

Case No. DSP-15020-01
Capital Plaza Walmart

Applicant: Walmart Real Estate Business Trust

FINAL DECISION — DISAPPROVAL OF DETAILED SITE PLAN

Detailed Site Plan 15020-01 (“DSP”), to construct a 35,287 square foot expansion to combine certain uses in the C-S-C Zone, is DISAPPROVED.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Procedural and Factual Background²

In September 2014, Walmart filed an application for a DSP with the Planning Department to expand its existing 144,227 square foot department store/retail “use”³ by 35,287 square

¹ See the Land Use Article Section 25-210 (“LU”), Md. Ann. Code (2012 Ed. & Supp. 2015), the Prince George’s County Code, Subtitle 27, Section 27-290 (“PGCC”) (2015), and *Cnty. Council of Prince George’s Cnty. v. Zimmer Dev. Co.*, 444 Md. 490; 120 A.3d 677 (2015) (The District Council is expressly authorized to review a final decision of the county planning board to approve or disapprove a detailed site plan and the District Council’s review results in a final decision).

² The District Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision. See PGCC § 27-141. The District Council may also take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. See District Council Rules of Procedure Rule 6(f).

³ Under the County Code, Walmart is not a “use.” The County Code defines a “use” as either (i) the purpose for which a “Building,” “Structure,” or land is designed, arranged, intended, maintained, or occupied; or (ii) any activity, occupation, business, or operation carried on in, or on, a “Building,” “Structure,” or parcel of land. See PGCC § 27-107.01(a)(244). In 2007, Walmart was issued a Certificate of Use and Occupancy Permit for a department store/retail “use.” The Code defines retail (not including pawnshops) as the sale of commodities or goods, usually in small quantities, directly to ultimate consumers. See PGCC § 27-107(a)(202). The County Code does not define a “department store” but Walmart has occupied the premise for its intended purpose. Merriam-Webster dictionary defines a department store as a large store that has separate areas in which different kinds of products are sold. See <http://www.merriam-webster.com/dictionary/department%20store> (last visited September 16, 2016). See also PGCC § 27-108.01(a)(7)(Words and phrases not specifically defined or interpreted in this Subtitle or the Prince George’s County Code shall be construed according to the common and generally recognized usage of the language. Technical words and phrases, and others that have acquired a peculiar and appropriate meaning in the law, shall be construed according to that meaning).

feet—for a total of 179,564 square feet. According to Walmart, the proposed 35,287 square feet building expansion will be a “full grocery component,” which will not disrupt operations of the existing department store “use.” The entire expansion (from front to back) will include produce, deli, bakery, organics, milk, bread, eggs and standard household products and detergents. Walmart’s application was not accepted for review by the Planning Department until December 28, 2015.⁴ *See* Application Form, 9/15/2014, DSP Statement of Justification, 3/30/2016, DSP-15020-01, CD-R, 12/24/15 (Digital Site Plans), (5/5/2016, Tr., pp. 13–14, 38, 69–70, 103, 118, 120–21, 133, 154, 186–88, 209–10).

In December 2015, Walmart filed a permit application with the Planning Department to certify its existing 144,227 square foot department store/retail “use” as nonconforming. *See* Application Forms for Nonconforming Use, 12/8/2015, 12/22/2015, NCU Statement of Justification, 3/7/2016, Certificate of Occupancy, 8/1/2007—Use (M-NCPPC Zoning): Department Store/Ret.

In March 2016, the Planning Board (by authorized designee) administratively approved Walmart’s permit application and certified Walmart’s existing 144,227 square foot department store/retail “use” as nonconforming.⁵ *See* PGCPB No. 16-60, p. 2, NCU File 53471-2015-U, Certificate of Occupancy, 8/1/2007—Use (MNCPPC Zoning): Department Store/Ret.

⁴ There is no “use” in the County Code defined as a “full grocery component.” According to the County Code, no use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses and all uses not listed are prohibited. *See* PGCC §27-461(a)(7). Moreover, no land, building, or structure shall be used in any manner which is not allowed. *See* PGCC §27-114. The Code defines the “use” proposed by Walmart as a food or beverage store. *See* PGCC § 27-107.01(a)(91.1).

⁵ Judicial notice is taken of the evidence contained within Walmart’s certification of nonconforming use approval by the Planning Board. The County Code does not authorize an administrative certification of nonconforming uses (without transmittal to the District Council) unless they occur *solely* within an enclosed building. *See* PGCC § 27-244(d)(1–4). A nonconforming use is the “Use” of any “Building,” “Structure,” or land. *See* PGCC § 27-107.01(a)(166). Walmart’s permit application for certification of its department store/retail “use” included a “garden center use” and a “vehicle lubrication or tune-up facility use.” Walmart’s garden center is a *structure* located on an area of *land outside* of its enclosed building. Walmart’s tire and lube center is a building located on land with service bays and drive aisles (not solely enclosed) used for parking, and service and storage of cars. *See* Items for DSP-15020-

In April 2016, Planning Department’s Technical Staff recommended approval of Walmart’s DSP. *See* Technical Staff Report, 4/15/2016. Staff’s recommendation was transmitted to the Planning Board for consideration.

On May 5, 2016, Planning Board held a hearing to consider Walmart’s DSP. Over the objection of Citizen Opposition that Walmart’s proposal (to combine certain uses) was subject to a special exception review and approval, Planning Board reviewed Walmart’s DSP using site plan procedures.⁶ After the hearing, Planning Board approved Walmart’s DSP. *See* (5/5/2016, Tr.). Subsequently, on May 26, 2016, Planning Board adopted a resolution certifying its action of May 5, 2016. *See* PGCPB No. 16-60, pp. 18–20.

On May 31, 2016, the Planning Board’s resolution was sent to all persons of record and to the Clerk of the County Council. *See* Letter of Transmittal, 5/31/2016.

(...continued)

01, Slides 9–13; (5/5/2016, Tr., p. 209–10); PGCC § 27-107.01(a)(167), which defines a Nursery and Garden Center as “Buildings,” “Structures,” *or an area of land used for the display and sale of nursery stock or garden supplies.* PGCC § 27-107.01(a)(247.1) and (249), which defines a Vehicle Lubrication or Tune-up Facility as “An establishment that specializes in, and performs the sole service of, motor vehicle greasing, oil changing (including filters), fluids replacement (excluding gasoline and diesel fuels), or tune-ups; and which may include the retail sale of vehicle parts, products, or accessories associated with such specialized service.” A Vehicle Parts or Tire Store is defined as “A facility where the primary ‘use’ is the retail sale of vehicle parts, products, tires, or accessories.” Planning Board’s administrative certification of Walmart’s department store/retail “use” as nonconforming was illegal under the County Code because the certification of the department store/retail “use” included “uses” which are not solely within an enclosed building. As a matter of law, the Planning Board’s authorized representative is required to notify the District Council of its recommendation where the nonconforming uses does not occur solely within an enclosed building, and only if the District Council does not elect to review the recommendation within thirty (30) days, shall the representative certify the use as nonconforming. *See* PGCC § 27-244(d)(1–4). Notwithstanding Planning Board’s illegal approval of Walmart’s permit application for nonconforming use, it will not be used as basis for denial of Walmart’s DSP because the proposed expansion is not exempt from special exception approval. *See discussion infra.*

⁶ The County Code defines a food or beverage store as “a use providing the retail sales of food, beverages, and sundries primarily for home consumption, and may include food or beverage preparation.” *See* PGCC § 27-107.01(a)(91.1). A department store exceeding 125,000 square feet with a food or beverage component “use” or a food or beverage store “use” that is “in combination with a department or variety store “use” on the same or adjacent site” is a permitted use by a special exception—not a permitted use by right. *See* PGCC §§ 27-348.02, 27-461, 27-548.22, 27.548.25, CB-24-2013. During the hearing before the Planning Board, it was revealed that Planning Department’s staff made the decision for the Applicant to forego filing an application for a special exception. *See* (5/5/2016, Tr., p. 130).

On June 20, 2016, the District Council elected to review Walmart’s DSP, as approved by Planning Board. *See Zoning Agenda, 6/20/2016.*

On June 29, 2016, certain persons of record before the Planning Board (“Citizen Opposition”) filed a written appeal with the Clerk of the Council, and requested oral argument. *See Petition for Appeal, 6/29/2016.*

On August 5, 2016, notice of oral argument was sent to all persons of record. *See Notice of Oral Argument, 8/5/2016.*

On September 12, 2016, the District Council held a public hearing to review Walmart’s DSP. *See Zoning Agenda, 9/12/2016.* At the conclusion of the hearing, the matter was taken under advisement.

On September 13, 2016, the District Council referred this matter to staff to prepare an order of denial. *See Zoning Agenda, 9/13/2016.*

For the reasons that follow, the District Council finds, among other things, that Planning Board’s approval of Walmart’s DSP was illegal because (as a matter of law), Walmart’s proposed expansion to combine certain uses in the C-S-C Zone is subject to review and approval by a special exception. *See PGCC §§ 27-348.02, 27-461, 27-548.22, 27.548.25, CB-24-2013.*

II. Zoning Legislation

A. Council Bill 2-2002

Since 2002, the District Council enacted zoning legislation concerning the construction and expansion of certain department or variety stores combined with food and beverage stores. For example, in the Commercial Shopping Center (C-S-C) Zone (before the existing Walmart was constructed) a department or variety store “use” not exceeding 125,000 square feet of gross floor area was permitted as a matter of right. But if the proposed “use” exceeded 125,000 square feet, it

was permitted as a matter of right (without special exception approval) so long as the project was within the Developed Tier or a designated Revitalization Tax Credit Area. On the other hand, a proposed food or beverage store “use” in combination with a department or variety store “use” on the same or adjacent site was not a permitted use by right but it was a permitted use by a special exception. Absent certain other exceptions, all other department or variety store “use” were permitted uses by special exception in the C-S-C Zone. *See* CB-2-2002, Agenda Item Summary, PGCC §§ 27-348.02, 27-461.

B. Capital Plaza Walmart

Subsequent to the enactment of CB-2-2002, Walmart constructed its existing 144,227 square foot department store in the Capital Plaza Shopping Center (“Shopping Center”). According to counsel for Planning Board, Walmart (*i.e.*, a department store/retail “use”) “started out as a special exception.” *See* (5/5/2016, Tr., p. 16). This is legally incorrect. The construction of Walmart’s 144,227 square foot building (for a department store/retail “use”) was permitted as a matter of right (not by special exception) because the Shopping Center site was in the C-S-C Zone and in the Developed Tier. *See* 2000 General Plan, pp. 94–5, CB-2-2002, PGCC § 27-461. Walmart opened for business in 2007 after it was issued a use and occupancy permit by the County for a department store/retail “use.” *See* Certificate of Occupancy, 8/1/2007.⁷ The County Code defines retail (not including pawnshops) as the sale of commodities or goods, usually in small quantities, directly to ultimate consumers. *See* PGCC § 27-107(a)(202).

⁷ On April 11, 2005, the Planning Department received an “overall site plan” from Walmart. Within weeks (on April 29, 2005), the Planning Department approved Walmart’s “overall site plan.” *See* Permit 34432-2003-CGU-04, NCU 53471-2015-U, Overall Site Plan, 4/11/2005.

C. 2010 Central Annapolis Road Sector Plan and Sectional Map Amendment

In 2010, development within the Shopping Center became subject to the 2010 Central Annapolis Road Sector Plan and Sectional Map Amendment,⁸ which was approved by the Council in October 2010 (“2010 Plan”). Absent certain exemptions, development within the Shopping Center site also became subject to the approved 2010 DDOZ. A DDOZ is superimposed over the Central Annapolis Road sector plan area to ensure that development of land meets the goals of the plan. *See* 2010 Plan, Chapter 8, p. 137. According to counsel for Planning Board, the approval of the 2010 DDOZ made Walmart’s existing department store/retail “use” nonconforming. *See* (5/5/2016, Tr., p. 16). This is also legally incorrect.

The 2010 DDOZ expressly provided that “all buildings, structures, and uses which were lawful or could be certified as a legal nonconforming use on the date of SMA approval are exempt from the development district standards and from site plan review and are not nonconforming.” *See* 2010 Plan, Chapter 8, p. 136. Nothing in 2010 SMA rezoned the Shopping Center from the C-S-C Zone. Walmart’s property was (and still is) in the C-S-C Zone—certified for a department store/retail “use” that is permitted by right and when combined with certain other uses, permitted by special exception. Nothing in the SMA (including the 2010 DDOZ) amended the Commercial Table of Uses in the C-S-C Zone to prohibit a department store/retail “use” so as to make it

⁸ A Sector Plan is a comprehensive plan for the physical development of a portion of one or more planning areas, showing in detail such planning features as type, density and intensity of land uses, pedestrian traffic features, public facilities (parking structures, public open space, rapid transit station, community service provisions, and the like), and relationship of the various uses to transportation, services, and amenities within the area of the sector plan and, where appropriate, to other areas. The sector plan may include maps, graphics, and text and is designated as the sector plan for the area which it encompasses. *See* PGCC § 27-107 (a)(206.2). The purpose of the 2010 Sector Plan is to guide future redevelopment and revitalization along the Annapolis Road corridor between Veterans Parkway (MD 410) and the Baltimore-Washington Parkway. *See* 2010 Plan, Chapter 1, p. 1. Its companion Sectional Map Amendment is a comprehensive rezoning process to approve specific rezoning proposals for land in a defined plan area of the county zoning map in order to bring zoning in conformance with approved county plans and policies. The SMA process corrects existing zoning that hinders such development, and it reduces piecemeal rezoning. *See* 2010 Plan, Chapter 8, p. 123. *See also* PGCC Subtitle 27, Part 3, Division 4 – Sectional Map Amendment.

nonconforming. *See* 2010 Plan, Chapter 8, pp. 123–36, PBCPB No. 16-60, p. 2, Technical Staff Report, p. 5, CB-2-2002, PGCC §§ 27-348.02, 27-461. Moreover, since 2002, a food or beverage store “use” that is in combination with a department or variety store “use” on the same or adjacent site has been a permitted use by special exception—no aspect of the 2010 Plan amended the Commercial Table of Uses in the C-S-C Zone to render said use nonconforming. Simply put, Walmart’s department store/retail “use” in the C-S-C Zone never became (by operation of any law) nonconforming. *See* CB-2-2002, PGCC §§ 27-348.02, 27-461. *See* also PGCC § 27-107(a)(45)(165)(166).

D. Council Bill 13-2012

In 2012 (before Walmart filed applications for DSP and nonconforming use), the Council enacted legislation applicable to certain future projects in the C-S-C Zone and within the Developed Tier or a designated Revitalization Tax Credit Area—this legislation did not rezone the Capital Plaza Shopping Center from the C-S-C Zone, nor did it amend the Commercial Table of Uses in the C-S-C Zone to prohibit (or make nonconforming) “uses” for a department store/retail or food or beverage store. In particular (and relevant to Walmart’s proposed expansion for a food or beverage store “use”), the 2012 legislation permitted, as a matter of right, the construction of department or variety stores exceeding 125,000 square feet of gross floor area in the C-S-C Zone, and within the Developed Tier, or a designated Revitalization Tax Credit Area so long as the department or variety store “use” does not contain any food or beverage component “use.” In other words (as it relates to property located in the C-S-C Zone and Developed Tier), a department store “use” was still a permitted use by right but when combined with a food or beverage store, the use is a permitted use by special exception. *See* CB-13-2012, Agenda Item Summary, PGCC §§ 27-348.02, 27-461. This limitation does not apply to property in the Developed Tier if the property

(a) has an approved Preliminary Plan of subdivision for property split-zoned R-R (Rural Residential) and I-3 (Planned Industrial/Employment Park), and is located on and inside the Capital Beltway at an existing interchange with said Beltway, or (b) the subject of a Preliminary Plan or Detailed Site Plan for an integrated shopping center developed pursuant to CB-65-2003, or (c) is the subject of a building permit issued for said use prior to September 1, 2005 pursuant to CB-65-2003. *See* PGCC § 27-461, Table of Uses, Footnote 52. *See also* CB-65-2003. At oral argument, Counsel for Walmart argued that because Walmart’s building permit was issued prior to September 1, 2005, the limitation imposed by CB-13-2012 was inapplicable to Walmart’s property. Counsel for Walmart misstates the law. The exemption from the limitation imposed by CB-13-2013 only applies to permits issued prior to September 1, 2005 pursuant to CB-65-2003. CB-65-2003 only applies to permits issued prior to September 1, 2005 for retail uses in the R-R and I-3 Zones. Walmart is in the C-S-C Zone. Regardless, since 2002, a food or beverage store “use” that is in combination with a department or variety store “use” on the same or adjacent site is a permitted use by special exception.

E. Council Bill 24-2013

In 2013 (before Walmart filed applications for DSP and nonconforming use), the Council enacted further legislation, which clarified the method for determining which “uses” are subject to site plan approval and which “uses” are exempt from a special exception in certain DDOZs—this legislation also did not rezone the Capital Plaza Shopping Center from the C-S-C Zone nor did it amend the Commercial Table of Uses in the C-S-C Zone to prohibit (or make nonconforming) “uses” for a department store/retail or food or beverage store. The legislation expressly provided that “uses” in the underlying zone which would normally require a special exception shall be permitted “uses” subject to site plan review by Planning Board only if the Development District

Standards provided for such “uses” within a table of uses. See CB-24-2013, Agenda Item Summary, PGCC §§ 27-548.22, 27-548.25. See also 2010 Plan.

At the Planning Board hearing, Citizen Opposition (relying on CB-24-2013), opposed Planning Board’s review and approval of Walmart’s proposed expansion by DSP. Counsel for Citizen Opposition stated as follows:

MR. LYNCH: We’re opposed to this DSP for two alternative legal reasons. First, Section 27-548.22(d) of the Zoning Ordinance requires each Development District Overlay Zone to include a table of uses, quote, clearly showing all uses in the underlying zone that will be permitted, prohibited or otherwise restricted, pursuant to Section 27-548.25. Here there is no table of uses in the Central Annapolis Road Sector Plan D-D-O Zone. Therefore, until a table is included, no use is allowed in the zone, particularly, 180,000 square foot department and variety store.

Alternatively, if uses are allowed in this D-D-O Zone, then the applicant’s proposed 35,000 square foot expansion requires a special exception and not merely a DSP. Under Section 27-548.25(d), a special exception procedures shall apply to uses within a Development District as provided herein. Uses which would normally require a special exception in the underlying zone shall be permitted uses only if the Development District Standards so provide within a table of use and such uses shall instead be subject to Site Plan review.

Here, there is no table of uses in the Sector Plan. Therefore, the special exception procedures apply to this proposed expansion which is allowed only as a special exception in the underlying C-S-C Zone.

I’d like to point out, this is not merely an expansion of an existing use, it’s a change of use. The addition of a full line grocery store fundamentally changes the use that exists at the property. See (5/5/2016, Tr., pp. 36–40).

Counsel for Planning Board disagreed and stated as follows:

MS. BORDEN: Yes, thank you Madam Chair. Debra Borden again, Principal Counsel. I believe what Mr. Lynch is referring to is the Text Amendment that was titled CB24 2013. It amended among other things Section 275-48.22 it added subsection C. I will read it in its entirety. A table of uses shall be incorporated within each Development District Overlay Zone clearly showing all uses in the underlying zone that will be permitted, prohibited or otherwise restricted pursuant to Section 27-548.25 of this division.

Now the interpretation that Mr. Lynch put forward is that we should read that in both a prospective, so everything that happens after that, as well as retrospective, everything that happened before that, kind of manner, that we should apply it to D-D-O-Z's that were put into place before the Text Amendment was enacted. That is not how we do things. That is not how we would read something like that.

We would only read something like that as a retrospective retroactive piece of legislation if it said that. It has to say that. It doesn't say that. It says shall be incorporated. So from here on in, all D-D-O-Z's that are enacted through the SMA process, shall have tables of uses. We happen to have a lot of SMA's and a lot of Sector Plans in this county and we have a number of them that don't have tables of uses incorporated into them as of the date of this enactment.

So to suggest that we would then say that that means if you don't have a table of uses in your Sector Plan or in your D-D-O-Z that that means that all your uses are prohibited, that would be an absurd result and we would never do that. We would also not say that because you don't have a table of uses all of your uses are special exceptions. Again, the law doesn't say that. We don't make it up. We have to base it on the law that's actually in place. This Text Amendment simply said from here on, we're going to have table of uses in every single D-D-O-Z.

The second point if I can look at my notes, nonconforming uses. I believe Mr. Lynch argued that even nonconforming uses are somehow subject to the special exception requirement. That again is not what the law says and what we would do is we would read both the D-D-O-Z that's contained in the Central Annapolis Road SMA and the Zoning Ordinance. We have to read them both and we have to reconcile them both so that they all fit together like a jigsaw puzzle and make sense. We can't read one and ignore the other. We can't ignore one, ignore the Zoning Ordinance and then only solely rely on the D-D-O-Z. We have to make them make sense together. And in order to do that, you have to start again at the beginning and at the beginning before the D-D-O-Z and before the Text Amendment this use was already there. It was built, it was operating for years prior to the Text Amendment and prior to the D-D-O-Z. According to the D-D-O-Z, all legally existing development which would include this use, is now legally existing, it's not nonconforming, it's a use that is permitted and can continue forever.

Then on the date that they decide they want to change their Site Plan according to this document, this document meaning the SMA, then it becomes a nonconforming use that needs to be certified because again it preexisted the D-D-O-Z. It needs to be certified as a nonconforming use and then at the point where they want to expand, they need to do a DSP. It does not allow you to do a special exception. Even if, even if we said that Item D under 27-548.25 actually applied, it still sends you to the DSP process. It says if you were a special exception in the underlying zone then you go through a DSP with some additional findings. So either way it's a DSP it's not a special exception.

Whether or not this was what the Council intended, I really can't say. All I know is what it says and what it says is if you were a special exception in the underlying zone, then you go through a DSP. It does not say that you're prohibited.

What it does say is that you're supposed to have a use table that identifies your use specifically and this particular book does not have a use table. All it does is it sends you back to the use tables that are in the Zoning Ordinance, but the use table that's in the Zoning Ordinance says that in this particular underlying zone it's a special exception. It's a very circular thing. Yes. And it's very confusing. Yes. Which is why we had to spend a number of days meeting and mapping this out and that's what we did.

So again, to reiterate, it starts off as a special exception. The D-D-O-Z is enacted, it becomes a legal not nonconforming use that is permitted to exist forever. At the moment they try to expand, it becomes a certified nonconforming use that needs to apply for a DSP with additional findings. There is no way that it says in this book that you file a special exception. It doesn't have special exception in this book. This book is the thing that applies to this property. In addition to the Zoning Ordinance they both apply. You can't ignore one and only use the other. That's the way it works. *See (5/5/2016, Tr., pp. 55–59).*

The District Council disagrees with counsel for Planning Board. CB-24-2013 is not confusing. CB-24-2013 clarified the method for determining which “uses” are subject to site plan approval and which “uses” are exempt from a special exception in certain DDOZs—it did not amend the Commercial Table of Uses in the C-S-C Zone to prohibit (or make nonconforming) “uses” for a department store/retail or food or beverage store. CB-24-2013 expressly provided that “uses” in the underlying zone which would normally require a special exception shall be permitted “uses” subject to site plan review by Planning Board only if the Development District Standards provided for such “uses” within a table of uses. The legislation expressly stated that it did not apply to DDOZs approved prior to January 1, 2010, nor to any existing DDOZ approved after January 1, 2010, for which a table of uses was incorporated at the time of the approval of the DDOZ. The District Council, in enacting Section 2 of CB-24-2013, plainly intended the requirements to apply to any DDOZ approved after January 1, 2010, without a use table, retrospectively. When the

DDOZ was approved in October 2010, a table of uses was not incorporated—clearly showing all uses in the underlying zone that will be permitted, prohibited, or otherwise restricted. *See* CB-24-2013, Agenda Item Summary, PGCC §§ 27-548.22, 27-548.25, 2010 Plan. It was also the District Council’s intent for CB-24-2013 to apply retrospectively to the 2010 DDOZ because it did not have a table of uses. The bill’s sponsor informed the committee that CB-24-2013 provides clarity for uses allowed in a DDOZ. The bill’s sponsor also explained that the legislation was submitted as a result of a situation in which a use normally requiring a special exception was allowed because a use table was not required for the DDOZ. The District Council was fully aware at the time CB-24-2013 was enacted that the 2010 DDOZ was approved after January 1, 2010 without a table of uses. *See* Agenda Item Summary for CB-24-2013.

According to Walmart, the proposed 35,287 square feet building expansion (from front to back) will be a “full grocery component,” which will not disrupt operations of the existing department store “use.” The entire expansion will include produce, deli, bakery, organics, milk, bread, eggs and standard household products and detergents. *See* DSP Statement of Justification, 3/30/2016, DSP-15020-01, CD-R, 12/24/15 (Digital Site Plans), (5/5/2016, Tr., pp. 13–14, 38, 69–70, 103, 118, 120–21, 133, 154, 186–88, 209–10). There is no “use” in the County Code defined as a “full grocery component.” Accordingly, no use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses and all uses not listed are prohibited. *See* PGCC §27-461(a)(7). Moreover, no land, building, or structure shall be used in any manner which is not allowed. *See* PGCC §27-114.

The County Code defines a “use” as either (i) the purpose for which a “Building,” “Structure,” or land is designed, arranged, intended, maintained, or occupied; or (ii) any activity, occupation, business, or operation carried on in, or on, a “Building,” “Structure,” or parcel of land.

See PGCC § 27-107.01(a)(244). The County Code defines a food or beverage store as “a use providing the retail sales of food, beverages, and sundries primarily for home consumption, and may include food or beverage preparation.” See PGCC § 27-107.01(a)(91.1). A department store exceeding 125,000 square feet with a food or beverage component “use” or a food or beverage store “use” that is “in combination with a department or variety store “use” on the same or adjacent site” is a permitted use by a special exception—not a permitted use by right. See PGCC §§ 27-348.02, 27-461, 27-548.22, 27.548.25, CB-24-2013.

Because the 2010 DDOZ did not incorporate a table of uses clearly showing all uses in the C-S-C Zone that will be permitted, prohibited, or otherwise restricted when it was approved, Walmart’s proposed expansion to combine certain uses in the CSC Zone was subject to a special exception since the “uses” normally required a special exception in the CSC Zone. See PGCC §§ 27-348.02, 27-461, 27-548.22, 27.548.25. See also CB-24-2013.

i. Walmart as a Nonconforming Use

Assuming, *arguendo*, that Walmart’s department store/retail “use” became nonconforming after the approval of the 2010 DDOZ, as Planning Board claims, Walmart’s proposed expansion of its nonconforming “use” is not subject to any of the exemptions in the 2010 DDOZ. The following exemption is relevant to Walmart’s nonconforming use:⁹

7. Nonconforming buildings, structures, and uses. Restoration or reconstruction of a nonconforming building or structure, or a certified nonconforming use, is exempt from the development district standards and from site plan review if it meets the requirements of Section 27-243(a)(1) of the Zoning Ordinance.

⁹ Even if Planning Board did not certify Walmart’s existing department store/retail “use” as nonconforming, Walmart’s proposed expansion would still not qualify for an exemption under the 2010 DDOZ because an addition to a lawful nonresidential development could not increase its existing gross square footage by more than 5,000 square feet. See 2010 DDOZ, p. 138, Exemption 5, Nonresidential development.

Except for improvements listed in section 8. General below, a property may not expand a certified nonconforming use unless a detailed site plan is approved with findings that the expansion is compatible with adjacent uses and meets the goals of the sector plan. See 2010 DDOZ, Exemptions, p. 138.

Section 27-243(a)(1) provides

- (a) Without enlargement, extension, or relocation.
- (1) The restoration, reconstruction, or reestablishment of a nonconforming building or structure, or a certified nonconforming use, which has either been unintentionally destroyed by fire or other calamity, has temporarily ceased operation for the sole purpose of correcting Code violations, or has temporarily ceased operation due to the seasonal nature of the use, may be permitted without relocation, enlargement, or extension, provided that:
- (A) Where the building, structure, or use has been unintentionally destroyed by fire or other calamity, a building permit for restoration or reconstruction shall be issued within one (1) calendar year from the destruction date, and construction pursuant to the permit has begun within six (6) calendar months after the date of issuance (or lawful extension) of the permit, and proceeds to completion in a timely manner. If it has been destroyed for more than one (1) calendar year, the reconstruction, reestablishment, or restoration may only be permitted upon approval of a Special Exception in accordance with Part 4 of this Subtitle.
- (B) Where a certified nonconforming use has temporarily ceased operation, either for the sole purpose of correcting Code violations or because the nature of the nonconforming use is seasonal, such use shall be reestablished within one (1) calendar year from the date upon which operation last ceased.

It is undisputed that Walmart's certified nonconforming use has not been unintentionally destroyed by fire or other calamity, has temporarily ceased operation for the sole purpose of correcting Code violations, or has temporarily ceased operation due to the seasonal nature of the use.

Planning Board erred as a matter of law when it relied on the second paragraph of Exemption 7 to approve Walmart's DSP to expand and combine its nonconforming department store/retail "use" with a food or beverage "use." The second paragraph of Exemption 7 provides only for an expansion of the "use" certified as nonconforming. For development standards not covered by the 2010 DDOZ, the other applicable sections of the Zoning Ordinance shall serve as the requirement and all development shall comply with County regulations and ordinances.¹⁰ *See* 2010 DDOZ, p. 138. A nonconforming use may not be changed to, or changed to include, any use other than that certified, unless such other use is permitted, or permitted by grant of a Special Exception, in the zone in which the nonconforming use is located. *See* PGCC § 27-243.01.

According to Walmart, the proposed 35,287 square feet building expansion (from front to back) will be a "full grocery component," which will not disrupt operations of the existing department store "use." The entire expansion will include produce, deli, bakery, organics, milk, bread, eggs and standard household products and detergents. *See* DSP Statement of Justification, 3/30/2016; DSP-15020-01, CD-R, 12/24/15 (Digital Site Plans); (5/5/2016, Tr., pp. 13–14, 38, 69–70, 103, 118, 120–21, 133, 154, 186–88, 209–10). There is no "use" in the County Code defined as a "full grocery component." Accordingly, no use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses and all uses not listed are prohibited. *See* PGCC §27-461(a)(7). Moreover, no land, building, or structure shall be used in any manner which is not allowed. *See* PGCC §27-114.

The County Code defines a "use" as either (i) the purpose for which a "Building," "Structure," or land is designed, arranged, intended, maintained, or occupied; or (ii) any activity,

¹⁰ For example, the reconstruction or restoration of a nonconforming building or structure, or a certified nonconforming use, which has been unintentionally destroyed by fire or other calamity and which involves an enlargement, extension, or relocation, may be permitted only upon approval of a Special Exception in accordance with Part 4 of this Subtitle. *See* PGCC 27-243(b)(1).

occupation, business, or operation carried on in, or on, a “Building,” “Structure,” or parcel of land. *See* PGCC § 27-107.01(a)(244). The County Code defines a food or beverage store as “a use providing the retail sales of food, beverages, and sundries primarily for home consumption, and may include food or beverage preparation.” *See* PGCC § 27-107.01(a)(91.1). A department store exceeding 125,000 square feet with a food or beverage component “use” or a food or beverage store “use” that is “in combination with a department or variety store ‘use’ on the same or adjacent site” is a permitted use by a special exception—not a permitted use by right. *See* PGCC §§ 27-348.02, 27-461, 27-548.22, 27.548.25. *See also* CB-24-2013.

Planning Board’s approval of Walmart’s DSP as an expansion of a nonconforming department store/retail “use” was illegal, because the proposed expansion in the C-S-C Zone is not a permitted use except by approval of a Special Exception. *See* PGCC § 27-243.01.

III. Standing

In Prince George’s County, a person may make a request to the District Council for the review of a decision of the Planning Board *only if*:

- (1) the person is an *aggrieved* person that appeared at the hearing before the zoning hearing examiner or planning board in person, by an attorney, or in writing; and
- (2) the review is expressly authorized under this division. *See* LU § 25-212 (Emphasis added).

A. Citizen Opposition

Section 25-210 of the Land Use Article expressly authorizes an appeal to the District Council of a decision of the Planning Board to approve or disapprove a Detailed Site Plan. *See* LU § 25-210. Six (6) individuals (Richard Bailey, Sandra Barnes-Loveday, Delvin Champagne, Paula M. Davis, Denise Hamler, Claren E. Heikal) and Community Standards Coalition (c/o Denise

Hamler) appealed Planning Board’s approval of Walmart’s DSP to the District Council.¹¹ On appeal, Citizen Opposition allege the following:

1. The Planning Board erred legally when it approved DSP-15020-01 because the law requires the Applicant to obtain a Special Exception to expand the existing Walmart store.
 - A. The Zoning Ordinance requires Applicant to obtain a Special Exception.
 - B. A determination that the existing Walmart store is a nonconforming use does not obviate the need for the Applicant to obtain a Special Exception.
2. No uses are allowed in the Central Annapolis Road Sector Plan DDOZ because the Plan does not contain a table of uses. *See* Petition for Appeal, Exhibit A, 6/29/2016.

B. Aggrievement

To be a person aggrieved, “[t]he decision must not only affect a matter in which the protestant has a specific interest or property right but his interest therein must be such that he is personally and specially affected in a way different from that suffered by the public generally.” *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 144, 230 A.2d 289, 294 (1967). “An adjoining, confronting or nearby property owner is deemed, *prima facie*, to be specially damaged and, therefore, a person aggrieved.” *Id.* at 145, 230 A.2d at 294. “A protestant is specially aggrieved when she is farther away than an adjoining, confronting, or nearby property owner, but is still close enough to the site of the rezoning action to be considered almost *prima facie* aggrieved, and offers ‘plus factors’ supporting injury.” *A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colo., LLC*, 447 Md. 425, 451–453, 135 A.3d 492, 508–509 (2016) (quoting *Ray v. Mayor & City*

¹¹ There were approximately five hundred and twenty nine (529) persons of record before the Planning Board. *See* Persons of Record List, 3/10/2016.

Council of Baltimore, 430 Md. 74, 85, 59 A.3d 545, 551-552 (2013)). The Court of Appeals reiterated that for a person to be aggrieved, proximity is the most important factor and beyond that, special aggrievement must be shown. In *A Guy Named Moe*, the Court stated

A review of our cases, where standing to challenge a rezoning action was at issue, reveals one critical point: proximity is the most important factor to be considered. The relevance and import of other facts tending to show aggrievement depends on how close the affected property is to the re-zoned property. There is, however, no bright-line rule for exactly how close a property must be in order to show special aggrievement. Instead, this Court has maintained a flexible standard, finding standing in cases that do not quite satisfy the “adjoining, confronting or nearby” standard of *prima facie* aggrievement, but are nudging up against that line. Protestants in such cases will be considered to pass the standing threshold if they allege specific facts of their injury. In other words, once sufficient proximity is shown, some typical allegations of harm acquire legal significance that would otherwise be discounted. But in the absence of proximity, much more is needed. For example, an owner’s lay opinion of decreasing property values and increasing traffic has been considered sufficient for special aggrievement when combined with proximity that is almost as great as in cases where properties are “adjoining, confronting or nearby.” Conversely, without sufficient proximity, similar facts will only support general aggrievement. For example, when the affected properties are not sufficiently close to the site to qualify as almost *prima facie* aggrieved, claims of increasing traffic, change in the character of the neighborhood, lay opinion projecting a decrease in property values, and limited visibility have been held to show only general aggrievement. *Id.* at 451–453, 135 A.3d 508–509.

The existing Walmart, which opened for business in 2007, is located at 6210 Annapolis Road, Landover Hills, 20784.

Richard Bailey has resided at 6803 Goodwin Street, Hyattsville, MD 20784 for approximately 10 years. His property is approximately 1 mile or 4,280 feet from the existing Walmart. Mr. Bailey testified in general that he was opposed to Walmart’s proposed expansion. *See* (5/5/2016, Tr., pp. 106–10).

Sandra Barnes-Loveday resides at 6922 Annapolis Road, New Carrollton, MD 20784, which is approximately .8 miles or 3,136 feet from the existing Walmart. Ms. Barnes-Loveday did not testify before the Planning Board. *See* (5/5/2016, Tr.).

Delvin Champagne resides at 4007 Spirea Court, Hyattsville, MD 20784, which is approximately .7 miles or 1,877 feet from the existing Walmart. Mr. Champagne testified before the Planning Board. *See* (5/5/2016, Tr., pp. 81–94).

Paula M. Davis resides at 6442 Otis Street, Landover Hills, Maryland 20784, which is approximately 1 mile or 2,792 feet from the existing Walmart. Ms. Davis did not testify before the Planning Board. *See* (5/5/2016, Tr.).

Denise Hamler resides at 3714 37th Avenue, Cottage City, MD 20722, which is approximately 3.2 miles from the existing Walmart. Ms. Hamler testified on behalf of Community Standards Coalition before the Planning Board. *See* (5/5/2016, Tr., pp. 41–49).

Clareen E. Heikal resides at 3117 Laurel Avenue, Cheverly, MD 20785, which is approximately 2 miles or 4,855 feet from the existing Walmart. Ms. Heikal testified before the Planning Board. *See* (5/5/2016, Tr., pp. 59–67).

The District Council finds that the Citizens lack sufficient proximity to the proposed expansion of the existing Walmart. Their generalized testimony such as claims of increasing traffic, change in the character of the neighborhood, lay opinion projecting a decrease in property values, limited visibility, and pre-existing issues concerning alleged promises from Walmart only demonstrates general aggrievement. Therefore, the appeal filed by Citizen Opposition will be dismissed because they are not aggrieved.

ORDERED this 19th day of September, 2016, by the following vote:

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

Opposed:

Abstained:

Absent: Council Member Franklin

Vote: 8-0

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: _____
Derrick Leon Davis, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council