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February 21, 2024

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

Re: City Council Bill 23-0432 – Rezoning – 3301 Saint Paul Street and 3311 through 3327 Saint Paul Street

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 23-0432 for form and legal sufficiency. The bill would change the zoning of 3301 and 3311-3327 St. Paul Street from the R-8 Zoning District to the C-1 Zoning District.

Although any number of zoning designations are open for properties in original or comprehensive rezoning, there is not the same flexibility in piecemeal rezoning such as this. *See Mayor and City Council of Rockville v. Rylyns Enterprises*, 372 Md. 514, 535-36 (2002) (explaining the rationale behind rigidity in zoning as protecting landowners and society at large). Even if the Mayor and City Council believes now that the selection of the I-2 Zoning District for this parcel was wrong, second guessing is not allowed in piecemeal rezoning.

However, the Mayor and City Council may permit a piecemeal rezoning if it finds facts sufficient to show either: 1) there was mistake in the original zoning classification; or 2) there has been a substantial change in the character of the neighborhood since the original zoning classification. *Id. See also* Md. Code, Land Use Art., § 10-304(b)(2); Baltimore City Code, Art. 32, §§ 5-508(a) and (b)(l). "The 'mistake' option 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." *Rylyns Enterprises*, 372 Md. at 538-39. With regard to the "change" option, "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." *Id.* at 538. The legal standard for each of these options is discussed in more detail below.

<u>Legal Standard for Change in the Character of the Neighborhood</u>

"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). Thus, the Mayor and City Council must find facts of a substantial change in the character and the use of the district since the last comprehensive rezoning of the property and that the rezoning will promote the "public health, safety, morals, or general welfare" and not merely advantage the property owner. *Id*.

The "substantial change" must be in the "immediate neighborhood" of the subject property, and must be of "such a nature as to have affected its character." *Clayman v. Prince George's County*, 266 Md. 409, 418 (1972). Moreover, the required changes must be physical in nature. *Anne Arundel County v. Bell*, 442 Md. 539, 555 (2015) (citations omitted). However, infrastructure changes such as sewer or water extension or road widening do not count. *Id.* at 419. In addition, the physical changes have to be shown to be unforeseen at the time of the last rezoning. *Rylyns Enterprises*, 372 Md. at 538. Contemplated growth and increased density are not sufficient. *Clayman*, 266 Md. at 419.

Legal Standard for Mistake

To sustain a piecemeal change on the basis of a mistake in the last comprehensive rezoning, 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. 692, 698 (1996) (citation omitted). 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." *Id*. "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.'" *Boyce v. Sembly*, 25 Md. App. 43, 52 (1975) (citations omitted).

A court has not considered it enough to merely show that the new zoning would make more logical sense. *Greenblatt v. Toney Schloss Properties Corp.*, 235 Md. 9, 13-14 (1964). Nor are courts persuaded that a more profitable use of the property could be made if rezoned is evidence of a mistake in its current zoning. *Shadynook Imp. Ass'n v. Molloy*, 232 Md. 265, 272 (1963). Courts have also been skeptical of finding a mistake when there is evidence of careful consideration of the area during the past comprehensive rezoning. *Stratakis v. Beauchamp*, 268 Md. 643, 653-54 (1973).

Avoiding Spot Zoning

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. *Cassel*, 195 Md. 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*. Examples include "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 avoiding 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 Enterprises*, 372 Md. at 545-46).

Additional Required Findings of Fact

In addition to finding that there was either a substantial change in the character of the neighborhood or a mistake in the original zoning classification, the Mayor and City Council is required to make findings of fact on the following matters:

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

Md. Code, Land Use, § 10-304(b)(l); Baltimore City Code, Art. 32, § 5-508(b)(2).

The Mayor and City Council must also 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) (citation omitted); *see also White*, 109 Md. App. at 699 ("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.'").

Planning Commission Recommendation

The Planning Department Report ("Report") supports this rezoning, with an amendment to remove 3301 St. Paul because it was included in error. The Report states there was a mistake in zoning these properties as R-8 during the Transform Baltimore comprehensive rezoning process. Although the owners of some of the lots had petitioned for commercial rezoning, they were inexplicably denied while surrounding blocks were rezoned. Report at 3. The Report mentions a memorandum from the applicant that supports the finding of mistake, but that letter does not appear to be in the online bill file.

The Report also makes findings on each of the additional required matters outlined in the previous section.

Process Requirements

The City Council 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 Council is required to make findings of fact about the factors in Section 10-304 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 or a substantial change in the neighborhood; 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 or description of the property 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 and motorists 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, and the posted notice must be provided 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 at the hearing, all procedural requirements are satisfied, and the bill is amended to remove 3301 as recommended by the Planning Commission, the Law Department can approve the bill for form and legal sufficiency.

Sincerely,

Jeffrey Hochstetler
Chief Solicitor

cc: Ebony Thompson, Acting City Solicitor
Nina Themelis, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Hilary Ruley, Chief Solicitor
Ashlea Brown, Chief Solicitor
Michelle Toth, Special Solicitor
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