
CITY OF BALTIMORE

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Mayor



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August 5, 2019

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 19-0372 - Zoning – Fells Point Overlay District

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 18-0372 for form and legal sufficiency. The bill would establish a new Fells Point Height Overlay District. The bill establishes height limits allowed in certain areas of the district and provides that the regulations of the underlying zoning districts apply.

The City Code describes overlay districts as comprising “a layer of regulations...superimposed on the regulations of an underlying district.” City Code, Art. 32, § 12-102. According to the City Code, overlay districts are “intended to modify or supplement the regulations of its underlying zoning districts in recognition of unique circumstances in the area, while maintaining the general character and purpose of the underlying zoning districts over which it is located.” *Id.* Maryland State law endorses the use of concepts such as overlay districts in stating that while “[z]oning regulations adopted by the Mayor and City Council of Baltimore City...shall be uniform for each class or kind of development throughout each district or zone...[z]oning regulations in one district or zone may differ from those in other districts or zones.” Md. Land Use, § 10-301. In applying this State law, the regulations affecting each R-8 District in the City, for example, must be identical to one another, but an R-8 District that is also subject to an overlay district is able to be governed by both types of district regulations. In the case of Council Bill 18-0372, an overlay district in Fells Point is intended to limit building heights in an area that is predominately regulated by R8 and C1 zoning.

Neither Maryland State law or the City Code establish special procedures governing the use of overlay districts. General legal principles hold that “so long as the public purpose supporting enactment of a zoning district or classification furthers a legitimate zoning purpose substantially related to the use and development of land, the classification is unlikely to be held” unlawful, unless the exercise conflicts with the scope of authority delegated to a local government.¹ Rathkopf’s *The Law of Zoning and Planning* § 11:14 (4th ed.). In the absence of specific governing standards applicable to overlay districts, the City must rely on procedures derived from the City Code’s statement of purpose regarding the use of overlay districts and the above statement of

general legal principles. Thus, in order to approve an overlay district the City Council must find that:

- (1) There are unique circumstances in the area, which are the subject of recognition in the proposed legislation;
- (2) The proposed legislation will maintain the general character and purpose of the underlying zoning districts over which it is located; and
- (3) The proposed overlay district will further a legitimate zoning purpose substantially related to the use and development of land.

In addition to finding the above facts to support the approval of an overlay district, the City Council must also consider the following standards for amending the text of the zoning code:

- (1) Is the amendment consistent with the City's Comprehensive Master Plan;
- (2) Does it promote the public health, safety, and welfare;
- (3) Is it consistent with the intent and general regulations of this Code;
- (4) Would it correct an error or omission, clarify existing requirements, or effect a change in policy; and
- (5) Would the amendment create nonconformities.

City Code, Art. 32, § 5-508(c).

The Planning Commission Report ("Report") does not clearly provide evidence that all the above standards are met. In relation to the facts needed to support an overlay district, we note that the Report concludes that "After careful review and consideration, we are not convinced that that this height overlay district is the right tool for the job." Report at 3. In fact, the Planning Department expressly *did not find* that the proposed legislation will maintain the general character and purpose of the underlying zoning districts. To this end, the Report states, "Lowering the height limit does not ensure thoughtful design or retaining existing character." *Id.* As for the other two criteria involving the overlay district, it appears that the Report is, at best, ambivalent as to whether those facts exist. As for the considerations needed for a text amendment, those too appear to be absent from the Report. Thus, in order to lawfully adopt the bill, the City Council must adduce facts from testimony other than what is contained in the Report as to the existence of the required facts.

We turn now to other procedural requirements. A text amendment is deemed a "legislative authorization." City Code, Art. 32, § 5-501(1). The City Code does not provide specific notices for the creation of overlay districts, but due process considerations suggest that notice requirements for comprehensive rezoning should apply. See City Code, Art. 32, § 5-601. Specifically, notice of the City Council hearing must be given by publication in a newspaper of general circulation in the City, by posting in conspicuous places around the perimeter of the property and by first-class mail 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 addresses of the properties 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) and (f).

Assuming the factual requirements are satisfied at the bill's public hearing and the other procedures are satisfied, the Law Department is prepared to approve the bill as drafted for form and legal sufficiency.

Sincerely,



Victor K. Terval
Chief Solicitor

cc: Andre M. Davis, City Solicitor
Jeffrey Amoros, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Hilary Ruley, Chief Solicitor
Ashlea Brown, Assistant Solicitor