CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
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101 City Hall
Baltimore, Maryland 21202

August 6, 2014

The Honorable President and
Members of the Baltimore
City Council
c/o Natawna Austin, Executive Secretary
409 City Hall
Baltimore, MD 21202

RE: City Council Bill 14-0411–Rezoning -424-426 and 428 East 25th Street

Dear President and Members:

You have requested the advice of the Law Department regarding City Council Bill 14-0411. City Council Bill 14-0411proposes the rezone 424-426 and 428 East 25th St. from the B-3-2 zoning district to the OR-2 zoning district. The properties had been vacant but recent past uses included a bar/restaurant. A primary care clinic is set to open soon in one part of the properties.

Rezoning Standard – Change or Mistake

The regulations for the use of property within the various use districts are supported upon the basic theory that they apply equally and uniformly within the district affected. Invidious distinctions and discriminations in zoning cannot be allowed, for the very essence of zoning is territorial division according to the character of the land and the buildings, their peculiar suitability for particular uses, and uniformity of use within the use district. *Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348(1950) citing *Sugar v. North Baltimore Methodist Protestant Church*, 164 Md. 487, 494, 165 A. 703; *Heath v. Mayor and City Council of Baltimore*, 187 Md. 296, 305, 49 A.2d 799. 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 use district since the original enactment that the public health, safety, morals, or general welfare would be promoted by a change in the regulations. *Id.* 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. *Mayor and City Council of Rockville v. Rylyns, Inc.*, 372 Md. 514 (2002). In *Lambert v. Seabold*, 246 Md. 562(1962), the

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Court declined to approve a rezoning noting that there had been no change in the character of the neighborhood and it was constrained to find that the action of the Board, and its affirmance by the Circuit Court, in reclassifying the properties from R-6 to B-L, to quote Chief Judge Hammond in *Polinger v. Briefs*, 244 Md. 538, 541, 224 A.2d 460, 461, 224 A.2d 460 (1966), 'can amount to no more than the more impermissible change of mind or heart which was condemned in *Kay Const. Co. v. County Council*, 227 Md. 479, 177 A.2d 694, and *Schultze v. Montgomery County Planning Bd.*, 230 Md. 76, 185 A.2d 502.

"The burden of proving change or mistake which rests on the applicant is quite onerous. In demonstrating change in the neighborhood, the applicant must show: '(a) what area reasonably constituted the 'neighborhood' of the subject property, (b) the changes which have occurred in that neighborhood since the comprehensive rezoning and (c) that these changes resulted in a change in the character of the neighborhood." *Mayor and City Council of Rockville v. Henley*, 268 Md. 469(1973). Proof of change merely permits the legislative body to grant the requested rezoning; it does not compel it to do so. *Id.*

In the case of City Council Bill14-0411, there is no claim of mistake in the original zoning of the properties. As for substantial change in the character of the neighborhood, there is a claim from the Planning Commission staff that the character of the neighborhood has changed. The purported support for this is that the area is "becoming" more pedestrian oriented with a goal of promoting small office and very limited walk to commercial. This does not constitute evidence of substantial change in the neighborhood but rather evidences a "mere change of mind or heart" regarding the zoning for the area. In addition, letters from neighborhood associations have been received expressing their desire that the area become less commercial. That evidence is merely aspirational and does not show an actual change in the character of the neighborhood. Community leaders have stated that they have been long interested in downzoning East 25th Street to achieve this goal. Information provided by the community, however, do not support that the subject property and the area east of it was included in the efforts of the community.1 In addition, the surrounding area contains a wide variety of commercial, residential, governmental and community service uses that may be more consistent with the existing zoning.

Reverse Spot Zoning

The Law Department is also concerned that passage of City Council Bill 14-0411 will lead to a challenge to the validity of the ordinance based upon the legal principle of "reverse spot zoning." Spot zoning in general results when there is a singling out of an "area for different treatment from that accorded to the similar surrounding land indistinguishable from it in

1 See SUMMARY OF COMPREHENSIVE ZONING MAP CHANGES IN CHARLES VILLAGE as approved by CVCA Board on 3/5/2013*

character, for the economic benefit of the owner of the lot or to his economic detriment". *In re Appeal of Relans Valley Forge Greenes Assoc.*, 576 Pa. 15, (2003). "Reverse spot zoning" is "any land use decision that arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." It has also been described as "a zoning ordinance that prevents a property owner from utilizing his or her property in a certain way, when virtually all of the adjoining neighbors are not subject to such a restriction...." *Palmer Trinity v. Village of Palmetto Bay*, 31 So.3d 260 (2010). *Riya Finnegan LLC v. Township of West Brunswick*, 197 N.J. 184(2008) citing *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). An example of reverse spot zoning is a claim by a property owner that changing a zoning classification affected only his property. *Id.* In reverse spot zoning "it is the neighboring community that seeks to reap a benefit by imposing its particular view, contrary to the previously generated plan, upon the specific parcel, to the detriment of the rights of that parcel's owner." *Id.*

In *Finnegan*, the owner was planning a retail development but the Township changed the property's zoning to a classification that prevented that use. The court noted that it was not just that the rezoning would make it more difficult for the property to be developed for the specific use or that the neighboring communities were the impetus for the change or that the new zoning was inconsistent with the comprehensive plan, it was a combination of all these factors that made the government's decision arbitrary and capricious and thus a case of forbidden reverse spot zoning.

City Council Bill 14-0411, if enacted, would be subject to a similar analysis for invalidation as reverse spot zoning. The bill proposes to change the zoning classification of a small parcel of land from B-3-2 to OR-2. This change would result in the property being classified differently from much of its immediate surrounding and enjoining neighbors in a way that is to the economically detrimental to the owner who has an agreement to develop the property for a particular purpose. As in *Finnegan*, the change will make it difficult to develop the property according the existing plans, i.e. development of the property for a medical clinic and drug treatment center which is allowed of right under the current classification. The change was at the impetus of the neighboring communities. The bill proposing the change was introduced at the behest of neighboring communities by the city councilman for the area. The change is inconsistent with the current zoning of the neighboring and adjoining similar properties. All property to the east is currently in the same zoning district and similar in character to the subject of the rezoning. The property to the west is partially in the proposed new zoning district for the subject property and is predominantly rowhouses that are totally different in character from the subject property. The property to the west and adjacent to the rear side of the subject property retains the current zoning of the subject property, as does a strip of land to the north. Other than the street front and a small strip to the west zoned OR-2, the property is surrounded by B-3-2. Zoning district lines have to be drawn somewhere and in this case, the line

seems to be appropriately placed at a point where the character of the structures and the uses changes. This scenario creates a strong basis for a claim of reverse spot zoning.

Vested Rights

Another consideration with respect to City Council Bill 14-0411 is whether the right of the landowner to use the property for a use permitted under current zoning but not permitted as of right under the proposed zoning has vested prior to the change in the zoning classification. "The majority rule, which can be synthesized from the multitudinous decisions in this area, may be stated as follows: A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations.". *Town of Sykesville v. West Shore Communications*, 110 Md.App. 300(2014).

The "cases make it clear that before there can be the commencement of a building ... there must be (i) a manifest commencement of some work or labor on the ground which everyone can readily see and recognize as the commencement of a building and (ii) the work done must have been begun with the intention and purpose then formed to continue the work until the completion of the building. If either of these elements is missing then there has been no 'commencement of the building.'" Id. The West Shore case goes into extensive analysis as to the requirement that the commencement of construction be done in good faith. For the purposes of this report, it is sufficient to note that good faith commencement of work is a significant factor and is highly dependent on the facts in any given case.

The representations relevant to City Council Bill 14-0411indicate that a medical clinic/ methadone clinic has plans to utilize the subject property. The tenant/operator of the clinic has applied for construction permits and use and occupancy permits for the clinic. If Bill 14-0411 passes, use of the property for the clinic will no longer be permitted as of right but will require a conditional use that must be approved by the Board of Municipal and Zoning Appeals. In addition, it appears that one phase of the project is commencing operation as the primary care clinic is preparing to open and may already be in operation. Rights with respect to that use may therefore have vested, although there seems to be no opposition to that use. Whether the operator's rights with respect to the current zoning for the remainder of the project have vested will depend upon the facts that develop over the course of the next several weeks prior to the bill's possible passage.

Americans With Disabilities Act

The final consideration for the City Council with respect to City Council Bill 14-0411 is whether the actions of the Council would be found to constitute a violation of the Americans with Disabilities Act (ADA). The ADA prohibits the City from discriminating against persons with disabilities in its zoning laws and decisions. *See Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 44-46 (2nd Cir. 1997); *A Helping Hand, L.L.C. v. Baltimore County,* 2005 U.S. Dist. LEXIS 22196 *60 (D. Md. Sept. 30, 2005). Indeed, Baltimore City has recently been challenged with respect to its use of zoning legislation in a manner that alleges discrimination against recovering alcoholics and substance abusers. See *U.S. v. City of Baltimore*, 845 F.Supp 2d 640 (2012). This may subject the City to greater scrutiny by the Justice Department with respect to any future zoning actions affecting those disabled by addiction.

Cases regarding methadone treatment centers and zoning decisions that violate the ADA are particularly fact intensive. Given the significant involvement of the U.S. Department of Justice in cases involving enforcement of the ADA in addiction service matters, the potential consequences of being found in violation should be carefully considered before passing legislation that could be the subject of such a finding. If the City were found to be in violation of the ADA due to the passage of Bill 14-0411, it may forever (or at least for many years to come) be constrained in its ability to effect the siting of future clinics even under clearly egregious circumstances. Cases concerning violations of the ADA often result in federal consent decrees that take control away from the local jurisdiction with respect to locating such facilities and can extend beyond the scope of the original claimed violation to assume control over other related zoning decision-making.

If Bill 14-0411 is enacted and the City is sued and does not prevail, the City would be liable for damages and attorney's fees which would inevitably run into the millions of dollars. It is clear from case law across the country that the current scenario at the very least puts the City at great risk of violating the ADA should passage of the legislation prevent the opening of a methadone clinic on the subject property. In addition, the Council would be proceeding at great peril if it fails to elicit credible testimony/evidence from disinterested experts regarding whether defeat of the bill would negatively affect the patient population.

Proponents of Bill 14-0411 have also raised the issue of saturation of the area with drug treatment facilities as a reason for passage of the legislation. Saturation with respect to a certain use is not a factor that can be considered for the purposes of rezoning a property. Attempts to limit the number of treatment facilities in an area have generally not been considered favorably by the courts. Federal courts have almost uniformly invalidated, or refused to enforce, local zoning regulations that explicitly limit the number of group homes in a neighborhood. *See, e.g.*,

Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002) (holding that the city could not enforce a 2,500-foot spacing requirement against a community-based residential facility for developmentally disabled adults, and requiring the city's zoning board to grant the home an exception from the requirement); *Larkin v. Michigan Protection and Advocacy Serv.*, 89 F.3d 285 (6th Cir. 1996) (invalidating a state law which required residential facilities for disabled persons to locate at least 1,500 feet apart); *Horizon House Developmental Serv., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992) (invalidating a 1,000-foot spacing requirement for group residences for mentally disabled individuals); *The ARC of New Jersey v. State of New Jersey*, 950 F. Supp. 637 (D.N.J. 1996) (invalidating a state law that permitted municipalities to deny conditional use permits to residences of 7 or more developmentally disabled persons if another home would be located within 1,500 feet, or if the number of developmentally disabled residents in the locality would exceed a certain quota).

Courts have reasoned that quotas or distance requirements facially discriminate against disabled individuals. Therefore, such requirements may be upheld only if they serve a legitimate governmental interest, which cannot be served through less discriminatory means. See *ARC of New Jersey,* 950 F. Supp. at 645. Although the cases deal with residential treatment facilities, the same legal concepts are at play. Although the quotas or spacing requirements might serve the "legitimate" interest of providing access to treatment for citizen in all areas of the City, this rationale would not be sufficient if other areas are already served by other clinics and it is shown that the area in question is particularly in need of additional clinics or particularly accessible due to the transportation options in the vicinity.

Based on the foregoing, the Law Department advises great caution with respect to moving forward with this legislation. Insufficient facts are available to predict whether the bill is legally sufficient. The City has limited zoning authority with respect to establishment of uses of land and can only exercise the authority granted to it by the State. Many of the considerations related to the appropriateness of treatment facilities for a particular area are outside the scope of zoning authority but may be factors in the State licensure process. Ultimately, the need to rezone this property should be weighed against the potential financial liability for ADA violations or illegality under zoning law and the possibility of loss of control of the process with respect to future establishment of drug treatment centers.

Sincerely yours,

Elena R. DiPietro

Elena R. DiPietro
Chief Solicitor

cc: George A. Nilson, City Solicitor
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