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CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG  
Mayor



DEPARTMENT OF LAW  
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May 6, 2019

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 19-0355 –Rezoning of 141 – 145 West Hamburg Street

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 19-0355 for form and legal sufficiency. If enacted, the bill would change the zoning for 141-145 West Hamburg Street from the R-7 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.

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 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-8 only a short time 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-7 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 Planning Commission found neither a change in the neighborhood nor a *factual* mistake in the selection of a residential zoning for this property and therefore recommends disapproval of this bill. Planning’s Report finds that this property was zoned residential prior to comprehensive rezoning in 2017 and that residential zoning was retained. The Mayor and City Council knew that a liquor store operated there as a non-conforming use since at least 1971. There is absolutely no evidence that zoning this property residential in 2017 or in 1971 was a mistake. To the contrary, all the evidence shows that it was considered properly zoned as residential for almost half a century and that the neighborhood has stayed residential that entire time. There has also been no showing of any events occurring since the last comprehensive rezoning in 2017 that would evidence a mistake in the selection of a residential zoning category for this property. Rather, this was a well-studied property, with a clear history, that was intentionally zoned residential because the entire neighborhood has been residential for decades.

Therefore, rezoning this property now to C-1 would constitute unlawful spot zoning because it would be 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). Moreover, a court will most likely see this as a thinly veiled attempt to remove the property from the mandatory amortization of non-conforming liquor stores required by Section 18-701 of Article 32, the City’s Zoning Code. To rezone a property simply to avoid a financial impact to the property owner is the hallmark of unlawful spot zoning.

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: Jeffrey Amoros, Mayor’s Legislative Liaison  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Victor Tervalá, Chief Solicitor  
Hilary Ruley, Chief Solicitor  
Ashlea Brown, Assistant Solicitor