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# Consistency with Comprehensive Plans: Does Maryland Law Mean What It Says, or Say What It Means?

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# ARTICLE

## CONSISTENCY WITH COMPREHENSIVE PLANS: DOES MARYLAND LAW MEAN WHAT IT SAYS, OR SAY WHAT IT MEANS?

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In 2008 the Maryland Court of Appeals in *David Train v. Terrapin Run LLC*[1] upheld the grant of a special exception for a planned development of 4300 homes, a 125,000 square foot shopping center, and a sewage treatment plant in an area the Allegany County comprehensive plan designated for agriculture and conservation. At issue was whether the Board of Appeals could approve the project in light of the Maryland Code's definition of a "special exception" as:

> A grant of a specific use that would not be appropriate generally or without restriction and shall be based upon a finding that certain conditions governing special exceptions as detailed in the zoning ordinance exist, that the use conforms to the plan and is compatible with the existing neighborhood.[2]

A closely divided court held that the statute did not require strict conformity with the comprehensive plan for two reasons. First, the plan was a guide for future development of the county, but it had no regulatory effect unless a statute, ordinance, or regulation required compliance with its recommendations. Second, the use of the term "conforms to the plan," which first appeared in amendments to Article 66B in 1970[3] and was retained in 1992,[4] had essentially the same meaning as the usage prior to that date, which required that special exceptions should be "in harmony" with the plan. The court went to considerable length in supporting its position that various "Smart Growth" statutes had not mandated that counties have comprehensive plans, or if they did, the state had no power to enforce a conformity clause.

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1. Trail v. Terrapin Run, LLC, 403 Md. 523 (2008).
2. Maryland Code (1957, 2003 Repl. Vol.), Article 66, § 1(k),
3. 1970 Md. Laws Ch. 672.
4. 1992 Md. Laws Ch. 437.

> Accordingly, we find nothing in the history of the 1992 legislation that remotely indicates that the Legislature believed that it was establishing that the use of the word 'conform' in the 1970 statute and as stated in Article 66B, without additional restrictive language which was not added, imposed any stricter standard on such land use decisions than the traditional 'in harmony with' language of the pre-1970 statute or our pre-and post-1970 cases meant the same thing. [5]

Judge Harrell, dissenting, argued that provisions of Article 66B requiring a finding of conformance with the comprehensive plan were not mere suggestions. Rather, the definition of special exception linked it to the comprehensive plan. He further argued that the pre-1970 "in harmony" standard applied not to the comprehensive land use plan, but to the zoning plan, an element of the comprehensive plan.

In direct response to the *Terrapin Run* decision, the 2009 session of the General Assembly enacted the Smart Growth and Sustainable Development Act (SGSDA).[6] The preamble to the legislation noted that while the court's holding could be construed to apply only to special exceptions, the General Assembly was concerned that a broader interpretation could undermine the importance of making land use decisions "that are consistent with the comprehensive plan," as required by Article 66B, § 4.09. It then expressed the intent of the General Assembly:

> To encourage the development of ordinances and regulations that apply to locally designated priority funding areas and allow for mixed uses and bonus densities beyond those specified in the local comprehensive plan by excluding land uses and densities or intensities in the definition of 'consistency' for priority funding areas; and
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> … as evidenced in Article 66B, §§ 1.03(e) and 4.09, that comprehensive plans should be followed as closely as possible while not being elevated to the status of an ordinance and that deviations from the plan should be rare.[7]

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5. *See Trail*, 403 Md. at 569-70.
6. 2009 Md. Laws Ch. 180.
7. S.B. 280, 1999 Leg. (Md. 2009) (see Preamble at 3).

Standing alone, this artful circumlocution in the preamble of the law appeared to have it both ways. It encouraged higher densities and mixed uses in priority funding areas beyond levels specified in plans. The second Whereas clause, however, insisted projects follow plans "as closely as possible," before softening the blow by not elevating the plan to regulatory status. Apart from the atmospherics surrounding adoption of the law that characterized it as a repudiation of the court's decision, it would seem the General Assembly wanted to leave things about where they were before the issue went to court, making a confirming wink at the court's droll aside in *Terrapin Run* : "We acknowledge that purpose clauses are not normally absolute indications of the Legislature's intent when passing a statute."[8]

To understand what the legislature intended to do, we must look first at what it actually did and rely on the plain language of the statute, at least insofar as the language is unambiguous. This is not as simple as it sounds, so we shall proceed step by step.

First, the General Assembly amended the definition of "special exception" to require a finding that the use "is consistent with" the plan.[9] It then defined consistency with a comprehensive plan to mean:

> . . . an action taken that will further, and not be contrary to, the following items in the plan:
> 1.policies;
> 2.timing of the implementation of the plan;
> 3.timing of development
> 4.timing of rezoning;
> 5.development patterns;
> 6.land uses; and
> 7.densities or intensities.[10]

In addition to the redefined special exceptions, covered actions include zoning, planned development, subdivision and other ordinances and regulations.[11] Water and sewerage service areas, solid waste disposal, and municipal annexations required findings of plan consistency.[12] That seems to be just about everything, and if the amendment stopped there, a plain

8. 403 Md. at 570 n.41.
9. 2009 Md. Laws Ch. 180 § 1.00(k)
10. Ch. 180 § 1.02(c); MD. CODE ANN., LAND USE § 1-303 (2017).
11. Ch. 180 § 1.02(a)(1); *cf* §§ 1.00(k), 1.04 (f), and 4.09; MD. CODE ANN., LAND USE § 1-301 (2017).
12. Ch. 180 §§ 1.02 (a)(2), (3) and 1.02 (b); MD. CODE ANN., LAND USE § 1-302 (2017).

reading of it would make it clear that projects such as Terrapin Run could not pass muster as furthering and not being contrary to the comprehensive plan.

But the General Assembly was not through. It made an exception that swallowed a substantial length of the rule. Actions taken in priority funding areas (PFAs)--designated in plans for higher densities and given priority in state capital funding programs—are not required to be consistent with plans with regard to land uses and densities or intensities.[13] Then, in 2012, the General Assembly enacted a clarifying amendment to the consistency rule, requiring charter counties to revise comprehensive plans on a 10-year cycle and that they:

> shall ensure the implementation of the visions, the development regulations element, and the sensitive areas element of the plan.
> . . . through adoption of the following applicable implementation mechanisms that are consistent with the comprehensive plan:
> 1.zoning laws; and
> 2.local laws governing:
> i.planned development;
> ii.subdivision; and
> iii.other land use provisions.[14]

***Special Exceptions Must be Consistent***

Reading the clarified law in its entirety, the legislature, at a minimum, changed the law prospectively to render illegal approval of a special exception in a non-priority funding area that does not further and is contrary to the seven specified elements of a comprehensive plan, or the first five elements if in a priority funding area. It did not directly or immediately affect the status of Terrapin Run. The state Department of the Environment (MDE), however, denied changes in water and sewerage categories necessary for Terrapin Run to proceed.[15] The State Department of Planning, joining with MDE, rejected the county's designation of the area as Tier II

13. Ch. 180 § 1.02(c); MD. CODE ANN., LAND USE. § 1-304 (2017).
14. MD. CODE ANN., LAND USE § 1-417 (2012), *amended by* 2013 Md. Laws Ch. 674.
15. There is independent authority to deny changes in sewer service areas that are inconsistent with a county's comprehensive plan. MD. CODE ANN., LAND USE § 9-501 et seq; § 9-506 (a)(1) (2017). For example, *In The Matter of Global Mission Church of Greater Washington SBC,* Case. No. 10-C-08-003362, Cir. Ct. Frederick County, Md. found the Frederick County Planning Commission acted within its authority in denying the church's application for a change in water and sewer service category upon finding it was not consistent with the county's comprehensive plan.

for future water and sewer service, arguing that it should be placed in Tier IV for no service and restricting development to minor subdivisions of seven or fewer lots served by well and septic. Following further litigation, mediation, threat of and rescue from foreclosure, the project appeared dead in 2013. The law would make future Terrapin Runs illegal.

### *The Pooh Rule*

In commenting on the probability of bees noticing one conducting a balloon-assisted raid on their honey, Winnie the Pooh advised Christopher Robin: "They might or they might not. . . . You never can tell with bees."[16] So it seems with the consistency doctrine in dealing with subdivisions and zoning. It is safe to say SGSDA replaced the "in harmony with" standard with the tighter definition of consistency. Thus, endeth the lesson in legislative clarity.

The Maryland Department of Planning (MDP) has been circumspect in its exposition of the law. Its publication designed to prepare planning commissioners and members of boards of appeals for the statutorily mandatory course on their respective duties says that SGSDA clarifies "consistency" between comprehensive plans and local zoning ordinances and regulations. It then states that:

> In order to implement the 12 planning visions, the 1992 Economic Growth, Resource Protection, and Planning Act required all jurisdictions to adopt ordinances and regulations (this includes rezoning ordinances), planned development ordinances and regulations, subdivision ordinances and regulations, and other land use ordinances and regulations that are 'consistent' with the plan.[17]

By adding the parenthetical reference to *rezoning ordinances*, MDP casually recognized that rezoning cases, unlike subdivisions and special exceptions, are the places where actions are most likely not to further the local comprehensive plan, or to be contrary to one or more of the seven items with which the law requires consistency. This is because Maryland courts have long held master plans have regulatory authority when local law requires subdivisions to be consistent with them. This linkage has enabled

16. *See* A.A. MILNE, WINNIE THE POOH (Methuen & Co. Ltd. pub.) (1st ed. 1926).
17. Planning Commission, Planning Board, and Board of Appeals Education Course, *Module Two: The Comprehensive Plan*, MD. PLANNING COMM'RS ASSOC. 2 – 1, 2 – 7 https://planning.maryland.gov/PDF/YourPart/PlanningCommissionerTraining/Planning101_TheComprehensivePlan.pdf (last visited May 18, 2017).

regulators to impose conditions on subdivisions that reduce substantially the yield of space and units permitted by the property's zoning.[18] Zoning map amendments have a more complex relationship to comprehensive plans.

Most zones are not linked to plans and can be applied without regard to plan recommendations so long as they meet other legal requirements. There are two basic forms of zoning actions. Individual zoning map amendments involve single parcels and usually are initiated by application of the property owner or contract purchaser. Comprehensive (or sectional) map amendments involve substantially more than a single parcel—even an entire county—and are initiated by the government.[19]

### *Individual Map Amendments*

Individual map amendments are quasi-judicial in character and require a particularized finding of facts by the decision maker.[20] A change in Euclidean zones, which usually contain fixed dimensional standards, requires a finding of change in the character of the neighborhood where the new zone is to be applied since the last comprehensive rezoning, or that there was a mistake in the original zoning of the property.[21] A floating zone, which has been characterized as "in the nature of a special exception," does not have to meet the Change-Mistake Rule and may be applied upon finding it meets the particular standards of its purpose clause. Prior to the SGSGA, local map amendments, whether they involved Euclidean or floating zones were not required to be consistent with the comprehensive plan unless the text of the applicable zone required it.[22]

Unless otherwise conferred by statute or ordinance, standing to appeal an

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18. The Court of Appeals in *Trail* restated the rule from Mayor and Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 514, 530 (2002) (internal citations omitted). "We repeatedly have noted that plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. Where the latter exist, however, they serve to elevate the status of comprehensive plans *to the level of true regulatory device*..." 403 Md. at 527 n.5.
19. To avoid confusion between comprehensive plans and comprehensive zoning map amendments, I shall, in most cases, refer to the latter as sectional map amendments.
20. Hyson v. Montgomery County Council, 242 Md. 55 (1966).
21. The rule is based on the assumption that the comprehensive rezoning was a well-conceived plan that took into account broad public interests, as contrasted with the particular interests of a single landowner. Thus, there is a strong presumption of the correctness of the original or comprehensive rezoning. *See* Barlow Burke, Jr., *The Change-Mistake Rule and Zoning in Maryland*, 25 AM. U. L. REV. 631, 633 n.9 (1975) (noting the leading and related cases on the rule, the history of the rule, and unjust criticism of the rule).
22. *Rylyns Enterprises, Inc*., 372 Md. at 530 (2002); *See Trail,* 403 Md. 523.

individual zoning map amendment decision is based on the proximity of the plaintiff's property to the rezoned parcel. Property owners with land immediately adjoining or confronting the rezoned parcel have *prime facie* aggrievement. Other nearby owners whose property does not touch or confront the parcel may have "almost *prime facie* aggrievement" if they are not too far distant (e.g., 200-1000 feet) and allege "plus factors" of injury, such as noise, congestion, reduction in property value, etc. attributable to development that would occur under the change in zoning.[23]

The standard of review for a local map amendment is limited to determining if the decision was based on an erroneous interpretation of law and "whether the issue before the administrative body is 'fairly debatable,' that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions."[24] To be fairly debatable, a decision must be made in a quasi-judicial fact-finding process that includes opportunity for cross-examination and is supported by "substantial evidence" in the record as a whole.[25] The only part of the individual map amendment process that is legislative is the final action of the local governing body that approves the amendment to its zoning map.

***Comprehensive/Sectional Zoning Map Amendments.***

Sectional map amendments are purely legislative acts. They are presumed valid, and absent specific statutory authority, judicial review is limited in scope to "assessing whether the agency was acting within its legal boundaries."[26] Prior to the SGSDA there was no requirement, absent a statute or ordinance, that a sectional zoning map amendment must be consistent with a comprehensive plan's zoning recommendations.[27] That statute now exists and provides the basis for a cause of action by an eligible complainant that alleges the action of the legislative body was illegal or

23. Anne Arundel County v. Bell, 442 Md. 539 (2015); Ray v. Mayor and City Council of Baltimore, 430 Md. 74, 85 (2013); Bryniarski v. Montgomery County Board of Appeals, 247 Md. 137, 144 (1967).
24. Sembly v. County Bd. of Appeals of Baltimore County, 269 Md. 177, 182 (1973); *see also* Montgomery County v. Butler, 41 Md. 271, 283 (2010); Marzullo v. Kahl, 366 Md. 158, 171 (2001).
25. White v. North, 356 Md. 31, 44 (1999).
26. County Council of Prince George's County v. Offen, 334 Md. 499 (1994); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 67 (1969). *See also* Howard County v. Dorsey, 292 Md. 351, 362-63 (1982); Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 706-07 (1977), *cert. denied sub nom.* Funger v. Montgomery County, 434 U.S. 1067 (1978); County Council v. District Land Corp., 274 Md. 691, 701-02 (1975); Montgomery County v. Leizman, 268 Md. 621, 631-33 (1973); Ark Readi-Mix Concrete Corp. v. Smith, 251 Md. 1, 4 (1968).
27. *See Woodward & Lothrop, Inc*., 280 Md. 686.

*ultra vires*; outside its legal boundaries because it does not further or is contrary to—i.e., is not consistent with—one or more of the enumerated plan elements in the SGSDA. But standing to bring suit to challenge inclusion in a comprehensive zoning amendment of parcels zoned inconsistently with the comprehensive plan may be harder to achieve under new rules enunciated by the Court of Appeals in April 2015.

***Taxpayers Left Standing: Bell and Harwood***

In paired cases arising from Anne Arundel County, the Court of Appeals distinguished the basis for standing in sectional map amendment cases from individual zoning cases. Following adoption of a new General Development Plan,[28] Anne Arundel County in 2011 enacted a sectional map amendment covering 59,045 properties in the area of Thurgood Marshall Airport and the Baltimore-Washington Parkway. Zoning was changed on 264 parcels and the prior zoning was reconfirmed for the remaining parcels. Several individuals and civic organizations filed suit for declaratory judgment, alleging the county had engaged in spot and contract zoning by reclassifying certain parcels inconsistently with the plan. The county and intervening property owners moved to dismiss the citizens' suit for lack of standing. The circuit court granted the motion to dismiss, concluding the citizens failed to prove special aggrievement and that Maryland law did not support standing based on *prime facie* aggrievement for landowners by virtue of their proximity to the contested parcels.

In *Bell v. Anne Arundel County*[29] the Court of Special Appeals reversed, holding that adjoining, confronting, and nearby property owners challenging a local government land use decision had standing as *prima facie aggrieved* and other owners whose property was farther away were *almost prima facie aggrieved* by alleging other "plus factors" supporting injury.[30] The effect of the Court of Special Appeals decision was to recognize no distinction between standing requirements for challengers of legislative acts such as sectional map amendments and those appealing quasi-judicial administrative decisions on individual zoning amendments.

While review of *Bell* was pending before the Court of Appeals, a separate challenge to another Anne Arundel County sectional map amendment in the southern sector of the county came before the Court of

28. *Anne Arundel County General Development Plan*, ANNE ARUNDEL CO. COUNCIL 1, 3 (Apr. 2009) http://www.aacounty.org/departments/planning-and-zoning/forms-and-publications/GDP2009.pdf.
29. Bell v. Anne Arundel County, 215 Md. App. 161 (2013); *cert. granted,* Md. No. 29 (March 21, 2014); *rev'd sub nom* Anne Arundel County v. Bell*,* 442 Md. 539 (2015) (hereinafter "Anne Arundel v. Bell").
30. *Bell*, 215 Md. App. at 183 (citing *Ray*, 430 Md. at 85).

Special Appeals. In *Harwood Civic Association v. Anne Arundel County,*[31] landowners and civic associations challenged the rezoning of eight farm properties, of some 50 included in the amendment, as a violation of the consistency rule and as illegal spot zoning. Anne Arundel County Circuit Court again dismissed the case for lack of standing for all but two plaintiffs. Invoking its *Bell* decision*,* the Court of Special Appeals reversed, holding the plaintiffs had standing.

The Court of Appeals reversed the intermediate court in both *Bell* and *Harwood*, holding that plaintiffs challenging a sectional map amendment must demonstrate taxpayer standing.[32] The Court concluded that proximity to rezoned property and near-proximity with "plus" factors, which conferred standing in local map amendment cases were inappropriate bases for contesting the purely legislative action involved in comprehensive rezoning.

> The principles underlying property owner standing, heretofore applied to judicial review actions and other modalities of judicial challenges to quasi-judicial and other administrative land use decisions, should not be extended to apply to challenges to comprehensive zoning legislative actions. Comprehensive zoning on the one hand, and quasi-judicial or administrative land use actions on the other, are not similar sufficiently in process or justification to warrant extension by analogy of property owner standing principles from the latter to the former. Rather, taxpayer standing is the correct standing doctrine which Respondents/Plaintiffs must satisfy before they may be allowed to maintain a judicial challenge to comprehensive zoning legislation.[33]

The court pointed out that an individual rezoning action is decided on "*individual, as opposed to general, grounds,* and scrutinizes a single property*"*[34] and (except for floating zones) must clear the threshold of the Change-Mistake Rule.[35] Such actions are taken under procedural rules governing executive and administrative decision making that require at least one hearing and opportunity for cross-examination. The decision involves a factual determination by the zoning authority that is supported by substantial evidence of record. The action is legislative only at the end

31. Anne Arundel County v. Harwood Civic Association, 442 Md. 595 (2015).
32. *Anne Arundel v. Bell,* 442 Md. at 586.
33. *Id*. at 551 n.5.
34. *Id* at 555 (internal citations omitted) (emphasis in original).
35. *Id*.

because the legislative body must enact a resolution or ordinance amending the zoning map. Rooted in the common law of private nuisance, standing to challenge such actions depends on proximity of challengers to the property at issue. Adjacent and confronting owners are considered to be *prime facie* aggrieved, and thus have standing to seek relief from the courts. Other nearby owners (the court found no case allowing standing to complainants with property more than 1000 feet from the rezoned parcel) may be considered "almost *prime facie*" aggrieved if they offer additional "plus factors" asserting injury.[36]

Summarizing *Montgomery County v. Woodward & Lothrop*[37] and *Mayor and Council of Rockville v. Rylyns Enterprises,*[38] the Court emphasized that comprehensive rezoning differs from individual zoning cases in process,

> geographic scope, and the standard of review. The process is legislative in its entirety. No significant judicial function is involved. It is initiated by the legislative body and usually involves an area containing a considerable number of properties. Rather than making a particularized determination regarding a single property, the legislative body considers broad policy issues of future public needs and the relationship of the matter to the public health, safety, and general welfare. Comprehensive zonings 'are limited only by the general boundaries of …appropriate procedural and due process considerations.'[39]

The standard of review is whether the legislature had any reasonable basis for its action.

In a detailed exegesis of the *Superblock Trilogy*[40] and *State Center*[41]*,* the Court distinguished administrative and executive land use decisions that focus on the particular facts of a single parcel and legislative actions that consider general issues of public policy. Standing based on proximity of property ownership applied to the former, but had not been applied to "judicial challenges to legislative acts reached through solely legislative

36. *Id.* at 559.
37. *Woodward & Lothrop, Inc.*, 280 Md. 686.
38. *Rylyns Enterprises, Inc.*, 372 Md. 514.
39. *Id.* at 533.
40. 120 W. Fayette St., LLLP v. Mayor and City Council of Baltimore, 407 Md. 253 (2009) (hereinafter "Superblock I"); 120 West Fayette St., LLLP v. Mayor and City Council of Baltimore, 413 Md. 309 (2010) (hereinafter "Superblock II"); 120 West Fayette St., LLLP v. Mayor and City Council of Baltimore, 426 Md. 14 (2011) (hereinafter "Superblock III").
41. State Center, LLC v. Lexington Charles Limited Partnership, 438 Md. 451 (2014).

processes."[42] Pointing out that the Anne Arundel sectional map amendment challenged in *Bell* involved 59,045 parcels, the Court mused that granting standing on the basis of property ownership might make eligible plaintiffs of owners of all those parcels as well as other owners of property adjoining, confronting, or within 200 to 1000 feet of the perimeter of the rezoned area.[43] Hypothesizing an exponential increase in suits brought by property owners suffering no greater harm than that experienced by the general public, the Court concluded:

> The doctrine of taxpayer standing—already available to some complainants challenging administrative land use decisions—is the appropriate standing doctrine that complainants challenging comprehensive zoning legislation must satisfy.[44]

To attain taxpayer standing, a complainant must allege (1) it is a taxpayer, (2) the suit is brought on behalf of all other taxpayers in a class suffering the same injury, (3) the governmental action is illegal or *ultra vires*, and (4) the action specially injures the taxpayer by resulting in a pecuniary loss or an increase in taxes. (5) Finally, there must be a "nexus" between the government's action, the potential pecuniary loss, and the potential for the remedy to alleviate the harm to the plaintiff and all similarly situated taxpayers.[45]

The Court was sanguine about the ability of taxpayers, whether they owned directly affected property or not, to attain standing to challenge comprehensive zoning amendments. The litigants in both *Bell* and *Harwood*, however, were denied standing. The Court assumed at least two *Bell* plaintiffs were taxpayers. They alleged the county engaged in illegal spot zoning of certain properties included in the comprehensive zoning action, satisfying one prong of the standing test. They failed, however, to allege a pecuniary loss or increase in their taxes as a consequence of the action.[46] *Harwood's* plaintiffs also relied exclusively on property owner standing. Although the Court thought one plaintiff may have met two of the requirements for taxpayer standing by alleging the decision would increase her taxes and that the rezoning of particular properties was impermissible spot zoning, she had waived claiming taxpayer standing.[47]

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42. *Anne Arundel v. Bell,* 442 Md. at 569.
43. *Id*. at 570.
44. *Id*. at 575.
45. *Id*. at 577-79.
46. *Id*. at 584-86.
47. *Harwood,* 442 Md. at 613-15.

The Court majority bushed aside the dissenters' concern that taxpayer standing could severely circumscribe the ability of aggrieved property owners to challenge a comprehensive zoning action, citing a number of cases in which it had been successfully maintained to challenge both executive and legislative actions.[48] Theoretically, if it satisfied all prongs of the test, any taxpayer can bring suit under taxpayer doctrine since proximity to a questioned parcel is unnecessary. There will likely one or more taxpayers with property covered by the comprehensive zoning amendment and even more located outside it that will experience the same effects from the action. But taxpayer standing presumes tax effects, such as a tax increase or at least a pecuniary loss, as a consequence of the zoning action. If a complainant's property value has been diminished by a sectional map amendment, that should satisfy the requirement of special harm, even though taxes would, thereby, also be reduced. The requirement is pecuniary injury OR a tax increase.[49] This harm must be shared with other taxpayers and the relief sought must alleviate the injury or tax burden.[50]

Parties whose properties are rezoned to lower densities or less desirable uses than were previously permitted are frequent challengers of comprehensive zoning amendments. It seems unlikely taxpayer standing doctrine will affect the ability of such complainants to achieve standing. The Court casually observed that in *Anderson House v. Mayor and City Council of Rockville*[51] the plaintiff was entitled to review of the claim that its rights were affected by the change in zoning imposed by a sectional map amendment. Anderson House did not plead as a taxpayer but as an owner objecting to the zone applied to its property. The Court of Appeals held the circuit court had jurisdiction to hear the appeal by virtue of a city ordinance enacted pursuant to state law[52] or under the Declaratory Judgment Act.[53] The allegation that the zone applied to its property failed to meet the

48. Taxpayer standing to challenge executive actions: *State Center*, 438 Md. at 583; *Superblock I,* 407 Md. at 269-70; Inlet Associates v. Assateague House Condominium Assoc., 313 Md. 413, 440-43 (1988). Taxpayer standing to challenge legislative actions: Ansell v. Howard County Council, 264 Md. 629, 634 (1972); Mayor and City Council of Baltimore v. Keyser, 72 Md. 106 (1890); Boitnott v. Mayor and City Council of Baltimore, 356 Md. 226 (1999).
49. 438 Md. at 556–57, 92 A.3d at 463 (quoting Citizens Planning and Housing Association v. County Executive of Baltimore County, 273 Md. 333, 339 (1974)). The dissenting opinion in Bell surmised taxpayer standing could not be achieved if taxes do not increase. That seems an overreaction to the majority opinion. However, if the potential plaintiff's property has its value increased by the zoning action, the resulting increase in taxes incident to an increase in property value has not been considered an actionable injury.
50. *State Center,* 438 Md. at 572-73 (footnote omitted).
51. Bellamy v. State, 400 Md. 646 (2007).
52. MD. CODE ANN., LAND USE § 4-406 (2017).
53. MD. CODE ANN., CTS. & J. PROC. §§ 3-403, 3-406, and 3-409 (2017).

requirement that zones treat uniformly all property to which they are applied satisfied the jurisdictional requirements of the Declaratory Judgment Act. Pecuniary loss or a resulting increase in taxation of the plaintiff and similarly situated taxpayers, were not at issue.

Ultimately, the requirement of taxpayer standing may not bar the courthouse door to parties offended by the zones bestowed by sectional map amendments. Maryland jurisdictions either grant the right of judicial review by circuit court of individual and comprehensive zoning actions to aggrieved parties, or even any parties participating in the zoning process.[54]

Could Anderson House have qualified for taxpayer standing? It clearly was not acting as a private attorney general to vindicate the public interest against an illegal act of the government. But with modest creativity in the bill of complaint, Anderson House might have metamorphosed into a taxpayer with standing had it not gained it by way of the city code. It made a good faith allegation that the rezoning of its property was an *ultra vires* act. It was a taxpayer. No allegation was made that taxes would be increased, but it could make a palpable claim of pecuniary loss due to the down zoning, which prevented development of a larger office building.[55] The rub comes in showing explicitly or implicitly that the harm it suffered was shared by a similarly situated class of taxpayers. "In other words, the allegations of the injury must apply to all taxpayers in the assumed class and not merely the plaintiffs as private complainants, in order for the taxpayer standing doctrine to apply."[56]

Because Anderson House was the only property owner so affected, a liberal application of the rule would be required to conjure a class. That was conceivably available since it claimed the zone applied to it and other

54. MD. CODE ANN., LAND USE § 4-401 covers all jurisdictions outside Baltimore City and the Maryland-National Capital Park and Planning Commission. It allows any person aggrieved by the action, taxpayers, and local officials to file for judicial review of a zoning action of a board of appeals or legislative body. Similar provisions for Baltimore City are provided in Section 10-501. In M-NCPPC jurisdictions, Section 22-402 allows any aggrieved person or any person that appeared at the hearing, in person, by attorney, or in writing in Montgomery County, to request judicial review of an individual or sectional map amendment. Section 22-407, governing Prince George's County, allows appeals by any municipality, taxing district, person, civic or homeowners association, or aggrieved applicant to seek judicial review of an individual or sectional map amendment.

55. "[A] party, as a taxpayer, may satisfy the 'special damage' standing requirement by alleging both '1) an action by a municipal corporation or public official that is illegal or ultra vires, and 2) that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes.'" Kendall v. Howard County, 431 Md. 590, 605 (2013) (quoting *Superblock I*, 407 Md. at 267).

56. *State Center,* 438 Md. at 554-55.

properties did not treat them uniformly, even though the other owners may not have suffered pecuniary loss or a tax increase. A more creative argument might allege that the suit was in behalf of all taxpayers, since the down zoning would result in a possible loss to the city treasury, which could result in a general tax increase. There was a clear nexus between the alleged injury and the zoning action and a declaratory judgment could remedy the alleged wrong. Dicta in *Bell* suggests courts should erect a high threshold of solemnity when applying the laugh test to assertions of taxpayer standing. It is doubtful, however, that Anderson House could have lost its case on the merits more gracefully had it achieved standing as a taxpayer instead of as a disgruntled property owner.

Retrofitting *Anderson House* suggests that in comprehensive zoning cases that adversely affect a single party, it may be difficult to meet all prongs of the taxpayer standing rule. But it is hard to imagine an affected owner would be denied standing to vindicate its private property interest against alleged unlawful government action. In such instances it may be necessary to sue for damages under regulatory taking doctrine instead of seeking a declaratory judgment or injunction. That route, however, is not a particularly promising option if the comprehensive zoning has left the property with reasonable uses and has not singled it out for arbitrary action.[57] Historically, suits by disappointed owners challenging classification of their property in lower densities or more limited uses as part of comprehensive zoning amendments, or claims of denial of due process, have not fared well in Maryland courts.[58]

Taxpayer standing is an awkward fit for an owner of down zoned property with a minimal deep interest in serving as private attorney general. It presents greater challenges for citizens performing that role with more enthusiasm, particularly if they have no directly impacted property or increased tax liability. *Bell* and *Harwood* suggest that citizen/taxpayer suits to enforce the consistency rule are likely to increase, particularly in situations where a sectional map amendment is used as a Christmas tree for selectively favored owners whose applications could not survive the individual rezoning process.

The Court of Appeals offered *Boitnott v. Mayor and City Council of Baltimore*[59] as an example of how well taxpayer standing can work. Several

57. "For an individual property owner to escape the binding impact of a comprehensive rezoning he must show that the plan lacks the necessary relationship to the general public interest and welfare that is presumed or that the effect of the plan is to deprive him of any reasonable use of his property." Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 67 (1969).
58. *See supra* note 26 and accompanying text.
59. *See White,* 356 Md. 226.

taxpayers filed for declaratory judgment and an interlocutory injunction to invalidate an urban renewal ordinance. The Court found they achieved taxpayer standing, although few, if any of them lived in the renewal area, because they alleged the city's action was illegal and *ultra vires*, and that they and other taxpayers would be damaged by increased taxes to pay for the redevelopment of the area.

In contrast with the situation in *Boitnott*, the *Harwood* and *Bell* plaintiffs had harder cases to make. Some alleged their property values would fall, thus incurring a pecuniary loss. If there were more than one, they had an ostensible class. The overall thrust of the comprehensive zoning, however, was to increase densities and, thus, revenue yields. As a consequence, other taxpayers could see a reduction in taxes; or if taxes rose, it would be a result of increased property values, which is generally not considered an injury to the taxpayer. If there was any tax effect, it was unlikely to be different than that enjoyed by the general public.

Plaintiffs like those in *Boitnott* that do not own property directly affected by the rezoning must be creative in alleging the special aggrievement necessary for taxpayer standing. The basic difference between citizen complainants and owners of down zoned property is that the former are suing to vindicate the public interest in enforcing the consistency rule while the latter are likely suing for relief from its application to their property. It would be ironic indeed if it became more difficult for proponents of consistency to achieve standing than its opponents.

Assuming complainants achieve standing as taxpayers or by statutes granting right of appeal to circuit court, the consistency doctrine is likely to have different effects in cases involving individual and comprehensive zoning amendments, and in priority funding areas (PFAs) and the areas outside them.

## Potential Effects of the Consistency Rule in Priority Funding Areas

### *Individual Map Amendments*

The logic of Smart Growth is to concentrate growth in each county's priority funding areas (PFAs)--relatively compact, moderate-to-high density areas with supporting infrastructure. That objective can be facilitated by adopting current, well-designed comprehensive plans that identify strategic locations for changes in land use and major increases in density and implementing them with consistent zoning and timely capital improvements.

The SGSDA, as noted above, provides for exemptions from consistency for land uses, densities and intensities—the most definitive features of a zoning class. The preamble of the SGSDA explains the purpose of the exemptions is to permit bonus densities and mixed uses in priority funding

areas.[60] The exemptions, however, may perversely create obstacles rather than facilitate well-planned and orderly development and redevelopment, especially if a jurisdiction adopts a comprehensive plan but does not follow up with a sectional map amendment.

In the absence of a consistent sectional map amendment the initiative lies with developers to apply for rezoning of individual prime parcels for more dense or different land uses. Assuming no conflict with the plan's recommendations for the timing or pattern of development, the principal constraint on approving an individual rezoning application, whether or not it is consistent with the plan, is the requirement to establish change in the character of the neighborhood since the last comprehensive zoning, or if a floating zone, that its purposes are met. If these hurdles are cleared, zones can be approved that may not advance, or may even be contrary to, the recommendations of the plan, which remains merely a guide, as it was when *Terrapin Run* was decided.

A different problem could result if a consistent sectional map amendment is adopted that basically ratifies existing conditions. By setting a new zoning baseline it would be almost impossible to approve an individual zoning application that increased density or introduced different uses because a change in the character of the neighborhood could not be shown. This would maintain consistency with the plan's lack of interest in achieving much but frustrate the SGSDA's ostensible objective of encouraging higher densities and mixed uses in PFAs.

In a final scenario, if an ambitious comprehensive plan recommends new higher density centers of growth but, again, is not followed with a consistent sectional map amendment, it cannot be implemented through individual map amendments using Euclidean zones if no change occurred in the character of the neighborhood since the last comprehensive zoning. On the other hand, if change is established, an individual rezoning could be approved whether it is consistent or not with the plan.

Floating zones can evade the change-mistake problem, and given the ingenuity of the land use bar, such zones or text amendments to zones already on the ground are likely to be drafted to permit new uses and densities. A potential issue with floating zones is that they are regarded as analogous to special exceptions, which the SGSDA requires, without exception, to be consistent with the comprehensive plan. If that analogy were to be taken seriously, a floating zone that is inconsistent with the plan

60. S.B. 280, 1999 Leg. (Md. 2009) "WHEREAS, It is the intent of the General Assembly to encourage the development of ordinances and regulations that apply to locally designated priority funding areas and allow for mixed uses and bonus densities beyond those specified in the local comprehensive plan by excluding land uses and densities or intensities in the definition of "consistency" for priority funding areas" *Id.*

should not be approved.

Even if an individual rezoning application is consistent with the plan, and meets all the necessary requirements for approval, the applicant bears high transaction costs to satisfy the quasi-judicial procedural requirements for a local map amendment. These include the talent and time required to secure approval, risks of denial, and regardless of the decision, appeal. Any change in zoning in or near residential neighborhoods poses organized community opposition, which is often a barrier to increased development in PFAs.[61]

Ultimately, depending upon parcel by parcel rezoning at the initiative of landowners and developers abdicates public responsibility for orderly redevelopment of priority funding areas. If the Change-Mistake Rule were abandoned in favor of consistency doctrine, it would be possible to approve a consistent local map amendment in all the above scenarios. The exemptions of land uses and density or intensity from consistency in PFAs is not consistent with smart growth or effective planning.

### *Sectional (Comprehensive) Map Amendments*

Only a small proportion of land in PFAs is suitable for high-density, transit-oriented, walkable, mixed-use communities envisioned in state smart growth policies. Much of it contains existing buildings that remain profitable, even if they are not the highest and best uses of the land. It may require substantial increases in density to justify demolition and redevelopment. In the face of opposition to large density increases from current owners, tenants, and adjacent neighborhoods, there are strong economic incentives for owners of land at the periphery of central areas, and of vacant or underutilized land some distance away, to seek more intensive uses. This perverse incentive is facilitated by the fairly lax way in which counties have drawn their PFAs. Cheap land, willing sellers, easy sewer access, slight community opposition, and a permissive plan are the basic ingredients for disorganized sprawl.

Priority funding areas in the state's five metropolitan counties encompass from a third to more than half of all land, including wide swaths of established low and medium density residential neighborhoods. In developing and rural counties, PFAs tend to encompass all land with existing or planned sewerage service; most of it unlikely to become candidates for intensive planned development. Pressure can be intense for

61. Casey Dawkins et al., *Barriers to Development Inside Maryland's Priority Funding Areas: Perspectives of Planners, Developers, and Advocates*, NAT'L CTR. FOR SMART GROWTH RESEARCH AND EDUC. (Jan. 30, 2012) http://www.mdp.state.md.us/PDF/YourPart/773/20120130/PFA-Barriers20120130.pdf.

scattered higher density land uses in these areas where land is less expensive but sewer is programmed.

The exemptions to uses, density and intensity for PFAs allow a locality to adopt sectional map amendments that allow for more, or less, than its comprehensive plan proposes. On the other hand, if a comprehensive plan is adopted but no implementing sectional map amendment is enacted, individual zoning amendments, even if consistent with the plan, must meet the requirements of the Change-Mistake Rule. Either way, the exemptions undermine the significance of the comprehensive plan. The best way to achieve Smart Growth objectives is to put them in regularly updated comprehensive plans and implement them with comprehensive zoning amendments. The exemptions for PFAs do not work any better with comprehensive rezoning than without it.

**Change v. Consistency Doctrine in Non-PFAs**

Because of the exemptions, consistency doctrine can be expected to have greater force and engender more litigation outside PFAs. The corollary of policies to concentrate growth in high-density centers is to reduce densities elsewhere to protect agriculture, rural communities, open space, and natural resources. Consequently, comprehensive plans and sectional map amendments implementing them will involve down zoning of substantial areas of land.

The prospect of losing the potential for urban or suburban development will inspire some landowners to try to improve their fortunes by persuading the local legislative body to bestow a higher density zone on their properties. Lawsuits can be expected from disappointed owners of down zoned land, alleging regulatory takings as well as pecuniary losses. Sympathetic treatment of such owners by retaining or increasing the density permitted on their properties will almost surely generate citizen/taxpayer suits like *Bell* and *Harwood,* alleging the enclaves of up zoned land violate the consistency requirement. Assuming both categories of complainants achieve standing, those protesting consistent down zoning ought to expect more difficulty prevailing on the merits than those protesting inconsistent up zoning.

***Individual Map Amendments***

The legal boundary for idiosyncratic zoning is more restrictive outside PFAs where uses and density are not exempted from the consistency requirement. As a result, consistency could replace the Change-Mistake Rule as a basic requirement for approval of an individual map amendment.

Logic would suggest that even though an individual rezoning applicant succeeds in producing substantial evidence of change in the character of the neighborhood and that the proposed zone is otherwise an appropriate use for the site, it should be denied upon a finding that the proposed zone is not

consistent with the comprehensive plan's specific recommendations for the property. This is because approval would not further and would be contrary to one or more of the elements with which the zone must be consistent. That result would accord with decisions of courts in other states that require consistency of zoning actions with plans.

A plan that designates a particular zone for application to a specific parcel leaves less room for interpretation than one that merely recommends a land use that might be satisfied by several zones to be applied case-by-case by local map amendment. Local governments are allowed considerable discretion when a plan's language is aspirational (*should)* rather than obligatory (*shall*/*must*) in describing uses or development standards; or uses ranges for heights and densities.[62]

States that require consistency vary in the degree of deference granted local governments in interpreting their plans. California courts will reverse a finding of consistency ". . . only if, based on the evidence before City Council, a reasonable person could not have reached the same conclusion."[63] Florida, however, rejects the "fairly debatable standard" for determining whether a land use action is consistent with a comprehensive plan and instead subjects them to "strict scrutiny." As applied in the land use context, strict scrutiny is not quite the same as the rule applied in cases claiming infringement of constitutional rights. Rather, it "arises from th*e necessity of strict compliance with comprehensive plan*."[64] In reviewing whether a zoning action is inconsistent with the comprehensive plan:

> The test . . . is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies.
>
> Strict scrutiny is not defined in the land use cases which use the phrase but its meaning can be ascertained from the common definition of the separate words. Strict implies rigid exactness, *People v. Gardiner,* 33 A.D. 204, 53 N.Y.S. 451 (1893), or precision, Black's Law Dictionary 1275 (5th ed. 1979). A thing

62. *See generally* Brian W. Ohm, *Let the Courts Guide You: Planning and Zoning Consistency*, AM. PLANNING ASSOC. No. 11 (Nov. 2005) (summarizing a number of cases from Maine, California, Washington, and Florida).
63. No Oil, Inc. v. City of Los Angeles, 196 Cal. App. 3d 223, 234 (1987) (internal citations omitted).
64. Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (1993).

> scrutinized has been subjected to minute investigation. *Commonwealth v. White,* 271 Pa. 584, 115 A. 870 (1922). Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review.[65]

Under this standard of review, one proposing a change in zoning has the burden of proving it is consistent with the plan. The burden then shifts to the government to demonstrate retaining the existing classification serves a legitimate public purpose and of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable.[66] It is not clear that the Florida Supreme Court would be satisfied with a finding that was only fairly debatable. It appears to have softened the view of the lower court that the government must prove ". . .by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use."[67] However, it concluded that:

> While they may be useful, the board will not be required to make findings of fact. However, in order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling.[68]

The full impact of strict scrutiny review was demonstrated in *Pinecrest Lakes, Inc. v. Shidel*.[69] An adjoining property owner challenged approval of a site plan as inconsistent with the county comprehensive plan. After the intervening developer prevailed at trial, based on a "fairly debatable" standard of review for the county's decision, it proceeded to develop while the case was pending on appeal. The appellate court ordered trial *de novo* on the consistency issue and the trial court found the county's development order was not consistent with the comprehensive plan. The court then approved the remedy requested by the citizens: demolition of the buildings that had been constructed. On appeal, the 4th District Court of Appeal upheld the lower court's finding of inconsistency and the judgment. It rejected the idea that the local government was entitled to a high degree of deference in interpreting its plan when the consistency of its actions with

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65. Machado v. Musgrove, 519 So. 2d 629, 632 (1987).
66. *Snyder,* 627 So.2d at 476.
67. *Id*. at 471 (citing *Snyder v. Board of County Com'rs of Brevard County*, 595 So.2d 65 (1991)) (internal citations omitted).
68. *Id.* at 476.
69. Pinecrest Lakes, Inc. v. Shidel, 795 So.2d 191 (2001).

the plan were at issue. Under Florida's Growth Management Act of 1985,[70] the court said:

"Deference by the courts . . . would not only be inconsistent with the text and structure of the statute, but it would ignore the very reasons for adopting the legislation in the first place."[71] In 2014 the Florida Legislature repealed the 1984 Growth Management Act. Among provisions of the Community Development Act that replaced it was reinstatement of the "fairly debatable" standard for review of third party challenges to changes in classification of individual parcels.

In the leading state case on consistency, *Fasano v. Board of Commissioners of Washington County*,[72] the Oregon Supreme Court held that:

> [I]t is clear that under our statutes the plan adopted by the planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles." ***
>
> We believe that the state legislature has conditioned the county's power to zone upon the prerequisite that the zoning attempt to further the general welfare of the community through consciousness, in a prospective sense, of the factors mentioned above. In other words, except as noted later in this opinion, it must be proved that the change is in conformance with the comprehensive plan.[73]

Each of these cases dealt with individual zoning map amendments or subdivision/site plan actions. Each of the state courts framed them as quasi-judicial actions and applied a more rigorous standard of review than the test generally applied to legislative actions. Requiring consistency with the

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70. Growth Management Act of 1985, FLA. STAT. §§ 163.3161-163.3215 (1995).
71. 795 So.2d at 202.
72. Fasano v. Board of Commissioners of Washington County, 507 P.2d 23 (1973).
73. *Id*. at 27-28. The exceptions noted later involved procedural matters rather than exceptions to the consistency test. The court added: "In proving that the change is in conformance with the comprehensive plan in this case, the proof, at a minimum, should show (1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property." *Id.* at 28.

comprehensive plan may add an additional hurdle to rezoning that clears the Change-Mistake Rule, and could effectively displace it. A consistency rule also could affect the use of floating zones, depending on the flexibility or ambiguity of the plan's land use and zoning directives.

The situation and cases above dealt with local map amendments that involved neighborhood change but a proposed zone that was found to be inconsistent with the comprehensive plan. Under SGSDA, however, a finding that a proposal "furthers and is not contrary" to the elements of the comprehensive plan should logically trump the "no change" finding. This is because the governmental "action" of denial would not further and would be contrary to the plan.[74] As the consistency rule takes hold and all Maryland jurisdictions adopt and maintain comprehensive plans, the Change-Mistake Rule may have outlived its usefulness as a barrier to piecemeal zoning in non-priority funding areas.

### *Sectional Map Amendments*

The most interesting cases involving the consistency doctrine outside PFAs are likely to arise in rural areas where most of the zoning in the sectional map amendment is consistent with the comprehensive plans but a few parcels are placed in zones that appear contrary to the plan's recommendations. Although defeated by lack of standing, the complaints of *Bell* and *Harwood,* together with a circuit court case, *Bilek v. the County Commissioners of Queen Anne's County*,[75] illustrate some of the issues litigants and courts will confront.

In November 2011 the Queen Anne's County Board of Commissioners (BOC) enacted a comprehensive rezoning ordinance (sectional map amendment) covering eleven parcels. Four environmental groups and 14 residents filed suit claiming that the rezoning of four of the properties was not consistent with the county's comprehensive plan. All four properties were in an area designated by the county's comprehensive plan for "Rural Agricultural" use or "Permanently Preserved Land." A 216-acre property was rezoned from Agricultural (AG) to Light Industrial Highway Services (LIHS). An 80-acre parcel was rezoned from Countryside (CS) to Neighborhood Village Center. Thirty-one acres of a third, 173+-acre parcel,

74. Overturning denial of a consistent individual map amendment, however, would not automatically impose the requested zone. Although an individual map amendment involves quasi-judicial fact finding, its completion requires a legislative act. A legislative body has discretion to approve or deny it. Courts cannot not compel a county to approve a zoning amendment; even one consistent with its plan. Mandamus will not lie to compel a discretionary or legislative act. Talbot County. v. Miles Point Property, LLC, 415 Md. 372, 377 (2010).

75. Circuit Ct. for Queen Anne's County, Case No. 17-C-11-16677, (August 7, 2012) (hereinafter "Bilek").

was rezoned from Agricultural (AG) to Suburban Commercial (SC) and the remaining 142 acres were rezoned Suburban Estate (SE). Finally, a 55-acre property was rezoned from Agricultural (AG) to Suburban Commercial (SC). The county's planning commission recommended against rezoning all four properties as contrary to the comprehensive plan. The BOC, nonetheless, found each was consistent with it.

With no facts in dispute, plaintiffs sought summary judgment on grounds the BOC exceeded its authority by rezoning the properties in a way that was inconsistent with the comprehensive plan. The BOC moved to dismiss or for summary judgment, arguing it had wide discretion in the legislative act of rezoning.

Standing was not at issue. The circuit court first considered whether the commissioners acted within their legal boundaries. Second it addressed whether the zoning actions met the requirements of state and county law for consistency with the comprehensive plan.

In rezoning the 216-acre parcel the court found the BOC clearly had not acted within its legal boundaries because application of the LIHS Zone was restricted to key intersections along the U.S. 301 corridor and the fact that "the property simply does not lie within the area specified by the statute for this particular zoning classification."[76] Summary judgment was granted for plaintiffs with respect to that parcel without addressing the consistency question.

The other three zoning actions required the court to consider the consistency issue. It found the 2009 amendments to Article 66B required the county's zoning and development regulations to further, and not be contrary to" seven specified items in its comprehensive plan.[77] A relevant provision of the Queen Anne's County Zoning Code reinforced that requirement, stating its purpose was to implement the comprehensive plan . . . by "Giving effect to policies and proposals of the *Comprehensive Plan. . . ,*"[78]

The court pointed out that for individual zoning map amendments, the county code required the BOC to make a determination "based on specific facts contained in the record" that "substantial change has occurred in the

76. *Id*. at 8 n.3. The court elaborated: "It is inarguable that the County Commissioners have the legisltive authority to correct this legal mistake by amending the County Zoning Ordinance. However, at this point the LIHS District is limited to the Route 301 corridor and the Court cannot somehow infer that this parcel of land at a U.S. Route 50 intersectiobn somehow lies within the Route 301 corridor, or on the record before it, can provide safe acess/egress to sites along same." *Id.*

77. MD. CODE ANN., srt. 66B §§1.02(c), 4.03, and 4.09.

78. QUEEN ANNE'S COUNTY, MD., CODE, §18:1-4 (2005).

character of the neighborhood where the property is located" or a "mistake was made in the existing zoning classification."[79] Comprehensive rezoning did not require making such findings, "provided that the map amendments are consistent with the goals and purposes of the Comprehensive Plan then in effect."[80]

> The BOC contended its actions were part of a comprehensive rezoning and, thus, it was not required to find change had occurred or to make quasi-judicial findings of fact on the merits of the rezoning.[81]

The court accepted the commissioners' representation of their action as comprehensive to narrow the focus of the case, but it was clearly skeptical, noting: "the rezoning in this case has the appearance of spot zoning, rather than part of a 'comprehensive rezoning' process."[82] But even assuming it was part of a comprehensive rezoning, the court said that: "For a rezoning ordinance, to pass muster, . . . it must be consistent with the Comprehensive Plan which means that the ordinance will 'further, and not be contrary to' the seven criteria enumerated in § 1.02(c) and it must meet the consistency requirements of § 4.03(a)."[83] The court concluded that the BOC had not: " . . . adequately demonstrated or set forth facts in their Findings and Decision to show that they addressed the constituency requirements of Article 66B § 1.02(c) and § 4.03(a) regarding the 2010 Comprehensive Plan or that they designed the Ordinance to address the purposes of § 4.03(b)(1)-(7)."[84] Absent a record showing such consideration, there were disputed issues of material fact, so the court denied summary judgment for either party as to the three properties.

The BOC abandoned the case before going to trial, deciding: "that expending further legal effort and dollars to try to uphold earlier rezoning on four farm properties from agricultural to commercial/residential was 'not warranted.'"[85] It is a fair inference that they concluded they could not demonstrate the rezonings were consistent with the plan, and probably could not convince a court that they were little more than an attempt to bundle local map amendments and pass them off as part of comprehensive

79. QUEEN ANNE'S COUNTY, MD., CODE, § 18:1-222(B).
80. QUEEN ANNE'S COUNTY, MD., CODE, § 18:1-222(F) (2005).
81. *Hyson,* 242 Md. 55.
82. *Bilek,* at *11 (citing *Anderson House v. Rockville*, 402 Md. 689, 707-708 n.17 (2008)).
83. *Id.* at *12.
84. *Id.* at *13.
85. 2 THE QUEEN ANNE'S CHRONICLE 6, 4 (Nov./Dec. 2012) (citing board minutes for August 28).

rezoning.

Since standing was not at issue in *Bilek* it is not possible to know if the plaintiffs could have sustained their suit as taxpayers. They do not seem to have alleged any special pecuniary loss or that their taxes would have increased as a consequence of the contested rezonings. Allegation that the BOC's action exceeded its legal boundaries by rezoning certain parcels inconsistently with the comprehensive plan was accepted as a cause of action. This was in line with Court of Appeals dicta in *Harwood* musing that the requirement of alleging illegal or *ulta vires* governmental action was satisfied by the allegations of impermissible spot zoning of certain parcels, constituting arbitrary and capricious action in violation of the consistency requirement of the state land use code.[86]

Discussion by the Court of Special Appeals in *Bell* and *Harwood*, and the circuit court in *Bilek*, suggest the kind of reasoning needed to overcome the strong presumption of validity for comprehensive zoning. In each case, plaintiffs sought invalidation of the zoning of specific parcels rather than the entire ordinance. They alleged not only that the specific parcels were classified in zones that were inconsistent with the comprehensive plan but also were impermissible spot zoning. These are separate arguments that may not always overlap. Both seek to pierce the veil of comprehensive zoning to apply a less deferential test of the validity of the zoning applied to certain parcels than to the legislation as a whole. But the tests to be applied are different. An inconsistent zone may not be spot zoning (at least in a PFA), but spot zoning is almost certain to be inconsistent.

Consistency is the slipperier concept. The land use recommendations of a comprehensive plan may range from a general use that embraces several Euclidean and floating zones—e.g., "rural" or "medium-density residential"—or specify a specific use or density that can be permitted only by a particular zone. In Montgomery County, for example, the Functional Master Plan for Agriculture and Rural Open Space contains specific zoning recommendations. Otherwise, the Montgomery County Zoning Code's one agricultural zone and four rural residential zones, as well as three residential estate zones arguably could be consistent with "rural" land uses.[87] At least six zones conceivably could satisfy a "moderate density residential" recommendation in a plan. The more specific the plan, the less wiggle room

86. *Harwood,* 442 Md. at 614.

87. A general "rural" land use might be satisfied by the Agricultural Reserve (AR) Zone with a density of one dwelling per 25 acres; the Rural (R), Rural Cluster (RC), or Rural Neighborhood Cluster (RNC) zones—each densities of one dwelling per five acres; and three Residential Estate zones with densities of one to two acres. MONTGOMERY COUNTY, MD., CODE, Ch. 59 §§ 4.2.1, 4.3.3-4.3.5, 4.4.4-4.4.6 (2014).

is available for the local legislature in choosing which zones to apply.

Showing the zoning is inconsistent with the comprehensive plan is only the first step in a successful challenge for the would-be taxpayer plaintiff. The relief sought must remedy the alleged pecuniary loss or tax increase. A declaratory judgment that the contested zone is inconsistent or an injunction against applying it restores the *status quo ante.* To the extent the plaintiff's injury arose from the zoning on those parcels alone it may, thus, be remedied. This "solution," however, tends to overlook that, most likely, the real reason for the suit is not to save money for a class of taxpayers or to rescue the public treasury from loss, but to require the legislative body to follow its own plans. The original zoning on the contested parcels may also be inconsistent with the comprehensive plan. Declaratory or injunctive relief merely clears away the immediate wrong, but cannot fully right it. What ultimately matters is what is built, and where.

All three cases targeted specific parcels instead of challenging the legality of whole sectional map amendments because the standard of review for spot zoning is far less deferential than for comprehensive zoning. The heavy burden of overcoming the presumption of validity for comprehensive zoning makes it desirable for a landowner to seek financially advantageous rezoning of its property in the sectional map amendment, particularly if it could not survive the fact-finding scrutiny of the quasi-judicial process required for an individual map amendment.

It does not follow, however, that all parts of a sectional map amendment are invulnerable to attack under spot zoning standards of review. In *George F. Becker Co. v. Jerns*[88] the Court of Appeals found reclassification of a parcel from a residential to an industrial zone as part of a comprehensive rezoning was nonetheless "an arbitrary and unreasonable devotion of a small area to a use inconsistent with the uses to which the rest of the district is restricted, made for the sole benefit of the private interests of the owner and not in accordance with a comprehensive plan."[89]

In an individual rezoning action the Howard County Board of Commissioners granted Becker industrial zoning over the recommendation of the planning commission, but implementation was suspended pending a suit challenging the decision. Meanwhile, the board enacted a sectional map amendment and again overruled the planning commission's recommendation to retain residential zoning on the property. No reasons in the record were offered for this action beyond those stated two years earlier in the local map amendment case. The Court severed the parcels from the rest of the amendment and found the rezoning of the Becker property irreconcilable with the comprehensive plan and applied the tests for spot

88. George F. Becker Co. v. Jerns, 230 Md. 541 (1963).
89. *Id*. at 546 (quoting *Hewitt v. Baltimore County*, 220 Md. 48 (1959)).

zoning: There was no showing of a mistake in the original zoning or substantial change in the character of the neighborhood. The Court concluded:

> It is not the function of the courts to zone or rezone but only to determine whether the legislative body has properly applied the law to the facts. Nevertheless, when there is no basis for reasonable debate or there are no supporting facts in the record, it is proper for the court to declare a reclassification or rezoning to be arbitrary, whimsical, discriminatory or illegal (citations omitted).
>
> When the record, as is the case here, is devoid of any supporting evidence (other than the conclusions of the board which were without probative value), there is no question to debate. There was no showing here of a basic mistake in the original zoning or a substantial change in the character of the neighborhood.[90]

This reasoning suggests that in enacting a sectional map amendment that includes some parcels with zoning classifications that are inconsistent with the comprehensive plan exceeds legal boundaries makes those zones severable from the amendment and void *ab initio*. The Court's application of the Change-Mistake Rule seems unnecessary since even if there had been a change or mistake, the industrial zoning was both inconsistent with the plan and inappropriate for the site. Once inconsistency has been established nothing is gained in subjecting the action to the substantive and procedural requirements for spot zoning. The Change-Mistake analysis in *Becker* and of the circuit court in *Bilek*, as well as dicta of the Court of Special Appeals in *Harwood*, seem to be a conditioned judicial reflex in zoning cases.[91]

The industrial zoning in *Becker* clearly was inconsistent with the residential land use recommended by the plan. A less clear-cut case would require further analysis. If, for example, the plan recommended residential zoning but did not specify a recommended density for each parcel and the sectional map amendment applied a substantially denser residential zone to Becker's land than to any other property. An allegation of illegal spot

90. *Jerns*, 230 Md. at 547.

91. The Court of Special Appeals held that since plaintiffs challenged rezoning of a specific parcel as spot zoning, the limited legal boundaries review of the entire ordinance "did not preclude their more specific challenge." Determining if illegal spot zoning occurred required a site-specific analysis. "Faced with allegations of spot zoning, a court reviews the challenged action for arbitrary, unreasonable, and discriminatory action." Harwood, 442 Md. at 609. Therefore, the circuit court should have reviewed plaintiff's challenge under this standard.

zoning should require more than an assertion the application of the challenged zone was an *ultra vires* act and beyond the legal boundary for comprehensive zoning. At a minimum, there should be evidence the plan had not contemplated the aberrant zone. And its defenders should be required to provide at least a scintilla of support for the proposition that the zone was a fairly debatable component of the plan's residential strategy.

A possible consequence of the consistency doctrine may be to move the struggle over land use from the mildly legalistic arena of zoning into the more overtly political arena of plan making. An owner with ambition for more favorable zoning of its land without enduring the individual rezoning process will find it prudent to focus on ensuring the land uses and zoning categories desired are raised as fairly debatable elements of the comprehensive plan before being applied by sectional map amendment. Once a plan has been adopted, it will be harder to challenge successfully zoning oddities in court if they are arguably consistent with the plan. Community and environmental activists can be expected to demand strong and precise constraints. These competing interests could provoke a shift in legal strategy to attack plans directly since they have attained regulatory status, notwithstanding the wish of the General Assembly that they should evade it.

### *When Zoning Inconsistency Meets Subdivision Consistency*

Although the Maryland Court of Appeals has not yet spoken on the extent of sectional map amendment consistency with master plans under the SGSDA, there is a substantial line of judicial decisions on the consistency of subdivisions with plans when local regulations require it. Some zones require consistency with plans but most do not. All zones establish the maximum density or intensity of permitted development. Within that envelope, subdivision is concerned with the layout of a development and its relationship to other property in the area. Local subdivision regulations generally require consistency with master plans. Thus, if a master plan contains language that limits density or other dimensions of future development, the plan has regulatory precedence over the zone's maxima.[92] The SGSDA provides no exemption in PFAs for the pattern of development. Maryland preemption doctrine would appear to allow local jurisdictions to continue to require consistency of subdivisions with plans.[93]

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92. Board of Commissioners of Cecil County v. Gaster, 285 Md. 233 (1979); Coffey v. Maryland-National Capital Park and Planning Commission, 293 Md. 24 (1982); Boyds Civic Association v. Montgomery County Council, 309 Md. 683 (1987); Maryland.-National.Capital Park and Planning Commission v. Greater Baden-Aquasco Citizens Association. 412 Md. 73 (2009); PNS Development, LLC v. People's Counsel, 425 Md. 436 (2011).
93. State law may preempt local law by conflict, express preemption, or implied

Producing a consistent subdivision on a parcel with an inconsistent zone in a PFA has potential for metastasizing into a Catch-22. Although neither case above involved the SGSDA's consistency requirements (or exemptions therefrom), two recent Court of Appeals decisions suggest the utility of careful drafting of plan language to avoid judicial deconstruction to divine what in the world the local land use authorities were thinking and if a consistent subdivision should prevail in an inconsistent zone.

In *Maryland-National Capital Park and Planning Commission. v. Greater Baden-Aquasco Citizens Association.*[94] the Prince George's County Planning Board approved a subdivision in the county's Rural Tier, finding it was "not inconsistent" with the county's comprehensive plan for that area. In making its findings, the planning board did not address the subdivision's relationship to the plan's numeric growth standard for the area, which set a goal of capturing less than one percent of the county's dwelling unit growth in the Rural Tier from the time of the general plan's adoption in 2002 to 2025. The Court held that the plan imposed a binding obligation on the planning board to at least consider the numeric growth objective in determining whether to approve the subdivision:

> The Planning Board, in determining whether a preliminary subdivision plan conforms to the Master Plan, either must offer some analysis of how the preliminary subdivision plan under consideration may impact the long-term growth objective established in the General Plan or explain why such an analysis or conclusion is not required, as provided in § 24-121(a)(5) of the County Code. What the Board cannot do, however, is ignore entirely a patently relevant element of the Plan.[95]

The Court emphasized the importance of addressing all of a plan's relevant provisions in deciding whether to approve a subdivision.

*Pringle v. Montgomery County Planning Board*[96] took the consistency test a step further, focusing on the way a planning standard is phrased to

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preemption. *Altadis U.S.A. v. Prince George's County* 431 Md. 307 (2013). Since the SGSDA explicitly promotes consistency, it would not appear to conflict with local consistency requirements for subdivisions. It does not explicitly preempt such regulations. Given the overall deference of land use law and regulation in Maryland to its local governments, claiming implied preemption in a field the state clearly does not completely occupy seems a hard case to make.

94. *Maryland-National Capital Park and Planning Comm'n,* 412 Md. 73.
95. *Id*. at 107.
96. Pringle v. Montgomery County Planning Bd. M-NCPPC, 212 Md. App. 478 (2013).

determine the range of discretion allowed in interpreting the plan and its application to a specific subdivision. Pringle appealed approval of a subdivision in the Germantown employment corridor, alleging it violated design guidelines of the 2009 sector plan[97] for the area, which stated: "Street level retail must conform to the plan's urban design guidance."[98] In addressing the specific area at issue, the plan directed that: "Big box retailers, if proposed, should have active storefronts with multiple entrances and small retail uses facing Seneca Meadows Parkway and Observation Drive."[99] The detailed design guidelines for street-oriented development provided:

> Locate buildings adjacent to the street to form a building line of the sidewalk and street that form public spaces. Provide front entrances along the street to improve pedestrian convenience, Activate the street, and reduce walking distances. Provide street level retail uses along streets where street activity is desired. Place retail, restaurants, and other uses at highly visible locations along boulevards and main streets to add vitality and convenience. Design retail storefronts with large, clear glass windows for merchandise display that promote retailing and add visual interest to the street.[100]

Although the plan's admonition that development "must conform" to its recommendations was binding and the layout of the subdivision's big box supermarket and other retail departed from them, the Court of Special Appeals found the planning board had based its decision on substantial evidence that some of the guidelines were not feasible on the site. Moreover, the term *should* provided sufficient latitude to deviate from them. The court concluded: "[W]e are persuaded that there is substantial evidence in the record to support the Planning Board's findings of fact regarding the characteristics of the site itself and its ultimate conclusion of consistency with the Sector Plan."[101] The planning board had met its burden of justifying its decision that the subdivision was consistent with the plan.

While neither of these cases rested on the new consistency standard of the SGSDA they suggest that courts take seriously consistency requirements. Both cases underline the need for local legislatures and regulatory agencies to consider and document their consideration of

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97. *Id.* at 480.
98. *Id.* at 481.
99. *Id*.
100. *Id.* at n.3. (noting the design guidelines in regard to "Street-Oriented Development").
101. *Id*. at 491.

standards and guidelines enunciated in plans and that they cannot expect courts to accept "findings" that are not based on substantial evidence. Moreover, in both cases the burden of proving their action was consistent with plans shifted to the defendant planning boards. Assertions of consistency unsupported by a record of evidence-based reasons are unlikely to amuse a court. As Judge Harrell wrote in *Acquasco-Baden*:

> The Board's conclusion that the application was 'not inconsistent' with the 2002 General Plan Development Pattern policies for the Rural Tier was a broad conclusory statement and not based on sufficient facts in the record before it. Such a half-baked conclusion is not entitled to deferential review.[102]

A lesson to be drawn from these cases is that in crafting the language of plans, careful forethought should be given to how tightly to bind regulatory agencies charged with administering them. Foolish consistency can become a hobgoblin of future regulators, developers, and citizens. What *must* be done shall be done. What *should* be done, can be done a bit differently.

If the reasoning of the subdivision cases is applied to a claim of violation of the consistency standard of the SGSDA by treatment of a particular parcel included in a sectional map amendment, there would be a rebuttable proposition that a local zoning authority exceeded its legal boundaries upon a showing that the zoning on a specific parcel included in the SMA was inconsistent with the comprehensive plan. The burden would then shift to the government to demonstrate that it considered the matter and reached its decision that the action was consistent with the plan based on substantial evidence of record. Such a finding should require more than a conclusory assertion by the local legislative body. It should not, however, require proof of change in neighborhood character or mistake in the original zoning; only that reasonable minds could disagree whether the zone applied was consistent with the plan.

**Summing Up: It Doesn't Quite Add Up**

The most remarkable feature of Maryland's new consistency doctrine is its inconsistency in the treatment of priority funding areas and land outside them. The exemptions for land uses and density/intensities in PFAs essentially leave comprehensive plans where they were before the purported legislative overruling of *Terrapin Run*. This undermines the authority of plans with respect to zoning but in jurisdictions that require consistency of

102. *Maryland-National Capital Park and Planning Comm'n,* 412 Md. at 109.

subdivisions with plans, there is potential for tension in aligning consistent subdivisions with inconsistent zones.

In areas outside PFAs, consistency doctrine seems at odds with the hoary Change-Mistake Rule. It logically would permit approval of an individual zoning map amendment that was consistent with the plan, even though there was no change in the neighborhood and deny an inconsistent application notwithstanding a clear showing of change or mistake. In PFAs, the Change-Mistake Rule will remain relevant in situations where a comprehensive plan is not implemented by a consistent sectional map amendment. If a sectional map amendment establishes a new baseline for measuring neighborhood change the rule is of no consequence since showing change would be virtually impossible. Removal of the exemptions and abandonment of the Change-Mistake Rule would better serve the cause of smart growth and effective planning.

If the General Assembly's approach to consistency is a bit inconsistent, enforcement of it through judicial review of sectional map amendments may require nimble allegations and liberal suspension of judicial disbelief for complainants to achieve taxpayer standing to serve as private attorneys general. If rigorously applied, it makes sectional map amendments, if not fully impregnable, at least hard to attack by both disappointed landowners and civic watchdogs. On the other hand, statutory rights of appeal and grants of jurisdiction for review of sectional map amendments may make taxpayer standing more a jurisprudential curiosity than a regulator of litigation.

Finally, while consistency doctrine strengthens the role of plans in the management of growth and regulation of land uses, it contains an inherent moral and policy hazard. Elevation of plans to regulatory status produces a perverse incentive, even with the best of intentions, to over specify requirements for each parcel of land and to bind the future too tightly to the preferences of the moment of the plan's adoption. Tastes in styles of living and working and the design and technology of development often changes more quickly than revision of plans. Balancing the need for direction in the public interest with the ability of the private producers of homes and business spaces to adapt to shifts in markets and tastes without first amending comprehensive plans will require attention to both the art and economics of planning. Consistency does not require exactitude.