

5802 PETITION FOR ZONING RE-CLASSIFICATION AND/OR SPECIAL EXCEPTION

TO THE ZONING COMMISSIONERS OF BALTIMORE COUNTY:

I, Albert Abrahamson, legal owner, of the property situated in Baltimore County and which is described in the description and plat attached hereto and made a part hereof hereby petition (1) that the zoning status of the herein described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an R-6 zone to an an R-6 zone for the following reason:

Because of error in the Classification of this property by the adoption of the Western Area Land Use Map.

For such other reasons that may be assigned at the hearing.

See Attached Description

Property is to be posted and advertised as prescribed by Zoning Regulations.

I or we, agree to pay expenses of above re-classification and/or Special Exception advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

Contract purchaser
Address: 2135 M. Fulton Ave. (N)

Address: The Jefferson Building (4)
Valley 3-6300

Address: The Jefferson Building (4)
Valley 3-6300

ONCE BY THE Zoning Commissioner of Baltimore County, this 14 day of January, 1968, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be held before the Zoning Commissioner of Baltimore County in Room 104, County Office Building in Towson, Baltimore County, on the 20th day of March, 1968, at 2:00 o'clock.

Filed: Jan 14 68

By Albert Abrahamson, Legal Owner

By Edward B. Rathkopf, Petitioner's Attorney

By John S. Gorman, Zoning Commissioner of Baltimore County

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IN THE COURT OF APPEALS OF MARYLAND

No. 320

September Term 1964

BERNARD H. MILLER, et al

V.

ALBERT ABRAHAMSON

Freeston, C.J.
Horne
Harbury
Oppenheimer
Barnes, JJ.

Dissenting opinion by
Barnes, J.

Filed: June 23, 1965

The majority opinion illustrates to my mind the essential soundness of the "mistake in original zoning-change in physical conditions" rule which we have applied in rezoning cases since the decision of this Court in Wakerfield v. Kraft, 202 Md. 136, 96 A. 2d 27 (1953). I pointed out, at some length, in Part III of my dissenting opinion in MacDonald v. Board of County Commissioners of Prince George's County, 238 Md. 597, 276-601, A. 2d 100, No. 427 September Term 1964, decided May 3, 1965, the unfortunate entry of this doctrine into the Maryland law and its rapid and unhealthy growth. The MacDonald case, however, involved the "change in physical conditions" portion of the rule; the case at bar involves "mistake in original zoning", the remaining part of the rule. The comments in Part III of the dissenting opinion in MacDonald are generally applicable in this case, and need not be repeated here. There are additional observations with particular reference to the "mistake" portion of the rule which should be made.

In the majority opinion it is stated that for the petitioner to prevail, he must "meet the heavy burden placed upon him" to show the original mistake. In MacDonald the majority stated that the rezoning could only be sustained when there is "strong evidence of mistake" in the original

zoning or when there is "a substantial change in conditions" in the neighborhood. In some of our prior cases we have indicated that there is a strong presumption of the reasonableness of a zoning ordinance but this presumption of reasonableness does not apply with the same weight or "with as great force" to a rezoning ordinance. See Metz v. County Commissioners of Howard County, 217 Md. 357, 129 A. 2d 136 (1957) and cases cited in that opinion.

As all of the cases agree that both zoning and rezoning ordinances involve the exercise of legislative power, why is it that the exercise of legislative power at a later time does not have at least equal force or an equal presumption of validity as does the prior exercise of legislative power? Apart from rezoning legislation, we have consistently, vigorously and, to my mind, quite properly held that one legislative body may not prevent contrary action by the legislative body acting at a later date, however emphatically it attempts to do this. Montgomery County v. Bigelow, 196 Md. 413, 423, 77 A. 2d 164 (1950); see also State v. Fisher, 204 Md. 307, 315, 104 A. 2d 403 (1954); Prince George's County v. Poonos, 220 Md. 362, 367, 152 A. 2d 555 (1959). In my opinion, there should be no "heavy burden" upon the petitioner or the requirement of "strong evidence of mistake" in the original zoning. As stated by the Court in Partlett v.

Hiddletown Township, 51 N.J. Super. 261, quoted in 1 Rathkopf, The Law of Zoning and Planning, 27-14 (n. 22):

"... the presumption of validity attending the original ordinance must give way to the presumption of the correctness of the amending ordinance. The Legislature not only conferred upon municipalities the power to adopt zoning ordinances but also the power to amend, change, modify or repeal them."

I fear that our present rule is justly subject to the observation by Rathkopf when he stated:

"The Maryland rule would appear to be a limitation upon the power of the legislative body to resume rather than a strict rule of presumption." (Id., p. 27-16).

We should return to more orthodox doctrine. If we are not able to do this because of the doctrine of stare decisis, I again suggest, with great respect, as I did in the dissent in MacDonald, that the Legislative Council and ultimately the General Assembly give serious thought to a change of the present rule by appropriate legislation.

In my opinion the "mistake in original zoning" portion of this rule - assuming stare decisis its validity - has been misapplied by the majority in the case at bar. While the facts are rather fully stated in the majority opinion, they need some further amplification.

Mr. Gavrellis, the Deputy Director of Planning for Baltimore County for six years and the Acting Director of the

Office of Planning and Zoning, was with the Department of Planning in 1955 or 1956 when the Department of Planning originally processed the subdivision plans for the 5.2 acre parcel involved in this case. The prior studies culminated with the recommendation in connection with the adoption of the Western Planning Area Zoning Map. It is undisputed that the Department of Planning recommended to the Planning Board that the subject property be zoned B-2 (Business-Local). Mr. Gavrellis gave in some detail the factors which led the Planning staff to recommend that the subject property be given commercial zoning. These factors were:

1. The fact that Old Court Road was proposed to be relocated so as to eliminate the 90-degree turn at the present intersection of Old Court Road with Marriott's Lane.
2. The plans of the Planning staff called for the ultimate extension of Holling Road northerly from Liberty Road across Scott's Level Branch to intersect Old Court Road as relocated opposite the middle of the subject tract.
3. The subdivision had been developed so that the back lots adjoining the commercial area had lot depths greater than these typical in an R-6 development.
4. The concept of a small shopping area for neighborhood service areas seemed logical to the Planning staff as the subject property was approximately halfway between two

commercial areas, and there were no other shopping facilities for this newly-developed area other than at Reisterstown Road or at Liberty Road. The Planning staff felt there was a need, based on its general studies, that the small commercial area on the subject property was appropriate.

It is uncontradicted that the Department of Planning prior to 1960, and as early as 1956, approved preliminary site plans for the subject property indicating a proposed shopping center on this site.

It is also undisputed that the B-2 zoning for the subject property as recommended was placed on the Master Plan and remains at the present time on the Master Plan.

On the documents of both the Department of Planning and the Planning Board when the Planning Board presented its recommendations to the County Council on October 16, 1961, it clearly appeared that the Planning Board's recommendation was for B-2 zoning for the subject property and was not for R-6 zoning. There was no other recommendation by the Planning Board. It is entirely clear from the testimony of Mr. Gavrellis that there was absolutely no basis for any other recommendation. The motion made at the meeting of the County Council on October 16, 1961 was "to accept the Planning Board's recommendation of R-6 zoning" and this motion "carried unanimously." (Emphasis supplied). The intent of the County Council was clearly to

OPINION

"The Autumnwood Subdivision and Belle Farm Estates Commercial property located on the north side of Old Court Road, the former, near the intersection of Scotts Level Road and the latter at the existing sharp bend in Old Court Road to the west of Scotts Level Road. Mrs. Boon seconded by Mr. Dignan, moved to accept the Planning Board's recommendation of R-6 zoning. Carried unanimously."

The testimony of Mr. George E. Gavrelis, Acting Planning Director of the County, indicates that his department, as well as the Planning Board, not only were aware of this planned use of the property but had affirmatively recommended that this tract be

For the foregoing reasons we are of the opinion that there was an error in the original zoning by the County Council, and that the situation has not been changed by any developments since that time. Therefore, for these reasons, all independent of each other and none relying on the other, the order of the Zoning Commissioner in this case is reversed and the zoning of the property from an "R-6" Zone to a "B-1" Zone is hereby granted.

ORDER

For the reasons set forth in the foregoing Opinion, it is this

day of May, 1964 by the County Board of Appeals, ORDERED that the reclassification petitioned for, be and the same is hereby granted.

IMPORTANT: MAKE CHECKS PAYABLE TO BALTIMORE COUNTY, MARYLAND
MAIL TO DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWSON 4, MARYLAND
PLEASE RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.

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MAIL TO DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWSON 4, MARYLAND
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PLEASE RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.

Remarks: To replace sign
Posted by: J. B. Borne Date of return: 3-14-63
Signature

ALBERT ABRAHAMS - ZONING FILE NO. 5802

BERNARD H. MILLER, IN THE CIRCUIT COURT
TUDY ELLIOTT, and FOR BALTIMORE COUNTY
SAMUEL H. CRODNYTSKY
vs. AT LAW
J. MITCHELL AUSTIN, Miscellaneous Docket 7
and W. GILES PARKER, Folio 386, Case No. 3028
constituting the County
Board of Appeals of
Baltimore County

MR. JUSTICE:

Please enter an Appeal to the Court of Appeals of
Maryland from the Order rendered by the Circuit Court for
Baltimore County, At Law, on August 25, 1964, in the above
captioned Appeal.

ALLAN J. NALESTER

SULLIVAN AND FITTLER
Attorneys for Appellants
1410 Court Square Building
Baltimore, Maryland 21202
Phone 2-1122

I HEREBY CERTIFY, that on this 21st day of September,
1964, a copy of the foregoing was mailed to W. Lee Harrison,
Esquire, Loyola Building, Towson, Maryland 21204, and County
Board of Appeals of Baltimore County, County Office Building,
Towson, Maryland, 21204.

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Counsel for Appellants

APPEALS SCHEDULED

October 7, 1964

1.	10 8	10:00 am	Israel & Jos. W. Shapiro N. S. (Old) Court Road 3957' East of Stevenson Road	CONTINUED R-40 & R-20 to R-A. Elevator Apt. Building	*Hennegan *Kimmel *Fleischman *Blum *Willen *Weisheit	63-90-RX	3	19/29/62
2.	10 13	"	Chas. J. McLennan 250' from E. S. Cowpens Ave. app. Concordia Avenue	CONTINUED R-40 to R-20	*Trimble *Mosner (Kaufman)	63-60	9	10/3/63
3.	10 15	"	William R. Eppler Valley & North Roads	Nursing Home	*Carlin (Shriver McLean)	5791-X	3	4/4/63
1.	10 20	"	Frederick Diehlman NW cor. Rolling & Powers	R-10, R-6 & R-A to B-L	*Siskind *Kenney	64-82-R	1	5/4/64
1.	10 22	"	Mary E. Mack NE S Maiden Choice Lane 254' from SE S Highview	R-6 & R-A to B-L, SE - Gas Station	*Ford (Hessey, IV Singer)	63-97-RX	13	12/3/63
1.	10 27	"	Federal Motors Inns, Inc. E S Reisterstown Road, 652.32' to R W of Beltway	Var. 413.5 (di)	*Kaufman Feinberg	63-123-V	3	12/18/62
1.	"	11:00 am	The Holiday Inn SE corner Reisterstown Rd. & Beltway	Flashing Sign	*Kaufman Feinberg	64-5-V	3	3/10/64
1.	"	1:30 pm	Harold F. Comes 7229 Golden Ring Road	Storing trucks & comm. uses	*Maslan Vadala	688-ZV	15	5/26/64
1.	10 29	10:00 am	John F. Miller W. S. Rolling Road, 850' S. of Collinsway Road	R-20 to R-10 & R-6	*Adelson (Doherty Feeley Neuberger)	63-144-R	1	12/5/63
0.	11/5	"	Texaco Service Station SW cor. Liberty Road & Miltard Mill Road	Storing trucks, excessive number of signs	*Lev	64-36-V	2	5/11/64
1.	"	1:30 pm	Gustav Lochner, Jr. SW cor. Kenwood & Golden Ring Road	R-6 to B-L Service Garage	*Romad'a Bohlen	65-33-RX	14	3/17/64
2.	11 10	10:00 am	Frances Mansfield SW S York Road & SE/S Westbury Road	R-10 to B-L	*Mansfield Muffoletti	64-31-R	9	2/26/64
3.	11/12	"	G. Clyde Andrew N. S. Bellona Avenue 660' W. of Clarke Avenue	R-10 to B-R	*Proctor Murray	64-60-R	8	3/13/64
1.	11/17	"	Louis J. Glass NE corner Smith Avenue & Timber Ridge Road	R-10 & R-20 to R-A	Proctor Conomis (Rothbloom *Sullivan Kramer Haskin)	64-41-R	3	3/18/64

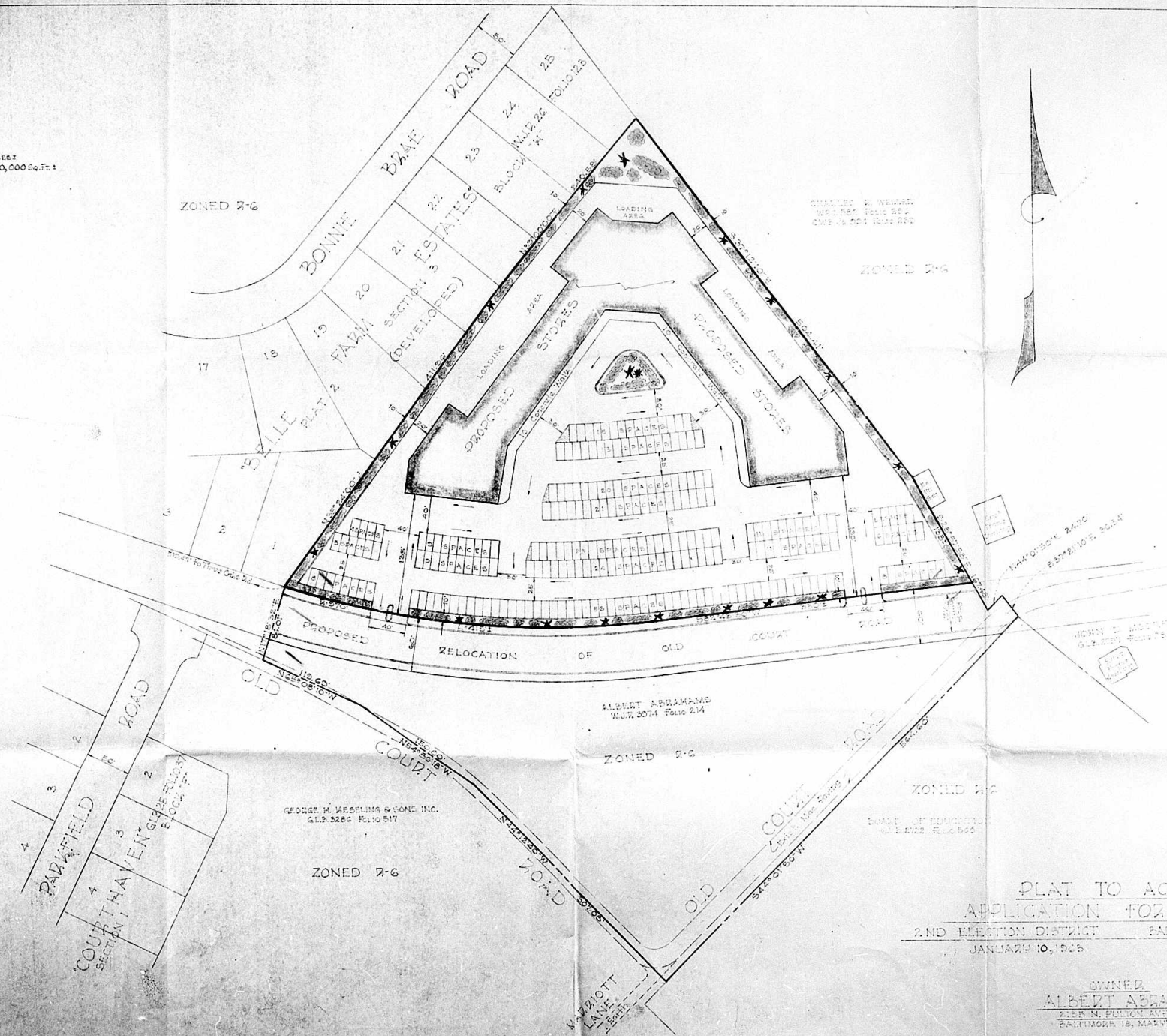
APPEALS SCHEDULED

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15.	11 19	10:00 am	Lighthouse Enterprises, Inc. W/S Rolling Road, 900 S. of Baltimore National Pike	R-6 to R-A	*Kimmel (Kenney Adams Lemman)	64 79-R	1	4/7/64
6.	11 24	"	A. V. Williams NE S Martin Blvd. 783.82' from E S Compass Road	B-L to R-A	*Maguire *Vadala	64-74-R	15	4/15/64
7.	12 1	10:00 am	Whyar Corporation 1015 York Road	Business Sign	*Armiger Stengel	64-103-SPH	9	4/16/64
8.	"	1:30 pm	Mrs. Salvatore Mantegna 2160 Vailthorn Road	Operating Music Studio in R-G Zone	*Fuentelba	64-40-V	15	5/7/64

NOTES

TOTAL AREA TO BE REZONED 5.2 ACRES
 TOTAL AREA OF PROPOSED STORES 50,000 SQ. FT.
 TOTAL PARKING SPACES 250
 ALL PARKING SPACES 5'x20'



RUZDUM & JESCHKE
 CONSULTING ENGINEERS &
 LAND SURVEYORS
 2415 MARLAND AVENUE
 BALTIMORE 18, MARYLAND

PLAT TO ACCOMPANY
 APPLICATION FOR RE-ZONING
 2ND ELECTION DISTRICT BALTIMORE COUNTY, MARYLAND
 JANUARY 10, 1965 SCALE 1"=60'

OWNED
 ALBERT ABRAMAMS
 2415 MARLAND AVENUE
 BALTIMORE 18, MARYLAND

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reasons given therefor will warrant. Cf. State, etc., v. Critzer, 236 Md. 256. We must, therefore, examine the reasons given by the above experts.

Gavrolis, when asked if he had an opinion as to whether or not error had been committed in the classification of the subject property by the adoption of the map, replied, "No." Surely, if reasons given by an expert are insufficient grounds for the expert to formulate an opinion, they can scarcely be soundly held to be clear and satisfactory evidence to overcome the heavy burden created by the presumptive validity, mentioned above; so we proceed to Willenmain's reasons. When carefully scrutinized, the crux of his grounds for believing that a mistake had been made was the "strategic" location of the property in relation to "proposed" new roads and "proposed" improvements to old ones, supplemented by the weight he placed upon Item 21, and his belief of no adverse effect upon other properties and the location of existing shopping centers that inconvenienced the public in going to and from them; although, at the same time, stating that it is always difficult to locate these small shopping areas because of the possible ramifications of the commercial zoning itself. We do not think, xxxxxxxxxxxxxxxxxxxx that the reasons given by those experts were sufficient to make the issue of mistake (and bear in mind that we are only dealing with that question in this case) fairly debatable.

We are cited the case of Jobar Corp. v. Rodgers Forge, 236 Md. 106, in support of Applicant's position. That case in-

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involved questions of both mistake and change in neighborhood. We limit our present discussion to the issue of mistake. The same two experts testified in that case as in the instant one, and its citation here affords an opportunity to point up the holding of the majority in Rogers Forge, where the Court was divided 4 to 3.

The majority in that case took considerable trouble to set forth in quite some detail the reasons assigned by Willenmain to support his opinion that an error had been committed (these reasons are stated in 236 Md. pp. 116-118 and consume about 2 pages of the printed report). These reasons set forth, at some length, the situation and condition of the subject property in that case and the surrounding properties at the time of the adoption of the map involved therein. They then went on to state the needs and potentials of the area and the projects that were "reasonably probable of fruition in the foreseeable future" (Trustees v. Baltimore County, *supra*) which, in Willenmain's opinion, the County Commissioners (now the County Council) failed to take into account, when the map was adopted. The reasons were supported, in the reasoning of a majority of the Court, by exhibits and other evidence. The Board of Appeals, after a consideration of all of the evidence, accepted the expert's opinion and stated that a mistake had been made, and this Court upheld the action of the Board of Appeals, on the ground

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that the issue was, at least, fairly debatable. But in upholding the said Board's right to accept Willenmain's opinion, we were careful to point out that if "it [the Board] decided to accept his opinion for the reasons given by him, we cannot, under our previous holdings, reverse the Board's action, in the absence of a showing that the acceptance of the opinion was arbitrary and capricious in a legal sense." In other words, the reasons presented by an expert to support his opinion cannot be immaterial or frivolous in character, but must be sound and substantial ones. In the case at bar, Willenmain did not state the situation of the critical area and the conditions surrounding it at the time of the adoption of the map, including the projects, improvements and developments which were reasonably probable of fruition in the foreseeable future. Nor did he state anything of a substantial nature which should have been reasonably foreseen by the Council, but was ignored by it. From the above, it is seen that Jobar Corp. is easily and readily distinguished from the instant case.

We do not deem it is necessary to discuss further the evidence relative to "proposed" plans relative to roads.

We have said several times above, in considering the testimony relative to the individual factors involved, that the evidence relative to that individual factor, alone, was insufficient to make the issue of mistake fairly debatable. Nor are we

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able to conclude that an examination of the evidence pertaining to all of the factors considered as a whole raises the issue into the realm of fair debatability. Our conclusion is metaphorically illustrated by the simple arithmetical computation that zero plus any number of additional zeros still equals zero. As the evidence before the Board was too thin to make the issue of mistake fairly debatable, it rendered its action arbitrary and capricious in a legal sense; consequently the court's order affirming the Board must be reversed.

ORDER REVERSED, AND CASE REMANDED FOR THE ENTRY OF AN ORDER IN ACCORDANCE WITH THIS OPINION; APPELLEE TO PAY THE COSTS IN THIS COURT AND BELOW.

¹The gentlemen of the Board who sat in this case are both of high standing and reputation, and we make no intimation that either of them, intentionally, was arbitrary or capricious.