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I. STATEMENT OF THE CASE

Application No. G-866, filed on June 21, 2007 by Applicant National Labor College (the "College"), requests reclassification from the R-90 Zone to the O-M Zone of one acre of land located at 10000 New Hampshire Avenue, at the southwest corner of the intersection of Powder Mill Road and New Hampshire Avenue in Silver Spring, on property identified as a portion of Parcel A of the George Meany Center for Labor Studies Plat (P.B. 22279), in the 5th Election District. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, development standards and staging. Such limitations are shown on a Schematic Development Plan that is submitted with the application, and must be repeated in covenants to be filed in the county land records.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC"), who recommended *approval* in a report dated October 15, 2007.¹ See Ex. 33. The Montgomery County Planning Board ("Planning Board") considered the application on October 25, 2007 and, by a vote of 5 to 0, recommended *approval*, finding that the project is in substantial compliance with the zoning, land use and density recommendations of the applicable master plan, does not conflict with other county plans and policies, satisfies the purpose of the O-M Zone to provide locations for moderate-intensity office buildings in areas outside a Central Business District that will not have an adverse impact on the adjacent neighborhood, and provides for a more desirable form of development than could be achieved under the unrestricted standards of the O-M Zone. See Ex. 34.

A public hearing was convened on November 9, 2007, after proper notice, at which time evidence and testimony were presented in support of the application. No opposition was expressed at the hearing and none is reflected in the record. The record was held open for one week to permit the submission of executed covenants and closed on November 16, 2007. By Order dated December 13, 2007, the Hearing Examiner reopened the record to await final action by the County

¹ The Staff Report is liberally quoted and paraphrased in Part II.

Council on Zoning Text Amendment (“ZTA”) 07-17, which, as introduced on December 11, 2007, clarified that the present application should be reviewed under the 2003-2005 AGP Policy Element, which was in effect when the application was filed, rather than the 2007-2009 Growth Policy that the County Council adopted on November 13, 2007. See Ex. 45; ZTA 07-17. By letter dated December 17, 2007, Applicant’s counsel requested that the record be closed and the Hearing Examiner’s report issued without waiting for final action on ZTA 07-17. See Ex. 46. The Applicant argued that the Zoning Ordinance does not expressly require a finding of adequate public facilities under Growth Policy standards, and that the District Council has the discretion to approve the present application without a Growth Policy finding. By Order dated December 20, 2007, the Hearing Examiner denied the request to close the record, noting that it has been the Council’s longstanding practice to consider applicable Growth Policy standards in assessing the potential traffic impacts of a proposed rezoning.

On January 25, 2007, the Hearing Examiner’s office received two submissions: a supplemental traffic analysis from the Applicant analyzing the compliance of the proposed development with the 2007-2009 Growth Policy, and a memorandum from Transportation Planning Staff at MNCPPC containing its opinion that the trip mitigation proposed in the supplemental analysis would be adequate to comply with the 2007-2009 Growth Policy at the time of subdivision review. See Exs. 49-50. By Order dated February 12, 2008, these submissions were accepted into the record, a ten-day comment period was established, and a date of February 26, 2008 was established for the close of the record. The record closed on that date, the same day that the Council took final action on ZTA 07-17, establishing that rezoning applications should be reviewed under the Growth Policy in effect at the time of application.

II. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter. Any conflicts in the evidence are resolved under the preponderance of the evidence test.

A. Subject Property and Surrounding Area

The subject property consists of 1.03 acres of land located at 10000 New Hampshire Avenue in Silver Spring, Maryland and identified as part of Parcel A, George Meany Center for Labor Studies, N990 on Maryland Tax Map KP13. The property is located at the southwest corner of New Hampshire Avenue and Powder Mill Road, in an R-90 Zone, a few blocks from the Prince George's County Line. It has approximately 115 feet of frontage along New Hampshire Avenue and 275 feet of frontage along Powder Mill Road, which is at this location a stub road ending in a cul de sac at the western edge of the subject property. The site is currently vacant, except for a sidewalk that traverses the property diagonally and an access drive from Powder Mill Road to the adjacent Holly Hall Apartments, which is protected by an easement. The property is gently sloped and clear of vegetation, except for grass and a single tree that is in poor health. It contains no wetlands, floodplains, rare or endangered species or critical habitats.

The surrounding area must be identified in a floating zone case, such as the present case, so that compatibility can be properly evaluated. The "surrounding area" is defined less rigidly in a floating zone case than in evaluating an application for a Euclidean zone. In general, the surrounding area includes those areas that would be most directly affected by the proposed development. In the present case, Technical Staff defined the surrounding area as bounded generally by I-495 to the south, Hillandale Subdivision to the north, New Hampshire Avenue and Hillandale Shopping Center to the east, and the Hillandale Heights Subdivision to the west². This area is shown on the aerial photograph on the next page, excerpted from the Staff Report. The Applicant's land planner, Phil Perrine, defined the surrounding area slightly more broadly, including additional commercial properties to the east and southeast and two properties in non-residential use that are within view of the subject property, diagonally across the intersection of New Hampshire Avenue and Powder Mill Road. The Hearing Examiner finds that for the most part, Mr. Perrine's suggested

² Based on the dashed line on the aerial photograph in the Staff Report (reproduced on the next page), the Hearing Examiner interprets Staff's surrounding area definition to exclude the two residential subdivisions it refers to, stopping at their borders.

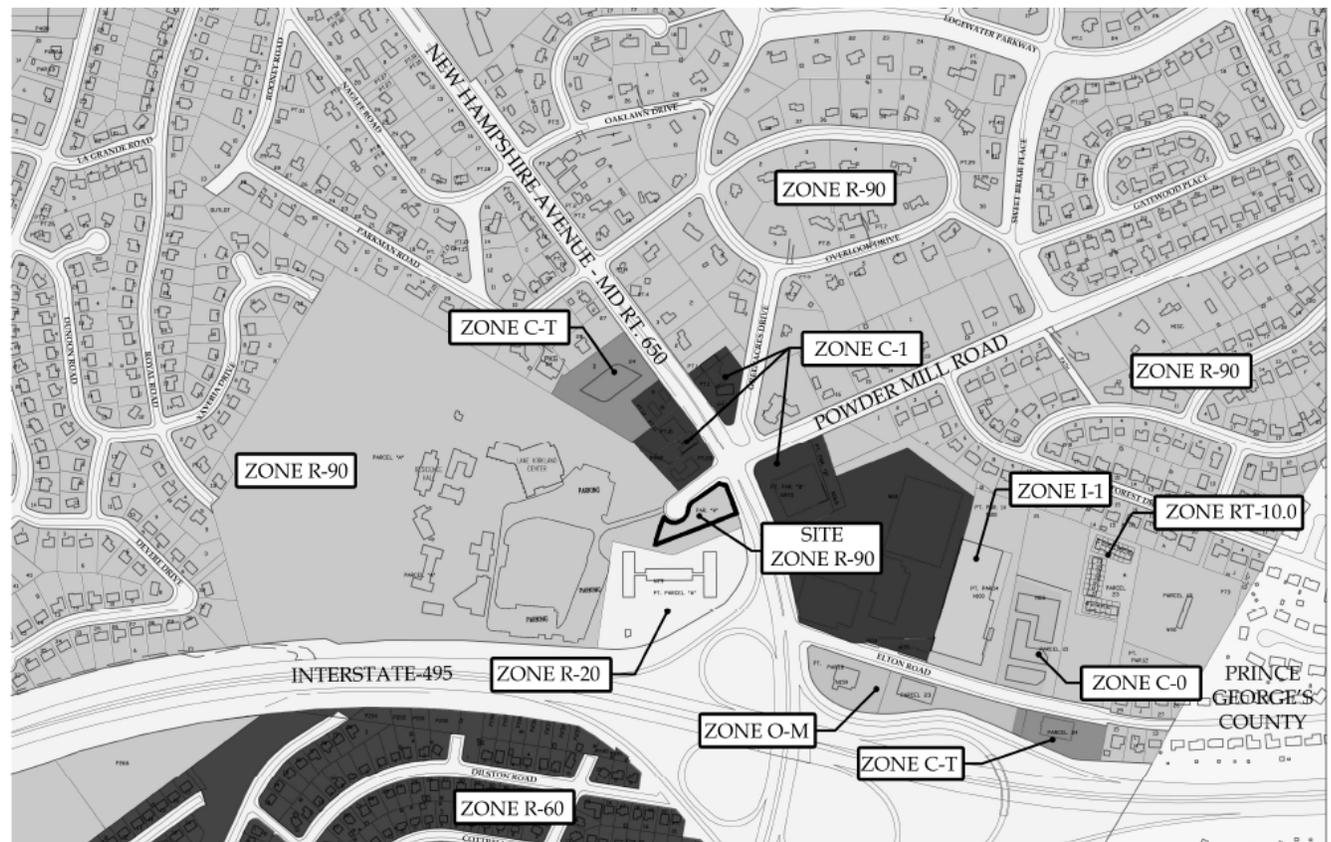
surrounding area better defines the properties that would be most affected by the proposed development, since it includes properties within view of the site that Staff had excluded. To the east, the Hearing Examiner agrees with Technical Staff that the impact of the proposed development would extend very little past the Hillandale Shopping Center. The Hearing Examiner has revised the surrounding area line on the aerial photograph below to reflect her finding that the surrounding area for this case is generally bound by I-495 to the south, the R-90 residential area along New Hampshire to the north and northeast, the boundary of the National Labor College campus to the west and northwest, and the eastern edge of the Hillandale Shopping Center property to the east.

Surrounding Area Map, adapted from Staff Report Attachment 2



The surrounding area contains a mix of commercial uses, a church, a multi-family apartment building and the National Labor College. Abutting the subject site to the west is the remainder of the 47-acre College property, classified in the R-90 Zone. Abutting to the south is the Holly Hall Apartments, a low-income apartment building for seniors in the R-20 Zone. The subject site confronts property in the C-1 Zone to the north and east, and diagonally to the northeast: a gas station across Powder Mill Road to the north, a church diagonally across the intersection, and the Hillandale Shopping Center across New Hampshire Avenue. The surrounding area also contains an office building and a small retail center at its northern edges, and a property just south of the Hillandale Shopping Center that was recently reclassified to the same zone sought here, the O-M Zone. Beyond the surrounding area to the north and west are single-family homes in the R-90 Zone. East of the Hillandale Shopping Center are a small amount of additional retail and office, a multi-family residential building, and additional single-family homes. The diagram below shows existing zoning patterns in the area.

Existing Zoning, excerpted from Ex. 13



Photographs of the site and surrounding land uses follow.

**Subject Site Seen from Powder Mill Road, Looking East
Towards New Hampshire Avenue. Ex. 15(b).**



**Subject Site, Looking Southwest Toward Holly Hill Apartments and
National Labor College. Excerpted from Staff Report Attachment 8.**

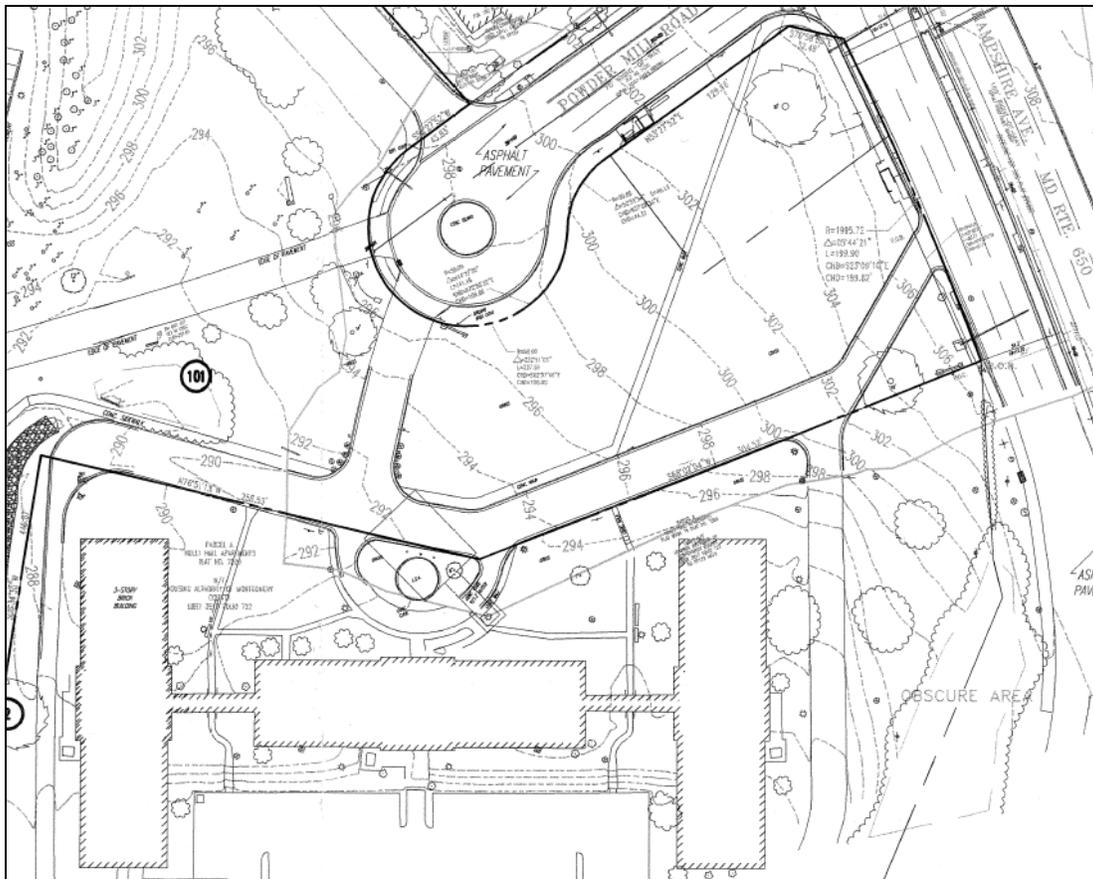


Subject Site, Looking North Towards Intersection of New Hampshire Avenue and Powder Mill Road. Excerpted from Staff Report Attachment 8.



The current layout of the site and its relationship to the Holly Hall Apartments may be seen on the drawing below.

Detail from Natural Resources Inventory/Forest Stand Delineation, Ex. 30(e), Showing Current Conditions



B. Zoning History

The subject property was classified under the R-90 Zone in the 1958 County-wide comprehensive rezoning. In 1964, the owner of a filling station on the north side of the stub end of Powder Mill Road west of New Hampshire Avenue sought to expand the station using the subject property. Rezoning application E-86 was granted to facilitate the expansion, rezoning the subject property to the C-1 Zone. A master plan was later adopted recommending C-1 zoning for part of the subject property. In 1974, the filling station arranged a land swap with the owners of the College property, allowing the gas station to expand to the west rather than onto the subject site. This was carried out with the help of two additional rezonings, one reclassifying land behind the filling station to the C-1 Zone and another reclassifying the subject site back to the R-90 Zone. The justification given for the latter was that the property was surrounded by R-90 zoning on three sides. As Mr. Perrine pointed out, however, none of the adjacent R-90 property could be used for single-family housing; it consisted of the College, New Hampshire Avenue right-of-way and a narrow strip to the south. Subsequent master plans carried forward the R-90 zoning classification in their recommendations.

C. Proposed Development

The Applicant has a contract to sell the subject site to Chevy Chase Bank, if the rezoning is approved, for the construction of bank branch with drive-through windows. Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, i.e. elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan

review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

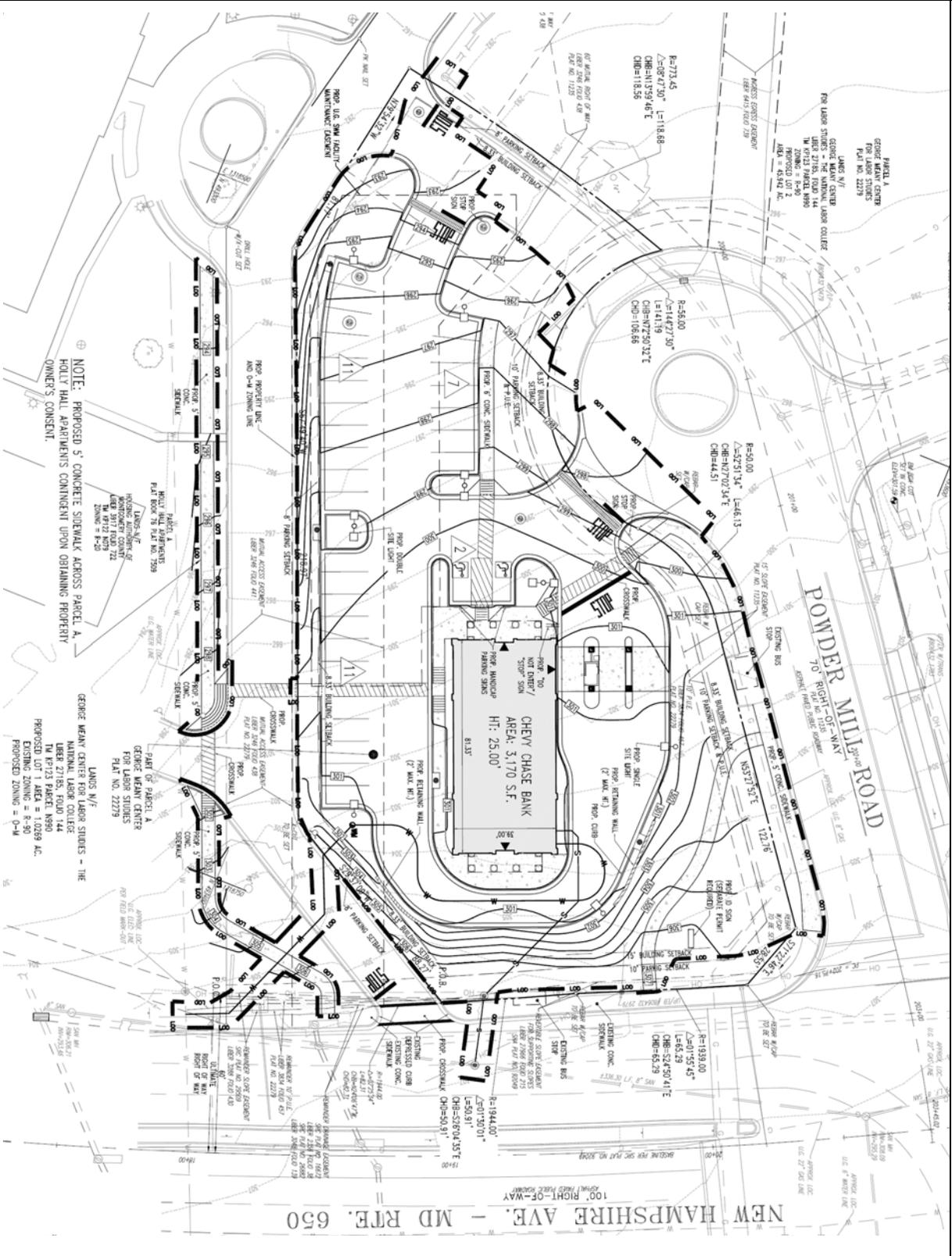
The binding elements shown on the SDP in the development standards table below limit the use of the site to a bank branch with a maximum of 3,650 square feet, drive-up ATMs and teller service, associated signage, parking, landscaping, lighting and infrastructure improvements. They also specify that the building will be no more than one story or 25 feet in height, and will have a floor area ratio no greater than 0.5. The SDP graphics are shown on the next page.

Development Standards Table with Binding Elements, from Ex. 30(c)

LAND USE AND DEVELOPMENT STANDARDS

Development Standards	Zoning Ordinance Requirements	Binding Development Standards	Binding Use Standards
Lot Coverage	60%	Not Binding	Development and use of the Property shall be limited to a bank branch containing a maximum 3,650 square feet, with drive-up ATMs and teller service, associated signage, parking, landscaping, lighting and infrastructure improvements.
Building Height – stories	5 stories	Not greater than 1 story	
Building Height – feet	60 feet	Not greater than 25 feet	
Green Area	10%	Not Binding	
Floor Area Ratio (FAR)	1.5	Not greater than 0.5	
Gross Floor Area (GFA)	N/A	Not greater than 3,650 sf	
Building setback from New Hampshire Ave.	15 feet	Not Binding	
Building setback from Powder Mill Road	(25 ft/3) = 8.33 feet (1' for each 3 feet in height)	Not Binding	
Building setback from adjacent residential property (zoned R-90)	(25 ft/3) = 8.33 feet (1' for each 3 feet in height)	Not Binding	
Off-Street Parking	5 spaces/1000 sf of gross floor area (19 spaces)	Not Binding	
Development Phasing	N/A	The project will be developed in one phase	

Schematic Development Plan Graphics, from Ex. 30(c)



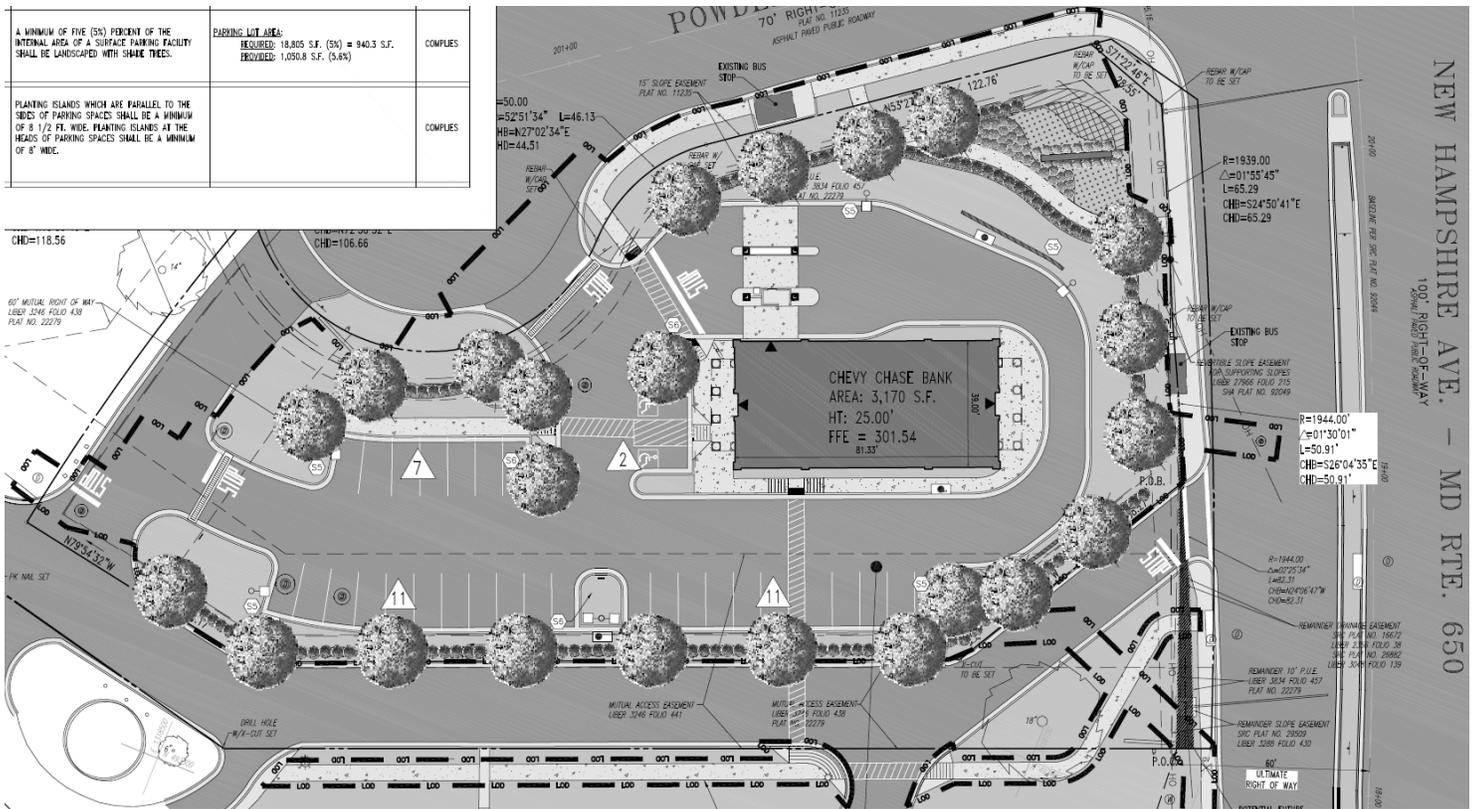
NOTE: PROPOSED 5' CONCRETE SIDEWALK ACROSS PARCEL A HOLY HALL APARTMENTS CONJUNCT UPON OBTAINING PROPERTY OWNER'S CONSENT.

LANDS W/P
 GEORGE MEANY CENTER FOR LABOR STUDIES - THE NATIONAL LABOR COLLEGE
 100' RIGHT-OF-WAY
 T.M. #P23 PARCEL 1890
 EXISTING ZONING = R-90
 PROPOSED ZONING = O-M

NOTE: EXCEPT FOR THE SPECIFIC BINDING ELEMENTS IDENTIFIED ON THIS PLAN UNDER THE HEADING "BINDING ELEMENTS", ALL IMPROVEMENTS, DEVELOPMENT STANDARDS AND NOTES SHOWN HEREON ARE FOR ILLUSTRATIVE PURPOSES ONLY.

The Applicant has also provided an illustrative landscape and lighting plan, which is helpful to visualize what the site could look like at completion. The exact location of the building and other elements would be determined during site plan review, but according to testimony from Mr. Perrine and the Applicant’s representative, the configuration of the site, together with the development standards for the O-M Zone and the binding elements on the SDP, make it unlikely that the final design would depart significantly from what is shown on the SDP and the illustrative plan below.

**Concept Landscape and Lighting Plan, Ex. 41
(Color Rendering Shown Here in Black and White)**



Primary vehicular access is shown from the existing roadway that extends from Powder Mill Drive to the Holly Hall Apartments. Access would also be available via the existing driveway along the site’s southern border, which leads from the Holly Hall Apartments to a right-in/right-out access to New Hampshire Avenue. Pedestrian access is shown via new sidewalks and lead-in walkways.

D. Master Plan

The subject property is located within the area covered by the *1997 White Oak Master Plan* (the “Master Plan”). The Master Plan confirmed the existing R-90 zoning but made no specific recommendations for the subject site. The subject site is within the “Hillandale Commercial Center” identified in the Master Plan, which is described as a local retail center with little opportunity for growth. Community-Based Planning Staff, which is responsible for master plans within MNCPPC, finds that the proposed one-story bank in the O-M Zone would promote redevelopment that is consistent with the recommendations of the Master Plan. See Staff Report, Ex. 34 at 8.

E. Development Standards for the Zone

As shown in the table below, the proposed development would be consistent with applicable development standards.

Development Standards for O-M Zone, Section 59-C-2.41, and Applicable Parking Requirements under Sections 59-E-2.81 and 59-E-3.7. Adapted from Staff Report p. 5

Standard	Required	Proposed
Maximum lot coverage	60%	8.2 %
Maximum building height	5 stories or 60 ft.	1 story or 25 ft.*
Minimum green area	10%	Approx. 30%
Maximum Floor Area Ratio (FAR)	1.5 FAR	0.5 FAR*
Setbacks		
From any street right-of-way shown on a master plan	15 ft.	Approx. 45 ft.
From lot line adjoining residentially zoned property not recommended for commercial or industrial zoning on master plan (College property)	1 ft. for each 3 ft. in bldg height, or 8.3 ft.	Approx. 34 ft.
Parking	19 spaces ³	34 spaces
Parking setbacks		
Adjoining residentially zoned property not recommended for commercial or industrial zoning in master plan, not used for off-street parking and not in a public right-of-way with a width of 120 feet or more, applicable front, side, or rear setback applies.	From College property: 8-foot site yard setback	8 to 24 ft.
Adjoining road right-of-way of 120 ft. or more	10 ft.	18 ft.

* Denotes binding element

³ Based on office use requirement of five spaces per 1,000 square feet.

F. Public Facilities

Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, schools, water and sewage facilities, and police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy and biennially in the two-year AGP Policy Element.⁴ While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a rezoning case, because the Council bears the responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the opportunity for a broader review than may be available to the Planning Board at subdivision. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

1. Transportation

Under the 2003-05 AGP Policy Element, which was in effect when the present application was filed and at the time of the public hearing, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").⁵ Pursuant to Zoning Text Amendment 07-17, enacted on February 26, 2008, the present application will be evaluated under the

⁴ See *2007-2009 Growth Policy, Resolution No. 16-376*, adopted November 13, 2007.

⁵ See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003; *Local Area Transportation Review Guidelines Approved and Adopted July 2004 ("2004 LATR Guidelines")* at 1. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element and the 2004 LATR Guidelines.

growth policy in effect when the application was filed, the 2003-2005 AGP Policy Element.⁶ The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. 2004 LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.). The “peak hour” is the 60-minute segment within each three-hour peak period that has the highest level of traffic at the location being studied.

The methodology prescribed under the 2004 LATR Guidelines is an analysis of Critical Lane Volume (“CLV”). CLV analysis counts conflicting movements at an intersection, such as left turns v. through movements, as a means of assessing whether the intersection is performing at an acceptable level or is experiencing unacceptable levels of congestion. The County Council has established congestion standards for each policy area in the County, which set the maximum CLV an intersection may have before it is considered to have unacceptable congestion. The congestion standards range from a CLV of 1,400 in rural areas to 1,800 in Metro policy areas. See 2004 LATR Guidelines at 3. Under the 2004 LATR Guidelines, a development proposal will be considered to pass LATR if a traffic study acceptable to Technical Staff demonstrates that either the intersections studied will have CLVs below the relevant congestion standard with the proposed development in place (including the effect of any proposed traffic mitigation), or the proposed development would not make conditions worse at an intersection that already has a CLV exceeding the congestion standard.

See id.

⁶ The Hearing Examiner hereby takes official notice of Zoning Text Amendment (“ZTA”) 07-17. As noted in Part I of this report, the record in this case was held open to await final action on ZTA 07-17. While the record was held open, the Applicant elected to submit a supplemental traffic report describing actions it could take to mitigate 35 percent of its primary trips, as would be required under the 2007-2009 Growth Policy. See Ex.49; 2007-2009 Growth Policy at 4-7. Based on a brief analysis by Transportation Staff at MNCPPC, these actions, including sidewalk and crosswalk improvements and a new bus turnaround area, would be sufficient to satisfy Policy Area Mobility Review (“PAMR”) requirements under the 2007-2009 Growth Policy. See Ex. 50. It is evident from the Applicant’s earlier traffic study that the proposed bank would satisfy the requirements of Local Area Transportation Review under both the 2003-2005 AGP Policy Element and the 2007-2009 Growth Policy, given that it would not cause critical lane volume at the studied intersections to exceed either the new or the old congestion standard. See Ex. 27(a) at 20; 2007-2009 Growth Policy at 12. Thus, the Applicant has submitted evidence which, although unnecessary under ZTA 07-17, would be sufficient to support a finding of adequate transportation capacity under the 2007-2009 Growth Policy.

The Applicant performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt (“background” traffic), and trips expected to be generated by the proposed development. Technical Staff required the Applicant to study two intersections, the intersection of New Hampshire Road with Elton Road and with Powder Mill Road.

The traffic study found that both of the studied intersections currently operate within the Fairland/White Oak Policy Area congestion standard under the 2003-2005 AGP Policy Element, which established a CLV of 1,500 as the acceptable maximum. See Ex. 27(a) at 6. The study further found that all of the studied intersections would continue to operate within the congestion standard with the addition of background traffic and traffic anticipated from the proposed bank. See *id.* at 12, 20.

Traffic generation expected in connection with the new bank building was estimated based on trip generation rates published by the nationally-known Institute of Transportation Engineers (“ITE”). See Ex. 27(a) at 12. Trip generation was not reduced to reflect the fact that Chevy Chase Bank already has a bank branch right across New Hampshire Avenue from the subject site. It was reduced, however, by assumptions under the ITE methodology about diverted and pass-by trips. Bank traffic is expected to be heaviest during the afternoon peak period. During that period, the Applicant estimates that 21 percent of trips would be primary trips, meaning that the driver is making a trip primarily to visit the bank; 25 percent of trips would be diverted trips, meaning visits to the site by drivers who are already on the road but need to depart from their normal route to reach the site; and 54 percent of trips would be pass-by trips, meaning visits to the site by drivers who are traveling on New Hampshire Avenue and merely stop off at the site. See *id.* at 13.

Transportation Planning Staff at the MNCPPC recommended that development on the site be limited to the uses specified in the binding elements, i.e., a drive-through bank with three windows and a maximum of 3,650 square feet (the binding elements do not specify the number of windows, an issue to be addressed during subdivision). See Staff Report at 6. With this condition,

Staff opined that the proposed rezoning as currently presented satisfies LATR and, therefore, the APF test. *See id.* at 7.

2. Utilities

Technical Staff reports that Staff of the Washington Suburban Sanitary Commission (“WSSC”) have found that the proposed rezoning and development would not significantly impact WSSC distribution and collection systems. *See Staff Report* at 6. WSSC staff have indicated that the water connection proposed on the SDP, connecting to an on-site water main owned by the College, will not be permitted. *See id.* WSSC staff have indicated that a non-CIP-sized water main extension to the Powder Mill Road cul-de-sac will be required for service, although they stated that this change need not be done at the zoning stage. *See id.* The Applicant’s civil engineer testified that the connection WSSC prefers can be implemented, consistent with both the binding elements and the general layout shown on the SDP. *See Tr.* at 43.

The highly developed character of the surrounding area and the testimony of the Applicant’s engineer support a conclusion that other utilities such as electric, gas and telephone are readily available.

G. Environment and Stormwater Management

A Natural Resources Inventory/Forest Stand Delineation (“NRI/FSD”) has been approved by MNCPPC, showing no forest or specimen trees on the subject site. *See Ex. 30(e)*. It leaves open for later reconsideration whether a water channel in the I-495 right-of-way, located outside the subject site on another portion of the College’s property, should be considered a stream and therefore require an environmental buffer. *See Staff Report Attachment 6; Ex. 42*. Technical Staff explains that no forestation will be required in connection with the proposed development, but the NRI/FSD issue will have to be resolved in connection with a parking lot that was built on the College property fairly recently. *See Ex. 35*. The resolution of that issue will not have any effect on the development of the subject site, which is not crossed by the water channel in question.

The Department of Permitting Services (“DPS”) has approved a concept stormwater management plan for the proposed redevelopment. See Ex. 30(g). The Applicant’s engineer testified that the Applicant will provide stormwater management to the full extent required under County law. He noted that a small triangle of land would be dedicated along New Hampshire Avenue to provide the full 120-foot right-of-way. See Tr. at 43-44.

H. Community Participation

There was no community participation in this case. The Applicant’s representative, Jim Gentile, testified that individual meetings took place with some of the particularly active citizens who have been involved in past modifications to the college’s special exception, as well as with the Hillandale Citizens Association, adjoining and confronting property owners and Holly Hall residents. Mr. Gentile did not recall any specific negative comments from members of the community. He acknowledged that suggestions were made about details of the plan, but stated that no one objected to the idea of using the property for a bank branch, and that there were many positive comments.

A representative of Chevy Chase Bank, Joseph Pearson, stated that Holly Hall residents seemed pleased with the idea of a bank branch on their side of New Hampshire Avenue. He noted that additional sidewalks and a bus stop connection were added partly in response to comments from Holly Hall residents.

III. SUMMARY OF HEARING

A. Applicant’s Case in Chief

1. Jim Gentile, National Labor College. Tr. at 5-12.

Mr. Gentile is Acting General Counsel to the National Labor College, formerly the George Meany Center for Labor Studies. He briefly described the 47-acre campus of the College, located on the west side of New Hampshire Avenue, noting that the College is an accredited college dedicated to providing higher education access for working people. Mr. Gentile stated that the College purchased the one-acre subject property many years ago and has never used it. In recent

years, while undertaking a campus building project, the College determined that the property would never be used for the College, so another use should be identified that could benefit the College financially. Mr. Gentile described important elements in this process: (1) the desire to reap a reasonable financial return; (2) the desire for a use that would be compatible with the College and suitably dignified, given that the property sits at the front door to the College; and (3) the desire for a use that would be compatible with the surrounding community, because the College is an active community participant and neighbor and would like the new use to be welcomed by local residents.

Mr. Gentile confirmed that the College operates pursuant to a special exception granted by the Board of Appeals. He testified that the College obtained a modification of its special exception in June, 2007 that removed the subject site from the land area covered by the special exception. Mr. Gentile stated that the College has entered into a contract to sell the subject property to Chevy Chase Bank for the development of a bank branch. He noted that the proposed development of the subject site would not necessitate any change in the day-to-day operations of the College.

Mr. Gentile described the College's discussions with citizen groups about the present rezoning. These included individual meetings with some of the particularly active citizens who have been involved in past modifications to the College's special exception, a briefing to the Hillandale Citizens Association, a meeting to which all adjoining and confronting property owners and the citizens association were invited, and a meeting with residents at Holly Hall, the adjacent multi-family residential facility. Mr. Gentile did not recall any specific negative comments from members of the community. He acknowledged that suggestions were made about details of the plan, but stated that no one objected to the idea of using the property for a bank branch, and that there were many positive comments.

2. Phil Perrine, land planner. Tr. at 12-39.

Mr. Perrine was designated an expert in land planning. He described the subject property, the surrounding area and the zoning history of the subject property. In describing the surrounding area, Mr. Perrine noted that substantially all of the commercially zoned property in the

area is in commercial use, and most of the R-90 zoned property in the area is in residential use, except for the College and one or two religious uses.

Mr. Perrine briefly described the conceptual plan for the proposed bank building, driveways, landscaping and sidewalks. He noted the binding elements, which address height and floor area ratio. Mr. Perrine opined that in light of the minimum setback requirements for the zone, the FAR limitation and the need for a drive-through aisle that encircles the building, the building could only be constructed in approximately the location shown on the SDP. See Tr. at 29-30. He considers it unlikely that the building could be pushed farther south, closer to the adjoining multi-family building, while still having enough room for a drive-through lane. Mr. Perrine noted, moreover, that even if the building were pushed farther south on the subject site, the distance from the property line to the Holly Hall building is about 50 feet. Tr. at 31. In addition, the one-story bank building would be much smaller than the three-story, peaked-roof Holly Hall building.

Turning to the Master Plan, Mr. Perrine described it as a guide, noting that the O-M Zone is a classic floating zone that may be applied where appropriate, and need not be recommended in a master plan. He noted that the subject site is within an area designated in the Master Plan as the Hillandale Commercial Center, and that Technical Staff in the Community-Based Planning Division, who are responsible for master plans, consider this application consistent with the master plan. Mr. Perrine observed that the zoning history of the subject property shows a pragmatic approach to development in the immediate area, rather than strict conformity to a master plan. He noted that the proposed development would carry out the Master Plan's intent to provide more services within the Hillandale Commercial Center.

Mr. Perrine opined that the proposed development would satisfy the purpose clause for the O-M Zone, given that it is not in a central business district, and is surrounded by commercial zoning and commercial, institutional, multi-family and office uses, not predominantly residential uses. He noted that the only residential property that is not separated from the subject site by substantial distance and residential barriers is Holly Hall. Mr. Perrine noted that the Holly Hall building has three wings, with a driveway leading to a circular drop-off area in the front of the building, facing the subject

site, and another driveway leading to the rear parking area, on the other side of the building from the subject site. He stated that he has never seen anyone outside in the formal green area in front of the building. Mr. Perrine noted that the proposed bank would be more convenient for Holly Hall residents than the existing bank branch (owned by the same bank) on the other side of New Hampshire Avenue.

In Mr. Perrine's view, the area of the subject site would not be appropriate for high-intensity uses, although it is on a major road and in the vicinity of a community shopping center, because this is not a CBD-type setting. Mr. Perrine testified that the proposed development would satisfy the development standards of the O-M Zone, including green area, building height, FAR and setbacks. Mr. Perrine noted that a fire station is located less than a mile away, a police station about five miles away and two libraries not far away.

Mr. Perrine opined that the proposed development would be compatible with the surrounding area, noting the prevalent pattern of uses and that the proposed building would be smaller in bulk and height than those around the site. In his view, the proposed development would improve the current barren lot, including providing a better sidewalk and bus stop. Moreover, the development would comply with Zoning Ordinance requirements for landscape screening of the parking facilities, including a minimum three-foot hedge and trees planted every 40 feet. The landscaping is conceptual at this stage, but would have to be approved during site plan review.

Finally, Mr. Perrine opined that a bank would provide a much better community service on the subject site than a residential use. Under the present R-90 zoning one could presumably build four houses on the property, but they would be isolated from other single-family homes by a six-lane divided road, an institutional use and a multi-family building. Tr. at 38.

3. David Duke, civil engineer. Tr. at 40-46.

Mr. Duke's company prepared the SDP and an engineering report in this case. He confirmed the description of the site as a vacant field planted in grass, with one tree in very poor condition. Mr. Duke noted that the site is served by existing water, sewer and other utilities, all of which are sufficient to support the proposed development. He acknowledged the comment in the

Staff Report that the WSSC objects to the connection point shown on the SDP, but stated that the connection WSSC prefers can be implemented, consistent with both the binding elements and the general layout shown on the SDP. See Tr. at 43.

Mr. Duke stated that the applicant has obtained preliminary approval of a concept stormwater plan from the County, and will provide stormwater management to the full extent required under County law. He noted that a small triangle of land would be dedicated along New Hampshire Avenue to provide the full 120-foot right-of-way.

The only significant open issue Mr. Duke identified is the classification of a drainage channel on the NRI/FSD, but it is located in another area of the College property, not within the subject site. The resolution of that issue will affect the College's use of the larger site, but not the area proposed for rezoning.

Mr. Duke opined that the proposed reclassification is suitable for the subject site from a civil engineering perspective.

4. Joseph Pearson, Chevy Chase Bank. Tr. at 47-49.

Mr. Pearson is Vice President of Real Estate Development for Chevy Chase Bank, and his role includes coordinating predevelopment activities for Chevy Chase Bank branch sites. He testified that Chevy Chase Bank has a contract to purchase the subject property from the College. Mr. Pearson stated that the bank building shown on the SDP is consistent with the prototype that Chevy Chase Bank is currently developing elsewhere in the County, and the site is well-suited for a drive-in bank branch. He described the site as a great location, with high visibility in a commercial area. Mr. Pearson noted that the bank has had a couple of meetings with Holly Hall residents, and they seem excited about having the bank on the same side of New Hampshire Avenue, because many residents bank there. He noted that the additional sidewalks and bus stop connection were added partly in response to comments from Holly Hall residents. Mr. Pearson stated that Chevy Chase Bank intends to develop the property in accordance with the binding elements of the SDP if the rezoning is approved, and that the bank understands that specific details concerning parking, building location, setbacks and on-site circulation will be addressed during site plan.

IV. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. 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.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with 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 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. The O-M Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as exact building location, landscaping and screening. The application of the zone to the subject property involves an evaluation of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause

The purpose of the O-M Zone as stated in Code §59-C-4.31 is set forth below.

59-C-4.310. Purpose.

It is the purpose of the O-M zone to provide locations for moderate-intensity office buildings in areas outside of central business districts. It is intended that the O-M zone be located in areas where high-intensity uses are not appropriate, but where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood. This zone is not intended for use in areas which are predominantly one-family residential in character.

The fact that an application complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require the granting of any application.

The subject site is outside a central business district, in a mixed-use area that is not predominantly one-family residential in character. The surrounding area has a mix of commercial, institutional and multi-family uses, and the subject property is adjacent to or confronts each of these use types – a multi-family building, a large institutional use, a gas station and a shopping center. The subject site is in a small commercial area where the proximity of residential neighborhoods would make high-intensity uses inappropriate. The Hearing Examiner agrees with the findings by Technical Staff and Mr. Perrine that the proposed rezoning and development would not adversely impact the adjoining neighborhood. The proposed bank branch would be a moderate-intensity use in keeping with the character of the surrounding commercial center. At this location, adjacent to New Hampshire Avenue and I-495 and surrounded by commercial and institutional uses, the activity level at the proposed bank would be very unlikely to have an adverse effect on the Holly Hall Apartments. Moreover, the proposed building would be much smaller than the Holly Hall building and other buildings nearby, and therefore would not be obtrusive. The Zoning Ordinance requires screening of parking lots, and landscaping will be designed in detail at a later stage, if the zoning is approved. Moreover, the traffic study established that the proposed project would not adversely affect local traffic conditions.

For all of these reasons, the Hearing Examiner concludes that the proposed rezoning and development would be consistent with the purpose clause for the O-M Zone.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. The Hearing Examiner concludes that the proposed rezoning and development would be compatible with existing uses in the surrounding area

(the record contains no information about planned uses). A small bank building at this location would blend in well with the mixed character of the surrounding area and, with the limitations on size and activity established in the binding elements of the SDP, would be compatible with the adjacent Holly Hall Apartments, the only residential use that would not be buffered by substantial distances and intervening development. As Technical Staff noted, higher-density residential uses are often located near lower-intensity commercial uses. See Ex. 35. The view from the Holly Hall Apartments in the direction of the subject site is already dominated by roadways and commercial uses, so exchanging a bare piece of grass in the forefront of that view for a small building and parking with surrounding landscaping is unlikely to have a negative effect. Traffic impacts would be minor, resulting in no appreciable adverse impact, and pedestrian connections would be improved by the planned sidewalks and walkways. For all of these reasons, the Hearing Examiner concludes that the proposed development would be compatible with Holly Hall. The evidence amply demonstrates that the proposed development would be compatible with the remaining surrounding uses, which are of similar or greater scale and intensity.

C. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that 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*].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. Additional issues affecting the public interest may also be considered.

The Planning Board and Technical Staff opined that the proposed development would substantially comply with the Master Plan, and the Hearing Examiner agrees. Although the Master

Plan recommended continued R-90 zoning for the subject site, it included the site in the Hillandale Commercial Center, suggesting that, as Technical Staff concluded, the proposed rezoning and development would be consistent with the Master Plan's recommendations.

With regard to public facilities, the evidence indicates that the proposed rezoning and redevelopment would be adequately supported by and would have no adverse effect on local roadways and public utilities.

Both Technical Staff and Mr. Perrine opined that the subject site would be put to a higher use under the O-M Zone than under its current zoning. The current R-90 classification would permit the construction of about four single-family homes on the site, but the site is not attractive for single-family use, surrounded as it is by busy roadways, commercial and institutional uses and a multi-family apartment building. This supports a conclusion that the requested rezoning would serve the public interest by allowing a property that currently has neither function nor natural beauty to be put to productive use

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification bears sufficient relationship to the public interest to warrant its approval.

V. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I make the following conclusions:

1. The application satisfies the requirements of the purpose clause;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area;
3. The requested reclassification to the O-M Zone bears sufficient relationship to the public interest to justify its approval.

VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-866, seeking reclassification from the R-90 Zone to the O-M Zone of 1.03 acres of land located at 10000 New Hampshire Avenue, Silver Spring, Maryland, in the 5th Election District, be ***approved*** in the amount requested and subject to the specifications and requirements of the approved Schematic Development Plan, Ex. 30(c); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance, and provided that the Declaration of Covenants is filed in the county land records in accordance with § 59-H-2.54 of the Zoning Ordinance.

Dated: February 27, 2008

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner