CITY OF BALTIMORE
CATHERINE E. PUGH, Mayor

DEPARTMENT OF LAW
101 City Hall
Baltimore, Maryland 21202

July 7, 2017

Honorable President and Members
of the City Council of Baltimore
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Attn: Natawna B. Austin
Executive Secretary

Re: City Council Bill 17-0080 – Rezoning – 127, 129, 133, 135 W. West St. and 1220 Race St.

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 17-0080 for form and legal sufficiency. The bill would change the zoning for 127, 129, 133 and 135 W. West St. from OR-1 zoning district to the TOD-4 zoning district and the Race St. property fromTOD-1 to TOD-4.

The Planning Department issued a Staff Report ("Report") regarding the properties proposed to be rezoned by this bill. The Report explains that, during to TransForm Baltimore process, the majority of the block was designated TOD-4 but the West St. properties were mistakenly left as O-R-1. In addition, they were inadvertently left off the list that amended the zoning of the last remaining townhouse lots in the block to TOD-4. With respect to the Race St. property, the Staff report explains that changing the zoning classification to TOD-4 will allow for more units and higher height limitations. Citing the factors in the Land Use Art. 10-304 and 10-305 and related facts, the Report suggests that the rezoning for 1220 Race St. is authorized due to a substantial change in the character of the neighborhood.

It is difficult to find facts for the Race St. property that support a change in the character of the neighborhood given that a mere month or so has pasted since the property was rezoned in Transform. It is not likely that there has been a substantial change in the neighborhood in that time. The Law Department suggests that the City Council, in the alternative, find facts to support a finding of mistake in the existing zoning classification for that property. This justification is supported by facts that show that amendments were submitted during Transform hearings to change 1220 Race St. from I-MU to TOD-1. A second amendment later in the process proposed a change to TOD-4. Both amendments appeared in the list of proposed MAP amendments initially. The second amendment, however, was mistakenly dropped from the list that was presented to the Committee for a vote. As a result, that amendment was not voted on by the Committee and did

Favorable w/ Comments

not advance to second and third reader. If the Committee receives testimony at the hearing that will place these facts on the record, it will be able to make findings of fact that, in conjunction with the Planning Staff Report setting forth the statutory factors, will support mistake as the justification to rezone the Race St. property.

The City Council may approve a proposed map amendments based on a finding that there was a "mistake in the existing zoning classification." Md. Land Use Code Ann., §10-304(b)(2); Baltimore City Code, (BCC) Art. 32, § 5-508(b)(1)(ii). In determining whether to rezone on the basis of mistake, the City Council is required to make findings of fact, for each property, on the following matters: (1) population change; (2) the availability of public facilities; (3) the present and future transportation patterns; (4) compatibility with existing and proposed development; (5) the recommendations of the Planning Commission and the Board of Municipal and Zoning Appeals; and (6) the relationship of the proposed amendment to the City's plan. Md. Land Use Code Ann., §10-304(b)(1). *See also*, BCC, Art. 32, § 5-508(b)(2) (citing same factors with (v) being "the recommendations of the City agencies and officials," and (vi) 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." § 5-508(b)(3).

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." Cty. Council of Prince George's Cty. v. Zimmer Dev. Co., 444 Md. 490, 510, 120 A.3d 677, 688–89 (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"); *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.'").

With regard to rezoning on the basis of mistake, it is "firmly established that there is a strong presumption of the correctness of original zoning and of comprehensive rezoning." *People's Counsel v. Beachwood I Ltd. Partnership*, 107 Md. App. 627, 641 (1995), *quoting*, *Wells v. Pierpont*, 253 Md. 554, 557 (1969). To sustain a piecemeal change, there must be substantial evidence that "the Council failed to take into account then existing facts . . . so that the Council's action was premised . . . on a misapprehension." *White v. Spring*, 109 Md. App. at 698, *quoting*, *People's Counsel*, 107 Md. App. at 645. In other words, "[a] conclusion based upon 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." 109 Md. App. at 698. "Error can be established by showing that at the time of the comprehensive zoning 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[,]" [and]

"by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect." Boyce v. Sembly, 25 Md. App. 43, 51 (1975) (citations omitted). "Thus, unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not 'fairly debatable.'" *Id.* at 52.

A finding of mistake, however, absent a regulatory taking, merely permits the further consideration of rezoning, it does not mandate a rezoning. *White*, 109 Md. App. at 708. Rather, a second inquiry "regarding whether, and if so, how, the property is reclassified," is required. *Id.* at 709. This second conclusion is due great deference. *Id.* (after a prior mistake has been established and accepted as fact by a legislative zoning entity, that entity's decision as to whether to rezone, and if so, how to reclassify, is due the same deference the prior comprehensive rezoning was due).

In sum, the Land Use and Transportation Committee (the "Committee") is required to hold a quasi-judicial public hearing with regard to the bill wherein 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 Committee is required to make findings of fact for each property with regard to the factors in §§10-304 and 10-305 of the Land Use Article and § 5-508 of Article 32. 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. As noted above, the Staff Report does not supply facts to support a finding of mistake for the Race St. property; therefore, Council will have to base its findings on other testimony presented at the hearing.

Finally, 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." BCC 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. 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 property and the name of the applicant. Art. 32, §5-601(c). The posted notices must be at least 3 feet by 4 feet in size, placed at a prominent location, and at least one sign must be visible from each of the property's street frontages. Art. 32, §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. 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 at the hearing and that all procedural requirements are satisfied, the Law Department approves the bill for form and legal sufficiency.

Sincerely yours

Elena R. DiPietro

Elena R. DiPietro
Chief Solicitor

cc: David Ralph, Acting City Solicitor
Karen Stokes, Director, Mayor's Office of Government Relations
Kyron Banks, Mayor's Legislative Liaison
Jennifer Landis, Assistant Solicitor
Hilary Ruley, Chief Solicitor
Victor K. Tervala, Chief Solicitor