

IN RE: * BEFORE THE
PALMETTO GROUP, INC. * HOWARD COUNTY
* ZONING BOARD
ZONING COUNSEL * CASE NO.: ZB-1131M

MEMORANDUM OF LAW

Comes now Zoning Counsel for Howard County’s (“Zoning Counsel”) Memorandum of Law filed herein pursuant to § III.D.11 of the Rules of Procedure of the Zoning Board Hearing Examiner (“Hearing Examiner”) in Case No.: ZB-1131M, which is a Zoning Map Amendment Petition from The Palmetto Group, Inc. (“Petitioner”) to reclassify parcels of land from the Transit Oriented Development (TOD) District to the R-12 (Residential: Single) District, or in the alternative, the R-SC (Residential: Single Cluster) District for properties located at 6871 and 6875 Dorsey Road in Elkridge, Maryland.

PRELIMINARY MOTION

Zoning Counsel objects to Protestant Joel B. Hurewitz’s Motion to Disqualify Hearing Examiner and Zoning Counsel and wishes to incorporate the arguments made in Petitioner’s Opposition to Protestant Joel B. Hurewitz’s Motion to Disqualify Hearing Examiner and Zoning Counsel, and supplement with additional information stated herein.

The Protestant made several declarations that are nothing more than misinterpretation of the cited law. For context, both the Hearing Examiner and Zoning Counsel positions—for as long as they have existed—have been filled by employment contract as approved in the County budget. Rule 1.015 of the Rules of Procedure of the County Council states that “the Council may, by resolution

or as provided in the County budget, employ such legal, financial, technical, or other assistance as it may from time to time deem necessary.” This Rule is explicit in stating that budget actions may take the place of resolutions within the context of certain hiring practices. We maintain that this situation is one of them.

Section 16.305 of the Howard County Code of Ordinances speaks to Terms of Service for the Zoning Board of Appeals states:

- (a) The budget for the Hearing Examiner shall be included in the Board of Appeals budget.
- (b) While holding the position of Hearing Examiner, the Hearing Examiner may not represent any client involving land use in Howard County.

This implies that employment of the Hearing Examiner for the Board of Appeals is approved through the budgetary process. While the Zoning Board and the Board of Appeals are different, the previous section stayed silent on the position of the Hearing Examiner for the Zoning Board and normal interpretation allows for the inference of a similar process for a similar position.

Furthermore, Section 16.1000 of the Code states, in pertinent part:

- (a) The County Council may employ a Zoning Counsel on a part-time, contractual basis. The Zoning Counsel shall be a member in good standing of the Bar of the Maryland Court of Appeals and at the time of appointment shall have been actively engaged in the general practice of law for at least 5 years.

The Code does require a vote of three Councilmembers to enter into the contract of employment, which occurred, but it simply does not demand a Council Resolution and its full public process to employ a Hearing Examiner or a Zoning Counsel. We contend that these positions are part of the administrative actions and proceedings of the Council- a human resources personnel process.

In addition to what we believe to be Protestant's misinterpretation of the law, the Motion should be dismissed for policy reasons, with the aim of serving the best interests of Howard County

residents. Though the Charter proscribes adherence to certain legal requirements, within those confines, the County Council still has the ability to, and the duty to, decide the most expedient, efficient, and cost-effective ways to discharge its administrative duties. Granting this Motion would introduce delay and uncertainty to the whole zoning hearing process. As mentioned before, there is no substantive concern with the experience or qualifications of the current Hearing Examiner or Zoning Counsel. Though well intentioned, the desire for procedural accuracy should not be used to obsessively contemplate minutiae to the detriment of executing the business of serving residents.

STATEMENT OF FACTS

The subject of the present case consists of 0.40 acres on the north side of Dorsey Road approximately 530 feet southeast of the intersection of Dorsey Road and Douglas Legum Drive, shown as Parcels 706 and 726 on Howard County Tax Map 43, Grid 6 with addresses of 6871 and 6875 Dorsey Road (“Subject Property” or “Property”). The Subject Property was zoned “Commercial B” in 1951 and was rezoned to “M-2” (Manufacturing: Heavy) in 1954. The Property remained M-2 until 2004 when it was rezoned “TOD.” The Property retained the TOD designation during the 2013 Comprehensive Rezoning. Petitioner alleges the Howard County Council’s (“County Council”) rezoning of the Subject Property to the TOD Zone was a legal mistake, and provides two (2) arguments in support:

1. The 2013 comprehensive rezoning map erroneously depicted the Subject Property as part of a larger, single parcel comprised of approximately 1.11 acres; and
2. During the 2013 Comprehensive Rezoning, the County Council mistakenly believed there was a market for TOD development where the Subject Property is located.

ZONING COUNSEL’S ROLE

Zoning Counsel's role pursuant to § 16.1000(c) of the Howard County Code ("County Code") is to produce evidence and testimony supporting comprehensive rezoning and to facilitate a complete record during hearings on piecemeal zoning map amendment requests. It is Zoning Counsel's understanding that, while the position is to defend the existing comprehensive rezoning, Zoning Counsel's responsibility does not extend defending clear cases of mistake or pursuing nonmeritorious arguments. Rather Zoning Counsel serves as a legal and technical expert in opposition to Petitioner's case given Protestants—especially if unrepresented—may not grasp the nuance and idiosyncrasies of a "change/mistake" argument in the context of a piecemeal zoning map amendment. In other words, Zoning Counsel should solicit evidence that may otherwise not be introduced into the record that would assist the Hearing Examiner in issuing the report required pursuant to § 16.203A(b) of the County Code and the Zoning Board issuing a final decision pursuant to § 16.204(a) of the County Code.

CHANGE/MISTAKE IN CONTEXT OF PIECEMEAL REZONINGS

The Zoning Board for Howard County is authorized to grant piecemeal zoning map amendments based on findings required by law. § 16-204(i) of the County Code. In Maryland, piecemeal rezonings for Euclidean zones must comply with the "change-mistake" rule codified pursuant to § 4-204 of the Land Use Article, and analyzed in *Boyce v. Sembly*, 25 Md. App. 43 (1975). Change is not relevant to this matter so the focus will be solely on "mistake." In *Boyce*, the Court summarizes the mistake rule as follows:

[E]rror or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. 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.

Id. at 50-51. To prove that the Council's action was a mistake, "it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council." *Id.* at 52. Moreover, "a conclusion based on 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." *People's Counsel for Balt. Cnty. v. Beachwood I Ltd. P'ship*, 107 Md. App. 627, 645 (1995). The burden of proof necessary to satisfy the mistake rule has been described by Maryland Courts as "onerous." *See Stratakis v. Beauchamp*, 268 Md. 643 (1973), and must overcome the strong presumption of correctness which attaches to the adoption of a comprehensive rezoning. *Quinn v. Cnty. Comm'rs. of Kent Cnty.*, 20 Md. App. 413 (1974) (citations omitted).

The strong presumption of validity includes the premise that the County Council had before it and did, in fact, consider all relevant facts and circumstances during the comprehensive rezoning process. *See Beachwood I Ltd. P'ship*, 107 Md. App. at 645-46. Unsupported conclusions from expert witnesses are insufficient to generate a fairly debatable issue with respect to mistake. *See Beachwood I Ltd. P'ship*, 107 Md. App. at 651. Mistake can also be shown in situations where the passage of time has shown that the underlying assumptions or premises relied upon to justify a particular zoning classification were incorrect. *See Beachwood I Ltd. P'ship*, 107 Md. App. 627, 645 (1995) (citing *Mayor & Council of Rockville v. Stone*, 271 Md. 655 (1974)). In *Tennison v. Shomette*, 38 Md. App. 1 (1977), property was rezoned to allow a motel, but during the subsequent

comprehensive rezoning process, the zoning classification was changed to a zone that prohibited a future motel. The Court found sufficient evidence to support a mistake based on the Planning Commission's statement that there was no intent to undermine recent rezoning decisions and that the rezoning was fundamentally inconsistent with overall development scheme established in the governing plan. In *People's Zoning Counsel for Baltimore Cnty. v. Williams*, 45 Md. App. 617 (1979), the County Council erred zoning a property to an industrial zone under the assumption that the site was a prime industrial site and that failure to rezone would decrease the supply of industrial zones available in Baltimore County. Evidence in the record proved both of these assumptions were "fairly debatable" because hundreds of acres of industrial property existed in close proximity to the site.

ANALYSIS OF PETITIONER'S ARGUMENT FOR MISTAKE

1. The 2013 comprehensive rezoning map erroneously depicted the Subject Property as part of a larger, single parcel comprised of approximately 1.11 acres.

Petitioner submitted maps into the record that were used during the 2013 Comprehensive Rezoning process in which the Subject Property was depicted as a portion of a single, larger parcel. Pet'r's. SOJ, Exhibit A. In contrast to how the Subject Property was depicted during the 2013 Comprehensive Rezoning, Petitioner also submitted maps from previous comprehensive rezonings that clearly depict internal lot lines illustrating that the erroneously believed single, larger parcel is actually comprised of four (4) separate parcels. Pet'r's. SOJ, Exhibit B. The consequence of this mistake is that instead of the County Council rezoning a single 1.11-acre parcel suitable for development pursuant to TOD District standards, the County Council rezoned four (4) small,

unrelated parcels¹ TOD and unrealistically expected the individual parcels to independently support transit-oriented development.

The purpose provision within the TOD District under § 127.4 of the County Code, states: “[t]he TOD District provides for the development and redevelopment of key parcels of land within 3,500 feet of a MARC Station.” The record includes testimony from Ms. Julia Sauer, Division Chief for Public Service and Zoning Administration, that in her expert opinion, these parcels cannot be classified as “key parcels of land” for purposes of TOD development given their diminutive size and isolated position on the north side of Dorsey Road. In Ms. Sauer’s opinion, a key parcel would likely be a larger developable area or one that is necessary to provide vehicular or pedestrian access to the overall development site.

Zoning Counsel believes Petitioner has satisfied the evidentiary burden of mistake by including probative evidence to demonstrate that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. *See Beachwood I Ltd. P’ship*, 107 Md. App. at 645. In this case, the County Council made a mistake during the 2013 comprehensive rezoning when the proposed and approved maps failed to accurately depict the Subject Property. This was not a case of bad judgment after full consideration of the facts. The information provided to the County Council was incorrect and based on that evidence the County Council erroneously retained the zoning for the Subject Property, which satisfies the legal definition of a mistake.

2. During the 2013 Comprehensive Rezoning, the County Council mistakenly believed there was a market for transit-oriented development where the subject properties are located.

¹ In the case *sub judice*, the parcels consist of 0.199 and 0.208 acres, respectively.

Although Zoning Counsel believes Petitioner has met their burden of proving, it is important for the Hearing Examiner to consider all of Petitioner's arguments. In short, Zoning Counsel is not persuaded by Petitioner's secondary argument in this instance. Several residential developments have been constructed in the TOD District following its retention during the 2013 comprehensive rezoning. It is not inconceivable that these parcels—if depicted correctly on the 2013 maps—could have or will be developed as part of a larger development project.

Furthermore, it is presumed that the County Council, during the comprehensive rezoning process, had before it and did, in fact, consider all of the relevant facts and circumstances then existing. *See Beachwood I Ltd. P'ship*, 107 Md. App. at 645-46. Any obstacle or difficulty incorporating the Subject Property into the larger TOD would not satisfy the legal definition of a mistake. The existing conditions of the surrounding properties were known by the County Council given these adjoining properties were fully built-out and the environmental features and topographic limitations were deemed to be known and understood by the County Council. Thus, Zoning Counsel does not believe it was a zoning mistake to retain the TOD District on the Property based on the absence of a market for transit-oriented development or the difficulty in enveloping the Subject Property into a larger transit-oriented development project.

WHAT DISTRICT SHOULD BE APPLIED DEMONSTRATING MISTAKE?

A. Background.

In Maryland, even if a mistake is found to have occurred during the comprehensive rezoning process, said finding of a mistake merely permits a rezoning, it is not compelled. *See Hardesty v. Dumphy*, 259 Md. 718 (1970). The only instance where a rezoning is compelled upon

demonstrating a mistake is when the existing zoning amounts to an unconstitutional taking. *See Dill v. Jobar Corp.*, 242 Md. 16 (1966). In other words, only when applicant has demonstrated that the existing zoning has deprived the applicant of all reasonable use of the property and that it cannot be used for any of the permitted uses in the existing zone, is a rezoning compelled. *See Coppolino v. Cnty. Board of Appeals*, 23 Md. App. 358, 372 (1974).

B. Petitioner's Argument and Zoning Counsel's Opinion.

Zoning Counsel believes this is one of the rare instances where rezoning is compelled. Petitioner included exhaustive evidence into the record of the numerous failed attempts to sell, abandon or give away the Property. Zoning Counsel is especially persuaded by the failure of a buyer to foreclose on this property after it was purchased through a tax sale.² At less than 0.5 acres, the Subject Property cannot be developed with residential uses because the TOD District requires at least three (3) acres. Likewise, the other uses permitted in the TOD Zone are impracticable given the diminutive size of the Subject Property. Pursuant to § 127.4 of the County Code, many permitted uses in the TOD District are impossible based on their innate characteristics, e.g., ambulatory health care facility, horse racetrack facility, schools and fire departments, whereas other permitted uses are impossible after cursory analysis of the practical implications, e.g., flex space, offices or religious facilities. Finally commercial uses permitted with limitations under subsection C. should not be conceived as "reasonable uses." Zoning Council believes any limited commercial use would be discordant with residential development on the south side of Dorsey Road that if developed would simultaneously subvert the goals and purposes of the TOD District through creating an isolated piece of commercial property.

² Zoning Counsel does not condone Petitioner's choice to cease paying property taxes, but believes this action helps to demonstrate the absence of reasonable uses for the Subject Property.

The legal standard herein is “reasonable use of the property,” not all conceivable use of the property. Zoning Counsel, based on the evidence and testimony, does not believe it would be reasonable to develop the Subject Property for any use in the TOD District for the reasons previously stated. Therefore, Zoning Counsel believes the “existing zoning has deprived the applicant of all reasonable use of the property and that it cannot be used for any of the permitted uses in the existing zone.” *Coppolino*, 23 Md. App. at 372 (1974) (finding zoning was not confiscatory because no evidence besides single-family uses were considered by applicant’s experts and the applicant failed to demonstrate that homes at a lower density could be constructed.).

C. What District Corrects the Mistake?

Having determined that there was a mistake in the 2013 Comprehensive Rezoning, and that rezoning is compelled based on the Petitioner being deprived of all reasonable use of the property, the final step in the analysis is to determine, but for the mistake, how would the County Council had rezoned the Subject Property during the 2013 Comprehensive Rezoning? In the original Statement of Justification, the Petitioner requested the R-12 District to provide zoning consistent with the R-12 zoned properties on the south side of Dorsey Road. Petitioner’s request has since been revised and requests the R-SC District as the primary zone with R-12 being the alternative. The R-12 and R-SC Districts are similar, however, the R-SC District allows minimum lot sizes of 6,000 sq. ft., whereas the R-12 District requires a minimum lot sizes of 12,000 sq. ft. The Subject Property consists of parcels 8,668 sq. ft. and 9060 sq. ft., respectively, resulting in both lots being nonconforming if zoned R-12. Because these lots are nonconforming, internal adjustment of lot

lines in the R-12 District is prohibited. On the other hand, the R-SC District would allow for adjusting the internal lot lines because both lots can satisfy the minimum lot size requirement. Petitioner argues in favor of the R-SC District as responsive to the housing crisis the State of Maryland is facing evidenced by Executive Order 01.01.2025.19 issued by Governor Wes Moore to spur the construction of more housing. Pet'r's. Ex. 10.

Despite Petitioner's evidence showing the R-SC District to be superior for purposes of meeting housing demands and providing the highest and best use of the Property, Zoning Counsel believes the task before the Hearing Examiner is to determine—but for the mistake what classification would the County Council have applied during the 2013 Comprehensive Rezoning? To this end, Zoning Counsel believes the County Council would have zoned the Property R-12 to better match the residential development on the south side of Dorsey Road. Nevertheless, a cursory review of the Howard County zoning map shows no pattern or bright-line rule for imposing the R-SC District on a specific property; thus, it is not inconceivable that had the County Council understood the Subject Property to consist of four (4) independent parcels, it would have imposed the R-SC District to better effectuate residential development.

CONCLUSION

For all the above-referenced reasons, Zoning Counsel respectfully submits that there is sufficient evidence in the record to show that it was a mistake to retain the TOD District during the 2013 Comprehensive Rezoning for the Subject Property. Zoning Counsel believes this mistake compels rezoning because it deprives Petitioner all reasonable use of the Subject Property. Zoning Counsel believes that correcting the mistake—as discussed *supra*—results in imposing the R-12 District, although the R-SC District would not have been improbable or impossible.

Respectfully submitted,

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