

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

November 30, 2015

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

Re: City Council Bill 15-0554— Planned Unit Development –
Brewers Hill

Dear Mr. President and City Council Members:

The Law Department has reviewed City Council Bill 15-0554 for form and legal sufficiency. The bill repeals an existing planned unit development for Brewers Hill and approves a new Development Plan for the Brewers Hill Planned Unit Development. The bill converts the existing Industrial PUD to a Business PUD, extends the boundaries, establishes higher densities and some height restrictions and encourages mixed use development. The bill allows for an increase in the number of residential units which will require a variance for minimum lot area. The report of the Planning Commission contains finding to support the need for the variance.

To be lawful, the proposed PUD “must be compatible with the surrounding neighborhood, it must further the purposes of the proposed reclassification, and special precautions [must] be applied to insure that there will be no discordance with existing uses.” *Bigenho v. Montgomery County Council*, 248 Md. 386, 391 (Md. 1968). The report by the Planning Commission generally indicates that proposed changes satisfy this legal standard.

The Report of the Planning Commission recommends that Council Bill 15-0554 be amended as outlined in the Staff Report, attached to the Planning Commission’s bill report. The Law Department has reviewed these proposals. If the City Council adopts the proposed amendments, the Law Department will approve them as legally sufficient.

The Law Department does have several concerns about the bill. First, on page 5, line 31, “substance abuse treatment centers” are specifically prohibited. The bill in general states that all permitted, accessory, and conditional uses authorized in a B-2 Zoning District under the Zoning Code are specifically authorized in the PUD as permitted, accessory or conditional. One of the permitted uses in a B-2 district is “Clinics: health care.” The bill, therefore, discriminates against clinics based on the

nature of the disability of the patients. 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 discriminates against recovering alcoholics and substance abusers. See *U.S. v. City of Baltimore*, 845 F.Supp2d 640 (2012). This may subject the City to greater scrutiny by the Justice Department with respect to any future zoning actions effecting those disabled by addiction.

Cases regarding substance abuse 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 15-0554, 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 15-0554 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

The Law Department's next concern is the language of Section 9 concerning off-street parking requirements. Section 9-124 of the Zoning Code provides that "off-street parking in a Planned Unit Development must be provided in accordance with the requirements of Title 10 {"Off-Street Parking Regulations"} of this article, as they apply to the underlying district." The undeveloped lots in the PUD are zoned R-8, B-2-2 and M-3. Section 10-405(19) provides that for planned unit developments in all districts, the number of off-street parking spaces required is "the required number set forth in this section for each use, plus any additional spaces required by the City Council after considering written recommendations by the Board, the Department of Public Works, and the Planning Commission." Section 9(a) must comply with this requirement. It is not clear that the bill's language comports with the Zoning Code requirements. The Law Department recommends amending page 5, line 34 after "spaces" by inserting "are as set forth in Section 10-405 plus any additional spaces required by the City Council after considering written recommendations by the Board, the Department of Public Works, and the Planning Commission. Spaces". Also, after "follows" in the same line, insert "unless a different requirement for a specific use is required by Sec. 10-405". Finally, on line 39,

after "space," insert "provided that (3) provides for at least the number of spaces required under 10-405(16) and (30) or other applicable section of the Zoning Code".

Another off-street parking concern is in Section 9(b). This section allows for off-premises facilities within 600 feet to satisfy the off-street parking requirements. Section 10-304 of the Zoning Code requires that the facility be within 300 feet of the premises served. The Law Department recommends on page 6, line 1, striking "600" and inserting "300". In addition, on line 3, strike "The" through "distance" on line 4. Finally, on line 5, before "When " insert "Subject to the requirements of Title 10 of this Zoning Code,".

The Law Department is also concerned about Section 12 of the bill where it states "Notwithstanding the provisions of any future City Ordinance, neither major or minor modifications to this Ordinance in the future shall be subject to any expiration dates or other time limits on development." The City Council cannot bind future legislatures in this way. The Law Department, therefore recommends deleting this sentence.

Pursuant to the City Zoning Code ("ZC"), a bill concerning a PUD is classified as a "legislative authorization." ZC § 16-101. Legislative authorizations require that certain procedures be followed in the bill's passage. Specifically, certain notice requirements apply to the bill's introduction. *See* ZC § 16-203. The bill must be referred to certain City agencies, which are obligated to review the bill in a specified manner. *See* ZC §§ 16-301, 16-302 & 16-303. Additional public notice and hearing requirements also apply to the bill. *See* ZC § 16-402. Certain limitations on the City Council's ability to amend the bill apply. *See* ZC § 16-403. Finally, the bill requires a Third Reading holdover before final passage by the Council. *See* ZC § 16-404.

Provided that the bill is amended to cure the legal issues discussed above and assuming all the procedural requirements are met, the Law Department will approve the bill for form and legal sufficiency.

Sincerely,



Elena R. DiPietro
Chief Solicitor

**Cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Victor Tervalo, Chief Solicitor
Hilary Ruley, Chief Solicitor
Jennifer Landis, Assistant Solicitor**

Law Department Amendments
City Council Bill 15-0554

1. On page 5, line 31, strike “substance abuse treatment centers.”
2. On page 5, line 34 after “spaces” by inserting “are as set forth in Section 10-405 plus any additional spaces required by the City Council after considering written recommendations by the Board, the Department of Public Works, and the Planning Commission. Spaces”.
3. After “follows” in the same line, insert “unless a different requirement for a specific use is required by Sec. 10-405”.
4. On line 39, after “space,” insert “provided that (3) provides for at least the number of spaces required under 10-405(16) and (30) or other applicable section of the Zoning Code”.
5. On page 6, line 1, strike “600” and inserting “300”.
6. On page 6, line 3, strike “The” through “distance” on line 4.
7. On page 6, line 5, before “When” insert “Subject to the requirements of Title 10 of this Zoning Code,”.
8. On page 6, line 24, strike beginning with “Notwithstanding” through “development” on line 26.