IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

SEPTEMBER TERM, 2004
No. 02708

JAMES LUTHER HUMPHREY, III

Appellant

vs.

MARYLAND-NATIONAL CAPITAL
PARK & PLANNING COMMISSION, et al.

Appellees

APPEAL FROM THE MONTGOMERY COUNTY CIRCUIT COURT
(Judge Durke G. Thompson)

BRIEF OF APPELLANT

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June 23, 2005

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STATEMENT OF THE CASE

Article III, §33 of the Maryland Constitution declares unconstitutional special laws enacted for the benefit of an individual case when the general law already comprehensively addresses all cases. On November 6, 2001, the Montgomery County Council, sitting as the District Council for the Montgomery County portion of the Maryland-Washington Regional District ("Council"), enacted Zoning Text Amendment ("ZTA") 01-08. Believing this was done to facilitate in a particular way development of one property in the entire County, petitioner, James Luther Humphrey, III, challenged the constitutionality of ZTA 01-08 before the Montgomery County Planning Board ("Board"). The challenge was made in land use proceedings otherwise authorizing the intended beneficiary of the ZTA, the Federal Realty Investment Trust ("FRIT"), to construct a mixed-use commercial/residential development in Bethesda. Petitioner appeared before the Board on February 19, 2004 to document why ZTA 01-08 was invalid as special zoning legislation, and to claim that approval of the FRIT development based upon that ZTA should be denied. The Board rejected his claim in an Opinion issued on June 25, 2004. (E.82). A petition for judicial review was timely filed in Montgomery County Circuit Court. On December 22, 2005, Judge Durke G. Thompson heard argument on the petition. (E. 9-81). At the close of the argument Judge Thompson issued an oral bench ruling denying the petition. (E.77-81). An order denying the petitioner was docketed on January 18, 2005 (E.7). This appeal followed on February 10, 2005.

QUESTION PRESENTED FOR REVIEW

WHEN A ZONING TEXT AMENDMENT IS ENACTED TO MODIFY THE DEVELOPMENT STANDARDS OF AN ESTABLISHED ZONE SOLELY TO FACILITATE THE DEVELOPMENT OF ONE PARCEL IN THE ZONE, IS THE ENACTMENT PER SE VALID UNDER ARTICLE III, §33 OF THE MARYLAND CONSTITUTION SIMPLY BECAUSE THE ENACTMENT HAS POTENTIAL APPLICABILITY TO A HANDFUL OF OTHER PROPERTIES IN THE ZONE?

STATEMENT OF FACTS

The Development Proposal

These consolidated appeals involve Preliminary Plan No. 1-04041 and Site Plan No. 8-04014 ("the Plans"). (E.83). The Plans contemplate redevelopment of a developed 2.5 acre site in Bethesda ("the Property") by the Federal Realty Investment Trust ("FRIT"). (E.83-84). The Property is located on the east side of Arlington Road, extending the entire length of the block between Elm Street and Bethesda Avenue. (E.116). The redevelopment consists of replacing a Giant Food grocery store with a five-story, 272,340 square foot mixed-use development, with a maximum height of 65 feet. (E.83-85). The redevelopment is to include ground floor retail and restaurant space, 180 residential housing units on floors 2-5, and optional retail mezzanine space of up to 6,194 square feet. Id. The floor-area-ratio (FAR), i.e., the ratio of the gross floor area of the redevelopment to the gross area of the site, is 2.5. (E.105).

The Property is zoned C-2 (E.83), which is among the zones designated as commercial in the Montgomery County Zoning Ordinance, §59-C-4.1 (App. 13). The proposed development exceeds the development limits of this zone as they existed prior to enactment of ZTA 01-08. (App. 2-6). Before that amendment, the zone had a height limit of 42 feet, an FAR limit of 1.5, and residential units were not permitted as a matter of right. By contrast, the proposed development includes residential dwelling units in a building 65 feet in height with an FAR of 2.5. The changes to the C-2 zone wrought by ZTA 01-08 permitted residential units, raised the height limit to 75 feet and increased the FAR to 2.5. The proposed development could not have been approved but for the changes to the C-2 zone brought about by enactment of ZTA 01-08, and this appeal challenges the legality of the development solely on the basis of the illegality of ZTA 01-08. (E.11-13).

Prior Proceedings

These administrative appeals are not the first ones involving development of the Property. In 2002, the Board approved Preliminary Plan No. 1-99088 and Site Plan No. 8-02035 for the Property. Petitioner and others sought judicial review of these decisions in Montgomery County Circuit Court, where they were consolidated and reviewed. All the respondents here were respondents in those cases. Circuit Judge Debelius' Memorandum Opinion (E.200-03) details why that appeal did not focus on ZTA 01-08:

> The subject property is within the Bethesda Central Business District (CBD) and covered by a Master Plan (The Sector Plan was approved in 1994.). It is zoned C-2,

> which, prior to the enactment of the zoning text amendments, provided a maximum building height of 42 feet and a FAR (floor-area-ratio) of 1.5, and allowed no residential units as a matter of right. The owners of the subject property sought to build a taller building with mixed commercial/residential uses. Rather than seek a change in the zoning itself, under the change or mistake criteria, the owners pursued a zoning text amendment to allow their project to proceed. The Montgomery County Council, sitting as the District Council, enacted ZTA 01-08 in November of 2001. ZTA 01-08 provided for residential uses within the C-2 zone for properties within 1500 feet of a Metro station, with a FAR of up to 2.5 for a mixed residential and commercial development, and a building height limit of 75 feet (if 60% of the FAR is residential and the building is at least 300 feet from single-family residences). While these conditions are highly specific, they arguably could have applied to properties other than the subject parcel. Some controversy followed within the first few months, resulting in additional input and culminating in an even more specifically refined zoning text amendment for a mixed use project, ZTA 02-04, which provided for a maximum building height of 65 feet for a mixed use building with a minimum site of 1.5 acres, at lest 300 feet from a residential development, and adjoining a public parking garage which exceeds 50 feet in height. It is apparent from the record and from the tape of the District Council hearing at which ZTA 02-04 was passed that this amendment was tailored to fit the Federal Realty project and deliberately narrowed and restricted to insure that no other property would qualify within the ambit of the amendment.

(E.200-01).

Based upon these facts, Judge Debelius concluded that ZTA 02-04 (App. 7-12) was invalid on both constitutional and statutory grounds:

> In response to a challenge to ZTA 02-04 mounted at the Planning Board hearing, an effort was made by the Board to overlook the obvious attempt to tailor the

amendment to the specific property which is the subject of this case, by suggesting that the text amendment might apply to other properties nearby, though none could be cited, and that, in the future, properties might be assembled, which if combined with redevelopment, construction of public parking garages or rezoning, might come within the ambit of the specific conditions of the amendment. The Preliminary and Site Plans for the subject property were approved.

. . .

Article III, Section 33 of the Maryland Constitution prohibits the passage of "special laws," and this prohibition has been held to apply to local zoning laws. The enactment of "special laws for special cases" is generally inappropriate. While ZTA 02-04 enjoys the presumption of constitutionality, Petitioners attempt to overcome the presumption by pointing out the history and specifics set forth above. Even an ordinance which does not on its face identify a specific property or situation, will run afoul of the prohibition if its practical and intended effect is to address one situation in a statutory plan already covered by a general law.

. . .

ZTA 02-04 was enacted as a special law for a special case. It is argued by Respondents that there are many useful purposes served by the amendment, that it fulfills public policy goals, is consistent with "Smart Growth," etc. That all may be true, but it is an inescapable conclusion that by enacting zoning text amendment ZTA 02-04 the District Council circumvented a well established Sector Plan within the existing Master Plan, without the mechanisms and safeguards purposefully put in place for changing such a plan, and its effect was to benefit a particular property, and that is not permissible.

> For the same reasons discussed above, ZTA 02-04 violates the uniformity requirement contained in Section 8-102 of the Regional District Act, contained in Article 28 of the Maryland Annotated Code, requiring that "all regulations shall be uniform for each class or kind of building throughout the district or zone." The challenged amendment is a specific legislation attempt to single out a property for non-uniform treatment. There are no other members of the intentionally narrowly defined class.
>
> As the challenged Preliminary and Site Plans were reviewed and approved, under ZTA 02-04, they must be vacated. It is an invalid and unconstitutional text amendment.

(E.201-03).

Since the plans before Judge Debelius were based upon Board approval under ZTA 02-04, he had no occasion to address, and therefore was not asked to address, the validity of the earlier law, i.e., ZTA 01-08. **His decision was not appealed by any respondent.** The County Attorney subsequently concluded that the effect of the ruling was to leave in effect the development standards for the C-2 zone in the Zoning Ordinance as they existed prior to enactment of ZTA 02-04, including ZTA 01-08. (E.118). The County Attorney concluded that development of the Property could proceed "under the standards established by ZTA 01-08." Id. FRIT concurred in this assessment and submitted to the Board the current Plans, predicated on ZTA 01-08, opining that the effect of invalidating ZTA 02-04 was to "automatically revive" ZTA 01-08. (E.157). In its Opinion, the Board concluded that it would review the Plans under the development standards in ZTA 01-08. (E.102).

Administrative Proceedings Before the Board

At the Board hearing, petitioner and other Bethesda residents and civic groups testified orally or in writing in opposition to approval of the development. (E.192-235). Petitioner's testimony was not limited to, but did include, explicit legal challenges to reliance by the Board on ZTA 01-08, i.e., essentially the same claims presented previously as to ZTA 02-04. (E.192-99, 264-69). During the hearing, the legality of ZTA 01-08 was defended by the Board's General Counsel (E.290-91) and by the attorney for FRIT (E.154-89, 288).[1] The Board discussed these issues in open hearing. (E.290-96, 309-20). In its June 25, 2004 Opinion approving both Plans, the Board addressed the validity of ZTA 01-08 and rejected petitioner's claims. (E.101-03). In its Opinion, the Board explicitly relied on an exhibit submitted by FRIT that the Board said "makes abundantly clear that ZTA 01-08 applies not only to the subject site but to several properties in both Bethesda and Wheaton." (E.103). The Board then concluded, in accordance with its legal staff's opinion on the matter,

> that, because the effect of ZTA 01-08 is that it applies to several properties, it does not constitute special legislation and is, therefore constitutional.

Id.

On July 19, 2004, both Plan approvals were timely appealed to the Montgomery County Circuit Court by petitioner. In his bench ruling, Judge Thompson adopted an essentially identical rationale to that of the Board. After

[1] Other residents and groups expressed support for the project, but none of these took issue with the legal claims made before the Board by petitioner.

concluding that the government had stated the case for enactment "in a legitimate fashion" (E.79), the Court ruled that it was necessary for petitioner to overcome "the presumption of the propriety of that action" with a showing that ZTA 01-08 "is beneficial to a particular parcel or user." Id. The Court further explained that

> the indication is that [ZTA 01-08] is beneficial to more than that one user, although maybe not immediately or maybe not as specifically, so that the Court finds that motive or stated purpose, I guess stated purpose is a better term, as the legislation is presented in the legislative history is sufficient to sustain the law in light of its ordinary procedural enactment and the fact that it is applicable to other properties than the one to which the petitioner points….

(E.79).

Bethesda CBD Sector Plan

Bethesda was the subject of intense planning efforts in the early 1990's, culminating in the award-winning 1994 Bethesda CBD Sector Plan. An early example of "smart-growth" planning, the Sector Plan prescribes that high density residential redevelopment in Bethesda should take place in the CBD area (E.355-56) and in the adjacent Transit Station Residential (TS-R) District (E.370-76), with a "stepping-down" in building heights as development moves away from the Metro Station and toward the edges of the Sector Plan area, in order to achieve compatibility with nearby residential areas. (E.362, 364, 366-67). The Property, although within the Sector Plan area, is not within the CBD itself, an area targeted by the Sector Plan for high-density residential redevelopment. The Property is located in the Arlington Road District, where the Sector Plan objectives include,

inter alia, protecting the surrounding residential areas from commercial intrusions by providing for lower density commercial development. (E.383). Consistent with this, the Property is located in an area of the Arlington Road District for which the Plan recommends continued C-2 zoning, continued retail and commercial use, a continued 1.5 FAR, and a three-story building height limit of 42 feet – all consistent with the "step-down" vision for development, as well as with building standards for height and FAR as then specified for development in the C-2 zone. (E.363, 368, 381-88). In other words, the Sector Plan recommendation for redevelopment of the area that includes the Property was adherence to development limits prescribed for the C-2 zone, as those limits existed at the time of Sector Plan approval in 1994.

In its Opinion, the Board did not find that FRIT's Plans were fully consistent with the development and use limits for the C-2 zone as they existed in 1994. Nor could it. As will be detailed, prior to enactment of ZTA 01-08 in November 2001, residential use was not a permitted use in the C-2 zone, the building height limit in the C-2 zone was 42 feet, and the FAR was 1.5. The Plans transgress all of these limits. How the Board reconciled this is made clear by its rationale for approving a building height of 65 feet (E.106), or 55% in excess of the Sector Plan limit:

> [B]uilding height need not be limited to the recommended Sector Plan height as a master plan only serves as a guideline in the absence of a statutory requirement that the master plan be binding.

(E.100). Similarly, the Sector Plan "guideline" of 1.5 FAR was exceeded by two-thirds in the approved Plans (2.5 FAR) (E.105) and residential use was authorized in a zone where, but for ZTA 01-08, it is not a permitted use.[2]

Evolution of the C-2 Zone

As explained above, the focus of this appeal is on the changes made by the Council in the development standards for the C-2 zone, changes whose practical and intended effect were to make possible the development of the Property as now approved by the Board. This requires a description of the evolution of C-2 standards, beginning before the FRIT project was conceived.

1. C-2 Development Standards – Pre FRIT Project

Prior to the conception of the FRIT project, the C-2 Zone, like most zones in the County Zoning Ordinance, had a set of straightforward development standards that applied without exception everywhere in the zone, i.e., to every property in the County zoned C-2. As relevant here, §59-C-4.35 of the Zoning Ordinance provided as follows for new construction in the C-2 zone (prior to November 26, 2001):

[2] Given these glaring differences, a meritorious argument could be made that there was no good faith effort to be guided by the Sector Plan "guidelines," and that the preliminary plan does not "substantially conform" to the Sector Plan, as required by Montgomery County Code §50-35(l). (App. 28). Nevertheless, petitioner is not claiming here that development approval by the Board is so manifestly at odds with the Sector Plan as to be per se unlawful. Petitioner eschews appealing this sort of "judgment call" issue, in favor of emphasis on his claim of legal error in enactment of, and reliance on, ZTA 01-08.

> **59-C-4.350. Purpose**
>
> It is the purpose of this zone to provide locations for general commercial uses representing various types of retail trades, businesses and services for a regional or local area. Typical locations for such uses shall include: central urban commercial areas, regional shopping centers and clusters of commercial development
>
> **59-C-4.351. Building Height.**
>
> The maximum building height at any point measured from the finished grade is 3 stories or 42 feet
>
> . . . .
>
> **59-C-4.352. Floor Area.**
>
> The gross floor area of buildings shall not exceed FAR 1.5.

(App. 16-17). In addition, apart from hotels and motels, residential dwellings were not a permitted use; they were a Special Exception use. §59-C-4.2(a) fn. 40 (Prior to Nov. 26, 2001). (App. 13-15).

2. <u>Rezoning – FRIT's Road Not Taken</u>

FRIT developed its current plan for four floors of residential and one floor of commercial development on the Property during the time the foregoing C-2 development standards were in effect. But FRIT had an obvious problem: the project could not be built unless one of two things happened: (1) the C-2 zoning of the property would have to be changed to another zoning classification -- one that would permit residential units, a greater height limit and a greater FAR, such as TS-M; or (2) the use and development standards for the C-2 zone as a whole

would have to be changed to accommodate the project. As will be shown, FRIT took the second route; it did not seek a rezoning of the Property.

Although FRIT elected not to pursue this route, it could have sought to get the zoning changed on a single parcel of land – in zoning parlance, a "map amendment," – rather than change the use and development standards for an entire zone. After all, the FRIT project's height was 155% of the C-2 allowable maximum; the FAR was 167% of the C-2 allowable maximum; and residential was not a permitted use category in the zone. In fact, however, while parcel-specific TS-M rezoning was feasible, it would have required an amendment to the Sector Plan, a result that could not be achieved with the speed and dispatch of a narrow, targeted ZTA. As noted by Judge Debelius, FRIT circumvented the Sector Plan in favor of getting the use and development standards for the C-2 zone changed for the Property. (E.203).

3. ZTA 01-08 – The Road Taken

The road taken by FRIT was to prepare a custom-tailored ZTA that would permit development of the Property, obtain legislative sponsorship for the ZTA, and see it through to enactment. In August 2001, FRIT met with Council President Ewing to discuss a proposed ZTA. (E.219-20). By August 31, 2001, FRIT had submitted to president Ewing a draft ZTA that reflected technical adjustments recommended by the Council's Senior Legislative Analyst, and requested introduction of the ZTA at the Council's September 11, 2001 meeting. Id. This request was honored, and the FRIT draft was introduced as ZTA 01-08

on that date. (E.221). At no point, from before introduction to enactment of ZTA 01-08, did any other developers or owners of C-2 zoned land involve themselves in the legislative process.

The next step in the approval process was consideration by the Planning Board, which scheduled a hearing for October 1, 2001. (E.222) On September 19, 2001 FRIT sent the Board a detailed letter explaining its evolving interest in development of the Property, noting its discussions with Board staff and Council members regarding development on the property and the ZTA, and highlighting the need for the ZTA's enactment to enable the development to go forward. (E.343-44). Shortly thereafter, the Board's September 27, 2001 staff report was issued, recommending approval by the Board. (E.333-37) The staff explained in its "Background" discussion the self-evident fact that the motivation for the bill was FRIT's interest in developing the Property in a manner not then permitted in the C-2 zone. Id. The report did not disclose that the bill would allow development of the Property at a level beyond the 42-foot explicit height limit in the Sector Plan for the Property applicable to other C-2 zoned property in Bethesda. Following the October 1, 2001 hearing, the Board recommended Council approval. (E.222-23).

The Council held a public hearing on ZTA 01-08 on October 16, 2001. (E.224-33) Understandably, with citizens' attention focused elsewhere in the wake of September 11th, the public hearing attracted little interest and drew no opposition. Id. The next day, October 17, 2001, the attorney for FRIT sent the

Council's legislative staff a letter incorporating language for a minor change to ZTA 01-08, reflecting a suggestion she made at the hearing the previous day, to increase the options for use of the ground floor. (E.230) ZTA 01-08 was duly amended by staff to reflect this suggestion and, as amended, ZTA 01-08 was unanimously enacted on November 6, 2001. (E.234)

The official minutes of that Council session confirm why ZTA 01-08 was enacted. (E.234). One of the sponsors, Councilmember Denis, stated the purpose of ZTA 01-08 as follows: "to add a residential component to the vibrant area of downtown Bethesda." Id. He went on to compliment Federal Realty for helping "bring the text amendment to fruition." Id.

The enactment of ZTA 01-08 added another purpose for the C-2 zone in §59-C-4.350:

> A further purpose of this zone is to promote the effective use of transit facilities in Central Business Districts by encouraging housing with commercial uses in close proximity to Metro stations located in Central Business Districts.

(App. 19). This purpose was implemented with additional provisions permitting residential use within 1500 feet of a CBD Metro station, with an FAR of up to 2.5 for a mixed commercial and residential development, and a building height limit of 75 feet (if 60% of the floor area is residential, the ground floor is commercial (except for incidental residential use), and the building at least 300 feet from single-family residences). (App. 4-5). These highly specific conditions, of course, fit precisely with the FRIT project. But because the criteria were written in

general terms, there was at least a theoretical possibility that other C-2 zoned properties could meet them. In fact, properties in the Wheaton CBD occupied by a fully developed regional shopping center and office complex meet these criteria. (E.336-37). But given that the focus was on facilitating approval of the FRIT project, there was no mention by any Council member of the impact of the proposed ZTA on properties in the Wheaton CBD.

4. ZTA 02-04

ZTA 01-08 was not long on the books before petitioner and other Bethesda citizens and civic groups discovered it, and the low-profile law suddenly became a high-profile matter of citizen concern, even before FRIT could file with the Board for approval of its plans under ZTA 01-08. In February and March 2002, Council members received a great deal of correspondence urging repeal, and expressing concern about ZTA 01-08 – both with respect to its terms and the low-profile way it was enacted. (E.209-16). On March 21, 2002, the Council's Planning, Housing and Economic Development (PHED) Committee considered what to do about ZTA 01-08.

Councilmember Ewing introduced ZTA 02-04 on April 9, 2002, worded to **repeal** ZTA 01-08 and **restore** the previous general standards for all of the C-2 zone. The repeal bill was endorsed by various citizens groups. (E.213-15). On June 11, 2002, a public hearing was held on the bill. Meanwhile, FRIT agreed to lower the height of its proposed building from 75 feet to 67 feet. Following the

public hearing, the Council referred ZTA 02-04 to the PHED Committee for a worksession.

The final version of ZTA 02-04 that emerged was very different from the original. The amended ZTA 02-04, rather than serve as a vehicle for repeal of ZTA 01-08, left it in place, albeit with added provisions giving it even more narrowly circumscribed applicability. As described by Judge Debelius, ZTA 02-04 "was tailored to fit the Federal Realty project and deliberately narrowed and restricted to ensure that no other property would qualify within the ambit of the amendment." (E.201).

ARGUMENT

I. STANDARD OF REVIEW

During the hearing on the Plans before the Board, petitioner raised two explicit claims attacking the validity of ZTA 01-08: It (1) is an unconstitutional special law; and (2) violates state law requirements for uniformity in zoning. These claims were presented with ample citation to relevant legal authorities, statutory and decisional. (R.680-84). Petitioner further advised the Board that under Montgomery County v. Broadcast Equities, Inc., 370 Md. 438, 750 A.2d 995 (2000), the Board was required to address these claims in deciding whether the Plans could be approved:

> Under Maryland law, administrative agencies are fully competent to resolve issues of constitutionality and validity of statutes or ordinances in adjudicatory administrative proceedings which are subject to judicial review.

Id., 750 A.2d at 1002 n.8 (citing cases from County Zoning Boards). (E.195).

The Board's Opinion rejected petitioner's claims without discussion of the cited authorities. (E.101-02). The issues presented are exclusively legal issues that are subject to de novo judicial review, where the Board's legal analysis, such as it is, is owed no deference. Marzullo v. Kahl, 377 Md. 158, 783 A.2d 169, 177 (2001); Stansbury v. Jones, 372 Md. 172, 812 A.2d 312, 319 (2002). This is particularly so when, as here, the issue raised focuses on the constitutionality of a statute. This is an issue beyond the Board's area of expertise, even for an ordinance the Board interprets with regularity. Unlike the Council, the Board is not a legislative body and does not, as a regular course of business, find it necessary to pass on the constitutionality of the laws it administers.[3] Similarly, this Court's review of the lower court's ruling on an issue of law is plenary.

Although in form this case is one of judicial review of the decision of an **agency**, the legal issue presented turns exclusively on a determination of the purpose and effect of a **legislative** enactment. More specifically, as to enactment of ZTA 01-08, the issues center on the actions and statements of the **Council**, not the post-enactment actions and statements of the **Board**. Hence, any findings by

[3] The Board's lack of expertise on constitutional law questions is not at odds with Broadcast Equities' rule of presumptive competence to adjudicate constitutional claims. Under established judicial review principles, the agency must be given the first opportunity to decide all issues material to its decision, even those where the courts obviously have greater expertise.

the Board in relation to petitioner's legal claims do not constitute traditional fact-finding subject to the substantial evidence test and are legally irrelevant.[4]

In the lower court, petitioner presented both the constitutional and uniformity arguments. In practical terms, however, when an otherwise uniform zone is modified to benefit a particular property, the considerations relevant to a determination of both claims are sufficiently "intertwined"[5] that it is most unlikely that a ZTA would be found constitutional but non-uniform, or uniform but not constitutional. To simplify the issues on appeal, therefore, only the constitutional claim is presented. Nothing of significance is lost by this because, as detailed below, an important factor in weighing constitutionality is whether the enactment creates arbitrary statutory distinctions – in zoning parlance, a lack of uniformity in the zone.

II. ZTA 01-08 IS UNCONSTITUTIONAL SPECIAL LEGISLATION

Article III, §33 of the Maryland Constitution (App. 1) prohibits the passage of "special laws." Montgomery County's delegated power to enact laws is limited by constitutional provisions. Montgomery County Council v. Garrott, 243 Md. 634, 222 A.2d 164, 168-70 (1966). In fact, this Court has ruled explicitly that Article III, §33, while nominally addressed to the General Assembly, "logically

[4] In the same vein, any findings by the lower court in evaluating petitioners' legal claims are subject to de novo review in this Court. E.g., People's Counsel v. Country Ridge Shopping Center, Inc., 144 Md. App. 580, 799 A.2d 425, 432 (2002).

[5] This is the term Judge Thompson used to describe the relationship between the two issues in his bench decision. (E. 80).

applies to the legislative bodies … to which the General Assembly has delegated power." Mears v. Town of Oxford, 52 Md. App. 407, 449 A.2d 1165, 1173 n. 11 (1982). Hence, Article III, §33 applies to the Council, whether sitting as the County Council or, as here, as a District Council.

A "special law" is defined as "a special law for a special case." Potomac Sand & Gravel Co. v. Governor of Maryland, 266 Md. 358, 392 A.2d 241, 251 (1972). The prohibition on special laws is to prevent enactment of laws for the purpose of providing relief in individual cases. Id., 293 A.2d at 251-52. Even if the legislation on its face is not applicable to a single case, if its practical and intended effect is to address one situation, in a statutory plan already covered by a general law, it is a "special law." See Beauchamp v. Somerset County Sanitary Commission, 256 Md. 541, 261 A.2d 461, 464-65 (1970). Judge Debelius applied this "practical and intended effect" standard in invalidating ZTA 02-04. (E.202).

Beauchamp is instructive in analyzing the constitutional significance of ZTA 01-08 under the constraints of Article III, §33. In that case, as the Council did here, the General Assembly enacted a law which on its face did not apply to one situation – it exempted all American Legion posts in Somerset County from Sanitary District assessments. 261 A.2d at 463. The Court first observed that the law was enacted despite a then-existing general statutory plan covering the same subject matter. Id. at 464. Here, of course, ZTA 01-08 was enacted in the same context: as an addition to a comprehensive, long-standing set of zoning law

requirements otherwise broadly applicable to the Property and all other properties within the C-2 zone. Assessing the factual record developed in the trial court, the Court of Appeals then looked beneath the textual surface of the law to examine its practical and intended effect:

> The facts in this case indicate that although the Sanitary Commission has county-wide authority, it has established only one sub-district known as the Princess Anne sub-district in which the lands of American Legion Post No. 94 are located and *it is the only American Legion Post* in the sub-district. There are two other incorporated American Legion Posts located elsewhere in Somerset County *beyond the territorial limits of the Princess Anne sub-district*, but these other two Posts are neither served by the Sanitary Commission nor assessed by it. It is thus seen that **the practical effect and the effect intended by the sponsors of the Act was to exempt American Legion Post No. 94 from any assessment or charge by the Sanitary Commission. The Act thus, in effect, applies to one taxpayer only and to the lands of that one taxpayer.** In our opinion, it is a "special" act which is unconstitutional under the provisions of Article III, Section 33 of the Maryland Constitution.

261 A.2d at 464-65 (italics in original; other emphasis added).

To properly assess the intended effect of ZTA 01-08, therefore, Beauchamp teaches that this question is not resolved with a superficial inspection of the language of the enactment. Thus, ZTA 01-08 is not immunized from scrutiny by the fact that a special purpose is masked by neutral-sounding criteria that could potentially apply elsewhere. While far from clear, Judge Thompson's bench ruling appears to embrace the erroneous notion that superficially neutral criteria are all that is necessary to avoid judicial condemnation, so long as the enactment

has some prospect for future applicability to other properties. (E.79). But this is far too lenient a standard, both under Beauchamp and post-Beauchamp Court of Appeals caselaw. To resolve special legislation claims, a beneath-the-surface analysis is required.

In Cities Service Co. v. Governor, 290 Md. 533, 431 A.2d 663 (1981), the Court discussed the purposes that underline Article III, §33 and detailed a number of factors to be weighed, in a non-mechanical fashion, to assess an enactment for constitutionality. 431 A.2d at 671-73.[6] The Court began by noting that one of §33's "most important" purposes "is to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others," and to prevent special legislation that grants "special privileges to special interests … in conflict with previously enacted general legislation covering the same subject matter." Id. at 672. Five factors were identified as relevant, with the Court making clear that "no one [factor] is conclusive in all cases." 431 A.2d at 672. As detailed below, these factors point to the same conclusion as Judge Debelius reached for ZTA 02-04: that ZTA 01-08 is unconstitutional special legislation. Neither the Board nor the lower court assessed ZTA 01-08 under the Cities Service multiple-factor test.

1. Underlying Purpose of the Legislation

The lead factor in Cities Service is expressed as follows:

[6] The mode of analysis set forth in Cities Service was expressly reaffirmed in later cases , including Maryland v. Good Samaritan Hosp., 299 Md. 310, 329-30, 473 A.2d 892, 901-02 (1984); and State v. Burning Tree Club, Inc., 315 Md. 254, 273, 554 A.2d 366, 375-77 (1989).

> [T]he Court has looked to the underlying purpose of the legislation in question to determine whether it was actually intended to benefit or burden a particular member or members of a class instead of an entire class.

431 A.2d at 672 (citing Beauchamp). The legislative record is clear: the intended beneficiary of ZTA 01-08 was not the entire class of C-2 zoned properties in the County, but only the FRIT Property. Indeed, when the Council discovered after enactment of ZTA 01-08 that it could potentially apply elsewhere, it acted with dispatch, before any plans utilizing ZTA 01-08 were filed for review and approval, to "correct" the situation.[7] This culminated

> in an even more specifically refined zoning text amendment for a mixed use project, ZTA 02-04, … tailored to fit the Federal Realty project and deliberately narrowed and restricted to insure that no other property would qualify within the ambit of the amendment.

Mem. Opinion 2 (Debelius, J.) (E.201). This finding is a definitive judgment that the Council's intention all along was to benefit only the FRIT Property, before, during and after enactment of ZTA 01-08.

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[7] Below it was argued that a reviewing court may not look at the Council's actions subsequent to enactment of ZTA 01-08 to determine whether its purpose was to facilitate a particular mode of development for the FRIT property. This may be the rule when the issue before the Court is construction of the terms of a statute with reference to its legislative history. Here, however, the task is very different: to examine the relevant facts to determine whether there exists an unconstitutional legislative purpose and result. Such evidence will rarely, if ever, emerge from the official, documented legislative history. Rather, facts and circumstances external to the official justification for an enactment may very well be strongly probative of why a bill was proposed and enacted. There is no logical reason for a rule that such evidence must precede enactment.

2. Substance Over Form in Naming Beneficiaries

The second Cities Service factor is thusly expressed:

> Whether particular individuals or entities are identified in the statute has been a consideration. … However, statutory provisions which did not name particular individuals or entities have been held to be prohibited special laws, whereas enactments naming specific entities have been held not to be special laws. The substance and "practical effect" of an enactment is to be considered and not merely its form.

431 A.2d at 672-73 (citations omitted).

This factor makes clear, as Judge Debelius implicitly understood in invalidating ZTA 02-04, that a law does not need to name the benefited party to be a special law. Cities Service cites Beauchamp as an example of a case where the invalid enactment did not name the intended beneficiary. Id. What the record shows, as detailed above, is that ZTA 01-08 was carefully crafted and customized by FRIT, working in close cooperation with the Council and its staff, to provide a particular C-2 zoned property in the County with different development standards that would enable the FRIT project to move forward without running afoul of the traditional C-2 zone development standards. As explained above, it took injection of four highly particular criteria into the C-2 zone via ZTA 01-08 to get to this result:

- within 1500 feet of a CBD Metro stop
- at least 300 feet from single-family residential development
- mixed-use with at least 60% residential component

- commercial ground floor (with minor exceptions)

(App. 4-5). In the words of the Court of Appeals in Beauchamp, supra, 261 A.2d at 465, the factual record in this case demonstrates that "the effect intended by the sponsors of the Act was to exempt" one property from specific development constraints generally applicable to every other property in the C-2 zone. Plainly, the Council did not act to make adjustments of a general nature to properties wherever located in the C-2 zone. Because its focus was exclusively on the FRIT Property, there is nothing in the legislative record leading to adoption of ZTA 01-08 addressing whether the amendments to the C-2 zone were a good or a bad idea for the C-2 zone generally, or for any C-2 property other than that owned by FRIT.

The obligation to look at substance over form in assessing legislative purpose also highlights the legal error in the Board's (and the lower court's) assessment of ZTA 01-08. As detailed above, both decided there was no special legislation problem because FRIT identified other, already fully developed C-2 zoned properties that could be redeveloped under the ZTA 01-08 development criteria. (E.102-03, 155, 185-89, 288, 290). At most, the record reflects that a few other properties (for which no redevelopment proposal has been shown to be contemplated, let alone practical and feasible) might in theory someday derive future benefit from ZTA 01-08. This happenstance, however, does not dispositively validate the enactment. Such reasoning, effectively concurred in by the lower court, simply cannot be squared with the ruling in Beauchamp. Beauchamp invalidated a law exempting American Legion posts in Somerset

County from Sanitary District assessments. There was one intended beneficiary, but additional American Legion posts in the part of Somerset County subject to Sanitary Commission charges could have been established, or equally easily, a sewage fee area could have been established in those areas of the County where two other American Legion Posts already were established. Either way, the statute had readily foreseeable future applicability to others and thus would, under the Board's rationale, be constitutional.

In the lower court, respondents defended the Board's rule that any possible future applicability of a legislative enactment to someone other than the intended beneficiary obviates any constitutional problem. This rule is a misapplication of Cities Service and its progeny, which establish that no one factor is to be mechanically applied as dispositive. Moreover, the situation here must be contrasted with cases where the party challenging the law is the apparent object of the **burden** of the law. In such situations, the enactments may well have been prompted by the legislature's adverse reaction to the actions of the person who thereafter challenges the enactment as singling him out. The courts nevertheless hold that such enactments may constitute reasonable legislative judgments that, in the future, **all** should be prohibited from engaging in similar conduct.[8] These

[8] E.g., State v. Burning Tree Club, Inc., 315 Md. 254, 554 A.2d 366, 375-77 (1989) (statute denying favorable property tax treatment to country clubs practicing sex discrimination); Mears v. Town of Oxford, supra, 449 A.2d at 1168 (statute enacting a Town-wide moratorium on marina expansion); Potomac Sand & Gravel Co. v. Governor, supra, 293 A.2d at 251-52 (statute prohibiting dredging in county tidal waters and marshlands).

cases stand for the principle that corrective legislation grounded in public policy will not be thwarted by the invocation of the "special legislation" label by those whose actions prompted awareness of the need for a remedial enactment in the first place. These decisions are of minimal relevance here, where the Court must assess the claim of special legislation coming not from the person whose actions prompted a legislative **curtailment**, but rather from a person seeking constitutional protection against special legislative **benefit**.

Reyes v. Prince Georges County, 281 Md. 279, 380 A.2d 12 (1977) also relied upon by respondents, does not support the rule espoused by the Board. In Reyes, a county law relating to revenue bond financing of industrial buildings was expanded to include sports arenas, and was challenged as special legislation on the ground that there was only one such facility in the county. 380 A.2d at 25-27. The Court found the law to resemble "a public law more than a special law," because it was not limited to a single facility "by name **or in any equivalent manner**," and gave the county the option "to acquire or finance other sports facilities," and to do so for such "sport arenas or sports stadia no matter where located in the county." Id. at 27 (emphasis added). Here, in contrast, there is unrefuted evidence of a clear intention to limit the legislation to a single location in Montgomery County, not by name, but in an "equivalent manner." Rather than provide the same option for like development projects "no matter where located" in the C-2 zone, the Council at the outset sharply circumscribed where in the C-2 zone the option could be utilized, and then promptly amended ZTA 01-08 with

ZTA 02-04 to ensure that even that limited possibility was foreclosed. Put another way, in Reyes the county displayed the intent to act expansively; in this case, the Council displayed the intent to act as narrowly as possible, to benefit one property.

3. Favorable Treatment and Discrimination

The third Cities Service factor focuses on legislative favoritism:

> If a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation, this would support a conclusion that the Act constitutes a prohibited special law.

431 A.2d at 673 (citations omitted).

This factor also weighs against ZTA 01-08. The motivation for ZTA 01-08 was the FRIT project, and it was FRIT that "sought and received special advantages from the Legislature." Id. These advantages were denied to almost all other properties in the C-2 zone. While a few other properties were swept in as theoretical future beneficiaries, this does not diminish the favoritism and discriminatory impact of ZTA 01-08.

In the lower court, it was argued that because ZTA 01-08 was broadened slightly in its applicability between the time of introduction and the time of enactment, its purpose could not have been to benefit a single property. As introduced, ZTA 01-08 included, in addition to the highly particular criteria enumerated above, a requirement that the property be adjacent to a public parking garage. The Planning Board staff considered this unduly restrictive (E.336), but

the Board did not recommend elimination of this requirement. (E.222-23). The public parking garage adjacency requirement was nonetheless deleted without explanation when the draft bill was submitted to the Council for final action, and the change was accepted by the Council without comment when ZTA 01-08 was enacted. Seven months later, when ZTA 02-04 was enacted to narrow the geographic scope of ZTA 01-08, the requirement for adjacency to a public parking garage was put back into the law to narrow its geographic scope. (E.201). This sequence of events makes clear that the Council never had in mind that its amendment to the C-2 zone was for the benefit of multiple properties; it was interested solely in facilitating the development of one project. As detailed above, on the day of enactment of ZTA 01-08, the Council's focus was exclusively on the FRIT Property.

4. Inadequate General Law Serving the Public Interest

The fourth Cities Service factor examines whether ZTA 01-08 was needed to serve the public interest due to inadequacies in the general law:

> The public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest, are pertinent considerations.

431 A.2d at 673 (citations omitted).

As has already been detailed, ZTA 01-08 is not based on any legislative finding or concern about inadequacies in the general zoning law or the C-2 zone in particular. Moreover, the Bethesda CBD Sector Plan disposes of any notion that

the C-2 zone needed adjustment to fulfill land use goals for that area of the County. The Sector Plan was described at the time of its completion in 1994 by the then Chairman of the Planning Board as having received a merit award from the American Planning Association and as one that "effectively…address[es] major issues such as location and density of new commercial and residential development," in a way "that will guide Bethesda development for the next twenty years." Moreover, from the time of approval of the Sector Plan in 1994 to the present, the County Zoning Ordinance has included a zone, the TS-M (Transit Station – Mixed) Zone, which allows development according to the very standards FRIT obtained for the Property through amendment of the C-2 zone. §59-C-8. (App. 24-27). In short, ZTA 01-08 was not needed to advance the enactment's stated public interest purpose; the award-winning Sector Plan and existing laws were fully capable of doing that.

5. Arbitrary Statutory Distinctions

The fifth Cities Service factor looks at the inherent reasonableness of the distinctions drawn by the challenged legislation:

> [I]n deciding whether an enactment applies to an entire class, or applies only to certain members of the class and therefore is prohibited by §33, the Court has reviewed the legislatively drawn distinctions to determine whether they are arbitrary and without any reasonable basis.

431 A.2d at 673 (citations omitted). As detailed previously, ZTA 01-08 severely limited the places in the C-2 zone where it would apply. To accomplish this

without naming the FRIT property in the bill, qualifying geographic criteria were enacted for C-2 zoned properties. As detailed above, a set of very specialized geographic criteria were created for increasing the building height, FAR and permitted uses for applicability only in a very specific limited situation with the C-2 zone:

- within 1500 feet of a CBD Metro stop **and**
- at least 300 feet from residential development.

(App. 4-5). But as has also been detailed, while these changes were prompted by FRIT's desire to develop its Property in a certain manner, and enacted for no other reason, the wording of ZTA 01-08 was such that, in theory, it would allow similar increased building height and FAR in another place -- C-2 zoned property in the Wheaton CBD where C-2 land is currently occupied by a regional shopping center and office complex. (E.335-36). But as Judge Debelius found, the Council enacted ZTA 02-04 to impose additional requirements to ensure (1) that any Wheaton CBD properties zoned C-2 that could have benefited under ZTA 01-08 would no longer be eligible for any increased height or FAR; and (2) that only the FRIT Property would be eligible for the increased height and FAR allowances. This was no accident. Upon examining the videotape of the Council session, Judge Debelius found that the Council voted for ZTA 02-04 with the purpose of intent of ensuring that no other property in the County would benefit from the FRIT-inspired changes to the C-2 zone. (E.201). These actions by the Council plainly reveal that beforehand, in enacting ZTA 01-08, it never had any interest in

a zone-wide modification of the C-2 zone; it was interested purely and simply in accommodating the FRIT development proposal at one location within the zone.

This was accomplished by the Council without consideration of the arbitrariness of the statutory distinctions being created. As the transcript of the Council discussion on enactment of ZTA 01-08 reveals, the Council's focus was not on crafting meaningful legislative distinctions for the C-2 zone. There is nothing in the Council session leading to enactment of ZTA 01-08 that amounts to a discussion of the utility or reasonableness of the criteria, so as to distinguish among C-2 zoned properties, either individually or collectively, from the point of view of any land use goal or policy. There is no mention, for example, of the appropriateness of the geographic criteria being prescribed to qualify for development under ZTA 01-08. (E.224-33).

The stated purpose of ZTA 01-08 is "to promote the effective use of transit facilities in Central Business Districts." The obvious, straightforward way to do this legislatively is to create a new zone (or an overlay zone) for properties in proximity to Metro stations, and, in a comprehensive rezoning, decide which particular properties should be so rezoned. Instead, ZTA 01-08 arbitrarily specifies that only C-2 zoned properties within 1500' of a Metro station are capable of promoting public transit use with development at the more liberal standards specified in ZTA 01-08. Yet there are C-2 properties just **outside** the 1500' radius that sit immediately adjacent to public transit (bus) routes and, as

such, are as good if not even better candidates for fulfilling the ostensible statutory purpose than many qualifying properties **inside** the 1500' radius.

Petitioner, a Bethesda resident, gave highly specific unrebutted testimony documenting the nature of the arbitrariness of ZTA 01-08, as applied to Bethesda properties in the C-2 zone:

> [I]n the Bethesda sector plan area there are two C-2 properties on Arlington Road: The Rio Grande Restaurant site on lot 24-F and parcel 4 immediately to its south – and I've attached a map, it is the last attachment in your packet – which are located just beyond the 1500-foot distance. However, a resident from a housing unit on either of these two sites by boarding the free Bethesda 8 Express bus at the nearest stop could arrive at the CBD Metro station in less time than a resident of the subject property walking the 1500 feet to the station. The inclusion of these two parcels within the ambit of ZTA 01-08 would just as effectively … meet its stated purpose: To promote the effective use of CBD transit facilities by encouraging housing with commercial uses in close proximity to those Metro stations, while not increasing the number of vehicles in the area. And I would note that the trip on the Bethesda 8 express that I took this morning, in morning rush hour from the excluded parcels on that map to the Metro station, took less than 7 minutes, including the walk to the bus stop. But a pedestrian walking 1500 feet from the subject property at a rate of 2.5 feet per second – which is the rate established on page 13 of the LATR guidelines used for timing crossing cycles at signaled intersections – will take a minimum of ten minutes to reach that station.

(E.267-68) (The referenced map, also undisputed, is at E.235).

The Planning Board nonetheless concluded that the 1500 foot limit was a reasonable distance restriction tied to proximity to a Metro station. (E.103) But

neither the Board nor the lower court addressed petitioner's undisputed evidence that the stated goal of more effective use of CBD transit facilities could be more fully achieved without selectively favoring some properties in the C-2 zone and disadvantaging others that were also in proximity to a Metro station. ZTA 01-08 has this effect not because of a minor imperfection in statutory line drawing; rather uniform, nondiscriminatory amendment of the C-2 zone was simply nowhere on the agenda when ZTA 01-08 was enacted. Quite the opposite: the goal was to craft development standards with only one C-2 zoned property in the County targeted to benefit from them, without regard to whether an arbitrarily small number of other C-2 zoned properties might have future prospects of such benefit.

In conclusion, under applicable constitutional standards, ZTA 01-08 must be deemed unconstitutional special interest legislation on much the same basis as ZTA 02-04 was declared unconstitutional. See Prince George's County v. Board of Supervisors of Elections, 337 Md. 496, 509, 654 A.2d 1303, 1309 (1994) (when amendment to original law is held unconstitutional, those portions of the original law that were unconstitutional for the same reason must also be struck down.)

CONCLUSION

For the foregoing reasons, the Court should conclude that the Board's decisions approving the Preliminary Plan and the Site Plan in these combined appeals were based on an unconstitutional and invalid statute, i.e., ZTA 01-08, and therefore cannot stand. The Board approvals should be reversed and vacated.

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CERTIFICATE OF SERVICE

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