the current development proposal differs substantially from that approved in 1987. *See* 03/06/14 Tr., at 32-34.

We reverse the action of Planning Board because its decision to approve Walmart's Detailed Site Plan, without findings and conclusions of transportation adequacy, was predicated on errors of law, arbitrary and capricious, and not supported by substantial evidence. *See K.W. James Rochow, et al. v. Maryland-National Capital Park and Planning Commission, et al.*, 115 Md. App. 558, 827 A.2d 927 (2003) (even if the Council were to be satisfied that there are adequate traffic facilities for a plan, it may decide not to approve it if elected officials wished to consider constituent concerns that the proposed plan will generate more traffic), *Tauber v. County Bd. of Appeals for Montgomery County*, 257 Md. 202, 262 A.2d 513 (1970) (the testimony of an expert traffic witness for the applicant was sufficiently countered by substantial evidence of lay witness who lived in the neighborhood as to existing congestion and hazards to affirm the Board's denial on this basis).

C. Stormwater Management

Prior to our remand of this application to Planning Board, persons of record raised the issue of Walmart's stormwater management plan. We were persuaded by appellant's concerns. On remand *de novo*, we directed Planning Board as follows:

- On remand, the Planning Board should thoroughly address grading and storm water management on the subject property. While the record indicates that there is an approved Storm Water Management Concept Plan for the site, expert witness testimony produced at the Planning Board hearing reveals significant factual dispute regarding that plan's capacity to accommodate storm water under in its current state of development. Further, neither the record nor Planning Board resolution indicate whether the current Concept Plan assess changes in storm water runoff resulting from the additional development and impact on adjoining properties. As a result, on remand the Planning Board should evaluate whether the Applicant's current storm water plan satisfied all regulatory requirements for approval of storm water management concept plans. The District Council also instructs the Planning Board to conduct a new public hearing where County staff, the Applicant, and all Persons of Record will be permitted to present evidence regarding whether the Applicant's storm water plan satisfied all regulatory requirements.

See Order of Remand De Novo, 9/23/2014, pp. 16–17.

Our remand was based on evidence in the administrative record supplied by expert testimony during the Planning Board public hearing as to the site plan application. Specifically, Robert E. Bathurst, P.E., of Century Engineering, storm water engineer was qualified as an expert witness at the hearing and offered insight as to the approved Storm Water Management Concept Plan and its viability after completion of the proposed additional development on the site. *See* Tr., 03/06/14, at 51-66. The expert opined that the Walmart's storm water plan does not meet the minimum storm water standards because it incorrectly treats existing pervious surfaces as impervious surfaces. If Walmart properly treated the pervious areas as pervious areas, the applicable storm water regulations would require Walmart to *reduce* the size of the building or parking lot and to provide additional storm water management. *See* Tr., 03/06/15, at 58, 59-60. In particular, Mr. Bathurst's testimony highlights specific inconsistencies with the State approved storm water concept plan for the site, namely the lack of evidence as to a downstream study in the certification of the current concept plan; the strong discrepancy shown on the concept plan of impervious surface and the State law, resulting in marginal storm water management *before* the

addition of new impervious surfaces on-site; and the obsolete design of the concept plan that lacks an attenuation device to hold back the peak. *See* Tr., 03/06/15, at 58, 59-61.

The general purposes of Detailed Site Plans are:

- (A) To provide for development in accordance with the principles for the orderly, planned, efficient and economical development contained in the General Plan, Master Plan, or other approved plan;
- (B) To help fulfill the purposes of the zone in which the land is located;
- (C) To provide for development in accordance with the site design guidelines established in this Division; and
- (D) To provide approval procedures that are easy to understand and consistent for all types of Detailed Site Plans.

See PGCC § 27-281(b)(1). (Emphasis added). These are planning considerations. *See Zimmer Dev. Co.*, 2015 Md. LEXIS 565, *109 (Md. Aug. 20, 2015).

The specific purposes of Detailed Site Plan are:

- (A) To show the specific location and delineation of buildings and structures, parking facilities, streets, green areas, and other physical features and land uses proposed for the site;
- (B) To show specific grading, planting, sediment control, woodland conservation areas, regulated environmental features and storm water management features proposed for the site;
- (C) To locate and describe the specific recreation facilities proposed, architectural form of buildings, and street furniture (such as lamps, signs, and benches) proposed for the site; and
- (D) To describe any maintenance agreements, covenants, or construction contract documents that are necessary to assure that the Plan is implemented in accordance with the requirements of this Subtitle.

See PGCC § 27-281(c)(1).

Site design guidelines required for a proposed Detailed Site Plan include, but are not limited to:

Parking, loading, and circulation.

(A) Surface parking lots should be located and designed to provide safe and efficient vehicular and pedestrian circulation within the site, while minimizing the visual impact of cars. Parking spaces should be located to provide convenient access to major destination points on the site. As a means of achieving these objectives, the following guidelines should be observed:

- (i) Parking lots should generally be provided to the rear or sides of structures;
- (ii) Parking spaces should be located as near as possible to the uses they serve;
- (iii) Parking aisles should be oriented to minimize the number of parking lanes crossed by pedestrians;
- (iv) Large, uninterrupted expanses of pavement should be avoided or substantially mitigated by the location of green space and plant materials within the parking lot, in accordance with the Landscape Manual, particularly in parking areas serving townhouses; and
- (v) Special areas for van pool, car pool, and visitor parking should be located with convenient pedestrian access to buildings.

(B) Loading areas should be visually unobtrusive and located to minimize conflicts with vehicles or pedestrians. To fulfill this goal, the following guidelines should be observed:

- (i) Loading docks should be oriented toward service roads and away from major streets or public view; and
- (ii) Loading areas should be clearly marked and should be separated from parking areas to the extent possible.

(C) Vehicular and pedestrian circulation on a site should be safe, efficient, and convenient for both pedestrians and drivers. To fulfill this goal, the following guidelines should be observed:

- (i) The location, number and design of driveway entrances to the site should minimize conflict with off-site traffic, should provide a safe transition into the parking lot, and should provide adequate acceleration and deceleration lanes, if necessary;
- (ii) Entrance drives should provide adequate space for queuing;
- (iii) Circulation patterns should be designed so that vehicular traffic may flow freely through the parking lot without encouraging higher speeds than can be safely accommodated;
- (iv) Parking areas should be designed to discourage their use as through-access drives;
- (v) Internal signs such as directional arrows, lane markings, and other roadway commands should be used to facilitate safe driving through the parking lot;
- (vi) Drive-through establishments should be designed with adequate space for queuing lanes that do not conflict with circulation traffic patterns or pedestrian access;

- (vii) Parcel pick-up areas should be coordinated with other on-site traffic flows;
- (viii) Pedestrian access should be provided into the site and through parking lots to the major destinations on the site;
- (ix) Pedestrian and vehicular circulation routes should generally be separated and clearly marked;
- (x) Crosswalks for pedestrians that span vehicular lanes should be identified by the use of signs, stripes on the pavement, change of paving material, or similar techniques; and
- (xi) Barrier-free pathways to accommodate the handicapped should be provided.

See PGCC 27-274(a)(2). Our Code also requires that a Detailed Site Plan application shall include: street names, right-of-way and pavement widths of existing streets and interchanges within and adjacent to the site; existing rights-of-way and easements (such as railroad, utility, water, sewer, access, and storm drainage); proposed system of internal streets including right-of-way widths; any other pertinent information. *See* PGCC § 27-282 (e)(6)(7)(12)(21). It is clear from the statutory provisions above that planning considerations required to be made by Planning Board when it reviews a Detailed Site Plan for approval include approval of stormwater management plans in order to make the required findings of whether the Plan satisfies the site design guidelines. When statutory provisions are entirely clear, with no ambiguity whatsoever, administrative constructions, no matter how well entrenched, are not given weight. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 381 (1999) (*quoting Macke Co. v. Comptroller*, 302 Md. 18, 22-23, 485 A.2d 254, 257 (1984)). We find that Walmart had the legal obligation to prove that its storm water plan satisfies all regulatory requirements before Planning Board may approve its Detailed Site Plan. After remand, the unrefuted expert testimony is that Walmart's storm water plan *does not meet the minimum storm water standards* because it incorrectly treats existing pervious surfaces as impervious surfaces. If Walmart properly treated the pervious areas as pervious areas, *the applicable storm water regulations would require Walmart to reduce the size*

of the building or parking lot and to provide additional storm water management. See Tr., 03/06/15, at 58, 59-60. (Emphasis added).

Because the issue of stormwater management is directly related to the site design guidelines required for approval of a Detailed Site Plan, such as the size of the building or parking lot (which was not assessed by Planning Board in the first place) Planning Board illegally approved Walmart's Detailed Site Plan. Planning Board further erred when it directed stormwater concerns, including expert testimony from Mr. Robert Bathurst, to the Department of Permitting, Inspections and Enforcement (DPIE), which are directly related to site design guidelines for approval of a Detailed Site Plan. *See* PGCPB No. 14-16(A), p. 30.

For the reasons set forth above, we reverse the action of Planning Board to approve Walmart's Detailed Site Plan because its decision was predicated on an error of law, arbitrary and capricious, and not supported by substantial evidence

ORDERED this 21st day of September, 2015, by the following vote:

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

Opposed:

Abstained:

Absent:

Vote: 9-0

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: _____
Mel Franklin, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council