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July 15, 2024

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 24-0542 - Rezoning – 3701-3733 Towanda Avenue

Dear President and City Council Members:

The Law Department reviewed City Council Bill 24-0542 for form and legal sufficiency. The bill changes the zoning for the properties known as 3701-3733 Towanda Avenue from the R-6 Zoning District to the C-1 Zoning District. The bill would take effect on the 30th day after its enactment.

The owner of the Towanda Avenue properties is the Mayor and City Council of Baltimore. The properties are part of a redevelopment project in the Park Heights neighborhood that plans to build multigenerational housing for grandparents caring for minor children. The subject properties would be the site of a primary and pediatric Wellness Center to provide health care to the residents of the multigenerational housing and the surrounding community.

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)(l).

> 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 must 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 *Rylyns*, 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)(l); 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 approval of this rezoning and the Planning Commission concurred. The rezoning is sought based on a significant change in the character of the neighborhood. The Staff Report does not contain detailed findings of facts which would support the rezoning sought by this bill. There is a statement that the applicant submitted a memorandum which addresses the required findings. Accordingly, the City Council must make the required findings of fact as set forth above at the hearing of the bill.

The Staff Report did note the following:

- That the subject property is in the Park Heights Urban Renewal Area, which contemplates that the zoning for the subject area would be R5, but does not prohibit or further restrict the properties from being used as proposed by the applicant;
- That the properties are located in the Park Heights Master Plan Area, which identifies both a need for new housing and a health care provider shortage; and
- That it appears that there has been substantial outreach regarding the project to surrounding communities, and that the project would complement the surrounding community.

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 24-0542 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,

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