Land Use and Zoning—Zoning Amendments: The Effect of Maryland’s Change or Mistake Rule on the Fairly Debatable Standard—Who’s Got the Presumptions?

Follow this and additional works at: http://openscholarship.wustl.edu/law_urbanlaw
Part of the Law Commons

Recommended Citation
Available at: http://openscholarship.wustl.edu/law_urbanlaw/vol10/iss1/16
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." In reviewing amendment grants, the Maryland Court of Appeals 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. Pattey v. Board of County

   (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, compatibility 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).


Commissioners 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. The applicant sought a reclassification of agricultural and conservation zones to high density residential, hotel-apartment, and business zones. After the County Planning and Zoning Commission recommended rezoning, the County Commissioners unanimously passed an amending ordinance. 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. Residents of Worcester County challenged the rezoning and appealed the circuit court decision affirming the amendment.

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 Rathkopp, 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.\textsuperscript{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]."\textsuperscript{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.\textsuperscript{13} "Fairly debatable" means that "there is room for reasonable debate as to whether the facts justify . . . the need for its enactment."\textsuperscript{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.\textsuperscript{15}

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

\begin{enumerate}
\item 11. 271 Md. at 366, 317 A.2d at 150.
\item 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.
\item 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).
\item 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).
\end{enumerate}

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

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. Shiflet, 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 amending 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 . . . ." RATHKOPP, supra note 3, at 21-35 to -36 (3rd ed. 1974) (emphasis added). But see Board of Zoning Appeals v. Bailey, 216 Md. 556, 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.

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

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

---


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. [The "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, 313 (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).


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. 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. On its face, this is inconsistent with the presumed validity of the original zoning (derived from the change


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'r's v. Meltzer, 239 Md. 144, 155, 210 A.2d 505, 511 (1965). The reason for this is that

[even 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.\footnote{29} Three general approaches to the resolution of this apparent inconsistency can be

courts [may] interfere with that denial." \textit{Id.} at 643, 321 A.2d at 782. \textit{See} Messenger \textit{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. \textit{See} Board of County Comm'rs \textit{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. \textit{See}, \textit{e.g.}, \textit{Stratakis v. Beauchamp}, 268 Md. 643, 304 A.2d 244 (1973); \textit{Hysen v. Montgomery County Council}, 242 Md. 55, 217 A.2d 578 (1966); \textit{Dill v. Jobar Corp.}, 242 Md. 16, 217 A.2d 564 (1966); \textit{Rohde v. County Bd. of Appeals}, 234 Md. 259, 199 A.2d 216 (1964); \textit{Muhly v. County Council}, 218 Md. 543, 147 A.2d 735 (1959). The \textit{Hysen} 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 \textit{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 \textit{Renz} and \textit{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." \textit{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 \textit{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." \textit{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...
substantiality of the alleged changes. 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.” The policy that “zoning can never be completely permanent” supports placing the burden of persuasion on challengers of the reclassification. This line of cases consistently upholds amendments.

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

---


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 non-conforming 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.

not with as great force." 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]."

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." 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.

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

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).
42. 271 Md. 352, 317 A.2d 142 (1974).
review is "confined to a determination of whether sufficient evidence has been presented at the zoning hearing to make the issue fairly debatable . . . ." 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. 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.

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. It accepted a reasonable delineation arguendo to reach the issue whether the specific changes alleged were substantial. After


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. The court conceded that substantial change may occur when new or expanded sewer facilities are built. 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." 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. Further, the change to a National Seashore Park was held not to affect the "character" of the subject property. 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.

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 . . . ." The delineation would include the site of proposed improvements on State Route 113 and the area that was rezoned to rural residential.

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


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. 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. 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. The court thus ignores the logical and occasionally stated position that cases of rezoning grants should be treated differently from rezoning denials. 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.

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. By a narrow, although not unprecedented, view of the

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 43 (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?
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 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.


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.

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."\textsuperscript{62}

The \textit{Pattey} court dismisses in a cursory manner the substantiality of the proposed road improvement.\textsuperscript{62} It does not mention the cases in which such changes were held to create grounds for reasonable debate\textsuperscript{64} even when previously known to the original zoning authorities, so long as the changes were "reasonably probable of fruition in the foreseeable future"\textsuperscript{65} and would affect the character of the

\textsuperscript{62} 271 Md. at 366, 317 A.2d at 150; \textit{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). \textit{But cf.} Board of County Comm'rs v. Kines, 239 Md. 119, 210 A.2d 367 (1965).


subject property. 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, despite the fact that these considerations have been influential in other cases.

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

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).


http://openscholarship.wustl.edu/law_urbanlaw/vol10/iss1/16
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. 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." 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." 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. "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. 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 within the owner's immediate neighborhood. Otherwise, the owner is forced to rely on the passage of a comprehensive rezoning enactment.

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.
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 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.

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. 

David A. Smith 

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 decision-makers”), 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).