UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1199

September Term, 2016

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

v.

WALMART REAL ESTATE BUSINESS TRUST, ET AL.

Wright,
Nazarian,
Arthur,

JJ.

Opinion by Wright, J.

Filed: August 24, 2017

In February 2014, appellee, Wal-Mart Real Estate Business Trust ("Applicant"), requested approval of Detailed Site Plan application 89063-07 ("DSP 89063-07") to expand an existing vacant retail building within the Duvall Village Shopping Center for use as a Wal-Mart department store ("Wal-Mart" or "Walmart"). Over the objection of appellant citizens residing in nearby residential communities ("Citizens"), the Prince George's County Planning Board ("Planning Board") of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") issued a resolution in April 2014, approving DSP 89063-07.

Thereafter, appellant, the Prince George's County Council, sitting as the District Council ("District Council"), elected to review the Planning Board's decision, and the Citizens filed an appeal accordingly. A hearing was held on June 30, 2014. In September 2014, the District Council ordered that the matter be "remanded to the Planning Board to conduct proceedings *de novo*."

On remand, the Planning Board held a hearing on March 19, 2015, reviewed the application, and again approved DSP 89063-07 in an amended resolution issued in April 2015. Once again, the District Council elected to review the decision, and Citizens filed a notice of appeal. Following another hearing on June 22, 2015, the District Council issued an order on September 21, 2015, "revers[ing] the action of the Planning Board to approve [DSP 89063-07] because its decision was predicated on an error of law, arbitrary and capricious, and not supported by substantial evidence."

On October 28, 2015, Applicant filed a petition for judicial review of the District Council's order in the Circuit Court for Prince George's County. The matter was heard on April 22, 2016. After receiving supplemental briefs from the parties on May 23, 2016, the court issued an opinion and order on August 10, 2016, reversing the District Council's decision. The District Council and the Citizens timely appealed.

Questions Presented

The parties ask:

> 1. Whether the [Planning] Board lacked jurisdiction to approve a request for land uses which required approval by special exception?
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> 2. Whether the District Council has original and appellate jurisdiction to review the [Planning] Board's decision to approve or disapprove a detailed site plan?
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> 3. Whether the District Council's final decision was supported by substantial evidence, fairly debatable, and not premised upon an erroneous conclusion of law?
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> 4. Whether the Planning Board erred when it approved the Applicant's Detailed Site Plan without analyzing the current adequacy of the local roads?
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> 5. Whether the Planning Board had the statutory authority to disregard the District Council's remand order?

For the reasons that follow, we affirm the circuit court's judgment.

Facts

The Duvall Village Shopping Center is an "L" shaped shopping center that was constructed in 1998 on 14.64 acres of General Commercial ("C-G") zoned property in the southeast quadrant of the intersection of Annapolis Road and Glenn Dale Road. The

shopping center is approximately 87,238 sq. ft. and consists of a 4,835 sq. ft. bank building, a 26,591 sq. ft. inline retail center, a vacant 56,238 sq. ft. space, and parking. Applicant proposed to occupy the vacant, anchor tenant space most recently occupied by a Super Fresh grocery store, and expand the existing retail to 77,916 sq. ft. for use as a department store.

The shopping center was originally built pursuant to Preliminary Plan 4-87104, which was approved by the Planning Board on September 24, 1987, and formalized in Resolution No. 87-433. At that time, the Planning Board found:

1. The subdivision, as modified, meets the legal requirements of Subtitle 24 of the Prince George's County Code and of Article 28, Annotated Code of Maryland.

2. According to the established Planning Board policies, a conceptual stormwater management plan is appropriate for the site. The effects of this subdivision on downstream areas must be studied.

3. Certain specific road improvements and road dedication for both Annapolis Road (Md. Route 450) and Glenn Dale Road (Md. Route 193) are required in order for transportation facilities to be adequate to serve this proposed development.

4. The Trails Coordinator recommended an eight-foot trail easement to be constructed and maintained by the developer and/or his assigns.

5. Detailed site plan review and approval is required for this site.

In accordance with the requirement of Preliminary Plan 4-87104, the initial DSP-89063 for the shopping center was approved in 1989. It allowed a total of 133,457 sq. ft. for the shopping center, which included 112,665 sq. ft. for retail, 7,060 sq. ft. for restaurants, 3,000 sq. ft. for a bank, and 10,732 sq. ft. for office space. The approval for

DSP-89063 was formalized in Resolution No. 89-414 on August 16, 1989, and was subject to 14 conditions. Applications to revise DSP-89063 were made six times between its initial approval and the time of Applicant's request in this case, making this the seventh.

On March 6, 2003, the Planning Board approved Preliminary Plan 4-02103 in order to make substantial changes to the shopping center. That approval was formalized in Resolution No. 03-22, which referred to a 1987 traffic study:

> The staff has no available counts at the critical intersection. Nonetheless, because the application is a resubdivision of an existing parcel, and because the parcel is partially developed and has an approved level of development which was the subject of an adequacy test in 1987, and no further development is proposed, the Prince George's County Planning Board could deem the application to have no net impact on surrounding roadways. Staff believes there is sufficient evidence that the subdivision would have no net traffic impact on the critical intersection.
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> Based on the preceding findings, the Transportation Planning Section concludes that adequate transportation facilities would exist to serve the proposed subdivision as required under Section 24-124 of the Prince George's County Code if the application is approved.

In November 2003, Educational Systems Employees filed a DSP to construct a 12,519 sq. ft. Federal Credit Union in the shopping center. The Planning Board approved it as DSP-89063-05, which became the fifth of the seven aforementioned revisions. Although a Use & Occupancy permit was issued, the credit union was never constructed.

On February 4, 2014, Applicant filed DSP 89063-07 to allow the development of its department store in the shopping center. Applicant's DSP combined the unused 12,519 sq. ft. from the credit union's approved DSP with the existing vacant 56,238 sq.

ft. from the abandoned Super Fresh grocery, along with an additional yet to be built 9,159 sq. ft., for a total of 77,916 sq. ft.

According to a technical staff report submitted to the Planning Board on February 20, 2014, the Urban Design Staff ("Staff") reviewed Applicant's DSP to determine compliance with applicable provisions of the Prince George's County Code ("PGCC"), including the 11 design guidelines of PGCC §27-274 required for the approval of a DSP. As to PGCC §27-274(a)(2), which addresses "Parking, loading, and circulation," the Staff noted the following comment offered by the Transportation Planning Section:

> The expansion of the development which is being sought will have no impact on access to the site. All of the previous access points will remain and there will be no new access point provided. Regarding on-site circulation, staff has no issues.

As to PGCC §27-274(a)(3), which addresses "Lighting," the Staff stated:

> Any new outdoor lighting provided for the site shall be functional and attractive and shall provide adequate illumination without causing negative off-site impacts. Existing overgrown vegetation proximate to existing lighting fixtures shall be pruned so as to not interfere with their proper functioning.

As to PGCC §27-274(a)(6), which addresses "Site and streetscape amenities," the Staff stated:

> The applicant shall revise the plans to provide for parking of a minimum of five bicycles at a location convenient to the entrance of Wal-Mart. The location and design of the racks shall be approved by the Planning Board or its designee.

And, as to PGCC §27-274(a)(10), which addresses "Architecture," the Staff stated:

> The architecture shall be revised in consultation with the Urban Design staff to replace the repetitive, rectilinear decorative elements flanking the

> main entrance on the front elevation with more attractive decorative elements, such as lattice and/or ornamental masonry.

In sum, based upon its evaluation and analysis, the Staff recommended "that the Planning Board adopt the findings of [the technical staff] report and APPROVE Detailed Site Plan . . . 89063-07" subject to certain conditions.

On March 6, 2014, the Planning Board conducted a hearing on DSP 89063-07. Glen Burton of the Staff's Transportation Section testified:

> [T]he task before me in this Detailed Site Plan . . . is essentially to compare what's being proposed with what was originally tested for transportation adequacy at the original Preliminary Plan of Subdivision. To that end, I am satisfied that the Site Plan before us today will not exceed the traffic that was originally tested for adequacy back in 1987. I'm also satisfied that from a density perspective the overall square footage of development that is being proposed today will not exceed the density that was originally tested again in 1987.

Meanwhile, Citizens described their concerns about traffic. Counsel for Citizens argued:

> Traffic, there was discussion before the break about the 1987 traffic study and of course my clients are wondering well how in the world can a traffic study in 1987 have any bearing on a decision in the year 2014, 27 years later. And as a lay person, I mean I think any lay person would accept that question, you know, and so part of my assignment in this case was to give advice to my clients and we dug into the file and we made real effort, we sent lawyers down here to review the file and to look for that traffic report and it's nowhere in the file. So not only is the applicant relying on a 1987 traffic study, it's a traffic study that appears to be no longer in existence. We've spent considerable effort looking for it. We went through planning information services and after our careful review, we didn't see it.
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> Regarding traffic, neither staff nor the applicant responded to . . . one of my client's most basic questions, where is the traffic report. No one has responded to that question. No one has said, has staff seen the traffic report? Silence on that topic. Instead we get *post hoc* rationalization about a calculation done today about what was decided in 1987, 27 years ago and then the conclusion that the trip cap is not violated.

On April 1, 2014, the Planning Board issued Resolution No. 14-16 approving DSP 89063-07. Regarding traffic, it stated:

> **Transportation Planning** - The Planning Board reviewed the subject project with respect to transportation and makes the following findings:
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> The property has been the subject of two preliminary plans of subdivision approvals and a DSP review and approval . . . .
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> On November 14, 200[3], the Planning Board approved Preliminary Plan 4-02103 . . . with ten conditions. This preliminary plan was approved with a development density of 114,139 square feet of commercial development. Preliminary Plan 4-02103 represented a resubdivision of an existing parcel and, because the parcel is partially developed and has an approved level of development which was the subject of an adequacy test in 1987 and no further development is proposed, the Planning Board deemed the application to have no net impact on surrounding roadways.
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> In the current approval, the existing building (vacant grocery store) will be expanded within the shopping center. The proposed expansion of 21,678 square feet (of which 12,519 square feet was previously approved) brings the total area of development within the shopping center to 109,342 square feet. In light of the fact that the shopping center expansion falls below the development thresholds that were the subject of previous approvals, the Planning Board concludes that there will be no net increase in off-site traffic.
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> The expansion of the existing development herein approved will have no impact on access to the site. All of the previous access points will remain and there will be no new access point provided. Regarding on-site circulation, the Planning Board has no issues.
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> In conclusion, . . . from the standpoint of transportation, the subject plan is acceptable and meets the finding required for a DSP as described in Section 27-285 of the Zoning Ordinance. Further, in accordance with our review, there are no transportation planning issues that require resolution prior to issuance of building permits for the project, but that the applicant should be advised that SHA may require that other transportation planning considerations be addressed before they issue the required access permit.

The Planning Board found that the "subject approval is in conformance with the requirements of [PGCC] Section 27-461(b)" and that "[t]he proposed Wal-Mart is a permitted use within the C-G Zone."

Citizens appealed the Planning Board's approval of DSP 89063-07 to the District Council, asserting:

> The Planning Board erred legally when it approved DSP-89063-07 because the Planning Board failed to review the adequacy of the road system serving the proposed development even though no planning body has considered the adequacy of the roads since 1987. That failure is especially significant where the traffic study from the 1987 Preliminary Plan is missing and there are material differences between the proposed development in 1987 and the proposed development in 2014.

On June 30, 2014, the District Council heard oral argument on the matter, at which time counsel for Citizens argued, in pertinent part:

> One of the unfortunate facts of this project is that a traffic adequacy analysis was performed in 1987 when the Planning Board approved a preliminary plan, 1987. The traffic analysis is lost. No one can find it. No one has seen it in the last ten years or so. No one knows what the traffic report says. All they know was there was a finding that the traffic infrastructure was adequate.
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> Back in those days, Staff didn't do a trip cap analysis. They just looked at the size of the project. So here we are 27 years later. We've asked for a traffic adequacy analysis. Staff says, under 24-111, we're not required to do that because this project was approved after 1970 . . . .
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> Everyone agrees that the traffic adequacy study was performed, was reached in 1987, 27 years ago. And when we asked Staff why, why can you rely on that, they direct us to Section 24-111, Section 24-111. And what that section says is that if there was a Preliminary Plan - - I'm paraphrasing. If there is a Preliminary Plan approved prior to October 27, 1970, and then you want to re-subdivide it with a new Preliminary Plan, you've got to redo the traffic adequacy analysis. So Staff says, since this project was approved in 1987, after the 1970 date, you don't do it.

> My legal interpretation of this section is different. Section 24-111 is silent as to what happens if a Preliminary Plan was approved say on November 1, 1970. We say – or in 1987 – we say that no circumstances, there is a requirement or should be a requirement and you have the discretion to require a traffic adequacy analysis . . . .

Burton, a member of Staff's Transportation Section, told the District Council:

> With respect to the traffic study, much has been said about the traffic study being unavailable or lost. It really isn't relevant in the sense that we already have a Preliminary Plan that was approved in '87. Part of that approval was based on a traffic analysis that was done at that time. The Planning Board rendered a resolution, and so I'm not so sure that, for the purpose of this case, even if I had a copy of the traffic study in my hand, it would have changed my recommendation.
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> The fact of the matter is we are reviewing a Detailed Site Plan. And under the rules that [have] been discussed prior, we're not allowed to reevaluate this site for transportation adequacy at the time of Detailed Site Plan. So even if I had the old traffic study, or a new traffic study, which we would not have required anyway, that really wasn't part of the review. The primary purpose, from my perspective in reviewing a Detailed Site Plan as it pertains to traffic is really a comparative analysis. That is to say we're comparing what was originally tested for adequacy versus what is being proposed.
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> That was basically the crux of my evaluation in this case. And, as I have stated in my referral, and I believe the Planning Board Resolutions speak to that issue, I came to the conclusion that the development that's before us today, at least that is being proposed would generate less traffic than the one that was originally tested in '87. And I also concluded, in terms of the development square footage itself, it also would be less than what was originally tested in '87.
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> So, both from the perspective of trips and square footage, I came to the conclusion that what's pending or what was approved by the Planning Board in this case is a lesser development in terms of square footage or trips than the one that was originally approved. And that's the extent of my evaluation.

The District Council issued its Notice of Final Decision on September 24, 2014. Regarding traffic, the District Council found:

> In reaching its decision on this matter, we further note the Planning Board's finding that it had no authority, when reviewing DSP-89063-07, to consider the adequacy of the road system serving the proposed development because the 1987 Preliminary Plan performed that analysis. Instead, the record reflects the ruling of the Planning Board that the only relevant issue was whether traffic generated by the development proposed in the subject application would be greater than the traffic authorized by the 1987 Preliminary Plan.
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> We take notice of the provisions of §24-111 of the County Subdivision Regulations, providing that, with certain exceptions, a Preliminary Plan dated prior to October 27, 1970, does not authorize the issuance of a building permit. Based on the record, we find that Planning Board erred in its interpretation §24-111 that a Preliminary Plan approved after October 27, 1970, must then be approved upon sit[e] plan application without any consideration of the adequacy of roads in the area. What's more, this provision is silent as to Preliminary Plans approved *after* October 27, 1970. For these reasons, we find Planning Board's reliance on §24-111 for its conclusions as to transportation adequacy for this application erroneous conclusions of law.
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> We are further unable to find merit in Planning Board's conclusion of no jurisdiction over transportation adequacy, despite the compelling evidence in dispute the adequacy of the road system, as we find plainly the case in the subject application, because: (1) as previously discussed in this section of our Order, we find the record plainly shows fundamental changes in development patterns and traffic in this portion of Prince George's County since 1987; (2) the 1987 [study] is missing from the Preliminary Plan file, or no longer exists, thwarting meaningful consultation or evaluation as to traffic; and (3) the current development proposal differs widely from that approved in 1987.
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> Based on this evidence, we find that the Planning Board failed to review the adequacy of the road system serving the proposed development, even though no planning body has considered the adequacy of the roads since 1987. That failure is especially significant where the traffic study from the 1987 Preliminary Plan is missing, and there are material differences between the proposed development in 1987 and the current

> proposal. For these reasons, we find that a Remand *De Novo* is necessary in order for Planning Board to evaluate the adequacy of the relevant roads and intersections for the proposed development, and for Planning Board to take evidence and receive testimony in new proceedings as to the current adequacy of relevant roads and intersections for the proposed development.

(Internal citations omitted). Accordingly, the District Council issued a remand order that included six main points. As to traffic, the District Council ordered:

> On remand, Planning Board shall process this matter anew in accordance with the prescriptions of Part 3, Division 9 of the Zoning Ordinance. In conducting *de novo* proceedings, the District Council instructs the Planning Board to evaluate the adequacy of transportation facilities, including relevant roads and intersections in the vicinity of the property that is the subject of this application, and to make specific findings and determinations as to the adequacy of those transportation facilities[.] In so doing, Planning Board is additionally instructed to conduct a new public hearing where County staff, the Applicant, and all Persons of Record will be permitted to present evidence regarding adequacy of transportation facilities, including relevant roads and intersections in the vicinity of the subject application.

Upon remand, the Staff referred the matter "to the concerned agencies and divisions," including the M-NCPPC Legal Department, M-NCPPC Transportation Planning Section, and The Prince George's County Department of Permitting, Inspections, and Enforcement. The Staff again recommended approval of the DSP with conditions.

On March 19, 2015, the Planning Board conducted a hearing on remand. Citizens sought to call their traffic engineer, Lei Zhang, Ph.D., as an expert witness, but the Planning Board ruled as follows:

> [I]f he was here to testify on the adequacy of transportation then . . . we are precluded from hearing that at this stage.
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> * * *

> We cannot entertain that. That Preliminary Plan stands approved, the analysis has been done. And unless and until the law changes where there's a time limit on that transportation evaluation, we have to abide by that. That has not occurred yet.

Thus, Zhang was not permitted to testify.

At the conclusion of the hearing on remand, the Planning Board reapproved DSP 89063-07 "along with the associated conditions and changes to those conditions as outlined in the [S]taff's report." Prior to announcing that ruling, the Planning Board informed the public:

> I invite you to participate in the zoning rewrite, which is going on right now. We're looking at the Zoning Ordinance and all these various requirements and what works and what doesn't work, what needs to be synthesized, what needs to be deep-6'd and we've had a whole host of community meetings around the County. And I hope that this is a chance to get involved and make a difference and make some of the changes that you want to see. Because that's going to have to be adopted by the County Council over time, in time.
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> And the other thing is you want to get involved with planning early because sometimes once the zoning is in place - - . . . then the issue is you come for a Site Plan or to subdivision [sic] and the question then is does it conform to the zoning. And it's much more difficult to challenge at that standpoint because the criteria is limited at that point . . . . And until those laws are changed, then we have to abide by the ones that are in place right now.

On April 7, 2015, the Planning Board issued its Amended Resolution No. 14-16(A) unanimously approving DSP 89063-07. In that Resolution, the Planning Board incorporated the six instructions ordered by the District Council to be addressed on remand, and included comments as to each one. As to traffic, the Planning Board "determined that evidence on the adequacy of transportation facilities was not relevant

for the hearing on the DSP and confined itself to determining whether the proposed development conformed to transportation adequacy findings made as part of the previous two subdivision approvals." Finding that "[t]he subject approval is in conformance with the requirements of Section 27-461(b), which governs permitted uses in commercial zones," the Planning Board ruled that "[t]he proposed Wal-Mart is a permitted use in the C-G zone."

Citizens again appealed the Planning Board's approval to the District Council. On June 22, 2015, the District Council heard oral argument to review the Board's decision. Thereafter, it reversed the Planning Board's reapproval of DSP 89063-07 by a 9-0 vote, stating in pertinent part:

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

On October 28, 2015, Applicant filed a petition for judicial review in circuit court. Following a hearing on April 22, 2016, the court gave the parties an opportunity to

submit "proposed findings of fact and conclusions of law" based upon the arguments that they made. On August 10, 2016, the circuit court issued an opinion and order finding that the District Council erred in denying the DSP. According to the court, the District Council only had jurisdiction on appeal and, therefore, it could "only reverse the Planning Board's decision if the decision was one that the Planning Board was not legally authorized to make, is not supported by substantial evidence of record[,] is arbitrary, or otherwise illegal." Finding that the Planning Board used substantial evidence and made no erroneous conclusion of law, it ruled that the District Council's "interference in this case was outside [its] jurisdiction." This timely appeal followed.

Additional facts will be included below, as they become relevant to our discussion.

Standard of Review

"When reviewing administrative decisions, we look through the circuit court, although applying the same standard of review, and evaluate the decision of the agency." *Rojas v. Bd. of Liquor License Comm'rs for Baltimore City*, 230 Md. App. 472, 481 (2016) (citing *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 553 (2015) ("*Zimmer*")). In so doing, this Court is:

> limited to determining if there is substantial evidence in the record as a whole to support the agency's finding and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. Stated differently, [o]ur primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious. In applying the substantial evidence test, we must decide whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.

Id. (quoting *Matthews v. Hous. Auth. of Baltimore City*, 216 Md. App. 572, 582 (2014)). "With regard to fact-based decisions, the court may not substitute its own judgment for that of the agency." *Cty. Council of Prince George's Cty. v. Curtis Regency Serv. Corp.*, 121 Md. App. 123, 133 (1998) ("*Curtis Regency*") (citation omitted).

"When deciding issues of law, [however,] our review is expansive, and we may substitute our judgment for that of the agency if there are erroneous conclusions of law, employing a *de novo* standard of review." *Rojas*, 230 Md. App. at 481 (citation and internal quotation marks omitted). Nonetheless, "[w]e review the agency's decision in the light most favorable to the agency because it is *prima facie* correct and entitled to a presumption of validity." *McClure v. Montgomery Cty. Planning Bd. of Maryland-Nat. Capital Park & Planning Comm'n*, 220 Md. App. 369, 379 (2014) (citation and internal quotation marks omitted).

Discussion

I. Planning Board's Jurisdiction

The District Council first argues that the Wal-Mart was not an approved use in the C-G Zone and, therefore, Applicant needed a special exception before the Planning Board could approve DSP 89063-07. Applicant disagrees and asserts that a special exception was not required because its proposed land use – a 77,916 sq. ft. department store – is permitted in the C-G Zone.[1] We agree with Applicant.

[1] Applicant also argues that this issue is not properly before us because the District Council never raised it in either of its two appellate reviews of the DSP, or in circuit court. We shall assume, without deciding, that this issue was preserved.

Pursuant to PGCC § 27-457(c), "[t]he uses allowed in the C-G Zone are the same as those allowed in the C-S-C [Commercial Shopping Center] Zone." The Table of Uses in PGCC § 27-461(b)(1)(E) provides that a department store "[n]ot exceeding 85,000 square feet of gross floor area without regard to percentage of gross floor area for food and beverage component" is permitted in the C-S-C Zone and does not require a special exception. Thus, Applicant's proposed 77,916 sq. ft. department store is a permitted use in the C-G Zone[2] and the Planning Board had jurisdiction to approve it.

II. District Council's Jurisdiction

Next, the District Council argues that the circuit court erred[3] when it concluded that the District Council's review of the Planning Board's decision was an interference and outside its jurisdiction. Relying primarily on the Court of Appeals's analysis in *Zimmer*, it contends that the legislature has expressly granted original and appellate jurisdiction to the District Council to approve or disapprove a DSP. In response, Applicant avers that only the Planning Board has original jurisdiction in this matter and the District Council can simply exercise appellate review.

[2] As noted by the District Council, the Table of Uses provides that, by contrast, a "[f]ood or beverage store . . . [i]n combination with a department or variety store on the same or adjacent site" requires a special exception. PGCC § 27-461(b)(1)(E). But, because Applicant's DSP was specifically for a "Department Store," this section is not relevant to our analysis.

[3] Although we generally "look through the circuit court," we address this issue as it is relevant to our review of the entire matter.

As in *Zimmer*, the property at issue here is within the Prince George's County portion of the Maryland-Washington Regional District, as recognized in the Maryland-Washington Regional District Act ("RDA"), codified in Division II of the Md. Code (2012) Land Use Article ("LU"). *See* 444 Md. at 523. Therefore, the RDA and the PGCC govern the requirements and procedures at issue. *See id.* at 523-24.

"Unsurprisingly, the making of 'plans' falls clearly under the ambit of 'planning.'" *Id*., 444 Md. at 506 (citation omitted). Pursuant to PGCC § 27-285(a)(1), "[p]rior to the issuance of any grading, building, or use and occupancy permit for the development or use of any land for which a [DSP] is required, the applicant shall obtain approval of a [DSP] from the Planning Board." Thereafter, the Planning Board's decision is "embodied in a resolution adopted at a regularly scheduled public meeting[.]" PGCC § 27-285(a)(6).

If a party of record is aggrieved by the Planning Board's decision on a [DSP], that party may appeal to the District Council. PGCC § 27-290(a); LU § 25-210(a)(2). In addition, "[t]he District Council may vote to review the Planning Board's decision on its own motion within thirty (30) days after the date of the notice." PGCC § 27-290(a); *see generally* LU § 25-210. As the Court of Appeals noted in *Zimmer*, 444 Md. at 562, "[t]he District Council's review results in a 'final decision,' according to LU § 25-210(d), but LU § 25-210(a) labels also the decision of the Planning Board as 'a final decision.'" Thus, we must ascertain which "final decision" is subject to our review.

PGCC § 27-132(f)(1) provides that, "[i]n deciding an appeal to the District Council, or Council election to review a decision made by the Zoning Hearing Examiner or the Planning Board, the Council shall exercise original jurisdiction." By contrast, there is no provision in the RDA that confers original jurisdiction over DSP review to the District Council.

In this case, the District Council did not "create the cause but, instead, hear[d] the cause to correct and revise proceedings already instituted[.]" *Curtis Regency*, 121 Md. App. at 134. As such, it did not exercise original jurisdiction; it exercised only appellate jurisdiction in this matter. *See id.* at 134-35 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803); *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cty.*, 336 Md. 569, 590 (1994)). Therefore, we review the Planning Board's decision, not that of the District Council. *See Archers Glen Partners, Inc. v. Garner*, 176 Md. App. 292 (2007) (reviewing the Planning Board's decision on appeal), *aff'd*, 405 Md. 43 (2008); *Rochow v. Maryland Nat'l Capital Park & Planning Comm'n*, 151 Md. App. 558 (2003) (same).[4]

[4] We recognize that in some instances, this Court and the Court of Appeals have reviewed the District Council's ruling on the same matter rather than that of the Planning Board. *See Cty. Council of Prince George's Cty. v. Offen*, 334 Md. 499 (1994) (reviewing District Council in zoning matter); *Cox v. Prince George's Cty.*, 86 Md. App. 179 (1991) (reviewing District Council in matter regarding special exception to zoning); *W. Montgomery Cty. Citizens Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 309 Md. 183 (1987) (reviewing District Council's failure to modify zoning law); *Montgomery Cty. v. Woodward & Lothrop, Inc.*, 280 Md. 686 (1977) (reviewing District Council's rezoning decision and noting that the District Council, "in its legislative capacity" may "delegate[] to the Planning Board the administrative function of determining, pursuant to carefully drawn procedural guidelines, including site plan

Notwithstanding the procedural posture of this case, we believe that, substantively, the Court of Appeals's decision in *Zimmer*, 444 Md. at 569-70, holding that the District Council exercises appellate – as opposed to original jurisdiction – when it reviews an action of the Planning Board to approve or disapprove a Comprehensive Design Plan ("CDP") or Specific Design Plan ("SDP"), should be extended to its review of DSPs as well. In *Zimmer*, the Court differentiated DSPs from CDPs and SDPs, stating that the CDP and SDP process, by contrast, "is a broader implementation of planning considerations, aimed at producing 'a better environment than could be achieved under other regulations . . . .'" *Id.* at 563 (quoting PGCC § 27-521(a)(2)). The *Zimmer* Court concluded that "[i]f the Legislature intended CDPs and SDPs to be regulated similarly and under the same statute, we must assume that it would have done so expressly." *Id.*

Nonetheless, simply because the *Zimmer* Court noted differences between CDPs/SDPs and DSPs, we are not precluded from holding that the District Council is properly vested with the power to exercise original jurisdiction when it reviews an action of the Planning Board to approve or disapprove a DSP. *Zimmer* does not stand for that proposition. Rather, *Zimmer* made clear that "LU § 25-210 does not prescribe . . . the standard of review by which the District Council considers decisions of the Planning Board (nor did Art. 28, § 8-129) regarding [DSPs]." *Id.* at 562. The Court further noted

review, the actual appropriate density for a specific property"). Those cases, however, involved matters of zoning and not planning. Moreover, ironically, they were decided prior to the 1996 amendment of PGCC § 27-132 and, thus, are not pertinent to our analysis.

that "the RDA does not refer (either as contained in the Land Use Article or Article 28) to Planning Board determinations regarding [DSPs] as 'recommendations,' but they are labeled 'final decisions' by LU § 25-210(a)." *Id.* at 562 n.74.

The RDA delegates to the Planning Board the power to exercise jurisdiction over certain land use functions, including planning, LU § 20-202(a)(ii)(1), and the District Council "may revoke a delegation of site plan approval authority to the [Planning Board] only for the purpose of delegating approval authority over [DSPs] to the governing body of a municipal corporation in the regional district," LU § 25-210(e). It cannot confer that authority unto itself. *See Zimmer*, 444 Md. at 570 ("The District Council may not arrogate to itself original jurisdiction where the RDA places that responsibility elsewhere.").[5] Thus, we hold that "[t]o the extent that the provisions of the PGCC purport to give the District Council the ability to consider *de novo* the merits of Planning

[5] The District Council, however, has broad legislative authority:

> The fundamental division of zoning, planning, and land use authority in the RDA grants regional authority to the Commission, broad local authority to the county planning boards, and specific local authority to the county district councils. Although the RDA grants authority to the district councils through discrete provisions, unlike the broader grant of authority provided the planning boards, such authority is not narrow.

Zimmer, 444 Md. at 529-30 (internal footnote and citations omitted). For instance, the District Council can establish procedures for the planning process. *Id.* at 526 (citing LU § 21-208(a)). "The District Council may direct the Commission to prepare the general plan based on studies and considerations of, among others, 'existing and forecasted' population growth, development, transportation needs, housing needs and demands, and transportation needs." *Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 88 (2009) (Citation omitted). It is for the Planning Board, however, to carry out that process.

Board decisions regarding [DSPs], such provisions are invalid." *See id.; see also Curtis Regency*, 121 Md. App. at 135 n.4 ("If an ordinance did exist, we would strongly question its validity, since it would appear to contradict the exclusive jurisdiction given to the Planning Board by public general law.") (Citing *Prince George's Cnty. v. Maryland-Nat'l Capital Park and Planning Comm'n*, 269 Md. 202 (1973) (public general laws supercede local law)). "Because, according to PGCC § 27-106, the provisions are severable, they are still enforceable to the extent that they do not conflict with the original jurisdiction of the Planning Board under the RDA." *Zimmer*, 444 Md. at 571 (footnote omitted).

III. Review of Administrative Agency

The District Council's argument is a variant of what we have just disposed of above. The contention is that this Court should review its decision – rather than the Planning Board's amended resolution – to determine whether it was supported by substantial evidence, fairly debatable, and not premised upon an erroneous conclusion of law. To reiterate, for purposes of appellate review in this matter, our review is limited to that of the Planning Board's decision. In that regard, there was substantial, credible evidence upon which the Planning Board could base its approval with conditions. As Applicant points out, the Staff twice conducted a complete and statutorily compliant review of the DSP 89063-07 application and twice determined that it met the criteria for expansion of the shopping center. Because a reasoning mind reasonably could have reached the factual conclusion the agency reached, we uphold the Planning Board's

approval. *See Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 110 (2009) ("It is not unreasonable for the Planning Board to rely on a Staff Report, as the Planning Board did in this case, if the Staff Report is thorough, well conceived, and contains adequate findings of fact.") (Footnote omitted).

IV. Current Adequacy of Local Roads

Citizens argue that the Planning Board erred when it approved DSP 89063-07 without analyzing the current adequacy of the local roads. According to Citizens, the Subtitle 27 of the PGCC "makes clear that the Planning Board should consider the adequacy of public roads when it reviews an application for a DSP." Thus, Citizens contend that the Planning Board erred when it failed to evaluate the adequacy of transportation facilities, refused to allow any testimony or proffer from their expert, and instead based its decision on whether the traffic generated by Applicant's proposed development would be greater than the traffic authorized by the 1987 Preliminary Plan.

In response, Applicant asserts that adequacy of public facilities is not a required finding for approval of a DSP and that, in any event, the Planning Board made a finding of adequacy in its 1987 and 2003 preliminary plan approvals. Applicant also notes that "the improvements analyzed in the 1987 and 2003 Preliminary Plans anticipated a larger shopping center than was approved" through DSP 89063-07 and, therefore, there was no error on the Planning Board's part.

Pursuant to PGCC § 24-124(a)(1), "[b]efore any *preliminary plan* may be approved, the Planning Board shall find that . . . [t]here will be adequate access roads

available to serve traffic which would be generated by the proposed subdivision[.]" (Emphasis added). However, nowhere in PGCC § 24-124, entitled "Adequate roads required," are DSPs – or the requirements for their approval – mentioned. And, although PGCC § 24-111 addresses subdivisions approved prior to October 27, 1970, it does not address applications approved after that date.

In this case, preliminary plans were approved in 1987 and 2003. After the District Council remanded the matter to the Planning Board in 2014, the Transportation Planning Section of the M-NCPPC reiterated that "there is no requirement for the provision of a traffic study in support of a DSP application." Then, at the second hearing before the District Council, People's Zoning Counsel testified:

> The Planning Board is correct that adequacy of transportation is dealt with at the time of Preliminary Plan of Subdivision . . . . And so when the case was remanded to the Planning Board to look at adequacy of transportation, the Planning Board was in somewhat of a bind. I think they may have wanted to comply with the Order, but they knew that legally they could not comply.

Indeed, Citizens correctly state that one purpose of a DSP is "to help fulfill the purposes of the zone in which the land is located," PGCC § 27-281(b)(1)(B), and one purpose of a C-G Zone is "[t]o improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas[.]" PGCC § 27-446(a)(5). PGCC § 27-546(d)(10) provides, however, that "if more than six (6) years have elapsed since a finding of adequacy was made . . . through a preliminary plat approval," then in order to approve a DSP, the Planning Board shall find that "the development will be adequately served within a reasonable period of time with

existing or programmed public facilities[.]" The Planning Board made such a finding here when it concluded: "In light of the fact that the shopping center expansion falls below the development thresholds that were the subject of previous approvals, the Planning Board concludes that there will be no net increase in off-site traffic."

We believe that the People's Zoning Counsel put it best when it explained to the District Council:

> [I]t raises the problem that one of the requirements of the [DSP] is that, on the [DSP], if more than six years have elapsed since the finding of adequacy was made at the time of the Preliminary Plat approval the Board and the Council must find the development will be adequately served [with]in a reasonable period of time with existing program or facilities. But by inference and by implication, the Planning Board, in my opinion, has made that finding.
>
> The inference is they approved a Preliminary Plan of Subdivision. Having approved a Preliminary Plan of Subdivision, they have found adequacy. Then they make the implication that we don't need to review this further even though it's been remanded to us because we've already done it. We don't need to do it again. And so again it's sort of a subjective interpretation as to whether or not 27-546(d)(10) and the finding of adequacy has been made under the Zoning Ordinance, Section 27, which is a requirement of the [DSP] as complied to or rather as compared to Section 24, which is the subdivision ordinance, which is entirely within the authority of the Planning Board.
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> * * *
>
> [T]he ultimate criterion for approval of a [DSP] . . . is that both the Planning Board and the District Council must find that the [DSP] represents a reasonable alternative for satisfying the Site Design Guidelines of Subtitle 27 without requiring unreasonable cost and without detracting substantially from the utility of the proposed developments for its intended use.
>
> I think that, having already completed a Preliminary Plan of Subdivision, not requiring the Applicant to file a new traffic study is avoiding that unreasonable cost. The use is permitted as of right in this particular, on this particular property, and so it does not detract substantially from the utility of the proposed development. And finally,

> whether it is a reasonable alternative for satisfying the Site Design Guidelines, again that's subjective. It's a very low bar for the Applicant to get over. I believe they have gotten over that bar . . . .

Based upon the present iteration of the PGCC and the record before us, we conclude that an additional adequacy study is not required for approval of a DSP so long as the Planning Board finds that the development will be properly served by existing facilities.

V. District Council's Remand

Finally, Citizens argue that the District Council correctly reversed the Planning Board because the latter lacked the statutory authority to disregard the former's remand order. In response, Applicant contends that the Planning Board did not disregard the "lawful issues" in the District Council's remand. After reviewing the record, we perceive no error in the Planning Board's actions.

As previously explained, the District Court had only appellate jurisdiction in this matter; thus, its authority in reviewing the Planning Board's initial decision was limited. Specifically, it could "affirm, reverse, or modify the decision of the Planning Board, or remand the [DSP] one time to the Planning Board *to take further testimony or reconsider its decision in accordance with specified grounds* stated in the Order of Remand adopted by the Council." PGCC § 27-290(d) (emphasis added). It did not have the authority to order the Planning Board to conduct proceedings "*de novo*," or in other words, to direct them to start anew. *See Mayer v. Montgomery Cty.*, 143 Md. App. 261, 281 (2002) (stating that a "hearing '*de novo*' means trying the matter anew the same as if it had not

been heard before and as if no decision had been previously rendered") (citation omitted). Because the District Council went beyond the bounds of their authority, the Planning Board was not constrained by the District Council's remand order to conduct proceedings "*de novo*," regardless of whether or not the Planning Board disregarded such order.

In any event, we agree with Applicant that "[o]n remand, all lawful, applicable issues were addressed fully by the Planning Board" prior to reapproving DSP 89063-07. Prior to the second hearing before it, the Planning Board announced that it would "proceed with the portions of the remand order that [it could] address," pursuant to the Zoning Ordinance. Then, in its amended Resolution, the Planning Board incorporated the six instructions ordered by the District Council to be addressed, and included comments as to each one. Accordingly, we are satisfied that the Planning Board adequately complied with the District Council's order, albeit improper, on remand.

For all of the foregoing reasons, we affirm the circuit court's judgment that reversed the District Council's ruling and reinstated the Planning Board's approval of DSP 89063-07.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.