

February 17, 2021

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

Re: Mayor and City Council Bill 21-0006 – Rezoning– 407 Benninghaus Road

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 21-0006 for form and legal sufficiency. The bill would change the zoning for 407 Benninghaus Road from the R-3 Zoning District to the OR-1 Zoning District. This bill is the same as City Council Bill 20-567 from last term.

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 is likely little 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-3.

In determining whether to rezone based on mistake, the City Council is required to make findings of fact 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); Baltimore City Code, Art. 32, § 5-508(b)(2) (citing same factors with (v) being "the recommendations of the City agencies and officials," and (iv) 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." *City 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.").

Regarding rezoning for 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 City Council 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 about the factors in Sections 10-304 and 10-305 of the Land Use Article and Section 5-508 of Article 32 of the Baltimore City Code. If, after its investigation of the facts, the Committee makes findings which support: (I) 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.

Here, the Planning Department Report (“Report”) asserts that there was no evidence of mistake and the neighborhood has not substantially changed. The City Council must find facts, at its hearing, to support that there was a mistake in rezoning the neighborhood R-3 at the time of the last comprehensive rezoning. This must be a true mistake and not merely a differing opinion or current analysis that indicates the selection of R-3 is no longer considered appropriate. Rather, there must be some factual basis to support that the Council had meant in 2017 to select something other than R-3 at the time of the comprehensive rezoning. This would likely prove extremely difficult given that the Planning Department has explained the deliberate thought that went into the selection of R-3 to keep the property in character with the traditional residential neighborhood. Moreover, at the time of this last comprehensive rezoning, the surrounding properties’ non-conforming residential uses were zoned residential in an effort to increase the residential character of the neighborhood. *See, e.g., Tennison v. Shomette*, 38 Md. App. 1, 5 (1977), *cert. denied*, 282 Md. 739 (1978). Despite the Report, the Planning Commission decided there had been a mistake in this rezoning. The Planning Commission provides no facts to support this assertion other than it believes the applicant that offered facts to substantiate a mistake.

Rezoning this parcel now, only to allow the owner to make profitable use of it, would likely be considered illegal spot zoning. *See, e.g., Tennison v. Shomette*, 38 Md. App. 1, 8, (1977) (cited with approval in *Mayor and City Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 546-47 (2002)). The Council should articulate reasons why this rezoning is consistent with the plans for the area and beneficial to the public. Specifically, why the use the property as a parking lot is not merely in the self-interest of the owner.

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.” 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 or description 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 for rezoning has been met. Assuming the required findings are made at the hearing to support a mistake and to evidence that this is not spot zoning, and all procedural requirements are satisfied, the Law Department can approve the bill for form and legal sufficiency.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Hilary Ruley", is centered below the closing. The signature is fluid and cursive.

Hilary Ruley
Chief Solicitor

cc: Nina Themelis, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Ashlea Brown, Assistant Solicitor