CITY OF BALTIMORE

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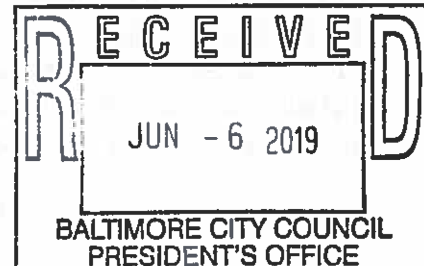

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 19-0333 – Rezoning – 801-803 North Chester Street

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 19-0333 for form and legal sufficiency. The bill would change the zoning for the properties known as 801-803 North Chester Street from the R-8 zoning district to the C-1 zoning district.

The City Council may 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); Baltimore City Code, Art. 32, §§5-508(a) and (b)(1). There would appear to be no basis to believe that the neighborhood has substantially changed between the comprehensive rezoning of the property on June 5, 2017 and today's date. Therefore, to legally rezone the property the City Council must identify a "mistake" that led to the inappropriate zoning of the property as R-8.

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*, Baltimore City Code, Art. 32, §5-508(b)(2) (citing same factors with (v) being "the recommendations of the City agencies and

Fav w/ comments

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.

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." *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 510 (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"); *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.'").

<u>Mistake in the Current Zoning Classification</u>

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*, 109 Md. App. at 698 (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.* "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 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; 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.

Here, **the Planning Commission has recommended approval of the bill based on the facts presented by the applicant. The proposed findings of fact by the applicant do not establish the requisite facts upon which to find a "mistake." The applicant's facts suggest that it was an error of judgment to zone the property R8 because the property at 801 was constructed for a commercial use "as evident in its architecture." Applicant's Findings, p. 3. While this may be, in the applicant's opinion, a case of bad judgment, it does not establish that there was a misapprehension or that the conclusion to zone the properties to R8 was based on misinformation, as is required to support a finding of "mistake" sufficient to rezone. See, *White*, supra. The Findings submitted by the applicant, alone, cannot support a finding of mistake. Furthermore, although the applicant's proposed findings do arguably support that the neighborhood has changed since 2010, the facts suggested to do not establish that the neighborhood has changed *substantially* since June, 2017 (nor could they). "The 'change' half of the 'change-mistake' rule requires that, in order for a piecemeal Euclidean zoning change to be approved, 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." *Rylyns*, supra (as cited in 3 Rathkopf's The Law of Zoning and Planning § 42.6). The Staff Report recommends disapproval. The Staff Report is, therefore, not available as a source of facts upon which the City Council can base its findings. Facts to support a mistake in the current zoning, therefore, must be offered during the hearing on the bill for the bill to be legally sufficient.**

Spot Zoning

In addition to not providing facts to support mistake, this could amount to spot zoning.

The law with respect to spot zoning is well settled. In *Tennison v. Shomette*, 38 Md. App. 1, 8 (1977), the Court of Special Appeals explained that spot zoning occurs when a small area in a district is placed in a zoning classification which is different from the surrounding properties.

The *Tennison* court reasoned that generally "spot zoning is not invalid per se", but that "its validity depends on the facts of each individual case."

It has also long been held by the courts that although spot zoning is illegal if inconsistent with an established comprehensive plan and is made solely for the "benefit of private interests", it can also be a valid exercise of the police power where the zoning is in harmony with the comprehensive plan and bears a substantial relationship to the public health, safety, and general welfare. *Cassell v. Mayor of Baltimore*, 195 Md. 348 (1950). (Emphasis added.) **According to the staff report, this zoning would not be consistent with the comprehensive plan and would not be in the public's interest.** Staff Report, p. 3-4.

The general rule set forward in *Tennison* has long been followed by the courts, and must be applied with respect to Bill 19-0333. It was cited with approval by the Court of Appeals in *Mayor and City Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 546-47 (2002). The court there cited both *Tennison* and *Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348 (1949), stating that spot zoning 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." The court also noted 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 not in accordance with the comprehensive zoning plan and is merely for private gain." *Id.* (Emphasis in original.) The *Rylyns* court also noted that if a use is permitted in a small area and is not inconsistent with the use of the larger surrounding area even though it may be different from that use, it is not spot zoning if it does not conflict with the comprehensive plan but is in harmony with the orderly growth of a new use for the other property in that locality.

Hewitt v. County Comm'rs of Baltimore County, 220 Md. 48 (1959), is also instructive. In that case, although the Court of Appeals agreed with the rationale expressed in the above-cited cases, it nonetheless stated that it has "consistently rejected spot zoning" and "has repeatedly referred to the statutory requirement ... that zoning shall be in accordance with a comprehensive plan." The *Hewitt* court thus ruled that the request of the owner there to rezone property located in a residential zoning district for commercial use constituted invalid spot zoning. The court found that such rezoning amounted to an arbitrary and unreasonable devotion of small area for a use inconsistent with the uses restricted to the rest of the district. As a result, the court concluded that the rezoning was for the sole benefit of the private interest of the property owner and was not in accordance with the comprehensive plan.

In this case, the properties are currently zoned R-8. The requested rezone, according to the Staff Report, is to expand the restaurant which can continue as a conditional use on the 801 property. Staff Report, p. 3. The facts suggest that this is impermissible spot zoning for private gain unless there is testimony establishing that the rezoning is for the public good and in accordance with the comprehensive plan.

Procedural Requirements

In addition, the Baltimore City Code, Art. 32, § 5-506 states that "The Planning Commission must consider the referred bill in a public hearing. Notice of the public hearing must be given in accordance with Title 5, Subtitle 6 {"Notices"} of this Code. Except as provided in

posted notice must be 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 and whether the rezoning amounts to spot zoning. Assuming the required findings are made at the hearing and that all procedural requirements are satisfied, including facts are presented at the hearing that rule out spot zoning and establish that the original zoning was based on erroneous facts, the Law Department could approve the bill for form and legal sufficiency.

Sincerely yours,

Ashlea H. Brown
Assistant Solicitor

cc: Andre M. Davis, City Solicitor
Jeff Amoros, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor
Victor Tervala, Chief Solicitor
Hilary Ruley, Chief Solicitor