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CITY OF BALTIMORE

BRANDON M. SCOTT  
Mayor



DEPARTMENT OF LAW  
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May 10, 2022

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 22-0188 – rezoning 3101-3113 Eastern Avenue

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 22-0188 for form and legal sufficiency. The bill changes the zoning for the property known as 3101-3113 Eastern Avenue from the R-8 Zoning District to the C-1 Zoning District.

The City Council may permit the proposed 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).

In determining whether the proposed rezoning meets either standard, the City Council is required to make findings of fact 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 officials," and (vi) being "the proposed amendment's consistency with the City's Comprehensive Master Plan.").

Furthermore, the City Council is required 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, *Cremens 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.").

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).

The Planning staff suggests that it was a mistake to retain the R-8 zoning of the two properties because "there has been no residential use of 3101 Eastern Avenue or of 3113 Eastern Avenue for the past hundred years or more." Staff report, p. 3. Furthermore, the staff report explains how the current zoning of the two properties as R-8 is not consistent or reflective of the zoning of the surrounding properties.

Provided the City Council agrees with the testimony and finds that the decision to retain the zoning of the property in 2017 was based on a misapprehension, the Law Department could approve the bill for form and sufficiency.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ashlea H. Brown', is centered below the word 'Sincerely,'.

Ashlea H. Brown  
Chief Solicitor

cc: Matthew Stegman  
Nina Themelis  
Nikki Thompson  
Elena DiPietro  
Hilary Ruley