

CITY OF BALTIMORE

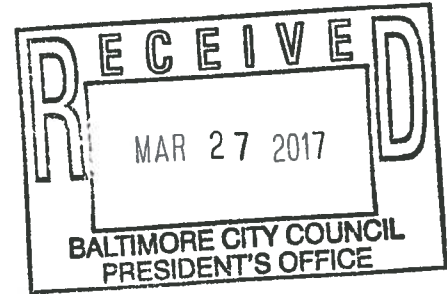
CATHERINE E. PUGH, Mayor



DEPARTMENT OF LAW

101 City Hall
Baltimore, Maryland 21202

March 27, 2017



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 17-0015 – Planned Unit Development – Designation –
The Fox Building

Dear Mr. President and City Council Members:

The Law Department has reviewed City Council Bill 17-0015 for form and legal sufficiency. The bill approves the application of D & C Management LLP, owner of certain property located at 3100 and 3300 Falls Cliff Drive, to have those properties designated an Industrial Planned Unit Development. The bill also approves the Development Plan submitted by the applicant.

The criteria examined for approval of a Planned Unit Development (“PUD”) are “compatibility with a Master Plan, conformance to regulatory criteria, and an examination of potential deleterious effects *vis-a-vis* adjacent property and uses.” *Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 31 (2006). A PUD “allows for additional uses on a property not provided for by the permitted or conditional uses designated in that underlying district, but which are adjudged, on a case-by-case basis, not to be incompatible or deleterious at a given location and within the contemplation generally of the applicable Master Plan (or other planning document) and the general purposes of the underlying zone, much like a conditional use.” *Id.* The Zoning Code of Baltimore City (“ZC”), in Section 9-112, sets forth governing standards which reflect the above cited case law. The Staff Report from the Planning Department (“Report”) does not supply findings regarding these factors; therefore they will have to be established at the hearing and accepted by the City Council. *See* ZC 9-110 (“The City Council may authorize the Planned Unit Development and approve the Development Plan in accordance with the procedures, guides, and standards of this title and of Title 14 {Conditional Uses} and Title 16 {Legislative Authorizations} of this article.”).

The Law Department has several concerns about this bill. First, in Sec. 4, there is a list of prohibited uses. The list uses terminology from the new Zoning Code, known as Transform Baltimore, which takes effect June 5, 2017. Some of the terminology does not exist under the current Zoning Code. Since this bill is being enacted under the current Zoning Code, the

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terminology for the prohibited uses must conform with the terminology for those uses under the current Code. The bill must be amended to comport with the current Zoning Code.

Second, Sec. 5 of the bill proposes to incorporate a memorandum of understanding between the developer and the Hampden Community Council into the bill. Generally, “[i]n dealing with an application for a planned unit development, the legislative authority may not go beyond the powers granted by the existing enabling legislation.” 83 Am. Jur. 2d Zoning and Planning § 403. In other words, City Council is limited by the authority granted to it in the Land Use Article of the Maryland Code when placing conditions upon a PUD. There are many issues that City Council has legal authority to regulate in a general sense, that is, across the entire City via general laws, but which cannot be applied to one particular development in a piece of zoning legislation. The Court of Appeals explained the distinction in *Northwest Merchants Terminal v. O'Rourke*, 191 Md. 171 (1948):

The purpose of the zoning law is, of course to devote general areas or districts to selected uses... ‘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 zone.’ [citations omitted]. ‘On purely public or political questions regarding exercise of the police power, e. g., passage of general building, traffic or zoning laws, legislators may follow the wishes of their constituents. Such action is not subject to judicial review. But in restricting individual rights by exercise of the police power neither a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of neighbors or for their benefit. Such action is arbitrary and unlawful, i.e., contrary to Art. 23 of the Declaration of Rights and beyond the delegated power of the town.

In other words, our local zoning code has factors which must be considered by agencies when deciding on a PUD. Those factors concern land use matters; e.g. impact of the development on the traffic in that area, the height and placement of buildings, compatibility with master plan, availability of light and air, topography of the land, impact on future development and neighboring properties etc. City Council has the power to place restrictions on the development which mitigate any impact the development has on these types of land use issues. Anything outside the scope of these matters cannot be restricted in a PUD.

To the extent that the MOU covers matters that are appropriate zoning material, those matters should be in the text of the bill. Any other matters included in the MOU cannot be incorporated by reference in the bill. The Law Department, therefore, proposes that the language of Sec. 5 be moved to the recitals and merely acknowledge the MOU’s existence without incorporating it into the bill.

Third, in Sec. 6(c) there is a reference to the Zoning Code but is not clear which Zoning Code is being referenced, the current Code or Transform.

Finally, Sec. 7 provides that the ‘applicant shall maintain continued communication with the Hampden Community Council’s Zoning and Land Use Committee throughout the development of the PUD. This is not appropriate material for a PUD bill. The relationship between the developer and the community is not related to land use matters and is outside the scope of this bill.

It also should be noted that certain procedural requirements apply to this bill because the designation of a Planned Unit Development is deemed a “legislative authorization.” ZC §§16-101(c)(3), 16-101(d). Specifically, special notice requirements apply to the bill’s introduction and the bill must be referred to certain City agencies, which are obligated to review it in a specified manner. See ZC §§16-203, 16-301, 16-303. Additional public notice and hearing requirements apply to the bill, including advertising the time, place and subject of the hearing in a paper of general circulation for 15 days and posting the property conspicuously with this same information. See Md. Code, Land Use, §10-303; ZC §16-402. Finally, certain limitations on the City Council’s ability to amend the bill apply, including a Third Reading hold-over before final passage by the Council. See ZC §§16-403, 16-404.

This bill is the appropriate method for the City Council to review the facts and make the determination as to whether the legal standard for the designation of the property located at 3100 and 3300 Falls Cliff Drive as an Industrial Planned Unit Development has been met. Thus, if the required findings are made at the hearing, and if the amendments proposed by the Planning Commission and the Law Department are passed, the Law Department will approve the bill for form and legal sufficiency.

Sincerely,



Elena R. DiPietro
Chief Solicitor

cc: David Ralph, Acting City Solicitor
Kyron Banks, Mayor’s Legislative Liaison
Hilary Ruley, Chief Solicitor
Victor Tervalva, Chief Solicitor
Jennifer Landis, Assistant Solicitor