ZONING AMENDMENTS: THE EFFECT OF MARYLAND'S CHANGE OR MISTAKE RULE ON THE FAIRLY DEBATABLE STANDARD—WHO'S GOT THE PRESUMPTIONS?

The Maryland statute enabling local authorities to pass zoning ordinances includes a change or mistake rule that restricts amending power to cases in which there has been a "substantial change in the character of the neighborhood" or a "mistake in the existing zoning."[1] In reviewing amendment grants, the Maryland Court of Appeals[2] has not been consistent in resolving the apparent conflict between the presumption said to arise from the change or mistake rule and the presumption of validity that normally attaches to legislative findings under the "fairly debatable" standard.[3] *Pattey v. Board of County*

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1. MD. ANN. CODE art. 66B, § 4.05(a) (1970):

(a) *Generally; findings for reclassification.*—Such regulations, restrictions, and boundaries may from time to time be amended . . . . Where the purpose and effect of the proposed amendment is to change the zoning classification, the local legislative body shall make findings of fact in each specific case including, but not limited to, the following matters: population change, availability of public facilities, present and future transportation patterns, compatability with existing and proposed development for the area, the recommendation of the planning commission, and the relationship of such proposed amendment to the jurisdiction's plan; *and may grant the amendment based upon a finding that there was a substantial change in the character of the neighborhood where the property is located or that there was a mistake in the existing zoning classification.*

(emphasis added).

2. This is the highest court in Maryland. MD. CTS. & JUD. PRO. CODE ANN. § 1-301 (1974).

3. *See* MacDonald v. Board of County Comm'rs, 238 Md. 549, 557, 210 A.2d 325, 329 (1965) (Barnes, J., dissenting); 1 R. ANDERSON, THE AMERICAN LAW OF ZONING §§ 2.15-.16, 4.29 (1966) [hereinafter cited as ANDERSON]; 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.93, at 254-60 (3d ed. 1965); 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 21-1 to -41, 27-14 to -21 (3d ed. 1974), 21-36 to -41, 27-14 to -20 (Supp. 1973) [hereinafter cited as RATHKOPF]. *See also* D. MANDELKER, THE ZONING DILEMMA 86-105 (1971) [hereinafter cited as MANDELKER]; Arnebergh, *Zoning: When Should It—And When May It—Be Changed?*, in INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN PROCEEDINGS 89 (1971); Goldman, *Zoning Change: Flexibility vs. Stability*, 26 MD. L. REV. 48 (1966); Liebmann, *Maryland Zoning—The Court and Its Critics*, 27 MD. L. REV. 39 (1967); 13 MD. L. REV. 242 (1953).

Commissioners[4] illustrates this conflict and one approach to its resolution.

In 1972 the Chincoteague Bay Limited Partnership petitioned the County Commissioners to rezone 1,870 acres located on Chincoteague Bay, directly across from Assateague Island National Seashore Park.[5] The applicant sought a reclassification of agricultural and conservation zones to high density residential, hotel-apartment, and business zones.[6] After the County Planning and Zoning Commission recommended rezoning, the County Commissioners unanimously passed an amending ordinance.[7] The Commissioners found that the requirements of the Maryland enabling statute had been met by a showing of "substantial change" in the neighborhood. The finding was based upon the availability of a new sewerage system, the change of Assateague Island to a National Seashore Park, nearby road improvements, and other new developments in the county, including a recent reclassification of 100 acres.[8] Residents of Worcester County challenged the rezoning[9] and appealed the circuit court decision affirming the amendment.[10] The

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4. 271 Md. 352, 317 A.2d 142 (1974).

5. *Id.* at 354, 317 A.2d at 143-44.

6. *Id.* at 355, 317 A.2d at 144. Land sought to be rezoned was being held by the applicant under purchase contracts and was zoned mostly as an A-1 (agricultural) district, with the portion closest to Chincoteague Bay being zoned as a C-1 (conservation) district. *Id.* at 354, 317 A.2d at 144.

7. *Id.* at 354, 317 A.2d at 145. The application was recommended for approval subject to certain enunciated conditions which were accepted by the applicant. *Id.*

8. *Id.* at 357-58, 317 A.2d at 145.

9. While protesting adjacent landowners have no "vested right" in the original zoning ordinance, they are entitled to rely on the enforcement of the change or mistake rule. *Compare* Chayt v. Maryland Jockey Club, 179 Md. 390, 395, 18 A.2d 856, 858-59 (1941), *with* Wakefield v. Kraft, 202 Md. 136, 143-44, 96 A.2d 27, 30 (1953), *and* Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 171, 188, 60 A.2d 743, 751 (1948). *See generally* RATHKOPF, *supra* note 3, at 27-12 to -13 (3d ed. 1974); Gitelman, *The Role of the Neighbors in Zoning Cases*, 28 ARK. L. REV. 221 (1975).

10. 271 Md. at 358, 317 A.2d at 146. The circuit court held that sufficient evidence of change existed to sustain the application, relying primarily on the availability of the new sewer system and the reclassification of Assateague Island to a National Seashore Park. *Id.* The circuit court also found sufficient evidence of mistake to justify the rezoning. The evidence of mistake initially surfaced in this court, contrary to the general rule that the reviewing court, on appeal from a zoning decision, "may only consider . . . evidence which is on the record." *Id.* at 360, 317 A.2d at 146. Nevertheless, the *Pattey* court ruled on the mistake issue and reversed the lower court on the merits. *Id.* at 361, 317 A.2d at 147. For discussion of "mistake in existing zoning" see ANDERSON, *supra* note 3, § 4.29.

court of appeals reversed, holding that the evidence before the Commissioners was insufficient to make the question of substantial change fairly debatable.[11]

Restrictive zoning classifications have been upheld under the police power providing the enactment has "substantial relation to the health, safety, morals, or general welfare [of the community]."[12] When the issue of validity is fairly debatable, the courts, adhering to the separation of powers doctrine, have refused to substitute their judgment for that of the local zoning authority.[13] "Fairly debatable" means that "there is room for reasonable debate as to whether the facts justify . . . the need for its enactment."[14] The effect of this standard on an initial zoning classification places upon challengers the burdens of producing evidence and persuading the court that the local authority's action was arbitrary, capricious or discriminatory.[15]

Courts have also employed the fairly debatable standard in reviewing comprehensive rezoning enactments,[16] since the power to amend is considered correlative to the power to enact the initial regulations.[17]

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11. 271 Md. at 366, 317 A.2d at 150.

12. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (zoning valid under police powers).

13. *Id.* at 388; *see, e.g.*, Fuller v. County Comm'rs, 214 Md. 168, 172-73, 133 A.2d 397, 399 (1957). *See generally* ANDERSON, *supra* note 3, § 2.10; MCQUILLIN, *supra* note 3, § 25.93.

14. Wakefield v. Kraft, 202 Md. 136, 142, 96 A.2d 27, 29 (1953). *See generally* ANDERSON, *supra* note 3, § 2.16; 7 URBAN L. ANN. 267 (1974).

15. *See, e.g.*, Wakefield v. Kraft, 202 Md. 136, 141, 96 A.2d 27, 29 (1953) (court's function in review of rezoning restricted by a presumption in favor of its validity).

16. Comprehensive rezoning refers to a reclassification of an entire municipality or a substantial part thereof. It is carried out under the authority of the municipal legislature, rather than by the zoning commission, and is not subject to the requirements of the change or mistake rule. *See* Scull v. Coleman, 251 Md. 6, 246 A.2d 223 (1968); Von Lusch v. Board of County Comm'rs, 24 Md. App. 383, 330 A.2d 738 (1975); MD. ANN. CODE art. 25A, § 5(X) (1973). *See generally* Carson, *Reclassification, Variances, and Special Exceptions in Maryland*, 21 MD. L. REV. 306, 308 (1961).

17. *See, e.g.*, Baltimore County v. Missouri Realty, Inc., 219 Md. 155, 160-61, 148 A.2d 424, 427-28 (1959); Missouri Realty, Inc. v. Ramer, 216 Md. 442, 447, 140 A.2d 655, 657 (1958). *See generally* ANDERSON, *supra* note 3, § 4.25; RATHKOPF, *supra* note 3, at 27-1 to -13 (3d ed. 1974); Bosselman, *Downzoning*, 32 URBAN LAND 3, 4 (1973).

The power to amend may be delegated to agencies of local government. Baltimore County v. Missouri Realty, Inc., 219 Md. 155, 162, 148 A.2d 424, 428 (1959).

Amendments that reclassify a single parcel of land[18] have been subjected to a more critical standard of review in some jurisdictions.[19] The more stringent standards, based on a belief in the need for stable land use patterns,[20] frequently require that piecemeal alterations be supported by a showing of public need or benefit.[21]

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18. Amendments in these situations are often called "piecemeal rezoning." Courts seem to be particularly suspect of "spot zoning," which is a type of piecemeal rezoning that "puts a small area in a zone different from that of the surrounding area . . . . Such zoning [is] invalid . . . . [i]f it is an arbitrary and unreasonable devotion of the small area to a use inconsistent with the uses to which the rest of the district is restricted and made for the sole benefit of the private interests of the owner." Huff v. Board of Zoning Appeals, 214 Md. 48, 57, 133 A.2d 83, 88 (1957); *see, e.g.*, Minor v. Shifflett, 252 Md. 158, 166, 249 A.2d 159, 164, *cert. denied*, 396 U.S. 844 (1969). *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 93-96 (1971).

When the zoning authorities amend the original zoning in a piecemeal fashion, some debate has arisen over whether this is a legislative or adjudicatory activity. The majority of cases hold it to be legislative. *See, e.g.*, Offutt v. Board of Zoning Appeals, 204 Md. 551, 562, 105 A.2d 219, 224 (1954). *But cf.* Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966); Woodlawn Area Citizens Ass'n v. Board of County Comm'rs, 241 Md. 187, 216 A.2d 149 (1966). In these latter cases the court of appeals has distinguished the resulting amendment, which it labels legislative, from the fact-finding process that leads to its grant, which it labels administrative or quasi-judicial. *See generally* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972); 24 CATHOLIC U.L. REV. 294, 309-12 (1975).

19. Such standards have been interposed by prescribing methods for challenge, obtaining other property owners' support for the challenge, or limiting amendments to be authorized under certain circumstances. *See* ANDERSON, *supra* note 3, § 4.25. The limitations imposed when the zoning authorities seek to reclassify property to a *more* restrictive use operate to protect the owner from an arbitrary confiscatory taking. *See* Kracke v. Weinberg, 197 Md. 339, 79 A.2d 387 (1951); *cf.* County Council v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975). When original conditions are relaxed by the amendment, these limitations are meant to protect neighboring landowners. "It is at least arguable, that if it is presumed that conditions required property originally to be restricted, . . . those same conditions existed up to the time of the amendment . . . . [so that] those who seek to sustain the validity of the amendatory ordinance in such case, would be required to show that the former condition no longer prevailed by *introducing evidence* that there had been a change in the character of the property involved . . . ." RATHKOPF, *supra* note 3, at 21-35 to -36 (3d ed. 1974) (emphasis added). *But see* Board of Zoning Appeals v. Bailey, 216 Md. 536, 141 A.2d 502 (1958); 13 MD. L. REV. 242, 247-50 (1953). *See generally* 24 CATHOLIC U.L. REV. 294 (1975).

20. *See, e.g.*, Ellicott v. Mayor & City Council, 180 Md. 176, 181, 23 A.2d 649, 651 (1942): "The purpose of the zoning law is, of course, to devote general areas or districts to selected uses. 'The whole value of zoning lies in the establishment of more or less permanent districts, well planned and arranged.' Rehfeld v. City and County of San Francisco, 218 Cal. 83, 85, 21 P.2d 419, 420."

21. *See, e.g.*, Offutt v. Board of Zoning Appeals, 204 Md. 551, 105 A.2d 219 (1954). *Compare* Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953), *with*

Since 1951 the Maryland Court of Appeals has used the change or mistake rule[22] as a mechanical public benefit formula to determine the validity of piecemeal rezonings.[23] The court has stated that the rule creates a presumption in favor of the validity of the original zoning.[24] To overcome this presumption, an applicant must produce sufficient evidence of change or mistake.[25]

When the local authority has denied rezoning, the fairly debatable standard is used to define the applicant's burden of persuasion on appeal.[26] In this procedural setting the use of the standard is consistent with the presumed validity of the original zoning. On appeal,

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American Oil Co. v. Miller, 204 Md. 32, 102 A.2d 727 (1954). *See generally* RATHKOPF, *supra* note 3, at 27-12 to -13 & n.18 (3d ed. 1974).

22. Kracke v. Weinberg, 197 Md. 339, 347, 79 A.2d 387, 391 (1951). For a history of the Maryland change or mistake rule see MacDonald v. Board of County Comm'rs, 238 Md. 549, 576-77, 210 A.2d 325, 340-41 (1965) (Barnes, J., dissenting); Goldman, *supra* note 3, at 49. For a discussion of the change or mistake approach of other jurisdictions see 24 CATHOLIC U.L. REV. 294 (1975).

23. The factors of change or mistake have been called:

> talismanic phrases now applied with Draconian severity to rezoning efforts of the local legislative bodies, with unfortunate results.
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> [T]he "mistake-change in physical condition" rule should not be an *exclusive* test. While, of course, an amendment is often predicated upon the recognition of changing conditions or of a mistake in original zoning . . . , such factors, while relevant, are not controlling, and are among many circumstances for the Council to weigh and evaluate. Similarly, reviewing courts should consider the presence or absence of such factors merely as *some evidence* tending to show whether or not the action of the Council, in granting or denying a proposed reclassification, was arbitrary, unreasonable, or capricious. The majority has now made the rule the exclusive test . . . .

MacDonald v. Board of County Comm'rs, 238 Md. 549, 577, 581, 210 A.2d 325, 341, 343 (1965) (Barnes, J., dissenting). *See also* ANDERSON, *supra* note 3, § 4.29; RATHKOPF, *supra* note 3, at 27-14 to -23 (3d ed. 1974), 27-14 to -22 (Supp. 1973).

24. Stratakis v. Beauchamp, 268 Md. 643, 652, 304 A.2d 244, 249 (1973).

25. *See, e.g.*, Wells v. Pierpont, 253 Md. 554, 253 A.2d 749 (1969). Even when the court has found that "[i]ndividually, some of these considerations [of change or mistake] would not be controlling; taken together, their *cumulative effect* is very strong . . . ." Mayor & Council v. Cotler, 230 Md. 335, 339, 187 A.2d 94, 96 (1963) (emphasis added). *See generally* MANDELKER, *supra* note 3, at 92-96 (analysis of results regarding planning considerations).

26. *See, e.g.*, Valenzia v. Zoning Bd., 270 Md. 478, 312 A.2d 277 (1973); Mayor & Council v. Henley, 268 Md. 469, 302 A.2d 45 (1973); Cabin John, Ltd. v. Montgomery County Council, 259 Md. 661, 271 A.2d 174 (1970); Agneslane, Inc. v. Lucas, 247 Md. 612, 233 A.2d 757 (1967); Park Constr. Corp. v. Board of County Comm'rs, 245 Md. 597, 227 A.2d 15 (1967); Board of County Comm'rs v. Farr, 242 Md. 315, 218 A.2d 923 (1966); Dobry v. Board of County Comm'rs, 241 Md. 717, 216 A.2d 746 (1966); Pallace v. Inter City Land Co., 239 Md. 549, 212 A.2d 262 (1965); Board of County Comm'rs v.

both the fairly debatable standard and the presumption of validity operate in favor of the local authority's action, since its refusal to grant an amendment logically implies an affirmance of the existing classifications. Applicants are rarely able to overcome the fairly debatable standard in this situation.[27] When neighboring landowners contest a rezoning on appeal, however, the burden of persuasion dictated by the fairly debatable standard is in conflict with the presumed validity of the original zoning. Judicial deference to the local authority's judgment on the reclassification under the fairly debatable standard would theoretically place the burden of persuasion on those challenging the grant.[28] On its face, this is inconsistent with the presumed validity of the original zoning (derived from the change

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Meltzer, 239 Md. 144, 210 A.2d 505 (1965); Kaslow v. Mayor & Council, 236 Md. 159, 202 A.2d 638 (1964); Reese v. Mandel, 224 Md. 121, 167 A.2d 111 (1961); Hewitt v. County Comm'rs, 220 Md. 48, 151 A.2d 144 (1959); Iverson v. Zoning Bd., 22 Md. App. 265, 322 A.2d 569 (1974). *See also* note 28 *infra.*

27. *See* cases cited note 26 *supra. See also* Montgomery County Council v. Scrimgeour, 211 Md. 306, 312, 127 A.2d 528, 531 (1956), *quoting* Mayor & Council v. Biermann, 187 Md. 514, 523, 50 A.2d 804, 808 (1947): "[T]he property owner has the heavy burden of overcoming the presumption of constitutionality of legislative action, even if the legislative body acted without evidence at all." *But see* Charles J. Cirelli & Sons, Inc. v. Harford County Council, 26 Md. App. 491, 338 A.2d 400 (1975). *See also* Board of County Comm'rs v. Oak Hill Farms, Inc., 232 Md. 274, 192 A.2d 761 (1963), *discussed in* Cohen, *Some Aspects of Maryland Administrative Law*, 24 MD. L. REV. 1, 40-42 (1964) (special local review provision for Prince George's County).

28. In the absence of the change or mistake rule, the operation of the fairly debatable rule logically should produce "a marked difference between the changes which will justify a reclassification by the zoning authorities and those which impel one." Board County Comm'rs v. Meltzer, 239 Md. 144, 155, 210 A.2d 505, 511 (1965). The reason for this is that

> [e]ven if there were facts which would have justified the Council in rezoning the property, this would not of itself prove the denial of rezoning illegal. There is still the area of debatability, and one who attacks the refusal of rezoning must meet the heavy burden of proving that the action of the legislative body in refusing it was arbitrary, capricious or illegal.

County Council v. Gendleman, 227 Md. 491, 498, 177 A.2d 687, 690 (1962).

In the majority of cases the court of appeals fails to differentiate between cases in which the local authority denies the amendment and those in which it is granted. At least one author has concluded that "[o]n balance . . . a lack of clarity in the decisions leads us to treat both situations as the same." MANDELKER, *supra* note 3, at 89. Nevertheless, when the court of appeals affirms a denial, it has often stated or implied that cases of rezoning refusals are to be treated differently from cases in which rezoning has been granted. Templeton v. County Council, 21 Md. App. 636, 321 A.2d 778 (1974), held: "It is only when the denial of the requested rezoning conflicts with constitutional provisions that the

or mistake rule), which in theory would place the burden on the applicant to justify the amendment on appeal.[29] Three general approaches to the resolution of this apparent inconsistency can be

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courts [may] interfere with that denial." *Id.* at 643, 321 A.2d at 782. *See* Messenger v. Board of County Comm'rs, 259 Md. 693, 704, 271 A.2d 166, 172 (1970), and cases cited therein. The import of such statements, as a basis to distinguish between those situations in which rezoning is initially granted and those initially denied, is unclear. The use of a different test when reclassification has been granted may refer to the imposition of a presumption of validity of the original zoning limiting the operation of the fairly debatable rule. On the other hand, the difference referred to could be the "area of debatability" created by an autonomous application of the fairly debatable rule. *See* Board of County Comm'rs v. Meltzer, 239 Md. 144, 155, 210 A.2d 505, 511 (1965). The effect of the court of appeals' acknowledgment of this distinction is stronger, vis-à-vis the fairly debatable rule, when rezoning has been granted by the local authorities. *See, e.g.*, Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973); Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966); Dill v. Jobar Corp., 242 Md. 16, 217 A.2d 564 (1966); Rohde v. County Bd. of Appeals, 234 Md. 259, 199 A.2d 216 (1964); Muhly v. County Council, 218 Md. 543, 147 A.2d 735 (1959). The *Hyson* court stated that "[e]vidence to *justify* the expertise of the zoning authorities in granting reclassification does not have to be so strong as evidence that would *require* rezoning." 242 Md. at 76, 217 A.2d at 591. The same conclusion is implied in *Rohde* when the court, in upholding a reclassification, distinguished two cases relied upon by appellants (neighboring property owners): "On the . . . evidence we cannot say that the action of the Board was arbitrary or unreasonable. . . . The situation here presented is the reverse of that in the *Renz* and *Reese* cases in that here the Board has approved the reclassification, but there it disapproved reclassification." 234 Md. at 268, 199 A.2d at 221.

29. Professor Rathkopf, in attempting to resolve the apparent inconsistency between legislative deference to a rezoning grant and the presumed validity of the original zoning, suggests that the court of appeals "require[s] the proponent of the change to support it by evidence [of change or mistake] as a condition precedent to the operation of the presumption of validity but such evidence having been given, it would appear that the presumption then attaches with its customary vigor." RATHKOPF, *supra* note 3, at 27-16 to -17 (3d ed. 1974).

Once an applicant has produced evidence of change and has convinced the zoning authorities that the change is, in fact, sufficient, it is unclear what degree of authority attaches to their determination on appeal. The problem arises when the court in reviewing the evidence expands its exploration beyond a search for sufficient evidence into a legal determination of what constitutes "substantial change." The court's approach to the issue of what constitutes sufficient evidence of "substantial change" is reflected by its determination of which party must bear the burden of persuasion on appeal and by the strength of the evidence required to overcome this burden.

In Habliston v. City of Salisbury, 258 Md. 350, 265 A.2d 885 (1970), the court of appeals explained its position on evidence of "substantial change," emphasizing that the party alleging a "change in the character of the neighborhood" must show "evidence of a substantial change." *Id.* at 363, 265 A.2d at

developed from an analysis of the Maryland Court of Appeals' decisions.[30]

One line of cases, characterized by *West Ridge, Inc. v. McNamara*,[31] stresses judicial deference to legislative judgments concerning the

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891; *cf.* Dustin v. Mayor & Council, 23 Md. App. 389, 328 A.2d 748 (1974), which quotes *Habliston* and adds: "We are rigidly limited in this appeal to a determination whether there is *any evidence tending to support the finding* that changes had occurred that altered the character of the neighborhood." *Id.* at 415, 328 A.2d at 764 (citations omitted). Then the court examined alleged changes in the neighborhood based on the extension of an avenue as an industrial road. Holding that no legally sufficient evidence existed to justify the rezoning, the court said "that road changes, to justify a piecemeal zoning reclassification, must destroy the *strong presumption* of the correctness of original zoning and constitute *strong evidence* that such change has affected the character of the neighborhood." *Id.* at 421, 328 A.2d at 767 (citations omitted).

30. These generalized approaches have been developed by the author and are not meant to represent Maryland zoning law as perceived by the Maryland courts. The lines of cases described herein have been distinguished based upon a functional analysis of the presumption problem. The cases have been placed within an analytical framework according to their procedural posture, the process by which the court evaluates alleged factors of change, and the result reached by the court as to the validity of the amending ordinance. Since the court, in any particular case, will have chosen citations indiscriminately from any of the three lines of cases and often from cases of rezoning denials, the court's citations have been given little regard in this analysis.

At least two criteria have been suggested as to the court of appeals' method of determining the proper standard from among those approaches. MANDELKER, *supra* note 3, at 86-105 (planning consideration); Sickels, *The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals*, 59 AM. POL. SCI. REV. 100 (1965) ("statistical" survey, concluding that result depends on judge). *But see* Liebmann, *supra* note 3 (challenging Sickels' findings).

31. 222 Md. 448, 160 A.2d 907 (1960). The *West Ridge* court upheld the reclassification of 18.5 acres from agriculture to light commercial and of six-tenths acres to heavy commercial based on "evidence of a change in conditions due to the substantial increase in population of the area, of the increasing commercialization in the vicinity, and of the general public trend towards the use of shopping centers . . . ." *Id.* at 457, 160 A.2d at 912. The court reached its holding based on the following standard of review:

> [I]n the case of piecemeal rezoning, there must be a showing of either an error in original comprehensive zoning or such a change in conditions as to warrant rezoning, [and] if either of these is shown, or if there are facts from which the legislative body could reasonably have made such a finding (*i.e.*, that the matter is at least fairly debatable), the courts may not interfere with the legislative action, and that since there is a presumption in favor of the validity of the legislative action, the burden is on those objecting to the rezoning to show the absence of error in the original zoning and the lack of any such change in conditions as would warrant the rezoning.

Id. at 454, 160 A.2d at 910.

substantiality of the alleged changes.[32] Under this approach, the change or mistake rule does not affect the court's use of the fairly debatable standard because "[o]nce property is reclassified by the Council, its action is presumed to be valid, and it is incumbent upon those who attack the same to overcome the presumption."[33] The policy that "zoning can never be completely permanent"[34] supports placing the burden of persuasion on challengers of the reclassification. This line of cases consistently upholds amendments.[35]

Wakefield v. Kraft[36] is representative of a second line of cases.[37] In *Wakefield* the court of appeals stated that the presumption of legislative validity "applies to rezoning as well as to original zoning, *though*

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32. *See* Mayor & Council v. Stone, 271 Md. 655, 319 A.2d 536 (1974); Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966); Overton v. Board of County Comm'rs, 225 Md. 212, 170 A.2d 172 (1961); West Ridge, Inc. v. McNamara, 222 Md. 448, 160 A.2d 907 (1960); Pressman v. Mayor & City Council, 222 Md. 330, 160 A.2d 379 (1960); Muhly v. County Council, 218 Md. 543, 147 A.2d 735 (1959).

33. Hyson v. Montgomery County Council, 242 Md. 55, 76, 217 A.2d 578, 591 (1966).

34. Muhly v. County Council, 218 Md. 543, 547, 147 A.2d 735, 737 (1959). Further support could be found in the neighboring landowner's lack of vested rights in the existing classifications. *See* note 9 *supra.*

35. *See* cases cited note 32 *supra.*

36. 202 Md. 136, 96 A.2d 27 (1953). The *Wakefield* court felt "abundant" facts existed before the County Commissioners that permitted them "to debate on equal terms, at least, with anyone challenging the propriety, the fairness, and the soundness of their conclusion that the zoning ordinance [applying to a road intersection] should be amended [from residential to commercial]." *Id.* at 144, 96 A.2d at 30. Those facts included (1) planning policy allowing for rezoning of road intersections for commercial use for the "accommodation and convenience of the residents of the residential district;" (2) precise location of an intersection unknown at the time of the existing ordinance enactment; (3) existence of nonconforming business uses across the street and adjacent to the subject parcel; (4) new roads causing increased traffic from 300% to 500%; (5) Maryland's building of an armory on part of the original Wakefield property that "increase[d] noise, confusion and dirt about the intersection;" and (6) a definite need for a neighborhood shopping center (although rezoning sought to build an automobile showroom and garage). *Id.* at 145-47, 96 A.2d at 30-32.

37. *See* Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 202 A.2d 612 (1964); County Comm'rs v. Merryman, 222 Md. 314, 159 A.2d 854 (1960); City of Baltimore v. NAACP, 221 Md. 329, 157 A.2d 433 (1960); Mettee v. County Comm'rs, 212 Md. 357, 129 A.2d 136 (1957); Eckes v. Board of Zoning Appeals, 209 Md. 432, 121 A.2d 249 (1956); American Oil Co. v. Miller, 204 Md. 32, 102 A.2d 727 (1954); Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953).

not with as great force."[38] The court justifies the dilution of the presumption by recognizing "a counter-presumption that the original zoning . . . was well planned and designed to be reasonably permanent which may be overcome only by proof [of change or mistake]."[39] If the court determines that neither a change nor a mistake has been shown, "the presumption of the reasonableness of the rezoning would be destroyed."[40] Under this approach, when some showing of change or mistake exists to support the rezoning, the cases are silent on the issue of which party bears the burden of persuasion on appeal. Examination of the results reached in these cases demonstrates that reclassifications are often affirmed despite a lessening of the presumed legislative validity.[41]

Pattey v. Board of County Commissioners[42] represents a third line of more recent cases.[43] The *Pattey* court stated that the scope of

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38. Wakefield v. Kraft, 202 Md. 136, 141, 96 A.2d 27, 29 (1953) (emphasis added).

39. County Comm'rs v. Merryman, 222 Md. 314, 324, 159 A.2d 854, 860 (1960).

40. *Id.* Conceptually this approach differs from that taken in *West Ridge* in that here the court attempts a simultaneous application of both presumptions, which accounts for the dilution of the presumed legislative validity. Consequently, a clear statement that the burden of persuasion falls on challengers, such as that found in the *West Ridge* line of cases (*see* notes 31-33 and accompanying text *supra*) has not been made in these cases. In its review of alleged changes under the *Wakefield* approach, the court focused on the presence or absence of a public need for the change rather than on its substantiality. This focus could be justified by the purpose of the change or mistake rule. *See* notes 22, 23 and accompanying text *supra*. Although this emphasis on public need serves to distinguish the *Wakefield* approach from that taken in *Pattey*, the distinctions between the *Wakefield* line of cases and those in *West Ridge* are blurred at this point. *See, e.g.*, Rohde v. County Bd. of Appeals, 234 Md. 259, 199 A.2d 216 (1964); Bishop v. Board of County Comm'rs, 230 Md. 494, 187 A.2d 851 (1963); Fallon v. City of Baltimore, 219 Md. 110, 148 A.2d 709 (1959); Price v. Cohen, 213 Md. 457, 132 A.2d 125 (1957).

41. *See* Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 202 A.2d 612 (1964); Mettee v. County Comm'rs, 212 Md. 357, 129 A.2d 136 (1957); Eckes v. Board of Zoning Appeals, 209 Md. 432, 121 A.2d 249 (1956); Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953).

42. 271 Md. 352, 317 A.2d 142 (1974).

43. *See* Trainer v. Lipchin, 269 Md. 667, 309 A.2d 471 (1973); Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973); Border v. Grooms, 267 Md. 100, 297 A.2d 81 (1972); Clayman v. Prince George's County, 266 Md. 409, 292 A.2d 689 (1972); Creswell v. Baltimore Aviation Serv., Inc., 257 Md. 712, 264 A.2d 838 (1970); Wells v. Pierpont, 253 Md. 554, 253 A.2d 749 (1969); Woodlawn Ass'n v. Board of County Comm'rs, 241 Md. 187, 216 A.2d 149

review is "confined to a determination of whether sufficient evidence has been presented at the zoning hearing to make the issue fairly debatable . . . ."[44] Nevertheless, the court maintained that attempts to rezone are "dominated by the strong presumption of correctness which attaches to such original zoning" and that the burden to produce "strong" evidence of change is an "onerous" one.[45] The *Pattey* court placed this burden upon the applicant in an independent review of the evidence. Under the *Pattey* approach, the applicant must thus overcome the onerous burden on appeal before the court will apply the fairly debatable standard to the findings of the zoning authorities. As a consequence, the amendments have usually been defeated.[46]

The *Pattey* court bypassed an opportunity to invalidate the amendment because of the applicant's failure to delineate the perimeters of the neighborhood in which the changes were alleged to have occurred.[47] It accepted a reasonable delineation *arguendo* to reach the issue whether the specific changes alleged were substantial.[48] After

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(1966); Mothershead v. Board of County Comm'rs, 240 Md. 365, 214 A.2d 326 (1965); Miller v. Abrahams, 239 Md. 263, 211 A.2d 309 (1965); Board of County Comm'rs v. Kines, 239 Md. 119, 210 A.2d 367 (1965); MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965); Pahl v. County Bd. of Appeals, 237 Md. 294, 206 A.2d 245 (1965); Shadynook Improvement Ass'n v. Molloy, 232 Md. 265, 192 A.2d 502 (1963); Dustin v. Mayor & Council, 23 Md. App. 389, 328 A.2d 748 (1974).

44. 271 Md. at 360, 317 A.2d at 146.

45. *Id.* at 359, 317 A.2d at 146.

46. *See* cases cited note 43 *supra.*

47. 271 Md. at 361-62, 317 A.2d at 147-48. The court states that the failure to delineate "is alone sufficient to mandate reversal." *Id.* at 362-63, 317 A.2d at 148 In Iverson v. Zoning Bd., 22 Md. App. 265, 322 A.2d 569 (1974), the court of special appeals, citing *Pattey*, held that the zoning board properly refused to rezone when the landowner failed to delineate the neighborhood in which changes were alleged to have occurred. Further, the *Iverson* court refused to remand the case for a proper delineation, thus holding that the applicant's procedural error was fatal. *Id.* at 273, 322 A.2d at 573.

48. 271 Md. at 364, 317 A.2d at 148. While change must be "substantial" with respect to the character of the neighborhood, the Commissioners made no finding of fact as to the proper delineation of the neighborhood in question. *Id.* at 363-64, 317 A.2d at 148. The circuit court found that the entire county is the neighborhood based upon §§ 20.11-.12 of the Worcester County Zoning Ordinance, which provides "for map amendments in 'recognition of the fact that sections of Worcester County are changing from a rural to a residential, commercial, industrial, or other character . . . .'" 271 Md. at 362, 317 A.2d at 148.

concluding that insufficient evidence of "substantial change" existed to overcome the presumption of correctness attaching to the original zoning, the court held that the issue was not fairly debatable.[49] The court conceded that substantial change may occur when new or expanded sewer facilities are built.[50] It distinguished, however, the import of the sewer expansion involved in the present case by noting that the newly built facility was two to three miles from the subject property and that representations concerning its availability to the applicant were "equivocal."[51] Increased development throughout Worcester County and the change of Assateague Island to a National Seashore Park were held to be clearly outside of the reasonably delineated neighborhood.[52] Further, the change to a National Seashore Park was held not to affect the "character" of the subject property.[53] The court summarily dismissed the proposed improvements of State Route 113 as a factor indicative of substantial change, since there was nothing to indicate that it was unknown to the authorities

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The courts of appeals' delineation "of what, at the most, could constitute the "reasonable 'neighborhood'" was "[r]oughly . . . an area of some sixteen square miles and would barely include the [site of the new sewer facility], some two miles from the subject property . . . ." *Id.* at 363, 317 A.2d at 148. The delineation would include the site of proposed improvements on State Route 113 and the area that was rezoned to rural residential. *Id.*

49. *Id.* at 366, 317 A.2d at 150.

50. *Id.* at 364, 317 A.2d at 149; *see* Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968); Meginniss v. Trustees of the Sheppard & Enoch Pratt Hosp., 246 Md. 704, 229 A.2d 417 (1967); Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966). *But cf.* Clayman v. Prince George's County, 266 Md. 409, 292 A.2d 689 (1972); Chatham Corp. v. Beltram, 252 Md. 578, 251 A.2d 1 (1969); MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965).

51. 271 Md. at 364, 317 A.2d at 149. The court of appeals refused to consider a letter from the County Sanitary District that promised facilities would be available to the applicant until its own could be built. The court stated that "in our review of a zoning decision we are confined to the record before the legislative body." *Id.* at 365, 317 A.2d at 149.

52. *Id.* at 364-65, 317 A.2d at 149. Assateague Island is six miles across Chincoteague Bay from the subject property and 25 to 30 miles by automobile. There are no docking facilities on the island. The rezoning of the island permanently precluded development of an urban residential district four and one-half miles long, two general business areas, and two hotel-apartment districts that were contemplated by the land use map for the area. The park was geared primarily to daytime uses. The applicant argued that a need was created for overnight accommodations on the mainland and especially in the neighborhood of the subject property. The Commission accepted this in their findings, but the court of appeals rejected it. *Id.* at 365, 317 A.2d at 149.

53. *Id.*

at the time of the original zoning.[54] In similar fashion, it held that the rezoning of 100 acres within the immediate neighborhood of the applicant's property to a less dense classification than any of those sought by the applicant could not justify the amendment.[55]

The *Pattey* opinion, which is short and mechanical, draws much of the support for imposing an onerous burden on the appellants from cases in which zoning authorities initially *denied* rezoning applications.[56] The court thus ignores the logical and occasionally stated position that cases of rezoning grants should be treated differently from rezoning denials.[57] Further, despite an ostensible acceptance of the fairly debatable standard, the *Pattey* court makes no attempt to explain how the standard relates to the onerous burden placed on the appellants, nor does it offer citation or discussion of the *Wakefield* or *West Ridge* lines of cases.[58]

Although the judgment of the local authorities regarding the existence of substantial change seems to be at least within the realm of reasonable debate, the *Pattey* court, reviewing the alleged changes, either alters the meaning of fairly debatable or simply allows the standard to be overpowered by the undefined but onerous burden of persuasion.[59] By a narrow, although not unprecedented, view of the

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54. *Id.* at 365-66, 317 A.2d at 149-50.

55. *Id.* at 366, 317 A.2d at 150.

56. *Id.* at 359, 317 A.2d at 146. The court, without independent analysis, drew support for its stand on presumptions from five cases: Valenzia v. Zoning Bd., 270 Md. 478, 312 A.2d 277 (1973); Trainer v. Lipchin, 269 Md. 667, 309 A.2d 471 (1973); Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973); Mayor & Council v. Henley, 268 Md. 469, 302 A.2d 45 (1973); Cabin John, Ltd. v. Montgomery County, 259 Md. 661, 271 A.2d 174 (1970). 271 Md. at 359, 317 A.2d at 146. Two of these cases, *Trainer* and *Stratakis,* dealt with rezoning grants based on alleged mistakes. The other three, *Valenzia, Henley* and *Cabin John,* were rezoning denial cases.

57. *See* notes 26, 28 and accompanying text *supra.*

58. The fairly debatable standard is given a mechanical recitation in the *Pattey* decision. 271 Md. at 360, 317 A.2d at 146. The citations that follow the statement of the standard refer to the inadmissibility of new evidence on appeal, and no citations are given to cases that discuss the fairly debatable standard. *Id.* Nevertheless, the court again pays lip service to the standard when announcing its holding on the issue of alleged change. *Id.* at 366, 317 A.2d at 150.

59. *Cf.* note 14 and accompanying text *supra.* Justice Barnes in his dissent in Miller v. Abrahams, 239 Md. 263, 211 A.2d 309 (1965), stated:

> As all of the cases agree that both zoning and rezoning ordinances involve the exercise of legislative power, why is it that the exercise of legislative power at a later time does not have at least equal force or an equal presumption of validity as does the prior exercise of legislative power? Apart from

statutory language the court of appeals limits substantial change to *physical* change within the immediate neighborhood.[60] Such an interpretation precludes debate on the substantiality of change on Assateague Island or in the surrounding county, which, although outside of the delineated neighborhood, at least arguably "affected its character."[61] Moreover, by holding that a rezoning within the

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rezoning legislation, we have consistently, vigorously and, to my mind, quite properly held that one legislative body may not prevent contrary action by the legislative body acting at a later date, however emphatically it attempts to do this.

Id. at 276, 211 A.2d at 316; *accord,* Woodlawn Area Citizens Ass'n v. Board of County Comm'rs, 241 Md. 187, 203-13, 216 A.2d 149, 159-65 (1966) (Barnes, J., dissenting); MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965) (Barnes, J., dissenting); Prince George's County v. Donohoe, 220 Md. 362, 367, 152 A.2d 555, 557 (1959); State v. Fisher, 204 Md. 307, 315, 104 A.2d 403, 406 (1954); Montgomery County Council v. Bigelow, 196 Md. 413, 423, 77 A.2d 164, 168 (1950); RATHKOPF, *supra* note 3, at 21-38, 27-16 (3d ed. 1974).

60. 271 Md. at 363, 317 A.2d at 148. The court states that "changes must occur in the immediate neighborhood of such a nature as to have *affected its character.*" *Id.* at 365, 317 A.2d at 149.

Justice Barnes, in his dissent to MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965), examines

> the syllogisms upon which this "change-or-mistake" rule rests. As [he] see[s] them they are:
>
> Major premise: The comprehensive zoning plan was a good plan when enacted; the plan is good today, if physical conditions have not changed.
>
> Minor premise: Physical conditions have not changed.
>
> Conclusion: The plan is good today . . . .
>
> . . . .
>
> The difficulty lies in the dependence upon the terms "good"—"bad"—"conditions", and the interpretation to be placed on each. Or, to put the matter a different way, the defect may lie in confining the term "conditions" to the connotation of "physical conditions."

Id. at 578, 210 A.2d at 341 (footnotes omitted). In his analysis of the Maryland cases, Rathkopf suggests that "the term 'changed conditions' need not relate to actual physical conditions already present; it may relate to social or economic conditions reasonably foreseeable and presently or potentially operating upon the community." RATHKOPF, *supra* note 3, at 27-19 (3d ed. 1974).

61. The effect could have been found in terms of development, marketing potential, and public need in the area for overnight accommodations. The circuit court gave the following description of the developments in Worcester County:

> Ocean City [north of the subject property] has developed into a high density community, with a proliferation of low-rise, mid-rise and high-rise condominiums, as well as an enormous mobile home community, designed to answer the apparently insatiable desire of people to acquire a second home . . . . [C]amp grounds and tenting areas have mushroomed, [and] [a]long virtually every road in the County, one can see a clearing for the construction of a residence of some description.

Brief for Appellee at 25, Pattey v. Board of Comm'rs, 271 Md. 352, 317 A.2d 142 (1974).

neighborhood to a less dense classification cannot be substantial, the court of appeals seems to measure this term by the degree of difference between the existing classification and that sought by the applicant, rather than by the effects of the rezoning on the "character of the neighborhood."[62]

The *Pattey* court dismisses in a cursory manner the substantiality of the proposed road improvement.[63] It does not mention the cases in which such changes were held to create grounds for reasonable debate[64] even when previously known to the original zoning authorities, so long as the changes were "reasonably probable of fruition in the foreseeable future"[65] and would affect the character of the

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62. 271 Md. at 366, 317 A.2d at 150; *cf.* West Ridge, Inc. v. McNamara, 222 Md. 448, 160 A.2d 907 (1960) (finding of "substantial change" justified reclassification from agriculture to cottage residential, light industrial, and heavy commercial classifications).

The problem with the court's analysis is that, arguably, substantial change in the character of the neighborhood could occur by a rezoning to any classification accompanied by subsequent development, particularly when the rezoning and development occur in an area of 100 acres, as in the instant case. The following cases have held that the rezoning of neighboring property could constitute substantial change: Kirkman v. Montgomery County Council, 251 Md. 273, 247 A.2d 255 (1968); Lutherville Community Ass'n v. Wingard, 239 Md. 163, 210 A.2d 534 (1965); Board of County Comm'rs v. Oak Hill Farms, Inc., 232 Md. 274, 192 A.2d 761 (1963); Bishop v. Board of Comm'rs, 230 Md. 494, 187 A.2d 851 (1963). *But cf.* Board of County Comm'rs v. Kines, 239 Md. 119, 210 A.2d 367 (1965).

63. 271 Md. at 366, 317 A.2d at 150.

64. *See, e.g.*, Ragan v. Hildeshiem, 247 Md. 609, 233 A.2d 761 (1967); Beth Tfiloh Congregation v. Blum, 242 Md. 84, 218 A.2d 29 (1966); Finney v. Halle, 241 Md. 224, 216 A.2d 530 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 202 A.2d 612 (1964); Muhly v. County Council, 218 Md. 543, 147 A.2d 735 (1958). *But cf.* Wells v. Pierpont, 253 Md. 554, 253 A.2d 749 (1969); Board of County Comm'rs v. Kines, 239 Md. 119, 210 A.2d 367 (1965); MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965); Greenblatt v. Toney Schloss Properties Corp., 235 Md. 9, 200 A.2d 70 (1964).

65. *See* Brenbrook Constr. Co. v. Dahne, 254 Md. 443, 255 A.2d 32 (1969); Bujno v. Montgomery County Council, 243 Md. 110, 220 A.2d 126 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 202 A.2d 612 (1964); Rohde v. County Bd. of Appeals, 234 Md. 259, 199 A.2d 216 (1964); Town of Somerset v. County Council, 229 Md. 42, 181 A.2d 671 (1962); McBee v. Baltimore County, 221 Md. 312, 157 A.2d 258 (1960). *But cf.* Miller v. Abrahams, 239 Md. 263, 211 A.2d 309 (1966); Board of County Comm'rs v. Meltzer, 239 Md. 144, 210 A.2d 505 (1965); Park Constr. Corp. v. Board of County Comm'rs, 245 Md. 597, 227 A.2d 15 (1957).

subject property.[66] Finally, the court discusses neither the import of the planning commission recommendation for the amendment nor the alleged compliance of the higher use classification sought with the future land use map,[67] despite the fact that these considerations have been influential in other cases.[68]

One difficulty inherent in the *Pattey* court's interpretation of the Maryland enabling statute is that it requires the applicant to show substantial physical change while, in the absence of comprehensive

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66. In France v. Shapiro, 248 Md. 335, 236 A.2d 726 (1968), the court of appeals held invalid the rezoning of certain property on the grounds that there had been no proof of substantial change, even though the property was adjacent to two other parcels whose rezoning had previously been upheld upon the same alleged road improvement. *Id.* at 343, 236 A.2d at 731; *see* Beth Tfiloh Congregation v. Blum, 242 Md. 84, 218 A.2d 29 (1966); Finney v. Halle, 241 Md. 224, 216 A.2d 530 (1966). The *France* court said it did not intend the previous holdings to be taken as authority for the proposition that all property adjoining the Baltimore County Beltway, whether or not adversely affected, had undergone so substantial a change as to be eligible for rezoning. 248 Md. at 343, 236 A.2d at 731. *Finney*, on its facts, was an extreme case in which the construction of the Beltway served the property, involved the destruction of the improvements, and left a tract for which the requested classification was justified. *Id. Finney* should be compared with Greenblatt v. Toney Schloss Properties Corp., 235 Md. 9, 200 A.2d 70 (1964), in which a change in access to the subject property caused solely by the Beltway was held to be insufficient change to support a reclassification from R-40 to R-20, even though the tract was cut off from other R-40 property and access could be had only through R-20 property. *Id.* at 11-14, 200 A.2d at 71-73.

67. The land use plan indicated that the subject property should ultimately be the site of "non-urban residential development." It was envisioned that this category would be utilized in the following manner: "*Non-Urban Residential Areas.* These include both existing and projected developments of a primarily single-family residential nature, *at such densities as will not require central water or sewer systems. Not more than 2 dwellings per gross acre can be permitted safely where individual wells and septic tanks must be relied upon. . . .*" 271 Md. at 355, 317 A.2d at 144. The circuit court noted that "the case is one that is anticipated under the original Comprehensive Master Plan, upon the occurrence of certain contingencies, and those contingencies have occurred . . . . [The amendment] is found to be nothing more than an extension of that Plan and an implementation of its stated expectations, purposes and objectives . . . ." Brief for Appellee at 20, Pattey v. Board of Comm'rs, 271 Md. 352, 317 A.2d 142 (1974).

68. *See, e.g.*, Montgomery v. Board of County Comm'rs, 263 Md. 1, 280 A.2d 901 (1971); Messinger v. Board of County Comm'rs, 259 Md. 693, 271 A.2d 166 (1970); Stephens v. Montgomery County Council, 248 Md. 256, 235 A.2d 701 (1967). *But cf.* Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973); Heller v. Prince George's County, 264 Md. 410, 286 A.2d 772 (1972); Habliston v. City of Salisbury, 258 Md. 350, 265 A.2d 885 (1970).

rezoning, severely restricting the possibilities of such change occurring in the first place. If a landowner has developed parts of his own tract according to the existing zoning, his attempt to use that development as evidence of substantial change in an application to rezone the remainder to higher density classifications would be open to attack.[69] If the developer withstands this challenge and completes a high density project on the rezoned segment, his attempt to use this as evidence of change in an application to rezone the remainder may yet be attacked as "bootstrapping."[70] Aside from piecemeal rezoning, theoretical alternatives to achieve a modification of the existing zoning for a single parcel include the use of variances, special exceptions, and "floating zones."[71] Under the interpretation of the Maryland courts, none of these alternatives would be available to a landowner seeking high density development in agricultural or conservation districts. Variances may be granted only when literal enforcement of the ordinances would result in "unnecessary" hardship.[72] "Floating zones," construed to be similar to special exceptions, are properly granted only when the applicant's use would conform to the character of the neighborhood.[73] It appears that neighborhood change, sufficient to overcome the requirements of the change or mistake rule, can occur only when building projects are undertaken by the local sanitary or highway departments[74] within the owner's immediate neighborhood. Otherwise, the owner is forced to rely on the passage of a comprehensive rezoning enactment.[75]

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69. *See* note 62 *supra.*

70. *See* MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965) (changes by applicant within given tract discredited on "bootstrap" theory).

71. *See* Carson, *supra* note 16. *See generally* MANDELKER, *supra* note 3, at 53.

72. *See, e.g.*, Carson, *supra* note 16, at 315.

73. *See* Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963); *cf.* Chatham Corp. v. Beltram, 243 Md. 138, 220 A.2d 589 (1966); Bujno v. County Council, 243 Md. 110, 220 A.2d 126 (1966); Knudsen v. Montgomery County Council, 241 Md. 436, 217 A.2d 97 (1966); Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965).

74. *See* notes 50, 63-64 and accompanying text *supra.* For a discussion of the influence of highways on land use policy see MANDELKER, *supra* note 3, at 95-96.

75. *See* Zinn v. Board of Appeals, 207 Md. 355, 114 A.2d 614 (1955), in which the court said:

The *Pattey* case illustrates the need for a definitive analysis by the Maryland courts of how the burden of persuasion is to operate in cases in which zoning amendments are granted. Absent a repeal of the change or mistake requirement, the treatment of presumptions in cases of rezoning grants needs to be distinguished from that taken in cases of denials to reflect the limitation on local authority discretion imposed by the rule.[76] The *West Ridge* approach to presumptions on appeal from rezoning grants, by interpreting this limitation narrowly, supports a localized legislative determination of what types of changes justify piecemeal revision of existing land use regulations. One of the primary benefits derived from this approach is flexibility to deal with both physical development and development in planning techniques as they occur. The Maryland courts, however, appear to be moving away from the *West Ridge* line and towards the *Pattey* approach.[77]

> *Zoning, of course, looks to the future and is predicated upon an assumed ability to protect future needs within a narrow range of fallibility.* When it is argued that an unanticipated need has developed, this presupposes fault in the original plan, that should be ideally corrected by a resurvey of the land use map, rather than by piecemeal alteration.

Id. at 359, 114 A.2d at 615 (emphasis added).

Zoning changes can, however, be initiated by powers outside of the control of the local authorities, *e.g.*, state or federal intervention or natural disaster, but woe be to the applicant who is forced to rely on any of these!

76. *See* note 28 *supra.* The recent restatement of this position by the court of special appeals in Iverson v. Zoning Bd., 22 Md. App. 265, 322 A.2d 569 (1974), may indicate a move towards its acceptance. *But see* note 57 and accompanying text *supra.*

77. The movement towards the *Pattey* position is supported by a historical view of the cases. *Compare* cases cited note 43 *supra, with* cases cited notes 32 *and* 37 *supra.* Mayor & Council v. Stone, 271 Md. 655, 319 A.2d 536 (1974), from the *West Ridge* line of cases, appears to be an exception to this trend. In *Stone* the court states:

> [W]e remain mindful of the fact that the rezoning . . . had to be based on evidence sufficient to overcome the strong presumption of correctness which is afforded to comprehensive zoning. . . . Nevertheless, when the evidence offered *convinces the legislative body* that either change or mistake is present, its decision must be sustained by a court on appeal unless it is shown that this action was arbitrary or capricious because not enough evidence had been adduced to make the issue "fairly debatable."

271 Md. at 660-61, 319 A.2d at 540 (emphasis added). This language, taken at face value and in view of the court's result, could be read as a backing off from the *Pattey* approach, despite citation of *Pattey* as support. *Id.* A return to the *Pattey* approach by the court of special appeals in Dustin v. Mayor & Council, 23 Md. App. 389, 328 A.2d 748 (1974), however, suggests that the *Pattey* approach was compromised because the application in *Stone* was filed by

The *Pattey* approach employs standards of review that protect existing classifications from piecemeal assaults in the name of permanency and stability by adopting presumptions that favor zoning authorities when they deny reclassification and protesting neighbors when amendments are granted. The latter result is achieved by painting over the substantial change requirement with broad strokes of judicial gloss that limit the boundaries of legislative discretion. As long as the courts are consistent in the use of this approach, critics who charge usurpation of the legislative function[78] may be directing their attentions toward the wrong evil, since, in fact, the court's rejection of an amendment reaffirms the legislative judgments made at the adoption of the original zoning. Perhaps a more serious problem with the *Pattey* approach is that it stifles both flexibility and opportunities for growth.[79]

The *Pattey* approach suggests that reliance on comprehensive rezoning to accomplish zoning alterations will promote stability. The alternative to flexibility in zoning, however, is not stability. Conditions can and do change more quickly than comprehensive rezoning can possibly contend with and often in directions which are, at best, difficult for planners to predict very far in advance. To answer simply that the original zoning must prevail is both crude and myopic.[80]

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the City Planning Commission for a less dense classification. 23 Md. App. at 413, 328 A.2d at 763. The court in *Stone* contends that it has made no such differentiation. 271 Md. at 661, 319 A.2d at 540.

78. *See* RATHKOPF, *supra* note 3, at 21-38 (3d ed. 1974) (contending that the court of appeals is "constituting itself as a super zoning body").

79. It is debatable whether this is a positive effect. *Compare* Goldman, *supra* note 3 (concluding that the change or mistake rule ought to be rejected for a reasonableness test), *and* 24 CATHOLIC U.L. REV. 294 (1975) (concluding "emphasis on stability has limited planning flexibility" and "fails to guide local decisionmakers"), *with* Arnebergh, *supra* note 3 (concluding that without a high degree of permanency of zoning, adjacent owner's value and public confidence in government integrity will be destroyed), *and* Liebmann, *supra* note 3, at 51 (concluding that denial of piecemeal reclassifications under the change or mistake rule will encourage fundamental zoning reforms that are needed to achieve social ends). For an excellent compilation on the issues, techniques, problems and trends in the area of management and control of growth see URBAN LAND INSTITUTE, MANAGEMENT & CONTROL OF GROWTH (R. Scott ed. 1975).

80. *See generally* I URBAN LAND INSTITUTE, MANAGEMENT & CONTROL OF GROWTH 1-426 (R. Scott ed. 1975).