

**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**

IN THE MATTER OF: *

MARYLAND-NATIONAL CAPITAL *

PARK AND PLANNING COMMISSION *

Applicant *

Callum Murray, M-NCPPC Technical Staff *

For the Application *

Nicholas Petruccelli (Owner of Subject Site) * Zoning Application No. G-870

Supporting the Application *

James R. Clifford, Esquire *

Attorney for Nicholas Petruccelli *

Stephen Ellis, on behalf of the *

Darnestown Civic Association *

Supporting the Application *

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	Page No.
I. EXECUTIVE SUMMARY	2
II. STATEMENT OF THE CASE	3
III. FINDINGS OF FACT.....	4
A. Subject Property	4
B. Surrounding Area and Adjacent Development	7
C. Zoning and Land Use History	9
D. The Rezoning Request, and the Mistake in the Master Plan and SMA-G-800	10
IV. SUMMARY OF THE HEARING.....	19
V. ZONING ISSUES	27
A. The Law Governing Reclassification to a Euclidean Zone (the “Change/Mistake” Rule).....	27
B. Applying the Change/Mistake Rule to the Facts.....	29
C. The Appropriate Remedy and the Public Interest	32
VI. CONCLUSIONS	33
VII. RECOMMENDATION.....	33

I. EXECUTIVE SUMMARY

Applicant:	Maryland-National Capital Park and Planning Commission
LMA No. & Date of Filing:	G-870, filed September 14, 2007
Zoning and Use Sought:	Zone: C-1 Use: Convenience Commercial
Current Zone and Use:	Zone: O-M Current Use: Vacant except for a telecommunications tower disguised as a large flagpole
Rezoning Method:	To correct a mistake in the comprehensive rezoning in SMA G-800
Location:	14120 Darnestown Road, Darnestown, Maryland.
Applicable Master Plan:	<i>Potomac Subregion Master Plan</i>
Area to be Rezoned:	1.98 acres.
Right-of-Way to be dedicated:	8,603 square feet was scheduled to be dedicated along Darnestown Road in LMA G-685. A roughly equivalent amount would have to be dedicated at this site as part of the Darnestown Road Right-of-Way, if it was not dedicated after LMA G-685 was approved.
Traffic Issues:	None
Environmental Issues:	None
Zoning Issue:	Whether Applicant has established a mistake in the comprehensive rezoning approved in SMA G-800
Consistency with Master Plan:	The proposed rezoning is consistent with the objectives of the <i>Potomac Subregion Master Plan</i> . Ambiguities in the Master Plan resulted in the mistake this application seeks to correct, as will be explained at length in this report.
Neighborhood Response:	Support by the Darnestown Civic Association and the property owner. There is no opposition.
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Local Map Amendment (LMA) Application No. G-870, filed on September 14, 2007, by Applicant Maryland-National Capital Park and Planning Commission (M-NCPPC), requests reclassification from the O-M Zone (Office building, moderate intensity) to the C-1 Zone (Convenience Commercial) of split-zoned property known as Parcels P490 and N536, at 14120 Darnestown Road, Darnestown, Maryland. The property to be rezoned is about 1.98 acres (1.65 acres in Parcel P490 plus 0.33 acres in part of Parcel N536, the remainder of which is already in the C-1 Zone). The site is located in an area subject to the *Potomac Subregion Master Plan*. It is owned by Nicholas and Vanda Petruccelli, and has the Tax Account Numbers 00392992 and 02802695. The owners support the application and there is no opposition.

What makes the case unusual is that it seeks to reclassify from a floating zone (O-M) to a Euclidean Zone (C-1), which is the reverse of the typical rezoning case. Because the reclassification sought is to a Euclidean Zone, the burden on the Applicant is also different. 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.

This application seeks rezoning based on alleged mistake in the last comprehensive zoning of the subject site in SMA G-800, which had been intended to implement recommendations in the *Potomac Subregion Master Plan*, approved and adopted April 2002 (Master Plan). The alleged mistake is that the property in question was left in the existing O-M Zone.¹ The Applicant now seeks to reclassify to C-1 the only part of the overall area that had been classified as O-M, so that the

¹ The subject site had been rezoned O-M in 1992 by the Council in LMA G-685 (Resolution 12-556, adopted 2/25/92). Exhibit 21. Technical Staff and the Planning Board had opposed the owner's application at the time because the O-M Zone was not recommended in the Master Plan, the surrounding area was predominantly residential and comprehensive planning was needed for the entire Darnestown area. Exhibit 21(b). That comprehensive planning subsequently resulted in the 2002 Potomac Subregion Master Plan and Sectional Map Amendment G-800.

zone will be consistent with what Applicant believes was the intent of the planners when they drafted the *2002 Potomac Subregion Master Plan*.

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 “C” 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 (Exhibit 24) based on the reasons set forth in the Technical Staff Report.

A public hearing was noticed for, and conducted on, October 26, 2007. Three witnesses testified, Callum Murray of Technical Staff, on behalf of M-NCPPC, Nicholas Petruccelli, the property owner, and Stephen Ellis, on behalf of the Darnestown Civic Association. All testimony supported the application, and as mentioned, there has been no opposition at all in this case. The record was held open until November 2, 2007, to give Mr. Murray of Technical Staff an opportunity to make some supplemental filings. He did so, and the record closed, as scheduled on November 2, 2007.

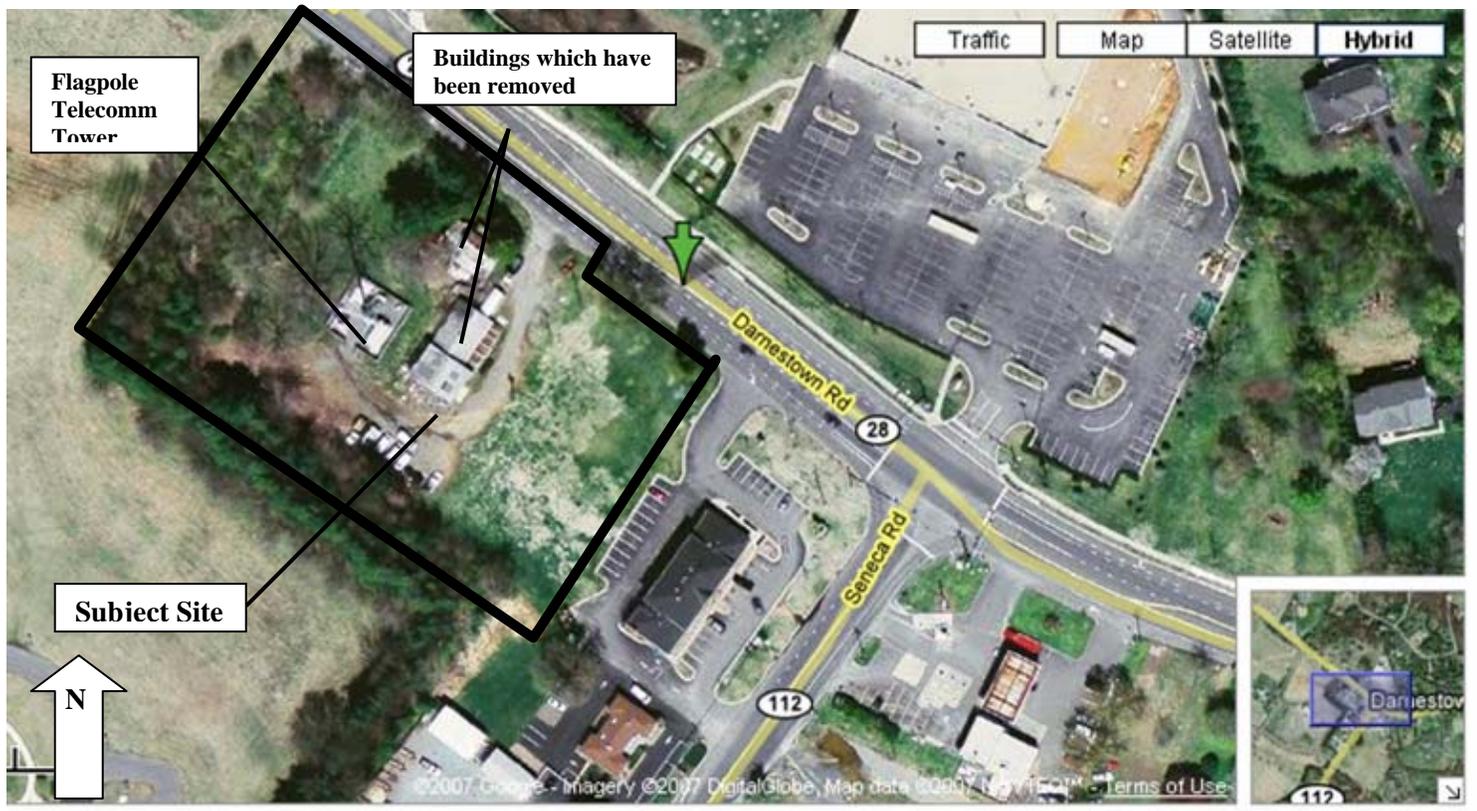
The Applicant in this type of case bears a burden to overcome the legal presumption that all comprehensive rezoning is accurate. In this case, the Applicant has met its burden. As will appear more fully below, the evidence of record supports a finding of mistake in the most recent comprehensive rezoning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

III. FINDINGS OF FACT

A. Subject Property

The subject property, 14120 Darnestown Road, Darnestown, Maryland, is a mostly vacant tract, currently improved only with a telecommunications tower disguised as a flagpole. It is shown

on the following Google satellite photo, Exhibit 29. Mr. Murray of Technical Staff indicates that the photo accurately portrays the subject site and its immediate surroundings, except that the buildings to the east of the telecommunications tower were demolished after the photo was taken. No later photos are available. Exhibit 30.

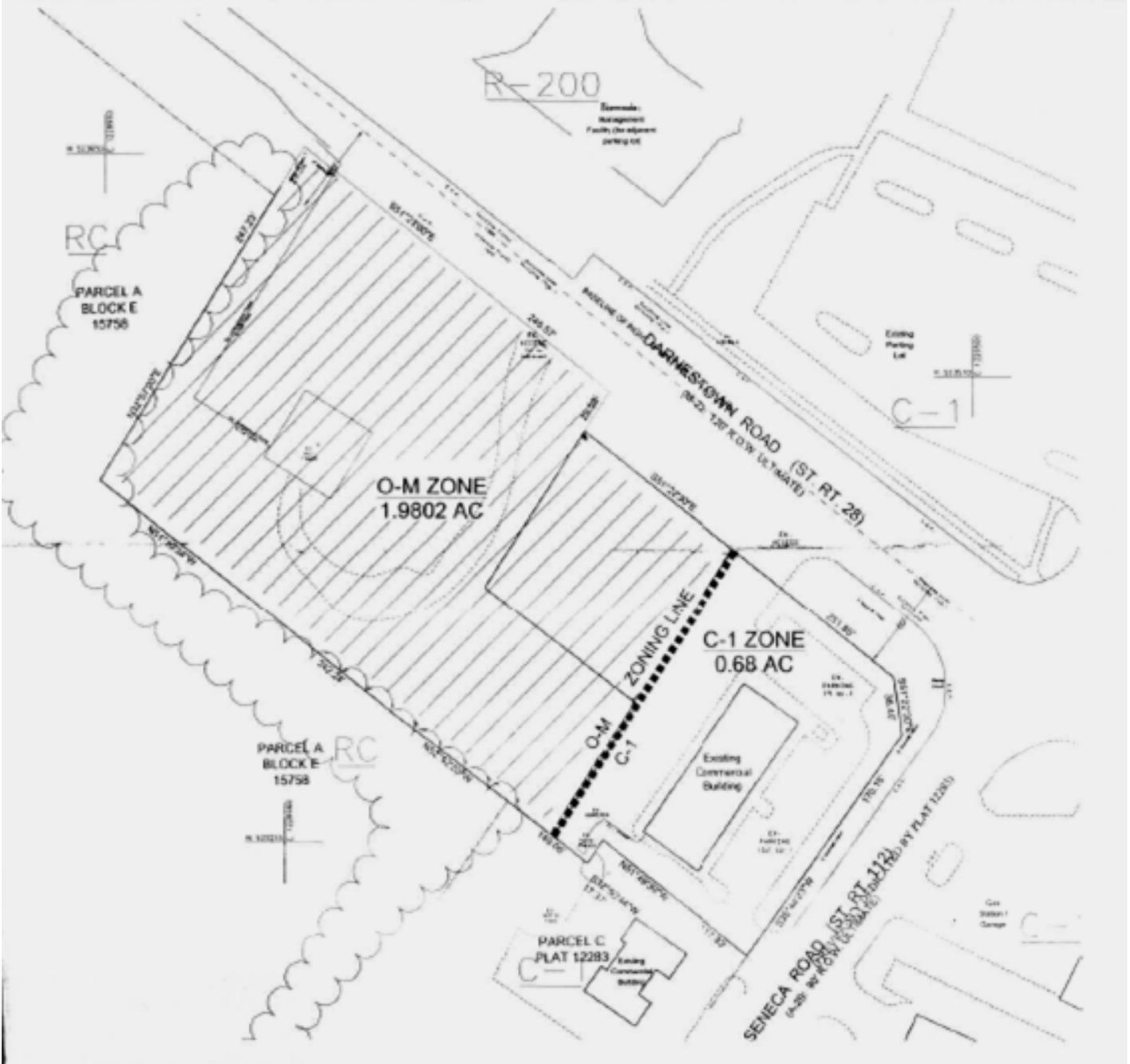


The site was described in the Council's 1992 opinion in LMA G-685 (Exhibit 21(a)):

The subject property is located at the heart of the Darnestown and Vicinity planning area in the western half of Montgomery County and about three miles directly north of the Potomac River. The property is also located about 70 feet west of the intersection of Darnestown and Seneca Roads. The site is an irregularly-shaped parcel that possesses about 365 feet of frontage along Darnestown Road and extends 215 feet in depth along its eastern edge. The property contains sloping topography which drops 22 feet in elevation as it extends from east to west. The western and lower one-third of the site is wooded. . . .

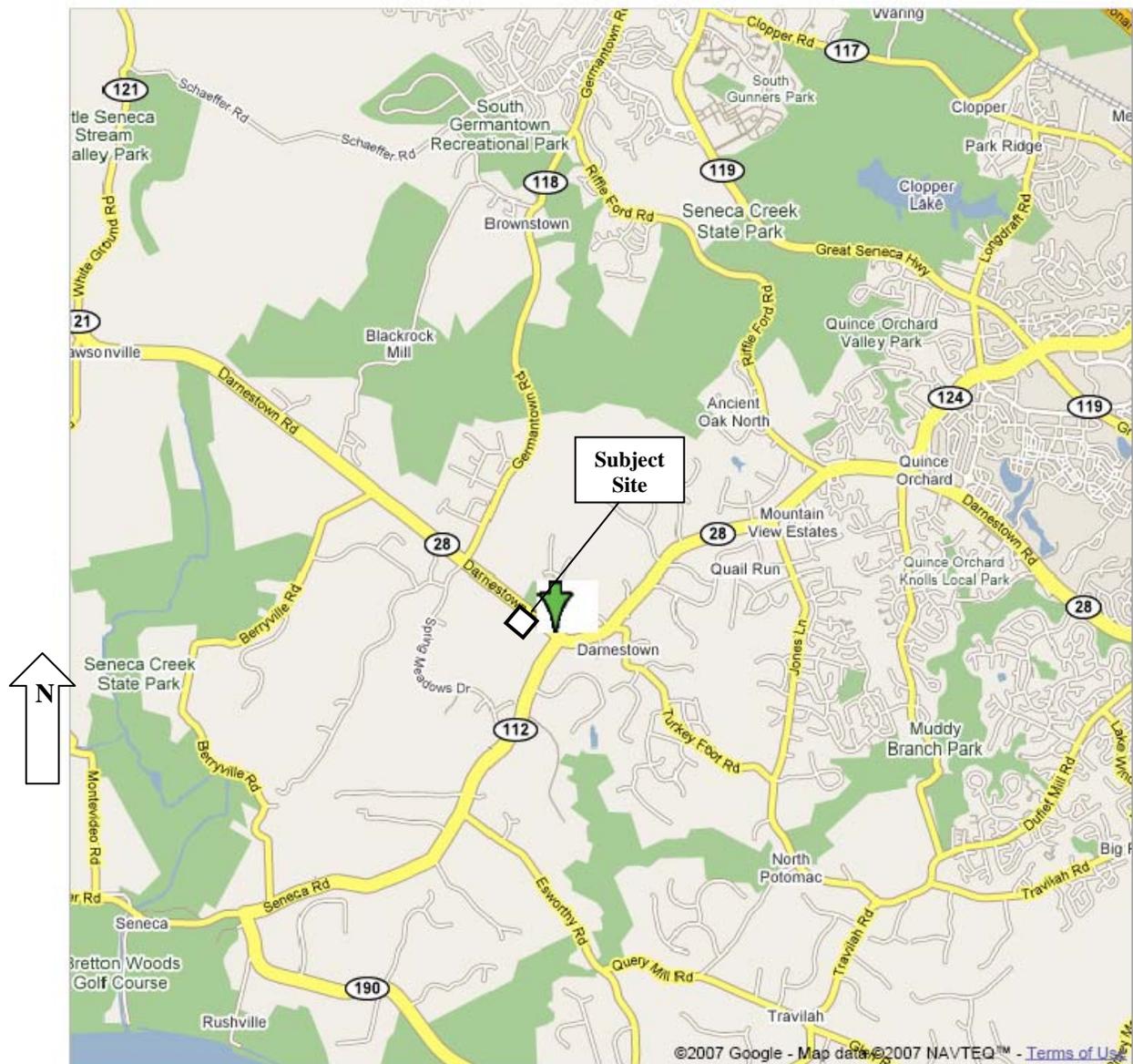
² The Technical Staff Report is quoted and paraphrased frequently herein.

This description is still applicable. The following Zoning Site Map (Exhibit 8) depicts the site as it currently exists³:



³ It should be noted that the Site Plan contained in another exhibit (Exhibit 9) is not intended by the parties to represent a site plan for the future under the C-1 Zone. Rather, it was intended by the Applicant to show a proposed site plan under the O-M Zone that had been earlier submitted. Tr. 7. It therefore will not be considered as part of this rezoning request.

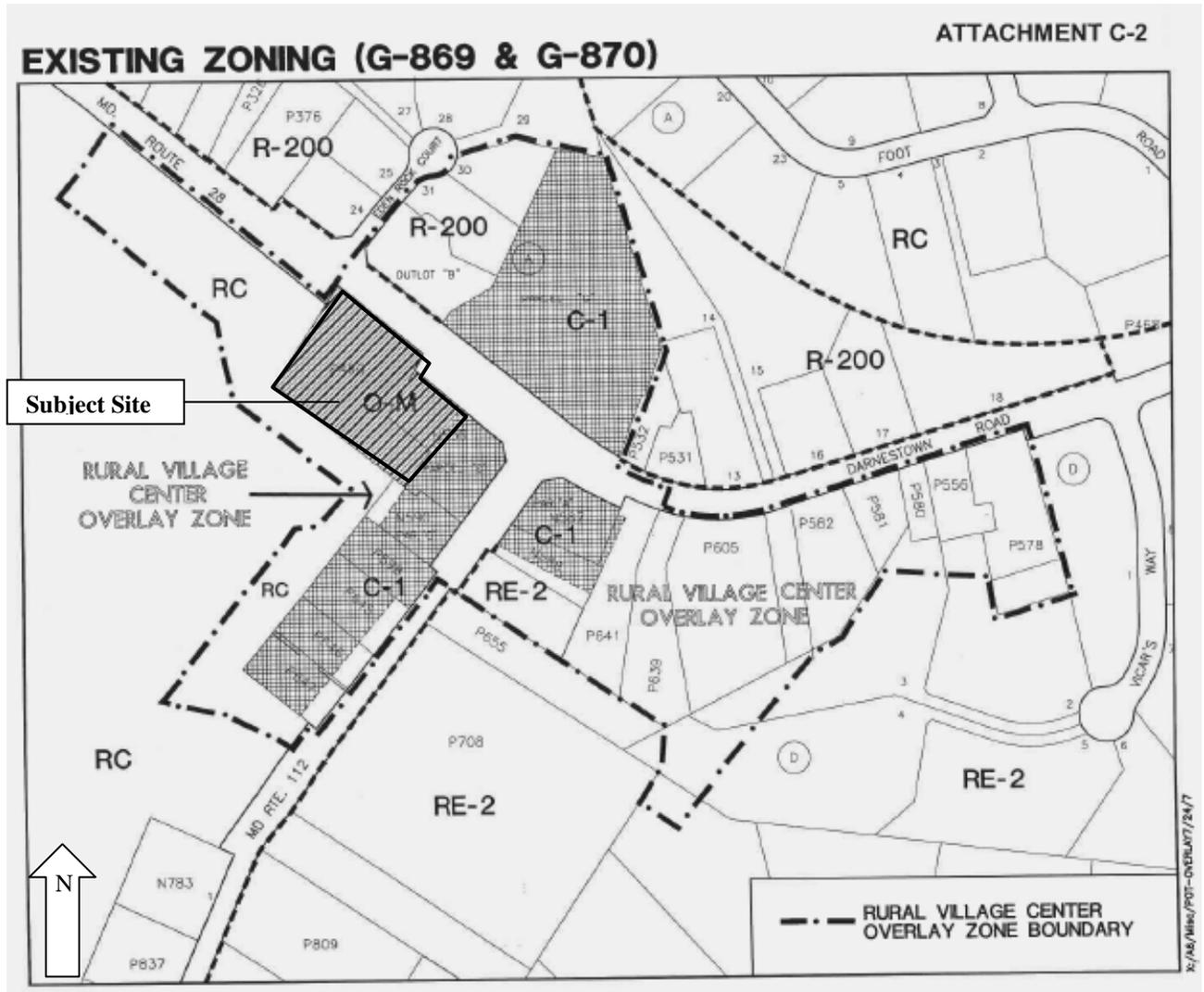
The general location of the site can be seen on the following Google map (Exhibit 26):



B. Surrounding Area and Adjacent Development

The surrounding area was defined and described by the Council in LMA G-685 as including those uses located within a radius ranging between 800 and 1,000 feet from the site. Callum Murray of Technical Staff recommended using the same definition in the current case (Tr. 17-19), and referenced the current zoning map contained on page 100 of the Master Plan (Exhibit 25) to explain it.

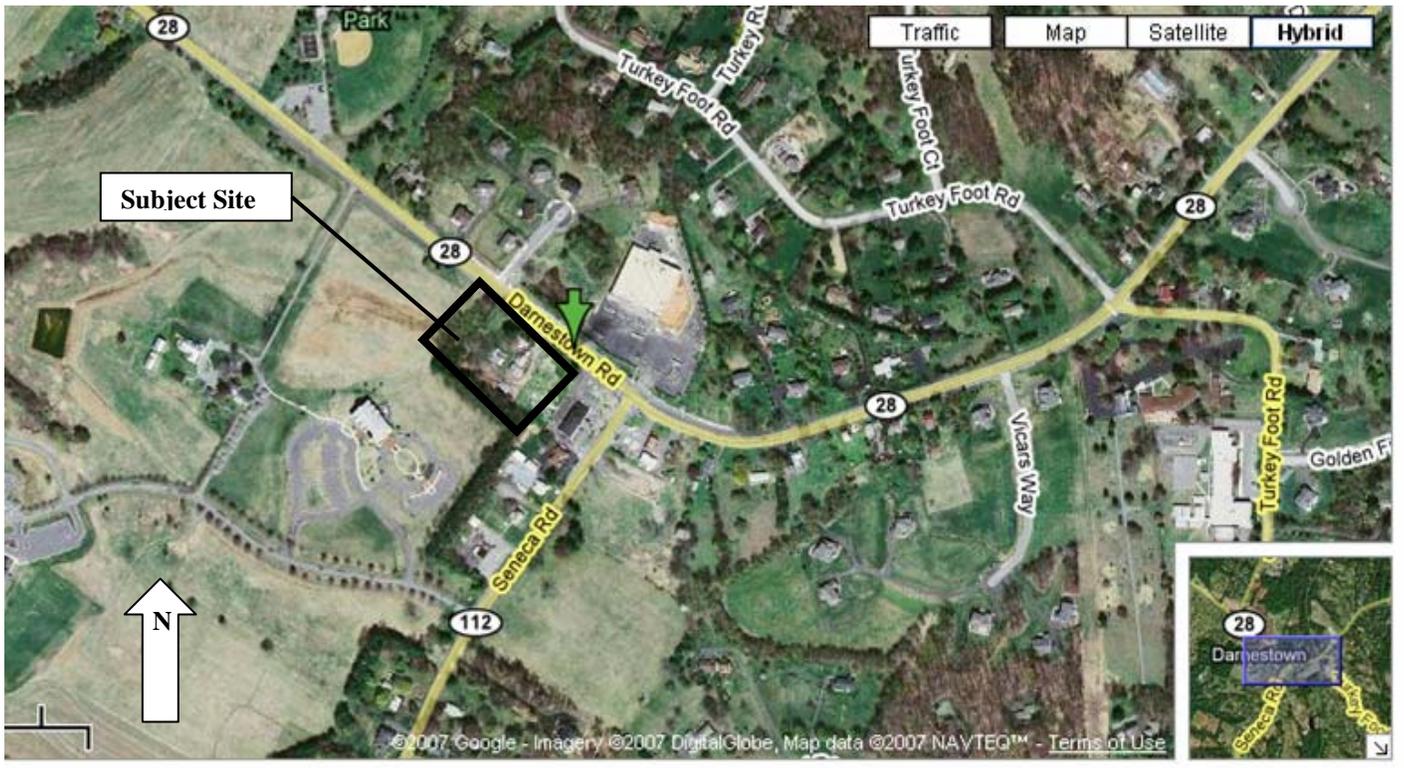
This map is reproduced as Attachment C-1 to the Technical Staff report (Exhibit 13). A more detailed map was appended as Attachment C-2 to the Technical Staff report, and it is shown below:



According to Mr. Murray, the surrounding area essentially includes the Rural Village Center Overlay Zone and a portion of the neighboring Archdiocese property within a 1000-foot radius. The Archdiocese property, which is southwest of the subject site, consists of about 189⁴ acres in the RC Zone. Also within the surrounding area are the Darnestown Village Center, the C-1 zoned uses on

⁴ The court reporter incorrectly listed this figure as 139 acres.

the west side of Seneca Road, a gas station on the southeast corner of Darnestown and Seneca Roads in the C-1 Zone, a large grocery store, and a storm water management area on the north side of Darnestown Road. Tr. 17-19. It also encompasses RE-2 zoned properties on the east side of Seneca Road and R-200 zoned properties on the north side of Darnestown Road. These features can be seen on the following Google satellite photo (Exhibit 28):



C. Zoning and Land Use History

The subject site had the following zoning history, as compiled by Technical Staff (Exhibit 32):

1958

The site was classified for half-acre residential density (R-R Zone) when countywide comprehensive zoning was applied in 1958.

1969-70

LMA Application F-399, filed on June 2, 1969 for reclassification of 0.91 acres from the R-R Zone to the C-1 Zone, included a portion of the property at the intersection of Darnestown Road and Seneca Road. The C-1 zoning request was

approved by the District Council on September 22, 1970, for 8,625 square feet, leaving in residential zoning the portion of Lot E which is part of the subject property.

1973

The R-R Zone was renamed the R-200 Zone on October 2, 1973.

1980

All of the subject property was down-zoned to the RC (Rural Cluster) Zone by comprehensive zoning, Sectional Map Amendment G-247, in 1980.

1992

On February 25, 1992, the District Council adopted Resolution No. 12-556 and approved LMA Application No. G-685, reclassifying the subject property (1.9576 acres) from the RC Zone to the O-M Zone.

2002

On October 15, 2002, the District Council adopted Resolution No. 14-1468, approving Sectional Map Amendment G-800 to the Zoning Map and applied the Rural Village Center Overlay Zone to Darnestown Village, including the subject property.

D. The Rezoning Request, and the Mistake in the Master Plan and SMA-G-800

As mentioned at the outset, this Local Map Amendment application requests reclassification from the O-M Zone (Office building, moderate intensity) to the C-1 Zone (Convenience Commercial).

The Mistake:

The request is based on a mistake that was made in the last comprehensive zoning of the subject site in SMA G-800, which had been intended to implement recommendations in the *Potomac Subregion Master Plan*, approved and adopted April 2002 (Exhibit 25). The mistake is that the property in question was left in the existing O-M Zone, even though the planners sought to recommend its reclassification into the C-1 Zone, consistent with the adjacent property, during development of the Master Plan.

It must be remembered that the Darnestown Village area 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. Exhibit 23(b), Technical Staff report of July 1, 2002, for SMA G-800, p. 1. The subject site consists of under two acres. Thus, the precise language for the subject site conveyed from Master Plan draft to Master Plan draft, and ultimately into SMA G-800, was not the main focus of attention, as evidenced by the legislative history in the record as Exhibits 22 and 23 (and their subparts). The primary concern of the planners for the Darnestown Village area seemed to be the imposition of the Rural Village Center Overlay Zone, which would protect the rural village character of the whole Darnestown Village area.

Once the mistake was made in the Master Plan, its inclusion in the SMA G-800 was routine, in the absence of anyone noticing it at the time. This general policy was stated by Marlene Michaelson, Senior Legislative Analyst,⁵ in her October 10, 2002, memorandum to the Council regarding SMA G-800 (Exhibit 23(b), p. 2): “While the Council can reverse a decision made during the Master Plan, it has been Council policy to confirm all Master Plan decisions during the SMA unless significant new information has been presented which leads the Council to believe a change is warranted.” In this case, all the evidence confirms that no one caught the Master Plan error until after the SMA was approved.

The uncontradicted testimony in this case is to the effect that all interested parties thought the C-1 Zone would result from the new Master Plan and the comprehensive zoning in SMA G-800. This was the testimony of Callum Murray of Technical Staff, who wrote the Technical Staff report for SMA G-800 and has represented M-NCPPC in the present case. As testified by Mr. Murray (Tr. 19):

There was a mistake in inclusion in resolution number 14-1170, and subsequently in the 2002 Potomac Subregion Master Plan of a reference to the O-M zone

⁵ The Hearing Examiner thanks Ms. Michaelson for gathering the legislative history referenced in this case.

within a recommendation to establish an overlay zone, which should only pertain to the C-1 zone.

As a consequence, this resulted in a mistake during the comprehensive zoning in SMA G-800 in which the O-M zone was permitted to remain a part of the subject site when the intent was to change it to C-1, subject to the Rural Village Center Overlay Zone.

His testimony was confirmed by Stephen Ellis, who represented the Darnestown Civic Association. According to Mr. Ellis, all involved believed the subject site was going to become C-1 property, because that was what the community, in general, wanted. The community wanted the C-1 Zone to provide convenient retail for the local residents, and because of restrictions on septic capacities in the area, the possibilities for developing in the O-M zone were much more restricted than in the C-1 Zone. Mr. Ellis stated that they thought that everything was running smoothly, because the Planning Board had also approved the elimination of the O-M Zone [during the Master Plan process]. Mr. Ellis suggested that this issue “was basically overlooked by the Council.” Tr. 36.

When asked by the Hearing Examiner whether he believed that the Council made a mistake in leaving the O-M Zone, while intending to accomplish the ends set forth by Mr. Ellis, he responded (Tr. 37):

Yes. There was no reason that any Council member would have been against that change as far as I know. Because the community, the property owner, the Planning Board staff and the Planning Board were all in favor of the entire C-1 for the entire overlay zone. We were all in [synch].⁶ It was surprising to us that it didn't happen.

Nicholas Petruccelli, the owner of the subject site, testified on this point too. Mr. Petruccelli was also under the impression that the Council was going to be changing the Zone to C-1, as had been discussed in the Master Plan process. He was surprised to learn later that it had not been done, and he believes the other participants were surprised as well. “We were supposed to be included, you know,

⁶ The court reporter incorrectly spelled the word “cinque.”

in the master plan. . . . So everybody was surprised, I mean, what happened, you know. We thought there was an oversight.” Tr. 41.

The mistake in this case is further evidenced by the inherent inconsistency in the language of the Master Plan regarding the O-M Zone. The language in the Master Plan relevant to this case is found at pages 98-99, where the “Darnestown Village Center” is discussed. In that discussion, the Master Plan observes, in a bullet point, that:

- **The O-M zoning** [which was then, and still is, the existing zone on the subject site] **is inappropriate in this location. Its densities are too high for a rural village and for an area reliant on septic systems.**[p. 98, Emphasis added]

The C-1 Zone is also discussed, with the Master Plan expressing concerns, but not concluding that it was “inappropriate” for the area, as the Plan had characterized the O-M Zone:

Development in the C-1 Zone does not require site plan review or a public hearing and has resulted in patterns that are objectionable to the surrounding community. [p. 98]

To remedy the problem with the C-1 Zone, the Master Plan recommended the establishment of a Rural Village Center Overlay Zone which would limit the uses permitted in the C-1 Zone:

“The Rural Village Center Overlay Zone would delete certain C-1 uses considered inappropriate for a rural village. The Overlay Zone would include development standards for green area, location of buildings and parking, building height, and density.”[p. 99]

However, when the Master Plan’s analysis was reduced to a bullet point recommendation, the language failed to distinguish between the C-1 and the O-M Zones, stating:

- Use the overlay zone to limit the uses that would otherwise be allowed in the base zones (C-1 and O-M) to those that would be appropriate for a rural village. [p. 99]

This coupling of the C-1 and O-M Zones was carried forward to the subsequent Sectional Map Amendment (G-800), which retained the existing O-M Zone on the subject property to

implement what the District Council apparently assumed was a recommendation stated in the *Potomac Subregion Master Plan*.

The Council's Intent:

Technical Staff believes, and the Hearing Examiner agrees based on the record, that the County Council's intent in both the Master Plan and the comprehensive rezoning was to carry out the recommendations of both the planners and the community. Those recommendations were for the O-M Zone to be replaced by the C-1 Zone at this location. As stated by Mr. Murray:

Well, the discussions with the master plan advisory group and citizens and the Planning Board, the whole intent was to eliminate the O-M zone. And, in fact, on page 98 of the master plan, it states the O-M zone is inappropriate in this location. [Tr. 20.]

* * *

[T]he intent of the advisory group, the staff, the citizens association, and I believe the PHED Committee and County Council, was to create an attractive, pedestrian-friendly rural village center consistent with not only retail uses, . . . and a limitation of inappropriate uses via the new rural village center overlay zone. [Tr. 23]

* * *

And the language there was that the permitted uses under the overlay zone would be based on the C-1 uses with adjustments. As far as I can recollect, and I believe as far as the citizens involved in that can recollect, there wasn't one single illusion by any PHED Committee member or Council member to alter that during all of the work sessions on the master plan. [Tr. 26-27.]

Those recommendations did not actually get incorporated into SMA G-800 because ambiguous language mentioning both the C-1 and the O-M Zones in connection with the overlay zone crept into the final versions of the Master Plan (at p. 99 of the Master Plan, quoted on the previous page of this report).

This conclusion is buttressed by the fact that an earlier draft of the Master Plan, the Planning Board Draft of September 2001 (Exhibit 11, p. 97), specifically noted that, in the subject area (which then, as now, included both C-1 and O-M Zones), the permitted uses under the overlay zone “will be based on the C-1 uses with adjustments,” not C-1 and O-M uses with adjustments. In fact, it proposed establishing a “C-1 Overlay Zone,” not a C-1 and O-M Overlay Zone. Moreover, the Rural Village Center Overlay Zone, subsequently approved by the County Council, specifically prohibited certain land uses generally located in the C-1 Zone, and not those generally located in the O-M Zone. Staff also notes that no objection was voiced to the removal of the O-M Zone during the public hearings and work sessions. *See* Technical Staff report, Exhibit 13, p. 7. Tr. 19-25. Yet, the Council mistakenly included the O-M reference in its Master Plan recommendation bullet point, and then mistakenly relied upon that bullet point in adopting SMA G-800.

Problems with the O-M Zone in this Area:

Mr. Murray outlined why the O-M Zone is inappropriate for the area in both his Technical Staff report and his testimony:

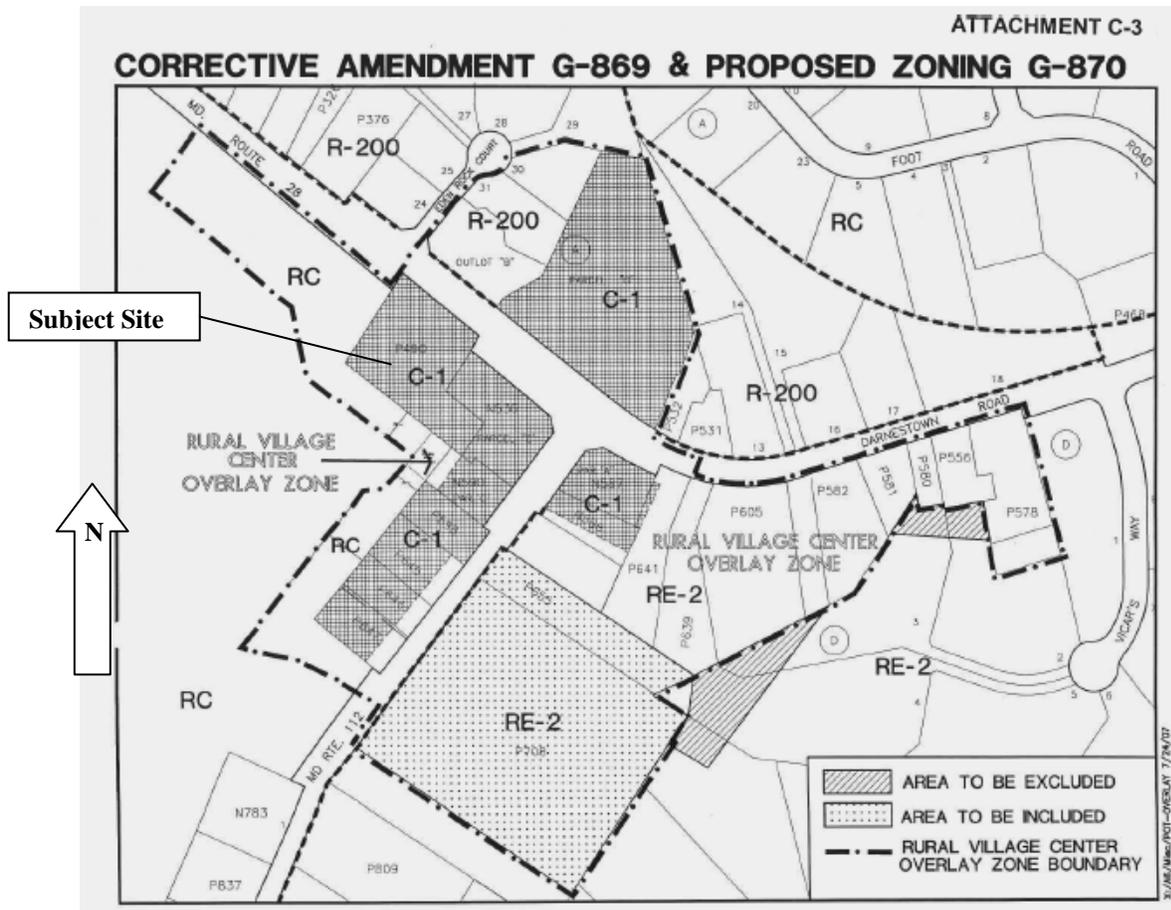
In general, wastewater flows for retail uses are less than for office uses, with retail requiring 0.05 gal/day/s.f. An office building would require 0.09 gal/day/s.f. [Given the limited septic capacity of the area, an office building would therefore be substantially smaller than a retail building and would not meet the current demands of the local community. Furthermore, there are numerous retail uses permitted in the C-1 zone that are not permitted in the O-M zone. These include a bookstore, gift shop, garden supply, hardware store, clothing store, dry goods store, and real estate office. An emphasis on low-water use establishments would allow for the potential for one or two higher water use occupants such as a sandwich or coffee shop, or café, and a variety of uses to serve the needs of the Darnestown citizens. [Exhibit 13, p. 8.]

In his testimony (Tr. 24), Mr. Murray points out that the O-M zone is designed for moderate intensity office buildings outside of central business districts. This site is far away from any central business district. He also notes that the O-M Zone “permits an FAR of 1.5, a building height of seven stories, and a lot coverage of 75 percent, all clearly inappropriate for a rural village, even if artificially

constrained by covenants. And the rural village center overlay zone was clearly geared to prohibit land uses generally located in the C-1 zone and not the O-M zone.” Mr. Murray stated that it was not practical to have an O-M application that is limited to a FAR of 0.2, which is a limit imposed by the Rural Village Center Overlay Zone. In the O-M Zone, a FAR of up to 1.5 is ordinarily permitted.

The Solution:

The Applicant now seeks to correct the zoning mistake by reclassifying, to C-1, the only part of the overall area that is currently classified as O-M, so that the zone will be consistent with the intent of the planners when they drafted the *Potomac Subregion Master Plan*. The Hearing Examiner agrees. The O-M Zone is inconsistent with the Master Plan analysis (at p. 98, quoted on page 13 of this report), which concluded that the O-M Zone was “inappropriate” for this area, and that the C-1 Zone was appropriate if its uses were limited by an Overlay Zone. After rezoning, the zoning map of the area would look as depicted by Technical Staff in Attachment C-3 to Exhibit 13.



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. 29-31.

As to the C-1 Zone's purpose and regulations, Mr. Murray noted that the rezoning would permit convenience shopping facilities for local residents; it would be directly abutting and confronting areas of C-1 zoning [not large commercial areas]; it would be the commercial edge of the rural village center; it would merely extend the C-1 uses along the frontage of Darnestown Road's existing C-1 uses; and it is not within a central business district. Regulations such as building height would be controlled by the Rural Village Center Overlay Zone. For example, the height could not exceed 35 feet; the green area would be 35 percent of the gross tract area; and the density would not be in excess of 0.2 FAR. According to Mr. Murray, there is nothing in the regulations for the C-1 zone, as controlled by the Overlay Zone, which would be in conflict with the site that is subject of this rezoning.⁷

⁷ It should be noted that the total area of C-1 zoned property in the Darnestown Village area is about 8 acres. If the subject application is granted, the total will be just over 10 acres. It therefore does not exceed the 15 acre maximum specified in Zoning Ordinance §59-C-4.341.

Mr. Murray further testified that C-1 development would be compatible with surrounding development. It meets or abuts C-1 property on the east side. It confronts a large 40,000 square foot grocery store, Harris Teeter, on the north side of Darnestown Road, and it would extend neighborhood convenience retail for the convenience of a very large Darnestown subregion. It would also be compatible with planned land uses in the area, including a future 32-unit assisted living facility, and convenience commercial for the future residents of that facility.

According to Mr. Murray, the proposed rezoning would have no adverse impact on public facilities, schools and transportation or utilities. In fact, commercial trips by local citizens may be reduced in that they would not have to travel to the far north to shop at Quince Orchard and Darnestown Roads.

Mr. Murray indicated that approval of the current application would have the following additional benefits (Tr. 24-25):

- It would resolve an anomalous split zoning on the subject property. (SMA G-800 had already resolved dozens of these in other areas.)
- It would resolve the issue of different development standards on abutting sections of the same property, which make it very difficult for the property owner to do some form of coherent development.
- It would meet the original intent of the Master Plan [to provide convenience commercial facilities for the benefit of the local residents].
- It would offer a property owner a great deal more flexibility in providing additional neighborhood-warranted retail; and
- It would eliminate undue restraints on development caused by the fact that office buildings require almost twice as much sewage capacity per square foot (0.09 gallons per day per square foot) as retail uses (0.05 gallons per day per square foot).

Mr. Murray's testimony was strongly supported by both the property owner (Tr. 39-42) and the Darnestown Civic Association (Tr. 32-38).

Based on this record, the Hearing Examiner finds that a mistake was made when the Council approved that portion of SMA G-800 which left the subject site in the O-M Zone; that the Council's underlying intent was to carry out the Master Plan goal of supporting the rural village center at this

location; that the Master Plan expressly determined that the O-M Zone was inconsistent with that goal; that contrary to the Council's general intent, it inadvertently allowed the O-M Zone to remain on the subject site based on the mistaken inclusion of ambiguous language in the Master Plan upon which it relied; and that the appropriate remedy would be to grant the instant application to reclassify the site to the C-1 Zone.

IV. SUMMARY OF THE HEARING

Three witnesses testified at the hearing, Callum Murray of Technical Staff, on behalf of M-NCPPC, Nicholas Petruccelli, the property owner, and Stephen Ellis, on behalf of the Darnestown Civic Association. Mr. Petruccelli was represented at the hearing by attorney James R. Clifford, Esquire. All testimony supported the application.

Prior to the receipt of testimony, the Hearing Examiner marked as exhibits and took official notice of legislative history and other government records relevant to this case, as follows:

1. The record in local map amendment G-685, approved in Council Resolution No. 12-556 (Exhibit 21), which reclassified the subject site from the R-C zone, rural cluster zone, to the O-M zone on February 25, 1992, with binding covenants restricting development to office use. The related documents were marked Exhibits 21(a), (b) and (c);
2. The legislative history of the Potomac Subregion Master Plan of April 2002, approved in Council Resolution No. 14-1170 (Exhibit 22), dated March 5, 2002. The related documents were marked Exhibits 22(a) through (f); and
3. The legislative history of SMA G-800, Council Resolution No. 14-1468 (Exhibit 23) dated October 15, 2002. The related documents were marked Exhibits 23(a) and (b).

1. Callum Murray, for the M-NCPPC (Tr. 3, 5-8, 11-31; 42-43):

Callum Murray testified that he represents the Maryland-National Capital Park and Planning Commission in these proceedings. He submitted an affidavit of posting (Exhibit 20); a letter from the Planning Board (Exhibit 24) unanimously agreeing that Local Map Amendment G-870 be filed with

a Planning Board recommendation of approval; and the final edition of the April 2002 Potomac Subregion Master Plan (Exhibit 25).

Mr. Murray further testified that he is a planner certified by the American Institute of Certified Planners, and a registered landscape architect licensed by the State of Maryland. He is employed by the Montgomery County Planning Department as a community planning team leader for the Potomac Subregion rural area. By virtue of the Planning Board's letter (Exhibit 24), he appears as the representative of M-NCPPC. He noted that the applicant seeks a rezoning from the present O-M zone to the C-1 zone for the subject property.

Mr. Murray recited the zoning history of the subject site. The site was classified for a half-acre residential density when countywide comprehensive zoning was first applied in 1958. It was placed in the R-200 Zone [then called R-R Zone].

Local map amendment application F-399 filed on June 2nd, 1969, for reclassification of 0.91 acres from the R-200 zone to the C-1 zone, included a portion of this property at the intersection of Darnestown Road and Seneca Road. The C-1 zoning request was approved by the District Council on September 22nd, 1970, for 8625 square feet, leaving in residential zoning the portion of lot E, which is part of the subject property.

In 1980, all of the subject property, not including the previously referenced C-1 property, was downzoned to R-C [Rural Cluster] by comprehensive zoning in May of 1980.

On February the 25th, 1992, the District Council adopted Resolution No. 12-556 approving local map amendment application number G-685 reclassifying 1.9576 acres of the subject property from the R-C zone to the O-M zone.

On October 15th, 2002, the Council adopted Resolution No. 14-1468 approving SMA G-800, which amended the zoning map and applied the rural village center overlay zone to Darnestown Village, including the subject property.

Mr. Murray further testified that the last local map amendment LMA number G-685 defined the surrounding area as a radius ranging between 800 feet and 1000 feet from the site. This was acceptable to the hearing examiner and the District Council at the time. The subject property today constitutes the western edge of the Darnestown Rural Village Center as defined by Map 25 on page 100 of the 2002 approved and adopted Potomac Subregion Master Plan (This Map is reproduced as attachment C-3 to the Technical Staff report (Exhibit 13).

According to Mr. Murray, the surrounding area includes a C-1 zoned area for uses on the west side of Seneca Road, a gas station on the southeast corner of Darnestown and Seneca Roads, a large grocery store with storm water management area on the north side of Darnestown Road, and the 189-acre⁸ Archdiocese of Washington property to the southwest of the subject property. He would define the surrounding area as the Darnestown Village Center, and include in a portion of the neighboring Archdiocese property within a 1,000-foot radius.

Mr. Murray testified that the basis for M-NCPPC's rezoning request is its belief that a mistake was made in the comprehensive zoning and Sectional Map Amendment G-800 in October of 2002. There was a mistake in inclusion in Resolution Number 14-1170, and subsequently in the 2002 Potomac Subregion Master Plan, of a reference to the O-M zone within a recommendation to establish an overlay zone, which should only pertain to the C-1 zone. As a consequence, this resulted in a mistake during the comprehensive zoning in SMA G-800 in which the O-M zone was permitted to remain a part of the subject site when the intent was to change it to C-1, subject to the Rural

⁸ The court reporter incorrectly transcribed this area as 139 acres.

Village Center Overlay Zone.

Mr. Murray referenced page 99 of the approved and adopted Master Plan (Exhibit 25), which states that the Rural Village Center Overlay Zone would delete certain C-1 uses considered inappropriate of a rural village. The Planning Board Draft Master Plan (Exhibit 11, p. 97), which was the subject of County Council deliberation prior to framing of Resolution 14-1170 stated:

C-1 overlay zone: This commercial area covers ten acres and includes all current C-1 and O-M sites. The permitted uses under the overlay zone will be based on the C-1 usage, with adjustments. . . . [Emphasis supplied]

For some reason that language did not find its way into the final version of the Master Plan.

According to Mr. Murray, during the discussions with the Master Plan Advisory Group and citizens and the Planning Board, the whole intent was to eliminate the O-M zone. In fact, on page 98 of the final Master Plan (Exhibit 25), it states “[t]he O-M zone is inappropriate in this location.” So the language of the Master Plan is itself internally inconsistent [*i.e.*, with the language on page 99, which indicates that the overlay zone would apply to both the C-1 and O-M Zones].

In Mr. Murray’s opinion, the 1992 LMA G-685, which reclassified the property into the O-M Zone was inappropriate at the time, and Planning Staff had recommended against it. Mr. Murray believes the O-M Zone is not consistent with the intent of the advisory group, the staff, the citizens association, the PHED Committee and County Council, to create an attractive, pedestrian-friendly rural village center. This would allow a limited expansion of retail uses and a limitation of inappropriate uses via the new Rural Village Center Overlay Zone.

Mr. Murray then compared the C-1 Zone with the O-M Zone. The C-1 Zone typically provides locations for convenience shopping facilities which are of a neighborhood orientation, and which supply necessities usually requiring frequent purchasing. The purpose clause states that they shouldn’t be so large or so broad in scope as to attract substantial amounts of trade from outside the

neighborhood, and further states the intent of the Convenience Commercial Zone is that it not be located in close proximity to other commercial areas. Mr. Murray opined that, in the case of Darnestown, the O-M Zone would constitute such a commercial area.

The O-M Zone calls for a moderate intensity office use, intended for areas outside of central business districts. Mr. Murray observed that the subject site is not near a central business district. The zone permits an FAR of 1.5, a building height of seven stories, and a lot coverage of 75 percent, all clearly inappropriate for a rural village, according to Mr. Murray, even if artificially constrained by covenants.

Mr. Murray pointed out that the Rural Village Center Overlay Zone was clearly geared to prohibit land uses generally located in the C-1 zone, and not the O-M zone. He indicated that approval of the current application would have the following effects:

- It would resolve and anomalous split zoning on the subject property. (SMA G-800 had actually resolved dozens of these in other areas.)
- It would resolve the issue of different development standards on abutting sections of the same property, which makes it very difficult for the property owner to do some form of coherent development.
- It would meet the original intent of the Master Plan.
- It would offer a property owner a great deal more flexibility in providing additional neighborhood-warranted retail; and
- It would eliminate undue restraints on development caused by the fact that office buildings require almost twice as much sewage capacity per square foot (0.09 gallons per day per square foot) as retail uses (0.05 gallons per day per square foot).

Mr. Murray stated that it was not practical to have an O-M application that is limited to a FAR of 0.2, which is a limit imposed by the Rural Village Center Overlay Zone. In the O-M Zone an FAR of up to 1.5 is ordinarily permitted, though difficult to attain.

Mr. Murray believes that the error of leaving the O-M Zone in place crept in during the preparation of the proposed Council resolution for approval of the Master Plan. It then was approved by the Council and served as the basis for its inclusion in the subsequently approved SMA G-800.

Mr. Murray further testified that the proposed C-1 Zone would be appropriate since it would comport with the zone's purposes and regulations; it would be compatibility with existing and planned land uses in the surrounding area; and it would be in the public interest.

As to the C-1 Zone's purpose and regulations, Mr. Murray noted that the rezoning would permit convenience shopping facilities; it would be directly abutting and confronting areas of C-1; it would be the commercial edge of the rural village center; and it would merely extend the C-1 uses along the frontage of Darnestown Road's existing C-1 uses. Regulations such as building height would be controlled by the Rural Village Overlay Zone. For example, the height could not exceed 35 feet; the green area would be 35 percent of the gross tract area; and the density would not be in excess of 0.2 FAR. According to Mr. Murray, there is nothing in the regulations for the C-1 zone as controlled by the Overlay Zone, which would be in conflict with the land that is subject of this rezoning.

Mr. Murray further testified that it would be compatible with surrounding development. It meets or abuts C-1 property on the east side. It confronts a large 40,000 square foot grocery store, Harris Teeter, on the north side, and it would extend neighborhood convenience retail for the convenience of a very large Darnestown subregion. It would also be compatible with planned land uses in the area, including a future 32-unit assisted living facility, and convenience commercial for the future residents of that facility.

According to Mr. Murray, the proposed rezoning would have no adverse impact on public facilities, schools and transportation or utilities. In fact, any commercial trips by local citizens may be reduced in that they wouldn't have to travel to the far north at Quince Orchard and Darnestown Roads to shop.

2. Stephen Ellis, for the Darnestown Civic Association (Tr. 32-38):

Stephen Ellis testified for the Darnestown Civic Association and stated that he “would support Mr. Murray and the Planning Board letter wholeheartedly.” Tr. 32. He referenced the map on page 100 of the final Master Plan, noting that the large blank area to the southwest of the subject site marked “RC” is owned by the Archdiocese of Washington.

At the time, that was owned by the Windsor School, which was owned by the Bullard family of Rockville. Two different fence companies were there by special exception before Mr. Petruccelli bought the property. In the eighties, the Darnestown property across the street was owned by a developer that wanted to build a 200,000 square foot shopping center along the north side of Darnestown Road, which is zoned R-200 and C-1. The Civic Association had a pitched battle with that developer, but it supported Mr. Petruccelli’s effort to rezone for office space because there were no nearby residences which would be adversely affected at the time. There weren't any homes built across the street at that time. Subsequently, the property owner across the street, the developer, found out that the Council was not going to back him in a rezoning of his property, so the residential properties, the R-200s on either side of the C-1 Zone on the north side of Darnestown Road were developed as housing.

By 1998, when Callum Murray and other planners came out to talk to the Civic Association about the new Master Plan, the Association no longer favored the O-M Zone, which had not been developed, because they wanted a very compact C-1 center for Darnestown, with sufficient intensity to provide for the express needs of the neighbors for more local retail businesses. The O-M Zone could not supply that. The Civic Association contacted all of the commercial property owners in Darnestown during the Master Plan process, and “we were basically united in our vision for the master plan.” Tr. 35. According to Mr. Ellis, none of the property owners was against anything that

was going to take place during this Master Plan. There was support from the Landaus, Mr. Petruccelli, Mr. Bailey, the Coopersmith family, which owns the gas station property, and there was no opposition whatsoever.

All apparently believed the subject site was going to become C-1 property, because that was what the community, in general, wanted. Because of restrictions on septic capacities, the possibilities for developing in the O-M zone were much more restricted than in the C-1 Zone. Mr. Ellis stated that they thought that everything was running smoothly, because the Planning Board had also approved the elimination of the O-M Zone [during the Master Plan process]. Mr. Ellis suggested that this issue “was basically overlooked by the Council.” Tr. 36.

When asked by the Hearing Examiner whether he believed that the Council made a mistake in leaving the O-M Zone, while intending to accomplish the ends set forth by Mr. Mr. Ellis, he responded (Tr. 37):

Yes. There was no reason that any Council member would have been against that change as far as I know. Because the community, the property owner, the Planning Board staff and the Planning Board were all in favor of the entire C-1 for the entire overlay zone. We were all in [synch].⁹ It was surprising to us that it didn't happen.

3. Nicholas Petruccelli (Tr. 38-42):

Nicholas Petruccelli testified that he would like to develop the property with the more retail specific business that the community is looking for. Right now, the way it is under the O-M Zone, he is limited to office or medical office, which is very limiting, especially for medical offices because they require even greater septic capacity than general offices. If the site is developed as general or medical offices, it will really not be providing any other use for the community there.

Mr. Petruccelli applied for the O-M Zone in 1992 because, after the fence companies left the property, it was an eyesore, and he had been advised at the time that it could be rezoned to O-M to

⁹ The court reporter incorrectly spelled the word “cinque.”

develop it as offices. After the rezoning, based on the real estate market at the time, he decided not to develop the property. Now, there is a need for local retail in the area, not offices.

Mr. Petruccelli was also under the impression that the Council was going to be changing the Zone to C-1, as had been discussed in the Master Plan process. He was surprised to learn later that it had not been done, and he believes the other participants were surprised as well. “We were supposed to be included, you know, in the master plan. . . . So everybody was surprised, I mean, what happened, you know. We thought there was an oversight.” Tr. 41. They are now trying to correct it.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The subject case, unlike most brought before the Council, seeks to reclassify land from a floating zone (O-M) to a 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)

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. Montgomery County has many floating zones, including the O-M Zone which was allowed to remain on the subject property by SMA G-800.

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 a substantial change in the zoning neighborhood or a mistake in the previous comprehensive zoning. *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 the comprehensive zoning, this case is analyzed under the change/mistake formula.¹⁰

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 the SMA that left the Subject Property zoned O-M. 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.¹¹

¹⁰ In this unusual case, the application for rezoning does not fit neatly into any category. As noted in *Tauber v. Montgomery County Council*, 244 Md. 332, 336, 223 A.2d 615 (1966), the “change/mistake” analysis does not apply when an applicant is seeking to rezone from a Euclidean Zone to a floating zone. But this application does not seek reclassification to a floating zone. This case also does not involve an effort by a private party to switch from one Euclidean Zone to another Euclidean Zone, which is the typical case in which the “change/mistake” standard has been applied. Instead, the M-NCPPC seeks reclassification from a floating zone to a Euclidean Zone. Nevertheless, the “change/mistake” analysis is the appropriate one here because the Applicant is challenging part of a comprehensive zoning (SMA G--800) on the theory that the Council was mistaken.

¹¹ The court also notes that 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.

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.

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.¹² 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 the last comprehensive zoning (SMA G-800) covering, *inter alia*, the subject site. The alleged mistake is that the property in question was left in the existing O-M Zone. The Applicant now seeks to reclassify, to the C-1 Zone, the only part of the overall area that had been classified as O-M, so that the zone will be consistent with the plan for this area (a rural village center) expressed in the applicable Master

¹² 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.

Plan. 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.

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 the Master Plan in drafting the challenged SMA G-800. The language in the Master Plan Recommendations (Exhibit 25, p. 99) inadvertently included a reference to the O-M Zone as a base zone for proposed Overlay Zone. That language was not present in the Planning Board Draft of the Master Plan (Exhibit 11, p.97), which mentions the O-M Zone as one of the current zones, but specifies that “[t]he permitted uses under the overlay zone will be based on the C-1 uses with adjustments.”

All the evidence indicates that the approach in the Planning Board Draft is what the planners and the community intended for the final Master Plan. Apparently, when the Master Plan draft was edited into its final form, two concepts (*i.e.*, that both the C-1 and O-M Zones existed in the area, and that there would be a base zone for the overlay zone) were combined into one bullet point, with misleading results not intended by the planners.

This error was not caught immediately because it was a small part of a large Master Plan. Discussions of the Darnestown village center after the Planning Board Draft were directed mostly at the nature of the proposed overlay zone. The final version of the Master Plan was approved by the Council on March 5, 2002, in Resolution 14-1170 (Exhibit 22). At page 18 of that resolution, the

new recommendation bullet points were substituted for the recommendation language in the Planning Board Draft. The new bullet points were certainly more concise, but they misleadingly indicated that both the O-M Zone and the C-1 Zone would be base zones for the intended overlay zone.

In addition to the testimony in this case to the effect that this result was not intended, the Master Plan itself specifies that “[t]he O-M Zone is inappropriate for this location. . . .” Exhibit 25, p. 98. Thus, the evidence is uncontradicted that the planners did not intend to retain the O-M Zone for this site. Nevertheless, once the ambiguous language crept into the Master Plan, it served as the basis for the subsequent SMA G-800, which left the O-M Zone in place. As stated in the Council Opinion in Resolution No. 14-1468 (Exhibit 23, p. 1), “The Council finds that Sectional Map Amendment Application G-800 is necessary to implement the land use and development policies expressed in the Approved and Adopted Potomac Subregion Master Plan.” That is the way the process generally works. “While the Council can reverse a decision made during the Master Plan, it has been Council policy to confirm all Master Plan decisions during the SMA unless significant new information has been presented which leads the Council to believe a change is warranted.”¹³

In this case, all the evidence confirms that no one caught the Master Plan error until after SMA G-800 was approved by the Council in Resolution No. 14-1468 on October 15, 2002. This is not surprising, since the Darnestown Village area 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. Exhibit 23(b), Technical Staff report of July 1, 2002, for SMA G-800, p. 1. The subject site consists of under two acres.

¹³ This general policy was stated by Marlene Michaelson, Senior Legislative Analyst, in her October 10, 2002, memorandum to the Council regarding SMA G-800 (Exhibit 23(b), p. 2).

In sum, the evidence demonstrates that there was an invalid factual premise regarding the propriety of retaining the O-M Zone at this site and that the Council relied upon it in adopting that portion of SMA G-800 which applied to the Darnestown Village Center area. 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. 15-19) of this report. As that discussion establishes, the O-M Zone is inappropriate for this location, while the C-1 Zone, as controlled by the Rural Village Center Overlay 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 and possible adverse effects on the surrounding area or public facilities.

As previously mentioned, the Master Plan recommended the C-1 Zone, with additional limits imposed by an overlay zone. That overlay zone is currently in place under Zoning Ordinance §59-C-18.23. Hence, the C-1 Zone would conform to the Master Plan.

Both Technical Staff and the Planning Board more than recommended approval of this zoning application; they brought the application themselves. 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. 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 Darnestown Road to other areas to shop. Tr. 30-31.

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-870:

1. That a mistake was made when the Council approved that portion of SMA G-800 which left the subject site in the O-M 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-870, for the reclassification from the O-M Zone to the C-1 Zone of 1.98 acres of split-zoned property known as Parcel P490 and Part of

Parcel N536, located at 14120 Darnestown Road, Darnestown, Maryland, be approved in order to correct a mistake made in Sectional Map Amendment G-800.

Dated: December 12, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner