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SUBJ: Bootleg zoning reclassifications

Dear Mr. Zimmerman:

I am sure that you saw the story in the *Baltimore Sun* reporting the displeasure expressed by county residents about the propensity of the county council to pass legislation that tinkers with the zoning of individual parcels of land. ("*A slippery slope": Baltimore County residents say council skirts zoning process, state law with targeted bills*," August 9, 2012.) I invite your attention to four recent bills, 44-21, 46-21, 73-21, and 75-21, as examples.

Critics describe these bills as unlawful "spot" and "contract" zoning. They well may be spot or contract zoning, but they are also invalid legislative piecemeal rezonings, unlawful on their face.

The council may rezone land only if it does so in a "comprehensive" manner. The indicia of comprehensiveness were described by the Maryland Court of Appeals in *Rockville v. Rylyns Enterprises*, 372 Md. 514 (2002).

Comprehensive rezoning is accomplished in Baltimore County through the quadrennial Comprehensive Zoning Map Process (CZMP). Once the CZMP is concluded by amendments by the council to the official zoning map, the zoning of individual parcels of land may not be changed until the next CZMP other than by "piecemeal" rezoning.

Piecemeal rezonings are referred to as zoning reclassifications in the county charter and code and are governed by the process set forth therein. A zoning reclassification must be initiated by the property owner filing a petition with the county Board of Appeals. It may be granted only if there was a mistake in the CZMP or a substantial change in the character of the neighborhood since the CZMP, referred to as the "change or mistake" rule.

The CZMP is a legislative process controlled by the council. On the other hand, a zoning reclassification is an administrative process conducted in a quasi-judicial manner. Nearby residents affected by the proposed change in zoning have the right to contest the reclassification at an administrative hearing during which the property owner bears the burden of proving change or mistake.

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Section 602(e) of the county charter states that the Baltimore County Board of Appeals has "original and exclusive" jurisdiction over petitions for zoning reclassification. The allocation of powers could not be any clearer: The county council is prohibited from doing zoning reclassifications.

The above-referenced bills violate that prohibition. They are invalid legislative piecemeal rezonings or, as I refer to them, bootleg zoning reclassifications.

The duties of People's Counsel under Section 524.1(a)(3) of the charter include filing suit to enjoin violations of the county's zoning map. I believe that defending the integrity of the zoning map from legislative assault is the primary duty of your office and the main reason that it was established by the charter as an independent agency.

The bootleg zoning reclassifications are allowing uses of land that violate the zoning map. In my opinion, you have an obligation to challenge their validity in court.

<u>Analysis</u>

Baltimore County generally follows the so-called Euclidean form of zoning, in which the county is divided into various zoning classifications by a zoning map. The uses that may be made of a piece of property and the regulations applicable to those uses, such as restrictions on the density and height of buildings, are determined by its zoning classification, generally referred to as the property's "zoning."

The purpose of each of the bills referenced above is to customize the zoning uses and regulations applicable to a single parcel of land. To do so, each bill creates what for all practical purposes is a unique zoning classification for the targeted parcel.

If it looks like a duck, swims like a duck, and quacks like a duck, it's a duck. If these bills are not de facto "piecemeal rezonings," then what are they?

<u>Bill 44-21</u> targets a specific property classified Manufacturing, Light (ML). Residential uses generally are not permitted in an ML zone. Bill 44-21 allows multi-family residential uses on the targeted property subject to certain conditions and restrictions.

The only residential uses permitted in a ML zone before Bill 44-21 were those allowed through *other* bootleg zoning reclassification bills. Each bill imposes different set of conditions and restrictions on the residential uses allowed on the targeted tracts of land. It is not an exaggeration to say that the council has been rezoning land zoned ML parcel by parcel. The practice of bootleg zoning reclassification has wreaked havoc on orderly land use regulation in the county.

<u>Bill 46-21</u> involves a parcel classified Business, Local (BL). Residential uses are permitted in a BL zone subject to certain conditions and restrictions. Bill 46-21 supersedes those conditions and restrictions, allowing residential uses on the property targeted by the bill and subjecting them to their own unique set of regulations. The bill also exempts the improvements from certain

requirements generally applicable in a BL zone. The effect of the bill is to allow a much higher density of residential development than otherwise would be permitted.

Bill 73-21 also exempts a parcel of land zoned BL from the conditions and restrictions on residential uses in a BL zone and subjects the parcel to its own set of conditions and restrictions that allow a higher density of residential development. The conditions and restrictions are different from those imposed on the parcel that is the subject of Bill 73-21. As with the other bills, there is no attempt at uniformity even within similar bootleg zoning reclassifications.

Bill 75-21 allows a commercial kennel as a matter of right on a parcel zoned Business, Major (BM). It is the only parcel classified BM on which a commercial kennel is permitted.

All the bills changed the uses allowed on individual properties and created separate sets of regulations governing those uses. The bills *rezoned* those properties within any reasonable meaning of the term.

Perhaps the most insulting element of these bills is the use of language intended to show that they are not "special laws" benefiting only specific, identifiable persons, but exercises of the county's police power through public local laws of general application. My personal favorite is the language in Bill 44-21.

Bill 44-21 purports to apply to any land currently zoned ML that *"was previously used as an extended stay hotel, provided that the property upon which the multi-family residential use is situated is within the Hunt Valley/Timonium master plan focus area, is within 1,000 feet of a commuter light-rail station, and is at least 1,000 feet from the nearest residential zone."* Who is the council trying to kid about Bill 44-21 being a law of general application?

As it happens, it doesn't matter if the bills are special laws or laws of general application passed by the council. State law and Section 602(e) of the county charter flatly preclude the council from passing either one to do a piecemeal rezoning.

It also doesn't matter if the bill's language happens to make the bill apply to parcels other than the targeted parcel, rezoning them as well. The inclusion of other parcels would not be enough to change the council's action from a piecemeal to a comprehensive rezoning as defined by Maryland law.

If these bills are valid, they would represent an alternative means of obtaining a traditional zoning reclassification under the change or mistake rule. For example, a landowner allegedly impacted by a change in the character of a residentially zoned neighborhood could seek a bill allowing construction of a commercial use on his or her land *instead* of petitioning the Board of Appeals for a zoning reclassification. The problem with that theory, of course, is that no one who reads the county charter in the context of state law honestly believes that such "alternative" relief for landowners dissatisfied with the zoning of their land is lawful.

Or maybe it works this way: A landowner truly affected by a change or mistake must go through the *lawful* process and petition the Board of Appeals. A landowner not affected by a change or mistake, however, must go through the *unlawful* process and seek a bootleg zoning reclassification from the county council. Yes, I am being facetious. What I really think is that for years the council knowingly has ignored the legal limitations on its zoning powers.

Legal precedent

The council is likely to claim that these bills were not piecemeal rezonings but simply were legislative "text amendments" to the county's zoning laws. The appellate case most closely on point appears to be *MBC Realty, LLC v. Baltimore*, 192 Md. App. 218 (2010).

The city had enacted a moratorium on the erection of billboards. The first bill in question created an exception to the moratorium in the B-5 zoning district, allowing placement of billboards on publicly owned stadia and arenas as a conditional use. B-5 is the zoning classification applicable to the city's central commercial district. A second bill approved the erection of 14 billboards on what is now Royal Farms Arena, which is in the B-5 district.

The Court of Special Appeals upheld the bills against a suit alleging that they were, among other things, an invalid piecemeal rezoning. The Court pointed out that the conditional use added to the zoning code applied *uniformly* throughout the B-5 district and did not constitute a change to the zoning classification on which the arena is located. It concluded that the bill creating the conditional use was a legislative text amendment, not a piecemeal rezoning.

The key word is "uniformly." In *Maryland Reclamation Associates v. Harford County*, 468 Md. 339 (2020), the Maryland Court of Appeals described a text amendment as a regulation of the area, height, density, etc. of a use "*applicable to all properties within a zoning district*." The court has had occasion to distinguish "zoning actions" subject to a quasi-judicial process from purely legislative acts such as plan and text amendments. In *Appleton v. Cecil County*, 404 Md. 92 (2008), the court stated as follows:

> ***"A 'zoning' action decides the use of a specific parcel or assemblage of parcels of land and creates or modifies substantively the governing zoning classification or defines the permissible uses, building and lot sizes, population density, topographical and physical features, and other characteristics of a specific parcel or assemblage of parcels of land by exercising some discretionary judgment after the consideration of the unique circumstances of the affected parcels and buildings."***

That is exactly what Bills 44-21, 46-21, 73-21, and 75-21 did. They were zoning actions, not text amendments. Specifically, they were invalid piecemeal rezonings.

A bill allowing billboards to be placed on stadia and arenas in a commercial district (a text amendment) is not the same as a bill effectively changing the zoning of an individual parcel of land from low density residential to high density residential, commercial to residential, or major

business to commercial, and imposing conditions and restrictions on the new uses allowed on the parcel (a piecemeal rezoning). Let the council try to persuade a court that it is.

Racial discrimination

Although the issue may not be relevant to the facial validity of the bills, it is worth noting that the practice of bootleg zoning reclassifications is racially discriminatory, at least in effect. The county already is the subject of a conciliation agreement with HUD because housing patterns in the county reflect a history of policies and practices that discriminated against minority and disabled residents.

A review of the bootleg reclassifications reveals that they have produced a lot of market rate housing but, at least as far as I can tell, not one unit of affordable housing. The reason is not hard to figure out.

As noted above, critics describe the bills as "contract zoning." The bills certainly have a strong transactional element, with council members touting them as compromises negotiated between developers and neighbors.

Given the county's historical resistance to affordable housing, it is hardly surprising that the deals never include affordable housing – and members of the council surely know that. Bootleg reclassification is one more practice with a disparate impact on minority and disabled residents in a county with a history of such practices. It invites more legal action against the county.

Governmental bodies that make up their own rules as they go along often get themselves into legal hot water. It is one of many good reasons to stick to the processes set forth in law.

Political influence and corruption

Another good reason to adhere to the law is to minimize opportunities for corruption. It would be foolish to ignore that consideration in a county with a history of political corruption as extensive as Baltimore County's.

State and county law requires piecemeal rezonings to be decided in a quasi-judicial manner rather than through a purely legislative process to protect the rights of persons requesting the rezonings as well as persons opposing them. The requirement minimizes the role of politics and political influence in the decisions.

A lot of money can be at stake for a person who requests a zoning reclassification. Put that together with the almost inviolate tradition of "councilmanic courtesy" in Baltimore County and you have the recipe for corruption. It would be naïve not to believe that many bootleg zoning reclassification bills are introduced by council members seeking to advance their own personal or political interests rather than the best interests of the county.

The bootleg zoning reclassification bills violate state and county law. They have a disparate and adverse impact on minority and disabled residents and generally undermine orderly and effective

land use planning and zoning in the county. The possibility that corruption, whether the criminal kind or the "soft" variety, keeps the practice alive cannot be dismissed.

Conclusion

The practice of bootleg zoning reclassifications has gone on in Baltimore County for years. The recent spate of bootleg reclassifications less than a year after the county completed a CZMP drew particular attention, however, and for good reason.

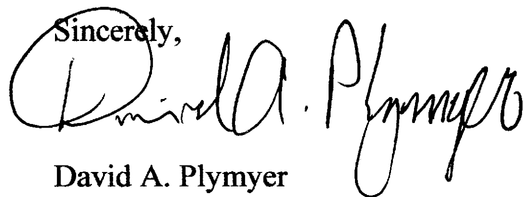
The county's CZMP is unusual in comparison with the comprehensive rezoning processes of most counties in that it bends over backwards to accommodate the wishes of landowners and prospective developers. Each property owner that requests a rezoning as part of the CZMP is entitled to have the request put to a separate vote by the council.

So, within months of missing an opportunity to get a rezoning done lawfully a property owner gets a chance to have it done unlawfully? The council has taken an unlawful practice to absurd lengths.

One thing that I hear a lot from community groups is how exhausting the never-ending cycle of rezonings has become, and how it places them at a disadvantage to landowners and developers. I believe that most of the residents I hear from are less concerned about what has happened in the past than with halting the bootleg reclassifications going forward.

Nevertheless, it is doubtful that the council can be disabused of this longstanding practice without litigation. County residents should not have to pay to fund that litigation. With all due respect, their taxes pay for your office to undertake such litigation on their behalf.

Sincerely,



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