

Case No.: S.E. 4738 and Variance 4738
Project Name: Potomac Business Park

Applicant: Oxon Hill Associates, L.C.

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

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record and disposition recommendation of the Zoning Hearing Examiner for Special Exception and Variance application 4738, that permission to construct a department or variety store exceeding 85,000 square feet of gross floor area with a food and beverage component, and required companion request for a variance from strict application of the provisions of Section 27-348.02(a)(1) of the Zoning Ordinance ("that the site shall have frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets"), on approximately 15.44 acres of land in the I-3 (Planned Industrial/Employment Park) Zone, and identified as Lots 6, 7, and 8 of the Potomac Business Park, Oxon Hill, Maryland, is DENIED, pursuant to the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of Prince George's County Code, Sections 27-127, 27-131, 27-132, 27-140–27-142, 27-317, and the Regional District Act, Land Use Article, Annotated Code of Maryland (2012 and Supp. 2014).¹

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- ____" herein. References to the Regional District Act within Md. Code Ann., Land Use (2012 & Supp. 2014) are styled the "Regional District Act" and cited "§ ____ of the 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, Oxon Hill Associates, L.C., are styled "Applicant" herein. References to the opposition are styled "Citizen Opposition" herein. Citations to exhibits within the administrative record created before the ZHE, as listed on the ZHE Document Sheet, are styled "Ex. ____" herein.

PROCEDURAL HISTORY²

On or about October 8, 2013, the Development Review Division in the Planning Department of the Maryland-National Capital Park and Planning Commission accepted Applicant's special exception application and its companion variance application (S.E. 4738) for review.³ Ex. 1. On January 8, 2014, pursuant to § 27-311 of the Zoning Ordinance, the Technical Staff completed its report and recommended that S.E. 4738 be approved, subject to conditions. Ex. 25. On January 23, 2014, the Planning Board chose not to hold a hearing and adopted Staff's recommendation as its own. Ex. 30(b).

In accordance with Subdivision 2, Part 3 of the Zoning Ordinance, the Zoning Hearing Examiner (ZHE) conducted evidentiary hearings on March 19, 20, April 8, and May 1, 2014,

² See § 27-141 ("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 RULES OF PROCEDURE FOR THE PRINCE GEORGE'S COUNTY DISTRICT COUNCIL (Adopted by CR-5-1993 and Amended by CR-2-1994, CR-2-1995 and CR-74-1995)

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."

In 2012, Applicant filed Detailed Site Plan (DSP-11011) and Departure from Parking and Loading Standards (DPLS-370) applications for approval of a 100,779-square-foot department or variety store, specifically a Super Walmart, on 13.36 acres, which consisted of Lots 6 and 8. After the Planning Board approved DSP-11011 (PGCPB No. 12-42) and DPLS-370 (PGCPB No. 12-43), the District Council remanded both applications to the Planning Board. See Orders of Remand dated January 28, 2013. Subsequently, on March 4, 2013, the Applicant withdrew both applications. See PGCPB No. 14-48, File No. DSP-13048, at 2; Technical Staff Report, 4/24/2014, at 5. See also *or visit*:

http://www.mnccppcapps.org/planning/damsweb/Case_Detail.cfm?CaseNumber=DSP-11011

http://www.mnccppcapps.org/planning/damsweb/Case_Detail.cfm?CaseNumber=DPLS-370

³ The Applicant is Oxon Hill Associates, L.C., not "Potomac Business Park." Potomac Business Park is the name of the project. See Ex. 1, Application, at 1; Ex. 2, Statement of Justification, at 2; Ex. 89, Non-Corporate Applicant Affidavit; Ex. 25, 1/08/2014 Technical Staff Report. Other documents within the administrative record, including the disposition recommendation of the ZHE, incorrectly reflect Oxon Hill Associates as a Limited Liability Company (LLC). However, the entity registered with the State Department of Assessments and Taxation (SDAT) is "Oxon Hill Associates, L.C.," not "Oxon Hill Associates LLC." Whether it is a distinction without a difference is not before us today; this final decision reflects the entity's accurate designation.

respectively. *See generally* 3/19/2014 Tr.; 3/20/2014 Tr.; 4/8/2014, Tr.; 5/1/2014 Tr.⁴ At the conclusion of the evidentiary hearing, the ZHE kept the record open for additional documents, the last of which was received on May 2, 2014. The administrative record created by the ZHE consists of 89 exhibits, including closing memoranda filed by the Citizens and the Applicant. *See* Ex. 87; Ex. 88.

On August 5, 2014, the ZHE issued a disposition recommendation in accordance with § 27-127 of the Zoning Ordinance and recommended DENIAL as to S.E. 4738, *i.e.*, denial of the special exception and companion variance application, with the Clerk of the District Council and notified Applicant and all persons of record. *See* 8/5/2014 ZHE Disp. Rcmd'n, at 1.

On or about September 4, 2014, and pursuant to § 27-131 of the Zoning Ordinance, Applicant's attorney filed exceptions to the disposition recommendation of the ZHE with the Clerk of the District Council and requested oral argument before the District Council. *See generally* 9/4/2014 Mem., Applicant.

On or about September 8, 2014, the District Council elected to make the final decision as to S.E. 4738. In accordance with § 27-125.04 of the Zoning Ordinance, notice of oral argument was mailed to all persons of record by the Clerk of the District Council, stating that the District Council would conduct oral argument as to S.E. 4738, as well as the related detailed site plan application DSP-13048, on January 12, 2015.⁵

⁴ The administrative record indicated a total of 680 persons of record. *See* Ex. 8(d).

⁵ Pursuant to § 27-471(d), a Conceptual Site Plan (CSP) and a Detailed Site Plan (DSP) are required for all uses and improvements in the I-3 (Planned Industrial/Employment Park) Zone. An approved DSP is required prior to issuance of permits for the project. The special exception site plan is essentially the detailed site plan for Lots 6, 7, and 8, since a special exception site plan takes precedence over any other plan approved. *See* § 27-319(a), Zoning Ordinance; Ex. 25, at 4–5. After filing S.E. 4738, the special exception and companion variance application, Applicant did not wait for final disposition on the conditional use and variance and filed a concurrent detailed site plan application (DSP-13048). While the disposition recommendation by ZHE and final decision as to S.E. 4738 were far from completion, the Planning Board nevertheless reviewed DSP-13048, adopting PGCPB No. 14-48, a

On or about January 5, 2015, Citizens filed a memorandum in support of the ZHE's decision and in opposition to the Applicant's exceptions. *See* 1/02/2015 Mem., Citizens Opposition.

On January 12, 2015, the District Council conducted oral argument as to S.E. 4738 and DSP-13048 pursuant to the procedures recited in § 27-131 of the Zoning Ordinance and its Rules of Procedure. *See generally* 1/12/2015 Tr. At the conclusion of the oral argument, the District Council took both matters under advisement.

ZONING AUTHORITY

The Prince George's County Council, by way of the express authority conferred by the Maryland General Assembly through the Regional District Act, 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

resolution with recommendation of approval subject to conformance with **approved** S.E. 4738, as to DSP-13048 on May 15, 2014. We note that Planning Board adopted PGCPB No. 14-48 nearly three months **prior** to the ZHE disposition recommendation of DENIAL for S.E. 4738. In turn, the District Council elected to review DSP-13078 on June 30, 2014; no appeal was filed by any person of record in DSP-13048. Because Applicant's special exception and companion variance case, S.E. 4738, is DENIED, Applicant's Detailed Site Plan (DSP-13048) will also be DENIED, via a separate final decision of the District Council as to DSP-13048. *See* PGCPB No. 14-48, at. 2–3 (The proposed use on the subject DSP is not allowed in the I-3 Zone without prior approval, and conformance with, S.E. 4738).

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 procedures relative to special exceptions pursuant to §§ 22-206 and 22-301, which provide:

§ 22-301. Special exceptions and variances.

(a) Authorized. --

(1) A district council may adopt zoning laws⁶ that authorize the board of appeals,

⁶ Pursuant to §14-101 of the Regional District Act:

(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.;

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 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.

The District Council established the Office of the Zoning Hearing Examiner to conduct hearings on applications for special exceptions under Part 4 of the Zoning Ordinance, including applications for variances in conjunction with Special Exceptions.⁷ § 27-102 of the Zoning Ordinance provides overarching purposes to guide 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;
- (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.

The Zoning Ordinance regulates special exceptions pursuant to the general zoning authority in Sections 22-202 and 22-206 and the specific authority as to special exceptions in Sections 22-301 and 22-310 of the RDA. *See generally* §§ 27-102, 27-311, 27-312, 27-313, 27-

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

314, 27-315, 27-316, 27-319, 27-324, Zoning Ordinance. Regarding special exceptions, § 27-317 of the Zoning Ordinance provides:

A special exception **may** be approved, pursuant to § 27-317(a), **if**⁸:

- (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, Zoning Ordinance (emphasis added).

Department or Variety Stores, and Department or Variety Stores Combined With Food and Beverage Stores, are permitted by special exception in the I-3 Zone and **shall** be subject to the following requirements:

⁸ See §27-108.01, Zoning Ordinance.

Interpretations and rules of construction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See § 27-348.02, Zoning Ordinance (emphasis added).

In turn, § 27-230 of the Zoning Ordinance governs the grant of a variance and provides as follows:

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

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

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

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

Well-established Maryland case law, to be discussed *infra*, also governs the standard of review for variances.

FINDINGS AND CONCLUSIONS⁹

The Subject Property

The subject property consists of three vacant lots, Lots 6, 7, and 8, within the larger Potomac Business Park development, which is completely vacant at this time. Lot 6 sits on the southeastern corner of the intersection of Oxon Hill Road (MD 414) and Clipper Way.¹⁰ It is roughly rectangular in shape, except along its western frontage on Clipper Way which is curvilinear, and it contains regulated environmental features along the southern end. Lots 7 and 8 sit on the western side of Clipper Way, southwest of Lot 6, and extend in a triangular shape towards Indian Head Highway (MD 210) to the west.

The property is surrounded by the following uses:

- North - Across Oxon Hill Road is the Forest Heights Baptist Church in the R-R Zone

⁹ Because a contested application for a special exception, as is the case here, may not be granted or denied without written findings of material facts and conclusions, we make our own findings of material facts and conclusions, but we also adopt, where applicable, certain findings of material facts and conclusions of the ZHE in furtherance of our denial of S.E. 4738. *See* §§ 25-204, Land Use Article; §§ 27-132, 27-134, 27-141, Zoning Ordinance. *See also Templeton v. County Council of Prince George's County*, 23 Md. App. 596, 598; 329 A.2d 428 (1974) (where Council has delegated duty 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 citation omitted).

¹⁰ Clipper Way was formerly known as Felker Avenue. *See* Ex. 25, 1-08/2014 TSR, at 4–5.

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

The Neighborhood is defined by the following boundaries:

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

Ex. 25, at 4–5, Slides 2–13.

Prior Zoning Approvals for the Subject Property

In November 1987, the Planning Board approved, subject to seven conditions, Conceptual Site Plan application SP-87116 for the Potomac Business Park, including this property. In June 1988, the Planning Board approved, subject to 20 conditions, Preliminary Plan of Subdivision application 4-88054 (PGCPB No. 88-250) for the Potomac Business Park property. The property was recorded in Plat Book VJ 160-87 on October 30, 1991. In January 1996, the preliminary plan approval was reconsidered, and an amended resolution was issued (PGCPB Resolution No. 88-250(A)), also subject to 20 conditions. In turn, the property was then re-recorded in Plat Book VJ 178-69 on February 26, 1997, as a plat of correction. The property was again re-recorded in Plat Book MMB 233-87 on April 18, 2011, as a plat of resubdivision. The Final Plat of Subdivision includes the following Note: “No direct access to Oxon Hill Road is permitted. All access shall be off of Felker Avenue.” Ex. 25, at 6; 3/19/14 Tr., at 120–21.

In 2012, Applicant filed applications for a Detailed Site Plan (DSP-11011) and Departure from Parking and Loading Standards (DPLS-370) for approval of a 100,779-square-foot department or variety store, specifically a Super Walmart, on 13.36 acres of land consisting of

Lots 6 and 8, for which the Planning Board recommended approval. *See* PGCPB No. 12-42 (as to DSP-11011); PGCPB No. 12-43 (as to DPLS-370).

On November 7, 2012, the District Council enacted CB-64-2012, a zoning ordinance concerning department or variety stores, which amended the Zoning Ordinance to permit department or variety stores in the I-3 Zone by special exception, under certain circumstances. *See generally* CB-64-2012.

The subject property lies within an area discussed in the 2006 *Master Plan and Sectional Map Amendment (SMA) for the Henson Creek-South Potomac Planning Areas 76B and 80*. The property is also situated within the Oxon Hill Regional Center, an area for which County land use policy recommends mixed-use zoning to implement the concepts and guidelines within the Master Plan. Technical Staff noted that the Master Plan “designates this area a transition area and recommends future development at lower scale transit-oriented (TOD) densities and intensities than the core area in order to serve potential future light rail transit station stops.” Ex. 25, at 4–5. The approved SMA retained this property within the I-3 Zone. The 2002 *General Plan* assigned the subject property within the Developed Tier of the County. The Developed Tier land use vision of the County is that of a network of sustainable, transit-supporting, mixed-use pedestrian-oriented, medium-to-high density neighborhoods. Most recently, the 2014 *Plan Prince George’s 2035 General Plan Amendment* placed the property inside the Growth Boundary of the County and designates the property in a Local Center. *See* 2014 *Plan Prince George’s*, at 13-15.

Applicant’s Proposal

Applicant intends to construct a 100,310 square-foot Walmart Supercenter on Lot 6 of the subject property. The proposed “Supercenter” will consist of a grocery store, a general merchandise store, and a garden center. Applicant also proposes to lease a portion of the site to

an additional tenant, as is Walmart's practice, but Applicant did not identify the tenant nor the type of use envisioned. The proposed Walmart store will be approximately 100 feet west of the John Hanson Montessori School (Montessori School). Ex. 40; 3/19/2014 Tr., at 24–25. Applicant submitted pictures looking from the easternmost portion where the proposed building will be constructed toward the Montessori school. Ex. 76(a)–(g). The loading dock for deliveries will also be located on that side of the store. The Applicant submitted information on the types of trucks generally used for deliveries at Walmart. All of its tractor trailer delivery trucks should “no longer idle anywhere for more than 3 minutes” and will “typically deliver early (around 5 a.m.) and late in the day (around 10 p.m.) with deliveries ... occurring approximately 3-5 times a day.” Ex. 75(a)–(b). Applicant's land use planner stated that as many as six (6) of these delivery vehicles will unload at the site, given the size of the proposed store. 3/20/2014 Tr., at 15–16. No noise study was prepared to ascertain the effect that these vehicles might have on the adjacent Montessori school. 3/18/2014 Tr., at 33.

Mr. Valdis Ronis oversaw the design of the proposed Walmart. He prepared an Architectural Compatibility Area exhibit for the development to show how the use will be compatible to its surroundings. Ex. 41. According to his assessment of the surrounding area, he “found a lot of commercial structures that used masonry, [and] used synthetic stucco or what some people call EIFS for trim.” 3/19/ 2014 Tr., at 45. The residences in the area are mostly “wood framed with siding and masonry.” 3/19/2014 Tr., at 45. As a result, the proposed Walmart is designed as follows:

Our building is masonry predominantly, some of it painted, some of it integral color, some of it architectural finish, meaning it's a split-face finish or it's in a module that mimics brick. We're using synthetic stucco for the trim We have glazed entrances. Actually if you look at the design of the [Montessori] school, they're actually quite similar [The school] appears to be in a modernist style,

very simple lines, not much adornment. A very functional, utilitarian building. It has some elegance.

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

3/19/2014 Tr., at 45–46.

Applicant prepared architectural renderings of exterior and interior of the proposed store. *See* Ex. 43; Ex. 49; Ex. 52. The proposed building will have varying height, ranging from approximately 28 feet to 36 feet, designed to give the appearance of two stories in the proposed building front facing the public rights-of-way. Technical Staff, as well as several persons of record in opposition to the project, observed that additional efforts possible and necessary to break-up or eliminate a visual perception of “blankness” along the building’s southern façade and to “present an aesthetically-pleasing unified whole.” Ex. 25, at 10; 3/19/2014 Tr., at 83–86. Mr. Ronis admitted that certain changes could be made to improve the aesthetics that would not be cost-prohibitive. 3/19/2014 Tr., at 85–86.

Applicant’s Request for a Variance

Because Applicant requested a special exception for a proposed department or variety store, with a food and beverage component, and a gross floor area of greater than 85,000 square feet in the I-3 Zone (a Walmart Supercenter), the site **shall have frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets.** *See* § 27-348.02(a)(1), Zoning Ordinance. *See also* PGCPB No. 88-250(A), (citing condition of approval for plan of subdivision as to the property denied the business park any access to Oxon Hill Road, which is an arterial roadway). Accordingly, Applicant concurrently

seeks a variance from strict application of this requirement. As support for the variance request,

Applicant states:

- **A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;**
- **RESPONSE:** Applicant asserts the latter criterion of “...other extraordinary situations or conditions” is applicable to the Property, which was created by Record Plat PM 233@87 in 2011. The Record Plat includes a note denying access to Oxon Hill Road directly from the Property. Section 24-121(a)(3) requires that sites with frontage on arterial roads be designed so the lots/parcels will front on interior or service roads. This requirement within the Subdivision Regulations is in direct conflict with the Zoning Ordinance requirement noted herein that mandates access to an arterial for the proposed use. Although direct vehicular access to the arterial roadway was proposed, the Maryland State Highway Association (“MSHA”) – which has the only statutory authority to permit access – denied the access as evidenced by Finding No. 11 of the Preliminary Plan Approval embodied in Planning Board Resolution No. 88-250, attached hereto. Additionally, Condition No. 9 of Resolution No. 88-250 includes a requirement of a Final Plat Note expressing “No direct access to Oxon Hill Road is permitted. All access shall be off of Felker Avenue” (renamed Clipper Way). The Applicant asserts the MSHA denial of access to the arterial roadway and the Subdivision Regulations prohibition of access to an arterial roadway create extraordinary situation as a result of a conflicting statute and issuance of a controlling decision from a statutory entity from which a Zoning Ordinance regulation cannot supersede circumstances and conditions on the Property. Additionally, the Planning Board approval of Condition No. 9 has the effect of placing the Property in an “extraordinary condition” upon the Property’s usage. None of current situation or condition is of the Applicant’s making. The situation and the condition, individually and collectively forces access to this Property to be from Clipper Way, which has a right-of-way width of 70 feet.
- Section 27-348.02(a)(1) disallows access for the proposed use from primary or secondary streets. Clipper Way is neither. Per Section 27-462(b)(1), Footnote 1, all streets serving commercial uses are deemed to have 70-foot rights-of-way for determining setbacks. These roads are considered “Urban Commercial or Industrial Roads” as defined by the Prince George’s County design guidelines, “Specifications and Standards for Roadways and Bridges” 2008 (p.15), and have a right-of-way width of 70 feet, per Development Standard 100.05 (p.79, Table I-1). The Property

has frontage on an arterial roadway and is served by Clipper Way, a designated Urban Commercial or Industrial Roadway. The clear intent of this requirement is to keep direct traffic generated from the proposed use off primary and secondary streets, which are generally residential streets. The Property has frontage on both an arterial and a Commercial or Industrial Road, a road specifically designed to accept such traffic.

- **The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property;**
- RESPONSE: Because the Property is denied access to the arterial, the strict application of the requirement to access the arterial would create a practical difficulty for the Property owner in that the Property could not be developed with a permitted use. The Zoning Ordinance recognizes a Department or Variety Store Combined with a Food and Beverage Store as a special exception use in the I-3 Zone, traditionally considered compatible and appropriate in the zone in which it is allowed. While other potential uses might be developed, no other potential development has been able to proceed forward since approval of the Preliminary Plan the proposed development is “ripe” for proceeding and can exist and thrive consistent the applicable regulations, agency decision and Planning Board condition disallowing the arterial access. Mandating the access has the impact of disapproving the use and denying the owner an otherwise appropriate use of its land.
- **The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.**
- RESPONSE: The 2002 General Plan placed the Property in the Developing Tier. The vision for the Developing Tier is a “network of sustainable, transit-supporting, mixed-use, pedestrian-oriented, medium-to high-density neighborhoods.” (p. 31)
- The 2006 *Henson Creek-South Potomac Master Plan* (“Master Plan”), which further defined land use recommendations for the Property, is generally silent on the subject of access to arterial roadways. However, the Master Plan is the land use recommendation tool, while the Subdivision Regulations and the Zoning Ordinance are the implementation tools, designed to ensure the Master Plan recommendations are brought to fruition. The Master Plan places the Property in the Oxon Hill Regional Center, which among other things, includes the following strategies (p 51):

- **A new arterial roadway to relieve traffic congestion on Oxon Hill Road.**
- **Oxon Hill Road reconfigured as an arterial road with a grand boulevard design from St. Barnabas Road to Indian Head Highway that includes four drive lanes, curbside parking, wide sidewalks and a wide center island designed to accommodate a potential future Light Rail Transit (LRT) alignment and station stops.**
- Direct access to Oxon Hill Road from this Property could be at odds with these strategies. However, the Master Plan does express an intent to have buildings “front” along the arterial, Oxon Hill Road, which orientation – notwithstanding the lack of access – is proposed by the application. Allowing development without this access advances the recommendations of the Master Plan for Oxon Hill Road; the approval of the variance will not substantially impair the integrity of the master plan or General Plan.

See Ex. 2, 9/03/2013 Stmt. Justif’n, VSE 4748 to Companion Case S.E. 4738. Other support for the variance application found in our review of the administrative record is the written land planning analysis submitted by Applicant’s planning expert, Mr. Joseph Del Balzo, demonstrating how the variance request is in compliance with Sections 27-317, 27-348.02 and 27-471(a) of the Zoning Ordinance. *See generally* Ex. 69.

Other persuasive evidence in the administrative record, however, highlights deficiencies with the requested variance. A second written land planning analysis in the record composed by Ms. Jennifer Cowley, also expert in the area of land use planning, Ms. Jennifer Cowley,¹¹ was submitted to the administrative record. In it, Ms. Cowley, who was retained by the Citizen Opposition, points out how the requested special exception and variance requests do not comply

¹¹ Jennifer Evans-Cowley, PhD, AICP is a national expert on land use. She serves as a Professor of City and Regional Planning and Associate Dean for Academic Affairs and Administration for the college of Engineering at The Ohio State University. In her position, she teaches courses on development regulation, among others. Her research has been widely published in both academic and professional journals. Her research on big box retail has been published in a Planning Advisory Service Report by the American Planning Association. She serves as a consultant to governments, builder’ associations, law firms, and research institutes. Evans-Cowley holds a BS in Political Science and Master’s in Urban Planning from Texas A&M University, a Master’s in Public Administration from the University of North Texas, and a PhD in Urban and Regional Science from Texas A&M University. *See* Ex. 54 and Ex. 54.

with relevant portions of the Zoning Ordinance. We find the following conclusions within Ms.

Cowley's report particularly persuasive in our assessment of the proposed variance request:

The plat for the property specifically notes "No direct access to Oxon Hill Road is permitted. All access shall be off Felker Avenue [which is not known as Clipper way]." This is further reiterated in the 1988 amendment to the plat. In order for a variance to be granted there must be a finding of one or more of several conditions, as specified in Section 27-230(a) of the Zoning Ordinance.

§ 27-230(a)(1)- *A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;*

First, does the specific parcel of land have exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions? The staff report argues that there is a conflict between the zoning ordinance and the subdivision regulations creating an extraordinary situation or condition. However, this is simply not the case. Within the zoning ordinance there are many different uses that are permitted by right for this property that do not require arterial access. This parcel does not have any unique physical conditions that prohibit reasonable economic use of the property. The property owner could choose to use the property for any by right use.

§ 27-230(a)(2)- *The strict application of this subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property;*

The staff report argues that the property owner that applied for the plat had no way of knowing that 25 years later they would need direct access to Oxon Hill. While it is true that the original owner who platted the property would not be able to predict this 25 years later, that does not mean that it has resulted in an unusual practical difficulty or exceptional or undue hardship on the property owner.

The I-3 Planned Industrial/Employment Park zone allows for more than 140 different uses by right, which do not require direct access to an arterial roadway. There is not an unusual practical difficulty when there are so many by right uses of the property that make the property usable in its current condition without direct access to Oxon Hill. It is important to remember that the proposed Walmart is not a permitted use by right, it is only a permitted use by special exception. A special exception requires that certain conditions be met. In this case the condition is that there be arterial access. Because there is not arterial access the special exception should not be granted. Just because a condition cannot be met by a site does not mean that a variance is warranted.

§ 27-230(a)(3)- *The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan;*

While the staff report states that the variance would not substantially impair the “intent, purpose, or integrity of the 2006 approved Master Plan and Sectional map Amendment for Henson Creek-South Potomac Planning Area 76B or 80.” This is a narrow reading of the master plan, only pointing to the recommendation for mixed-use for the property. While, yes, mixed use is pointed out in the master plan, the staff fail to point out the many conflicting points in the master plan.

The Henson Creek – South Potomac Master Plan notes that there are underutilized retail strip shopping malls, pointing to excess retail square footage in the planning area. The plan identifies in the developed tier that newer centers or bigger stores that were built in competing locations and retail uses have declined, leaving former retail business sites underutilized. The plan emphasizes the need to redevelop commercial strips and apply land use regulations that promote redevelopment and revitalization. The plan emphasizes that infill development should improve the function of commercial areas.

The plan recognizes what happens when you permit new retail development in an already developed area. The result is a redistribution of retail to newer sites and resulting vacancies in the existing retail areas. In the National Harbor/Oxon Hill/Ft. Washington retail submarket there is more than 136,000 square feet of vacant retail space available. Recent development at the National Harbor includes completing uses, such as Big Lots and is approximately 2 miles away from the Oxon Hill site. The addition of this Walmart will grow the total retail square footage by 5 percent in the national Harbor/Oxon Hill/Ft. Washington retail submarket. Adding this substantial square footage in an area that already has substantial retail vacancy will result in a redistribution of retail activity, exacerbating the problem of vacancies in retail center.

The granting of this variance, in combination of the approval of the special exception, would substantially impair the intent and purpose of the Master Plan, which is focused on reducing the volume of underutilized retail areas. This infill development would not improve the function of commercial areas, but simply result in further decline in nearby retail areas.

In my opinion, the criteria to grant a variance have not been met. The variance should not be granted.

See Ex. 56, Mem., Cowley, at 6-8.

Ms. Cowley's testimony during the evidentiary hearing conducted before the ZHE buttresses above-stated flaws. Our review of the administrative record reveals the following testimony assessing the subject application and all accompanying documents and relevant provisions of law:

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

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

[There are also no] peculiar and unusual practical difficulties ... or exceptional or undue hardship upon the owner [if the variance is not granted] The basis of [this] opinion is to look at the current configuration of the site, so what is the property area that's available. To look at what could be developed on the site, what are the possibilities of development. There are more than 140 possible uses that could be done by right on the property today I examined the zoning ordinance, looking at the I-3 planned industrial park zone. I went through the different uses that are permitted, and the various subcriteria or additional criteria that are in place. And the only use in the I-3 district that requires arterial access is a large big box retail area in excess of 85,000 square feet

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

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

[The request substantially impairs the intent, purpose or integrity of the general plan or Master Plan.] [U]pon review of the Henson Creek South Potomac Master Plan, one of the key things that is identified in that Master Plan is the currently

underutilized retail within the planning area. They point out that there is an excess of retail square footage, and it identifies the fact that newer centers have resulted in competing locations

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

See 3/19/14 Tr., at 170–73, 177–78.

Law Applicable to Variance

In addition to Ms. Cowley’s expert testimony, we are mindful of the constraints of our legal authority stated in the Zoning Ordinance, as well as precedent found in Maryland case law concerning variances.

Beginning with the stated legal standard found in our local zoning law, we note the prescriptions of § 27-230 of the Zoning Ordinance, stating that “[t]he District Council may only grant a variance if it finds that (1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions; (2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and (3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan. § 27-230, Zoning Ordinance.

Relevant precedent governing consideration of variances is also found in Maryland case law, which provides the following additional parameters that guide our assessment of the subject application:

First, as a general rule, the authority to grant a variance should be exercised sparingly and only under exceptional circumstances. *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424

(1995).¹² In its decision, the *Cromwell* court explained the two-step process necessary in the evaluation of a variance request:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is—in and of itself—unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, *i.e.*, a determination of whether practical difficulty and / or unreasonable hardship, resulting from the disproportionate impact of the ordinance *caused* by the property's uniqueness, exists. Further consideration must then be given to the general purposes of the zoning ordinance.

Cromwell, 102 Md. App. at 694–95, 651 A.2d at 425-27 (emphasis in original).

Thus, a property's uniqueness or peculiarity that, as a result of same, causes an abnormal impact of a zoning ordinance on the property, is the threshold issue to be first addressed and determined as a condition precedent to consideration of any potentially existing practical difficulties. In other words, and as defined through longstanding precedent announced by Maryland courts, this means:

In the zoning context, the 'unique' aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property.

¹² A variance should not be granted unless the need to justify the request is substantial, and not merely for the applicant's convenience. *Belvoir Farms Homeowners Association v. North*, 355 Md. 259, 276-77, 734 A.2d 227 (1999); *Mills v. Godlove*, 200 Md. App. 213, 224-25, 26 A. 3d 1034 (2011). Addressing a necessary restraint in consideration of requests for variances, the Court of Appeals of Maryland has stated:

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

Marino v. City of Baltimore, 215 Md. 206, 216–17, 137 A.2d 198 (1957); *see also Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, 407 Md. 53, 79-83, 962 A.2d 404 (2008).

‘Uniqueness’ of a property for zoning purposes require that the subject property have an inherent characteristic not shared by other properties in the area, *i.e.*, its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

North v. St. Mary’s County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994).

The above-stated current statutory and legal framework is binding upon our review variance requests. Thus, and given these constraints, we are unable to conclude that Applicant has adduced sufficient evidence to meet its burden of production and, as a result, its burden of persuasion, necessary to warrant our approval of the subject variance request. Instead, and as prescribed by the Zoning Ordinance, we state the following determinations as to the subject application for a variance:

- § 27-230(a)(1) - A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions.

We find that the subject property does not have exceptional narrowness, shallowness or shape, exceptional topographic conditions, or other extraordinary situations or conditions.¹³ To this end, we disagree with the finding within the disposition recommendation of the ZHE that Applicant has shown that the property is subject to an extraordinary situation because a State and preliminary plat requirement precludes it from accessing Oxon Hill Road. Next, we further disagree with the finding of Technical Staff that there exists a conflict between the Zoning Ordinance and the Subdivision Regulations, the application of which creates an extraordinary situation or condition on the property. Rather, we find this determination by staff flatly incorrect

¹³ We note that the subject variance request is does not advance support for the requested variance based on the topography or shape of the property. Rather, the subject variance request advances as its sole basis the subject property’s lack of access to the Oxon Hill Road right-of-way.

because, as the Ordinance plainly states, whenever any provision of the Zoning Ordinance imposes a greater requirement or a higher standard than is required in any State or Federal statute or other County ordinance or regulation, the provisions of the Zoning Ordinance shall govern unless preempted by State or Federal law. § 27-103(a), Zoning Ordinance. What's more, we are compelled to point out that the "extraordinary situations or conditions" must be a physical characteristic of the land itself. *North*, 99 Md. App. at 514. Within the Zoning Ordinance, we find that there exist a myriad of different uses that do not require arterial access, and are currently permitted, by right, for the subject property. Simply put, we find that this property does not have any unique physical conditions that prohibit reasonable economic use of the property because the property's record owner is under no obligation to use the property as requested; instead, Applicant holds ample choice to use the property for any other permitted use under its present zoning classification. Thus, we find Applicant failed to produce probative evidence that the subject property is sufficiently affected by the prescriptions of the Zoning Ordinance that is different than its impact on other relevant properties. Accordingly, we find that Applicant failed to meet its burden of proving compliance with the requirements of § 27-230(a)(1).

- § 27-230(a)(2) - The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property.

Even assuming, *arguendo*, that Applicant satisfied the prescriptions of § 27-230(a)(1) of the Zoning Ordinance, we nevertheless find that strict application of § 27-230(a)(2) will not result in peculiar and unusual practical difficulties to or exceptional or undue hardship to Applicant. Indeed, § 27-230(a) of the Zoning Ordinance identifies both the "practical

difficulties” and “exceptional or undue hardship” standards. What’s more, the Court of Special Appeals of Maryland explained the difference as follows:

The determination of which standard to apply, “practical difficulties” or “undue hardship,” rests on which of two types of variances is being requested: “area variances” or “use variances.” Area variances are variances “from area, height, density, setback, or sideline restrictions, such as a variance from the distance required between buildings.” *Anderson v. Bd. of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 37 (1974). Use variances “permit[] a use other than that permitted in the particular district by the ordinance, such as a variance for an office or commercial use in a zone restricted to residential uses.” *Id.* at 38. Because the changes to the character of the neighborhood are considered less drastic with area variances than with use variances, the less stringent “practical difficulties” standard applies to area variances, while the “undue hardship” standard applies to use variances. *See Loyola Fed. Savs. & Loan Ass’n v. Buschman*, 227 Md. 243, 249 (1961).

Montgomery County v. Rotwein, 169 Md. App. 716, 728–29, 906 A.2d 959 (2006).

Technical Staff indicated that the property owner made application for the plat had no way of knowing that, 25 years later, they would need direct access to Oxon Hill Road. While it may indeed be true that the original property owner that first platted the property could not be held responsible in predicting future uses for the property, some 25 years later, we find that this understandable lack of foresight does not amount to an unusual practical difficulty, or exceptional or undue hardship on the current property owner. In our view, guided by the legal constraints of the law, the need sufficient to justify the variance must be substantial and urgent, and not merely for the convenience of the applicant. *McLean v. Soley*, 270 Md. 208, 212–13, 310 A.2d 783 (1973). In fact, on the contrary, we find that the I-3 (Planned Industrial/Employment Park) Zone allows for more than 140 different uses that are permitted by right. Moreover, not one of these 140 uses require direct access to an arterial roadway. Thus, we find there simply is not an unusual practical difficulty established, because there exists a plethora of alternate, permitted by right uses available for the subject property that make the property usable in its

current condition, **without** direct access to Oxon Hill. We find it especially important to remember that the proposed Walmart is not a permitted use by right; instead, it is only a conditionally permitted use through an approved special exception. As with all conditional uses, a special exception requires that certain conditions are met. Here, the condition is arterial access. Nevertheless, the Zoning Ordinance still authorizes Applicant to develop an 85,000 square foot Walmart **without** obtaining a variance from § 27-348.02(a)(1). *See also* 3/19/14, Tr.; Ex. 55; § 27-473, Zoning Ordinance. Because there currently exist 140 permitted uses by right for the subject property, including a mere reduction in the proposed gross floor area for the proposed Walmart by approximately 15%, we find that the record demonstrates that Applicant is able to secure a reasonable return from, or make a reasonable use of, the property without a variance.

In *Rotwein, supra*, the Court examined a request for an area variance and stated, “the pertinent inquiry with respect to economic loss is whether ‘it is impossible to secure a reasonable return from or to make a reasonable use of such property.’” *Rotwein*, 169 Md. App. at 733, *citing Marino v. Mayor and City of Baltimore*, 215 Md. 206, 137 A.2d 198 (1957)). Thus, the *Rotwein* court concluded that the applicant had not demonstrated that “unless her application [for an area variance] is granted, it will be ‘impossible [for her] to make reasonable use of her property.’” *Id.* Similarly, as to the subject proposal, we find that the record supports a proposal for Applicant to build a smaller Walmart, or to utilize any other currently permitted use for the I-3 Zone through access to Clipper Way.

- § 27-230(a)(3) - The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

The 2006 *Approved Master Plan and Sectional Map Amendment for Henson Creek-South Potomac Planning Area 76B or 80* (“2006 Plan”) land use policy strongly emphasizes the need

to redevelop commercial strips and apply available land use regulations to promote redevelopment and revitalization. The 2006 Plan notes that there are underutilized retail shopping malls and this is an indication of excess retail square footage within the subject planning area. Moreover, we are persuaded by Ms. Cowley's expert opinion and testimony on this issue.

We are mindful of our prerogative at Maryland law to draw reasonable inferences from conflicting facts and circumstances within the administrative record. *See Moseman v. County Council of Prince George's County*, 99 Md. App. 258, 265, 636 A.2d 499 (1994). Further, we must point out our responsibility, when considering the evidence in the record for a special exception application, that "we can properly accept one expert's opinion when two well-qualified experts have rendered differing opinions making an issue [in the case] ... fairly debatable." *See Dundalk Holding Co. v. Horn*, 266 Md. 280, 289-91, 292 A.2d 77 (1972). Thus, the *weight* to be accorded to an expert's testimony is properly a matter for us to determine. Accordingly, and except where otherwise specifically provided herein, we adopt the findings of Ms. Cowley as our own. *See generally* Ex. 56.

While Technical Staff determined that the variance would not substantially impair the "intent, purpose, or integrity of the 2006 approved Master Plan and Sectional Map Amendment for Henson Creek-South Potomac Planning Area 76B or 80," this is a narrow reading of the master plan, only pointing to the recommendation for mixed-use for the property. While we concede the that existence of mixed use is pointed out in the master plan, Technical Staff fails to point out the myriad conflicting stated land use policy goals and objectives within the master plan.

The *Henson Creek – South Potomac Master Plan* notes that there are underutilized retail strip shopping malls, pointing to excess retail square footage in the planning area. The plan identifies in the developed tier that newer centers or bigger stores that were built in competing locations and retail uses have declined, leaving former retail business sites underutilized. The plan emphasizes the need to redevelop commercial strips and apply land use regulations that promote redevelopment and revitalization. The plan emphasizes that infill development should improve the function of commercial areas.

The plan recognizes what happens when you permit new retail development in an already developed area. The result is a redistribution of retail to newer sites and resulting vacancies in the existing retail areas. In the National Harbor / Oxon Hill / Fort Washington retail submarket there is more than 136,000 square feet of vacant retail space available. Recent development at the National Harbor includes competing retail uses, such as “Big Lots,” which is located approximately 2 miles away from the proposed Oxon Hill site for the project. The addition of this Walmart will grow the total retail square footage by 5 percent in the national Harbor / Oxon Hill / Fort Washington retail submarket. Adding this substantial square footage in an area that already has substantial retail vacancy will result in a redistribution of retail activity, exacerbating the problem of vacancies in retail center.

We therefore find that to grant the requested variance, in combination with the requested special exception, would serve to unambiguously and substantially impair the intent and purpose of the Master Plan stated focus on reduction of the number and volume of underutilized retail areas. Thus, we conclude that the proposed infill development would not serve to improve the function of commercial areas but, rather, simply result in a further decline in existing, nearby retail areas.

Additionally, the Maryland Court of Appeals recently held that when statutes link planning and zoning, Master Plans are elevated to the level of true regulatory devices. *HNS Dev't, LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 457, 42 A.3d 12 (2012), affirming *HNS Development, LLC v. People's Counsel for Baltimore County, et al.*, 200 Md. App. 1, 24 A.3d 167 (2011), citing *Mayor & City Council of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 814 A.2d 469 (2002). The court also held that plans that did not conform to the Master Plan must be rejected, and nonconformance may serve as an independent basis of denial. *Id.*, citing *Maryland-National Capital Park & Planning Commission v. Greater Baden-Aquasco Citizens Association*, 412 Md. 73, 89–90, 985 A.2d 1160 (2009); *Coffey v. Maryland-National Capital Park & Planning Commission*, 293 Md. 24, 25, 441 A.2d 1041 (1982). Because we found above that the Applicant's request for a variance does not conform to the 2006 Plan, we deny the request for a variance for failure to conform to the 2006 Plan. *See Lussier v. Md. Racing Comm'n*, 343 Md. 681, 696–97, 684 A.2d 804 (1996); *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881 (1989). *See also Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449 (1995) (agency's expertise in its own field must be respected).

For these reasons above, we DENY Applicant's request for a variance.

Law Applicable to Special Exception

We recognized, when taking final action on an application for a special exception, we are also constrained by our own legal authority in the Zoning Ordinance and Maryland case law on special exceptions.

In our Zoning Ordinance, the legal requirements for a special exception are 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.

Department or Variety Stores, Department or Variety Stores Combined With Food and Beverage Stores, in the I-3 Zone, are permitted by special exception 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.

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

See § 27-348.02, Zoning Ordinance (emphasis added).

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.

As the Maryland high court later explained in *Montgomery County v. Butler*, 417 Md. 271, 305 (2010), *quoting Schultz, supra*, 291 Md. at 11, “[i]f [the applicant] shows ... that the proposed use would be conducted without real detriment to the neighborhood ... [the applicant] has met his burden.” Once the applicant meets this threshold, the local zoning board will “ascertain in each case the adverse effects that the proposed use would have on the specific, actual surrounding area.” *Id.* The Court of Appeals has further noted that “if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious and illegal.” *Loyola, supra*, 406 Md. at 83, *quoting*

Turner v. Hammond, 270 Md. 41, at 55.

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." 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."

Applying the above-stated parameters to our evaluation of the evidence within the administrative record, we find probative evidence that the proposed Walmart has characteristics not inherent in the use that will adversely affect this particular site more adversely than elsewhere in the same zone. We further find that the neighborhood has characteristics which would cause the proposed Walmart to have uniquely detrimental effects on the neighborhood.

The Applicant's Case

In this case, Joseph Del Balzo, the Applicant's expert in the area of land use planning, opined as follows regarding compliance of the subject application with applicable provisions of the Zoning Ordinance:

- [F]rom a planning perspective, a great deal of care went into the design of this. This building, this site's been through a number of different variations, and this design is the culmination of looking at the impacts, some meetings that were had with staff ... and it was all intended ... to both conform to the master plan requirements for an urban setting and to minimize impacts on the adjoining properties....
- [W]e're in ... transitional area E. And one of the things that the master plan, for the entire regional center, one of the things or a couple of things

that the master plan is trying to implement is a pedestrian-friendly, transit-oriented boulevard kind of atmosphere along the entire stretch of Oxon Hill Road.

- One of the things that we have done with this property is Oxon Hill Road – in order to create that urban setting, you don't want the building set back behind the parking lot. You want the building up on the road. We've placed the building up on the road in accordance with the required setbacks obviously. We had to set it back some but between the building and ... Oxon Hill Road, there is a wide, I believe at some points, it's as much as 70 feet, pedestrian promenade, so we tried to create a very urban pedestrian-friendly frontage on Oxon Hill Road.... If you drive down Oxon Hill Road today, it's not a very pedestrian-friendly, transit-oriented road but this is what the master plan is calling for
- So this is ... the first new development ... that is aimed at implementing these strategies of the master plan. Again, we're in area E, which is a transition area, so we're not going to get the kinds of densities or intensities that the core area is calling for but area E,... calls for moderate density to moderate intensities and this is that kind of, of development. And ... we're implementing a lot of the requirements or recommendations of the master plan regarding building heights and urban pedestrian-friendly placement and the primary parking – one of the big ones is putting the parking away from Oxon Hill Road. I think there was a suggestion yesterday about ... structured parking. That's not in the plan. What the plan says is put your parking away from Oxon Hill Road....
- I think, ... we've gone on to some length to minimize impacts on adjoining properties and to protect health, safety and welfare for the residents and ... both schools in the area....
- [There is a] 90 feet to 100 ... setback, [between the building and the Montessori school]. It's a significant separation between buildings, especially when you're talking about an urban, a planned urban area. When you have urban areas, you have buildings that are close together. You have dense development. So I think given the setbacks, given the landscaping, given the orientation of the activities, I think we have protected landowners from adverse impacts.

See 3/20/14, Tr., at 17–19, 21–22, 42, 46.

Applicant's expert also provided a written land planning analysis addressing the Application's comportment with §§ 27-317, 27-348.02 and 27-471(a) of the Zoning Ordinance.

See generally Ex. 69. Finally, Mr. Del Balzo offered his professional opinion that the subject application will promote the general purposes of the Zoning Ordinance, as follows:

The proposed special exception brings a nationally recognized retailer to this part of the county. The site has been designed to provide a secondary access point on Clipper Way, allowing trucks to travel along a perimeter, significantly minimizing truck and car interface. Access is to an “Urban Commercial or Industrial Road” (as defined by the Prince George’s County design guidelines), with easy access to an arterial and then to the interstate highways nearby. The Property represents a convenient and safe location for a large scale retail operation. Road improvements required by the Preliminary Plan and set as Plat Notes will ensure safety at the site access points. There are no residential uses within the immediate area; safety and welfare of inhabitants of the county are not impaired. Commercial and institutional uses surround the Property, which is an area convenient to the transportation system, including a Metro Bus stop just to the west of the Property on Oxon Hill Road. There is no evidence that the proposed use in its proposed location will have any negative impact [on] health, safety or welfare in the area. In fact, the site design, with the building close to Oxon Hill Road and sufficient ... setbacks and landscaping, ensures the use will be compatible with other uses in the area

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

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

See Ex. 69, at 7, 10, 12.

Dale Coppage, qualified within in the administrative record as an expert in the area of transportation planning, offered testimony stating that, in his professional opinion, the proposed request would not negatively impact the local streets. He explained:

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

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

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

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

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

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

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

3/18/2014, Tr., at 120–23.

During cross-examination at the evidentiary hearing, several persons of record questioned the conclusions offered by Mr. Coppage, criticizing his use of the Institute of Traffic Engineers (“ITE”) Manual and trip generation rates, since those calculations are used for “free-standing Discount Superstores” ranging from 120,000 to 230,000 square feet of gross floor area, while the subject project proposes a smaller amount of square footage. Ex. 53; 3/19/2014 Tr. At 139–41. The opposition further a disclaimer within the ITE Manual, which states that if the use being measured is not compatible, local data should be utilized to examine its impact. *Id.* Mr. Coppage disagreed, noting that Applicant’s traffic analysis was cross-analyzed using the transportation impact guidelines of M-NCPPC and the State of Maryland, in accordance with the parameters set by Technical Staff. 3/19/2014 Tr., at 135–36, 142.

Other evidence in support of the subject application includes the testimony of Michael Birkland, professional engineer. According to our review of the administrative record, Mr. Birkland, along with his engineering firm, prepared the plans for the special exception application. Using an illustrative of the site, Ex. 39, he explained during his testimony how the site meets applicable requirements of the Zoning Ordinance:

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

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

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

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

See 3/19/2014 Tr., at 14–18.

Mr. Birkland also noted that the proposed concurrent site plan application satisfies the requirements set forth in the County Landscape Manual, as there is at least a minimum 20-foot landscape buffer along all sides, as well as a 6-foot, board-on-board fence, and further buffering on the east property line adjacent to the Montessori School. *See* Ex. 20(c); 3/19/2014 Tr., at 19–20. Moreover, the fence runs from Oxon Hill Road down to the limited disturbance area. Technical Staff also agreed that the proposal satisfies all provisions of the Landscape Manual. *See* Ex. 25.

Our review of the record further reveals testimony at the hearing from several residents stating support of the subject application. The residents cited the possibility of increased tax revenues, employment opportunities, including short-term construction jobs for contractors, as well as long-term employment opportunities once the store opens. *See* 3/19/14 Tr., at 282–83, 308–09, 314–16, 321–22, 351–52. Lastly, these residents also speculated that the subject proposal will serve to stimulate interest by other businesses to locate in the area of the project.

Agency Comment

The record reflects that Technical Staff found the proposed use generally consistent with the vision of the 2002 *General Plan*, and that the subject project conforms to the general land use recommendations of the 2006 Master Plan and SMA.

As part of the Technical Staff Report, the Community Planning Division offered the following comments concerning the subject proposal:

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

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

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

See Ex. 25, at 102–04.

The Countywide Planning Division's comments within the Technical Staff Report stated its determination that the subject request would not burden the police facilities designated to serve the area:

The proposed development is within the service area of Police District IV, Oxon Hill. There is 267,660 square feet of space in all of the facilities used by the Prince George's County Police Department and the July 1, 2012 (U.S. Census Bureau) county population estimate is 881,138. Using the 141 square feet per 1,000 residents, it calculates to 124,240 square feet of space for police ... [and] is within the guideline....

Ex. 25, at 105.

The Countywide Planning Division further determined that the actual travel times for fire and paramedic services to travel to the site are below the required guidelines times, which vary

from 3.25 to 7.25 minutes; that the County's Capital Improvement Program anticipates replacement and enlargement of the existing Oxon Hill Fire Station, which will enhance Fire / EMS Services in the area; and the project will not impact school facilities for the area of the subject application. *See* Ex. 25, at 105–06.

The Transportation Planning Section noted that the requested use would not result in an increase of vehicular trips beyond the trip cap imposed at the time of subdivision approval. Ex. 25, at 93–94.

Other comments within the record include the Maryland State Highway Administration (SHA). By letter dated June 25, 2013, SHA offered its analysis as to a proposed traffic signal at the MD 414 / Felker Avenue (not Clipper Way) intersection, and four alternatives, as follows:

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

SHA further stated that alternatives 3 and 4 were not available due to parking and frontage requirements, and requested other submissions. *See* Ex. 74(b). By letter dated September 3,

2013, SHA submitted suggestions for various amendments to Applicant's traffic plans in the proposal. *See* Ex. 25, at 95–98.

Citizen Opposition

The administrative record reveals the following groups of persons opposed to the proposed use include: parents of children that attend John Hanson Montessori School and Oxon Hill High School; students from both schools; residents in the neighborhood; and other concerned individuals. The residents opposed testified as to their belief that the use, specifically this use at this specific location, would adversely impact the students and teachers at the Montessori School and Oxon Hill High School. Both schools presently begin between 7:30 a.m. and 9:00 a.m., and classes conclude shortly after 4:00 p.m. We further note testimony in the record that the High School provides bus service for after-school activities that circulate in the area of the project. Other testimony in the record indicated that traffic along Oxon Hill Road is already overcrowded and backed up, and if the traffic from Walmart Supercenter is added to the existing traffic, the backup will be unbearable. Moreover, the record contains testimony that the 500-plus students that walk to the High School each school day could be subjected to harm by walking adjacent to the three parking areas for the store, because they'll have to dodge the cars turning in, or the pedestrians that have to park to the west of Clipper Way. 3/19/2014 Tr., at 279–80.

Other persons of record testified concerning their general objections to the store itself, reciting its alleged past policies of paying lower wages, opposing any increase to the minimum wage, and hiring part time employees to avoid paying benefits. Others were concerned that Walmart may drive out existing businesses in the area because it is able to offer its products at a lower price. Some believed that crime would increase if the request is approved. One witness

noted: “There’s a sense in parking lots in general, and especially in Walmart parking lots, that one feels less safe.” 3/19/2014 Tr., at 113.

Dr. Lei Zhang, an expert in traffic engineering, conducted a traffic impact analysis study using a computer-generated “tool” he developed along with his colleagues at the University of Maryland. *See* Ex. 80; 4/8/2014 Tr., at 16, 20–21. Dr. Zhang admitted that the tool is not used by Prince George’s County in its analysis of traffic and that it is not a tool that Technical Staff or the County would have required Applicant to utilize. Nevertheless, the record reflect Dr. Zhang’s testimony explaining that the tool consists of a travel demand model that was originally developed by the Metropolitan Washington Council of Governments (COG) to determine what new trips will be generated by new development, and a “system-wide” large-scale traffic simulation model “that simulates every single individual vehicle in the system, including the new vehicles, the new trips generated from the Walmart development, which we can identify in the network.” 4/8/2014 Tr., at 26. The tool differs, however, in one major respect from the traffic analysis tools used by the County—it looks far beyond the intersections closest to the proposed development. In his study within the administrative record, Dr. Zhang included “more than 100 intersections in the Oxon Hill neighborhood, also including the freeways and all the freeway entrance[s] and existing ramps in this particular area.” *See* 4/8/2014 Tr., at 27. The “neighborhood,” for purposes of the study, is far larger than that proposed by Technical Staff and Applicant, extending into a portion of the District of Columbia. *See* Ex. 80, at 4; 4/08/2014 Tr., at 31–32. Zhang stated in his testimony that the traffic analyses offered by Technical Staff and Applicant do not clearly state why such a large study area was used, further noting that “this type of development [does] not usually generate traffic impact very far away.” *See* 4/08/2014 Tr., at 36. Finally, the record reflects Dr. testimony upon reviewing traffic at two periods of time, 2015

and 2030, with or without development of the Walmart, and his conclusion that the use would adversely affect the flow of traffic in the area, as follows:

- [C]urrently even without the development, without the Walmart development, there is a queue during the afternoon peak period ... for westbound traffic that occupies this roadway....
- Then for comparison purposes, I also developed a similar queuing graph for this same roadway segment, with the proposed Walmart development. So it shows some, it shows increased queuing in the segment of MD 414 between MD 210 and east of Livingston Road....
- Now with development there is some increased queuing near Clipper Way and the ramps of 210, 495, and [MD] 414.... But ... we see much more severe impact on westbound traffic. There is some impact on eastbound traffic as well, but not as severe as thewestbound traffic.

See 4/8/2014 Tr., at 52–54.

Citizen Opposition also retained Ms. Jennifer Cowley, an expert in the area of land use planning. Ms. Cowley also prepared a written land planning analysis, which addressed the Application’s failure to comply with the relevant portions of the Zoning Ordinance, including the variance and special exception request. We have reviewed Ms. Cowley’s report, and we are persuaded by her findings and conclusions.

We are mindful of our prerogative at Maryland law to draw reasonable inferences from conflicting facts and circumstances within the administrative record. *See Moseman v. County Council of Prince George’s County*, 99 Md. App. 258, 265, 636 A.2d 499 (1994). Further, we must point out our responsibility, when considering the evidence in the record for a special exception application, that “we can properly accept one expert’s opinion when two well-qualified experts have rendered differing opinions making an issue [in the case] ... fairly debatable.” *See Dundalk Holding Co. v. Horn*, 266 Md. 280, 289-91, 292 A.2d 77 (1972). Thus, the *weight* to be accorded to an expert’s testimony is properly a matter for us to determine.

Accordingly, and except where otherwise specifically provided herein, we adopt the findings of Ms. Cowley as our own. *See generally* Ex. 56.

§ 27-317(a) of the Zoning Ordinance states that a special exception may be approved if:

(1) *The proposed use and site plan are in harmony with the purposes of this Subtitle.*

Among the purposes of the Zoning Ordinance, as provided in § 27-102(a), there are several that this proposed development will not advance.

§ 27-102(a)(2) - *To implement the General Plan, Area Master Plans, and Functional Master Plans;*

This proposed development will not advance the implementation of the General Plan and area master plan. The *Henson Creek – South Potomac Master Plan* notes that there are underutilized retail strip shopping malls, substantial underutilization of existing retail sites and recognizes that as new retail sites are developed, it results in additional retail vacancies in the planning area. As reported earlier in this report, the National Harbor / Oxon Hill / Fort Washington retail submarket already has 136,000 square feet of vacant retail space. Adding the Walmart Supercenter would grow the total retail square footage by 5 percent in the retail submarket. Because the customer base has not grown, this simply results in the redistribution of retail activity, resulting in further increases in retail vacancy.

This area is within the 2014 *Plan Prince George's 2035* General Plan Amendment growth corridor along the proposed transit line; yet, we note that there is no clarity in the proposed site plan on what the transit connectivity is, or how the site will or will not accommodate transit use. The General Plan calls for the Oxon Hill Regional Center to be a compact, transit-oriented, mixed use development.

As a result, and based on our review of the evidence within the administrative record, we find that the proposed Walmart Supercenter will not advance the implementation of the *Henson Creek – South Potomac Master Plan* land use policies, as follows:

§ 27-102(a)(6) - To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;

The proposed Walmart Supercenter is located adjacent to two schools. A key point of concern is safety of children in the PM peak when schools are letting out and there is a high degree of shopping activity at the proposed Walmart Supercenter. Because of the closeness of these schools, special attention is needed to the pedestrian and vehicular connections between these uses. The staff recognizes this challenge in its staff report, noting that conditions should be placed upon any approval of the special exception, noting that the use “dictates that additional attention be paid to setbacks, architecture, landscaping, lighting and green areas.” The staff report specifically notes that the impacts of traffic on Clipper Way shall be addressed, given the use by Oxon Hill High School. And also notes that details for special paving and enhancements near sidewalks be noted. While these are of course important, there is no commentary on the specifics of how to ensure that these improvements will make it possible to guarantee the safety of students at these schools as they travel to and from schools across the proposed Walmart Supercenter site.

§ 27-102(a)(9) - To encourage economic development activities that provide desirable employment and a broad tax base; § 27-102(a)(12) – To insure the social and economic stability of all parts of the County;

This proposed development will not encourage economic development activities that provide desirable employment and a broad, protected tax base. Generally the retail trade area for a Walmart Supercenter is three to five miles. In developed retail markets, such as in the Henson

Creek-South Potomac area, most of the new sales from a new superstore can be expected to be taken from surrounding retailers selling similar products in the trade area. *See* Ex. 56, Map 3. The result is a net loss of jobs within two miles of a Walmart store. We find that within two miles from the proposed Walmart Supercenter it is probable that there will be decreased job creation from continuing firms, decreased job creation due to fewer entering firms, and increased job destruction due to retailers leaving the area. We further find, based on our review of the record, that the biggest impact will be the contraction in jobs by existing stores. Accordingly, this is likely to be most apparent in large retailers, such as Safeway, Save-a-lot, Shoppers, and Kmart, which all located only a mile away along and near Oxon Hill Road.

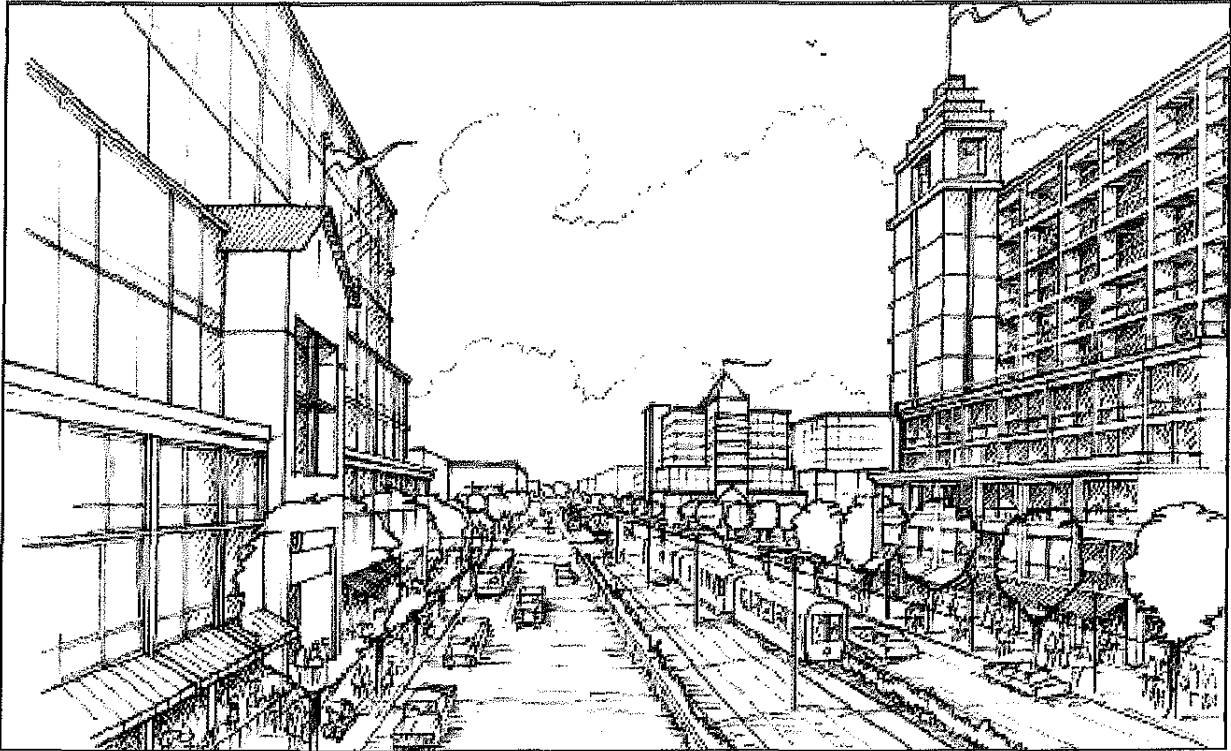
We also conclude that that the construction of the Walmart will impact employment at the Giant on Indian Head Highway. Because there is a proposed garden center in the proposal, the County can expect negative impacts associated with the Home Depot on Oxon Hill. The proposed Walmart is in a developed corridor where there are already choices for shoppers. The addition of this retailer will redistribute the existing retail jobs and result in surrounding retailers reducing employment with jobs simply shifting from grocery stores and others to the Walmart. The impacts within two miles of the proposed Walmart will be the most readily apparent.

TABLE 1 PROJECTED ECONOMIC IMPACTS ON RETAIL TRADE FOR COMPETITIVE RETAILERS FOR PRINCE GEORGE'S COUNTY

Type	Number of Establishments	Annual Payroll Earnings	Number of Employees
General Merchandise Stores	69	\$12,062,000	889
Supermarkets and Grocery Stores	158	\$170,350,000	6,595
Total Competitive Retailers	227	\$182,412,000	7,484
<i>Economic Impact of Proposed Walmart Supercenter</i>	-	-\$2,736,180	-202

Source: U.S. Census County Business Patterns, 2011

However, the impacts will also affect the county as a whole because the people who work at the retailers within the two miles of the proposed Walmart come from a larger geographic area. A study on the impact of Walmart on retail employment and wages found that the opening of a Walmart store reduced county-level retail employment by 2.7 percent. This study suggests that while Walmart may create new jobs, more are lost as existing businesses downsize or close leading to a net job loss for the county. In addition, the study also found a decrease in county-level retail earnings of 1.5 percent following the opening of a Walmart store. A typical Walmart Supercenter employs 400-500 workers. Therefore, we find, based on the record before us, if the special exception and variance request is granted for the Walmart Supercenter, it is probable that the total retail payroll earnings would decrease by about \$2.7 million. We also accept and credit the opinion of Ms. Cowley that for each new Walmart employee the County will lose 1.4 retail jobs.



The Oxon Hill Corridor is planned to be supportive of transit oriented development, providing convenient access for pedestrians and transit.

We accept as fact that consumers do not consume more because a new store has arrived; their retail expenditures are redistributed from existing grocery, general merchandise, and garden centers in the trade area. Any new large store will capture its business at the expense of other retailers in the trade area. There is not enough population growth within this developed area to generate retail sales from increased demand. That is to say there can be expected to be little to no net new sales with the entry of Walmart into this area. A Walmart Supercenter captures about 4 percent of existing grocery stores' sales one year after entry across a metropolitan region.

The General Plan for Prince George's County identifies Oxon Hill as a Transforming Neighborhoods Initiative area due to economic decline. The development of the Walmart Supercenter would be counterproductive to the plans to revitalize the Oxon Hill corridor, simply

creating more vacancies and redistributing employment from existing stores on the Oxon Hill corridor to the new proposed store.

The proposed Walmart Supercenter would not encourage economic development activities that provide desirable employment and a broad, protected tax base. Nor will it insure the social and economic stability of all parts of the County.

§ 27-102(a)(11) - To lessen the danger and congestion on traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned function;

As we have previously found, it is probable that the Walmart Supercenter will exceed the Trip Cap established for the Potomac Business Park. Thus, the development of the Walmart Supercenter will increase congestion of traffic on the street and serve as a detriment to the transportation system.

In Oxon Hill, the Henson Creek – South Potomac Master Plan calls for a strong emphasis on pedestrian and transit oriented development to create an urban character and feel. The plan calls for evaluating all development proposals for compliance with best practices for transit-oriented development. The plan calls for these best practices to reduce traffic congestion and to improve the safety of the streets.

The Plan recognizes that Oxon Hill Road has heavy traffic congestion and the plan calls for a reconfiguration of the arterial roadway and creation of minor streets to better link the area. The plan calls for a short block pattern to allow for multiple inter-connections, generally with pedestrian pathway intersections no further than 400 feet apart. It should be noted that the organization of the proposed site plan for the Walmart Supercenter does not support a block pattern that allows for inter-connections. While this site is designated in the plan as a transition area at lower densities, it still calls for transit oriented development that supports pedestrian

activity. The proposed Walmart Supercenter will not lessen the danger and congestion of traffic on streets, nor insure the continued usefulness of all elements of the transportation system for their planned functions.

Accordingly, upon review of the administrative record, we find that Applicant has not met its burden of proving that the proposed Walmart will not cause congestion of traffic on roads in the vicinity of the Subject Property including Clipper Way, MD 414, Livingston Road and the ramp to I-495. We further find that the Potomac Business Park Trip Cap Study Amendment does not prove that the Walmart's traffic will meet the trip cap limit. The Trip Cap Amendment was based on the 8th Edition of the Institute of Traffic Engineers Manual, and the 8th Edition is the not the most current edition. Instead, we credit Professor Cowley's report that the data in the 8th Edition is not statistically significant. The 9th Edition is the most current edition. It relies on a larger number of stores and reports a higher trip generation report. We further credit Ms. Cowley's opinion that it is probable that the Walmart will contribute more than the allowed 555 PM peak hour trips.

The Applicant's plan to have parking lots on both sides of Clipper Way violates § 27-102(a)(11) because the design will increase the danger and congestion of traffic on the streets. We find that Walmart's customers will use the parking lot on the west side of Clipper Way on a daily basis. Consumers parking there will walk more than 1,000 feet to the store entrance. On the way, they will cross two curb cuts and Clipper Way itself. The design is dangerous because the pedestrian crosswalk is at the north curb cut. Pedestrians will use that crosswalk close to an intersection where cars will be queuing to make a left or right turn. This design also creates the risk that drivers of vehicle seeking to turn into the parking lot will have limited visibility, which increases risk to the pedestrians.

§ 27-317(a)(2) - The proposed use is in conformation with all the applicable requirements and regulations of this Subtitle;

The proposed use is not in conformance with all of the applicable requirements and regulations of the Zoning Ordinance because the subject proposal for a Walmart Supercenter cannot meet the requirement for direct access to an arterial roadway. *See* the findings and conclusions concerning the variance request, *supra*.

§ 27-317(a)(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;

We adopt and incorporate, as if fully restated herein, our discussion above that Applicant's proposed Walmart Supercenter does not support the implementation of the Master Plan. We find that Applicant's proposal will substantially impair the County's efforts to revitalize existing retail shopping centers with high vacancy rates.

§ 27-317(a)(4) - The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;

§ 27-317(a)(5)- The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood;

The proposed Walmart Supercenter is located adjacent to two schools. *See* Ex. 56, Map 4. A key point of concern is safety of children in the PM peak when schools are letting out and there is a high degree of shopping activity at the proposed Walmart Supercenter. Because of the closeness of these schools, special attention is needed to the pedestrian and vehicular connections between these uses. The staff recognizes this challenge in its staff report, nothing that conditions should be placed upon any approval of the special exception, nothing that the use "dictates that additional attention be paid to setbacks, architecture, landscaping, lighting and green areas". The staff report specifically notes that the impacts of traffic on Clipper Way shall be addressed, given

the use by Oxon Hill High School. The report also notes that details for special paving and enhancements near sidewalks be noted. While these are of course important, there is no commentary on the specifics of how to ensure that these improvements will make it possible to ensure the safety of students at these schools as they travel to and from schools across the proposed Walmart Supercenter site.

Based on the testimony in the administrative record, we find that Applicant's proposal will adversely impact students of JHMS, students of Oxon High School, nearby residents, and workers in the area. We also find that the Walmart Supercenter will be detrimental to the use of adjacent properties.

We credit the testimony of parents of students that attend JHMS and Oxon Hill High School, students from both schools, residents in the adjacent neighborhood, and the employee of Oxon Hill High School who described the adverse effects of the Walmart. Those witnesses included: Doris Brown (mother of two students); Harriet Richardson (mother of a student); Nicole Nelson (mother of a student); Ms. Nelson's daughter (student); Kristin Thompson (resident of South Lawn); Marcel Adams (Oxon Hill High School Student Government President); Sandra Shirley (Oxon Hill resident); Patricia Monroe (resident of South Lawn); and Patricia Tipton (resident of Oxon Hill). We find that the Walmart would adversely impact the students and teachers at the Montessori School and Oxon Hill High School. We also find that the traffic going to and leaving the Walmart will create a safety risk for the high school students walking in the vicinity of the parking areas for the Walmart. *See generally* 3/19/2014 Tr.; 3/20/2014 Tr.; 4/8/2014, Tr.; 5/1/2014 Tr.

Although the Citizens did not have the burden of proof, we find that they proved that noise from the Walmart will adversely impact JHMS. We specifically find that the Walmart and

the trucks making deliveries to Walmart will generate noise that will negatively impact the students and teachers at JHMS. We further find that Applicant offered no site-specific and persuasive evidence to rebut Citizens' testimony that noise from the adjacent Walmart will adversely impact the JHMS.

Ms. Cowley described the safety issues that the Walmart would create. We find that her testimony accurately described the safety issues. The Applicant's design for the split parking makes the safety risk more acute. The plans call for approximately 43% of the parking to be on the west side of Clipper Way. It is probable that Walmart's customers will use this lot on a daily basis. It is also probable that these customers will first seek a parking space on the east side of Clipper Way. We also find that that the Walmart would create safety issues for the Oxon Hill High School students who will likely walk in the vicinity of the road that provide ingress and egress to the Walmart and its various parking lots. We further find that the split parking design increases the safety risk to pedestrians.

We rely on the GIS Map, Ex. 82, to make the factual finding that the adverse impacts of the proposed Walmart would be greater at the proposed location than at other locations in the same I-3 zone. The GIS Map proves that there are other locations in the I-3 zone which have access to an arterial road and which are not in close proximity to a school. We find that the adverse effects of the Walmart, individually and cumulatively, are greater at the proposed location than they would be elsewhere in the I-3 zone where there is access to an arterial road and no schools in close proximity.

Of particular interest in the proposed site plan is the second parking lot located across Clipper Way. Section 27-573 of the Zoning Ordinance permits an off-site parking lot within 500 feet of the nearest boundary of the record lot on which the use is located. As currently proposed

more than 40 percent of the parking is proposed to be accommodated across Clipper Way. Given the high volume of parking provided in the secondary lot, it is probable that this lot will be used on a daily basis. It is probable that vehicles will start in the first parking lot and circle looking for a space before giving up and heading to the secondary parking lot, driving up the in and out traffic on Clipper Way. Additionally, pedestrians would be expected to walk more than 1,000 linear feet to get from the secondary parking lot to the store entrance. Pedestrians will be expected to cross two curb cuts and Clipper Way itself. One particular concern is the location of the pedestrian crosswalk at the north curb cut. Pedestrians are expected to cross the driveway close to the intersection where cars are stacking waiting to make a right or left turn. This creates limited visibility for the vehicle wishing to make a turn into the parking lot, increasing the risk for the pedestrian of an accident.

We further find that Applicant did not satisfy its burden of proving that it complied with § 27-317(a)(4) and (5).

In addition to satisfying the requirements of § 27-317, the Applicant must also meet the requirements of § 27-348.02. As part of the findings and conclusions stated herein, we further adopt and incorporate, as if fully restated herein, our findings and conclusions stated above for our denial of Applicant's request for variance from § 27-348.02(a)(1).

§ 27-348.02(a)(1) - The site shall have frontage on and direct access to an existing arterial roadway, with no access to primary or secondary streets;

The site does not have direct vehicular access to an existing arterial roadway. Access is required to be taken from Clipper Way based on the approved plat. This criterion cannot be met.

§ 27-348.02(a)(2) - The applicant shall demonstrate that local streets surrounding the site are adequate to accommodate the anticipated increase in traffic;

The Potomac Business Park Trip Cap Study Amendment utilizes ITE rates and finds that peak trips from the Walmart would equal 342 peak trips in the PM peak. It is important to note that the ITE manual has substantial limitations and there is wide variation in the reported traffic counts. ITE bases its peak hour traffic projections on a limited number of observations. For free standing discount superstores they undertook observations at 64 stores. It is important to note that ITE does not report the R. The R indicates how well data points fit a statistical model. ITE only shows the R if the model explains 50 percent or more of the variance in trip generation. In simple terms this means that based on the observation of the 65 stores there is so much variation that we cannot say that the square footage is a reliable measure for predicting the volume of traffic that would be produced at a Walmart Supercenter or other free-standing discount superstore. Based on the ITE's observations the highest trip rate they observed was 7.4 vehicle trips during the PM peak hour per 1,000 square feet of gross floor area. If we translate this to the proposed Walmart Supercenter, this would mean that we would expect to see as many as 742 vehicles at the PM peak, well above the 555 PM trip cap for the Potomac Business Park.

It is probable that the proposed Walmart Supercenter will contribute more than the 555 PM peak hour trips that the current zoning on the property allows for. We note that it is important to remember that the Walmart Supercenter is the first development in the business park. The Potomac Business Park has a trip cap of 555 PM peak hour trips across the entire business park. This leaves limited, if any, capacity for any future development in the business park.

There is no existing traffic data for Clipper Way, which will be the main access road to the Walmart Supercenter and will see a significant increase in traffic. *See* Ex. 56, Map 1. There are other users contributing to traffic on Clipper Way, including a Clarion Hotel. Oxon Hill High

School has 1,200 students, generating approximately 1,500 trips per day. It is expected that a portion of these trips are on Clipper Way.

There has been no traffic study to determine whether Clipper Way can appropriately handle the traffic volume to be added by the proposed Walmart Supercenter, nor an assessment of any intersection improvements that would be needed. The Transportation Review Guidelines, Part 1, state “An assessment of the area affected by traffic generated by the proposed development is mandatory.”

In the Developed Tier of Prince George’s County, the MNCPPC level of service standard in this policy area is Level of Service (LOS) “E” indicating 50 seconds of delay or less for an unsignalized intersection. A Level of Service “E” means that the flow of traffic is operating at capacity, creating irregular flow and speed variability. Because of the level of traffic volume expected, it is likely that some form of traffic control will be necessary. There is no information at this time to confirm whether the addition of the Walmart Supercenter would result in a reduction in level of service below the required level.

Applicant’s Exceptions to ZHE Decision

Exceptions were filed by Applicant on September 4, 2014. Pursuant to § 27-131 of the Zoning Ordinance, we consider and dispose of the exception as follows:

1. The Zoning Hearing Examiner (“Examiner”) expresses the rationale for the Denial in Conclusions of Law (“Conclusions”) Nos. 2 and 3 of the Decision most with “assertions” for which there are no facts elicited by testimony and any lay or expert witness.

Response: After careful review of the ZHE disposition denying S.E. 4738 and Variance 4738, we find that ZHE Conclusions 2 and 3 were based on sufficient facts elicited from testimony, which included both lay and expert witnesses. *See* 8/5/2014 ZHE Disp. Rcmd’n, at 3-19. Even, assuming, *arguendo*, that ZHE Conclusions 1 and 2 were deficient, the District Council has made its own findings and conclusions concerning Applicant’s variance and special exception request. *See* pp. 14-29, 54-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant’s exception.

2. In Conclusion No. 3, the Examiner expresses---“I believe the requested use at the requested location will adversely impact residents/workers in the area and be detrimental to the use of adjacent properties” and cites as the “adverse impact/detriment” the use of sidewalks along an “industrial roadway” that high school students “may” be allowed to use and cross and notes the specific impacting the ingress/egress of trucks to a loading dock. First, only one witness specifically indicated working in the area (at Oxon Hill High School), and that witness provided no direct testimony or even an assertion that approval of the Special Exception use would be harmful to their work environment or continuation of working in the area. Second, no witness who testified as to being a resident of the “area” provided direct testimony on an “adverse impact” on the continued residency of use of their property as a “resident”. There was general testimony relative to traffic (which the Examiner found to meet all Special Exception requirements), crime (upon which the Examiner found no evidence of adverse impact), worker wages, and potential store closings (also no Examiner finding of adverse impact). Thus, it was erroneous to find—as a Conclusion of Law—there would be adverse impact on the residents/workers in the area.

Response: It was not erroneous for the ZHE to find, as a matter of law, that there would be adverse impact on the residents/workers in the area. There was substantial evidence in the record to support ZHE Conclusion 3. Even, assuming, *arguendo*, that ZHE Conclusion 3 was deficient, the District Council has made its own findings and conclusions concerning the adverse impact of the Applicant’s proposal. *See* pp. 29-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant’s exception.

3. The Examiner relies upon no factual evidence in the Record, nor testimony by any safety expert, transportation expert/planner providing evidence that students walking to, by or from the proposed Special Exception use presented any safety or similar hazard. Assertions by witnesses in opposition—without data—cannot be accepted as reliable evidence.

Response: This exception is without factual or legal merit. After careful review of the ZHE disposition denial, we are convinced and persuaded by her decision that she carefully recited the facts from the record to support her finding and conclusion. *See* 8/5/2014 ZHE Disp. Rcmd’n, at 3-19. We also find no merit in this exception because the District Council has made its own findings and conclusions concerning Applicant’s exception 3. *See* pp. pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant’s exception.

4. Also in Conclusion No. 3, the Examiner asserted that students at the combined elementary/middle school (Montessori) “...may also hear the delivery trucks idling or hear the workers unloading since the loading area is adjacent to the school’s property”. Again, there was no evidence that any noise would exceed the Code of Maryland Regulations or County standards for daytime noise.

Response: Conclusion 3 of the ZHE decision is supported by substantial evidence in the record. We also find no merit in this exception because the District Council has made its own

findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception.

5. More importantly, with regard to Applicant's Exceptions Nos. 3 and 4, the Applicant placed into the Record Exhibits Nos. 75a and 75b. Exhibit 75a expresses that, as of May 2006, all tractor trailer trucks used by the Department Store use are equipped with "auxiliary power units" to negate idling. Exhibit 75b expresses that truck deliveries occur in early morning around 5am and late evening around 10pm. With regard to the school hours, Examiner has testimony in the Record at (3/19/14 hearing) Transcript Pages 239, lines 21 et. seq and 246, lines 12, et. seq indicating the Oxon High School hours are 9:30am-4:40pm, and the Montessori school hours are 9:15am-3:55pm. Thus, there are no truck delivery noise or truck delivery traffic safety issues, since truck deliveries do not occur during the school hours.

Response: We find no merit in Applicant exception 5. The ZHE decision is supported by substantial evidence in the record. We also find no merit in this exception because the District Council has made its own findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception. Specifically, see above pp. 41-43, 52-53.

6. Applicant did not supply a Noise Study because there is no identifiable noise impact on the use of either property in which the school use occurs. One school is over 1000 feet away, and the other school is separated by the required Special Exception setbacks, buffering in excess of the Zoning Ordinance landscape requirements, and the building has been situated to place the use activity on the opposite end of the site—all provided in the testimony by Applicant witness Birkland on (3/19/14 hearing) Transcript Pages 16-24.

Response: We find no merit in Applicant's exception 6. The ZHE decision is supported by substantial evidence in the record. We also find no merit in this exception because the District Council has made its own findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception. Specifically, see above pp. 37-38.

7. In Conclusion No. 3, the Examiner expresses that "It is conceivable that this split parking design [shown on the site plan] could lead to problems between the teenage pedestrians and pedestrians..." Students in that area currently cross the arterial roadway with driving entrances all along Oxon Hill Road. There is no evidence nor was there any testimony by M-NCPPC Transportation Planning, County Department of Public Works and Transportation, the County Health Department, the County Board of Education, the Maryland State Highway Administration, or by any safety or traffic expert on this issue that would allow such an assertion, much less a Conclusion of Law. Applicant's witness Birkland provided testimony on (3/19/14 hearing) Transcript page 37, Lines 3, et. seq and Page 40, Lines 14, et. seq of multiple sidewalks and raised crosswalks to address pedestrian safety. Finally, the County Board of Education regularly places crossing guards or other safety personnel at any intersection or other location in close proximity to schools where it finds that crossing might be a hazard.

Response: We find no merit in Applicant exception 7. The ZHE decision is supported by substantial evidence in the record. We also find no merit in this exception because the District Council has made its own findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception. Specifically, *see* above pp. 37-38, 41-43, 49-50, 53.

8. In Conclusion No. 2, the Examiner express ("I do not believe...") the Applicant had not met its burden of providing evidence "unusual practical difficulties" citing case law that there is not practical difficulty because compliance with the statute from which a variance is sought would still allow the Applicant to "...secure a reasonable return from, or make a reasonable use of the property.

Response: We find no merit in Applicant's exception 8. The decision of the ZHE contained substantial evidence to support her conclusion that the Applicant did not meet its burden regarding unusual practical difficulties. *See* 8/5/2014 ZHE Disp. Rcmd'n, at 3-19. The District Council has made its own findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception. Specifically, *see* above pp. 23-25.

9. The intent of the section requiring access to and from an "arterial roadway" is primarily to negate use of residential and secondary roads for accessing the property. The access to the Special Exception property is via an "industrial roadway". The County Code specifically requires that all uses for the I-3 zoning classification (as the subject property is zoned) not access the property from an arterial roadway.

Response: We find no merit in Applicant's exception 9. *See* 8/5/2014 ZHE Disp. Rcmd'n, at 3-19. The District Council has made its own findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception. Specifically, *see* above pp. 17-19.

10. The case law cited by the Examiner (*Carney v. Baltimore*, 201 Md. 130, 93 A.2d 74 1952) specifically acknowledges that a variance should not be granted where doing so would not "...serve the essential legislative policy". The grant of the variance would not result in using a residential or secondary road. Moreover, *McLean v. Soley*, (270 Md. 208, 310 A.2d 783, 1973)—cited by Opponents' Counsel on the issue of "practical difficulty"—the Court made clear the criteria for determining "practical difficulty.

Response: We find no merit in Applicant's exception 10. *See* 8/5/2014 ZHE Disp. Rcmd'n, at 3-19. The District Council has made its own findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception. Specifically, *see* above pp. 21-23, 25-26, 28-29.

11. In the instant case, compliance with the restriction—“ingress/egress via an arterial roadway” is burdensome because is it specifically disallowed for any type of development on the property. It is unreasonable to have a restriction that is in direct conflict with County and State traffic safety policy. Second, granting the variance does substantial justice to the Applicant and other property owners. The Applicant has constructed the industrial roadway that will serve its property, County BOE property (Oxon Hill High School), and County Public Safety property. The only I-3 property (Montessori School) accessing the arterial highway then retains safe access that might otherwise be rendered a traffic issue if ingress/egress is mandated onto the arterial for the Applicant’s property. Lastly, the spirit of the zoning Ordinance provision is maintained because the intent is to negate access through residential and secondary streets, thereby impacting residential neighborhoods.

Response: We find no merit in Applicant’s exception 11. *See* 8/5/2014 ZHE Disp. Rcmd’n, at 3-19. The District Council has made its own findings and conclusions concerning Applicant’s exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant’s exception. Specifically, see above pp. 18-21.

12. Essentially, granting the variance furthers the policy of (1) not creating ingress/egress safety issues onto an arterial roadway, (2) allows for the ingress/egress specifically mandated by the County Code, and (3) allows for the safe ingress/egress prescribed by the Maryland State Highway Administration and approved for the Applicant’s development by entity with jurisdiction on the arterial roadway.

Response: We find no merit in Applicant’s exception 12. *See* 8/5/2014 ZHE Disp. Rcmd’n, at 3-19. The District Council has made its own findings and conclusions concerning Applicant’s exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant’s exception. Specifically, see above pp. 18-21.

13. The Applicant provided testimony and argument (3/19/14 hearing) Transcript Page 121, (3/20/14 hearing) Transcript Page 29, Lines 11, et. seq. and 107-108) and Exhibits (74 a-c) into the Record on its exhaustion of administrative remedies and efforts to obtain permission for arterial access. Both the statutory and administrative denial of arterial access is premised on safety. It is contradictory for the Examiner to recommend against granting a variance where the Ordinance’s mandated arterial access is against County and State statutory and/or policy determinations premised on safety, while also suggesting the crossing of a parking lot entrance—where no factual testimony of an safety issue has been elicited—is deemed a “conceivable” problem.

Response: We find no merit in Applicant’s exception 13. *See* 8/5/2014 ZHE Disp. Rcmd’n, at 3-19. The District Council has made its own findings and conclusions concerning Applicant’s exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant’s exception. Specifically, see above pp. 25-26.

14. Moreover, Examiner's Conclusion No. 2 erroneously interprets the law. The Examiner states "practical difficulty is not shown". The Conclusion of Law indicating that "practical difficulty" standard is applicable to an "area variance" 'as asserted by the Applicant. However, in reviewing the Variance, the Examiner uses the standard applicable to a use variance, concluding the Applicant needed to demonstrate "reasonable return from or reasonable use of the property was not possible". The latter is how "undue hardship", the standard for "use" variance is demonstrated and is not applicable to a showing of "practical difficulty", the standard for an "area" variance. See *McRad Anderson, et al. v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974); *Loyola Federal Savings and Loan association v. Buschman* 227 Md. App. 243, 176 A.2d 355 (1961); *James L. Mills, et ux. V. Ronald Godlove, et al* 200 Md. App. 213, 26 A.3d. 1034 (2011). In sum, a showing of practicable difficulty was shown and the Examiner erroneously applied the undue hardship test to the evidence elicited in support of the practicable difficulty shown by the Applicant.

Response: We find no merit in Applicant's exception 14. *See* 8/5/2014 ZHE Disp. Rcmd'n, at 3-19. The District Council has made its own findings and conclusions concerning Applicant's exception 3. *See* pp. 14-29, 30-56 above, which we adopt and incorporate, as if fully restated here, as our response to Applicant's exception. Specifically, *see* above pp. 24-26, 28-29.

In assessing this application, we take administrative notice of the prescription set forth in the Zoning Ordinance that "the burden in any zoning case shall be the applicant's." *See* § 27-142, Zoning Ordinance. As Maryland courts have long settled, when assessing the merits of whether to approve a special exception application, there is a distinction between evidence which compels a certain result and that which merely permits it. *See Jabine v. Priola*, 45 Md. App. 218, 232-33, 412 A.2d 1277 (1980), *rev'd on other grounds sub nom., Woodfield v. W. River Improvement Ass'n*, 165 Md. App. 700, 886 A.2d 944 (2005). Moreover, when we, the administrative agency for land use and zoning proposals, review a special exception application, we note other requirements within Maryland administrative law that "[e]valuation of a special exception application is not an equation to be balanced with formulaic precision." *See Sharp v. Howard County Bd. of Appeals*, 98 Md. App. 57, 73, 632 A.2d 248, 256 (1993). And, this lack of a precise rubric is reflected in the standard of judicial review applied to zoning decisions. *Schultz v. Pritts*, 291 Md. 1, 26, 432 A.2d 1319, 1333 (1981); *see also Alviani v. Dixon*, 365 Md. 95,

107–08, 775 A.2d 1234, 1241 (2001); *Board of County Commissioners v. Oakhill Farms*, 232 Md. 274, 283, 192 A. 2d 761, 766 (1963) (whether test of substantial evidence on the entire record or test against weight of all the evidence is followed, courts have exercised restraint so as not to substitute their judgments for that of the agency and not to choose between equally permissible inferences, or to make independent determinations of fact, as to do so constitutes non-judicial role). Rather, courts have attempted to decide whether a reasoning mind could reasonably have reached the result the agency reached upon a fair consideration of the fact picture painted by the entire record. In the cases dealing with consideration of the weight of the evidence, the matter seems to have come down to whether, all that was before the agency considered, its action was clearly erroneous or, to use the phrase which has become standard in Maryland zoning cases, not fairly debatable. *Id.* The basic reason for the fairly debatable standard is that zoning matters are, first of all, legislative functions and, absent arbitrary and capricious actions, are presumptively correct, if based upon substantial evidence, even if substantial evidence to the contrary exists. *See Cremins v. County Comm'rs of Washington County*, 164 Md. App. 426, 438, 883 A.2d 966, 973–74 (2005) (internal quotations and citations omitted). There is substantial evidence to support the zoning agency's conclusion if reasoning minds could reasonably reach the conclusion from facts in the record. Evidence is substantial if there is a little more than a scintilla of evidence. *Id.* Thus, “fairly debatable” under Maryland administrative law is whether the agency's determination is based upon evidence from which reasonable persons could come to different conclusions. *Sembly v. County Bd. of Appeals*, 269 Md. 177, 182, 304 A.2d 814, 818 (1973). *See also Prince George's County v. Meininger*, 264 Md. 148, 151, 285 A.2d 649, 651 (1972) (internal quotations omitted); *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398, 396 A.2d 1080, 1089 (1979).

Before us is a special exception and companion variance case, S.E. 4738. As stated in Maryland cases, 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). What's more, in two special exception cases, the Court of Special Appeals of Maryland has stated, "It is the applicant . . . who bears the burden of persuading the administrative board that the desired use will not adversely affect the neighborhood." See *Futoryan v. City of Baltimore*, 150 Md. App. 157, 172, 819 A.2d 1074 (2003), quoting *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974). Moreover, *Anderson* Court stated that a special exception applicant "has the burden of adducing testimony" to show, "to the satisfaction of the board," that the proposed use "would be conducted without real detriment to the neighborhood" and "would not actually adversely affect the public interest." *Id.*, 23 Md. App. at 617, 329 A.2d 716.

The Court, in *Angelini v. Harford County*, 144 Md. App. 369, 798 A.2d 26, *cert. denied*, 370 Md. 269 (2002), where a zoning line extension was denied, gave a lengthy review of the burden of proof issue. Conceding that the *Angelini* applicant had met the burden of production, the Court held that the zoning board was still entitled not to approve the applicant's request:

The appellant [or applicant] undertook to persuade the Board to alter [the zoning boundary]. It was the appellant who thereby became the proponent of the proposition on the table for debate, and it was the appellant, therefore, to whom was allocated the burden of persuasion. In this case, the Board was simply not persuaded. It is never the case that the Board must be either (1) persuaded by the appellant to act or (2) persuaded by the opponents not to act. What would happen, in so Manichean a world, if the Board were not persuaded by either side? There is only one burden of persuasion, and it points in only one direction. In abstract theory, [opposition parties] are not required to present any evidence at all, let alone substantial evidence."

144 Md.App. at 376-77, 798 A.2d 26 (portions omitted and emphasis added). The *Angelini* court relied on and quoted *Pollard's Towing, Inc. v. Berman's Body Frame, Inc.*, 137 Md. App. 277, 289-90, 768 A.2d 131 (2001), as follows:

In this case, all that was required was that the Board be not persuaded that there was a need for additional towing services. To the extent its finding was weightier than that, the incremental weight was surplusage. For less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something. (Emphasis added.) These decisions indicate that the burden of persuasion remains with the applicant and that the opposition has no evidentiary burden at all, in cases where the zoning agency denies the application.

Simply put, for reasons stated above, we are not persuaded by the evidence in the record to approve S.E. 4738.

Ordered this 10th day of March, 2015, by the following vote:

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

Opposed:

Abstained:

Absent:

Vote: 9-0

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

By: _____
Mel Franklin, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council