

Case No: S.E. 4734 Mill Branch Crossing

Applicant: Wal-Mart Real Estate Business Trust

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

ZONING ORDINANCE NO. 12 - 2015

ORDER OF APPROVAL WITH CONDITIONS

IT IS HEREBY ORDERED, after review of the administrative record and disposition recommendation of the Zoning Hearing Examiner as to Special Exception Application 4734, that permission to construct a Department or Variety Store exceeding 125,000 square feet of gross floor area with a food and beverage component, on approximately 24.90 acres of land in the C-S-C (Commercial Shopping Center) Zone, located on the east side of Robert Crain Highway (US 301) south of Laurel Bowie Road (MD 197) to Mill Branch Road, within the City of Bowie, also identified as parts of Parcels 27, 28, 52, 59 and 71, Tax Map 55, Grid E-4, Planning Area 71B, in the Developing Tier of the County, be and the same is hereby APPROVED subject to conditions, pursuant to the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of Prince George's County Code, §§ 27-127, 27-131–27-132, 27-140–27-142, 27-317, 27-318, and

the Regional District Act within the Land Use Article, Annotated Code of Maryland (2012 & Supp. 2014).^{1, 2}

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

The Applicant seeks our permission to develop, across the street from its existing location, a larger and improved business model of its existing retail establishment to satisfy the demands of the existing neighborhood and customer base. For the reasons that follow, we shall conditionally approve the application.

- The Subject Proposal

This matter involves a request to construct a 186,933 square-foot Department or Variety Store combined with Food and Beverage Store (“Wal-Mart Super Center”) on a 24.9-acre portion of land within a larger, 74-acre tract in the C-S-C Zone, generally known as “Mill Branch Crossing.” See 01/21/2015 ZHE Dec’n, at 18; Ex. 33. As described in the Applicant's justification statement, the proposed use combines three (3) major uses within one building: a grocery store, a general merchandise store, and a garden center. The subject application also includes a proposal for multiple small retail tenants housed within the Wal-Mart store. See 01/21/2015 ZHE Dec’n, at 18; Ex. 33.

¹ The Zoning Ordinance of Prince George’s County, Maryland, being also Subtitle 27 of the Prince George’s County Code, §§ 27-101 (2011 Ed. & Supp. 2014) *et seq.*, are styled “the Zoning Ordinance” and cited “§ 27- ___, PGCZO” herein. References to the Regional District Act within Md. Code Ann., Land Use (2012 & Supp. 2014) are styled the “Regional District Act” and cited “§ ___, Land Use Article” herein. References to the Zoning Hearing Examiner are styled “ZHE” herein. References to the Development Review Division of the Maryland-National Capital Park and Planning Commission are styled “Technical Staff” herein. References to Applicant, Wal-Mart Real Estate Business Trust, are styled “Applicant” herein. References to the opposition are styled “Citizens Opposition” herein. Citations to exhibits within the administrative record created before the ZHE, as listed on the ZHE Document Sheet, are styled “Ex. ___” herein.

² The provisions of the Zoning Ordinance and RDA cited herein are not exclusive designations as to the scope of authorities available to the District Council in reaching its final decision to approve S.E. 4734, subject to conditions.

³ See *Templeton v. County Council of Prince George’s County*, 23 Md. App. 596, 598; 329 A.2d 428 (1974) (holding that, phone adjustment of making findings of fact and recommendations to a Zoning Hearing Examiner, Council may comply with the requirement of “specific written findings of basic facts and conclusions of law” by adopting Examiner’s findings and conclusions) (internal citations omitted).

Direct access to the development site is proposed from Robert Crain Highway (US 301), and via a four-lane, private driveway from Mill Branch Road. 01/21/2015 ZHE Dec'n, at 31. As proposed, a 748-space parking lot fronts the proposed building. *Id.* The southern and eastern sides of the proposed structure, and a future regional park, are the proposed location of an automotive center and the loading docks/recycling/organic waste/wood pallet storage area, respectively. 01/21/2015 ZHE Dec'n, at 18; Ex. 28a.

- Procedural History⁴

On or about July 10, 2013, the Development Review Division within the Planning Department of the Maryland-National Capital Park and Planning Commission accepted special exception application S.E. 4734, with its later companion Type II tree conservation plan TCPIL-016-08, filed by Applicant, for review. Ex. 33.

On November 26, 2014, the Technical Staff issued a report and assessment as to S.E. 4734 and recommended disapproval of the proposed development, pursuant to § 27-311 of the Zoning Ordinance. *See* Ex. 33. On December 12, 2014, the Prince George's County Planning Board reviewed the subject application, but Planning Board did not schedule S.E. 4734 for a public hearing. Instead, Planning Board forwarded its direct transmittal of the subject development to the District Council/Zoning Hearing Examiner. *See generally* 12/13/2013 Ltr, Hirsch to Epps-Webb; Exhibit 36, 37.

⁴ *See* § 27-141, PGCZO ("The 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 also* R. 6, "Oral Argument and Evidentiary Hearings," D. Council R. of Proc. (1996):

"Rule 6: Oral Argument and Evidentiary Hearings:

(f) The District Council may 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."

Upon receipt of the transmittal of the subject application by Planning Board and, in accordance with Subdivision 2, Part 3 of the Zoning Ordinance, the ZHE conducted evidentiary hearings concerning S.E. 4734 on February 26, 27, and March 27, 2014, respectively. *See generally* 02/26/2014 Tr.; 02/27/2014 Tr.; 03/27/2014, Tr.⁵ At the conclusion of the evidentiary hearing, the ZHE kept the record open for additional documents, after which the administrative record closed on May 2, 2014, with 136 exhibits. *Id.*

On January 21, 2015, the ZHE issued a disposition recommendation of DISAPPROVAL as to S.E. 4734, *i.e.*, denial of the special exception and related application for a tree conservation plan, and transmitted this decision to the Clerk of the District Council with notice to the Applicant and all persons of record. *See* 01/21/2015 ZHE Dec'n, at 1.

The Clerk of the District Council then mailed notice of the scheduled oral argument to all persons of record as required by § 27-125.04 of the Zoning Ordinance, and stating that the District Council would conduct oral argument as to S.E. 4734 on April 13, 2015.

Soon thereafter, counsel for Applicant filed exceptions to the ZHE disposition recommendation with the Clerk of the District Council, and requested oral argument before the District Council. *See generally* 02/20/2015 Mem., Applicant. In response, the Citizens filed correspondence with the Clerk of the District Council on or about April 1 requesting postponement of the scheduled April 13, 2015, oral argument to ensure adequate time for production and review of potential responsive documents to two (2) pending public records requests filed pursuant to the Maryland Public Information Act ("MPIA") in Title 4 of the General Provisions Article, Annotated Code of Maryland. *See generally* Md. Code Ann., GP, §§ 4-101–4-601 (2014); *see also* 04/01/2015

⁵ The administrative record indicated a total of 115 persons of record. *See* 01/21/2015 ZHE Dec'n.

Mem., e, at 1–2; 03/13/2015 Ltr (MPIA), Nelson to Floyd; 03/18/2015 Ltr (MPIA), Nelson to Floyd.

On or about April 2, 2015, the Citizens filed a Motion to Disqualify Council Member Todd M. Turner from Participating in the District Council’s Review of S.E. 4734, along with memoranda in support of the motion. *See* 04/02/2015 Ltr, Nelson to Floyd and Mem., Citizens Opp’n. Thereafter, on or about April 6, 2015, the Citizens filed a memorandum with Proposed Findings of Fact and Conclusions of Law and Response to Applicant’s Exceptions, and stating general support of the ZHE’s disposition recommendation and recommendations Technical Staff Report. *See generally* 04/06/2015 Mem., Citizens Opposition.

At the April 13, 2015, rescheduled oral argument, the District Council granted the Citizens and Applicant time for comment regarding the procedural motions filed by the Citizens in this case, namely the Motion for Continuance and the Motion to Disqualify Council Member Todd M. Turner. *See* 04/13/2015 Tr., at 5. In support of its Motion, counsel for the Citizens Opposition stated that the additional time was needed for review and assessment of potentially responsive documents for (2) pending MPIA requests submitted to the County for various records of potential relevance for preliminary motions pending in the case. *See* 04/13/2015 Tr., at 8. After comments offered by the People’s Zoning Counsel and discussion by the members, the District Council voted to continue the oral argument until May 11, 2015, to afford additional time for Citizens Opposition to review any potentially responsive documents for two (2) pending MPIA requests believed to have bearing on its motion to disqualify. *See generally* 04/13/2015 Tr. The Clerk thereafter issued notice of the May 11, 2015, rescheduled oral argument date.

On May 11, 2015, upon calling the scheduled proceedings to order, the District Council heard comments from the parties as to the Citizens’ preliminary motion to disqualify Council

Member Todd M. Turner. *See* 05/11/2015 Tr., at 2–10. After a brief orientation by People’s Zoning Counsel as to the law of disqualification in Maryland, involving a member’s discretion concerning disqualification, a *voir dire* examination of Council Member Turner to determine whether there existed a financial bias, a financial bias, a personal bias, or a prejudgment bias sufficient to warrant disqualification based on actual an actual conflict of interest that would render his participation in the consideration and disposition of S.E. 4734. *See* 05/11/015 Tr., at 8–9. In responding to the questions posed by the People’s Zoning Counsel, Council Member Turner confirmed that neither he, nor his immediate family members, have any financial interest in the case; that he had not prejudged the subject application based on facts outside of the administrative record as to S.E. 4734. *Id.*, at 8–9. Finally, Council Member Turner reaffirmed that he had not prejudged the case, and the Council Member affirmed fitness to participate in the case in a fair, impartial, and objective manner without prejudging any of the arguments. *Id.* Based on these responses, the Council accepted the declaration and promptly began argument proceedings pursuant to its election to make the final decision as to S.E. 4734 in accordance with § 27-131 of the Zoning Ordinance and the Rules of Procedure. *See generally* 05/11/2015 Tr. At the conclusion of those proceedings, the District Council took this matter under advisement. *Id.*

Thereafter, on June 8, 2015, the District Council voted favorably to refer the subject application to staff for preparation of an Order of Approval with Conditions.

- Zoning Authority

The Prince George’s County Council, by way of express authority conferred by the Maryland General Assembly through the Regional District Act (“RDA”), sits as the District Council for that portion of the Maryland-Washington Regional District within Prince George’s County. *See* §§ 14-101(f), 22-101(b), Land Use Article. As such, the RDA designates the Prince George’s

County Council, sitting as the District Council, broad authority to regulate zoning and land use matters. *See* §§ 22-201(b), 22-202(a, b), 22-206, 22-208, 22-301(a)–(c), 22-310(a), 22-407(a), Land Use Article. In so doing, the legislature designates specific authority for the District Council to make factual determinations and to adjudicate certain factual disputes in reaching a final decision in zoning cases. In conveying this expansive zoning authority, the Maryland Legislature also ceded substantial legislative prerogative upon the district councils, which may by ordinance, adopt and amend the text of the zoning ordinance and may, by resolution or ordinance, adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, the size of lots, yards, courts and other open spaces. *See* § 22-104, Land Use Article. Accordingly, in exercising its authority to regulate land use and zoning in the County, the District Council enacted certain procedural prescriptions within the County Zoning Ordinance. *See Prince George's County v. Ray's Used Cars*, 398 Md. 632, 635–36, 922 A.2d 495, 497 (2007).

Further, and in direct conformance with the RDA, the district councils may also divide the portion of the regional district located within its county into districts and zones of any number, shape, or area it may determine. *See* § 22-201, Land Use Article. As such, the enactment of zoning laws affecting the districts and zones of its respective geographic designation, as well as the right to the construction, alteration, and uses of buildings and structures, and the uses of land, including surface, subsurface, and air rights falls within the exclusive province of the district councils. *Id.* In so doing, the RDA inures the district councils with regulatory controls to promulgate prescriptions governing the form and manner of uses and structures on land, and to dictate the form and order of procedures deemed appropriate as to zoning and land use controls for land within its purview. *See* §§ 22-202, 22-206, Land Use Article.

Finally, the District Council enjoys specific authority to regulate land use in the County in establishing specific local procedural requirements for special exceptions pursuant to §§ 22-206 and 22-301, of the RDA which provide, respectively:

§ 22-301. Special exceptions and variances.

(a) Authorized. --

(1) A district council may adopt zoning laws⁶ that authorize the board of appeals, the district council, or an administrative office or agency designated by the district council to grant special exceptions and variances to the zoning laws on conditions that are necessary to carry out the purposes of this division.

(2) Any zoning law adopted under this subsection shall contain appropriate standards and safeguards to ensure that any special exception or variance that is granted is consistent with the general purposes and intent of the zoning laws.

(b) Appeals. -- Subject to § 22-309 of this subtitle, an appeal from a decision of an administrative office or agency designated under this subtitle shall follow the procedure determined by the district council.

(c) Authorization to decide certain questions. -- The district council may authorize the board of appeals to interpret zoning maps or decide questions, such as the location of lot lines or district boundary lines, as the questions arise in the administration of zoning laws.

§ 22-206. Procedures.

(a) In general. -- **A district council may amend its zoning laws**, including any maps:

- (1) in accordance with procedures established in its zoning laws; and
- (2) after holding an advertised public hearing.

(b) **Permissible elements. -- The procedures and zoning laws may include:**

(1) procedures limiting the times when amendments may be adopted;

(2) provisions for hearings and preliminary determinations by an examiner, a board, or any other unit;

(3) procedures for quorums, number of votes required to enact amendments, and variations or increases based on factors such as master plans, recommendations of the hearing examiner, county planning board, municipal corporation, governed special taxing district, or other body, and

⁶ Pursuant to §14-101 of the RDA:

- (1) "Zoning law" means the legislative implementation of regulations for zoning by a local jurisdiction;
- (2) "Zoning law" includes a zoning ordinance, zoning regulation, zoning code, and any similar legislative action to implement zoning controls in a local jurisdiction.;

petitions of abutting property owners, and the evidentiary value that may be accorded to any of these factors; and

(4) procedures for hearings, notice, costs, fees, amendment of applications, recordings, reverter, lapse, and reconsideration de novo of undeveloped zoning amendments.

(c) Notice to nearby property owners -- Prince George's County. --

(1) In Prince George's County, the district council may provide for notice of the public hearing on a proposed amendment to its zoning plan or zoning laws to be given to the owners of properties, as they appear on the assessment rolls of the county, adjoining, across the road from, on the same block as, or in the general vicinity of the property that is the subject of the proposed amendment.

(2) A zoning law adopted under this subsection may require notice to be given by mail or by posting the notice on or in the vicinity of the property involved in the proposed amendment or both.

(d) Limitation. – In a year in which a district council is elected, the district council may not amend a zoning law from November 1 and until the newly elected district council has taken office.

§§ 22-301, 22-206, Land Use Article (*emphasis added*).

- Requirements for Special Exceptions

Accordingly, through adoption of a local law, the District Council established an Office of the Zoning Hearing Examiner and delegated specific duties, particularly to conduct hearings for special exception applications in accordance with Part 4 of the Zoning Ordinance,⁷ in keeping with the overarching purposes for its local zoning law, recited in §27-102 of the Zoning Ordinance guide an administrative agency's exercise of its police power in furtherance of the public safety, health, and welfare of the citizens and residents of the County:

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

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

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

(4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;

⁷ See §§ 22-301, 22-310, Land Use Article. See also Subdivisions 1–3, Part 3 Administration, PGCZO (setting forth authority for general zoning procedures for Zoning Hearing Examiner and the District Council).

- (5) To provide adequate light, air, and privacy;
- (6) To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;
- (7) To protect the County from fire, flood, panic, and other dangers;
- (8) To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;
- (9) To encourage economic development activities that provide desirable employment and a broad, protected tax base;
- (10) To prevent the overcrowding of land;
- (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;
- (12) To insure the social and economic stability of all parts of the County;
- (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;
- (14) To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and
- (15) To protect and conserve the agricultural industry and natural resources.

§ 27-102, PGCZO (*emphasis added*).

The County Zoning Ordinance also regulates special exceptions pursuant to its general zoning authority set forth in §§ 22-202 and 22-206 of the RDA, while its specific authority as to special exceptions is recited in §§ 22-301 and 22-310 of the RDA. *See generally* §§ 27-102, 27-311–27-316, 27-319, 27-324, PGCZO. Accordingly, § 27-317 of the Zoning Ordinance sets forth the specific elements of local zoning law relevant to the consideration of special exceptions, as follows:

A special exception may be approved, pursuant to § 27-317(a), if:

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

- (6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and
- (7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5).
- (b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:
 - (1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or
 - (2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

§ 27-317, PGCZO.

Department or Variety Stores, and Department or Variety Stores Combined with Food and Beverage Stores, are permitted by special exception in the C-S-C Zone and **shall** be subject to the following requirements:

- (a) Department or Variety Stores and Department or Variety Stores combined with Food and Beverage Stores permitted in the use tables by Special Exception (SE) in the I-3, C-S-C and C-M zones **shall** be subject to the following requirements:
 - (1) **The site shall have frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets.**
 - (2) The applicant shall demonstrate that local streets surrounding the site are adequate to accommodate the anticipated increase in traffic.
 - (3) The site shall contain pedestrian walkways within the parking lot to promote safety.
 - (4) The design of the parking and loading facilities shall ensure that commercial and customer traffic will be sufficiently separated and shall provide a separate customer loading area at the front of the store.
 - (5) All buildings, structures, off-street parking compounds, and loading areas shall be located at least:
 - (A) One hundred (100) feet from any adjoining land in a Residential Zone, or land proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, approved Official Plan for an R-P-C Zone, or any approved Conceptual or Detailed Site Plan; and
 - (B) Fifty (50) feet from all other adjoining property lines and street lines.
 - (6) All perimeter areas of the site shall be buffered or screened, as required by the Landscape Manual; however, the Council may require additional buffering and screening if deemed necessary to protect surrounding properties.

- (7) The building entrance and nearby sidewalks shall be enhanced with a combination of special paving, landscaping, raised planters, benches and special light fixtures.
- (8) The application shall include a comprehensive sign package and a comprehensive exterior lighting plan.
- (9) The applicant shall use exterior architectural features to enhance the site's architectural compatibility with surrounding commercial and residential areas.

PGCZO, § 27-217, (2011 Ed. & Supp. 2014).

In addition, the following woodland conservation requirements within the Subtitle 25 of the County Code apply to the subject application, as follows:

(c) Conservation Method Priorities.

(1) The required priorities for woodland conservation methods are as follows in the order listed:

(K) On-site landscaping using native species of field grown nursery stock that establish landscaped areas a minimum of 35 feet wide and 5,000 square feet in area. At least 50 percent of the plants in the landscaped area must be trees.

§ 25-122, Prince George's County Code (2011 & Supp. 2014).

Finally, we take administrative notice of established Maryland case law that informs our review of special exceptions that we will discuss in later sections of this final decision.

As stated in the administrative record, this application requests permission to use a portion of a 74-acre property, known as "Mill Branch Crossing," for a Department or Variety Store, combined with a Food and Beverage Store, located at the northeast quadrant of the intersection of Robert Crain Highway (US 301) and Mill Branch Road, Council District 4. The subject property has a land area of 24.9 acres that is comprised of portions of six (6) parcels (27, 28, 52, 58, 59 and 71). The record reflects that the site is part of a larger, 74-acre site, known as "Mill Branch Crossing," rezoned in 2006 from the R-A (Residential Agricultural) to C-S-C (Commercial Shopping Center) Zone through a Sectional Map Amendment approval by the District Council as

part of its periodic review of comprehensive zoning maps for the area. CR-11-2006, at 17–18; 2006 *Bowie and Vicinity Master Plan and SMA*, at 127.

The subject property is partially wooded but is primarily cleared, apparently as a result of many decades of agricultural use. The subject site is encumbered by a 50-foot access easement, recorded amongst the Land Records for Prince George’s County at Liber 28018, Folio 685, to the benefit of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”). As such, the easement extends to the northeast from Mill Branch Road, extending along the entire southeastern property line of the subject property that is necessary, based on the facts in the administrative record, to provide access to the abutting publicly owned property to the east and northeast, for which the record states there is a planned recreational development project called the Green Branch Regional Park. Ex. 110.

- Neighborhood and Surrounding Uses

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

The site is surrounded by the following uses:

North—remaining portion of the 74-acre Mill Branch Crossing site, beyond which lies an unnamed tributary to Green Branch, and other land within the C-S-C Zone which is improved with an operational gas station, as well as an operating motel with restaurant and package store. Further to the north are existing commercial uses in the C-M (Commercial Miscellaneous) Zone, as well as property improved with residential uses in the M-X-T (Mixed Use-Transportation Oriented) and R-R (Rural Residential) Zones;

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

East—publicly owned, agricultural land in the O-S (Open Space) Zone with M-NCPPC as title owner, designated for purposes of a planned development project known as the Green Branch Regional Park;

South—undeveloped land and agricultural fields in the R-A and O-S Zones, along with the Maenner Agricultural Preservation District, Ex. 92; and

West—the remaining acreage of the Mill Branch site, with zoning classification in the

C-S-C Zone.

01/21/2015 ZHE Dec'n, at 2.

Finally, on the east side of Robert Crain Highway (US 301) is the existing Wal-Mart retail store, a 120,000 square foot department or variety store, with street address of 3300 Robert Crain Highway (US 301), constructed on property that is also currently within the C-S-C Zone. *Id.*

- Comprehensive Plan for the Subject Property

During its 2002 examination of County land use and development policies pursuant to § 21-103(b) of the RDA, the District Council evaluated the County's existing growth and development policies which, together with the comments submitted to the record of public testimony, formulated broad strategies to guide the future growth and development of the County. *See 2002 Prince George's County General Plan*, at 3. After complying with the procedural prescriptions set forth in State law as well as the County Code, the District Council took final action to the 2002 *Prince George's County General Plan* on October 7, 2002, via adoption of CR-47-2002. In particular, the 2002 General Plan established the County's growth policy tier boundaries, which were designed to establish a hierarchy of goals, objectives, policies and strategies to develop a preferred development pattern for the County. *See 01/21/2015 ZHE Dec'n*, at 2–3; *2002 Prince George's General Plan*, at 94. In so doing, these development policies are intended to inform infrastructure and public facilities decisions in the County based on this vision, along with the infrastructure and other public facilities needed to accommodate that pattern. *See 2002 Prince George's County General Plan*, at 13. In so doing the 2002 General Plan designated a three-tier development pattern—Developed, Developing, and Rural—along with the characteristics, opportunities, and constraints unique to each. *Id.* In adopting CR-47-2002, by way of Amendment 2 on page 3, the Council approved the designation of the subject property within the Developing Tier within the 2002 General Plan. *See*

01/21/2015 ZHE Dec'n, at 5; CR-34-2002, at 2; CR-47-2002, at 3; 2002 *Prince George's County General Plan*, at 46–47.

On February 11, 2006, roughly three and one-half years later, in accordance with the RDA and County law, the District Council approved the 2006 *Bowie and Vicinity Master Plan and Sectional Map Amendment* (“2006 *Bowie Master Plan and SMA*”), thereby rezoning the subject property from the R-A (Residential-Agricultural) to the C-S-C (Commercial Shopping Center) Zone. *See* CR-11-2006, at 17–18. Evidence in the record also reflects the designation of Mill Branch Road as a Scenic Road and Historic Road, as defined in § 23-103(b)(17)(C) and (H) of the County Code, by way of the District Council’s approval of the 2006 *Bowie Master Plan and SMA*. *See* 2006 *Bowie Master Plan and SMA*, at 65. As defined in § 23-103(b)(17)(H) of the Prince George’s County Code, a ‘scenic road’ is defined as “a public or private road, designated by the County Council, which provides scenic views along a substantial part of its length through natural or manmade features, such as forest or extensive woodland, cropland, pasturage, or meadows; distinctive topography, including outcroppings, streambeds or wetlands; traditional building types; historic sites; or roadway features such as curving, rolling roadway alignment and ‘leaf tunnels.’” The term ‘historic road’ is also a defined term within § 23-103(b)(17)(C) of the Code, and means “a public or private road, designated by the County Council, which has been documented by historic surveys or maps, and which maintains its historic alignment and historic landscape context through views of natural features, historic landscape plan L patterns, historic sites and structures, historic farmstead groupings, or rural villages.” § 23-103(b)(17)(C),(H), Prince George’s County Code (2011 Ed. & 2014 Supp.). *See also* 2006 *Bowie Master Plan and SMA*, at 64.

- Prior Zoning Approvals for the Subject Property

On June 12, 2007, the Applicant submitted a Preliminary Plan of Subdivision Application No. 4-07043 for the Mill Branch Crossing shopping center; this was later withdrawn on or about November 1, 2007. 01/21/2015 ZHE Dec'n, at 3. A subsequent subdivision proposal, Preliminary Plan of Subdivision 4-08052, was later approved for the Mill Branch Crossing Shopping Center on May 29, 2009, via adoption of PGCPB No. 09-85 by the Planning Board. As reflected therein, this application proposed development of a shopping center and 150-room hotel on the entire 74-acre property, of which the subject property is a portion. *Id.* The adoption of PGCPB No. 09-85 also created "Parcel A," and imposed various conditions of approval, such as a Detailed Site Plan approval requirement prior to final plat. As of the date of this Order, Preliminary Plan of Subdivision 4-08052 is currently in a valid status; according to the record, the validity period expires December 31, 2015. As of the date of this final decision, no final plat has been filed or recorded for the subject site. *Id.*

On June 8, 2010, Applicant filed a limited Detailed Site Plan application, DSP-10018, to construct an entrance road onto the 74-acre site. As of the date of this final decision, application DSP-10018 remains pending. 01/21/2015 ZHE Dec'n, at 3.

On January 6, 2011, the Applicant requested that the Planning Board reconsideration the provisions of Conditions 2, 6, 8, 9, 18, 19, 20, 21, 22, 26, and 32 of PGCPB Resolution No. 09-85—all of which, the record states, relate to the Detailed Site Plan conditions of approval. However, on February 3, 2011, the Planning Board denied the request to waive the rules, which was an essential procedural threshold for Planning Board to reach the merits of Applicant's reconsideration request. As a result, the Planning Board's refusal served as a constructive denial of the reconsideration request. *See* 01/21/2015 ZHE Dec'n, at 3.

On March 22, 2012, the Applicant filed another application for a preliminary plan of Subdivision, Application No. 4-11011, reflected in the record as a proposal to create five (5) parcels for development of a shopping center, and request for approval of certain adjustments to the previous Detailed Site Plan conditions; however, the record reveals that the Applicant later withdrew the request. 01/21/2015 ZHE Dec'n, at 3.

In addition, Applicant has submitted an explanation of the proposal embodied within DSP-13034, which includes the entire 74-acre site. *See* Ex. 104. As stated in the record, DSP-13034 requests approval for the following freestanding structures: 1.) a 186,933 square-foot, retail structure with proposed height of 31–34 feet for a department or variety store use (“Building A”); 2.) a 150-room, 11,200 square-foot hotel (“Building B”); 3.) a 45-seat eating and drinking establishment/restaurant (“Building C”); 4.) a 5,268 square-foot structure for a banking use (“Building D”); 5.) a 300-seat, 10,958 square-foot eating and drinking establishment (“Building E”); 6.) a 10,000 square-foot eating and drinking establishment/restaurant (“Building F”); 7.) a 4,992 square-foot retail structure (“Building G”); and 8.) a 6,500 square-foot retail structure (“Building K”). *See* Ex. 104.

- Effects of Previous Approvals on Applicant’s Proposal

The record reflects, and we incorporate here by reference, the approved Preliminary Plan of Subdivision No. 4-0805 that was approved for this site, subject to 36 conditions, including the requirement for an approved Detailed Site Plan (DSP) prior to final plat. 01/21/2015 ZHE Dec'n, at 7. Then, the Applicant filed a DSP application three (3) months after the subject Application, but the record indicates that the proposal has not yet been finally accepted. *Id.* For purposes of consistency, the ZHE found, and we agree, that the Special Exception Site Plan is essentially the “Detailed Site Plan” for that portion of the 74-acre site, since a Special

Exception Site Plan takes precedence over any other plan approval pursuant to § 27-319(a) of the Zoning Ordinance, and ensures consistency between the various stages of the development review and approval process. *Id.* Certain conditions of the Preliminary Plan approval require specific tests and findings at the time of the DSP approval. Logically, many of those conditions that are related to the DSP approval should also be applied to the Special Exception Site Plan to avoid the need for revisions. Thus, we further agree with the findings by the ZHE and the Technical Staff, respectively, that the Special Exception Site Plan should address these elements at this time, with the caveat that a final plat cannot be recorded until an overall DSP is approved. *Id.*

The disapproval recommendation of the ZHE as to S.E. 4734 is premised upon the sufficiency of the evidence to meet required findings of approval and compatibility with comprehensive plan guidance, specifically sufficiency of the record transportation, traffic, and site access; adverse environmental impacts on surrounding existing uses, statutory and comprehensive planning determinations that relate to transportation, traffic, and site access; environmental and adverse impacts on surrounding existing uses; and conformance with comprehensive plan recommendations, which we discuss below:

- County Comprehensive Plans – No Substantial Impairment

The ZHE found that S.E. 4734 is not in harmony with certain general purposes of the Zoning Ordinance, § 27-102, as follows:

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

Although the property in its entirety encompasses 74 acres, the proposed Super Center has been positioned so as to render the most adverse impacts on the Historic and Scenic Mill Branch Road and on the agricultural lands that it is sited adjacent to. Additionally, the use of a private right of way for the truck and citizen traffic to the Super Center all combine to fail to protect and promote the health, safety, and welfare of the present and future inhabitants of the County. It should also be noted that Mr. Robert Bathurst, an expert in the field of civil engineering, testified extensively to the inadequacies of the Applicant's current stormwater

management proposals, including the Bowman Report (Exhibits 20 and 77) and the Tech Group Report (Exhibit 76) to protect adjacent lands or roadways. (Exhibit 122) The Applicant has conceded that its stormwater management plans are simply a work in progress and will be subject to amendments, which are not ascertainable at this time, prior to any approvals.

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

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

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

(4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;

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

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

The District Council, through the 2002 General Plan, made sometimes-difficult decisions as to where the line between the Rural Tier and Developing Tier was to be located. This property was one of those instances. The District Council decided that the subject property was appropriate for development. The 2006 Master Plan recommended commercial zoning for the site, and the subsequent Sectional Map Amendment placed the site in the C-S-C Zone. If this were a question of another strip-commercial center along a major roadway in Prince George's County, Staff would have concerns over impacts. But this particular use, located adjoining the Rural Tier and a planned Regional Park facility was correctly singled out for additional and more intensive scrutiny, both through the Master Plan Design Guidelines, as well as the 36 conditions of approval imposed by the Planning Board in its approval of the Preliminary Plan. Automotive center, loading docks, compactors, and recycling areas do not promote the most beneficial relationship between the subject property and the adjacent agricultural lands and the Regional

Park and in no way protect these adjacent lands and uses, including the many citizens frequenting the ball fields at the Regional Park, from the adverse impacts of the Applicant's proposed development.

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

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

See 02/26/2014 Tr.; 02/27/2015 Tr.; 03/27/2014 Tr.; *passim*.

The responses to paragraphs 4 and 6 of § 27-102 within the disposition recommendation of the ZHE suggest that the 2006 Bowie Master Plan designation of Mill Branch Road will be frustrated by the proposed development. However, the Guidelines for the Design of Scenic and Historic Roadways in Prince George's County, Maryland, did not exist at the time of designation for Mill Branch Road at the time of approval of 2006 Bowie Master Plan in February 2006. The Guidelines were published in February 2007, one year after the designation was made for Mill Branch Road. Ex. 136. Moreover, the Guidelines state that the determination of which roadways are included in, or removed from, the Master List of Scenic and Historic Roads lies with the Council. Since the design guidelines for Scenic and Historic Roads could not have been considered by the Council at the time of designation, it cannot be said that the 2006 designation could be impaired by the proposed project. Finally, the Council retains the authority to remove roadways from the Master List off Scenic and Historic Roads. *See* Ex. 136, at 6. As a result, we are unable to agree with the conclusion of the ZHE that the Historic / Scenic Road designation will have any impact on the proposed development, or supply evidence to suggest that that the subject department store use is frustrated by the scenic road or historic designations within the 2006 Master Plan. Thus, we assign scant probative value to the inclusion of those designations in the evaluation of S.E. 4734.

The ZHE next found that the Applicant failed to meet its burden of proof required pursuant to § 27-317(a)(1) of the Zoning Ordinance and further declared that the application not in harmony with the following general purposes of Commercial Zones, § 27-446(a), specifically:

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

Next, the ZHE criticized site design and architectural features of the proposed project:

“In addition to its failure to adequately address landscape and stormwater issues, the architecture as proposed is subpar, cookie cutter in its similarities to other Wal-Mart stores, pedantic, prosaic, pedestrian, and, to quote the Technical Staff, “sets the bar dangerously low and provides an undesirable design precedent for future development.” The proposed architectural features do not even attempt to “enhance the site’s agricultural compatibility with surrounding commercial and residential areas.”

See 01/21/2015 ZHE Dec’n, at 26. *See also* Ex.’s 57, 90, 113, 123, and 124; §27-317(a)(2), §27-348.02(a)(9), PGCZO.

What’s more, in justifying the disposition recommendation to disapprove the proposed development, the ZHE summarily subscribed to speculations of the Technical Staff offered as an “attempt” to assess the subject application’s conformance with the environmental guidelines within the 2006 Bowie Master Plan, as follows:

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

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

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

Strategies:

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

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

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

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

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

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

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

Strategies:

1. Implement the strategies contained in the Western Branch Watershed Restoration Action Strategy (WRAS).

2. Add identified mitigation sites from the WRAS to the countywide database of mitigation sites.

3 Encourage the location of necessary off-site mitigation for wetlands, streams, and woodland within sites identified in the WRAS and within sensitive areas that are not currently wooded.

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

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

The special exception site plan and subsequent DSP should demonstrate the use of low-impact development stormwater management techniques such as bio retention, French drains, depressed parking lot islands, and the use of native plants, to the fullest extent possible, subject to approval by the City of Bowie Department

of Public Works during technical stormwater management review. Approval of the stormwater management concept plan by the City of Bowie is still pending.

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

The Green Branch Tributary, which crosses this site along its northern boundary and receives stormwater discharge from this site, has been evaluated for existing water quality and stream stability, and the impact of the proposed development on stream stability and water quality, specifically related to the proposed stormwater discharge, was analyzed.

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

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

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

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

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

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

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

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

Strategies:

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

This is a new commercial development, located adjacent to the Rural Tier, on a largely open site that has been in agricultural use up to the present time. ***The use of trees and landscaping materials to provide a transition between the Developing and the Rural Tier is desirable, and will result in an increase in overall tree canopy cover where it is currently lacking.*** In accordance with the requirements of the Landscape Manual, a minimum of a Type “C” buffer yard (30-foot landscaped strip and 40-foot building setback) is required to be provided. ***A wider buffer yard may be appropriate to create an appropriate transition between differing development patterns.*** In this case, the ability to determine the most appropriate transition is hampered by two factors; the area is outside of the special exception boundary, and is encumbered by the easement for the shared drive to serve the proposed park.

2. Provide a minimum of ten percent tree cover on all development projects.

This can be met through the provision of preserved areas or landscape trees.

3. Establish street trees in planting strips designed to promote long-term growth and increase tree cover.

4. Establish tree planting adjacent to and within areas of impervious surfaces.

Ensure an even distribution of tree planting to provide shade to the maximum amount of impervious areas possible.

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

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

Strategies:

1. Encourage the use of green building techniques that reduce energy consumption. New building designs should strive to incorporate the latest ***environmental technologies in project buildings and site design.*** As redevelopment occurs, the existing buildings should be reused and redesigned to incorporate energy and building material efficiencies.

2. Encourage the use of alternative energy sources such as ***solar, wind, and hydrogen power.*** ***Provide public examples of uses of alternative energy sources.***

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

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

Strategies:

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

2. Require the use of full cut-off optic light fixtures should be used for all proposed uses.

3. Discourage the use of streetlights and entrance lighting except where warranted by safety concerns.

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

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

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

Strategies:

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

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

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

possibility of further substantially impairing the integrity of the approved master plan.

See 01/21/2015 ZHE Dec'n, at 30; Ex. 83 (*emphasis added*).

We acknowledge the environmental sensitivities highlighted by the Technical Staff, above. As such, we find merit in the use of building design to promote compatibility with the surrounding uses, which is recommended by the 2006 Master Plan and the current County General Plan, 2014 *Plan Prince George's 2035*. In its disposition of a zoning case, an administrative body may properly review and condition its approval upon the use of certain building façade materials where the body has legitimate, non-aesthetic reasons to review building design, as such review is not permitted solely for purposes of aesthetics. *See Coscan v. Washington, Inc. v. Maryland-National Capital Park and Planning Comm'n*, 87 Md. App. 602, 590 A.2d 1080 (1991). Examples of legitimate bases for such conditions include protecting a scenic area, and preserving an adjacent historic mansion and site. *Id.*

Based on the evidence within the administrative record, including and in addition to the comprehensive land use policy set forth in the comprehensive plans applicable to the area of the subject property, we conclude that the environmentally sensitive features in the vicinity of the subject property warrant additional conditions of approval that minimize impervious surfaces and enhanced stormwater management techniques in the design of the project to safeguard the public safety, health, and welfare, as well as to protect water quality and critical habitat from stormwater pollutants. *See generally* 2014 *Plan Prince George's 2035*, at 128–34. *See also* § 27-108.01, PGCZO (“Interpretations and rules of construction . . . (10) The word ‘**approve**’ includes **approve with conditions, modifications, or amendments**”); § 27-318, PGCZO (“Conditional approval. When a Special Exception is approved, **any requirements or conditions deemed necessary to protect adjacent properties and the general neighborhood may be added to those of this**

Subtitle”) (*emphasis added*).

We now turn to the provisions of 2006 Bowie Master Plan. As a matter of first impression, we find that the subject application conforms to the land use development recommendations of the 2006 *Bowie Master Plan and SMA*, particularly the language addressing the subject property that calls for rezoning the property to the C-S-C Zone, the recommendation for “high quality retail uses, including a hotel,” and “quality department stores.” 2006 *Bowie Master Plan and SMA*, at 12. While we acknowledge the language within that section stating that commercial development “should not include discount or “big box” commercial activities, and that “no individual retail use, other than food or beverage store (grocery store) shall exceed 125,000 square feet in size.” See 2006 *Bowie Master Plan and SMA*, at 16. We question the conclusion reached by the ZHE that it does not conform to the Master Plan policies, strategies, and guidelines pertaining to the type of commercial building proposed for the project, despite the inclusion of language in the 2006 *Bowie Master Plan* that specifically discourages “big box” commercial uses, 01/21/2015 ZHE Dec’n, at 5, as follows:

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

Strategies:

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

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

(1.) The development **should include quality department stores but should not include discount or “big-box” commercial activities. No individual retail uses, other than food or beverage stores (grocery store) shall exceed 125,000**

square feet in size. Retail sales of alcoholic beverages in a food or beverage store are limited to 5,000 square feet or less.

(2.) The existing 22-foot easement that provides access to the Green Branch Regional Park should be vacated and replaced by a new temporary easement, fifty (50) feet in width, located on this property at its easternmost property line on Mill Branch Road. The new, temporary easement should be vacated when it is replaced by permanent access via a right-of-way to be constructed at the time this property is developed. The new temporary easement on the easternmost property line should form the boundary between the Developing Tier and the Rural Tier.

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

2006 *Bowie Master Plan and SMA*, at 12, 16 (*emphasis added*).

Within the disposition recommendation for the subject application, the ZHE concluded that “the Master Plan’s vision and desire for the ultimate development of this site is for something more than what is being proposed by the Applicant.” We are not persuaded, based on the evidence within the record, and recent revisions to the County Future Land Use development pattern embodied in the 2014 General Plan Update, *Plan Prince George’s 2035*, adopted on May 6, 2014. In fact, in our assessment of the plain language of the 2014 Plan Prince George’s 2035, we find the proposed development very consistent with the new center classification and County Growth Concept.

We reject the conclusion reached by the ZHE that the proposed development does not serve the purpose of implementing the policies, guidelines, and strategies of the 2006 *Bowie Master Plan and SMA*. See 01/21/2015 ZHE Dec’n, at 25. The language in the 2006 *Bowie Master Plan* is unambiguous as to commercial uses envisioned for this site. See 2006 *Bowie Master Plan and SMA*, at 16. Although the Master Plan Policies, Strategies, and Guidelines pertaining to the type of commercial building and uses specifically discourage “big-box” commercial uses, this language is a guide and is not regulatory. Thus, we find that the proposed development will not substantially impair the integrity of the 2006 *Bowie and Vicinity Master Plan and SMA*.

Even if the language of the 2006 Master Plan concerning big box retail, *which targets only this property*, could be construed as a regulatory prescription, we question the validity of, and the rationale behind, the Bowie Master Plan's 125,000 square-foot gross floor area limitation for department stores—but not food or beverage stores—at this particular site. *See 2006 Bowie and Vicinity Master Plan and SMA*, at 16.

We also disagree with the conclusion of the ZHE that a “Wal-Mart Super Center, albeit one more aesthetically pleasing than the older model directly across Robert Crain Highway (US 301) to the west, would seem to be the quintessential example of the big-box discount store being discouraged by the District Council.” 01/21/2015 ZHE Dec'n, at 6–7. The ZHE also pointed out that subject development application proposes a “building that far exceeds the square footage recommendation for a single-use.” This is an unambiguous factual point of specious probative bearing upon the question of substantial impairment to a General Plan or Master Plan for the area of the proposed development, particularly when examined in the context of the recommendations set forth in the 2014 the General Plan update.

In 2014, pursuant to the decennial review requirement in Title 21 of the RDA, discussed above, the District Council considered and approved an update to its General Plan on May 6, 2014. As part of that approval, the District Council declared that where approved General Plan recommendations conflict with existing area master plan and functional master plan recommendations, the 2014 General Plan update supersedes and amends any inconsistent provisions within said master plans, including the 2006 *Bowie and Vicinity Master Plan and SMA* for the area of the subject property. *See CR-26-2014*, at 1; *2014 Plan Prince George's 2035*, at 194. With respect to recommendations in the 2014 *Plan Prince George's* relevant to the subject property, the 2014 General Plan update reaffirms the Mill Branch Crossing property within its Bowie

Suburban Town Center designation and the pertinent recommendations applicable to those centers stated therein. *See Plan Prince George's 2035*, Table 14, at Att. B, p. 18. Specifically, the land use policy vision for the Local Town Center designations in the 2014 General Plan is as follows:

A range of auto-accessible centers that anchor larger areas of suburban subdivisions. Overall the centers are less dense and intense than other center types and may be larger than a half mile in size due to their auto orientation. The centers typically have a walkable “core” or town center. Often the mix of uses is horizontal across the centers rather than vertical within individual buildings. Town Centers such as Brandywine, Konterra, and Westphalia are currently under construction and have received significant public and private investment for infrastructure improvements. These centers are envisioned to develop per the guidelines in Plan 2035 help fulfill countywide goals.

See 2014 Plan Prince George's 2035, at 92–93, Table 14, Att. B, at 18.

In fact, as approved, the Land Use Chapter of the 2014 *Plan Prince George's 2035* refines and establishes a new Growth Concept supported by prioritized center designations and direction as to the appropriate density and commensurate site design. *Id.* Pursuant to adoption of *Plan Prince George's 2035* by the District Council on May 6, 2014, we take administrative notice that the current center classification for the Mill Branch property is Commercial Suburban Town Center. *See 2014 Plan Prince George's 2035*, at 78 (Map 13, Prince George's County Growth Policy Map); 79–81 (Map 14, Generalized Future Land Use Map); 88–89, PGCPB No. 14-10 Att. C, at 3. The revised Growth Concept applies current best practices to maximize market strength and manage growth effectively at existing centers in the County. *See 2014 Plan Prince George's 2035*, at 83. “Suburban Town Centers,” as stated in the plan, are “[a]uto-oriented centers that anchor larger areas of suburban subdivisions. The overall center is less dense and intense than other center types and may be larger than a half mile in size, due to the auto orientation.” *Id.* Further, *Plan Prince George's 2035* calls for medium- to medium-high residential development, along with limited

commercial uses, within its suburban centers, rather than scattering them throughout the Established Communities. 2014 *Plan Prince George's 2035*, at 16, 82–83, 89.

We next note that, in light of the Suburban Town Center land use policy for “a range of auto-accessible centers offered to anchor larger areas of suburban subdivisions,” those centers are “less dense and intense overall than other center types within the 2014 General Plan update.” *See Plan Prince George's 2035*, at 92–93, Att. B, Table 14, at 18. In addition, the current land use policy corrects elements of the 2002 General Plan vision and forecasts to limit mixed-use developments, which served to drive recommendations within subsequent comprehensive plans, such as the 2006 *Bowie and Vicinity Master Plan and SMA*. *Id.*

Moreover, under Maryland law, despite the recommendation applicable to the subject property within the 2006 Bowie Master Plan that the commercial department stores “should not include discount of ‘big-box’ stores,” the recommendations of a master plan generally serve only as a guide and not a mandate unless the statute, ordinance or regulation provides otherwise. 2006 *Bowie and Vicinity Master Plan and SMA*, at 16. *See also Floyd v. County Council of Prince George's County*, 55 Md. App. 246, 461 A.2d 76 (1983); *Coffey v. Maryland-National Capital Park and Planning Comm'n*, 293 Md. 24, 441 A.2d 1041 (1981).

As for conformance with applicable comprehensive plans approved for the subject property, we note the observation by the ZHE, that “the General Plan locates the subject property in the Developing Tier. The vision for the Developing Tier is to maintain a pattern of low- to moderate-density, suburban, residential communities, distinct commercial centers, and employment areas that are increasingly transit- serviceable.” 01/21/2015 ZHE Dec'n, at 16. The ZHE also concluded that the subject application does not substantially impair the commercial development embodies within the land use recommendations of the 2006 *Bowie Master Plan and*

SMA. Id.

The ZHE does not, however, assess the proposed development in the context of the updated general recommendations for the area of the subject property, which modifies the 2002 *Prince George's County General Plan* vision for a Developing and a Regional Center that emphasizes transit accessibility and mixed use development. *See 2014 Plan Prince George's 2035*, 82–83, 89, 92–93, 194. We find that the subject application is in conformance with the updated recommendations for the area of the subject property based on the 2014 General Plan modifications to the County's land use development guidelines.

We lastly note the observation by the ZHE that “the Master Plan's vision and desire for the ultimate development of this site is for something more than what is being proposed by the Applicant.” With the full array of current comprehensive plans in mind, we find that the evidence within the record does not support that observation. In fact, in our assessment of the plain language of *Plan Prince George's 2035*, along with the corroborative language of the 2006 *Bowie Master Plan* as to commercial development at the subject site, we find the proposed development very consistent with the new center classification and County Growth Concept.

- Adverse Impacts and Adjacent Uses

In recommending disapproval of S.E. 4734, the ZHE cites the record testimony of various witnesses as to the intensity of the adverse impacts anticipated by the proposed use. While we acknowledge the quantity of the evidence, we find it unpersuasive and insufficient to conclude that the traffic congestion or adversities to agricultural and commercial uses would actually occur at any specific property adjacent to the proposed use. *See Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974).

Further, we find misplaced the citation to Subtitle 30 of the County Code in support of

recommending disapproval of S.E. 4734. We take all due notice of the policy found in § 2-501 of the Agriculture Article of State law that the purpose of the Maryland Agricultural Land Preservation Foundation to provide sources of agricultural products within the State for the citizens of the State; control the urban expansion which is consuming the agricultural land and woodland of the State; curb the spread of urban blight and deterioration; and protect agricultural land and woodland as open-space land. *See* Md. Code Ann., Agriculture § 2-501. Notwithstanding, and contrary to the findings of the ZHE, its function really is for establishment easements upon the agricultural property, *not* to prevent incompatible uses from locating adjacent to an agricultural property. *See* Md. Code Ann., Agriculture § 2-503. Most importantly, a primary benefit to the owner of the agricultural property is to insulate farmers from nuisance lawsuits related to the pursuit of agricultural land uses on their property, regardless of noise, dust, other activities that tend to be offensive to adjacent property owners. *See* Md. Code Ann., Agriculture, §§ 2-501–2-515 (2012); §§ 30-101, 30-103–104, 30-106, and 30-302, Prince George’s County Code (2011 & 2014 Supp.).

While we do not dispute the testimony in the administrative record expressing concern regarding the protection of agricultural uses in the nearby vicinity of the site proposed for development, we are not persuaded that the effects of the adverse impact of the proposed commercial development would serve to affect adjacent properties more adversely in that particular site than anywhere else in the C-S-C Zone. Moreover, we find that that there is an existing Wal-Mart store directly across the street from the proposed new structure, and it has an enclosed area of approximately 100,000 square feet of gross floor area as well as continuous operation since it was constructed and opened in 1993. *See* 09/13/2013 App. Stmt. Just’n, at 11. The evidence also states that the Applicant intends to move and expand that department store to accommodate an existing customer base. *Id.* Therefore, we are unable to conclude that the new facility will actually be more

adverse than the adverse effects ordinarily associated with this in its current operation directly across US 301 from the subject property. *See AT&T Wireless Services v. Mayor & City Council of Baltimore*, 123 Md. App. 681, 720 A.2d 925 (1998).

Moreover, it is well-settled in Maryland law that a “special exception is a use which has been legislatively predetermined to be conditionally compatible with the uses permitted as of right in a particular zone, the condition being that a zoning body must decide whether that compatibility exists. *See Creswell v. Baltimore Aviation*, 257 Md. 712, 719, 264 A.2d 838 (1970). Finally, we are mindful that an applicant’s right to a special exception is predicated upon his compliance with the safeguards enumerated in the portion of the zoning ordinance which the existence of the right. *Martin Marietta Associates v. Citizens*, 41 Md. App. 26, 395 A.2d 179 (1978).

See §27-318 (When a Special Exception is approved, any requirements or conditions deemed necessary to protect adjacent properties and the general neighbourhood may be added to those of this Subtitle).

Before us is a special exception site plan proposal. As is plainly established in the rubric of Maryland zoning case law, the special exception / conditional use Applicant’s burden “assumes not merely the lesser burden of generating a fairly debatable issue so as to permit a ruling in its favor but the significantly greater burden of actually dispelling fair debate by proof so clear and decisive as legally to compel a ruling in its favor.” *B. P Oil, Inc. v. Bd. of Appeals*, 42 Md. App. 576, 580, 401 A.2d 1054 (1979). A special exception or conditional use involves a use which is permitted, once certain statutory criteria have been satisfied. It is a desirable use, which is attended with detrimental effects that require that certain conditions be met, and once met, it is a permitted use because the legislative body has made that policy decision. Moreover, it is irrelevant whether a special exception is compatible with permitted uses because the legislative body has made that

policy decision. *Mosburg v. Montgomery Co.*, 107 Md. App. 1, 666 A.2d 1253 (1995).

The ZHE findings are supported by specific exhibits, testimony, and legal authority within the Zoning Ordinance. *See People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 85–87, 956 A.2d 166, 194–95 (2008) *citing People's Counsel for Baltimore Co. v. Mangione*, 85 Md. App. 738, 751–52, 584 A.2d 1318, 1324–25 (1991) (evaluation of evidence in special exception application not balanced with formulaic precision; finder of fact must judge credibility of each witness and apply to evidence presented). *See also Anderson v. Sawyer*, 23 Md. App. 612, 620–22, 329 A.2d 716, 722–23 (1974) (finding testimony of expert no more probative value than layman in evaluation of evidence as to special exception application).

In *Schultz v. Pritts*, 291 Md. 1, 15, 432 A.2d 1319 (1981), the Court of Appeals of Maryland 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 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 later 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 Baltimore County v. Loyola College in Md.*, 406 Md. 54, 100–01, 956 A.2d 166 (2008). Rather, this comparison is “focused entirely on the neighborhood involved in each case.” *Loyola*, 406 Md. at 102. Accordingly, even though a special exception use may have certain 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.” *Loyola*, 406 Md. at 106.

In *Loyola*, the Court of Appeals explained 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.

Loyola, 406 Md. at 106–07.

Essentially, in assessing a request for a special exception, our inquiry is whether the Applicant’s proposal will have adverse effects on properties in the neighborhood that are “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.” *Id.* We note that this inquiry first requires us to have an understanding of the neighborhood surrounding the subject property. Next, we must analyze the neighborhood’s unique characteristics that may be adversely affected “above and beyond those [effects] inherently associated with such a special exception use irrespective of its location within the zone.” *Loyola*, 406 Md. at 107.

Applying the above-stated parameters to our evaluation of evidence in the record before us, we are unpersuaded that the adverse effects associated with the proposed use in the subject application, a proposed Department or Variety Store or Department or Variety Store combined with Food or Beverage Component, are greater at this location than they would generally be elsewhere within similarly properties in the C-S-C Zone. *See* 01/21/2015 ZHE Dec'n, at 25. In addition, we are equally unconvinced that there exists evidence in the administrative record sufficient to demonstrate that the conditional use on the proposed site would adversely affect the environment of the general neighborhood including neighboring parks, marsh lands, and the Patuxent River. *Id.* *See also Entzian v. Prince George's County*, 32 Md. App. 256, 360 A.2d 6 (1976).

Because S.E. 4734 has an approved preliminary plan in place and requires a detailed site plan process later in the development process, we find that in order to safeguard the public safety, health, and welfare of the citizens and residents in the area of the subject proposal, the conditions of approval within Preliminary Plan 4-08052 will be incorporated as conditions of approval within this document of approval with conditions as to S.E. 4734 to ensure continuity of site design and review as well as sustainable building design and compatible with surrounding uses, conditions of approval are needed as further assurance that the proposal will develop in accordance with the comprehensive plans' policies and strategies as to building form and site design for development. *See* §27-318 (When a Special Exception is approved, any requirements or conditions deemed necessary to protect adjacent properties and the general neighbourhood may be added to those of this Subtitle).

- Access to Arterial Roadway Requirement

Finally, the ZHE also recommended disapproval as to S.E. 4734 because the Applicant does not currently have direct vehicular access to US 301 from development site. *See* 01/21/2015 ZHE

Dec’n, at 31. However, we note other testimony in the record stating that the Applicant is aware of the requirement and is actively pursuing approval for that direct access with the SHA. *See* 01/21/2015 ZHE Dec’n, at 16–17. Accordingly, we find that a condition of approval for S.E. 4734 is needed to allow the Applicant to secure approval for direct access, as required by the Zoning Ordinance, as was indicated with the administrative record⁸

- Applicant’s Exceptions

In accordance with the procedural prescriptions set forth in the Zoning Ordinance, counsel for the Applicant filed the following exceptions to the ZHE decision as to S.E. 4734, as follows:

1. The Zoning Hearing Examiner's (“Examiner”) rationale for the Denial is expressed in Decision's Conclusions of Law (“Conclusions”). However, certain pronouncements within that portion of the Decision seem more appropriately to be Findings of Fact (“Findings”), *i.e.* Nos. 1-7, is further evidenced by the Examiner's declaration in Conclusion No. 8, which is expressed as "All of the aforementioned facts." Without stipulating to the correctness of those Findings, the Applicant does assert that Conclusion Nos. 8-12, 14-16, 22 and 23-which do embody rationale and premise for the Decision-are in error.

2. The Examiner’s Conclusions in support of the Denial are (a) that two requirements of § 27-348.02 relative to architecture and access are not satisfied, (b) one area of the neighborhood selected by the Examiner will be adversely impacted, and (c) some of the “Purposes” (General and Specific to the C-S-C Zone) are not satisfied. These are addressed by Applicant below in the order noted in No. 2.

3. In Conclusion No. 23, the Examiner concludes the Applicant has not satisfied the requirements of § 27-348.02 (a)(9). The Conclusion relies mostly on the Technical Staff Report (“Staff Report”) expressing the architectural level of quality does not “set the tone” for future development. However, the requirement is for the Applicant to “use exterior architectural features to enhance the site's architectural compatibility with surrounding commercial and residential areas.” Neither Exhibit 33 nor 40-both Staff assessments of architecture-address the architecture of the surrounding area, use of materials, heights, and other design features. The only testimony offered by a witness with education and/or background in architecture was that of Applicant Witness Valdis Ranis. His testimony explained how the mapping of an area of architectural influence was done and what specific aspects from commercial and residential architecture were

⁸ It is worth noting, based on our review of the record, that no variance from the strict application of the prescriptions of § 27-348.02 was sought by the Applicant in this case. Based on the Applicant’s lack of title ownership to the easement that is between its property and US 301, in addition to the apparent fact that the holder of the easement is a public entity, a variance request pursuant to § 27-230 of the Zoning Ordinance is a viable alternative possibility to securing consent from SHA for direct vehicular access to US 301.

considered used and enhanced upon in the design of the Applicant's department store. The Examiner also improperly considered Opponent's testimony and Exhibits which, while addressing a proximate "agricultural building," is not the commercial and residential areas to which the statute directs architectural compatibility and enhancement be measured. Thus, it was erroneous to find-as a Conclusion of Law-the Applicant had not demonstrated compliance with the requirement.

4. Conclusions 17-21 serve as the premise for Examiner's Conclusion No. 22. Therein, the Examiner wholly ignores controlling statutes from the Zoning Ordinance. As noted by multiple Applicant witnesses, the Zoning Ordinance provides in § 27-270 for the Order of Approvals and in § 27-319 for the Effect of (Special Exception) Site Plan Approval. In sum, the Special Exception Site Plan is controlling over a Detailed Site Plan. Additionally, no Final Plat of Subdivision can be approved prior to approval of any required Detailed Site Plan. A land dedication, pursuant to an approved Preliminary Plan of Subdivision, has already been approved for the larger property within which the special exception is situated. Ultimately, this dedication provides both "frontage and direct vehicular access" to an existing arterial roadway. The Examiner and Opposition erroneously conclude and assert that it is the "frontage and direct vehicular access" that must be "existing." This conflicts with the plain reading of the statute. It is the "arterial roadway" that is the subject of the adjective (existing) expressing the statutory requirement. Any other reading of the statute would effectively negate §§ 27-270 and 27-319. The sequential development approval process-long in place, allows for effective review of issues (a) first for the entirety of a property via the subdivision process, (h) second to special zoning issues as a result of the proposed department store use via the special exception, and (c) finally site issues via the special exception and detailed site plan processes. Platting, inclusive of dedications, easements, and other landowner commitments, comes last. In sum, if there is no approved development, there is no need to precede forward with-in this instance-the dedication of land. To read 27-348-02 (a) (1) as requiring the "frontage" and "vehicular access" be existing at the time of the proposed development approval is illogical and in conflict with the plain reading of the statutory requirement.

5. Conclusions 14-16 provide no basis for denial of the Special Exception by the Examiner. To put this in context, we first note that Conclusion No. 13 of the Decision addresses the question of whether the Applicant's Special Exception proposal substantially impairs the Master Plan, Functional Master Plans, and the General Plan. As support for this finding, the ZHE's disposition recommendation, in pages 26-30, largely restates the identified Policies and Staff Comments from the Staff Report. Applicant also points out that and we find persuasive that there are express no adverse findings and generally note that (a) no portion of the Special Exception site falls within the area of the applicable Plan or (b) the Special Exception application does not directly impact the regulated features on the site or (c) it's a matter that can be addressed later in the approval process. In sum, Staff does not find or conclude there is some substantial impairment of those plans. Thereafter, in Conclusion No. 14, The Examiner then expresses "These findings (presumably Finding No. 13) are concurred in by Mr. Robert Bathhurst" but that, in Conclusion No. 15, the "burden of proof was not met." According to the

testimony of Harry Roth, both individuals being in opposition to the Special Exception application. Lastly, the Examiner gives—in Conclusion No. 16—no weight other than to the testimony of those who live in the neighborhood that is south of the special exception site and no weight to the testimony of any other witnesses from outside the Rural Tier. First, the evidence shows the majority of the traffic to and from the special exception site will not traverse through the Rural Tier. Applicant also provided evidence of the development condition requiring signage—deterring traffic from the special exception site toward and through the Rural Tier. Moreover, all of the testimony relative to problems of farm vehicles on the narrow roads proximate to the special exception site was expressed as an “existing problem” and therefore cannot be an adverse impact brought upon by the Applicant’s proposal. Lastly, the Examiner concluded (in Footnote 6, Conclusion No. 3 on page 23) that it was the agriculture fields that actually—as opposed to speculative witness testimony—have impacts on adjoining properties.

6. In sum, the impacts from the proposed development, even if “adverse,” are not the result of a this specific special exception at this location. Rather, the testimony from both sides indicates that any site development, pursuant to the approved Preliminary Plan of Subdivision on this C-S-C zoned property, will lead to normal impacts associated, generally, with all development.

7. In Conclusions 8-12, the Examiner essentially determines this Special Exception application, if approved, will not be in harmony with certain General Purposes of the Zoning Ordinance and Specific Purposes for Commercial Zones. The property that encompasses the special exception site—as shown by the evidence—was placed by the Council into the Developing Tier and into the zone specifically in place for retail centers. The planning process has resulted in an approval for 619,000 square feet of retail/office and a 150-room hotel. The proposed department store use is approximately 30% of the proposed center, not an uncommon size for an anchor tenant. The County recently adopted an update to its Landscape Manual, which includes sections to address Historic and Scenic Roads. The Special Exception Site Plan provides landscaping consistent with the new requirements. The property within which the special exception site exists is subject to an easement and agreement with M-NCPPC Parks to provide an area for use to access its property and to the M-NCPPC property.

8. The Examiner accepted testimony, commenting on the stormwater concept plan for the larger property and special exception site—from an Opposition witness, who (1) did not indicate that he has ever processed or had a Stormwater Concept Plan approved in Prince George’s County; nor (2) been qualified by Prince George’s County to provide “peer review” of applications for Stormwater Concept Plan approval. The applicable plan has been approved by the County and was awaiting—at the time of the hearing—additional review and approval by the City of Bowie. The approval provided by the professional staff of the County should not be arbitrarily tossed aside (and burden or correctness impliedly shifted) and deemed invalid by an individual whom has never processed or received an approval from the County).

9. The Council, in its wisdom, (1) determined the boundaries of the Developing and Rural Tiers, (2) the placement of the larger property in the C-S-C

zone, (3) the designation of Historic and Scenic Roads and (4) the regulatory criteria, including the appropriate buffering, setbacks and landscaping for properties in the same or differing tiers, zones, and uses. These regulations are in place to allow development: to be compatible, harmonious, safe, and to allow continued use and enjoyment of properties without real detriment. Property owners may not always like what is adjoining, but the regulatory scheme is in place to allow all properties reasonable enjoyment. The Examiner's decision arbitrarily ignores the entire body of evidence in the record showing this Special Exception either complied with or exceeded the regulations in place to ensure these Master Plan Purposes.

10. The record contains no evidence that this special exception use for a department store does not adhere to all of the regulatory requirements for this use at this location. This alone is substantial evidence-not rebutted-of the special exception use and site plan adherence to the General Purposes of the Zoning Ordinance and Specific Purposes of Commercial Zones.

11. Lastly, the Examiner concludes, relying solely upon the Staff Report (pages 24-30 of the Decision pulls nearly entirely from pages 24-30 of that Staff Report), the Special Exception contradicts site specific Guidelines of the applicable Master Plan. However, no such Conclusion can be gathered from the narrative of the Decision or the Staff Report.

12. The Staff Report uses different aspects of the Master Plan Narrative that results in referring to the proposed use as a "big-box discount store" (as does the Opposition) though no such term appears in the Master Plan section applicable to the Special Exception site. The Master Plan Narrative actually expresses development (a) should include "quality department stores," (b) should not include "discount or big box commercial activities", and (c) only grocery stores shall exceed 125,000 square feet in size. The Applicant saw and asserted there existed conflicts in this Master Plan Narrative. Applicant's witnesses Albert and Del Balzo provided the most relevant testimony on the subject of those three points. That evidence showed (1) the proposed department store would carry a variety of products and brands with a diversity of price points, (2) that similar to all retail and service providers, the department store would at times offer discounts or sales, (3) the proposed department store size was similar to that of Nordstrom's and Macy's (the latter currently existing in Bowie), all in excess of 125,000 square feet, (4) the Master Plan Guidelines, expressing a need for department stores, could not have intended to also prohibit the use simply because it was proposed in excess of 125,000 square feet, and (5) this narrative relative to site design was conflicting, "aspirational" at best, but definitely not mandatory.

02/20/2015 Ltr, Gingles to Floyd.

We've reviewed the Applicant's exceptions, along with points elucidated at the May 11, 2015, Oral Argument, in formulating our assessment as to S.E. 4734. Accordingly, the District

Council reincorporates its findings of fact and conclusions of law, *supra*, in this final decision as to S.E. 4734.

- Citizens Opposition – Motion to Disqualify

Regarding the procedural Motion to Disqualify filed by the Citizens Opposition, we incorporate by reference the above-stated findings of fact as to the Motion to Disqualify Council Member Todd M. Turner, filed April 6, 2015, by the Citizens Opposition. Further, we take administrative notice of the section of the County Ethics Code concerning conflicts of interest, particularly § 2-293, which states, in pertinent part, as follows:

(a) Participation Prohibitions. Except as permitted by Board regulations or opinion, an official or employee may not participate in:

(1) Any matter, except in the exercise of an administrative or ministerial duty which does not affect the disposition or decision with respect to that matter, if, to his knowledge, he, his spouse, parent, child, brother, or sister has an interest therein.

(2) Any matter, except in the exercise of an administrative or ministerial duty, which does not affect the disposition or decision with respect to the matter, when any of the following is a party thereto:

(A) Any business entity in which he has a direct financial interest of which he may reasonably be expected to know;

(B) Any business entity of which he is an officer, director, trustee, partner, or employee, or in which any of the above-listed relatives has this interest;

(C) Any business entity with which he or, to his knowledge, any of the relatives listed in paragraph (1) of this Subsection is negotiating or has any arrangement concerning prospective employment;

(D) Any business entity which is a party to an existing contract with the official or employee, or which the official or employee knows is a party to a contract with any of the above-named relatives, if the contract could reasonably be expected to result in a conflict between the private interests of the official or employee and his official duties;

(E) Any entity doing business with the County in which a direct financial interest is owned by another entity in which the official or employee has a direct financial interest, if he may be reasonably expected to know of both direct financial interests; or

(F) Any business entity which the official or employee knows is his creditor or obligee, or that of any of the relatives listed in paragraph (1) of this Subsection, with respect to a thing of economic value and which, by reason thereof, is in a position to affect directly and substantially the interest of the official or employee or any of the above-named relatives.

(3) If a disqualification pursuant to paragraphs (1) or (2) of this Subsection leaves any body with less than a quorum capable of acting, or if the disqualified official or employee is required by law to act or is the only person authorized to act, the disqualified person shall disclose the nature and circumstances of the conflict and may participate or act.

(4) The prohibitions of paragraph (1) of this Subsection do not apply if participation is allowed by regulation or opinion of the Board.

(b) Employment Restrictions.

(1) (A) Except as permitted by regulation of the Board when such interest is disclosed or when the employment does not create a conflict of interest or appearance of conflict, an official or employee may not:

(i) Be employed by, or have a financial interest in, any entity subject to his authority or that of the County agency, board, or commission with which he is affiliated or any entity which is negotiating or has entered a contract with that agency, board, or commission; or

(ii) Hold any other employment relationship which would impair the impartiality or independence of judgment of the official or employee.

(B) This prohibition does not apply to:

(i) An official or employee who is appointed to a regulatory or licensing authority pursuant to a statutory requirement that persons subject to the jurisdiction of the authority be represented in appointments to it;

(ii) Subject to other provisions of law, including this Section 2-293, a member of a board or commission in regard to a financial interest or employment held at the time of appointment, provided the financial interest or employment is publicly disclosed to the appointing authority and Board; or

(iii) An official or employee whose duties are ministerial, if the private employment or financial interest does not create a conflict of interest or the appearance of a conflict of interest, as permitted and in accordance with regulations adopted by the Board; or

(iv) Employment or financial interests allowed by regulation of the Board if the employment does not create a conflict of interest or the appearance of a conflict of interest or the financial interest is disclosed.

(2) Post-employment limitations and restrictions.

(A) With the exception of former members of the County Council, a former official or employee may not assist or represent any party other than the County for compensation in a case, contract, or other specific matter involving the County if that matter is one in which he significantly participated as an official or employee.

(B) Until the conclusion of the next regular session that begins after the elected official leaves office, a former member of the County Council may not assist or represent another party for compensation in a matter that is the subject of legislative action.

(3) An official or employee may not assist or represent a party for contingent compensation in any matter before or involving the County, other than in a judicial or quasi-judicial proceeding.

See § 2-293, Prince George's County Code (2011 & Supp. 2014).

Regarding the Motion to Disqualify and facts elucidated during the *voir dire* examination of Council Member Turner during the May 11, 2015, proceedings, we are persuaded by Council Member Turner's responses *voir dire* examination by the People's Zoning Counsel. We further find that Council Member Turner unambiguously state his ability to vote and to participate fully in the matter—fairly, objectively, and in the public interest. See 05/11/2015 Tr. See also Ltr, 04/01/2015, Nelson to Floyd Finally ,we find all Moreover, we find the arguments advanced by the Citizens to establish a conflict of interest amount to little more than bald accusations and compel no further action. In other words, we find the Citizens Motion to Disqualify without merit.

- Conclusion

Based on the record before us, we are persuaded that the applicant has met its burden of producing evidence sufficient to meet the criteria for approval of a special exception for Department of Variety Store combined with Food or Beverage Component, pursuant to § 27-348.02 of the Zoning Ordinance, that S.E. 4734 should be approved, subject to certain conditions.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. The Zoning Map of the Maryland-Washington Regional District in Prince George's County, Maryland, is hereby amended to show an approved special exception for a Department or Variety Store Combined with Food and Beverage Component, which is the subject of Application No. S.E. 4734. All development and use of the subject property under this special exception shall conform to the site plan filed in accordance with this decision.

SECTION 2. Approval of Application No. S.E. 4734 is subject to the following conditions:

1. Approval of S.E. 4734 is conditioned upon approval by SHA for direct vehicular access to Robert Crain Highway (US 301) from the site in accordance with § 27-348.02(a)(1) of the Zoning Ordinance, within two (2) years of the special exception approval, or upon approval of a variance from the strict application of § 27-348.02(a)(1) for the subject development, whichever is earlier.

2. Prior to signature approval of the special exception site plan, the applicant shall redesign the proposed building using the following considerations:
 - a. To be successful, architectural design should include materials, elements and massing in an architectural composition that makes design sense to ensure cohesive design relationship among the various parts of the architectural composition.
 - b. The various segments of the building, including the front entrance, market, home and pharmacy, outdoor living and auto center, should be distinct but also have a design relationship to one another in its architectural form, detailing, and use of architectural materials.
 - c. The applicant should consider further articulating the roofline about the signage and entranceways to the various segments of the building to provide visual variety and to help define the various parts.
 - d. The four architectural façades of this building should all receive equal treatment as they will be visible from the access to the adjacent park land and the park, itself.
 - e. Architectural materials should be more cohesively organized on the four façades. For example, the entire first story might be treated in the dark brown quick brick, with the upper story a painted brown and the integrally colored brown split face block could be used uniformly to accentuate the various entrances to the building.
 - f. Visual interest should be ensured by attention to the form and massing of the building, the use of contrasting materials, colors and/or various regular patterns of the application of architectural detail.
 - g. The pattern of the black ornamental fence above a brick knee wall provided on the far right of the front elevation of the building presents an aesthetically pleasing aspect and should perhaps be repeated elsewhere in the design.
 - h. Use of a single material such as the Trespa Meteon Medium Brown stone in a single location, *e.g.*, the upper story proximate to the entrance to the "market," should be avoided.

Architectural materials should be repeated elsewhere in the design in a comprehensible arrangement.

- i. The almost entirely flat roofline treatment should be reevaluated, and additional punctuation of same should be provided over the market, home and pharmacy, outdoor living and auto center signage and/or entranceways.
 - j. The use of silver paint should be avoided on the side façades, as it has no design relationship to the remainder of the building. The silver paint should especially be avoided on the right side façade, as it will be highly visible from the access road to the park and the parkland on its opposite side.
3. Prior to signature approval of the special exception site plan, confirmation shall be submitted from the City of Bowie that they have agreed to the revised, approved Stormwater Management Concept Letter and Plan issued by DPIE for this property on September 13, 2013, or a subsequent revision.
4. Prior to signature approval of the special exception site plan, the TCPII plan shall be revised to show all storm water management elements shown on the valid approved SWM concept plan for this site.
5. Prior to signature approval of the special exception site plan:
 - a. An amended wetland studies shall be submitted with regards to additional wetlands on the site, and the NRI shall be revised to reflect any additional information provided; and
 - b. The TCPII shall correctly reflect any change to environmental features shown on the revised NRI.
6.
 - a. All landscaping shall be removed from the TCPII plan unless it is proposed to be credited as woodland conservation to meet the requirements of Sec. 25-122(c)(1)(K). Any on-site landscaping proposed to be credited as woodland conservation shall be indicated in a differentiated graphic pattern on the plan and in the legend.
 - b. All woodland conservation areas on-site shall be labeled by woodland conservation methodology and area.
 - c. Any on-site landscaping proposed to be credited as woodland conservation detailed plant schedule showing the plant quantities, types and size which demonstrates that the

landscape area is a minimum of 35 feet in width, 5,000 square foot in area, will be planted in native species, meets the stocking rate of 1,000 seedling equivalents per acre, and no less than 50 percent of the plants in the landscape area shall be trees.

- d. The tree canopy coverage schedule shall be moved from the TCPII plan sheet to the landscape plan.
- e. The separate woodland conservation tabulations chart shall be removed.
- f. In the legend, specific areas quantification shall be removed from the labels identifying graphic elements shown on the plan. Specific area quantifications shall be limited to the woodland conservation worksheet.
- g. The TCPII number shall be added to all approval blocks.
- h. The limits of the special exception shall be added to the plan. The TCPII may use a phased worksheet, if the applicant proposes to phase the provision of woodland conservation requirements.
- i. Note 22 shall be removed from the plan.
- j. A graphic shall be included on the plan and legend to identify the specimen trees proposed to be removed.
- k. The specimen trees proposed for removal shall be indicated on the plan using a graphic element included in the legend.
- l. The TCPII notes shall be revised as follows:
 - 1.) Note 1 shall reference SE-4734.
 - 2.) Note 2 shall reference the Department of Permits, Inspections and Enforcement ("DPIE").
 - 3.) Note 9 shall indicate that the site is grandfathered.
 - 4.) Note 21 shall indicate that the afforestation shall be completed in phase with development.
 - 5.) Note 29 shall be completed to read:
"The required site stocking rate is 1000 seedling equivalents per acre, as demonstrated by the plant size

and quantities for designated afforestation/ reforestation areas shown in the plant schedule."

- 6.) Natural regeneration notes shall be removed from the plan. No natural regeneration is appropriate on this site.
 - m. A fence detail for split rail fence or an equivalent to act as a permanent tree protection device shall be added to the plan detail sheet.
 - n. Permanent tree protection fencing shall be shown on the plan whenever a vulnerable planting edge is exposed.
 - o. Permanent tree protection devices shall be graphically differentiated from temporary tree protection fencing on the plan and in the legend.
 - p. The TCP is grandfathered, however the TCP shall adhere to a stocking requirement of 1,000 seedling equivalents per acre (*see* Condition 5.I.(3), above).
 - q. Remove the site stocking table and provide area specific plant schedules that demonstrate how afforestation and on-site landscaping requirements, if proposed, will be fulfilled.
 - r. All afforestation/reforestation areas shall be set back a minimum of five (5) feet from the back of curb to allow for a maintenance mow zone.
 - s. Remove the Reforestation Calculations table from the plan sheet.
 - t. Submit plans that are signed and dated by the preparer, who shall be a qualified professional.
7. The development should include a pedestrian/hiker/biker system comprehensively designed pedestrian/hiker/biker system to encourage pedestrian and biking activity within the development and with connections to the Green Branch Regional Park and Prince George's Stadium.
8. Prior to the issuance of building permits, the applicant, his heirs, successors and/or assignees shall provide a financial contribution of \$210.00 to DPW&T for placement of a bikeway sign(s) along Mill Branch Road, designated a Class III Bikeway. A note shall be placed

on the final plat for payment to be received prior to the issuance of the first building permit. If DPW&T declines the signage, this condition shall be void.

9. The applicant, as well as the applicant's heirs, successors and/or assignees shall provide, unless otherwise modified by DPW&T and SHA:
 - a. A multiuse sidepath for pedestrians and bicyclists on Mill Branch Road connecting to the intersection of US 301 and Excalibur Road.
 - b. A multiuse sidepath or wide sidewalk along the subject site's entire frontage of the access road connection Mill Branch Road to the existing M-NCPPC parkland.
 - c. A sidewalk along the subject site's entire portion of the main access road entering the subject site.
 - d. Provide a wide crosswalk with pedestrian islands on Robert Crain Highway (US 301) to create a safer road crossing and to accommodate both pedestrians and bicyclists using the recommended sidepath.
 - e. Raised crosswalks on roads approaching Mill Branch Road to create safe road crossings for pedestrians and bicyclists.
 - f. Install "bikeway narrows" signage on the approach to Mill Branch Road and the site entrance.
 - g. Provide a bicycle rack(s) accommodating a minimum of twenty (20) bicycle parking spaces at a location convenient to the building entrance.
 - h. Provide paving of and placement of appropriate traffic markers and/or restrictions on Mill Branch Road.
10. Prior to the approval of the detailed site plan, the applicant shall submit a Phase III mitigation and data recovery plan for review and approval by the Historic Preservation staff and the Historic Preservation Commission for 18PR857. The applicant shall provide a final report detailing the Phase III investigations, and ensure that all artifacts are curated in a proper manner and brought back to the site for interpretative exhibits to be determined by the Planning Board at the time of review of the Detailed Site Plan.

11. The applicant shall provide interpretive signage detailing the results of the archeological investigations at site 18PR857. The location, wording, and timing for installation of the interpretive signage shall be reviewed by the staff archaeologist at the time of detailed site plan approval.
12. If state or federal monies or federal permits are required for the project, Section 106 review may require archeological survey for state or federal agencies. Section 106 of the National Historic Preservation Act (“NHPA”) requires federal agencies to take into account the effects of their undertakings on historic properties, to include archeological sites. The applicant shall provide proof to Historic Preservation staff that they have forwarded all necessary materials to the Maryland Historical Trust for their review of potential effects on historical resources on the subject property prior to approval of final plat.
13. Prior to submission of the detailed site plan, the applicant should determine the limits of a buffer yard along the eastern property which is between the areas designated inside and outside of the County’s Growth Boundary, as set forth in the 2014 *Plan Prince George’s 2035* General Plan (formerly known as the Developing and Rural Tiers within the 2002 General Plan). In order to facilitate the development of the buffer yard, prior to submission of the detailed site plan, the applicant should enter into a revised easement agreement with the Department of Parks and Recreation, which will facilitate the relocation of the existing access easement, as well as the creation of a landscape buffer for existing agricultural uses in the vicinity of the proposed development, and provide sufficient transition between the properties within and outside of County Growth Boundary.
14. At the time of detailed site plan review for the entire property, the applicant should explore the provision of a second point of access, from Robert Crain Highway (US 301) to the Green Branch Athletic Complex, with the Department of Parks and Recreation.
15. Prior to submission of the detailed site plan, the applicant should meet with the Department of Parks and Recreation to determine the type and extent of landscaping, berming, or fencing should be provided along the park property line, in order to buffer incompatible uses, and to determine whether any additional vehicular and pedestrian connections should be provided from this project area to the Green Branch Athletic Complex.

16. Prior to submission of a detailed site plan, the applicant shall meet with the Technical Staff to determine the type and extent of landscaping, berming, or other screening necessary to provide, to the maximum extent possible, increased buffer as a transition along the County Growth Boundary, and to further ensure that the adjacent agricultural and recreational uses in the vicinity of the site are buffered from the proposed development. Applicant shall provide, to the maximum extent possible, the increased buffer as recommended, at the time of detailed site plan.
17. At the time of detailed site plan approval, the applicant shall demonstrate, to the maximum extent practicable, the use of environmentally sustainable design techniques that incorporate the latest technologies in high-performance construction for the project buildings, and site design techniques that minimize pervious surfaces and incorporate permeable pavers where possible on the site.
18. Prior to the issuance of building permits, the applicant, his heirs, successors and/or assignees shall provide a financial contribution, in an amount to be determined with the City of Bowie, to support the City of Bowie's Senior Call-A-Bus Service.
19. Prior to the issuance of building permits, the applicant shall provide a detailed written proposal stating the planned use and/or disposition of the existing Wal Mart Department or Variety Store located at 3300 Robert Crain Highway.

Enacted this 22nd day of June, 2015, by the following vote:

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

Opposed: Council Members Taveras and Toles.

Abstained:

Absent:

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: _____
Mel Franklin, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council