

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

**SPECIAL EXCEPTION
4733**

DECISION

Application:	Department or Variety Store Combined with Food and Beverage Store
Applicant:	Walmart Real Estate Business Trust
Opposition:	Donald Hancock, et.al.
Hearing Dates:	July 29, 2015, September 30, 2015, November 10, 2015, January 13, 2016 and February 10, 2016
Hearing Examiner:	Joyce B. Nichols
Disposition:	Denial

NATURE OF REQUEST

(1) Special Exception 4733 is a request to use approximately 23.9 acres of land (part of the approximately 64 acre development known as Woodyard Crossing Shopping Center) in the C-S-C (Commercial Shopping Center) Zone, Clinton, Maryland, for a Department or Variety Store combined with Food and Beverage Store, in excess of 125,000 square feet (an approximately 171,634 square foot store is being proposed).

(2) The Technical Staff recommended disapproval, Exhibits 22 and 73, and the Planning Board did not elect to have a hearing and in lieu thereof adopted the Technical Staff's recommendation of disapproval as its own. (Exhibit 24(b))

(3) At the conclusion of the evidentiary hearing the record was kept open for a variety of documents, upon receipt of which, the record was closed on March 9, 2016.

FINDINGS OF FACT

Subject Property

(1) The subject site is an approximately 23.4 acre portion of a larger developed site identified as Clinton Plaza, Parcel D-2, Record Plat NLP104, page 6, recorded on August 22, 1979, now known as the Woodyard Crossing Shopping Center ("Shopping Center"). The Shopping Center is located in the northwest quadrant of the intersection of Branch Avenue (MD 5) and Woodyard Road (MD 223). Walmart currently occupies a 134,241 square foot freestanding structure located on the northernmost portion of the developed site as a permitted use.

(2) Although the Special Exception site has been identified to include a general drive aisle available for any users of the Shopping Center, extending from the proposed Special Exception

location at the northernmost edge of the Shopping Center, through the entire Shopping Center to Woodyard Road, it does not have frontage on or access to a public road. The Applicant does not have a legal right of access via the Shopping Center drive aisle separate from that of the general public.

(3) Woodyard Crossing Shopping Center has three driveway entrances from Woodyard Road, two of which are directional due to the median strip in Woodyard Road. Access to the proposed Special Exception is shown on the Site Plan, Exhibit 72, from the westernmost driveway which is controlled by a traffic signal.

(4) The rear of the existing and proposed structures are buffered from the adjacent single family detached residential neighborhood to the west by a variable-width landscape strip and a 10 foot high wood fence.

History

(5) The site is the subject of Preliminary Plan of Subdivision 4-78275 for Clinton Plaza. Parcel D-2 was approved by the Prince George's County Planning Board on July 26, 1979. The Record Plat for the subject property contains a note which restricts the amount of development to 180,000 square feet. However, a memo dated June 1, 1989 (Feddis to Bond) indicates that the Applicant submitted a traffic study for Staff review for the purpose of expanding the development cap for the subject site to 800,000 square feet. In 1994, the Shopping Center was renovated and expanded to 280,000 square feet. There have been two Departure from Design Standards Applications approved for the property, DPLS-433 and DPLS-504, both for reductions in the 50-foot setback for loading areas from residentially-zoned land. Portions of the Shopping Center were the subject of two Alternative Compliance Applications to reduce the width of the landscape yard to the rear of the building (AC-93061 and AC-93064). In 1999, the Planning Director, M-NCPPC approved Alternative Compliance AC-99026 to provide an alternative buffering scheme to the residentially-zoned properties to the west. An amendment to that Alternative Compliance approval is included in this Application.

Neighborhood/Surrounding Uses

(6) The neighborhood as described by the Technical Staff and as agreed to by the Opposition is defined by the following boundaries:

North-	Coventry Way
East -	Branch Avenue (MD 5)
South-	Woodyard Road (MD 223)
West-	Old Branch Avenue

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

(8) The site is surrounded by the following uses:

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

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

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

West- Single-family detached residences in the Clinton Estates Subdivision in the R-80 Zone.

(9) Donald Hancock has lived in the community for forty-seven years. He now resides at 8509 Keebler Drive, Clinton, Maryland. He effectively relied on Exhibits 61 and 62 to describe the neighborhood. Other witnesses provided additional persuasive testimony that described the neighborhoods four unique characteristics:

(1) The Clinton Estates Residential Community borders the Western Border of the subject property.

The Clinton Estates residential community is located on the western border of the Shopping Center. (Exhibits 28 and 65) The residential property lines are less than 100 feet from the western property line of the existing Walmart store.

(2) Stormwater runoff from Waldorf Crossing now floods the Clinton Estates residential community.

The subject property's elevation is approximately five to nine feet higher than the elevation of the Clinton Estates residential community. (Exhibit 71, p. 5) Surface water from the subject property drains to, and through, the Clinton Estates residential community.

The Applicant presented evidence that culverts or drainage ways carry surface water from the subject property across residential properties to the west. Exhibits, including Exhibit 28, depict concrete drainage ways that run north/south between the houses and the fence. Additionally, there is a drainage way that runs east/west. The Applicant lacks an easement to discharge surface water into the culverts or drainage ways on the neighboring residential properties. (Exhibits 99(a), 99(b), 100(a), 100(b) and 101) The community fears the proposed

Walmart will continue to allow surface water runoff in to these drainage ways even though no person or entity possesses an easement to collect and drain surface water into these drainage ways.

The citizen's testified extensively about the ongoing flooding in the community. They described in detail the system of drainage ways and culverts that carries some of the surface water through their neighborhood. Exhibit 61 includes photographs of these paved culverts and drainage ways. (Exhibits 4(a) and (b), 5(a), 9, 12, 13(a), 19 and 61)

Donald Hancock testified persuasively about flooding in the neighborhood due to stormwater runoff from Woodyard Crossing. (November 10, 2015, T.p. 3-52). Mr. Hancock used Exhibits 61 and 62 to give a visual tour of the neighborhood and identified areas in his community that are most prone to flooding during and after rain events. Mr. Hancock testified that the culvert near the intersection of Schultz Road and Rockwell Drive has been "washed out" due to heavy stormwater flow and resultant flooding. (Exhibit 61, pp. 18-B and 18-F) He also testified that the driveway at the end of Willet Place is routinely underwater after a rainfall. (Exhibit 61, pp. 15-A and 15-B) He described how the County recently replaced the bridge on Schultz Road near Old Branch Road which had been compromised due to persistent flooding. (Exhibit 61, p. 22-A) He further explained that the bridge at the opposite end of Shultz Road near the intersection with Springbrook Lane routinely floods during storms and that he has assisted neighbors on multiple occasions in towing their vehicles out of the flooded roadway. (Exhibit 61, p. 17-A) He testified that the stormwater management controls in his neighborhood do not effectively manage the runoff. On cross examination, Mr. Hancock testified that, in his opinion, the flooding became much worse beginning around 2007. He also stated that the development of the existing Walmart store exacerbated the stormwater issues in his community.

Frederick Holt resides at 8512 Keebler Drive, Clinton, Maryland. He also described the flooding problems in the community. (January 13, 2016, T.p. 146) His testimony regarding surface water flow and flooding in the community was persuasive. Surface water runoff flows from the east to the west beneath Branch Avenue. (*Id.* at 149) Surface water flows downhill to his community on the west side of the proposed Walmart. (*Id.* at 149-167) Exhibits 87 I, J, and K depict flooding in front of his residence. (*Id.* at 168-171) Exhibits 87 M, N, and O depict two ditches that come from the area of the proposed Walmart and flow through his property. (*Id.* at 171-172) The ditches continue beneath Schultz Road and then to Old Branch Avenue. (*Id.* at 172-173)

Al and Mary Alexander reside at 8307 Schultz Road, Clinton, Maryland (September 30, 2015, T.p. 77, 78 and 90) and persuasively testified regarding flooding. Mr. Alexander testified that their house is three houses from the bridge "[t]hat floods all the time." Mr. Alexander expressed concern that the proposed Walmart would make the flooding worse:

Because all that [surface water] drainage comes off on our side. Now see not only on that end of Schultz, but there's also another low bridge on the other end of Schultz. I don't go out at the end that much, but I hear my neighbors say that one floods out and when it, if we get more water flowing through here from time to time, we're just going to be

isolated, you know, unless they get around to fixing it some kind of way by elevating those bridges.

Id. at 92 Jackie Foster also described the flooding on Schultz Road. (November 10, 2105, T.p. 140-158)

(3) Woodyard Road (MD 223) is a major east/west road for the area and is already congested with traffic.

Woodyard Road (MD 223) is a major east/west road for the area. Woodyard Crossing has three entrances to Woodyard Road. (Exhibit 29) The Applicant's Traffic Engineer, Mr. Michael Lenhart, studied three intersections: Woodyard Road and Shopping Center Driveway; Woodyard Road (Westbound) and Shopping Center Driveway (Right-in/right-out); and Brandywine Avenue (MD 5) and Woodyard Road. Mr. Lenhart did not study the westernmost entrance to the Woodyard Crossing which leads to the road behind the stores.

Mr. Lenhart opined that the proposed Walmart would not cause the overall LOS of the three intersections to fall below LOS C. (September 30, 2015, T.p. 16) Mr. Lenhart agreed that "the overall intersection [LOS] includes all the turning movements, even the ones that have the low volume." (*Id.* at 43) He testified that although he was able to calculate the LOS for the individual turning movements, he did not do so because Prince George's County does not require that analysis. (*Id.* at 24-26) In contrast, Charles County requires an analysis of the individual turning movements. (*Id.* at 25) Indeed, Waldorf Restaurants, Inc. has applied for a Special Exception to construct a Super Walmart in Waldorf, Charles County. The developer's traffic engineer in that case produced information regarding the LOS for the individual turning movements.

Lay witnesses described the congested traffic on Woodyard Road and the problems caused by the entrances to Woodyard Crossing. Donald Hancock persuasively testified regarding the traffic congestion at the entrances to Woodyard Crossing. (November 10, 2015, T.p. 3-52) Mr. Hancock drives in this area several times a week because his physicians are located across Woodyard Road across Woodyard Crossing. Mr. Hancock explained that cars exiting Woodyard Road are supposed to turn right only. Instead, they often turn left. That illegal turning movement creates additional traffic congestion. George Leftwood (September 30, 2015, T.p. 59-77) also described traffic congestion. Marjorie Sproesser (November 10, 2015, T.p. 131-140) and Jackie Foster (November 10, 2015, T.p. 140-158) also described the adverse traffic congestion.

(4) Woodyard Crossing draws more people to the community which, in turn, is contributing to an increase in crime in the community.

Persons are able to travel from the rear of Woodyard Crossing beneath the fence into the Clinton Estates residential community. (Exhibit 61, p. 1-A) George Leftwood, Jr. and his wife have lived at 8515 Keebler Drive in Clinton since 1975. (September 30, 2015, T.p. 59, 61) Mr. Leftwood described an increase in foot traffic in his community. "[T]here is a fence that goes back there, but they have holes under the fence and people come under the fence and go through

the neighborhood.” (*Id.* at 62) He sees these people on “[m]ost of the streets, especially my street.” (*Id.* at 63) Mr. Leftwood saw a relationship between the presence of those people and the increase in crime in his community:

Q. ...Now what if any changes were there in the crime rates in the neighborhood after the Walmart move in?

A. We seem to have more house breaking in...

Q. Houses?

A. ...people breaking into your house and a couple of my neighbors have had stuff stolen out of their shed. And breaking into their garages.

(*Id.* at 63-64) Al Alexander provided similar testimony about strangers going through the fence behind Woodyard Crossing and his concern about crime in the neighborhood. (*Id.* at 92(a)-93) Other citizens provided similar testimony.

Master Plan/Sectional Map Amendment

(10) The 2013 Approved Central Branch Avenue Corridor Revitalization Sector Plan recommends Commercial Mixed use for the subject property to implement the long-term vision for Downtown Clinton. To implement the long-term vision for Downtown Clinton, the Plan recommends that the site be rezoned to a zone appropriate for mixed-use development; the Illustrative Development Concept shows the current location of the Walmart being a soccer field. However, the Plan also notes that the Woodyard Crossing Shopping Center is currently experiencing some success in recent years, despite the fact that the overall Plan area is oversaturated with retail uses. Additionally, the Plan states:

Chapter 1: Introduction

The Central Branch Avenue Corridor Revitalization Sector Plan is focused on communities in transition along the Branch Avenue (MD 5) corridor between the Branch Avenue Metro Station and Southern Maryland Hospital. These communities and their commercial centers share common opportunities and constraints, and are part of an important commuter corridor generating 110,000 vehicles per day. Recent and potential future growth at Joint Base Andrews, the recent sale and planned expansion of services and office space at Southern Maryland Hospital, and the planned fixed guideway transit line along MD 5, create opportunities for growth and revitalization within communities along the corridor. These events, coupled with plans for transit-oriented development at the Branch Avenue Metro Station, also create opportunities to reposition key commercial and employment centers and offer a broader range of housing options. The sector plan highlights these and other key opportunities and constraints and presents redevelopment programs to guide future growth and revitalization at future transit nodes and within suburban strip shopping centers along Branch Avenue, Allentown Road, and the St. Barnabas Roads commercial corridor. **The plan provides a strategic direction for**

redeveloping retail centers into moderate density, compact, mixed-use, and pedestrian-and transit-oriented places, each with a unique identity and sense of place for communities they serve.

Given the extensive long-range planning work that already has been done for this area, this new sector plan is intended to be strategic in nature, with attention primarily given to critical issues and specific locations where change could and should occur. **To facilitate this goal, the sector plan considers both corridor-wide issues and development around six key focus areas. The focus areas [include]...the Clinton commercial core at Branch Avenue and Woodyard Road.**

Sector Plan, p. 6 (emphasis supplied)

Water Quality and Stormwater Management

Most of the land within the sector plan area was developed prior to the adoption of requirements regarding woodland conservation, stormwater control, or stream, wetland, and floodplain protections. Stream buffers were removed, some wetlands and floodplains were filled in order to create more dry land for development, and some streams that previously existed were removed, or channelized. This was accompanied by the creation of large areas of impervious surfaces such as roads, parking lots, rooftops, and sidewalks. Without the benefit of site features to manage stormwater run-off and mimic pre-development conditions, rain water that falls in an area is unable to infiltrate the ground. Much of it comes off impervious surfaces and flows untreated directly into the receiving streams and wetlands resulting in structural degradation such as falling slopes, deep ravines, and severe erosion of the remaining streams, wetlands and floodplains. As part of the planning process, the conditions of the area's environmental resources have been assessed and recommendations proposed.

Sector Plan, p. 29

Land Use Recommendations

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

Sector Plan, pp. 74-75

Development Program

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

The redevelopment concept transforms the two shopping centers on both sides of Branch Avenue into a mixed-use, transit-supported development capitalizing on the new transit stop. The concept integrates new uses and reconfigures the existing building form and function into a cohesive pedestrian environment marked by modified street grid and sidewalks on both sides. Pedestrian connection is provided between the two centers through a pedestrian overpass across Branch Avenue to the transit stop. Vertical mixed-use buildings with ground floor retail are introduced at the appropriate places where street activities are mostly expected. Parking garages are provided to maximize buildable areas.

Sector Plan, pp. 75-76

(11) The Plan Prince George's 2035 Approved General Plan (Plan Prince George's 2035) makes no relevant recommendations influencing a development application on this property.

Applicants Request

(12) The subject property is developed with an existing 134,241 square foot Walmart department store, including tire and garden centers, and parking and loading facilities. A 10-foot tall fence and mature trees screen the subject property from the adjoining residential development. The proposed Special Exception includes only the 23.90± acres of land identified on the Special Exception Site Plan, Exhibit 72, and does not include the rest of the Woodyard Crossing Shopping Center site. (See Exhibit 72(c) Overall Plan) The instant portion of the Shopping Center is the location of a long standing commercial development with well-established trees and other landscaping in the parking area.

(13) The Applicants proposal adds 37,393 square feet of interior space to the north side of the building, constructed in 2000, for a total of 171,634 square feet. An outdoor garden center of 2,699 square feet is also proposed. Additional parking facilities, landscaping, architectural and lighting upgrades are also proposed. The renovation will eliminate an existing Vehicle Tire and Lubrication facility already a part of the existing Department Store. The Application includes a grocery component that will exceed 10 percent of the merchandise area.

(14) Alternative Compliance for Section 4.7, Buffering Incompatible Uses, for a reduced bufferyard width along the western property line in the area of the new construction, to match the existing bufferyard width, is requested. Alternative Compliance for Section 4.3, Parking Lot Interior Planting, is also requested. AC-99026-01 A variance from Section 27-348.02(a)(5) for a reduced building setback in this same area is requested. The existing building is approximately 50 feet from the residential uses to the west; the proposed expansion is set back 100 feet from the residential properties. "A variance is requested to allow the grocery component in a building less than 100 feet from land in a residential zone to the west." (Exhibit 71, p. 24) "A small section of the drive aisle for the parking lot is within the 100-foot setback, coming to within 50.9 feet of the northern property line only...A variance is requested to allow this parking drive aisle." (Exhibit 71, p. 25) "Variances are requested for the following: 1. Extending the existing, approved Loading Access within the 100-foot setback, and 2. Locating a small corner of the parking access within the 100-foot setback." (Exhibit 25, p. 16)

(15) A 1,535 foot long drive aisle through the Shopping Center connects the proposed Special Exception site to Woodyard Road. The width of the Shopping Center drive aisle at its intersection with Woodyard Road is approximately 60 feet. (Testimony of Joseph Del Balzo, November 10, 2015; Exhibit 29)

LAW APPLICABLE

(1) A Department/Variety Store Combined with a Food and Beverage Store is permitted in the C-S-C Zone pursuant to §27-461(b) of the Zoning Ordinance by Special Exception in accordance with §27-317 and §27-348.02.

(2) §27-317(a) provides as follows:

(a) A Special Exception may be approved if:

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

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

(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;

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

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and

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

(7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5).

(3) §27-348.02(a) provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) §27-230(a) requires the following findings of fact prior to the grant of a variance:

(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.

Burden of Proof

(5) The burden of proof in any zoning case shall be the Applicant's. (§27-142(a)) Zoning cases are those matters designated to be heard before the Zoning Hearing Examiner by the Zoning Ordinance of Prince George's County. (§27-107.01 (a)(266))

Burden of Production and Persuasion

(6) The Applicant has the burden of providing legally sufficient evidence that is accepted into the record from which findings and conclusions can be either made directly or by reasonable inference. However, the Applicant must also persuade the trier of fact that the evidence produced not only permits the approval of the request but also is of sufficient strength or outweighs other evidence to the effect that the request either should or is required to be granted. B.P. Oil Company v. County Board of Appeals of Montgomery County, 42 Md. App. 576, 401 A.2d 1054 (1979).

Standard of Proof

(7) In reviewing the evidence that has been "produced", to determine if the District Council is "persuaded", the District Council must determine whether the answers, findings, or conclusions required or reached are supported by a "preponderance of the evidence" on each issue. While these magic words are not required to be recited, the "preponderance of the

evidence" is that evidence, when fairly considered, makes the stronger impression, has the greater weight and is more convincing as to its truth than the evidence in opposition thereto. Williams v. Supt. Clifton T. Perkins Hospital Center, 43 Md. App. 588, 406 A.2d 1302 (1980).

Credibility of Evidence

(8) It is within the sound discretion of the trier of fact, the Zoning Hearing Examiner, to determine certain evidence lacks credibility and to give no weight to that evidence. Md. State Retirement and Pension System v. Martin, 75 Md. App. 240, 540 A.2d 1188, 1192 (1988). In other words, certain evidence may just be ignored. It is given no weight in the conclusion, hence, found not credible.

Credibility findings of a hearing officer or judge are entitled to considerable deference and should not be reversed, absent an adequate explanation of the grounds for the reviewing body's source of disagreement. Anderson v. Dept. of Pub. Safety and Correctional Services, 330 Md. 187, 623 A.2d 198 (1994).

Adverse Effects

(9) "The Court . . . (of Appeals of Maryland) . . . has frequently expressed the applicable standards for judicial review of the grant or denial of a Special Exception use. The Special Exception use is a part of the comprehensive zoning Plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The Special Exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating this presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the Plan.

Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive Plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive Plan, a denial of an Application for a Special Exception use is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Rockville Fuel & Feed Co. v. Board of Appeals of Gaithersburg, 257 Md. 183, 187-88, 262 A.2d 499, 502 (1970); Montgomery County v. Merlands Club, Inc., 202 Md. 279, 287, 96 A.2d 261, 264 (1953); Anderson v. Sawyer, 23 Md. App. 612, 617, 329 A.2d 716, 720 (1974). These standards dictate that if a requested Special Exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied." Schultz v. Pritts, 291 Md. 1, 432

A.2d 1319, 1325 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995)

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 and the particular location proposed would have any adverse effects above and beyond those inherently associated with such a Special Exception use irrespective of its location within the zone. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Deen v. Baltimore Gas & Electric Co., 240 Md. 317, 330-31; 214 A.2d 146, 153 (1965); Anderson v. Sawyer, 23 Md. App. 612, 617-18, 329 A.2d 716, 720, 724 (1974).” Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1331 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

(10) “The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstance.” Cromwell v. Ward, 102 Md. App. 691, 703 (1995). *Cromwell* explained that analyzing a variance request is a two-step process:

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.

Id., 102 Md. App. at 694-95. (emphasis in original).

Trinity Assembly of God of Baltimore City, Inc. v. People’s Counsel for Baltimore County, 407 Md. 53, 81 (2008) explained:

To be “unique,” a property must “have an inherent characteristic not shared by other properties in the area, *i.e.*, its shape, topography, sub-surface 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.” Lewis v. Dept. of Natural Resources, 377 Md. 382, 434 (2003) (italics omitted) (quoting North v. St. Mary’s County, 99 Md. App. 502, 514, (1994)).

A self-imposed condition does not satisfy the requirement of uniqueness or practical difficulty. North v. St. Mary’s County, 99 Md. App. 502, 514, (1994) makes clear that “the ‘unique’ aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property.” And *Cromwell* emphasizes:

Were we to hold that self-inflicted hardships in and of themselves justified variances, we would, effectively not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless. We hold that practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted.

Cromwell, 102 Md. App. at 722.

CONCLUSIONS OF LAW

(1) The proposed Special Exception does not satisfy the requirement of Zoning Ordinance §27-348.02(a)(1). First, the site lacks “frontage” on an existing arterial roadway. The width of the internal drive aisle at its intersection with Woodyard Road is approximately 60 feet. (Testimony of Joseph Del Balzo, November 10, 2105) The sixty-foot wide terminus of the drive aisle does not constitute “frontage” on Woodyard Road. Second, the site lacks “direct vehicular access to an existing arterial roadway.” A 1,535 foot long drive aisle in the Shopping Center that connects the proposed Special Exception to Woodyard Road is not “direct vehicular access” especially where, as here, the Applicant failed to provide any evidence, such as an easement, that Applicant has been given a legal right from the property owner to occupy or utilize the frontage and drive aisle in perpetuity. §27-348.02(a)(1)

(2) Based on referrals from the County Department of Public Works and Transportation and the State Highway Administration, the Transportation Planning Section, M-NCPCC found that the local streets surrounding the subject property are adequate to accommodate the anticipated increase in traffic. (Exhibit 22) §27-348.02(a)(2)

(3) The Site Plan, Exhibit 72, provides pedestrian walkways within the parking lot in order to promote safety. §27-348.02(a)(3)

(4) The commercial loading area for the proposed Walmart is located behind the proposed addition, and the pedestrian entrances and pedestrian loading areas are exclusively located along the front facade of the existing and proposed structures. §27-348.02(a)(4)

(5) The existing building, trash compactor, loading spaces, and service driveway are all located within one hundred (100) feet from adjoining land in a Residential Zone in violation of §27-348.02(a)(5).

(6) The proposed Site Plan, Exhibit 72, is in violation of the 2010 Prince George’s County Landscape Manual and is therefore in violation of §27-348.02(a)(6). Alternative Compliance AC-99025-01 has been requested as part of the instant Application, which, if approved, will provide compliance with both the Landscape Manual and §27-348.02(a)(6). AC-99026-01 is discussed infra. §27-348.02(a)(6)

(7) The building entrance and nearby sidewalks will provide a combination of spiral paving, landscaping, raised planters, benches and light fixtures. (Exhibit 72) §27-348.02(a)(7)

(8) The Application provides a sign and exterior lighting plan. (Exhibit 72) §27-348.02(a)(8)

(9) The proposed architecture is largely rectilinear. The rooflines (other than a small portion of the front) are flat and undifferentiated. Variety of detailing, use of quality materials, windows, and an aesthetically pleasing pattern of fenestration are limited likewise to a very limited stretch of the front façade. The elevations, including the side (northern) architectural elevation of the proposed addition that will be clearly visible in the side parking lot and may be somewhat visible to the adjacent residentially-zoned land beyond, are largely blank walls and not aesthetically pleasing. The wall that is visible from the parking lot and the residentially zoned land to the north is a blank, formless wall. That wall is also likely visible from parts of the nearby residential community to the west.

(10) The Applicant's architectural witness, David L. Hoffman, testified that he was not familiar with the architectural requirements set forth in §27-348.02(a)(9). (July 29, 2015, T.p. 169-170) He also testified that he did not consider the architectural compatibility between the proposed Walmart and the nearby residential area as required by §27-348.02(a)(9). *Id.* at 155.

(11) Mr. Hoffman examined the architectural rendering (Ex. 41) and opined that the design was "unique." (July 29, 2015, T.p. 156) Opposition established on cross-examination the similarities between the allegedly "unique" design of the proposed Walmart and an existing Walmart in Rosedale, Maryland as depicted in Exhibit 43. In response to a question from People's Counsel, Mr. Hoffman testified that the design process starts with "fixture plan or a merchandising plan, which is a general layout of what the client wants to accomplish." *Id.* at 173. The design of the proposed Walmart comes from a template or "merchandising plan" and was not designed to be compatible with the other commercial and residential buildings in the neighborhood. Additionally, the design of the proposed Walmart does not enhance the site's architectural compatibility with surrounding commercial and residential areas, all in violation of §27-348.02(a)(9).

(12) 39% of the Special Exception area is devoted to green area (408,170 square feet) of which approximately 9% is surface water. (Exhibit 72(e), Note 4(g)) §27-348.02(a)(10)

Variance

(13) The R-80 Residential Zone borders the western and northern borders of the subject property. (Exhibit 22, p. 6) The Applicant is requesting a variance from §27-348.02(a)(5) which requires that all buildings, structures, off-street parking compounds, and loading areas associated with proposed Walmart shall be located at least 100 feet from any adjoining land in a residential zone. As testified to by Mr. Matthew Jones, the Applicant's Engineer, the existing building, trash compactor, loading spaces, and service driveway are less than 100 feet from any adjoining land in a residential zone. (July 29, 2015, T.p. 47-125; Exhibit 22, p. 9)

(14) The Applicant's Land Planner, Mr. Joseph Del Balzo, testified on November 10, 2015 and January 13, 2016. He argued that the subject property was unique for several reasons. A stream and wetlands are present on the east and north sides of the subject property. The Clinton Estates residential development is adjacent on the west side of the subject property and

residentially zoned land is adjacent on the north side of the subject property. The Application argues that these features “pinch” the developable area. Mr. Del Balzo also argued that the Shopping Center has frontage on, but no access to, Branch Avenue, and that the Shopping Center has only limited access to Woodyard Road. (January 13, 2016, T.p. 49-147; Exhibit 71, p. 24) He testified that if the Applicant were operating on a clean slate, it would orient the Walmart to face Woodyard Road. The Applicant argued that the wetlands prevented such an orientation if Walmart was to construct a parking lot to the east of the building. In response to a question from Mr. Tom Lockard, Technical Staff, M-NCPPC, Mr. Del Balzo testified that Walmart could design the building to face Woodyard Road and not interfere with the wetlands if it built structured parking, which has a smaller footprint than surface parking.

Mr. Del Balzo stated that there are eleven other comparable shopping centers with wetlands on the site. (Exhibit 71, p. 26) Two shopping centers had a higher percentage of wetlands than does the subject property. *Id.* He testified, “Clearly, the impact of wetlands is greatest on Crystal Plaza.” (*Id.* at 27)

Mr. Del Belzo testified that there are three other comparable shopping centers with access to one road only. *Id.* at 28 (January 13, 2016, T.p. 49-147)

Mr. Del Belzo recognized that the land Use Table for the C-S-C Zone authorizes many uses as of right that do not require a variance. He also recognized that the District Council disapproved a variance for a Department or Variety Store Combined with Food and Beverage Stores in Oxon Hill on that basis. (January 13, 2016, T.p. 49-147)

In its original Technical Staff Report, Planning Staff wrote:

Staff finds it hard to imagine that there is no alternative design for the site that would make the need for this variance go away. It may result in a smaller store or may require the Applicant to do some site-specific design, rather than applying their stock design to the property. Requiring the Applicant to do so does not reach the level of peculiar or unusual difficulty in staff’s opinion. The second criterion is not met.

Exhibit 22, p. 11

In its Amended Technical Staff Report, Planning Staff wrote:

Staff has reviewed the Revised Site Plan and Statement of Justification for the requested variances from §27-348.02(a)(5) for the above-referenced Application. While staff appreciates the amount of effort taken by the Applicant to show that the subject property is unique among shopping centers relative to the amount of wetlands on site and the single road frontage, we do not find the argument persuasive. We recognize the wetlands constrain the development area of the site, but note that the **most constrained** portion of the site (the northern end) is the area where the proposed building extension actually meets the 100-foot setback. This fact is not only counter-intuitive to the Applicant’s argument but, in staff’s opinion, is injurious to the point of negating it. If the most-constraining presence of the wetlands does not hinder the Applicant’s ability to meet the setback, how

then does their lesser-constraining presences do so? As to the Applicant's argument that the single access to Woodyard Road creates a unique and problematic situation, staff finds it unpersuasive, as well. Firstly, the Applicant, by their own analysis shows they are not unique in that regard. Secondly, and more importantly, the Applicant once again disproves their argument by meeting the setback for the addition. Staff must conclude, as we have previously, that this is a variance born of convenience.

A Special Exception use is considered compatible with uses permitted by-right within the zone, as long as specific criteria are met. Unless unique adverse impacts are identified, the Special Exception may be approved. The appropriate standard for determining whether the use would create an adverse impact upon surrounding properties is to show that the proposed use, at the particular location proposed, would have adverse impacts above and beyond those inherently associated with the Special Exception use, regardless of its location within the zone. In this case, Staff is particularly concerned with the impact of the proposed use on the residential properties to the west and the Applicant's request for a variance to the prescribed 100-foot setback.

Variances allow for circumvention of the strict terms of the Zoning Ordinance and should only be approved where the justification to do so is substantial. Consequently, they are to be used sparingly. Staff recognizes the long existence of the Walmart building, service drive, trash compactor, and loading spaces and their location relative to the residences to the west, but we also note the fact that this situation is only allowed through past excusals via several departures and alternative compliances, which the Applicant requests further amendments to. Those were approved for what was then a *permitted* use in the C-S-C Zone. What we are reviewing here is a Special Exception use which the District Council has determined has impacts above and beyond those ordinarily associated with the permitted by-right use. If the requirements can be met, they should be. We also recognize that it would be more expensive and less convenient for the Applicant to meet the setback requirement. However, economic hardship is not a sufficient reason to grant a variance, nor is convenience.

Assuming that the District Council's reasoning in requiring the 100-foot setback for these "big box" stores was to protect the adjoining residences (along with the requirement that the perimeter areas of the site shall be buffered or screened, as required by the Landscape Manual, from which the Applicant seeks further alternative compliance), Staff cannot find the variance for the expansion onto the existing building justified. Because we are unable to recommend approval of the variance, we cannot recommend approval of the Special Exception.

Exhibit 73, pp. 1-2 (emphasis in original)

After considering the evidence and reviewing the applicable law, your Zoning Hearing Examiner finds that the Applicant failed to meet its burden of proving the requirements for a variance set forth in §27-230.

(15) Your Zoning Hearing Examiner makes the factual and legal findings that the Applicant failed to prove compliance with §27-230(a)(1). The subject property does not have any extraordinary situations or conditions. The Zoning Hearing Examiner is not persuaded by Mr. Del Balzo's testimony that the orientation of the building towards Branch Avenue, the access to Woodyard Road and the presence of wetlands constitute an extraordinary situation or condition. Your Zoning Hearing Examiner finds credible, and is persuaded by, the Technical Staff. Your Zoning Hearing Examiner is especially persuaded by the fact that the proposed addition to the existing building satisfies the setback requirement even though it is closer to the wetlands than is the existing building.

Your Zoning Hearing Examiner finds that any constraints on the development of the proposed Walmart are self-imposed. A self-imposed condition does not satisfy the requirement of uniqueness. The shape, orientation, and location of the existing building cannot be a basis for a variance. *North*, 99 Md. App. at 514 ("the 'unique' aspect of a variance requirement does not refer to the extent of improvements upon the property")

For these reasons, your Zoning Hearing Examiner finds that the Applicant failed to meet its burden of proving compliance with the requirements of §27-230(a)(1). The Applicant's failure to prove compliance with Zoning Ordinance §27-230(a)(1) requires your Zoning Hearing Examiner to disapprove the Application for a variance.

(16) Even if the Applicant met its burden regarding §27-230(a)(1), the Applicant's failure to meet its burden regarding §27-230(a)(2) requires the disapproval of the Application for a variance. Any constraints on the development of the proposed Walmart are self-imposed. The Applicant admitted that it could provide a structured parking garage which would eliminate the need for a variance. A self-imposed condition does not satisfy the requirement of uniqueness or practical difficulty. *Cromwell*, 102 Md. App. at 722 ("practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted")

The strict Application of §27-348.02(a)(5) will not "result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property." §27-230(a)(2) identifies both the "practical difficulties" and "exceptional or undue hardship" standards. The Court of Special Appeals has explained the difference:

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 the 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. 7 Loan Ass'n v. Buschman*, 227 Md. 243, 249 (1961).

Montgomery Cnty. v. Rotwein, 169 Md. App. 716, 728-29 (2006).

Analyzing the evidence in the record in light of the less rigorous “practical difficulties” standard the Applicant failed to meet its burden of proving that it met that standard. 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 (1973). The Applicant has only shown that it seeks a variance as a matter of convenience because it seeks to construct the only use that requires a 100 foot setback. Your Zoning Hearing Examiner finds that the record in this case fails to establish “practical difficulties” that would permit the granting of a variance.

(17) The Use Table for the C-S-C Zone authorizes the Applicant to develop the subject property with approximately 179 uses permitted by right. (Exhibit 82) The Applicant is able to secure a reasonable return from, or make a reasonable use of, the property without a variance. Maryland’s case law supports this finding as a basis for denying a variance. *Montgomery County v. Rotwein*, 169 Md. App. 716 (2006) 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 form or to make a reasonable use of such property.’” *Id.* at 733 (citing *Marino v. City of Balt.*, 215 Md. 206, 218 (1957)). *Rotwein* 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, in the instant Application the only evidence is that the Applicant may build a smaller Walmart or any other use permitted in the zone or provide structured parking. The Applicant may also continue to operate the existing Walmart without adding the requested Food or Beverage Store.

The District Council analyzed a similar issue in SE/VSE 4738 (Potomac Business Park) where the Applicant sought a variance and a Special Exception for a Department or Variety Store Combined with Food and Beverage Stores in the I-3 Zone. There, the District Council found that the Applicant failed to prove a practical difficulty because the “I-3 Planned Industrial/Employment Park) Zone allows more than 140 different uses that are permitted by right.” (Exhibit 84, at p. 25) Your Zoning Hearing Examiner adopts that reasoning here and finds that the Applicant failed to prove a practical difficulty. For these reasons, your Zoning Hearing Examiner finds that the Applicant failed to meet its burden of proving compliance with §27-230(a)(2).

(18) Based on the foregoing, the Application fails to meet the requirements of §27-102(a)(2), (6), (11) and (13), and therefore also fails to meet the requirements of §27-317(a)(1), (2), (3), (4) and (5), and, at a minimum, also fails to meet the requirements of §27-348.02(a)(1), (5) and (9). As the Applicant failed to meet its burden of proof for both the Special Exception and the Variance requests, it is not necessary to discuss the request for Alternative Compliance.

DISPOSITION

Special Exception 4733, Variance 4733, and AC-99026-01 are DENIED.