

## Reclassification, Variances, and Special Exceptions in Maryland

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# RECLASSIFICATION, VARIANCES, AND SPECIAL EXCEPTIONS IN MARYLAND†

By ROBERT J. CARSON\*

## INTRODUCTION

Since the General Assembly enacted Maryland's initial zoning enabling act in 1927, relating only to Baltimore City and to cities and incorporated towns with more than 10,000 inhabitants,<sup>1</sup> thousands of landowners who have had their properties zoned for particular uses have sought to legally utilize them for other purposes. Well over a hundred cases in this area have gone to the Court of Appeals.<sup>2</sup> Moreover, litigation has steadily increased as desirable land, available for certain uses, such as commercial and industrial, has become more and more difficult to find.

The purpose of this article is to present the substantive legal bases for reclassification, variances, and special exceptions. These three topics represent the methods by which a person in Maryland today can legally use his property for purposes other than those permitted by the comprehensive zoning ordinance in force in his locality.<sup>3</sup> Each method has its own peculiar characteristics and normally can be readily distinguished from the other methods,

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<sup>1</sup> MD. LAWS 1927, Ch. 705, §§ 1-9, now codified in 6 MD. CODE (1957) Art. 66B, §§ 1-9.

<sup>2</sup> BROOKS, MARYLAND ZONING NOTES (1957), presents a compilation of Maryland zoning decisions through *Mettee v. County Comm.*, 212 Md. 357, 129 A. 2d 136 (1957). Also, Maryland zoning cases are now digested under the topic "Zoning" in the current cumulative supplement to 15 MARYLAND DIGEST, there having been no such topic in the original volume (Zoning matters were originally digested under the topic "Municipal Corporations.").

<sup>3</sup> Where a zoning ordinance is unconstitutional as applied to a certain tract, the landowner may seek either an injunction or a declaratory decree to prevent that ordinance from being enforced against him, even though one or more of the three above-mentioned administrative remedies is also available; *Kracke v. Weinberg*, 197 Md. 339, 79 A. 2d 387 (1951); *Ellicott v. City of Baltimore*, 180 Md. 176, 23 A. 2d 649 (1942). However, if one of these three administrative remedies has been sought and denied, and a statutory appeal from the zoning agency's decision is available, an injunction or a declaratory decree is no longer possible; *Baltimore v. Seabolt*, 210 Md. 199, 123 A. 2d 207 (1956). The landowner in such a situation may raise the point as to the constitutionality of the ordinance as applied to him for the first time on appeal, even though the zoning agency had no jurisdiction to decide this point; *Backus v. County Bd. of Appeals for Montgomery Co.*, 224 Md. 28, 166 A. 2d 241 (1960).

but in some situations one method, or a modification thereof, may be quite similar to another. Also, under certain conditions more than one method may be successfully employed by the landowner.

#### STATUTORY SOURCES

At the present time there are four Maryland statutes enabling the municipalities to enact zoning ordinances and to establish the necessary mechanics for zoning, including zoning boards. Each of these statutes differs from the others to quite an extent, in effect as well as in language.

The initial enabling act, mentioned above,<sup>4</sup> relates only to Baltimore City and to cities and incorporated towns with more than 10,000 inhabitants. A later enabling act was passed in 1933 with reference to "counties, cities, and other incorporated areas."<sup>5</sup> Moreover, zoning in chartered counties is today authorized under a separate statute,<sup>6</sup> and those parts of Montgomery County and Prince George's County within the Maryland-Washington Regional District are governed by a public local law.<sup>7</sup> Finally, to further complicate this statutory maze, there may be a public local law in force in any given locality, from which that area derives in whole or in part its zoning power.<sup>8</sup>

In addition to the foregoing complexity, any two municipalities, even though deriving their zoning authority from the same statute, may of course have enacted very dissimilar ordinances within the purview of that same statute. Therefore, in the discussion to follow, no attempt will be made to synthesize or catalogue the enabling statutes or the ordinances in this State. The procedural aspects of reclassification, variances, and special exceptions shall for the same reason be omitted, since they vary with each statute and each ordinance.

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<sup>4</sup> *Supra*, n. 1.

<sup>5</sup> MD. LAWS 1933, Ch. 599, §§ 12-14, now codified in 6 MD. CODE (1957) Art. 66B, §§ 21-23.

<sup>6</sup> 2 MD. CODE (1957) Art. 25A, § 5(U); 2 MD. CODE (Cum. Supp. 1960) Art. 25A, § 5(X).

<sup>7</sup> MD. LAWS 1959, ch. 780, *passim*. MD. LAWS 1927, ch. 448, originally granted to the District its zoning powers. A statutory history is found in *Nelson v. Montgomery Co.*, 214 Md. 587, 593-4, 136 A. 2d 373 (1957).

<sup>8</sup> For example, Baltimore County derived its zoning authority entirely from public local law and not from the later enabling act in Art. 66B, *supra*, n. 5, before becoming a chartered county, after which time it derived such authority from Art. 25A, *supra*, n. 6; *Baltimore County v. Mo. Realty*, 219 Md. 155, 148 A. 2d 424 (1959).

## RECLASSIFICATION

Reclassification, or rezoning, is simply the amendment of the existing zoning ordinance.<sup>9</sup> We are here only interested in the reclassification of a single landowner's tract, sometimes called "piecemeal reclassification,"<sup>10</sup> and not in comprehensive reclassification, *i.e.*, the rezoning of an entire municipality or a substantial part thereof, for which different rules are applicable.<sup>11</sup>

The power to reclassify a landowner's property may lie in either the municipal legislative body or in the municipality's zoning board,<sup>12</sup> depending on the enabling statute governing the municipality's zoning powers. If this power does reside in the zoning board, it is regarded as quasi-legislative and is given the same presumption of constitutionality as reclassification by a municipality's legislative body.<sup>13</sup>

In Maryland the substantive requirements for valid piecemeal reclassification present a most interesting judicial history.<sup>14</sup> In 1934 the Court of Appeals in *Land Co. v. Realty Co.*<sup>15</sup> held a Baltimore City ordinance valid which changed the property in question from a more restricted residential use district to a less restricted one. Apparently

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<sup>9</sup> See generally 1 RATHKOPF, *THE LAW OF ZONING AND PLANNING* (3d ed. 1960) Chs. 27-28; 1 YOKLEY, *ZONING LAW AND PRACTICE* (2d ed. 1953) §§ 83-89.

<sup>10</sup> See, for example, *McBee v. Baltimore County*, 221 Md. 312, 157 A. 2d 258 (1960).

<sup>11</sup> Comprehensive rezoning is given the same presumption of constitutionality that is accorded original zoning, and the "change or mistake rule," which applies to piecemeal reclassification, does not apply to comprehensive rezoning; *Trustees v. Baltimore County*, 221 Md. 550, 158 A. 2d 637 (1960); *McBee v. Baltimore County*, *supra*, n. 10. Furthermore, the authority to comprehensively rezone would seem to lie in the municipal legislative body rather than in the municipality's zoning board, even though the authority to rezone in a piecemeal fashion may reside in the latter. See *Baltimore County v. Mo. Realty*, 219 Md. 155, 148 A. 2d 424 (1959); and Md. LAWS 1959, Ch. 614, § 1, now codified in 2 MD. CODE (Cum. Supp. 1960) Art. 25A, § 5(X), legislation evidently enacted as a result of this case.

<sup>12</sup> See *Baltimore County v. Mo. Realty*, *id.*, where the Court of Appeals held the General Assembly could by statute validly authorize the Zoning Commissioner of Baltimore County to reclassify property without the approval of the County's legislative body.

<sup>13</sup> See, for example, *Offutt v. Bd. of Zoning Appeals*, 204 Md. 551, 105 A. 2d 219 (1954).

<sup>14</sup> Md. LAWS 1959, Ch. 780, § 79(i), adopted the "competent, material and substantial evidence" rule for the appropriate scope of review of piecemeal reclassification in those parts of Montgomery County and Prince George's County within the Maryland-Washington Regional District. See *Bd. of Co. Comm. v. Walcraft*, 224 Md. 610, 168 A. 2d 892 (1961).

<sup>15</sup> See Note, *Validity of A Rezoning Ordinance in Maryland*, 13 Md L. Rev. 242 (1953), for an interesting but somewhat dated discussion of this area.

<sup>16</sup> 167 Md. 185, 172 A. 911 (1934).

the protestants' counsel did not contend that the power to rezone a particular tract is substantively a more restricted power than the power to zone initially and comprehensively. At any rate, the Court did not discuss this point.

Seven years later, the Court of Appeals in *Chayt v. Maryland Jockey Club*<sup>16</sup> relied in part upon the *Land Co.* result in holding that an "amending ordinance placing nearby properties in a lower classification, and to that extent freeing such properties from the burdens of the original ordinance" was valid, since the protesting adjacent landowners had no "vested right" in the original zoning ordinance.<sup>17</sup> The Court recognized that "restriction . . . upon private property can only be justified where they are required for the reasonable protection of the public health, morals, safety, or welfare," but stated, "[w]e have been cited no case applying this principle to a situation of rezoning from a higher to a lower class."<sup>18</sup> The case involved the land immediately outside the Pimlico racetrack fence which had previously been a parking lot, this having been a non-conforming use because the land was zoned residential, as was the entire racetrack property. The Jockey Club wanted to build a stable there, and the Baltimore City Council enacted the amending ordinance, reclassifying the entire racetrack property as commercial, after an injunction had restrained issuance of a permit for the stable.<sup>19</sup> It seems apparent that the property should have been zoned commercial originally, especially since the areas immediately south and west of the racetrack had been so classified. And although the Court did mention that the rezoning ordinance only did what could validly have been done in the beginning, it nevertheless spoke in much broader language in reaching its result.

In 1950, *Cassel v. City of Baltimore*<sup>20</sup> again presented the Court of Appeals with the question of the validity of an ordinance which rezoned property from a higher to a lower use district. Here the Court unanimously held that the Baltimore City Council could not constitutionally rezone so that a funeral home would be allowed in a residential district, stating that such reclassification "is ordinarily

<sup>16</sup> 179 Md. 390, 18 A. 2d 856 (1941). *Cf.*, *N. W. Merchants Term. v. O'Rourke*, 191 Md. 171, 60 A. 2d 743 (1948) (quoting *Chayt* with approval in that a landowner has no vested right in the classification of neighboring property — but the Court recognized that piecemeal reclassification is not given as great a presumption of validity as original zoning).

<sup>17</sup> *Chayt v. Maryland Jockey Club*, 179 Md. 390, 395, 18 A. 2d 856 (1941).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Chayt v. Zoning Appeals Board*, 177 Md. 426, 9 A. 2d 747 (1939).

<sup>20</sup> 195 Md. 348, 73 A. 2d 486 (1950).

invalid because it provides for unreasonable and discriminatory 'spot zoning' beyond the statutory power of the city."<sup>21</sup> Neither the *Land Co.* case nor the *Chayt* case were mentioned in the opinion.

Shortly after *Cassel* was decided, the Court had before it a case, *Kracke v. Weinberg*,<sup>22</sup> wherein a property owner with land formerly zoned for commercial use and fit for no other use, had had his tract rezoned for residential use. The Court of Appeals held the rezoning ordinance invalid and stated what is today the law of Maryland:

"Where property is rezoned, it must appear that either there was some mistake in the original zoning, or that the character of the neighborhood has changed to such an extent that such action ought to be taken. Neither situation is present in the case before us. The property has always been commercial and apparently there is little chance of its ever being used for residence purposes. Rezoning to residential results in preventing the owners from using it, not only for its most suitable use, but for any practical use at all. Under these circumstances, their property is being taken from them without compensation, and we think the ordinance was void as to it."<sup>23</sup>

No reference to the former cases of *Land Co.*, *Chayt*, and *Cassel* was made in the opinion, but they may have been thought not in point since they dealt with reclassification from a higher to a lower use district.

Finally, in *Wakefield v. Kraft*<sup>24</sup> a divided (3-2) Court applied the "change or mistake rule" to the situation in which land is rezoned from a higher to a lower use district, Judge Hammond stating for the majority that:

"[The] presumption of reasonableness and constitutionality applies to rezoning as well as to original zon-

<sup>21</sup> *Id.*, 356-357.

<sup>22</sup> 197 Md. 339, 79 A. 2d 387 (1951), noted 13 Md. L. Rev. 242 (1953).

<sup>23</sup> *Id.*, 347. Emphasis added. 1 RATHKOPF, THE LAW OF ZONING AND PLANNING (3d ed. 1960) Ch. 27, § 1, p. 399, states that the wisest policy is only to amend under these circumstances, although not speaking specifically of any jurisdiction's rule in relation to this statement. 1 YOKLEY, ZONING LAW AND PRACTICE (2d ed. Cum. Supp. 1961) § 84, speaks of the Maryland rule as a "modern expression" of the limitation upon the power to reclassify.

<sup>24</sup> 202 Md. 136, 141, 96 A. 2d 27 (1953). See also *Baltimore County v. Mo. Realty*, 219 Md. 155, 148 A. 2d 424 (1959); *Zinn v. Board of Zoning Appeals*, 207 Md. 355, 114 A. 2d 614 (1955); *Offutt v. Bd of Zoning Appeals*, 204 Md. 551, 105 A. 2d 219 (1954); *American Oil Co. v. Miller*, 204 Md. 32, 102 A. 2d 727 (1954); *Zang & Sons, Builders, Inc. v. Taylor*, 203 Md. 628, 102 A. 2d 723 (1954).

ing, though not with as great force. This is so because it is presumed that the original zoning was well planned, and designed to be permanent; it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood was changed to an extent which justifies the amendatory action."<sup>25</sup>

Although the majority here apparently approved the result in *Chayt*,<sup>26</sup> that case's language was criticized as too broad.<sup>27</sup> Judge Hammond, while agreeing with *Chayt* that a property owner has no vested interest in the continuance of a zoning classification for a neighboring area, nevertheless thought that:

"He is entitled to rely on the rule that a classification made by ordinance will not be changed unless the change is required for the public good and is not made merely to accommodate private interests which are detrimental to the welfare of the other property owners of the same neighborhood."<sup>28</sup>

Paradoxically perhaps, the majority in *Wakefield* sustained the ordinance which had rezoned a tract at an intersection from a residential to a commercial district. Two non-conforming commercial uses and a lot recently reclassified to commercial were also present at the intersection. Judge Hammond felt the evidence presented at the hearing before the Howard County Commissioners sustained their action, specifically mentioning that the fact that the property could be used as a "facility" for the residential neighborhood presented a valid reason for rezoning. Chief Judge Sobeloff, writing the dissenting opinion, while not disagreeing with Judge Hammond's statement of the applicable zoning law, thought that the facts showed the reclassification was for "a private and not a public benefit"<sup>29</sup> because the landowner's future plans for the tract were not clearly shown and seemed to be for an automobile business rather than for stores to serve the neighborhood.

It is probably best to mention at this point that the question as to whether or not piecemeal reclassification

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<sup>25</sup> *Wakefield v. Kraft*, 202 Md. 136, 141, 96 A. 2d 27 (1953).

<sup>26</sup> *Id.*, 145.

<sup>27</sup> *Id.*, 142-143.

<sup>28</sup> *Id.*, 144.

<sup>29</sup> *Id.*, 158.

is reasonable in the light of the above-discussed substantive requirements, must be answered from the facts on which the municipal legislative body or the zoning board based its conclusions, rather than from the conclusions themselves. The personal knowledge of members of the municipal government or of the zoning board cannot be evidence, only those facts ascertained at the public hearing.<sup>30</sup> Of course the applicant for reclassification has the burden of showing a change in conditions or a mistake in the original zoning.<sup>31</sup>

Moreover, although the municipal legislative bodies and the zoning boards are very interested in knowing the specific use that will be made of property if rezoned,<sup>32</sup> they have no right to require conditions or the promise of a certain use from the landowner in return for reclassification, either by written contract or otherwise, since such conditions or such promise are deemed antithetical to the uniformity necessary within each use district.<sup>33</sup> However, the landowner's evidence as to his proposed use may be decisive of the question as to whether or not the rezoning is reasonable.<sup>34</sup>

"Spot zoning"<sup>35</sup> is an interesting aspect of piecemeal reclassification and has presented the Court of Appeals with a problem of definition ever since that term was introduced into the zoning jargon of this State. In *Chayt v. Maryland Jockey Club*<sup>36</sup> the Court mentioned that "spot zoning . . . as usually defined, signifies a carving out of one or more properties located in a given use district and reclassifying them in a different use district." However, in *Cassell v. City of Baltimore*<sup>37</sup> a spot zoning ordinance was said to be one which singled out a piece of property and gave it a use classification purely for the owner's benefit and inconsistent with the uses permitted in the rest of the area involved. Having created these divergent

<sup>30</sup> See, for example, *Tempink v. Bd. of Zoning Appeals*, 205 Md. 489, 497, 109 A. 2d 85 (1954); *American Oil Co. v. Miller*, *supra*, n. 24.

<sup>31</sup> See, for example, *Reese v. Mandel*, 224 Md. 121, 167 A. 2d 11 (1961).

<sup>32</sup> See, for example, *Wakefield v. Kraft*, 202 Md. 136, 96 A. 2d 27 (1953), discussed *supra*, *circa* n. 29, regarding this point.

<sup>33</sup> *Citizens Ass'n v. Pr. Geo. County*, 222 Md. 44, 158 A. 2d 663 (1960); *Rose v. Paape*, 221 Md. 369, 157 A. 2d 618 (1960); *Wakefield v. Kraft*, 202 Md. 136, 96 A. 2d 27 (1953).

<sup>34</sup> *Supra*, n. 32.

<sup>35</sup> See generally 1 RATHKOPF, *THE LAW OF ZONING AND PLANNING* (3d ed. 1960) Ch. 26; 1 YOKLEY, *ZONING LAW AND PRACTICE* (2d ed. 1953) §§ 90-95; Annotation, 51 A.L.R. 2d 263 (1957).

<sup>36</sup> 179 Md. 390, 393, 18 A. 2d 856 (1941).

<sup>37</sup> 195 Md. 348, 73 A. 2d 486 (1950). *Cf. Hedin v. Bd. of Co. Commissioners*, 209 Md. 224, 120 A. 2d 663 (1956) (reclassification from higher residential use district to lower one held not spot zoning where much of the adjacent property was already in the less restrictive district).

definitions, the Court in *Huff v. Bd. of Zoning Appeals*<sup>38</sup> chose a definition in line with that of the *Chayt* case:

“When a zoning ordinance or an amendment puts a small area in a zone different from that of the surrounding area, we have what may be called ‘spot zoning’, using the term in a descriptive sense. Such zoning may be invalid or valid. If 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, it is invalid. *Cassel v. City of Baltimore*, 195 Md. 348, 355. On the other hand, if the zoning of the small parcel is in accord and in harmony with the comprehensive zoning plan and is done for the public good — that is, to serve one or more of the purposes of the enabling statute, and so bears a substantial relationship to the public health, safety, morals and general welfare, it is valid.”<sup>39</sup>

As we have already seen in *Wakefield v. Kraft*,<sup>40</sup> rezoning to provide a business “facility” for a residential neighborhood may be valid spot zoning, using that term in its now accepted sense. The Court has specified several acceptable facilities:

“Generally . . . there is no inherent objection to the creation of small districts within a residential zone for the operation of such establishments as grocery stores, drug stores, barber shops, and even gasoline stations, for the accommodation and convenience of the residents of the residential zone.”<sup>41</sup>

Reclassification for a shopping center, combining several of these facilities, has been upheld where a definite need for such a center was shown.<sup>42</sup>

Traffic conditions are extremely important in determining the validity of such reclassification. The roads must be adequate for the expected increase in traffic, and the

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<sup>38</sup> 214 Md. 48, 133 A. 2d 83 (1957). See also *Baylis v. City of Baltimore*, 219 Md. 164, 167, 148 A. 2d 429 (1959) (“‘Spot zoning’ is a term used in many of the zoning cases, but as a descriptive term rather than a word of art.”).

<sup>39</sup> *Huff v. Bd. of Zoning Appeals*, 214 Md. 48, 57, 133 A. 2d 83 (1957).

<sup>40</sup> See *supra*, circa ns. 25-29.

<sup>41</sup> *Temmink v. Bd. of Zoning Appeals*, 205 Md. 489, 495, 109 A. 2d 85 (1954).

<sup>42</sup> See, for example, *Eckes v. Board of Zoning Appeals*, 209 Md. 432, 121 A. 2d 249 (1956).

projected flow cannot create a hazard.<sup>43</sup> However, the virtual certainty of immediate road improvement<sup>43a</sup> or new road construction<sup>43b</sup> can form the basis for valid reclassification, and perhaps a reasonable probability of either might be sufficient.<sup>43c</sup>

Naturally, some businesses are viewed with the utmost scrutiny. Thus, a funeral home has been found to have no place in a residential use district.<sup>44</sup> Gasoline stations have only been permitted where there was a need for such a facility to service the neighborhood, predicated at least in part upon the absence of other stations in the area.<sup>45</sup>

Finally, if an entire area seems misclassified, piecemeal alterations are invalid, and the land use map should be resurveyed and a comprehensive reclassification made, not merely a change for one particular tract.<sup>46</sup>

#### VARIANCES AND SPECIAL EXCEPTIONS DIFFERENTIATED

The Maryland law of variances and special exceptions has probably caused as much difficulty for the Court of Appeals as any other zoning area in the past thirty-five years. Yet it was not until 1953 and *Montgomery Co. v. Merlands Club*<sup>47</sup> that the Court clearly distinguished the two creatures:

“The Courts have often drawn distinctions between special exceptions and variances in zoning ordinances. In *Application of Devereux Foundation*, Zoning Case, 351 Pa. 478, 41 A. 2d 744, 746, the Court well stated the difference thus: ‘An “exception” in a zoning ordinance is one allowable where facts and conditions detailed in the ordinance, as those upon which an

<sup>43</sup> *Temmink v. Bd of Zoning Appeals*, 212 Md. 6, 128 A. 2d 256 (1957) (roads inadequate for shopping center, and traffic problem would be created. See also *Howard County v. Merryman*, 222 Md. 314, 159 A. 2d 854 (1960); *Price v. Cohen*, 213 Md. 457, 132 A. 2d 125 (1957).

<sup>43a</sup> *Nelson v. Montgomery Co.*, 214 Md. 587, 596, 136 A. 2d 373 (1957).

<sup>43b</sup> *Missouri Realty, Inc. v. Ramer*, 216 Md. 442, 450-1, 140 A. 2d 655 (1958).

<sup>43c</sup> *Cf. Howard County v. Merryman*, *supra*, n. 43, 323.

<sup>44</sup> *Cassel v. City of Baltimore*, 195 Md. 348, 73 A. 2d 486 (1950), discussed *supra*, *circa*, n. 20.

<sup>45</sup> *American Oil Co. v. Miller*, 204 Md. 32, 102 A. 2d 727 (1954) (rezoning from “Agricultural” to “Heavy Commercial” invalid where sufficient stations already existed and numerous “Heavy Commercial” sites were still available for stations); *Ellicott v. City of Baltimore*, 180 Md. 176, 23 A. 2d 649 (1942) (“reclassification” by Baltimore City “special exception” from residential to commercial use district valid where existing stations were not sufficient to service present traffic). See also, *West Ridge, Inc. v. McNamara*, 222 Md. 448, 160 A. 2d 907 (1960).

<sup>46</sup> *Zinn v. Board of Zoning Appeals*, 207 Md. 355, 114 A. 2d 614 (1955).

<sup>47</sup> 202 Md. 279, 96 A. 2d 261 (1953).

exception may be permitted, are found to exist. But zoning ordinances usually provide, as does the present one, for another kind of dispensation also permitted by the statute, by which a "variance" from the terms of the ordinance may be authorized in cases where a literal enforcement of its provisions would result in unnecessary hardship.' \* \* \*

"It is the common practice to join an application for an exception with an application for a variance, leaving it to the Board to decide on which ground it will grant the application. As a result, many cases discuss exceptions and variances without differentiation, yet the two do differ, and *one important distinction is that where a specific use is permitted by the legislative body in a given area if the general zoning plan is conformed to and there is no adverse affect on the neighborhood, the application can be granted without a showing of hardship or other conditions which are necessary for the allowance of a variance.*"<sup>48</sup>

#### VARIANCES

Much of the difficulty in differentiating between the variance and the special exception in Maryland was caused by the language of the earlier enabling act and the Baltimore City ordinances enacted under it. The original enabling act spoke of "special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained," which were to be permitted "in appropriate cases and subject to appropriate conditions and safeguards."<sup>49</sup> Pursuant to this statute, Baltimore City, by ordinance, allowed its Board of Zoning Appeals to "grant a permit [for a 'special exception'] when there are any practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of this ordinance."<sup>50</sup> This delegation of power to the Board was subsequently held void as too general and indefinite.<sup>51</sup> Thereafter, Baltimore City added new provisions to the former phrase which were very exact, even delineating the specific physical conditions necessary.

<sup>48</sup> *Id.*, 288-289. Emphasis added.

<sup>49</sup> 6 Md. CODE (1957) Art. 66B, § 7(a).

<sup>50</sup> Ordinance 1247, ¶ 33(b), approved March 20, 1931.

<sup>51</sup> *Sugar v. North Balto. M. E. Church*, 164 Md. 487, 165 A. 703 (1933); *Jack Lewis, Inc. v. Baltimore*, 164 Md. 146, 164 A. 220 (1933).

The Court of Appeals, construing these Baltimore City "special exceptions" (which were, of course, really variances<sup>52</sup>) strictly, then consistently found in a long line of cases that no adequate showing of hardship had been made.<sup>53</sup> Two cases involving these "special exceptions" which did, in fact, end favorably to the property owners, are very revealing as to the Court's attitude. In the first, the Court upheld the grant of an "exception" upon an analogy to reclassification, finding changed traffic conditions to provide a valid reason to permit a gas station facility.<sup>54</sup> In the second, the Court, ruling for the first time on appeal upon the validity of the original ordinance, held that it was unconstitutional as applied to the landowner.<sup>55</sup>

While these relatively recent cases may seem anachronistic today because of the statutory language involved, the rules therein contained are no doubt valid when applied to a bona fide variance in name as well as in substance. Thus, the Court of Appeals will require that the landowner sustain a unique and substantial hardship in order to be granted a variance, which hardship must apply to him personally and not be common in the neighborhood. A variance will not be granted merely to make the applicant's property more profitable or its use more convenient for him. Moreover, if the landowner has himself created the situation, as when he buys property with the intention of applying for a variance, he cannot be heard to complain.<sup>56</sup> Even if a variance is granted, conditions may validly be attached to the grant.<sup>57</sup> Of course, the "heavy" burden of proof before the zoning board is upon the applicant, and the Court of Appeals in review will require that the board's

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<sup>52</sup> See *Serio v. City of Baltimore*, 208 Md. 545, 119 A. 2d 387 (1956) (Baltimore City "special exception" called a "variance"). *Cf.*, *Marino v. City of Baltimore*, 215 Md. 206, 216, 137 A. 2d 198 (1957), which said, "Ordinarily, there is a marked distinction in the law of zoning between a *variance* and an *exception*, but there is none in Baltimore City since an *exception*, apparently, overlaps a *variance* inasmuch as both may be granted where there are 'practical difficulties or unnecessary hardships'."

<sup>53</sup> *Cleland v. City of Baltimore*, 193 Md. 440, 84 A. 2d 49 (1951); *Gleason v. Keswick Impvt. Ass'n*, 197 Md. 46, 78 A. 2d 164 (1951); *Easter v. City of Baltimore*, 195 Md. 395, 73 A. 2d 491 (1950); *Heath v. Mayor & C.C. of Balto.*, 190 Md. 478, 58 A. 2d 896 (1948); *M. & C.C. of Balto. v. Biermann*, 187 Md. 514, 50 A. 2d 804 (1947); *Heath v. M. & C.C. of Balto.*, 187 Md. 296, 49 A. 2d 799 (1946).

<sup>54</sup> *Ellicott v. City of Baltimore*, 180 Md. 176, 23 A. 2d 649 (1942).

<sup>55</sup> *Hoffman v. City of Baltimore*, 197 Md. 294, 79 A. 2d 367 (1951).

<sup>56</sup> See cases collected *supra*, n. 53.

<sup>57</sup> *Baylis v. City of Baltimore*, 219 Md. 164, 148 A. 2d 429 (1959) (*dictum*).

grant of a variance be supported by real and substantial evidence.<sup>58</sup>

Upholding the grant of a variance is no minor task. As stated above,<sup>59</sup> the only successful property owners in the Court of Appeals to this date seem to have been those for whom other relief, such as reclassification or an injunction or declaratory decree,<sup>60</sup> would have been appropriate.

### SPECIAL EXCEPTIONS

A special exception is normally required for certain uses because they are marginal, that is, because they are generally valid uses within a district but may be invalid in some parts of the district by causing, for example, traffic problems, or a health menace, or an obnoxious or extremely displeasing appearance or emission.<sup>61</sup> Therefore the legislative body requires a special exception for such uses so that the zoning board will only permit them where they will not be detrimental to the general neighborhood. Conditions can be exacted of the landowner by the board, thus further insuring that the use will not adversely affect the area.<sup>62</sup>

The Court of Appeals has held that a use for which a special exception is sought is *prima facie* valid, although the applicant does seem to have the burden of going forth with the evidence.<sup>63</sup> Reasons against the granting of an exception, to be cogent, must relate specifically to the property in question and not to the entire district.<sup>64</sup> Furthermore, it will be presumed that the municipality's health regulations will prevent the proposed use from creating a health problem.<sup>65</sup> Of course, the use requested must conform to the general zoning plan.<sup>66</sup>

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<sup>58</sup> See cases collected *supra*, n. 53.

<sup>59</sup> See *supra*, *circa* ns. 54-55.

<sup>60</sup> See discussion *supra*, *circa* n. 3.

<sup>61</sup> *Dorsey Enterprises v. Shpak*, 219 Md. 16, 147 A. 2d 853 (1959); *Montgomery Co. v. Merlands Club*, 202 Md. 279, 96 A. 2d 261 (1953).

<sup>62</sup> *Crowther, Inc. v. Johnson*, 225 Md. 379, 170 A. 2d 768 (1961) (*dictum*); *Citizens Ass'n v. Pr. Geo. County*, 222 Md. 44, 158 A. 2d 663 (1960) (*dictum*); *Baylis v. City of Baltimore*, 219 Md. 164, 148 A. 2d 429 (1959) (*dictum*); *Dorsey Enterprises v. Shpak, Id.* (Applicant willing to abide by Board's conditions).

<sup>63</sup> See, for example, *Dorsey Enterprises v. Shpak, supra*, n. 61; *Montgomery Co. v. Merlands Club, supra*, n. 61.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Crowther, Inc. v. Johnson, supra*, n. 62; *Montgomery Co. v. Merlands Club, supra*, n. 61. *Cf.*, *Dorsey Enterprises v. Shpak, supra*, n. 61.

<sup>66</sup> *Dorsey Enterprises v. Shpak, supra*, n. 61; *Erdman v. Bd. of Zon. Appeals*, 212 Md. 288, 129 A. 2d 124 (1957); *Oursler v. Bd. of Zoning Appeals*, 204 Md. 397, 104 A. 2d 568 (1954); *Montgomery Co. v. Merlands Club, supra*, n. 61.

In several cases the Court of Appeals seemed to regard the zoning board's action in granting a special exception to be quasi-legislative and accorded such action the strong presumption of constitutionality.<sup>67</sup> However, a very recent case, *Crowther, Inc. v. Johnson*,<sup>68</sup> may throw some doubt on the scope of review applicable, the Court there stating:

"The appellant's first contention is that the trial court erred when it held that the board is acting in a quasi-legislative capacity when it decides cases involving special exceptions, and hence the court confined itself to a too narrow scope of review in this case. In this case we feel it makes no real difference whether the board's action is considered as quasi-judicial or quasi-legislative for even under the broader scope of review claimed as to quasi-judicial action, we think that there was sufficient evidence to sustain the board's conclusion.

The general rule is that in reviewing the action of zoning boards a court will not substitute its judgment for the judgment of the board unless its action is shown to be arbitrary, capricious or illegal. . . . But if the questions involved are fairly debatable and the facts presented are sufficient to support the board's decision it must be upheld."<sup>69</sup>

At any rate, "a wide latitude of discretion in passing upon special exceptions"<sup>70</sup> is given to the zoning boards by the Court of Appeals.

Thus, it might fairly be said, by way of doggerel, that:

"While the Court has looked askance at the variance,  
It has regarded with affection the special exception."

Indeed, so favorable has been the Court of Appeal's attitude toward this device that it has upheld a floating manufacturing zone in Baltimore County, a use district that could be assigned by the zoning board to property meeting certain specified conditions, by an analogy to the special exception, and therefore applicants for this classification need not show a change in conditions or a mistake in the comprehensive zoning since the classification is deemed presumptively correct.<sup>71</sup>

<sup>67</sup> *Ibid.*

<sup>68</sup> 225 Md. 379, 170 A. 2d 768 (1961).

<sup>69</sup> *Id.*, 383. *Cf.*, *Snowden v. Mayor & C.C. of Balto.*, 224 Md. 443, 168 A. 2d 390 (1961), where the Court, in a non-conforming use case, broadly stated that the "substantial evidence test" is applicable in review of zoning matters and that therefore the result below must be "reasonable, 'not right'."

<sup>70</sup> *Crowther, Inc. v. Johnson*, 225 Md. 379, 383, 170 A. 2d 768 (1961).

<sup>71</sup> *Huff v. Bd. of Zoning Appeals*, 214 Md. 48, 133 A. 2d 83 (1957).

## CONCLUSION

As we have seen, the law of reclassification, variance, and special exceptions has been anything but static in the past thirty-five years. It presents an interesting, if at times vacillating history, and clearly shows a Court's increased wisdom accompanying increased familiarity in the field. There can be no doubt that ambiguity and uncertainty still exist, but the clarifying process seems well under way.