Spot Zoning: New Ideas for an Old Problem

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ASSUME THE OWNER OF A SMALL COMPUTING BUSINESS LOOKED FOR A NEW SITE FOR AN OFFICE BUILDING. She found sites already zoned for this use, but they are not convenient or are more than she can afford. She then finds an affordable site on a convenient street with residential zoning. The site is affordable because the market has priced it for residential, not commercial, use. The business owner may have to pay a premium to buy the site for commercial use, but it will be less than a site zoned for commercial use. In order to use the site for the business, however, the zoning for the site must change. There are three options: a rezoning, a conditional use, and a variance.

A rezoning, sometimes called a spot zoning, is the preferred option.[1] In this article, the term "spot zoning" is descriptive,[2] and refers to a rezoning by the legislative body that moves a property from one

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1. An initial search for cases on Westlaw that used the term "spot zoning" produced over 7000 cases. A more limited search found 742 cases that mentioned the term "spot zoning" at least ten times. When this search was limited to cases decided after January 1, 1980, it produced 216 cases. The cases cited in this article are taken from this second group. In addition, I reviewed cases cited in an A.L.R. Note on spot zoning. Mark S. Dennison, Annotation, *Determination Whether Zoning or Rezoning of Particular Parcel Constitutes Illegal Spot Zoning*, 73 A.L.R.5th 223 (1999). To this Annotation I added cases cited in the Cumulative Supplement as well as earlier cases that seemed to establish important principles.

2. The term "spot zoning" is an imprecise term of art. A court may hold that spot zoning is only a descriptive term, and that such zoning is invalid only if it does not meet the court's criteria for validity. *See, e.g.*, Bucholz v. City of Omaha, 120 N.W.2d 270, 275 (Neb. 1963) ("Spot zoning is a descriptive term rather than a legal term. Spot zoning as such is not necessarily invalid.") Other courts adopt a two-part test: is the zoning activity spot zoning and was there a reasonable basis for it. *See, e.g.*, Good Neighbors of Oregon Hill Protecting Prop. Rights v. Cty. of Rockingham, 774 S.E.2d 902, 906 (N.C. Ct. App.), *cert. denied*, 778 S.E.2d 78 (N.C. 2015).

zone to another on the zoning map to allow a more intensive use.[3] Because the legislative body rezones to a more intensive use to meet an individual need, courts review spot zonings to decide whether they give an unfair advantage. Spot zoning law is an archaic and elusive concept made up of standing law principles, procedural presumptions, and ambiguous doctrine that make analysis difficult.[4] This article attempts to makes sense of this puzzling legal mixture. It concludes that spot zoning is a flawed body of case law that requires new ideas to move it in a new direction.

Part I describes the spot zoning option, and compares it with conditional uses and hardship variances as alternatives for obtaining a change in use. Landowners are unlikely to obtain either one of the other two options. A zoning ordinance must designate conditional uses, usually marginal uses generally seen as compatible with the uses in the zoning district in which they want to locate. The zoning ordinance may not have designated a new use proposed by a landowner as a conditional use. Neither is a site considered appropriate by a landowner for a change in use likely to qualify for a hardship variance.[5] Because a comprehensive revision of the zoning map is infrequent,[6] a spot zoning is usually the only option.

Despite this reality, spot zoning may arouse skepticism, which Part II discusses. It may create a wealth transfer that unfairly benefits the landowner. It may indicate political capture by developers or landowners, may be an unacceptable strategy for making changes in a comprehensive zoning system, and may use a legislative process that does not meet democratic values. Part III discusses process problems suggested by skepticism. Process problems include the standing of objecting

3. A Massachusetts law allows the rezoning of small parcels without the risk of a spot-zoning objection. MASS. GEN. LAWS ch. 40R, §§ 1-14. It requires housing developments be at minimum densities in a zoning overlay district, in an existing concentrated development area or near a transit station. *Id.* §§ 2, 6. Municipalities receive one-time incentive zoning payments. *Id.* § 9; *see also* Mark Bobrowski, *The Massachusetts "Smart Growth" Experiment: Chapter 40R*, 92 MASS. L. REV. 1 (2009).

4. *See* John Mixon & Kathleen McGlynn, *A New Zoning and Planning Metaphor: Chaos and Complexity Theory*, 42 HOUS. L. REV. 1221, 1227-39 (2006) (discussing confusions in spot zoning doctrine).

5. *See generally* Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between?*, 39 URB. LAW. 877 (2007); Osborne M. Reynolds, Jr., *The 'Unique Circumstances' Rule in Zoning Variances-An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. LAW. 127 (1999); Bruce M. Kramer, *Current Decisions on State and Federal Law in Planning and Zoning, Part II*, 33 URB. LAW. 923 (2001); *see also* discussion *infra* Part I.

6. *See infra* note 47 and accompanying text.

neighbors to sue, whether the presumption of constitutionality applies, and the standard of judicial review courts should use. Part IV discusses substantive policy problems and introduces the multifactor test courts use when they consider the validity of spot zoning.

Part V discusses judicial definitions of spot zoning and the multifactor test. Although the factors vary, the factors courts often consider are the size of the spot-zoned site, whether a spot zoning serves a public need or purpose or the general welfare, whether it is compatible with the surrounding area, and whether it is consistent with a comprehensive plan. This Part concludes that size of site and purpose are not useful as decision factors. Compatibility problems are important but can often be resolved through mitigating measures, such as site treatment. Consistency with a comprehensive plan is the correct test for deciding the validity of spot zoning. The planning process provides an opportunity for open and participatory policy-making at the community level. It produces comprehensive plans, whose community-based policies can provide an acceptable basis for spot zoning.

I. The Spot Zoning Alternative

Zoning maps and ordinances require change. The choices reflected in the map and ordinances may not hold over time, as land use patterns change and opportunities arise to implement planning policies through zoning ordinance amendments. When change is necessary, a landowner has three options: a conditional use, a use variance, and a spot zoning.[7] The question is whether spot zoning is the only practicable alternative.

A landowner may obtain a conditional use only if the zoning ordinance designates it,[8] and the zoning board gives it approval under

7. As one court pointed out, a conditional use and a rezoning accomplish the same purpose. Both allow a landowner to use property in a manner that would not have been allowed without the conditional use approval or rezoning. Taylor v. Canyon Cty. Bd. of Comm'rs, 210 P.3d 532, 542 (Idaho 2009). The same point can be made about a use variance. *But see* Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 888 (Minn. 1978) (distinguishing zoning amendments from a special-use permit and applying the presumption of validity only to the former).

8. A day care center in a residential zone is an example of a conditional use. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926) [hereinafter *SZEA*], https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf; *see* DANIEL R. MANDELKER & MICHAEL ALLEN WOLFE, LAND USE LAW § 6.51 (6th ed. LexisNexis Matthew Bender, 2015) [hereinafter LAND USE LAW]; *see also* Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 223 (2016) (discussing conditional uses as applied to manufactured housing).

standards contained in the zoning ordinance.[9] A change in use that requires a spot zoning is not likely to be a conditional use. Zoning ordinances usually permit business and industrial uses of the type a landowner needs in nonresidential zones. Residential uses, such as multifamily projects, require a higher density another zone also allows.[10] A spot zoning can make a map change to the needed zone.

Zoning statutes also authorize a local zoning board to grant variances based on standards contained in the zoning statute. New businesses, industrial, and multifamily uses usually require a use variance if they want to locate in a residential zone. Boards grant use variances that authorize a different use for a property under a statutory hardship standard,[11] though court decisions and statutes may prohibit them because they can damage the land use pattern authorized by the zoning ordinance.[12] Courts also require that hardship must be unique to the property.[13] A site chosen for a new business, industrial, or multifamily use is not likely to meet these standards. There is nothing that is likely to be unique about them that justifies a use variance because of hardship.

9. Compatibility with adjacent uses is a common requirement and ordinances often provide that a conditional use must be compatible with the surrounding area. *See, e.g.*, Crooked Creek Conservation & Gun Club, Inc. v. Hamilton Cty. N. Bd. of Zoning Appeals, 677 N.E.2d 544, 546 (Ind. Ct. App. 1997) (upholding denial of trap and skeet shooting range as conditional use); Janas v. Town Bd. & Zoning Bd. of Appeals, 382 N.Y.S.2d 394, 398 (N.Y. App. Div. 1976) (upholding injurious to the neighborhood standard). For discussion of conditional use standards see Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60 (1963). Spot zonings must meet a similar requirement. *See infra* text accompanying notes 123-152 (suggesting that mitigating site requirements and alternatives, such as mixed-use zoning, can avoid incompatibility problems).

10. This practice stems from the leading Supreme Court case upholding the constitutionality of zoning, which upheld the exclusion of apartments from a zoning district that did not allow them. Vill. of Euclid v. Ambler, 272 U.S. 365 (1926). For a typical zoning ordinance format that distinguishes residential development based on differences in density see LAND USE LAW, *supra* note 8, § 5.01.

11. *See* LAND USE LAW, *supra* note 8, § 6:41 (requiring the plaintiff to show that the land cannot create a reasonable return when used for the zoned purpose, that the problem arises from the owner's individual circumstances, and the area's essential character will not be changed by the variance). This authority also derives from the Standard State Zoning Enabling Act. *SZEA*, *supra* note 8, § 7.

12. LAND USE LAW, *supra* note 8, § 6:40.

13. *Id.* § 6:43. Courts also hold that variances should be granted sparingly. *See, e.g.*, E & F Assocs., LLC v. Zoning Bd. of Appeals of Fairfield, 127 A.3d 986, 990 (Conn. 2015) ("[A] zoning board of appeals [is authorized] to grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan.").

A spot zoning change to a zoning district allowing a more intensive use is very often the only practicable option. Many are for small sites rezoned for a single building, as in the example at the beginning of this article. A spot zoning may also cover a much larger site, even up to several hundred acres, and may include a major multi-family or mixed-use development.[14]

In most states, a rezoning is a legislative act by the governing body, rather than a quasi-judicial act.[15] Zoning statutes and ordinances do not contain standards for spot zonings, and legislative hearings do not include quasi-judicial protections. Courts do not review spot zonings unless neighbors challenge them in court, where they—as legislative acts—usually receive a relaxed "rational basis" standard of judicial review.[16]

Spot zoning may be the only alternative available for a change in use but it may be suspect, particularly if it carves out a small site for a more intensive use that is incompatible with the surrounding area. The next Part considers whether the possibility for arbitrary action through spot zoning is a justification for skeptical judicial review.[17]

14. A municipality may approve a spot zoning as a planned unit development. *E.g.*, Evans v. Teton Cty., 73 P.3d 84 (Idaho 2003) (golf course and residential resort planned unit development). A planned unit development, or PUD, is a land use project whose development plan showing uses, densities, and design requires approval by the municipality in a review process. A PUD can range from infill housing on a few acres in a downtown area to a large master-planned community of 50 square miles. An approval of a PUD usually requires a rezoning, which can attract a spot-zoning objection. For discussion see DANIEL R. MANDELKER, PLANNED UNIT DEVELOPMENTS, PLANNING ADVISORY SERVICE REP. NO. 545 (2007).

15. LAND USE LAW, *supra* note 8, § 6.26. A minority of courts treat rezoning as a quasi-judicial act, which requires quasi-judicial procedures. The leading case adopting the minority view is Fasano v. Bd. of Cty. Comm'rs of Washington Cty., 507 P.2d 23, 26 (Or. 1973). *Accord* Cty. Council of Prince George's Cty. v. Zimmer Dev. Co., 120 A.3d 677, 687 (Md. 2015); *see also* cases cited *infra* note 60. For discussion of the quasi-judicial view see Philip L. Fraietta, *Contract and Conditional Zoning Without Romance: A Public Choice Analysis*, 81 FORDHAM L. REV. 1923, 1932-36 (2013); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1158-60 (1985) (discussing cases holding that rezoning or spot zoning is a legislative act).

16. For extensive discussion of the rational basis standard of judicial review see Membreno v. City of Hialeah, 188 So. 3d 13 (Fla. Dist. Ct. App. 2016); *see also* Robert J. Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, An Analytical Framework, and Synthesis*, 51 WASH. J. URB. & CONTEMP. L. 1, 11 (1997) (explaining standard of judicial review following Euclid decision). For discussion of the role of a presumption of constitutionality in spot zoning cases see *infra* text accompanying notes 84-98.

17. This article does not consider reverse spot zoning, which is another form of spot zoning. A reverse spot zoning is a change to a less intensive use of property. This type of zoning change, also called a downzoning, attracts a different basis for judicial review because it decreases rather than increases the value of property for development. Reverse spot zonings are downzonings treated as a spot zoning, rather than as a downzoning, problem.

II. Does Spot Zoning Require Judicial Skepticism?

Courts may consider spot zoning to be presumptively arbitrary.[18] There are three possible reasons. Spot zoning may arbitrarily confer a wealth transfer, an equal protection[19] concern that landowners receiving spot zonings obtain an unfair economic advantage. Second, spot zoning may be an example of political capture by landowners or developers, who can pressure the legislative body into making decisions that favor them. Third, spot zoning may also be an unacceptable method for making changes in the zoning ordinance, a concern that it violates the structural integrity of the zoning system.

A. *Wealth Transfer as a Basis for Judicial Skepticism*

Any zoning change that allows an intensified use of land use will create new value. In a conditional use or variance case, for example, a buyer may have acquired the land by paying a lower price than it is worth after the zoning board gives its approval for the conditional use or variance. A similar wealth creation occurs in spot zoning cases, because a buyer may have paid a lower price for the land

For cases on reverse spot zoning see, e.g., Lum Yip Kee, Ltd. v. City of Honolulu, 767 P.2d 815 (Haw. 1989) (held valid); Sullivan v. Town of Acton, 645 N.E.2d 700 (Mass. App. Ct. 1995) (same); Helena Sand & Gravel, Inc. v. Lewis & Clark Cty. Planning & Zoning Comm'n, 290 P.3d 691 (Mont. 2012) (same); Miller v. Town of Tilton, 655 A.2d 409 (N.H. 1995) (same, not inconsistent with comprehensive plan); Riya Finnegan LLC v. Twp. Council of S. Brunswick, 962 A.2d 484, 492 (N.J. 2008) (held invalid); Bigwood v. City of Wahpeton, 565 N.W.2d 498 (N.D. 1997) (held valid, to build low-income housing); Peck Slip Assocs. v. City Council of N.Y.C., 809 N.Y.S.2d 56 (N.Y. App. Div. 2006) (same, to preserve historic character of neighborhoods); Bishop Nursing Home, Inc. v. Zoning Hearing Bd. of Middletown, 638 A.2d 383 (Pa. Commw. Ct. 1994) (held invalid). For discussion see Brian K. Gilroy, *In Re Realen Valley Forge Greenes Associates: The Supreme Court of Pennsylvania Finds "Reverse Spot Zoning" Unlawful*, 14 WIDENER L.J. 521 (2005); Jaclyn Wyrwas, *Spotty Behavior or Good Precedent: The Rebirth of the Inverse Spot Zoning Doctrine in Riya Finnegan, LLC v. Township Council of South Brunswick*, 35 SETON HALL LEGIS. J. 516 (2011). On downzoning see LAND USE LAW, *supra* note 8, §§ 6.34-6.38.

18. Vicki Been, Josiah Madar, & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 231 (2014) [hereinafter Been] ("Zoning changes often confer concentrated benefits on individual property owners or small groups of owners, but impose more diffuse costs on other residents."); Carol M. Rose, *New Models for Local Land Use Decisions,* 79 NW. U. L. REV. 1155, 1160 (1985) ("[I]t is precisely [court land use decisions'] small scale and uncontroversial character that may open the door to arbitrariness or inside deals.").

19. *E.g.*, Foothill Cmtys. Coal. v. Cty. of Orange, 166 Cal. Rptr. 3d 627, 635 (Cal. Ct. App. 2014) ("The essence of spot zoning is irrational discrimination."); Van Renselaar v. City of Springfield, 787 N.E.2d 1148, 1152 (Mass. App. Ct. 2003); Granger v. Town of Woodford, 708 A.2d 1345 (Vt. 1998).

than it is worth after the rezoning.[20] Spot zoning confers an unearned increment in the value of land. It is a windfall to the landowner because he obtains it without compensation or effort. Spot zoning also creates a wealth transfer from adjacent neighbors to the owner of the spot-zoned site, because the spot zoning to a more intensive use may depress the value of neighboring property.

Wealth transfers are inescapable in the administration of a zoning ordinance. They may be acceptable when they occur through a conditional use or variance allowed under standards in the ordinance, if the zoning board follows process and gives reasons for its decision. These zoning approvals are a response to inevitable change that occurs under well-guided principles in a transparent approval process. A spot zoning may be a zoning change that needs to occur but, because of the unprincipled basis on which it receives approval, it may give an arbitrary advantage to landowners. A legislative body allows it without having to meet specified standards, and it does not require explanation with reasons and findings of fact. While there is some recognition of this problem in the spot zoning cases, courts will uphold spot zoning even though it provides a financial benefit to the landowner.[21]

The Supreme Court considered the wealth transfer issue in *Yee v. City of Escondido*,[22] a rent control case. A state statute and local ordinance set rent controls, and allowed mobile home owners to occupy

20. In the example set out at the beginning of this article, a site zoned for the proposed office building would sell at its value for this use. A site zoned for residential use would sell for its value for that use. The landowner could buy this site at that lower residential value and then attempt to obtain a rezoning for an office use, which would increase the value of the land. The landowner may have to pay a premium for the site reflecting the possibility that she would be able to obtain the rezoning, but this would probably be less than the price of a site already zoned for office use.

21. *See Van Renselaar*, 787 N.E.2d at 1152 (in upholding a spot zoning, the court stated that "[t]he test, however, is not whether the zoning change is beneficial to a landowner. 'It is no objection to a legislative solution of a public problem that it will incidentally lead to private profit or advantage.' " (quoting Lanner v. Bd. of Appeal of Tewksbury, 202 N.E.2d 777, 784 (Mass. 1964))); *see also* Taxpayers Ass'n of Weymouth v. Weymouth Twp., 364 A.2d 1016, 1023 (N.J. 1976) (that property owner initially suggested rezoning and would benefit "do not present a prima facie case of 'spot zoning' "); Great Atl. & Pac. Tea Co. v. Borough of Closter Planning Bd., No. A-1374-13T3, 2015 WL 1280815, at *5 (N.J. Super. Ct. App. Div. Mar. 23, 2015) (an amendment that was driven by discussions with a specific developer who stood to benefit did not prove illegal spot zoning); Kravetz v. Plenge, 84 A.D.2d 422, 430 (N.Y. App. Div. 1982) ("That an amendment was enacted through the impetus of one who would financially benefit by its enactment does not establish the result as impermissible spot zoning."). *But see* Little v. Bd. of Cty. Comm'rs of Flathead, 631 P.2d 1282 (Mont. 1981) (court noted in finding spot zoning invalid that county did not change zoning except on request by landowner).

22. 503 U.S. 519 (1992).

their homes at a below-market rent without fear of eviction. They could get premiums from purchasers when they sold, reflecting the increase in value created by these restrictions.

The Court did not find a per se taking of property (wealth) from the mobile home park owner.[23] It rejected an argument that "the ordinance transfers wealth from park owners to incumbent mobile home owners," and held that "[o]ther forms of land use regulation, however, can also be said to transfer wealth from the one who is regulated to another."[24] If the Court means that all wealth transfers through zoning are acceptable, then wealth transfers through spot zoning should not be a reason for skeptical judicial review. Spot zoning is distinguishable, however. Courts should be skeptical because legislative decision-making for spot zoning creates uncompensated wealth transfers that favor individual landowners arbitrarily.[25] They differ from wealth transfers created by an ordinance, like rent control, that applies uniformly to everyone.

23. *Id*. at 520 ("On their face, the state and local laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant."). The mobile home park owners argued that the ability of mobile homeowners to sell their mobile homes at a premium was a discrete transfer of a property interest that was equivalent to physical taking. The court disagreed, and held the physical takings cases were distinguishable. *Id. But see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding a physical taking when "crossover" and "non-crossover" cables installed on five-story apartment building).

24. *Yee*, 503 U.S. at 529 (the court also noted that "[t]raditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise.").

Whether a spot zoning transfers wealth from the landowner who sells property to the landowner who gets it spot zoned is problematic. The argument for wealth transfer is that the seller has lost the value of a rezoning expectancy. Professor John Drobak points out, however, that all kinds of government action, such as the location of a new highway, can change the market value of land. "Anyone who sells land before these things happen takes the risks that they would have had a higher sales price if they had waited to see if their land would appreciate from one of these events. This is just as true for anyone who sells land that later is rezoned. If the seller wanted to increase value, the seller could have had it rezoned before the sale, and that way, the seller would get the increased value." Email from John Drobak, Madill Professor of Law, Washington University in Saint Louis, to author (May 31, 2016) (on file with author).

25. *See* Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) ("[A]ll economic regulation effects wealth transfer. . . . The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes.").

Plaintiffs in the *Yee* case also alleged a generational disparity because existing mobile home owners could collect a premium on the sale of their mobile home, while the price for a future buyer would include that premium. The *Yee* Court held that this effect "might have some bearing on whether the ordinance causes a *regulatory* taking," but had "nothing to do with whether the ordinance causes a *physical* taking." *Yee*, 503 U.S. at 530 (emphasis in original). A similar generational disparity appears in spot

B. *Capture as a Basis for Judicial Skepticism*

Capture of the zoning process is another possible basis for judicial skepticism of spot zoning.[26] "Capture" is the dominant influence in the political process by an interest group or faction. If there is capture by developers, the courts should provide a more thorough judicial review, because developers could have pressured the decision-making body into a favorable decision. If there is capture by adjacent neighbor landowners, courts should provide a less rigorous judicial review because they had an opportunity to make their voice heard in a decision-making process they controlled.[27]

The problem of capture, or dominance, in the zoning process has received considerable attention. There are two major theories.[28] The Growth Machine Theory argues that developers and their allies control the process in which governments approve new development.[29] This theory especially applies to decision-making in urban areas. The

zoning, because the landowner who obtains a spot zoning will enjoy as a windfall an increase in the value of her land, while future buyers will have to pay the enhanced value created by the present owner's more intensive development. That problem would seem to create more of an equal protection than a takings problem, but the Court's dictum at least suggests that generational disparities of this type are suspect.

26. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law,* 24 URB. LAW. 1, 16 (1992) ("Upzoning or 'spot zoning' cases where a landowner has received an upzoning for a more intensive use can be a classic example of political malfunction. Because the courts believe that improper pressure on the legislative body may have been responsible for the upzoning, they may require the municipality to show a legitimate reason for the zoning change.") [hereinafter *Shifting Presumption*].

27. Capture does not exist when there is pluralist bargaining. *See id.* at 34 ("[C]ompetition between formal and informal groups pursuing a range of divergent goals and interests is assumed to place all important issues on the public agenda, guarantee that no group dominates the political arena, maintain political stability, and improve individuals' intellectual and deliberative skills." (quoting Richard E. Klosterman, *Arguments For and Against Planning*, 56 TOWN PLAN. REV. 1, 11 (1985))). Pluralist bargaining does not occur when all major interests have representation in a community but "some are excluded from the decision-making process by a dominant land-use coalition or minority interest." *Id*. at 35. Neither can pluralist bargaining occur in a community with a limited social and economic demographic that dominates decision-making. That community is captured because only one interest is represented that probably will produce exclusionary zoning decisions. *See id.*

28. *See generally* Been, *supra* note 18, at 231-34; *see also* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 404-09 (1977) (arguing that developers control urban, and homevoters suburban, areas, and that land developers are the "largest investors in municipal politics in the United States"). He also notes that majorities may be cyclical. *Id*. at 409 n.63.

29. *See generally* Harvey Molotch, *The Political Economy of Growth Machines*, J. URB. AFF. 29 (1993); Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1977); JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE (1987).

Homevoter Theory[30] argues that homeowners control decisions by local governments that affect their property interests, and can block new development that has a negative effect on home values. This theory especially applies to decision-making in suburban areas, but one study found homevoter opposition effective in blocking development in New York City.[31]

Applying these theories to spot zoning is problematic, because spot zoning occurs in both urban and suburban areas. The difficulty is determining which of these two interests is dominant.[32] The Growth Machine theory argues it is relevant to zoning because business, cultural, and government elites can control zoning bureaucracies through campaign contributions and influence,[33] and some studies found that developer interests control the zoning process and can obtain favorable zoning decisions.[34] Homevoters are likely to oppose spot zoning because of its perceived negative effect on property values.[35] Studies of capture in zoning change are limited and mixed, and show that citizen opposition is not always decisive.[36] The New York City study is an exception.[37]

30. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE AND LAND-USE POLITICS 18 (2001), [hereinafter HOMEVOTER].

31. *See* Been, *supra* note 18, at 241-61.

32. *Id* at 234-38 (describing these theories); *see also* sources cited *supra* note 29.

33. *See generally* articles cited *supra* note 29; Been, *supra* note 18, at 233-34. Redevelopment is another example, such as the redevelopment project approved in New London, Connecticut and upheld in *Kelo v. City of New London*. 545 U.S. 469 (2005); *see also* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721 (N.Y. 2010) (upholding redevelopment project by Columbia University in upper Manhattan).

34. *See* Arnold Fleishman & Carole Pierannunzi, *Citizens, Development Interests, and Local Land Use Regulations*, 52 J. POL. 838, 841 (1990), [hereinafter *Development Interests*]. *See generally* Jerry Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447 (2004).

35. *See* HOMEVOTER, *supra* note 30, at 8-12; *see also* William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects,* 41 URB. STUD. 317, 335 (2004).

36. *See Development Interests*, *supra* note 34 (discussing rezonings in Atlanta metropolitan area, citizen opposition and developer presence not accurate predictors of a rezoning approval, planning commission recommendation dominated governing body decision); Arnold Fleischmann, *Politics, Administration, and Local Land-Use Regulation: Analyzing Zoning as a Policy Process*, 49 PUB. ADMIN. REV. 337 (1989) (discussing same Atlanta study, citizen opposition in 39.1 percent of cases with 12.4 percent denied and 37.7 percent receiving some form of compromise approval, 48.9 percent of developer requests approved with conditions) [hereinafter *Politics*]; Eric H. Steele, P*articipation and Rules—The Functions of Zoning,* 1986 AM. B. FOUND. RES. J. 709, 733 (Zoning Amendment Committee recommendations in Evanston, Illinois; expressed opposition stronger than expressed support; majority of requests recommended for outright or modified approval when there was both support and opposition); *see also* Been, *supra* note 18, at 237.

37. Been, *supra* note 18.

These studies suggest that the Growth Machine and Homevoters theories can be, but are not always, dominant in the zoning process,[38] and that neither theory of interest dominance can support judicial skepticism without proof it has occurred.[39] There are additional reasons for believing that skepticism based on homevoter control is not justified. Homevoter opposition is seldom well organized and identified. There usually is no formal mechanism for recognizing neighborhood associations, or for ensuring adequate representation within them.[40] Courts may be justified in discounting opposition if they believe it includes some, but not all, neighbors affected by a rezoning decision.

A deeper concern is the legitimacy of Homevoter Theory. It rests on a number of assumptions. They include the assumption that property taxes will be capitalized into residential home values,[41] that local officeholders will respond to homevoter pressure to maintain property values, and that homevoters put a priority on higher property values

38. *Id.* at 260 ("The suspicion some courts harbor that upzonings signal undue developer influence or ad hoc and unprincipled decisions may be appropriate, but should at least be matched by suspicions that neighborhood opposition to land-use change likely tilts land-use decisions to be unfairly exclusionary and more risk averse than is optimal.").

39. For discussion of cases considering whether neighbor pressure on zoning decisions is a violation of substantive due process see Harold A. Ellis, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 LAND USE & ENVTL. L. REV. 275 (1992).

40. *See* Douglaston Civic Ass'n v. Galvin, 324 N.E.2d 317, 320 (N.Y. 1974) (holding that "an appropriate representative association" should have standing, and listing factors to consider in deciding whether association sufficiently representative, including requirement that association be "fairly representative of the community of interests which it seeks to protect"); *accord* Tri-County Concerned Citizens, Inc. v. Bd. of Cty. Comm'rs, 95 P.3d 1012 (Kan. Ct. App. 2004); All. for Metro. Stability v. Metro. Council, 671 N.W.2d 905 (Minn. Ct. App. 2003); *see also* Model Land Dev. Code § 2-307(3) (Am. Law Inst. 1976) (allowing Land Development Agency to designate neighborhood organization to participate in administrative hearings and bring judicial proceedings that has at least half of the adults within its boundaries, has at least 50 members, and at least 50 percent of the land area within its boundaries developed or available for residential use).

41. This assumption is necessary because homevoters should oppose spot zoning for uses that may lead to tax increases, such as more intensive residential developments likely to increase the number of schoolchildren the community has to educate. Rezonings for uses that will pay more property taxes than homevoters pay, such as commercial development, will not decrease home values for tax reasons, but homevoters may still oppose them because of their perceived negative effects on residential home values.

Professor Fischel argues that property values fully capitalize tax differences. HOMEVOTER, *supra* note 30, at 47-51 (discussing A. Quang Do & C.F. Sirmans, *Residential Property Tax Capitalization: Discount Rate Evidence from California*, 47 Nat'l Tax J. 341 (1994)); *see also* Albert M. Church, *Capitalization of the Effective Property Tax Rate on Single Family Residences*, 27 NAT'L TAX J. 113 (1974); R. Dusansky et al., *The Impact of Property Taxation on Housing Values and Rents*, 10 J. URB. ECON. 240 (1980).

above everything else.[42] These assumptions may not be true, and suggest that homevoter control may not occur.[43] Despite these concerns, capture by developers or homevoters is often a reality. Courts will have to decide whether capture is problem. Where capture exists, they should be skeptical.

Another type of homevoter capture is cause for concern where it exists. Many municipalities have a ward courtesy system that determines how the governing body makes decisions on issues that affect neighborhoods. In a ward courtesy system, the member of the ward in which a spot zoning occurs determines the governing body's decision.[44] Other members of the governing body support the ward member as a courtesy. Capture of the zoning process occurs because homevoter neighborhood interests influence their ward representative, who succeeds through the courtesy system. The outcome is usually a denial.[45] Court decisions on whether a ward courtesy arrangement violates substantive due process are mixed.[46] Ward courtesy still requires judicial skepticism when it occurs, because it allows one neighborhood in the municipality to control the zoning process through its representative on the governing body, whether the result is favorable or unfavorable.

42. *See* WILLIAM A. FISCHEL, DARTMOUTH COLL., AN ECONOMIC HISTORY OF ZONING AND A CURE FOR ITS EXCLUSIONARY EFFECTS 21 (2001), https://www.dartmouth.edu/~wfischel/Papers/02-03.pdf (observing how homebuyers place extremely high value on quality of life, which leads to an increase in property values in areas that can offer it; therefore, if zoning regulations changed to allow undesirable land uses in areas offering a high quality of life, local lawmakers would face scrutiny from the property owners whose land decreased in value).

43. Richard Schragger disputes these assumptions. Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1830-33 (2003) (reviewing HOMEVOTER, *supra* note 30) (arguing that local lawmakers do not have the necessary political clout to meaningfully influence property values).

If there is capture by homevoters, there may also be good reason to discount it because homeowners do not represent the population as a whole. Lee Anne Fennell, *Homes Rule,* 112 YALE L.J. 617, 630 (2002) (reviewing HOMEVOTER, *supra* note 30) ("The fact that homeowners as a group are richer, whiter, older, and more likely to be married than are their renting counterparts should not be ignored in assessing a homeowner-controlled model of local governance. . . . If Fischel's model of homeowner political control is accurate, local political decisions are largely being made by a subset of the population that is not demographically representative.").

44. The ward courtesy system requires election of the governing body by wards. Governing body members are elected at large in many municipalities, especially in the South. Counties often have a commission form of government, which is elected at large. Cities seldom have this form of government. DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 33-34 (8th ed. 2014).

45. *Shifting Presumption*, *supra* note 26, at 37.

46. *Compare* Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964) (liquor license, invalid) *with* Arroyo Vista Partners v. City of Santa Barbara, 732 F. Supp. 1046, 1051 (C.D. Cal. 1990) (denial of application for development plan, valid).

C. *The Integrity of the Zoning Process as a Basis for Judicial Skepticism*

Finally, critics argue that courts should be skeptical of spot zoning because it destroys the integrity of the zoning process. This problem occurs because a zoning change that intensifies land use can occur in two ways. The municipality can rezone all or a part of the community, but comprehensive rezoning does not happen often.[47] As a substitute for municipal failure to rezone comprehensively, a landowner can apply for a spot zoning change. The question is whether a zoning change requested by an individual landowner is an acceptable use of the zoning process. This problem is critical to a decision on how courts view spot zoning, but the cases have given it little attention.

An early Kentucky case discussed this question, and held that municipalities should make changes in the zoning ordinance through "systematic planning," if the lack of suitable sites for a particular use is due to restrictions in the zoning ordinance.[48] It concluded that "the common practice of zoning agencies, after the adoption of an original ordinance, is simply to wait until some property owner finds an opportunity to acquire a financial advantage by devoting his property to a use other than that for which it is zoned, and then struggle with the question of whether some excuse can be found for complying with his request for a rezoning."[49]

There is another view of this process. Professor Mixon points out that zoning change by spot zoning is not all bad. "Small, incremental changes in regulations to allow compatible commercial uses in a residential area experiencing strong economic pressure for change can permit orderly conversion of a neighborhood, whereas overly strict regulations may build up pressure to the point that catastrophe occurs in the form of urban decay and blight."[50] An intensification of residential

47. "It's not uncommon in my experience that a community is unable to, or chooses not to, proactively rezone areas where inconsistencies exist following a major comprehensive plan update due to a lack of resources or a lack of political will. Around 20-25% of communities do not rezone after doing a comprehensive plan." Email from Darcie White, AICP, Director, Clarion Associates LLC, to author (March 21, 2016) (on file with author).

48. Fritts v. City of Ashland, 348 S.W.2d 712, 714 (Ky. 1961); *see also* Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 447 (N.J. 1954) (rezoning held invalid as usurpation of power of board of adjustment to recommend variance).

49. *Fritz*, 248 S.W.2d at 714-15. This practice is called wait-and-see zoning. *See* Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 740 (1980).

50. Mixon & McGlynn, *supra* note 4, at 1254; *see also* Blacklidge v. City of Gulfport, 223 So. 2d 530, 533 (Miss. 1969) (change is inevitable); Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 79 (1994) ("A zoning

use to meet housing demand may also be an orderly zoning conversion. Spot zoning in response to economic and political pressure may not be an "arbitrary departure from a perfectly planned land use future."[51] The courts accept this reality. They approve piecemeal change by upholding spot zoning, even though it occurs at the request of a landowner.[52]

Although landowner instigation is not enough to invalidate a spot zoning, other problems arise because rezoning is a legislative act—except in the minority of states where it is quasi-judicial.[53] Legislative rezoning goes through stages. A landowner begins the spot zoning process but planning staff review it, and the planning commission holds hearings and makes a recommendation to the governing body.[54] The governing body may,[55] but is not required,[56] to adopt the staff

scheme also should not attempt to freeze a neighborhood in time. Despite the apparent conservatism inherent in the notion of 'protecting' a neighborhood against inconsistent changes in land uses, this does not imply that all changes are unwelcome.") (noting neighbor expectations in maintenance of neighborhood character). Commercial intensification also occurs in commercial areas, as the average life of a nonresidential building is 40 years. Redevelopment often means a more intensive use. *See* ARTHUR C. NELSON, FOUNDATIONS OF REAL ESTATE DEVELOPMENT FINANCING 11 (2014).

51. Mixon & McGlynn, *supra* note 4, at 1255.

52. Vella v. Town of Camden, 677 A.2d 1051, 1053 (Me. 1996); Portsmouth Advocates, Inc. v. City of Portsmouth, 587 A.2d 600, 602 (N.H. 1991) ("[T]his factor alone does not render the city council's actions unreasonable."); Great Atl. & Pac. Tea Co. v. Borough of Closter Planning Bd., No. A-1374-13T3, 2015 WL 1280815, at *5 (N.J. Super. Ct. App. Div. Mar. 23, 2015) (unpublished decision; amendment driven by discussions with specific developer who stood to benefit; case law consistently holds "those facts alone do not prove that a zoning amendment resulted in illegal spot zoning"); *see also* Van Renselaar v. City of Springfield, 787 N.E.2d 1148, 1152 (Mass. App. Ct. 2003) ("The test, however, is not whether the zoning change is beneficial to a landowner. 'It is no objection to a legislative solution of a public problem that it will incidentally lead to private profit or advantage'" (quoting Lanner v. Bd. of App. of Tewksbury, 202 N.E.2d 777, 784 (Mass. 1964))). *But see* Little v. Bd. of Cty. Comm'rs of Flathead City., 631 P.2d 1282, 1289 (Mont. 1981) (noting in finding spot zoning invalid that county did not change zoning except on request by landowner).

53. *See* Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L. 243, 255 (1994). Several states rejected the quasi-judicial view, and it has waned. Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil,"* 20 NOVA L. REV. 707, 729-30 (1996). Fasano v. Bd. of Cty. Comm'rs of Washington Cty., 507 P.2d 23, 26 (Or. 1973), is the leading case. *See* LAND USE LAW, *supra* note 8, § 6.26; *see also* cases cited *infra* note 88.

54. *See*, *e.g.*, DURHAM, N.C. UNIFIED DEVELOPMENT ORDINANCE § 3.2, http://durhamnc.gov/DocumentCenter/Home/View/7526. The ordinance requires a preapplication conference, neighborhood meetings, staff consultation and a hearing before the approving body. *Id.*

55. One study found that the planning commission adopted 77.2 percent of staff recommendations for rezonings, while the governing body adopted 66.6 percent. *Politics*, *supra* note 36, at 341.

56. *See* Englin v. Bd. of City. Comm'rs, 48 P.3d 39, 43 (Mont. 2002) (legislative body had discretion to reject planning staff recommendations).

recommendation, though studies show the planning commission recommendation may dominate the governing body decision.[57]

When the spot zoning reaches the governing body, however, it usually bargains with the landowner to obtain a modification of the original rezoning proposal. Neighbor opposition can demand modifications, such as a buffer area or reduced density that remedy any negative effects the rezoning may have on neighboring properties.[58] The governing body can adopt these modifications as conditions to the spot zoning.[59] In the office building case at the beginning of this article, for example, the governing body might approve the project with a condition that the landowner provide perimeter landscaping adjacent to residential neighborhoods. Conditioned spot zoning appears in the court decisions.[60] The difficulty is that bargaining occurs without formal control. No standards guide it, and it occurs in an informal process unrestricted by the demands of a formal hearing or findings of fact.[61]

In an important article, Professor Selmi describes how bargaining in the zoning process can impair the values that underlie the land use system.[62] He focuses on formal contracts such as development

57. *See Development Interests*, *supra* note 34, at 846.

58. Interview with Dee A. Joyner, Former Director of Planning, Saint Louis, Missouri, (Mar. 15, 2016) (on file with author); *see Development Interests*, *supra* note 34, at 840; *see also Politics*, *supra* note 36, at 342 (noting that governing bodies often approve rezonings in modified form).

59. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 992 (1987) ("[A]lthough a few jurisdictions have found contingent zoning invalid per se, a growing number have analyzed the legitimacy of this device on a case-by-case basis. Courts have upheld contingent zoning when traditional procedural requirements have been satisfied, the government decision-making body has employed its independent judgment, rezoning decisions are justified under generally applicable standards, and conditions or requirements are deemed reasonable under the circumstances at hand."); *see also* LAND USE LAW, *supra* note 8, §§ 6:59-6.62; Fraietta, *supra* note 15.

60. *E.g.*, Watson v. Town Council of Bernalillo, 805 P.2d 641 (N.M. Ct. App. 1991) (buffer zone provided, and conditions mitigating negative effects); Murden Cove Pres. Ass'n v. Kitsap Cty., 704 P.2d 1242, 1246 (Wash. Ct. App. 1985) (conditions imposed to prevent negative impacts).

61. These problems do not occur in those jurisdiction where rezonings are considered quasi-judicial. Notice and hearing are required; rules govern the conduct of the hearing, which should allow for cross-examination; there may be time limits for decisions; and the decision-maker must make findings of fact. *See, e.g.*, Fasano v. Bd. of Cty. Comm'rs, 507 P.2d 23, 30 (Or. 1973). The agency may also be required to make a determination that an application is complete. For a model law that details quasi-judicial procedures for land use proceedings, see AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 10-1 to 10-90 (Stuart Meck ed., 2002) [hereinafter Meck], https://www.huduser.gov/Publications/pdf/growingsmart_guide.pdf.

62. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011).

agreements between landowners and municipalities,[63] but much of his analysis applies to the informal bargaining that precedes spot zoning.[64] Professor Selmi identifies six norms that underlie the land use system, and shows how bargaining impairs the values served by those norms.[65] One objection is that bargaining impairs the vertical hierarchical structure of the system, in which developer landowners must secure permission from a government authority for their development.[66] Procedures required within that system protect the developer landowner, such as hearing requirements.[67] Variances and conditional uses are part of this vertical structure, while rezoning is not and does not include the protections the hierarchical structure provides.[68]

Bargaining also impairs the equality norm that requires governments to avoid the unequal treatment of applicants.[69] Negotiation and bargaining are unlikely to provide equal treatment. The opportunity to bargain, and the different skills, styles, biases and other factors brought to the bargaining table, are likely to lead to the different treatment of different landowners.[70] Finally, bargaining impairs the democratic norm because it excludes the public and citizen groups that have a stake in the spot zoning.[71] Neighbors and neighborhood groups can testify at legislative hearings, and a governing body can consider their views when bargaining with a developer, but they do not participate directly in the bargaining process.[72]

63. *Id.*
64. *See id.*
65. *Id.* at 597.
66. *Id.* at 612-13.
67. *Id.* at 640.
68. *See id.* at 600.
69. *Id.* at 627-31.
70. Professor Selmi also points out that bargaining does not produce rational decision-making and does not control the discretion of the decision maker. He notes, for example, that inadequate information may be available in the bargaining process. *Id.* at 630-36. This objection does not carry as much weight in the rezoning process, which requires input by planning staff and a hearing before the planning commission.
71. *Id.* at 636-43. The lack of an open public hearing impairs transparency when local governments contract with landowners and developers. Administrative hearings will be provided if the zoning process is quasi-judicial that should protect all participants, including landowners and neighbors. *See* Meck, *supra* note 61, § 10-207(7), at 10-36. The model law includes statutory limitations on ex parte communications. *Id.* For court decisions see LAND USE LAW, *supra* note 8, § 6.68.
72. Other norms that underlie the land use system are affected by contracts between local governments and landowners and developers. They impair the responsiveness norm because they prevent governments from responding to changed circumstances. Spot zonings also affect the restraint norm. This norm prevents governments from imposing excessive conditions on rezoning and applicants for other government approvals. The unconstitutional conditions doctrine places a restraint on overreaching. Selmi, *supra* note 62, at 617-25. Conditions adopted in a rezoning are subject to a public

D. *A Final Note on Skepticism*

This discussion asked whether courts should take a skeptical view of spot zoning, and examined a number of reasons why skepticism should occur. Spot zoning creates an uncompensated wealth transfer, which is a reason for skepticism despite the Supreme Court's lack of concern. Capture of the zoning process is another reason to be skeptical of spot zonings. There is support for capture by both developers and homevoters, and courts should consider whether capture has occurred when they review spot zoning cases. Ward courtesy, when it exists, is another example of capture. Spot zoning also is suspect because it damages the integrity of the zoning process. The bargaining that accompanies spot zoning invites unequal treatment and does not provide for public participation. The next sections review judicial treatment of the process and substantive problems spot zoning raises, and consider how judicial skepticism should guide the judicial response.

III. Process Issues in the Judicial Review of Spot Zoning

There are two sets of process issues in judicial review of spot zoning. The first is whether courts should allow neighborhood landowners and groups to challenge spot zoning as third parties. The second is the standards courts should apply when they review spot zoning. There are two parts to this problem. The first issue is whether spot zoning is entitled to the presumption of constitutionality typically accorded legislative acts, or whether courts should reverse this presumption. The second is whether courts should apply the traditional reasonably debatable standard of judicial review, or should reject this standard and apply a higher standard of strict scrutiny.

Whether there was capture in the political process should affect a decision on these issues. If there was homevoter capture, then neighbors had a controlling influence on the legislative process and were powerful enough to exert a dominant role. They should not be entitled to special judicial treatment.[73] If there was developer capture, courts

needs requirement. Wegner, *supra* note 59, at 989 ("[C]onditions or obligations may be imposed only as a means of addressing public needs that result from development proposed in conjunction with the requested rezoning.").

73. *See* Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 954 (2013) (arguing courts decline to protect homeowner interests because they suspect they have sufficient political influence with regulatory authorities without judicial intervention; developers need protection from a hostile local majority because they are underrepresented).

should be skeptical of spot zoning, grant standing to neighbors, and give spot zonings strict scrutiny. Wealth transfer concerns, and deficiencies in the bargaining process, also suggest assertive judicial intervention.

A. *Neighbor Standing*

Without a third party suit by neighbors,[74] spot zonings are likely to go unchallenged in court. The developer has negotiated a rezoning with the governing body, and neither is likely to challenge the decision. Standing doctrine decides when neighbors can challenge a spot zoning.[75] Courts solve this problem in a variety of ways that do not consider issues of capture, wealth transfer, or legislative deficiency.[76] Instead, standing doctrine in state courts is a prudential doctrine based on the constitutional separation of power. Courts require parties suing in court to have a discrete interest that implicates the judicial power to decide actual cases.[77]

74. *See* JOHN M. TAYLOR & NORMAN WILLIAMS, JR., 1 AMERICAN LAND PLANNING LAW § 2:1 (Rev. Ed. 2016) ("In such a case, the plaintiff is a neighboring landowner, and the real defendant is the developer; in this instance the municipality ends up siding with the developer. In one sense, therefore, the municipality is not a separate party in interest in land use conflicts, but merely the ally of one or the other of two primary parties in interest.").

75. For a detailed review of standing principles for rezoning in Maryland that discusses the standing issue, see Anne Arundel Cty. v. Bell, 113 A.3d 639 (Md. 2015) (explaining why property owners do not have standing to challenge comprehensive rezonings). Statutes may confer standing to sue in zoning cases. *See e.g.*, Griswold v. City of Homer, 252 P.3d 1020 (Alaska 2011) (ordinance granting standing did not violate state statute); Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. Dist. Ct. App. 2001); Save Homosassa River All. v. Citrus Cty., 2 So. 3d 329 (Fla. Dist. Ct. App. 2008) (statute liberalized standing rules).

76. *See* Ctr. Bay Gardens, L.L.C. v. City of Tempe, 153 P.3d 374, 378 n.5 (Ariz. Ct. App. 2007) (discussing cases). The standing issue in spot zoning cases is different from the standing issue in other cases of zoning change, such as variances and conditional uses, because the change in use is usually more substantial. Only spot zoning cases are cited here. *See id.*

77. Because there is no "case or controversy" requirement in state constitutions, state standing doctrine involves questions of prudential, or judicial, restraint. *See e.g.*, Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs., 712 P.2d 914, 919 (Ariz. 1985); Pence v. State, 652 N.E.2d 486, 487-88 (Ind. 1995) (maintains separation of powers; "restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury"); Jenkins v. Swan, 675 P.2d 1145, 1149 (Utah 1983).

Federal standing rules are based on the case and controversy requirement in the federal constitution, but were liberalized for third parties in Sierra Club v. Morton, 405 U.S. 727 (1972) (organizational standing). State courts sometimes follow the federal rules. *See e.g.*, Ramirez v. City of Santa Fe, 852 P.2d 690 (N.M. 1993) (challenge to comprehensive plan amendment; fear of increased noise, traffic, crime, and pollution; detrimental effect on aesthetics of area; decline in property values; intensification of traffic hazards at street intersections; an increase in drainage, flooding, and runoff; change in peaceful nature of neighborhood); *see also* Glengary-Gamlin Protective

In order to satisfy this requirement, the most common rule grants standing only when a third party plaintiff can show special damage,[78] or special harm, which must be different from that suffered by the general public.[79] Neighbors in spot zoning cases get standing when they can show special harm or damage under this rule,[80] and some courts use similar rules to grant standing to neighborhood organizations.[81]

Ass'n, v. Bird, 675 P.2d 344 (Idaho 1983) (looking to federal rules and granting standing to organization).

78. The special damage rule is an outgrowth of the law of public nuisance. A public nuisance is an offense against the state and subject to abatement by a government agency. An individual cannot abate a public nuisance without showing some special damage from the public nuisance. *See e.g.*, Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082, 1088 (Fla. 1978); *Arundel Cty*., 113 A.3d at 660.

Some states do not have this requirement. *See e.g.*, Napolitano v. Town Bd. of Se., 24 N.Y.S.3d 494, 496 (N.Y. Sup. Ct. 2015) ("[J]ust because more than one person may be harmed does not defeat standing, and standing cannot be denied because many people suffer the same injury."); Morra v. Grand City., 30 P.3d 1022, 1028 (Utah 2010) (rejecting requirement that plaintiffs lack standing because others have suffered, or will suffer, a similar injury).

79. LAND USE LAW, *supra* note 8, § 8.02. Courts apply the same rule to suits by municipal corporations. Vill. of Barrington Hills v. Vill. of Hoffman Estates, 410 N.E.2d 37 (Ill. 1980).

80. *See e.g.*, Summit Mall Co. v. Lemond, 132 S.W.3d 725, 734 (Ark. 2003) (using "adverse impact" test; considering property values, loss of green space, air and noise pollution, and traffic congestion); Blanchard v. Show Low Planning & Zoning Comm'n, 993 P.2d 1078, 1082 (Ariz. Ct. App. 1999) (showing greatly increased traffic load, noise and pollution from cars, possible increase in crime, light pollution); Evans v. Teton Cty., 73 P.3d 84, 88 (Idaho 2003) ("[P]roperties may be adversely affected by a development proposing an 18-hole golf course and pro shop, nearly five hundred homes, a helicopter pad, a 100-room inn, and 50 overnight cabins all on property adjacent to their rural homes"); Van Renselaar v. City of Springfield, 787 N.E.2d 1148 (Mass. App. Ct. 2003) (showing adverse impact; industrial wastewater treatment facility too close to their homes); Smith v. City of Papillion, 705 N.W.2d 584, 591 (Neb. 2005) (75 acre mixed-use development; properties would diminish in value); McGrath v. Town Bd. of N. Greenbush, 678 N.Y.S.2d 834, 836 (N.Y. App. Div. 1998) (shopping center; increased noise, increased vehicle and truck traffic, and degradation in the character of the neighborhood and style of life); *Napolitano* 24 N.Y.S.3d at 496 ("[J]ust because more than one person may be harmed does not defeat standing, and standing cannot be denied because many people suffer the same injury; harm alleged must be specific to individuals who allege it, and must be different in kind or degree from the public at large, but need not be unique."); Campbell v. Barraud, 394 N.Y.S.2d 909 (N.Y. App. Div. 1977) (finding diminution in property values and anticipated water pollution); Anderson v. Island Cty., 501 P.2d 594, 596 (Wash. 1972) (holding quiet enjoyment of residence is threatened by activities of batching plant); Hoke v. Moyer, 865 P.2d 624, 628 (Wyo. 1993) ("Doubling the density of adjacent property raises a number of perceptible harms for a property owner which are different than the harm to the general public, such as increased traffic and congestion."). *But see* Musi v. Town of Shallotte, 684 S.E.2d 892 (N.C. Ct. App. 2009) (requiring special damages in certiorari but not declaratory judgment action). *See generally* W. W. Allen, Annotation, *Standing of Lot Owner to Challenge Validity or Regularity of Zoning Changes Dealing with Neighboring Property* 37 A.L.R.2d 1143 (1954).

81. *See Armory Park Neighborhood Ass'n*, 712 P.2d at 919; Save Homosassa River All. v. Citrus Cty., 2 So. 3d 329 (Fla. Dist. Ct. App. 2008) (applying liberalized

Courts deny standing if they do not find special harm or damage,[82] as when neighbors are too distant from the rezoned property.[83] Although the fact-specific settings of the cases make conclusions difficult, harm clearly occurs when a new development has negative physical impacts on neighboring properties.[84] Inconsistency with existing land use patterns, such as the introduction of a major development or an increase in density, may also be enough.[85] An increase in traffic or traffic congestion is not enough.[86] Courts view this problem as one common to the general public.

An alternate rule is more generous and grants standing to neighbors based on proximity to the spot-zoned site, either under a per se rule or a rebuttable presumption.[87] Courts may also decide that neighbors have a legal interest that gives them a per se right to standing.[88]

statutory test for standing); *Bird*, 675 P.2d 344 (Idaho 1983) (looking to federal rules); Metropolitan Builders Ass'n v. Vill. of Germantown, 698 N.W.2d 301 (Wis. Ct. App. 2005); *see also* cases cited *supra* note 40; Jay M. Zitter, *Standing of Civic or Property Owners' Association to Challenge Zoning Board Decision (as Agreevied Party)*, 8 A.L.R.4th 1087 (1981).

82. *See e.g.*, Florida Rock Properties v. Keyser, 709 So. 2d 175 (Fla. Dist. Ct. App. 1998) (ownership of property and business; interest as citizen in the environment); Columbus v. Diaz-Verson, 373 S.E.2d 208, 210 (Ga. 1988) (allegations of speculative or contingent injuries); Dunaway v. City of Marietta, 308 S.E.2d 823, 824 (Ga. 1983); (increase in adjacent traffic congestion); Lindsey Creek Area Civic Ass'n v. Consol. Gov't of Columbus, 292 S.E.2d 61 (Ga. 1982) (same and proximity of proposed psychiatric hospital; evidence of general reduction in property values not enough); Ray v. Mayor of Baltimore, 59 A.3d 545 (Md. 2013) (planned unit development; increase in traffic); Sanitary & Imp. Dist. No. 347 of Douglas Cty. v. City of Omaha, 589 N.W.2d 160 (Neb. Ct. App. 1999) (increase in traffic; discussing cases); Tata v. Town of Babylon, 276 N.Y.S.2d 426, 428 (N.Y. Sup. Ct. 1967) ("delight with the status quo"); Davis v. City of Archdale, 344 S.E.2d 369 (N.C. Ct. App. 1986) (increase in traffic).

83. *See e.g.*, *Blanchard*, 93 P.2d at 1082 (property 1875 feet away; general harm to the area around the parcel in the form of increased traffic and noise not enough); *Ray*, 59 A.3d 545 (Md. 2013) (planned unit development; property 0.4 miles from site so visibility or change in character of neighborhood not enough).

84. *E.g.*, *Blanchard*, 93 P.2d at 1082 (greatly increased traffic load, noise and pollution from cars, possible increase in crime, light pollution).

85. *E.g.*, *Evan*s, 73 P.3d at 88 ("[P]roperties may be adversely affected by a development proposing an 18-hole golf course and pro shop, nearly five hundred homes, a helicopter pad, a 100-room inn, and 50 overnight cabins all on property adjacent to their rural homes").

86. *E.g.*, *Sanitary & Imp. Dist.*, 589 N.W.2d 160 (discussing cases).

87. *See Ray*, 59 A.3d at 550 (holding proximity is the most important factor to be considered); Bosse v. City of Portsmouth, 226 A.2d 99 (N.H. 1967) (plaintiffs located on same road as rezoned property); McGrath v. Town Bd. of Town of N. Greenbush, 678 N.Y.S.2d 834 (N.Y. App. Div. 1998) (proximity, rebuttable presumption); *see also* Center Bay Gardens, L.L.C. v. City of Tempe, 153 P.3d 374, 378 n.5 (Ariz. Ct. App. 2007) (discussing cases).

88. *E.g.*, Coates v. City of Cripple Creek, 865 P.2d 924 (Colo. App. 1993) ("legally protected interest" from "adverse effects caused by the legally deficient rezoning of adjacent property"); Nowicki v. Planning & Zoning Bd. of Milford, 172 A.2d 386, 389 (Conn. 1961) ("[R]ight to rely on the fact that the existing regulations would

Legal interests may include the right to rely on existing zoning regulations, and the right to protection from the adverse effects of a legally deficient rezoning. Some states grant standing under a public interest rule for issues of great constitutional importance that can apply to spot zoning cases.[89]

Per se or public interest standing rules may not reflect judicial skepticism, but they open the door to judicial intervention by neighbors. The dominant standing rule that requires neighbors to show special harm reflects prudential concerns about judicial intervention rather than judicial skepticism. It nevertheless enforces judicial concern about spot zoning by recognizing harm to property as the basis for standing, and the loss of property value that can occur because of wealth transfer to the spot-zoned property.

B. *The Presumption of Constitutionality and the Standard of Judicial Review*

The presumption that zoning ordinances are constitutional is longstanding, and stretches back to the Supreme Court's approval of zoning in the foundational *Euclid* case.[90] The presumption supports spot zoning and favors developers, because it puts the burden of proof to show invalidity on the neighbors challenging the spot zoning.

The strength of the presumption may be changing. Professor Tarlock and I have detailed its erosion, as courts in many areas realized that zoning could produce arbitrary decisions.[91] Spot zoning is an example. Two early Oregon cases adopted a presumption reversal for spot zoning at a time when the court held rezoning was a legislative

control the use of the defendants' property."); Smith v. City of Papillion, 705 N.W.2d 584, 591 (Neb. 2005) ("The fact that a person would be entitled to receive notice of an administrative hearing because he or she owns property adjacent or very close to the property in issue supports the conclusion that such a person would have standing in a corresponding zoning case."); Speakman v. Mayor of Borough of N. Plainfield, 84 A.2d 715 (N.J. 1951) (finding neighbors have interest because zoning arbitrary; "scheme of statute" connotes neighborhood interest); Jackson v. Guilford Cty. Bd. of Adjustment, 166 S.E.2d 78, 82 (N.C. 1969) (finding that if proposed use unlawful, neighboring owner "will sustain special damage from the proposed use through a reduction in the value of his own property").

89. Note, John Dimanno, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 (2008). For an application of this rule to grant standing to a property owner within a half-mile of the rezoned property, see Cabana v. Kenai Peninsula Borough, 21 P.3d 833 (Alaska 2001). For criticism of this rule, see Note, M. Ryan Harmanis, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729 (2015).

90. *See* Vill. of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

91. *Shifting Presumption*, *supra* note 26, at 3-8. Exclusionary zoning and Locally Unwanted Land Uses (LULUs) are examples.

act. The court recognized the "antithetical character" of spot zoning, and its "recognized erosive effect upon the comprehensive zoning plan."[92] In a later case confirming a presumption reversal, the court held that "[o]ne of the principal evils frequently observed is the practice of granting requests for zoning changes either upon the basis of special privilege or through a failure to see that the change would be inimical to the over-all plan for land use in the locality."[93]

Later, in *Fasano v. Board of County Comm'rs of Washington County*,[94] the Oregon Supreme Court held zoning must comply with the comprehensive plan, reversed the presumption of constitutionality, and applied heightened judicial scrutiny. In this case, the county approved a floating zone,[95] not a spot zoning. *Board of County Comm'rs of Brevard County v. Snyder*,[96] a Florida case, reversed the presumption of constitutionality in a rezoning denial case and applied strict scrutiny. The reasons for presumption reversal in each case differed. *Fasano* reversed the presumption because it believed developers put too much pressure on the zoning process. *Snyder* reversed the presumption to help developers because it believed vacant land is deliberately underzoned, forcing developers to apply for a zoning change.[97] Both courts held zoning is a quasi-judicial act, a minority view.[98]

The treatment of the presumption in spot zoning cases is mixed. A clear majority of decisions applies the traditional presumption in favor

92. Smith v. Washington Cty., 406 P.2d 545, 547 (Or. 1965) (en banc).

93. Roseta v. Washington Cty., 458 P.2d 405, 408 (Or. 1969).

94. Fasano v. Bd. of Cty. Comm'rs of Washington Cty., 507 P.2d 23, 26 (Or. 1973). For discussion of cases accepting and rejecting the *Fasano* quasi-judicial view, see Fraietta, *supra* note 15, at 1934-39; *see also* Todd W. Prall, *Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for A Uniform Standard of Review,* 2004 BYU L. Rev. 1049 (2004).

95. *Fasano*, 507 P.2d at 25 ("The P-R zone adopted by the 1963 ordinance is of the type known as a 'floating zone,' so-called because the ordinance creates a zone classification authorized for future use but not placed on the zoning map until its use at a particular location is approved by the governing body.").

96. Bd. of City. Comm'rs of Brevard Cnty. v. Snyder, 627 So 2d 469 (Fla. 1993). For discussion, see Pelham, *supra* note 53.

97. As noted in Been, *supra* note 18, at 249.

98. A minority of states take this position. *See, e.g.*, Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978); Barrie v. Kitsap Cty., 613 P.2d 1148, 1153 (Wash. 1980). For discussion of the legislative vs. quasi-judicial distinction see KOB-TV, L.L.C. v. City of Albuquerque, 111 P.3d 708, 716 (N.M. Ct. App. 2005). Several courts have continued to hold that rezonings are legislative acts. *E.g.*, South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir 1974); Cabana v. Kenai Peninsula Borough, 21 P.3d 833 (Alaska 2001); Wait v. City of Scottsdale, 618 P.2d 601 (Ariz. 1980); Hall Paving Co. v. Hall County, 226 S.E.2d 728 (Ga. 1976); State v. City of Rochester, 268 N.W.2d 885 (Minn. 1978); Quinlan v. City of Dover, 614 A.2d 1057 (N.H. 1992); Hampton v. Richland County, 357 S.E.2d 463 (S.C. 1987); *see also* LAND USE LAW, *supra* note 8, § 6:26; *infra* notes 14 and 84.

of the constitutionality of the rezoning.[99] Some courts reverse the presumption, even when a spot zoning is legislative.[100] Judicial skepticism requires reversal.

The standard of judicial review[101] in spot zoning cases is usually determined by whether the courts consider a spot zoning to be a legislative or quasi-judicial act. Most courts apply a "reasonably" or "fairly"

99. *E.g.*, Blaker v. Planning & Zoning Comm'n of Town of Fairfield, 562 A.2d 1093, 1097 (Conn. 1989); Barrett v. Hal W. Lamb & Associates, Inc., 255 S.E.2d 61, 62 (Ga. 1979) ("[T]his presumption may be overcome only by clear and convincing evidence."); Evans v. Teton County, 73 P.3d 84, 87 (Idaho 2003); Palermo Land Co. v. Planning Comm'n of Calcasieu Par., 561 So. 2d 482, 490 (La. 1990); Monte v. Par. of Jefferson ex rel. Coulon, 898 So. 2d 506, 511 (La. Ct. App. 2005); Van Renselaar v. City of Springfield, 787 N.E.2d 1148, 1152 (Mass. App. Ct. 2003) (must show conflict with enabling act beyond reasonable doubt); City of Essexville v. Carrollton Concrete Mix, Inc., 673 N.W.2d 815, 824 (Mich. Ct. App. 2003); Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 888 (Minn. 1978); Thomas v. Bd. of Sup'rs of Panola Cty., 45 So. 3d 1173, 1181 (Miss. 2010); Smith v. City of Riggs, 538 A.2d 808, 812-13 (N.J. 1988); Miller v. Town of Tilton, 655 A.2d 409, 410-11 (N.H. 1995) ("The plaintiffs carry the burden before the trial court to demonstrate that a zoning change is unreasonable or unlawful."); Kravetz v. Plenge, 446 N.Y.S.2d 807, 810 (N.Y. App. Div. 1982) ("[V]ery heavy burden of demonstrating unconstitutionality beyond a reasonable doubt."); Zopfi v. City of Wilmington, 160 S.E.2d 325, 332 (N.C. 1968); Atherton Dev. Co. v. Twp. of Ferguson, 29 A.3d 1197, 1204 (Pa. Comwlth. 2011); Historic Charleston Found. v. City of Charleston, 734 S.E.2d 306, 308 (S.C. 2012); City of Pharr v. Tippitt, 616 S.W.2d 173, 178 (Tex. 1981); Step Now Citizens Grp. v. Town of Utica Planning & Zoning Comm., 663 N.W.2d 833, 841 (Wis. Ct. App. 2003).

100. *See e.g.*, Aylor v. Sun Oil Co., 453 S.W.2d 18, 20 (Ky. 1970) ("The presumption in favor of the validity of a zoning ordinance cannot prevail when we have, as here, a clear case of spot zoning which bears no reasonable relationship to the zoning plan or a proper zoning purpose."); Chrismon v. Guilford Cty., 370 S.E.2d 579, 589 (N.C. 1988) ("[D]id the zoning authority make a clear showing of a reasonable basis for the zoning; . . ."); Good Neighbors of Oregon Hill Protecting Prop. Rights v. Cty. of Rockingham, 774 S.E.2d 902, 906 (N.C. Ct. App.), *cert denied*, 778 S.E.2d 78 (N.C. 2015) (placing burdenon the zoning authority in spot zoning cases, but not in ordinary zoning cases); City of Texarkana v. Howard, 633 S.W.2d 596, 597 (Tex. App. 1982) ("When a rezoning ordinance singles out a small area for treatment different from that given the similar surrounding land, the presumption of validity ordinarily extended to zoning ordinances disappears."). *But see* Bassani v. Bd. of Cty. Comm'rs for Yakima Cty., 853 P.2d 945, 948 (Wash. Ct. App. 1993) (holding rezoning as quasi-judicial act does not enjoy presumption, but granting some deference in review, appealing party's burden to show rezone erroneous, will be overturned only if arbitrary, capricious and contrary to law); Four States Realty Co. v. City of Baton Rouge, 309 So. 2d 659, 672 (La. 1974) ("[R]ezoning on a piecemeal or spot basis is highly suspect.").

101. If rezoning is a quasi-judicial action, then review is by certiorari on the record. The standard of judicial review is whether there is substantial evidence in the record to support the decision, and related standards. This is not strict scrutiny. *E.g.*, Town of Juno Beach v. McLeod, 832 So. 2d 864, 868 (Fla. Dist. Ct. App. 2002) (examining whether due process was afforded, whether substantial competent evidence supports the decision, and whether the requirements of law were followed); Evans v. Teton County, 73 P.3d 84, 87 (Idaho 2003) (statutory appeal; violated constitution or statute, exceeded statutory authority, unlawful procedure, not supported by substantial evidence on the record, arbitrary, capricious, or an abuse of discretion); Watson v.

debatable standard of judicial review if they hold spot zonings are legislative.[102] Recitation of this standard appears frequently in these cases. There is occasional support for giving spot zoning strict scrutiny.[103] Some courts that hold rezoning quasi-judicial may apply strict scrutiny, but quasi-judicial status does not require strict scrutiny review.[104]

The presumption of constitutionality and standard of judicial review courts apply in spot zoning cases reject judicial skepticism. It is not judicial abdication, however. Courts use a multifactor test when they review spot zoning, and they apply this test de novo without giving deference to the local zoning decision. This judicial inquiry does not have the benefit of a presumption. The next sections discuss the substantive tests courts apply.

IV. Substantive Issues in the Judicial Review of Spot Zoning

Substantive review of spot zoning starts with the rule that neighbors (who are typically the parties challenging a spot zoning) do not have a vested right in the continuation of existing zoning restrictions on neighboring property, which local governments are entitled to change.[105] Spot zoning

Town Council of Bernalillo, 805 P.2d 641 (N.M. Ct App. 1991) (substantial evidence on record); *see also* IDAHO CODE § 67-5279; Prall, *supra* note 94.

102. *E.g.*, State v. City of Rochester, 268 N.W.2d 885 (Minn. 1978); Quinlan v. City of Dover, 614 A.2d 1057, 1058 (N.H. 1992) (noting the trial court was persuaded by the balance of probabilities, on the evidence before it, that the decision was unreasonable); Zopfi v. City of Wilmington, 160 S.E.2d 325, 332 (N.C. 1968) (noting courts will not interfere if exercise of power fairly debatable); Fallin v. Knox Cty. Bd. of Comm'rs, 656 S.W.2d 338, 342 (Tenn. 1983). Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the leading Supreme Court case that upheld the constitutionality of zoning, established this standard of judicial review.

103. *See e.g.*, Linden Methodist Episcopal Church v. City of Linden, 173 A. 593, 595 (N.J. 1934) (holding that such attempts "should receive close scrutiny of the courts lest the zoning enactments, constitutional and legislative, be diverted from their true purpose"); D'Angelo v. Knights of Columbus Bldg. Ass'n of Bristol, R.I., 151 A.2d 495, 499 (R.I. 1959); *see also* Four States Realty Co. v. City of Baton Rouge, 309 So. 2d 659, 672 (La. 1974) (stating all ordinances are presumed valid, however, "rezoning on a piecemeal or spot basis is highly suspect"); City of Essexville v. Carrollton Concrete Mix, Inc., 673 N.W.2d 815, 824 (Mich. Ct. App. 2003) (noting presumption of validity, but discrete zoning decision allowing uses inconsistent with overall ordinance plan requires greater scrutiny).

104. *See* cases cited *supra* note 98 and accompanying text. *But see* Fasano, 507 P.2d at 586 (placing burden of proof on one seeking change).

105. Spiker v. City of Lakewood, 603 P.2d 130, 133 (Colo. 1979) (finding no "vested right, per se, in the maintenance of a particular zoning classification"); McGee v. City of Cocoa, 168 So. 2d 766, 769 (Fla. Dist. Ct. App. 1964) ("[V]ested rights in a particular zoning ordinance do not accrue to neighboring owners."); Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 733 (N.Y. 1951) ("Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public

can make zoning changes.[106] Binding rules that determine when a spot zoning is valid are more difficult to state, however, because decisions on spot zoning are flexible and fact-based.[107] Judicial approaches vary, and determining the basis on which courts review spot zoning is an elusive task that makes the statement of bright line rules difficult. Courts use a multifactor test in an unweighted manner that makes it hard to decide which factor has the most weight.[108] The next section cuts through this judicial mixture to examine the factors courts most commonly use. It concludes that most of these factors do not relate to the concerns that prompt judicial skepticism, and that the consistency of spot zoning with a

interest demands otherwise."); Zopfi v. City of Wilmington, 160 S.E.2d 325, 330 (N.C. 1968) (ruling that enactment of a zoning ordinance confers no vested right to have the ordinance remain forever in force); Gratton v. Conte, 73 A.2d 381, 385 (Pa. 1950) (finding no vested rights that would prevent city from subsequently amending ordinance); City of San Antonio v. Arden Encino Partners, Ltd., 103 S.W.3d 627 (Tex. App. 2003) (no vested interest in particular zoning classifications); Eggebeen v. Sonnenburg, 1 N.W.2d 84, 86 (Wis. 1941) ("[N]o legally protectable rights merely because of their reliance on the zoning ordinance."). *But see* Cosmopolitan Nat. Bank of Chicago v. City of Chicago, 190 N.E.2d 352, 355 (Ill. 1963) (holding one who buys land has right to rely upon classification at time of purchase; classification will not be changed unless for public good); Four States Realty Co. v. City of Baton Rouge, 309 So. 2d 659, 672 (La. 1974) ("Generally, property owners may rely upon the previous exercise of police power in zoning, expecting that changes in zoning will only be made so as to affect vested property interests when the change is required to assure the public welfare.").

106. *See e.g.*, Save Our Rural Env't v. Snohomish City., 662 P.2d 816 (Wash. 1983) (stating there is no hard and fast rule that all spot zoning is illegal); Bell v. City of Elkhorn, 364 N.W.2d 144, 148 (Wis. 1985) (not invalid per se). *But see* cases cited *supra* note 93 (no presumption of constitutionality).

107. *See* Chrismon v. Guilford County, 370 S.E.2d 579, 589 (N.C. 1988); Pollock v. Zoning Bd. of Adjustment, 342 A.2d 815, 819 (Pa. Commwlth. 1975).

108. A few courts, principally Maryland's, have adopted a change/mistake rule as the basis for reviewing a spot zoning. This rule requires a change in conditions in the area surrounding the rezoned property, or a mistake in the original zoning, as the basis for a spot zoning approval. Change is usually to a more intensive use. Keith H. Hirokawa, *Making Sense of a "Misunderstanding of the Planning Process": Examining the Relationship Between Zoning and Rezoning Under the Change-or-Mistake Rule*, 44 URB. LAW. 295 (2012) (detailing objections to and reasons for rule). Maryland and a few other states have adopted this rule. *E.g.*, Wakefield v. Kraft, 96 A.2d 27 (Md. 1953); Bd. of Aldermen v. Conerly, 509 So. 2d 877, 883 (Miss. 1987) (holding public need must also be shown); Harvey v. Town of Marion, 756 So.2d 835 (Miss. Ct. App. 2000); Bassani v. Bd. of Cty. Comm'rs for Yakima Cty., 853 P.2d 945, 950-51 (Wash. Ct. App. 1993); *see* MD. CODE ANN. Land Use § 4-204(b)(1) (codifying rule, exception for compliance with comprehensive plan). For cases rejecting the rule see Rock Creek Neighborhood League, Inc. v. D.C. Zoning Comm'n, 388 A.2d 450 (D.C. 1978); Palermo Land Co. v. Planning Comm'n of Calcasieu Par., 561 So. 2d 482 (La. 1990). Some courts consider substantial change in the neighborhood as a factor affecting the validity of spot zoning, without adopting the change/mistake rule. *E.g.*, City of Pharr v. Tippitt, 616 S.W.2d 173, 178 (Tex. 1981); *see also* LAND USE LAW, *supra* note 8, § 6:30.

comprehensive plan is the test courts should apply, aided by a concern about the effect a spot zoning can have on neighboring properties.

V. Multifactor Tests for the Judicial Review of Spot Zoning

The first step in the judicial review of spot zoning is to agree on a definition, but the definitions courts use are descriptive and provide little guidance. A commonly stated definition is that spot zoning is a "singling out" of a property for different treatment from the surrounding property, or for the benefit of the owner.[109] This definition reflects judicial skepticism that spot zoning is arbitrary, but the courts do not elaborate on the meaning of "singling out" or "benefit." A similar definition is contained in the frequently stated rule that, when considering a spot zoning, courts should weigh the benefit to the owner against the detriment to neighbors and the community.[110] There again is no effort

109. *E.g.*, Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cty. Comm'rs of Payette Cty., 358 P.3d 67, 74 (Idaho 2015) (discussing Type Two spot zoning); Scalambrino v. Town of Michiana Shores, 904 N.E.2d 673 (Ind. Ct. App. 2009); Perkins v. Bd. of Supervisors of Madison Cty., 636 N.W.2d 58 (Iowa 2001); Monte v. Par. of Jefferson *ex rel.* Coulon, 898 So. 2d 506 (La. Ct. App. 2005); City of Old Town v. Dimoulas, 803 A.2d 1018 (Me. 2002); Anne Arundel Cty. v. Harwood Civic Ass'n, 113 A.3d 672 (Md. 2015) (small area); W.R. Grace & Co. v. Cambridge City Council, 779 N.E.2d 141 (Mass. App. Ct. 2002); Smith v. City of Papillion, 705 N.W.2d 584, 599 (Neb. 2005); Rotterdam Ventures, Inc. v. Town Bd. of Rotterdam, 935 N.Y.S.2d 698 (N.Y. App. Div. 2011); Etheridge v. Cty. of Currituck, 762 S.E.2d 289, 292 (N.C. Ct. App. 2014); State *ex rel.* Phillips Supply Co. v. Cincinnati, 985 N.E.2d 257 (Ohio Ct. App. 2012); Penn Street, L.P. v. East Lampeter Tp. Zoning Hearing Bd., 84 A.3d 1114 (Pa. Cmwlth. Ct. 2014); Historic Charleston Found. v. City of Charleston, 734 S.E.2d 306 (S.C. 2012); Schrank v. Pennington Cty. Bd. of Comm'rs, 610 N.W.2d 90 (S.D. 2000) (involving particularly small property); Tolman v. Logan City, 167 P.3d 489 (Utah Ct. App. 2007); *In re* Hartland Group N. Ave. Permit, 958 A.2d 685 (Vt. 2008); Davidson Serles & Assocs. v. City of Kirkland, 246 P.3d 822 (Wash. Ct. App. 2011); Step Now Citizens Group v. Town of Utica Planning & Zoning Comm., 663 N.W.2d 833 (Wis. Ct. App. 2003). For variations on this definition, see Patricia E. Salkin, *Limitations upon the Substance of Zoning Ordinances*, 1 AM. LAW. ZONING § 6:12 (5th ed.). *See also* Foothill Cmtys. Coal. v. Cty. of Orange, 166 Cal. Rptr. 3d 627, 635 (Cal. Ct. App. 2014); Van Renselaar v. City of Springfield, 787 N.E.2d 1148, at 1152 (Mass. App. Ct. 2003); Granger v. Town of Woodford, 708 A.2d 1345 (Vt. 1998).

110. Griswold v. City of Homer, 925 P.2d 1015 (Alaska 1996); Coughlin v. City of Topeka, 480 P.2d 91 (Kan. 1971); Geiger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989); Jones v. Zoning Bd. of Adjustment of Long Beach Twp., 108 A.2d 498 (N.J. Super. Ct. App. Div. 1954); Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 735 (N.Y. 1951) ("Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community."); *Rotterdam Ventures*, 935 N.Y.S.2d 698; Good Neighbors of S. Davidson v. Town of Denton,

to explain how courts should weigh these disparate interests, or how courts should define them.

Substantive guidance appears in the multifactor test most courts use,[111] but the factors courts consider differ. Factors most often considered are whether the spot zoning is compatible with the surrounding area, and whether it is consistent with a comprehensive plan. Courts may also consider the size of the rezoned site, and may ask whether a spot zoning serves a public purpose or need or the general welfare.

559 S.E.2d 768 (N.C. 2002); *Historic Charleston Found.*, 734 S.E.2d 306; Knowles v. City of Aiken, 407 S.E.2d 639 (S.C. 1991).

111. *See e.g.*, King's Mill Homeowners Ass'n v. City of Westminster, 557 P.2d 1186, 1190 (Colo. 1976) (change of conditions unless in compliance with master plan); Zandri v. Zoning Comm'n of Ridgefield, 192 A.2d 876, 878 (Conn. 1963) (good of community, comprehensive plan); Gaida v. Planning and Zoning Comm'n of Shelton, 947 A.2d 361 (Conn. App. Ct. 2008) (serves public need in reasonable way, or is attempt to accommodate an individual property owner); Daro Realty, Inc. v. D.C. Zoning Comm'n, 581 A.2d 295, 299 (D.C. 1990) (benefit to particular property owner, inconsistent with comprehensive plan or character of surrounding area or zoning purposes); Hanna v. City of Chicago, 771 N.E.2d 13 (Ill. App. Ct. 2002) (out of harmony with comprehensive planning or would violate homogenous, compact and uniform zoning pattern); Kane v. City Council of Cedar Rapids, 537 N.W.2d 718, 723 (Iowa 1995) (size, changing conditions, use of property, suitability for various uses); Plains Grains Ltd. Partnership v. Board of Cty. Comm'rs of Cascade, 238 P.3d 332 (Mont. 2010) (differ significantly from surrounding area, benefit to few landowners); *Smith*, 705 N.W.2d at 599 (serves only interests of landowner, not in accord with comprehensive plan); Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Rocky Hill, 967 A.2d 929, 943 (N.J. Super. Ct. App. Div.) (whether to further comprehensive zoning scheme or relieve lot of harsh restriction); Bennett v. City Council of Las Cruces, 973 P.2d 871, 875 (N.M. Ct. App. 1999) (disturbs tenor of neighborhood, one or a few properties, not related to general plan); Watson v. Town Council of Bernalillo, 805 P.2d 641, 645 (N.M. Ct. App. 1991) (fails to comply with comprehensive plan, inconsistent with surrounding area, grants discriminatory benefit to landowner, harms neighboring properties or community welfare); *Rodgers*, 96 N.E.2d at 735 ("Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community."); *Chrismon*, 370 S.E.2d at 589 (size, compatibility with comprehensive zoning plan, benefits and detriments, relationship to adjacent uses); Sharp v. Zoning Hearing Bd. of Radnor, 628 A.2d 1223, 1228 (Pa. Cmwlth. Ct. 1993) (unjustifiably different from similar surrounding land; topography, location and characteristics of the land; relationship to comprehensive plan; effect on health, morals, safety and general welfare); *City of Pharr*, 616 S.W.2d at 178 (adverse impact on neighboring land, suitability, substantial relationship to health, safety and morals, preserve history and culture, difference from similar surroundings with proof of change of conditions); *Granger*, 708 A.2d (same zoning nearby, benefit to public, no conflict with plan, majority of electorate approved); Smith v. Skagit Cty., 453 P.2d 832, 848 (Wash. 1969) ("[T]otally different from, and inconsistent with, the classification of surrounding land and not in accordance with the comprehensive plan."); Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp., 62 P.3d 912, 920 (Wash. Ct. App. 2003) (discriminatory benefit without public advantage or justification); *Step Now Citizens Grp.*, 663 N.W.2d at 842 (long-range planning, effect on community, nature and character of parcel, use of surrounding land, overall zoning plan, public welfare, convenience and general prosperity).

Not all courts consider all of these factors, and they are not always consistent in the factors they consider.[112] The dominant factor that decides a case is not apparent.

Neither are the factors courts consider comparable, as they test for different concerns. An emphasis on the size of a property is a concern about the arbitrary nature of the spot zoning, as the rezoning of a small lot could be evidence of an arbitrary favor. The public purpose or need or the general welfare are a concern with legitimacy, a substantive due process issue not related to the effect of a spot zoning on its neighbors. The compatibility of a spot zoning with its surrounding area is a concern with its impact on neighbors. Consistency with the comprehensive plan reflects a preference for community policymaking that can prevent arbitrary decisions.

A. *Size of the Spot-Zoned Site*

Courts identify the size of a site as a factor they consider when reviewing spot zoning.[113] Courts do not explain why size is important, but the implication is that spot zoning on a small site is suspect. Size of the site relates to the definition of spot zoning as the "singling out" of a property for different treatment from surrounding property, or for the benefit of the owner of the spot-zoned property.[114] A review of older cases in one zoning treatise supports the importance of size. It found that courts disapproved nearly all spot zoning of sites three acres or less, while they approved spot zoning of sites 11 acres or more, with few exceptions.[115]

Size as a decision factor has merit, as large sites can include perimeter landscaping, setback, and other requirements that mitigate any adverse impacts on neighboring residential properties.[116] Mitigation is more difficult on small sites. Incompatibility with adjacent residential areas is also more difficult with smaller sites, which may be closer to

112. Some courts include the suitability of a property for its zoned use as one of the factors to consider. *E.g.*, *Kane*, 537 N.W.2d at 723; *Watson*, 805 P.2d 641; *City of Pharr*, 616 S.W.2d at 178. The suitability of a property for its zoned use is a factor courts should instead consider when they decide whether a zoning restriction is invalid as applied. The use and character of the zoned site is sometimes mentioned as a factor. *E.g.*, *Step Now Citizens Grp*., 663 N.W.2d at 842.

113. Furtney v. Simsbury Zoning Comm'n, 271 A.2d 319 (Conn. 1970); *Kane*, 537 N.W.2d at 723; *Watson*, 805 P.2d 641; *Chrismon*, 370 S.E.2d at 589.

114. *See supra* text accompanying note 109.

115. Salkin, *supra* note 109, § 6:15.

116. *See Watson*,, 805 P.2d 641 (buffer zone provided, and conditions mitigating negative effects); Murden Cove Pres. Ass'n v. Kitsap Cty., 704 P.2d 1242, 1246 (Wash. Ct. App. 1985) (conditions imposed to prevent negative impacts).

residential dwellings. The courts have not considered these problems, however, though they may note the proximity of a more intensive spot zoning to a residential use when holding a spot zone invalid.[117]

Site size may also influence the legislative body to engage in arbitrary decision-making. Rezonings on small lots are not the kind of policy issue that invite legislative compromise. "[I]t is precisely their small scale and uncontroversial character that may open the door to arbitrariness and inside deals."[118] Rezonings on larger sites may raise policy issues that attract a wider interest and be less subject to arbitrary decision-making.

Site size as a predictor of outcomes is limited, however, as courts hold spot zoning invalid even when the size of the lot is substantial.[119] Courts have also adopted the general rule that size is not a controlling factor in spot zoning cases.[120] Size is more properly a proxy for concerns courts can handle directly through other requirements, such as a requirement that a spot zoning must be consistent with a comprehensive

117. *E.g.*, Aylor v. Sun Oil Co. 453 S.W.2d 18 (Ky. 1970); *In re* Mulac, 210 A.2d 275, 277 (Pa. 1965) ("commercially zoned island in a residentially zoned sea").

118. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 Nw. U.L. REV. 1155, 1160 (1985). Professor Rose also points out that "[t]he problem with these decisions is precisely that they do not boil over into major controversies, they do not involve many people, they do not interest the press." *Id.*

119. *E.g.*, Little v. Winborn, 518 N.W.2d 384 (Iowa 1994) (223 acres); Greater Yellowstone Coal., Inc. v. Bd. of Cty. Comm'rs of Gallatin Cty., 25 P.3d 168 (Mont. 2001) (323 acres); Childress v. Yadkin Cty., 650 S.E.2d 55, 62 (N.C. Ct. App. 2007) (housing, 51 acres); Chrobuck v. Snohomish Cty., 480 P.2d 489 (Wash. 1971) (635 acres). For cases upholding spot zoning for large tracts see, e.g., Save Our Forest Action Coal., Inc. v. City of Kingston, 675 N.Y.S.2d 451 (N. Y. App. Div. 1998) (107 acres); Willott v. Vill. of Beachwood, 197 N.E.2d 201 (Ohio 1964) (80 acres).

120. Arcadia Dev. Co. v. City of Morgan Hill, 129 Cal. Rptr. 3d 369, 376 (Cal. Ct. App. 2011) ("Even where a small island is created in the midst of less restrictive zoning, the zoning may be upheld where rational reason in the public benefit exists for such a classification."); Thomas v. Bd. of Supervisors of Panola Cty., 45 So. 3d 1173 (Miss. 2010) (ruling fact that area is small, zoned at request of a single owner and of greater benefit to him is not spot zoning, if there is public need or compelling reason for it); N. 93 Neighbors, Inc. v. Bd. of Cty. Comm'rs of Flathead, 137 P.3d 557 (Mont. 2006); Little v. Bd. of Cty. Comm'rs of Flathead, 631 P.2d 1282, 1289 (Mont. 1981) (declaring concern is number of separate landowners benefited by requested change rather than actual size of the area benefited); Bennett v. City Council of Las Cruces, 973 P.2d 871 (N.M. Ct. App. 1998); McDowell v. Randolph Cty., 649 S.E.2d 920, 925 (N.C. Ct. App. 2007); *In re* Realen Valley Forge Greenes Assocs., 838 A.2d 718 (Pa. 2003) (noting size is relevant, but whether land treated unjustifiably different from similar surrounding land is most important); Pollock v. Zoning Bd. of Adjustment, 342 A.2d 815, 819 (Pa. Cmwlth. Ct. 1975); Step Now Citizens Group v. Utica Planning & Zoning Comm., 663 N.W.2d 833 (Wis. Ct. App. 2003) (noting significant size only one factor); *see also* Willey v. Town Council of Barrington, 261 A.2d 627, 634 (R.I. 1970) ("The fact that a small portion of land is involved in a legislative action does not make it ipso facto illegal spot zoning.").

plan, and must include remedial measures to avoid adverse impacts on neighboring properties.

B. *Public Purpose, Public Need, and the General Welfare*

A requirement that a spot zoning must serve a public purpose or a public need is another factor in the multifactor test courts use to review spot zonings.[121] A similar requirement appears in statements that courts should consider the effect of a spot zoning on the health, safety, or general welfare of a community.[122] Decisions considering these supportive factors do not have a principled basis, as courts accept a variety of land use and other justifications as satisfying the public purpose, public need, or general welfare requirement.[123] In *City of Pharr v. Tippitt*,[124] for example, the court upheld a spot zoning by finding a "great need for multiple housing," that the population had markedly increased, that only three small areas were zoned for multiple housing, and that the need for it would continue to grow. Other cases similarly found a public benefit in the need for housing.[125]

121. *E.g.*, Zandri v. Zoning Comm'n of Ridgefield, 192 A.2d 876, 878 (Conn. 1963) (good of community); Gaida v. Planning and Zoning Comm'n of Shelton, 947 A.2d 361 (Conn. App. Ct. 2008) (serves public need in reasonable way); Granger v. Town of Woodford, 708 A.2d 1345 (Vt. 1998) (benefit to public; conditions); Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp., 62 P.3d 912, 920 (Wash. Ct. App. 2003) (discriminatory benefit without public advantage or justification).

122. Sharp v. Zoning Hearing Bd. of Radnor, 628 A.2d 1223, 1228 (Pa. Cmwlth. Ct. 1993) (effect on "health, safety, morals, and general welfare); City of Pharr v. Tippitt, 616 S.W.2d 173, 178 (Tex. 1981) ("substantial relationship to health, safety [and] morals"); Step Now Citizens Grp. v. Utica Planning & Zoning Comm., 663 N.W.2d 833, 842 (Wis. Ct. App. 2003) (effect on community, public welfare, convenience and general prosperity); *see also* Morningside Ass'n v. Planning & Zoning Bd. of Milford, 292 A.2d 893 (Conn. 1972) (multifactor "best interests of the community" test).

123. Salkin, *supra* note 109, § 6:14, discusses the various uses the courts have approved. *See, e.g.*, Bartram v. Zoning Comm'n of Bridgeport, 68 A.2d 308, 310 (Conn. 1949) (decentralization of business in order to relieve traffic congestion); Ely v. City Council of Ames, 787 N.W.2d 479 (Iowa Ct. App. 2010) (preservation of property with historical and cultural significance); Agazzi v. Governing Body of Red Bank, No. L-3653-12, 2015 WL 9694382, at *6 (N.J. Super. Ct. App. Div. Jan. 13, 2016) ("easement for passive enjoyment of river views").

124. 616 S.W.2d 173, 179 (Tex. 1981).

125. *E.g.*, Zandri v. Zoning Comm'n of Ridgefield, 192 A.2d 876 (Conn. 1963) (need for garden apartments); Lee v. D.C. Zoning Comm'n, 411 A.2d 635, 642 (D.C. 1980) ("need for housing exists and injury to the land is minimal"); Decuir v. Town of Marksville, 426 So. 2d 766 (La. Ct. App. 1983) (housing shortage); Hunter's Grove Homeowners Ass'n v. Calcasieu Par. Police Jury, 422 So. 2d 673 (La. Ct. App. 1982) (need for manufactured housing); Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 890 (Minn. 1978) (need for more high density housing); Holmgren v. City of Lincoln, 256 N.W.2d 686 (Neb. 1977) (multifamily housing); Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731 (N.Y. 1951) (garden apartment

Courts also uphold spot zoning for industrial or commercial uses as serving a public purpose. In *Save Our Rural Environment v. Snohomish County*,[126] the Washington Supreme Court upheld a business park zoning classification that provided "a flexible means to broaden the industrial base of the region and to produce energy and travel time savings for employees."[127] In another Washington case, the court upheld a spot zoning for Light Manufacturing, which permitted a mini-warehouse and a furniture manufacturing facility. It would provide diversified employment opportunities for the local labor force while preserving the island's small town character to achieve the goal of a balanced community.[128] Other cases similarly held that spot zonings for industrial or commercial uses, including manufacturing plants and shopping centers,[129] served a public purpose or need or the general welfare of the community.

developments); Stone v. Scarpato, 728 N.Y.S.2d 61 (N.Y. App. Div. 2001) (assisted-living residence for senior citizens); Childress v. Yadkin Cty., 650 S.E.2d 55, 62 (N.C. Ct. App. 2007) (rezone limited to stick-built and modular rather than manufactured housing); Sharp v. Zoning Hearing Bd. of Radnor, 628 A.2d 1223 (Pa. Cmwlth. Ct. 1993) (on-campus housing); Fallin v. Knox Cty. Bd. of Comm'rs, 656 S.W.2d 338, 342 (Tenn. 1983) (need for apartments).

126. 662 P.2d 816 (Wash. 1983).

127. *Id.* at 819.

128. Murden Cove Pres. Ass'n v. Kitsap Cty., 704 P.2d 1242, 1246 (Wash. Ct. App. 1985).

129. *E.g.*, Griswold v. City of Homer, 925 P.2d 1015, 1022-23 (Alaska 1996) ("These benefits include encouraging filling in vacant places in the CBD; increasing the tax base and employment in the CBD; increasing convenience and accessibility for local and regional customers for vehicle repairs or purchases; and promoting orderly growth and development in the CBD."); Anderson v. Zoning Comm'n of Norwalk, 253 A.2d 16 (Conn. 1968) (shopping); Scalambrino v. Town of Michiana Shores, 904 N.E.2d 673 (Ind. Ct. App. 2009) (ruling that rezoning city property to allow cell phone tower lease and revenues therefrom not spot zoning but rationally related to town's welfare); Farley v. DeMuth, 399 S.W.2d 469 (Ky. 1965) (shopping center); Durand v. IDC Bellingham, 793 N.E.2d 359 (Mass. 2003) (concerning town in need of industrial development, and developer of power plant promised to contribute eight million dollars to town for municipal projects, including a school); Rando v. Town of N. Attleborough, 692 N.E.2d 544, 546-47 (Mass. App. Ct. 1998) (determining retail will increase the town's tax base and will likely increase the availability of retail services and employment opportunities); Cockrell v. Panola Cty. Bd. of Supervisors, 950 So. 2d 1086 (Miss. Ct. App. 2007) (allowing scrap metal plant where need existed for additional employment and space); Watson v. Town Council of Bernalillo, 805 P.2d 641, 646 (N.M. 1991) (plant would employ as many as 87 people, tax revenues nearly 25% of annual budget, agreement to initiate scholarship program and summer employment for high school students, and develop and maintain a park); Bennett v. City Council of Las Cruces, 973 P.2d 871 (N.M. Ct. App. 1998) (commercial center with mitigating conditions); Save Our Forest Action Coal. Inc. v. City of Kingston, 675 N.Y.S.2d 451, 454 (N. Y. App. Div. 1998) (holding retention of city's largest employer and to reap associated economic and tax benefits in connection with the development of a business park); Willott v. Vill. of Beachwood, 197 N.E.2d 201 (Ohio 1964) (shopping center); Oyster Growers Ass'n v. Moby Dick Corp., (Wash. Ct. App. 2003) (finding expansion of hotel would advance public interest by enabling modernization and continued success of a county historical site).

The rule, that a spot zoning is valid if the use approves it serves a public purpose, public need, or the general welfare, is a substantive due process problem.[130] The issue is whether the approval of a particular specific use advances a legitimate governmental interest. This approach to the problem is inconsistent with the way in which courts traditionally handle zoning questions. Instead, the issue should be whether a new zoning classification, which may allow several uses, is an acceptable change in the range of allowable land uses on the property. Concentrating on the function and purpose of the specific proposed use, rather than the zoning classification created by the rezoning, is contrary to the way courts consider zoning change.

As the Ohio Supreme Court pointed out in a case attacking the constitutionality of a zoning ordinance as applied, "[t]he analysis focuses on the legislative judgment underlying the enactment, as it is applied to the particular property, not the municipality's failure to approve what the owner suggests may be a better use of the property."[131] Conversely, the approval of a socially important use for a property should not be a reason for changing the zoning classification that previously applied. In the illustration at the beginning of this article, for example, the office building may be a socially important use of the property, but that possibility does not mean the zoning on the property should change. The question is whether a legislative judgment to rezone the property for a range of authorized commercial uses is correct. An office building is only one possible use that would be available if the municipality changed the zoning from residential to commercial.

The Kentucky Supreme Court saw this problem in an early decision where it invalidated a spot zoning from residential to light industrial use:

> Regardless of the foregoing considerations, the general welfare argument is not sound. The providing of employment opportunities is merely one element of general welfare as that term relates to the zoning field. Sociological factors, protection of property values, traffic and safety considerations, preservation of health, providing adequate light and air, all enter into the question of general welfare. (citation omitted) If the appellees' argument were carried to its logical conclusion the mere fact that employment would be provided through a particular use of land would

130. LAND USE LAW, *supra* note 8, § 2:39 (explaining substantive due process principles).

131. Jaylin Investments, Inc. v. Moreland Hills, 839 N.E.2d 903, 908 (Ohio 2006). The court added that "[i]f application of the zoning ordinance prevents an owner from using the property in a particular way, the proposed use is relevant but only as one factor to be considered in analyzing the zoning ordinance's application to the particular property at issue." *Id.*

> overcome all other factors, and a boiler factory could be put in the middle of a beautiful residential neighborhood.[132]

Whether a proposed use serves a public purpose, public need, or the general welfare is also irrelevant to most of the concerns that drive judicial skepticism about spot zoning. Approving a use for these reasons may have been the result of developer capture, or the product of a negotiated legislative process that did not serve democratic values.

Serving public purpose, public need, or general welfare objectives is possibly relevant to the criticism that spot zoning is an unacceptable wealth transfer. The argument may be that approving a use that serves an important policy objective, such as lower-income housing, justifies allowing the owner of a rezoned property an increment in the value of her land. The problem with this argument is that a rezoning is a targeted decision that affects a single site. It is arbitrary to allow one landowner to benefit from a decision that, while it benefits society, does not confer similar gains on other landowners. There is, as noted before, a "singling out." Land use policies, whether they affect housing, retail business, or anything else, should be made in a process in which private gains and losses can be balanced throughout the entire community.

C. *Incompatibility with the Surrounding Area*

The requirement that a spot zoning must be compatible with uses in the surrounding area is another factor courts consider. This factor implements the traditional zoning model, which requires the separation of incompatible uses. That zoning model derives from the leading Supreme Court zoning case, *Village of Euclid v. Ambler*,[133] which not only approved use separation but the designation of residential use districts from which multifamily uses could be excluded. Spot zoning cases accept this zoning hierarchy, by asking about incompatibility whenever a nonresidential or multi-family spot-zoned use locates in a residential neighborhood. This view of zoning also reflects the nuisance law basis of zoning,[134] which prefers the protection of residential uses,[135]

132. Fritts v. City of Ashland, 348 S.W.2d 712, 713-14 (Ky. 1961).

133. 272 U.S. 365 (1926).

134. "In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,' which lies at the foundation of so much of the common low of nuisances, ordinarily will furnish a fairly helpful clew [sic]. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power." *Euclid*, 272 U.S. at 387-88.

135. Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695 (Iowa 1961) (finding a feed grinding, feed mixing, and fertilizer sales business to be a nuisance in a residential area), is a typical case.

and the spot zoning standing cases, which can find justiciable harm to neighbors when nonresidential uses invade residential areas.[136] This zoning model is outdated, but it is first helpful to see how courts apply it.

Courts follow the nuisance model when they apply the compatibility factor to find that a spot zoning is incompatible with the surrounding area.[137] The difference is that courts in nuisance cases decide whether they should prohibit an existing land use that is not compatible in its area. In the spot zoning cases, the courts decide whether they should prevent a land use from locating in an area because its nuisance-like qualities make it incompatible with the surrounding neighborhood.[138]

As in the nuisance cases, courts in the spot zoning cases must first decide on the area in which they judge the acceptability of a spot-zoned use. This inquiry requires consideration of the surrounding neighborhood, not just the immediately adjacent area.[139] Within this framework, the courts, as expected, find incompatibility when residential or agricultural zones surround the spot-zoned nonresidential use.[140] They do not find incompatibility when the spot-zoned use

136. *See supra* text accompanying notes 74-89.

137. In most of the cases cited here, the spot zoning located a commercial or industrial use in a residential or mixed-use area. *E.g.*, Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 696 (N.Y. Sup. Ct.), *aff'd*, 134 N.Y.S.2d 593 (N.Y. App. Div. 1954) (rezoning from single family to multi-family as extension of multi-family zoning). Incompatibility is less likely when the rezoned use is residential. *See, e.g.*, Childress v. Yadkin Cty., 650 S.E.2d 55, 60 (N.C. Ct. App. 2007) (restricted residential use in area zoned agricultural).

For an argument that infill multifamily housing in single family residential neighborhoods should not be considered a nuisance see Michael Lewyn, *Yes to Infill, No to Nuisance*, 42 FORDHAM URB. L.J. 841, 854 (2015) (arguing nuisance concerns are outweighed by public policy in favor of pedestrian-friendly infill development, affordable rental housing, and orderly zoning and planning). Lewyn did not find a case in which a court held that multifamily housing was a nuisance in a single family residential area. *See id.*

138. Nuisance law cannot prevent the location of a new use. A nuisance that has not located in an area is an anticipatory nuisance. Courts will not enjoin anticipatory nuisances. *See* George P. Smith, II, *Re-Validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687 (2005); *see also* Alvey v. City of N. Miami Beach, No. 3D14-2935, 2015 WL 8937617, at *5 (Fla. Dist. Ct. App. Dec. 16, 2015) (holding that the city must find that "[t]he proposed change would be consistent with and in scale with the established neighborhood land use pattern."). The spot zoning was invalid "[b]ecause the City made no such finding and there was absolutely no evidence presented that '[t]he proposed change would be consistent with and in scale with the established neighborhood land use pattern.'" *Id*.

139. *See* Bennett v. City Council of Las Cruces, 973 P.2d 871 (N.M. Ct. App. 1998) (citing cases). Courts can conduct this inquiry if they hear a spot zoning case de novo. A court will be more limited if, as in some states, the case comes up on an administrative record, and the record is factually inadequate.

140. *E.g.*, Miller v. Town Planning Comm'n of Manchester, 113 A.2d 504, 506 (Conn. 1955) (jutting of a business into heart of residential zone for substantially

does not have a negative impact on the adjacent residential or agricultural area,[141] or where the spot-zoned use is similar to uses in the surrounding area.[142] In some of these cases, the spot zoning was for a multifamily or different residential use. Neither did courts find incompatibility when the spot-zoned use was in a mixed-use area that included the rezoned use.[143] Courts also considered the availability of

500 feet); Mastriani v. Bldg. Inspector of Monson, 475 N.E.2d 408 (Mass. App. Ct. 1985), (rezoning of parcel entirely surrounded by a rural residential zone to general commercial to allow medical offices); Modak-Truran v. Johnson, 18 So. 3d 206 (Miss. 2009) (concerning bed and breakfast inn to operate restaurant within area restricted to one- and two-family dwellings); Plains Grains Ltd. P'ship v. Bd. of Cty. Comm'rs of Cascade Cty., 238 P.3d 332, 346 (Mont. 2010) ("island of heavy industrial zoning within a large area zoned for Agricultural land"); Weber v. City of Grand Island, 87 N.W.2d 575 (Neb. 1958) (chain store in residential zone); Bosse v. City of Portsmouth, 226 A.2d 99 (N.H. 1967) (allowing 4.2 acres originally restricted to single residence use to limited industrial use; surrounding area had hundreds of acres zoned for single residence use); McDowell v. Randolph Cty., 649 S.E.2d 920 (N.C. Ct. App. 2007) (ruling heavy industrial operations incompatible with adjacent residential tracts); Budd v. Davie Cty., 447 S.E.2d 449 (N.C. Ct. App. 1994) (rezoning of a portion from residential-agricultural to industrial use); *In re* Fayette Cty. Ordinance No. 83-2, 509 A.2d 1342 (Pa. Commw. Ct. 1986) (zoning amendment that changed six acres from medium-density residential to heavy industrial).

141. *E.g.*, Taylor v. Canyon Cty. Bd. of Comm'rs, 210 P.3d 532 (Idaho 2009) (commercial use in agricultural area); Childress v. Yadkin Cty., 650 S.E.2d 55, 60 (N.C. Ct. App. 2007) (restricted residential use in agricultural district; limited to medium density stick built and modular homes only where adequate water and sewer or septic systems were available).

142. *E.g.*, Price v. Payette Cty. Bd. of Comm'rs, 958 P.2d 583 (Idaho 1998) (rezoning from agricultural to residential use, allowing lot subdivision where nearby growth and development caused area to become more residential); Lake Cty. First v. Polson City Council, 218 P.3d 816 (Mont. 2009) (rezoning from low density residential to highway commercial to allow large store where property bounded on three sides by highway commercial zoning); Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 696 (N.Y. Sup. Ct.), *aff'd*, 134 N.Y.S.2d 593 (N.Y. App. Div. 1954) (rezoning from single family to multi-family as extension of multi-family zoning); Cleaver v. Bd. of Adjustment of Tredyffrin Twp., 200 A.2d 408, 415 (Pa. 1964) (concerning garden apartments from zone in which residences were allowed on tracts of 12,000 square feet; large part of surrounding land had same or virtually same classification); St. Vladimir's Ukranian Orthodox Church v. Fun Bun, Inc., 283 A.2d 308 (Pa. Commw. Ct. 1971) (involving small lot; residential to commercial); Historic Charleston Found. v. City of Charleston, 734 S.E.2d 306, 308 (S.C. 2012) (finding change in height zoning designation not totally different from surrounding area).

143. Riddell v. City of Brinkley, 612 S.W.2d 116 (Ark. 1981) (residential to commercial); Tippitt v. City of Hernando, 909 So. 2d 1190 (Miss. Ct. App. 2005) (residential to office); Lake County First v. Polson City Council, 218 P.3d 816 (Mont. 2009) (low density residential to highway commercial); Bennett v. City Council for City of Las Cruces, 973 P.2d 871 (N.M. Ct. App. 1998) (high density residential to commercial); Musi v. Town of Shallotte, 684 S.E.2d 892, 896 (N.C. Ct. App. 2009) (rezoning to higher density of housing); Covington v. Town of Apex, 423 S.E.2d 537 (N.C. App. Ct. 1992) (from Office & Institutional-1 to Conditional Use Business-2 to permit electronic assembly).

buffering on a site that could mitigate any adverse impacts a spot-zoned use might have on adjacent property.[144]

The difficulty is that these cases accepted the conventional separation of uses as the basis for land use comparisons, even though the spot-zoned use was only a higher density residential use in a lower density residential area. The cases are also reactive, as they base their incompatibility decision on what they find in the existing environment, rather than recognizing spot zoning as an opportunity to accomplish needed land use change. There are occasional exceptions, as where a comprehensive plan designated a spot-zoned site as a buffer between areas zoned for different uses, and the court accepted the spot zoning.[145]

The cases that examine compatibility issues consider the importance of mixed-use areas that can tolerate zoning change, and buffering as a mitigation measure that can remedy adverse effects the spot-zoned use might have on neighboring properties. They do not take the next step, and require mixed-use zoning or buffering as proactive measures that can make a spot zoning acceptable.[146]

Commentators often refer to the separation of use basis for zoning as "Euclidian" zoning, echoing the name of the Supreme Court case that held zoning constitutional.[147] The Euclidean zoning model has changed

144. *See* Taylor v. Canyon Cty. Bd. of Comm'rs, 210 P.3d 532 (Idaho 2009) (involving extensive landscaping as well as some fencing); Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cty. Comm'rs of Payette Cty., 358 P.3d 67, 74 (Idaho 2015) (involving buffer zone of thousands of acres to provide habitat for wildlife and grazing animals); Ridgewood Land Co. v. Simmons, 137 So. 2d 532 (Miss. 1962) (involving row of houses as buffer zone for housing adjacent to shopping center).

145. *See* Tippitt v. City of Hernando, 909 So. 2d 1190 (Miss. Ct. App. 2005) (residential to office; city's comprehensive plan permitted small-scale office activities as transition and buffering between residential uses and incompatible non-residential activities); *see also* City of San Antonio v. Arden Encino Partners, Ltd., 103 S.W.3d 627, 632 (Tex. App. 2003) (rezoning from multi-family apartment complexes to zone that allowed offices and other business development; rezoning resulted in concentration of more heavily developed areas along highway, with lighter business development acting as buffer between heavy commercial areas and single family homes).

146. The usual remedy to attack spot zoning is a request for an injunction that will prevent the municipality from enforcing the zoning change. Most courts will not grant an affirmative injunction that will order the legislative body to take action, such as the approval of a site plan for a rezoned use that contains mitigating measures. *See* City of Conway v. Housing Auth., 584 S.W.2d 10, 13 (Ark. 1979). There are alternatives, such as a remand to the municipality with directions to consider mitigating measures. *See* Margaret M. Prahl, Comment, *The Rezoning Dilemma: What May a Court do With an Invalid Zoning Classification?,* 25 S.D. L. REV. 116 (1980).

147. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see also infra* note 142.

substantially,[148] as the Washington Supreme Court recognized when upholding a spot zoning for an electronics manufacturing facility:

> We are aware of the growing disenchantment with traditional "[E]uclidean" zoning philosophy and practices under which a municipality is divided into different types of zoning districts, each of which is assigned particular uses. . . . Modern land use controls such as Snohomish County's business park zone ordinance are an attempt to anticipate changing patterns of land development and to overcome the inadequacies and inflexibility of orthodox zoning regulations.[149]

Conditions attached to a spot zoning can mitigate its effects on neighboring properties, and the business park zoning in that case mitigated the adverse impacts of the development with "three conditions related to controlling drainage, buffering of agricultural lands, and resolving expected road and traffic problems in the area."[150] Buffering is a mitigation measure that avoids adverse impacts on neighboring properties, and usually includes landscaping and setbacks.[151] Mitigation is a standard requirement in environmental legislation that remedies the adverse effects of development on environmental resources.[152] It should be a requirement for spot zoning that would be an equally effective mitigation measure.[153]

148. In *A Better Way to Zone* (2008), Donald L. Eliot describes the changes that have occurred in the Euclidean zoning model, noting that Euclidean zoning systems today are "actually hybrids that draw on the major innovations of the past ninety years." *Id*. at 129. These innovations include performance zoning that can take account of land use incompatibilities, design and form-based controls, and the approval of land development projects as planned unit developments.

149. Save Our Rural Env't v. Snohomish Cty., 662 P.2d 816, 819 (Wash. 1983).

150. *Id*. at 817; *see also* Murden Cove Pres. Ass'n v. Kitsap Cty., 704 P.2d 1242, 1246-47 (Wash. Ct. App. 1985) (noting mitigating conditions). Zoning conditions are not available in all states. On the validity of zoning conditions, see *supra* note 58.

151. *See* LANE KENDIG, PERFORMANCE ZONING 45-50 (1980) (discussing buffer yards); *see also Murden Cove*, 704 P.2d at 521 (noting use of vegetated buffer strips).

For a proposal for internally buffered districts see William Leaf & Michael Lewyn, *Internally Buffered Districts: A New Technique to Make Zoning Less Exclusionary*, 44 REAL EST. L.J. 330 (2015). These districts can contain restrictions such as use, setback and noise restrictions. "Within these zones, intensive land uses like stores and apartments are allowed, so long as the latter uses are physically separated from nearby residential districts. These separation rules ensure that the intense uses within an internally buffered district does not strongly affect residents outside of that district." *Id.* at 332.

152. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §§ 10:43-10:44.20 (Rev. Ed. 2016) (discussing the requirement to mitigate environmental effects in environmental impact statements); *see also* HAW. REV. STAT. § 205A-26(2)(A) (stating that a county may not approve coastal development in Special Management Area "except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests."); Topliss v. Planning Comm'n, 842 P.2d 648 (Haw. Ct. App. 1993) (remanding permit denial to determine whether adverse effects can be minimized).

153. *See* Embudo Canyon Neighborhood Ass'n v. City of Albuquerque, 968 P.2d 1190, 1195 (N.M. Ct. App. 1998) (accepting rezoning when restrictions imposed by the city would ameliorate any harm to the surrounding property).

Mitigation measures like these may not always be enough.[154] Site plan review can provide additional protection. It requires a site-specific plan based on the zoning ordinance[155] that can specify the location and dimensions of buildings, landscaping, screening, architectural features, and other mitigating site elements.[156] Other measures can remedy the incompatibility problem. The comprehensive plan can determine when a more intensive use is acceptable in a residential or other less restrictive area, as when it can serve a buffering function.[157] Mixed-use zoning can relieve the rigidity of the traditional use separation model.[158] It establishes zones that provide a varied land use environment by allowing a combination of retail, office,

154. The floating zone is another zoning technique that can mitigate the impact of a rezoning on adjacent areas. With this technique, the municipality first adopts a zoning district that contains restrictions on new development allowed in the district, such as density, height, landscaping, setback and other restrictions. The municipality then rezones land to the district as landowners submit applications for a rezoning. The leading case upholding the validity of a floating zone is Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 733 (N.Y. 1951); see also Loh v. Town Plan & Zoning Comm'n of Fairfield, 282 A.2d 894 (Conn. 1971) (designed residence district).

155. *See Embudo Canyon*, 968 P.2d at 1193-94 (rezoning; site plan would alleviate noise concerns or any significant detrimental impact upon nearby residential areas).

156. *See* N.Y. TOWN LAW § 274-a(2)(a). The required site plan elements which are included in the zoning ordinance or local law may include, where appropriate, those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law. *See id.* Statutory authority for site plan review is uncommon, but the courts have found implied authority. *See* Town of Grand Chute v. U.S. Paper Converters, Inc., 600 N.W.2d 33 (Wis. Ct. App. 1999) (ruling town's site plan ordinance identifying access and traffic flow as a factor in site plan review held a sufficiently specific basis for planning commission's conditional approval of plan).

A development agreement between a developer and the municipality, which several states authorize, is another alternative that can include mitigating site treatments. For discussion see DAVID CALLIES ET AL., BARGAINING FOR DEVELOPMENT (2003). For discussion and examples of development agreements in Washington State, see Mun. Res. & Serv. Ctr., *Development Agreements*, MRCP, http://mrsc.org/Home/Explore-Topics/Planning/Land-Use-Administration/Development-Agreements.aspx (last visited Sept. 20, 2016).

157. *E.g.*, Tippitt v. City of Hernando, 909 So. 2d 1190 (Miss. Ct. App. 2005) (rezoning residential to office; city's comprehensive plan permitted small-scale office activities as transition and buffering between residential uses and incompatible nonresidential activities).

158. Alfred Bettman, the early zoning pioneer, made this point in his amicus brief in the *Euclid* case. He stated that "Each residential district, for instance, requires its neighborhood business center with its grocery store, drug store, branch bank, churches, schools . . . consequently these local business and civic areas, though segregated somewhat from the residential areas, are placed immediately adjoining to or in the center of the residential areas." Leaf & Lewyn, *supra* note 151, at 350 (quoting ALFRED BETTMAN, CITY AND REGIONAL PLANNING PAPERS 177 (1946), http://www.tnlanduse.com/bettmanbrief.pdf).

and residential uses.[159] A municipality can accommodate zoning change by adopting mixed-use zoning for areas where land use is in transition, or where it can mix development intensity while ensuring the compatibility of more and less intensive uses.[160]

The site-specific measures discussed here can protect neighboring landowners from the adverse effects of spot zoning. Municipalities should adopt them. When they do not accompany a spot zoning, and the court believes neighboring landowners are adversely affected, the court should remand its decision to give the municipality an opportunity to reconsider.

D. *Consistency with a Comprehensive Plan*

Consistency of zoning decisions with a comprehensive plan is an issue that transcends the validity of spot zoning. A majority of states do not require zoning decisions to be consistent with a comprehensive plan.[161] A minority requires consistency,[162] and a substantial number

159. *See* Gerald A. Fisher, *The Comprehensive Plan is an Indispensable Compass for Navigating Mixed-Use Zoning Decisions Through the Precepts of the Due Process, Takings, and Equal Protection Clauses*, 40 URB. LAW. 831 (2008); *Mixed-use Development and Ordinances*, CHESTER CTY. PLANNING COMM'N, http://www.landscapes2.org/ToolsLandscape/Pages/MixedUse.cfm (last visited Sept. 20, 2016); Will Macht, *Building Flexibility into Mixed-Use Projects*, URB. LAND (May 31, 2012), http://urbanland.uli.org/development-business/building-flexibility-into-mixed-use-projects/.

160. A mixed-use ordinance can provide for discretionary review and approval, or contain a set of regulations that specify the mixed-use development the ordinance allows. *See* FORT COLLINS, COLO., LOW DENSITY MIXED-USE NEIGHBORHOOD DISTRICT, http://www.reconnectingamerica.org/assets/Uploads/bestpractice099.pdf (specifying permitted uses and land use standards, including minimum densities).

Form-based codes are another alternative that replaces Euclidean zoning and can provide a guide for zoning change. They regulate the relationship between building facades and the public realm, the relationship of form to mass of buildings, the scale and types of streets and blocks, and elements within the public realm, such as sidewalks, travel lanes, street trees, and street furniture. *See, e.g.*, *Form-based Zoning*, MESA ARIZ. http://www.mesaaz.gov/business/development-sustainability/planning/long-range-planning/central-main-street-area-plan/form-based-zoning (last visited Sept. 20, 2016).

161. LAND USE LAW, *supra* note 8, § 3:14. For a recent case adopting the majority view see Apple Group, Ltd. v. Granger Twp. Bd. of Zoning Appeals, 41 N.E.3d 1185 (Ohio 2015)*; see also* Bernard v. City of Bedford, 593 S.W.2d 809, 812 (Tex. App. 1980) (noting no rule of law that a comprehensive zoning ordinance constitutes or becomes its comprehensive zoning or land use plan). In a majority view state, a court may find the requirement for consistency with a comprehensive plan in the control of land use through the zoning ordinance. *See, e,g,*, Furtney v. Simsbury Zoning Comm'n, 271 A.2d 319, 325 (Conn. 1970).

162. *See* Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL'Y 295, 305-15 (2000) [hereinafter *Adopted*] (discussing statutes that require consistency). For discussion of the minority view cases see Laura F. Ashley, *Re-Building New Orleans: How the Big Easy Can Be the Next Big Example*, 55 LOY. L. REV. 353, 364-73 (2009). For discussion of the

require consistency if a municipality has adopted a comprehensive plan.[163] Courts also require consistency with a comprehensive plan as one of the factors that supports spot zoning, even in states that do not generally require zoning to be consistent with an adopted comprehensive plan.[164] Courts that consider consistency with a comprehensive plan in their review of spot zoning do not usually discuss the larger question of whether all zoning regulations and decisions must be consistent.[165] In the minority of states where all zoning decisions must be consistent with a comprehensive plan, this requirement applies to spot zonings.[166]

Florida decision adopting the minority view see Pelham, *supra* note 53. *Accord* Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75, 75 (2003); Edward J. Sullivan, *The Evolving Role of the Comprehensive Plan*, 32 URB. LAW. 813, 822-23 (2000) (noting trend toward accepting plan as criterion for evaluating land use regulations and actions); *see also* BRIAN W. OHM, AM. PLANNING ASS'N, LET THE COURTS GUIDE YOU: PLANNING AND ZONING CONSISTENCY, ZONING PRACTICE (2005).

For arguments for the minority consistency requirement see Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 L. & CONTEMP. PROBS. 353 (1955); Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976); Edward J. Sullivan & Lawrence Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33 (1975). For criticisms based on a misunderstanding of the planning process and plans, see Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 104-09 (2015).

163. Edward J. Sullivan reports annually in articles in this journal on the comprehensive plan in land use and the various views courts have on the consistency requirement, including the view that an adopted comprehensive plan is a factor courts should consider in zoning decisions. *E.g.*, Edward J. Sullivan & Jennifer M. Bragar, *Recent Developments in Comprehensive Planning*, 47 URB. LAW. 457 (2015).

164. *See, e.g.*, King's Mill Homeowners Ass'n, Inc. v. City of Westminster, 557 P.2d 1186, 1190 (Colo. 1976) (change of conditions unless in compliance with master plan); Zandri v. Zoning Comm'n of Ridgefield, 192 A.2d 876, 878 (Conn. 1963) (comprehensive plan); Daro Realty, Inc. v. D.C. Zoning Comm'n, 581 A.2d 295, 299 (D.C. 1990) (inconsistent with comprehensive plan); Hanna v. City of Chicago, 771 N.E.2d 13, 23 (Ill. App. Ct. 2002) (out of harmony with comprehensive planning); Smith v. City of Papillion, 705 N.W.2d 584, 599 (2005) (not in accord with comprehensive plan); Bennett v. City Council of Las Cruces, 973 P.2d 871, 875 (N.M. Ct. App. 1999) (not related to general plan); Watson v. Town Council of Bernalillo, 805 P.2d 641, 645 (N.M. Ct. App. 1991) (fails to comply with comprehensive plan); Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 735 (N.Y. 1951) (benefit of individual owners rather than pursuant to comprehensive plan for general welfare of the community); Sharp v. Zoning Hearing Bd. of Radnor, 628 A.2d 1223, 1228 (Pa. Commw. Ct. 1993) (relationship to comprehensive plan); Granger v. Town of Woodford, 708 A.2d 1345 (Vt. 1998) (no conflict with plan); Smith v. Skagit Cty., 453 P.2d 832, 848 (Wash. 1969) ("not in accordance with the comprehensive plan"); Step Now Citizens Grp. v. Town of Utica Planning & Zoning Comm., 663 N.W.2d 833, 842 (Wis. Ct. App. 2003) (long-range planning).

165. At least in the sample this author has selected. *See e.g.*, W. Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P.3d 182, 191 (N.M. Ct. App. 2002) (holding compliance with plan not judicially reviewable).

166. *E.g.*, Foothill Cmtys. Coal. v. Cty. of Orange, 166 Cal. Rptr. 3d 627 (Cal. Ct. App. 2014) (statutory requirement); Juno Beach v. McLeod, 832 So. 2d 864 (Fla. Dist. Ct. App. 2002) (failure to apply plan); Machado v. Musgrove, 519 So. 2d 629, 633

The reasons for requiring a comprehensive plan to guide zoning decisions explain why consistency with a comprehensive plan is essential. Professor Selmi notes the importance of planning as a check on discretion in land use decision-making.[167] He argues that "[t]he concept of planning as a means of structuring land use discretion embodies two important ideas. One is that the sound exercise of discretion requires a sufficient information base upon which to make decisions."[168] Statutory provisions for the elements of a comprehensive plan require this information base, and require an element detailing land use planning policies.[169]

A variety of planning strategies can provide the information necessary for considering zoning change. Multi-scale planning can designate areas where it allows growth, and can include detailed plans at the neighborhood level[170] that provide guidance for zoning change. New technologies can assist with decision-making. Iterative design methods use "stakeholder input, geospatial modeling, impact simulations, and real-time feedback to facilitate holistic designs and smart decisions."[171]

(Fla. Dist. Ct. App. 1987) ("legislature added a definition of consistency"); Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cty. Comm'rs of Payette, 358 P.3d 67, 74 (Idaho 2015) (holding Type One spot zoning requires consistency with a comprehensive plan); Evans v. Teton Cty., 73 P.3d 84, 89 (Idaho 2003) ("A claim of 'spot zoning' is essentially an argument the change in zoning is not in accord with the comprehensive plan."); Willey v. Town Council of Barrington, 261 A.2d 627, 634 (R.I. 1970) ("The crucial test for a determining if an amendment to a zoning ordinance constitutes illegal spot zoning depends upon whether its enactment violates a municipality's comprehensive plan."). For discussion of the plan consistency requirement in Idaho see *Bone v. City of Lewiston*, 693 P.2d 1046 (Idaho 1984). *See also* Little v. Bd. of Cty. Comm'rs of Flathead, 631 P.2d 1282, 1293 (Mont. 1981) (substantial compliance).

167. Selmi, *supra* note 62, at 632.

168. *Id.* at 632.

169. *See* Meck, *supra* note 61, § 7-204 (specifying the contents of the land use element, including studies, inventory and analysis); *see also* Commentary: Land Use Element, *Id.* at 7-77. A Land Market Monitoring element is optional except when Urban Growth Areas are required. *Id.*, § 7-294.1. This element requires a periodic inventory of buildable lands to determine if there is an adequate supply. Tom Pelham notes, "Many local comprehensive plans in Florida contain provisions concerning mixed use development, compatibility, the mitigation of adverse development impacts, site plan review provisions, and other modern planning techniques." Email from Tom Pelham, Attorney, to author (June 10, 2016) (on file with author).

170. *See, e.g.*, BEN HERMAN & DARICE WHITE, THE 21ST CENTURY COMPREHENSIVE PLAN: SUBSTANCE, ROLE, AND FORM at 24 (2016); *Seattle 2035: Your City, Your Future*, SEATLE.GOV, http://2035.seattle.gov/draft-plan/ (last visited Sept. 20, 2016). On neighborhood plans see WENDELYN A. MARTZ, AM. PLANNING ASS'N, NEIGHBORHOOD-BASED PLANNING: FIVE CASE STUDIES, PLANNING ADVISORY SERVICE REP. NO. 455 (1995); Machado v. Musgrove, 519 So. 2d 629, 635 (Fla. Dist. Ct. App. 1987) ("[N]eighborhood study, when adopted by ordinance, becomes a law and an integral element of the land use plan.").

171. SHANNON MCELVANEY & DAVID ROUSE, AM. PLANNING ASS'N, GEODESIGN AND THE FUTURE OF PLANNING, (2015) (quoting Shannon McElvaney & Doug Walker

Professor Selmi also explains, "[a] second function of planning is to channel local government's discretion by imposing a form of discipline on its decision-making. The preparation of land use plans can force local governments to identify tradeoffs among conflicting goals, debate them, and resolve them before deciding actual development proposals."[172] This insight is critical. The ability to debate and resolve tradeoffs among conflicting goals at the planning stage avoids the capture and arbitrary decision-making that can arouse judicial skepticism. Comprehensive plan policies can support more intensive uses that create wealth transfer. It is justified, however, because it occurs by applying policies that benefit the entire community, not just a single landowner.

The role given to the comprehensive plan in Maine supports this conclusion. Maine, by statute, requires that zoning must be consistent with a comprehensive plan.[173] In a spot zoning case, the Maine Supreme Court held the spot zoning doctrine applies to municipalities that have not adopted a valid comprehensive plan, because "consistency with a comprehensive plan is sufficient to satisfy the common law requirement that neither the ordinance itself nor the procedures employed to enact it were arbitrary or fundamentally unfair."[174] Common-law spot zoning principles, though valid, are less significant because the legislature requires municipalities to adopt a comprehensive plan to govern their zoning rules.[175] Courts should extend this case by making plan consistency the sole basis for approving a spot zoning.[176] Possible

"Geodesign—Strategies for Urban Planning," Am. Planning Ass'n National Planning Conference, Chicago, April 14), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/pas/memo/geodesign/pdf/geodesignpasmemo.pdf; *see also* DAVID ROUSE & SHANNON MCELVANEY, COMPREHENSIVE PLANNING AND GEODESIGN (2016), https://planning-org-uploaded-media.s3.amazonaws.com/document/PASMEMO-2016-03-04.pdf.

Mixon & McGlynn, *supra* note 4, suggest another approach that would inform reliance on an adopted prior plan. They argue for an information-based display that uses computer and GIS capability to give "planning and zoning authorities an opportunity to shift away from static, end-based Utopian land use planning toward a planning system based on immediately apprehended and displayed data that can enable any observer to see opportunities and problems that would otherwise lie undetected." Id at 1255. This approach eliminates spot zoning problems by allowing decisions to be made "in the light of new information, new insight, new demands, and new opportunities." *Id.* at 1267.

172. Selmi, *supra* note 62, at 633.

173. ME. STAT. tit. 30A, § 4352(2) ("A zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body.").

174. Neighbors for Pres. of Old Town v. Dimoulas, 803 A.2d 1018, 1024 n.5 (Me. 2002).

175. *Id.*

176. Courts should approve a spot zoning only if it is consistent with an adopted plan. They should not use consistency with a plan as a reason for mandating a spot

adverse effects on neighboring properties can still be a problem. Courts should also require site-specific and regulatory measures to remedy these problems if they are likely to occur.

The next step in applying a plan consistency rule is to define consistency. The cases that considered the plan consistency factor did not define this term. Some statutes define consistency. The California statute defines consistency to mean that, "[t]he various land uses authorized by the [zoning] ordinance are compatible with the objectives, policies, general land uses and programs specified in such a plan," which is typical.[177] Courts have adopted similar tests.[178] An American Planning Association model planning law includes an important supplementary requirement. It requires the local planning agency to prepare an advisory report to the legislative body indicating whether a land development regulation or its amendment is consistent with the comprehensive plan.[179] This alternative provides a professional evaluation from the planning agency as the basis for the consistency determination.[180]

zoning that is consistent with the plan. *See* Marracci v. City of Scappoose, 552 P.2d 552, 553 (Or. Ct. App. 1976) ("[T]o conform more restrictive zoning ordinances with the plan is a legislative judgment to be made by a local governing body, and only subject to limited judicial review for patent arbitrariness.").

177. CAL. GOV'T CODE § 65860(a)(2). Florida statutes provide a more complete definition: "A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government." FLA. STAT. § 163.3194(3)(a). Strict scrutiny applies to judicial review of consistency determinations in Florida. Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder, 627 So. 2d 469, 475 (Fla. 1993); *see also* MD. CODE ANN., LAND USE § 1-303 (listing items in plan to be considered). Texas allows local governments to define consistency. TEX. LOC. GOV'T CODE ANN. § 213.002(2).

178. *E.g.*, Bergami v. Town Bd. of Rotterdam, 949 N.Y.S.2d 245, 247 (N.Y. App. Div. 2012) (determining whether the change "conflict[s] with the fundamental land use policies and development plans of the community").

179. Meck, *supra* note 61, § 8-104. The definition of consistency is similar to the definition in the Florida statute. FLA. STAT. § 163.3194(3)(a). For discussion of this provision see *Adopted*, *supra* note 162, at 314-20. If the legislative body finds the amendment is inconsistent with the plan, it may suggest changes or revisions, or changes in the comprehensive plan to eliminate the inconsistency. *Id.*

N.C. GEN. STAT. § 160A-383, requires city and town planning boards to "provide a written recommendation to the governing board that addresses plan consistency," but does not define consistency. The statute also provides that "the governing board shall also approve a statement describing whether its action is consistent with an adopted comprehensive plan." A similar law applies to counties. *Id*, § 153A-341; *see also* Morgan v. Nash Cty., 735 S.E.2d 615 (N.C. Ct. App. 2012) (compliance found).

180. The APA model law provides that a zoning amendment is void if a comprehensive plan is required but not adopted. Meck, *supra* note 61, § 8-104(1)(b); *see also* MONT. CODE ANN. § 76-2-201(2) (may amend zoning ordinance after plan adopted);

Cases applying the plan consistency factor in their review of spot zoning applied statutory definitions of consistency,[181] or adopted an implicit consistency requirement when a statute did not define this term. Both types of cases are included here. Comprehensive plans contain land use policies that specify land use goals and objectives. Cases held spot zoning invalid when it clearly did not comply with the land use policies in a comprehensive plan.[182] The vast majority of cases, however, had no difficulty identifying the land use policies that applied and finding consistency with these policies.[183] In some of

N.J. Stat. Ann. § 40:55D-62(a) (same). In the absence of a statute, courts should hold a spot zoning void if there is no comprehensive plan.

181. *See supra* note 178.

182. *See e.g.*, Machado v. Musgrove, 519 So. 2d 629, 635 (Fla. Dist. Ct. App. 1987) (non-residential development in residential areas limited to ranchlands, nurseries and croplands); Little v. Winborn, 518 N.W.2d 384, 388 (Iowa 1994) (did not comply with policies for development in rural areas; rezoning would result in scattered development); Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d 492, 493 (Ky. 1974) (from RB, which permitted only residential uses, to B3, to permit automobile businesses; plan designated area residential); Little v. Bd. of Cty. Comm'rs of Flathead Cty., 631 P.2d 1282, 1289 (Mont. 1981) (rezoning for regional shopping center; plan recommended residential use); McDowell v. Randolph Cty., 649 S.E.2d 920, 924 (N.C. Ct. App. 2007) (light industrial and residential agricultural to heavy industrial/conditional use; plan expressly provided that "[i]ndustrial development should not be located in areas that would diminish the desirability of existing and planned residential uses"); Covington v. Town of Apex, 423 S.E.2d 537, 541 (N.C. Ct. App. 1992) (Office & Institutional-1 to Conditional Use Business-2; plan policy to use buffer areas and transitional zoning to protect adjacent existing residential development; industrial uses should be located adjacent to or near the major railroad corridors and away from residential areas; zoning not to change in area).

183. Griswold v. City of Homer, 925 P.2d 1015, 1021 (Alaska 1996) (holding amendment to city's zoning and planning code to allow motor vehicle sales and services in central business district consistent with plan policies for central business district); Haines v. City of Phoenix, 727 P.2d 339, 344 (Ariz. Ct. App. 1986) (building height exceeded plan restriction; other goals of plan met, height restriction precatory); Foothill Cmntys. Coal. v. Cty. of Orange, 166 Cal. Rptr. 3d 627, 637 (Cal. Ct. App. 2014) (policies for senior housing); Blaker v. Planning and Zoning Comm'n of Fairfield, 562 A.2d 1093, 1100 (Conn. 1989) (condominium development fell within density range of plan); Daro Realty, Inc. v. D.C. Zoning Comm'n, 581 A.2d 295, 301 (D.C. 1990) (rezoning to medium high density general residence; policies of conserving stable neighborhoods and directing new development to neighborhoods in need of improvement, and open space policies of Preservation and Historic Features); Sw. Ranches Homeowners Ass'n, v. Broward Cty., 502 So. 2d 931, 938 (Fla. Dist. Ct. App. 1987) (finding solid waste facility consistent with plan recommendations for agricultural area); Neighbors for Pres. of Big & Little Creek Cmty. v. Bd of Cty Comm'rs of Payette Cty., 358 P.3d 67, 73 (Idaho 2015) (nuclear power plant in area designated industrial); Taylor v. Canyon Cty. Bd. of Comm'rs, 210 P.3d 532, 545 (Idaho 2009) (agricultural to commercial; consistency finding supported by substantial, competent, although conflicting, evidence); Evans v. Teton Cty., 73 P.3d 84, 86 (Idaho 2003) (agricultural to R-l; golf course and residential resort planned unit development; several policies of plan considered); Tippitt v. City of Hernando, 909 So. 2d 1190, 1193 (Miss. Ct. App. 2005) (residential R-12 to office; exception in plan for residential areas, "[s]mall-scale office activities used principally for transition and buffering between residential uses and incompatible non-residential activities");

these cases, the plan simply identified the use or density allowed on a site and did not indicate a change in land use in the surrounding area

Portsmouth Advocates, Inc. v. City of Portsmouth, 587 A.2d 600, 603 (N.H. 1991) (historic properties moved to less restrictive historic district; departure from plan's original recommended boundaries for historic district acceptable); Agazzi v. Governing Body of Red Bank, No. L-3653-12, 2015 WL 9694382 (N.J. Super. Ct. App. Div. Jan. 13, 2016) (reclassification to residential zoning implemented planning intent to conserve residential character of area; height limit did not contravene plan); Great Atl. & Pac. Tea Co. v. Borough of Closter Planning Bd., No. A-1374-13T3, 2015 WL 1280815, at *5 (N.J. Super. Ct. App. Div. Mar. 23, 2015) (unpublished; increased square footage allowed in retail development; plan deferred to market forces to develop property); Bennett v. City Council of Las Cruces, 973 P.2d 871, 877 (N.M. Ct. App. 1998) (high-density residential to commercial; met infill development goal and other features); Embudo Canyon Neighborhood Ass'n v. City of Albuquerque, 968 P.2d 1190, 1195 (N.M. Ct. App. 1998) (amusement facility; not banned to outskirts, can be integrated in certain areas); Watson v. Town Council of Bernalillo, 805 P.2d 641, 648 (N.M. Ct. App. 1991) (agriculture to industrial; plan "illustrated the community's interest in expanding the economic and industrial base and did not limit itself to development solely to the east and west of the town limits"); Bergami v. Town Bd. of Rotterdam, 949 N.Y.S.2d 245 (N.Y. App. Div. 2012) (change from agriculture to B-2 Business; Exit 25A study area "identified as appropriate for commercial and industrial growth and designated for future industrial growth"); Campbell v. Barraud, 394 N.Y.S.2d 909, 912 (N.Y. App. Div. 1977) (rezoning to senior citizen housing when need for such housing expressed in plan); Childress v. Yadkin Cty., 650 S.E.2d 55, 61 (N.C. Ct. App. 2007) (rural agriculture to restricted residential; most of county rural agricultural, county manager recognized development of residential subdivisions an inevitable consequence of transition from a purely rural environment to a mixed-use environment); Sharp v. Zoning Hearing Bd. of Radnor, 628 A.2d 1223, 1229 (Pa. Commw. Ct. 1993) (residential to planned institutional; plan recognized a need for additional on-campus housing); Pollock v. Zoning Bd. of Adjustment, 342 A.2d 815, 819 (Pa. Commw. Ct. 1975) (residential to office commercial; comprehensive plan encouraged commercial development along properties fronting on the Boulevard); Clawson v. Harborcreek Twp. Zoning Hearing Bd., 304 A.2d 184, 187 (Pa. Commw. Ct. 1973) (residential to commercial; continuation of township plan to make East Lake Road a commercial area); Bernard v. City of Bedford, 593 S.W.2d 809, 811-12 (Tex. App. 1980) (single-family to commercial; plan showed commercial use); Granger v. Town of Woodford, 708 A.2d 1345, 1347-1348 (Vt. 1998) (Rural Residential to Roadside Commercial; plan recommended Roadside Commercial Districts along Route 9); Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cty., 634 P.2d 853, 860 (Wash. 1981) (planned community, increase in residential densities; consistent with density and planned development recommendations of plan); Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp., 62 P.3d 912, 920-21 (Wash. Ct. App. 2003) (Restricted Residential to Resort Residential; General Rural plan designation contemplated some commercial use; hotel expansion consistent with historic preservation policies); Bassani v. Bd. of Cty. Comm'rs for Yakima Cty., 853 P.2d 945, 950-951 (Wash. Ct. App. 1993) (general rural to light industrial; complied with industrial development policies in plan); Murden Cove Pres. Ass'n v. Kitsap Cty., 704 P.2d 1242, 1246-47 (Wash. Ct. App. 1985) (Rural Undeveloped to Light Manufacturing and proposed planned unit development; consistent with plan for nonresidential use and urban concentration concept); Sonneland v. City of Spokane, 484 P.2d 421, 425 (Wash. Ct. App. 1971) (single-family to multi-family consistent with plan recommendation); *see also* Thornberg v. Vill. of N. Barrington, 747 N.E.2d 513 (Ill. App. Ct. 2001) (textual amendment allowing wireless facilities as special use in all property zoned residential R 1; trial court found consistency with comprehensive plan); City of Old Town v. Dimoulas, 803 A.2d 1018 (Me. 2002) (residential to commercial; absence of language in plan allowing commercial development not fatal).

was expected,[184] or indicated a need for transition and buffering.[185] In other cases, the policies included recommended a change to a more intensive use, and the spot zoning implemented these policies.[186] These cases included infill development in an urban neighborhood,[187] and new development in an area where the plan recommended change.[188]

VI. Conclusion

Spot zoning is a common and pervasive land use change often needed to adjust the land use pattern authorized by the zoning ordinance. Courts for decades have reviewed spot zoning through nebulous rules applied on an erratic basis, and have not considered the policy issues it creates. They adopted these rules at a time when the importance of the comprehensive plan was not clear, and when mitigating land use measures were undeveloped. It is time to recognize the importance of spot zoning as a land use process, and to reform judicial treatment consistent with modern concepts of land use law.

Reform requires attention to the problems spot zoning can create. Wealth transfer and capture by developer or neighbor interests can occur, and spot zoning takes place in a legislative process that does not satisfy democratic values. These problems require judicial skepticism. Neighbors get access to court if a spot zoning causes them harm, but most courts have not adopted procedural rules that require skepticism in their review of spot zoning. They apply a presumption of constitutionality and a relaxed standard of judicial review.

Substantively, courts for decades have applied a multifactor test for spot zoning that does not include judicial deference. Most of the factors courts consider are not helpful, however. The size of a spot-zoned

184. *E.g.*, Blaker v. Planning and Zoning Comm'n of Fairfield, 562 A.2d 1093, 1100 (Conn. 1989) (condominium development fell within density range of plan).

185. *E.g.*, Tippitt v. City of Hernando, 909 So. 2d 1190, 1193 (Miss. Ct. App. 2005) (residential R-12 to office; exception in plan for residential areas, "[s]mall-scale office activities used principally for transition and buffering between residential uses and incompatible non-residential activities").

186. The cases did not have difficulty deciding whether a plan was adequate to determine whether a spot zoning was consistent. A court should remand for more plan development if it decides a plan is not adequate.

187. *E.g.*, Daro Realty, Inc. v. D.C. Zoning Comm'n, 581 A.2d 295, 301 (D.C. 1990) (rezoning to medium high density general residence; policies of conserving stable neighborhoods and directing new development to neighborhoods in need of improvement, and open space policies of Preservation and Historic Features).

188. *E.g.*, Childress v. Yadkin Cty., 650 S.E.2d 55, 61 (N.C. Ct. App. 2007) (rural agriculture to restricted residential; most of county rural agricultural, county manager recognized development of residential subdivisions an inevitable consequence of transition from a purely rural environment to a mixed use environment).

site is not controlling, and whether spot zoning meets a public need, purpose, or the general welfare is unrelated to any of the concerns spot zoning creates. Consistency with a comprehensive plan, as the only test for spot zoning, addresses these concerns. Plan adoption follows a community-wide process, with public participation, that satisfies democratic values in the land use system. The policies adopted in a comprehensive plan can provide guidance for spot zoning that will prevent arbitrary decision-making. There will be wealth transfers, as in any distributive process that makes land use decisions, but they will implement policies adopted for the entire community, not a decision limited to a single landowner. Capture is unlikely.[189] Attention is still required to the possible impact of a spot zoning on neighboring properties through the adoption of mitigating measures.

These reforms require the abandonment of clumsy and archaic rules applied to an undisciplined and freewheeling legislative process, and the application of policies based on comprehensive planning that can accommodate spot zoning change. Reform requires new structure and new process, but change is necessary to give spot zoning an accepted place in the zoning system.

189. A municipality with a limited social and economic demographic will not have participation by a variety of conflicting interests. In that sense, there will be a capture of the plan preparation and adoption process a comprehensive plan does not remedy. The process, however, will be open and disciplined and will resolve land use policy issues on a community-wide basis.