

CITY OF BALTIMORE

CATHERINE E. PUGH, Mayor



DEPARTMENT OF LAW

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February 7, 2018

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 17-0106 Rezoning of 3601 – 3605 Park Heights Avenue

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 17-0106 for form and legal sufficiency. If enacted, the bill would change the zoning for 3601–3605 Park Heights Avenue from the R-6 Zoning District to the C-1 Zoning District. For the reasons set forth within, the Law Department cannot find that the bill is legally sufficient in achieving its purpose.

The City Council can only permit this rezoning 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. Code, Land Use, §10-304(b)(2); City Code, Art. 32, §§5-508(a),(b)(1). There would appear to be no basis to believe that the neighborhood could have substantially changed between the comprehensive rezoning of the property to R-6 on June 5, 2017 and today's date. Therefore, to legally rezone the property under current law, the City Council must identify a "mistake" that lead to the inappropriate zoning of the property as R-6 a mere eight months ago. Md. Code, Land Use §10-304(b)(2); City Code, Art. 32, §§5-508(a),(b)(1).

As "there is a strong presumption of the correctness of original zoning and of comprehensive rezoning," there must be substantial 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." *People's Counsel v. Beachwood I Ltd. Partnership*, 107 Md. App. 627, 641 (1995)(citations omitted); *Boyce v. Sembly*, 25 Md. App. 43, 52 (1975) (citations omitted). In other words, "the Council's action was premised initially on a misapprehension" making the selection of the R-6 zoning designation a "conclusion based upon a factual predicate that is incomplete or inaccurate." *People's Counsel*, 107 Md. App. at 641, 645 (1995)(citation omitted); accord *White v. Spring*, 109 Md. App. 692, 698 (1996). "[A]n 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.* at 645. Without showing either facts that were not taken into account or subsequent events, "the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not 'fairly debatable.'" *Boyce*, 25 Md. App. at 52.



To be sure, if evidence of a factual mistake sufficient to justify a rezoning is revealed, then courts will accord deference to the legislative judgment to rezone. *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 509-510 (2015); *accord 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”); *Floyd v. County Council of Prince George's County*, 55 Md. App. 246, 258 (1983) (“Substantial evidence, we have noted, ‘means a little more than a “scintilla of evidence.””).

The Law Department has not been provided with any such evidence. Moreover, we note that there was not a majority of votes of the Planning Commission to approve the rezoning. More important, still, the Report of the Planning Commission contains no facts to support that there was a *factual* mistake in the selection of R-6 as the zoning for 3601–3605 Park Heights Avenue. Md. Code, Land Use, §10-304(b)(2). Rather, it is clear in this case that City Council had a complete set of material facts about the property and chose to zone it R-6 as part of its comprehensive rezoning process, “Transform”.

Specifically, the City Council knew that the decades of alcohol sales at this location made it a non-conforming use in its previous zoning category, B-1, because that category permitted drugstores, pharmacies, ice cream shops and other grocery stores without alcohol sales. City Code, Zoning Article, §6-206. Rezoning a property to conform it to the intensity of the area around it is appropriate in comprehensive rezoning. *See, e.g., Tennison v. Shomette*, 38 Md. App. 1, 5 (1977), *cert. den.*, 282 Md. 739 (1978). Thus, the City Council appropriately rezoned the property R-6 to require the alcohol sales to cease within two years of the date of the rezoning and thereby conform the property to the appropriate level of commercial intensity for the neighborhood. To go backwards by undoing this comprehensive rezoning would constitute unlawful spot zoning because it would be increasing the intensity allowed in this neighborhood only for the benefit of the property owner. When the City has undertaken such efforts in the past, Maryland’s highest court has invalidated the ordinance as unreasonable, discriminatory spot zoning because the rezoning had insufficient relationship to the public health, safety or general welfare. *See, e.g., Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348, 354 (1950).

On the present record, it cannot be shown that the City Council had a misapprehension about these facts. Accordingly, the legal standard for rezoning cannot be met and the Law Department cannot approve the bill for legal sufficiency.

Very truly yours,



Andre M. Davis
City Solicitor

cc: Karen Stokes, Director, Mayor’s Office of Government Relations
Kyron Banks, Mayor’s Legislative Liaison

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