

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Rockville, Maryland 20850
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**Cases No. A-6126, A-6150, and A-6174
APPEAL OF EILEEN FINNEGAN OF HILLANDALE
CITIZENS ASSOCIATION, ET AL.**

OPINION OF THE BOARD

(Hearings held May 10, July 19, September 20, September 27, and October 4, 2006)
(Effective Date of Opinion: March 7, 2007)

Case No. A-6126 is an administrative appeal filed by Eileen Finnegan of the Hillandale Citizens Association, et al., (the "Appellants"), charging administrative error on the part of the County's Department of Permitting Services ("DPS") in the issuance of Building Permit No. 409297 (interior demolition permit), dated January 24, 2006, for the alteration of a mercantile building located at 10121 New Hampshire Avenue, Silver Spring, Maryland (the "Property").

Case No. A-6150 is an administrative appeal filed by the same Appellants, charging administrative error on the part of DPS in the issuance of Building Permit No. 417007, dated May 10, 2006, for the subject Property.

Case No. A-6174 is an administrative appeal filed by the same Appellants, charging administrative error on the part of DPS in the issuance of a Use and Occupancy Permit, dated August 26, 2006, for the same Property.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held public hearings on these appeals on May 10, July 19, September 20, September 27, and October 4, 2006. The Appellants were represented by Norman Knopf of Knopf and Brown. Corsair, Inc. (the "Intervenor"), which is the lessee of the subject Property and the holder of the permits at issue in these appeals, was permitted to intervene in these proceedings, and was represented by Stuart Barr and Steven Robins of Lerch, Early, & Brewer. Assistant County Attorney Malcolm Spicer represented DPS.

Case Nos. A-6126 and A-6150 were consolidated on July 19, 2006, at the request of counsel for the Intervenor, on a motion by Member Caryn L. Hines,

seconded by Wendell M. Holloway. Case No. A-6174 was consolidated with the other two, again at the request of counsel for the Intervenors, on September 27, 2006, on a motion by Member Angelo M. Caputo, seconded by Member Caryn L. Hines.

Decision of the Board: Administrative appeals **granted**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The subject Property, located at 10121 New Hampshire Avenue, Silver Spring, Maryland, in the C-1 zone, is commonly known as the "Hillandale Shopping Center." The Property is situated on the southeast corner of New Hampshire Avenue and Powder Mill Roads.

2. The permits at issue in these appeals were issued for the retail space in the Hillandale Shopping Center that was originally occupied by a Tower Marts store, and subsequently by a Zayre and an Ames store.

3. Ms. Renee Montgomery, Maryland area real estate manager for Safeway, a tenant of the Hillandale Shopping Center, testified that Safeway believes the proposed use will be detrimental to their business, and that Safeway's standard lease prohibits the location of flea markets, used goods or thrift stores in any shopping center in which a Safeway is located. She stated that there is no prohibition in Safeway's Hillandale site lease because the Ames store lease predated the Safeway store. See Exhibit 12. On cross examination, she clarified that the Ames store would not have fit into the prohibited categories, and that the standard lease prohibition was not included because the lease for the Ames side of the shopping center predated the lease for the Safeway side of the shopping center, and thus that the Safeway side lease could not supersede the existing Ames side lease. When asked what it was about the proposed use that she felt would be detrimental to Safeway's business, she stated that this type of use draws "people looking for opportunities that can lead to some unsavory associations, all of which may ... make our customers apprehensive in general." She stated that while she did not know if that would happen at Hillandale, that was her experience based on 1600 grocery stores. She acknowledged that she knew nothing of the Corsair Corporation or the way it managed its business.

4. Mr. Jim Gentile, Associate General Counsel for the National Labor College, stated that the National Labor College is located directly across New Hampshire Avenue from the Hillandale Shopping Center. He read into the record a letter from Dr. Sue Sherman, President of the College. That letter states, among other things, that "the proposed retail operation will not substantially serve the needs of either our students or our staff." See Exhibit 6. Mr. Gentile testified that

the students and staff at the College would prefer to see more restaurants in the shopping center. He stated that the College should be considered part of the neighborhood, and that the proposed use would receive very little, if any, use from the College's staff or students.

5. Ms. Eileen Finnegan, Land Use Chair for the Hillandale Citizens' Association, testified on behalf of the Citizens' Association and as an individual. Ms. Finnegan testified that she edits one of her neighborhood newsletters. She testified that in her capacity as land use chair and editor, she has written articles about the Hillandale Shopping Center and has researched the proposed use. On cross examination, she stated that she has lived in the neighborhood since the late 1980s, approximately three or four blocks from the shopping center, and that she has been the land use chair for this association for three or four years.

Ms. Finnegan testified on direct examination that the proposed use has sister operations on Viers Mill Road (Wheaton store, "Unique Thrift Store/Unique Bazaar") and in Adelphi (Adelphi store, "Value Village"). She showed photographs depicting the variety of goods available at the Wheaton store: clothing, shoes, accessories, household items, dishes, donated items, lamps and other electrical items, vacuum cleaners, furniture, mattresses, beds and exercise equipment. She presented photographs from the Adelphi store showing furniture, car seats, clothing, and sundries, among other things. She testified that the Unique Bazaar portion of the Wheaton store is an area where individual booths/stalls are rented out on a monthly basis, and she provided pricing information. See Exhibit 10(a). She stated that at the Wheaton location, the "bazaar" portion includes new furniture and services such as a barber, a hairdresser, seasonal tax services, a spiritual healer/tarot card reader, and Lotto. She testified that while most of the bazaar vendors keep the hours established for the entire Wheaton store, some have individual hours (e.g. the barber shop). See Exhibit 13.

Ms. Finnegan testified that Corsair is a high volume thrift operation, and that the Ellison family founded the for-profit thrift industry in the 1930s. She stated that these thrift stores are associated with a nonprofit, and that while some money goes back to the nonprofits, these stores are for-profit entities. She stated that donations are solicited by phone, that a truck picks up the donated items and brings them to the store, that teams of people sort through them, hang up and price the items to be sold, and send the rest away. She testified that since the inventory is donated and new items are constantly being trucked in, there is an emphasis on fast turnover and a fast turnaround of the products offered for sale. She stated that part of the marketing strategy is pricing, stating that there are specials on Mondays and holidays. She testified that the high volume, high turnover combination of thrift store and bazaar results in a flea market/perpetual yard sale.

Ms. Finnegan testified that according to the International Council of Shopping Centers (to whom she said Park and Planning had referred her), a

neighborhood center such as the Hillandale Shopping Center has a trading area of about three miles,¹ and that she thought the Hillandale Shopping Center had that kind of flavor to it as a neighborhood C-1. See Exhibit 15. She testified over the objection of opposing counsel that the research division of Park and Planning, which prepares the shopping center inventory for the County, told her that they rely on several authoritative sources of information when they work on shopping centers, including the American Planning Association and the Census Bureau's North American Industry Classification System. She stated that they also mentioned the Urban Land Institute. She noted that the NAICS had different classifications for department stores, discount department stores, used merchandise stores, and bazaars, which are characterized by the Census Bureau as temporary stands. She testified that she spoke with Anita Kramer, project director for the Dollars and Cents of Shopping Centers publication put out by the Urban Land Institute, and that Ms. Kramer said that a thrift store is not a department store. In addition, Ms. Finnegan testified that according to the American Planning Association, a "variety store" is a store that sells a wide variety of relatively small and inexpensive items, and she cited Bruce Variety at the Bradley Shopping Center as an example of a variety store. See Exhibit 18.

Ms. Finnegan testified that after understanding the high volume nature of this business, she believes the C-2 zone, which she indicated allows more intensive uses, is a much more reasonable location for this type of use than the C-1 zone.² She stated that she had concluded that this use was really a flea market, as evidenced by Exhibits 10(b) and (c), on which the Unique Bazaar is listed as one of the premier Maryland flea markets. On cross-examination, she acknowledged that the term "flea market" does not exist in the Zoning Ordinance. She testified that flea markets tend to have used merchandise and inexpensive imports. In response to a question asking if flea markets weren't really weekend types of things, she testified that there was a move towards permanent flea markets, and that this was one of them. She stated that the used nature of the thrift store side of the business rendered both the bazaar and the thrift store a flea market, with the thrift store as the biggest booth.

Ms. Finnegan testified that she had received a \$5 coupon in her December (2005) Gazette newspaper for use in the Wheaton store.³ She testified that she found that store listed on line as the largest thrift store in Maryland, with over 10,000 items to choose from daily. See Exhibit 16. She stated that the parking lot at the Wheaton store is typically crowded, which she said indicated that the Unique Thrift Store/Unique Bazaar is a regional magnet with large outreach. She testified that in addition to Maryland license plates, the license plates on the cars

¹ On cross-examination, she clarified that a neighborhood shopping center has a three mile radius.

² Ms. Finnegan testified on cross examination that although she is not an expert in zoning, from her perspective the proposed use does not fit the purpose clause of a C-1, since it is not a community-oriented.

³ Ms. Finnegan clarified on re-cross examination that this was the Burtonsville Gazette, which is circulated to an area that is not within three miles of the Wheaton store.

in the lot included plates from Virginia, Washington, DC, and diplomatic tags. She stated that the traffic and license plates indicate that the trading area is much bigger than three miles.

Ms. Finnegan testified that there are numerous box trucks (including lunch trucks) on site in Wheaton, and that she has seen storage trailers at both the Wheaton and Adelphi locations, although she indicated that those trucks may have been used to store items in advance of the opening of a store in Merrifield, Virginia.⁴

On cross-examination, Ms. Finnegan testified that the community would prefer to see a strong supermarket anchor (saying that the existing Safeway is very limited), and that they need other strong tenants so that all of the merchants at the shopping center do well (presumably financially) and work together. When asked what the adverse impact of the proposed use would be on the community, Ms. Finnegan stated that the community is looking for smaller, less intense operations which the community could support and which could lead to having community restaurants. She cited the diversity of the neighborhood and stated that the community would support some ethnic specialty stores. In response to a request for examples of strong tenants, she cited the Woodmoor Shopping Center, which she said has a children's shop, an Italian deli, a bakery, a trading shop, and Miller's. She also pointed to the Bradley Shopping Center, which she acknowledged is in the C-2 zone, with its hardware store, variety store, and bakery.

When asked on cross-examination if she would object to the reopening of the Ames store, she testified that the Ames store was a department store, and that as such, she did not think it belonged in the C-1 zone. She acknowledged that the Ames store was large, and said that it "was not a neighborhood market." She stated that the community did use the Ames store, although she said she did not think they were excited about having it there.

When asked about the Wheaton store, Ms. Finnegan acknowledged that it, too, was in the C-1 zone, and was in an old Ames building.

When asked on cross-examination where the Zoning Ordinance made the distinction between new and used goods, Ms. Finnegan stated that antique shops and pawn shops sell used goods, and then went on to say that she was not claiming that no used items could be sold in the County. She stated that although antique stores were permitted in the C-1 zone, they did not sell racks and racks of used clothing and electronics. When asked if the Zoning Ordinance limited the quantity of used items that could be sold, Ms. Finnegan stated that this type of use was permitted in the C-2 zone, under "retail trades, businesses and services of a general commercial nature," that that was a catchall for this large undefined or yet to be defined use.

⁴ Note that Ms. Finnegan's initial testimony was given prior to the opening of the Hillandale store.

On cross examination, in going through the photos in Exhibit 13 and discussing the items shown for sale, Ms. Finnegan stated that wearing apparel stores (except Department Stores) are permitted in the C-1 zone, and that the Zoning Ordinance did not distinguish between new and used apparel. She further acknowledged that white box trucks, eating and drinking establishments, jewelry stores, furniture sales, and barbers are all permitted in the C-1 zone. When asked if there was anything proposed for sale that could not, at least on an individual basis, be sold in the C-1 zone, Ms. Finnegan indicated that despite careful screening by thrift store staff, she was sure there were things on the shelves that should not be sold.

On cross-examination, Ms. Finnegan agreed that part of the Wheaton operation is a permanently set up thrift store, the other portion is the bazaar. She guessed that 60% of the floor space was dedicated to the thrift store and 40% to the bazaar. She testified that at least half of the floor space on the thrift store side was devoted to wearing apparel.

On redirect, Ms. Finnegan stated that the space at issue in these proceedings had previously been a Zayre, then an Ames, and that the Ames had closed in the fall of 2002.

6. Mr. Roland Liembach, former Vice President of Visual Merchandising for Woodward & Lothrop, testified on behalf on the Appellants. He testified that he worked for Woodward & Lothrop, which was a department store, for 41 years. He was accepted as an expert in department store visual merchandising, which he stated was how the merchandise and the facility are presented to the customer. He testified that as he understood it, based on his experience, a "department store" is a building or buildings selling a variety of new merchandise usually associated with the home and persons in the home and sold under one banner. On cross examination, he defined "department store" as "various classifications of new merchandise which are sold under one roof and one name."

7. Mr. Bill Barron, Eastern County Team Leader of the Montgomery County Planning Department, testified at the request of the Appellants. He stated that when the Planning Board the eastern County Master Plans (White Oak, Fairland, Cloverly, and Four Corners), they either reconfirmed the C-1 zoning that was in place or they expanded that zone where they thought it was necessary to define a neighborhood-oriented commercial area. He further testified that the Planning Board either confirmed or expanded C-2 zones when they felt that there was more of a regional nature of facilities. He testified that the C-2 zone allows shopping malls, department stores, auto dealers, and delicatessens, which he testified are not allowed in the C-1 zone. He testified that in areas like Hillandale, the Planning Board confirmed the C-1 zoning. When asked if the proposed use would be a proper facility for a neighborhood convenience shopping center, he deferred to

DPS.⁵ When asked from a planning standpoint whether uses that are geared to attract from the metropolitan area rather than the neighborhood would meet the goals of the C-1 zone, he confirmed that that was not the purpose of the C-1 zone. He stated that the facility in question was larger than they would normally find in the C-1 zone, and that as a planner, he would like to see it broken into smaller stores.⁶

In response to a Board question, Mr. Barron stated that the master plans are reviewed every 10 to 20 years. In response to a second Board question, he stated that in his work, he did not recall a C-1 zone being changed to a C-2 zone.

On cross-examination, Mr. Barron stated that Susan Scala-Demby in DPS would be the most appropriate person to interpret the uses that are appropriate for each zone. He also stated that the applicable master plan is the White Oak Master Plan, and that it discusses the Hillandale Shopping Center, but not this specific property. He stated that this shopping center had been zoned C-1 since at least the 1981 master plan, and indicated (in response to questioning) that he would not be surprised to know that it had been zoned C-1 since the 1960s. He stated that he has been working in the eastern part of the County for 25 years, and that the size of the building in question (the old Ames store, estimated to be about 70,000 square feet) has not changed.

8. Mr. John Thomas, President of the Hillandale Citizens' Association, testified on behalf of the Appellants. He testified that his community and surrounding communities currently experience a shortage of retail and service outlets where they could buy frequently needed items with a minimum of travel. He stated that the round trip distance to a hardware store was 10 miles (approximately 22 minutes), to a bookstore was 12 miles (again, approximately 22 minutes), to an arts and crafts store was 19 miles (approximately 34 minutes), and to a health club was 10 miles (approximately 20 minutes). He stated that the drive times vary with traffic and time of day. He stated that in his opinion, some of these necessities should be closer to their community. He indicated that this would reduce traffic and pollution, save gas, and improve the quality of life for residents of the community.

Mr. Thomas stated that the Hillandale Shopping Center is located in the C-1 zone, and has been zoned that way for 35 years. He stated that the community is still in need of many of the retailers and service providers that can exist in the C-1 zone.

⁵ On redirect, Mr. Barron stated that it was his understanding that DPS interprets the Zoning Ordinance, and that the Board of Appeals could decide whether what DPS did was correct or incorrect.

⁶ On cross examination, he stated that he was not saying that in order to be compatible, the proposed use had to be shrunk.

Mr. Thomas testified as to the diversity of the surrounding area, and provided some census information. He stated that this diversity creates needs that can be met by retailers and service providers permitted in a C-1 zone. He testified that five years ago, Ames was a tenant in the Shopping Center. He described Ames as a discount retail store that offered a wide range of new brand name merchandise at prices below those of conventional department stores and specialty retailers. He stated that Walmart, Target, and K-Mart were competition for Ames. He testified that the neighborhood residents knew what Ames offered, and shopped there for reliability and convenience, and that several residents had told him that they missed having Ames in the shopping center. He stated that they viewed it as a good place to go to purchase items such as baking pans, craft supplies, kitchen utensils and other items they needed in the course of everyday life.

Mr. Thomas testified that the current tenants of the Hillandale Shopping Center include a grocery store, a pharmacy, three fast food chains, a Radio Shack, a Hallmark store, a vacuum/sewing machine repair store, a mattress store, a video store, a beauty salon, a beer/wine store, a dry cleaner, a bank and an optician. He stated that these retailers and service providers meet the purpose of the C-1 zone because they provide necessities that are frequently purchased by consumers with a minimum of travel. He testified that the community still needs a larger grocery store, ethnic and specialty grocery stores, a hardware store, a bookstore, a day care center, theaters, a health club, an arts and crafts store, and restaurants.⁷

Mr. Thomas testified that he had visited a thrift store and bazaar related to the proposed use.⁸ He stated that the thrift store offered donated clothing and other items for resale. He stated that it appeared that once an item was sold, it was unlikely to be available again for sale in the store, making the point that you couldn't depend on being able to get the same items each time you went to the store. He testified that the bazaar housed an eclectic group of vendors, and that some booths were empty. He stated that there were two barbershops and two stores selling music. He stated that some of the items for sale may not be appropriate, and that one booth was selling rims for cars. He stated that the license plates on the cars in the parking lot were not only from Maryland, but also from Virginia and D.C., and from that concluded that the thrift store business was intended to serve more than the local community and that it placed traffic burdens on that community.⁹ He observed that because the thrift store side is based on donations to charity, as the donations change, so would the thrift store inventory. He stated that the company that runs the bazaar has no control over the specific

⁷ Questions from Board Member Caputo indicated that two hardware stores in Hillandale, one in the Hillandale Shopping Center, had closed because of competition from Home Depot. His questions also indicated that there had been a health club there too, but that it, too, had closed.

⁸ Based on his testimony, it appears that he visited the Wheaton store.

⁹ On cross examination, Mr. Thomas acknowledged that he merely assumed from their out-of-state license plates that the owners of the cars he observed did not live in the neighborhood. He also stated that he only visited the parking lot once and did not count the cars with out-of-state plates.

goods and services offered by the vendors who rent their booths (although on cross examination he admitted that he is not familiar with the written arrangement between the vendors and the company). He stated that as a result of his visit, he determined that the thrift store and bazaar did not fit in the C-1 zone, that this use did not dependably provide necessities that are frequently purchased, that it served more than the local community, and that it would create a traffic burden on the community.

Mr. Thomas further testified that he did not think the proposed use could be compared to Ames, stating that community residents could count of Ames to buy necessities frequently purchased with a minimum of travel.¹⁰ On cross examination, he testified that based on information he took from the Ames' website, Ames' business model had a neighborhood focus.

Mr. Thomas stated on cross examination that he believed that the location of the proposed use in the Hillandale Shopping Center took away from the opportunity for the other uses sought by the community to locate there, but clarified that even if all of the desired uses (hardware store, health club, book store, etc.) were located in the shopping center, he would still claim that the proposed use was not permitted. He said that he thought that Ames met the purpose clause because the community could depend on it to have items meeting their everyday needs in stock. He distinguished Ames from the proposed use by saying that as far as he could tell, the inventory at the proposed use would constantly change based on donations, and thus that it could not be counted on to always have on hand those items that the community needed.

9. Ms. Louanne Spiller testified for the Appellants. She said that she likes the diversity of her community. She stated that the community voted unanimously that the proposed use does not meet the requirements for the C-1 zone and should not be located here. She stated that she believed that Corsair had misrepresented itself as an Ames-type use. She testified that she patronized Ames, and that the proposed use was different from Ames because Ames sold new goods, not used goods. She stated that she likes to be a patron of her community, and that in her opinion it is important to have neighborhood-friendly shops and retailers. She testified that in her opinion, the proposed use serves a different type of community and has a different draw. On cross-examination, Ms. Spiller indicated that she thought this type of use was more appropriate for a C-2 zone.

10. Ms. Jacqueline Liembach testified for the Appellants. She stated that she and her husband had moved into Hillandale in 1971, and that many things had

¹⁰ He clarified on cross examination that he was speaking on behalf on the community, and that while he had never shopped at Ames, he was relating anecdotal information from people about why they went to Ames and what they used it for.

changed over the years, but that the zoning codes had not. She asked that the Board listen to the community, and return this C-1 shopping center to its original C-1 use, which she testified is defined by the nearby community. She stated that the proposed use does not belong in their shopping center. She said she would prefer a bookstore. When counsel for Corsair suggested that the proposed use would sell books, she clarified that she wanted to see a store that sold new books and current bestsellers.

11. Mr. Joel Finkelman testified on behalf of the Oakview Citizens' Association for the Appellants. He read a statement from John Walters, the president of the citizens' association, into the record. That statement indicated that Oakview has over 5,000 residents, and that those residents do not believe the proposed use meets the intent of the Zoning Ordinance. It stated that residents of Oakview would prefer a strong neighborhood center with retail options currently permitted in the code. It characterized the proposed use as a flea market, and indicated that as such, it was not compatible with the purpose of the C-1 zone. It indicated that the large size of the proposed use – 76,000 square feet – would serve to make it a regional magnet, exacerbating existing traffic congestion. It stated the need for additional restaurant facilities to serve the 10,000 employees expected at the Food and Drug Administration headquarters by 2010. Finally, it stated that Oakview would like to see additional family-oriented restaurants and shops with a neighborhood orientation. See Exhibit 23.

12. Ms. Susan Scala-Demby, Zoning Manager for the Department of Permitting Services, testified on behalf of Appellee DPS. She stated that she has been Zoning Manager for 5 years, and that she is familiar with the Hillandale site. She testified that DPS reviewed and approved the permits that are the subject of this appeal. She testified that DPS considered the proposed use to be a "variety and dry goods store" when they approved the permits for the C-1 zone.¹¹ She testified that while the Zoning Ordinance does not define this term, Webster's Third New International Dictionary defines "variety store" as "a retail establishment dealing in a large variety of merchandise, especially of low unit value. Compare 5 and 10 or general store." On cross-examination, she acknowledged that nowhere on the face of the building permit at issue does it say that this is a variety and dry goods store. She also stated on cross examination that she did not have the Glossary of Zoning, Development and Planning Terms, put out by the American Planning Association, which defined "variety store" as "a retail store that sells a wide variety of relatively small and inexpensive items." She indicated that low unit value would distinguish a variety store from a department store.

Ms. Scala-Demby testified that DPS does not put an emphasis on what a store calls itself in making this determination. She testified that the use tables in the Zoning Ordinance use the letter "P" to show permitted uses, and that uses of a

¹¹ On cross-examination, Ms. Scala-Demby clarified that while this building permit, like many, may not indicate the zoning use category, the application for this permit listed the intended use as "retail, wearing apparel, and variety."

similar character are also permitted. She stated that neither “variety and dry goods store,” nor “department store” is defined by the Zoning Ordinance, and agreed that this leaves room for different interpretations. Ms. Scala-Demby testified on cross-examination that the Zoning Ordinance does not “by a long shot” identify all of the conceivable types of uses, and that DPS is responsible for making reasonable interpretations regarding the use categories adopted by the County Council. She testified that many uses can fit into more than one category, and that the proposed use could be classified as a variety and dry goods store or as a (grandfathered) department store.

When asked if this proposed use would fit within the category of “retail trades, businesses, and services of a general commercial nature,” she stated that nothing falls clearly in any category unless the use code was specifically approved for the particular use, and that that is why DPS interprets the Ordinance to find the best fit for each use. She stated on cross-examination that a shopping mall such as White Flint or Westfield Montgomery would fall into this use category, stating on re-cross her belief that this category of “retail trades, businesses, and services of a general commercial nature” was typically for shopping centers or shopping malls, not for particular uses. She disagreed with the assertion of counsel for the Appellants that the category of “retail trades, businesses, and services of a general commercial nature,” was a better fit for the proposed use than “department store” or “variety store.”

When confronted on re-cross examination with section 59-A-2.22, General Rules of Interpretation, which says that uses designated by the letter “P” and uses of a similar character are permitted in the listed zones, but which continues by saying that where a use is not explicitly listed but is similar in character to more than one listed use, it must be deemed to be included in the more intensive of the designated uses in terms of traffic, noise, or community impact, Ms. Scala-Demby stated that if this were a brand new use, there wouldn’t be any category that would be similar to it, and the applicants would have to go to the Council to get a new use put into the Zoning Ordinance. See Exhibit 19(b). She then reiterated her belief that the types of items to be sold at the proposed use are permitted in the Zoning Ordinance, and probably had been sold by previous uses. She acknowledged on re-cross-examination by the Intervenor that there are many types of uses, such as music stores and sporting goods stores, which are not explicitly listed in the Zoning Ordinance, but which DPS uses its discretion to classify as variety and dry goods stores or as other permitted uses short of the broad “retail trades, businesses, and services of a general commercial nature” category. She then reconfirmed that she does not believe the proposed use should be classified as a flea market.

Ms. Scala-Demby agreed that in determining the best category, it would be appropriate to look to the purpose clause for the zone for guidance, but later clarified that the purpose clause is but one factor that goes into determining use categories, and that failure to meet one element of the purpose clause does not

necessarily equate to a failure to meet the entire purpose clause, or to automatic exclusion from the zone.

Ms. Scala-Demby testified that she had visited the sister store to the proposed use, located at the intersection of Randolph and Viers Mill Roads, and that she understood that the proposed use would sell merchandise similar to that sold at the sister store. She testified that the Hillandale site had previously been occupied by an Ames store, a Zayre store, and a Tower Marts store, and that the types of merchandise proposed to be sold at the proposed use were similar to the types of merchandise sold at Ames and Zayre. She testified that the Hillandale site has been zoned C-1 since the early 1960s or possibly earlier, and that the previous uses (Ames, Zayre, and Tower Marts) were consistent with the purpose of the C-1 zone, which she described as convenience shopping facilities and retail uses that have a neighborhood orientation [for items] that are purchases frequently with a minimum of travel. She testified that the proposed use satisfies that purpose as well. She stated that she did not believe the proposed use would attract substantial amounts of trade from outside the neighborhood.¹² She stated that she did not know where the description of “neighborhood” as being within a three mile radius came from, and that she thought that seemed small, but that nevertheless, she believed most of the people using this store would come from within a three mile radius. On cross-examination, she stated that based on her own personal experience, she considered the area served by a neighborhood shopping center to be beyond three miles.

She stated that the Zoning Ordinance does not make any distinction between used and unused merchandise, and does not require that merchandise sold be new. She testified that the types of merchandise sold at the proposed use would be similar to the types of merchandise offered by Kmart, and that Kmart would be allowed in the C-1 zone as a variety and dry goods store. She further testified that DPS has issued use and occupancy certificates for Kmart as variety and dry goods stores, including certificate number 208232 for a Kmart at the corner of Connecticut and Georgia Avenues, in the C-1 zone. Exhibits 24 and 25. Ms. Scala-Demby testified in response to a Board question that if Walmart were to decide that they would like smaller stores, they, too, could come in under the classification variety and dry goods store. She further stated, in response to questioning from the Board, that the Zoning Ordinance does not prohibit a store comprised of separately-owned vendors. She testified on cross-examination that the Zoning Ordinance does not limit the square footage of a “variety and dry goods store.”

On cross-examination, she acknowledged that the building permit originally granted for this site in 1961 (and hence for the Tower Marts, Zayre and Ames) was for a department store. She stated that the proposed use could also be classified as a department store, and allowed under the grandfathering provision in section

¹² Ms. Scala-Demby clarified on cross-examination that it was her interpretation that the majority of patrons of this use would not come from outside the neighborhood.

59-C-4.347 of the Zoning Ordinance, as a continuation of that use.¹³ When asked where, in the 1960 or 1965 Zoning Ordinances, department stores were allowed, Ms. Scala-Demby stated that while those ordinances did not specifically list department store as a permitted use, the changes made by the 1972 Zoning Ordinance included a use of “wearing apparel shops excluding department stores.” Exhibits 7(e) (1965 Code) 26 (1960 Code), and 27 (1972 Code). She said that the use had previously been simply “wearing apparel shop.” She stated that the addition of language excluding department stores clearly indicated that department stores had been a permitted use in the C-1 zone, but now were not. She testified that the term “department store” was not used in the Zoning Ordinance prior to 1971, but that she knew for a fact that the County had department stores before 1971. She stated that she was not present for the hearings in 1971 regarding this change to the Zoning Ordinance, but that it seems that wearing apparel shops were turning into department stores, and that that was what the Council was trying to exclude. She testified that the grandfathering provision was put into place to make clear that uses that were permitted prior to the March 26, 1971 amendment were not nonconforming uses, and could continue. She stated that if the use were not legal prior to 1971, it could not be continued under this grandfathering clause, and would be subject to 59-G (she was presumably referring to section 59-G-4.14, under which a nonconforming use would be considered abandoned after 6 months of non-use), but indicated that because this store was built with a validly issued building permit, she would consider it a lawfully existing use.

She testified on cross-examination that DPS looks more carefully at the intended use category in connection with a building permit than with an interior demolition permit, later clarifying that DPS does not conduct a zoning review on an application for a zoning permit.

13. Senator Ida Rubin testified for the Appellants. She stated that she has lived in her home, which is located approximately one mile from the proposed use, for over 44 years. She stated that she had submitted a letter, dated September 7, 2006, to the Board regarding this case. Exhibit 30. She characterized the proposed use as a flea market, and clarified that despite having characterized it as a department store in her letter, she does not believe it is a department store.¹⁴ She stated her belief that the proposed store was not like Ames or Zayre, which she said she and her neighbors all patronized. She said that the proposed use would not carry the types of items that the previous tenants had carried. She described the items carried by Ames and Zayre as convenience items, and cited household goods, notions, fabrics, pots and pans, kids’ clothing, and tennis balls as examples. She stated that she understood that stores in the C-1 zone were for the convenience of the neighborhood, and testified on cross-examination that she

¹³ Counsel for DPS stated during Appellant’s cross examination of Ms. Scala-Demby that the Board had previously issued a decision confirming this opinion in the Appeal of L. Ahmed Awan, case number A-5775. Exhibit 7(f).

¹⁴ Senator Rubin indicated that a member of her staff had contacted the Office of the County Attorney, which indicated that DPS had classified this use as a department store.

would classify Ames as a convenience store. She further testified on cross-examination that when she thought of C-1 stores, she thought of a cleaning store, a flower, a drug store, a restaurant, a grocery store, and a hardware store, saying that these were the types of stores that people patronize frequently, sometimes daily.

She stated her belief that the proposed use would attract people from beyond the surrounding residential area. She stated that with the base realignment, the area would be seeing an influx of an additional 8,000 employees. She stated her opinion that these employees would not patronize the proposed use. She stated her belief that a traffic study should be conducted before the proposed use is permitted. On cross examination, she testified that she would define the "local neighborhood" as being within a mile or two of the proposed use, an area which she estimated contained approximately 25,000 people. She reaffirmed her assertion that these people would not patronize the proposed use, but stated her belief that a substantial number of people would come from outside of that area to patronize the proposed store, resulting in traffic gridlock. She stated that the roads are already so crowded that you can sometimes sit through two or three cycles of lights to get out of the neighborhood, and that the access roads to the Beltway are backed up.

She testified that the proposed use is not a department store, and is not defined or categorized. She testified on cross examination that because this use is not defined or otherwise recognized in the Zoning Ordinance, it should not be permitted in the C-1 zone. When presented with a definition of "flea market" that said a flea market was "a street market for cheap or secondhand articles," she testified that the proposed use met this definition because many street markets have indoor facilities, and cited Ft. Lauderdale and Del Ray Beach (Florida) flea markets as examples of flea markets with indoor facilities. She acknowledged on cross examination that she had not personally visited the store, but based her testimony on reports of others that she had sent to visit the store. She testified that they reported that the store sold garments (mostly used wearing apparel) and second hand appliances, and that booths are available for short-term rental.

14. Mr. Orlo Ellison testified for the Intervenor, Corsair. He testified that he has been working in the thrift store business since 1970, has been a management consultant since 1975, and he has been with Corsair for two and one-half years, since it was formed.¹⁵ He stated that he is currently the project manager for the Hillandale site. On cross-examination, he stated that a project manager is responsible for site selection, negotiating leases, design, architecture, etcetera, until the project is turned over to operations. He testified that he was the project manager for the Wheaton store also, and that he is now part of the management company that runs the store. He testified with respect to the Wheaton store that

¹⁵ On cross-examination, Mr. Ellison stated that he is one of three principals in Corsair, and that his principal residence is in Colorado.

while he is not at the store on a daily basis (someone else manages the store on a daily basis), he has been there more than once a week this year.

Mr. Ellison described the Hillandale site as being located essentially at the intersection of New Hampshire Avenue and the Beltway, bounded by Elton and Powder Mill Roads.

Mr. Ellison testified that the shopping center was built sometime in 1961 or 1962. He indicated that the building housing the proposed use is shown on exhibit 8(h), a site drawing submitted by Safeway which shows the condition of the shopping center in 1986, and is labeled “variety store.”¹⁶ He stated that his company is the lessee of that building.

Mr. Ellison testified that he is associated with two stores similar to the proposed use: the Value Village Thrift Store, which he stated is 2.1 miles south of the proposed use at 2277 University Boulevard in Adelphi (in Prince George’s County); and the Unique Thrift Store/Unique Bazaar, which he stated is 6.1 miles away from the proposed site at 12111 Veirs Mill Road in Wheaton. When asked what the existing stores and the proposed store have in common with respect to items sold, he testified that although the mix of items sold will vary from store to store,¹⁷ the primary group of items sold at all stores is clothing. He stated that in addition, other soft goods, housewares, pots and pans, books, a small amount of electronics, and a small amount of furniture are sold. He stated that the proposed use is actually operating under a temporary certificate of occupancy. He stated that they have completed all of their inspections and are ready to receive their (final) certificate of occupancy as soon as all the paperwork is straightened out.

Mr. Ellison stated that the Hillandale store is the size of the old Ames stores. He stated that it has an open floor plan, and is divided into three general areas. He stated that on the left and the right side of the store are racks of clothing (about 540 racks), arranged by types of clothing and divided into sections for ladies, men, girls, and boys. He testified that there are also areas for bric-a-brac and furniture, including good lamps, tables, and toys. He testified that the various areas are marked with signage to help the customers find the items they are looking for. He testified that in the center is a small area – about 10 percent of the gross area (5 percent of the net retail area) – that is dedicated to specialty vendors. He stated that there were also ancillary functions, such as an employee break room, bathrooms, and customer changing rooms, which were included in the 90 percent (non-specialty item) area. He testified that the majority of sales at the store (about 80 percent) was clothing, including shoes and purses, and that

¹⁶ Mr. Ellison testified in response to questions on cross-examination that this designation was “not just a piece of artwork,” but rather a negotiated description amongst interested parties.

¹⁷ For example, Mr. Ellison testified that approximately 35 percent of the floor space in the Wheaton store is devoted to specialty vendors, as opposed to the 10 percent devoted to that use at the Hillandale store.

very close to that percentage of the net retail space floor area is devoted to wearing apparel.

Mr. Ellison testified that the Hillandale store gets its products from a number of different sources. He stated that the Value Village side is owned by the National Children's Center, and that the products sold on that side are donated to the National Children's Center and owned by the Center until they're sold.¹⁸ He testified that the merchandise on the Unique Thrift Store side is purchased from smaller charities that don't have their own retail operations, and also from surplus donations to charities like the Salvation Army and Goodwill.¹⁹ He testified that the store is a major source of income for all of the charities involved. He testified that the specialty vendors in the center of the store buy the items they sell from wholesalers to fulfill certain needs.

Mr. Ellison estimated that as of the day of his testimony (September 20, 2006), 50 percent of the clothing on the floor of the Hillandale store was new, meaning that it had never been worn,²⁰ and that nearly all (95-99 percent) of the items sold by the specialty vendors were new.

He stated that the donated items are sorted by saleability and condition. He testified that about half of the donated items are put out on the floor for sale, and that the other half is not suitable for sale. He testified that those garments are baled and shipped for sale overseas.

Mr. Ellison testified that he does not consider the proposed use to be a flea market. He described a flea market as a rental game, where you rent a person a piece of space, and don't care what they do with it, as long as they pay their rent and clean up when they leave. He differentiated this from his store's specialty

¹⁸ Mr. Ellison made clear on cross-examination that these garments are collected, unloaded, and sorted by Value Village employees. Value Village employees also stock the shelves on the Value Village side of the store. In response to questions, Mr. Ellison continued to describe the sorting process, indicating that goods which could not be sold but which were useable were presently being stored in the building, but would later be stored in trucks on the loading docks. These trucks would be driven away by Corsair employees. Mr. Ellison said that goods that could not be used were placed in one of the two compactors outside, and that the compactors were currently being emptied three times a week.

¹⁹ Mr. Ellison testified on cross-examination that the Unique Thrift Store side of the operation is staffed by Corsair employees. He testified that (private, non-Corsair) trucks bring the goods to the store, at which point Corsair employees take over the sorting operation.

²⁰ In response to a Board question asking how one would know if a garment was new, Mr. Ellison stated that many have tags on them, but that there were also a number of garments that had the tags removed which were also new. He stated that the Department of Commerce has a test to determine whether clothing has been worn or not. In response to questioning on cross-examination, Mr. Ellison testified that the term really isn't "new" but rather is "original," and is defined as clothing that has been washed once and is coming from the manufacturer. He stated that manufacturers wash all clothing once before it is sold. He testified that this "original" clothing is commonly referred to as "new," and that that is what he meant by "new." He stated again on cross-examination that about 50 percent of the garments on the Value Village and Unique sides are new, and that the percentage is higher for the specialty vendors, whose goods are primarily new.

vendors by saying that the specialty vendors were intended to be compatible with the thrift stores, and to bring to the marketplace items that are either lacking or in short supply in the thrift stores. He cited underwear as an example of something that would be lacking in the thrift stores. He stated that specialty vendors are selected after an interview process and a review of their businesses. He estimated that only one in 50 applicants reaches the interview stage. He testified that the specialty vendors are given marketing assistance, and constantly monitored to see how they are doing. He testified that the store has a very strict set of rules for specialty vendors, limiting what they can sell, when they can sell it, when they must be open, when they must be closed. He testified that the specialty vendors currently at the Hillandale store sell primarily clothing: undergarments, Brazilian jeans, other specialty jeans, hats, watches, party dresses, and christening gowns. Mr. Ellison stated that there are no services offered at the Hillandale store. Mr. Ellison testified that he would never permit a specialty vendor to offer a product, or even a service, that was not permitted in the C-1 zone. Mr. Ellison testified on cross-examination that specialty vendors and merchandise sold may change over time, provided the items sold are permitted in the zone. Mr. Ellison stated that he does not consider the Hillandale store to be a pawn shop or a consignment store, testifying that they do not offer loans against anything, and do not accept items to be sold on a consignment basis.

When asked on cross-examination about barber services and healing/tarot card reading at the Wheaton store, Mr. Ellison testified that the specialty vendors were screened for the products they sell. He testified that the barber services are ancillary to the primary use of selling products (presumably hair care items). He testified that if one looked at the advertisement for the healing center (which presumably includes tarot card reading), one would see that there are three addresses, and that while the owner of that center might do other things at her home/other locations, she sells religious items, healing items, homeopathic items, statues and miscellaneous items from India at the Wheaton store. He testified that he has no knowledge that she does tarot card readings at the Wheaton store.

On cross-examination, Mr. Ellison testified that the percentage of floor space dedicated to the specialty vendors was a designer prerogative, but that he would need to check with his zoning attorneys and the County, in addition to making numerous other architectural and construction changes, before altering it. He stated that the smallest specialty vendor booth was a net 48 square feet, and that no more than 5,000 square feet in the entire specialty area of the Hillandale store was rentable. He testified that the Hillandale store is currently set up for 18 specialty vendors, and that 10 or so are currently there. He testified that the booths are rented for 30 days, and that leases are automatically renewable unless canceled by either party, and are redone annually.

Mr. Ellison testified that he researched the property and building prior to leasing it. He stated that it was one of the sites that he compared against the Wheaton site when leasing that site. He testified that he looked very carefully at

demographics and traffic and other things when deciding to lease the site. He testified that the Hillandale area is one of the most densely populated areas around. He testified that the Value Village Store, two miles south of the Hillandale site, does not come close to satisfying the demand of customers in that market. He stated that Hillandale has an excellent demographic for his business. He testified that his customer base is anyone who likes to save money, and that while those people are represented at all levels, there is some disproportionate tip towards homeowners and people who are starting families. He testified that the best stores they have are the ones with the greatest mix of customers, and that the worst stores are where they attempt to locate a store in a single demographic.

When asked if he agreed with the three-mile radius used by Appellants to describe the neighborhood, Mr. Ellison stated that it was used by realtors, and that if your customer base was not within three miles of your proposed location, you probably shouldn't open a store there.²¹ He testified that according to the 2000 Census numbers, there are 155,000 people within a three-mile radius of the Hillandale store, and that the current estimates are pushing 200,000 for this fast-growing area. He stated that within three miles of the Hillandale site are the University of Maryland, Langley Park, White Oak, and a number of areas toward the west. He testified that based on his research, approximately one percent of that total population lives within the Hillandale Citizens' Association, and estimated that two or three percent live within the Oakview Citizens Association. He testified based on his experience that over time, he expects 80 percent of his customers will come from within a three-mile radius. He estimated that that number is probably higher at present. He testified that this was an identical distribution pattern of customers to that at the Wheaton and Adelphi stores. On cross examination, Mr. Ellison testified that somewhere around 15 percent of his customers would come from an area with a one-half mile radius (one-mile circle), then estimated that the same percentage would come from an area with a radius of one mile. Mr. Ellison also stated on cross-examination that he has other data to confirm where his market base lives, such as in-store sign-ups to win a free television.

Mr. Ellison testified that after learning of the opposition to the Hillandale store, he had his employees ask customers at the Adelphi and Wheaton stores if they like the thrift stores. In the case of the Adelphi store, if the customer lived or worked within a three-mile radius of the proposed Hillandale store and liked the idea of having a thrift store in their neighborhood, they were asked to sign a petition. In the case of the Wheaton store, if the customer lived or worked within three miles of that store,²² and supported the idea of a thrift store in their

²¹ On cross examination, Mr. Ellison stated that the three-mile radius was Appellant's description of neighborhood, but said that it could be considered an "economic neighborhood," saying it was the area in which people buying the products approved for the C-1 zone would usually shop. He gave groceries and drug store items as examples of things people would travel within a three-mile radius to obtain, and stated that the three-mile radius is commonly used to measure real estate.

²² The petition actually read "If you live or work within three miles of the proposed store...", but testimony was clear that in collecting signatures at the Wheaton store, customers were instructed

neighborhood, they were asked to sign the petition. Mr. Ellison testified that 1,310 signatures were collected at the Adelphi store, and that 1,261 signatures were collected at the Wheaton store. See Exhibit 22(b). Mr. Ellison testified that these signatures indicate support for the store, and that support at the Adelphi store in particular indicates that a good portion of that group would come from within the three-mile radius of the new store and would patronize that store.

Mr. Ellison testified that Exhibit 32 shows Corsair employees who live within a three-mile radius of the Hillandale store, and slightly farther out (to the edges of the map). He testified that the map showed a large density of employees in the area, and that where they see a lot of employees, they often see a lot of customers. He testified on cross examination that he sees this correlation between where his employees live and where his customers live because he likes to hire neighborhood people.

Mr. Ellison testified that Exhibit 33 shows where the people who signed the petition at the Wheaton store live relative to that store. The map depicts the three-mile radius around the Wheaton store, and then slightly farther out (to the edges of the map). Customers were asked to put a star on the map if it showed where they lived, and were told that if they lived outside the area, they could put a star next to their zip code. Mr. Ellison testified that Exhibit 33 shows the ratio of customers that come from inside versus outside a three mile radius of the store, and indicates that the store's highest draw is from inside the three-mile radius. He further testified that the three-mile radius extending from the Wheaton store and the three-mile radius extending from the Hillandale store would not touch, but rather would be 0.1 miles apart, as the stores are 6.1 miles apart.

Mr. Ellison testified that Exhibit 34 depicts a three-mile radius around the Hillandale store, and then slightly farther out (to the edges of the map). He testified that the dots on that Exhibit show the locations of the homes of the customers who signed the petition at the Adelphi store. He stated that that is why you see a higher density at the bottom of the three mile demographic that around the center of it. He testified that this map shows the density of customers decreasing as you move away from the location of the store. He stated that the densest cluster of dots is within the three-mile radius for the Hillandale store. He also stated that the Exhibit shows that a good number of the customers at the Adelphi store live in Hillandale and Oakview, and surrounding neighborhoods. He testified that the yellow dots were used to show where people lived who were outside of the three mile radius, and thus not allowed to sign the petition, but allowed to indicate where they lived on the map.

Mr. Ellison concluded that the data shown on Exhibits 32, 33, and 34 confirms the model that Corsair has used for many years to determine their distribution of customers – that 80 percent of their customers come from within a

to sign if they lived within three miles of the Wheaton store.

three-mile radius. He testified that their business cannot be successful if the majority of customers do not come from within a three mile radius.

Mr. Ellison testified that he believed that the Hillandale store serves an important neighborhood need, that it is a neighborhood-oriented type of use, and that it sells products that are used by neighborhood residents on a daily basis. He read the Zoning Ordinance definition of “regional shopping center,”²³ and stated that the Hillandale Shopping Center “by no means” meets that definition, and that he does not consider the proposed use to be a regional use.

Mr. Ellison testified based on personal knowledge that the Hillandale site had previously been used as an Ames, a Zayre, and a Tower Marts. He testified based on his personal knowledge that these stores sold clothing, soft goods, shoes, and a line of household variety items such as small appliances. He testified that the proposed use is selling the same products as its predecessors, and that he considered it to be the same use as the previous uses.

Mr. Ellison testified that he had talked to a number of customers at the Hillandale store, and that the feedback on the reuse and reoccupancy of the store has been 100 percent positive.

Mr. Ellison testified that the building has had “essentially everything redone on it,” including resealing, repointing, and repainting of the exterior. He stated that the building has a new roof and a new architectural front facade to match the shopping center. He stated that it has a new, lighted canopy and new windows. He stated that the building has new insulation and that all hazardous material has been remediated. He stated that the building has new tile, new carpet, new lights, new electrical service, new HVAC, fans and ADA-compliant bathrooms. He testified that the building meets and exceeds the 2006 building code. He testified that the building looks much improved. He stated that the changes did not increase the footprint of the building or add any square footage to it. He stated that no parking spaces were added to the parking lot since none were required.

Mr. Ellison testified that he was also the project manager for the Wheaton store. He testified that that store is also located in the C-1 zone, in an old Ames store, in a shopping center similar to the Hillandale Shopping Center except that the parking field is on the side. He stated that the tenants of the two shopping centers are similar, that the centers have a nearly identical parking count, and a similar distribution. He stated that there were not objections from the community or the County regarding the opening of the Wheaton store. He stated that he had met with the County prior to opening the Wheaton store, and that he had no difficulty obtaining permits from a zoning perspective.

²³ Section 59-A-2.1 of the Zoning Ordinance defines “regional shopping center” as “[a] shopping center comprised of a minimum of 600,000 gross leasable square feet and a minimum of 50 separate stores.”

In response to Board questions, Mr. Ellison testified that the each delivery truck makes one trip to the store per day, and that most of them are stored off-site. He estimated that there are a total of 15 to 19 truckloads per day, including trash trucks. He testified that there will not be food trucks at the Hillandale store, although he stated that food trucks were there for the contractors during the construction period. When presented on cross-examination with a picture of food trucks at the Hillandale store, taken September 4, 2006, Mr. Ellison stated that food trucks are not allowed at the store, and that he would look into it. Exhibit 35.

Mr. Ellison stated that Ms. Finnegan's count of 25 trucks at the Wheaton store was done just a couple of days before they received permission to put their trucks down in Virginia, and that all of their Virginia trucks were temporarily up at Wheaton. He testified that the Hillandale store has about 120 employees, maybe 200 at its peak, and that Zayre and Ames had approximately the same number. When asked if Ames' employees had to lay out the clothing on racks, sort it, and pack the goods that would not be sold, Mr. Ellison testified that while the operations were a little different, Ames' employees still had to unpack boxes and stock the racks and shelves. He stated that both Ames' and the proposed Hillandale store count customers per square foot, and that the density of employees per square foot was also very similar.

15. Ms. Jenny Brydie, manager of the Hillandale store, testified for Intervenor Corsair. Ms. Brydie testified that she had worked for Corsair for two years – one and a half years at the Wheaton store, briefly in Virginia, and now as manager of the Hillandale store.

Ms. Brydie testified that the majority of the merchandise sold is wearing apparel, shoes, household items, miscellaneous items and furniture.

Ms. Brydie testified that Exhibit 36 is a product list that she put together listing what is offered by the specialty vendors currently at the Hillandale store. She stated that this list shows that the vendors offer products, not services. She acknowledged on cross-examination that this list can change.

Regarding Exhibit 35, the September 9, 2006 photograph of the food catering truck, Ms. Brydie testified that she was in the store that day, and that someone told her there were two food trucks parked at the store that day. She testified that when she went out to ask them to leave, they refused, saying they had been there before. She then testified that she explained to them that they were allowed during construction, but that they were no longer allowed. She stated that they again refused to leave, at which time she testified she had a police officer working in the store, a Lieutenant Daniels, speak to the operators and have them removed from the premises. See Exhibit 37. She testified that neither Corsair nor Value Village invited these food trucks onto the premises, and that the trucks are not associated in any way with the Hillandale store.

Ms. Brydie testified that she was responsible for overseeing the preparation of the petitions at Exhibit 22(b), as well as the customer distribution maps at Exhibits 33 and 34. With regard to the preparation of the map in Exhibit 34 (3 mile radius around Hillandale store location, (edges of map to 4 miles)), Ms. Brydie testified that Corsair set up a table at the entrance to the Adelphi store, displaying the map. She testified that she had some 15-year olds ask customers at the Adelphi store to put a sticker on the map showing where they lived, if they lived within the confines of the map. If they lived within a three-mile radius of the Hillandale store, they were asked if they supported the opening of a new thrift store at Hillandale, and if so, to sign the petition. She testified that Corsair collected over 1,300 signatures in support of the new store.²⁴ She testified that Exhibit 34 indicates that there is a lot of interest in the Hillandale store from persons that live within three miles of that store. She also said that the map shows that patrons of the Adelphi store come from close proximity to that store.

With regard to Exhibit 33, Ms. Brydie testified that the survey process was the same as at the Adelphi store, except that people were asked if they could find their address on the map and if so, to mark it with a star. She testified that people who lived outside the three-mile radius were allowed to write the zip code on the margin of the map and mark it with a star. She testified that the color or size of the star did not matter. She stated that if people lived within a three-mile radius of the Wheaton store, they were asked if they supported the opening of a second store, and if so, if they would sign the petition. She testified that they collected over 1,200 signatures at the Wheaton store in about 30 hours.²⁵

Ms. Brydie acknowledged on cross-examination that she did not know the number of people who may have come to the store during the signature collection/mapping but did not stop to participate, but she indicated that as reported to her, all but one of the people who stopped were cooperative.

Ms. Brydie testified that she regularly talks to the customers in the stores because she does a lot of their marketing. She testified that the majority of the customers at the Hillandale store are coming from the Safeway or from other stores in the Hillandale Shopping Center. She said that a lot of customers she had talked to live in Silver Spring and Takoma Park. She testified that she believes that the store serves an important neighborhood need, and that it offers the same type of merchandise you would find in a regular department or novelty store. She testified that this is a store for people who want to save some money.

²⁴ She clarified that a small percentage of the signatures collected may have been by persons outside the three-mile radius, saying that some such people were so excited about the possibility of a new store, that it was good customer service to let them sign.

²⁵ Again, Ms. Brydie indicated that a small number of signatures may have been by people living outside of the three-mile radius, in light of their enthusiasm about the new store. With respect to the 30 hour figure, Ms. Brydie indicated that that was over the course of six days, at various scattered times throughout the day.

Ms. Brydie testified that she agreed with Mr. Ellison's distinction between a flea market and this store. She testified that she and her husband had previously been vendors at a flea market, and that her husband was a specialty vendor at the Wheaton store. She testified based on her personal experience that the differences she perceived between a flea market and the specialty vendor operations in the Corsair stores include the following (flea market versus specialty vendor): outdoor location versus indoor location; weekend hours only versus regular hours; sign-up sheet for desired days and damage waiver versus application and selection process; "tell us what you're selling" versus selection of vendors based on what they sell; no vendor license required versus vendor license required; daily rent versus monthly rent; accountable only to customers versus accountable to customers and to management (Corsair).

Ms. Brydie described that management structure at the Hillandale store as follows: She is the manager. There is a group of assistant managers under her, and a group of supervisors under the assistant managers. Finally, there are other employees under the supervisors. She testified that everyone basically reports to her, and that she gives out their responsibilities based on the area in which they work. To refute the testimony given by Ms. Montgomery as to why Safeway does not co-locate with thrift stores, Ms. Brydie testified that as manager of the Hillandale store, and previously as manager of the Wheaton store, she has never received any complaint that the store was mismanaged or that it drew people "looking for opportunities." She further testified that in her capacity as manager for these stores, she had never received any complaints that the stores drew people "that can lead to some unsavory associations" or that the store made other customers at the shopping center "apprehensive in general."

Ms. Brydie testified in response to Board questions that as manager, she does not wear a name tag, but that she makes herself present around the store. She stated that cashiers are identifiable by their smocks.

16. Mr. John Reinhard testified for the Intervenor Corsair. He testified that he currently works as a land use consultant, having previously worked for Montgomery County from 1971 through 2001 on zoning matters, first with the Department of Inspections and Licenses, then with the Department of Environmental Protection, and finally with the Department of Permitting Services. He testified that for the first nine years, he was involved with zoning enforcement; that for the next eight years, he did zoning interpretation, zoning review, counter responsibilities, telephone, and frontline; and that for the final 13 years, he was the manager for the zoning review function, a position which he testified was similar to that of Ms. Scala-Demby. He testified that he was familiar with the Montgomery County Zoning Ordinance and the provisions of the C-1 zone. He stated that he was routinely asked to make interpretations of the Zoning Ordinance, particularly with respect to use categories. He was accepted as an expert in use classification under the Zoning Ordinance and as an expert on all of the provisions of the C-1 zone.

Mr. Reinhard testified that he had visited the Wheaton and Hillandale stores. He testified that he agreed with the characterizations of Mr. Ellison and Ms. Brydie regarding what was sold at the store, and stated that in his opinion, the dominant product sold at the Hillandale store is wearing apparel. He testified that based on his observation, the listing on Exhibit 37 of products sold by the specialty vendors was accurate. He testified that he did not observe anything being offered by the specialty vendors that he would classify as a service. On cross-examination, he agreed that if a particular type of service were allowed in the C-1 zone, it could be allowed at the proposed store.

Mr. Reinhard testified that he was retained to examine the facts concerning the reuse of this former Ames store in the Hillandale Shopping Center, and then to analyze the Zoning Ordinance for the proper use category. He testified that the Zoning Ordinance does not identify every specialized type of retail use as a separate use category, and cited sporting goods stores, music stores, record and tape shops, and hobby stores as examples of uses operating in the County but not specifically identified as a separate use category in the Zoning Ordinance. He testified that those uses would historically be classified as variety and dry goods stores.

Mr. Reinhard testified that he had been present for Ms. Scala-Demby's testimony, and that he would agree with her classification of the proposed use as a variety and dry goods store. He stated that in his work for the County, he had opportunities to interpret the "variety and dry goods store" use category and apply it to various situations. He stated that the term is not defined by the Zoning Ordinance. He testified that it would be reasonable to consult a dictionary to define these terms,²⁶ and testified that based on the dictionary definitions of "variety store" and "dry goods" in the record at Exhibit 31 and his knowledge of the proposed use, he believed that this use fit the definition of a variety and dry goods store. He further testified that based on the historical application of that use category during his time at the Department of Permitting Services, he believed that the proposed use was properly identified as a variety and dry goods store, which he testified is permitted in the C-1 zone. He testified that the Zoning Ordinance does not limit the size of a variety and dry goods store, nor does it limit the amount of square footage allowed for wearing apparel stores.

Mr. Reinhard testified that the K-Mart located at Georgia and Connecticut Avenues in the C-1 zone was approved as a variety and dry goods store. In response to a Board question, he testified that to the best of his knowledge, the K-Mart does not sell used goods. On cross-examination, when asked if he would classify a new Zayre, Ames, K-Mart or Target as a variety and dry goods store, or as a department store, he testified he would classify them as variety and dry good stores.

²⁶ On cross-examination, he agreed that a land use planning dictionary would be another tool.

When asked on cross-examination about the difference between the use categories of department store and variety and dry goods store, and the use category of “retail trades, businesses, and services of a general commercial nature,” Mr. Reinhard testified that it was his impression that the retail trades use category implied a heavier and broader scope of commercial activity, something like a regional shopping center. When confronted with evidence on cross-examination showing that two Target stores had been permitted under the category “retail trades, businesses, and services of a general commercial nature,” Mr. Reinhard agreed that this is a third type of retail activity (in addition to department stores and variety and dry goods stores). See Exhibits 39 and 40. When asked on cross-examination if the zoning for the proposed use determined how it was classified (retail trades and department stores are not allowed in the C-1 zone, but variety stores are), Mr. Reinhard disagreed. When asked on cross-examination if it would be reasonable for the Board to determine that the previous uses (Ames, Zayre, Tower Marts) should have been classified as “retail trades, etc.,” Mr. Reinhard disagreed, asserting once again his impression that that use classification is for a much heavier type of commercial activity. Finally, when asked on cross-examination if that part of section 59-A-2.2(d) which says that if a use is not explicitly listed in any one zone, but is similar in character to more than one listed use, it must be deemed to be included in the more intensive of the designated uses in terms of traffic impact, would lead him to conclude that the proposed use should be classified as “retail trades, businesses, and services of a general commercial nature,” Mr. Reinhard said no. He explained that he felt that it was a variety and dry goods store for much the same reason, that that use implied a collection of various uses permitted in the zone.

On redirect, Mr. Reinhard agreed that the first sentence of section 59-A-2.2(d) states that uses designated by the letter “P” and uses of a similar character are permitted, and testified that DPS can properly classify a use that does not have a clear-cut use category in a category because of its similar character. Also on redirection, Mr. Reinhard testified that section 111-21(c)-2 of the 1958 Zoning Ordinance (general commercial zone) contained the use category “retail trades, businesses, and services of a general commercial nature,” and listed about 26 different subsets of these types of uses, including automobile parts, indoor automobile sales, funeral parlor, ice storage house, newspaper publishing establishment. He testified that these were what he would term to be heavier commercial uses, and that in using that as guidance as to what should be included in that use category today, he still concludes that this is not the proper classification for the proposed use. On re-cross examination, Mr. Reinhard acknowledged that the “retail trades” use was deleted from the 1960 Zoning Ordinance and did not reappear in the use tables until the early 1980s, and that when it reappeared, it did not contain the lists of subset uses.

Mr. Reinhard testified that the property on which the Hillandale Shopping Center is located is fairly large for a C-1 property, but that the development standards such as height, setbacks, green space serve to self-regulate the size of

the buildings. He testified that the size of the shopping center has no bearing on this case, and that the Zoning Ordinance does not regulate the size of buildings in the C-1 zone.

Mr. Reinhard testified that he agreed with Ms. Scala-Demby's conclusion that based on the facts, this use could also have been approved as a continuation of the previous department store use. He testified that based on his review of relevant documents in this case, the former Ames, Zayre, and Tower Marts stores had been approved as department stores. He testified that the Zoning Ordinance does not define department store, and did not define that term when the building in question was originally built. He testified that based on the definition of department store in Exhibit 31 and the testimony of Ms. Finnegan and other witnesses regarding the previous uses of this building, the current use is consistent with the previous uses. He testified that the Zoning Ordinance does not make a distinction between stores that sell new products and stores that sell used products.

Mr. Reinhard testified that to the best of his knowledge, the Zoning Ordinance did not contain any references to department stores prior to the 1971 reference to "wearing apparel shops, excluding department stores." See Exhibit 27. He testified that he believed the County and DPS recognized the use of "department store" prior to that because there were stores at that time which would meet the dictionary definition, and because there were certificates of occupancy issued for department stores. He testified that the previous tenants at the Hillandale site were all considered "department stores," as was the Ames store that was previously located where the Wheaton store is at present. He testified that he believed the amendment in 1971 was intended to distinguish between department stores and wearing apparel stores.

Mr. Reinhard testified that section 59-C-4.347 of the Zoning Ordinance is the nonconforming use clause for the C-1 zone. He read that section into the record.²⁷ He testified that because the previous Ames use was conducted in accordance with an approved permit issued by DPS or its predecessor department, that use was lawful. He similarly concluded that the Zayre and Tower Marts store were lawful, existing uses prior to 1971 because they had bona fide certificates of occupancy. Thus he testified that it would be reasonable to characterize the proposed use as a lawful continuation of the previous department store use.

²⁷ Section 59-C-4.347 of the Zoning Ordinance, entitled "Nonconforming uses, amendment of 1971," reads as follows: "Any use which is not permitted in the C-1 zone but was lawfully existing prior to the amendment of the C-1 zone on March 26, 1971, shall not be regarded as a nonconforming use; but any additions or structural alterations shall be in conformance with the above yard, green area and height regulations and shall not exceed 10 percent of the gross floor area of such use as it existed on that date."

Mr. Reinhard testified that a third way to view the proposed use would be to look at the individual categories of items sold. He indicated that a variety of goods were offered for sale, giving credence to the classification of this use as a variety and dry goods store. He testified that all of the types of items sold – books, appliances, wearing apparel, household items, etc. – when viewed individually, could be sold in the C-1 zone, and that all are neighborhood-oriented uses which require frequent purchase. He indicated on re-cross examination that even if the proposed use were comprised entirely of specialty vendors, either in a single store with booths or in a series of storefronts, and all were selling items which were permitted in the C-1 zone, this use would be permitted as a variety store.

Mr. Reinhard testified that when he was evaluating uses and classifications for the County, there was always an indication that the primary use of a building could also have related incidental uses or uses that were similarly permitted in the zone. He testified that the percentage of floor area devoted to the incidental use could be no more than 10 to 15 percent (he stated that he thought the building code had a 10 percent cap), and that the incidental use had to be permitted in the zone. Mr. Reinhard testified that from a zoning and a use classification standpoint, the fact that there are some specialty vendors on-site does not matter to the classification. He gave the example of a grocery store that includes a pharmacy, a florist, and a school supply section, but that is still classified as a grocery store. On redirect, he again agreed that even if it has a bank and a photoshop inside, he would still classify it as a grocery store

Mr. Reinhard testified that the term “flea market” is not a term recognized in the Zoning Ordinance. He testified that the proposed use was not a flea market use, as that term is defined on Exhibit 31 (dictionary).

Mr. Reinhard testified that he is familiar with the purpose clause of the C-1 zone. He characterized the purpose clause as a roadmap or planning tool in terms of where things are located in the County, but said that it doesn't really enter into day-to-day consideration of how uses should be classified. He testified that you would first look at the use table to see if a particular use is allowed in a given zone. He clarified on cross-examination that it is the land use chart and not the purpose clause that determines whether or not a use is allowed.

Mr. Reinhard testified that in his experience, traffic studies would only be required if the property required subdivision and had to go through a recording process for a new plat, but not where, as here, an existing building was being reused in a manner similar to its previous use.

17. Ms. Eileen Finnegan was recalled to testify as a rebuttal witness for the Appellants. She testified that after viewing Intervenor's Exhibit 34, showing the three mile radius around the Hillandale store, she realized that hers was just one community in an area that was nearly 28 square miles, and included not only Hillandale, but White Oak, Burnt Mills, Four Corners, Silver Spring, Long Branch,

Langley Park, Lewisdale, Adelphi, College Park, North College Park, Beltsville and Calverton. Exhibit 43 (red lines not accepted into evidence).

Ms. Finnegan testified that she went to the Adelphi store one day while the signatures on the petitions were being collected. She testified that when she asked about the petition, she was told that they needed 300 more signatures in order for the government to allow them to open a second store. She testified that she asked to read the petition, read the top of it, indicated that she lived within 3 miles of the proposed store, and asked where she could sign if she did not want a second store. She testified that she was told that she couldn't use that form, but rather that they would need to get another piece of paper for her. She said they both laughed and that she went on her way.

Ms. Finnegan testified that she had analyzed the petitions, and concluded that the Wheaton petition contained numerous signatures from beyond the three-mile radius, and that 70 percent of the signatures on the Adelphi petition were from addresses outside of Montgomery County. She testified that on the Adelphi petition, she found six addresses that were within the area covered by the Hillandale neighborhood association. She testified that she had spoken with the owner of the house at one of those addresses, and that he stated that he did not sign the petition, but that his grandchildren may have. Based on her analysis of the petitions, Ms. Finnegan testified that she thought they were loosely done. See Exhibit 47.

Ms. Finnegan testified that the Wheaton store advertised in the Gazette Community Guide (one distributed to Burtonsville, Silver Spring, Takoma Park and Wheaton, another distributed to Bethesda, Chevy Chase, Kensington, Burtonsville, Silver Spring and Wheaton), and in the Washington City Paper. Exhibit 48. She testified that these advertisements noted that a new store would be opening in Hillandale. She testified that the thrift store guide entitled "Dirt Cheap Real Goods," published in 2004, includes the Adelphi store, and indicated that these stores are intended to draw from an area larger than the immediate neighborhood. Exhibit 49. Ms. Finnegan testified that the Wheaton store was listed on a flea market owner/dealers internet website. Exhibit 50. She testified that the store was "self-listed," meaning that the business owner had to apply to have his store listed there. She testified that this information would be viewed by people in a large geographic area, and was intended to attract them to the store.

Ms. Finnegan testified that a Hillandale resident, Elizabeth St. John, submitted a letter to the Board on September 10, 2006, in which she stated that she had looked at the license plates on the cars in the parking lot at the Hillandale store, and found that 22.8 percent of them were from outside of Maryland. Exhibit 51. On cross-examination, Ms. Finnegan testified that Ms. St. John did not look at the cars coming in or out of the parking lot, or up or down New Hampshire Avenue, and so had no baseline on which to compare the cars in the parking lot with the ambient cars in the area. Ms. Finnegan was unable to say how many of

the cars in the parking lot were patronizing the thrift store versus the other stores in the shopping center, and was unable to say if the drivers of the cars might have been on their way to or from work.

Ms. Finnegan testified that a September 23, 2006 K-Mart advertisement indicates that K-Mart sells televisions, cameras, dining room furniture, rugs, batteries, outdoor furniture, wearing apparel and household goods. She testified that K-Mart also sells heavy goods, such as refrigerators. She testified that she does not believe that merely selling a variety of goods renders a store a variety store, and that she believes a more accurate description of what a variety store should be is the Bruce Variety model.

Ms. Finnegan testified that following Mr. Ellison's characterization of 50 percent of the items sold at the store as being "new," she and her husband went to the Wheaton store to look at the merchandise. She testified that she counted two out of 36 pairs of women's trousers that still had tags, and that her husband counted two of 124 men's shirts with hanging tags (one with a laundry tag). She testified that she had gone to the Hillandale store for the same purpose, and had counted six of 36 fancy dresses with hanging tags. She testified that in her opinion, the correct percentage of new items was more like 10 or 15 percent.

Ms. Finnegan testified on cross-examination that she had been in the Hillandale store three times, and that it sold clothing, toys, games, household items, televisions, small electrical appliances, and furniture. She agreed that the square footage devoted to the thrift store was greater than that devoted to the specialty vendors, although she would not agree to a percent classification.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the building permits were properly issued.

2. Section 8-26(g) of the Montgomery County Code requires that a building or structure for which a permit is issued comply with all applicable zoning regulations, including the following:

Section 59-A-2.2(d) of the Zoning Ordinance provides, in relevant part, that "[u]ses designated by the letter "P" and uses of a similar character are permitted in the zones indicated, subject to all applicable regulations. Uses explicitly listed in

one or more zones are permitted only in those zones. Where a use is not explicitly listed in any zone but is similar in character to more than one listed use, then the use must be deemed to be included in the more intensive of the designated uses in terms of traffic impact, noise, or other community impact.”

Section 59-C-4.2(d) lists the following commercial uses, and states whether they are permitted or may be authorized by special exception in named zones. An excerpt from this section is reproduced below to show the permissibility of the various listed uses in the C-1 and C-2 zones, as follows:

Section 59-C-4.2. Land uses. No use is allowed except as indicated in the following table:

-Permitted Uses. Uses designated by the letter "P" are permitted on any lot in the zones indicated, subject to all applicable regulations.

-Special Exception Uses. Uses designated by the letters "SE" may be authorized as special exceptions under article 59-G.

* * * * *

(d) Commercial (excised to show only C-1 and C-2 zones):

(d) Commercial:	C-1	C-2
Adult entertainment business. ⁴³		P
Antique shops, handicrafts or art sales.	P	P
Appliance stores.	P	P
Automobile parts, supplies and tire stores.	P ¹³	P
Automobile sales, indoor.		P
Automobile sales, outdoors.		SE
Automobile sales and service mall.		
Boat sales, indoors.		
Boat sales, outdoors.		
Book stores.	P	P
Building materials and supplies.		P
Combination retail store.		SE
Convenience food and beverage.		
Country inns.		
Delicatessen.		P
Department stores.		P
Drug store.	P	P

Eating and drinking establishment, excluding a drive-in.	P ¹⁷	P
Eating and drinking establishments, including drive-ins.	SE	SE
Farm implements, storage and sales.		P
Feed and grain, storage and sales.		P
Florists.	P	P
Food and beverage store.	P ¹⁹	P ¹⁹
Furniture stores, carpet or related furnishing sales or service.	P ¹⁸	P
Garden supply shops.	P	P
Gift shops.	P	P
Grocery stores.	P	P
Hardware stores.	P	P
Heavy equipment, sales and services.		
Jewelry stores.	P	P
Landscape contractor.		
Mobile homes and trailer sales.		
Newsstand.	P	P
Pet shops.	SE	P
Photographic and art supply stores.	P	P
Printing and publishing.		P
Retail sales and personal services.		
Retail trades, businesses, and services of a general commercial nature.		P
Saddlery.		
Specialty shop.		
Tire, battery and accessory stores located in an integrated shopping center.	SE	
Transitory use. ⁴⁵	P/SE	P/SE
Variety and dry goods	P	P

stores.		
Wearing apparel stores.	P	P

* * * * *

¹³ When located in a shopping center containing at least 50,000 square feet of commercial floor area and fronting on an arterial road, or highway; provided that no reconditioning, repair or installation work is performed on or about the premises, and that there be no outside storage.

¹⁷ No entertainment, except music may be offered; however, patron dancing is permitted if the area designated for dancing purposes does not occupy more than 10 percent of the total gross floor area of the restaurant, not to exceed 200 square feet.

¹⁸ Not to occupy more than 20 percent of the total gross floor area permitted at one location.

¹⁹ Provided that any goods prepared on the premises shall be offered for sale only on the premises and at retail.

⁴³ In accordance with adult entertainment business restrictions as provided in Section 59-A-6.16.

⁴⁵ In accordance with Section 59-A-6.13.

Finally, section 59-C-4.340 of the Zoning Ordinance provides that it is the purpose of the C-1 zone “to provide locations for convenience shopping facilities in which are found retail commercial uses which have a neighborhood orientation and which supply necessities usually requiring frequent purchasing with a minimum of consumer travel.” That section further states that:

Such facilities should be located so that their frequency and distributional pattern reflect their neighborhood orientation. In addition, such facilities should not be so large or so broad in scope of services as to attract substantial amounts of trade from outside the neighborhood. It is further the intent of this zone that, in order to restrict the size of such facilities, the convenience commercial zone should not be located in close proximity to other commercial areas; and it shall not be applied to land which is located within a central business district as defined in section 59-A-2.1.

3. As noted above, the purpose of the C-1 zone is “to provide locations for convenience shopping facilities in which are found retail commercial uses which have a neighborhood orientation and which supply necessities usually requiring frequent purchasing with a minimum of consumer travel.” That section also provides that “such facilities should be located so that their frequency and distributional pattern reflect their neighborhood orientation ... [and] ... should not be so large or so broad in scope of services as to attract substantial amounts of trade from outside the neighborhood.”

Given the number of references in this section to the “neighborhood” orientation of shopping facilities in the C-1 zone, considerable testimony and evidence in these proceedings was devoted to defining the “neighborhood” that would be served by this proposed use. Although as a “purpose” clause, section 59-C-4.340 is more hortatory and instructive than binding, the testimony and evidence regarding the neighborhood served by the proposed facility was helpful to the Board in determining, under section 59-A-2.2(d), which “use” the proposed use most closely resembled and thus how to classify that use, since the anticipated scale of the uses permitted in the C-1 zone becomes more clear when read against the backdrop of section 59-C-4.340.

The term “neighborhood” is not defined in the Zoning Ordinance. Appellants introduced evidence and testimony indicating that the International Council of Shopping Centers definition of “neighborhood” shopping center was a center that drew from a three mile radius. They presented evidence, compiled by neighbor Elizabeth St. John, that on one Sunday, Ms. St. John had observed that 22.8% of the license plates in the parking lot at the Hillandale location were not Maryland plates, which they argued confirms their position that many persons who patronize this store come from outside the “neighborhood.” See Exhibit 51.²⁸ They presented testimony and evidence to indicate that the proposed use is being widely marketed throughout the metropolitan area, not just to persons living within three miles of the Property. See Exhibits 16, 17, 48, 49, and 50. The Board finds that this marketing evidence indicates that contrary to the express purpose of the C-1 zone, the proposed use is intended to attract substantial amounts of trade from outside the neighborhood (regardless of its definition), and indeed from throughout the region.

Intervenors presented graphic evidence of informal surveys they had conducted at their Wheaton and Adelphi locations that they say show that the majority of their employees and patrons come from within a three-mile “neighborhood” radius proposed by the Appellants. See Exhibits 22, 32, 33 and 34. The Board is not persuaded that Exhibits 33 and 34 fairly depict the extent of the geographical areas from which the customers to the Wheaton and Adelphi stores come, since testimony indicates that not all customers stopped to take part in the survey, and that those customers who did stop but could not find their address within the confines of the pertinent map either did not mark where they lived (at the Adelphi store), or were given the opportunity to list their zip code if they desired (at the Wheaton store). Intervenors provided no figures as to the percentage of customers who participated in this exercise, or the percentage of customers who tried but could not locate their address on the maps, and thus did not indicate where they lived.

²⁸ This exhibit was accepted over the objection of opposing counsel. The Board acknowledges that this informal survey was flawed in that there was no way of knowing where the people driving those cars actually came from, and that there was no baseline survey of cars along that stretch of New Hampshire Avenue or Powder Mill Road to indicate the typical percentage of out of state license plates in that area, regardless of their destination.

That said, in viewing Exhibits 33 and 34, showing this three-mile “neighborhood” radius, the Board was struck by two things: first, that under this definition, the “neighborhood” around the Hillandale site covered approximately 28 square miles and embraced a population that testimony indicated was approaching 200,000 people, and second, that if this were the way in which “neighborhoods” were defined, the County would have only five “neighborhoods.” The Board notes that such a definition is contrary to the commonly understood meaning of neighborhood, and to their personal understanding of that term.

4. The Board is persuaded by the testimony of Ms. Finnegan and exhibits of record that the proposed use is not a variety and dry goods store. See Exhibit 13. The Board finds that the activities associated with this proposed use—the large number of small box trucks delivering goods for sale, the sorting of incoming goods for condition and saleability, the repackaging and reshipment of unsaleable but useable goods for sale overseas, and the compacting and disposal of those incoming goods that are determined to be unuseable—are not typical, in the Board’s experience, of variety store operations. The Board notes that Mr. Ellison testified that the sorting operation at the proposed use is different from the backroom operations at the prior (Ames) use, although he noted that Ames employees did have to unpack boxes and stock racks/shelves. In addition, the Board finds unusual the fact that the proposed use is in actuality three distinct operations under one roof—Value Village Thrift Store, Unique Thrift Store, and the Specialty Vendors/Bazaar. Finally, evidence indicates that at least some of the goods sold by this proposed use are not “small and inexpensive” or “of low unit value,” as would characterize a variety store under the definitions given by both the Appellants and the Appellee (e.g. televisions and exercise equipment). Despite evidence that a Kmart (and indeed the sister store in Wheaton) had been licensed in the C-1 zone as a variety and dry goods store, the Board is persuaded that the more recent permitting of a Target store under the “retail trades, businesses and services of a general commercial nature” use category was more correct. The Board finds that the proposed use is not unlike Target with respect to the variety of items sold (based on testimony regarding the types of items sold at the proposed use, and the Board’s personal knowledge of the merchandise sold at Target), and that the unique operational aspects of this use, while not prohibited by the Zoning Ordinance, render the use more intense than a typical retail use. The Board is not persuaded by the testimony of Mr. Reinhard that the sale of a variety of items which are individually permitted to be sold in the C-1 zone renders the proposed use a “variety store.”

5. Ms. Scala-Demby and Mr. Reinhard testified that the proposed use could also be viewed as a department store, which would be grandfathered in the C-1 zone by section 59-C-4.3437 of the Zoning Ordinance. Again, based on the characteristics of the proposed use as testified to by Ms. Finnegan, Mr. Thomas, and Mr. Ellison, the Board finds this use to be unlike any department store of which they are aware. The Board’s conclusion is supported by the testimony of

Mr. Lienbach, who defined “department store” as “various classifications of new merchandise which are sold under one roof and one name.” Evidence indicates that this use has a section of independent vendor booths, and two separate thrift stores. It has a large sorting and reshipping operation. Its inventory is unpredictable, and arrives in numerous small box trucks. A large percentage of the items offered for sale are used.²⁹ Although department store is not defined by the Zoning Ordinance, the Board concludes that the operation described in the testimony and depicted in photographs is unlike that of the predecessor tenants at this site, with which the Board was familiar, and is not a department store use.

6. The Board finds that evidence indicates that the vast majority—if not all—of the items sold by the proposed store could be sold in the C-1 zone under various individual use classifications, e.g. appliance stores, book stores, furniture stores, photographic supply stores, and wearing apparel stores. The Board further finds that while these uses may, on their own, be permitted, the combination of these (and other permissible) uses does not result in a permissible “variety” store use, but rather results in a very large and intense use that is more intensive than is contemplated for the C-1 zone. The Board finds that this combined use does not explicitly fall within one of the categories of permitted uses listed in section 59-C-4.2(d) of the Zoning Ordinance, but is similar in character to more than one such use. As such, pursuant to section 59-A-2.2(d) of the Zoning Ordinance, this use must be deemed to be included in the more intensive of the designated uses in terms of traffic impact, noise, or other community impact. The Board finds that the seemingly broader, more intense use category of “Retail trades, businesses, and services of a general commercial nature,” which is permitted in the C-2 zone but is not allowed in the C-1 zone, best describes this proposed use, and that it should be classified as such.

As previously noted, witnesses for both the Intervenors and DPS testified that the use category of “Retail trades, businesses, and services of a general commercial nature” is generally applied to shopping malls and not to individual uses.³⁰ Although those parties made this assertion arguably to demonstrate the their proposed use should not be classified as “Retail trades, businesses, and services of a general commercial nature,” the Board finds that the large scale of this use, the wide variety of goods sold, and the fact that there are multiple merchants/vendors on site, who may change from time to time, suggests that this use is not dissimilar to that of a shopping mall. The Board notes again that DPS has recently issued permits for Target stores as “retail trades, businesses, and services of a general commercial nature.” Exhibits 39 and 40.

²⁹ The Board notes here that the Zoning Ordinance does not preclude the sale of used goods, nor does it prohibit a store comprised of separately-owned vendors, but these aspects of the proposed use are not consistent with the Board’s understanding of “department store.”

³⁰ The Board finds that evidence of record indicating that Target stores have been permitted under this use category indicates that this use category is not limited to shopping malls/regional shopping centers.

7. The Board concludes, based on the foregoing, that DPS erred in issuing the building permits at issue in these appeals, since the amalgamation of uses resulted in a more intensive use which was not permitted in the C-1 zone and thus did not comply with all applicable zoning regulations, as required by section 8-26(g) of the Montgomery County Code.

8. Based on the foregoing, the Board finds that DPS has not met its burden of demonstrating by a preponderance of the evidence that Building Permit Nos. 409297 and 417007, and the Use and Occupancy permit for the proposed use, dated August 26, 2006, were properly issued. These permits should therefore be revoked.

7. The appeals in consolidated Cases A-6126, A-6150, and A-6174 are **GRANTED**.

On a motion by Member Angelo M. Caputo, seconded by Member Wendell M. Holloway, with Member Caryn L. Hines and Vice Chair Donna L. Barron in agreement, and Chair Allison I. Fultz necessarily not participating, the Board voted 4 to 0 to grant the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



Donna L. Barron
Vice-Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 7th day of March, 2007.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).