June 11, 2019

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 19-0356 – Zoning Map Amendment – 123 South Chester Street

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 19-0356 for form and legal sufficiency. The bill would amend the zoning district map for the R-8 zoned property known as 123 South Chester Street to apply a Rowhouse Mixed-Use Overlay District (R-MU) designation and providing for a special effective date.

Although the rowhouse mixed-use overlay district may be applied to rowhouse dwellings in R-8, it may only be applied to a minimum of 50 percent of the blockface or two opposing corner lots. Art. 32, § 12-1001 (a) and § 12-1002. According to the staff report, the property does not meet this requirement. See, Staff Report, p.2.

Contrary to its staff report, **the Planning Commission has recommended approval of the bill based on the facts presented by the applicant. The proposed findings of fact by the applicant do not establish that the property meets the requisite size, nor do the proposed findings of fact establish that the zoning during Transform was based on erroneous facts as required to legally rezone the property.**

The City Council may permit this map amendment 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 led 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*, Baltimore City Code, 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.

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." *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"); *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.'").

Mistake in the Current Zoning Classification

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*, 109 Md. App. at 698 (citation omitted). 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." *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.

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 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; 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.

Spot Zoning

This could amount to spot zoning.

The law with respect to spot zoning is well settled. In *Tennison v. Shomette*, 38 Md. App. 1, 8 (1977), the Court of Special Appeals explained that spot zoning occurs when a small area in a district is placed in a zoning classification which is different from the surrounding properties. The *Tennison* court reasoned that generally "spot zoning is not invalid per se", but that "its validity depends on the facts of each individual case."

It has also long been held by the courts that although spot zoning is illegal if inconsistent with an established comprehensive plan and is made solely for the "benefit of private interests", it can also be a valid exercise of the police power where the zoning is in harmony with the comprehensive plan and bears a substantial relationship to the public health, safety, and general welfare. *Cassell v. Mayor of Baltimore*, 195 Md. 348 (1950). (Emphasis added.) **According to the staff report, this zoning change is being requested because the applicant is interested in the option of outdoor dining.** Staff Report, p. 1.

The general rule set forward in *Tennison* has long been followed by the courts, and must be applied with respect to Bill 19-0356. It was cited with approval by the Court of Appeals in *Mayor and City Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 546-47 (2002). The court there cited both *Tennison* and *Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348 (1949), stating that spot zoning 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." The court also noted 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 not in accordance with the comprehensive zoning plan and is merely for private gain." *Id*. (Emphasis in original.) The *Rylyns* court also noted that if a use is permitted in a small area and is not inconsistent with the use of the larger surrounding area even though it may be different from that use, it is not spot zoning if it does not conflict with the comprehensive plan but is in harmony with the orderly growth of a new use for the other property in that locality.

Hewitt v. County Comm'rs of Baltimore County, 220 Md. 48 (1959), is also instructive. In that case, although the Court of Appeals agreed with the rationale expressed in the above-cited cases, it nonetheless stated that it has "consistently rejected spot zoning" and "has repeatedly referred to the statutory requirement ... that zoning shall be in accordance with a comprehensive plan." The *Hewitt* court thus ruled that the request of the owner there to rezone property located in a residential zoning district for commercial use constituted invalid spot zoning. The court found that such rezoning amounted to an arbitrary and unreasonable devotion of small area for a use inconsistent with the uses restricted to the rest of the district. As a result, the court concluded

that the rezoning was for the sole benefit of the private interest of the property owner and was not in accordance with the comprehensive plan.

The facts suggest that this is impermissible spot zoning for private gain unless there is testimony establishing that the map amendment is for the public good and in accordance with the comprehensive plan.

Procedural Requirements

In addition, the Baltimore City Code, Art. 32, § 5-506 states that "The Planning Commission must consider the referred bill in a public hearing. Notice of the public hearing must be given in accordance with Title 5, Subtitle 6 {"Notices"} of this Code. Except as provided in subsection (e)(2) of this section, the hearing must be concluded no more than 60 days from the Commission's receipt of the referred bill."
§ 5-506(e) states that

> "(1) If an agency fails to submit its written report and recommendations within the period specified by this section, the City Council may proceed without that report and recommendations.
> (2) However, the applicant may waive this time limit and consent to an extension of the reporting period by giving written notice of the waiver and consent to the President of the City Council, with copies to the Board of Municipal and Zoning Appeals, the Planning Commission, and the Zoning Administrator."

Certain procedural requirements apply to this bill because a zoning map amendment 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 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, 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 for the City Council to review the facts and make the determination as to whether the legal standard has been met and whether the rezoning amounts to spot zoning. Assuming the required findings are made at the hearing and that all procedural requirements are satisfied, **including facts presented at the hearing that rule out spot zoning and establish that the original zoning was based on erroneous facts**, the Law Department could approve the bill for form and legal sufficiency. **However, if the property does not meet**

the required minimum size for an R-MU Overlay as the Staff Report states, the bill cannot be approved.

Sincerely yours,

Ashlea H. Brown
Assistant Solicitor

cc: Andre M. Davis, City Solicitor
Jeff Amoros, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor
Victor Tervala, Chief Solicitor
Hilary Ruley, Chief Solicitor