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October 23, 2024

The Honorable President and Members
of the Baltimore City Council
Attn: Natawna B. Austin, Executive Secretary
Room 409, City Hall, 100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 24-0591 – Rezoning – 121 Riverside Road

Dear President and City Council Members:

The Law Department reviewed City Council Bill 24-0591 for form and legal sufficiency. The bill changes the zoning for the property known as 121 Riverside Road (Block 7027D, Lot 001) from the R-6 Zoning District to the IMU-1 Zoning District. The ordinance would take effect on the date of its enactment.

Rezoning Standards

The Mayor and City Council may permit a piecemeal rezoning ***only if*** it finds facts sufficient to show either a mistake in the existing zoning classification or a substantial change in the character of the neighborhood. MD Land Use Art., § 10-304(b)(2); Baltimore City Code, Art. 32, §§ 5-508(a) and (b)(l).

> The "change-mistake" rule is a rule of the either/or type. The "change" half of the "change-mistake" rule requires that, in order for a piecemeal Euclidean zoning change to be approved, there must be a satisfactory showing that there has been significant and unanticipated change in a relatively well-defined area (the "neighborhood") surrounding the property in question since its original or last comprehensive rezoning, whichever occurred most recently. The "mistake" option of the rule requires a showing that the underlying assumptions or premises relied upon by the legislative body during the immediately preceding original or comprehensive rezoning were incorrect. In other words, there must be a showing of a mistake of fact. Mistake in this context does not refer to a mistake in judgment.

Rylyns Enterprises, 372 Md. at 483.

"It is unquestioned that the City Council has the power to amend its City Zoning Ordinance whenever there has been **such a change in the character and use of a district** since the original

enactment that the **public health, safety, morals, or general welfare would be promoted** by a change in the regulations." *Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348, 354 (1950) (emphasis added). The Mayor and City Council must find facts of a substantial change in the character and the use of the district since the comprehensive rezoning of the property on June 5, 2017 and that the rezoning will promote the "public health, safety, morals, or general welfare" and not merely advantage the property owner. *Id*. at 358.

As to the substantial change, courts in Maryland want to see facts of a "significant and unanticipated change in a relatively well-defined area." *Rylyns Enterprises*, 372 Md. at 483. The "'neighborhood' must be the immediate neighborhood of the subject property, not some area miles away; and the changes must occur in that immediate neighborhood of such a nature as to have affected its character." *Clayman v. Prince George's County*, 266 Md. 409, 418 (1972). The changes are required to be physical. *Anne Arundel County v. Bell*, 442 Md. 539, 555 (2015) (*citing Montgomery County v. Woodward & Lothrop*, 280 Md. 686, 712–13 (1977)). However, those physical changes cannot be infrastructure such as sewer or water extension or road widening. *Clayman*, 266 Md. at 419. And the physical changes have to be shown to be unforeseen at the time of the last rezoning. *County Council of Prince George's County v. Zimmer Development Co.*, 444 Md. 490 (2015). Contemplated growth and density is not sufficient. *Clayman*, 266 Md. at 419.

As to whether the change benefits solely the property owner, courts look, in part, to see if a similar use is nearby such that the community could easily take advantage of the use elsewhere. *Cassel*, 195 Md. at 358 (three other similar uses only a few blocks away lead to conclusion that zoning change was only for private owner's gain).

Findings of Fact

In determining whether to rezone based on mistake or change in the character of the neighborhood, the City Council is required to make findings of fact on the following matters:

(i) population change;
(ii) the availability of public facilities;
(iii) the present and future transportation patterns;
(iv) compatibility with existing and proposed development;
(v) the recommendations of the Planning Commission and the Board of Municipal and Zoning Appeals; and
(vi) the relationship of the proposed amendment to the City's plan.

Md. Code, Land Use, § 10-304(b)(l); Baltimore City Code, Art. 32, § 5-508(b)(2) (citing same factors with (v) being "the recommendations of the City agencies and officials," and (iv) being "the proposed amendment's consistency with the City's Comprehensive Master Plan.").

Article 32 of the City Code also requires Council to consider:

(i) existing uses of property within the general area of the property in question;
(ii) the zoning classification of other property within the general area of the property in question;
(iii) the suitability of the property in question for the uses permitted under its existing zoning classification; and

(iv) the trend of development, if any, in the general area of the property in question, including changes, if any, that have taken place since the property in question was placed in its present zoning classification.

Baltimore City Code, Art. 32, § 5-508(b)(3).

The Mayor and City Council's decision regarding a piecemeal rezoning is reviewed under the substantial evidence test and should be upheld "if reasoning minds could reasonably reach the conclusion from facts in the record." *City Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 510 (2015) (*quoting Cremins v. Cnty. Comm'rs of Washington Cnty.*, 164 Md. App. 426, 438 (2005)); *see also White v. Spring*, 109 Md. App. 692, 699, *cert. denied*, 343 Md. 680 (1996) ("the courts may not substitute their judgment for that of the legislative agency if the issue is rendered fairly debatable"); *accord Floyd v. County Council of Prince George's County*, 55 Md. App. 246, 258 (1983) ("'substantial evidence' means a little more than a 'scintilla of evidence.'").

Spot Zoning

The City must find sufficient facts for a change or mistake because "Zoning is permissible only as an exercise of the police power of the State. When this power is exercised by a city, it is confined by the limitations fixed in the grant by the State and to the accomplishment of the purposes for which the State authorized the city to zone." *Cassel*, 195 Md. at 353.

In piecemeal rezoning bills, like this one, if there is not a factual basis to support the change or the mistake, then rezoning is considered illegal spot zoning. *Id*. at 355. Spot Zoning "has appeared in many cities in America as the result of pressure put upon councilmen to pass amendments to zoning ordinances solely for the benefit of private interests." *Id*. It is the "arbitrary and unreasonable devotion of a small area within a zoning district to a use which is inconsistent with the use to which the rest of the district is restricted." *Id*. It is "therefore, universally held that a 'spot zoning' ordinance, which singles out a parcel of land within the limits of a use district and marks it off into a separate district for the benefit of the owner, thereby permitting a use of that parcel inconsistent with the use permitted in the rest of the district, is invalid if it is not in accordance with the comprehensive zoning plan and is merely for private gain." *Id*.

However, "a use permitted in a small area, which is not inconsistent with the use to which the larger surrounding area is restricted, although it may be different from that use, is not 'spot zoning' when it does not conflict with the comprehensive plan but is in harmony with an orderly growth of a new use for property in the locality." *Id*. The example given was "small districts within a residential district for use of grocery stores, drug stores and barber shops, and even gasoline filling stations, for the accommodation and convenience of the residents of the residential district." *Id*. at 355-356.

Thus, to avoid spot zoning, the Mayor and City Council must show how the contemplated use is consistent with the character of the neighborhood. *See, e.g., Tennison v. Shomette*, 38 Md. App. 1, 8 (1977) (cited with approval in *Rylyns*, 372 Md. at 546-47; *accord Mayor and City Council of Baltimore v. Byrd*, 191 Md. 632, 640 (1948)).

Planning Commission Recommendation

The Planning Department Staff Report ("Staff Report") supports this rezoning. Based on the Staff Report, the Planning Commission adopted a resolution recommending approval of the zoning change proposed by Council Bill 24-0591. The Staff Report notes that the property is improved with an industrial structure which existed on the property prior to the current R-6 designation. The structure is vacant, and the property has a Zone A floodplain designation. The property is at the western tip of Brooklyn which has developed over time as predominantly residential. The area directly surrounding the subject property is either residential or undeveloped. The area north of the property is undeveloped. East of the subject property is some industrial and commercial development which existed prior to the Transform zoning change in 2017. Property south and west of the subject is in Anne Arundel County and is either greenspace or residential. According to the applicant the property was zoned M-2-1 until 2017. The subject property is contained within the Strategic Neighborhood Action Plan (SNAP) for Brooklyn and Curtis Bay. The zoning code description for the requested IMU designation is:

> Industrial Mixed-Use Zoning. Primarily for existing industrial buildings and permits both light industrial uses and a variety of nonindustrial uses, such as dwellings, commercial, creating a mixed-use environment.

The zoning code description for the existing R-6 zoning is:

> Low density rowhouse neighborhoods. Landscaped front yards, setback buildings. Accommodates detached and semi-detached dwellings, rowhouse developments and multifamily developments. Limited non-residential uses

The Staff Report notes that under the SNAP an area directly adjacent to the subject property to the north is a focus area for potential development as a residential and commercial site.

Planning states in the Staff Report that the "subject property is eligible for a zoning district change pursuant to §5-508(b)(1)(ii) of Article 32 – Zoning, considered as a mistake in the existing zoning classification. Given the current structure and use history of the property, a classification of I-MU is more appropriate for the property to allow for utilization of the property in a manner that compliments and enhances the existing uses in the immediate vicinity." As set forth above, a mistake in zoning as a basis for a map amendment, must be a mistake in fact, and not a mistake in judgment, in assigning the zoning district of the property at issue in the last comprehensive zoning.

The Staff Report states on page 3 that the applicant has communicated with the neighborhood and garnered support for the rezoning of this property. The end of the Staff Report, however, contains the following statement: "Notification: Action Baybrook (Opposed), the Concerned Citizens of a Better Brooklyn (Opposed), and Community of Curtis Bay Association have been notified of this action." Moreover, the Staff Report notes that the property is unsuitable for the uses permitted under its current zoning classification (R-6) due largely to the fact that the existing structure is a single-story manufacturing building. On pages 3 and 5 of the Staff Report, however, it is noted that the applicant has "garnered support for the demolition" of the subject property. If the manufacturing building is to be demolished, its presence has little impact on whether this property is unsuitable for the uses permitted under the current zoning.

The Staff Report contains an equity assessment of the requested rezoning which finds that the requested rezoning would allow the removal of a vacant property and a greater diversity of uses than is permitted under the current R-6 zoning. According to Planning staff, IMU zoning has more control over uses than a standard Industrial classification. The equity analysis also states that the IMU will better support the surrounding neighborhood by providing a variety of uses and a diversity of housing options.

Under the standards set forth above, the Council must find facts that support a finding that there was a mistake in the zoning of this property as R-6 at the time Transform was enacted in 2017. The Council must also show how the contemplated use is consistent with the character of the neighborhood. In the Statement of Intent there is no indication of how the applicant intends to use this property.

The City Council is required to hold a quasi-judicial public hearing with regard to the bill where it will hear and weigh the evidence as presented in: (1) the Planning Report and other agency reports; (2) testimony from the Planning Department and other City agency representatives; and (3) testimony from members of the public and interested persons. After weighing the evidence presented and submitted into the record before it, the Council is required to make findings of fact about the factors in Sections 10-304 and 10-305 of the Land Use Article of the Maryland Code and Section 5-508 of Article 32 of the Baltimore City Code. If, after its investigation of the facts, the Committee makes findings which support: (1) a mistake in the comprehensive zoning; and (2) a new zoning classification for the properties, it may adopt these findings and the legal requirements for granting the rezoning would be met.

Additionally, certain procedural requirements apply to this bill beyond those discussed above because a change in the zoning classification of a property is deemed a "legislative authorization." Baltimore City Code, Art. 32, § 5-501(2)(iii). Specifically, notice of the City Council hearing must be given by publication in a newspaper of general circulation in the City, by posting in a conspicuous place on the property and by first-class mail, on forms provided by the Zoning Administrator, to each person who appears on the tax records of the City as an owner of the property to be rezoned. Baltimore City Code, Art. 32, § 5-601(b). The notice of the City Council hearing must include the date, time, place and purpose of the hearing, as well as the address of the subject property or a drawing or description of the boundaries of the area affected by the proposed rezoning and the name of the applicant. Baltimore City Code, Art. 32, § 5- 601(c). The posted notices must be at least 3 feet by 4 feet in size, placed at a prominent location near the sidewalk or right-of-way for pedestrians to view, and at least one sign must be visible from each of the property's street frontages. City Code, Art., § 5-601(d). The published and mailed notices must be given at least 15 days before the hearing; the posted notice must be at least 30 days before the public hearing. Baltimore City Code, Art. 32, § 5-601(e), (f).

The bill is the appropriate method for the City Council to review the facts and make the determination as to whether the legal standard for rezoning has been met. Assuming the required findings are made and that all procedural requirements are satisfied, the Law Department can approve the bill for form and legal sufficiency.

Sincerely yours,

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