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CHANGE OR MISTAKE TEST v. FLOATING ZONE: THEIR APPLICABILITY

In 1948 the Maryland Court of Appeals in *Northwest Merchants Terminal, Inc. v. O'Rourke*[1] applied the so-called "change or mistake" test in determining the validity of a zoning amendment. The test was later firmly implanted in Maryland Zoning Law in *Kracke v. Weinberg*,[2] wherein the court said: "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. . . ."[3]

The Maryland Court has continued to apply the "change or mistake" test in recent decisions.[4] In *MacDonald v. Bd. of County Comm'rs*[5] the court again applied the "change or mistake" test when Judge Oppenheimer reversed an approval by a Regional Council and lower court and ruled that there was neither evidence of error in the original

[1] 191 Md. 171, 60 A.2d 743 (1948).

[2] ____ Md. ____, 79 A.2d 387 (1951).

[3] *Id.* at 391.

[4] *E.g.*, Woodlawn Area Citizens Council v. Bd. of County Comm'rs, 241 Md. 187, 216 A.2d 149 (1966); 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). *Accord;* Bd. of Zoning Appeals of Baltimore County v. Bailey, 216 Md. 536, 141 A.2d 502 (1958); Conley v. Montgomery County, 216 Md. 379, 140 A.2d 525 (1958); Nelson v. County Council, 214 Md. 587, 136 A.2d 373 (1957); Board of County Comm'rs v. Troxell, 214 Md. 135, 132 A.2d 845 (1957); Mettee v. County Comm'rs, 212 Md. 357, 129 A.2d 136 (1957); Hardesty v. Bd. of Zoning Appeals, 211 Md. 172, 126 A.2d 621 (1956); Zinn v. Bd. of Zoning Appeals, 207 Md. 355, 114 A.2d 614 (1955); Temmink v. Bd. of Zoning Appeals, 205 Md. 489, 109 A.2d 85 (1954); Offutt v. Bd. of Zoning Appeals, 204 Md. 551, 105 A.2d 219 (1954).

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

zoning nor a change in conditions so as to justify the proposed amendment.[6] In *MacDonald,* the Technical Staff of the Planning Commission and the Regional Planning Board had recommended denial of the application to rezone but the Regional Council had approved it.

A review of the Maryland cases involving the "change or mistake" test indicates the often insurmountable obstacles facing the property owner or legislature desiring to amend the existing regulations.[7] This is a result of the Euclidean zoning concept which arose from the decision in *Village of Euclid v. Ambler Realty Co.*[8] Professor Russell Reno of the University of Maryland described Euclidean zoning as a concept which favors a ". . . method of controlling land use by setting up established districts with set boundaries."[9]

In 1957, in *Huff* v. *Bd. of Zoning Appeals,*[10] Maryland became the second state to adopt a new concept in the reclassification of zones when it recognized the floating-zone concept established by the Court of Appeals of New York in *Rodgers v. Village of Tarrytown.*[11]

A floating zone is a particular type of use-district wherein the specific location is not initially fixed. As such it floats within an entire governmental zoning unit attaching to specific properties upon petition of a property owner within the unit desiring to develop his tract for that particular use. High-rise residential, manufacturing-restricted, and town houses are common types of floating zones. Courts often

[6] *Id.* at _____, 210 A.2d at _____. The court's decisions were essentially the same in Miller v. Abrahams, 239 Md. 263, 211 A.2d 309 (1965), and Mothershead v. Bd. of County Comm'rs, 240 Md. 365, 214 A.2d 326 (1965).

[7] See *E.g.,* Goldman, *ZONING CHANGE: Flexbility vs. Stability,* 26 MD. L. REV. 48, 51 (1966).

[8] 272 U.S. 365 (1926).

[9] Reno, *Non-Euclidean Zoning: The Use of the Floating Zone,* 23 MD. L. REV. 105, (1963).

[10] 214 Md. 48, 133 A.2d 83 (1956).

[11] 302 N.Y. 115, 96 N.E.2d 731 (1951).

times refer to such zones as floating high-rise residential zones, floating town house zones, etc.

In *Huff*, Baltimore County had been rezoned with twelve fixed use districts and one floating industrial use, district "M-r," Manufacturing Restricted, which related to light industry. In accordance with the zoning ordinance permission to establish a "M-r" zone was to be granted or refused upon a petition filed by an individual property owner, with appropriate notice. The owner of an 18-acre tract classified as residential, filed a petition with the Zoning Commission to reclassify his property to "M-r." In upholding the Zoning Commission reclassification the Court of Appeals drew an analogy between the floating zone concept and a special exception when it said:

> . . . [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 or 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 a part of a comprehensive plan, that the use which the administrative body permits, upon application to the particular case of the specific standards, is *prima facie* proper in the environment in which it is permitted. . . .[12]

The court went on to hold that light industry was compatible with surrounding residential uses and that the Zoning Commission had properly reclassified the area in accordance with the comprehensive zoning plan.[13] In *Costello v. Sieling*,[14] the court reaaffirmed its decision in *Huff* when it upheld a floating trailer-park zone as being compatible with an existing agricultural zone.

[12] Huff v. Board of Zoning Appeals, *supra* note 10, at _____, 33 A.2d at 91.

[13] *Id.* at———, 133 A.2d at ———. See also Harr, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

It should be noted that in both *Huff* and *Costello* the court ruled on whether the Zoning Commission acted in an arbitrary or capricious manner in determining if the floating zone was compatible with surrounding zones. In deciding in favor of the Commission the court brought the floating zone into the category of a special exception and applied the rules governing special exceptions rather than the rules applicable to the "change or mistake" test.[15] It was still apparent that the court was having difficulty in dismissing the "change or mistake" test's applicability due to the concurrent decisions applying it.

In August of 1965 the Maryland Court in *Beall v. Montgomery County Council,*[16] upheld a floating apartment complex when it held: ". . . the Maryland 'change or mistake' rule is not applicable to the case at bar in view of the conclusion of the Technical Staff, adopted by the Planning Commission and the Council, that the applications complied with the purposes of the R-H Zone . . . and of our decisions in [*Huff* and *Costello.*]"[17] The *Beall* case involved a floating R-H (highrise apartments) zone. The owner of the subject property filed an application to rezone with the County Council. Upon its being approved by the Planning Commission and its Technical Staff the County Council gave its approval. Various neighboring residential property owners appealed the Council's approval arguing that there was no evidence of a mistake in the original zoning or of a substantial change in the character of the neighborhood to justify rezoning under the Maryland change or mistake rule. Note that the court refused to consider the "change or mistake" test since the legislative zoning bodies had approved the reclassification and found that the proposal for R-H zoning complied with the purposes of that zone.

[14] 223 Md. 24, 161 A.2d 824 (1960).

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

[16] 240 Md. 77, 212 A.2d 751 (1965).

[17] *Id.* at _____, 212 A.2d at 757 (Citations omitted.).

By the *Beall* case, the Maryland Court of Appeals has apparently devised a method of determining when the "change or mistake" test should not apply and the floating-zone concept should be considered. In *Huff* and *Costello* the court felt the question was whether the reclassification was in accordance with the comprehensive plan of zoning and if the new classification would be compatible with existing zones. If these were found to be true by the court, then the floating-zone concept fell into the category of a special exception with the "change or mistake" test not applying. In *Beall,* however, the court felt the deciding factor in determining if the floating-zone concept should be applied was whether there was a finding by the legislative body that the proposal for the floating zone complied with the purposes of that zone. If this finding was made by the legislative body which had authority to grant reclassifications, then since they felt this was prima facie evidence that they were dealing with a special exception the "change or mistake" test would not be considered. The court reaffirmed *Beall* in deciding *Knudsen v. Montgomery County Council.*[18] Again, the same method of determination was used in *Bujno v. Montgomery County Council.*[19] In *Bujno* the court went even further when it said: "Although it is most desirable that the council should find specifically that the proposal does comply with the R-H zone purposes, this finding may be inferred from the Council's opinion. . . ."[20] The impact of the decision is even greater when one considers that in this case both the Technical Staff and Planning Commission had recommended denial and the Zoning Commission proceeded in granting approval over their recommendation.

It is, therefore, apparent that the Maryland courts have accepted the floating zone as a special exception whereby an application to rezone may be approved without reference to the "change or mistake" rules. However, in order to be

[18] 241 Md. 436, 217 A.2d 97 (1966).
[19] 243 Md. 110, 220 A.2d 126 (1966).
[20] *Id.* at _____, 220 A.2d at 130.

classified as a special exception there must be a legislative finding that the proposal to reclassify complies with the purposes of that zone.

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