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Developments in the Search for Workable Standards of Judicial Review of Piecemeal Rezoning

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RECENT DEVELOPMENTS

Developments in the Search for Workable Standards of Judicial Review of Piecemeal Rezoning

In 1926, the Supreme Court, in *Village of Euclid v. Ambler Realty Co.*, held that zoning is a legislative determination subject to a limited scope of judicial review.[1] Now a trend toward modification of that principle has emerged. The half-century since the Supreme Court established the constitutionality of zoning in *Euclid* has witnessed a dramatic increase in the number and complexity of land use regulations enacted under the aegis of the zoning power.[2] Moreover, a "new mood"[3] has emerged which suggests that private property should serve "a variety of public purposes beyond its function as a medium of private investment."[4] This perception of the societal implications of land use has necessitated allowing local zoning boards to exercise much greater regulatory power over private property.[5] When that power is directed at selected parcels on a piecemeal basis, however, the potential for arbitrary disregard of private property rights is substantial.[6] The inordinate

1. 272 U.S. 365 (1926). *See* pp. 298-99 & notes 25-30 *infra*. The broad principle of *Euclid* was recently affirmed in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

2. Such regulations include height and setback restrictions, minimum lot size, subdivision controls, aesthetic and architectural controls, minimum floor space requirements, limitations on the number of bedrooms, specification of the timing of development, and requirements regarding the contribution of parkland and school sites. *See generally* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1972), a detailed examination of new regulatory techniques prepared for the Council on Environmental Quality.

3. In their recent report, *The Use of Land*, the Citizens' Advisory Committee on Environmental Quality describes changing attitudes toward the use of land as a "new mood" in the nation, a mood that recognizes for the first time that decisions regarding the use of land will have a major impact on our society. It suggests land use decisions must take into account a whole range of social, economic, and environmental factors which in the past have often been ignored.

Bosselman, *Downzoning*, 32 URBAN LAND 3, 4 (1973).

4. *Id.* at 4.

5. This trend is comprehensively treated in F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 212-35 (1973).

6. While all legislation effects a redistribution of benefits and detriments in a soci-

use of zoning amendments as the principal means of land use control has focused attention on this problem.[7]

Zoning litigation usually arises in one of three ways:[8] either the landowner challenges the zoning board's approval of higher density use for a neighboring property,[9] the landowner challenges the refusal of the zoning board to increase density on his property, or the landowner challenges the action of the zoning board, which sua sponte has reduced the permissible density of his land. All three of these situations have traditionally been denominated as "piecemeal rezonings."[10] However, the term "downzoning" is increasingly used to describe the third situation, a zoning board's sua sponte reduction of density.[11]

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ety, individual property rights are seldom affected as directly or with so much opportunity for abuse as in a rezoning. Theoretically, unpopular policies are subject to reversal at the polls, but since rezonings affect specific individuals rather than a broad-based segment of the electorate, it is unlikely that a significant political counterforce could be generated. Consequently, as a student commentator has noted, "because of the procedural informality and limited judicial review which accompany legislative action, the presence of improprieties looms large, and individual rights are often sacrificed either on the altar of public opinion or ex parte over a lunch at the club." Comment, *Zoning Amendments—the Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 132 (1972).

7. In practice, however, it is the changes that are more important than the regulations. The National Commission on Urban Problems found that most communities use the "wait and see" approach to zoning. Thus it is the process that is important, not the original zoning plan. Rather than being contained in a published plan, "the community's real land use policy comes to be expressed in the zoning amendment."

Bosselman, *supra* note 3, at 4.

8. A fourth avenue of litigation is appeal from the decision of the board of adjustment upon denial of a request for a variance or special exception. These decisions do not contemplate zoning changes. *See* 2 R. ANDERSON, AMERICAN LAW OF ZONING § 14.04 (1968) [hereinafter cited as ANDERSON]. Consequently, they will not be considered here.

9. To prevent undue population concentration and overcrowding of land, zoning ordinances usually establish density limits by prescribing minimum lot area restrictions and building height, setback, and yard requirements. *See* 1 ANDERSON § 7.06; 2 *id.* §§ 8.41-.44. Density regulation is expressly authorized by enabling legislation and is generally upheld as a valid health measure. *Id.* However, in recent years, density restrictions which tend to exclude classes of persons from a community have been frequently invalidated. *See* note 24 *infra*.

10. *See, e.g.*, Board of County Comm'rs v. Edmonds, 240 Md. 680, 215 A.2d 209 (1965); MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965); Kracke v. Weinberg, 197 Md. 339, 79 A.2d 387 (1951).

11. The term downzoning, used here to refer to a density reduction, would also include a reduction in intensity of use, *e.g.*, from commercial use to residential use. While some courts now refer to density reduction as downzoning, others continue to describe density reduction by a number of terms including upzoning, upgrading or simply rezoning. The profession now appears to have settled on the term downzoning. *See* ALI-

The enactment of both comprehensive zoning ordinances and piecemeal rezoning amendments[12] is a legislative function.[13] Not only are zoning ordinances accorded the usual presumption of constitutional validity which attaches to legislation, but if the validity of the ordinance is even "fairly debatable" the ordinance must be sustained.[14] While the burden of proof imposed on the complainant under this standard is not insuperable,[15] it has generally been recognized as most difficult to overcome.[16] Courts which question the effectiveness of the traditional review standards to protect property rights face the challenge of devising a more workable standard of review—one which meaningfully checks arbitrary rezonings without hampering local efforts to change zoning plans which may be "obsolete in the light of present sophistication in our awareness of land use implications."[17]

In its first opportunity to consider the appropriate standard of judicial review of piecemeal downzoning, the Virginia Supreme Court, in *Board of Supervisors v. Snell Construction Corp.*,[18] established a somewhat novel standard which diminished the presumption of validity of piecemeal downzoning ordinances. The plaintiff-landowner filed an application to rezone sixteen acres of his twenty-six acre tract from single family residential to residential townhouse, ten units per acre (RT-10). On the urging of the county land use staff, the application was amended to request high density zoning (up to seventy-five units per acre) on a portion of the tract and RT-10 on the remainder, in conformance with the recommended densities of a newly adopted master plan. The planning board recommended rezoning the entire

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ABA/ULI STUDY MATERIALS OF THE ALI-ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, LAND USE LITIGATION: CRITICAL ISSUES FOR ATTORNEYS, DEVELOPERS AND PUBLIC OFFICIALS 269 (1974).

12. The term piecemeal zoning is not susceptible of precise definition. In general, the term refers to a zoning amendment "which establishes districts and regulates land uses in part, but not all, of the territory of a municipality." 1 ANDERSON § 5.14. While application of the term is generally confined to rezonings of small areas, one court held that an ordinance which rezoned 29 acres of a 650 acre tract was a piecemeal rezoning. MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965).

A distinction should be made between piecemeal zoning and spot zoning. The term spot zoning is normally applied to rezoning of a single landowner and to a use which is significantly cut of character with, and likely to disturb the tenor of the neighborhood. It is most often limited to rezoning very small parcels and would rarely be applied to one as large as 29 acres. *See* 1 ANDERSON §§ 5.04-.08.

13. *See* 2 ANDERSON § 14.04.

14. *See* p. 299 & note 27 *infra*.

15. *See* 1 ANDERSON § 2.16, at 76.

16. *See id.* § 2.17, at 77.

17. Bosselman, *supra* note 3, at 4.

18. 214 Va. 655, 202 S.E.2d 889 (1974).

tract RT-10, but the board of supervisors enacted an ordinance rezoning the tract for high density and RT-10 uses as the landowner requested. One year later, a newly elected board downzoned the high density use to RT-10. The trial court, in granting the landowner's motion for declaratory judgment, found the downzoning was not based upon a substantial change in circumstances or mistake in the original zoning and therefore held the downzoning ordinance invalid as arbitrary, capricious, and unreasonable.[19] On appeal to the Virginia Supreme Court,[20] the board argued that the absence of a change or mistake does not render the zoning ordinance unreasonable.[21] It argued alternatively that the previous board's approval of higher density use in the face of sewer and traffic problems was a mistake, even if done knowingly.[22] Further, the board argued that the new board's unwillingness to accept higher densities in light of substantial proof of continued deterioration of sewage and road facilities constituted a change within the rule enunciated by the trial court.[23]

In affirming, the supreme court unanimously held that a piecemeal downzoning ordinance is invalid as unreasonable unless based on a change in circumstances which substantially affects the public health, safety, or welfare, or unless based on a mistake in the original zoning. Once the landowner makes a prima facie showing that there has been no change in circumstances, the burden of going forward with the evidence of a change or mistake shifts to the governing body. If the governing body produces sufficient evidence to make the existence of a change or mistake fairly debatable, the ordinance must be sustained. The court held, as a matter of law, that the election of a new board of supervisors did not constitute a change of circumstances within the rule. The opinion did not explicitly consider the board's argument that the increase of density in the face of traffic and sewer problems was a mistake justifying the downzoning. Rather, the court concluded that the board produced no evidence probative of mistake or change. The "change or mistake" rule enunciated by the Virginia court represents another in a series of recent decisions departing from traditional review standards.

This Recent Development will compare the standards of review of piece-

19. Board of Supervisors v. Snell Constr. Corp., Chancery No. 36495 (Va. Cir. Ct., Nov. 24, 1972) (letter opinion), *aff'd*, 214 Va. 655, 202 S.E.2d 889 (1974).

20. There is no intermediate appellate division in the Virginia court system and no appeal to the supreme court as a matter of right. The supreme court, after review of the application for a writ of error, determines if the appeal should be allowed. *See* VA. CONST. art. VI, § 1; VA. CODE ANN. § 8-462 (1957).

21. Brief for Appellant at 8-17, Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889 (1974).

22. *Id.* at 20-22.

23. *Id.* at 22-23.

meal rezonings under the *Snell* decision with those established by the highest courts of Maryland, New York, and Oregon. These decisions have reduced the presumption of validity traditionally accorded rezoning amendments either by shifting the burden of proof to the governing body, by imposing substantive limitations on the rezoning power, or by employing the broader review standards of quasi-judicial actions to rezoning challenges. Emphasis will be placed on the impact these standards are likely to have on affected landowners and on a community's ability to regulate land use effectively.[24]

I. TRADITIONAL REVIEW STANDARDS

The majority of courts have established a very limited scope for reviewing piecemeal rezoning decisions. Under the standard of review established in *Euclid*, the complaining landowner assumes the burden of proving the zoning ordinance unreasonable, arbitrary, or capricious, that it bears no relation to the public health, safety or general welfare,[25] or that it amounts to a taking.[26]

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24. A related but distinct development is the trend toward heightened judicial scrutiny of zoning ordinances which are alleged to have an exclusionary effect. *See* Township of Willistown v. Chesterdale Farms, Inc., 7 Pa. Commw. 453, 300 A.2d 107 (1973) (zoning ordinance which did not provide sufficient land area for apartments generally, nor for lower cost apartments, was unconstitutional) and authorities cited therein at 463-64 nn.2, 3, 300 A.2d at 112 nn.2, 3; Annot., 48 A.L.R.3d 1210 (1973); 58 CORNELL L. REV. 1035, 1045 (1973). Notwithstanding that some courts invalidate exclusionary zoning as arbitrary and hence violative of the landowner's due process rights, *see, e.g.*, Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 469-71, 268 A.2d 765, 766-67 (1970), the issues raised are significantly different from the question of a zoning amendment's reasonableness normally involved in rezoning challenges. Consequently, this article is not concerned with the standards of review of rezoning which may be exclusionary. Nor will it consider the review standards of zoning ordinances which may abridge other constitutional rights, *see, e.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (downzoning which barred low-cost, black housing project was a racially discriminatory violation of equal protection); Construction Industry Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974) (annual unit quota on residential construction violates first amendment right to travel).

25. *See* 1 ANDERSON §§ 2.14-.16.

26. An ordinance which amounts to a taking of property without compensation, which is proscribed by the fifth and fourteenth amendments to the Constitution, is one which deprives the owner of all use of the land for any purpose to which it is reasonably adaptable. *See* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). If a taking cannot be established, the downzoning might be barred by the doctrine of equitable estoppel or vested rights. The universal rule is that an owner acquires no right to use his land in accordance with existing zoning by mere purchase in reliance thereon. Many courts apply the principles of equitable estoppel and vested rights (which some courts use interchangeably) to prevent the downzoning from applying to the landowner if he has substantially relied in good faith on government conduct. For an excellent analysis of the variations among states, see Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Dis-*

The Court will not substitute its judgment for that of the zoning board, and if the reasonableness of the ordinance is even "fairly debatable," it must be sustained.[27] Moreover, the courts generally will not inquire into the motives of the Board members.[28] Thus, the task of proving arbitrariness under this standard has been extremely difficult.[29] While the Court in *Euclid* applied these principles to test the validity of an entire municipal zoning scheme, the majority of courts have applied this standard in reviewing piecemeal rezoning ordinances as well.[30]

A. The Comprehensive Plan Requirement

Underlying the Court's reasoning in *Euclid* was the assumption that the exercise of the zoning power would be premised upon a rational and productive use of community planning. This philosophy is reflected in the requirement of nearly every state zoning enabling act that all zoning be enacted in accordance with a comprehensive plan for land use.[31] Failure to meet this requirement renders the ordinance ultra vires and therefore void.[32] Theoretically, the comprehensive plan requirement assures the affected landowner that a piecemeal rezoning is necessary to subserve the overriding public interest in rational community development. Practical application of the require-

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putes, 1971 URBAN L. ANNUAL 63. While accrual of vested rights is contingent upon pecuniary reliance manifested by a physical change in the land, a liberalizing trend may be discernible which would extend these principles to pecuniary reliance prior to actual physical construction. *See* Imperial Homes v. Town of Largo, Civil No. 37,160 (Fla. Cir. Ct., Aug. 1, 1973); Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972); Gruber v. Mayor & Twp. Comm'n, 39 N.J. 1, 186 A.2d 489 (1962) (*semble*).

27. *See* Zahn v. Board of Pub. Works, 274 U.S. 325, 328 (1927).

28. *See* 1 ANDERSON § 4.18; Comment, *supra* note 6, at 140 n.80.

29. *See* Comment, *supra* note 6, at 131-32.

30. *See* 1 ANDERSON § 2.14, at 69 & n.2. These standards have been sustained recently in federal court. *See* South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974) (en banc) (local rezoning decisions are quasi-legislative in character, entitled to a presumption of validity, and not subject to federal judicial intervention in the absence of arbitrary action), *overruling* 482 F.2d 389 (5th Cir. 1973), *petition for cert. dismissed*, 416 U.S. 901 (1974) (rezoning of specific parcels is adjudicative in character, requires adherence to minimal due process including statement of reasons for action and non-recourse to evidence *de hors* the record).

31. *See* ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926). For a comprehensive survey of the enabling laws, see Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 368-80 (1965).

The requirement that zoning be in accordance with a comprehensive plan is a nearly universal requirement of state zoning enabling legislation. *See* Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155-56 (1955).

32. *See, e.g.*, Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

ment, however, has shown that it affords little protection against arbitrary rezoning.

The problem has been largely one of definition. Without legislative guidance, the courts have been unwilling to require adherence to a written master plan or other such planning document.[33] In fact, the absence of any type of written plan does not invalidate a zoning ordinance.[34] Rather, the comprehensive plan "may be garnered from any available source, most especially the master plan of the community, if any has been adopted, the zoning law itself and the zoning map."[35]

Since the comprehensive plan is a concept which lacks concrete definition, it is often difficult to determine whether a given zoning amendment conforms to the plan. This difficulty is compounded by the necessity of allowing the political subdivision to modify the plan itself as need occasions.[36] Therefore, it is sometimes argued in defense of a piecemeal zoning ordinance that, while the amendment conflicts with the existing comprehensive plan, it is intended to modify and supplant the plan and the new plan is embodied in the very amendment which is challenged.[37]

In view of the practical difficulties involved in construing the comprehensive plan requirement, courts have merely required that the zoning ordinance be well thought out and not arbitrary.[38] Thus, while the comprehensive plan requirement was conceived as an independent test of validity, it has become no more than a reflection of the constitutional test of "reasonableness."[39]

In *Udell v. Haas*,[40] an opinion which imparted greater significance to the comprehensive plan requirement, the New York Court of Appeals interpreted the requirement in terms markedly dissimilar from the weight of authority and its own past pronouncements.[41] Viewing the comprehensive plan as a

33. Courts have not equated the master plan with the comprehensive plan because this would merge the planning function with the zoning function and elevate the planner's decisions to the status of law. *See, e.g.*, Nottingham Village, Inc. v. Baltimore County, 266 Md. 339, 354-55, 292 A.2d 680, 687-88 (1972).

34. *See, e.g.*, Kozesnik v. Township of Montgomery, 24 N.J. 154, 165-66, 131 A.2d 1, 7-8 (1957). The court also noted that in 1954, while there were 371 zoning ordinances in the state, there were only 320 planning boards and only 112 master plans.

35. Udell v. Haas, 21 N.Y.2d 463, 472, 235 N.E.2d 897, 902, 288 N.Y.S.2d 888, 896 (1968).

36. *See* Annot., 40 A.L.R.3d 372, at 383 (1971).

37. *See, e.g.*, Gruber v. Mayor & Twp. Comm'n, 39 N.J. 1, 11, 186 A.2d 489, 494 (1962).

38. *See, e.g.*, Storch v. Zoning Bd., 267 Md. 476, 488-89, 298 A.2d 8, 15-16 (1972).

39. *See* Haar, *supra* note 31, at 1157, 1171-72, 1173.

40. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

41. *Compare id., with* Rodgers v. Tarrytown, 302 N.Y. 115, 121-22, 96 N.E.2d 731, 733 (1951); *see* Haar, *supra* note 31, at 1170-71.

protection against arbitrary decisionmaking, the court noted that "[w]ith the heavy presumption of constitutional validity [of zoning ordinances] . . . and the difficulty in judicially applying a 'reasonableness' standard,"[42] the landowner might be tyrannized if the courts do not require more than "mock obeisance" to the statutory requirement.[43] Therefore, the court would demand "clarity and specificity . . . in the articulation of the premises" upon which a zoning ordinance is based, thereby providing more effective judicial review.[44] Moreover, the court evinced an intent to scrutinize piecemeal rezonings more closely for compliance with the comprehensive plan requirement.[45]

Finding that the downzoning of several small lots from commercial use to residential use conflicted with the town's basic land use scheme for commercial development of the area,[46] the court declared the downzoning invalid as ultra vires the enabling act. While the court emphasized the importance of professional land use study, it did not accept the professionals' recommendations at face value. Rather, the recommendations of the village's planning consultants were rejected as being inconsistent with the basic land use scheme of the community.

A more emphatic departure from the presumption of the validity of piecemeal rezonings was made in *Roseta v. County of Washington*.[47] The Oregon Supreme Court shifted the burden of proving that the rezoning amendment accords with the comprehensive plan to the governing body. From the enabling act, the court extrapolated a legislative intent to regard the requirement as *stricti juris* which justified shifting the burden of proof. This

42. 21 N.Y.2d at 469, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.

43. *Id.* at 470, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.

44. *Id.*

45. Where . . . local officials adopt a zoning amendment to deal with various problems that have arisen, but give no consideration to alternatives which might minimize the adverse effects of a change on particular landowners, and then call in the experts to justify the steps already taken in contemplation of anticipated litigation, closer judicial scrutiny is required to determine whether the amendment conforms to the comprehensive plan.

Id. at 470, 235 N.E.2d at 901, 288 N.Y.S.2d at 894-95.

46. The stated development goals of the community set forth two years previously provided for continued low density residential development with a peripheral commercial supporting area to strengthen the tax base. Previous amendments had rezoned areas adjacent to the plaintiff's lots for commercial use. The court determined that these factors demonstrated that the pattern of peripheral commercial use constituted the "comprehensive plan." The findings of the village's experts that it "is the feeling of the Village" that it did not want extensive business in that area was held not a sufficient expression of public interest to warrant the zone change in the absence of a deliberate change in community policy reflected in a careful planning study.

47. 254 Ore. 161, 458 P.2d 405 (1969).

approach, or variations of it, has been adopted in only a few jurisdictions.[48]

Occasionally, it has been suggested that many of the abuses associated with rezoning could be ameliorated by judicial insistence on compliance with the comprehensive plan requirement.[49] Nevertheless, several limitations of the comprehensive plan requirement as a means of providing more meaningful review are apparent. First, the comprehensive plan requirement is a statutory one which exists apart from, and should not limit, the inquiry of whether the amendment comports with constitutional requirements. Second, the problems inherent in defining a comprehensive plan in a given instance make it difficult to determine whether a rezoning is consonant with the comprehensive plan in many situations. When the amendment effects a change in use, as in *Udell*, the problem is less pronounced. But where, as in *Snell*, the amendment effects a less dramatic change (as from a residential high rise to a townhouse classification) greater difficulty arises in determining if the amendment conforms to the comprehensive plan. Several courts, including the Oregon Supreme Court, have enlarged the scope of reviewing whether the amendment complies with constitutional requirements as well as with the comprehensive plan requirement.[50]

B. The Change or Mistake Rule

For at least three decades a few state courts have held that the strong presumption of the correctness of the original zoning necessarily weakens the presumptive validity of subsequent piecemeal changes.[51] A piecemeal

48. *Roseta* and D'Angelo v. Knights of Columbus Bldg. Ass'n, 89 R.I. 76, 151 A.2d 495 (1959) (*semble*), both implemented this rule in the context of spot zoning; the rule, therefore, may not be applicable to other rezoning situations. *See* note 12 *supra*. *Compare* Forestview Homeowners Ass'n, Inc. v. County of Cook, 18 Ill. App. 3d 230, 242-43, 309 N.E.2d 763, 773 (1974) (burden on plaintiff), *with* Raabe v. City of Walker, 383 Mich. 165, 178, 174 N.W.2d 789, 796 (1970) (absence of a comprehensive plan weakens the presumption of validity which otherwise would attach to a rezoning).

49. *See* Roseta v. County of Washington, 254 Ore. 161, 168, 458 P.2d 405, 409 (1969).

50. *See* p. 304 & notes 59 & 60 *infra*.

51. *See, e.g.*, Roosevelt v. City of Englewood, 176 Colo. 576, 492 P.2d 65 (1971) (evidence of material change of conditions required to justify rezoning); Clark v. City of Boulder, 146 Colo. 526, 362 P.2d 160 (1961); Mayor & Council of Rockville v. Stone, 271 Md. 655, 319 A.2d 536 (1974); Kracke v. Weinberg, 197 Md. 339, 347, 79 A.2d 387, 391 (1951) (rezoning valid if original zoning was based on mistake); Northwest Merchants Terminal v. O'Rourke, 191 Md. 171, 60 A.2d 743 (1948) (rezoning invalid unless based on changed conditions); Underwood v. City of Jackson, 300 So. 2d 442 (Miss. 1974); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966). Connecticut and Oregon, states which formerly applied the rule, *see* Zoning Comm'n v. New Canaan Bldg. Co., 146 Conn. 170, 148 A.2d 330 (1959); Page v. City of Portland, 17 Ore. 632, 165 P.2d 280 (1946), now appear to have abandoned it. *See* Andrew C. Petersen, Inc. v. Town Plan. & Zoning Comm'n, 154 Conn. 638, 228 A.2d 126 (1967)

change is invalid unless warranted by strong evidence of a substantial change of conditions, or by a mistake in the original zoning.[52] In some jurisdictions it appears that the zoning board, as the proponent of the change, must assume the burden of proving that a change or mistake has occurred.[53] The Maryland courts, the chief proponents of the doctrine, have rigidly interpreted the rule and seem to require a change in physical conditions currently operating upon the neighborhood as a precondition to a piecemeal zoning change.[54]

The limitation this rule may sometimes place on planning flexibility is illustrated in *MacDonald v. Board of County Commissioners*.[55] The zoning board approved high rise zoning for a 29-acre parcel of a proposed 650-acre development. The 650-acre tract was part of a large area in the county which had been zoned rural agricultural (minimum lot size ½ acre), but which remained largely undeveloped. The proposed development plan was based on innovative planning concepts designed to provide a mixture of compatible uses while maximizing open space and recreational acreage. The Maryland Court of Appeals held the high rise zoning invalid, apparently because there had been no significant change in physical circumstances.[56] Thus, the court's decision foreclosed the utilization of an innovative planning concept of mixing densities either because the concept was unknown at the time of the original zoning or because the board did not appreciate, as it later did, the advantages of its adoption. Therefore, the narrow interpretation of change or mistake effectively locked the board into what it regarded as an antiquated zoning plan for that area. As expressed by the dissent, the Maryland change or mistake rule fails to consider that ideas change.[57]

(by implication); Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973). *See generally* 1 ANDERSON § 4.29; 1 C. RATHKOPF, THE LAW OF ZONING AND PLANNING § 27-14 (1974).

52. *See* Board of County Comm'rs v. Edmonds, 240 Md. 680, 687, 215 A.2d 209, 213 (1965). In this respect, the Virginia rule differs in that it does not require strong evidence of a change or mistake and its application is limited to downzonings. *See* Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 659 n.1, 202 S.E.2d 889, 893 n.1 (1974); pp. 305-06 *infra*.

53. *See* 1 ANDERSON § 4.29, at 210-11. The burden of proof established under this rule differs from that adopted by the Virginia Supreme Court in *Snell*. *See* pp. 307-08 *infra*.

54. The court does not define the rule in these terms; however, a reading of the cases lends support to this conclusion. *See, e.g.*, MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965); Kracke v. Weinberg, 197 Md. 339, 79 A.2d 387 (1951). This interpretation of the majority approach was voiced in dissent in *MacDonald*. *See* 238 Md. at 581, 210 A.2d at 343 (Barnes, J., dissenting).

55. 238 Md. 549, 210 A.2d 325 (1965).

56. *See* note 54 *supra*.

57. 238 Md. at 579, 210 A.2d at 342 (Barnes, J., dissenting).

II. PIECEMEAL ZONING AS A QUASI-JUDICIAL FUNCTION

In *Fasano v. Board of County Commissioners*,[58] the Oregon Supreme Court broke sharply with precedent in holding that piecemeal zoning amendments are the product of quasi-judicial action, not legislative action.[59] Focusing on the nature of the zoning board's activity, the court determined that ordinances which establish general policies are legislative acts, whereas those which apply to specific parcels of property are quasi-judicial and enjoy no legislative presumption of validity. The court reasoned that "local and small decision groups are simply not the equivalent in all respects of state and national legislatures" and noted the "almost irresistible pressures that can be asserted by private economic interests on local government . . . ."[60] Rejected was the argument that the separation of powers doctrine required the courts to accord every ordinance a full presumption of validity. To do so, said the court, would permit rezonings to be "shielded from less than constitutional scrutiny."[61]

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58. 264 Ore. 574, 507 P.2d 23 (1973).

59. Several recent opinions have embraced this principle. *See* Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627, 630 (Colo. 1973) (ruling on application for rezoning for planned unit development was adjudicative in nature and district court's order to grant rezoning request was proper when denial of request lacked any competent evidence to support the findings); Kropf v. City of Sterling Heights, 391 Mich. 139, 164, 215 N.W.2d 179, 193 (1974) (Levin, J., concurring) (when rulings on individual applications for rezoning and piecemeal rezoning amendments are adjudicative in nature they are subject to direct review by courts on the merits of the proposed use); Lowe v. City of Missoula, 525 P.2d 551, 554 (Mont. 1974) (piecemeal downzoning is adjudicative in nature and invalid as an abuse of discretion when review of entire record reveals that city council acted upon information which was lacking in fact and foundation).

The ALI MODEL LAND DEVELOPMENT CODE (Proposed Official Draft No. 1, 1974) follows the *Fasano* rule. *See* section 2-312 and accompanying comment which designates as "Special Amendments" those amendments which result in a change limited in effect to a single parcel or to several parcels under related ownership, or which change regulations applicable to an area of 50 acres or less. The section, with certain exceptions, permits amendments only if the "development at the proposed location is essential or especially appropriate in view of the available alternatives within or without the jurisdiction . . . ." (§ 2-312(2)(a)). Moreover, the section requires that adoption of a special amendment be preceded by a quasi-judicial-type hearing (§ 2-304), rather than a legislative-type hearing (§ 2-305).

60. 264 Ore. at 580, 588, 507 P.2d at 26, 30.

61. *Id.* at 580, 507 P.2d at 26. For a view that the basis of the *Fasano* opinion is statutory interpretation of the state enabling act, not due process, see Mattis, *The Year of Fasano: What Thirty-Two Acres Hath Wrought, reprinted in* ALI-ABA/ULI STUDY MATERIALS, *supra* note 11, at 77-78. Although the author concedes that the procedural safeguards required by the court may reach "constitutional proportions," he states that it is "more than possible to rationalize the procedural pronouncements as a type of 'common law' or further extrapolation of elements adhering in the statutes once the court

Under this standard, piecemeal rezoning amendments must be justified by the proponent of the change. The proponent assumes the burden of proving, at a minimum, that a public need for the change exists, that the need will be best satisfied by changing the particular piece of property, and that the change conforms with the comprehensive plan. The court established a sliding scale under which the level of proof necessary to show the above factors will increase with the degree of change. Moreover, "as the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase."[62] The court noted, however, that a mistake in the original zoning or change in physical conditions might justify, but will not delimit, the determination of the existence of the public need for a zoning change.

Other consequences of the characterization of small scale rezoning proceedings as quasi-judicial are the procedural safeguards which must be provided in the amendatory process.[63] Exactly what procedures will be required is uncertain;[64] however, the court gave some guidance as to what a few of the requirements are:

> Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no prehearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.[65]

III. *Snell*: A New Twist in the Change or Mistake Rule

In *Snell*, the Virginia Supreme Court established a standard of review which undercut the traditional presumption of validity accorded legislation. The Virginia rule, in this respect, parallels the development of review standards in Maryland and Oregon.

A. Nature and Effect of the Decision

In ruling that piecemeal downzonings are invalid absent a change in circumstances or a mistake in the original zoning, the court relied heavily on the

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determined the adjudicatory nature of the small scale rezone proceeding." *Id.* at 82-83.

62. 264 Ore. at 586, 507 P.2d at 29.

63. *See generally* Comment, *supra* note 6.

64. The procedures which satisfy due process requirements vary with the circumstances, *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 263 (1970), and the court did not attempt to fully define them in *Fasano*.

65. 264 Ore. at 588, 507 P.2d at 30.

state zoning enabling act. The court premised its decision on two statutory policies. First, the statutes establish a deliberate balance between private property rights and public interests. Zoning bodies are instructed to zone with "reasonable consideration for . . . the conservation of properties and their values."[66] Second, the statutes establish as one purpose of zoning the encouragement of economic development which provides desirable employment and enlarges the tax base.[67] The court reasoned that the change or mistake rule will establish predictability and stability in the law. Stability of permissible land uses conserves legitimate profit expectations, thereby encouraging investment, with the result that land will be put to "its optimum use to fulfill societal needs."[68] Thus, the court concluded that the rule promotes the policies and purposes of the enabling act.[69]

Unfortunately, the court's terse statement of the Virginia change or mistake rule affords little indication of the decision's reach. Since no facts were presented in *Snell* which seriously controverted whether a change had

66. 214 Va. at 658, 202 S.E.2d at 892, *quoting* VA. CODE ANN. § 15.1-490 (1973).

67. *See* VA. CODE ANN. § 15.1-489(7) (1973).

68. 214 Va. at 657, 202 S.E.2d at 892. A concern that zoning laws not discourage investment and retard community development has been voiced elsewhere. "[I]t is not enough to regulate land development. There must be incentive to develop, or else there will be little new housing except that which government could afford to build." Golden v. Planning Bd., (*Ramapo*) 30 N.Y.2d 359, 390, 285 N.E.2d 291, 309, 334 N.Y.S.2d 138, 162 (1972) (Breitel & Jasen, JJ., dissenting, *citing* D. MANDELKER, THE ZONING DILEMMA 47-51 (1971)), *appeal dismissed*, 409 U.S. 1003 (1973).

See Betts, *The Police Power—Rezoning to Lower Density*, APPRAISAL J., Jan. 1974, at 86, for a professional appraiser's insight into just how uncertain land values can become when the potential for unrestrained downzonings exists. A reasonable implication of Mr. Betts' analysis is that uncertainty often makes investment speculative, thereby discouraging redevelopment.

69. While the court justified its decision as promoting the purposes of the enabling act, it did not go so far as to hold that amendments enacted in the absence of a change or mistake exceeded the authority conferred by the statute. Indeed, the statutory language provides little basis for such an interpretation. *Compare* VA. CODE ANN. §§ 15.1-489, 15.1-490 (1973), *with* § 15.1-491(g) (grant of power to amend regulations). *But cf.* Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Super. Ct. 1971), *cert. granted*, 62 N.J. 185, 299 A.2d 720 (1972), *retried*, 128 N.J. Super. 438, 320 A.2d 223 (Super. Ct. 1974) (zoning ordinance which does not meet regional housing needs held ultra vires because not in furtherance of the purposes of the enabling act, *i.e.*, the furtherance of the general welfare).

The sections of the enabling act relied upon by the court reasonably support the court's conclusion that the act requires a board to carefully consider the effect of a proposed downzoning on private property and community development. A failure to do so would be evidence of arbitrariness and unreasonableness. However, those sections set forth the general purposes to be effected by the zoning power and only a very strained interpretation could establish as their intended effect a substantive limitation on the power of local governments to rezone. Therefore, it is arguable that the court's reliance on the enabling act as the basis of its decision should preclude a restrictive definition of change or mistake.

occurred, the court was not called upon to specify which factors might constitute a change justifying a piecemeal downzoning.[70] Nor did the court volunteer dicta which might provide some insight. On the basis of this limited opinion, it is somewhat conjectural to predict the development of the rule in future cases. Yet the way in which the rule is defined is likely to affect land use regulation significantly.

If in future cases the court limits evidence of change to physical changes which occur subsequent to the original zoning, it will have aligned itself with the Maryland court's apparent development of the rule. As *MacDonald* illustrates, the Maryland court's rigid interpretation of "change," to the extent that it establishes a strict precondition to a zoning change, effects a substantive limitation on the power of local governments to rezone. In this sense, the rule may be thought of as something "akin to administrative res judicata."[71] On the other hand, the court may define a change or mistake which substantially affects the public health, safety, or welfare in broad terms. Theoretically, the change or mistake rule may be flexible enough to allow consideration of a range of socioeconomic variables including demographic changes, changed ideas and planning concepts. Defined in these terms, the rule, rather than establishing a strict precondition to a zoning change, merely requires the governing body to delineate the reasons for the change, and thereby provides the court with a sounder basis for applying the constitutional test of reasonableness.

B. Burden of Proof

Under the rule announced in *Snell*, once the landowner makes a prima facie showing that no change of circumstances has occurred since enactment of the existing zoning, the burden shifts to the governing body to produce evidence sufficient to render the existence of a change or mistake fairly debatable. Failure to introduce such evidence renders the downzoning ordinance presumptively unreasonable and invalid. While the requirement arguably shifts the burden of proof to the governing body, it may be more accurate to regard the rule as shifting the burden of production of evidence

70. The county conceded that no change of physical circumstances had occurred since the rezoning by the previous board. Brief for Appellants at 22, Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889 (1974). The county did contend that the election of a new board constituted a change within the rule. Arguably, the court's rejection of this argument indicates an intention to limit the change requirement to physical changes. Nevertheless, it is reasonable to conclude that a change of board members, in the absence of any evidence of a need for the zoning change in terms of social changes or new planning concepts or policies, does not preclude consideration of the latter as satisfying the change requirement.

71. 1 ANDERSON § 4.29, at 209.

to the governing body.[72] Thus, the requirement might merely be regarded as a reflection of the maxim that even a moving party should not be required to prove a negative fact once a prima facie case has been made, at least where the facts in issue are peculiarly within the knowledge of the adverse party.[73] Otherwise, the landowner would be placed in the difficult position of proving the absence of a change or mistake.

Even if the rule does effectively shift the burden of proof to the governing body, the burden imposed is minimal. The board needs only to introduce evidence sufficient to render the existence of a change or mistake fairly debatable, a standard of proof much lower than proof by a preponderance of evidence, the normal standard in civil cases.[74]

The incidence of the burden of proof under the Maryland change or mistake rule is unclear. While the courts have sometimes said that a presumption of validity applies to zoning amendments, more frequently noted is the presumption that the original ordinance is valid.[75] Therefore, the burden of proof of mistake or change rests with the board as the proponent of the change.

Under the *Fasano* rule, the burden of proof appears to rest with the zoning board whenever it has approved a piecemeal rezoning. The court explained that, "[b]ecause the action of the commission [board] in this instance is an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change."[76] It seems, therefore, the proponent of the change alluded to by the court is the applicant

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72. The shifting burden here pertains to the burden of proof only in its secondary sense. It refers to shifting the burden to produce evidence to the defendant, not to a shifting of the risk of non-persuasion. *See, e.g.*, Hill v. Smith, 260 U.S. 592, 594 (1923); 9 J. WIGMORE, EVIDENCE §§ 2485, 2487 (3d ed. 1940).

73. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 643 (D.C. Cir. 1973). *See also* 9 J. WIGMORE, *supra* note 72, §§ 2486, 2489; 31A C.J.S. *Evidence* §§ 112-13 (1964).

74. *See* C. MCCORMICK, EVIDENCE § 339, at 793 (2d ed. 1972); 9 J. WIGMORE, *supra* note 73, § 2498; 32A C.J.S. *Evidence* § 1020 (1964); 30 AM. JUR. 2d *Evidence* § 1163 (1967).

75. *Compare* Board of County Comm'rs v. Edmonds, 240 Md. 680, 215 A.2d 209 (1965), *and* DePaul v. Board of County Comm'rs, 237 Md. 221, 205 A.2d 805 (1965) (burden on proponent of rezoning change challenging board's refusal to rezone property), *with* MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965) (burden on party urging validity of rezoning amendment to overcome strong presumption of validity of original zoning), *and* American Oil Co. v. Miller, 204 Md. 32, 102 A.2d 727 (1954); Kracke v. Weinberg, 197 Md. 339, 79 A.2d 387 (1951) (presumption of validity applies to rezoning as well as to original zoning, but not with as great a force).

76. 264 Ore. at 586, 507 P.2d at 29.

for the zoning change appearing before the zoning board. Under established principles of administrative review, the board's determination, whether approving or rejecting the application for a change, should be accorded a presumption of regularity when reviewed by the court.[77]

However, the court added the following language which conflicts with this interpretation: "As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase."[78] The court's reference to *the burden of showing that the potential impact was carefully considered and weighed* apparently applies to the zoning board and belies the assumption that the burden of proof referred to by the court is that of the applicant. Rather, it appears that the court has shifted the burden of proof to the zoning board when defending its zoning change before the court. In effect, the Oregon Supreme Court, much like the Maryland courts, has ascribed a presumption of validity to the original zoning but not to the later determination of the zoning board to rezone. Thus, the zoning board, though actually the defendant before the court, is placed in the procedural posture of a moving party appearing before the court in the first instance. Clearly, this result does not flow from the designation of piecemeal rezoning as a judicial function.

IV. The Quasi-Judicial Label

As courts reconsider the standards of reviewing rezonings, whether they characterize rezoning proceedings as quasi-judicial or legislative will have a dramatic impact upon the rights of the parties involved and the community's interest in rational development. The disparate approaches taken by the courts which have considered the question are likely to serve as guides for future decisions, and it is important, therefore, to examine their theoretical bases in light of the significant interests they affect.

A. Change or Mistake Rule

The theoretical basis for the change or mistake rule has not been explained by the courts beyond stating that the original zoning was designed to be more or less permanent and presumed to be valid. Therefore, changes cannot be accorded the same presumption of validity.[79] In rejecting that argument, one court replied that the original ordinance was a legislative act presumed to

77. *See* note 82 *infra.*
78. 264 Ore. at 586, 507 P.2d at 29.
79. *See* cases cited note 75 *supra.*

be valid when enacted, and the piecemeal rezoning amendment which superseded it likewise was a legislative act and also presumed valid.[80] Therefore, it appears that the change or mistake rule implicitly assumes that the enactment of piecemeal rezoning amendments, if not quasi-judicial acts, are at least something less than legislative acts. Yet, aside from shifting the burden of proof, the courts have neither altered review standards for piecemeal rezonings nor required procedural safeguards in the decisionmaking process. Instead the courts have focused on reviewing the substantive decision itself and not the fairness and rationality of the decisionmaking process. The emphasis on stability has limited planning flexibility without necessarily protecting the rights of the parties involved. Although the requirement that the board prove a change may reveal arbitrary and capricious action to the court as an ancillary benefit, the rule fails to guide local decisionmakers or landowners adequately.

B. The Fasano *Rule*

Notwithstanding the formal organization of zoning boards as legislative bodies, the *Fasano* rule apparently regards them as performing the quasi-judicial decisionmaking of an administrative agency when engaged in piecemeal rezoning. The following generalized principles of administrative law should apply to the review of board proceedings:[81]

1) The determinations of the board are accorded a presumption of regularity.[82]
2) When the board engages in adjudicatory factfinding, a number of procedural safeguards must be employed. Legislative factfinding does not require the full range of procedural safeguards.[83]
3) The court's review of the board's findings of fact is limited to the determination of whether there is substantial evidence to support the board's findings.[84]

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80. Bartlett v. Township of Middletown, 51 N.J. Super. 239, 261, 143 A.2d 778, 790 (Super. Ct. 1958).

81. These observations are simplifications of a vast body of law which is pregnant with troublesome and controversial questions.

82. *See* City of Colorado Springs v. District Court, 519 P.2d 325, 327 (Colo. 1974), *quoting* United States v. Chem. Foundation, Inc., 272 U.S. 1, 14-15 (1926); C. McCORMICK, *supra* note 74, § 343; 2 AM. JUR. 2d *Administrative Law* §§ 750-51 (1962).

83. *See* 1 F. COOPER, STATE ADMINISTRATIVE LAW 177-80 (1965). *See also* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. City of Denver, 210 U.S. 373 (1908).

84. *See* 4 K.C. DAVIS, ADMINISTRATIVE LAW § 29.01 (1958).

> In recent decades the principal guide to the meaning of substantial evidence has been a Supreme Court statement written by Chief Justice Hughes: "Sub-

4) The court can substitute its judgment for that of the board on legal questions, but will normally give some deference to the board's determinations when the issues raised require special expertise or when the determinations involve mixed questions of fact and law.[85]

Theoretically, article III courts and their state counterparts cannot constitutionally exercise legislative discretion.[86] In practice, however, the difficulty of determining whether an issue presents legal or factual questions can often result in the substitution of judicial for administrative judgment.[87]

The *Fasano* rule may well foreshadow the introduction of these problems in zoning cases. In addition to proving compliance with the statutory plan requirement, the proponent of the change assumes the burden of proving "that there is a public need for the kind of change in question and that the need is *best* met by the proposal under consideration."[88] Since planning is more of an art than a science, and zoning changes involve numerous policy choices and informed judgments, it is difficult to conceive of a situation in which there can be one *best* judgment as to the optimal land use policy for a given area. Therefore, the substitution of judicial for legislative judgment in this area looms large, and with it the prospect of fragmented policymaking.

The procedural implications of the quasi-judicial label will fundamentally alter the character of rezoning proceedings. The requirement that zoning boards develop a complete record with adequate findings, provide impartial decisionmakers with no ex parte contacts, and permit the introduction and rebuttal of evidence, will go a long way towards improving the rationality and fairness of the decisionmaking process. The courts, in ruling that existing procedures violate due process, will likely provoke a legislative response. The legislative establishment of administrative procedures would provide meaningful guidance to local decisionmakers and affected landowners. That these procedures would unduly burden the rezoning process seems unlikely.[89]

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stantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Id. at § 29.02, *quoting* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

85. *See* 4 K.C. DAVIS, *supra* note 84, §§ 30.01, 30.14. *See generally* Comment, *Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance*, 115 U. PA. L. REV. 40 (1966).

86. *See* Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923); 4 K.C. DAVIS, *supra* note 84, at § 29.10. The Constitution does not prevent a state from assigning nonjudicial functions to its courts. *See* Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). However, the state constitutions often place such a limitation on state courts. *See, e.g.*, Rosslyn Gas Co. v. Fletcher, 5 F. Supp. 25 (E.D. Va. 1933).

87. *See* 4 K.C. DAVIS, *supra* note 84, § 29.11, at 187.

88. 264 Ore. at 586, 507 P.2d at 29 (emphasis added).

89. An analysis of the procedural safeguards required under the quasi-judicial label and their effect from the viewpoint of practical administration may be found in Comment, *supra* note 6, at 140-42.

C. An Alternative Conception

It has always been assumed that local zoning bodies are not the equivalent in all respects of state and national legislatures. The notice and hearing requirements prescribed by the enabling acts which apply to zoning (but not to state and national legislatures) are evidence of this.[90] Moreover, these requirements have been regarded as jurisdictional[91] and appear to be of constitutional dimension.[92] Additionally, without abandoning the conception of rezoning as legislative, some courts have required typically non-legislative safeguards in reviewing rezoning decisions to ensure the "essential fairness" of the proceedings.[93] Conceding the adjudicatory aspects of piecemeal rezoning decisions, they nevertheless involve an important element of discretionary policymaking which cannot and should not be enervated. Given the hybrid nature of rezoning, it is anomalous to regard rezoning judgments as strictly quasi-judicial in nature and subject to reversal unless they are arbitrary, or are not based on substantial evidence.[94] Thus, while due process may require the adoption of a number of procedural safeguards in the decisionmaking process, it should not be thought to require expansion of the scope of judicial review in a way which would permit substitution of the court's judgment for that of the zoning board.[95]

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90. *See* 1 ANDERSON §§ 4.03, 4.11, 4.12.

91. Statutory requirements of notice and hearing preliminary to amendment of zoning are mandatory and jurisdictional, and any amendment passed in contravention of these requirements is void. *See* Village of Riverwoods v. County of Lake, 94 Ill. App. 2d 320, 327, 237 N.E.2d 547, 551 (1968); Annot., 96 A.L.R.2d 449, § 5, at 461 (1964).

92. *See* Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972); Taschner v. City Council, 31 Cal. App. 3d 48, 65, 107 Cal. Rptr. 214, 228 (1973); Bell v. Studdard, 220 Ga. 756, 141 S.E.2d 536 (1965). An enabling act which did not require notice was said to deprive a landowner of his property without due process of law. *See* Gilgert v. Stockton Port Dist., 7 Cal. 2d 384, 391-92, 60 P.2d 847, 850 (1936) (dictum).

93. *See, e.g.*, Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402. 408-09 (D.C. Cir. 1973) (although the zoning commission "is a quasi-legislative body and is not required to support its judgments with findings of fact," *id.* at 408, it is nevertheless required to articulate the reasons for its downzoning action by making a statement to the court within forty-five days); Ruppert v. Washington, 366 F. Supp. 683 (D.D.C. 1973).

94. *But see* Comment, *supra* note 6, which critically examined the basis for the widespread belief that rezoning is a legislative function. The author concludes that rezoning is a judicial or quasi-judicial function and outlines the procedural safeguards which should be provided in the amendatory process. The author does not address the implications of the quasi-judicial designation for the scope of judicial review.

95. *Compare* ALI MODEL LAND DEVELOPMENT CODE, *supra* note 59, § 9-101(7), which makes a piecemeal rezoning amendment subject to judicial review as an "order." Although section 9-109 permits the court to declare an order invalid upon the usual grounds of invalidation of adjudicatory administrative proceedings, it enters a strong ad-

V. CONCLUSION

The traditionally narrow scope of judicial review of rezoning has increasingly been attacked by the courts and commentators. With the validity of the traditional standards open to serious question, it is important that courts devise standards which will provide guidance for local decisionmakers and ensure meaningful review for affected landowners without impinging on the flexibility needed to implement new land use policies and without making the courts super-legislatures.

Judicial insistence on strict compliance with the comprehensive plan requirement would ameliorate many rezoning problems. However, limiting extensive review to compliance with the comprehensive plan requirement involves a danger that arbitrary decisionmaking may not be checked in some situations. The designation of piecemeal rezoning as a quasi-judicial function expands procedural safeguards, and while likely to promote rationality and fairness in the decisionmaking process, poses a danger of substituting judicial for administrative judgment. As an alternate approach, courts may regard these proceedings as quasi-legislative, thus requiring procedural safeguards while giving deference to the administrative determination and imposing the burden of proof on the complainant.

The impact of the Virginia rule is largely uncertain. A requirement that rezoning be predicated upon a change or mistake in physical circumstances, to the extent that it places a substantive limitation on the power to rezone, unnecessarily limits planning flexibility and should be avoided. If the court defines the changed circumstances requirement broadly, it may steer a middle course between the inefficacious protection provided by courts which accord piecemeal downzonings a full presumption of validity, and the super-legislative role courts assume when the presumption of validity is totally rejected. However, without a clearer statement of the nature of rezoning proceedings, zoning boards and affected landowners lack a meaningful guide to their rights and responsibilities.

Carmen D. Legato

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monition for the court to consider the expertise of the administrative agency. *See id.* § 9-109(3), Comment (Tent. Draft No. 3, 1971).