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Zoning Change: Flexibility vs. Stability

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Comments and Casenotes

ZONING CHANGE: FLEXIBILITY vs. STABILITY

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The Maryland Court of Appeals has recently had five opportunities to express its views on changing existing zoning regulations by amendment.[1] In four of these, the court affirmed the "original error or change in conditions" test, using it to prohibit amendments of original zoning ordinances.[2] In the fifth, it reaffirmed its acceptance of the "floating zone" concept, thereby placing Maryland in the forefront of progressive zoning and planning to a limited extent.[3] Thus, the court has evidenced an aversion to change by clinging to the "mistake or change" test, while at the same time granting its approval to a new concept which might be said to be the antithesis of traditional Euclidean zoning.

The court is not without its dissents, however. Judge Barnes wrote lengthy, comprehensive criticisms of the majority opinions in *MacDonald, Miller,* and *Woodlawn,* attacking the court's application of the "mistake or change" test and advocating a much more liberal test for judging the propriety of zoning amendments.[4]

Using these cases as the focal point, this comment will survey the application of the "original error-change in condition" test in Maryland and other jurisdictions, as well as the various tests used in other states. Likewise, the use of the "floating zone" will be discussed in an effort to find a workable tool for amendment in the face of the otherwise stringent, stabilizing test ordinarily employed in Maryland.

ORIGINAL ERROR OR CHANGE IN CONDITION

In *MacDonald v. Board of County Commissioners for Prince George's County,*[5] application was made by a land company to reclassify the property in question from R-R (rural residential) to R-H (multiple family high rise residential). The Technical Staff of the Planning

1. Woodlawn Area Citizens Council v. Board of County Comm'rs for Prince George's County, 216 A.2d 149 (Md. 1966); Mothershead v. Board of County Comm'rs for Prince George's County, 240 Md. 365, 214 A.2d 326 (1965); Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965); Miller v. Abrahams, 239 Md. 263, 211 A.2d 309 (1965); MacDonald v. Board of County Comm'rs for Prince George's County, 238 Md. 549, 210 A.2d 325 (1965).

2. Woodlawn Area Citizens Council v. Board of County Comm'rs for Prince George's County; Mothershead v. Board of County Comm'rs for Prince George's County; Miller v. Abrahams; MacDonald v. Board of County Comm'rs for Prince George's County, *supra* note 1.

3. Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965).

4. The court in *Mothershead* applied the test in a unanimous opinion due to the fact that Judge Barnes did not sit on the case. Had he sat, it is likely he would have dissented there, too.

5. 238 Md. 549, 210 A.2d 325 (1965).

Commission recommended denial, as did the Regional Planning Board. The Regional Council approved the application, however, as did the Circuit Court when the ruling was appealed by nearby property owners. The Maryland Court of Appeals, Oppenheimer, J., reversed, ruling that there was neither evidence of error in the original zoning nor a change in conditions so as to justify the proposed amendment.[6] Thus, the court merely added to an already long line of cases which determined the propriety of zoning amendments on the basis of the "mistake or change" test.

This test was first used in 1948 in the case of *Northwest Merchants Terminal v. O'Rourke*.[7] In that case, property holders attempted to have their area rezoned in order to prevent the erection of a warehouse in the neighborhood. In voiding the amendment, the Court of Appeals ruled that there was a *presumption of reasonableness* as to the original zoning, and that it was presumed to be well planned and permanently arranged and subject to change only to meet a *genuine change in conditions*.[8]

In *Hoffman v. Mayor & City Council of Baltimore*,[9] the court allowed a rezoning based on the fact that by the original zoning the land in question was unusable, and had, in fact, never been used for the purposes for which it was zoned. Though never specifically mentioned, the "original error" test clearly seemed to be the basis of the decision.

The first true declaration of the test was made in *Kracke v. Weinberg*.[10] There, injunctive relief was sought by a property owner to void a zoning change made by the city in changing his property from commercial to residential. In voiding the change, the court said:

> The presumption as to the original ordinance would be that the zones were well planned and arranged and were to be more or less permanent, subject to change only to meet genuine changes in conditions. 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.[11]

From that time on, the "mistake or change" test was firmly implanted in Maryland zoning law, bringing with it a great many obstacles to flexible zoning. First of all, there is an immediate presumption in favor of the original zoning. Consequently, a most difficult burden is placed on the person applying for the change. He must prove beyond a reasonable doubt that there was either an original error or a subsequent change in conditions. This presumption in itself is indicative of an attitude of stability and aversion to change.

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6. The court's rulings were essentially the same in Miller v. Abrahams, 239 Md. 263, 211 A.2d 309 (1965) and Mothershead v. Board of County Comm'rs for Prince George's County, 240 Md. 365, 214 A.2d 326 (1965).

7. 191 Md. 171, 60 A.2d 743 (1948).

8. The change in condition criteria was again discussed in Cassel v. Mayor & City Council of Baltimore, 195 Md. 348, 73 A.2d 486 (1950).

9. 197 Md. 294, 79 A.2d 367 (1951).

10. 197 Md. 339, 79 A.2d 387 (1951).

11. *Id.* at 347, 79 A.2d at 391.

In *Wakefield v. Kraft*,[12] the court was called upon to review the legislative body's amendment of existing zoning from residential to a lower use. The court ruled that it could not substitute its judgment for that of the legislature if the question decided, *i.e.*, whether there was sufficient evidence to allow an amendment, was *fairly debatable:*

> It is not the function, duty, or right of a Court to zone or rezone, but only to determine whether the legislative body has properly applied the governing law to the facts. If there is room for reasonable debate as to whether the facts justify the municipal legislature in deciding the need for its enactment, it must be upheld. It is only when there is no room for reasonable debate, or a record barren of supporting facts, that the Court can declare the legislative action arbitrary, capricious, discriminatory or an unequal application of the law.[13]

The application of this test has led to many interesting results. For example, in *Board of Appeals of Baltimore County v. Bailey*,[14] the property owner wanted a change from a lower to a higher zone in order to build a trailer park.[15] Though the Zoning Commission felt that there could be no objection due to the fact that the rezoning was from a lower to a higher use, the court held that there was still a need to satisfy the "mistake or change" test; and since the issue was not debatable, there being no evidence at all to satisfy the test, the court overruled the Zoning Commission.[16] Thus, even in the unusual situation where the amendment called for rezoning to a higher zone, the proposal was blocked by the "mistake or change" test.

In *Kroen v. Board of Zoning Appeals of Baltimore County*,[17] the landowner wanted to erect row houses in an area zoned for single-family dwellings. He based his application on increased population caused by the proximity of the Bethlehem Steel and Martin Company plants. His application was denied, the court reasoning that:

> It is a basic rule in the law of zoning that where a board of city or county officials, under authority conferred by the Legislature has enacted a zoning ordinance, judicial review of action taken by the board is restricted and narrow in scope. An attack upon a zoning ordinance, to be successful, must show affirmatively and clearly that it is arbitrary, capricious, discriminatory, or illegal. The presumption of reasonableness and constitutional validity applies to rezoning as well as original zoning. The courts presume that the original zoning is well planned and designed to be perma-

12. 202 Md. 136, 96 A.2d 27 (1953).
13. *Id.* at 147, 96 A.2d at 29.
14. 216 Md. 536, 141 A.2d 502 (1958).
15. The Baltimore County zoning ordinances were odd in that a lower use (trailer park) was permitted only in a residential zone higher than the one in which the property owner already lived.
16. It had been argued in that case that the proposed Northeast Expressway would cause a substantial change in conditions. The court held that if such a change occurred, application for amendment would have to be made at that time.
17. 209 Md. 420, 121 A.2d 181 (1956).

> nent. Accordingly it is a firmly established rule that before a zoning board reclassifies property from one zone to another, there should be proof either (1) that there was a mistake in the original zoning, or (2) that the character of the neighborhood was changed to such an extent as to justify reclassification.[18]

The aforementioned are but a few of the many cases in which the Maryland court has applied the "original error-change in condition" rule,[19] and a survey of all the cases would indicate the court's unbending attitude in applying this rule and its concommitant preservation of existing regulations.

Perhaps the only deviation from the court's antipathy toward amendment of existing zoning ordinances appeared in *Missouri Realty, Inc. v. Ramer*,[20] where the court permitted an amendment from one residential zone to a lower residential zone. The court said:

> It should be noted that this case involves an application for reclassification from one residential sub-category to another; not the removal of the land from the use category in which it was placed when originally zoned, as was the situation in many of the cases presented to this Court. In this respect, the situation is, to a certain degree, different from the application to reclassify property zoned as residential to commercial or industrial.[21]

Thus, the court seems to adopt a more liberal attitude when reviewing amendments from one use to a similar use.

This brief review of cases concerning the Maryland "mistake or change" rule is indicative of the often insurmountable obstacles facing the property owner or legislature desiring to amend the existing regulations and the limited amount of aid that can be derived by appeal to the judiciary.[22] It is the thought of Judge Barnes, and the courts of a

18. *Id.* at 426, 121 A.2d at 184.

19. For other cases on point, see, *e.g.*, Renz v. Bonfield Holding Co., 223 Md. 34, 158 A.2d 611 (1960); McBee v. Baltimore County, 221 Md. 312, 157 A.2d 258 (1960); Hewitt v. County Comm'rs of Baltimore County, 220 Md. 48, 151 A.2d 144 (1959); Muhly v. County Council for Montgomery County, 218 Md. 543, 147 A.2d 735 (1958); Board of Zoning Appeals of Baltimore County v. Bailey, 216 Md. 536, 141 A.2d 502 (1957); Conley v. Montgomery County, 216 Md. 379, 140 A.2d 525 (1957); Nelson v. County Council for Montgomery County, 214 Md. 587, 136 A.2d 373 (1957); Board of County Comm'rs of Talbott County v. Troxell, 214 Md. 135, 132 A.2d 845 (1957); Mettee v. County Comm'rs of Howard County, 212 Md. 357, 129 A.2d 136 (1957); Hardesty v. Board of Zoning Appeals of Baltimore County, 211 Md. 172, 126 A.2d 621 (1956); Zinn v. Board of Zoning Appeals of Baltimore County, 207 Md. 355, 114 A.2d 614 (1955); Temmink v. Board of Zoning Appeals of Baltimore County, 205 Md. 489, 109 A.2d 85 (1954); Offutt v. Board of Zoning Appeals of Baltimore County, 204 Md. 551, 105 A.2d 219 (1954).

20. 216 Md. 422, 140 A.2d 655 (1957).

21. *Id.* at 449, 140 A.2d at 658.

22. It may be noted that several other states also employ the "mistake or change" test. See, *e.g.*, Nowicki v. Planning & Zoning Bd. of Town of Milford, 148 Conn. 492, 172 A.2d 386 (1961); Kimball v. Court of Common Council of City of Meriden, 148 Conn. 97, 167 A.2d 706 (1961); Holly Development, Inc. v. Board of County Commr's of County of Arapahoe, 140 Col. 95, 342 P.2d 1032 (1959); City of Jackson v. Bridges, 243 Miss. 646, 139 So. 2d 660 (1962); Page v. City of Portland, 178 Ore. 632, 165 P.2d 280 (1946). A thorough review of all of the jurisdictions may be found in YOKLEY, ZONING LAW & PRACTICE §§ 85–87 (Supp. 2d ed. 1964); and RATHKOPF, THE LAW OF ZONING AND PLANNING 27–16 (1964).

great many other states, that this test should be discarded in favor of a more flexible, modern and workable test. The inherent difficulties with this test, as well as the undesirable results attained in using it, have led to the movement to discard it.

First of all, there are difficulties in applying the "mistake or change" test. There are differences of opinion in merely defining what constitutes a mistake, and what constitutes changed conditions can likewise be a relative matter. For example, Judge Barnes has interpreted the majority of the court's definition to include only changes in *physical* condition: "The majority has now made the rule the exclusive test and has confined the 'change in conditions' portion of the rule to a change in *physical* condition."[23] If this is so, though nowhere does the majority of the court in the *MacDonald* case so state it, then factors such as increased population and other socio-economic changes would not be included. If Judge Barnes is correct, however, then perhaps this explains the court's decision in the *Kroen* case.[24] Nevertheless, other judges and commentators have interpreted the test much more broadly.[25] Also, it is difficult to ascertain the maximum distance that a changed condition can exist from the area desiring amendment so as to satisfy the test.

But the greatest drawback in using the rule is that it completely thwarts the efforts of legislative or zoning authorities in the absence of satisfaction of one of the requirements; there are many circumstances where change is desirable, but impossible, due to the rule. The facts in the *MacDonald* case are illustrative. The property in question was zoned single family residential but had never been developed. As such, there could be no showing of a change in condition. The developers desired to construct high-rise apartments on the land, and though the zoning board had ultimately determined that this might be a better use for the land, no one had been able to prove the original zoning was clearly erroneous when passed. The reason for the change was evident — *ideas* had changed. A more modern jurisdiction would have allowed the change had the proponents shown the amendment to be reasonable and not arbitrary or capricious; the Maryland court, not able to satisfy the "mistake or change" test, had no choice but to strike down the amendment, no matter how reasonable and desirable it appeared to be.

Other jurisdictions have adopted far more liberal and flexible tests in efforts to avoid the adverse effects of the "mistake or change" test.[26]

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23. *MacDonald*, 238 Md. 549, at 581, 210 A.2d 325, at 343. The recent case of Finney v. Halle, 216 A.2d 530 (Md. 1966) held that the construction of the Baltimore Beltway and the excavation of sewers were sufficient changes in condition to justify a zoning amendment.

24. 209 Md. 420, 121 A.2d 181 (1956).

25. See, *e.g.*, RATHKOPF, *op. cit. supra* note 22, at 27-19, where he states:
The term "changed condition" 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. The terms "mistake in the original ordinance" may refer to a failure to foresee as well as to an actual, then present error of classification or boundary.

26. The entire area is thoroughly discussed in YOKLEY, *op. cit. supra* note 22, §§ 85-87 (Supp. 2d ed. 1964), and RATHKOPF, *op. cit. supra* note 22, at 27-16 (1964).

In *Oka v. Cole*,[27] the Florida Supreme Court overruled a lower court holding which had voided a zoning amendment for failing to satisfy the "mistake or change" test. The Supreme Court said:

> [W]e find no authority in our decisions or elsewhere to the effect that [the mistake or change test] is indispensable, that vested rights can accrue to neighboring owners, or that ordinances altering zoning restrictions are to be tested by any standard other than that applicable to zoning classifications generally, *i.e.*, that the restriction imposed shall not be arbitrary but reasonably related to health, safety, or welfare.[28]

The New Jersey courts also reject the rigid "mistake or change" test. In *Gruber v. Mayor and Township Committee of Raritan Township*,[29] the action of the township was attacked for changing the area in question from "four residential" to "eight industrial". In validating the change the court said, "The comprehensive plan evidenced in the original zoning ordinance was not immutable and could reasonably be altered either because of changed circumstances or because of changed viewpoints as to the needs and interests of the entire community."[30] The court went on to say that an overall test of reasonableness had to be satisfied.[31]

The Massachusetts Supreme Judicial Court has specifically rejected the "mistake or change" test as an exclusive test, instead ruling that it is but one of many relevant factors to be considered: "The petitioners stress that there have been few changes in the neighborhood since 1926 when the zoning ordinance was adopted. Such a factor, while relevant, is not controlling. It was one of several circumstances for the Council to weigh and evaluate."[32]

The Illinois court has also adopted the liberal, flexible view, stating in its opinion that the same standards used to justify original zoning should be used in ascertaining the propriety of amendatory ordinances:

> The validity of an amendatory zoning ordinance, with respect to the exercise of police power, must be determined by the same rules and tests as those applied in ascertaining the validity of original zoning ordinances; and where the amendment of a zoning ordinance is clearly an arbitrary and unreasonable action on the part of the city council, ostensibly taken to promote the public health,

27. 145 So. 2d 233 (Fla. 1962).

28. *Id.* at 235. This same rule was again stated by a Florida court in Chadwick v. Layton, 150 So. 2d 485 (Fla. Dist. Ct. App. 1963).

29. 39 N.J. 1, 186 A.2d 489 (1962).

30. *Id.* at 494.

31. See also Fanale v. Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958); Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A.2d 1 (1957); Tremarco v. Garzio, 55 N.J. Super. 320, 150 A.2d 799 (1959); Hochberg v. Borough of Freehold, 40 N.J. Super. 276, 123 A.2d 46 (App. Dist. 1956).

32. Raymond v. Comm. of Public Works of Lowell, 333 Mass. 410, 131 N.E.2d 189, 191 (1956). The same rule was stated in Shapiro v. City of Cambridge, 340 Mass. 652, 166 N.E.2d 208 (1960); Cohen v. City of Lynn, 333 Mass. 694, 132 N.E.2d 664 (1956); Lamare v. Commissioner of Public Works of Fall River, 324 Mass. 542, 87 N.E.2d 211 (1949).

> safety, comfort, morals or welfare, but having no substantial relation to any of these objects, such amendment is of no force and effect. . . . An amendatory ordinance cannot be sustained if the evidence fails to show that it was passed for the public good, but instead tends to show it was passed in deference to the wishes of certain individuals.[33]

This same liberal attitude can be found in Iowa,[34] Missouri,[35] North Carolina,[36] Wisconsin,[37] Texas,[38] New York,[39] and Rhode Island.[40] Kentucky, too, rejects the "mistake or change" test except in cases of spot zoning,[41] and in the absence of the spot zoning question, the Kentucky courts apply the reasonableness standard.

The results under the different tests are apparent. Under the Maryland rule, it is imperative that the original zoning ordinance be correct not only for the present but also for the future, for change does not come easy. As stated by Professor Rathkopf in discussing the Maryland cases:

> The Maryland rule would appear to be a limitation upon the power of the legislative body to rezone rather than a strict rule of presumption. It requires the proponent of the change to support it by evidence of such mistake in the original zoning ordinance or of changed conditions 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.[42]

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33. Trust Co. of Chicago v. City of Chicago, 403 Ill. 91, 96 N.E.2d 499, 504–05 (1951). Also see Kennedy v. City of Evanston, 348 Ill. 426, 81 N.E. 312 (1932) and Kinney v. City of Joliet, 411 Ill. 284, 103 N.E.2d 473 (1952).

34. See Keller v. City of Council Bluffs, 246 Iowa 202, 66 N.W.2d 113, 116–17, 51 A.L.R.2d 251 (1954):

> We are of the opinion the governing body of a municipality may amend its zoning ordinances any time it deems circumstances and conditions warrant such action, and such an amendment is valid if the procedural requirements of the statutes are followed and it is not unreasonable or capricious nor inconsistent with the spirit and design of the zoning statute. The burden is upon the plaintiffs attacking the amendment to establish that the acts of the council were arbitrary, unreasonable, unjust and out of keeping with the spirit of the zoning statutes.

This case was noted in 33 TEXAS L. REV. 763 (1955). The Iowa view is further elaborated upon in Plaza Recreational Center v. Sioux City, 253 Iowa 246, 111 N.W.2d 758 (1961).

35. See, *e.g.*, Miller v. Kansas City, 358 S.W.2d 100 (Mo. 1962).

36. See, *e.g.*, Walker v. Town of Elkin, 254 N.C. 85, 118 S.E.2d 1 (1961).

37. See, *e.g.*, Eggebeen v. Sonnenburg, 239 Wisc. 213, 1 N.W.2d 84 (1941).

38. See, *e.g.*, Reichert v. City of Hunter's Creek Village, 345 S.W.2d 838 (Tex. Ct. Civ. App. 1961) and City of Irving v. Bull, 369 S.W.2d 60 (Tex. Ct. Civ. App. 1963).

39. See, *e.g.*, McCabe v. Town of Oyster Bay, 13 App. Div. 2d 979, 217 N.Y.S.2d 163 (1961); Levitt v. Incorporated Village of Sands Point, 6 App. Div. 2d 701, 174 N.Y.S.2d 283 (1958), *aff'd*, 6 N.Y.2d 269, 189 N.Y.S.2d 212, 160 N.E.2d 501 (1959).

40. See, *e.g.*, Hadley v. Harold Realty Co., 198 A.2d 149 (R.I. 1964) and Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

41. See, *e.g.*, Hodge v. Luckett, 357 S.W.2d 303 (Ky. 1962); Leutenmayer v. Mathis, 333 S.W.2d 774 (Ky. 1959); Shemwell v. Speck, 265 S.W.2d 468 (Ky. 1954); Byrn v. Beechwood Village, 253 S.W.2d 395 (Ky. 1952).

42. RATHKOPF, *op. cit. supra* note 22, at 27–16 (1964).

In Maryland, then, it is virtually impossible to zone undeveloped areas, for it is most difficult for a planner to accurately predict the needs of certain regions a great many years in advance. When passed, the ordinance might have been correct; years later, it might no longer be consonant with new theories on zoning and planning. As ideas change, the law must change with it. New theories of planning are useless if they cannot be carried forth due to outmoded zoning law. The Maryland "mistake or change" rule is a definite bar to the application of modern ideas of zoning and planning, and until it is discarded for a more modern test, progress in Maryland will be retarded.

Today, planning revolves around a comprehensive plan.[43] It involves planning in advance for large areas, and it cannot be effective if the zoning aspects of the plan are retarded by the Maryland rule. The New Jersey court has stated: "The comprehensive plan evidenced in the original zoning ordinance was not *immutable* and could reasonably be altered either because of changed circumstances or *because of changed viewpoints as to the needs and interests of the entire community.*"[44] Note the Pennsylvania Supreme Court's statement concerning flexibility and the comprehensive plan: "It is a matter of common sense and reality that a comprehensive plan is not like the law of Medes and the Persians; it must be subject to reasonable change from time to time as conditions in an area or a township or a large neighborhood change."[45]

Judge Barnes, after making an exhaustive survey of all of the states and writers, felt no recourse but to issue his dissent in the *MacDonald* case. Realizing the conflict with effective planning caused by the court's re-affirmance of the "mistake or change" test, he most effectively advocated overturning this rule:

> As above indicated, ideas change. They particularly change in considering zoning reclassification in a volatile situation and particularly in an area of rural virgin territory in the process of change to urban or suburban development. The syllogisms of the "mistake-change in condition" rule applied by the majority give no place to these new ideas. As I see the matter, it is entirely possible that the original zoning viewed in the light of conditions existing at the time of the formulation of the original comprehensive plan might have been proper and in accordance with the then recognized zoning concepts, and, with no change in physical conditions in the meantime, a new subdivision, prepared in accordance with more modern and more enlightened zoning ideas, be proper a relatively short time later. If we broadened our perspective and raised our sights in the "change in conditions" portion of the rule to include changes in zoning concepts and philosophy and did not limit it to a change in physical conditions merely, the problem would be largely solved. The people's representatives

43. See Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955).

44. Gruber v. Mayor & Township Committee of Raritan Township, 39 N.J. 1, 186 A.2d 489, 494 (1962) (emphasis added.)

45. Furniss v. Township of Lower Merion, 412 Pa. 404, 194 A.2d 926, 927 (1962).

would then be free to give effect to the new ideas and concepts; they would arise from the present Procrustean bed upon which we have placed them, with renewed vigor, to advance the public interest. The case at bar is an excellent example of the unfortunate effect of the presently restricted rule."[46]

SPOT ZONING

Even if the obstacle of the "mistake or change" test can be overcome, there is always the possibility that a proposed amendment might constitute illegal spot zoning, and the proponents of the change must take steps to guard against this possibility.

Spot zoning was defined in detail by the Maryland Court of Appeals in *Cassel v. Mayor and City Council of Baltimore*.[47] In that case, application was made to amend existing zoning in the Howard Park section of Baltimore City so as to allow the establishment of a funeral home in an otherwise residential area. The court denied the application as it would constitute an illegal spot zone, stating:

> Spot zoning, the arbitrary and unreasonable devotion of a small area within a zoning district to a use which is inconsistent with the use to which the rest of the district is restricted, has appeared in many cities in America as a result of pressure put upon councilmen to pass amendments to zoning ordinances solely for the benefit of private interests. . . . It is, therefore, universally held that a "spot zoning" ordinance, which singles out a parcel of land within the limits of a use district and marks it off with a separate district for the benefit of the owner, thereby permitting a use of that parcel inconsistent with the use permitted in the rest of the district, is invalid if not in accordance with the comprehensive plan and is merely for private gain.[48]

The court went on to add that spot zoning would not be illegal when it did not conflict with the comprehensive plan and was in harmony with orderly growth in the locality and the public welfare. It also stated that the "mistake or change" test still had to be satisfied.

The spot zoning rule has been applied in Maryland as stated in the *Cassel* case, but with inconsistent results. In an early case, *Ellicott v. Mayor and City Council of Baltimore*,[49] the court approved the creation of a spot zone in a residential area to erect a gasoline station. It based its decision on the changed condition of increased traffic, thereby allowing the erection of a gasoline station because it was in the best interests of the public welfare. On the other hand, a 17%

46. 238 Md. 549, 581–82, 210 A.2d 325, 343–44 (1965).

47. 195 Md. 348, 73 A.2d 486 (1950).

48. *Id.* at 355, 73 A.2d at 488–89. For application of the same rule in other states, see, *e.g.*, Leahy v. Inspector of Buildings of City of New Bedford, 308 Mass. 128, 31 N.E.2d 436 (1941); Jersey Triangle Corp. v. Board of Adjustment, 127 N.J.L. 194, 21 A.2d 845 (1941); Polk v. Axton, 306 Ky. 498, 208 S.W.2d 497 (1948); Page v. City of Portland, 178 Ore. 632, 165 P.2d 280 (1946).

49. 180 Md. 176, 23 A.2d 649 (1941).

increase in traffic was not considered a sufficient reason to enact a spot zone to erect a gasoline station in an agricultural zone in *American Oil Co. v. Miller*.[50] Also, in *Mayor & City Council of Baltimore v. Byrd*,[51] the court ruled that increased traffic was not such an overriding issue as to allow the enactment of a spot zone for a gasoline station in a residential neighborhood.

When Baltimore County rezoned to commercial land adjacent to the newly opened Baltimore-Harrisburg Expressway, while the rest of the land in the area remained residential, the court found illegal spot zoning.[52] The court did not feel that the need for tourist facilities on the expressway was related to the public welfare to such an extent as to justify spot zoning. Yet, in *Offutt v. Board of Zoning Appeals of Baltimore County*,[53] the court ruled that the rezoning of land from residential to industrial was proper and not illegal spot zoning, as this type of change was consistent with the general welfare.

It is evident from these cases that each case must rest on its own particular facts. There can be no real predictability except in the most obvious cases. But the fact remains that spot zoning is an evil to be protected against, and legislatures and courts should not relax their stringent standards against spot zoning even if they reject the "mistake-change" test. The ultimate aim of zoning is to plan for the betterment and benefit of the public, and it is the antithesis of this aim to allow zoning amendments for the benefit of private individuals. Illegal spot zoning and "reasonableness" are mutually exclusive; under the proposed "reasonableness" test, providing for flexibility and change in zoning, the evil of spot zoning must still be avoided.

NON-EUCLIDEAN ZONING AS A VEHICLE FOR FLEXIBILITY IN ZONING

In recent years, a few courts have made provision for a new tool to aid in the accomplishment of flexible planning — the "floating zone". A "floating zone" is one which is not earmarked to a specific location but will attach to any piece of land in the zone at the application of the property owners. As such, it "floats" over an entire area, attaching on a piecemeal basis to specific properties. It is odd that the Maryland court is but one of two state courts which have actually accepted this concept. For a court dedicated to principles of stability, it has embraced a totally non-Euclidean method of effecting zoning change. The court had previously validated the use of a "floating zone" in Baltimore County in *Huff v. Board of Zoning Appeals of Baltimore County*,[54] and in the 1965 case of *Beall v. Montgomery*

50. 204 Md. 32, 102 A.2d 747 (1954).

51. 191 Md. 632, 62 A.2d 588 (1948).

52. Hewitt v. County Comm'rs of Baltimore County, 220 Md. 48, 151 A.2d 144 (1959).

53. 204 Md. 551, 105 A.2d 219 (1953).

54. 214 Md. 48, 133 A.2d 83 (1956).

County Council,[55] it allowed a "floating zone" in Montgomery County.[56]

The Baltimore County floating zone was an M-R (light industrial) zone, which was to allow certain light industries to be developed in residential areas. The zone was not delineated as to area, but would attach to a given piece of land upon application by the landowner and approval by the Zoning Commission. In allowing the use of such a zone, the Court of Appeals equated the "floating zone" with a "special exception,"[57] and said:

> If the regulations be read as we read them, it is clear that the Manufacturing, Restricted classification is analogous to a special exception, and the rules which are applicable to special exceptions would apply, not the general rules of original error or change in conditions of the character of the neighborhood, that control the propriety of rezoning. This is because, as in the case of a special exception, there has been a prior legislative determination, as part of a comprehensive plan, that the use which the administrative body permits, upon application to the particular case of the specified standards, is prima facie proper in the environment in which it is permitted.[58]

Thus, once the "floating use" is determined to be compatible with the existing use in the area (the Maryland court felt that light industry was compatible with residential use), then the zone could attach upon activation of the required procedures.[59] In 1960, a floating zone was upheld in Howard County in *Costello v. Sieling*.[60] The court referred to the *Huff* case in upholding a floating trailer-park zone as compatible with the existing agricultural zone.

The *Beall* case involved a floating R-H (high-rise residential) zone in Montgomery County. In upholding the use of such a zone there, Judge Barnes cited the preceding Maryland cases and held that these cases and the legislature's determination that this use was compatible with the classification of neighboring property were controlling.

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55. 240 Md. 77, 212 A.2d 751 (1965).

56. The use of the "floating zone" in Maryland is discussed in an excellent article by Professor Russell Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963).

57. The use of "special exceptions" in Maryland is discussed in Carson, *Reclassification, Variances, and Special Exceptions in Maryland*, 21 MD. L. REV. 306 (1961).

58. 214 Md. at 62, 113 A.2d at 91.

59. There was a dissenting opinion in the case in which the "floating zone" was attacked as invalid spot-zoning. As such, it could be changed only on meeting the "mistake-change" test:

> The scheme of the ordinance is the negation of zoning. It overrides the basic concept of use zoning by districts, that is to say, territorial division according to the character of the lands and structures and their peculiar use suitability and a comprehensive regulatory plan to advance the general good within the prescribed range of the police power.

214 Md. at 68, 133 A.2d at 95, quoting Rockhill v. Chesterfield Township, 23 N.J. 117, 128 A.2d 473 (1957).

60. 223 Md. 24, 161 A.2d 824 (1960).

A unanimous Court of Appeals followed Judge Barnes' lead and altered the existing zoning without the use of the "mistake-change" test.[61]

New York is the only other state to approve the use of the "floating zone." In *Rodgers v. Village of Tarrytown,*[62] the Court of Appeals of New York approved the creation of a new B-B zone (allowing single or multi-family dwellings) in any residential district upon application by the landowner. The court reasoned that the zone was created in the interests of public welfare and was neither arbitrary nor capricious. It did not constitute spot zoning, for it was enacted for the benefit of the entire community. The court viewed this as just another means of amending existing zoning laws; the amendment took place at the time the legislature passed the floating zone scheme; and only the affixation of its actual boundaries was delayed until a later period. It may be noted that the floating zone in *Rodgers* was much broader than that used in *Huff,* for in *Rodgers* a multiplicity of uses were permitted by the new zone (single or multi-family dwelling), while in *Huff* only one specified use was allowed. Still, both were approved.[63]

The only other court to rule on the use of the "floating zone" is Pennsylvania, and that court struck down the use of such a zone in *Eves v. Zoning Board of Adjustment of Lower Gwynedd Township.*[64] The court ruled that it was not in conjunction with an *existing comprehensive plan* as provided for in Pennsylvania enabling legislation, and the fact that it might be in conjunction with comprehensive planning for the future would not suffice to uphold it. The court was a proponent of strict judicial review in the zoning area and felt that this aim would be defeated by the case-by-case rezoning concomitant with floating zones.

Yet in *Donahue v. Zoning Board of Adjustment of Whitemarsh Township,*[65] the Pennsylvania court upheld a scheme whereby a property owner could apply for an amendment to a floating apartment house zone. The court differentiated this from the *Eves* case because in *Donahue,* within six weeks of approval of the change, the zoning map was amended to reflect the reclassification. The court thereby viewed the entire procedure as one amendatory transaction and differentiated this from a "floating zone". It felt that this was still in accordance with the existing comprehensive plan for the area. Though

61. In his dissenting opinion in the *MacDonald* case, Judge Barnes very convincingly argues that the R-H zone in Prince George's County should have qualified as a floating zone. In referring to it in *Beall,* he differentiates this case due to the fact that in *MacDonald,* the Technical Staff and Planning Commission initially disapproved the application, though the County Council and lower court subsequently approved it. At no time was it argued that the Prince George's R-H zone was a floating zone, so the majority would not consider it. In *Beall,* all legislative and administrative bodies approved the application, and the floating zone was approved.

62. 302 N.Y. 115, 96 N.E.2d 731 (1951).

63. The dissenting opinion in *Rodgers* was similar to the one in *Huff,* attacking this as illegal spot zoning, etc., 96 N.E.2d at 738:

> On the contrary, a person purchasing property in Tarrytown in a Residence A or B district to bring up his children now has no way of knowing whether the property next to his may or may not become the site of a multiple family dwelling with the attendant increases in population, traffic dangers, commerce and congestion.

64. 401 Pa. 211, 164 A.2d 7 (1960).

65. 412 Pa. 332, 194 A.2d 610 (1963).

the court made this distinction, it is possible that the Pennsylvania court may use the case as a basis to reconsider the *Eves* case, as the distinction appears to be a rather tenuous one.

The "floating zone" concept has caused a great deal of controversy. Strong arguments, pro and con, have been raised. One argument against the use of the "floating zone" has been that it is unfair to neighboring property owners, because the protection afforded them under Euclidean zoning is no longer present. As put by one writer defending the *Eves* case:

> [I]t would be unfair and superficial to view the *Gwynedd Township* decision as the product of blind adherence to zoning concepts of the twenties. The court was obviously and rightly concerned with other traditional concepts which are perhaps more important than zoning principles, old or new. Notice, equality under the law, and all that makes up our notions of fairness may be wrongly sacrificed in the name of progress. Thus, even if the advocates of flexible zoning are correct in claiming that it represents progress in land-use control, it is better to advance slowly, than to sacrifice due process rights.[66]

It is also argued that all "floating zones" constitute spot zoning merely because they are not in accordance with a then existing comprehensive plan, the existence of the plan being vital to any successful zoning scheme.[67]

These arguments, though valid, can be refuted. First of all, it must be kept in mind that there are very stringent standards that must be met before one will be granted the right to a "floating zone".[68] And presuming a high degree of integrity on the part of the member of the reviewing body, it can be said that the public welfare will at all times be fostered. Therefore, fears of spot zoning should be no greater than they were before the advent of "floating zones".

The argument of lack of notice to the property owners is also refutable. Everyone has notice that the zone exists. If the zone is of the Maryland type, where the compatibility test is rigidly adhered to, then its application theoretically will not be detrimental to nearby property owners. The same risk is run where special exceptions, variances or amendments are possible. Of course, property values may fall, but

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66. Harr and Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary,* 74 HARV. L. REV. 1552, 1573 (1961).

67. For further criticisms, see Mosher, *The Floating Zone: Legal Status and Application to Gasoline Stations,* 1 TULSA L. REV. 149 (1964).

68. For example, before one can obtain an M-R floating zone in Baltimore County, he must file a petition with the Zoning Commissioner showing complete building and topographical development plans. The Zoning Commissioner must then get a favorable recommendation from the Planning Commission. Subsequently, a public hearing is held by the Zoning Commission, from which an appeal to the Board of Zoning Appeals may be taken.

All approved plans must meet stringent maintenance requirements for the buildings and grounds. Height and area regulations must be complied with. Off-street parking requirements must be met, and parking areas must be paved and lighted. Reclassification will result if these rules are not complied with.

this is not usually a legitimate zoning concern. Inevitably, in certain instances, individual property owners must suffer for the public good.

The proponents of "floating zones" cite flexibility and planning advantages. Though applicable primarily to new areas, they also have applicability to developed areas. Due to the impossibility of applying strict zoning standards at an early developmental stage, the use of the "floating zone" allows for unrestricted development in new areas; at the same time, though, the strict standards that must be met before granting a change to a "floating zone" provide protection to already existing uses. Its main virtue is that it unshackles undeveloped lands from the retardation of pre-ordained zoning, particularly in areas such as Maryland where amendment is so hard to obtain.[69]

This is not to advocate wholesale creation of "floating zones"; this, admittedly, would lead to chaos, and all attempts to do this thus far have been blocked by the courts.[70] But used prudently, in areas not conducive to definitive restrictions and in jurisdictions adverse to change, the concept of the "floating zone" is certainly advisable. It allows for freedom to change when ideas change, and when the planners deem it necessary. It protects against the chance of less prudent zoning at first and the inability to effect change when later desired. Used carefully, then, the "floating zone" serves to rectify some of the defects of the Maryland "mistake or change" test.

CONCLUSION

The "mistake or change" test places Maryland with the least progressive states regarding amendment of existing zoning ordinances. Its defects and adverse effects are serious enough to merit departure from this rule in favor of a test of "reasonableness"; and although stare decisis may be argued as a bar to change, the Maryland court has stated on several occasions that when the reason behind a rule ceases to exist, the rule itself will no longer apply.[71] This is not, of course, to in any way advocate departure from strict rules to prevent spot zoning. Still, the Maryland court has prudently allowed the use of the "floating zone," which is most desirable in an effort to overcome the inherent difficulties of effecting changes in Maryland. Even though the court appears to be inconsistent, further development in the "floating zone" area is warranted until such time, and even after, that the court rejects the "mistake or change" test.

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69. For favorable comments concerning the use of "floating zones", see Note, *Spot-Zoning and the Comprehensive Plan,* 10 SYRACUSE L. REV. 303 (1959); and Note, *Non-Euclidean Zoning — Its Theoretical Validity and Practical Desirability in Underdeveloped Areas,* 30 U. CINC. L. REV. 297 (1961).

70. In Rockhill v. Chesterfield Township, 23 N.J. 117, 128 A.2d 473 (1957), the court struck down a zoning scheme whereby the entire township was zoned residential and agricultural, and provision was made for a multitude of special exceptions. It termed such a scheme the antithesis of zoning and an invitation to spot zoning. See also Town of Hobart v. Collier, 3 Wis. 2d 182, 87 N.W.2d 868 (1958); and State v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

71. See, *e.g.,* State v. Cohen, 166 Md. 682, 687–88, 172 Atl. 274, 277 (1934); Barker v. Ayers, 5 Md. 202, 209 (1853).