
CITY OF BALTIMORE

BRANDON M. SCOTT

Mayor



DEPARTMENT OF LAW
EBONY M. THOMPSON,
ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

March 22, 2023

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 22-0321 - Rezoning – 1419 to 1431 Bank Street and 409 South
Spring Street

Dear President and City Council Members:

The Law Department reviewed City Council Bill 22-0321 for form and legal sufficiency. The bill changes the zoning for the properties known as 1419 to 1431 Bank Street (Block 1433, Lots 043, 044, 045, 046, 047, and 048/050) and 409 South Spring Street (Block 1433, Lot 051/060) from the R-8 and IMU-1 Zoning Districts to the C-2 Zoning District. The bill would take effect on the date of enactment.

The C-2 zoning classification is for pedestrian-oriented small to medium-scale commercial development, and is appropriate for mixed-use development. IMU-1 permits light industrial use development and includes residential and commercial uses. Zoning for R-8 is for continuous rowhouse development along full blocks, or other residential development of a similar density.

The Mayor and City Council may permit a piecemeal rezoning *only 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 Land Use Art., § 10-304(b)(2); Baltimore City Code, Art. 32, §§ 5-508(a) and (b)(1).

The “change-mistake” rule is a rule of the either/or type. 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. The “mistake” option of the rule 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. Mistake in this context does not refer to a mistake in judgment.

Mayor and Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 517, 538 (2002).

Legal Standard for Change

“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). The Mayor and City Council must find facts of a substantial change in the character and the use of the district since the comprehensive rezoning of the property on June 5, 2017 and that the rezoning will promote the “public health, safety, morals, or general welfare” and not merely advantage the property owner. *Id.* at 358.

To constitute a substantial change, courts in Maryland want to see facts of a “significant and unanticipated change in a relatively well-defined area.” *Rylyns Enterprises*, 372 Md. at 538. The “‘neighborhood’ must be the immediate neighborhood of the subject property, not some area miles away; and the changes must occur in that immediate neighborhood of such a nature as to have affected its character.” *Clayman v. Prince George’s County*, 266 Md. 409, 418 (1972). The changes are required to be physical. *Anne Arundel County v. Bell*, 442 Md. 539, 555 (2015) (citing *Montgomery County v. Woodward & Lothrop*, 280 Md. 686, 712–13 (1977)). However, those physical changes cannot be infrastructure such as sewer or water extension or road widening. *Clayman*, 266 Md. at 419. And the physical changes have to be shown to be unforeseen at the time of the last rezoning. *County Council of Prince George’s County v. Zimmer Development Co.*, 444 Md. 490 (2015). Contemplated growth and density are not sufficient. *Clayman*, 266 Md. at 419.

In determining whether the change benefits only the property owner, courts look, in part, to see if a similar use exists nearby of which the community could easily take advantage. *Cassel*, 195 Md. at 358 (three other similar uses only a few blocks away lead to conclusion that zoning change was only for private owner’s gain).

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 on 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.

The Supreme Court of Maryland (formerly the Court of Appeals of Maryland) has said it is not sufficient 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 the fact 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).

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.*

Spot Zoning

The City must find sufficient facts for a change or mistake because “[z]oning is permissible only as an exercise of the police power of the State. When this power is exercised by a city, it is confined by the limitations fixed in the grant by the State and to the accomplishment of the purposes for which the State authorized the city to zone.” *Cassel*, 195 Md. at 353.

In piecemeal rezoning bills if there is not a factual basis to support the change or the mistake, then rezoning is considered illegal spot zoning. *Id.* 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.* The example given was “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.

Therefore, 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 *Rylins*, 372 Md. at 546-47; accord *Mayor and City Council of Baltimore v. Byrd*, 191 Md. 632, 640 (1948)).

Findings of Fact

The City Council is required to make the following findings of fact in determining whether to permit rezoning based on mistake or change in the character of the neighborhood:

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

Md. Code, Land Use, § 10-304(b)(1); Baltimore City Code, Art. 32, § 5-508(b)(2).

Article 32 of the City Code requires the Council to consider the following additional factors:

- (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) (*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.").

Planning Commission Recommendation

The Planning Department Staff Report recommended disapproval of this rezoning. The Planning Commission rejected the Staff Report, and voted to approve the rezoning based on the justification submitted by the applicant for the zoning change. The justification submitted by the applicant to change the zoning of the subject properties is based on a change in the character of the neighborhood since the last comprehensive rezoning in 2017. The submission does not address or otherwise assert that there was a mistake made in the zoning designation of the subject properties at the time of the last comprehensive rezoning.

The report of the Planning staff noted that the "south side of Bank Street is part of the northern edge of a traditionally residential mixed-use area dating from the early 19th Century. The north

side of Bank Street at this location is the site of Perkins Homes, an early 1940s public housing development that was scheduled for demolition beginning in 2020 as part of a major redevelopment of a large section of inner East Baltimore now known as the ‘Perkins-Somerset-Oldtown’ project.” The Staff Report further notes that in 1971 the Bank Street properties were originally zoned B-3-3 and 409 South Spring Street was zoned M-2-2. In a comprehensive rezoning of Fells Point over ten years ago, the Bank Street properties were rezoned R-8 and 409 South Spring Street was rezoned B-1-2. In the comprehensive rezoning in 2017, the Bank Street properties retained the R-8 designation, and 409 South Spring Street was rezoned to IMU (Industrial Mixed Use). This was later revised to IMU-1 which allows for lighter industrial, commercial, and residential uses. The Perkins Homes site across from these properties was rezoned from R-9 to C-2.

The Planning Staff Report specifically found no evidence that a mistake was made in the zoning of these properties (Planning Staff Report, pg. 3), and that the proposed rezoning would have to be justified based on a substantial change in the character of the neighborhood. The Staff Report noted that the largest change in the neighborhood since the 2017 comprehensive rezoning has been the clearing of the Perkins Homes site. Although this has resulted in a large population decrease, this decrease will be reversed when the Perkins site redevelopment is complete. The report noted that while changing the zoning of the subject properties to C-2 would align it with the zoning for the Perkins site, it would further reduce the R-8 zoning along Bank Street outside the Fells Point Historic District. Planning staff found the surrounding area has a combination of existing property uses, namely, residential, residential mixed-use, commercial, and light industrial. The report concluded that there “is not a demonstrated need for the proposed rezoning in order to meet the goals of the Comprehensive Master Plan,” and that both the Bank Street lots and 409 South Spring Street can be appropriately redeveloped under their existing zoning classifications.

The submission by the applicant requesting the zoning change, which was relied on by the Planning Commission, states that the change in zoning is justified by a substantial change in the character of the neighborhood since the comprehensive 2017 rezoning. Once rezoned, the applicant states that “the Property is going to be intentionally redeveloped with a residential use that is consistent with existing character of the neighborhood, and food processing: light, tavern, and retail goods establishment uses which will meet the needs of residents.”

The applicant submission states that zoning for the Perkins Homes redevelopment was first approved in approximately June 2016, prior to the passage of the 2017 comprehensive rezoning. (Applicant Submission, pg.1). The applicant identifies two new and two future residential developments within a half mile of the subject properties. The applicant asserts that although the population of the property census tract that includes the properties declined from 2017 to 2020, the population of the area has increased from 2020-2023. (Applicant Submission, pg.3). As a result, there is a growing need for more commercial options to serve the growing population. The applicant’s submission notes that the properties are near several bus lines, are near truck routes, and have easy access to major transportation routes. (Applicant Submission, pg.3). The applicant states that adjacent properties are zoned R-8 and that there is also a large swath of C-2 zoning. (Applicant Submission, pg.4). The submission asserts that the properties are not suited for the uses permitted under the existing zoning of the properties. (Applicant Submission, pg.4). No facts are offered in support of this assertion. Additionally, a review of the plat filed in support of the rezoning shows that the properties immediately surrounding the subject properties are a mixture of R-8 and IMU-1 zoning, which are the same zoning designations of the properties.

Because the Staff Report does not provide facts to support a change in the character of the neighborhood, there must be testimony at the hearing for the Council to rely on that supports a change in the character of the neighborhood as the basis for this rezoning. If there is testimony at the hearing that the City Council believes is sufficient to meet the standards for this type of rezoning it can approve the bill.

Process

The City Council is required to hold a quasi-judicial public hearing with regard to the bill where 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 for each property about the factors in §§ 10-304 and 10-305 of the Land Use Article of the Maryland Code 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 or a change in the character of the surrounding neighborhood; and (2) a new zoning classification for the property, 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 of the property or description of the boundaries of the area affected by the proposed rezoning, 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. Window mounted signs must be posted inside the window glass. City Code, Art., § 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. Baltimore City Code, Art. 32, § 5-601(e), (f). See also Land Use Article, § 10-303 (procedural requirements).

Council Bill 22-0321 is the appropriate method for the City Council to review the facts and determine whether the legal standard for rezoning has been met. If the required findings are made at the hearing and that all procedural requirements are satisfied, the Law Department approves the bill for form and legal sufficiency.

Sincerely yours,



Michele M. Toth
Special Solicitor

Cc: Ebony M. Thompson
Nina Themelis
Elena DiPietro
Hilary Ruley
Ashlea Brown
Jeff Hochstetler
D'ereka Bolden
Teresa Cummings