

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

Applicant:	Maryland-National Capital Park and Planning Commission
LMA No. & Date of Filing:	G-868, filed June 27, 2010
Zoning and Use Sought:	Zone: C-1 Use: Convenience Commercial
Current Zone and Use:	Zone: C-4 Current Use: The eastern (corner) parcel, owned by Bardon, Inc., is vacant; the western parcel, owned by Travillah-WHM, ¹ has four structures, one of which is used by a dry-cleaners. The others consist of two residential style frame structures and one storage facility.
Rezoning Method:	To correct a mistake in LMA G-653, later confirmed in the comprehensive rezoning, SMA G-800
Location:	14119 Travilah Road and 14000 Piney Meetinghouse Road, Rockville, Maryland
Applicable Master Plan:	<i>Potomac Subregion Master Plan</i>
Area to be Rezoned:	3.54 acres
Traffic and Environmental Issues:	None
Zoning Issue:	Whether Applicant has established a mistake in Local Map Amendment (LMA) G-653, and the comprehensive rezoning approved in Sectional Map Amendment (SMA) G-800. The asserted mistake is that neither of the roadways on which the site has frontage, Travilah Road and Piney Meetinghouse Road, is a major or arterial highway, and the C-4 Zone requires 100 feet of frontage on a major or arterial highway for a building permit to issue. Zoning Ordinance §59-C-4.375.
Consistency with Master Plan:	The proposed rezoning is consistent with the general objectives of the <i>Potomac Subregion Master Plan</i> , but the mistake in the existing C-4 Zoning was overlooked when the Master Plan was revised in 2002, and it therefore did not recommend a change.
Neighborhood Response:	Support by the property owners. There has been no opposition.
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

¹ Travillah-WHM, Limited Partnership, spells their its with a double-L, even though the Road is spelled "Travilah."

II. STATEMENT OF THE CASE

Local Map Amendment (LMA) Application No. G-868, filed on June 27, 2010, by Applicant Maryland-National Capital Park and Planning Commission (M-NCPPC), requests reclassification from the C-4 Zone (Limited Commercial) to the C-1 Zone (Convenience Commercial) of property known as Parcels P160 and P113 and Part of Parcel 400 on Tax Map FR32, located at 14119 Travilah Road and 14000 Piney Meeting House Road, Rockville, Maryland. The subject site is in the Potomac Subregion, and consists of approximately 3.54 acres in the 6th Election District. The eastern (corner) property (Parcel P113 and Part of Parcel 400) contains approximately 1.55 acres, and is owned by Bardon, Inc. (Tax Account Numbers 06-402408 and 06-402272), and the western parcel (Parcel P160) contains approximately 1.99 acres, and is owned by Travillah-WHM, Limited Partnership (Tax Account Number 06-400001). Exhibits 9(a) and (b) and Exhibit 10. The owners support the application and there is no opposition. Exhibits 23 and 38; Tr. 16-19.

This case is somewhat unusual because it is not seeking reclassification to a floating zone, as has become more common in recent times. Rather, it seeks to reclassify from one Euclidean Zone (C-4) to another Euclidean Zone (C-1), based on asserted mistakes in the Local Map Amendment (LMA) G-653 that initially rezoned the property into the C-4 Zone, and in the comprehensive rezoning confirming that zone in Sectional Map Amendment (SMA) G-800. The mistake is that neither of the roadways on which the site has frontage, Travilah Road and Piney Meetinghouse Road, is a major or arterial highway, and the C-4 Zone requires 100 feet of frontage on a major or arterial highway for a building permit to issue. *Zoning Ordinance §59-C-4.375.*

Because the reclassification sought is to a Euclidean Zone, the burden on the Applicant is different from that which is applied in floating zone cases. As will be discussed at length later in this

report, this burden requires the Applicant prove either a change in circumstances or a mistake in the comprehensive zoning (and in this case, in the local map amendment that led to it).

The zoning application was initiated by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) who, in a report dated July 9, 2007, recommended approval of the subject rezoning request (Item "A" in the Staff report), as well as other corrective map amendments and local map amendments needed to correct other zoning errors (Exhibit 13).² The Planning Board considered the application on July 26, 2007, and unanimously recommended approval for the reasons set forth in the Technical Staff Report, as confirmed by a letter to the Hearing Examiner from the Planning Board, dated September 17, 2010 (Exhibit 21).

Notice of a public hearing for September 20, 2010, was published 30 days in advance in two newspapers, as required by Zoning Ordinance §59-H-4.21 (Exhibits 16 and 17), and the property was posted as required in §59-H-4.23 (Exhibit 37). The public hearing proceeded, as scheduled, on September 20, 2010. Two witnesses testified, Callum Murray of Technical Staff, on behalf of M-NCPPC, and Richard Freedman, the regional environmental land services manager for Aggregate Industries, which is the parent company of Bardon, Inc. Bardon is the company that owns the corner (eastern) parcel of the subject site, and Mr. Freedman indicated the owner's support for the rezoning. Tr. 16-19. No witness appeared on behalf of Travillah-WHM, the owner of the western portion of the subject site, but William Magruder, a partner and representative of Travillah-WHM, LP, later submitted a letter of support on behalf of Travillah-WHM (Exhibit 38).

All testimony supported the application, and as mentioned, there has been no opposition at all in this case. The record was held open until October 11, 2010, for additional submissions by Applicant and comments thereon by interested parties. On November 8, 2010, Applicant submitted

² The Technical Staff Report is quoted and paraphrased frequently herein.

additional exhibits (Exhibits 26 – 34) and requested that the record be reopened to receive them.

Exhibit 35. By Order of November 10, 2010, the Hearing Examiner reopened the record to receive the additional filings, and closed it again, after a comment period, on November 22, 2010.

Upon reviewing the file in preparation of this report, the Hearing Examiner realized that the record was still incomplete, and it therefore was reopened by Order of December 21, 2010 (Exhibit 43) to receive additional filings (Exhibits 37-42). The record closed again on December 21, 2010.

The Applicant in this type of case bears a burden to overcome the legal presumption that all comprehensive rezoning is accurate. In this case, the Applicant has met its burden. As will appear more fully below, the evidence of record supports a finding of mistake in LMA G-653 and in the most recent comprehensive rezoning of the subject site (SMA G-800). Accordingly, the Hearing Examiner recommends granting this application.

III. FINDINGS OF FACT

A. Subject Property

The subject property consists of two tracts located just southwest of the intersection of Travilah Road and Piney Meeting House Road, in Rockville, Maryland. The eastern (corner) property (Parcel P113 and Part of Parcel 400) contains approximately 1.55 acres, and is owned by Bardon, Inc; the western parcel (Parcel P160), which fronts on Travilah Road, contains approximately 1.99 acres, and is owned by Travillah-WHM, Limited Partnership.

The eastern tract is undeveloped, while the western tract contains four structures, one of which is a one-story retail structure currently occupied by a dry-cleaners. Tr. 26. The other structures consist of two residential style frame buildings and one storage facility. These features can be seen on plat maps of the two tracts (Exhibits 6 and 8) and photographs of the area supplied by the Applicant (Exhibits 32 and 33(a) through (e)).

Below, side by side, are the plats for the two tracts that comprise the site:

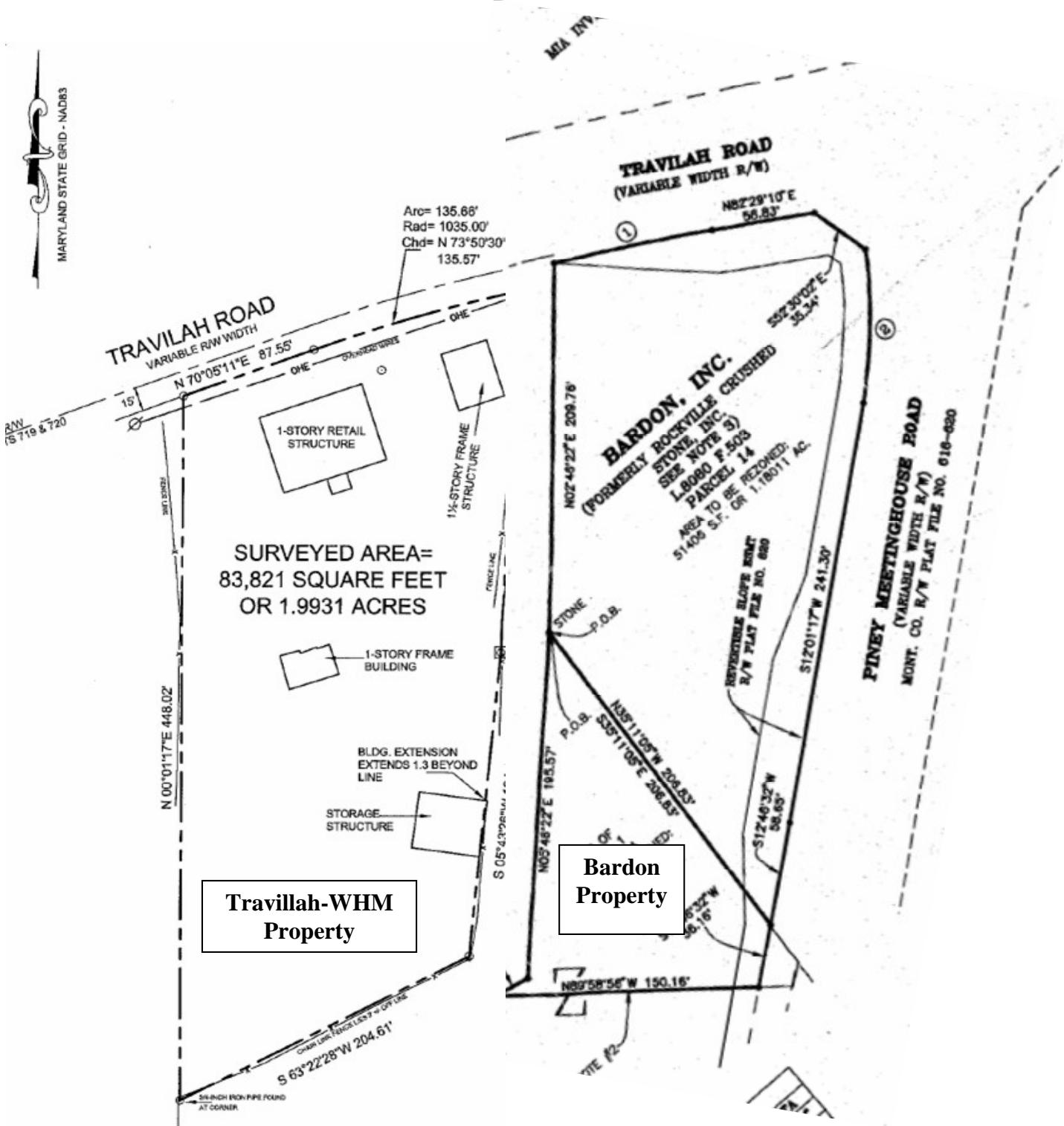


Exhibit 32 is an aerial photograph showing the entire site, with numbers keyed to the ground level photographs contained in Exhibits 33(a) through (e), all of which are reproduced below and on the following pages:





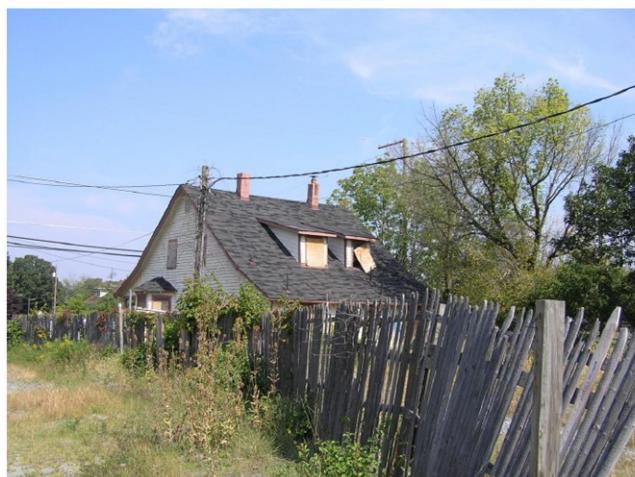
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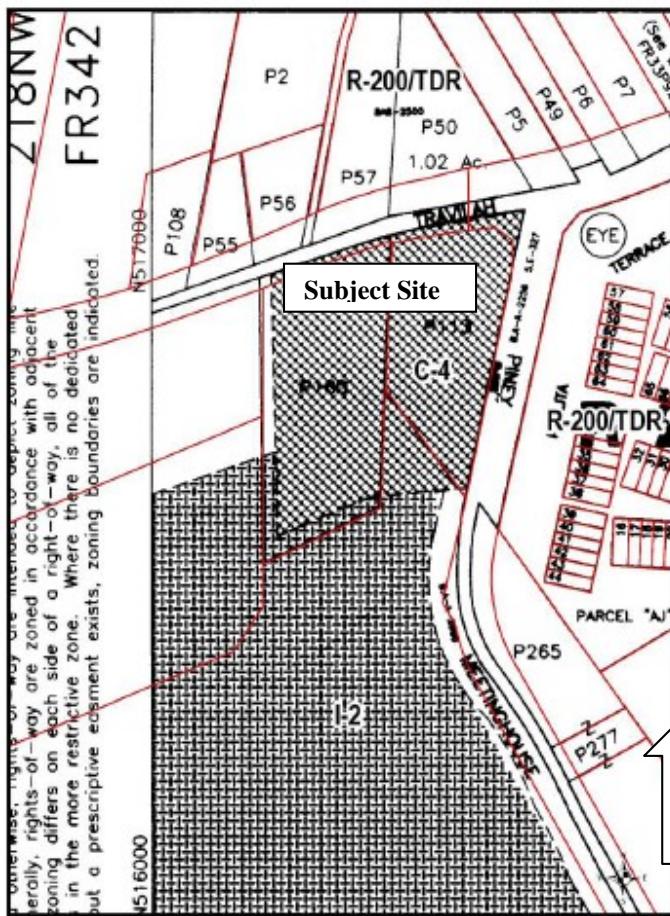


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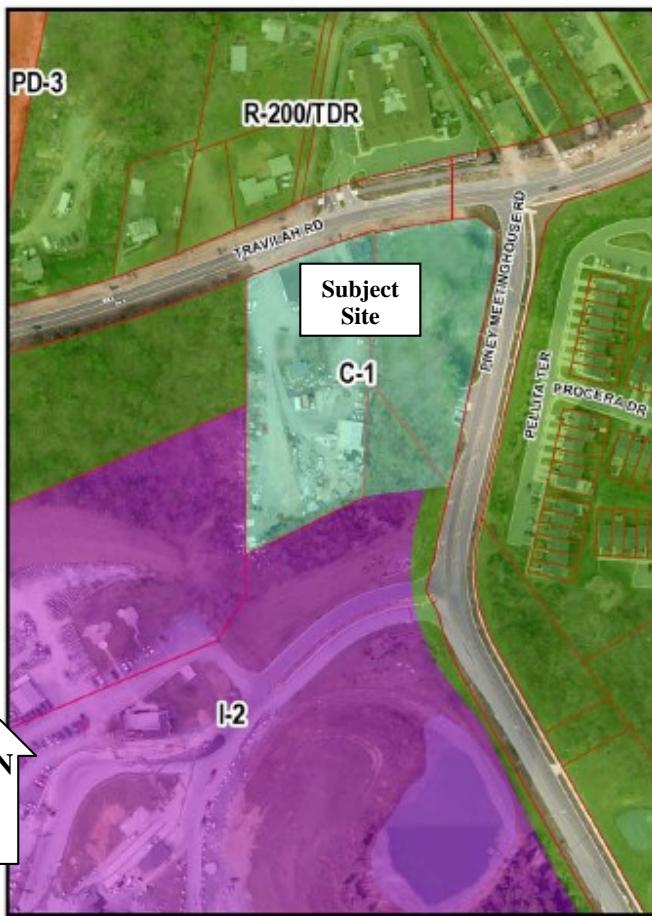


B. Surrounding Area and Adjacent Development

The area and zoning immediately around the subject site is displayed on a map provided by Applicant (Exhibit 29). It shows the existing zoning on the left and the proposed zoning on the right:

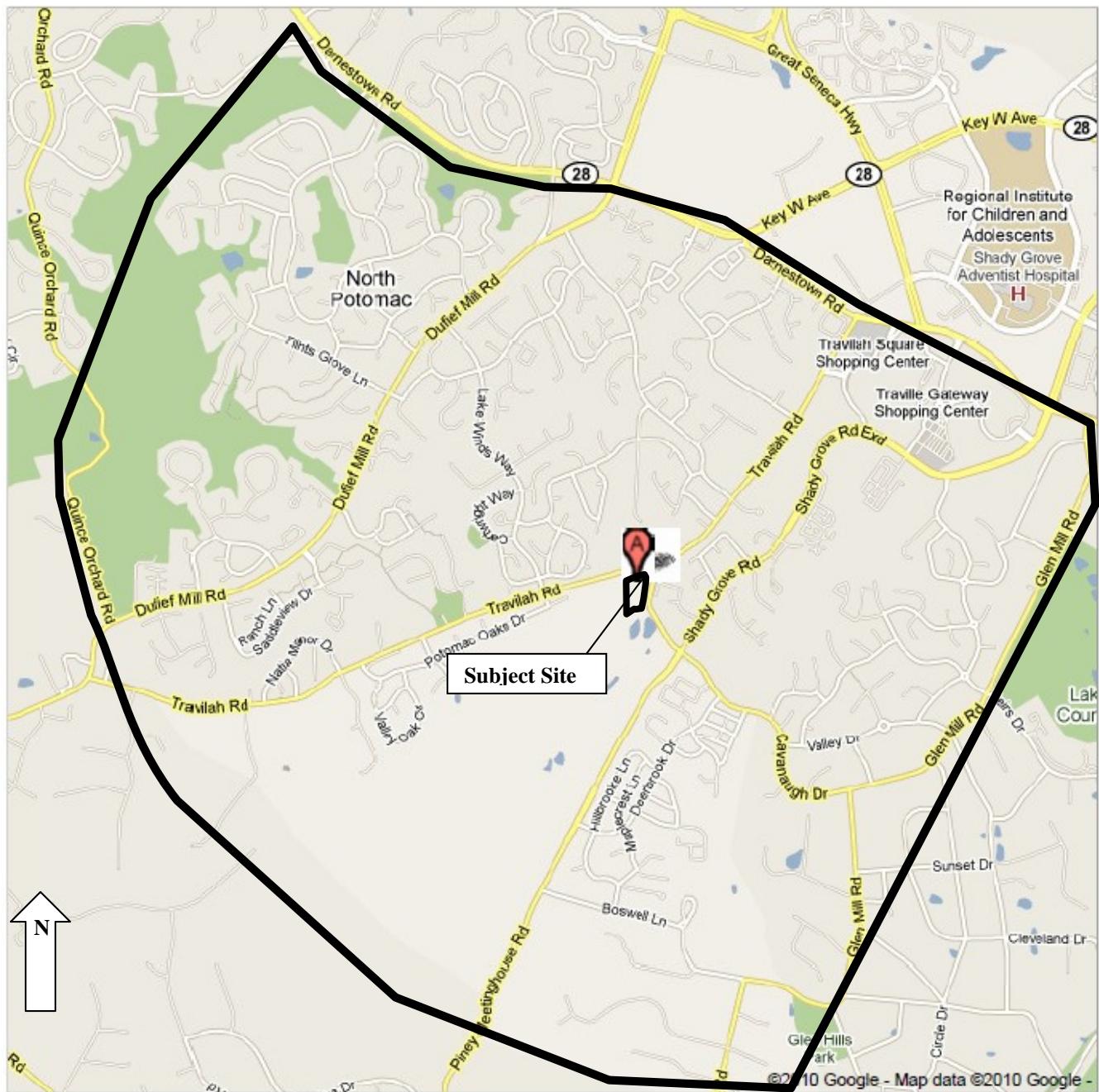


Existing Zoning

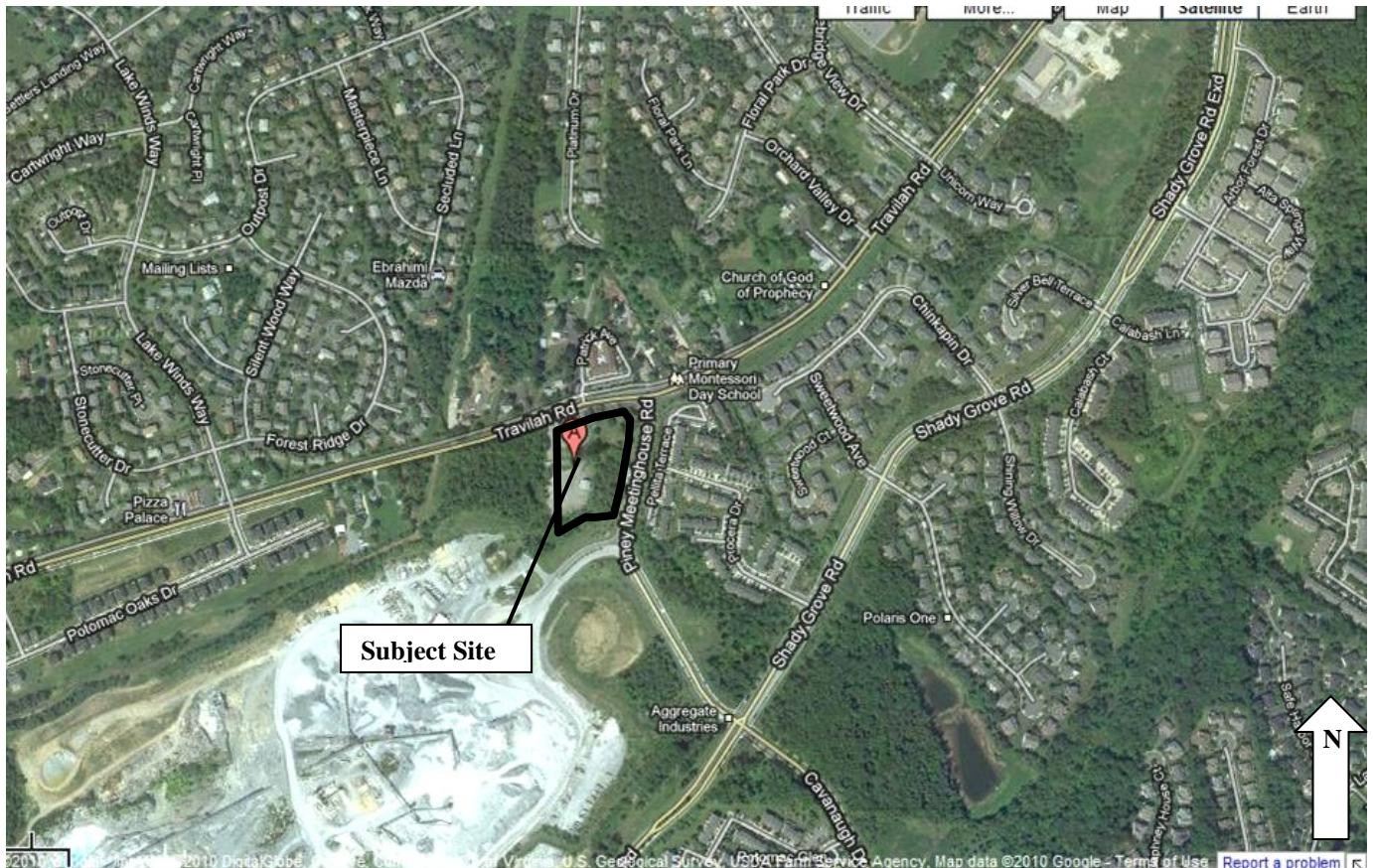


Proposed Zoning

The surrounding area was defined by the Council in LMA G-653 as bounded on the north by Route 28, on the east by Glen Mill Road, and on the south and west by the Pepco right-of-way. Although the affected area is likely much smaller than this defined area, it is sensible to keep the same defined area in this case for consistency, and it is shown below on a Google map. The surrounding area is as depicted in the April 23, 1990 Hearing Examiner's report (p. 6) regarding LMA G-653 (Ex.. 22):



In Resolution 11-2044 granting LMA G-653, the Council characterized the neighborhood as suburban, with an expanded road network (page 2 of the resolution). The April 23, 1990 Hearing Examiner's report, commented that the "Travilah quarry," a long-standing industrial use, was located immediately south of the subject site,³ but the zoning neighborhood, by that time, was characterized by extensive residential development and roads (1990 report, p. 7). As shown on the map reproduced on page 9 of this report, the zoning around the subject site, except for the quarry to its south, is largely residential, R-200/TDR and PD-3. Moreover, the Google satellite photo showing the area in 2010, reproduced below,⁴ demonstrates that the area around the subject site is currently dominated by residential development, except for the quarry to the immediate south-southwest of the site.



³ The quarry was operated at the time by Rockville Crushed Stone, Inc., which now is Bardon, Inc., the owner of the eastern half of the subject site. Resolution 11-2044 and the April 23, 1990 Hearing Examiner's report are in Exhibit 22.

⁴ The Hearing Examiner takes official notice of the Google satellite photo of the area (Exhibit 42), above, and the Google map of the surrounding area reproduced on the previous page (Exhibit 41).

The surrounding area, as it presently exists, was described by Callum Murray of Technical Staff at the hearing. In addition to the 330 acre quarry to the south of the site, there are townhouses to the east of Piney Meetinghouse Road and single family houses at a density of three per acre to the north, the west, and the northeast. In his opinion, a small area of convenience shopping in the C-1 zone is entirely compatible with both types of use. Tr. 27-28.

C. Zoning and Land Use History

The subject site had the following zoning history, as compiled by Technical Staff (Exhibit 25, pp. 1-2):

The subject property received split zoning in 1958 when comprehensive zoning applied the C-1 Zone to approximately 2.76 acres and half-acre residential density to the remainder. . . .

In 1980, new comprehensive zoning was applied to the site which confirmed the C-1 Zone and applied the I-2 Zone for the remainder except for those portions of the site lying within the road right-of-way which were retained in the residential zoning classification . . .

On July 7, 1986, the District Council adopted Ordinance 10-75, which . . . effectively rezoned about 22,000 square feet of the site from residential to commercial and industrial zoning.

On May 29, 1990, the County Council . . . approved the following resolution (No. 11-2044):

“Application No. G-653 for the reclassification from the C-1 and I-2 Zones to the C-4 Zone of 3.77596 acres known as parcels 160 and 113, located at 14119 Travilah Road and 14000 Piney Meeting House Road, Rockville, in the 6th Election District, is granted for the C-4 Zone in the amount requested.”

On October 15, 2002, the District Council adopted Resolution No. 14-1468 approving Sectional Map Amendment G-800 . . . SMA G-800 was the first comprehensive zoning in the Subregion for 22 years, rezoning approximately 890 acres and confirming approximately 39,963 acres with existing zoning, including the subject property.

D. The Rezoning Request, and the Mistake in LMA-G-653 and SMA-G-800

As mentioned at the outset, this Local Map Amendment application requests reclassification from the C-4 Zone (Limited Commercial) to the C-1 Zone (Convenience Commercial).

The Mistake:

The request is based on a mistake that was made twice, once in LMA G-653, which rezoned the site to C-4 in 1990 (Tr. 11-13), and once in SMA G-800, a comprehensive zoning measure which reconfirmed the zoning on the site in 2002, as a tiny part of 39,693 acres that were not recommended for rezoning in the sectional map amendment. Tr. 32-33. The comprehensive zoning in SMA G-800 had been intended to implement recommendations in the *Potomac Subregion Master Plan*, approved and adopted April 2002. Exhibits 39 and 40.

The mistake is that the property in question was placed in the C-4 Zone in LMA G-653 and then left in the existing C-4 Zone in SMA G-800, even though that Zone renders the land almost unusable and certainly incapable of being developed. This situation results from the fact that Zoning Ordinance §59-C-4.375 provides that “*No building permits shall be issued for new construction in the C-4 zone except on lots having a minimum frontage of 100 feet on an arterial or major road,*” and neither of the roadways on which the site has frontage, Travilah Road and Piney Meetinghouse Road, is an arterial or major road, as defined in County Code Sec. 49-31 and the applicable Master Plan. The Approved and Adopted Potomac Subregion Master Plan classifies Travilah Road and this section of Piney Meetinghouse Road as Primary Residential Streets with a minimum right-of-way of 70 feet. Arterials in the Master Plan have a minimum right-of-way of 80 – 120 feet and Major Highways a minimum of 120-150 feet. Exhibit 25, pp. 2-3 and Tr. 11-14.

It must be remembered that the subject site was only one small portion of a very large area reviewed for the comprehensive zoning in SMA G-800. In this process, 40,583 acres were reviewed and approximately 890 acres were rezoned. Technical Staff report of July 1, 2002, for SMA G-800 (Exhibit. 40, p. 1). The subject site consists of less than four acres and therefore was not the main focus of attention.

Once the mistake was made in LMA G-653, its reconfirmation in the SMA G-800 was routine, in the absence of anyone noticing it at the time. In fact, it was not discovered until the owner of the eastern portion of the site considered getting a building permit. As testified to by the owner's agent, Richard Freedman (Tr. 16-17), the error was discovered about five years ago when his company contemplated constructing a sales facility on the site. His engineers then informed him

. . . that in order to do anything in the C-4 zone, you had to have 100-foot of frontage on a major or arterial road, and neither Travilah nor Piney Meetinghouse, and the property sits on the corner, is a major or arterial road. Therefore the C-4 zone, we learned, was totally unusable at that location. And so we had unusable property.

Mr. Freedman then approached the owner of the abutting property (*i.e.*, the western half of the subject site), and they agreed to try and get the property rezoned. Ultimately, Callum Murray of Technical Staff initiated this process to rectify the situation.

The Impact of the Mistake:

As mentioned, the major impact of the mistake is to render the property incapable of being developed because no building permits can be issued. This result has negative impacts beyond the property itself – it deprives nearby residents of convenience commercial development which could serve them and it prevents the County from collecting a significant amount of tax revenue. Mr. Freedman testified that he had successfully appealed the tax assessment of the property, knowing that it was unusable, and the assessed property value was reduced from several hundred thousand dollars to \$5,000 for the corner property (*i.e.*, eastern half of the subject site). He also had the property appraised for his own informational purposes in 2007, and its appraised value in the proper zone (*i.e.*, C-1 Zone), was \$3.5 million. Tr. 18-19.

The Council's Intent:

The County Council's intent in LMA G-653 was clearly stated in Resolution 11-2044 (Exhibit 22, p. 3.) – “[to] satisfy good planning objectives by providing commercial uses that are accessible to

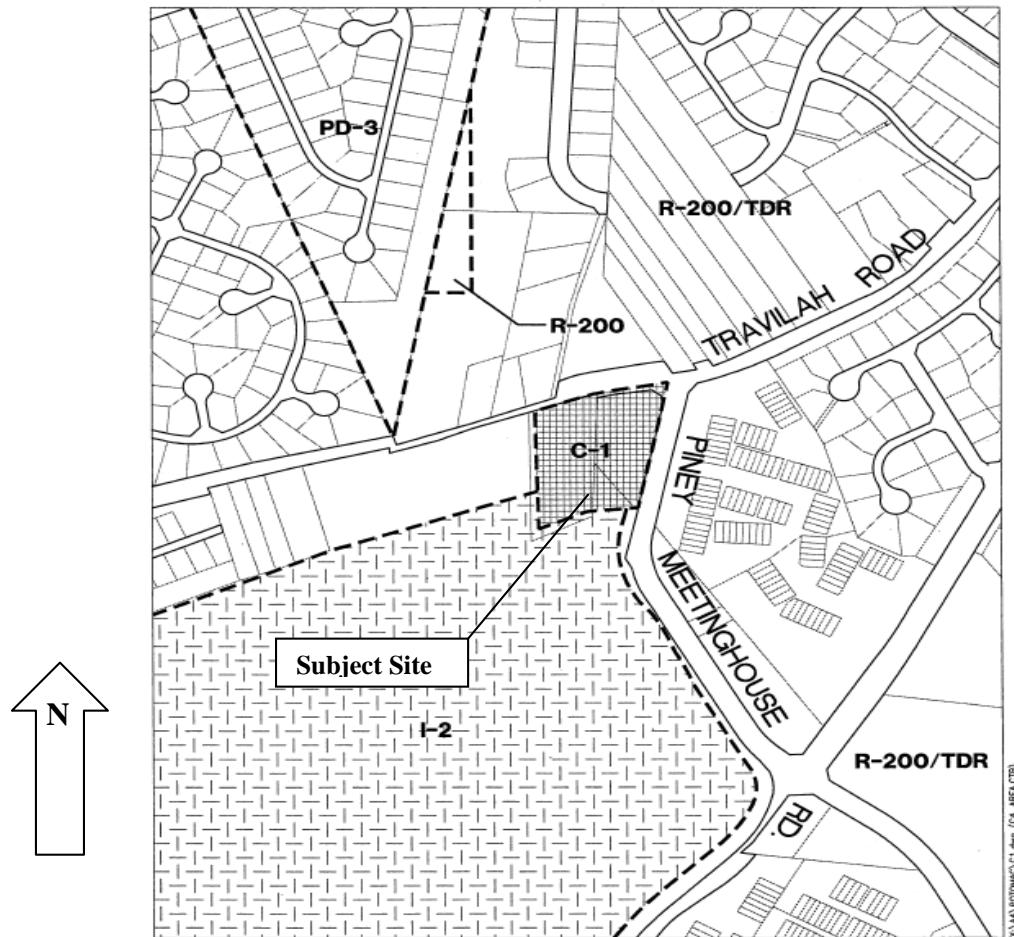
residential neighborhoods.” That intent was clearly frustrated by providing the site with a commercial zone (C-4), the terms of which must necessarily result in no commercial development on the site. Because nobody had noticed the mistake prior to the comprehensive rezoning of the area in SMA G-800, the error was compounded by confirming the site’s C-4 Zoning, *sub silentio*, as part of the 39,693 acres which were not recommended for a zoning change.

The Solution:

The proposed rezoning to the C-1 Zone would carry out the intent of the Council in its local map amendment for the site, G-653, by “by providing commercial uses that are accessible to residential neighborhoods.” Exhibit 22, p. 3. As noted by Mr. Murray, the C-4 Zone actually frustrates the purpose of the commercial zoning, whereas the proposed C-1 Zone would fulfill it. Tr. 24

After rezoning, the zoning map of the area would look as depicted by Technical Staff in Attachment A-2 to Exhibit 13.

G-868 PROPOSED ZONING



The Propriety and Benefits of the C-1 Zone for this Site:

The Purpose Clause of the C-1 Zone is contained in Zoning Ordinance §59-C-4.340:

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. 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.

Mr. Murray testified that the proposed C-1 Zone would comport with the zone's purpose; it would be compatible with existing and planned land uses in the surrounding area; and it would be in the public interest. Tr. 14, 22-28. As stated by Mr. Murray (Tr. 14):

The application complies with the intent of the master plan, the Board, and the Council, complies with the C-1 zone purpose clause and regulations is compatible with existing land uses and planned land uses in the surrounding area, and is in the public interest.

Mr. Murray opined that the C-1 zone is appropriate for the site because it provides locations for convenience shopping facilities which are of a neighborhood orientation and which supply necessities usually requiring frequent purchasing. The C-1 zoned area would also be sufficiently limited in its size (under four acres) that it would not permit commercial facilities large enough to attract substantial amounts of trade from outside the neighborhood. Tr. 22.

The purpose clause for the C-1 zone (Zoning Ordinance of 59-C-4.340) provides that the intent of the zone is that convenience commercial should not be located in close proximity to other commercial areas. Mr. Murray noted that the nearest commercial area is on Maryland Route 28, approximately 5,000 feet, or almost one mile distant. He added that there is very limited commercial zoning within the Potomac Subregion. Tr. 22.

Mr. Murray further testified that (Tr. 27-28),

. . . there's been commercial zoning of some kind on the property for 52 years. . . . there's townhouses to the east of Piney Meetinghouse Road, and single family houses at a density of three per acre to the north, the west, and the northeast; a small area of convenience shopping in the C-1 zone is entirely compatible with both types of use. [Emphasis added.]

The area requirements of the C-1 Zone, set forth in Zoning Ordinance §59-C-4.341, would be met by the proposed rezoning since the site is less than 15 acres. According to Mr. Murray, the proposed rezoning also would have no adverse impact on public facilities. As stated by Mr. Murray (Tr. 14):

There will be no adverse impact on public facilities, schools, transportation, or utilities. In fact, convenience commercial trips by local citizens may be minimized.

Although the uses permitted in the C-1 and C-4 zones are similar, demands on public facilities may be reduced in that the theoretical commercial density in the C-1 Zone is less than that usually generated in the existing C-4 Zone. Exhibit 15, p. 3.

Mr. Murray's testimony was supported by both property owners. Tr. 16-19 and Exhibit 38.

Based on this record, the Hearing Examiner finds that a mistake was made when the Council rezoned the subject site to the C-4 Zone in LMA G-653 and when it approved that portion of SMA G-800 which left the subject site in the C-4 Zone; that the Council's underlying intent in LMA G-653 was "[to] satisfy good planning objectives by providing commercial uses that are accessible to residential neighborhoods;"⁵ that the C-4 Zone was actually inconsistent with that goal because restrictions in the Zone would prevent a building permit from being issued;⁶ that contrary to the Council's general intent, it inadvertently allowed the C-4 Zone to remain on the subject site in SMA G-800 because, at the time of the Sectional Map Amendment, neither the property owners nor the supporting agencies reporting to the Council (*i.e.*, Technical Staff, the Planning Board, the former

⁵ Resolution 11-2044 (Exhibit 22, p. 3).

⁶ Zoning Ordinance §59-C-4.375.

Hearing Examiner and Council Staff) brought the issue to the Council's attention; that the appropriate remedy would be to grant the instant application reclassifying the site to the C-1 Zone; and that the C-1 zone would carry out the Council's original intent in LMA G-653 and SMA G-800 by providing convenience commercial facilities for the benefit of the local residents.

IV. SUMMARY OF THE HEARING

Two witnesses testified at the hearing, Callum Murray of Technical Staff, on behalf of M-NCPPC, and Richard Freedman, the regional environmental land services manager for Aggregate Industries, which is the parent company of Bardon, Inc. Bardon is the company that owns the corner (eastern) parcel of the subject site. No witness appeared on behalf of Travillah-WHM, the owner of the western portion of the subject site, but Mr. Murray indicated that Bill Magruder, of Black Rock Development, a representative of Travillah-WHM, would submit a letter of support on behalf of Travillah-WHM before the record closed. Tr. 5. All testimony supported the application, and as mentioned, there has been no opposition at all in this case.

Prior to the receipt of testimony, the Hearing Examiner took official notice of the record of LMA G-653, which contains Resolution 11-2044. That resolution reclassified the subject site from the C-1 and I-2 Zones to the C-4 Zone on May 29, 1990. Exhibit 22.

1. Callum Murray, for the M-NCPPC (Tr. 8-16; 20-38):

Callum Murray testified that he represents the Applicant, Maryland-National Capital Park and Planning Commission in these proceedings. He is a planner certified by the AICP and a registered landscape architect, licensed by the State of Maryland. In addition to his role as a representative of the Applicant, Mr. Murray testified as an expert in land use and land use planning. Tr. 28-30. He is currently employed by the Montgomery County Planning Department as community planning team leader for the Potomac Subregion and the rural area. The Applicant seeks rezoning from the present

C-4 Zone to the C-1 Zone for the subject property.

Mr. Murray described the zoning history of the site: The property received split zoning in 1958 when comprehensive zoning applied the C-1 zone to approximately 2.76 acres to the west, and a half acre residential density to the remainder. When this zoning pattern was applied, commercial zoning was withheld from an area adjacent to the old right-of-way in accordance with a practice at the time, which was later declared unconstitutional in the case of *Carl M. Freeman Associates, Inc., v. the State Roads Commission*. In 1980, a new comprehensive zoning was applied to the site, which confirmed the C-1 zone, and applied the I-2 zone for the remainder, except for those portions of the site lying within the road right-of-way, which were retained in the residential zoning classification, notwithstanding the *Freeman* decision. On July 7, 1986, the District Council adopted Ordinance 10-75 which was designed as curative legislation to implement the *Freeman* decision and effectively rezoned about 22,000 square feet of the site from residential to commercial and industrial zoning. On May 29th, 1990, the Council approved the Resolution 11-2044, granting LMA G-653 for the reclassification from the C-1 and I-2 zones to the C-4 zone of 3.77 acres known as parcels 160 and 118 located at 14119 Travilah Road, and 14000 Piney Meetinghouse Road, in the 6th Election District.

On October 15th, 2002, the District Council adopted resolution number 14-1468 approving Sectional Map Amendment G-800. SMA G-800 was the first comprehensive zoning in the Subregion for 22 years, rezoning approximately 890 acres, and confirming approximately 39,963 acres with existing zoning, including the subject property.

Mr. Murray further testified that the basis for the rezoning request is that a mistake was made in Local Map Amendment G-653 because the C-4 zone requires 100 feet of frontage on a major or arterial highway, and neither Travilah Road nor Piney Meetinghouse Road meets that description in

this area. Arterial and major roads are defined in the County Code, Chapter 49, *Streets and Roads*. Section 49-31, *Classification of Roads*, provides that each road, except secondary residential streets and tertiary residential streets, must be classified as designated in an applicable master plan. According to Mr. Murray, a major highway is a road meant nearly exclusively for through movement of vehicles at a moderate speed. Access must be from grade separated interchanges and at grade intersections with public roads. An arterial is a road meant for through movement of vehicles at moderate speeds, although some access to abutting properties is expected.

The minimum right-of-way for a road may be specified in the applicable master plan. If a minimum right-of-way for a particular road is not specified, the minimum right-of-way must be 100 feet for a primary residential street with a median, or 70 feet for a primary residential street without the median. Neither Travilah Road or Piney Meetinghouse Road in this location has a median, and the approved and adopted Potomac Subregion Master Plan classifies both Travilah Road and this section of Piney Meetinghouse Road as primary streets, with a minimum right-of-way of 70 feet, whereas arterials in the Master Plan have a minimum right-of-way of 80 to 120 feet, and major highways a minimum of 120 to 150 feet.

Mr. Murray further testified that both property owners have indicated to Planning Staff that the property is unusable, and have requested assistance in obtaining relief. If one compares the C-1 zone and the C-4 zone, the uses permitted in both are very similar, but the theoretical density under the optional method in the C-4 zone would be greater than that typically generated within the C-1 zone. The major difference is that in the C-4 zone, which is currently on the site, lots must have a minimum frontage of 100 feet on arterial or major road. Without that, permits will not be granted for new construction. According to Mr. Murray, it is very unlikely the County Council would change that by text amendment, because it would impinge on other sites in the County.

Mr. Murray further testified that the C-1 zone is appropriate for the site. It was on the site for 32 years, until 1990, and the 1990 G-653 case actually included an alternative application to consolidate the C-1 and I-2 properties to a single C-1 zone. The commercial zoning was considered appropriate at the site in 1990, “but unfortunately, the applicants, the technical staff, the Board, the hearing examiner, District Council all, and this is very strange in this County, inadvertently missed a requirement of the C-4 zone. . .” Tr. 13.

Mr. Murray concluded that the assumptions underlying the rezoning relied upon by the zoning authority in 1990 were invalid. He stated that, had staff been aware of the mistake, there is little doubt that the proposed classification would have been implemented via Sectional Map Amendment in 2002. According to Mr. Murray, the owners have acknowledged the mistake, and have confirmed in writing that C-1 is a fair zone for the property. He stated that the application does not substantially alter the type of land uses that would occur. “The application complies with the intent of the Master Plan, the Board, and the Council, complies with the C-1 zone purpose clause and regulations, is compatible with existing land uses and planned land uses in the surrounding area, and is in the public interest.” Tr. 14.

Mr. Murray further testified that there will be no adverse impact on public facilities, schools, transportation, or utilities. In fact, convenience commercial trips by local citizens may be minimized. Tr. 14.

According to Mr. Murray, the motivation for coming forward now after all these years is that an application for a building permit was denied. Tr. 15.

Mr. Murray introduced a diagram showing, on the left half, the existing zoning on the property, and on the right half, the proposed zoning on the property (Exhibit 24). The surrounding area for this property was defined in G-653 as bounded on the north by Route 28, on the east by Glen

Mill Road, and on the south and west by the Pepco right-of-way, and that definition is being proposed here. Tr. 21.

Mr. Murray testified that the C-1 zone is appropriate for the site because it provides locations for convenience shopping facilities which are of a neighborhood orientation and which supply necessities usually requiring frequent purchasing. They should not be so large or so broad in scope as to attract substantial amounts of trade from outside the neighborhood. Tr. 22.

The purpose clause for the C-1 zone (Zoning Ordinance of 59-C-4.340) states that the intent of the zone is that convenience commercial should not be located in close proximity to other commercial areas. The nearest commercial area is on Maryland Route 28, approximately 5,000 feet, or almost one mile distant, and that, by coincidence is in the C-4 zone. He noted that there is very limited commercial zoning within the Potomac Subregion.

According to Mr. Murray, all parties recommended approval of a commercial zone in G-653, and the Council determined that commercial zoning bore sufficient relationship to the public interest to justify approval. The surrounding neighborhood represented by the North Potomac Citizens Association indicated a need for the commercial zoning, but the commercial zone actually approved (C-4) could not fulfill the purpose because of the mistake discussed.

The area requirements of the zone, set forth in §59-C-4.341, are met since it is less than 15 acres. For the C-1 Zone, the building height maximum is 30 feet. For the C-4 zone, under the optional method, the height limit would be 40 feet, so that the C-1 zone would actually potentially have less effect on the area.

Currently, on the western half of the site, there is an old house that Mr. Murray believes is empty and a small commercial structure divided into two parts. The right half used to be a convenience store. It's now empty. The left half is a dry cleaners. [Mr. Freedman indicated that the

dry cleaners is functioning]. Tr. 26. The current structures meet building height restrictions, but Mr. Murray is not certain about whether it complies with all of the setback requirements.

The green area minimum in C-1 zone is a minimum of 10 percent, and the site taken as a whole meets that requirement.

Mr. Murray further testified that the proposed rezoning would be compatible with existing development and proposed development in the surrounding community. The southeast and southern parcel is a heavy industrial zone, a quarry of about 330 acres. There are townhouses to the east of Piney Meetinghouse Road, and single family houses at a density of three per acre to the north, the west, and the northeast. In his opinion, a small area of convenience shopping in the C-1 zone is entirely compatible with both types of use. Tr. 27-28.

According to Mr. Murray, there is no specific review of the subject property in the Potomac Subregion Master Plan, which addresses 66 square miles of Potomac. The Master Plan just recognized that there was C-4 zoning here and did not recommend a change. Tr. 31-32. Mr. Murray observed, “we should have scrutinized it, and realized that it was inappropriate at that site. We just did not focus on this particular zoning.” Tr. 32. The Master Plan was followed by SMA G-800, approved in October 2002, which rezoned almost 900 acres in the Potomac Subregion, but did not recommend rezoning the subject site because the Master Plan did not address it. Thus, the mistake in this case is a mistake in the LMA, which was then confirmed in the SMA. Tr. 33-34.

Mr. Murray also provided a statement of adequacy of public facilities for the record. A sewer is available to this property. It doesn't require any change in category. And it's not going to have any impact on schools. The master plan found that the transportation facilities in the vicinity were adequate.

He also agreed that, it would be in the public interest for these properties to be rezoned so that they would have a higher assessable value for tax purposes. Tr. 34.

2. Richard Freedman (Tr. 16-19):

Richard Freedman testified that he is the regional environmental land services manager for Aggregate Industries, which is the parent company of Bardon, Inc. Bardon is the company that owns the corner (eastern) parcel of the subject site. Aggregate Industries is a producer of construction aggregates, and among other locations, owns the adjacent Rockville Quarry, sometimes known as Travilah Quarry, which encompasses most of the I-2 zoned land adjacent to the subject property.

Mr. Freedman is responsible for managing real estate assets, maximizing value and minimizing cost, and also managing approvals and permits. Five or six years ago, his company contemplated putting a sales facility for “hardscape” products on the corner lot of the subject site. His engineers then informed him that the property was unusable because it was in the C-4 zone, and in order to do anything in the C-4 zone, the property had to have 100 feet of frontage on a major or arterial road, and neither Travilah nor Piney Meetinghouse, is a major or arterial road.

Mr. Freedman then approached Bill Magruder, the adjacent property owner, and they asked the attorney who had been involved in the LMA G-653 rezoning to remedy the problem free of charge. That never occurred. Although his company did not have any immediate need to develop or use the property, he still wishes to maximize value of company assets, and a useless piece of commercial property is clearly an under-valued company asset. Then, Callum Murray of Technical Staff became involved to rectify the situation.

Meanwhile, Mr. Freedman successfully appealed the tax assessment of the property, knowing that it was unusable, and the assessed property value was reduced from several hundred thousand dollars to \$5,000 for the corner property [*i.e.*, eastern half of the subject site]. He also had it

appraised for his own informational purposes in 2007, and its appraised value in the proper zone (*i.e.*, C-1 Zone), was \$3.5 million. Mr. Freedman made the point that Montgomery County is missing out on a lot of tax revenue on this piece of property, and certainly on the adjacent one as well. As a Montgomery County resident and taxpayer, he feels that the only responsible thing to do is rezone the property to a usable category.

At the moment, Mr. Freedman stated, his company is just interested in getting the property properly zoned so that it could be used or sold at such time as the company may decide to do so.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones.⁷ The subject case, unlike most brought before the Council, seeks to reclassify land from one Euclidian Zone (C-4) to another Euclidian zone (C-1). Also unlike most cases, this application was filed by a government agency, the Maryland-National Capital Park and Planning Commission, not by a private party.

A. The Law Governing Reclassification to a Euclidean Zone (the “Change/Mistake” Rule)

The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height. In the State of Maryland, a property owner seeking to reclassify his or her property from one Euclidean zone to another bears a heavy burden to prove either

⁷ A floating zone is a flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause and regulations for the zone, the development would be compatible with the surrounding area and it would serve the public interest.

a substantial change in the zoning neighborhood or a mistake in the original zoning or comprehensive rezoning. See *Stratakis v. Beauchamp*, 268 Md. 643, 652-53, 304 A.2d 244, 249 (1973). This doctrine is known as the “change/mistake” rule. Because the Applicant is seeking reclassification to a Euclidean Zone on the subject site, based on an asserted error in a prior local map amendment and in the comprehensive zoning, this case is analyzed under the change/mistake formula.

If the Applicant succeeds in demonstrating change or mistake, the District Council is permitted, but not required, to grant the proposed rezoning. The Applicant must also demonstrate that the requested rezoning is warranted. *White v. Spring*, 109 Md. App. 692, 708-709, 675 A.2d 1023, 1030-1031, *cert den'd*, 684 A.2d 455 (1996).

The application filed in the present case seeks rezoning based on mistake. Thus, the first question presented is whether the District Council committed a “mistake,” as that term is used in zoning law, when it adopted LMA G-653 and the SMA that left the subject property zoned C-4. In *Boyce v. Sembly*, 25 Md. App. 43, 50-51, 334 A.2d 137, 142 (1975), the court defined the term “mistake.”

[E]rror or mistake is established when there is probative evidence to show that the . . . premises relied upon by the Council . . . were invalid. Error can be established by showing that . . . the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension.⁸

This same test has been relied on in the subsequent case law. See, e.g., *Howard County v. Dorsey*, 292 Md. 351, 356-57, 438 A.2d 1339 (1982); *People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership*, 107 Md. App. 627, 645, 670 A.2d 484, 493 (1995); and *White, supra*, 109 Md. App. at 698.

⁸ The court also notes that a mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect.

In *Beachwood*, 107 Md. App. at 645, the court further clarified the concept:

The finding of a mistake or error is not so much concerned with the logical validity or merit of ultimate conclusion-drawing as it is with the adequacy and accuracy of the factual premises that underlie the conclusion-drawing. A conclusion based on a factual predicate that is incomplete or inaccurate may be deemed, in zoning law, a mistake or error; an allegedly aberrant conclusion based on full and accurate information, by contrast, is simply a case of bad judgment, which is immunized from second-guessing.

Thus, mistake is *not* demonstrated by evidence that a zoning authority used bad judgment.

The change-mistake doctrine is designed to allow mistakes to be corrected, not to provide individual property owners with the means to second-guess comprehensive zoning decisions.⁹ A rezoning request can be granted based on mistake if strong evidence of error makes the question of mistake fairly debatable, *Dorsey*, 292 Md. at 356, and the requested rezoning is shown to be warranted. *White*, 109 Md. App. at 708-709.

B. Applying the Change/Mistake Rule to the Facts

This application seeks rezoning based on a mistake made by the Council in LMA G-653 and in the last comprehensive zoning (SMA G-800) covering, *inter alia*, the subject site. The alleged mistake is that the property in question was rezoned to the C-4 Zone on May 29, 1990, by LMA G-653 and left in the existing C-4 Zone in the 1992 SMA G-800 because the information provided to the Council in both instances did not indicate that applying the C-4 zone to this site would result in an unusable commercial lot – one where no building permit could issue. We now examine whether the record in this case, discussed at length in Part III.D. of this report, meets the criteria for rezoning under the change/mistake rule.

⁹ Maryland's highest court "has repeatedly recognized that there is a strong presumption of the correctness of comprehensive rezoning, and that 'strong evidence' of error is required to overcome that presumption." *Dorsey*, 292 Md. at 355; See also, *Beachwood*, 107 Md. App. at 641; and *Boyce*, 25 Md. App. at 49.

The first question is whether a “mistake” was made, as that term is defined in the case law discussed in the previous section. A “mistake” in this context is not an error of judgment by the Council, but rather a showing that “the . . . premises relied upon by the Council . . . were invalid . . .[;]
that . . . the Council failed to take into account then existing facts . . . so that the Council's action was premised initially on a misapprehension.” *Boyce*, 25 Md. App. at 50-51.

In this case, the alleged mistake clearly falls within the courts' definition of that concept. The Council here indisputably relied upon recommendations of the Technical Staff, the Planning Board and the former Hearing Examiner, all of whom failed to notice (and therefore failed to mention to the Council) that the subject site did not have frontage on an arterial or major road, thereby precluding a building permit in the C-4 Zone. *Zoning Ordinance* §59-C-4.375. As stated by Mr. Murray in his Staff Report of July 9, 2007 (Exhibit 13, p. 3):

The hearing examiner recommended approval of the application . . . Both the technical staff and the Planning Board acknowledged that the requested zoning was desirable and would satisfy planning objectives by providing commercial uses accessible to residential neighborhoods. The surrounding community, represented by the North Potomac Citizens Association, supported the reclassification and indicated a need for it.

For all the above reasons, the application was granted seventeen years ago. Unfortunately, the applicants, the technical staff, the Planning Board, the hearing examiner and the District Council all inadvertently missed a requirement of the C-4 Zone that stipulated that any new construction would require 100 feet of frontage on a major or arterial highway. Both Travilah Road and Piney Meeting House Road between Travilah Road and Shady Grove Road Extended are classified as primary residential streets and have never been proposed as major or arterial highways. The classification applied for and granted was therefore a mistake. The original application had proposed an alternative consolidation of both properties (C-1 and I-2) to the C-1 Zone. On reading the record of the case, this alternative classification would likely have been granted, had the applicant or reviewers noted the requirement regarding C-4 frontage.

In this case, all the evidence confirms that no one caught the error in LMA G-653 and SMA G-800 until after it was approved by the Council in Resolution No. 14-1468 on October 15, 2002. This is not surprising, since the subject site was only one small portion of a very large area reviewed for the

revised Master Plan and the comprehensive zoning. In this process, 40,583 acres were reviewed for SMA G-800, and approximately 890 acres were rezoned. Technical Staff report of July 1, 2002, for SMA G-800 (Exhibit 40, p. 1). The subject site consists of under four acres.

In sum, the evidence demonstrates that there was an invalid factual premise regarding the propriety of retaining the C-4 Zone at this site and that the Council relied upon it in adopting LMA G-653 and that portion of SMA G-800 which applied to the subject site. Thus, the mistake and reliance criteria have been established.

However, as noted above, even though the evidence establishes that a mistake was made and relied upon, a decision to grant the rezoning requested in this application is permitted, not required. The District Council has the responsibility to consider whether the requested rezoning would be warranted (*i.e.*, that it would be the appropriate remedy for the mistake and would serve the public interest). *See White*, 109 Md. App. at 708-709. That issue is discussed in the next section.

C. The Appropriate Remedy and the Public Interest

Questions relating to the appropriate remedy for the mistake were discussed in Part III.D. (pp. 12-18) of this report. As that discussion establishes, the C-4 Zone is inappropriate for this location, while the C-1 Zone is appropriate and will serve the public interest. The C-1 Zone is appropriate because this site will satisfy the purpose clause of the zone, as well as its regulations, and will be compatible with surrounding development.

Maryland law requires that any rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

“. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional

district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

Factors which may be considered in determining the public interest include Master Plan conformity, the recommendations of the Planning Board and its staff, possible adverse effects on the surrounding area or public facilities and potential public benefits.

As stated by Callum Murray on behalf of the Maryland-National Capital Park and Planning Commission, “The Master Plan that applies is the Potomac Subregion Master Plan, and unfortunately, at the time the zoning for the 66 square miles of Potomac was reviewed, there was no specific review of this property.” Tr. 31. Mr. Murray noted that because the problem with the C-4 Zone was not noticed by Technical Staff, the Master Plan did not recommend a change in the zoning for the subject site. Mr. Murray went on to say (Tr. 32):

But I should say that we should really, looking back on it, we should have scrutinized it, and realized that it was inappropriate at that site. We just did not focus on this particular zoning.

Because they had overlooked the earlier error, both Technical Staff and the Planning Board did more than just recommend approval of this zoning application; they brought the application themselves.

It should be noted that strict consistency with Master Plan is usually not required. *Mayor and Council of Rockville v. Rylens Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002), citing *Richmarr v. American PCS*, 117 Md. App. 607, 635-51, 701 A.2d 879, 893-901 (1997). As is evident from Mr. Murray’s testimony, it was never the intent of the Master Plan framers to render the subject site unusable for commercial development. In fact, the opposite was intended. The C-4 Zone was not challenged in the Master Plan because of an oversight by the planners.

The testimony of Callum Murray of Technical Staff also establishes that the C-1 zone would be compatible with the surrounding area and would not strain public facilities. Tr. 14. In fact,

encouraging convenience retail on the site may reduce the number of trips by making retail available to local residents who will not have to travel out to other areas to shop.

Finally, rezoning the site to the C-1 Zone would result in a benefit not only to the property owners and nearby residents; it will also provide a significant increase in the property assessment for tax purposes. As noted earlier in this report, the owner of the eastern half of the site successfully appealed the tax assessment of the property, knowing that it was unusable, and the assessed property value was reduced from several hundred thousand dollars to \$5,000. The owner also had the property appraised for his own informational purposes in 2007, and its appraised value in the proper zone (*i.e.*, C-1 Zone), was \$3.5 million. Tr. 18-19. Thus, granting this rezoning will provide the public benefit of potentially increased tax revenues. There is no evidence of any negative impacts from the proposed rezoning.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions with respect to Local Map Amendment Application G-868:

1. That a mistake was made when the Council approved LMA G-653, which rezoned the site to C-4, and in the portion of SMA G-800 which left the subject site in the C-4 Zone;
2. That the appropriate remedy would be to grant the instant application to reclassify the site to the C-1 Zone; and
3. That the requested reclassification to the C-1 Zone bears sufficient relationship to the public interest to justify its approval.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-868, for the reclassification from the C-4 Zone to the C-1 Zone of 3.54 acres of property known as Parcels P160 and P113, and Part of Parcel 400 on Tax Map FR32, and located at 14119 Travilah Road and 14000 Piney Meeting House

Road, Rockville, Maryland, be approved in order to correct a mistake made in Local Map
Amendment G-653 and Sectional Map Amendment G-800.

Dated: December 22, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner