

CITY OF BALTIMORE

CATHERINE E. PUGH, Mayor



DEPARTMENT OF LAW

ANDRE M. DAVIS, City Solicitor
101 City Hall
Baltimore, Maryland 21202

August 27, 2018

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

Re: City Council Bill 18-0270 – Planned Unit Development – 5601 Eastern Avenue

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 18-0270 for form and legal sufficiency. The bill would repeal the existing Planned Unit Development (“PUD”) for 5601 Eastern Avenue and replace it with a Planned Unit Development for 5601 Eastern Avenue and 5801 Eastern Avenue.

A repeal of a PUD without a replacement has no legal impediments because for floating zones, such as a PUD, Maryland Courts have said that the legislative body must have “a little more than a scintilla of evidence” to support its decision and that decision must not be “arbitrary, capricious or illegal.” *Rockville Crushed Stone, Inc. v. Montgomery County*, 78 Md. App. 176, 190 (1989) (citations omitted). However, the replacement of a new PUD for 5601 Eastern Avenue, to include 5801 Eastern Avenue, is treated as any other enactment of a new PUD. Baltimore City Code, Art. 32, §§ 5-201(a), 13-403(a)(4), (b).

A PUD is not permitted in an I-2 zoning district. Baltimore City Code, Art. 32, § 13-201(c). Therefore, this PUD is only allowed if 5601 Eastern Avenue is rezoned because it is currently zoned I-2. City Council Bill 18-0269, or another to bill to rezone 5601 Eastern Avenue, must be enacted at or before the time that this bill is enacted. Additionally, there must be at least two acres within the PUD. Baltimore City Code, Art. 32, §13-202(b). 5601 Eastern Avenue, which is larger than twenty acres, must remain a part of this PUD because 5801 Eastern Avenue, at only 27,000 square feet, is too small for a PUD itself. In short, if 5601 Eastern Avenue is not rezoned, or is otherwise removed from this bill, then the PUD cannot be enacted because it cannot exist for 5801 Eastern Avenue alone.

Findings of Fact and Factors to Consider

The City Council may approve the PUD in accordance with Subtitle 2 of Article 13 of the City's Zoning Code, which requires that the City Council find facts to establish:

- (1) the use is compatible with the surrounding neighborhood;
- (2) the use furthers the purpose of the proposed classification; and
- (3) the PUD master plan developed under § 13-304 {"PUD master plan"} of this title ensures that there will be no discordance with existing uses.

Baltimore City Code, Art. 32, §13-203(b). In addition, the PUD is subject to the conditional use standards in Section 5-406, which means that the City Council may not approve the PUD unless it finds:

- (1) the establishment, location, construction, maintenance, or operation of the PUD would not be detrimental to or endanger the public health, safety, or welfare;
- (2) the use would not be precluded by any other law, including an applicable Urban Renewal Plan;
- (3) the authorization would not be contrary to the public interest; and
- (4) the authorization would be in harmony with the purpose and intent of this Code.

Baltimore City Code, Art. 32, §§5-406, 13-203(a)(1). The following additional factors must also be considered:

- (i) whether the planned unit development is in general conformance with all elements of the Comprehensive Master Plan, and the character and nature of existing and contemplated development in the vicinity of the proposed planned unit development;
- (ii) whether the planned unit development will preserve unusual topographic or natural features of the land, and the design of the planned unit development will best utilize and be compatible with the topography of the land;
- (iii) whether the physical characteristics of the planned unit development will not adversely affect future development or the value of undeveloped neighboring areas, or the use, maintenance, or value of neighboring areas already developed;

- (iv) whether the planned unit development will provide the same protection as the basic district regulations in regard to fire, health hazards, and other dangers;
- (v) whether the planned unit development will encourage innovative design features or adaptive reuse of structures that would not be possible by application of the basic district regulations; and
- (vi) whether the planned unit development is compatible with any nearby industrial district.

Baltimore City Code, Art. 32, §13-203(a)(2).

The Planning Report does not find all the facts necessary to support this Planned Unit Development. Therefore, the City Council must take care to make all the required findings of fact.

Approval of the Master Plan

The Mayor and City Council's enactment of the ordinance is legislative approval of the PUD Master Plan, which must include thirteen separate components. Baltimore City Code, Art. 32, §13-304(a), (b). There are no required findings or reviews for this Master Plan by the City Council, but the Planning Commission must include in its bill report to the City Council its final determination on the proposed PUD Master Plan. Baltimore City Code, Art. 32, §13-304(d). Thus, it is imperative that in Section 3, the Planning Commission and City Council are satisfied that they have received the correct Exhibits that make up this Master Plan. The Law Department notes that the Planning Report recommends amending the Exhibits to reflect a new date and an additional exhibit. The Law Department would approve that amendment for form and legal sufficiency. Additionally, the Planning Report states that this PUD serves to approve the same design approvals that had been approved under the previous PUD. The Law Department would also approve that amendment for form and legal sufficiency.

Exceptions for Use, Bulk, Yard, Parking and Signage

The PUD can make exceptions for the use, bulk, yard, parking and signage regulations of the underlying districts (C-3, if 5601 Eastern Avenue is rezoned; C-4 for 5801 Eastern Avenue). Baltimore City Code, Art. 32, §13-202(c). But, in "determining whether to grant an exception from district regulations, the Planning Commission and City Council must consider whether the exception will:

- (1) enhance the overall merit of the planned unit development;
- (2) promote the objectives of both the City and the development;

- (3) enhance the quality of the design of the structures and the site plan;
- (4) enable the development to offer environmental and pedestrian amenities;
- (5) not cause such an adverse impact on neighboring properties so as to outweigh the benefits of the development;
- (6) not negatively affect the value and enjoyment of surrounding property, the provision of municipal services, or the flow of traffic;
- (7) be compatible with the land use policies of the Comprehensive Master Plan;
- (8) provide a substantial public benefit to the City, as illustrated in subsection (d) of this section; and
- (9) allow uses that predominantly match or are compatible with uses allowed in the underlying zoning district and the zoning districts of adjacent properties.”

Baltimore City Code, Art. 32, §13-204(a). Moreover, to be granted an exception, the applicant must demonstrate superior design, enhanced amenities and substantial benefit to the City. Baltimore City Code, Art. 32, §13-204(b), (c). Examples of substantial benefits to the City are contained in Section 13-204(d). Baltimore City Code, Art. 32, §13-204(d).

This PUD seeks such exceptions to bulk regulations in Sections 4 and 5 and to the parking regulations in Section 9. It also seeks in certain signage regulation exceptions in Section 11. **The Planning Report does not address all these considerations for each of the exceptions sought in this PUD. Therefore, the City Council must take care to address the required considerations for each legally permissible exception.**

While there are no legal impediments to the exemptions sought in Sections 4, 5 and 9, assuming the above facts are found with respect to them, there is a problem with the signage exception in Section 11. In that Section, the bill creates a whole separate set of signage regulations for the area contained in the PUD rather than operating as an exception to the existing regulations on signs contained in Title 17 of Article 32 of the City Code. Thus, Section 11 impermissibly operates as the creation of a whole new set of sign regulations applicable only in this PUD. Baltimore City Code, Art. 32, §13-202(c). The amendment suggested in the Planning Report, to delete subsection 11(b), while legally sufficient, is not enough to cure this problem. Therefore, the Law Department recommends rewording this Section 11 to make the permissions or restrictions sought conform with the regulations on signs in Title 17 or deleting Section 11. A suggested amendment to remove the sign regulations is attached to this bill report.

Conditions Imposed

Conditions may be imposed on the PUD in accordance with Section 5-405(a). Baltimore City Code, Art. 32, §13-203(a)(1). These can only be conditions that protect the public interest and are “reasonably related and roughly proportional to the expected impact” of the PUD. Baltimore City Code, Art. 32, §5-405(a). Such a condition is proposed in Section 10 of the Bill concerning principal entrances and frontages. The City Council must find that this condition protects the public interest and does so in a way that it proportional to the expected impact.

Additionally, such a condition is imposed in Section 6(b) with the language “when within a full service grocery store whose net leasable area exceeds 15,000 square feet.” That language operates as a condition on a retail goods establishment with alcoholic beverage sales. Such a use is permitted of right in a C-4 district but is only permitted by enactment of conditional use ordinance in a C-3. Baltimore City Code, Art. 32, Tbl. 10-301. This PUD would operate as the conditional use ordinance and therefore permit the retail goods establishment with alcoholic beverage sales. The Law Department notes that the Planning Report recommends an amendment to language in Section 6(b). The Law Department would approve that language for form and legal sufficiency. However, as with the conditions in Section 10 of the bill, the City Council must find that this condition protects the public interest and does so in a way that it proportional to the expected impact.

The Planning Report does not address the required findings for these conditions. Therefore, the City Council must take care to make these findings for every condition sought to be imposed on this PUD.

Use Restrictions

With respect to the use restrictions in Section 6, 7, and 8 of the bill, there are various issues.

Section 6(a) is unclear because it refers to a “Title 10-205.” Even if the word “Section” was intended instead of “Title,” there is still ambiguity because it is unclear if the PUD is attempting to permit all the uses that are allowed in the C-3 district, or also those that are conditional in that district. It is also unclear if the PUD is to allow any of the uses permitted or conditional in the C-4 district. Baltimore City Code, Art. 32, §10-205. Presumably, Section 6(a) should be reworded to state that the PUD allows all the uses permitted in C-3 and C-4. The Law Department notes that the Planning Report suggests an amendment to this language that will remedy this issue by allowing all permitted uses and two conditional uses. The Law Department would approve this amendment for form and legal sufficiency.

Section 6(c) should be modified to remove the language “as approved under the Final Development Plan at 5801 Eastern Avenue” because this PUD would have its own Development

Plan that is approved via this PUD process. Baltimore City Code, Art. 32, §13-304. This exact amendment is recommended in the Planning Report and the Law Department would approve it for form and legal sufficiency.

Section 7 includes in its list of prohibited uses, several uses that are not in Article 32. These include a Community Correction Center, Firearm Sales, Parole and Probation Field Office and Taxidermist Shop. These uses need to be removed from the bill or reworded so that they are defined by whatever use they would fall under in Article 32. Baltimore City Code, Art. 32, §13-202(c). A suggested amendment to remove these uses is attached to this bill report.

Section 8(a) states that a certain liquor license must be “approved as a conditional use by the Board.” The Board of Municipal and Zoning Appeals does not approve liquor licenses. If the intent of this language is to allow a Class A Beer, Wine & Liquor License if approved by the Liquor Board, then the language should be modified to “as may qualify under applicable law for such license.” If the intent is to require a conditional use for something that is already permitted of right in a C-3 or C-4, that may not be accomplished in a PUD because it effectuates a change in the text of Article 32. Baltimore City Code, Art. 32, §13-202(c). Certainly, an otherwise permitted use can be prohibited in a PUD, but it cannot be made to get conditional use approval if such approval is not required in the underlying zoning district.

Section 8(b) must be clarified because as written in prohibits a tavern with off-premises sales unless that tavern is the retail goods establishment in a grocery store described in Section 6(b). It is unclear how such grocery store with over 15,000 square feet would satisfy the requirement in Section 14-437(b) of Article 32 that requires more than half of the establishment’s floor space be devoted to on-premises consumption and annually more than half of the average daily receipts are for the sale of alcoholic beverages for on-premises consumption. Baltimore City Code, Art. 32, §14-337(b). The Law Department recommends deleting the language that ties this use restriction to Section 6(b).

The Planning Report suggested an amendment to eliminate the entirety of Section 8, which would fix the issues in Sections 8(a) and 8(b). The Law Department would approve that amendment for form and legal sufficiency.

Tolling Provision

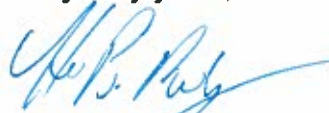
The Law Department notes that Section 15 should be removed from the bill as it may conflict with the rules on tolling time limits and stays set forth in Title 19 of Article 32 and the City’s Building Code. Baltimore City Code, Art. 32, §§ 19-301(c), 19-302(d); Baltimore City Building, Fire and Related Codes, §128.6.1. An amendment to accomplish that purpose is attached to this bill report.

Procedural Requirements

Finally, certain procedural requirements apply to this bill beyond those discussed above because the enactment of a Planned Unit Development is deemed a "legislative authorization." Baltimore City Code, Art. 32, §5-501(2)(iii). This includes referral to certain agencies, including the Planning Commission. Baltimore City Code, Art. 32, §§5-504, 5-506. 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. 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 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 that is visible to passing pedestrians, and at least one sign must be visible from each of the property's street frontages. 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).

The bill is the appropriate method to review the facts and make the determination as to whether the legal standards for PUD have been met. The Law Department can approve the amended bill for form and legal sufficiency if the required findings are made at the hearing, all procedural requirements are satisfied, and the amendments discussed herein, or other satisfactory amendments, are adopted.

Very truly yours,



Hilary Ruley
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
Victor Tervalá, Chief Solicitor
Ashlea Brown, Assistant Solicitor
Avery Aisenstark

AMENDMENTS TO COUNCIL BILL 18-0270
(1st Reader Copy)

Proposed by: Law Dep't
{To be offered to the Land Use and Transportation Committee}

Amendment No. 1

Delete lines 40 and 41 on page 3 and lines 1 through 11 on page 4.

Amendment No. 2

On page 3, delete lines 8, 9, 13 and 16.

Amendment No. 3

On page 4, delete lines 27 through 30.