Circuit Court for Prince George's County
Case No. CAL20-19297

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 1757

September Term, 2021

DAVONA GRANT, *et al*.

v.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, *et al*.

Friedman,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: February 16, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. MD. R. 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Wal-Mart seeks to expand its existing store in the Woodyard Crossing Shopping Center into a Wal-Mart Superstore by adding a grocery store and garden center. The history of that application is well-known to the parties, was described in an unreported opinion by this Court,[1] and a reported opinion of the Supreme Court of Maryland,[2] and will not be repeated here. The sole remaining issue after all of this litigation is whether the Prince George's County Council sitting as the District Council erred in approving a zoning variance from a setback requirement.[3] Because we shall find that the District Council did not err, we shall affirm.

BACKGROUND

We described the need for a variance in our prior opinion:

> [W]hen the original Wal-Mart was built in 2000, the Prince George's County Code required a 50 foot setback but 2002 amendments increased the requirement to 100 feet. If no work had been undertaken, the existing Wal-Mart would have been out of compliance with the Code, but grandfathered in and allowed to continue [despite] its nonconformance. PGCC § 27-384. New construction, however, regardless of its impact on the building's distance from the setback, requires that any grandfathered nonconformance be brought into compliance. PGCC § 27-384(a)(5). Thus, Wal-Mart either

[1] Our unreported opinion is captioned as *Davona Grant v. County Council of Prince George's County, et al.*, Case No.809 (Sept. Term 2017) (Dec. 3, 2018) and is available online at https://perma.cc/6ZBB-KDCK

[2] The opinion of the Supreme Court of Maryland, formerly known as the Court of Appeals, is *Grant v. County Council of Prince George's County*, 465 Md. 496 (2019).

[3] Grant also argues that the District Council failed to comply with the Supreme Court of Maryland's admonition to conduct more deliberation on the matter on remand. Grant's argument, however, misconstrues as a directive what was only a general observation that "more deliberation by the public body—rather than the very bare minimum—is always encouraged" lest it open itself up to "public skepticism or criticism, or a legal challenge of its decision." *Grant*, 465 Md. at 517.

> needed to move the original store or [obtain] a variance from the setback requirement.

Grant, slip op. at *13-*14. We then observed that the governing law requires three findings to grant a variance:

> The District Council is authorized to grant a variance only if it finds that:
>
> (1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;
>
> (2) The strict application of [the Zoning Code] will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and
>
> (3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

Grant, slip op. at *14 (quoting PGCC § 27-230(a)). We equated the first of these factors with "uniqueness," *id*. at *14-*15 (citing *Cromwell v. Ward*, 102 Md. App. 691, 703 (1995)), and held that the District Council had applied the wrong standard for determining uniqueness. Specifically, we held that the District Council had evaluated whether the *building* rather than the *land* was unique. *Id*. at *15-*16. Grant also challenged whether Wal-Mart had sufficiently proven the second of these factors, that strict compliance will cause "practical difficulties," or more succinctly that the practical difficulties that Wal-Mart had identified were self-created and therefore not cognizable. *Id.* at *16. We declined to reach that question but instead directed the District Council to address "practical difficulty" on remand. *Id*. at *16.

Critically for our purposes here, we reviewed the evidence that Wal-Mart had already submitted as to "uniqueness, practical difficulty, and compliance with the General Plan or

Master Plan" and held that "Wal-Mart [had] met its burden of production." *Id*. at *17. We made clear that, on remand, the District Council was permitted but not required to receive more evidence before it reconsidered whether Wal-Mart had satisfied its burden of persuasion under the proper standards. *Id*. at *17-*18.[4] Although we are not strictly bound by those prior decisions, this Court gives great weight to its prior determinations in the same case.[5] Thus, as we review the District Council's findings of uniqueness and practical difficulty, we do so under the traditional "substantial evidence" standard with which we review administrative decisions, but also viewed through the prism that we have already found that evidence legally sufficient and entitled to this Court's significant deference.

I. UNIQUENESS

The District Council, in its revised statement, did precisely as this Court directed and made significant findings about the unique characteristics of the property and the relationship between those characteristics and the zoning rules from which Wal-Mart seeks a variance:

[4] Our choice of the use of the terms burden of production and burden of persuasion was intentional as those two components, together, make up the burden of proof. *Bd. of Trustees, Cmty. Coll. of Baltimore Cty. v. Patient First Corp.*, 444 Md. 452, 469 (2015) ("The phrase 'burden of proof' encompasses two distinct burdens: the burden of production and the burden of persuasion.").

[5] Two important appellate doctrines are close but do not apply here. *First*, we are not bound by the doctrine of the "law of the case," which binds the litigants and trial court on rulings of law, but not on matters of evidence. *Reier v. State Dept. of Assessments and Taxation*, 397 Md. 2, 21-22 (2007). Neither are we bound by the application of *stare decisis* as our prior decision in the matter was issued in an unreported decision. *See* MD. R. 1-104(a); *Colao v. Maryland-Nat'l Capital Park & Planning Comm'n*, 167 Md. App. 194, 209-10 (2005). Nevertheless, even where these doctrines do not apply, prudential concerns dictate that we should not lightly abandon our prior determinations.

The *land* or property on which Walmart's existing building is located has an inherent characteristic not shared by surrounding or neighboring properties in the area, and that uniqueness results in an extraordinary impact upon it by virtue of the operation of CB-2-2002, CB-13-2012, CB-64-2012. PGCC §§ 27-348.02, 27-461, [*Dan's Mountain Wind Force v. Allegany Cty. Bd. of Zoning Apps.*, 236 Md. App. 483, 494 (2018)]. Among other unique characteristics, the "need for the variance is brought about by that unique combination of encumbrances—the wetlands to the east and the large setback and landscaping requirements to the north and west—on the property."

Walmart's 100-foot setback variance is related to the topographical attributes of the property, which affects the property differently from surrounding properties: the impact is unique as compared to similarly situated properties. Walmart's expert, J. DelBalzo testified that "the property is irregularly shaped and uncommonly impacted by wetlands and the Patuxent River Primary Management Area (PMA)." Specifically, "the developable area [of the property is pinched] between residential uses and environmental features [that] does not occur elsewhere in the neighborhood; it is unique to this property." As further attested to by Walmart in its Amended Statement of Justification, "there are some commercial properties that stretch to the north, but they are not also surrounded by residential uses" like the property. "The presence of wetlands and their impact is extraordinary on this property." The "area of wetlands impedes the ability of [Walmart] to move the store eastward so as to allow the existing development to adhere to the required setbacks mandates for a department store—existing or new—to sell grocery products."

Mr. DelBalzo testified in his report that "no other commercial property in the neighborhood or nearby is impacted as much. ... The environmental features on this site effectively squeeze the development envelope on the property ... and present an extraordinary topographic condition on the property." Further, there is "no direct access to the Freeway for the [S]hopping [C]enter or Walmart that is possible due to the wetlands, which limited access presents unique problems for loading and parking circulation that can be overcome by allowing truck traffic to circulate behind the building, closer to the existing residential lots, swing around the northern portion of the site, to exit back along the eastern portion back to Woodyard Road."

The prominence of environmental features on the property, in comparison to similar shopping centers and the surrounding area evidence a shape, exceptional topographic conditions or other extraordinary situations or conditions to meet the requirements for the variance. Staff also found that the property contains regulated environmental features within the PMA that are required to be preserved and/or restored to the fullest extent possible and

> that Walmart was mandated to further constrict the site/property by removing its proposed submerged gravel wetland outside of the area of the PMA-thereby further constraining the developable area of the property. Collectively, the facts satisfy the criterion for the grant of a variance.
>
> The unique features of the property cause the setback requirements to affect the property differently or disproportionately from the way it affects other surrounding properties. The wetlands, the PMA and the surrounding residential development give rise to uniqueness as do the "practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions." *North*, 99 Md. App. at 514. Thus, the attributes of the property are related to the application of the setback and the landscaping requirements. In addition, the uniqueness of this property guarantees that the "granted variance cannot act as precedent in an application regarding another property," [*Dan's*] *Mt. Wind Force, LLC*, 236 Md. App at 496, as the "presence of wetlands and their impact is extraordinary on this property. This extraordinary impact is demonstrated through the review of the shopping centers in the County as well as the surrounding area. No other shopping center of the 48 centers in the C-S-C Zone classified Neighborhood (100,000-square-feet or above) or greater, save one, has more wetlands that were not disturbed than Woodyard Crossing.

(internal references and citations omitted). In our view, the District Council conducted its uniqueness review in precisely the manner that we have explained. Specifically, it looked to see whether the property was unique and whether its uniqueness had a nexus to the aspect of the zoning code from which the applicant had sought relief. Here, the District Council determined that the wetlands on the property were unique as compared to neighboring properties,[6] that those wetlands create a "pinched" developable footprint, and that there is

[6] Grant criticizes the District Council for also comparing the uniqueness of the subject property to other shopping centers throughout the County. Grant's criticism, however, is directed at the argument presented in Wal-Mart's Statement of Justification, not the findings made by the District Council. In its findings, the District Council specifically identified the boundaries of the neighborhood and surrounding area, and based its finding of uniqueness specifically on the property having "an inherent characteristic not shared by [those] surrounding or neighboring properties." That, after making its finding of uniqueness, the District Council also observed that the property was impacted in a way that

a nexus between that footprint and the setback rules from which Wal-Mart had sought relief. There was significant evidence in the record to support this finding and we will not disturb it.

II. PRACTICAL DIFFICULTY

As noted above, our prior unreported opinion in this case found that Wal-Mart had satisfied its burden of production with regard to practical difficulty, *Grant*, slip op. at *17 ("Wal-Mart met its burden of production to survive a motion to dismiss[, including] … sufficient evidence of … practical difficulty …"). We remanded, however, so that the District Council could consider, in the first instance, whether in the absence of the requested variance, Wal-Mart will suffer a "practical difficulty" or, conversely, whether "Wal-Mart's need for a variance arises solely from a 'self-imposed hardship.'" *Id*. at *16.

On remand, the District Council was persuaded that the unique nature of the property and the increase in setback requirements create a practical difficulty for Wal-Mart, which was not of its own making. That finding is consistent with our remand order and is thoroughly supported in the record. We therefore affirm.

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

was unique not only when compared to the surrounding area but also to other shopping centers in the County, is irrelevant to the validity of its finding.