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## Zoning—Rezoning: New Standards for Governing Bodies—*Parkridge v. City of Seattle*, 89 Wn. 2d 454, 573 P.2d 359 (1978)

Alice L. Hearst

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**ZONING—REZONES: NEW STANDARDS FOR GOVERNING BODIES—*Parkridge v. City of Seattle*, 89 Wn. 2d 454, 573 P.2d 359 (1978).**

Plaintiff-developer purchased lots in Seattle's Capitol Hill neighborhood which were zoned for medium density apartments.<sup>1</sup> Following an unsuccessful attempt to rezone for high density apartments in 1966, plaintiff allowed the lots' existing residences to deteriorate. In 1973 the City of Seattle Building Department ordered plaintiff to close, repair to code, or demolish the buildings. Plaintiff applied for a permit to demolish the structures; the city then requested the preparation of an environmental impact statement (EIS) detailing plaintiff's comprehensive development plans.<sup>2</sup> Instead of pursuing the demolition application, plaintiff applied for a building permit to construct a medium density apartment unit. An EIS requirement was again imposed and plaintiff took steps to comply.<sup>3</sup>

During the interval between plaintiff's application for a demolition permit and its application for a building permit, a group of neighboring residents filed a petition requesting a downzone of the property to a single family residential classification identical to that of the adjacent residential property.<sup>4</sup> Following hearings before the city planning commis-

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1. *Parkridge v. City of Seattle*, 89 Wn. 2d 454, 573 P.2d 359 (1978).

2. The State Environmental Policy Act (SEPA) requires that local government action "significantly affecting the quality of the environment" be preceded by an environmental impact statement (EIS). WASH. REV. CODE § 43.21C.030 (1976). Under SEPA and the administrative regulations promulgated pursuant thereto, the city has authority to deny or reasonably to condition any proposal so as to mitigate or prevent adverse environmental impacts. WASH. ADMIN. CODE §§ 197-10-055 to-100 (1976).

In *Parkridge*, the EIS requirement was imposed after the city notified the Capitol Hill Land Use Review Board of the demolition application. The review board demanded that the city require an environmental assessment. The board is a voluntary organization composed of Capitol Hill residents interested in monitoring neighborhood development. Brief for Amicus Curiae at 3, 4, *Parkridge v. City of Seattle*, 89 Wn. 2d 454, 573 P.2d 359 (1978). Plaintiff implied that the city's notification of the citizen's group was clandestine, Brief for Respondents at 38, and the trial court considered the building department's action an exhibition of favoritism and therefore violative of the appearance of fairness doctrine, Brief for Respondents at 16. The supreme court did not reach the appearance of fairness issue, but reacted as the trial court did, referring to the notification as a "private arrangement" carried out by "someone in the City's building department." 89 Wn. 2d at 456-57, 573 P.2d at 361. The apparent or perceived unfairness may have had a significant impact upon the supreme court's willingness to affirm the trial court's decision.

3. 89 Wn. 2d at 457-58, 573 P.2d at 362. Both the building permit application and the imposition of the EIS requirement occurred between the filing of the rezone petition and its approval. This sequence affected the "vested rights" case discussed in note 9 *infra*.

4. 89 Wn. 2d at 457, 573 P.2d at 362. Plaintiff's parcel was also bounded by a small neighborhood business zone and a city park. The property had an unusual zoning history which had some impact on the presumption of validity to be accorded rezones. See note 51 *infra*.

sion<sup>5</sup> and the city council's committee on planning and urban development, the city council passed an ordinance approving the down-zone,<sup>6</sup> whereupon the plaintiff filed a petition for certiorari to review the city's action.<sup>7</sup>

5. The composition, powers, and duties of planning commissions are outlined in R.C.W. § 35.63 (1976) (cities), § 35A.63 (1976) (code cities), and § 36.70 (1976) (counties). Planning commissions have only advisory powers and are appointed by the municipality's legislative body to act as "the research and fact finding agency of the municipality." WASH. REV. CODE § 35.63.060 (1976).

Informal public hearings were held twice before the planning commission and twice before the city council's planning and urban development committee. The planning commission recommended to the committee on urban development a zoning classification of RM 1600, a low density multiple family designation. The commission pointed to factors such as proximity to a city park and access to public transit which made the area suitable for multi-family development. Brief for Respondents at 5, 6. This suggestion was a compromise between the neighbors' request for RS 5000, a high density single family classification and the extant RM 800, a medium density multiple family classification.

No hearings were held before the city council, although tapes of the prior hearings were available along with other evidentiary materials such as staff reports. Although not articulated by the court, the city council's failure to adopt the planning commission's suggestion may have supported the court's belief that the council acted on insufficient facts. Because the city council filed no formal or informal findings of fact or conclusions, the supreme court concluded that there was no way of knowing whether the council considered *any* of the evidence before it. 89 Wn. 2d at 461, 573 P.2d at 364.

6. Seattle, Wash., Ordinance No. 103510 (June 26, 1974).

7. The writ of certiorari is well established as the appropriate means of obtaining review of municipal zoning and rezoning actions in Washington. *Pierce v. King County*, 62 Wn. 2d 324, 382 P.2d 628 (1963). Although use of the writ has traditionally been restricted to reviewing judicial proceedings, *Tenny v. Seattle Electric Co.*, 48 Wash. 150, 92 P. 895 (1907), Washington has recognized its use to review the acts of a governmental body where it appears that the body acted arbitrarily, unreasonably, and capriciously, and where no adequate remedy exists at law. *Pierce v. King County*, 62 Wn. 2d at 329, 382 P.2d at 632. Citing cases from other jurisdictions, the *Pierce* court held that "[c]ertiorari is the appropriate remedy to test the reasonableness of [an] ordinance." *Id.* at 331, 382 P.2d at 633.

Several states have used the writ to review judicial or quasi-judicial acts only; the determination of whether an act is judicial or legislative is "wavering." K. DAVIS, ADMINISTRATIVE LAW TEXT § 24.02 (3d ed. 1972). Washington apparently does not feel bound to restrict the use of the writ to the review of nonlegislative acts. Thus the use of the writ is not of itself sufficient to prove that the court considers rezones quasi-judicial acts. Indeed, there has been some criticism of the restriction of certiorari to the review of only judicial acts. B. SCHWARTZ, ADMINISTRATIVE LAW § 185, at 530 (1976).

Although the Washington courts have invoked certiorari to review rezoning actions, they have reviewed those actions under an arbitrary and capricious standard rather than a substantial evidence standard. See notes 72-73 *infra*. The Washington statute does not specify the applicable standard of review. It provides only that the writ shall be granted "when an inferior tribunal, board or officer, exercising judicial functions, has exceeded [its] jurisdiction . . ." WASH. REV. CODE § 7.16.040 (1976). The rezone in *Parkridge* was reviewed under R.C.W. § 7.16.120(4)-(5) (1976), 89 Wn. 2d at 459, 573 P.2d at 363. That statute provides:

The questions involving the merits to be determined by the court upon the hearing are: . . .

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, as would be set aside by the court, as against the weight of the evidence.

This section seems to embody a substantial evidence standard. See notes 72-76 and accompanying text *infra* (discussion of the standard used in *Parkridge*).

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On review, the trial court found that justifications for the rezone were not supported by credible evidence, and overturned the rezone as arbitrary and capricious.<sup>8</sup> The Washington Supreme Court affirmed.<sup>9</sup> *Parkridge v. City of Seattle*, 89 Wn. 2d 454, 573 P.2d 359 (1978).

### I. THE COURT'S HOLDINGS

In affirming the trial court's decision, the supreme court articulated several new principles affecting the degree of deference given to rezoning actions of local legislative bodies. These principles broaden the scope of review of rezoning decisions and impose stricter standards of proof on applicants seeking rezones. The overall effect of *Parkridge* is the expansion of procedural due process requirements in rezoning actions.

This note examines four aspects of rezoning decisions addressed by the court: the policy basis upon which rezoning actions may legitimately be grounded;<sup>10</sup> the quantum of evidence necessary to support a rezoning decision;<sup>11</sup> the allocation of the burden of proof in rezoning actions;<sup>12</sup> and the presumption of validity, if any, accorded local rezoning decisions.<sup>13</sup>

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8. *Parkridge v. City of Seattle*, No. 783462 (Wash. Super. Ct., King County, June 10, 1975). The trial court found the rezone invalid on four grounds: (1) the decision was unsupported by credible evidence and therefore arbitrary and capricious; (2) the rezone resulted in an inverse spot zone; (3) city council members who voted on the rezone failed to appear at the hearings or listen to tape recordings, denying the plaintiffs due process of law and violating the appearance of fairness doctrine; and (4) the city failed to comply with SEPA. 89 Wn. 2d at 459, 573 P.2d at 363. The supreme court affirmed on the first ground and did not reach the other issues. *Id.*

9. The *Parkridge* controversy began as two cases which were consolidated on appeal: a "rezone" case, the subject of this note, and a "vested rights" case. In the latter case, the developers contended they had a vested right to a building permit because application for the permit was made prior to approval of the rezone petition. The *Parkridge* court stated the rule in Washington regarding the vesting of rights to building permits: "[T]he right vests when the party . . . applies for [the] building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application." 89 Wn. 2d at 465, 573 P.2d at 366 (quoting *Hull v. Hunt*, 53 Wn. 2d 125, 130, 331 P.2d 856, 859 (1958)).

The city contended that plaintiff had no vested right because plaintiff's design plans were not complete at the time of application: they consisted only of conceptual drawings and an EIS had not been prepared. The city building code requires that where no action is taken on an application for six months, the plans be destroyed and the applicants reapply. SEATTLE, WASH., BUILDING CODE § 3.02.030(b) (1976). The supreme court affirmed the trial court's findings that the developer had pursued the application with sufficient diligence to avoid the cancellation provision in the code. 89 Wn. 2d at 465, 573 P.2d at 365. The city argued on appeal that plans must be complete when filed. Brief for Appellants at 33. The supreme court's holding implies that total compliance is not necessary upon initial filing: permit applicants must be given a reasonable time to complete or perfect the plans.

10. See Part II-A *infra*.

11. See Part II-B *infra*.

12. See Part II-C *infra*.

13. See Part II-D *infra*.

## II. ANALYSIS

### A. *Public Policy: Rezone Must Bear a Substantial Relation to the Public Welfare.*

That zoning is a valid exercise of local police power has not seriously been debated since the United States Supreme Court's decision in *Village of Euclid v. Ambler Realty*.<sup>14</sup> But because zoning restricts an individual's right to the unfettered use of private property,<sup>15</sup> zoning decisions require a balancing of public interest and individual property rights.<sup>16</sup> To be upheld, zoning regulations must bear a substantial relation to public health, safety, welfare, or morals.<sup>17</sup>

Zoning plans must also be flexible enough to adjust to changes in the environment they are designed to regulate; they must respond to fluctuating concepts of public welfare.<sup>18</sup> The mechanism for responding to such changes is the rezone. The *Parkridge* court held that to be legitimately grounded in the police power, rezones as well as initial zoning actions must bear a substantial relation to public welfare.<sup>19</sup>

While the court did not articulate the means for determining whether a rezone bears a substantial relation to public welfare, that determination appears to require a two-fold analysis. First, the public welfare must be defined; second, the composition of the public in the particular case must be defined.

Zoning is a tool for implementing a comprehensive plan for develop-

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14. 272 U.S. 365, 387 (1926).

15. "It is well established that every person has the right to use his property in his own way and for his own purposes, subject only to the restraints necessary to secure the common welfare." *Hauser v. Arness*, 44 Wn. 2d 358, 367, 267 P.2d 691, 697 (1954) (quoting *Midland Electric Coal Corp. v. Knox Co.*, 1 Ill. 2d 200, 115 N.E.2d 275, 280 (1953)). "[Zoning regulations] constitute a serious impairment of the right to use and enjoy property, and they . . . interfere with the possession thereof." *Pierce v. King County*, 62 Wn. 2d 324, 336, 382 P.2d 628, 636 (1963). See also Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1418-19 (1978).

16. Property rights have always been subjected to some forms of control in the public interest. Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 1977 DUKE L.J. 841, 841-43. Professor Wright notes that zoning decisions involve more than simply balancing an individual's right to unrestricted use of his property against the public's desire for systematic development. It must also be recognized that zoning laws have a particularly pervasive impact, frequently affecting individual rights not automatically connected with land use—rights such as free association and travel. *Id.* at 844.

17. *Hauser v. Arness*, 44 Wn. 2d 358, 367-68, 267 P.2d 691, 696-97 (1954).

18. "[Z]oning authorities cannot blind themselves to changing conditions." *Bishop v. Town of Houghton*, 69 Wn. 2d 786, 792, 420 P.2d 368, 372 (1966). Indeed, where significant changes in circumstances have occurred, the municipality has a duty to modify an outdated ordinance. *Id.*

19. 89 Wn. 2d at 461, 573 P.2d at 363.

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ment.<sup>20</sup> In developing a plan that promotes the public welfare, zoning authorities must take into account specific considerations, such as the location of public facilities, traffic patterns, and existing and desired housing densities.<sup>21</sup> All such factors affect the public welfare and must be adequately accommodated when devising an acceptable zoning plan. *Parkridge* did not formulate a definition of the public welfare peculiar to rezones.<sup>22</sup> Thus, it appears that the standards for determining what is in the public interest in initial zoning decisions<sup>23</sup> will apply with equal force in rezoning actions.

The more troublesome issue, particularly apparent in rezoning actions, is defining the public whose interests are affected. In rezones which are quasi-judicial<sup>24</sup> there are potentially three interested groups: the opponents of the rezone, the proponents, and the general public. The *Parkridge* court declared that the public's interest must be considered.<sup>25</sup> While the interests of those individuals immediately affected "may be given substantial weight,"<sup>26</sup> the court was concerned that all aspects of the rezone's impact be assessed by the decisionmaking body. To justify rezones, then, the local governing body must demonstrate not only that the interests of those immediately affected have been considered, but that the decision accords with the general public welfare.

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20. [R]ealistic municipal "planning" . . . must be comprehensive, flexible, and prospective, for it attempts to anticipate the future destiny as well as project protection for the existing social, civic, physical, and economic values of the particular municipal area involved.

. . . "[Z]oning" on the other hand, is, in effect, a part of and an end result or product of effective municipal "planning". . . .

*Shelton v. City of Bellevue*, 73 Wn. 2d 28, 35, 435 P.2d 949, 953 (1968).

The terms planning and zoning are frequently confused. Until recently, there has been little judicial consideration of the effect of a comprehensive plan on zoning ordinances. See Haar, "In Accordance With a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955). *Parkridge* requires cities to produce "substantial evidence" in support of rezones to assure that the change will be in the public interest. 89 Wn. 2d at 462, 573 P.2d at 364. The case thus lends strength to existing comprehensive plans which presumably reflect general public welfare considerations. See notes 49–52 and accompanying text *infra*.

21. R.C.W. § 35.63.090 (1976) requires that zoning regulations be part of a comprehensive plan designed to, *inter alia*, encourage the most appropriate use of land, reduce traffic congestion, prevent overcrowding, promote coordinated development, encourage development of community units, and facilitate adequate provision of transportation, water, and sewerage. Similar provisions are found in R.C.W. § 35A.63.061 (1976) and R.C.W. § 36.70.760 (1976).

22. The court said only that "the rezone must bear a substantial relationship to the public health, safety, morals or welfare." 89 Wn. 2d at 462, 573 P.2d at 364.

23. See note 21 *supra*.

24. See note 68 *infra* for a discussion of the characterization of rezones as legislative or quasi-judicial.

25. 89 Wn. 2d at 462–63, 573 P.2d at 364.

26. *Id.* at 462, 573 P.2d at 364.

*B. Quantum of Evidence: A Rezone Must be Supported by Sufficient Evidence.*

As noted, a rezone must bear a substantial relation to the public welfare.<sup>27</sup> This requirement raises the question of the nature and extent of evidence necessary to show a public benefit. The trial court in *Parkridge* overturned the city's approval of the rezone petition because it found no credible evidence to support the action.<sup>28</sup> In affirming, the supreme court held that the rezone must be supported by "substantial evidence,"<sup>29</sup> citing an Oregon case, *Fasano v. Board of County Commissioners*.<sup>30</sup> In *Fasano* it was held that such evidence, "at a minimum, should show (1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property."<sup>31</sup>

The *Parkridge* court found that the city had failed to meet the sufficient evidence standard of *Fasano*.<sup>32</sup> The primary support for the city's action was evidence of a change in community attitudes toward preserving single family neighborhoods.<sup>33</sup> The court, while noting that the views of the immediately affected residents were not to be denigrated, found the evidence insufficient to demonstrate a need for change in the *public* interest.<sup>34</sup>

An examination of prior land use cases suggests those factors which the Washington court will consider sufficiently demonstrative of the need for a zoning change: traffic congestion,<sup>35</sup> inadequate public facilities,<sup>36</sup>

27. See note 17 and accompanying text *supra*.

28. 89 Wn. 2d at 459, 573 P.2d at 363. The credible evidence standard is essentially a restatement of the substantial evidence standard. See notes 75-76 and accompanying text *infra*. One court defined the standard as follows: "We must 'determine whether the findings made 'are supported by and in accordance with reliable, probative, and substantial evidence in the whole administrative record, . . . and whether the conclusions of the Board [of Zoning Adjustment] flow rationally from these findings . . .'" Association for Preservation of 1700 Block of N. St., N.W., and Vicinity v. District of Columbia Bd. of Zoning Adjustment, 384 A.2d 674, 677 (D.C. 1978) (citations omitted).

29. 89 Wn. 2d at 462, 573 P.2d at 364.

30. 264 Or. 574, 507 P.2d 23 (1973).

31. *Id.*, 507 P.2d at 28.

32. 89 Wn. 2d at 462, 573 P.2d at 364.

33. *Id.*

34. "A reference to changed attitude in the neighborhood . . . [does not rise] to the level of substantial evidence necessary to establish that conditions had so markedly changed . . . that a rezone [is] required in the public interest." 89 Wn. 2d at 462, 573 P.2d at 364. The court went on to note that while the views of those affected may be entitled to substantial weight, "[t]hey cannot . . . be controlling absent compelling reasons requiring a rezone for the public health, safety, morals or general welfare." *Id.*

35. *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wn. 2d 378, 384-86, 312 P.2d 195, 198-99 (1957) (where no systematic, detailed traffic survey had been made, city's refusal to grant petitioner authority to construct a church because neighbors contended traffic would be a problem held arbitrary and capricious).

36. *SAVE v. City of Bothell*, 89 Wn. 2d 862, 868, 576 P.2d 401, 405-06 (1978) (city's grant of

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and significant environmental impact,<sup>37</sup> all of which affect the general public. The *Parkridge* court emphasized that individual rights should not be restricted unless curtailment advances a public interest beyond that of a small but vocal minority.

### C. *Burden of Proof: The Party Seeking a Rezone Bears the Burden of Proof.*

By characterizing comprehensive zoning acts as legislative and rezones as adjudicative,<sup>38</sup> *Parkridge* placed the burden of proving that a rezone is in the public interest on the party seeking modification of the zoning ordinance.<sup>39</sup> This allocation is a departure from the judiciary's customary deference to decisions made by a legislative body.<sup>40</sup> The City of Seattle objected strenuously to this allocation, noting the lack of precedent for "put[ting] the city to its proof."<sup>41</sup> The court's rejection of the city's position means that, in review of rezones approved by the municipality, the governing body is placed in essentially the same position as a private party.<sup>42</sup>

In *Parkridge*, the city, having approved the rezone, was considered the proponent. It therefore carried the burden of proving that the rezone was justified in the public's interest; its decision was not entitled to a presumption of validity.<sup>43</sup> The city argued that this allocation of the burden of proof put it at an "undeserved disadvantage" and that "opponents of controversial rezones [would] be encouraged to seek judicial review."<sup>44</sup> The city further contended that as a result of the court's allocation of the burden of proof, local governing bodies would be forced to adhere ri-

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rezone invalid where evidence showed, *inter alia*, that the requirements of "substantial investments in highways, sewers, and other services and utilities" had been disregarded).

37. *Narrowview Preservation Ass'n v. City of Tacoma*, 84 Wn. 2d 416, 422–23, 526 P.2d 897, 902 (1974) (where statements regarding environmental impact of project had been obtained from health department, park district, fire department, public works department, and public schools, and where there was a showing that population density would not be significantly increased, rezone not arbitrary or capricious).

38. 89 Wn. 2d at 463, 573 P.2d at 365. See notes 60–63 and accompanying text *infra* (discussion of the nature of rezones as legislative or quasi-judicial).

39. 89 Wn. 2d at 462, 573 P.2d at 364.

40. The deference stems from concepts of separation of powers. See note 57 *infra*. Prior to characterizing rezones as quasi-judicial in 1971, see note 68 *infra*, the court had shown considerable deference to municipal legislative decisions in the zoning area. See, e.g., *State ex rel. Myhre v. City of Spokane*, 70 Wn. 2d 207, 422 P.2d 790 (1967); *McNaughton v. Boeing*, 68 Wn. 2d 659, 414 P.2d 778 (1966).

41. Appellant's Motion for Reconsideration at 6, *Parkridge v. City of Seattle*, 89 Wn. 2d 454, 573 P.2d 359 (1978).

42. See note 48 and accompanying text *infra*.

43. 89 Wn. 2d at 462, 573 P.2d at 364. See also notes 56–63 and accompanying text *infra*.

44. Appellant's Motion for Reconsideration at 6.

gidly to outdated zoning plans.<sup>45</sup> These fears, however, are not entirely warranted. When an adjudicative rezone is challenged in court, the local governing body must prove that the rezone bears a substantial relation to the public health and welfare if that body is the proponent of the rezone.<sup>46</sup> As a practical matter, the *Parkridge* court's holding will most substantially affect the parties before the local governing body.<sup>47</sup> The original rezone applicant bears an initial burden of producing sufficient evidence to convince the local governing body that there is a need for the change in the public interest. The governing body in effect adopts that evidence to support its action. In other words, applicants for a rezone are to be put to *their* proof, and the governing board's decision stands or falls accordingly. Thus, had the rezone applicants in *Parkridge* produced sufficient credible evidence demonstrating a public need for the downzone before the city, the city's subsequent approval of the downzone would probably have been sustained by that same evidence. By the same token, when the governing body introduces a rezone of an adjudicative nature on its own initiative, it assumes the position of a private applicant from the outset and is indeed "put . . . to its proof."<sup>48</sup>

This allocation of the burden of proof provides some assurance that local decisionmakers will afford adequate procedural fairness to parties affected by a rezone.<sup>49</sup> Local decisionmakers may also be more demanding of special interest groups urging a rezone because in most cases the burden is upon that group to provide the required quantum of evidence.

As previously noted, *Parkridge* generated apprehension that local de-

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45. *Id.* See also Alkire, *Washington's Super-Zoning Commission*, 14 GONZ. L. REV. 559, 590 (1979). A rezone may, in a particular case, be legislative and therefore be entitled to a presumption of validity. See note 62 *infra*.

46. See note 19 and accompanying text *supra*.

47. The court in fact stated that "the proponents of the rezone have the burden of proof." 89 Wn. 2d at 462, 573 P.2d at 364. While this holding was directed to the proponents before the trial court, in practical effect it places a greater burden on the party originally requesting a rezone. In *Parkridge* the neighbors who filed the rezone petition were the original parties in interest and thus should have demonstrated to the governing body that the rezone was necessary in the public interest.

48. Appellant's Motion for Reconsideration at 6. The city assumes the position of a private applicant whenever the rezone is of a quasi-judicial nature. See note 68 *infra*.

49. The *Parkridge* decision also gives some assurance that property interests will not be substantially altered by rezones unless justified by reasons at least as compelling as those justifying the original zoning. See text accompanying notes 21-23 *supra*. The decision encourages local governing bodies to impose a heavier burden of proof on the proponents of a rezone. While an individual has no absolute right to a particular zoning classification of his or her property, "zoning implies a degree of permanency," *Farrell v. City of Seattle*, 75 Wn. 2d 540, 543, 452 P.2d 965, 967 (1969), and a heavier burden of proof on the proponents is therefore appropriate. Since zoning regulations provide a "degree of stability and continuity in the usage of land to which affected landowners are entitled to look in the orderly occupation, enjoyment, and development of their property," *Chrobuck v. Snohomish County*, 78 Wn. 2d 858, 868, 480 P.2d 489, 495 (1971), substantial procedural fairness is proper when that property is subjected to a rezone.

cisionmakers will be unduly constrained by outdated zoning ordinances.<sup>50</sup> In one sense, such apprehension is justified since the *Parkridge* decision strengthens existing comprehensive zoning ordinances<sup>51</sup> by according them a strong presumption of validity.<sup>52</sup> To overcome this presumption, the rezone applicant, and ultimately the decisionmaking body, must prove that circumstances have so changed that a rezone is warranted.<sup>53</sup>

Assuming the validity of the *Parkridge* court's characterization of rezoning actions as adjudicative, it cannot be said that the court is unfairly intruding upon the legislative sphere.<sup>54</sup> To the extent that the original zoning is considered legislative and granted a presumption of validity,<sup>55</sup> the *Parkridge* decision enhances the integrity of that legislative act. If, however, the rezone on its facts calls for a legislative response, the local governing body's decision should be granted a presumption of validity in accordance with traditional treatment of legislative acts.

### *D. Presumption of Validity: No Presumption of Validity Attaches to Rezoning Actions.*

The *Parkridge* court held that no presumption of validity attaches to

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50. See notes 44–45 and accompanying text *supra*. Courts frequently have been criticized for their failure to require a showing that rezones further land use policies set forth in comprehensive plans. See generally Haar, *supra* note 20. This criticism often arises in cases involving alleged spot zoning, an issue raised before the *Parkridge* trial court but not reached on appeal. 89 Wn. 2d at 459, 573 P.2d at 360. Washington courts, however, have recognized the importance of observing comprehensive land use policies in rezone actions. See, e.g., Chrobuck v. Snohomish County, 78 Wn. 2d 858, 867–68, 480 P.2d 489, 495 (1971).

51. *Parkridge* appeared to redefine the type of original zoning ordinance which is entitled to a presumption of validity. The definition apparently has been extended to include rezones which have been challenged and upheld, or which have stood unchallenged for a reasonable period of time. The property in *Parkridge* was zoned RS 5000, a high density single family residential zone, under a comprehensive zoning ordinance enacted in 1957; it was upzoned in 1959 to RM 800. 89 Wn. 2d at 456, 573 P.2d at 361. The court noted that: “[T]he original rezone of these lots in 1959 must be presumed to have followed from regular and proper procedures and we are directed to no evidence in the record which would suggest that the rezone was invalid at the time it was made.” 89 Wn. 2d at 462, 573 P.2d at 364.

52. 89 Wn. 2d at 460, 573 P.2d at 363. See note 60 and accompanying text *infra* (discussion of the presumption of validity).

It is well established that an original zoning ordinance carries a stronger presumption of validity than its subsequent amendments. 1 E. YOKLEY, ZONING LAW AND PRACTICE § 7–7, at 325 (3d ed. 1965). As previously noted, amendments which have withstood challenge or have endured a reasonable length of time enjoy the same presumption of validity as the original. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 4.26, at 238 (2d ed. 1968); see note 51 *supra*. The reasoning behind this presumption, which is usually apparent in cases including alleged spot zoning, is that frequent rezoning tends to corrode a comprehensive plan. See generally 1 R. ANDERSON, *supra*, §§ 5.08–5.18.

53. 89 Wn. 2d at 462, 573 P.2d at 364. See text accompanying notes 21–23 *supra* (discussion of the public interest requirement for approval of rezones).

54. Alkire, *supra* note 45, at 591–96.

55. See notes 51–52 *supra*.

rezoning actions.<sup>56</sup> This holding initially appears to alter the traditional concept of separation of powers by substituting judicial for legislative decisionmaking.<sup>57</sup> On closer scrutiny, however, it becomes apparent that the court's objective was to insure adequate procedural fairness rather than to guarantee the correct result in all cases.<sup>58</sup> To accomplish that objective, the court concerned itself with the nature of the rezone action rather than with the status of the decisionmakers as a legislative or administrative board.<sup>59</sup>

Full understanding of this aspect of *Parkridge* requires brief inquiry into the theoretical bases for characterizing particular actions as legislative or quasi-judicial and an examination of the consequences of such characterization. Legislative acts are cloaked with a presumption of validity. One reason for this presumption is the assumed ability of the electoral process to remedy abuses of legislative power.<sup>60</sup> It does not follow, however, that every decision made by an elected body is a legislative act.

56. 89 Wn. 2d at 462, 573 P.2d at 364.

57. The separation of powers doctrine is a fundamental aspect of the American system of government. The essential idea is that "persons intrusted with power in any one of [the three] branches [of government] shall not be permitted to encroach upon the powers confided to the others." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). The concept is embodied in both the federal and state constitutions. Legislative powers are vested in Congress or the state legislature, U.S. CONST. art. I, § 1, WASH. CONST. art. II, § 1; judicial powers are vested in the courts, U.S. CONST. art. III, § 1, WASH. CONST. art. IV, § 1. It has been argued that the separation of powers doctrine is too rigid an analytical tool for intelligent evaluation of land use problems. Halting further inquiry because an action is labeled legislative "avoids consideration of 'essential fairness' . . . and forecloses . . . examination of the rational connection between the action taken and the situation dealt with." Wengert, *Constitutional Principles Applied to Land Use Planning: A Tentative Restatement*, 19 NAT. RESOURCES J. 1, 8 (1979). Professor Davis notes that the "danger of . . . injustice lurks in unchecked power. not in blended power." K. DAVIS, *supra* note 7, § 1.08, at 25. *But see* Alkire, *supra* note 45, at 591-96 (criticism of the Washington Supreme Court's activism in zoning cases generally).

58. It appears that the court tried to delineate procedural safeguards for rezone actions by requiring the governing body to articulate reasons for its decisions. *See* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753, 766-67 (1976) (general discussion of why imposition of procedural safeguards is an appropriate judicial role in review of rezone actions); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1502-23 (1978) [hereinafter cited as *Zoning Developments*].

59. The court cited *Fleming v. City of Tacoma*, 81 Wn. 2d 292, 502 P.2d 327 (1972) in characterizing the rezone actions as "basically adjudicatory." 89 Wn. 2d at 463, 573 P.2d at 365. The *Fleming* court discussed in detail the factors leading to a conclusion that rezones may be quasi-judicial rather than legislative acts: the presence of distinct parties in interest, the localized applicability of rezones, and the statutory requirement of zoning hearings. 81 Wn. 2d at 298-99, 502 P.2d at 331.

60. There are three principal reasons for according a presumption of validity to legislative acts: administrative problems would ensue if each person affected by a decision were accorded individual due process; the size of the group affected by most legislative acts guards against unreasonable actions; and recourse is available through the legislative process. *Zoning Developments*, *supra* note 58, at 1508-09.

Courts have used three tests to determine whether an action is legislative or adjudicative, none of which is entirely satisfactory. Some courts have focused on the nature of the decisionmaking body as appointed or elected. Others have resorted to blanket classification of all acts relating to a particular

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Rather, legislative bodies, particularly local ones,<sup>61</sup> may perform administrative or adjudicative tasks under particular circumstances.<sup>62</sup> For example, a local governing body may act legislatively when planning the expansion of a municipal water system and administratively in determining whether a particular subdivision within that planning area will receive a water permit or license under particular circumstances. When an elected body acts in a nonlegislative capacity, as when it grants permits, due process usually demands greater attention to procedural fairness because aggrieved individuals have no redress through the electoral process.<sup>63</sup>

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subject matter as one or the other. Still others have gone to great lengths to distinguish policy decisions from decisions based on the specific facts of the case; the former decisions are deemed legislative, the latter quasi-judicial. *Id.* at 1509.

61. There are significant differences between local legislative bodies and state and federal legislatures: local bodies typically possess only powers delegated by the state with implicit or explicit substantive and procedural limitations and frequently exercise both legislative and administrative powers. They are, furthermore, “heirs to the judicial suspicion of local government . . . generated by political struggle and incidents of municipal corruption.” 4 R. ANDERSON, *AMERICAN LAW OF ZONING* 2D § 25.05, at 209 (1976). Accordingly, courts have not hesitated to scrutinize carefully the decisions of local legislative bodies. *Id.*

In *Fasano v. Board of County Comm’rs*, 264 Or. 574, 507 P.2d 23, 26 (1973) (en banc), cited in *Parkridge*, 89 Wn. 2d at 461, 573 P.2d at 363, the court stated:

[W]e would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures.

See note 68 *infra* (discussion suggesting the appropriateness of increased judicial scrutiny when rezones are at issue).

62. Analogies can be drawn from administrative law. An act is legislative in nature when it has general applicability and addresses future conduct. An adjudicative act, however, is one which has an immediate effect on identifiable parties and in which the decision turns upon the particular facts. B. SCHWARTZ, *supra* note 7, § 55, at 144. See also *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *American Airlines, Inc. v. C.A.B.*, 359 F.2d 624, 636–37 (D.C. Cir.) (Burger, J., dissenting), cert. denied, 385 U.S. 843 (1966).

This classification poses a conceptual problem when discussing rezones. In one sense, the court in *Parkridge* seems to recognize that rezones are legislative, emphasizing that rezones must be carried out in the public interest because they affect the general public welfare. On the other hand, the public’s interest must be considered because all zoning actions, as an exercise of the police powers, must be grounded in the public interest. See notes 14–17 *supra*. This consideration alone does not convert an action which is essentially adjudicative into one which is legislative. “Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.” *Fleming v. City of Tacoma*, 81 Wn. 2d 292, 299, 502 P.2d 327, 331 (1972) (en banc).

No classification approach is entirely satisfactory because rezones may arise in any number of factual situations. A twofold approach has been suggested for differentiating legislative from adjudicative actions. It calls for consideration of the nature of the underlying facts, and consideration of the particularity of impact of such decision. *Zoning Developments*, *supra* note 58, at 1510. The author argues that this approach “comports with the functional analysis of procedural due process.” *Id.* at 1512.

63. Procedural due process considerations are triggered when the action is not legislative and there is a protected interest in life, liberty, or property at stake. *Zoning Developments*, *supra* note 58, at 1503. Procedural due process promotes three interests: (1) governmental decisions that are correct

Although there is no "bright line" dividing legislative from adjudicative actions,<sup>64</sup> the distinction is necessary because there are different consequences depending on the classification—for example, there are differences in the record and hearing requirements<sup>65</sup> and in the standard of judicial review.<sup>66</sup>

Classification is particularly difficult in rezoning actions where the factual situations may vary so as to call for a legislative or an adjudicative response in a given instance.<sup>67</sup> Since 1971 the Washington Supreme Court has nonetheless consistently characterized rezones as quasi-judicial,<sup>68</sup> and the facts of *Parkridge* fell squarely within that category.<sup>69</sup>

The *Parkridge* court characterized the entire rezoning action as quasi-judicial.<sup>70</sup> The court thus rejected the city's argument that only the decisionmaking process was quasi-judicial, while the ultimate rezoning decision retained its legislative nature and was thus immune from serious judicial scrutiny.<sup>71</sup>

and promote the public welfare; (2) adequate representation for affected individuals; and (3) government justification of its actions to persons directly affected. *Id.* at 1505.

64. *Bell Telephone Co. v. F.C.C.*, 503 F.2d 1250, 1268 n.26 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (quoting *Duquesne Light Co. v. E.P.A.*, 481 F.2d 1, 5-6 (3d Cir. 1973)).

65. See notes 77-79 and accompanying text *infra*.

66. See notes 72-76 and accompanying text *infra*.

67. The facts of a particular case may call for either a legislative or an adjudicative response from the governing body. See note 62 *supra*. While this inability clearly to categorize a rezone action may not be desirable from the standpoint of prescribing a given set of procedural requirements, due process considerations are themselves flexible. See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1277 (1975).

68. Prior to 1971, the court consistently characterized rezones as legislative acts. See, e.g., *Lillions v. Gibbs*, 47 Wn. 2d 629, 632, 289 P.2d 203, 205 (1955). Beginning with *Chrobuck v. Snohomish County*, 78 Wn. 2d 858, 480 P.2d 489 (1971) (en banc), the court just as consistently labeled rezones as adjudicative acts. The reasoning behind this shift was first articulated in *Fleming v. City of Tacoma*, 81 Wn. 2d 292, 502 P.2d 327 (1972). The court observed that "[d]ecisions which amend or change conditions under existing zoning laws . . . require an extremely sensitive balance between individual rights and the public welfare." *Id.* at 295, 502 P.2d at 329. The court further noted that "zoning reclassifications are sufficiently distinguishable from other legislative functions [of local elected bodies] that an exception to the general rule [insulating legislative bodies from judicial scrutiny] is desirable." *Id.* at 298, 502 P.2d at 330-31. See also Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 132 (1972) ("[B]ecause of the procedural informality and limited judicial review which accompany legislative action, the presence of improprieties looms large, and individual rights are often sacrificed on the alter [sic] of public opinion or ex parte over lunch at the club." (footnotes omitted)); Comment, *Developments in the Search for Workable Standards of Judicial Review of Piecemeal Rezoning*, 24 CATH. U.L. REV. 294, 294-95 (1975).

69. In *Parkridge* there were two distinct parties in interest, the rezone had a direct impact on the property rights of the parties in question, and the decision turned on the facts of the case. See note 59 *supra*.

70. 89 Wn. 2d at 460, 573 P.2d at 363.

71. The City of Seattle contended that the court's prior decision in *Fleming v. City of Tacoma*, 81

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### 1. Expanded scope of review

In characterizing rezones as quasi-judicial actions, *Parkridge* altered the applicable standards of judicial review. Traditionally, legislative factual determinations have been reviewed under the arbitrary and capricious standard,<sup>72</sup> while judicial factual determinations are upheld if supported by substantial evidence.<sup>73</sup> The *Parkridge* court apparently moved from the arbitrary and capricious to the substantial evidence standard, raising concern that it would no longer give deference to local decision-makers.<sup>74</sup> This fear is unwarranted. Although theoretical differences exist between the two standards,<sup>75</sup> in practical application the differences are not significant.<sup>76</sup> It is therefore doubtful that the label applied will affect the scope of review.

### 2. The record requirement and procedural due process

#### *Parkridge* requires governing bodies to file findings of fact and reasons

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Wn. 2d 292, 502 P.2d 327 (1972) (en banc), had simply labeled the decisionmaking process adjudicative while the end result retained its legislative nature. Appellant's Motion for Reconsideration at 3.

72. Under the arbitrary and capricious standard, legislative actions are invalid if unsupported by evidence in the record, and made in disregard of the facts. *State ex rel. Myhre v. City of Spokane*, 70 Wn. 2d 203, 207, 422 P.2d 790, 792 (1967). The arbitrary and capricious standard is used to review discretionary action where no formal record is produced. B. SCHWARTZ, *supra* note 7, § 215, at 605, § 217, at 609.

73. The substantial evidence standard refers to whether or not the findings of fact are based upon substantial evidence, looking at the whole of the evidence and determining whether the conclusion was reasonable in light of the same. B. SCHWARTZ, *supra* note 7, § 210, at 595. The substantial evidence standard is a "middle position" under which "the court decides questions of law but . . . limits itself to the test of reasonableness in reviewing findings of fact." K. DAVIS, *supra* note 7, § 29.01, at 525.

The substantial evidence standard has frequently been applied in other jurisdictions in reviewing factual determinations of municipal bodies in rezoning actions, although no Washington case has expressly acknowledged its reliance on the standard. *See, e.g., Muller v. City of Albuquerque*, 92 N.M. 264, 587 P.2d 42 (1978); *Association for Preservation of 1700 N St., N.W., and Vicinity v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 668 (D.C. 1978). The *Parkridge* court was unclear about the standard it was using. Although the action was labeled adjudicative, and the court found the evidence insufficient, 89 Wn. 2d at 462, 573 P.2d at 364, it labeled the city's action arbitrary and capricious, 89 Wn. 2d at 459, 573 P.2d at 363.

74. *See* note 45 *supra*.

75. The arbitrary and capricious inquiry theoretically limits the court's review of questions of fact to the test of reasonableness in the exercise of discretion. K. DAVIS, *supra* note 7, § 29.01, at 525. In Washington, however, the arbitrary and capricious standard has allowed some inquiry into the factual determinations of a legislative body. *See, e.g., Chrobuck v. Snohomish County*, 78 Wn. 2d 858, 480 P.2d 489 (1971). *See also* B. SCHWARTZ, *supra* note 7, § 217, at 609–10.

76. "Review of discretion is . . . subject to essentially the same standard of review as findings of fact under the substantial evidence rule." B. SCHWARTZ, *supra* note 7, § 217, at 609. *See also Mobil Oil Corp. v. Federal Power Comm'n.*, 417 U.S. 283, 307 (1974); *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974).

in support of rezones.<sup>77</sup> This requirement expands prior law which required governing bodies to provide only a verbatim record.<sup>78</sup> By imposing this requirement, the court insured that the evidence will be given fuller consideration. This assurance is particularly important when the decisionmaking body was not the party hearing the original testimony.<sup>79</sup> The requirement accords with the most fundamental of due process considerations: an individual whose rights are at stake is entitled to at least the benefits of reasoned decisionmaking.<sup>80</sup>

### III. CONCLUSION

The *Parkridge* decision takes significant steps to protect both the interests of individuals whose property is affected by rezones and the interests of the public in general. By reallocating the burden of proof to the proponent of a rezone and requiring a more extensive record, the court protected property owners from arbitrary decisionmaking. By expanding and delineating evidentiary requirements to include substantial public interest factors, the court assured increased consideration of the public's interest.

A word of caution is nonetheless in order. The increased protections mandated by *Parkridge* are appropriate when the rezone under review is

77. 89 Wn. 2d at 464, 573 P.2d at 365.

78. *Barrie v. Kitsap County*, 84 Wn. 2d 579, 587, 527 P.2d 1377, 1381 (1974) (en banc). *Parkridge* left open the question of what will constitute a verbatim record. Taped transcripts were presented to the court on review; the court commented that "[w]ithout a verbatim record, it is most difficult to review the council's actions." 89 Wn. 2d at 460, 573 P.2d at 363. As the city noted, verbatim means "word for word" and does not necessarily imply that a transcript must be written. Appellant's Motion for Reconsideration at 8. In a case subsequent to *Barrie*, the court accepted as the record taped recordings of zoning proceedings. *Byers v. Board of Clallam County Comm'rs.*, 84 Wn. 2d 796, 529 P.2d 823 (1974). However, tapes were available for only part of the proceedings and the *Byers* court agreed with the trial court's finding that the records of the proceedings were therefore "so brief as to be wholly uninformative." *Id.* at 799, 529 P.2d at 826. *But see Beach v. Board of Adjustment*, 73 Wn. 2d 343, 438 P.2d 617 (1968) (transcript of admittedly incomplete shorthand notes, following failure of tape recorder, was not an accurate and complete record of board of adjustment hearing as intended by the legislature).

Judge Friendly articulated what seems to be the soundest approach when he said that electronic recordings in administrative hearings ought to be sufficient to generate a record, unless an appeal is taken from that decision, in which case the tapes should be transcribed. Friendly, *supra* note 67, at 1292.

79. The extent to which members of the city council reviewed the record prior to making their decision was unclear. Brief for Appellants at 25, Brief for Respondents at 6.

80. A written statement of reasons, almost essential if there is to be judicial review [of administrative decisions], is desirable on many . . . grounds. The necessity for justification is a powerful preventive of wrong decisions. The requirement also tends to effectuate . . . uniformity . . .

A statement of reasons may even make a decision somewhat more acceptable to a losing claimant. Moreover, the requirement is not burdensome. Friendly, *supra* note 67, at 1292 (footnotes omitted).

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truly quasi-judicial in nature. The court, however, seems to label all rezones as quasi-judicial. Rezones may also be legislative acts. Thus, considerable care must be taken properly to characterize the action if the court is to avoid taking unwarranted excursions into the legislative sphere.

*Alice L. Hearst*