

IN THE CIRCUIT COURT OF ORANGE COUNTY, VIRGINIA

---

National Trust for Historic Preservation )  
in the United States )  
1785 Massachusetts Ave, NW )  
Washington, DC 20036 )  
Friends of Wilderness Battlefield )  
P.O. Box 576 )  
Locust Grove, VA 22508 )  
Curtis Abel )  
422 Birchside Circle )  
Locust Grove, VA 22508 )  
Dale Brown )  
13205 Fox Gate Drive )  
Spotsylvania, VA 22553 )  
Susan Caton )  
218 Musket Lane )  
Locust Grove, VA 22508 )  
Sheila Clark )  
117 Parliament Street )  
Locust Grove, VA 22508 )  
Dwight L. Mottet )  
215 Creekside Drive )  
Locust Grove, VA 22508 )  
and )  
Craig Rains )  
204 Fairway Drive )  
Locust Grove, VA 22508, )  
Plaintiffs, )  
v. )  

---

No. \_\_\_\_\_

---

Board of Supervisors of Orange County, Virginia )  
Gordon Building )  
112 West Main Street )  
Orange, VA 22960, )  
) )  
Defendant. )  
) )  
SERVE: Sharon Pandak )  
Greenhan Taves, Pandak & Stoner PLLC )  
4004 Genesee Place, Suite201 )  
Woodbridge, VA 22192 )  
) )

---

**PETITION FOR REVIEW AND COMPLAINT FOR DECLARATORY JUDGMENT,  
INJUNCTIVE AND OTHER RELIEF**

Come now the Plaintiffs, by their counsel, appealing the decision of the Board of Supervisors of Orange County, Virginia (the “Board”) on August 25, 2009 granting the application of JDC Ventures LLC and 3 & 20 Limited Partnership, on behalf of Wal-Mart, Inc. (together, “Walmart”) for Special Use Permit 8-07 (the “SUP”) to build a Walmart superstore and other retail facilities (the “Walmart Application”). This action is brought pursuant to Sections 8.01-184 and 15.2-2285.F. of the Code of Virginia and Section 70-91 of the Code of Ordinances of Orange County, Virginia (“Orange County Code”).

**INTRODUCTION**

1. In May 1864, some 180,000 Americans in the Union and Confederate Armies clashed in Orange County, Virginia in what has come to be called the Battle of the Wilderness. Almost 30,000 of them were casualties in that battle. As Pulitzer Prize winning Civil War historian James McPherson recently stated, “The Battle of the Wilderness was a great turning point in the Civil War — the first clash between Robert E. Lee and Ulysses S. Grant and the

beginning of the end for the beleaguered Confederacy.” *Wal-Mart vs. The Wilderness*, WASHINGTON POST, May 3, 2009 at C6. Today, that battle is commemorated as part of the Fredericksburg and Spotsylvania National Military Park (the “National Military Park”), a unit of the National Park System administered by the U.S. National Park Service.

2. On August 25, 2009, the Board, in a split vote, approved the SUP, which permits the construction of a Walmart superstore and other retail establishments totaling 225,000 square feet on land (the “Walmart Site”) which is part of the Wilderness Battlefield, as well as part of the battlefield of the earlier Battle of Chancellorsville. In approving this desecration of hallowed land, the Board ignored the opposition, entreaties, historical information and assistance provided and/or offered by the Governor and Speaker of the House of Delegates of the Commonwealth of Virginia, U.S. Senator James Webb, the Virginia Department of Historic Resources, the U.S. National Park Service, members of Congress from States whose citizens had died on the Wilderness Battlefield, 250 prominent historians and Civil War experts, and numerous local residents, among others.

3. The Board brushed aside all of these well-founded objections because the Board was unduly influenced by Walmart’s projections that approving the SUP would bring increased tax revenues and jobs to the County. But the Board ignored gaping holes in Walmart’s projections and undertook no independent analysis of that subject.

4. Instead, at an early stage, a majority of the Board announced support for accepting the Walmart project at the Walmart Site and tolerated no internal views to the contrary. The Board fired the County Administrator for even suggesting in an email to the Board that proposals for alternative locations farther from the National Military Park should be explored so as to preserve the battlefield as a tourism destination.

5. The Board majority was so determined to approve the proposed SUP — at whatever cost to the County’s historical resources or to its residents — that:

- (a) Despite the fact that Virginia law makes clear that zoning decisions should appropriately protect historic areas, the Board failed reasonably to inform itself about the historical importance of the Walmart Site or about the adverse impacts of the project on the Wilderness Battlefield and otherwise on the National Park Service’s National Military Park. In this respect, the Board rejected offers of assistance and input from many experts who offered their views and services, including the Virginia Department of Historic Resources. Instead, the Board relied in this respect almost entirely on an archeological report prepared for Walmart concerning what physical artifacts could be found on the Walmart Site. Yet, among other deficiencies of the report for purposes of analyzing the Application, that report did not even purport to address the impact the Walmart project would likely have on the National Military Park and the Wilderness Battlefield.
- (b) The Board proceeded to vote on the Walmart Application despite the fact that the County Planning Commission had taken no valid and effective vote recommending for or against the Application. Both State and County law require that the Planning Commission make a recommendation before the Board votes on a special use permit.
- (c) The Board moved forward with approval of the Walmart Application despite the fact that the County’s zoning ordinance failed to contain protections required by

Virginia law to ensure that reasonable consideration was given to the protection of historic areas like those in question here.

- (d) The Board moved forward with approval of the Walmart Application while ignoring the County Comprehensive Plan's emphasis on protecting the County's historic resources and while not taking the time first to deliberate on and adopt, as called for in the Comprehensive Plan, a "comprehensive battlefield resource protection plan for civil war sites" and "corridor overlay districts for roads adjacent to or leading to significant historic sites."
- (e) The Board moved ahead with approval of the Walmart Application despite the fact that the Board could not approve it without violating the County's zoning ordinance because the Virginia Department of Transportation had required an access road to the Walmart project running across residentially-zoned land, a practice recently found unlawful by the Virginia Supreme Court.

6. The Board's approval of the Application was accordingly flawed in numerous respects. Plaintiffs ask this Court not only to hold invalid and to vacate that approval and preclude any further action under it, but to hold invalid and unenforceable those portions of the County's zoning ordinance permitting approvals of projects such as that at issue here until the Board adopts provisions adequately protecting historical resources, as required by Virginia law.

## **BACKGROUND FACTS**

### **I. THE PROPERTY AT ISSUE**

7. The "Walmart Site" consists of approximately 51.55 acres comprising two parcels, identified as Tax Map Nos. 24-8 and 24-10, PIN 0240000000080 and

02400000009100. The Site is located along the north side of Route 3 near the intersection of Route 20 and abuts Wilderness Run on the east.

8. This appeal also relates to the building of an access road to the Walmart Site across the property to the west of the Walmart Site (the “Adjacent Property”). That property is identified as Tax Map No. 24-9, PIN 02400000000890, and is owned by King-Evans Culpepper Property, LLC.

## **II. THE PARTIES**

9. (a) Plaintiff National Trust for Historic Preservation in the United States (“National Trust”) is a private, charitable, educational, nonprofit corporation chartered by Congress in 1949 to protect America's historic resources and to facilitate public participation in the preservation of our nation’s heritage. *See* 16 U.S.C. §§ 461, 468. With the strong support of more than 230,000 members and supporters nationwide, including over 16,000 members in Virginia, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust also has 29 Historic Sites open to the public, including James Madison’s Montpelier in Orange, Virginia, which includes nearly 2,700 acres. In carrying out its mission, the National Trust has participated as a party or *amicus curiae* in more than 200 cases in federal and state courts since 1970.

(b) The National Trust has a legally cognizable interest in the Board’s approval of the SUP. That interest is derived from the National Trust’s congressional mandate, which specifies that the National Trust is authorized to sue and be sued in its corporate name “[t]o the extent necessary to enable it to carry out the functions vested in it by [16 U.S.C. §§ 468-468e].” The National Trust brings this suit to meet its federal mandate of protecting the public’s interest in

ensuring that the Wilderness Battlefield and the National Military Park, nationally significant Civil War sites, are protected against the inappropriate decision by the Board in approving Walmart's SUP. Congress specifically established the National Trust as an entity that represents the public's interest in protecting such nationally significant historic resources in federal and state courts. *See Landmarks Preservation Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 531 N.E.2d 9 (1988) (Illinois Supreme Court held that the Congressional charter of the National Trust preempts state laws of standing because "[i]t seems essential that, in order to perform its congressionally mandated functions, the National Trust must be allowed to maintain suits in State courts").

10. Plaintiff Friends of Wilderness Battlefield, Inc. ("FoWB") is a non-stock non-profit corporation organized under the laws of the Commonwealth of Virginia. It was organized for the purposes of promoting for the benefit of the general public the preservation, protection and interpretation of the natural and historic resources of the Commonwealth of Virginia principally in the Wilderness area of Spotsylvania and Orange Counties, Virginia; assisting in the preservation of areas of historic significance and promoting social welfare by combating community deterioration in the vicinity of Civil War battlefields and historic sites, with particular emphasis on the Wilderness Battlefield area located in Spotsylvania and Orange Counties, Virginia; and conducting, sponsoring and facilitating the holding of special tours, lectures, conferences, seminars and other educational activities relating to the foregoing purposes. FoWB is party to two agreements with the National Park Service's National Military Park. Under those agreements, FoWB assists the National Military Park in the historic restoration of Ellwood, a historic house located on the Wilderness Battlefield that played an important role in that battle; provides the interpretative staff to assist visitors to Ellwood and its

grounds; assists in maintaining the building and grounds at Ellwood, under the supervision and guidance of the National Military Park; creates educational opportunities at the National Military Park; and raises funds to accomplish these goals and participates in decisions concerning their expenditure. The ability of FoWB to achieve its objectives, carry out its corporate purpose and fulfill its responsibilities under its agreements with the National Park Service — including to protect and preserve the Wilderness Battlefield and to provide an educational experience to visitors — will be undermined by the Walmart project, as set forth herein.

11. (a) Plaintiff Curtis Abel resides, and owns his home, at 422 Birchside Circle, Locust Grove, Virginia 22508, which is in the Lake of the Wood subdivision. He has standing to bring this legal challenge. He will be adversely impacted by the substantially increased traffic that will result from the placing of the Walmart superstore and other developments on the Walmart Site. As a resident of Lake of the Woods, he will also be required to pay a substantial amount as part of the cost of upgrading the Keaton's Run dam in his subdivision as a result of the approval of the SUP. Under Virginia law, the residents of that subdivision will be responsible, through their homeowner's association, to pay 50% of the cost of upgrading that dam because part of the area covered by the SUP is in the "dam break inundation zone" and the development approved will change the spillway design flood standards of the dam. *See* VA. CODE §§ 10.1-606.3, 15.2-2243.1. The Walmart project will also substantially change the whole rural character of the area in which he lives.

(b) In addition, he will be personally affected, in ways not experienced by citizens generally, by the adverse impact the Walmart project will have on the Wilderness Battlefield, and particularly at Ellwood. Mr. Abel currently serves as an interpreter at Ellwood, educating members of the public about the Battle of the Wilderness and about the role Ellwood played in

the battle. By degrading the experience of visitors to Ellwood and to other sites in the Wilderness Battlefield, the Walmart project will undermine Plaintiff Abel's efforts to make Ellwood and the Wilderness Battlefield an attractive and educational place for other visitors to come to learn about the Battle of the Wilderness. Among other adverse impacts on that Battlefield that will result from the commercial development on the Walmart Site, his ability to appreciate and enjoy the Battlefield will also be adversely impacted by the sharply increased commercialization and traffic at the intersection of Route 20 and Route 3, which is effectively the gateway to the National Park Service's operations at the Wilderness Battlefield portion of the National Military Park.

12. (a) Plaintiff Dale Brown resides, and owns his home, at 13205 Fox Gate Drive, Spotsylvania, Virginia 22553, in the Fox Chase Subdivision. He has standing to bring this legal challenge. His home is approximately one-half mile from the Walmart Site. From his house, he has a visual line of sight to the property where the Walmart is to be built. His house sits on an elevation 90 feet higher than the Walmart Site. The construction of the Walmart on that site will therefore have an adverse visual impact on Mr. Brown; not only will he be able to see the store from his house, but he will suffer from light pollution caused by the Walmart development. Mr. Brown will also be adversely affected by the substantially increased traffic along Route 3, which will make it more difficult for him to exit and enter his subdivision from that road and which will bring increased noise, pollution and litter near his home. The Walmart project will also substantially change the whole rural character of the area in which he lives.

(b) In addition, Mr. Brown has a keen interest in the well-being of the Wilderness Battlefield. Mr. Brown had an ancestor who fought and lost his life during General John B. Gordon's flank attack at the Battle of the Wilderness. Mr. Brown is a director of Friends of

Wilderness Battlefield and serves as an interpreter at Ellwood and has otherwise devoted his personal time and effort to raising money for the benefit of Ellwood and the Wilderness Battlefield and otherwise assisting to educate members of the public about that battle and the role played in it by Ellwood. Among other adverse impacts on the Wilderness Battlefield that will result from the commercial development on the Walmart Site, his ability to appreciate and experience the Battlefield will be adversely impacted by the sharply increased commercialization and traffic at the intersection of Route 20 and Route 3. By degrading the experience of visitors to Ellwood and to other sites in the Wilderness Battlefield, the Walmart project will also undermine Plaintiff Brown's efforts to make Ellwood and the Wilderness Battlefield an attractive and educational place for other visitors to come to learn about the Battle of the Wilderness.

13. (a) Plaintiff Susan Caton resides, and owns her home, at 218 Musket Lane, Locust Grove, Virginia 22508, which is in the Lake of the Woods subdivision off of Route 3, slightly more than one mile from the Walmart development. Plaintiff Caton has standing to bring this legal challenge. She will be adversely impacted by the substantially increased traffic and noise that will result from the placing of the Walmart superstore at its proposed location. As a resident of Lake of the Woods, she will also be required to pay a substantial amount as part of the cost of upgrading the Keaton's Run dam in her subdivision as a result of the approval of the SUP. Under Virginia law, the residents of that subdivision will be responsible, through their homeowner's association, to pay 50% of the cost of upgrading that dam because part of the area covered by the SUP is in the "dam break inundation zone" and the development approved will change the spillway design flood standards of the dam. *See* VA. CODE §§ 10.1-606.3, 15.2-2243.1.

(b) In addition, Plaintiff Caton is a small business owner, having owned for almost 20 years a flower business located slightly more than one mile along Route 3 from the Walmart Site, at 4266 Germanna Highway, Locust Grove, Virginia, named "Susan's Flowers, Etc." The substantially increased traffic on Route 3 that will result from the Walmart at that location will interfere with her ability to deliver flowers to her customers. Walmart will also be a high-volume and low-priced competitor to her flower business, making it more difficult for her to continue in that business. The Walmart project will also substantially change the whole character of the area in which she lives and conducts her business.

14. Plaintiff Sheila Clark resides, and owns her home, at 117 Parliament Street, Locust Grove, Virginia 22508, which is in the Lake of the Woods subdivision. Her house is approximately 2.4 miles from the Walmart Site. She has standing to bring this legal challenge. She will be adversely impacted by the substantially increased traffic, noise and pollution that will result from the placing of the Walmart superstore and other developments on the Walmart Site. Among other things, the Walmart development will change the rural nature of the part of Orange County in which she lives. As a resident of the Lake of the Woods subdivision, moreover, she will be required to pay a substantial amount as part of the cost of upgrading the Keaton's Run dam in her subdivision as a result of the approval of the SUP. Under Virginia law, the residents of that subdivision will be responsible, through their homeowner's association, to pay 50% of the cost of upgrading that dam because part of the area covered by the SUP is in the "dam break inundation zone" and the development approved will change the spillway design flood standards of the dam. *See* VA. CODE §§ 10.1-606.3, 15.2-2243.1.

15. (a) Plaintiff Dwight L. Mottet resides, and owns his home, at 215 Creekside Drive, Locust Grove, Virginia 22508, which is in the Lake of the Wood subdivision. His house

is approximately 1.6 miles from the Walmart development. He has standing to bring this legal challenge. He will be adversely impacted by the substantially increased traffic, noise and pollution that will result from the placing of the Walmart superstore and other developments on the Walmart Site. Among other things, the Walmart development will change the rural nature of the part of Orange County in which he lives. As a resident of the Lake of the Woods subdivision, moreover, he will be required to pay a substantial amount as part of the cost of upgrading the Keaton's Run dam in his subdivision as a result of the approval of the SUP. Under Virginia law, the residents of that subdivision will be responsible, through their homeowner's association, to pay 50% of the cost of upgrading that dam because part of the area covered by the SUP is in the "dam break inundation zone" and the development approved will change the spillway design flood standards of the dam. *See* VA. CODE §§ 10.1-606.3, 15.2-2243.1.

(b) In addition, Mr. Mottet will be personally affected by the adverse impact the Walmart project will have on the Wilderness Battlefield, and particularly at Ellwood. Plaintiff Mottet is a director of Friends of Wilderness Battlefield, has contributed personal funds to the restoration of Ellwood, has devoted his personal time and efforts to raising money from others for that purpose and currently serves and has long served as an interpreter at Ellwood, educating members of the public about the Battle of the Wilderness and about the role Ellwood played in the battle. Among other adverse impacts on the Wilderness Battlefield that will result from the commercial development on the Walmart Site, his ability to appreciate and experience the Battlefield will be adversely impacted by the sharply increased commercialization and traffic at the intersection of Route 20 and Route 3. By degrading the experience of visitors to Ellwood, however, the

Walmart project will undermine Plaintiff Mottet's efforts to make Ellwood an attractive and educational place for other visitors to come to learn about the Battle of the Wilderness.

16. (a) Plaintiff Craig Rains resides, and owns his home, at 204 Fairway Drive, Locust Grove, Virginia 22508, which is in the Lake of the Woods subdivision off of Route 3 and slightly more than one mile from the Walmart Site. Mr. Rains has standing to bring this legal challenge. His house stands on one of the highest points in the Lake of the Woods, and he will suffer from enhanced light pollution caused by the Walmart development. He will also be adversely impacted by the substantially increased traffic and noise that will result from the placing of the Walmart superstore at its proposed location. As a resident of Lake of the Woods, he will be required to pay a substantial amount as part of the cost of upgrading the Keaton's Run dam in his subdivision as a result of the approval of the SUP. Under Virginia law, the Lake of the Woods residents, through their homeowner's association, will be responsible for 50% of the cost of upgrading the Keaton's Run dam because part of the area covered by the SUP is in the "dam break inundation zone" and the development approved will change the spillway design flood standards of the dam. *See* VA. CODE §§ 10.1-606.3, 15.2-2243.1. The Walmart project will also substantially change the whole character of the area in which he lives.

(b) In addition, Plaintiff Rains has a strong interest in the well-being of the Wilderness Battlefield. One of Mr. Rains' ancestors, a great granduncle, fought at the Wilderness in the 21st Virginia Infantry, under General Richard S. Ewell. Mr. Rains' decision to move to Orange County was driven primarily by its proximity to the National Military Park and the other Civil War sites in this area of Virginia. Mr. Rains is a director of the Friends of Wilderness Battlefield, and he has devoted his own time and efforts to raising money for the restoration of Ellwood and maintaining the Wilderness Battlefield, serving as an interpreter and tour guide to

educate members of the public about the Battle of the Wilderness and about the role Ellwood played in the battle and otherwise working for the preservation of Ellwood and its grounds.

Mr. Rains visits the Wilderness Battlefield approximately twice per week for various purposes, including evaluating the need for additional maintenance and upkeep and to experience the story of the Battle of the Wilderness. Among other adverse impacts on the Wilderness Battlefield that will result from the commercial development on the Walmart Site, his ability to appreciate and experience the Battlefield will be adversely impacted by the sharply increased commercialization and traffic at the intersection of Route 20 and Route 3, which is effectively the gateway to the Wilderness Battlefield, and by the sharply increased traffic through the Battlefield on Route 20. By similarly degrading the experience of other visitors to Ellwood and the Wilderness Battlefield, the Walmart project will also undermine Plaintiff Rains' efforts to make Ellwood and the Wilderness Battlefield an attractive and educational place for other visitors to come to learn about the Battle of the Wilderness.

17. The Defendant Board of Supervisors is the legislative body of Orange County, Virginia. It is charged with the responsibility of adopting, amending and administering zoning ordinances, zoning maps and comprehensive plans and other related subdivision and development ordinances, including the grant of special use permits, all pursuant to the statutes and/or Constitution of the Commonwealth of Virginia. The Board is capable of suing and being sued in its own name.

### **III. THE WILDERNESS AND CHANCELLORSVILLE BATTLEFIELDS AND THE WALMART SITE**

18. In May 1864, General Ulysses S. Grant led the Union's Army of the Potomac across the Rapidan River, headed for Richmond, Virginia in what was the beginning of a year-long series of battles that brought an end to the Civil War, in which more Americans died than in

any other war in the history of the United States of America. The bulk of Grant's army travelled from the river crossing on Germanna Plank Road, which is now Route 3, into Orange County. The Confederate Army of Northern Virginia under General Robert E. Lee attacked the Union Army as it was crossing through the Wilderness, a densely thicketed area along the Germanna Plank Road. The principal Confederate assault came from the southwest along what was then called the Orange Turnpike, what is now Route 20. The Union Army turned to face the assault, leading to one of the most horrendous and bloody battles of the Civil War, known as the Battle of the Wilderness.

19. A substantial portion of the Battle of the Wilderness was fought on or immediately adjacent to what is now Route 20. That road was itself the route along which attacks and counter-attacks were conducted, a short distance from the Walmart Site.

20. Today, most of the visitors to the Wilderness Battlefield enter it through the intersection of Route 20 and Route 3, which serves as the gateway to that Battlefield. Route 3, running at this location northwest and southeast, is the major route to the battlefield from Culpeper, Virginia and from Fredericksburg, Virginia and Interstate 95. Route 20, a two-lane road, starts at its intersection with Route 3 and generally runs southwest from there, to the Town of Orange, Virginia and beyond. The intersection of Route 3 and Route 20 is mostly undeveloped, although marred by some commercial development.

21. A short distance to the east along Route 3 from that intersection is also where the Battle of Chancellorsville had been fought the previous year, in May 1863. It had been a tremendous victory for the Army of Northern Virginia. Confederate troops had occupied what is now the Walmart Site during that battle. General Thomas J. ("Stonewall") Jackson was mortally

wounded in that battle, and he was brought to the Wilderness Tavern close to the Walmart Site, where his arm was amputated.

22. In 1927, Congress established the National Military Park to commemorate, among other things, the Wilderness and Chancellorsville Battles. 16 U.S.C. § 425. The Walmart Site is immediately across Route 3 from the boundary of the National Military Park.

23. In 1990, Congress established the Civil War Sites Advisory Commission (the “CWSAC”) to identify this Nation’s historically significant Civil War sites and assess threats to their integrity, among other things. 16 U.S.C. § 1a-5 note. In establishing the CWSAC, Congress found that “many sites ... associated with the Civil War which represent important means by which the Civil War may continue to be understood and interpreted by the public are located in regions which are undergoing rapid urban and suburban development.” *Id.* § 1203(1).

24. In 1993, the CWSAC issued its report to Congress. The CWSAC identified Wilderness and Chancellorsville Battlefields as among that elite class of Civil War battlefields which possess the highest level of historical significance and merit the highest priority for preservation, referred to as “Priority 1, Class A Battlefields.” The CWSAC classified battlefield lands based on a careful examination of official records and other sources and using established survey and evaluation criteria. While certain areas were identified as “core area,” essentially where the actual combat occurred, a broader area was categorized as the “study area,” which includes other areas where troops were deployed and maneuvered and which provide more of the tactical context of the battle than does the core area alone. The “Wilderness Battlefield,” as used herein, shall mean the whole area comprising that battlefield as identified in the CWSAC 1993 report.

25. The Walmart Site is located directly within the “study area” of both the Wilderness Battlefield and the Chancellorsville Battlefield as established by the CWSAC. That site is accordingly within the officially-recognized historic boundaries of both of those battlefields, which are not the same as the boundaries of the National Military Park established decades earlier. In addition, the Walmart Site is directly adjacent to the core area of the Wilderness Battlefield, where fierce combat took place. The CWSAC made clear that both the “study area” and “core area” are critical to understanding the significance of Civil War battlefields and interpreting the conflicts that occurred there. For Priority 1, Class A Battlefields such as the Wilderness and Chancellorsville Battlefields, even the “study area” should be treated with special consideration and sensitivity to its historic importance.

26. Little more than one-quarter mile southwest along Route 20 from the intersection of Routes 3 and 20 is the driveway to Ellwood, the only structure standing today that existed at the time of the Battle of the Wilderness. The summer home at that time of the Lacy family, Ellwood played an important role during the battle. Owned by the National Park Service and located within the National Military Park, Ellwood is currently being restored to its appearance at the time of the battle and is being converted into a significant center for visitor education about the Battle of the Wilderness. The National Park Service is spending hundreds of thousands of dollars for the development of electronic demonstratives about the battle, which are to be housed at Ellwood.

27. During the battle, the Union Army’s 5th Corps under General Gouverneur Warren had its headquarters at Ellwood. General Grant’s headquarters were a few hundred yards from Ellwood, just across what is now Route 20 and, again, little more than one-quarter mile from the intersections of Routes 3 and 20 where the Walmart Site is located. The Confederate Army’s 2d

Corps under General Richard S. Ewell had its headquarters further southwest along what us now Route 20.

28. An area on both sides of Route 20, known as Saunders Field, constituted one of the few clearings on the Wilderness Battlefield. Saunders Field was the location of horrendous warfare. One of the principal chroniclers of the Battle of the Wilderness, Gordon C. Rhea, based on contemporary sources, described the scene after one Union charge across that field as follows:

As refugees from the shattered Union charge began to straggle in, the magnitude of the repulse became evident. The turnpike behind [Union General Warren, whose headquarters were at Ellwood] was clogged with ambulances and wounded men on foot asking directions to the 5th Corps' hospital. Rough tables had been erected under trees where surgeons were hacking off arms and legs in an effort to save lives. Shrieks and groans rent the air. Piles of severed limbs rose higher by the minute. Regiments were decimated.

GORDON C. RHEA, *THE BATTLE OF THE WILDERNESS, MAY 5-6, 1864* at 156 (2004).

29. On May 6, 1864, the Confederate Army broke through the Union lines just north of Route 20, pushing some Union forces back across what is now Route 3 into the area of the Walmart Site. Union troops constructed earthworks and trenches across what is now Route 3, within 100 feet of what is now that site. Union troops and artillery were also pushed back onto the grounds of Ellwood. Its floors were stained with blood, and graves of soldiers dotted its grounds.

30. During the Battle of the Wilderness, what is now the Walmart Site was accordingly close to the actual combat and formed part of the continuous landscape that stood between the right flank of the Union line and the main rear area of the Union army. The Walmart Site at the time of that battle had been cleared of trees, one of the few clearings available in the heavily-forested vicinity. That Site was accordingly an important area for the maneuvering of troops and artillery — before, during and after the battle. The Site was also

important as an area for hospitals and prisoners behind the battle lines. One of the Union hospitals was located in the immediate vicinity of the Walmart Site. American soldiers undoubtedly died, were treated for the wounds or lost their limbs on or very close to that Site.

31. On May 7, 1864, the area around the intersection of Germanna Plank Road and Orange Turnpike (where modern Routes 3 and 20 now meet) was the site of a dramatic further development in the strategic direction of the Union War effort. After all prior battles between the Union Army of the Potomac and Robert E. Lee's Confederate Army in Virginia, the Union Army had failed to advance south, closer to their objective of the Confederate capitol in Richmond. As the Union Army was leaving the field of battle in the Wilderness on that day, however, General Grant ordered his army to march south, signaling that, this time, the army would continue to move toward Richmond. His strategic direction, which elicited a cheer from the troops, signaled the start of the bloody Overland Campaign, leading eventually, after a series of further battles, to the surrender at Appomattox Court House. Nearly three quarters of the Union Army passed the area of this intersection on its way south from the battlefield, leaving behind many of those who fell in the battle. Despite being marred by some commercial development, that area and site largely maintain its wartime appearance and rural character. Its utility as a heritage tourist destination and as the gateway to the Wilderness Battlefield, however, would be significantly degraded by the intense development approved by the Board on the Walmart Site.

#### **IV. THE WALMART APPLICATION AND THE COUNTY'S ACTION ON THE SUP**

32. In 2007, Walmart began discussing with the officials of Orange County the proposed development of what became the Walmart Site. The proposal would permit more than

225,000 square feet of a Walmart superstore and other retail operations to be built and operated on a 52-acre tract at the intersection of Routes 20 and 3.

**A. The Board of Supervisors' Inadequate Amendments to the County's Zoning Ordinance in Anticipation of the Walmart Application**

33. The Code of Virginia, Section 15.2-2283, requires that zoning ordinances "shall be designed to give reasonable consideration to each of the following purposes, where applicable: ... (v) to protect against destruction of or encroachment upon historic areas ...." The need for such protection is applicable in Orange County. As its Comprehensive Plan states, "Orange County is rich in history," but "[m]any of the county's important historic resources are at risk." Nevertheless, nowhere in the County's zoning ordinance are there any requirements, procedures, standards or other provisions designed to ensure that reasonable consideration is given to the protection of historic areas against destruction or encroachment.

34. As a result of initial discussions with Walmart, the Board amended the County's zoning ordinance. But the Board did not amend the zoning ordinance to include any requirements, procedures, standards or other provisions designed to ensure that reasonable consideration was given to the protection of historic areas against destruction or encroachment.

35. Instead, the Board only amended the County's zoning ordinance to require proposals for "large retail use" to submit a special use permit application and site plans. ORANGE COUNTY CODE §70-582. That provision contains no substantive requirements, other than that proposals for "large retail use" must comply with guidelines adopted by the Board.

36. Shortly thereafter, the Board adopted "Large Retail Use Design Guidelines." Despite the fact that the site of the proposed Walmart superstore was an integral part of two Civil War battlefields, the Board of Supervisors imposed no requirements, in Section 70-582 of the

Orange County Code or in the Large Retail Use Design Guidelines, for the assessment of the historical significance of that or other sites of proposed large retail uses.

**B. The Board of Supervisors' Failure to Comply With the County's Comprehensive Plan in Anticipation of the Walmart Application**

37. The County's zoning ordinance requires that, in acting on a special use permit application, the Board of Supervisors "shall consider whether the proposed use would further the purposes of the comprehensive plan," among other things. ORANGE COUNTY CODE § 70-141.

38. In 2006, Orange County adopted a Comprehensive Plan as required by state law. VA. CODE § 15.2-2223. The Plan was subsequently amended in 2007 and in January 2009.

39. The Comprehensive Plan recognized that "Orange County is rich in history," containing historic resources including Wilderness Battlefield. Comprehensive Plan at 23. One of the objectives of the Plan was to "promote preservation of appropriate historical sites, areas and buildings." *Id.* at 50.

40. To implement that objective, the Comprehensive Plan adopted several strategies, including to "develop a long-term historic plan, including developing a comprehensive battlefield resource protection plan for civil war sites," and to "create corridor overlay districts for roads adjacent to or leading to significant historic sites." The Walmart Site is a Civil War site, as established by the CWSAC. Routes 20 and 3 are adjacent to and lead to significant historic sites, including the Wilderness and Chancellorsville Battlefields.

41. In preparation for its consideration of the Walmart Application, the Board of Supervisors took no steps to carry out the Comprehensive Plan's strategy of first developing a long-term historic plan, a comprehensive battlefield resource protection plan for Civil War sites such as the Wilderness Battlefield or corridor overlay districts for roads adjacent to or leading to significant historic sites, such as the Wilderness Battlefield.

42. A group of historic preservation organizations offered to pay the cost of engaging in such a planning process for the gateway to the Wilderness Battlefield, but the Board rejected their offer of assistance, leap-frogged over that deliberative first step and moved directly to action on the Walmart Application.

**C. The Walmart Application Is Filed**

43. The Walmart Application was initially filed in 2008 and was revised and re-submitted in early 2009. The Application described the project as including the construction of an approximately 133,481 square foot Walmart superstore plus 4,748 square feet of outdoor garden center. The Application made clear that restaurants and additional retail stores were contemplated on the Walmart Site, adding nearly 100,000 additional square feet of retail and retail servicing space. Vast parking lots would also be built on the site.

**D. The Absence of a Valid and Effective Recommendation of the Planning Commission**

44. The Walmart Application was referred to the Planning Commission for its recommendation. The Code of Virginia and the Orange County Code of Law require that the Planning Commission vote on a recommendation to the Board of Supervisors before it may take action on a special use permit. VA. CODE § 15.2-2285.B; ORANGE COUNTY CODE §§ 70-141, 142.

45. The Planning Commission never took a valid and effective vote on the Walmart Application.

- (a) On June 25, 2009, the Planning Commission purported to take a vote on the Walmart Application, but it was later found to have been an invalid vote because proper notice of that meeting had not been given to the public. When that defect

was discovered, the Board of Supervisors postponed at the last minute the public hearing and meeting it had scheduled to consider on the Walmart Application on July 24, 2009.

- (b) The Planning Commission held a public meeting on August 20, 2009 to vote on the Walmart Application, but the vote at that meeting was four members in favor of recommending approval of the Application and four members voting against making such a favorable recommendation. Under the Code of Virginia, a majority of members present must vote for a recommendation, whether positive or negative, for it to be an official act of the Planning Commission. VA. CODE § 15.2-2215. The vote taken on August 20, 2009 was therefore not a valid and effective action of the Planning Commission. Nevertheless, the chairperson announced that the Application would “go forward” to the Board of Supervisors, and the meeting was adjourned.
- (c) Notice had been given that a special meeting of the Planning Commission would be held on August 21, 2009 “in the event that [the Planning Commission] needs additional time after the public hearing on August 20, 2009 to take action on SUP 08-07.” Because at least some of the members of the Planning Commission understood that additional time was not needed after the hearing of August 20, 2009 for the Planning Commission to take action, those members of the Planning Commission understood that there would not be another meeting held on August 21, 2009. Members of the Planning Commission and the public were led to believe at the meeting of August 20, 2009 that the meeting would not be held on August 21, 2009.

- (d) Shortly before the noticed time for the August 21, 2009 meeting, some members of the Planning Commission, but not all, were advised that that meeting would in fact be held. Reasonable notice under the circumstances that the August 21, 2009 meeting would be held was not given to the public or to members of the Planning Commission, particularly those known to be opposed to the Walmart Application. The meeting purportedly held on August 21, 2009 was accordingly not legally held, and no vote taken there constituted valid action of the Planning Commission.
- (e) On August 21, 2009, 6 of the 11 members of the Planning Commission attended a purported meeting of the Commission. The four members who had voted in favor of the Walmart Application were present, but only one of the four who had voted against the Application was present. Five members voted in favor of a recommendation of approval of the Walmart Application. One member present voted against making such a recommendation.

46. At its August 24, 2009 meeting, the Board of Supervisors claimed that the Planning Commission had recommended approval of the Walmart Application, which was not true.

**E. The Board of Supervisors Votes to Approve the SUP**

47. On August 24, 2009, the Board of Supervisors met and heard comments from the public on the Walmart Application. After hearing such comments, the Board discussed and voted on the Application. That vote was not taken until after midnight. The Board continued the meeting into the early morning hours of August 25, 2009 to complete its action. By that time, almost all members of the public had left the meeting.

48. Four members of the Board of Supervisors voted to grant the SUP, and one member voted against. The SUP was subject to a set of conditions that, if violated, would cause the revocation of the SUP.

**V. THE BOARD OF SUPERVISORS GAVE INADEQUATE CONSIDERATION TO MATERIAL FACTORS IN APPROVING THE APPLICATION**

49. Early in the process described above, a majority of the members of the Board of Supervisors publicly announced that they would support the Walmart Application. The Board of Supervisors was so determined to approve that Application that it tolerated no dissent from its staff and failed to gather and/or to consider critical facts relevant to the decision to be made.

**A. The Board's Flawed Consideration of the Supposed Economic Benefits of the Walmart Application**

50. The majority of the Board of Supervisors favored the Walmart Application because it would supposedly bring additional tax revenues and jobs to Orange County, but the Board never undertook a comprehensive analysis of those supposed benefits. Instead, the Board of Supervisors relied entirely in this regard on a fiscal impact analysis submitted by Walmart.

51. The County's Comprehensive Plan established "guidelines for development proposals," requiring all such proposals to be accompanied by a "fiscal impact analysis." The guidelines require that such an analysis include both the positive and the negative impacts of a proposed development on public revenues and on public costs. Comprehensive Plan at 92-93.

52. Walmart's fiscal impact analysis, however, only analyzed supposed positive benefits of the approval of the SUP. The Board of Supervisors neither required Walmart to address negative and offsetting impacts nor commissioned an independent assessment of those factors from independent experts. Nor, on information and belief, did the Board of Supervisors otherwise consider such negative and offsetting factors. For example:

- As the Walmart report recognized, “[i]f the new development simply displaces existing retail trade, ... its net economic impact on the community could be close to zero.” The report made no attempt, however, to estimate the extent of likely losses of existing business revenues or the net gain in projected revenues. In fact, it is highly probable that the Walmart project would drive out a large proportion of local businesses.
- The report failed to recognize that tourism is one of Orange County’s largest industries and failed to estimate the adverse tax revenue impact on County tourism from the adverse impacts the Walmart project would have on the County’s historical resources.
- The report made no attempt to estimate the offsetting impacts resulting from additional costs the County would need to incur to provide police, fire and other services to a mega-store at this location.
- While the Walmart analysis projects an increase in jobs as a result of the Walmart project, the assessment made no attempt to identify what portion of those jobs would be filled by residents of Orange County, as opposed to residents of Spotsylvania or Culpeper Counties.

53. The Board was well aware of the inadequacies of the Walmart fiscal impact analysis on which the Board relied. County officials had previously insisted on a condition in the SUP that Walmart “provide mitigation of its impact on local law enforcement services, to include: Full funding for a period of five (5) years for two (2) full-time deputy sheriff positions, one (1) full-time communication officer, vehicles and equipment,” an amount totaling \$786,000

over the 5-year period. At the last minute, however, the Board of Supervisors deleted this condition from the SUP.

**B. Even in the Face of Widespread Opposition from Experts and Government Leaders, the Board Failed to Obtain Critical Information about the Historical Importance of the Walmart Site and of the Impacts of Approving the SUP on the National Military Park**

54. The Walmart Application produced an outcry of opposition because of the historic importance of the Site and the adverse impact of the Walmart project on the Wilderness Battlefield. But the Board of Supervisors brushed off the facts and expert opinions provided to them and failed to take steps to evaluate those concerns.

- (a) By letter of July 13, 2009, Virginia Governor Timothy M. Kaine and Speaker of the House William J. Howell wrote the Board of Supervisors “strongly encourag[ing] your Board to work closely with Walmart to find an appropriate alternative site for the proposed retail center in the vicinity of the proposed site yet situated outside the boundaries of Wilderness Battlefield and out of view of Fredericksburg and Spotsylvania National Military Park.”\* Governor Kaine and Speaker Howell stated that they “stand ready to offer the technical services of any and all state agencies” to achieve that objective.\* The Board of Supervisors brushed off that letter and effectively rejected that offer.
- (b) By letter of December 9, 2008, some 250 noted historians and other experts on the Civil War wrote to Walmart’s President and Chief Executive Officer. They wrote to “urge you in the strongest possible terms to pursue alternate building locations for the Walmart Supercenter proposed in Orange County, Virginia.”\* They

---

\* Emphasis added.

objected that the site “lies within the historic boundary of the Wilderness Battlefield and only one quarter mile from the current boundary of the Wilderness Battlefield unit of the Fredericksburg and Spotsylvania National Military Park.” They stressed the historical importance of the Wilderness Battle and expressed their view that the proposed location would greatly increase traffic through the area and encourage further development to encroach upon and spoil the battlefield, thereby seriously degrading the experience of visitors.

- (c) By letters of May 20, 2009 and June 8, 2009, the Department of Historic Resources of the Commonwealth of Virginia wrote officials of Orange County stating, among other things, that “construction of a Walmart facility at the scale on the site proposed will, in our professional judgment have a serious adverse effect both on the Wilderness Battlefield and on the National [Military] Park.”\*

The Department further expressed its view that, because “the proposed project involves placement of a large ‘big box’ commercial development, with attendant and secondary commercial development sites in the midst of and on Register-eligible battlefield lands, the impact is direct and adverse, notwithstanding Walmart’s offer to set aside a major portion of the development parcel as a conservation area. ...A direct adverse effect of this magnitude and of this scale cannot be mitigated successfully with building and landscape design treatments; the project constitutes a large-scale alteration of an historic landscape.”\*

Nevertheless, the Board of Supervisors gave little or no weight to the views of the Department of Historic Resources, required no further analysis or investigation of

---

\* Emphasis added.

the historic importance of the Walmart Site and brushed aside concerns about that issue. A County staff person merely made an unannounced visit to the Department's archives and had an impromptu discussion with the archivist and others who happened to be available.

- (d) The Superintendent of the National Military Park similarly informed the County that “the proposed development will have serious impacts on Wilderness Battlefield and will degrade the overall experience of visitors to the Battlefield and to Orange County.” He also objected that, if the proposed development is approved, it would significantly impact the impression of visitors to the National Military Park when entering the primary gateway to Wilderness unit of the Park, which is at the intersection of Route 3 and Route 20. The Board never even responded to his letters in that regard or otherwise engaged with him to understand his objections. The Superintendent was merely permitted to be heard at public meetings with the same three-minute time limit as other speakers, which was an inadequate amount of time to address such significant issues.
- (e) The official unit of the National Park Service charged with assisting governments at all levels, including the county level, in planning, interpreting and protecting sites where historic battles were fought, known as the American Battlefield Protection Program, *see* 16 U.S.C. § 469k-1(a), similarly stated in July 2009 that the Walmart Application presents “serious threats to surviving land at the Wilderness. Immediate preservation measures are necessary to save this nationally-significant battlefield.”\*

---

\* Emphasis added.

(f) Congressmen from states whose soldiers fought and died in the Wilderness Battlefield wrote to the President of Walmart, expressing their “profound disappointment in your company’s decision to locate a new store near the Wilderness battlefield in Virginia and urge your immediate reconsideration.”\*

Indeed, the Senate of the State of Vermont adopted a resolution urging the Orange County Board of Supervisors to protect the historic ground of the Wilderness Battlefield. Copies of these documents were provided to the Board of Supervisors.

55. The Board of Supervisors, however, ignored these critical historical facts and (apart from an inadequate Walmart visual impact study) made no effort to evaluate the importance of the Walmart Site as part of this larger context or to evaluate the impact of the Walmart development on the Wilderness Battlefield.

56. The Board of Supervisors relied almost entirely, as to impacts on historical resources, on a report prepared for and submitted by Walmart on an archeological study conducted on the Walmart Site. But that report did not even analyze the issue of the impact of the proposed Walmart superstore and related developments on the National Military Park, despite the fact that the Walmart Site is directly across Route 3 from the National Military Park, is at the gateway to the National Military Park and is immediately adjacent to the area in which actual combat occurred during the Battle of the Wilderness. The report instead was addressed solely to the issue of whether or not the Walmart Site itself is eligible for listing in the National Register of Historic Places. That issue is far narrower than the issues the Board of Supervisors

---

\* Emphasis added.

should have considered in determining whether approval of the Walmart Application would adversely impact the County's historic resources.

57. Nevertheless, the Walmart report affirmed that the boundaries of both the Wilderness Battlefield and the Chancellorsville Battlefield "extend over the entire area including the project parcel." The report also explained that "troops moved extensively along what is today the Route 3 corridor and camped in the general area." But the report's authors sought to downplay the significance of those facts by noting the irrelevant fact that the project parcel is not within the boundary of the National Military Park. Moreover, the report found several archeological sites on the Walmart parcel that "appear to have both high physical integrity and significant historic data potential" and were found to contain Civil War artifacts, a bivouac associated with General Grant's occupation and a historic road trace.

58. The Board of Supervisors did require Walmart to conduct a visual impact study to assess the visual impact of the Walmart project on the National Military Park. But that visual impact study failed to take into account the National Park Service's plan to restore the viewshed from Ellwood in the direction of the Walmart project by removing trees which had not been present during the Wilderness Battle. The Virginia Department of Historic Resources criticized Walmart's visual impact study and stated that "at a minimum, the Department would have to recommend that an independent professional assessment be undertaken to settle the question of the visual impacts of the proposed development" on the National Military Park. No such independent visual impact study was ordered by the County.

59. Among other things, the Board of Supervisors failed to obtain any evaluation of, and failed to consider, the impact on the National Military Park of the enormous increase in traffic that will result from the SUP's approval. Walmart's traffic impact study, submitted with

its Application, predicts that approximately 2,000 additional motor vehicles per day will drive to and from the Walmart development on Route 20 through the Wilderness Battlefield unit of the National Military Park, directly through Saunders Field where so many lost their lives or limbs. During peak Saturday hours, the traffic is projected to be far worse. The substantial additional traffic along what was once the actual location of one of the Civil War's most horrendous and bloody battles will substantially increase noise and air pollution there, interfering with the ability of visitors to appreciate the immensity of what occurred there, and will create safety hazards for visitors to that area of the battlefield. The safety of visitors would be greatly compromised, particularly at the entrance to Ellwood and at the National Park Service interpretative site at Saunders Field, with an increase of 2,000 vehicles on a typical day, and more on weekends, the prime visitation time for these areas.

60. Such a large increase in traffic would also significantly and adversely impact the number of "destination" or planned visits to Ellwood and to the Battlefield, the number of "passer-by" or impulse visits, and the number of return visits to Ellwood and other sites along Route 20 within the Wilderness Battlefield.

61. The enormous increase in traffic at the intersection of Routes 3 and 20 will also significantly and adversely affect that intersection's service as a gateway to the Wilderness unit of the National Military Park. That intersection will instead become a heavily commercialized and heavily trafficked center of noise, pollution and activity that will significantly detract from the ability of visitors to appreciate the enormous sacrifices of the soldiers who died or were significantly injured on that Battlefield.

**C. The Board of Supervisors Failed to Obtain Sufficient Information About the Adverse Impact on the Eastern Portion of Orange County and on Those Who Live and Work There**

62. The Board of Supervisors also failed to give due consideration and inquiry into the substantial adverse impacts of approving the SUP on residents of the eastern portion of Orange County and on those who work there.

63. The Walmart project will totally change the whole character of the eastern part of Orange County. Among other things, the Walmart development will bring substantial traffic congestion to the Route 3 corridor, along with additional noise and pollution.

64. One adverse impact on the residents of the Lake of the Woods subdivision near the Walmart Site is that they will be responsible to finance 50 percent of the substantial cost of upgrading the dam on Keaton's Run in their subdivision. Under Virginia law, the Lake of the Woods residents, through their homeowner's association, will be responsible for 50% of the cost of upgrading the Keaton's Run dam because part of the area covered by the SUP is in the "dam break inundation zone" and the development approved will change the spillway design flood standards of the dam." *See* VA. CODE §§ 10.1-606.3, 15.2-2243.1. Not only are the residents of that subdivision being adversely impacted by the traffic, noise, congestion and pollution that will be increased by approval of the SUP, but they will likely be required to pay thousands of dollars each as a result of the Walmart development.

**D. The Board Violated the County Code by Requiring an Unlawful Access Road Across Adjacent Residentially-Zoned Land**

65. The Walmart Application proposed to build a four-lane access road connecting Route 3 to the Walmart Site and traversing Adjacent Property to the west of that site. The purpose of that access road would be to provide a vehicular connection between Route 3 and the commercial developments on the Walmart Site, for use by commercial visitors to that site. The

owner of that Adjacent Property was not a party to the Walmart Application. That Adjacent Property is zoned R-1, for residential use.

66. On information and belief, that access road was proposed to meet the objections of the Virginia Department of Transportation (“VDOT”) to the initial version of the Walmart Application.

67. By late July 2009, Walmart had not obtained the agreement of the owner of the Adjacent Property to permit such an access road. Walmart therefore objected to being required, as a condition to the SUP, to construct that access road. VDOT, however, refused to relent in its insistence on such an access road, stating that, without that condition, VDOT would require additional improvements to be made at the intersection of Routes 3 and 20 to address traffic concerns.

68. The Board was well aware that it had recently been found by the Virginia Supreme Court to have violated the Orange County Code by permitting a similar commercial access road across residentially-zoned land. *See Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005).

69. Nevertheless, rather than attempting to address VDOT’s concerns about traffic impacts in a manner that did not violate the Orange County Code, the Board brushed off objections to the Walmart Application based on that case.

70. Accordingly, the Board conditioned its approval of the SUP on the construction of the commercial four-lane access road across the residentially-zoned Adjacent Property.

**E. The Board Abdicated Its Duties to Obtain and Consider All Material Information Concerning Adverse as Well as Supposed Positive Benefits of the Walmart Project, Even Firing The County Administrator for Suggesting an Alternative Walmart Location**

71. The Board of Supervisors' failure adequately to obtain information concerning possible negative impacts of the Walmart project reflects the Board majority's determination to proceed with approval of the Walmart Application at whatever cost to the historic resources and to residents of the County.

72. The Board majority was so determined to overcome all obstacles to approval of the Walmart Application that it fired the Administrator of Orange County for having the temerity even to suggest to the Board privately that the Walmart project should not be located at the Walmart Site, but instead at a site further away from the National Military Park.

73. It is the duty of the Board of Supervisors to obtain material, relevant information, both positive and negative, and to hear opposing views when considering a proposal having such a significant impact on the County, its residents and, in particular, the historic resources having nationwide, statewide and local importance. The Board of Supervisors abdicated its responsibilities in that regard.

**COUNT I**

**(The Board of Supervisors' Manner of Deciding to Grant the SUP and the Decision They Made Were Unreasonable, Arbitrary and Capricious and Not Reasonably Related to the Public Health, Safety, Morals and General Welfare)**

74. Paragraphs 1-73 above are incorporated by reference.

75. The manner in which the Board of Supervisors considered the Walmart Application was unreasonable, arbitrary and capricious and was not reasonably related to the public health, safety, morals and general welfare. Having already publicly announced its support for approval of the Application, the Board failed to gather before it critical information material,

but adverse, to approval, closed its mind to any opinion or information adverse to the Application proffered by others and relied on one-sided reports submitted by Walmart without a critical independent evaluation.

76. Among other things as set forth above, the Board failed critically to evaluate the true economic and fiscal impact of the Walmart project on the County; failed adequately to investigate and evaluate the historical significance of the Walmart Site or the Walmart project's impact on the Wilderness Battlefield and on the National Military Park; failed adequately to consider the cost to and adverse impacts on residents of the County of the Walmart development project; failed to comply with the County's Comprehensive Plan; failed to adopt required provisions in the County's zoning ordinance to assure proper consideration of impacts on historic areas; and failed to accept reasonable offers of assistance in carrying out its duties.

77. By the manner in which the Board processed and decided the Walmart Application, the Board abdicated its responsibilities to protect the County's historic resources and to protect the interests of its citizens. Particularly in light of the nationwide, statewide and countywide importance of the issues raised by the Walmart Application, the Board of Supervisors' single-minded pursuit of approval of the Application without conducting a careful evaluation rendered the process followed by the Board under the circumstances to be, and to render the resulting Board approval, unreasonable, arbitrary and capricious and not reasonably related to the public health, safety, morals and general welfare.

78. Apart from the inadequate process employed, the decision made by the Board on the Walmart Application was itself unreasonable, arbitrary and capricious and was not reasonably related to the public health, safety, morals and general welfare. The Board gave undue weight to the supposed but inadequately evaluated economic benefits to the County of the

Walmart project and brushed aside and gave inadequate weight to the substantial negative impacts of the Walmart project. In this regard, the Board gave little or no weight to the views of the U.S. National Park Service, the Virginia Department of Historic Resources, numerous prominent Civil War historians, the Governor of the Commonwealth of Virginia and the Speaker of its House of Delegates, U.S. Senator James Webb and others concerning the adverse impact of the Walmart project on the Wilderness Battlefield and the National Military Park. Moreover, the Board gave little or no consideration to the substantial adverse impact of the Walmart project on the eastern portion of the County, including by reason of an enormous increase in traffic in that part of the County, with its consequent congestion, noise and pollution.

## **COUNT II**

### **(No Valid Recommendation Was Made to the Board of Supervisors by the Planning Commission as Required by Law)**

79. Paragraphs 1-78 above are incorporated by reference.
80. Virginia law required that the recommendation of the Orange County Planning Commission be obtained before the Board of Supervisors could vote on the Walmart Application and the proposed SUP. VA. CODE § 15.2-2285.B, ORANGE COUNTY CODE §§ 70-141, 142.
81. No valid and effective recommendation of the Orange County Planning Commission was obtained on the Walmart Application or the proposed SUP.
82. Accordingly, the Board of Supervisors' vote purporting to adopt the SUP was invalid.

### **COUNT III**

#### **(Unlawful Zoning Ordinance for Failing to Comply with VA. CODE § 15.2-2283)**

83. Paragraphs 1-82 above are incorporated by reference.
84. Section 15.2-2283 of the Code of Virginia requires that zoning ordinances “shall be designed to give reasonable consideration,” where applicable, to the objective of protecting “against destruction of or encroachment upon historic areas.”
85. Orange County’s zoning ordinances have no provisions designed to give reasonable consideration to the objective of protecting against destruction of or encroachment upon historic areas.
86. The objective of protecting against destruction of or encroachment upon historic areas is applicable to Orange County, which has substantial historic resources. Wilderness Battlefield, including the Walmart Site, is such an historic area, including the Walmart Site.
87. Accordingly, Orange County’s approval of the SUP under an ordinance which failed to comply with Section 15.2-2283 was invalid.
88. In addition, the zoning ordinance of Orange County is invalid to the extent it is sought to be applied to any land which is on, or is on the approaches to, historic areas.

### **COUNT IV**

#### **(The SUP Unlawfully Requires the Construction of a Commercial Access Road Across Residentially-Zoned Land)**

89. Paragraphs 1-88 above are incorporated by reference.
90. As a condition to its approval of the SUP, the Board of Supervisors required that Walmart build a four-lane road across the Adjacent Property to connect Route 3 to the Walmart Site for use by commercial traffic visiting the Walmart Site.

91. The Adjacent Property across which the access road is required to be constructed is zoned R-1, for residential use. It is unlawful for the Board of Supervisors to authorize, much less require, a developer to build a commercial access road across residentially-zoned land.

92. The Board of Supervisors of Orange County had previously approved a special use permit in a similar situation, namely where a commercial access road would run through property zoned for limited residential use. In 2005, the Virginia Supreme Court held that the Board of Supervisors had violated Orange County's Code, which prohibited permitting such an access road across residentially zoned property, even with the agreement of the owner of the property. *See Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005). Yet when that recent decision was called to the attention of the Board of Supervisors in 2009, it brushed aside objections to the Walmart Application on this ground.

93. By mandating construction of a commercial access road across residentially zoned property as a condition to the SUP, the Board of Supervisors has knowingly repeated the very action found to violate the Orange County Code in *Capelle*.

94. Because a condition of the SUP violates the Orange County Code, as found in *Capelle*, the SUP violates the County Code and is invalid.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court issue a *writ of certiorari* directed to the Board of Supervisors of Orange County commanding it, within the time limits of Section 70-92 of the Code of Ordinances of Orange County after service thereof, to return to Plaintiffs' attorney and the Court certified copies of the entire record in the matter in which this appeal has been taken. Plaintiffs further respectfully ask this Court to enter an order:

- (i) finding and declaring that the Board of Supervisors' approval of the SUP was unlawful and invalid;
- (ii) enjoining Orange County, Virginia from taking any further official action pursuant to the SUP, including approval of site plans or other permits or applications pursuant to that SUP;
- (iii) finding and declaring that the Orange County zoning ordinance is unlawful and invalid to the extent it is sought to be applied to any land which is on, or is on the approaches to, historic areas;
- (iv) enjoining Orange County, Virginia from taking any official action pursuant to the County's zoning ordinance relating to any application for County action concerning land which is on, or is on the approaches to, historic areas unless and until the County complies with the requirements of Section 15.2-2283 of the Code of Virginia; and

- (v) granting Plaintiffs such other relief as the Court finds to be equitable and appropriate to serve the interests of justice and implement the applicable provisions of law.

Respectfully submitted,

/s/ Randall K. Miller

Randall K. Miller (VSB 70672)

Nicholas M. DePalma (VSB 72886)

ARNOLD & PORTER LLP

1600 Tysons Boulevard, Suite 900

McLean, VA 22102-4865

Main: 703.720.7000

Direct: 703.720.7030

Facsimile: 703.720.7399

Email: Randall.Miller@aporter.com

Email: Nicholas.DePalma@aporter.com

Robert D. Rosenbaum \*

ARNOLD & PORTER LLP

555 Twelfth Street, NW

Washington, DC 20004-1206

Main: 202.942.5000

Direct: 202.942.5862

Facsimile: 202.942.5999

Email: Robert.Rosenbaum@aporter.com

Dated: September 23, 2009

---

\* Subject to admission *pro hac vice*.