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**CITY OF BALTIMORE**

**CATHERINE E. PUGH,**  
Mayor



**DEPARTMENT OF LAW**  
**ANDRE M. DAVIS, CITY SOLICITOR**  
100 N. HOLLIDAY STREET  
SUITE 101, CITY HALL  
BALTIMORE, MD 21202

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February 15, 2018

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 17-0121 – Rezoning – 300 Block of East 25 ½ Street

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 17-0121 for form and legal sufficiency. The bill would change the zoning for the properties known as the 300 block of East 25 ½ Street from the R-8 Zoning District to the I-MU Zoning District.

The City Council may permit this 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). There would appear to be no basis to believe that the neighborhood has substantially changed between the comprehensive rezoning of the property on June 5, 2017 and today's date. Therefore, to legally rezone the property the City Council must identify a "mistake" that lead to the inappropriate zoning of the property as R-8.

In determining whether to rezone on the basis of mistake, the City Council is required to make findings of fact, for each property, 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*, BCC, 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."). Article 32 of the City Code also requires Council 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." § 5-508(b)(3).

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, *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"); *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 v. Spring*, 109 Md. App. at 698, quoting, *People's Counsel*, 107 Md. App. at 645. 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." 109 Md. App. at 698. "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).

In sum, the Land Use and Transportation Committee (the "Committee") is required to hold a quasi-judicial public hearing with regard to the bill wherein 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 Committee is required to make findings of fact for each property with regard to the factors in §§10-304 and 10-305 of the Land Use Article and § 5-508 of Article 32. If, after its investigation of the facts, the Committee makes findings which support: (1) a mistake in the comprehensive

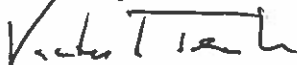
zoning; and (2) a new zoning classification for the properties, it may adopt these findings and the legal requirements for granting the rezoning would be met.

The Law Department notes that the basis of the mistake here appears to be an error in the final version of the zoning map, which is inconsistent with what was adopted by Council. The Planning Report states that the property was to be rezoned R-8 as part of the initial mapping for the comprehensive rezoning. As part of the public review process, a request was made and adopted by City Council to rezone the property as Industrial Mixed Use. This change was not made, however, on the zoning map. (See Report at 1). Maryland caselaw has approved this type of mistake as the basis for a change in a zoning classification. See *Tennison v. Shomette*, 38 Md. App. 1, 6-7 (1977), *cert. denied*, 282 Md. 739 (1978) (mistake found where County Commissioners intended to zone the property C-2 but zoned the property C-1 instead). **The Planning Report, however, does not supply all the facts required by law to support the rezoning. It would be useful to have evidence that the City Council actually intended to rezone the property to Industrial Mixed Use. Moreover, the Report does not discuss the additional considerations required by Section 5-508(b)(3) of Article 32. Therefore, the City Council may base its findings on other testimony presented at the hearing.**

Finally, 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." BCC 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. 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 and the name of the applicant. Art. 32, §5-601(c). The posted notices must be at least 3 feet by 4 feet in size, placed at a prominent location, and at least one sign must be visible from each of the property's street frontages. Art. 32, §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. Art. 32, §5-601(e) and (f).

The bill is the appropriate method for the City Council to review the facts and make the determination as to whether the legal standard for rezoning has been met. Assuming the required findings are made at the hearing and all procedural requirements are satisfied, the Law Department approves the bill for form and legal sufficiency.

Sincerely,



Victor K. Tervala  
Chief Solicitor

cc: Andre M. Davis, City Solicitor  
Karen Stokes, Director, Mayor's Office of Government Relations  
Kyron Banks, Mayor's Legislative Liaison  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Hilary Ruley, Chief Solicitor  
Jennifer Landis, Assistant Solicitor